



FOURTH ITEM ON THE AGENDA

**Reports of the Committee on
Freedom of Association****346th Report of the Committee
on Freedom of Association***Contents*

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Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 24 and 25 May and 1 June 2007, under the chairmanship of Professor Paul van der Heijden.
2. The members of Argentinian, French, Guatemalan and Mexican nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2459, 2477 and 2485), France (Case No. 2475), Guatemala (Case No. 2482) and Mexico (Case No. 2503), respectively.

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3. Currently, there are 121 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 30 cases on the merits, reaching definitive conclusions in 24 cases and interim conclusions in six cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 2318 (Cambodia), 2489 (Colombia) and 2528 (Philippines) because of the extreme seriousness and urgency of the matters dealt with therein.

New cases

5. The Committee adjourned until its next meeting the examination of the following cases: Nos 2552 (Bahrain), 2553 (Peru), 2554 (Colombia), 2555 (Chile), 2556 (Colombia), 2557 (El Salvador), 2558 (Honduras), 2559 (Peru), 2560 (Colombia), 2561 (Argentina), 2562 (Argentina), 2563 (Argentina), 2564 (Chile) and 2565 (Colombia), since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

Observations requested from governments

6. The Committee is still awaiting observations or information from the governments concerned in the following cases: Nos 2241 (Guatemala), 2265 (Switzerland), 2392 (Chile), 2462 (Chile), 2465 (Chile), 2476 (Cameroon), 2486 (Romania), 2493 (Colombia), 2529 (Belgium), 2531 (Argentina), 2532 (Peru), 2533 (Peru), 2534 (Cape Verde), 2535 (Argentina), 2536 (Mexico), 2539 (Peru), 2541 (Mexico), 2543 (Estonia), 2544 (Nicaragua), 2545 (Norway), 2546 (Philippines), 2547 (United States), 2548 (Burundi), 2549 (Argentina) and 2550 (Guatemala).

Observations requested from complainants

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

Partial information received from governments

8. In Cases Nos 1787 (Colombia), 2177 (Japan), 2183 (Japan), 2203 (Guatemala), 2295 (Guatemala), 2317 (Republic of Moldova), 2341 (Guatemala), 2384 (Colombia), 2434 (Colombia), 2445 (Guatemala), 2450 (Djibouti), 2470 (Brazil), 2478 (Mexico), 2490 (Costa Rica), 2494 (Indonesia), 2498 (Colombia), 2513 (Argentina), 2516 (Ethiopia), 2519 (Sri Lanka), 2522 (Colombia) and 2540 (Guatemala), the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

Observations received from governments

9. As regards Cases Nos 2248 (Peru), 2254 (Bolivarian Republic of Venezuela), 2355 (Colombia), 2356 (Colombia), 2361 (Guatemala), 2362 (Colombia), 2400 (Peru), 2422 (Bolivarian Republic of Venezuela), 2457 (France), 2472 (Indonesia), 2492 (Luxembourg), 2501 (Uruguay), 2518 (Costa Rica), 2527 (Peru), 2530 (Uruguay), 2538 (Ecuador), 2542 (Costa Rica) and 2551 (El Salvador), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

Urgent appeals

10. As regards Cases Nos 2262 (Cambodia), 2449 (Eritrea), 2497 (Colombia), 2499 (Argentina), 2512 (India), 2515 (Argentina), 2517 (Honduras), 2520 (Pakistan), 2524 (United States) and 2526 (Paraguay), the Committee observes that, despite the time which has elapsed since the submission of the complaints, it has not received the observations of the governments. The Committee draws the attention of the governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these governments to transmit or complete their observations or information as a matter of urgency.

Article 26 complaints

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

Transmission of cases to the Committee of Experts

13. 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: Nigeria (Case No. 2432), Philippines (Case No. 2488) and United Kingdom (Jersey) (Case No. 2473).

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

Case No. 2414 (Argentina)

14. The Committee last examined its case at its March 2006 meeting [see 340th Report, approved by the Governing Body at its 295th Session, paras 274–293] and, on that occasion, noting that the documentation the Government had attached to its reply showed that the Provincial Education Council (CPE) of Neuquén province had adopted a new resolution (record No. 2503-37259/02) declaring resolution No. 163 of 2002 null and void, removing from resolution No. 1550 of 1999 the obligation to inform on those participating in stoppages, and recognizing that the directors of establishments or anyone in charge thereof may, in the context of protest days, freely exercise the right to strike without any sanction whatsoever, the Committee noted with interest the new resolution of the CPE and requested the Government to report on the implementation of the resolution.
15. In a communication of 30 November 2006, the Government states that, first of all, it should be pointed out that the document referred to in the Committee's recommendation is not, strictly speaking, a resolution (record No. 2503-37259/02), rather it is a draft resolution prepared by the representatives of the Educational Workers' Association of Neuquén (ATEN) members of the deliberative body of the CPE, which did not receive the number of votes required to become a legal provision. Therefore, the draft resolution attached to the file before this body, and which is referred to in the recommendation, is merely an initiative of the representatives of the trade union, who, in turn, belong to the group presenting the complaint to the ILO. The said draft has not been approved by the aforementioned body, it has not received the majority support of members that is required if a draft resolution is to become a legal provision, neither was it assigned a resolution number nor did it undergo the relevant process of formalization and therefore it does not fulfil the minimum legal requirements.
16. The Government states that article 3 of Act No. 242/61 establishes that:

The Provincial Education Council shall be composed: (a) of a chairperson and two committee members, one belonging to the primary education branch and another to one of the other branches of education, appointed by the executive authority; (b) of two committee members directly elected by active teaching staff, one of whom shall belong to the primary education branch and another to one of the other branches of education; (c) of a committee member representing the *consejeros escolares* (education councillors), elected at a joint meeting of all the members of the said councils from among those members by a simple majority.

The Government states that, through their representatives, trade union organizations have the opportunity to propose, evaluate, examine and finally decide on educational and management matters brought to their attention. Thus, on 11 February 2004, the deliberative body, at the suggestion of those of its members representing the trade union organization, addressed the issue in question, but despite doing so, the majority vote necessary to declare resolution No. 163 of 2002 null and void (removing from resolution No. 1550 of 1999 the

obligation to inform on those participating in stoppages, and recognizing that the directors of establishments or anyone in charge thereof may, in the context of protest days, freely exercise the right to strike without any sanction whatsoever) was not achieved. Thus, as the issue in question was not addressed in a way that met with the requirements established by law, this party is able to state that the procedure carried out did not give rise to a valid act of the administration.

17. With a view to the Committee issuing another opinion, the Government states that the recommendation it made is based on a provision that, in the eyes of the province, is null and void, and it should be pointed out that, to date, the facts and legislation in place when the complaint lodged by the Confederation of Education Workers of Argentina (CTERA) and ATEN was contested have not changed, and resolution No. 163/02 is still currently in full force. Furthermore, the Government states that there are administrative proceedings pending regarding non-compliance with resolution No. 163/02. Finally, it should be pointed out that the original reason for establishing resolution No. 163/02 was to prioritize the right to work of those workers who do not support industrial action and fundamentally to safeguard the social function of schools within the current economic and socio-cultural context of the province, taking into account the operation of school dinner halls, on which a large proportion of the children in this district depend for food and the consequent need for school directors to keep their schools open in order to provide this service.
18. *The Committee notes this information, in particular, the fact that the resolution (record No. 2503-37259/02) was merely a draft resolution, which was not approved. The Committee recalls that the complainant organizations had objected to resolutions Nos 1550 of 1999 and 163 of 2002, adopted by the Provisional Education Council (CPE) of Neuquén province, because they considered that these resolutions prohibit the directors of educational establishments in the province from exercising the right to strike by requiring them to be present at the establishment whenever protest days are taking place, while at the same time requiring them to draw up a list of those members of staff who participate in a stoppage [see 340th Report, para. 290]. The Committee recalls its statement to the effect that “While the Committee has found that the education sector does not constitute an essential service, it has held that principals and vice-principals can have their right to strike restricted or even prohibited.” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 588]. The Committee also stresses that it has emphasized the fact that essential services or civil service workers deprived of the right to strike should benefit from appropriate guarantees designed to safeguard their interests. In these circumstances, the Committee requests the Government to inform it whether the workers affected by the resolutions in question can have recourse to conciliation or arbitration procedures that have the confidence of all the parties, in order to protect their interests.*
19. *Finally, the Committee requests the Government to keep it informed regarding the judicial procedure under way against resolution No. 163/02, to which it refers in its reply.*

Cases Nos 2188 and 2402 (Bangladesh)

20. The Committee examined these cases, which concern the alleged anti-union discrimination and intimidation of trade union members and leaders of the Bangladesh Diploma Nurses Association (BDNA), at its March and November 2006 meetings [see 340th Report, paras 21–26 and 343rd Report, paras 22–27], respectively.
21. In respect of Case No. 2188, the Committee requested the Government to consider instituting an independent investigation into the dismissal of Ms Bhattacharjee and envisage dropping its appeal against her reinstatement. It further reiterated its firm hope that the Appellate Division would issue a judgement in conformity with freedom of

association principles confirming the High Court decision reinstating her in her job with full benefits and requested the Government to provide it with a copy of the decision of the Appellate Division once it is issued. The Committee further requested the Government to provide information in respect of the warnings issued to ten union officials of the BDNA executive committee and the Committee's recommendation that the Government give appropriate directions to the management of Shahid Sorwardi Hospital so that these warnings are withdrawn. Finally, the Committee urged the Government to conduct an independent inquiry into: (1) the reasons for the disciplinary proceedings brought against Manimala Biswas, Akikara Akter, Kohinur Begum, Khadabox Sarker, Delwara Chowdhury, Jasmin Uddin and Provati Das, seven trade union leaders of the BDNA, and if it is found that they are related to the trade union activities of these leaders, to ensure that they were withdrawn without delay; and (2) the reasons for the transfer of Sabina Yaesmin and Md. Sazzad Hossain and if it is found that they were imposed due to their trade union activities, to take appropriate measures to redress the anti-union discrimination.

22. In respect of Case No. 2402, the Committee requested the Government to transmit a copy of the decision of the Appellate Division of the Supreme Court in respect of the transfer of four nurses (Ms Krishna Beny Dey, Ms Israt Jahan, Mr Golam Hossain and Mr Kamaluddin) and to conduct an independent investigation into all allegations of anti-union discrimination suffered by the officials and members of the BDNA and, if these allegations are found to be true, to provide redress for the damages suffered.
23. By its communication dated 28 February 2007, the Government transmits a copy of its previous observations in these cases. With regard to Case No. 2188, the Government indicates that following an appointment of a new Advocate on Record, the Attorney General has decided that the dismissal order of Ms Bhattacharjee may be considered and communicated this decision to the relevant department. As concerns Case No. 2402, the Government asserts, once again, that the transfer orders of four staff nurses were issued in the public interest and indicates that following the decision of the Appellate Division of the Supreme Court, the four nurses joined their posts to which they were transferred.
24. *The Committee deplors the lack of action by the Government to give effect to its recommendations and the absence of substantive information to its request since the first examinations of these cases. The Committee emphasizes that the Government should recognize the importance for their own reputation of formulating detailed replies to the allegations brought by the complainant organizations, so as to allow the Committee to undertake an objective examination [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 24] and strongly urges the Government to be more cooperative in the future.*
25. *Referring to its previous examinations of these cases, the Committee once again emphasizes that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. Where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see **Digest**, op. cit., para. 835]. The Committee deeply regrets that the Government has maintained its appeal against the reinstatement of Ms Bhattacharjee over several years now and with numerous procedural delays, including the changing of the Advocate on Record, without making an attempt to carry out an independent investigation into the circumstances of her dismissal to determine whether there had been anti-union discrimination, as the Committee had previously requested. The Committee, therefore, once again strongly urges the Government to conduct independent investigations immediately into all allegations of anti-union discrimination suffered by the officials and*

members of the BDNA, including the dismissal of Ms Bhattacharjee, the disciplinary proceedings brought against seven trade union leaders of the BDNA (Manimala Biswas, Akikara Akter, Kohinur Begum, Khadabox Sarker, Delwara Chowdhury, Jasmin Uddin and Provati Das) and the transfer of Sabina Yaesmin and Md. Sazzad Hossain and ten senior trade union leaders of the BDNA, as alleged by the complainant in Case No. 2402. If these allegations are found to be true, the Committee requests the Government to take the necessary measures to redress the anti-union discrimination and to provide appropriate remedy for the damages suffered. It further requests the Government to keep it informed of the outcome of the investigations.

26. The Committee once again requests the Government to transmit copies of the decision of the Appellate Division of the Supreme Court in respect of the transfer of four nurses, leaders of the BDNA (Ms Krishna Beny Dey, Ms Israt Jahan, Mr Golam Hossain and Mr Kamaluddin) and the decision of the Appellate Division in respect of dismissal of Ms Bhattacharjee.
27. Finally, the Committee requests the Government to provide information in respect of the warnings issued to ten union officials of the BDNA executive committee and the Committee's recommendation that the Government give appropriate directions to the management of Shahid Sorwardi Hospital so that these warnings are withdrawn.

Case No. 2239 (Colombia)

28. The Committee last examined this case at its meeting in November 2006 [see 343rd Report, paras 59–61]. On that occasion, the Committee requested the Government to send its observations regarding the allegations presented by the National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO) concerning the unilateral termination by Tejicóndor of the signed collective agreement following its merger with Fabricato, and refuting the Government's statement that the agreement signed by the Tejicóndor workers was applied to these workers following the merger between Tejicóndor and Fabricato until it expired. The Committee notes that in its communications dated 26 October 2006 and 21 March 2007, the Government states that the company should apply the collective agreement concluded with SINDELHATO (the trade union that existed in Fabricato at the time of the merger, and represented more than 50 per cent of the workers) in accordance with the decision of the judicial authorities in the courts of first and of second instance. However, the Committee observes that in the ruling of the High Court of Medellín on the lawsuit presented by SINALTRADIHITEXCO and supported by the Government, the court upheld the ruling of the court of first instance on 2 August 2005, concluding that the two agreements in force before the Fabricato–Tejicóndor merger should be applied within the company: the agreement concluded with SINALTRADIHITEXCO and the one concluded with SINDELHATO. The Committee notes that SINDELHATO later became the majority organization and therefore the company bargained the new collective agreement with it and not with SINALTRADIHITEXCO. *In these circumstances, the Committee requests the Government to carry out an investigation in order to determine whether the company actually applied the collective agreement signed with SINALTRADIHITEXCO while it was in force, and if this is not the case, it should adequately compensate the trade union for the agreed union dues and benefits that it did not receive during the time the collective agreement was in force.*

Case No. 2396 (El Salvador)

29. When it last examined this case at its meeting in November 2006, the Committee made the following recommendation [see 343rd Report, para. 648]:

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

30. In its communication dated 18 January 2007, the Government states, in relation to the case of Mr José Gilberto Soto, that it condemned the crime from the outset and that the relevant investigations have been launched to find the criminals responsible for this deplorable act. To that end, the Government has made available all the necessary resources to conduct a serious, in-depth and impartial investigation with a view to identifying those responsible for the murder of Mr Soto, as well as their motives, and to ensuring that they are tried and duly punished. The Government therefore categorically rejects the assertions of the Salvadorian Inter-Union Committee (CIEL), supported by the International Confederation of Free Trade Unions (ICFTU), in its communication dated 28 February 2006 [see 343rd Report, paras 638 and 639]. The Government states that it is sending the observations requested in order to repudiate these complaints.
31. The complainant bases its complaints on seven conclusions taken from the report of the Human Rights Ombudsman, Ms Beatrice Alamanni de Carrillo, on Mr Gilberto Soto's case.
32. It must be clarified, in regard to this report, that the investigation carried out by the Office of the Human Rights Ombudsman presented certain information as fact, due to a lack of communication with those responsible for the case, whereas scientific evidence disapproved it.
33. With regard to the management of the crime scene which was open (i.e. people could access it easily as it was in a public area), when the national civil police arrived there were already many local residents and onlookers present. The bicycle and other material evidence were legally seized under article 180 of the Code of Penal Procedure and now fall under police jurisdiction.
34. Regarding the alleged sexual abuse of the accused by the agents of the authorities, it should be noted that the defendant, Santos Sánchez Ayala, underwent a physical examination which showed that he had not been subjected to any form of abuse. It was thereby procedurally determined that the defendant, Sánchez Ayala, was lying when he said that he had been sexually abused. In similar circumstances, an examination was also carried out on the defendant, Herbert Ramírez, even though he did not request it at his initial hearing; the result was also negative, showing that he had not suffered the alleged sexual abuse.
35. It should be noted that it is a fact that one of the witnesses withdrew during the identity parade of the suspects because the witness's relatives received threats from one of the direct perpetrators of the crime and from his relatives and members of the same gang (*Mara Dieciocho*). The intimidation suffered by the witness was revealed at the public hearing at which the witnesses spoke of these threats and the reason for his behaviour.
36. With regard to the statement referring to the use of anonymous or confidential sources, it must be made clear that these are used to guide the investigation, through the formulation of hypotheses to be proven by other evidence so that a conclusion to the case can be drawn. We can therefore affirm that the information or circumstances provided by informants about a crime do not constitute proof, but supply information on verified evidence which make the preliminary investigation possible.

37. The informer is simply a mediate witness offering information during the trial as an intermediary or infiltrator helping to obtain information. In this case, the movements of the accused were investigated. One of the informants said that Herbert Joel Ramírez Gómez's firearm (the murder weapon) had been seized. This information was corroborated by the ballistic expert's evidence, which was established as preliminary evidence by the First Criminal Court of Usulután, and the statement of the informant was thereby confirmed, since the firearm seized from Ramírez Gómez fired the bullets which killed Mr José Gilberto Soto.
38. Furthermore, the total secrecy that was imposed on the legal proceedings was because of the actions of the Office of the Human Rights Ombudsperson employees. The support officer of that institution offered to send the witnesses to Canada or Australia if they changed their statements, saying that he could obtain asylum for them and their families. This is proved by the opening of investigations for bribery against the support officer of the Office of the Human Rights Ombudsperson.
39. During interviews with the victim's family members, no pressure was exerted. Furthermore, when Ms María Soto was interviewed, members of the International Brotherhood of Teamsters were present; they read the statement before it was signed, a fact which can be corroborated, since the statement is registered with the Court of Justice of Usulután with their signatures affixed.
40. It is important to mention that the investigation carried out by the Elite Division against Organized Crime (DECO) of the national civil police was able to establish that the motive for the murder of Mr José Gilberto Soto could be that his wife, Elva Maritza Ortíz Zelaya, who is resident in the United States, wanted to take revenge for being subjected to domestic violence.
41. Ms Arely Soto (the victim's sister) and her husband, Carlos Chacón (the victim's brother-in-law), confirm this hypothesis in their respective statements given to different police and legal authorities by hinting at the problems between José Gilberto Soto and Elva Maritza Ortíz Zelaya (the victim's wife). Carlos Chacón states that he listened to a message recorded on the answering machine of one of the victim's telephones in which the victim's wife was insulting the victim. He also stated that he overheard a telephone conversation between them in which they were arguing.
42. On a judicial level the case is not concluded, however, the final ruling found Herbert Joel Ramírez guilty of the crime. With regard to the two suspects who were acquitted, the public prosecutors on the case expressed their disagreement with the ruling and gave notice of appeal to the high court: the case will now go before the criminal court of the Supreme Court of Justice.
43. These observations concur with the reports drafted by the Attorney-General's Office and the Elite Division against Organized Crime (DECO). It is clear that the motive for the murder of Mr José Gilberto Soto is not connected with any trade union activity, i.e. the motive is not related to his labour activities. For this reason, with all due respect the Government asks the Committee on Freedom of Association to consider this case closed, since the alleged crimes do not constitute a violation of trade union rights.
44. *The Committee notes the Government's information and in particular that the (final) legal verdict finds Herbert Joel Ramírez guilty of the murder of the trade union leader, José Gilberto Soto, and that the public prosecutors have given notice of appeal to the high court against the acquittal of the other two suspects. The Committee notes that the Government's reply states that the police believe the motive for the murder of Mr José Gilberto Soto*

could be that his wife, Elva Maritza Ortíz Zelaya (who is resident in the United States), wanted to take revenge for being subjected to domestic violence.

45. *The Committee regrets once again the murder of this trade union official and requests the Government to send it the judgement without delay, as well as any other decision or ruling relating to the high court appeal mentioned by the Government. The Committee invites the complainant organizations to present their comments on the Government's statements, if they so wish.*

Cases Nos 2017 and 2050 (Guatemala)

46. The Committee last examined these cases at its meeting in March 2006 [see 340th Report, paras 98–100] and on that occasion:

- (i) with respect to the allegations concerning the Banco de Crédito Hipotecario Nacional (anti-union dismissals and suspensions), the Committee recalled that the Government had provided information about action being taken by the negotiating committee in respect of these allegations and requested the Government to keep it informed of the progress made by that committee;
- (ii) with respect to the allegations relating to the Tamport S.A. company (dismissals due to the company's closure), the Committee requested the Government to inform it of the final results of the legal proceedings under way;
- (iii) with regard to the dismissals from the La Exacta and/or San Juan El Horizonte farm, in respect of which reinstatement had been ordered, the Committee requested the Government to keep it informed of the reinstatement proceedings under way;
- (iv) with regard to the murder of Mr. Baudillo Amado Cermeño Ramírez in December 2001, the Committee requested the Government to send it the ruling handed down in that respect;
- (v) with regard to the allegations concerning the kidnapping of and assaults and threats against the trade unionist of the Santa María de Lourdes farm, Mr. Walter Oswaldo Apen Ruiz, and his family, the Committee requested the Government to send its observations and to ensure that the safety of the trade union member, which had been threatened, was guaranteed; and
- (vi) with regard to the allegations relating to the murder of trade union members Efraín Recinos, Basilio Guzmán, Diego Orozco and José García Gonzáles, the injuries to 11 workers and the detention of 45 workers of the La Exacta and/or San Juan El Horizonte farm, the Committee urged the Government to send information in this respect without delay.

47. In its communications dated 29 May, 16 October and 29 December 2006, the Government reports that:

- Information was requested from the District Prosecutor of the Government Prosecutor's Office of the municipality of Coatepeque in the department of Quetzaltenango regarding the alleged violence at the La Exacta farm (following the dismissals carried out by the company, the workers and their families decided to occupy the company's premises peacefully in order to press for the reinstatement of the dismissed workers. The occupation lasted 35 days, ending on 24 August 1994, when the employer, with private police officers who were supported by the army and the national police, evicted the farmers, killing three, arresting 45 and injuring 11). The Prosecutor's Office reported that the murder of the three trade unionists and the offences of coercion and usurpation involving other trade unionists was being processed, that various steps had been taken and that some of the trade unionists had been granted bail. In October 1996 the competent judge ordered the provisional closure of the case in favour of the trade unionists due to the offences of triple

homicide, inflicting injury, abuse of authority, coercion and usurpation. In 2001, the Government-Prosecutor's Office requested that the investigation be reopened, which the first instance court judge allowed. At present, the case is in the investigation phase, the examining magistrate having summoned the trade unionists pending the first statement on the aforementioned offences. *The Committee notes this information, regrets the excessive delay in the investigation and requests the Government to keep it informed on the final result of the trial.*

- With regard to the allegations relating to the Tampont SA company, the Ministry of Labour and Social Welfare requested information regarding this case from the Seventh Labour and Social Welfare Court, which reported that the decision of 20 February 2006 rejected the company's objections and that the case was closed on 8 March 2006 because the workers stated that it was no longer in their interest to negotiate the list of claims. On 29 March 2005, the judicial authority ordered the definitive seizure of the machinery belonging to the company and on 9 March it ordered the definitive seizure of the property of Ms Dora Elizabeth Sanchez Portillo, legal representative and shareholder of Tampont SA, who died on 24 October 2005. The Court was informed of this on 7 November 2005. The seized goods have not been sold because the deceased's probate proceedings representative has to be legally appointed by the claimants. *The Committee notes this information and hopes that the workers in question will receive the appropriate compensation and benefits in law once the company's property has been sold.*
- With respect to the allegations concerning the Banco de Crédito Hipotecario Nacional, it should be noted that the negotiating committee, set up in 2002, was unsuccessful, due to the employer's lack of political will, and therefore the Ministry of Labour could not mediate. Despite the fact that the committee could not fulfil its task, the Ministry of Labour and Social Welfare, through the Tripartite Committee on International Labour Affairs and the rapid response mechanism for examining cases recommended by the 2004 direct contacts mission, intervened to resolve the labour conflict at the request of the workers. The workers and employers were invited to a conciliation meeting, where it was agreed that a bipartite conciliation committee should be set up, composed of one employers' representative and one workers' representative from the Tripartite Committee on International Labour Affairs. As a result of these efforts, bipartite meetings were held and progress was made on the points for discussion; however, because of an anti-bank bulletin published by the trade union, the employers withdrew from the bipartite committee and all further conciliation meetings were cancelled. After these events, the parties were urged to continue the conciliation meetings, but only the workers expressed a desire to do so; the bank's management did not reply. A workers' representative from the Tripartite Committee subsequently reported that the problems continued between the trade union and the bank's management and it was therefore requested that the bank again be sent communications urging it to reconsider its position. *The Committee notes this information. The Committee deeply regrets that after the extensive period that has elapsed since the allegations of anti-union dismissals and suspensions, the facts have yet to be clarified. The Committee requests the Government to carry out a detailed independent investigation without delay into these events and, if they are found to be of an anti-union nature, to take the necessary measures to reinstate the dismissed workers.*

48. *Finally, the Committee requests the Government to send without delay the information requested regarding: (a) the reinstatement proceedings of the workers dismissed from the La Exacta and/or San Juan El Horizonte farm; (b) the ruling regarding the murder of Mr Baudillo Amado Cermeño Ramírez; and (c) the kidnapping of, and assaults and threats against, the trade unionist Walter Oswaldo Apen Ruiz and his family. Taking into account*

the seriousness of these issues, the Committee urges the Government to ensure that a prompt judicial investigation into these acts of violence is carried out and hopes that the guilty parties will be punished.

Case No. 2259 (Guatemala)

- 49.** At its November 2006 meeting, the Committee made the following recommendations regarding the matters which remained pending [see 343rd Report, paras 88–91]:

With regard to the dismissal of Ms Edna Violeta Díaz Reyes, an official of the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic and to the acts of discrimination against Ms Cobox Ramón, "... given the Government's information with regard to the situation of Ms Cobox Ramón to the effect that although proceedings are under way, the social partners concerned are willing to resolve the issue through conciliation, the Committee requests the Government to indicate whether that includes the alleged acts of anti-union discrimination against Ms Cobox Ramón and Ms Díaz de Reyes, as the Government does not refer to these, and to keep it informed of any agreement reached."

As regards the undertaking by the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) and the University to resolve, by means of a direct agreement, the dispute between them, the Committee noted that according to the most recent communication of the Trade Union of Workers of Guatemala (UNSITRAGUA), not only has no agreement been reached, but the University, in addition, insists on negotiating with individual union members. "The Committee requests the Government to take the necessary steps to ensure that the parties reach a direct agreement to end the collective dispute between them, in accordance with their undertaking, and to ensure that negotiation with individual workers is not detrimental to collective negotiation with the trade union organization."

The Committee requested the Government to send observations with regard to: "(a) the allegations concerning illegal dismissals, disciplinary proceedings, dismissals without just cause on grounds of reorganization, and transfers intended to force members of UNSITRAGUA at the Office of the Attorney-General of the Nation to resign, in connection with which it had requested the Government to keep it informed of any pending judicial decisions and inform it as to whether the other dismissed or transferred workers had initiated legal or administrative proceedings and, if so, to inform it of the decisions taken; and (b) the alleged supervision and interference by the State in the management of trade union funds, in connection with which the Committee had requested the Government to ensure that the functions of the Superintendent for Tax Administration were brought into line with the principles relating to the financial autonomy of trade union organizations, and, in consultation with the trade union confederations, to modify the legislation as necessary in this direction, and to keep it informed of measures taken in this respect."

- 50.** In its communication of 13 June 2006 (received in January 2007), the Government states, with regard to the allegations relating to the Secretariat of Public Works of the First Lady of the Republic (SITRASEC), that, in the course of a labour inspection, the representative of the workers indicated that dismissals of members of the executive committee of the trade union and the advisory council, who enjoyed immunity as a result of their posts, had been carried out in 2004 without due process having been followed and that the secretariat had been summoned before the judicial authority while proceedings were ongoing. They added that the present authorities of the secretariat had not taken reprisals since they took up their functions in February 2006 and had shown that they were open to dialogue. The employer's side informed the labour inspectors that, prior to sitting down at the negotiating table, they sought information and alternatives that would allow them to take a fair approach with regard to the staff, disregarding the actions of the previous administration and respecting legal proceedings under way, as well as freedom of association.
- 51.** In its communication dated 13 February 2007, the Government also states with regard to the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the

Republic (SITRASEC) and the dismissal of trade union official Edna Violeta Díaz Reyes, that on 10 October 2005 the National Civil Service Board upheld the complaint of the said person concerning her dismissal on the grounds of her position as a trade union official.

52. *The Committee notes this information with satisfaction and requests the Government to confirm that the trade union official Edna Violeta Díaz Reyes has been effectively reinstated in the post she formerly occupied. The Committee also requests the Government to report in particular on the situation of the trade unionist Ms Cobox Ramón (given that in its reply, the Government does not refer specifically to the said individual) and on the situations of other members of the executive committee of the trade union dismissed in 2004.*
53. *Finally, the Committee deplores the fact that the Government has not sent information regarding the other issues pending regarding: (a) actions preventing collective bargaining in the University of San Carlos de Guatemala and the need for the authorities to take steps to ensure that the parties reach an agreement that puts an end to the existing collective dispute; (b) the allegations concerning illegal dismissals, disciplinary proceedings, dismissals without just cause in connection with reorganization, and transfers intended to force workers belonging to UNSITRAGUA in the Office of the Attorney-General of the Nation to resign, in connection with which it had requested the Government to keep it informed of any pending judicial decisions and inform it as to whether the other dismissed or transferred workers had initiated legal or administrative proceedings and, if so, to inform it of the decisions taken; and (c) the alleged supervision and interference by the State in the management of trade union funds, in connection with which the Committee had requested the Government to ensure that the functions of the Superintendent for Tax Administration were brought into line with the principles relating to the financial autonomy of trade union organizations, and, in consultation with the trade union confederations, to modify the legislation as necessary in this direction, and to keep it informed of measures taken in this respect. The Committee once again urges the Government to keep it informed of these three issues.*

Case No. 2413 (Guatemala)

54. The Committee last examined this case at its November 2006 meeting. On that occasion, the Committee made the following recommendations [see 343rd Report, para. 858]:
- (a) As regards the events that took place during the demonstrations on 14 March 2005 (according to the complainant, the national civil police intervened during the event and started to fire tear gas at the demonstrators while, according to the Government, a disturbance of public order occurred during the demonstration and private property was damaged), the Committee regrets that the independent investigation it requested has not been carried out and urges the Government to take immediate steps to initiate such an investigation. The Committee requests the Government to keep it informed of the outcome of this investigation.
 - (b) As regards the alleged arrest warrants against the leaders who organized the protest of 14 March 2005, the Committee requests the complainant to communicate the names of the trade union leaders in question to enable the Government to carry out the appropriate investigation.
 - (c) As regards the alleged repression on 15 March 2005 by members of the national army and of the national civil police of demonstrators from trade unions and other organizations, resulting in the death of Juan Esteban López, leader of the Committee of Peasant Unity and member of the National Coordination of Peasant Organizations, and of the workers José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz, and in serious injuries to a further 11 workers (named by the complainant), the Committee deeply regrets that, with alleged events as serious as these,

the investigation it requested has still not been launched, and urges the Government to take steps to initiate such an investigation immediately.

- (d) As regards the alleged disrespectful statements by the President of the Republic in the media about trade union leaders and violence against participants in the demonstrations, the Committee once again requests the Government to take steps to initiate the investigation it requested and to keep it informed of the outcome.
- (e) As regards the allegations with regard to the appeal lodged by the enterprise to revoke the resolution recognizing legal personality and approving the by-laws of the Trade Union of Workers of the Finca El Cóbano Ingenio Magdalena SA (SITRAFECIMASA) and the resolution of the Ministry of Labour which, disregarding the rules of due process, modified the name of the trade union by deleting the reference to Ingenio Magdalena SA, the Committee requests the Government to send it a copy of Order No. 48-2005, together with a copy of the resolution referred to by the complainant and the relevant labour inspection report, indicating why the workers who formed the trade union were not interviewed during the inspection.
- (f) As regards the allegations concerning the dismissal of 23 workers who attempted to establish a trade union at the Finca El Cóbano (it is alleged that court reinstatement orders exist and have been ignored by the enterprise), the Committee regrets that the Government has not sent its observations on this matter and requests the Government to carry out an investigation without delay and, if judicial orders for the reinstatement of dismissed trade union members are found to exist, to take steps to ensure immediate compliance with these orders. The Committee requests the Government to keep it informed in this regard.
- (g) As regards the allegations concerning the dismissal of five workers belonging to the Trade Union of Workers of the municipality of San Juan Chamelco, department of Alta Verapaz (it is also alleged that the judicial authorities ordered the reinstatement of the dismissed workers, but that the municipality refused to comply with the order), the Committee regrets that the Government has not sent its observations on this matter and urges the Government to carry out without further delay an investigation and, if orders for the reinstatement of dismissed trade union members are found to exist, to take steps to ensure immediate compliance with these orders and to keep it informed in this regard.
- (h) As regards the alleged dismissal of a worker belonging to the Trade Union of Workers of the San Vicente Tuberculosis Sanatorium, in violation of the provisions of the collective agreement on working conditions, the Committee regrets that the Government has not sent its observations on this matter, expects that the judicial proceedings currently under way will soon be concluded, and urges the Government to keep it informed of the outcome.
- (i) As regards the alleged dismissal of two workers belonging to the Trade Union of Workers of the municipality of El Tumbador, San Marcos, in the context of a collective dispute during the negotiation of a collective agreement on working conditions, the Committee regrets that the Government has not supplied its observations on this matter and requests it to take steps to conduct an investigation into the alleged events and to keep it informed in this regard.
- (j) As regards the alleged lockout at Bocadelli SA following the submission of a draft collective agreement by the enterprise's trade union, the Committee requests the Government to continue taking steps to bring about an agreement between the parties, expects that the abovementioned judicial proceedings currently under way will soon be concluded, and requests to be kept informed in this regard.

55. The Government sent observations in communications dated 22 November, 11 and 18 December 2006, and 12 January and 16 April 2007.

56. As regards the events that took place during the demonstrations on 14 March 2005 (according to the complainant organization, the national civil police intervened during the event and started to fire tear gas at the demonstrators while, according to the Government, a disturbance of public order occurred during the demonstration and private property was

damaged), the Committee notes that, according to the Government, the criminal investigation which was launched is currently ongoing. *Given that more than two years have already passed since the events occurred and recalling that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee, fifth (revised) edition, 2006, para. 105**], the Committee requests the Government to take all the measures in its power to ensure that the said investigation clarifies the facts and identifies those responsible in the near future.*

57. The Committee requested the complainant organization to communicate the names of the trade union leaders for whom arrest warrants had been issued, in order to enable the Government to carry out the appropriate investigation. *The Committee regrets that the said information has not been sent and requests the complainant organization to send it without delay.*
58. As regards the alleged repression on 15 March 2005 by members of the national army and of the national civil police of demonstrators from trade unions and other organizations, resulting in the death of Juan Esteban López, leader of the Committee of Peasant Unity and member of the National Coordination of Peasant Organizations, and of the workers José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz, and in serious injuries to a further 11 workers, the Committee notes the Government's statement to the effect that a criminal investigation is ongoing. *The Committee requests the Government to take the necessary measures to ensure that the said investigation is completed in the near future, in order to clarify the facts and identify those responsible.*
59. As regards the alleged disrespectful statements by the President of the Republic in the media about trade union leaders and violence against participants in the demonstrations, with regard to which the Committee requested that an investigation be initiated and that it be kept informed in that regard, *the Committee regrets that the Government has not kept it informed in that respect and requests it to do so without delay.*
60. As regards the allegations with regard to the appeal lodged by the enterprise to revoke the resolution recognizing legal personality and approving the by-laws of the Trade Union of Workers of the Finca El Cóbano Ingenio Magdalena SA (SITRAFECIMASA) and the resolution of the Ministry of Labour which, disregarding the rules of due process, modified the name of the trade union by deleting the reference to Ingenio Magdalena SA, the Committee requested the Government to send it a copy of Order No. 48-2005, together with a copy of the resolution referred to by the complainant and the relevant labour inspection report, indicating why the workers who formed the trade union were not interviewed during the inspection. *The Committee regrets that the Government has not sent its observations in this regard and requests it to do so without delay.*
61. As regards the allegations concerning the dismissal of 23 workers who attempted to establish a trade union at the Finca El Cóbano (it is alleged that court reinstatement orders exist and have been ignored by the enterprise), the Committee requested the Government to carry out an investigation without delay and, if judicial orders for the reinstatement of dismissed trade union members were found to exist, to take steps to ensure immediate compliance with those orders. The Committee notes the information provided by the Government to the effect that the workers who were dismissed initiated 14 reinstatement actions, four of which were successful and the workers involved are awaiting reinstatement, two were dropped, two were closed and six are pending owing to the presentation of an *amparo* action (appeal for the protection of constitutional rights). *The Committee requests the Government to ensure that the reinstatements ordered by the judicial authority are carried out and to keep it informed of developments.*

62. As regards the allegations concerning the dismissal of five workers belonging to the Trade Union of Workers of the municipality of San Juan Chamelco, department of Alta Verapaz, the Committee requested the Government to carry out without further delay an investigation and, if orders for the reinstatement of dismissed trade union members were found to exist, to take steps to ensure immediate compliance with those orders. The Committee notes with interest that, according to the copies of the reinstatement reports sent by the Government, the five workers who had been dismissed were reinstated on 18 May 2006.
63. As regards the alleged dismissal of a worker belonging to the Trade Union of Workers of the San Vicente Tuberculosis Sanatorium, in violation of the provisions of the collective agreement on working conditions, the Committee requested the Government to keep it informed of the outcome of the judicial proceedings under way. The Committee notes with interest that, on 12 February 2007, the Sixth Judge of the Labour and Social Security Court in the first economic zone ordered the reinstatement of the dismissed worker in his post. This measure was implemented on 2 March 2007.
64. As regards the alleged dismissal of two workers belonging to the Trade Union of Workers of the municipality of El Tumbador, San Marcos, in the context of a collective dispute during the negotiation of a collective agreement on working conditions, the Committee requested the Government to take steps to conduct an investigation into the alleged events and to keep it informed in this regard. *The Committee regrets that the Government has not sent its observations in this regard and requests it to do so without delay.*
65. As regards the alleged lockout at Bocadelli SA following the submission of a draft collective agreement by the enterprise's trade union, the Committee requested the Government to continue to take steps to bring about an agreement between the parties and requested to be kept informed in this regard. *The Committee regrets that the Government has not sent its observations in this regard and requests it to do so without delay.*
66. As regards the allegations contained in the communication of the Trade Union of Workers of Guatemala (UNSITRAGUA) of 2 October 2006, relating to delays affecting the registration of the executive committee of the Trade Union of Workers of the Ministry of the Environment and Natural Resources (SITRAMARN) owing to an application for revocation lodged by the Ministry of the Environment and Natural Resources, which has prevented the trade union from initiating a collective bargaining process, despite the fact that, according to the allegations, Guatemalan legislation establishes that the said appeals do not have a suspensive effect, the Committee notes with interest that the Government states that the revocation appeal was rejected and the procedure for the recognition of the trade union's legal personality continued, with the members of the executive committee being registered.

Case No. 2236 (Indonesia)

67. The Committee last examined this case, which concerns allegations of anti-union discrimination by the Bridgestone Tyre Indonesia Company against four trade union officers suspended without pay, at its November 2006 meeting. On that occasion, the Committee noted with concern that four years had elapsed since the complaint of anti-union discrimination was first made, without any reported progress on these proceedings and once again urged the Government to ensure that the proceedings for the examination of allegations of anti-union discrimination against the four trade union officers be completed without further delay and in a fully impartial manner, regardless of the fact that the former director-president has since left the country. The Committee also recalled that it had previously noted with regret that the anti-union discrimination and the dismissal proceedings concerning the four trade union officers had gone ahead simultaneously, and

requested the Government to inform it of the decision of the Supreme Court with respect to the appeal made by these trade union officers on the decision of the National Administrative High Court, as well as to transmit all relevant texts and confirm that no decision in favour of dismissal would be enforced prior to the resolution of the question of anti-union discrimination. If the allegations relating to anti-union discrimination were found to be true, but the trade union officers had already received formal notification of their dismissals, the Committee once again urged the Government to ensure, in cooperation with the employer concerned, that the trade union officers are reinstated or, if reinstatement would not be possible, that they are paid adequate compensation such as to constitute sufficiently dissuasive sanctions, taking into account the damage caused and the need to avoid the repetition of such acts in the future. Finally the Committee, recalling the complainant's allegation that the company had refused to negotiate with the union's executive committee, once again requested the Government to encourage negotiations, with a view to the conclusion of a collective agreement [see 343rd Report, paras 96–100].

- 68.** In a communication of 9 March 2007, the Government indicates, with respect to the anti-union discrimination proceedings involving the four trade union officers, that it continues to face difficulty in presenting the former director-president of the company before the court, as he is a foreign citizen who has left the country. In spite of the efforts taken, including the submission of the case to the international police (INTERPOL), no progress with respect to this matter has been made.
- 69.** As concerns the encouragement of negotiations, the Government states that in 2004 the Central Committee for the Settlement of Labour Disputes issued a decision to replace the union's old bargaining team for the purpose of negotiating a collective agreement, and that a new bargaining team had participated in 2004 and 2006 collective labour agreement negotiations. A copy of the new collective labour agreement would be communicated to the Committee separately.
- 70.** *The Committee notes with deep regret that the Government once again confines itself to stating that no progress with respect to the four trade union officers' anti-union discrimination proceedings has been made, due to difficulties in presenting the departed former director-president of the company before the court, and otherwise provides no information respecting the legal proceedings concerning the concerned parties. Noting with deep concern that over four years have now elapsed since the complaint of anti-union discrimination was first made, and in light of the apparent impasse in these proceedings due to the absence of the former director-president, the Committee requests the Government to institute an independent investigation at the enterprise and with the workers concerned to determine whether they have been the subject of anti-union discrimination and, if the allegations are found to be true, but the trade union officers had already received formal notification of their dismissals, to ensure, in cooperation with the employer concerned, that the trade union officers are reinstated or, if reinstatement is not possible, that they are paid adequate compensation such as to constitute sufficiently dissuasive sanctions, taking into account the damage caused and the need to avoid the repetition of such acts in the future. The Committee requests to be kept informed of developments in this regard. In addition, the Committee once again requests the Government to inform it of the decision of the Supreme Court with respect to the appeal made by these trade union officers on the decision of the National Administrative High Court, as well as to transmit all relevant texts.*
- 71.** *Noting the Government's indication that a collective labour agreement has been entered into between a new bargaining team and the company, the Committee requests the Government to transmit a copy of the agreement without delay, as well as a copy of the decision of the Central Committee for the Settlement of Labour Disputes which apparently replaced the union's old bargaining team.*

Case No. 2336 (Indonesia)

72. The Committee last examined this case, which concerns several freedom of association violations at the Jaya Bersama Company such as its refusal to recognize the plant-level trade union affiliated to the Federation of Construction, Informal and General Workers (F-KUI), the anti-union dismissal of 11 trade union members, including all the officials, and acts of intimidation against employees, at its November 2006 meeting. On that occasion, the Committee: (1) urged the Government to take the necessary measures to ensure that the Central Committee for Labour Dispute Settlement's decision ordering the payment of severance pay to the 11 dismissed workers is complied with; and (2) requested the Government to inform it of the steps taken to ensure trade union recognition and encourage collective bargaining in good faith between the company and the plant-level F-KUI union [see 343rd Report, paras 101–105].
73. In a communication of 9 March 2007, the Government states that it continues to face difficulty in presenting the employer to the court as, according to reports from the visit of labour inspectors and police authorities to the employer's premises, the employer has apparently closed its operations and has yet to comply with the Central Committee's decision ordering severance pay for the 11 dismissed trade union members. The Government adds that the employees may pursue their right to severance pay through legal means, such as by petitioning the courts to auction the employer's assets.
74. *The Committee notes with regret that, once again, the Government provides no new information respecting the severance pay due to the 11 dismissed trade union members, other than to repeat that it has not been able to present the employer before the court and so obtain the execution of the Central Committee's severance pay order. Recalling further that the Central Committee's decision was issued between August–November 2004, so that two and a half years have therefore elapsed without any progress made in securing its execution, the Committee recalls that justice delayed is justice denied and once again urges the Government to take the necessary measures to ensure by all appropriate means that the Central Committee's decision ordering the payment of severance pay to the 11 dismissed workers is complied with. Noting the Government's indication that the company has apparently ceased its operations, the Committee also requests the Government to verify and inform it of the company's operational status.*

Case No. 2441 (Indonesia)

75. The Committee last examined this case, which concerns anti-union dismissal, harassment of and threats of violence against trade union leaders, and shortcomings in the legislation at its May–June 2006 meeting, where it requested the Government to: take necessary measures to reinstate Mr Sukamto without loss of wages or benefits; review section 158(1)(f) of the Manpower Act of 2003 to ensure that the term “gross misconduct” is not interpreted so as to include legitimate trade union activities; and conduct an independent investigation without delay into the allegations of harassment, threats, and defamatory statements with a view to clarifying the facts, determining criminal responsibility, if any, and punishing those responsible [see 342nd Report, paras 594–628].
76. The International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) submitted additional information in a communication of 22 August 2006. The complainant states that on 18 July 2006 it, along with representatives from the Federation of Independent Tobacco, Cane and Sugar Workers' Unions (FPSM TG) of which the above-named Mr Sukamto was President, met with officials from the Department of Manpower and Transmigration, including four persons from the Department's Directorate of Industrial Relations Institutions (KHI). At this meeting, the Government indicated that Ms Haiyani Rumondang, Head of the KHI

Subdirectorate, had met with the management of the employer, the PT Gunung Madu Plantation, and had informed the latter that the recommendations formulated by the Committee in the present case did not yet constitute a decision of the ILO and were in no way legally binding upon the Government of Indonesia. The complainant adds that a similar view was expressed by Mr Sutanto, the Department's Director-General for International Relations, at a later meeting on 18 July 2006, to the effect that the ILO's decision was still "pending" and therefore no action was required.

77. The complainant contends that the Government's statements and failure to take concrete action strongly suggest that it has no intention of implementing the recommendations formulated by the Committee.
78. In a communication dated 8 March 2007, the Government indicated that there is no possibility of reinstating Mr Sukamto at Gunung Madu Plantation due to the fact that the Government has no right to intervene before the Supreme Court where the case is pending. The Government specifies that it does not have authority to force the employer to reinstate the dismissed worker. However, an effort of persuasion was carried out as reported earlier, but both parties refused mediation. Now the case is pending before the Supreme Court and the Government will transmit the decision to the ILO when handed down.
79. *With respect to the complainant's latest communication, the Committee must make clear that the conclusions and recommendations it formulated in this case, and which were approved by the Governing Body at its 296th Session in June 2006, are not "pending" or provisional in nature. They are to be implemented fully and promptly; in other words with the same due consideration the Government accords to all the obligations it has freely undertaken by virtue of its membership in the Organization.*
80. *The Committee must recall in this respect the circumstances surrounding Mr Sukamto's dismissal, which have never been contested by the Government. In particular, the Committee recalls that Mr Sukamto was dismissed due to the recommendation he made to the workers in respect of the employer's proposal on a wage increase. It was in this context that the Committee had requested the Government to ensure his reinstatement and to review the Manpower Act in force so as to ensure that the term "gross misconduct" may not be interpreted so as to include legitimate trade union activities [see 342nd Report, para. 620].*
81. *In these circumstances and recalling moreover the seriousness of the matters raised in the present case, the Committee once again strongly urges the Government to take immediate steps to implement all of its previous recommendations and in particular, to reinstate Mr Sukamto without loss of wages or benefits; review section 158(1)(f) of the Manpower Act of 2003 to ensure that the term "gross misconduct" is not interpreted so as to include legitimate trade union activities; and conduct an independent investigation into the allegations of harassment, threats and defamatory statements with a view to clarifying the facts, determining criminal responsibility, if any, and punishing those responsible. The Committee requests the Government to keep it informed of developments in this regard, including any court decisions handed down with regard to Mr Sukamto.*

Case No. 2139 (Japan)

82. The Committee last examined this case, which concerns allegations of preferential treatment granted to certain workers' organizations in the appointment of nominees to the Central Labour Relations Commission (CLRC) and various prefectural labour relations commissions (PLRC), at its November 2005 meeting. The Committee, recalling the necessity of affording fair and equal treatment to all representative organizations, with a view to restoring the confidence of all workers in the fairness of the composition of labour

relations commissions and other similar councils that exercise extremely important functions from a labour relations perspective, had urged the Government to take these principles into consideration when appointing worker members for the 29th term of the CLRC. It had also asked to be provided with the decision of the Tokyo District Court respecting the lawsuit filed by the complainant challenging workers' appointments for the 28th term of the CLRC [see 338th Report, para. 206].

- 83.** In its communication of 5 January 2007 the complainant, the National Confederation of Trade Unions (ZENROREN), states that on 7 July 2006 the Government issued a public announcement entitled "Nomination of candidates for worker members of the CLRC", requesting the trade unions that qualify for nominating candidates to the CLRC submit their nominations. The complainant and its affiliates, together with other independent trade unions, submitted a list of three worker member nominees to the CLRC: Mr Horiguchi, Mr Kokobun, and Mr Imai.
- 84.** On 16 November 2006, the Government appointed 15 worker members for the 29th term of the CLRC. None of the candidates backed by the complainant and other independent trade unions were nominated; all of the appointees were individuals nominated by the Japan Trade Union Confederation (JTUC-RENGO). In response, the complainant issued a "protest statement against the biased appointment of worker members for the 29th Session of the CLRC", which was submitted to the Ministry of Health, Labour and Welfare (MOHLW) the day after the appointments.
- 85.** The complainant states that it held negotiations concerning the appointments with the MOHLW on 19 December 2006. In said negotiations, the MOHLW maintained that persons competent to represent workers' interests in general were appointed, taking into consideration different factors, including the criteria laid down in 2002 for the selection and appointment of worker members, and that persons competent to represent workers' interests in general would be appointed fairly and impartially for the 30th term of the CLRC as well. When requested for more information about the selection process leading to the November 2006 appointments, however, the Ministry initially refused to give a reply, stating that it could not disclose the concrete manner in which the appointments were decided, as it was a question of "personnel affairs." The complainant adds that it had asked for the Ministry's view on the Committee's previous recommendations in the present case, to which the Ministry responded that it "respects the ILO recommendation and the composition of the 29th term of the CLRC is the result of its effort to make fair appointments".
- 86.** The complainant indicates that on 8 November 2006 the Tokyo District Court issued a decision rejecting the complainant's challenge to the worker member appointments to the 28th Session of the CLRC. A copy of the decision is attached to the communication. In arriving at its conclusions the Tokyo District Court considered, inter alia, the Committee's recommendation in its 330th Report to take "remedial measures on the occasion of appointments for the 28th term of the CLRC or before that, should worker member positions become vacant in the meantime", as well as the recommendations formulated by the Committee in its most recent examination of the present case, as set out in its 338th Report. However, the Court interpreted the said recommendations to "merely request measures for establishing criteria for worker members' appointments, or for correcting the imbalance in their composition from the perspective of restoring the confidence of workers", and subsequently determined that the appointments to the 28th Session of the CLRC did not violate ILO Convention No. 87. The complainant indicates that it has appealed this decision to the Tokyo High Court.
- 87.** The complainant alleges that on 21 September 2004, the Kyoto General Council of Trade Unions (Kyoto-SOHYO) filed suit against the Kyoto Prefectural Government and the

Governor of Kyoto in Kyoto District Court to challenge the exclusive appointment of worker members nominated by RENGO-Kyoto to the 39th term of the Kyoto PLRC (KPLRC). According to the complainant, candidates nominated by RENGO-Kyoto have occupied all worker member posts in the KPLRC since 1989, or eight terms in a row, in spite of the fact that the membership ratio between Kyoto-SOHYO and RENGO-Kyoto is 3:5, so that it could reasonably be expected that at least one of the five worker members be chosen from candidates nominated by Kyoto-SOHYO. On 21 June 2006, the Kyoto District Court dismissed Kyoto-SOHYO's suit seeking the annulment of worker member appointments to the KPLRC. On 22 September 2006, the composition of the 40th term of the KPLRC was announced; all worker members appointed were again from RENGO-Kyoto nominees.

- 88.** The complainant states that, in Kanagawa prefecture, the worker members for the 35th term of the Kanagawa PLRC appointed in April 2004 were all candidates nominated by RENGO-Kanagawa. On 15 July 2004, the complainant's Kanagawa subsidiary (KANAGAWA ROREN) and its ten affiliates filed suit in Yokohama District Court to challenge the appointments. The complainant adds that the membership ratio between KANAGAWA ROREN and RENGO-Kanagawa stands at 1:4, so that it could reasonably be expected that at least one of the seven worker members on the Kanagawa PLRC would be chosen from the nominees submitted by KANAGAWA ROREN; nevertheless, the Yokohama District Court dismissed the suit on 28 November 2006.
- 89.** The complainant indicates that all worker members in the Hyogo PLRC have been appointed from JTUC-RENGO nominees for many years as well, and that legal challenges to the appointments had been mounted since the 37th term of the Hyogo PLRC. The complainant's challenges to the appointments to the 37th and 38th Sessions of the Hyogo PLRC failed to succeed, but a suit against the appointments to the 39th term is currently before the Kobe District court, which is expected to hand down a judgement in March 2007.
- 90.** In a communication of 12 January 2007, the Government states that new members consisting of 15 employers, 15 labour members and 15 government members were appointed to the 29th term of the CLRC on 16 November 2006. As concerns the worker members, persons competent to represent the interests of workers in general were appointed by the Prime Minister based on recommendations made by labour unions, and taking into account various considerations including, among others, the organizational situation of each trade union; as a result, 15 persons recommended by RENGO-affiliated unions were appointed.
- 91.** As concerns the appointment of worker members to PLRCs, the Government indicates that, in January 2005, eight members in various PLRCs were individuals recommended by trade unions affiliated with the complainant. Since that time, new members were appointed in all of the 47 PLRCs, and the number of appointees nominated by ZENROREN for all of the PLRCs remains at eight.
- 92.** The Government indicates that the Tokyo District Court issued an 8 November 2006 decision rejecting the complainant's challenge to the appointments to the 28th term of the CLRC. In arriving at its decision, the Court found, inter alia, that: (1) the CLRC was an industrial dispute resolution body, as opposed to one charged with elaborating policy, and as such it was not an absolute necessity for it to have different opinions and positions represented by members with different union affiliations; (2) there was no legal provision requiring that a worker member nominated by a particular trade union take part in the examination of a case concerning that particular trade union; (3) the Prime Minister's appointment of worker members exclusively from JTUC-RENGO nominees cannot be considered to be discriminatory treatment; (4) the recommendations formulated by the

Committee in its 330th and 338th Reports merely request measures for establishing criteria for worker members' appointments, or for correcting the imbalance in their composition from the perspective of restoring the confidence of workers, so that the appointments of worker members to the CLRC cannot be regarded as violating ILO Convention No. 87; and (5) the complainant's total membership, compared to that of JTUC-RENGO, cannot be regarded as sufficient for obtaining one worker member post, so that the non-appointment of the complainant's nominees cannot be viewed as an unreasonable decision. The Government adds, in respect of the December 2006 negotiations held between the MOHLW and the complainant, that the complainant had queried whether people might think that the Government appointed some nominees with a particular intention, to which the Ministry replied that it did not have any particular intention.

93. *While noting the Government's indication concerning ZENROREN's membership in the PLRCs, the Committee notes with regret that, in spite of the recommendations concerning the composition of the CLRC it had formulated in its 330th and 338th Reports, according to the information provided by the complainant and the Government yet again no ZENROREN nominee was appointed to the most recent term of the CLRC. The Committee is, under these circumstances, once again compelled to recall the necessity of affording fair and equal treatment to all representative organizations, with a view to restoring the confidence of all workers in the fairness of the composition of labour relations commissions and other similar councils that exercise extremely important functions from a labour relations perspective [328th Report, paras 444–447] and requests the Government to keep it informed of all measures taken in this regard as concerns the CLRC, as well as the Kyoto, Kanagawa and Hyogo PLRCs.*
94. *Observing that the complainant has appealed the 8 November 2006 decision of the Tokyo District Court, the Committee requests the Government to communicate a copy of its examination of the case to the Tokyo High Court, and to transmit a copy of the High Court's decision when it is handed down.*

Case No. 2176 (Japan)

95. The Committee last examined this case on its merits at its November 2006 session. The complainant organization, Japan Postal Industry Workers' Union (YUSANRO), which had alleged that the existing legal provisions against unfair labour practices and anti-union discrimination were inadequate, including in their implementation, had submitted new information respecting Case No. 2-1998 before the Central Labour Relations Commission (CLRC), according to which the CLRC had (1) issued a relief order regarding the transfer of a union leader aimed at weakening the union, and (2) ruled that the refusal to rent an office to the union constituted an unfair labour practice. The latter ruling ordered Japan Post to authorize the union to use a room in each post office as a union office; however Japan Post appealed to the Tokyo District Court demanding the annulment of the CLRC decision. The complainant alleged that despite its repeated requests, the CLRC refused to initiate the procedure to have an "urgent order" issued by the Court requiring Japan Post to comply with the CLRC decision, pending the Court's ruling, or pay a penalty to the complainant. The complainant must therefore await the final court decision, thus aggravating the damage it has already suffered in this matter. Noting the above information, the Committee recalled that justice delayed is justice denied and requested the Government to provide its observations on the information submitted by the complainant [see 343rd Report, paras 120–124].
96. In a communication of 17 January 2007 the Government states, with respect to the CLRC's refusal to issue an "urgent order", that the purpose of emergency orders is to secure the effectiveness of a remedial order issued by the CLRC while a lawsuit brought by an employer for the remedial order's annulment is pending before the Court. The CLRC

petitions the Court for an emergency order if it determines, after examining the particulars of the case, that tentative enforcement of the remedial order is necessary: on this basis, since 2001 the CLRC has filed requests for emergency orders in about 22 per cent of the cases where employers have appealed its remedial orders to the Court. In respect of Case 2(2)-1998, referred to by the complainant, the CLRC did not file a request for an emergency order as it did not recognize any pressing circumstances that would make it difficult to achieve the remedial order's expected effect, such as the normalization of labour relations by correcting unfair labour practices. The CLRC considers that at present there is no reason for changing this attitude. The Government adds, in respect of this issue, that penalties for the violation of an emergency order do not apply to Japan Post.

97. The Government also indicates that the CLRC had not issued a relief order with regard to the transfer of a trade union leader, as the complainant had alleged, but rather dismissed the complainant's complaint that the transfer constituted an unfair labour practice as lacking sufficient merit.
98. In a communication of 30 April 2007, the Government states, with regard to Case 2(2)-1998, that the CLRC filed a request for an emergency order with the court on 11 April 2007.
99. *With respect to the case concerning the transfer of a trade union leader, the Committee notes that there appears to be a discrepancy in the information before it. The complainant had previously alleged that a relief order had been issued by the CLRC with respect to the transfer, whereas the Government indicates that the CLRC had in fact dismissed the complaint for lack of merit. In these circumstances, the Committee considers that it will not pursue its examination of this aspect of the case unless new information is submitted by the complainant.*
100. *With respect to Case 2(2)-1998, the Committee notes the Government's indication that the CLRC has petitioned the Tokyo District Court for an emergency order to obtain compliance with its ruling in favour of the complainant, pending the Court's decision. It requests the Government to keep it informed of developments respecting this case, and to transmit a copy of the Court's decision once it is handed down.*

Case No. 2304 (Japan)

101. The Committee last examined this case, which concerns the arrest and detention of trade union officers and members, massive searches of trade union offices and residences of trade union leaders, and the confiscation of trade union property, at its June 2006 meeting. The Committee noted that no proceedings had been filed against the three persons involved in the Tokyo Station incident, though two cases were pending against members of the complainant organization, the Japan Confederation of Railway Workers' Unions (JRU), for embezzlement of union funds and for events arising out of the Urawa Train Depot incident, respectively. It also noted the various legal proceedings against the authorities for state liability, unreasonable searches and confiscation, search of private residences, arbitrary interference with the JRU's operations, and abuse of power. The Committee requested the Government to keep it informed of developments respecting the above proceedings and provide it with the judgements as soon as they were issued. It also requested the Government to provide its observations on the complainant's allegations that the police gave misleading information on the number of items returned to the complainant, and that the judicial process in the cases it has filed against the authorities have been unfair, as evinced by the replacements of judges, long delays and multiple hearings [see 342nd Report, paras 116–122].

- 102.** In its communication of 5 July 2006, the complainant states, with respect to the case concerning compensatory damages for illegal search and seizure brought by the complainant against the Government, that on 30 June 2006 the Tokyo District Court issued a judgement recognizing some of the complainant's claims while dismissing the others. In particular, the court judged the seizure of 40 items illegitimate and ordered the Tokyo Metropolitan Government (TMG) to pay compensation. A copy of the judgement is attached to the communication.
- 103.** In its 19 February 2007 communication, the complainant alleges that on 15 February the Public Safety Bureau of the Tokyo Police raided the JRU premises again, searching a JRU office and confiscating 665 items. The complainant states that in the case concerning state liability for compensation with respect to previous seizures of documents, despite repeated urgings by the presiding judge, the Metropolitan Police Department (MPD) has yet to explain the linkage between the confiscated items and the case in connection with which they were confiscated. The complainant adds that on 21 February 2007, the prosecutors will make their summations and recommendations for sentencing in the Urawa Train Depot incident, in which seven members of the East Japan Railway Workers' Union were arrested in 2002.
- 104.** In a communication dated 6 March 2007, the Government states that, of the 1,870 items seized by the MPD in connection with the Urawa Train Depot case, 1,161 have been returned to the complainant, and 13 items can be retrieved at any time. The remaining items will be returned when, in the course of the trial, it is appropriate to do so. As for the items seized in connection with the Tokyo Station incident, all 1,039 of them have been returned, except for 22 items seized again by the MPD because of their necessity in the investigation of another case.
- 105.** As regards the action concerning state liability for compensation brought by the Japan Railway Welfare Association (JRWA) against the Government and the TMG, the Government indicates that on 30 June 2006 the Tokyo District Court dismissed the compensation claims, but recognized part of the plaintiff's claims. The JRWA and the TMG appealed the decision on 12 July and 14 July 2006, respectively; it is currently being heard in the Tokyo High Court.
- 106.** With regard to the action concerning state liability for compensation brought by the complainant against the Government and the TMG, the Government states that the Tokyo District Court dismissed the complainant's compensation claims. The Government adds, with respect to the events of 7 December 2005, that the MPD conducted searches of JRU offices and other venues on suspicion of embezzlement, based on search warrants issued by the judge after strict judicial examination in accordance with the Code of Criminal Procedure. The embezzlement case is presently under investigation, and the MPD has returned some of the seized items deemed less important to the case.
- 107.** In communications dated 30 April and 9 May 2007, the Government adds, with respect to the action concerning state liability for compensation brought by the complainant against the Government and the TMG, that on 9 March 2007 the complainant appealed the Tokyo District Court's dismissal of its compensation claims; the case is currently before the High Court. The Government also indicates that the searches of JRU offices and facilities on 15 and 19 February 2007 were conducted by the MPD based on search warrants issued by the judge after strict judicial examination, in accordance with the Code of Criminal Procedure.
- 108.** *The Committee notes the information provided by the complainant and the Government, including the fact that: (1) the JRWA's claim for compensation had been partially recognized and partially dismissed by the Tokyo District Court, and (2) the JRU's*

compensation claim had been dismissed by the same court. Noting that both cases were now before the Tokyo High Court on appeal, the Committee requests the Government to transmit copies of the High Court's decisions once they are handed down. The Committee also requests the Government to provide its observations with respect to the complainant's allegations concerning a 2005 search in which over 2,000 basic union documents were seized, and were still yet to be returned.

Case No. 2381 (Lithuania)

109. The Committee last examined this case at its November 2006 meeting [see 343rd Report, paras 125–136]. On that occasion, it requested the Government to indicate whether the suspension of Mr Petras Grebliauskas from his post as vice-president of the Lithuanian Trade Union “Solidarumas”, has now been lifted and to communicate the results of the pre-trial investigation launched on 30 January 2006 into the legitimacy of the action of Mr Grebliauskas when transferring the part of the building belonging to the union. The Committee further requested the Government and the complainant organization to indicate whether all seized items, during the search of the union office on 31 January 2006, including the union computer, have since been returned and whether the trade union can now have access to its accounts.
110. In its communication dated 20 October 2006, the complainant organization informs that the case pending against Mr Petras Grebliauskas was declared non-suited and the compulsory measures related to all persons were removed.
111. In its communication dated 2 November 2006, the Government confirms that the case against Mr Grebliauskas was declared non-suited and considers that Case No. 2381 has lost its grounds and purpose.
112. *The Committee notes this information with interest.*

Case No. 2048 (Morocco)

113. The Committee last examined this case at its meeting in November 2006 [see 343rd Report, paras 137–139]. On several occasions, it urged the Government to provide, without delay, copies of the two decisions concerning the criminal proceedings that resulted from certain events during the collective labour dispute of 1999 at the AVITEMA farm and charges of “abuse of power” brought against Mr Abderrazak Chellaoui, Mr Bouazza Maâch and Mr Abdeslam Talha.
114. In its communication dated 25 January 2007, the Government indicates that, according to the information gathered from the external offices of the Ministry of Employment, Mr Abderrazak Chellaoui, the owner of AVITEMA, committed suicide in 2006.
115. *The Committee duly notes this information. It recalls that the requested decisions concerned charges brought by the workers of the AVITEMA farm against Mr Abderrazak Chellaoui, Mr Bouazza Maâch, a member of the Menzah police, and Mr Abdeslam Talha, a member of the auxiliary police force of Aïn Aouda, for “violence and torture”. Following the inquiries carried out by the criminal investigation department, the Public Prosecutor instituted proceedings against these three persons for “abuse of power”, in accordance with section 231 of the Moroccan Penal Code. The Committee recalls that the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, para. 52]. The Committee*

therefore once again requests the Government to transmit, as soon as possible, a copy of the decisions involving Mr Bouazza Maâch and Mr Abdeslam Talha.

Case No. 2455 (Morocco)

- 116.** The Committee examined this case at its meeting in May 2006 [see 342nd Report, paras 753–770]. It concerns the Royal Air Maroc (RAM) company's refusal to recognize the Moroccan Union of Aviation Technicians (STAM); its refusal to negotiate with this trade union, preferring to deal with staff representatives; and several acts of anti-union harassment following a strike that began on 29 June 2005. The Committee requested the Government to ensure, firstly, that the RAM recognizes the STAM, a legally constituted trade union and the most representative and, secondly, that, in future, it negotiates with STAM's representatives, who must not be subjected to anti-union discrimination or harassment.
- 117.** In its communication dated 31 October 2006, Aircraft Engineers International (AEI) reiterates its complaint against the Government of Morocco and the management of the RAM for violating the recommendations contained in the 342nd Report of the Committee on Freedom of Association. The complainant organization reports that many of the recommendations have not been put into effect. The leaders of STAM, as well as about 100 of its active members, were forced to leave the RAM. The company had initially granted the trade union's requests then, as the months passed, it became impossible to contact the company or the STAM members in Morocco. The secretary-general of the complainant organization states that he could only confirm, after managing to contact a former employee, that STAM had been drained of its members and rendered powerless. The complainant attaches the testimony of a former member of STAM which describes a worsening situation, culminating in the victimization of the trade union members. According to the testimony, although the Government recognizes the trade union, the RAM does not. The complainant organization asks the Committee to conduct an investigation with the aim of awarding compensation.
- 118.** In its communication dated 14 December 2006, the Government reports that, after the first strike which ended in February 2006, the conflict reignited because of the suspension of ten technicians. The Government adds that, according to the information gathered by the external offices of the Ministry of Employment and Professional Training, they were suspended after the electric cables connecting to the fuel tank of an aeroplane were cut, and not in retaliation against those who participated in the strike, as argued by the STAM union leaders. In fact, because of the lack of work at the company, the management decided to put 100 mechanics on administrative leave. Several conciliation meetings were held and all of the mechanics who had been temporarily laid off preferred to negotiate their departure. The Government stresses that this agreement was made official through legal channels and peace was restored to the company.
- 119.** *With regard to the quasi dissolution of the trade union, noted by the complainant organization, the Committee recalls that it requested the Government of Morocco to ensure that the RAM recognizes the STAM, and that, in future, it negotiates with STAM's representatives, who must not be subjected to anti-union discrimination or harassment. The Committee wishes to draw the Government's attention to the principle stating that no person should be dismissed or prejudiced in his or her employment by reason of legitimate trade union activities. Given the extremely serious nature of the new allegations and the contradictions between the information provided by the Government and the complainant organization respectively, the Committee requests the Government to carry out an independent, comprehensive investigation into this matter. If it is proven that acts of anti-union discrimination were committed against the members of STAM in order to dissolve the trade union, the Committee requests the Government to remedy the situation*

and to ensure that the RAM recognizes the STAM, and that, in future, it negotiates with its leaders. Furthermore, the Committee requests the Government to send it a copy of the legal decision concerning the administrative leave.

Case No. 2338 (Mexico)

- 120.** When previously examining the case in March 2006, the Committee requested the Government to take the measures necessary to ensure that the authorities of the State of Morelos carried out an inquiry into the alleged assault of workers of the enterprise CONFITALIA SA de CV who were on picket lines and to request the Local Conciliation and Arbitration Board of the State of Morelos to provide the reasons why it had not initiated the procedure for determining the circumstances of the strike [see 340th Report, para. 138].
- 121.** In its communication of 23 January 2007, the Government states that the Local Conciliation and Arbitration Board of the State of Morelos declared that Cases Nos 02/580/01 and 02/481/01 fall within its purview. Both cases result from the holding of a strike because of violation of the collective labour agreement concluded between the Progressive Trade Union of Mexican In-Bond Industry Workers (SPTIMRM) and the enterprise CONFITALIA SA de CV. It specifies that, on 28 April 2006, the plenary session of the Local Conciliation and Arbitration Board of the State of Morelos handed down a decision to the effect that, inter alia, it had resolved to sentence CONFITALIA SA de CV to payment and settlement of the following:
- wages due but unpaid;
 - holiday pay for the entire period of service;
 - payment of 75 per cent of the real amount of workers' wages, by virtue of the concept of paid holidays for the entire period of service;
 - payment of wages due, from the date when work was suspended until 28 April 2006 when the relevant decision was handed down;
 - payment of compensation amounting to three months' minimum salary as laid down in article 123, section A, clause XXI, of the Constitution of the United States of Mexico;
 - payment of a long-service bonus; and
 - payment of compensation consisting of 20 days' wages for each year of service, in terms of the considerations and circumstances contained in the documentary evidence and the decision respectively.
- 122.** Likewise, the Local Conciliation and Arbitration Board of the State of Morelos states that, on 26 May 2006, the SPTIMR initiated a direct *amparo* action (appeal for the enforcement of constitutional rights) against the ruling in question, deeming that it infringed the guarantees concerning grounds and reasons provided in articles 14 and 16 of the Constitution of Mexico, as explained. On the same date, the union – which represented CONFITALIA SA de CV because the company had declared bankruptcy – declined to comply with the final decision given by the aforementioned board and initiated an *amparo* action in which it requested the suspension of the ruling in question.

123. Currently, both *amparo* procedures are duly under way and have been brought before the competent collegiate circuit court so that that federal authority will be cognizant of and make a decision on the cases in question.
124. The Local Conciliation and Arbitration Board of the State of Morelos undertakes to abide lawfully by the decision of the competent collegiate circuit court, and will comply with any final judgement handed down.
125. *The Committee notes this information and the decisions of the Conciliation and Arbitration Board of the State of Morelos which appear to cover payment of compensation and of salaries relating to the period of the strike, and which have been appealed, and requests the Government to communicate any decision handed down by the collegiate circuit court on the amparo actions brought by both parties. Furthermore, the Committee reiterates its previous recommendation that the authorities of the State of Morelos should conduct an inquiry into the allegations of attacks against workers of the enterprise CONFITALIA SA de CV and inform the Committee of the reasons why the Conciliation and Arbitration Board of the State of Morelos has not initiated the procedure for determining the circumstances of the strike.*

Case No. 2444 (Mexico)

126. At its June 2006 meeting, the Committee made the following recommendations regarding the issues that remained pending [see 342nd Report, para. 821]:
- (a) The Committee requests the Government to take measures to encourage and promote between the enterprises Editorial Taller SA de CV, Editorial Voz e Imagen de Oaxaca SA de CV, the newspaper Noticias de Oaxaca and the Trade Union of Industrial, Related and Allied Workers of the State of Oaxaca (STICYSEO), the full development and use of the procedures for voluntary negotiation with the aim of regulating conditions of employment by way of collective agreements. Furthermore, the Committee requests the Government to inform it of any decisions adopted by the Local Conciliation and Arbitration Board of the State of Oaxaca on this matter.
 - (b) Observing that the complainant organization and the Government offer contradictory versions of the facts (specifically acts of violence against the property, imprisonment and injury) that occurred during the strike at the enterprise Editorial Taller SA de CV (Editorial Voz e Imagen de Oaxaca SA de CV and newspaper Noticias de Oaxaca), the Committee requests the Government to inform it of the results of the investigations initiated and of the judicial proceedings to which the complainant organization refers.
 - (c) Regarding the allegation that since the beginning of the strike the management of the enterprise Editorial Taller SA de CV has insulted and slandered the image of the executive committee of the STICYSEO and of its members, accusing them of being criminals before the national and international media, the Committee requests the Government to conduct an investigation into this allegation and to inform it of the result.

127. In its communication of 27 November 2006, the Government states the following:

- Recommendation (a) of the Committee on Freedom of Association: with regard to the request made by the Committee on Freedom of Association to the effect that the conditions of employment at the enterprises concerned should be regulated by collective agreements, the Government points out that the Revolutionary Confederation of Farm Workers (CROC) stated in its communication that a collective labour agreement already exists in the case of the enterprise Editorial Taller SA de CV, since, according to the CROC's version of events, in March 2005, the Trade Union of Industrial, Related and Allied Workers of the State of Oaxaca (STICYSEO), an affiliate of the CROC, called a strike at the said enterprise, with the precise aim of bringing about the revision of the collective labour agreement concluded with the

enterprise. Subsequently, the CROC stated that the enterprise was duly convened and attended conciliatory talks, not with the STICYSEO, the trade union which had concluded the collective labour agreement, but rather with a supposed coalition of workers that was not recognized by the Local Conciliation and Arbitration Board of Oaxaca State.

- Recommendation (c): the Government states that, if the STICYSEO feels that its rights as an organization have been violated, then it has the option of exercising the legal means and appeals provided for under the Mexican legal system before the competent authorities. That is to say, if the trade union considers that its executive committee and its members have been slandered, then it can lodge the corresponding complaints against those individuals who make up the management of the Editorial Taller SA de CV and who might have committed what would probably constitute offences, it being up to the competent judicial authorities to decide whether an offence has been committed or not. The offence of slander is covered by sections Nos 350–355 of the Federal Criminal Code: Section No. 350 expressly states that:

Section No. 350. The offence of slander shall be punishable by up to two years' imprisonment or a fine of 50 to 300 pesos, or both sanctions, at the judge's discretion.

Slander consists of falsely informing one or more persons of the involvement of another physical or moral person, as defined by law, in a real or false, determined or undetermined act which could cause that person to be dishonoured, discredited, suffer prejudice or expose him/her to the scorn of another.

If the person subjected to slander is one of the relatives or persons referred to in sections Nos 343bis and 343ter, in the latter case whenever the person subjected to slander lives in the same house as the victim, the sentence shall be increased by a third.

Moreover, sections Nos 332–337 of the Criminal Code for the Free and Sovereign State of Oaxaca state the following with regard to the offence of slander:

Section No. 332. Slander shall be punished by six months' to five years' imprisonment and a fine of 500–1,000 pesos.

Slander consists of falsely informing one or more persons of the involvement of another physical or moral person, as defined by law, in a real or false, determined or undetermined act which could cause that person to be dishonoured, discredited, suffer prejudice or expose him/her to the scorn of another.

It is also stated in the said communication that the CROC states that a separate, new enterprise, known as Editorial Voz e Imagen de Oaxaca, SA de CV occupied the same premises as the enterprise Editorial Taller SA de CV and that a strike was also called with regard to the former enterprise on 4 May 2005, but that on this occasion the strike was called with a view to obtaining the conclusion of a collective labour agreement.

Furthermore, it is also stated that on 21 May 2005, the STICYSEO presented a call to strike at the enterprise Editorial Taller SA de CV to the Local Conciliation and Arbitration Board of Oaxaca State, for violation of the clauses of the collective labour agreement.

As can be seen from the above information, the prevailing working conditions in the enterprise Editorial Taller SA de CV are included in the collective labour contract that the STICYSEO had concluded with the enterprise.

Furthermore, the Committee on Freedom of Association should be aware that the Local Conciliation and Arbitration Board of the State of Oaxaca has been informed of

the Committee's request to be informed of any decisions adopted by the said Board on this matter.

- Recommendation (b): in this regard, the Government reports that work on preliminary investigation PGR/OAX/OAX/IV/118/2005 and preliminary investigation PGR/OAX/OAX/I/148/2005 has not yet been completed, and therefore it is not possible to report on their results.

As to the request for information concerning the current state of the judicial process referred to by the complainant organization, it should be pointed out that, according to the records of the Office of the Attorney-General of the Republic (PGR) in Oaxaca, Mr David Aguilar Robles brought five actions for *amparo* (protection of constitutional rights) before the Third District Court in Oaxaca State: *amparo* actions Nos 911/2005, 917 and related action 918/2005, 1079/2005 and 323/2006, which were all dismissed by the relevant federal judicial authority owing to the fact that the alleged violation did not exist.

- 128.** In its communication dated 10 January 2007, the Government states that, as it informed the Committee on Freedom of Association, the Local Conciliation and Arbitration Board of the State of Oaxaca has been notified of the Committee's request to be informed of any decisions adopted by the said Board on this matter.
- 129.** In this regard, the Government, adding to its previous comments of November 2006, points out that the Local Conciliation and Arbitration Board of the State of Oaxaca stated with regard to calls for strike action Nos 70/2005 and 28/2005 made by the STICYSEO against the enterprise Editorial Taller SA de CV, that on 11 December 2006 two agreements were concluded settling both strike procedures and, as a consequence, the said Local Conciliation and Arbitration Board ordered that the abovementioned files be closed and all physical signs of strike action at the said enterprise be removed.
- 130.** Copies of the said agreements were attached. The sixth clause of the agreement relating to file No. 70/2005 and the fourth clause of the agreement relating to file No. 28/2005 state the following:

Enterprise and trade union state that neither reserves any right or any action against its counterpart, and, as a consequence, this agreement brings to an end any contractual or legal relationship that existed between them in the past, likewise both parties mutually and with immediate effect undertake to grant the widest pardon possible that exists in criminal law with regard to the disputes and/or allegations initiated against one another, including their partners and agents, with regard to the alleged offences committed by those convened here and who are parties to the strike procedure which we are addressing, extending the said pardon to the labour authorities who may have examined this matter, if a dispute has been initiated and/or a complaint has been lodged against them for any offence. [...]

- 131.** *The Committee notes the information provided by the Government. The Committee notes with interest the conclusion of the collective agreements which settled both strike procedures, as well as the fact that the parties dropped their disputes and complaints within the framework of the said collective agreements (previously the federal judicial authority had already dismissed five actions for amparo).*

Case No. 2432 (Nigeria)

- 132.** The Committee last examined this case at its November 2006 session [see 343rd Report, paras 1011–1029] and requested the Government to amend its legislation in line with the provisions of Conventions Nos 87 and 98 so as to:

- limit the definition of “essential services” to the strict sense of the term, i.e. to services the interruption of which would endanger the life, personal safety or health of the whole or part of the population;
- ensure that workers’ organizations may have recourse to protest strikes aimed at criticizing the Government’s economic and social policies that have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living, as well as in disputes of interest, without sanction;
- ensure that peaceful incitement of workers to participate in a strike action is not forbidden;
- ensure that the wording of section 42(1)(B) is not used to declare illegal peaceful strike actions, including picketing, workplace occupations and gathering and that any restrictions placed on strike actions aimed at guaranteeing the maintenance of public order are not such as to render any such action relatively impossible; and
- amend section 11 of the Trade Union Act 1973 so that employees in the Customs and Excise Department, the Immigration Department, the prison services, the Nigerian Security Printing and Minting Company, the Central Bank of Nigeria and Nigerian External Telecommunications, are ensured the right to organize and to bargain collectively.

133. In its communication dated 1 March 2007, the Government states that Nigeria is operating a democratic administration where individuals and corporate organizations are free to initiate bills before the National Assembly. The Trade Unions (Amendment) Act 2005 was one of such bills. Before its enactment, the social partners and the ILO were requested to present memoranda on it to the National Assembly. It is not the Government’s intention to abort the process of a comprehensive review of Nigeria’s labour laws undertaken by the social partners in collaboration with the ILO. The Government points out that most of the issues raised in the present case have been addressed by the draft Collective Labour Relations Bill that was jointly reviewed by the social partners and the ILO. The Government indicates that both Bills have been approved by the Federal Executive Council and are being finalized for enactment by the National Assembly.

134. With regard to the allegation that no tripartite consultation was held prior to the enactment of the Trade Unions (Amendment) Act 2005, the Government indicates that public hearings took place in both chambers of the National Assembly. The participation of all interested stakeholders, including the social partners and the ILO has greatly moderated the final draft of the Act. Moreover, the Government has, on several occasions, engaged in a dialogue with the social partners over the Trade Unions (Amendment) Act. In 2005, the Government invited the employers and workers’ representatives to a meeting to discuss the guidelines for the implementation of the Amendment Act. An interactive session among the social partners on the Amendment Act was organized on 20 December 2005. It was resolved at that meeting that the existing structure should be maintained, but that further consultations needed to be held. A subsequent interactive session was held on 24 January 2007. The social partners agreed to maintain the status quo. The Government has been in constant dialogue with the Nigeria Employers’ Consultative Association (NECA), the Trade Union Congress of Nigeria (TUC) and the Nigeria Labour Congress (NLC).

135. With regard to the allegation that workers employed in the army, navy, air force, police force, customs and excise, immigration and prisons, preventive services are denied the right to establishing their organizations, the Government indicates that Convention No. 87 excludes members of the police and armed forces from its scope. However, other sectors mentioned have been noted and addressed by the Collective Labour Relations Bill. Moreover, the civilians working with the armed forces are not denied the right to join trade unions. Indeed, they are already unionized, depending on their cadres, and belong to either of the eight public sector unions.

136. With regard to the alleged violations of the right to strike, the Government indicates that section 6(a) and (b) of the Trade Unions (Amendment) Act, which bans strikes and limits them to concerns constituting a “dispute of right” has been addressed by the draft Collective Labour Relations Bill. The Government considers, however, that because of the strong promotion of social dialogue, there has been no need to enforce this provision of the Act. Furthermore, section 9 of the Amendment Act (amending section 42(1)(B)) has also been taken care of by the draft Bill. The Government has not, at any given point in time, accosted any group of workers as a result of the application of section 9 of the Act.
137. The Government adds that the new Trade Union (Amendment) Act is not intended to weaken the unity within the Nigerian workers. Rather, it aims at the democratization of the labour movement and compliance with the provisions of Convention No. 87. As a result of the new legislation, the Confederation of Free Trade Unions (CFTU) of Nigeria has recently merged with the NLC to form a bigger and stronger labour federation.
138. Finally, the Government indicates its acceptance of the Office’s offer of technical assistance.
139. *The Committee recalls that the complainant in this case alleged that the Trade Union (Amendment) Act 2005, adopted without prior tripartite consultations, violated established freedom of association principles on strikes (in particular, sections 6(a) and (b) and 9), essential services (as defined under the Trade Dispute Act, to which the Trade Union Act refers) and the right to organize of workers employed in customs and excise, immigration, prisons and preventive services (section 11 of the Trade Union Act 1973, not amended by the Amendment Act). The Committee notes the Government’s statement that the social partners are involved in the process of the comprehensive review of the labour legislation.*
140. *The Committee further notes the Government’s statement that most of the issues raised in the present case will be addressed in the Collective Labour Relations Bill, which is now being finalized for enactment by the National Assembly. While taking due note of this information, the Committee trusts that the Collective Labour Relations Bill will also provide for the necessary amendments to the Trade Union Act, so as to ensure that this Act is also brought into full conformity with Conventions Nos 87 and 98. In this regard, the Committee would recall, in particular, the need to ensure the right to organize of employees in the Customs and Excise Department, the Immigration Department, the prison services, the Nigerian Security Printing and Minting Company, the Central Bank of Nigeria and Nigerian External Telecommunications through the amendment of section 11 of the Trade Union Act 1973.*
141. *The Committee expects that the Committee’s recommendations will be reflected in the new legislation and welcomes the Government’s acceptance of ILO technical assistance. It requests the Government to keep the Committee of Experts on the Application of Conventions and Recommendations informed of the developments in the legislative review process.*

Case No. 2006 (Pakistan)

142. The Committee last examined this case at its November 2005 meeting when it urged, once again, the Government to lift immediately the ban on trade union activities at Karachi Electric Supply Corporation (KESC) and to restore without delay the rights of the KESC Democratic Mazdoor Union as a collective bargaining agent [338th Report, paras 264–266].
143. In its communication of 14 October 2006, the Federation of Oil, Gas, Steel, Docks, Communication, Transport & Electricity Workers (FOGSEW) indicated that the

Government has so far ignored the Committee's recommendations in this case. Moreover, the High Court Sindh, in its verdict of 23 June 2006, directed the National Industrial Relations Commission to decide to conduct a new election of a collective bargaining agent in the KESC, thereby ignoring the Committee's recommendation. The FOGSWEG was now preparing to address the High Court again with a complaint of infringement of collective bargaining rights.

144. *The Committee regrets that the Government provided no information regarding this case since its last examination. The Committee emphasizes that the Government should recognize the importance for their own reputation of formulating detailed replies to the allegations brought by complainant organizations, so as to allow the Committee to undertake an objective examination [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 24]. The Committee strongly urges the Government to be more cooperative in the future. The Committee recalls that it has been requesting the Government to restore collective bargaining rights to the KESC Democratic Mazdoor Union since this case was examined for the first time in November 2000. Deploring that the Government has so far not given any effect to its recommendation, the Committee once again strongly urges the Government to restore without delay the rights of the KESC Democratic Mazdoor Union as collective bargaining agent and to keep it informed in this respect.*

Case No. 2086 (Paraguay)

145. The Committee last examined this case relating to the trial and sentencing in the first instance for "breach of trust" of the three presidents of the trade union confederations, CUT, CPT and CESITEP, Mr Alan Flores, Mr Jerónimo López and Mr Barreto Medina, at its meeting in November 2006 [see 343rd Report, paras 169–171]. The Committee had noted that, on 31 December 2003, the judicial authority had cancelled the preventive detention of the trade union officials in question, who were currently at liberty, and expressed the hope that the judicial proceedings initiated against the trade union officials would be concluded in the near future. It had also noted that in a communication dated 6 June 2006, the Trade Union Confederation of State Employees of Paraguay (CESITEP) reported that the criminal proceedings had not been concluded and alleged further violations of procedural rights in the second instance (in particular the failure to produce the evidence requested to follow up on a development in the second instance).
146. *The Committee deplors the fact that the Government has still not sent its observations regarding this case and the excessive delay in the judicial process. The Committee expresses the hope that due process of law will be respected in the framework of the judicial proceedings initiated against the trade union officials, and that the proceedings will be concluded in the near future. The Committee stresses that justice delayed is justice denied. The Committee once again requests the Government to inform it of the final ruling handed down in this case and to send its observations on the communication of CESITEP without delay.*

Case No. 2293 (Peru)

147. The Committee last examined this case at its June 2005 meeting, when it made the following recommendations [see 337th Report, paras 1124–1136]:
- (a) The Committee requests the Government, in consultation with the employers' and workers' organizations concerned, to take the necessary measures so as to avoid obstacles to the establishment of trade unions in the public sector and to keep it informed in this regard.

- (b) The Committee requests the Government to take steps to ensure that health and social security authorities comply with the criteria laid down in respect of the deduction of trade union dues from wages and to keep it informed of all measures taken in this respect.

- 148.** In a communication dated 25 October 2006 the Government recalls that the National Trade Union of Social Security Workers (SINACUT ESSALUD) has been on the register of trade union organizations of public officials since 2 July 2004 and that there is no justification for its non-recognition by the social security institution, ESSALUD. It adds that on 18 April 2005 SINACUT filed proceedings for the protection of its constitutional rights so as to oblige ESSALUD to grant it unrestricted enjoyment of its constitutional right to freedom of association, to bargain collectively and to strike. The proceedings were finally resolved by the Constitutional Court in a 19 April 2006 ruling, declaring the complaint to be inadmissible on the grounds that article VII of the Preliminary Title and article 5, paragraph 2, of the Constitutional Procedural Code provided for a specific procedure which is equally satisfactory as a means of protecting a constitutional right that has supposedly been infringed. Consequently, because the matter in dispute comes under the country's labour legislation, it will have to follow the procedure for administrative disputes. The Government states further that it has not been proved that the right to freedom of association, to bargain collectively or to strike has been infringed. Should ESSALUD persist in its refusal to recognize the trade union, SINACUT is clearly entitled to have recourse to the proper channels. *The Committee takes note of this information, invites the Government to consider, together with ESSALUD, the effective recognition of SINACUT and requests the Government to inform it of the final outcome of any case brought before the administrative disputes authority by the organization with respect to its recognition by ESSALUD.*
- 149.** The Government states that: (1) with regard to the requirements imposed on SINACUT by ESSALUD before it will deduct union dues from union members' wages, ESSALUD claims that the presentation of a magnetic support containing a list of members of the trade union is necessary for the data to be entered into company payroll more quickly; the labour administration considers that this practice can constitute a burden that a trade union is not necessarily in a position to assume and that, consequently, in the absence of an agreement, it is for the employer to provide the necessary material and human resources for the data to be entered as efficiently as possible; (2) with regard to the requirement that SINACUT present a membership card and national identity document with each request for the deduction of union dues, ESSALUD states that, although it has the files of all the workers, there have been many instances where their signatures had been forged, to their cost, and it is impossible month after month to go through the files of every worker who authorizes the deduction of union dues just to check his or her ID; the labour administration considers that the point raised by ESSALUD is valid, since the purpose of this requirement is to protect the union dues, which is in the workers' interests; and (3) with regard to the requirement that workers submit a letter of resignation from the union in order to suspend the deduction of union dues, ESSALUD states that this requirement has been dropped and that in many cases deductions are now being stopped simply at the worker's request. The Government observes that the foregoing information demonstrates ESSALUD's willingness to remove some of the requirements imposed and explains why others, in the employer's opinion, are justified. *The Committee takes note of this information and recalls that, on examining this case in June 2005, it considered that, when deducting trade union dues from wages, ESSALUD should restrict itself to requesting evidence of new affiliations or resignations of members.*

Case No. 2252 (Philippines)

- 150.** The Committee last examined this case, at its November 2006 session [see 343rd Report, paras 182–190]. The Committee recalls that the case concerns the continued refusal by Toyota Motor Philippines Corporation (TMPC) to recognize and negotiate with the complainant Toyota Motor Philippines Corporation Workers' Association (TMPCWA) despite the union's certification by the Department of Labor (DOLE) as sole and exclusive bargaining agent; the TMPC moreover dismissed 227 workers and filed criminal charges against other officers and members for having staged strikes in protest at this refusal. The National Labor Relations Commission (NLRC) later on found these dismissals valid but nevertheless required the TMPC to grant separation pay of one month's pay for every year of service. One hundred and twenty two workers have not accepted the compensation package. Several legal appeals are pending before the courts filed by both parties.
- 151.** During the last examination of this case, the Committee made the following recommendations: (1) with regard to the recent allegations by the complainant concerning the new certification election of 16 February 2006 which led to the certification of the Toyota Motor Philippines Corporation Labor Organization (TMPCLO) – which was allegedly established under the dominance of the employer – as sole and exclusive bargaining agent of all the rank and file employees, the Committee requested the Government to provide further clarifications on whether the TMPCLO obtained the absolute majority of votes required for certification and to keep it informed of the appeal filed by the TMPCWA against the mediator-arbiters' order certifying the TMPCLO; the Committee also noted that the recent certification ballot took place in the particularly difficult context of the repeated refusal by the TMPC to recognize and negotiate with the TMPCWA, and once again requested the Government to communicate the decision of the NLRC of 9 August 2005 dismissing the unfair labour practice case filed by the TMPCWA alleging company domination of the TMPCLO, (2) with regard to the appeal made by TMPC against the certification election in 2000 on the ground that it should have been opened to the employees at levels 5–8 – a question which appears to continue to be at issue in respect of the latest certification election of 16 February 2006 – the Committee once again requested the Government to communicate the text of the decision of the Court of Appeals as soon as it is handed down; it also requested the Government to indicate the condition established for the recent elections on the basis of which the TMPCLO was certified as bargaining agent and to specify whether the employer has changed its position on the question as to the workers that constitute the bargaining unit, as well as any impact that such a change may have on the case pending before the Court of Appeals; (3) with regard to its previous request for the reinstatement of 122 workers dismissed from the TMPC (who had not accepted the compensation package) or, if reinstatement was not possible, the payment to them of adequate compensation, the Committee requested the Government to provide information on the measure taken to initiate discussions on this issue; and (4) with regard to the criminal charges laid against 18 trade union members and officers the Committee requested the Government to transmit a copy of the Court judgements as soon as they are rendered. It also requested the Government to institute an independent inquiry into the allegations of harassment by the police in respect of these 18 unionists and to keep the Committee informed of the outcome.
- 152.** The complainant organization provided additional information in support of its complaint in communications dated 29 August, September and 20 December 2006 and 20 March 2007.
- 153.** In its communication dated 29 August 2006, the complainant alleged that, on 7 August 2006, it discovered that the management of TMPC and the company dominated union, TMPCLO, agreed to start collective bargaining negotiations in a secret meeting. Previously, the complainant had filed a motion for reconsideration of the certification of

the TMPCLO and therefore, after finding out about the commencement of negotiations, wished to file a letter of request with the Secretary of the DOLE to get a certification concerning whether any order had been issued on the earlier motion. However, the DOLE guards and policemen prevented the union representatives from entering the DOLE building and filing the letter of request. To their disappointment, they found out that the secretary of the DOLE had issued an unofficial decision denying the Motion for Reconsideration by a mere letter addressed to the TMPCWA President, dated 31 July 2006, and not through an Official Order – a recurring practice at the DOLE. Moreover, the Office of the Secretary of the DOLE hurriedly issued an Entry of Judgement dated 4 August 2006, according to which the decision of the Med-Arbitrator of 7 April 2006 was declared final and executory; this decision denied the Protest filed by the complainant seeking the nullification of the Certification Election and certified the TMPCLO as sole and exclusive bargaining agent.

- 154.** Furthermore, according to the allegations, on 16 August 2006 the complainant went to the Office of the Secretary of the DOLE to file a letter asking the Secretary to make a decision on the Motion for Reconsideration as the union needed to know the right venue to file a petition for Certiorari to the Court of Appeals. However, in filing this letter to the Secretary, the guards prevented the union members and fired their firearms five times. This resulted in the workers panicking and running to the seventh floor, after which many police came and violently dispersed them. Five members were seriously injured and 21 were brought to jail and were charged with fabricated criminal charges, namely: slight physical injuries, assault and inciting sedition. These members were unjustly detained for three days.
- 155.** The complainant also makes several arguments against the certification of the TMPCLO: (i) according to a national law, a petition for certification election should be rejected if there is a bargaining deadlock which had become subject to a valid notice of strike or lockout, as in the case at hand (section 14, Rule VIII of Department Order No. 10-03); if a union has been certified as the sole and exclusive bargaining agent and is in dispute with the management caused by the management's refusal of collective bargaining, the Labor Code should be interpreted and implemented so as to prevent the DOLE from granting petition by anyone else for a new certification election; (ii) although the TMPC brought a civil suit contesting the certification of the TMPCWA on the ground that certain challenged votes of supervisory employees should not have been treated as invalid, it did not raise objection to the certification of the TMPCLO, although the votes of supervisory employees were once again treated as invalid; if the TMPC negotiates with the TMPCLO it therefore implicitly accepts that the true intention behind its previous appeal was the unjust and unfair refusal of collective bargaining with the TMPCWA which was nothing more than union busting; (iii) the complainant's filing of an unfair labour practice appeal against the TMPCLO should have served as a bar to the holding of collective bargaining negotiations; (iv) the DOLE should not have declared the TMPCLO as the winner of the certification elections before the courts decide on the matter of voting rights of supervisory employees which was at the heart of the previous certification election; by declaring these votes as "segregated" votes, the DOLE treated them as de facto invalid votes whereas none of the parties had made such a request; had they been treated as valid but challenged votes, the TMPCLO would have not obtained the absolute majority of valid votes cast; (v) the argument of the Government that the Dole has no lawful means to compel the employer to bargain collectively unless the union files an unfair labour practice case is astonishing given that the Government in this case should not be limited to the administrative branch and should comprise the legislative and judiciary branches; the Government is limited to justifying the DOLE's acts or omissions instead of explaining why the TMPCWA has been left refused by the employer for over five years; (vi) with regard to the case currently pending before the Court of Appeals, the Supreme Court had already ruled in the

framework of interim measures in favour of the complainant, and so the Court of Appeals should take account of this ruling in rendering its decision on the substance of the case.

- 156.** With regard to the criminal prosecution of the 18 TMPCWA members, the complainant indicates that the scheduled hearing of 14 June 2006 was postponed until 17 November 2006. The criminalization of labour has been used by the Government and the employers to oppress and prevent collective actions. Some of the 25 workers who were originally prosecuted accepted the payment offered by the company; in their case, the prosecutor did not pursue the warrant of arrest to put pressure on them and the court did not include them in the hearing arraignment. Although they never appear in the court hearings, the prosecutors do not recommend the issuing of a warrant or their arrest for violating the law by being absent.
- 157.** In its communication of September 2006, the complainant adds that it filed a complaint before DOLE's NLRC for unfair labour practices on 10 August 2006. The complaint was duly received and the first mandatory conferences were to be held on 12 and 19 September 2006. The complainant adds that since it has now filed a complaint for unfair labour practices, the Government is no longer justified in asserting that it is unable to compel the TMPC to bargain with the TMPCWA.
- 158.** In its letter, dated 20 December 2006, the complainant further alleges that, on 15 November 2006, the House of Representatives Committee on Labor and Employment called another meeting for the continuation of deliberations on House Resolution No. 173, entitled "Resolution Directing the House Committee on Labor and Employment to Conduct an Investigation, in Aid of Legislation, into Toyota Motor Philippines Corporation's (TMPC) Unfair Labor Practices, Refusal to Recognize the Union of Toyota Workers and Workers' Rights to Collectively Bargain and Strike; and Abide by the Rulings of the Supreme Court Supportive of the Workers and Recommend Measures to Protest the Rights and Welfare of the Workers". To the disappointment of the Committee, the TMPC management did not attend the hearing; this is the third meeting invitation that has been ignored by the TMPC.
- 159.** Furthermore, with regard to the collective bargaining negotiations with the TMPCLO, the complainant alleges that the company helped the TMPCLO to have the collective agreement ratified by stopping its production sometime in November 2006 and allowing the union to use the company facilities in order to gather the rank and file workers, and have them sign the ratification of the agreement with threats that those who did not sign could not acquire a bonus.
- 160.** With regard to the criminal case, the TMPCWA states that the company uses it as leverage to pacify the actions of illegally dismissed members and to keep on harassing the workers and their families to give up.
- 161.** In a communications dated 20 March 2007, the complainant indicates that on 6 December 2006, the TMPC and the company dominated union, TMPCLO, signed a collective bargaining agreement for the years 2007–11 and the agreement was approved and registered by the DOLE on 16 January 2007.
- 162.** The Government replied in communication dated 6 November 2006 and 15 January 2007. In its communication dated 6 November 2006, the Government indicates that there are now three related cases pending with the Court of Appeals. The first is the TMPC's appeal against the Order of the DOLE certifying the TMPCWA as the sole and exclusive bargaining representative of the TMPC's rank and file employees. The second and third cases, on the other hand, relate to appeals filed by the TMPCWA on the latest certification election (the Order authorizing the latest certification election and the Order certifying the

TMPCLO as the sole and exclusive bargaining representative). The Court of Appeals has yet to decide these cases which have been consolidated and will be examined together. With regard to the delay in the proceedings, the Government indicates that this is beyond its power to control and that the TMPCWA is not entirely blameless for the delay as it chose to file several incidental motions and petitions with the Court of Appeals and the Supreme Court. While recognizing the TMPCWA's right to avail itself of judicial remedies and incidental motions, the Government considers that the TMPCWA could have exercised restraint in this respect. Finally, the merits of the TMCP's appeal is a live issue before the Court of Appeal as the Supreme Court's dissolution of the injunctive relief previously issued by the Court of Appeals (preventing the commencement of collective bargaining) did not definitely settle the issue of the TMPCWA's majority status. Specifically, the Supreme Court ruled on whether the injunctive relief granted by the lower court complied with the following requisites: (a) that the invasion of the right sought to be protected is material and substantial; (b) the right of the complainant is clear and unmistakable; (c) there is an urgent and paramount necessity to prevent serious damage. There is, thus, no final determination on the merits of the main substantive issue, i.e., the TMCP's appeal against certification of the TMPCWA as bargaining agent. The Government believes that the Court of Appeals is not precluded from resolving the merits of the case based on issues, arguments and points not examined by the Supreme Court. The ruling of the Court of Appeals on these undecided issues may not therefore necessarily conflict with the Supreme Court's decision.

- 163.** With regard to the proceedings initiated before the NLRC for unfair labour practices, the Government indicates that after the Labour Arbiter rejected the initially filed charges, the NLRC affirmed on appeal this decision. Furthermore, the Department of Labor never favoured the TMPLCO and always decides cases on the basis of the merits of the parties' positions, claims, arguments and evidence vis-à-vis the applicable laws. Later on, the TMPCWA filed a second appeal for unfair labour practices. As to whether this deprives the Government of a valid excuse for not compelling the TMPC to bargain with the TMPCWA, the Government specifies that the mere filing of a case does not per se give it the coercive power to compel the employer to negotiate with the union. There must be a final determination that indeed the employer is guilty of unfair labour practices, i.e., that it refused to negotiate with the TMPCWA in lack of good faith.
- 164.** The Government adds that a pending bill (House Bill No. 1351) before the Philippine Congress essentially seeks to: (1) guarantee the expeditious nature of certification elections; and (2) promote free trade unionism and foster free and voluntary organization of a strong and united labour movement. In relation to the first objective, the bill seeks (1) to emphasize the employer's role as an observer, thereby eliminating employer interference which is an incessant cause of delay; (2) to restrict the grounds for cancellation of union registration as sole and exclusive bargaining agent; and (3) to clarify that the filing of a petition for cancellation of registration against the union does not suspend a petition for certification elections (Explanatory Note of House Bill No. 1351). This bill was already approved by the House of Representatives (one of the two chambers of the legislature) and is now being considered by the Senate.
- 165.** With regard to the criminal case against the 18 TMPCWA members and officers, the Government indicates that the court had not yet decided the case. The accusations relate to grave coercion. Moreover, the allegations of harassment by police officers have not been officially brought to the attention of local authorities by the TMPCWA. There is an effective machinery to address the concerns raised if and when the matter is officially brought to the authorities.
- 166.** With regard to the incident of 16 August 2006, the Government indicates that the TMPCWA held a rally on that day in front of the DOLE building. Some union members

attempted to rowdily enter the building and security guards attempted to keep them from entering the building. Some members pushed through to the inside of the building. Five gunshots echoed while the securities of the building tried to hold these people back – this being more than a fair warning. The TMPCWA members still forced their way into the DOLE building. Security guards were hurt, trying to prevent the rowdy entry. Some union members even succeeded in making their way up to the seventh floor to storm the Office of the Undersecretary of Labor and hurled unsavoury words against him. It took the intervention of the police to remove the union members. This was actually the second time that this group had committed these acts. On 26 July 2006, some TMPCWA members forced their way into the seventh floor where the Undersecretary was holding office, banged and kicked on his door and hurled invectives at him. As a result of the latest incident, the police charged the TMPCWA members with damage to property, assault and inciting to sedition, which police in any country would do when demonstrators forcibly enter a government workplace, cause damage to public property, and physically assault peace officers inside the building. The criminal proceedings spawned by this incident are still pending before the Prosecutors' Office.

- 167.** In its communication dated 15 January 2007, the Government indicates with regard to the dispute over the termination of 227 TMPCWA officers and members that, originally, the dismissals were authorized as lawful (due to the staging of a strike without having held a strike ballot and, later on, illegally refusing to obey the return to work order issued by the Secretary of the DOLE) but payment of separation pay was additionally required (one month's pay for every year of service). Pursuant to various appeals, the issue of the payment of separation pay is still pending before the Supreme Court. This notwithstanding, the TMPC offered and still offers adequate compensation to the dismissed employees. In fact, 105 out of the 227 TMPCWA members who were terminated already accepted the TMPC's offered compensation. Thus, with regard to the Committee's previous request for reinstatement of the 122 employees who did not accept the compensation package or adequate compensation, the DOLE can only go as far as attempting to conciliate the issue of adequate compensation considering that the Supreme Court shall conclusively decide the issues of reinstatement and separation pay. Much will depend on the acceptability of the TMCP's offer but discussions will be futile if the remaining affected employees adamantly refuse the package.
- 168.** With regard to the DOLE's decision to authorize the latest certification election, the Government adds to its previous comments that the petition of the TMPCLO was granted due to the supervening delay that effectively denied TMPC's rank and file employees of their bargaining rights. Furthermore, five years had passed since TMPCWA's certification and another union should be able to ask for a new election after the elapse of a reasonable time. Finally, the TMPCWA challenged the Department's decision before the Court of Appeals, where the matter is currently pending. In the meantime, the certification election took place and led to the certification of the TMPCLO. The mediator-arbiter in that framework decided that the votes of 121 supervisory employees should remain segregated in accordance with the prior ruling of the Department on this matter in the 2000 certification election when the TMPCWA was certified. The TMPCWA filed appeals against the decisions affirming the certification of the TMPCLO and the issue is currently pending before the Court of Appeals (as noted above).
- 169.** With regard to the position of the TMPC on the segregation of the votes of the supervisory employees, an issue which lies at the heart of the dispute, the Government indicates that, although the employer did not pursue its position with the same vigour on the occasion of the latest election, it argued in its position paper filed with the Med-Arbiter, that the 121 employees whose ballots were segregated were rank and file employees. The Government states that the seeming change in the TMPC's thinking on this issue does not seem to have any effect on the proceeding under way before the Court of Appeals, unless the TMPC

decides to file a manifestation with the court signifying its lack of interest in the case and/or its intention to withdraw the petition/appeal.

170. *The Committee notes from the information provided by the complainant and the Government that a new collective agreement was signed between the TMPCLO and the TMPC on 6 December 2006 for the period 2007–11. Previously, the complainant in this case, TMPCWA, had lodged appeals against the decisions of the DOLE authorizing a new certification election at the TMPC and affirming the certification of the TMPCLO as sole and exclusive bargaining agent of the rank and file employees in the TMPC. These appeals have been consolidated with the initial appeal filed in 2001 by the TMPC against the Order of the DOLE certifying the TMPCWA as bargaining agent.*
171. *The Committee must once again express its deep regret that an order for a new certification ballot was granted before the issues arising from the previous certification ballot could be resolved before the courts, especially as the certification ballot took place in the particularly difficult context of the repeated refusal by the TMPC to recognize and negotiate with the TMPCWA and the alleged practices of favouritism towards the TMPCLO.*
172. *The Committee expects that the Court of Appeals will issue its decision on the issue of certification without further delay and requests the Government to keep it informed in this respect. The Committee expects, moreover, that in rendering its decision, the Court of Appeals will take into account that according to the information provided by the Government, during the latest certification election, the TMPC did not pursue the matter of the segregation of the votes of the supervisory employees with any insistence and therefore seems to have changed position on this issue, which constitutes the basis for its pending appeal against the TMPCWA and lies at the heart of the dispute with that union.*
173. *With regard to its previous request for the reinstatement of the 122 dismissed workers who did not accept the compensation package, and if reinstatement is not possible, as determined by a competent judicial authority, the payment of adequate compensation, the Committee requests the Government to pursue its efforts in this respect and to keep it informed of the decision of the Supreme Court on the questions of reinstatement/compensation as soon as it is rendered.*
174. *With regard to the criminal charges laid against the 18 trade union members and officers for grave coercion against workers were not involved in the strike of 28–31 March 2001, the Committee once again requests the Government to transmit a copy of the court judgement as soon as it is rendered.*
175. *With regard to the incident of 16 August 2006, the Committee observes that the versions of the facts communicated by the complainant and the Government diverge. The Committee requests the Government to communicate any decisions issued in the framework of the criminal proceedings under way and to keep it informed of developments in the proceedings.*
176. *The Committee finally notes with interest that according to the Government, House Bill No. 1351, which has been approved by the House of Representatives and is currently being considered by the Senate, seeks, among other things, to guarantee the expeditious nature of certification elections by: (1) eliminating employer interference, which is an incessant cause of delay in certification proceedings; (2) restricting the grounds for cancellation of union registration; and (3) clarifying that the filing of a petition for cancellation of registration does not suspend a petition for certification election. The Committee requests the Government to transmit the text of House Bill No. 1351 and to keep it informed of developments regarding its adoption by the Senate.*

Case No. 2383 (United Kingdom)

- 177.** The Committee last examined this case at its November 2006 meeting [see 343rd Report, approved by the Governing Body at its 297th Session, paras 191–195]. The Committee requested to be kept informed of developments with regard to the following issues: (a) the progress of consultation with private contractors on the establishment of appropriate mechanisms to compensate prisoner custody officers in private sector companies to which certain of the functions of the prison have been contracted out, for the limitation of their right to strike; (b) the progress of consultations with a view to improving the current mechanism for the determination of prison officers' pay in England, Wales and Northern Ireland. With regard to the latter point, the Committee had taken note with interest of the Government's intention to satisfy a claim by the complainant Prisoner Officers' Association (POA) to include a trade union representative in the selection panel for the Prison Service Pay Review Body (PSPRB).
- 178.** In a communication dated 26 February 2007, the Government indicates that pursuant to the Committee's conclusions and recommendations in this case, the Government undertook to ensure that:
- (i) PSPRB awards would only be departed from in exceptional circumstances;
 - (ii) consultation would take place to ensure that arrangements for the appointment of members of the PSPRB are independent and impartial, are approved on the basis of specific guidance or criteria and have the confidence of all parties concerned.
- 179.** Her Majesty's Prison Service (HMPS), acting as the Government's representative, sought to address the following issues:
- (i) Open dialogue with the POA on this issue: HMPS telephoned POA officials on several occasions on this matter but received no response.
 - (ii) Changes to strengthen the recruitment criteria and provide for independent scrutiny of the recruitment process: proposals were drawn up and sent to all interested parties, including the POA, which, despite having in excess of the customary period of 28 days for reply, once again failed to respond.
- 180.** Accordingly, recruitment of new members of the PSPRB took place using the new criteria that had been circulated. In March 2006, the HMPS was asked if it could meet with the POA to discuss the ILO recommendations. At that meeting, the POA stated that it did not accept that the prison service and its officials could act as representatives for the Government on this issue, and criticized the Government for failure to consult. Despite ongoing discussions, the POA was unable to be persuaded that the mechanisms for Pay Review Body appointments were consistent with the Commissioner for Public Appointment's guidelines and subject to independent scrutiny. The POA set its aims firmly on achieving:
- (i) an independent Pay Review Body;
 - (ii) an input on the selection panel of the members of the Pay Review Body;
 - (iii) a written commitment that the Government, ministers or the employer would never attempt to interfere with the Pay Review Body; and
 - (iv) no reference to acceptance of workforce reform/modernization in determining future pay rises.

181. Between 31 July and 13 August 2006, the POA held a ballot seeking support of its conference motion seeking a mandate for “action up to and including strike action to achieve these objectives”. The result of the ballot was in support of the union’s position by a significant majority.
182. Following assistance from the Trades Union Congress (TUC) and the prisons minister, a draft outline agreement was reached addressing all four key points raised by the POA. The POA agreed to take this to a further Special Delegates Conference on 7 September 2006, where it was accepted by delegates, thereby removing the mandate for industrial action. Following the acceptance of the agreement, the POA then sought to further renegotiate the agreement by introducing additional conditions. This was unacceptable to the Government and the agreement was subsequently withdrawn.
183. This effectively placed the prison service in direct confrontation with the POA which, together with an unrelated dispute, resulted in the prison service successfully applying for an injunctive relief in the High Court to stop interference with the normal operation of the prison service. Contempt proceedings were scheduled to take place on 19 September 2006, as a consequence of which the POA had called for nationwide strike action, which would have been in breach of the legally binding agreement between the prison service and the POA.
184. Intervention at ministerial and TUC level allowed the parties to draw up a settlement document that agreed to look at a broader approach to issues between them, including the key issue of the Pay Review Body mechanisms. Discussions allowed another set of agreed proposals to be drawn up which would have had a much reduced impact, but which seemed acceptable to the POA negotiators. However, at a further Special Delegates Conference held on 30 November 2006, the proposed settlement was rejected by delegates but a further mandate given that the POA should return to the prison service to negotiate a better deal; to date no such approach has been received by the prison service.
185. Finally, in regard to private sector prisons, the National Offender Management Service (NOMS), which has responsibility for matters related to private prisons, has had discussions with providers on the issue of compensatory guarantees. All the companies are aware that, when setting their overall reward package, they must reflect prevailing market conditions in order to attract and retain staff in line with their organizational strategies. This includes the constraints imposed by section 127 of the 1994 Criminal Justice and Public Order Act in relation to the taking of industrial action. NOMS officials have also informed HMPS that they understand that the majority of trade unions in the private sector indicated they would be reluctant to engage in an agreement leading to a constraint on their ability to ballot for industrial action, but recognize that they remain so constrained by section 127 at the present time. Further discussions are planned involving the Minister responsible for Criminal Justice and Offender Management and the GMB Union to review these matters in more detail.
186. *The Committee takes note of the information provided by the Government. It regrets that the consultations carried out with the POA have not resulted in any agreed improvements in the current mechanism for the determination of prison officers’ pay in England, Wales and Northern Ireland. The Committee also notes that consultations with private contractors on the establishment of appropriate mechanisms to compensate prisoner custody officers in private sector companies for the limitation of the right to strike, have not had any result. The Committee requests the Government to pursue vigorously its efforts in respect of all the above and to keep it informed of developments.*

Case No. 2087 (Uruguay)

- 187.** The Committee last examined this case at its meeting in November 2006 [see 343rd Report, paras 196 and 198] and at that time requested the Government to keep it informed of the ruling of the Court of Administrative Proceedings with regard to the appeals lodged against the General Labour and Social Security Inspectorate Decree of 28 April 2003, which sanctioned the Savings and Loans Cooperative of Officials of the Armed Forces (CAOFA) for having dismissed workers because of their trade union membership.
- 188.** In its communication dated 21 February 2007, the Government reports that the Court of Administrative Proceedings has still not issued a ruling on the appeals lodged against the General Labour and Social Security Inspectorate Decree of 28 April 2003, as the documents are still being examined by the judges of the court. The Government adds that in the context of the proceedings, the State Prosecutor to the Court of Administrative Proceedings indicated in his report of 16 November 2006 that he believes the appeal will be rejected and the allegations will be confirmed; nevertheless, the court is the competent authority and it will rule as it sees fit.
- 189.** *The Committee notes this information and hopes that the Court of Administrative Proceedings will issue a ruling in the near future regarding the dismissal of workers because of their trade union membership, and it requests the Government to keep it informed of the ruling.*
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- 190.** Finally, the Committee requests the governments concerned to keep it informed of any developments relating to the following cases.

Case	Last examination on the merits	Last follow-up examination
1914 (Philippines)	June 1998	March 2002
1937 (Zimbabwe)	March 1998	March 2007
1991 (Japan)	November 2000	November 2006
2027 (Zimbabwe)	March 2000	March 2007
2046 (Colombia)	March 2005	June 2006
2068 (Colombia)	November 2005	June 2006
2088 (Bolivarian Republic of Venezuela)	March 2004	November 2006
2096 (Pakistan)	March 2004	November 2006
2114 (Japan)	June 2002	March 2007
2153 (Algeria)	March 2005	March 2007
2169 (Pakistan)	June 2003	March 2007
2171 (Sweden)	March 2003	March 2007
2186 (Hong Kong (China))	March 2004	November 2006
2234 (Mexico)	November 2003	March 2007
2242 (Pakistan)	November 2003	March 2007
2249 (Bolivarian Republic of Venezuela)	June 2005	March 2007
2256 (Argentina)	June 2004	March 2007
2267 (Nigeria)	June 2004	November 2006
2273 (Pakistan)	November 2004	March 2007
2275 (Nicaragua)	November 2005	November 2006
2279 (Peru)	June 2006	March 2007
2285 (Peru)	November 2004	March 2007

Case	Last examination on the merits	Last follow-up examination
2291 (Poland)	March 2004	March 2007
2292 (United States)	November 2006	–
2298 (Guatemala)	June 2006	March 2007
2301 (Malaysia)	March 2004	March 2007
2302 (Argentina)	November 2005	June 2006
2313 (Zimbabwe)	November 2006	–
2328 (Zimbabwe)	March 2005	March 2007
2330 (Honduras)	November 2004	March 2007
2348 (Iraq)	November 2006	–
2351 (Turkey)	March 2006	March 2007
2354 (Nicaragua)	March 2006	November 2006
2363 (Colombia)	November 2005	March 2007
2365 (Zimbabwe)	March 2007	–
2371 (Bangladesh)	June 2005	March 2007
2373 (Argentina)	March 2007	–
2377 (Argentina)	March 2006	November 2006
2380 (Sri Lanka)	March 2006	March 2007
2382 (Cameroon)	November 2005	November 2006
2386 (Peru)	November 2005	March 2007
2394 (Nicaragua)	March 2006	March 2007
2395 (Poland)	June 2005	March 2007
2399 (Pakistan)	November 2005	March 2007
2405 (Canada)	November 2006	–
2407 (Benin)	November 2005	March 2007
2419 (Sri Lanka)	March 2006	March 2007
2423 (El Salvador)	March 2007	–
2425 (Burundi)	November 2006	–
2426 (Burundi)	November 2006	–
2429 (Niger)	March 2006	November 2006
2436 (Denmark)	November 2006	–
2437 (United Kingdom)	March 2007	–
2438 (Argentina)	November 2006	–
2439 (Cameroon)	March 2006	November 2006
2440 (Argentina)	November 2006	–
2443 (Cambodia)	November 2006	–
2448 (Colombia)	March 2007	–
2456 (Argentina)	March 2007	–
2458 (Argentina)	March 2007	–
2460 (United States)	March 2007	–
2464 (Barbados)	March 2007	–
2467 (Canada)	March 2007	–
2468 (Cambodia)	March 2007	–
2471 (Djibouti)	March 2007	–
2474 (Poland)	March 2007	–
2479 (Mexico)	March 2007	–

Case	Last examination on the merits	Last follow-up examination
2481 (Colombia)	March 2007	-
2483 (Dominican Republic)	March 2007	-
2491 (Benin)	March 2007	-
2495 (Costa Rica)	March 2007	-
2496 (Burkina Faso)	March 2007	-

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

192. In addition, the Committee has just received information concerning the follow-up of Cases Nos 1890 (India), 2088 (Bolivarian Republic of Venezuela), 2134 (Panama), 2151 (Colombia), 2160 (Bolivarian Republic of Venezuela), 2227 (United States), 2237 (Colombia), 2249 (Bolivarian Republic of Venezuela), 2286 (Peru), 2326 (Australia), 2342 (Panama), 2364 (India), 2388 (Ukraine), 2390 (Guatemala), 2413 (Guatemala), 2416 (Morocco), 2433 (Bahrain), 2451 (Indonesia), 2452 (Peru), 2466 (Thailand) and 2502 (Greece), which it will examine at its next meeting.

CASE NO. 2459

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

Complaint against the Government of Argentina presented by

- **the Senior Staff Association of the Córdoba Province
Power Corporation (APSE) and**
- **the Argentinian Federation of Senior Staff
of the Electrical Supply Sector (FAPSEE)**

Allegations: The complainant organizations allege that the APSE has, in an arbitrary and discriminatory fashion, been excluded by law from the works council, a collegiate consultative and advisory body for the Córdoba Province Power Corporation

193. The present complaint is included in a communication from the Senior Staff Association of the Córdoba Province Power Corporation (APSE) and the Argentinian Federation of Senior Staff of the Electrical Supply Sector (FAPSEE) dated November 2005.

194. The Government sent its observations in a communication dated 1 March 2007.

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

A. The complainants' allegations

196. In their communication of November 2005, the APSE and the FAPSEE state that the APSE is a primary trade union organization with trade union status granted by the Ministry of Labour of the Republic of Argentina, and which provides union representation for

senior staff and officials with special technical and/or administrative functions serving within the Córdoba Province Power Corporation (EPEC). The complainants indicate that the APSE has concluded a collective agreement with the EPEC management governing the labour relationships of senior staff and officials undertaking special technical and/or administrative tasks, which has been duly approved by the Ministry of Labour.

- 197.** The complainants state that the EPEC is an enterprise dependent on the Government of Córdoba Province and run according to a structure laid down in provincial Act No. 9087/03. Article 27, paragraph 2, of this Act expressly recognizes the APSE as one of the trade unions to have concluded a collective labour agreement, together with the Light and Power Workers' Union of the City of Córdoba, the Villa María Regional Light and Power Workers' Union and the Río IV Regional Light and Power Workers' Union, trade unions that are of equal rank to the APSE and which represent different segments of the EPEC workforce. Article 22 of provincial Act No. 9087/03, mentioned above, created and established the works council, a collegiate consultative and advisory body of the EPEC, whose purpose is to monitor progress towards completion of a "management plan", mapping out objectives and investment within the Córdoba Province energy policy, which entails the preparation of quarterly reports for consideration by both the EPEC Board of Directors and the provincial executive authority.
- 198.** The complainants allege that, to their surprise and with no explanation given, provincial Act No. 9087/03 provides, in relation to the composition of the abovementioned works council, for participation by the highest ranked representatives (secretaries-general) of the Light and Power Workers' Unions of Córdoba, Villa María and Río IV, excluding from the council the chairperson of the APSE Executive Committee, who enjoys identical trade union rank to that of the trade union secretaries. The complainants consider that this arbitrary exclusion constitutes a clear violation of the right to equality enshrined in article 7 of the Constitution of the Province of Córdoba and article 16 of the National Constitution of Argentina, also running counter to the very same principles that have for so long been enshrined by the International Labour Organization in Conventions Nos 87, 98 and 111, as ratified by the Republic of Argentina and incorporated into the National Constitution of Argentina as laws regulating the exercise of the principles in question, given that this deliberate exclusion by the Government of Córdoba Province is barring a significant segment of the EPEC workforce from participating, via the appropriate representative, in the works council and in political and economic decisions concerning the way in which the employer operates.
- 199.** The complainant organizations make clear that the exclusion in question is without doubt an act of intolerable discrimination and constitutes a clear limitation on the exercise of freedom of association, in that it limits the full and effective exercise of trade union functions in defence of the interests of the workers represented by the APSE. They add that it would be opportune to cite in this case legal opinion No. 193-05, issued by the National Institute to Combat Discrimination, Xenophobia and Racism (INADI), a body reporting to the Argentine Interior Ministry, which, on being consulted by the APSE, expressed the view that "with regard to the composition of the works council set forth in Act No. 9087/03, which does not provide for participation by the APSE ... this Institute is of the opinion that every association of EPEC workers should be represented proportionally within the aforementioned council, in order to guarantee the exercise of rights under equal conditions".

B. The Government's reply

- 200.** In its communication of 1 March 2007, the Government states that it wishes to provide a brief description of the parties involved in the dispute and their functions, in order to clarify the extent and aim of the complaint. The APSE is the Senior Staff Association of

the Córdoba Province Power Corporation. It represents all senior staff members employed by that enterprise and officials with special technical and/or administrative functions who are not represented by other workers' trade union organizations. The EPEC is the provincial power corporation, an enterprise dependent on the Government of Córdoba Province and run according to a structure laid down in provincial Act No. 9087 which establishes that it shall be run by a Board of Directors made up of a chairperson and two members of the Board; the general management; a works council; managers, sub-managers and area heads. The said Act recognizes the APSE as a trade union included in the collective labour agreement. The works council, also provided for under article 2 of this Act, is a consultative and advisory body for the EPEC, whose purpose is to monitor progress regarding completion of a "management plan", mapping out objectives and investment within the Córdoba Province energy policy. This entails the preparation of quarterly reports for consideration by both the Board of Directors of the EPEC and the provincial executive authority.

- 201.** The Government states that, prior to the complaint presented to the Committee on Freedom of Association, the APSE brought its case before the Conciliation and Arbitration Unit of the Ministry of Labour of Córdoba Province (file No. 0472-069743/04). The provincial labour authority organized a conciliation session (held on 30 July 2004) to address the issue raised. No agreement was reached at that time and therefore the conciliation process was deemed to have been exhausted, leaving the complainant organization free to turn to legal channels in order to resolve the conflict. Likewise, prior to bringing the complaint before the ILO, the APSE made an official submission to the INADI which came within the scope of INADI's mandate and also complained of discrimination owing to the opinions and trade union membership of APSE members Walfrido Tomás Vergara (APSE President), Ricardo Alberto Merlino and José Luis Jiménez, who were also allegedly discriminated against with the unilateral amendment of their employment contracts, seriously damaging freedom of association. The Institute did not issue an opinion regarding the situation of the complainant Vergara, stating that legal proceedings were ongoing pending a ruling and that, given that both individual and collective employment relationships fall within the competence of the administrative authorities responsible for the regulation of work and the law courts, issuing an opinion in this respect would only lead to legal controversy.
- 202.** The Government states that, with regard to the legal proceedings linked to the APSE's complaint to the ILO, it is necessary to take into account the judicial proceedings in the case of "Vergara Walfrido T. and others Versus EPEC – reinstatement action" (appeal for the protection of constitutional trade union rights – *amparo sindical*, for a change of functions and transfer). This action was first brought before the Conciliation Court of the Seventh District of the City of Córdoba on 15 October 2004. An appeal was then lodged with the Eighth Division of the Labour Court of the City of Córdoba and the case is currently being examined by the Higher Court of Córdoba, pending a ruling by that court on an application for judicial review lodged by the APSE. The Government states that in the first instance the reinstatement claim was upheld, that the said claim was rejected in the second instance and that an appeal to annul is currently pending in this respect.
- 203.** As to the exclusion of the APSE from the works council of the EPEC and the inclusion of the Light and Power Workers' Union, the Government states that article 22 of provincial Act No. 9087, which regulates the running of the EPEC, established the works council, and the failure to include the APSE in the council should have been denounced before the legislature of Córdoba Province prior to the adoption of the Act, or in any case Parliament should have been urged to amend the Act. There is a specific procedure governing the amendment of an act which is in force and the relevant mechanisms provided for under the Provincial Constitution must be activated. The Government adds that it should be remembered that the national authorities have received no complaints whatsoever in this

regard, this being the first claim brought to their attention regarding the alleged violation of the principles of the freedom of association that this Act represents. According to the Government, the complaint made is based on differences between the trade unions (both have trade union personality) and the EPEC cannot serve as a mediator in this regard. Furthermore, none of the issues can be considered to be violations of rights related to freedom of association. All the measures taken are provided for under Act No. 9087, which lays down the structure according to which the EPEC is run, and under the collective agreement governing relations between the EPEC and the APSE (for example, article 42 of the agreement permits the Board of Directors to order the temporary transfer of staff without their agreement for up to six months). Therefore, the complainant has not suffered from any concrete prejudice. Furthermore, as can be seen from Title VIII, article 17, of the said Act on the duties and competences of the Board of Directors, the Board has complete freedom regarding decision-making, and thus the complaint is inaccurate when it states that “the possibility of participating in the process of taking significant decisions regarding the progress and the future of the public enterprise employer is being reduced”. Under article 22, Title XI, of the Act, the works council is described as a collegiate consultative and advisory body. The last paragraph of this article reads as follows: “The conclusions reached by the council will be reported. In cases where there is disagreement, each member shall prepare a separate report, to be transmitted to the Board of Directors and the Provincial Executive, as appropriate.” From the wording of the article it appears that the conclusions reached by this works council are not definitive in nature, but merely reports. The Board of Directors is completely independent and the council is an advisory body. The Government concludes that the complainant has not suffered from any concrete prejudice, and neither has the freedom of association been violated or damaged in any way whatsoever.

C. The Committee’s conclusions

204. *The Committee notes that the complainant organizations allege that the APSE has, in an arbitrary and discriminatory fashion, been excluded by law (Act No. 9087/03, attached to the complaint) from the works council, a collegiate consultative and advisory body for the Córdoba Province Power Corporation (EPEC) established through the said Act, which has the following functions and competences:*

(a) advise and put proposals to the Board of Directors with regard to aspects, issues or actions related to the management plan and other questions that it considers fall within its scope; (b) carry out follow-ups to policies developed by the EPEC, as well as developing the said policies with the aim of improving and widening their referential framework; (c) report on a quarterly basis to the Board of Directors and the Executive Authority on progress regarding the management programme. The general management shall provide all the information necessary for the completion of this task; (d) propose the creation and development of management tools aimed at overcoming limitations and increasing the enterprise’s efficiency; (e) suggest to the Board of Directors that external technical, financial, general or specific audits be carried out regarding matters related to the smooth running of the enterprise; (f) give advice and information on the preparation and follow-up to the sectoral power and telecommunications programme, on the need for generation capacity growth or substitution with regard to the electricity network and, should needs be, on the terms and conditions of calls for tender and the corresponding criteria for bidding; (g) attempt to ensure and propose that any services be contracted at the lowest possible cost to the enterprise while offering optimum quality and safety; (h) request the Board of Directors to implement safety measures when situations arise that may endanger the health and safety of the workers, the community and the environment.

205. *In this regard, the Committee notes the Government’s statement to the effect that: (1) prior to presenting its complaint to the Committee on Freedom of Association, the APSE brought its case before the Conciliation and Arbitration Unit of the Ministry of Labour of Córdoba Province. The provincial labour authority organized a conciliation session (held on*

30 July 2004) to address the issue raised. No agreement was reached at that time and therefore the conciliation process was deemed to have been exhausted, leaving the complainant organization free to turn to legal channels in order to resolve the conflict; (2) the works council was established by article 22 of provincial Act No. 9087, which lays down the structure according to which the EPEC is run, and the decision to include the Light and Power Workers' Union in that council, while excluding the APSE, should have been denounced before the legislature of Córdoba Province prior to the adoption of the Act, or in any case Parliament should have been urged to amend the Act. There is a specific procedure governing the amendment of an act which is in force and the relevant mechanisms provided for under the Provincial Constitution must be activated. The Government adds that it should be remembered that the national authorities have received no complaints whatsoever in this regard, this being the first claim brought to their attention regarding the alleged violation of the principles of the freedom of association that this Act represents; (3) the complaint made is based on differences between the trade unions (both have trade union personality) and the EPEC cannot serve as a mediator in this regard. Furthermore, none of the issues can be considered to be violations of rights related to the freedom of association; (4) article 22, Title XI, of the said Act describes the works council as a collegiate consultative and advisory body and the conclusions reached by this works council are not definitive in nature, but merely reports. The Board of Directors is completely independent and the council is an advisory body.

206. *The Committee notes in this regard that, when referring to the composition of the works council, article 22 of the Act states that the council shall be composed of the general management and the general secretaries of each of the Light and Power Workers' Unions (Córdoba, Villa María Regional and Río IV). The Committee also notes that the complainant organizations highlight the fact that the National Institute to Combat Discrimination, Xenophobia and Racism (INADI), a body established by law to examine complaints concerning discrimination, was of the opinion that, with regard to the composition of the council, "all the associations of workers present in the EPEC should be represented in proportion to their size". Moreover, the Committee notes that the Government does not deny that the APSE should be represented on the works council. In light of this, taking into account above all the fact that the APSE has trade union personality and is therefore a representative organization of the workers within the enterprise EPEC and the fact that the works council carries out functions of direct interest to the workers (the Government also states that the council prepares reports in its role as an advisory body), the Committee requests the Government to take the necessary measures to ensure that the APSE may join the works council of the EPEC.*

207. *Finally, the Committee notes that, in relation to the complaint lodged by the APSE, the Government refers to the legal proceedings (appeal for the protection of constitutional trade union rights – amparo sindical – for a change of functions and transfer) lodged by the chairperson of this organization against the EPEC. The Committee recalls that the complainant organization did not refer to this issue and notes that the Government states that the case is before the High Court of Córdoba, to resolve an application for judicial review lodged by the APSE. Whatever the case may be, the Committee recalls that, even if the transfer of the trade union official in question is confirmed, it is up to organizations of workers to decide on who will represent them on bodies such as the works council of the EPEC. The Committee invites the complainant organizations to comment, if they so wish, on the Government's statement concerning the transfer of the APSE President.*

The Committee's recommendations

208. *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 the necessary measures so that the Senior Staff Association of the Córdoba Province Power Corporation (APSE) may join the works council of the Córdoba Province Power Corporation (EPEC).*
- (b) *The Committee invites the complainant organizations to comment, if they so wish, on the Government's statement concerning the transfer of the APSE President.*

CASE NO. 2477

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

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

Allegations: The complainant organization objects to delays on the part of the administrative authority in processing its application for trade union status, as well as the partial approval by the administrative authority of certain amendments to the statutes of the Central of Argentinean Workers (CTA)

- 209.** The present complaint is contained in a communication of the Central of Argentinean Workers (CTA) dated March 2006. The CTA sent new allegations relating to its complaint in a communication of 18 September 2006.
- 210.** The Government sent its observations in a communication dated 15 May 2007.
- 211.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 212.** In its communication of March 2006, the CTA states that it is a trade union confederation (third-level body), registered with the Ministry of Labour, Employment and Social Security under No. 2027, through resolution No. 325 of the said authority. The CTA brings together workers from various sectors, unemployed persons and persons in precarious situations, as well as retired persons. It states that it is attempting to gain definitive recognition by the Argentine State through the application for trade union status that gave rise to this complaint. The CTA states that, on 23 August 2004, it lodged an application for trade union status with the Ministry of Labour, Employment and Social Security.
- 213.** The CTA lists the procedures and steps followed involving the Ministry of Labour, Employment and Social Security, which began with the submission of its application, and highlights the following facts. (1) On 20 December 2004, the "Trade Union Structure" Area Director of the Ministry of Labour, Employment and Social Security advised that

transmittal of the application for trade union status to the General Labour Confederation (CGT) be expedited within a period of 20 days. On the same date, the National Director of Trade Union Associations made the following statement: “in accordance with the preceding declaration, prior to transmittal to the General Labour Confederation, please produce a report on the existence of second- and third-level bodies, whose trade union status may coincide with that of those first-level bodies on file and on the registration of their membership if this National Directorate has been provided with that information”. (2) This report was produced on 31 January 2005. (3) On 9 February 2005, the CTA submitted a written request that the matter of transmittal to the CGT be settled quickly. (4) On 18 March 2005, a judicial measure of *amparo* (appeal for the protection of constitutional rights) was lodged with the labour authority regarding administrative delays. (5) On 8 June 2005, the judicial authority issued a ruling upholding the CTA’s application, resolving that “there have been administrative delays and ordering the Ministry of Labour, Employment and Social Security – National Directorate of Trade Union Associations to complete the administrative procedures within 20 days, ordering that transmittal to the CGT of the CTA’s application for trade union status be expedited. (6) On 18 May 2005, the Minister for Labour ordered that transmittal of the application for trade union status, along with a copy of the resolution and File No. 1-2015-1094.616, be expedited to 12 federations and one confederation (CGT). It should be pointed out that the intervening judge also ruled that owing to the said resolution, there had been administrative delays concerning the procedure, which had still not been completed. (7) Most of the federations, as well as the CGT, responded negatively to the granting of trade union status to the CTA. (8) On 17 November 2005, the CTA again requested that the matter be settled quickly, in an attempt to get the relevant body to speed up the process and grant the application for trade union status made in August 2004. (9) On 22 February 2006, an order was issued by the National Director of Trade Union Associations introducing what was clearly a new delaying measure which consisted of “requiring the General Labour Confederation of the Argentine Republic to provide a list of the bodies with trade union status affiliated to it, for which purpose a period of 20 working days has been granted ...”.

214. The CTA states that there is a need to explain briefly what the issue in question is, as well as its own position and that of the CGT regarding the said transmittal of the application. Above all, a summary of events is necessary regarding the delays on the part of the public administration. Recognition of the application for trade union status is based on past cases dealt with by the Ministry of Labour, Employment and Social Security. The trade union status of a third-level trade union body must be in line with the geographical area and category of persons covered by the first- and second-level trade union bodies which go to make up the third-level trade union body. Examples include the granting of trade union status to the Argentine Federation of Pastry, Cake, Ice Cream, Pizza and Biscuit Makers, the Federation of Government Professionals of the Autonomous City of Buenos Aires and the National Taxi Drivers’ Federation (FEPETAX). This “ascending radial” system is used in place of the procedure established under articles 25 and 28 of Act No. 23551 respecting trade union associations (LAS).

215. The CTA adds that the CGT and its other constituent federations believe that the CTA’s application is illegal. The CGT argues that because articles 32, 33 and 25 of the LAS are so similar, the system for the comparison of trade union status therefore also covers second- and third-level associations, depending on their accreditation as the most representative organizations at those levels. According to the CGT, a confederation must be the most representative in order to obtain trade union status, and the most representative organization is the one with the most members paying dues in each affiliated body with trade union status. In order to gain trade union status, the body must also challenge the current body with trade union status, in line with the terms of articles 25 and 28 of the LAS. The CGT and its constituent federations consider on this basis that there can only be one general confederation with trade union status.

- 216.** According to the CTA, the application for trade union status complies with the terms of article 32 of the LAS, which states that: “The most representative federations and confederations shall acquire trade union status under the terms of article 25.” In turn, article 25 of the LAS states that granting of trade union status is linked to the fulfilment of two conditions: (a) the body shall be registered and shall have been active for a period of not less than six months; and (b) over 20 per cent of the workers it seeks to represent must be members of the body. These requirements were met at the time of the application for trade union status and the CTA therefore believes that the administration is delaying issuing a final decision granting or denying trade union status. The Ministry of Labour, Employment and Social Security must speed up the process and decide on its position. It cannot maintain its current state of silence or employ delaying tactics in the face of applications to settle the matter quickly. Neither can it delay proceedings given the imminent ruling on an *amparo* action for administrative delays.
- 217.** The CTA stresses that the delaying tactics of the Ministry of Labour, Employment and Social Security and its failure to issue a decision have prevented it from having recourse to legal channels in order to obtain a ruling on the interpretation of Argentine law regarding the trade union status of the CTA. Article 62 of the LAS states that decisions to deny trade union status may be appealed against through the National Employment Appeals Court.
- 218.** In its communication of 18 September 2006, the CTA states that, from the time the complaint was presented to the Committee up to the present date, the Ministry of Labour, Employment and Social Security has continued to employ delaying tactics, which, as has already been demonstrated, are based on the “non-completion” or avoidance of completion of the trade union status procedure. Both scenarios involve non-compliance with the deadlines established by law for the completion of steps relating to the completion of the procedure and the existence of formalities the sole aim of which is to delay proceedings. The CTA refers to various steps related to transmittal to the CGT, applications for extensions regarding the file, the lodging of complaints before the administrative authority and applications for the matter to be settled quickly which went unheeded.
- 219.** According to the CTA, the summary of the ongoing proceedings demonstrates that the public administration only prioritizes the issue of the application when called on to settle the matter quickly or when *amparo* actions are lodged by the CTA regarding delays. The public administration adopts a defensive stance when faced by these appeals and applications, justifying its actions by adding that even the delaying tactics (as in the case of the new transmittal to the CGT) contribute to the completion of the procedure “in order to arrive at a decision that necessarily relates to the application”. The Argentine State requires a minimum of almost three years to complete a procedure that should really involve no more than a simple check to ensure the legality of the application made by the representative organization of workers seeking trade union status.
- 220.** Moreover, the CTA states that the Seventh National Congress of Delegates of the CTA was held in the city of Mar del Plata (Buenos Aires Province) on 30 and 31 March 2006. During that Congress, over 8,000 workers, fully exercising the freedom of association, approved (by a large majority) various reforms to the social statutes of the CTA. Among other things, these reforms sought to deepen and intensify trade union democracy. On the said occasion the social statutes were reformed, along with new articles 2 and 4, which read as follows:

Article 2: The geographical area of the CTA shall cover the entire territory of the Argentine Republic and any first-level trade unions, unions, associations or workers’ federations, cooperatives or civil associations which accept the principles, aims and beliefs of the third-level entity may join the said entity. Workers (any individuals who, through their work, carry out a productive and creative activity with the purpose of satisfying their material and spiritual needs) may join the CTA. In principle, the following categories of individual

may join the CTA: (a) employed workers; (b) unemployed workers; (c) workers receiving social security benefits; (d) self-employed workers and own-account workers (so long as they do not employ other workers); (e) associated or self-employed workers; (f) domestic workers. Article 4: Membership of the CTA is a voluntary and free act, performed by workers over the age of 14 covered by the subjective scope of activities, with the only condition being the acceptance and practice of the aims set out in the Declaration of Principles and the chapter on aims and ends, and the respect of the present statutes. Membership shall be obtained directly by the worker through the local, provincial, regional or national CTA organization or through any trade union, union, association or federation of any type which belongs to the CTA. National or provincial trade union bodies should be accepted as members by the National Executive Committee.

- 221.** The CTA alleges that, immediately after the trade union association had completed the procedures required by Argentine law with regard to the approval of amendments to statutes, on 27 July 2006 the *Official Bulletin* of the Argentine Republic published (page 29) Ministry of Labour, Employment and Social Security resolution No. 717/2006, which presents and partially approves the reforms to the CTA's social statutes while expressing reservations with regard to what the relevant authority refers to as "the adopted trade union classification" and "scope of membership", thus reinforcing decisions that contravene international standards which the Argentine State is obliged to respect.
- 222.** The CTA states that resolution No. 717/2006 is in direct conflict with the exercise of freedom of association and the right to organize, as well as violating the terms of Articles 2, 3 and 6 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). The Argentine State's position is set out in the recitals of resolution No. 717/2006: "with respect to the statutes submitted for approval, and in particular the provisions concerning the trade union classification and membership scope, Act No. 23551 respecting trade union associations and Regulatory Decree No. 438/88 (regulating the Act respecting trade union associations) take precedence should they come into conflict with the said statutes". Reiterating this approach, the relevant authority resolves through article 1 that: "As soon as the law requires it, the text of the social statutes of the Central of Argentinean Workers (CTA) shall be approved and the CTA shall then be known as Central of Argentinean Workers (CTA), as contained in page 44/99 of File No. 1.166.285/06, in line with the provisions of Act No. 23551 and Regulatory Decree No. 467/88, which take full precedence in law over the statutes should they come into conflict, in particular with regard to the adopted trade union classification and membership scope, as set out in the said piece of legislation."
- 223.** The CTA adds that, in contesting the trade union classification and the membership scope, resolution No. 717/2006 refers to two new articles on the statutes, articles 2 and 4. The authority maintains its exclusionary stance by arguing that the contents of the new articles of the social statutes approved at the recent Seventh National Congress of Mar del Plata overstep existing legal boundaries. Thus, resolution No. 717/2006 becomes discriminatory, in that it undermines the recognition, enjoyment and exercise on an equal footing of the social and economic human rights of CTA members. These rights were undermined whenever the authority claims that the LAS and Regulatory Decree No. 467/88 take precedence regarding the "adopted trade union classification" (which simply means that the authority will deny any workers not meeting the requirements contained in the said pieces of legislation the right to organize). Thus, self-employed, pseudo self-employed or own-account workers and those working within an unregistered employment relationship and the unemployed lose the right to organize.
- 224.** The CTA states that it has now been shown that this unacceptable restriction on freedom of association and collective independence, carried out through resolution No. 717/2006, is just one of a series of acts carried out by the administration that go far beyond simple checks regarding legality and registration, reflecting, as it does, animosity and hostility

towards the CTA. The articles challenged by the Ministry of Labour, Employment and Social Security of the Argentine Republic are essential for the development of the organization and the trade union activity of the workers' central. Both direct membership (article 4) and membership of workers regardless of their status (article 2) are essential characteristics of the CTA. Trade union organizations, their members and workers should be allowed to choose the form that trade union organizations take as part of the free and full exercise of their fundamental rights.

225. Finally, the CTA states that it has lodged the corresponding administrative appeals with the relevant authority and that it made it clear in those appeals that it will not accept any kind of restriction on the will to organize independently; this has been stated in the following terms: "Therefore, we insist that the original wording of articles 2 and 4 of the social statutes, as approved by the delegates at the Congress, be maintained and we neither agree to nor accept the interference of the National Executive Power through the Ministry of Labour, Employment and Social Security with regard to matters which fall under the competence, to the exclusion of any other body, of the trade union organization."

B. The Government's reply

226. In its communication of 15 May 2007, the Government notes in the first place the contradictions which exist in the allegations of the CTA. Secondly, it indicates that the complainant organization tried to obtain trade union status on the basis of article 28 of Act No. 23551 although it has members which are not envisaged by the provisions on trade union status. On the other hand, the trade union invokes the provisions of the abovementioned Act and alleges that the violation consists mainly in the delay of the Government due to successive administrative acts. The Government sums up the issues raised in the allegations as to whether it is necessary or not to compare the representativeness of trade unions as established in article 28 of Act No. 23551 or whether it is possible to apply exclusively articles 25 and 32 of Act No. 23551, in accordance with the last paragraph of article 28 of the Act.

227. The Government rejects in the first place that delays took place in the adoption of the administrative decisions. It recalls that in fact, the CTA presented its request for trade union status on 23 August 2004. On 3 September the National Directorate of Trade Union Associations issued a statement ordering the CTA to attach the minutes of the assemblies in which the first-level bodies decided to affiliate to the third-level entity as well as the minutes through which these affiliations were approved. On 20 December 2004 the National Directorate of Trade Union Associations issued a new order enumerating the first-level bodies whose minutes were added to the file and advising that copies be given to the CGT for any appeal within 20 days. Prior to this, it considered appropriate to verify whether any pre-existing second- or third-level body with trade union status could coincide in full or in part with the statutes of the first-level trade unions affiliated to the CTA. This led to a report dated 31 January 2005. In February the CTA requested that the file be forwarded to the CGT in accordance with the position of the National Directorate.

228. The Government adds that the administrative proceedings continued through successive legal examinations before the Trade Union Structure Department of the National Directorate of Trade Union Associations, the Labour Secretariat, and the Directorate of Legal Actions of the General Directorate of Judicial Matters.

229. The Government indicates that according to the CTA the conditions of articles 25 and 32 of Act No. 23551 for the recognition of the most representative organization were fully met as the organizations affiliated to the CTA are the most representative in their respective domains and for this reason it is not appropriate to apply the provisions of article 28 of Act No. 23551 on the comparison of trade union representativeness.

Following this affirmation, the Government indicates that the Labour Secretariat had to request reports in order to determine the existence of second- and third-level bodies whose trade union status is alleged by the CTA.

- 230.** On 18 May 2005, the Labour Minister decided to accord hearings to the CGT and the second-level bodies whose interests could be affected and from then onwards, the entities concerned started to respond. Various extensions were requested and granted.
- 231.** The Government adds that on 21 February 2006, the Trade Union Structure Department of the National Directorate of Trade Union Associations advised that the files be referred to the higher-ranking body and that the CGT be requested to indicate the entities with trade union status affiliated to it. This is due to the fact that a request for trade union status has not been made by a multi-sector confederation since 1946. At that time, trade union status had been granted to the CGT and a different law was in force than Act No. 23551. The CGT was finally notified on 21 February 2006 and on 22 March requested an extension of 20 days which was granted and expired on 17 March 2007, when another extension was requested. Finally, on 12 August 2006 the CGT was summoned to answer and the files were transferred to the General Directorate of Legal Actions.
- 232.** Finally, the Government indicates that the file concerning the request for trade union status by the CTA is still active and pending due to its particular characteristics, taking into account that the only precedent on record of a request for trade union status by a multi-sector confederation dates back to 1946 and was presented by the CGT. Currently, the various first-level trade union organizations affiliated to the CGT are in the course of appearing in the proceedings in order to indicate how many contributing members they have. It is the examination of the quality of trade union affiliated to the CGT that delays the proceedings and not any dilatory acts.
- 233.** The Government underlines the importance of taking into account the interests not only of the CTA but also the CGT, which involves the comparison of the representativeness of the first-, second- and third-level entities – an extremely difficult task given the high number of bodies with trade union status in Argentina.
- 234.** As for resolution 717/06 of the Ministry of Labour, Employment and Social Security, which partially approves the reform of the by-laws of the CTA and expresses a reservation as to the adopted trade union classification and scope of membership, the Government refutes the allegations of the CTA according to which the resolution violates the provisions of Articles 2, 3 and 6 of Convention No. 87. There is absolute freedom in Argentine law to establish professional associations regardless of their level, as deemed appropriate, without intervention by the authorities in conformity with articles 1, 5 and 23 of Act No. 23551. The Government also underlines that Case No. 1777 examined by the Committee is not applicable in this case.
- 235.** The Government clarifies that the issue in the present case is the comparison of trade union representativeness in order to obtain trade union status and the amendment of statutes aimed at incorporating a subjective trade union classification and scope of membership which are not in conformity with Act No. 23551. In fact, nothing prevents an organization from being established in conformity with resolution 325/97 in order to obtain a simple registration. However, when it comes to obtaining trade union status, the situation changes as the criterion of representativeness has to be taken into account and a comparison has to be carried out with other organizations which have trade union status in conformity with the provisions of Act No. 23551.
- 236.** The Government emphasizes that the CTA came to the Ministry of Labour to obtain trade union status in conformity with the law, which does not allow for direct affiliation nor for

organizations of the nature envisaged in the statutes of the CTA, which were examined by the Ministry of Labour in conformity with the provisions of articles 21 and 56, sections 1, 2, 21, 25 and 32. The Government underlines that the resolution of the Ministry which recognizes the trade union status should be in direct relationship with the organization's statutes which were previously approved and registered. In the present case, the statutes which were amended in order to obtain trade union status changed the context of representativeness and the classification established in Act No. 23551 by virtue of which trade union status was requested.

- 237.** The Government considers moreover that the Committee cannot pronounce itself on this case because it lacks elements which were not brought before it. Article 25 of Act No. 23551 provides that the qualification of most representative organization will be granted to the association which has the largest average number of contributing members, in relation to the average number of workers that it aims to represent.
- 238.** According to the Government the complainant organization affirms its intention to initiate the proceedings in the framework of Act No. 23551 in the hope of a change in the criterion applied by the administration so as to allow for the coexistence of first-, second- and third-level organizations with trade union status in conformity with articles 28, last paragraph, 25 and 32 of the aforementioned Act. In all its arguments, it acknowledges that the Act only allows for the affiliation of workers to first-level organizations and indicates that in fact, the second-level bodies only have the powers delegated to them expressly by the first-level body, notably that of collective bargaining. They are entities which group together other trade unions. Workers can only join a first-level trade union. The affiliation to a second- and third-level organization is an act exercised collectively by a workers' organization and not by one or several workers individually and it is possible to join, not to join or to resign from a higher-level entity. As a result, the complainant organization cannot feel prejudiced by the observations made on its statutes with regard to the impossibility of direct affiliation by workers to a third-level body.
- 239.** Similarly, with regard to workers in general, the Government indicates that in conformity with article 2 of Act No. 23551 which establishes the organizations which must be taken into account in order to determine the scope of representativeness and in conformity with article 1 of Decree No. 467/88 which defines the concept of worker, the provision of article 25 limits the scope of representativeness to those working in a relation of subordination, who are affiliated and pay their dues.

C. The Committee's conclusions

- 240.** *The Committee notes that in the present case, the complainant organization objects to the long period of time which has elapsed without the administrative authority having issued a decision regarding the application for trade union status that the complainant organization presented on 23 August 2004. Furthermore, it alleges that the administrative authority has only partially approved the reforms to the statutes of the CTA (agreed on at its National Congress in March 2006), in violation of the principles of freedom of association.*
- 241.** *The Committee, regretting the delay in the Government's reply, takes note of its observations indicating the various steps taken in the examination of the request for trade union status by a third level trade union organization and denying that this is a case of administrative delays. The Committee notes that the Government recounts the various stages of the proceedings due to the participation of various parties. The Committee also notes that according to the Government this is a particular situation as a request for trade union status has not been made by a third level trade union organization since 1946, when*

the General Confederation of Labour requested trade union status and a different legislation was in force.

- 242.** *The Committee, however, notes with concern that administrative proceedings have been ongoing for almost three years and, as a result of this excessive delay, the complainant organization may have been adversely affected in the exercise of its activities. The Committee observes that the Committee of Experts on the Application of Conventions and Recommendations has already examined this issue and that in its 2007 report it stated the following [see Report III (Part 1A), p. 41 of the English language version]:*

*In view of the significant benefits enjoyed by workers' organizations that have "trade union status" (including the right to collective bargaining), the Committee regrets that so long a period has elapsed – more than two years according to the Government – without any decision from the administrative authority. **The Committee urges the Government to take a decision without delay regarding the CTA's application for trade union status.***

In the same vein, the Committee strongly urges the Government to take a decision without delay regarding the CTA's application for trade union status (made almost three years ago) and to keep it informed in this respect.

- 243.** *As to the allegation that the administrative authority only partially approved the reforms to the statutes of the CTA adopted during the trade union organization's National Congress in March 2006, the Committee notes that according to the complainant organization, administrative resolution No. 717/2006 challenges new articles 2 and 4 of the statutes with regard to the trade union classification adopted and the scope of membership (in particular, article 2 allows both employed and unemployed workers, as well as those receiving social security benefits, to join the CTA and any of the organizations affiliated to it).*
- 244.** *The Committee takes note of the Government's observations according to which the conditions for obtaining a simple registration are different than those for acquiring trade union status and that the statutes of the CTA which were amended in order to obtain trade union status included subjects not envisaged in Act No. 23551, which does not allow for direct affiliation, nor for the nature of the organizations envisaged in the statutes of the CTA.*
- 245.** *In this respect, the Committee recalls that it has, in the past, pronounced itself with regard to similar allegations presented by the CTA in relation to the refusal of the Government to proceed with its trade union registration, based on the fact that it is a third-level trade union body which has certain special characteristics in its structure as regards its representation, whereby provision is made for direct affiliation by individual persons – including retired and unemployed persons – contrary to the provisions of Act No. 23551 respecting trade union associations [see 300th Report, Case No. 1777, paras 58–73]. On that occasion, the Committee stated the following:*

... the Committee recalls that organizations of employers and workers should have the right to draw up their constitutions and rules in conformity with Article 3 of Convention No. 87. The Committee therefore considers that the prohibition of the direct affiliation of certain persons to federations and confederations is contrary to freedom of association principles. It is for these organizations themselves to determine what the rules relating to their membership should be.

In these circumstances, the Committee urges the Government to take measures to ensure that the statutes of the CTA are fully approved and to keep it informed in this respect.

The Committee's recommendations

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

- (a) *The Committee strongly urges the Government to take a decision without delay regarding the CTA's application for trade union status (made almost three years ago) and to keep it informed in this respect.*
- (b) *The Committee urges the Government to take measures to ensure that the statutes of the CTA are fully approved and to keep it informed in this respect.*

CASE NO. 2485

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

Complaint against the Government of Argentina presented by the Union of Self-Convened State Workers (SITEA)

Allegations: The complainant organization alleges excessive delays and obstacles to its registration as a trade union organization, as well as acts of anti-trade union discrimination against its general secretary

- 247. This complaint is contained in a communication of the Union of Self-Convened State Workers (SITEA), of April 2006.
- 248. The Government sent its observations in a communication of January 2007.
- 249. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 250. In its communication of April 2006, SITEA alleges that, on 22 March 2004, it applied to be registered as a trade union organization that, at the time of submission of the complaint, the registration in question had still not been effected and that the administrative delays violate the principles of freedom of association.
- 251. The complainant organization also alleges that the Government of the Province of Mendoza took advantage of the delay in the trade union organization registration process to alter the employment conditions of the union's general secretary, specifically in regard to levels of remuneration, following a decision not to allow him to work overtime. The complainant organization adds that the victim lodged a legal appeal for protection of constitutional trade union rights (*amparo sindical*), demanding that the anti-trade union behaviour cease. This was rejected by the Third Labour Court of Mendoza Province on

the grounds that the individual in question was not covered by the regulations governing the protection of trade union leaders from dismissal. An extraordinary appeal against this ruling was lodged with the High Court of Justice of Mendoza Province.

B. The Government's reply

- 252.** In its communication of January 2007, the Government states the following, regarding the allegation concerning the delay affecting the registration of SITEA as a trade union organization: (1) the application for registration of SITEA as a trade union organization was received on 22 March 2004; and (2) from the time of its receipt until November 2006, the application was the subject of various observations made by the National Directorate of Trade Union Associations in the light of Act No. 23551 and Regulating Decree No. 467/88, which govern the formation and organization of trade unions in the Argentine Republic. The following observations were made: (a) the Statutes and the name adopted (given that private, as well as public, employees are covered), presumed the inclusion of retired persons and elderly pensioners. This was unfounded because, under articles 25, 21 and 22 of the Labour Contracts Act, members of trade union organizations must be in a dependent relationship; (b) some of the members do not belong to the integrated retirement and pensions system or belong to the provincial system; and (c) there was no compliance with the quota of female employees required by Decree No. 514/03.
- 253.** The Government states that the said observations were submitted and rectified by the complainant organization during 2004, 2005 and 2006. The draft document permitting the entity's application for registration as a trade union organization to go forward was approved on 10 December 2006 and is currently awaiting the Minister's signature. The process of trade union registration of the complainant organization, through the Ministry of Labour as the administrative labour authority, is proceeding normally. There has been no delay in granting registration, which will soon be effective in accordance with the outline of the procedure previously set out.
- 254.** As to the alleged acts of anti-trade union discrimination against the general secretary of the complainant organization, the Government states that, irrespective of the judicial examination of the question of trade union immunity, it should be taken into consideration that the State has not sought, at either the national or the provincial level, to undermine the status of the trade union leader. Nor has the provincial state authority done anything to prejudice the activities of the trade union leader being established, given that overtime does not constitute part of normal and regular remuneration, but is linked to a specific increase in workload and if no such increase has occurred then there is no reason for the State to pay overtime. None of the rights enshrined in the statutes of the public employees of Mendoza Province (Act No. 560 and amendments) has been infringed. This Act guarantees the following, in Chapter IV, under the heading of Rights: "Staff members have the right: (a) to protection against dismissal; (b) to fair remuneration; (c) to payments, benefits and compensation; (d) to commendations and bonuses; (e) to equal career opportunities; (f) to training; (g) to leave, exemptions and allowances; (h) to organize; (i) to social assistance (for employees and their families); (j) to transfers and exchanges; (k) to lodge appeals; (l) to reinstatement; (m) to resign from their posts; (n) to continue in their posts and to receive benefits upon retirement or resignation; (o) to insurance (covering employees and their families)."
- 255.** The Government stresses that at no time has the complainant objected to the nature of his post and yet the curious argument has been put forward that his overtime cannot be cut because it would prejudice his activities as a trade union leader and that, in this instance, the State has committed an act of discrimination which violates Conventions Nos 87 and 98. The Government states that Mr Víctor Hugo Dagfal has not been transferred, that his

remuneration has not been reduced, and that no acts have been committed that would, under any circumstances, disrupt his trade union activities.

- 256.** The Government states that, in accordance with Decrees Nos 1706/88, 1898/89 and 1103/93, the Ministry of Finance of the province has the power to authorize overtime in the interests of serving the public at the General Income Tax Directorate of the province and must lay down the duration of the overtime and the number of staff needed to cover it, while the Director of the Tax Directorate is responsible for deciding which staff shall be on duty during the periods in question. The said Decrees also lay down that staff called on to work a double shift shall be repaid the additional costs incurred. As a result, and to meet customer service requirements for the number of clients and for economic and financial reasons (the need to step up tax collection activity), the tax collection body introduced an evening shift of three hours a day as an extraordinary measure. It should be pointed out that the selection and designation of staff to work overtime are not regulated, but depend on the discretion of the Director of the General Income Tax Directorate, based on service and internal organizational requirements, as well as the equal rights of all staff members in the distribution of overtime.
- 257.** The Government stresses that the measure challenged did not constitute an illegal alteration of working conditions, but that the authority was exercising its duty to assign the personnel under its control. The fact that the individual in question is a public employee working at the General Income Tax Directorate means that he cannot claim ignorance of the system, nor can he point to non-existent implications, or charges based on mere statements or inference, or indeed claim that the authority is flouting the rules of the General Income Tax Directorate. The Government states that an extraordinary appeal has indeed been lodged against the ruling rejecting the appeal for protection of constitutional rights based on trade union protection and is currently being examined by the High Court of Mendoza Province (Case No. 86573, entitled “Dagfal Víctor Hugo”; Case No. 33465, entitled “*Dagfal Víctor Hugo versus Mendoza Province*, appeal for the protection of constitutional rights, for annulment and inconsistency”). Finally, the Government stresses that this case has been treated in the same way as any other, regardless of the fact that the individual concerned is a trade union leader. Overtime was paid because the increase in workload made it necessary. Had there not been an increase in the workload, overtime would not have been paid, as to do so would have meant that the State was squandering public funds.

C. The Committee’s conclusions

- 258.** *The Committee notes that, in the present case, the complainant organization objects to administrative delays affecting the registration as a trade union organization of SITEA, which applied for registration on 22 March 2004. It further alleges that the Government of Mendoza Province took advantage of this delay to alter the employment conditions of the general secretary of SITEA, (more specifically, those relating to levels of remuneration following a decision to deny the general secretary of SITEA the opportunity to work overtime).*
- 259.** *As to the alleged delay in the registration of SITEA as a trade union organization, the Committee notes the Government’s statement to the effect that: (1) the application for the registration of SITEA as a trade union organization was received on 22 March 2004, (2) from the time of its receipt until November 2006, the application was the subject of various observations made by the National Directorate of Trade Union Associations in the light of Act No. 23551 and Regulating Decree No. 467/88 which govern the formation and organization of trade unions in the Argentine Republic. The following observations were made: (a) the statutes and the name adopted (given that private, as well as public employees are covered) presumed the inclusion of retired persons and old-age*

- pensioners. This was unfounded because, under articles 25, 21 and 22 of the Labour Contracts Act, members of trade union organizations must be in a dependent relationship; (b) some of the members do not belong to the integrated retirement and pensions system or belong to the provincial system, and (c) there was not compliance with the quota of female employees required under Decree No. 514/03;(3) the said observations were submitted and rectified by the organization during 2004, 2005 and 2006. The draft document permitting the entity's application for registration as a trade union to go forward was approved on 10 December 2006 and is currently awaiting the Minister's signature; (4) the process of trade union registration of the complainant organization, through the Ministry of Labour as the administrative labour authority, is proceeding normally. There has been no delay in granting registration, which will soon be effective.*
- 260.** *The Committee expresses regret at the fact that it should take over three years to register a trade union organization. The Committee expects that SITEA will be registered as a trade union organization in the near future (given that the Government states that the issues raised in the observations made by the administrative authority have already been addressed and the draft resolution approving the application for trade union registration is currently awaiting the Minister's signature).*
- 261.** *With regard to the allegation that the authorities of Mendoza Province took advantage of the delay in the registration of SITEA as a trade union organization to alter the employment conditions of the general secretary of SITEA (more specifically, those relating to levels of remuneration following a decision to deny the general secretary of SITEA the opportunity to work overtime), the Committee notes the Government's statement that: (1) overtime is not covered by normal and regular remuneration, but is linked to an increase in workload and that, if no such increase has occurred, then the State is not obliged to pay overtime; (2) none of the rights guaranteed by the statutes of public employees of Mendoza Province have been infringed; (3) Mr Víctor Hugo Dagfal has not been transferred and his level of remuneration has not been reduced. Furthermore, no action has been taken that could, under any circumstances, disrupt his trade union activities; (4) the selection and assignment of staff to work overtime are not regulated, but depend on the discretion of the Director of the General Income Tax Directorate, based on service and internal organizational requirements, as well as the equal rights of all staff members in the distribution of overtime; and (5) an extraordinary appeal has indeed been lodged against the ruling rejecting the appeal for protection of constitutional rights based on trade union protection and is currently being examined by the High Court of Mendoza Province.*
- 262.** *In this respect, given the information available, the Committee considers that it is not in a position to determine whether the decision not to allow the general secretary of SITEA to work overtime was based on his trade union activities. The Committee therefore requests the Government to keep it informed of any ruling issued by the High Court of Justice of Mendoza Province with regard to the extraordinary appeal lodged by the general secretary of SITEA.*

The Committee's recommendations

- 263.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee regrets that it has taken over three years to register a trade union organization and expects that SITEA will be registered as a trade union organization in the very near future, given that the Government states that the issues raised in the observations made by the administrative*

authority have already been addressed and the draft resolution allowing the application request for trade union registration to proceed is currently awaiting the Minister's signature.

- (b) *The Committee requests the Government to keep it informed of any ruling issued by the High Court of Justice of Mendoza Province with regard to the extraordinary appeal lodged by the general secretary of SITEA.*

CASE No. 2500

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

**Complaint against the Government of Botswana
presented by
the Botswana Federation of Trade Unions (BFTU)**

Allegations: The complainant alleges that the employer interfered with internal trade union affairs, dismissed the entire union leadership for having produced information on salary scales at the bargaining table and for inciting workers to go on strike for better working conditions, and dismissed 461 workers employed at three diamond mines under the pretext that they provide essential services. It also alleges that there is no adequate dispute resolution process to deal with the demands of these workers and that the Government had failed to intervene, even though it had been fully informed of the situation. The employer also resorted unduly to the judicial process to harass workers and their union, which was destabilized and financially affected

- 264.** The complaint is contained in a communication from the Botswana Federation of Trade Unions (BFTU) dated 12 June 2006. The BFTU transmitted additional information in support of its complaint on 24 July 2006.
- 265.** The Government submitted its observations in a communication of 23 February 2007.
- 266.** Botswana 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

- 267.** In its communication of 12 June 2006, the complainant states that the Debswana Mining Company dismissed 461 striking employees in its Orapa, Letlhakane and Jwaneng mines.

These employees were dismissed as they were employed in essential services, and therefore prohibited from striking; the complainant alleges that this was an unfair pretext as the dismissed workers' jobs did not fall under the definition of essential services.

- 268.** The complainant states that the employer also dismissed union leaders for producing researched information on the salary scales of all of Debswana's employees at bargaining sessions with the employer, whereas other union leaders were dismissed for allegations of inciting workers to go on strike. According to the complainant, the latter were also sued for allegedly inciting the strike and, although ultimately unsuccessful, the lawsuit had instilled fear and destabilized the functioning of the union. This lawsuit forms part of a broader attempt by the employer to use the courts to frustrate the ability of workers to go on strike and diminish the union's finances. Furthermore, the complainant alleges that the company issued inflammatory statements through the media to demean the workers, thus inciting them to strike.
- 269.** The complainant states that there was no rapid dispute resolution process in place to deal with this dispute and that, although it had petitioned the Government to secure the reinstatement of the dismissed employees, the Government had not made any effort to address the matter.
- 270.** Further information in support of its earlier allegations are provided by the complainant in a communication of 24 July 2006. The complainant states that it had commissioned a fact-finding inquiry following the dismissal of 461 employees and union members by the Debswana Mining Company, as well as the dismissal of four BCL Mine employees who were also Botswana Mine Workers Union (BMWU) branch committee officials. The said inquiry took place on 14–15 May 2005; it was undertaken by Mr C.T.O. Phikane and Ms S. Dingalo.
- 271.** The inquiry was mandated to: (1) interview the concerned parties; (2) investigate what prompted the strike that led to the dismissal of 461 Debswana employees; (3) investigate why four BMWU branch committee members at the BCL Mine were dismissed; (4) investigate why BMWU Chairman and General Secretary were dismissed; (5) make recommendations on the matter; and (6) submit a report to the BFTU secretariat by 18 May 2005. The following persons were interviewed:
- Jack Tlthagale, General Secretary of the BMWU;
 - M. Rabasimane, shop steward at Jwaneng;
 - Johnson Gabonewe, former security officer;
 - Bokopaano Phirinyane, formerly an assistant buyer;
 - Chakalisa Masole, chairman of the BMWU at the Orapa–lethakane mines.
- 272.** With respect to the events prompting the strike that led to the dismissals, the complainant states that, according to the interviews conducted under the inquiry, industrial disharmony had existed since 2003. To address this disharmony the management of the Debswana company hired a consultant to present a paper on relationship-building initiatives; on 23 March 2003 the Nupen report was produced. In spite of these efforts, the situation failed to improve, and the BMWU and company employees continued to complain of favouritism on the shop floors.
- 273.** According to the complainant, the situation deteriorated with the appointment of the company's new Managing Director, Mr B. Marole. On the day of Mr B. Marole's inauguration party, employees took to the streets in a peaceful demonstration against his

appointment. The complainant alleges that this infuriated the outgoing Managing Director, Mr Nchindo, who attacked the bargaining unit during the demonstration by accusing them of acting like spoiled children; by this accusation, the complainant maintains, Mr Nchindo was referring to an incident, in March 2003, where he had offered employees in bands A1 to 4 a 2,500 pula (BWP) bonus. The complainant adds that managerial staff, however, were given bonuses in the region of 95,000 BWP, and that this had generated a significant amount of dissatisfaction amongst union members, as well as some managerial staff and government appointees, including the Permanent Secretary in the Ministry of Energy Affairs, who is also a board member of the Debswana Mining Company.

- 274.** The complainant states that when negotiations for the 2004–05 period started, the NEC of the BMWU were aware of the fact that bonuses to managerial staff had been awarded since 1997, and that the management was aware that the issue of bonuses would be tabled for negotiation. During negotiations, the management proposed the use of a performance-based reward system, under which bonuses would be issued when certain targets were achieved in all of its mines. The BMWU refused this offer, as a number of factors – including mechanical shutdowns – could frustrate the achievement of the targets, and insisted upon its demand of a 25,000 BWP bonus.
- 275.** According to the complainant, negotiations dragged on with both parties refusing to compromise. In July 2004, the BMWU declared a dispute with respect to the matter; however, the management and the union disagreed over the interpretation of clause 10 of the collective agreement, which provides for the procedures to follow in declaring a dispute. The matter was referred to the Commissioner of Labour, who found that the union was correct in declaring a dispute. Mediation followed, but was unsuccessful, with the employer’s proposal standing at a bonus of 6 per cent and a salary increment of 8 per cent. Subsequently, the union declared its intention to go on strike. The complainant states that the Commissioner of Labour had indicated that the strike would be lawful if rules were formulated – a position the employer was dissatisfied with.
- 276.** According to the complainant, strike rules were drawn up, and the employer was requested to indicate the departments that were essential services. The employer submitted a list of essential services comprising almost all of the departments, including cleaners and gardeners. Additionally, while the strike rules were being prepared the employer’s lawyers served the union with a court interdiction against the strike.
- 277.** The complainant states that the President of Botswana met with several members of the union’s executive body. At the said meeting, the union executive members agreed to the President’s request that he be given five days to talk to the management of the company; five days later the President telephoned the union and indicated that he had instructed the management to return to the negotiating table and to increase the terms of their offer.
- 278.** Resuming negotiations, the management proposed a 10 per cent bonus, as well as a 10 per cent salary raise. The complainant adds that the employer communicated this proposal directly to the union’s constituents in a special brief dated 10 August 2004, and that the brief stated that if the proposal was not accepted by 4 p.m. on 11 August 2004, it would be revoked, and that the previous offer of a 6 per cent and 8 per cent increase for the bonus and salary, respectively, would be reverted to.
- 279.** The union then wrote to propose a Joint Negotiating Committee (JNC) meeting on 13 August 2004, but the management replied that they would not be available until 16 August 2004. On 16 August 2004, the management informed the union that they had reverted to the 6 per cent bonus and 8 per cent salary increase.

- 280.** According to the complainant, the employees of the company asked the union representatives to allow their strike. In spite of the court interdiction, the employees went on strike from 23 August to 6 September 2004. The complainant maintains that the union was, at that point, unable to control them.
- 281.** The company, in response to the strike, sued the union's executive body, charging it with contempt of court; however, the case was dismissed by the Industrial Court for lack of jurisdiction.
- 282.** On 24 August 2004, the Debswana company dismissed 461 employees. The complainant alleges that although the strike was illegal, the fact that only 461 employees were dismissed – out of a total of 3,900 strike participants – and the criteria used to select the employees for dismissal were unfair and in violation of the company's own disciplinary procedures. As for the employees who returned to work, the complainant states that they were given written warnings valid for a period of 24 months, whereas the disciplinary procedures state that a final written warning shall be valid for 12 months from the date it is issued.
- 283.** The complainant adds that certain individuals were unfairly targeted by the employer. For instance, Mr Bokopaano Phirinyane, an assistant buyer in the materials department, was dismissed even though his job is not classified as an essential service, and even though he had been ill and hospitalized for most of the strike period. The complainant also adds that Mr Chakalisa Masole, the BMWU branch Secretary at the Orapa–Letlahkane mines, was charged with influencing employees not to vacate company housing between 24 August and 6 September 2004, even though he had been on leave from 16 August to 14 September 2004 to attend to his wife's illness and subsequent death. Mr Masole had been summoned to a hearing and was presently awaiting the verdict in his case.

Dismissal of four BMWU branch committee members from the BCL Mine, Selibe Pikwe

- 284.** The complainant states that in July 2003, the management of the BCL Mine submitted a proposed salary structure to the BMWU, which then commissioned a consultant to conduct research on the wage structure of the BCL Mine workforce. Among the research findings was that, the Chief Executive Officer of the BCL Mine was paid more than any other Chief Executive Officer in the market. The report was submitted to BCL Mine management; one of its recommendations was that employees be paid at market rates.
- 285.** The complainant alleges that, on 7 April 2004, the management asked that new members of the union's committee be elected, and had specifically asked union members not to re-elect Mr Mogende and Mr Kabelo Oitsile, the chairperson and the secretary of the committee, respectively. The new committee was elected on 26 April 2004; Mr Mogende and Mr Oitsile were both re-elected.
- 286.** Negotiations between the union and the company took place from 8 to 10 June 2004. In said negotiations, the management agreed to the union's proposal of a salary structure based on the commissioned report, indicating that they would use the report to devise a new structure. An agreement was signed by both parties on 13 July 2004.
- 287.** The complainant states that on 13 July 2004, the management wrote to the union inquiring as to who had submitted the confidential company information contained in the commissioned report. In its reply the following day, the union stated that the consultant, Boko, Motlhala and Company, had carried out the survey contained in the report. On 21 July 2004, the management wrote another letter asking the names of the individuals from whom confidential information was obtained. The union responded on 23 July 2004,

stating that it did not know how the information was obtained; the company nevertheless sent yet another letter on 28 July demanding the same information.

- 288.** On 30 July 2004, the management telephoned the 13 union committee members and asked them to report to the company's office to collect suspension letters. The union's attorneys challenged the suspensions in court; however, their case was dismissed by the High Court for lack of jurisdiction.
- 289.** The complainant alleges that four committee members were subsequently allowed to return to work, for having complied with the conditions of suspension, and four more members were called back to work in the first week of October 2004. Only Messrs. Mogende, Oitile, Molemoge, Buka and Keakitse remained suspended.
- 290.** On 5 October 2004, the abovementioned union committee members were called to the mine. According to the complainant, they were to be given letters lifting their suspension; instead, Mr Molemoge was discharged from the company, whereas the other four members were charged with: (1) unlawful possession of confidential information; (2) refusal to disclose the confidential information in their possession; (3) refusal to disclose the names of the individuals who had provided the confidential information; and (4) giving false evidence with the intention to mislead. Court hearings for the above-named committee members were held on 18 and 19 October 2004; on 15 November 2005, they were adjudged to have been properly dismissed. Appeals were filed, but the decision was upheld.
- 291.** The complainant alleges, in particular, that Mr Jack Tlhagale, General Secretary of the BMWU, was charged for having asked the Assistant General Manager of the company whether the company knew that Mr Lebotse, the outgoing General Secretary, had met with the management in Gaborone. Mr Tlhagale was charged with: (1) wilful dishonesty; (2) corruptly trying to obtain management information from management secretaries; (3) breach of the employment contract; and (4) conducting non-work investigation during working hours. According to the complainant, Mr Tlhagale had requested and was denied a complaint form before his hearing; furthermore, the hearing was procedurally flawed, as Mr Tlhagale was not allowed to hear the evidence given by the company's witness, even though by law the defendant should be present throughout the entire proceeding.
- 292.** On 11 April 2005, the complainant and the management were called to the district labour office for mediation; however, the management apologized and stated that it was not ready for the hearing.
- 293.** The complainant maintains that the concerned union committee members were only made aware of the company's wage structure information at the presentation made by the consultant, and that the consultant had confirmed, via a letter dated 22 October 2004, that information regarding the company's wage structure was not obtained from union officers. The complainant adds that, at a 10 June 2004 meeting of the JNC, the management had rejected the union's request for wage structure information, as it did not see the relevance of providing information respecting the salary of employees outside of the bargaining unit, and that only a cost book, monthly report, and audited financial statements were given to the union. In spite of the above, the complainant reiterates that the committee members were unfairly targeted and victimized due to their trade union activities and in violation of freedom of association principles.
- 294.** To its 24 July communication the complainant attaches several documents in support of its complaint, comprised mostly of communications between the BMWU and the Debswana company. The said documentation includes, in particular: (1) a 21 July 2006 letter from the BMWU to Debswana management accusing the company of showing favouritism to the

dissident BMWU faction; and (2) a notice from Debswana to its employees dated 10 July 2006 refuting the BMWU's accusations of interference and favouritism in the internal affairs of the BMWU and reiterating its policy of non-interference.

295. The complainant also attaches a copy of the Memorandum of Agreement between the BMWU and the Debswana Mining Company, dated 24 February 2000. Section 11 of the agreement, which relates to industrial action, is excerpted as annex.

B. The Government's reply

296. In its communication of 23 February 2007 the Government states that the Debswana Mining Company operates mines in Orapa, Jwaneng and Letlhakane, and that Debswana recognizes the BMWU as the collective bargaining agent of its members. This recognition is formalized in a collective agreement known as the Memorandum of Agreement.

297. According to the Government, the BMWU has established branches at each of the mines operated by Debswana. The union's constitution provides for the establishment and functioning of branch committees, as well as a National Executive Committee (NEC); all union elections at the branch and national levels took place without interference by the Debswana management.

298. In 2004, the BMWU elected a new NEC, Mr Chimbidzani Chimidza, who was then Chairperson of the Orapa branch committee, and Mr Jack Tlhagale, Chairperson of the Jwaneng branch committee were elected to the NEC as Chairperson and General Secretary, respectively.

299. Members of the BMWU at seven out of the 12 union branches, including those in the Orapa and Letlhakane mines, challenged the legitimacy of the election of Chimidza and Tlhagale to the NEC, as neither of them were subscribing union members as required by the BMWU's constitution. In response, the NEC dissolved the Orapa branch committee; members of the Orapa branch committee challenged the dissolution on the grounds that it was unconstitutional, as the procedure for the dissolution of the branches had not been followed. The Orapa branch committee, by a 14 July 2005 letter to the NEC, declared its dissolution null and void.

300. In October 2005, the seven branches called for a delegate's congress to deliberate on the BMWU's internal problems – under the BMWU's constitution the delegate's congress is the union's supreme decision-making body. The NEC sought and succeeded in obtaining an order from the High Court of Botswana prohibiting the congress from convening; the order further required officials from the seven branch committees to hand over funds of the branch accounts to the NEC. The branch officials, however, refused to comply with the court order.

301. According to the Government, in November 2005, the NEC again applied to the High Court of Botswana, seeking a declaratory order in respect of the legitimacy of their positions with the BMWU. On 25 April 2006 the High Court issued an order declaring the current NEC to be legitimately in charge of the union's affairs. As with the previous order, the declaratory order required that funds in the branch accounts be transferred to the NEC, and again the branch officials refused to comply with the order. Subsequently, the High Court found the branch officials to be in contempt of the court for their failure to cede branch account funds to the NEC in accordance with the orders and ordered them to transfer the funds within five days or face imprisonment for six months. The officials failed to comply and were sentenced to imprisonment for six months; the orders are currently being litigated in the High Court.

- 302.** The Government states that, according to the Debswana company, there is evidence of a split within the BMWU, and it appears that a number of employees at its mines have left the BMWU and intend to form a new union. The Debswana company has not been involved or participated in this internal union conflict. However, due to the conflict, normal industrial relations between Debswana and the union have been difficult to maintain; Debswana had a number of meetings with the BMWU where representatives of both Orapa branch committee factions attended, each claiming to be the sole legitimate representative of the BMWU, and also held several meetings with the BMWU in circumstances where the allegedly dissident Orapa branch committee were in attendance.
- 303.** After the April 2006 High Court order legitimizing the NEC as the lawful representative of the BMWU, the NEC insisted that the dissident Orapa mine branch committee be excluded from meetings. After discussion with the BMWU, Debswana took the view that it would meet with the BMWU on this basis, and recognize the faction designated by the NEC as representing the BMWU at the Orapa mine. The Government states that Debswana had agreed to do so despite objections raised by those who claim to be the legitimately elected branch committee and the significant numbers of BMWU members supporting them. The objections raised by these elements include allegations that: (1) the Orapa branch committee favoured by the NEC was never elected by the general membership in 2005, as alleged by the NEC; (2) some committee members had never been union members since they were employed and therefore did not qualify to be office bearers; and (3) the NEC had used a referendum to endorse its preferred committee instead of holding general elections, as required by the BMWU constitution.
- 304.** The Government states that as recently as August 2006, Debswana had concluded an agreement with the BMWU, and that the company's actions had been in accordance with the High Court's determination that the NEC was the lawfully elected representative. The company had noted, however, that there had been a significant number of resignations from the BMWU, particularly at its Orapa mine. The Government adds that on 1 September 2006, the office of the Registrar received an application to register a new union, the National Mining and Allied Workers' Union.
- 305.** With respect to the allegations concerning the mass dismissals following the strike at the Debswana Mining company, the Government explains that wage negotiations between Debswana and the BMWU had commenced in March 2004. By June 2004, the two parties had not reached a settlement and the BMWU referred the matter to the Commissioner of Labour for mediation.
- 306.** At the mediation meeting, the union gave notice of its intention to strike with effect from 26 July 2004. Debswana applied to the Industrial Court to interdict the contemplated strike; on 6 August 2004 the Industrial Court declared the strike unlawful on the following grounds:
- the contemplated strike contravened the dispute resolution procedures laid down in the collective agreement (Memorandum of Agreement) between Debswana and the BMWU;
 - the BMWU had not conducted a strike ballot as required by its constitution;
 - there was an outstanding dispute respecting the interpretation of essential services, as contained in the Memorandum of Agreement.
- 307.** The BMWU appealed the Industrial Court's decision, which was upheld by the Court of Appeal on 28 September 2004. The Government adds that, in spite of this, the BMWU called upon its members to commence a strike as of 23 August 2004.

- 308.** On 21 and 22 August 2004 the Industrial Court issued court orders advising members of the BMWU's Jwaneng mine branch and Orapa/Letlhakane branch – who had given notice of their intention to strike as of 23 August 2004 – that the contemplated strike action was in contempt of the 6 August 2004 court order ruling that the strike contravened the Trade Disputes Act. In the orders, the court had directed the BMWU's branch executive committees to hold general meetings the night before the strike was to commence to instruct BMWU members to comply with the court orders and to desist from embarking on any illegal strike action. The court further directed the BMWU not to encourage, incite, support or in any manner whatsoever cause its members to embark on an illegal strike. According to the Government, the branch executive committees were specifically directed to issue a statement in writing to their members unequivocally stating that the contemplated strike action would be in breach of the court order issued on 6 August 2004.
- 309.** A BMWU meeting was held at Orapa mine on 21 August 2004, which was also attended by union officials from the Jwaneng Mine and the BCL Mine. The Government states that at the meeting union officials advised union members that:
- judging from the recent illegal strike at the BCL Mine and the political intervention that followed, members were better served by embarking on illegal rather than legal strike action, because illegal strikes were not bound by the rules and timelines for strikes laid down in the Trade Disputes Act;
 - employees engaged in essential services should embark on an illegal strike action and thereby cause the water and electrical reticulation systems to stop, thus causing significant impact on the mines and putting pressure on the management;
 - if a sufficient number of employees participated in the illegal strike action, the management would not dismiss anyone but, in fact, would be more likely to capitulate and accede to the workers' demands.
- 310.** At the meeting, BMWU officials also called upon the Orapa and Letlhakane mine workers, whether union members or not, to join their colleagues in the Jwaneng mine in participating in the illegal strike action. It was resolved that the workers in both mines would support the strike, to begin on 23 August 2004. The said strike did in fact begin on 23 August 2004 and continued until 6 September 2004, a total of 13 days.
- 311.** The Government states that the BMWU officials had conceded, under oath, that the strike was illegal, and that the union's resort to illegal strike action cannot be justified by any conduct on the part of the Debswana Mining company or by any explanation to the effect that the BMWU had no other option but to resort to an illegal strike: on the contrary, the union's decision to flout the provisions of the Trade Disputes Act was both deliberate and calculated. The Government adds that, on the evidence available to Debswana, the BMWU officials, by urging essential services (including nursing staff) personnel to participate in the strike, intended through their unlawful actions to inflict maximum possible harm to the company, as well as to those employees who not participating in the strike and the communities in which Debswana conducts its mining operations.
- 312.** With respect to the dismissal of BMWU members engaged in essential services, the Government states that the Trade Disputes Act identifies a number of essential services for which limitations on the right to strike are imposed, and which are listed in a schedule to the Act. The schedule of essential services provided for in legislation, however, does not preclude an employer and a trade union from agreeing, in full freedom and without interference, that particular services and functions should be regarded as essential, and to accordingly limit the right to strike with respect to these job classifications. According to the Government, clause 11 of the Memorandum of Agreement concluded between BMWU

and Debswana classifies several services as essential, and which must continue to operate in the event of a strike – including those related to hospitals, schools, security, sanitation, refuse disposal, power, water supply and sanitation, firefighting, mine safety and transport. The classification of these services as essential, recognizes the fact that Debswana's mining operations are located in remote areas and that the company is responsible for the provision of the above services to the communities in those areas, rather than the local authorities. The Government states that prior to the strike, the Debswana company had consistently reminded the employees engaged in essential services, individually and collectively, that they were prohibited from striking and that, furthermore, the company had furnished the BMWU with a list of the names of the employees in essential services, as is required by the agreement.

313. According to the Government, the services deemed essential in the agreement were all, to varying degrees, disrupted during the period of the strike. It adds that the company's management closely monitored the levels of disruptions of services at the mining operations, the findings of which are as follows:

- Hospital services – More than half the complement of nurses and hospital orderlies went on strike, resulting in the unavailability of nursing and laundry services, which in turn compromised public health standards and put the well-being and lives of patients at risk.
- Security services – The absence of security personnel resulted in understaffed checkpoints, thereby compromising controls for the protection of precious stones in terms of both access control and search processes.
- Business services – There were no catering services and attendants at the catering messes to provide meals for critical areas e.g. hospital, apprentice and single-quarter residences.
- Transport services – Available drivers were stretched due to extended driving hours in an effort to transport essential services and production employees who continued to work.
- Water services – The water supply situation was put at risk due to the unavailability of some boreholes which could not be repaired/maintained due to staff unavailability.
- Refuse disposal and sanitation – Landfill sites were not manned, impacting negatively on the environment, and day-to-day refuse collection and disposal operations were disrupted.

314. Debswana therefore instituted disciplinary action against the employees acting in breach of the collective agreement, including the summary dismissal of those employees in essential services who had participated in the strike. In July 2005, almost a year after the strike, the BMWU lodged an appeal in the Industrial Court seeking condonation of the late lodging of its unfair dismissal case in respect of the 461 employees. The matter was partially heard in September 2006, whereas the main action, in which the dismissed employees claim a remedy for unfair dismissal, remains pending.

315. According to the Government about 2,000 employees received final written warnings for having taken part in the illegal strike. The warning was valid for 12 months for those who participated in the strike for seven days or less, and valid for 24 months for those who had participated in the strike for more than seven days. At a relationship-building initiative subsequent to the strike, the BMWU raised serious objections to the 24-month warnings, as they were not provided for in the disciplinary code. As a result of the union's appeal,

Debswana agreed to reduce the period for those warnings to 12 months; at the time of the BFTU's submission of its complaint, these warnings had lapsed.

- 316.** With respect to Mr Chakalisa Masole, in particular, the Government states that he was given a written warning for influencing dismissed employees not to vacate company housing, and that the written warning has since lapsed.
- 317.** As regards the allegation that the Debswana Mining Company is using the courts to weaken the union, the Government states that Debswana had lodged a case for contempt of court against BMWU officers for wilful disobedience of a court order prohibiting the strike, and for inciting employees to go on an illegal strike. Debswana's position in this respect is that the parties must respect and comply with court orders because this not only brings finality to disputes, but also promotes confidence in courts and respect for the laws regulating the relationship between the union and the management. The contempt of court application was dismissed by the Industrial Court on the grounds that the court lacked jurisdiction to issue the order sought by Debswana. The company did not appeal the decision, nor did it pursue contempt proceedings in any other court.
- 318.** As regards the complainant's allegation that Debswana had issued inflammatory statements demeaning workers, the Government replies that during and after the strike the BMWU used the press to campaign against Debswana, and that the language the union had used was inflammatory. In particular, officials of the BMWU made disparaging and defamatory allegations against some members of Debswana management, but the company chose not to take action against the BMWU officials concerned.
- 319.** As concerns the dismissal of four union officials from the BCL Mine, the Government states that, on 9 June 2004, while wage negotiations were being conducted, BMWU officials read out a document prepared by the union that was based on private and confidential information. In spite of several requests, the officials refused to divulge the source of the confidential information in their possession; consequently, the BCL Mine decided to institute disciplinary action against the officials concerned, which culminated in a decision that the officials were guilty of serious misconduct and had acted in breach of their employment contracts. Each of the officials were afforded the opportunity to appeal the penalty of dismissal that was imposed.
- 320.** At appeal hearings concluded in December 2004, the findings of misconduct and the penalty of dismissal were upheld. In April 2005, the Regional Labour Officer mediated the dispute concerning the officials' dismissal, but the parties failed to settle and the dispute was referred to the Industrial Court. Before the Industrial Court, none of the union officials have alleged that their dismissal was due to their position as union officials or to the activities undertaken by them in that capacity. Rather, the argument they had presented before the Industrial Court is that if any offence was committed, it was committed by the BMWU and not by them. Consequently, any penalties should be directed at and borne by the union itself. The Government states that the employer has responded to the statement filed by the union officials and that the parties were awaiting a date for the hearing of the case.
- 321.** With respect to the complainant's allegation concerning the inadequacy of the dispute resolution mechanisms in place, the Government states that the procedures established by the Trade Disputes Act requires a reference of all disputes to statutory mediation, followed by referral to the Industrial Court if the mediation is unsuccessful.
- 322.** As concerns the BFTU's petition requesting that the dismissed workers be reinstated, the Government states that it cannot accede to demands for the reinstatement of officials in circumstances where a dispute concerning their dismissal for misconduct remains pending

before the Industrial Court. Furthermore, the parties involved are independent entities on whom the Government cannot impose any decision; instead they may resort, and indeed have resorted to the applicable procedures in place for settling a dispute.

C. The Committee's conclusions

- 323.** *The Committee notes that the present case involves the following allegations: the dismissal of 461 employees and union members for having engaged in strike action; the dismissal of four union officials; interference by the employer in the union's internal affairs; and the failure of the government to provide adequate dispute resolution procedures and intervene in the dispute between the BMWU and the Debswana Mining Company.*
- 324.** *As concerns the dismissal of 461 employees following a strike that had taken place from 23 August to 6 September 2004, the Committee notes the complainant's statement that, although the strike had been unlawful, the dismissal of 461 – out of a total of 3,900 strike participants – was unfair. The complainant alleges that prior to the strike, the employer had submitted a list of persons employed in essential services, in accordance with the Memorandum of Agreement; however, the list submitted included employees working in departments other than those services categorized as essential in the Memorandum of Agreement, including cleaners and gardeners. The Committee recalls, in this respect, that the right to strike may be restricted or prohibited in essential services in the strict sense of the term – that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 576].*
- 325.** *The Committee observes that, generally speaking, the list in the collective agreement, which goes far beyond the mining sector to cover the provision of services to the community at large, corresponds to its notion of essential services. Although some of the services set out in the agreement, such as those concerning sanitation and transport, fall outside the scope of essential services in the strict sense of the term, the Committee observes that these restrictions on the right to strike are the result of an agreement freely entered into by the two parties. The Committee notes with regret in this regard the Government's indications that, in spite of the collective agreement, the BMWU had incited workers in numerous essential services to go on strike, and that this had a significant impact on the provision of hospital, power and water supply services. The Committee further notes, however, the complainant's allegation that Debswana violated the terms of the collective agreement by submitting a list to the BMWU of employees going beyond those working in essential services within the meaning of section 11 of the collective agreement – including cleaners and gardeners. Noting the Government's indication that the question of the dismissal of the 461 employees is currently before the Industrial Court, the Committee expects that these proceedings will be concluded expeditiously. It requests the Government to keep it informed of the outcome of the judicial proceedings and to ensure that all relevant information is gathered in an independent manner so as to shed light on the situation of these workers and the circumstances surrounding their dismissal. Should it be determined by the court or by the information gathered that any of those dismissed were employed in services other than those categorized as essential within the meaning of the collective agreement, it requests the Government to take the necessary measures to ensure that they are fully reinstated in their previous positions.*
- 326.** *The complainant also alleges that, of those dismissed following the strike, two individuals in particular had been unfairly targeted: Mr Bokopaano Phirinyane, an assistant buyer in the materials department, who was dismissed even though he had been ill and hospitalized for most of the strike period; and Mr Chakalisa Masole, the BMWU branch Secretary at the Orapa–Letlhakane mines, who was charged with influencing employees not to vacate*

company houses between 24 August and 6 September 2004, even though he had been on leave from 16 August to 14 September 2004.

- 327.** *In respect of the charges brought against Mr Chakalisa Masole, the BMWU branch secretary at the Orapa–Letlhakane mines, the Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions [see *Digest*, op. cit., fifth edition, 2006, para. 799]. Noting the Government’s indication that Mr Masole had received a written warning for influencing workers not to vacate company housing, which has since lapsed, the Committee requests the Government to clarify whether Mr Masole has indeed been brought before the courts, as the complainants allege, and to provide full particulars in this regard.*
- 328.** *As regards the dismissal of the other employees, including Mr Phirinyane, the Committee notes that, although the complainant claims their dismissals were unfair, it does not specifically allege that anti-union discrimination – or any violation of freedom of association principles, for that matter – played a part in their dismissals. The Committee is of the opinion, therefore, that this particular allegation calls for no further examination.*
- 329.** *With respect to the dismissal of, and charges brought against, the four union officials from the BCL Mine, the Committee notes the complainant’s allegation that the concerned parties had been targeted on the basis of their status as union officeholders, and of their activities on behalf of the union. The Committee also notes that, according to the Government, the four union officials were dismissed as a result of disciplinary proceedings for serious misconduct and that, before the Industrial Court, none of the union officials had alleged that their dismissal was due to their position as union officials, or to the activities undertaken by them in that capacity. Rather, the argument they had presented before the Industrial Court was that if any offence was committed, it was committed by the BMWU, and not by them. Consequently, any penalties should be directed at, and borne by, the union itself.*
- 330.** *The Committee observes from the information at its disposal that the disciplinary proceedings resulting in the dismissal of the four officials hinged on whether the concerned parties had divulged allegedly confidential information, in breach of their employment contracts. The Committee further notes that the BMWU leadership had commissioned consultants to research the wage structure of the workforce in the BCL Mine in July 2003, which resulted in a report containing the confidential information. This report moreover was used in the negotiations that subsequently took place from 8 to 10 June 2004, in which the company’s management agreed to the union’s proposed salary structure based on the report’s findings, and which resulted in the conclusion of a collective agreement on 13 July 2004.*
- 331.** *According to the complainant, the consultant subsequently confirmed that its information did not come from the union’s officers. The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, and that this protection is particularly desirable in the case of trade union officials because, in order to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate they hold from their trade unions. The Committee further recalls that it has pointed out that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed,*

either during their period of office or for a certain time thereafter except, of course, for a serious misconduct [see *Digest*, op. cit., paras 799 and 804]. In the light of the above principles and the information before it, the Committee queries whether the four BMWU officials were not indeed dismissed for having engaged in legitimate activities in furtherance of their members' interests. Noting that the concerned parties were awaiting a date for the hearing of their case, the Committee expects that the Industrial Court will bear these principles in mind when considering this case, and requests the Government to keep it informed of the outcome and to transmit a copy of the judgements as soon as it is handed down.

- 332.** *As regards the general allegation that the employer had interfered in the internal affairs of the BMWU by favouring one faction over the other, the Committee notes that this allegation is supported only by a letter in which the BMWU accused the Debswana company of favouring the dissident faction. The Committee further observes that this allegation is directly contradicted by the information provided by the Government, according to which the employer maintains that it has observed a policy of non-interference in the BMWU's affairs, and that the employer's actions have been consistently based on the court's determination of legitimacy. The Committee will therefore not proceed with the examination of this matter.*
- 333.** *As regards the allegation that the employer had engaged in litigation to harass and weaken the union, the Committee notes from the information at its disposal that Debswana had lodged a case for contempt of court against BMWU officers for wilful disobedience of a court order prohibiting the strike, and for inciting employees to go on an illegal strike. The case was apparently dismissed for lack of jurisdiction. Debswana was also a party to the case relating to the dismissal of the four union officials at its BCL Mine, an action which commenced when the four concerned individuals appealed their dismissal to the Industrial Court. The Committee observes that apparently both the complainant and the employer had sought recourse to legal action, where available and in furtherance of their respective interests. The Committee therefore considers that this allegation calls for no further examination.*
- 334.** *The Committee takes note of the complainant's allegation that the dispute resolution mechanisms currently in place are inadequate. It notes, nevertheless, that the complainant sets forth no evidence in support of this allegation, and in fact states that mediation between itself and the employer had been resorted to on a number of occasions. Furthermore, noting the Government's statement that mediation and litigation before the Industrial Court are available means of resolution under the Trade Disputes Act, the Committee will not examine this matter further unless additional information is transmitted by the complainant.*
- 335.** *The Committee observes that, although a report on relationship-building initiatives was commissioned by the Debswana company in 2003, it is clear – from the overall facts of the case and the allegations of defamatory remarks made by both sides – that the industrial relations climate within the company remains a tense one. The Committee therefore requests the Government to consider all possible measures aimed at fostering harmonious workplace relations between the BMWU and the Debswana Mining Company. It requests the Government to keep it informed in this regard.*

The Committee's recommendations

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

- (a) *Noting the Government's indication that the question of the dismissal of the 461 employees is currently before the Industrial Court, the Committee expects that these proceedings will be concluded expeditiously. It requests the Government to keep it informed of the outcome of the judicial proceedings and to ensure that all relevant information is gathered in an independent manner so as to shed light on the situation of these workers and the circumstances surrounding their dismissal. Should it be determined by the court or by the information gathered that any of those dismissed were employed in services other than those categorized as essential within the meaning of the collective agreement, it requests the Government to take the necessary measures to ensure that they are fully reinstated in their previous positions.*
- (b) *The Committee requests the Government to clarify whether Mr Masole has indeed been brought before the courts, as the complainants allege, and to provide full particulars in this regard.*
- (c) *As regards the dismissal of the four BMWU officials, the Committee expects that the Industrial Court will bear in mind the principles of freedom of association cited in its conclusions when considering their appeal and requests the Government to keep it informed of the outcome and to transmit a copy of the judgement as soon as it is handed down.*
- (d) *The Committee requests the Government to consider all possible measures aimed at ameliorating the industrial relations climate in the Debswana Mining Company. It requests the Government to keep it informed in this regard.*

Annex

Excerpt from the 24 February 2000 Memorandum of Agreement between the BMWU and the Debswana Mining Company

11. Industrial action

11.1 The Company and the Union agree not to cause, countenance or support any lockouts, strikes, restrictive practices or industrial action of any kind until the matter or matters in dispute have been dealt with in accordance with the procedures as stipulated under this Agreement, under the Trades Disputes Act of 1982, as may be amended, from time to time or any other relevant legislation.

11.2 The Union agrees that services essential for the maintenance of safety, security and health will, in the event of a strike, continue to be performed. The Company agrees to use employees during the strike who are employed on such services only for their normal defined routine duties.

11.3 Essential services for this purpose include those operations relating to:

- i. Hospital, Clinics and First Aid Station
- ii. Sanitation and Refuse Disposal System
- iii. Power Supply and Reticulation
- iv. Water Supply and Purification Plant

- v. Schools
 - vi. Fire Team Members
 - vii. Security
 - viii. Mine Safety
 - ix. Transport Staff in respect of the above services
- 11.4 The Union agrees that it will not interfere with the orderly shut down of the operation in the event of strike action. The Company agrees, in the event of a strike, to provide the Union with the names of all those employees required to work on essential services and will specify the length of time that the employee will be required to work.

CASE NO. 2523

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

**Complaint against the Government of Brazil
presented by
the National Association of Higher Education
Teachers (ANDES-SINDICATO NACIONAL)**

*Allegations: the complainant alleges that:
(i) numerous trade union officials have been dismissed; (ii) the offence of anti-union acts is not recognized in legislation, and there is therefore no protection mechanism to avoid discrimination against workers on the grounds of their membership of an organization; and (iii) the limited scope of the benefits of legal protection – through job security – afforded to officials of workers’ representative organizations has proved to be insufficient to fulfil the purpose of guaranteeing freedom of association*

- 337.** The complaint in this case is contained in communications from the National Association of Higher Education Teachers (ANDES-SINDICATO NACIONAL) dated 11 and 19 October 2006. In a communication dated 20 December 2006, ANDES-SINDICATO NACIONAL sent additional information.
- 338.** The Government sent its observations in a communication dated 8 March 2007.
- 339.** Brazil has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

340. In its communications of 11 and 19 October and 22 December 2006, ANDES-SINDICATO NACIONAL alleges that the Government has not taken measures to combat the anti-union behaviour repeatedly employed by private higher education institutions (PHEIs), including acts of intimidation and the dismissal of officials of organizations representing teachers. ANDES-SINDICATO NACIONAL states that, in the last two decades, there has been a significant increase in the number of PHEIs in the country. This has given rise to an increase in competition between faculties, university centres and private universities, leading to the adoption, by private universities, of policies intended to increase profits at the expense of ensuring the quality of education and of the professionals involved. Against this background, the PHEIs have attempted to reduce their labour costs and have consequently obstructed the autonomous organization of teachers into representative bodies, given that the creation of such bodies could make it difficult to apply employment conditions unilaterally. Interference by management in these teachers' trade union activities takes the form of explicit prohibitions, veiled threats and, in the vast majority of cases, the dismissal of trade union officials.

341. Specifically, ANDES-SINDICATO NACIONAL cites the following acts of anti-union discrimination:

- Triangulo Mineiro University Centre (UNIT). In March 2001, the teachers at this centre decided to form the Association of UNIT Teachers (SINDUNIT) – a branch of ANDES-SINDICATO NACIONAL – and in August the same year, UNIT dismissed ten members of the SINDUNIT executive committee;
- Methodist University of Piracicaba (UNIMEP). The seven members of the Council of Representatives of the Trade Union Branch of Teachers at the UNIMEP have recently been dismissed;
- Catholic University of Brasilia. In November 2005, eight teachers at the University formed a body named the Trade Union Cultural Association of Teachers at the Catholic University of Brasilia (ADUCB-Sección Sindical). On 18 November, the teachers in question informed the university rector's office of this fact. On 9 December 2005, all the teachers who had participated in the formation of ADUCB-Sección Sindical were dismissed. This has caused intimidation among the remaining teaching staff at the institution;
- Ipojuca Valley Faculty. In 2003, a number of teachers formed the Trade Union Branch of Teachers at Ipojuca Valley Faculty (SINDFAVIP). Following the trade union organization's general assembly, on 5 February 2004, the faculty authorities expressly forbade, in writing, any collective activity being undertaken by the trade union body on its premises and, in July, two SINDFAVIP union officials were dismissed;
- Caldas Novas Faculty, Goiás State. In 2004, all the executive members of the Trade Union Branch of Teachers at Caldas Novas Faculty (SINDUNICALDAS) were dismissed.

342. ANDES-SINDICATO NACIONAL states that, despite successive and notorious anti-union acts within the PHEI system, the State has not taken the necessary measures to counter this scourge. ANDES-SINDICATO NACIONAL adds that, although workers and trade union organizations have submitted complaints through the public administration, the competent authorities have not taken action to monitor or prohibit the practice of discriminatory behaviour present in the PHEIs, be it in the interior of the country or in metropolitan areas. The complainant declares that the offence of anti-union acts is not

recognized in legislation, and that there is therefore no protection mechanism to avoid discrimination against workers on the grounds of their membership of an organization. Furthermore, the legal protection afforded to officials of workers' representative organizations – through job security – has proved to be insufficient to fulfil the purpose of guaranteeing freedom of association. According to the complainant, this can be seen in the interpretation that the judicial authority places upon article 8, section VIII of the Federal Constitution, and section 543.3 and 522 of the Consolidated Labour Acts, limiting security to a certain number of union officials (a maximum of 20 members), irrespective of the size and structure of the trade union organization.

- 343.** This restrictive interpretation complicates the functioning of trade union organizations which, like ANDES-SINDICATO NACIONAL, represent a particular category over a wide geographical area and, as a result, need a decentralized management system to function effectively across all workplaces. ANDES-SINDICATO NACIONAL represents teachers in public and private higher education institutions throughout the country and is organized into trade union branches based in faculties, university centres and universities. The above interpretation impedes the extension of the right to security to branch officials carrying out activities directly in workplaces, who are therefore subject to interference and pressure from management.
- 344.** The complainant claims that the State's failure to address anti-union practices can only be rectified if the dismissed teachers are reinstated in their posts. Employers simply paying damages or being subject to any other penalty will not make amends for the violations of freedom of association arising from discriminatory behaviour. If such behaviour persists, the balance between the social partners will be placed in jeopardy.

B. The Government's reply

- 345.** In its communication of 8 March 2007, the Government states that, under current legislation, the Ministry of Labour and Employment does not have the power to take punitive measures against individuals, enterprises or trade unions accused of anti-union practices. This is the responsibility of the judicial authority. The Government adds that, even though it does not have the power to act, it requested information from the Regional Labour Delegations for the Federal District and Goiás and the Regional Labour Subdelegation for Caruaru-Pe, with the aim of ascertaining the true nature of the circumstances which formed the subject of the complaints. In this regard, the Government states that:
- the Regional Labour Delegation for the Federal District has reported that it has no record of any complaint regarding alleged anti-union practices by the Catholic University of Brasilia submitted by either a trade union organization or an official affected;
 - the Regional Labour Delegation for Goiás has stated that no request for mediation in the dispute between the parties in question has been submitted and that, in the course of various inspections carried out at the Caldas Novas Faculty, several irregularities were identified with respect to employee registration and delays in payment of salaries. Four infringement proceedings were brought against the institution in that regard;
 - the Regional Labour Subdelegation for Caruaru-Pe has stated that: (1) neither ANDES-SINDICATO NACIONAL, nor the SINDFAVIP, nor any teacher, has formally requested mediation between SINDFAVIP and the Ipojuca Valley Faculty in relation to alleged anti-union practices on the part of the Faculty; (2) on 22 July, the Subdelegation received a report from SINDFAVIP which stated that the Faculty in

question was to dismiss two of its officials, Mr José Luciano Albino Barbosa and Ms Nadine Agra; (3) as a result of official authorization of the terms for cancelling the employment contracts of the officials in question, the Faculty was invited to explain itself in that respect. The institution declared that the teachers in question did not enjoy the security provided for in law and, faced with this controversy, the Subdelegation refused to authorize the terms of cancellation. The parties decided to bring the dispute before the judicial authority; and (4) the judicial authority found that the individuals in question did not enjoy the right to trade union security, given that it is not possible, under the provisions of the legal system, to form trade unions whose jurisdiction – geographical area of activity – is smaller than a municipality nor to form a trade union at enterprise level.

346. The Government states that, although it does not have the power to take action against anti-union practices, the Ministry of Labour and Employment has attempted to address these complaints, as a special case, and has tried to resolve the disputes within the bounds of the actions open to it. The Government states that, in an attempt to overcome its lack of legal competence, the Ministry of Labour and Employment, together with workers' and employers' representatives, has, within the National Labour Forum, prepared a proposal for trade union reform which includes, among other things, a definition of anti-union acts and the possibility of the administrative authorities imposing penalties. The proposal for reform is currently before the National Congress.

347. Lastly, the Government states that, in accordance with the provisions of the internal legal system, trade union organizations acquire the prerogative to represent professional or economic categories once they have been registered with the competent body under the Federal Constitution and only legitimate representation can support the inherent constitutional rights of trade unions, such as security for officials. In its capacity as the body recognized by the judicial authority as competent to grant trade union registration, the Ministry of Labour and Employment maintains the National Register of Trade Union Bodies, for the purpose of monitoring the single trade union system and registering trade union organizations. In this regard, according to existing data held in the Register, none of the organizations mentioned by ANDES-SINDICATO NACIONAL are registered as trade unions.

C. The Committee's conclusions

348. *The Committee observes that the complainant alleges that numerous trade union officials have been dismissed and that, although workers and trade union organizations have submitted complaints through the public administration, the competent authorities have not taken action to monitor or prohibit the practice of discriminatory behaviour present in the PHEIs, be it in the interior of the country or in metropolitan areas. Specifically, ANDES-SINDICATO NACIONAL alleges: (1) that trade union officials – in some cases the entire executive committee – have been dismissed at various private education institutions in Brazil (the UNIT, the UNIMEP, the Catholic University of Brasilia, the Ipojuca Valley Faculty and the Caldas Novas Faculty); (2) that the offence of anti-union acts is not recognized in legislation, and that there is therefore no protection mechanism to avoid discrimination against workers on the grounds of their membership of an organization; and (3) that the limited scope of the benefits of legal protection – through job security – afforded to officials of workers' representative organizations has proved to be insufficient to fulfil the purpose of guaranteeing freedom of association (according to the complainant, the Supreme Federal Tribunal has interpreted legislation to mean that only a maximum of 20 officials should enjoy job security, irrespective of the size and structure of the trade union body).*

349. *With regard to the alleged dismissal of two union officials of the SINDFAVIP in July 2004, the Committee takes note of the Government's statement that the Regional Labour Subdelegation for Caruaru-Pe has stated that: (1) neither ANDES-SINDICATO NACIONAL, nor the SINDFAVIP, nor any teacher, has formally requested mediation between SINDFAVIP and the Ipojuca Valley Faculty in relation to alleged anti-union practices on the part of the Faculty; (2) on 22 July, the Subdelegation received a report from SINDFAVIP which stated that the Faculty in question was to dismiss two of its officials, Mr José Luciano Albino Barbosa and Ms Nadine Agra; (3) with regard to the process of officially authorizing the terms for cancelling the employment contracts of the officials in question, the administrative authority invited the Faculty to explain itself in that respect. The institution declared that the teachers in question did not enjoy the trade union immunity provided for in law and, faced with this controversy, the Subdelegation refused to authorize the terms of cancellation; and (4) the parties decided to bring the dispute before the judicial authority. The judicial authority found that the individuals in question did not enjoy the right to trade union immunity, given that it is not possible, under the provisions of the legal system, to form trade unions whose jurisdiction is smaller than a municipality nor to form a trade union at enterprise level.*
350. *In this regard, observing that the judicial authority has not denied that the dismissed employees were officials of the SINDFAVIP but has limited itself to stating that they did not enjoy union protection or immunity, given that it is not possible to form trade unions whose jurisdiction is smaller than a municipality nor to form a trade union at enterprise level, the Committee wishes to underline that "the free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions and that workers should be free to decide whether they prefer to establish, at the primary level, a works union or another form of basic organization, such as an industrial or craft union" [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 333 and 334]. Furthermore, the Committee recalls that, in its examination of a case involving Brazil, it stated that "the provisions of a national constitution concerning the prohibition of creating more than one trade union for a given occupational or economic category of workers, regardless of the level of organization, in a given territorial area which, in no case, may be smaller than a municipality are not compatible with the principles of freedom of association" [see 265th Report, Case No. 1487, para. 374(c)]. In these circumstances, the Committee requests the Government: (i) to take the necessary steps to amend the legislation so as to allow workers to form trade union organizations at the enterprise level, if they so wish; and (ii) having regard to the national context and the specific circumstances of this case, in particular the fact that the SINDFAVIP union officials were dismissed under legislation which is not in conformity with the principles of freedom of association, to take steps to have them reinstated. The Committee requests the Government to keep it informed in this regard.*
351. *With regard to the allegations concerning the dismissal, on 9 December 2005, of all the teachers who had participated in the creation of the ADUCB-Sección Sindical and the dismissal, in 2004, of all the executive members of the SINDUNICALDAS, the Committee takes note of the Government's statement that: (1) the Regional Labour Delegation for the Federal District has reported that it has no record of any complaint regarding alleged anti-union practices by the Catholic University of Brasilia submitted by either a trade union organization or an official affected; and (2) the Regional Labour Delegation for Goiás has stated that no request for mediation in the dispute between the parties in question has been submitted in respect of the allegations made and that penalties were imposed on the enterprise for other irregularities. In this regard, the Committee observes that, although complaints have not been submitted to the administrative authorities or the judicial authority in respect of these dismissals, the complainant has submitted with its complaint the termination of contract forms used by the Catholic University of Brasilia, from which it emerges that, in order to dismiss officials of the ADUCB-Sección Sindical,*

reasons “of an administrative nature” were cited. Furthermore, taking into account the judicial ruling under which trade union immunity was not granted to union officials at another education institution because they belonged to an enterprise union which, by law, cannot exist, the Committee cannot exclude the possibility that the officials affected therefore decided not to turn to the labour or judicial authorities. The Committee recalls that “one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures, and that this protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions; the Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers’ organizations shall have the right to elect their representatives in full freedom” [see *Digest*, op. cit., para. 799]. In these circumstances, the Committee requests the Government to take measures without delay to hold an investigation to determine the motives and specific facts behind the dismissal of officials of the ADUCB-Sección Sindical and the SINDUNICALDAS and, if it is established that they were dismissed for carrying out legitimate trade union activities, that it take steps, having regard to the national context and the specific circumstances of this case, to have them reinstated in their posts. The Committee requests the Government to keep it informed in this regard.

- 352.** *With regard to the allegations concerning the dismissal of ten members of the executive committee of the SINDUNIT – a branch of ANDES-SINDICATO NACIONAL – and the seven members of the Council of Representatives of the Trade Union Branch of Teachers at the UNIMEP, the Committee observes that the Government has not sent its observations on this matter. The Committee requests the Government to take measures without delay to hold an investigation to determine the motives and specific facts behind the dismissal of these officials and, if it is established that they were dismissed for carrying out legitimate trade union activities, that it take steps, having regard to the national context and the specific circumstances of this case, to have them reinstated in their posts. The Committee requests the Government to keep it informed in this regard.*
- 353.** *With regard to the allegation that national legislation does not recognize the offence of anti-union acts against union members, and that there is therefore no protection mechanism to avoid discrimination against workers on the grounds of their membership of an organization, the Committee takes note of the Government’s statement that: (1) although it does not have the power to take action against anti-union practices, the Ministry of Labour and Employment has attempted to address these complaints, as a special case, and has tried to resolve the disputes within the bounds of the actions open to it; and (2) in an attempt to overcome its lack of legal competence, the Ministry of Labour and Employment, together with workers’ and employers’ representatives, has, within the National Labour Forum, prepared a proposal for trade union reform which includes, among other things, a definition of anti-union acts and the possibility of the administrative authorities imposing penalties. The proposal for reform is currently before the National Congress. The Committee requests the Government to take measures to modify the legislation so as to bring it into conformity with freedom of association principles and to keep it informed of developments in the legal passage of the aforementioned proposal for trade union reform. Furthermore, the Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so wishes.*
- 354.** *With regard to the allegation concerning the limited scope of the benefits of legal protection – through job security – afforded to officials of workers’ representative organizations (according to the complainant, the Supreme Federal Tribunal has ruled,*

through jurisprudence, that, even irrespective of the size and structure of a trade union body, trade union immunity cannot be granted to more than 20 officials; see the ten provisions of section 522 of the Consolidated Labour Acts and supplementary provisions), the Committee observes that the Government has not sent its observations on this matter. The Committee observes that section 522 of the Consolidated Labour Acts lays down that the administration of a trade union shall be carried out by an executive comprising a maximum of seven and a consultative council composed of a minimum of three members, both bodies being elected by the general assembly. In this regard, bearing in mind that the complainant is a national organization, the Committee requests the Government to bring the parties together to hold further discussions on this matter.

The Committee's recommendations

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

- (a) The Committee requests the Government: (i) to take the necessary steps to amend the legislation so as to allow workers to form trade union organizations at the enterprise level, if they so wish; and (ii) having regard to the national context and the specific circumstances of this case, to take steps to have the two officials of SINDFAVIP reinstated. The Committee requests the Government to keep it informed in this regard.**
- (b) With regard to the allegations concerning the dismissal, on 9 December 2005, of all the teachers who had participated in the creation of the ADUCB-Sección Sindical and the dismissal, in 2004, of all the executive members of the SINDUNICALDAS, the Committee requests the Government to take measures without delay to hold an investigation to determine the motives and specific facts behind the dismissal of the officials in question and, if it is established that they were dismissed for carrying out legitimate trade union activities, that it take steps, having regard to the national context and the specific circumstances of this case, to have them reinstated in their posts. The Committee requests the Government to keep it informed in this regard.**
- (c) With regard to the allegations concerning the dismissal of ten members of the executive committee of the SINDUNIT – a branch of ANDES-SINDICATO NACIONAL – and the seven members of the Council of Representatives of the Trade Union Branch of Teachers at the UNIMEP, the Committee requests the Government to take measures without delay to hold an investigation to determine the motives and specific facts behind the dismissal of these officials and, if it is established that they were dismissed for carrying out legitimate trade union activities, that it take steps, having regard to the national context and the specific circumstances of this case, to have them reinstated in their posts. The Committee requests the Government to keep it informed in this regard.**
- (d) With regard to the allegation that national legislation does not recognize the offence of anti-union acts against union members, and that there is therefore no protection mechanism to avoid discrimination against workers on the grounds of their membership of an organization, the Committee requests the Government to take measures to amend the legislation so as to**

bring it into conformity with freedom of association principles and to keep it informed of developments in the legal passage of the proposal for trade union reform to which the Government refers and which covers this issue. Moreover, the Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so wishes.

- (e) *With regard to the allegation concerning the limited scope of the benefits of legal protection – through job security – afforded to officials of workers’ representative organizations, the Committee, bearing in mind that the complainant is a national organization, requests the Government to bring the parties together to hold further discussions on this matter.*

CASE NO. 2318

INTERIM REPORT

**Complaint against the Government of Cambodia
presented by
the International Trade Union Confederation (ITUC)**

Allegations: The murder of two trade union leaders; the continuing repression of trade unionists in Cambodia

- 356.** The Committee last examined this case on its merits at its June 2006 session, where it issued an interim report, approved by the Governing Body at its 296th Session [see 342nd Report, paras 235–256].
- 357.** The complainant submitted additional information in support of its allegations in communications dated 3 October 2006 and 30 January and 27 April 2007.
- 358.** The Government provided its observations in communications dated 17 October 2006 and 2 March 2007.
- 359.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers’ Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

- 360.** In its previous examination of the case, the Committee made the following recommendations [see 342nd Report, para. 256]:
- (a) The Committee deplores the absence of reply from the Government to its previous recommendations and urges it to be more cooperative in the future.
 - (b) The Committee emphasizes once again the seriousness of the allegations pending which refer to the murder of trade union leaders Chea Vichea and Ros Sovannareth. The Committee deeply deplores these events and draws the Government’s attention to the fact that such a climate of violence leading to the death of trade union leaders is a serious obstacle to the exercise of trade union rights.

- (c) The Committee firmly urges the Government to take measures in order to reopen the investigation into the murder of Chea Vichea and to ensure that no one is deprived of their liberty without the benefit of a normal procedure before an impartial and independent judicial authority.
- (d) The Committee urges the Government to institute immediately an independent judicial inquiry into the murder of Ros Sovannareth and to keep it informed of the outcome.
- (e) With regard to the reported agreement on no future marches in which Chea Mony and his fellow representative of the FTUWKC were forced to promise to make garment workers stop the strike and refrain from further marches, the Committee expects that the Government will declare this agreement null and void and requests the Government to ensure in the future the right of workers to peaceful demonstration to defend their occupational interests.
- (f) With regard to the physical assaults that particularly concern Lay Sophead and Pul Sopheak, both presidents of unions affiliated to the FTUWKC, the Committee urges the Government to institute independent judicial inquiries into these assaults and to keep it informed of the outcome.
- (g) The Committee firmly urges the Government to take measures to ensure that the trade union rights of workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives.
- (h) The Committee expresses its deep concern with the extreme seriousness of the case, and calls the Governing Body's special attention on the situation.

B. The complainant's new allegations

361. In its communication of 3 October 2006, the complainant, ITUC (formerly the International Confederation of Free Trade Unions (ICFTU)), deplores the absence of any initiative by the Government to reopen the investigation into the murder of Chea Vichea and to conduct an independent inquiry into the killing of Ros Sovannareth, stating that the failure to carry out an investigation aimed at discovering the true perpetrators of these acts only adds to the climate of impunity and sends a strong message to workers and trade unionists in Cambodia that trade union membership and trade union activism puts their safety and lives at risk.

Additional information in respect of the Chea Vichea case

362. With respect to Born Samnang, who along with Sok Sam Oeun was given a 20-year prison sentence in the case of Chea Vichea's murder despite proceedings marked, as the complainant had previously alleged, by numerous procedural irregularities in the investigation and prosecution phases, the complainant states that additional information obtained by its researcher in a 2 August 2006 interview with Born Samnang's mother, Noun Kim Sry, provides further support of his innocence. According to Noun Kim Sry, the police had beaten her son to make him confess that he killed Chea Vichea, whom he did not even know. Noun Kim Sry states that Born Samnang had told her that the police were pushing him to say that he was the killer of Chea Vichea and had told him that his girlfriend was also in jail, and that his mother had declared in public that he was no longer her son. Noun Kim Sry adds that, according to her son, two important policemen spoke with him and threatened to severely beat him if he refused to put his fingerprint on a letter they were going to give him. The police then beat him again before forcing his fingerprint onto the letter; soon after, he was presented to the media as one of the murderers of Chea Vichea. The complainant alleges that Noun Kim Sry remains greatly concerned for her son's health and visits him regularly in prison. She pays the wardens extra money to

provide him with food on account of his weakened state. A copy of Noun Kim Sry's statement is attached to the communication.

- 363.** According to the complainant, on the day of Chea Vichea's murder, Born Samnang was celebrating the Chinese New Year 60 kilometres away from where the murder took place. In spite of this strong alibi, the authorities refused to consider witnesses' accounts of Born Samnang's whereabouts on the day of the murder, even though they had made their observations public.
- 364.** Further to its previous allegations respecting Va Sothy, the owner of the newspaper stand where Chea Vichea was murdered, who could identify the real murderers but was too afraid to attend the trial, the complainant states that she fled the country and, on 10 August 2006, submitted a four-page statement on the killing of Chea Vichea, certified by a notarial services attorney and member of the Law Society of Thailand, Mr Nol Sunghondhabirom; a copy of her testimony translated into English is attached to the complainant's communication.
- 365.** Ms Va Sothy describes in her testimony how Chea Vichea was reading a newspaper at her stand when two men on a motorbike stopped in front of her stand. The man at the back of the motorbike came towards the stand and the other drove slowly to the north. After about 20 minutes of reading and looking around, suddenly the man faced Chea Vichea. Va Sothy states that she then heard three loud gunshots fired very close to her and saw Chea Vichea fall to the ground; she also describes seeing the shooter then put a black pistol into his trouser pocket and calmly walk away, heading northwards. In her statement Va Sothy gives a description of the murderer, the motorbike and the motorbike driver.
- 366.** She testifies that she had initially been afraid of being killed as a witness, and therefore gave a false description of the motorbike, denied remembering the face of the killer, and did not confirm the sketch of the killer shown to her by the police. She also called Mr Heng Pov, the police official in charge of the investigation, to ask him how the sketch shown to her could be based on eyewitness accounts, as she had been the only witness and did not remember the shooter's face. She was then informed that the police had arrested two persons for Chea Vichea's murder; upon seeing their faces on television, Va Sothy states that she realized that they were not the actual murderers, whose faces she could clearly recall.
- 367.** One month after the shooting, Chea Vichea's murderer returned to her news-stand again, which frightened Va Sothy deeply. She states that she feared, given that fake murderers were in prison while the real murderers went unpunished, that she would be killed if she continued to live in Cambodia and would never have the opportunity to tell the truth about the murder of Chea Vichea. She decided, therefore, to leave Cambodia.
- 368.** The complainant alleges that the two testimonies confirm the direct involvement of the authorities in ensuring that two innocent men were convicted for Chea Vichea's murder. Both independently testify to the role of the police in pressuring the two to confess to the crime. Heng Pov, the Phnom Penh police chief at the time of the murder, has since left Cambodia. In an interview published in the 18 August 2006 issue of the Belgian weekly magazine "Le Vif/L'Express", Heng Pov confirms his direct involvement in Chea Vichea's case. In the interview, Heng Pov confirms that pressure was put on innocent men to confess to the murder, and is quoted in the article as stating that it did not take him long to realize that Born Samnang and Sok Sam Oeun had nothing to do with the murder. However, Heng Pov denies his own responsibility in exerting this pressure, indicating that it came from persons highly placed in the military hierarchy. A copy of the magazine interview is attached to the complainant's communication.

369. These testimonies, the complainant states, point to the direct responsibility of the Government in hiding the true course of events and preventing the murderer of Chea Vichea and those who instigated his killing from being found and held accountable. This, in turn, has created an atmosphere of great insecurity among trade unionists in Cambodia.

Violence, threats of violence, and arrests

370. The complainant alleges that, since its last submission in September 2005, it has received additional news with respect to the continued repression of trade unionists, in particular the following information:

- On 4 July 2006, Mr Lay Chhamroeun, Vice-President of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC) at the Phnom Penh garment factory, was shot in his left leg by an unidentified person in front of the Kung Hong factory. The FTUWKC considers this to be a failed attempt to murder Lay Chhamroeun so as to intimidate and instil fear in trade unionists. No investigation was launched into this incident.
- As of July 2006, FTUWKC activists Chi Samon, Yeng Vann Yuth, Out Nun, Top Savy and Lem Samrith, who work in the Bright Sky factories located in Tra Paing Kkhleung, Sangkat Chaum Chao, Khan Dang Kor and Phnom Penh, were all subject to beatings. On 3 May 2006, Mr Chi Samon, who had been elected President of the FTUWKC branch of the Bright Sky garment factory, was attacked by seven persons 30 metres from the factory while walking home from his night shift. He sustained serious head injuries, as well as injury to his arms and legs and was taken to hospital by friends; the FTUWKC believes this was an attempt to murder him. Mr Yeng Van Yuth, a co-worker of Mr Chi Samon, was attacked on 12 May and was taken to an unknown clinic by the factory staff for head and rib injuries. Mr Chi states that he recognized one of the attackers as Mr Rot, a member of the rival trade union CUF, and believes that Mr Yuth was attacked because the assailants mistook Mr Yuth for him. Mr Chi reported the attack to the police and gave the names of his attackers to the local police authority and the Phnom Penh court, but to the best of the union's knowledge no investigation had started. On the morning of 22 May 2006, Mr Chi Samon received another death threat; when leaving the factory he found 20 people waiting for him and so returned to the factory and waited until 7 a.m. before leaving. Chi Samon states that he is being followed and watched all the time, and that he fears for the safety of his family and friends.
- The FTUWKC union affiliate in the Bright Sky garment factory wished to hold elections on 20 May 2006. However, the CUF threatened the 15 candidates for office, and 14 of them subsequently withdrew their candidacy. The CUF had been the only trade union recognized by the company; however, the FTUWKC affiliate claims 2,000 members registered with the authorities and are now recognized by the company.
- On 19 May 2006, Mr Chey Rithy, Vice-President of the Free Trade Union of the Suntex garment factory, was attacked by two unidentified men. The Suntex garment factory is adjacent to the Bright Sky factory and owned by the same proprietor. Chey Rithy's attackers threw stones at his head while he was riding his motorbike home from work, causing him to sustain head wounds.
- On 8 June 2006, Mr Lem Samrith, Treasurer of the FTUWKC branch in the Bright Sky garment factory, was beaten by a group of men.

- On 19 September 2006, Mr Choy Chin, Secretary-General of the Suntex union, was attacked by two unidentified men who threw stones at him and beat him with a metal pipe on his head and hands.

371. The complainant states that it has received different reports with respect to the potential identities of the attackers. Some sources suspect that the assaults took place with the consent of the management, whereas others confirm that the company paid Mr Chi Samon's medical costs and granted him passage through the main gate of the adjacent Suntex factory when his safety so required. According to the complainant, the involvement of the rival CUF union and the degree to which their actions were condoned or encouraged by the authorities and/or management is unclear. The FTUWKC had reported each of the assaults to the authorities, but thus far no investigations into any of the incidents had been initiated.

372. The complainant alleges that there were numerous instances where violence was used against workers on strike. On 3 July 2006, the authorities of Kandal Province arrested Ms Lach Sambo, Ms Yeom Khun and Mr Sal Koem San at their homes. All three are activists of the Free Trade Union of Workers of the Genuine Garment Factory (FTUWGGF), which is an FTUWKC affiliate in the Genuine factory situated in Veal Village, Angsnouri district, Kandal Province. The three activists were accused of "illegal detention of workers". Their arrest took place after the Genuine Garment Factory workers had been on strike for nine days; the strikers are accused of having blocked the gate to prevent workers willing to work from going in and out of the factory.

373. According to the complainant, the FTUWGGF denies these accusations and maintains that it had only locked the main gate to prevent trucks with goods from leaving the factory. Workers and management were free to go in and out of the factory through the other gates. The union had tried to come to an agreement with the management to get permission to check outgoing trucks, to be sure that goods would not be transported outside the factory to be processed elsewhere. The management had initially agreed but then refused to implement the agreement. The complainant alleges that the strike was commenced in response to the dismissal of Ms Lach Sambo and three of her colleagues on 23 June 2005. After an earlier strike, in August 2004, eight trade unionists, among them Lach Sambo, Yeom Khun and Sal Koem San, were accused of damaging the company's property. The trade unionists' cases were heard on 20 June 2006 and they were sentenced to five months' imprisonment. They appealed their convictions, but were nevertheless dismissed from their jobs. On 7 August 2006, Lach Sambo, Yeom Khun and Sal Koem San were released from custody, but not reinstated in their jobs, even though the union had requested the reinstatement of all dismissed union officials and activists.

374. In its second communication, dated 30 January 2007, the complainant states that the appeal hearings for Born Samnang and Sok Sam Oeun were scheduled for 6 October 2006. Despite the fact that new information potentially indicative of Born Samnang and Sok Sam Oeun's innocence was made public, in October 2006, the hearing was postponed due to the health of the judge, who was allegedly suffering from diarrhoea. The appeal hearing has not been rescheduled since.

375. According to the complainant, all new and important evidence – including the sworn statement of the eyewitness, Va Sothy, and the interview with former police chief, Heng Pov, attached to its 3 October 2006 communication – was submitted to the court before 6 October 2006. The complainant expresses its grave concern that the hearings have yet to be rescheduled, despite this important new evidence, and that a new investigation into Chea Vichea's murder has not been initiated. The complainant alleges that the Cambodian justice system lacks either the commitment or the ability to carry out a serious

investigation and ensure a fair trial for alleged suspects, leading to an atmosphere of great insecurity amongst trade unionists in Cambodia.

- 376.** The complainant indicates that it is constantly informed of trade union rights violations in Cambodia. Most recently, it had been informed of the existence of a blacklist comprised of at least 17 trade unionists, which prevents the said unionists from obtaining employment.
- 377.** In a communication dated 27 April 2007, the ITUC expresses the great sadness and anger with which it witnessed the murder of yet another trade unionist in Cambodia, Mr Hy Vuthy. Hy Vuthy was a trade union leader for the FTUWKC at the Suntex garment factory. Mr Hy Vuthy had received a death threat three months earlier in connection with his trade union activities.
- 378.** On 20 February 2007, Hy Vuthy wrote a letter to the Suntex garment factory management in order to obtain a day off for the workers in connection with the celebration of the Khmer New Year. The FTUWKC had indicated that the very next day he was approached by two angry members of a rival union who condemned his request and, three days later, on 24 February 2007, he was shot down. He was shot three times by two unidentified assailants on a motorcycle on his way home from work at 5.15 a.m., only 1.5 kilometres away from the factory. Police have ruled out that it was a robbery since Hy Vuthy's motorbike was not stolen by the perpetrators. The murder in fact carried many similarities to the ones committed against FTUWKC leaders Chea Vichea and Ros Sovannareth.
- 379.** In a protest letter to Cambodian Prime Minister Hun Sen on 26 February 2007, the ITUC reminded him that the impunity enjoyed by the murderers of Chea Vichea helps maintain a climate of intimidation and fear amongst trade union activists and impairs confidence in the Cambodian justice system. It added that, unfortunately, it also seems to invite further killings of opponents. The ITUC recalled that violent attacks on FTUWKC trade unionists have already occurred many times at Suntex and another factory owned by the Singaporean garment manufacturer Ocean Sky, Bright Sky.
- 380.** On 12 April 2007, the ITUC once more wrote to Cambodian Prime Minister Hun Sen, this time to express its profound dismay at the confirmation by the Cambodian Appeals Court of the sentencing of two innocent men, Mr Born Samnang and Mr Sok Sam Oeun, to 20 years' imprisonment for the murder of trade union leader Chea Vichea. The Cambodian authorities were well aware of the fact that a key eyewitness to the killing (Ms Va Sothy, newspaper vendor at the news-stand where Chea Vichea was shot) and the senior police official overseeing the investigation (Mr Heng Pov, at that time chief of the Phnom Penh police, who later on had to leave Cambodia) had both clearly and unequivocally testified that the two men were not responsible for the murder. Despite this, and the fact that both Mr Born and Mr Sok had strong and credible alibis for the time of the killing, no real attempt was ever made by the Cambodian authorities to properly investigate the crime and bring the real perpetrator(s) of this vicious crime to justice.
- 381.** This ruling by the Court of Appeal threw into further disrepute the independence of the judiciary in Cambodia, and reinforced the climate of impunity which exists in the country. The ITUC lamented that violent attacks against trade unionists, along with intimidation and harassment, have apparently become commonplace, and that unfortunately the Government appears to at best tolerate these abuses.
- 382.** The ITUC called upon Prime Minister Hun Sen to immediately take steps to ensure that genuine justice is done in this case. It demanded that the two innocent men be released from prison, and their safety guaranteed. It also called on the Government to ensure that full and proper investigations into this murder and other murders, such as the killing of

Mr Hy Vuthy, be conducted without delay, and that Cambodia complies in full with its obligations under international law to ensure respect for trade union and human rights.

- 383.** In the light of these events, the ITUC suggests that the ILO consider sending its own mission to Cambodia to investigate these matters in an objective and impartial manner and make any recommendations it deems necessary.

C. The Government's reply

- 384.** In a communication dated 17 October 2006, the Government states that it is following up on matters respecting the case's allegations and would inform the Committee accordingly. In its communication of 2 March 2007, the Government indicates that it continues to follow up on the matters concerning the case, and that the case of Born Samnang and Sok Sam Oeun has yet to be heard by the Court of Appeal.

D. The Committee's conclusions

- 385.** *The Committee is compelled, once again, to express its deep concern and regret at the seriousness of this case that concerns the assassination of trade union leaders, Chea Vichea and Ros Sovannareth. The Committee deeply deplores these events and once again draws the Government's attention to the fact that a climate of violence leading to the death of trade union leaders is a serious obstacle to the exercise of trade union rights.*
- 386.** *The Committee notes with deep concern the complainant's allegations contained in its 3 October 2006 and 27 April 2007 communications, according to which additional information – namely the statements made by Born Samnang's mother, Noun Kim Sry; Va Sothy, the owner of the newspaper stand by which Chea Vichea was murdered; and Heng Pov, the former chief of police in Phnom Penh – has arisen that lends further support to the innocence of Born Samnang and Sok Sam Oeun, the two men convicted and imprisoned for the murder of Chea Vichea.*
- 387.** *According to the complainant, although the above information had been submitted to the court for an appeal hearing, the convictions of these two men were upheld in apparent disregard of the evidence and in the absence of any real attempt by the Cambodian authorities to properly investigate the crime and bring its perpetrators to justice. The Committee recalls that it had previously expressed its serious misgivings as to the regularity of the trial concerning Chea Vichea's murder, and of the proceedings leading to it. In this respect, and particularly in light of the new allegations respecting the Chea Vichea case, the Committee deplores the fact that the Government, other than stating that it is "following up on matters", has provided no new information in its replies.*
- 388.** *Under these circumstances, the Committee must once again stress the importance of ensuring full respect for the right to freedom and security of persons and freedom from arbitrary arrest and detention, as well as the right to a fair trial by an independent and impartial tribunal, in accordance with the provisions of the Universal Declaration of Human Rights. The Committee yet again emphasizes, in the strongest possible terms, that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent, judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the greatest extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. The absence of judgements against guilty parties creates, in practice, an atmosphere of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee,***

fifth edition, 2006, paras 48 and 52]. In light of these principles, the Committee once again strongly urges the Government to reopen the investigation into the murder of Chea Vichea and to ensure that Born Samnang and Sok Sam Oeun may exercise, as soon as possible, their right to a full appeal before an impartial and independent judicial authority.

- 389.** *The Committee further deplores the recent murder of Hy Vuthy, trade union leader for the FTUWKC at the Suntex garment factory, and recalls that a situation of impunity fosters a climate of violence which is severely detrimental to the exercise of trade union rights and basic civil liberties. Observing, in addition, that the Government has provided no information on any steps taken to institute an independent judicial inquiry into the murder of Ros Sovannareth, the Committee strongly urges the Government to institute immediately independent inquiries into the murders of these two trade unionists and to keep it informed of the outcome.*
- 390.** *The Committee deplores the fact that, in spite of being reminded on previous occasions, the Government has yet again failed to provide information respecting the other aspects of the case and the Committee's recommendations relating thereto. These aspects concerned the suppression of trade unionists, including assaults on trade union leaders, Lay Sophead and Pul Sopheak. This being the case, the Committee further deplores the fact that fresh allegations respecting the repression of, and assault on, trade unionists, particularly for having engaged in a strike action, continue to be reported. According to the complainant, trade union leader Lay Chhamroeun of the FTUWKC was shot in the leg and numerous other unionists – Chi Samon, Yeng Vann Yuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Lem Samrith, Choy Chin, Lach Sambo, Yeon Khum, Sal Koem San – were attacked and beaten. In addition, the Committee notes with grave concern the complainant's allegations that no action has been taken by the police or competent government authorities, despite the complaints lodged. The lack of the Government's reply to these serious allegations would appear to testify to the general inaction in the face of such serious complaints. The Committee can only conclude, therefore, that a climate of violence, insecurity and impunity regarding the rule of law prevails in the country. Recalling that the Government has the duty to defend a social climate where respect for the law reigns as the only way of guaranteeing respect for, and protection of, individuals [see **Digest**, op. cit., para. 34], the Committee strongly urges the Government to institute, without delay, independent judicial inquiries into the assaults on all of the trade unionists named by the complainant and to keep it informed of developments in this respect, as a matter of urgency.*
- 391.** *The Committee notes with concern the complainant's indication that 17 trade unionists have been blacklisted, preventing the said individuals from obtaining employment. It recalls in this regard that all practices involving the blacklisting of trade union officials or members constitute a serious threat to the free exercise of trade union rights and, in general, governments should take stringent measures to combat such practices [see **Digest**, op. cit., para. 803]. Accordingly, the Committee requests the Government to take the necessary steps to combat all practices involving the blacklisting of trade union officials, and in particular to end the blacklisting of the 17 individuals as reported by the complainant.*
- 392.** *The Committee takes note of the complainant's allegations that trade unionists, Lach Sambo, Yeom Khun and Sal Koem San were arrested on 3 July 2006 on charges of having illegally detained workers, and that the arrest took place after workers in the Genuine Garment Factory had been on strike for nine days. Although the strikers were accused of having blocked the gate to prevent workers willing to work from getting in and out of the factory, the FTUWGGF denies these accusations and maintains that it had only locked the main gate to prevent trucks with goods from leaving the factory. The Committee further observes that Lach Sambo, Yeom Khun and Sal Koem San were all dismissed,*

following their conviction in court on 20 June 2006, and have not been reinstated despite having appealed their convictions. The Committee requests the Government to transmit its observations concerning this matter, as well as any relevant court judgements as a matter of urgency.

393. *Noting with concern that many of the acts of repression reported by the complainant occurred in the context of the exercise of the right to strike, the Committee once again urges the Government to take measures to ensure that the trade union rights of workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives.*

394. *The Committee once again expresses its deep concern with the extreme seriousness of the case and, in the absence of any significant efforts on the part of the Government to thoroughly investigate all of the above matters in a transparent, independent and impartial manner, strongly suggests that the Government accept an ILO expert mission to carry out an investigation into the above allegations and thus assist the Government in redressing any violations of trade union rights and bringing to an end the emerging climate of impunity. The Committee calls the Governing Body's special attention to the situation.*

The Committee's recommendations

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

- (a) The Committee emphasizes once again the seriousness of the allegations pending which refer, inter alia, to the murder of trade union leaders Chea Vichea, Ros Sovannareth and Hy Vuthy. The Committee deeply deplores these events and once again draws the Government's attention to the fact that such a climate of violence leading to the death of trade union leaders is a serious obstacle to the exercise of trade union rights.*
- (b) The Committee once again strongly urges the Government to reopen the investigation into the murder of Chea Vichea and to ensure that Born Samnang and Sok Sam Oeun may exercise, as soon as possible, their right to a full appeal before an impartial and independent judicial authority.*
- (c) The Committee strongly urges the Government to immediately institute independent inquiries into the murders of Ros Sovannareth and Hy Vuthy and to keep it informed of the outcome.*
- (d) The Committee strongly urges the Government to institute, without delay, independent judicial inquiries into the assaults on trade unionists, Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San, and to keep it informed of developments in this respect, as a matter of urgency.*
- (e) The Committee requests the Government to take the necessary steps to prevent the blacklisting of trade unionists and, in particular, of the 17 trade unionists mentioned by the complainant.*
- (f) The Committee requests the Government to transmit its observations respecting the dismissal of Lach Sambo, Yeom Khun and Sal Koem San*

following the strike action at the Genuine Garment Factory, as well as any relevant court judgements, as a matter of urgency.

- (g) *The Committee once again urges the Government to take measures to ensure that the trade union rights of workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and lives.*
- (h) *The Committee once again expresses its deep concern with the extreme seriousness of the case and, in the absence of any significant efforts on the part of the Government to thoroughly investigate all of the above matters in a transparent, independent and impartial manner, strongly suggests that the Government accept an ILO expert mission to carry out an investigation into the above allegations and thus assist the Government in redressing any violations of trade union rights and bringing to an end the emerging climate of impunity. The Committee calls the Governing Body's special attention to the situation.*

CASE NO. 2469

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

Complaints against the Government of Colombia presented by

- **the Trade Union Association of Public Health Professionals (ASDESALUD)**
- **the Trade Union of Public Officials of the University Hospital of Valle, State Social Company (SINSPUBLIC) and**
- **the Single Confederation of Workers (CUT)**

Allegations: ASDESALUD alleges the refusal to grant the right to collective bargaining to the workers of the former Social Security Institute (ISS), which was split into seven state social companies (ESEs) under the terms of Decree No. 1750 of 2003, and the non-recognition of the collective agreement in force; the limitation of trade union leave to 20 hours per month contained in Circular No. 0005 of 2005, and the initiation of disciplinary proceedings against three trade union officials for using that leave; the CUT and SINSPUBLIC allege the Government's failure to conduct collective bargaining with the trade unions regarding the adoption of Act No. 909 of 23 September 2004 and its regulatory decrees on public employment and administrative careers, which, under the terms of previous legislation, violate the

agreement concluded in 2003 between the public administration and SINSPUBLIC on employment conditions of the workers at the “Evaristo García” University Hospital, Valle

- 396.** The complaint is contained in a communication dated 9 February 2006 presented by the Trade Union Association of Public Health Professionals (ASDESALUD). The Union of Public Officials of the University Hospital of Valle ESE (SINSPUBLIC) and the Single Confederation of Workers (CUT) presented new allegations in communications dated 3 and 4 April 2006, respectively. The CUT and ASDESALUD presented additional information in communications dated 27 April and 5 May, respectively. Finally, ASDESALUD sent additional information in a communication dated 17 July 2006.
- 397.** The Government sent its observations in a communication dated 27 June 2006.
- 398.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants’ allegations

- 399.** In its communications dated 9 February, 5 May and 17 July 2006, ASDESALUD states that Decree No. 1750 of 2003 split the Social Security Institute (ISS) into seven state social companies (ESEs), including the Rafael Uribe and Uribe State Social Company. The split meant that the workers of the former Institute who had been public officials became public employees; as a result they no longer have the right to collective bargaining and are not covered by the signed collective agreement.
- 400.** ASDESALUD was founded on 3 July 2003, for the purpose of coping with the damaging effects of the new situation. It is affiliated to the National Union of State Workers and Public Services (UNETE) and the General Confederation of Workers (CGT).
- 401.** In view of the illegal act committed against the workers no longer covered by the collective agreement in force, an appeal of unconstitutionality was lodged against Decree No. 1750 of 2003. The Constitutional Court, in judgement C-314 of 2004, ruled that altering the legal employment relationship of the workers at the ISS when it changed from a state industrial and commercial company to a state social company (changing them from public officials to public employees) was legal. However, the Court also stated that the collective labour agreement is binding on the parties concerned, and a source of acquired rights for the workers covered by it, at least while the agreement remains in force. The collective agreement must therefore continue to apply to the public employees of the ESEs that previously benefited from it at the ISS, at least for as long as it remains in force.
- 402.** The complainant organization alleges that, notwithstanding the above, the ESEs refuse to apply the collective agreement, arguing that the ESEs established by Decree No. 1750 of 2003 were not, and are not, parties to the collective agreement, because they did not exist when it was signed.
- 403.** The complainant organization adds, moreover, that Decree No. 2813 of 2000 regulated article 13 of Act No. 584, 2000 on trade union leave for public servants’ representatives, establishing their right to the paid trade union leave needed to fulfil their duties. Despite this, the legal representative of the ESE Rafael Uribe and Uribe issued Circular No. 0005 of 2005 limiting trade union leave to 20 hours per month and establishing a cumbersome

procedure for obtaining trade union leave. ASDESALUD states that restricting trade union leave to 20 hours per month prevents the union from fulfilling its objectives (holding meetings of national and sectional executive committees, attending conferences, coverage of the various headquarters and companies in the health sector) especially considering that it is a nationwide industrial trade union. The organization adds that Ms María Nubia Henao Castrillón, Ms Luz Elena Tejada Holguín and Ms Olga Araque Jaramillo are facing disciplinary proceedings for using their trade union leave.

- 404.** In its communications dated 4 and 27 April 2006 the CUT alleges that the Government failed to conduct collective bargaining (despite the fact that in 2000 Colombia ratified Conventions Nos 151 and 154) in regard to Act No. 909 of 23 September 2004, which issued standards regulating public employment and administrative posts, and its regulatory decrees (No. 3232 of 5 October 2004, Decrees Nos 760, 765, 770, 775, 780 and 785 of 17 March 2005) under which more than 120,000 state workers in provisional posts will have to sit competitive examinations to retain their jobs. According to the complainants, the new provisions require these competitions to take place not only to fill vacant posts but also for posts held by employees who, having fulfilled the criteria required at the time to obtain the post, were not entered into the official administrative database due to an oversight by the public authorities.
- 405.** The CUT states that the Government only allowed the trade union organizations to present their opinions, without their effective participation in any collective bargaining on the new legislation to be adopted. The CUT adds that the new system will undoubtedly affect trade unions given that thousands of the affected workers are members of them.
- 406.** In its communication dated 3 April 2006, the Union of Public Officials of the University Hospital of Valle ESE (SINSPUBLIC HUV) adds that, in its particular case, the adoption of the aforementioned legislation infringed the collective agreement signed in 2003 by the trade union and the public authorities, article 24 of which provides that in accordance with the law, the “Evaristo García” Valle University Hospital ESE will continue to respect, for an indefinite period, the employment relationship of all public employees whose conditions of appointment and employment contracts are regulated by the collective agreement.

B. The Government’s reply

- 407.** In its communication dated 27 June 2006, the Government states that splitting up the ISS was legal, given the Constitutional Court’s ruling that Decree No. 1750 of 2003 was applicable in judgements C-314 and C-349 of 2004.
- 408.** The Government states that the collective agreement was signed by the ISS and SINTRASEGURIDAD SOCIAL, implying that the ESEs established by Decree No. 1750 of 26 June 2003 were not parties to the agreement, since the companies did not legally exist when it was signed (31 October 2001). The scope of the collective agreement is determined by law and in the present case the agreement was signed by the ISS without any reference to the possibility of its application to other companies, namely, the ESEs. There is therefore no legal provision to extend the application of the agreement beyond the company that signed it or to workers or employees of other companies.
- 409.** The Government adds that article 3 of the collective agreement states that the collective labour agreement will benefit the public officials engaged through the personnel department of the ISS in accordance with the established legal standards in force, and those who become part of that category as a result of future modifications to those legal standards and are members of the SINTRASEGURIDAD SOCIAL. The public officials engaged through the personnel department of the ISS who are members of the following

organizations will also benefit: Sintraiss, Asmedas, Andec, Anec, Asteco, Asocolquifar, Acodin, Asincoltras, Asbas, Asdoas and Aciteq. The Government emphasizes that the scope of the collective agreement is clear since it states categorically that it applies to public officials engaged through the personnel department of the ISS.

- 410.** Article 16 of Decree No. 1750 of 2003, which split the ISS into seven ESEs, stipulated that for all legal purposes, the workers of the ESEs established by this Decree will be public employees. Article 18 of the Decree, setting out the system of wages and benefits, provided that the system of wages and benefits of public employees of the ESEs established by this Decree will be the same as those of public employees in the executive branch at national level. It is therefore clear that the Decree splitting up the ISS changed the legal nature of the connection between the workers and their institution when they became ESEs, since the workers became public employees instead of public officials by legal order. This change in the legal relationship between the workers and the State came into effect by virtue of the law on 26 June 2003. It implies that anyone who ceases being a public official and becomes a public employee will be subject to the general rules for that category of workers.
- 411.** The Constitutional Court, on declaring in judgement C-314 of 2004 that Decree No. 1750 of 2003 was applicable, stated that:

It was also common knowledge that while public employees are bound to the administration through a legal, prescribed relationship, public officials have an employment contract governed by special rules. The result of this difference is that, under current legislation, public officials are authorized to negotiate collective labour agreements, intended to improve the minimal privileges stipulated by law, while public employees do not have this privilege, although they are authorized to form trade unions. It can therefore be deduced that the public servants assigned to the ESEs who acquired the status of public employee and lost that of public official, also lost the right to present lists of claims and to negotiate collective labour agreements. Consequently, belonging to a specific employment category, be it public official or public employee, does not imply an acquired right to conclude collective agreements, which is merely a capacity derived from the specific type of employment regime. The Court finds it valid to consider that, in this case, the residual right follows from the principal right, namely that, since the right to be a public employee or a public official does not exist, then the right to present collective agreements does not exist either if the employment regime has been modified. The contrary conclusion would be absurd, implying that certain types of public employees, who were previously public officials, would have the right to present collective labour agreements, unlike those who had never been public officials. This would create a third type of public employee, not provided for by the law, resulting from the transition from one employment category to another, and ultimately would impinge on the right to equality since those who had never been public officials would not have the right to improve their employment conditions through collective bargaining. It is therefore clear to the Court that the public employees working for the ESEs since 26 June 2003 cannot bargain collectively, nor can they aspire to benefit from collective agreements, as these are restricted by law to public officials.

- 412.** The Government adds that in judgement C-314 the Constitutional Court stated that:

... the Court believes that this harmonization is possible, hence the authorities' competence to fix labour conditions and salaries unilaterally does not in any way preclude the holding of consultations between the authorities and the workers on this matter, and in the event of disagreement, mutually acceptable solutions should be sought, as laid down in article 55. This means that nothing in the judgement prevents public employees from petitioning the authorities on their employment conditions and entering into discussions with them to come to an agreement on the subject, which implies that the right to collective bargaining should not be considered negated. However, unlike public officials, who have a right to comprehensive bargaining, the search for mutually acceptable negotiated solutions cannot affect the competence conferred upon the authorities by the judgement to fix employment conditions unilaterally. The creation of mechanisms allowing public employees,

or their representatives, to participate in determining their employment conditions is valid, provided it is understood that the final decision lies with the authorities specified in the Constitution, namely, Congress and the President at national level, and the assemblies, councils, governors and mayors working independently at the various territorial levels. Even with this restriction, requests can still legitimately be made to reach a mutually acceptable negotiated solution between the parties in the event of dispute between public employees and the authorities. The above clarifications in no way suggest that the Court should impose conditions on the implementation of Articles 7 and 8 of Convention No. 151, under revision, concerning public employees, which authorize taking specific national conditions into account. Article 7 does not confer a right to comprehensive collective bargaining on all public servants, but lays down that States must adopt measures appropriate to national conditions which promote negotiation between public authorities and public servants' organizations, which is compatible with the judgement. Article 7 further provides for the possibility of establishing such other methods as will allow representatives of public employees to participate in the determination of these matters, which is in keeping with the possibility of public employees consulting and petitioning the authorities, without infringing the constitutional competences of those bodies to fix unilaterally the pay and employment conditions of those employees. Likewise, Article 8 recognizes that the methods aimed at resolving conflicts should be appropriate to national conditions; therefore the Court understands this provision to be consistent with the judgement, as it does not contradict the authorities' right to unilaterally enact the laws which fix public employees' functions and pay, once all attempts at reaching mutual agreement have been exhausted.

- 413.** With regard to trade union leave, the Government states that Circular No. 0005 of 18 May 2005, issued by the general management of the ESE Rafael Uribe Uribe, stipulates the procedure to follow for granting trade union leave. This is neither an automatic right nor an imposition, and the strict criteria required by law must be met so as to avoid disrupting or affecting the provision of the public health service. The Legal Office of the Ministry of Social Protection stated in File No. 3821 of 23 March 2004, that as things stand, it found that the executive committee members of the public employees' trade unions and the subcommittee members have the right by means of an administrative application and prior request by the trade union organization, to be granted the leave needed to conduct their trade union activities, in a reasonable manner and in keeping with the ruling of the honourable Constitutional Court, without this affecting the provision of the public service where they work as public servants and under the terms of article 2 of Decree No. 2813, 2000. Decree No. 2813 stipulates that trade union leave must be regulated by each company, taking into account the needs of the trade union applying for the leave and also of the company's own need to ensure that it does not affect the provision of service. Circular No. 0005 seeks to comply with the parameters laid down by this Decree.

C. The Committee's conclusions

- 414.** *The Committee observes that this case refers to: (1) the refusal to grant the right of collective bargaining to the workers of the former ISS, which was split into seven ESEs under the terms of Decree No. 1750 of 2003, and the refusal to recognize the collective agreement in force; (2) the limitation of trade union leave to 20 hours per month contained in Circular No. 0005 of 2005, and the initiation of disciplinary proceedings against three trade union officials for using that leave; (3) the CUT allegation that the Government of Colombia failed to bargain collectively with the trade unions with regard to adopting Act No. 909 of 23 September 2004 and its regulatory decrees on public employment and administrative posts; and (4) the violation pursuant to previous legislation of the agreement signed in 2003 between the public authorities and SINSPUBLIC regarding the employment conditions of the workers at the "Evaristo García" University Hospital of Valle.*
- 415.** *With regard to the allegations presented by ASDESALUD relating to the refusal to grant the right to collective bargaining to public employees working at the Rafael Uribe and*

Uribe State Social Company (ESE) and the failure to apply the collective agreement in force, the Committee notes, that according to the allegations and the Government's reply, the former ISS was split into seven ESEs by Decree No. 1750 of 2003 which meant that the workers ceased to be public officials with the right to collective bargaining and became public employees who are denied that right. The collective agreement in force at the Institute does not apply to the new ESEs succeeding the Institute as it covers different subjects. The Committee further notes that ASDESALUD lodged a demand for the Constitutional Court to declare the Decree unconstitutional (a copy of the judgement is attached) because it violates acquired rights, inter alia. The Court believed that the legal change in the category of the workers was constitutional given that it is the legislator who is invested with the authority to lay down rules appropriate to those providing services in state companies and bodies and, furthermore, the public servants who acquired the category of public employee and lost that of public official, also lost the right to present lists of claims and to negotiate collective labour agreements. The Committee further notes that the Constitutional Court ruled that, in any event, the collective agreement in force at the time of the split had given rise to acquired rights. However, despite the Court's judgement, the ESEs do not apply it because they are not parties to its negotiation since they did not exist at that time and the collective agreement did not provide that it be applied in other companies. In this regard, the Committee considers that a legal provision which modified unilaterally the content of signed collective agreements, or requires that they be renegotiated, is contrary to the principles of collective bargaining, as well as the principle of the acquired rights of the parties [see 344th Report, Case No. 2434, para. 791].

- 416.** *Regarding the recognition of public employees' right to collective bargaining, the Committee recalls that in accordance with Conventions Nos 98, 151 and 154, ratified by Colombia, public sector workers in the central public service should have the right to collective bargaining. The Committee however, notes that, under Convention No. 154, collective bargaining in the public service allows for special modalities of application to be fixed. In effect, the Committee, sharing the view of the Committee of Experts in its 1994 General Survey, recalls that, even when the principle of the autonomy of the parties in the collective bargaining process remains valid with regard to public servants and public employers covered by Convention No. 151, this may be applied with a degree of flexibility, given the particular characteristics of the public service, mentioned earlier, while at the same time, the authorities should, to the greatest possible extent, promote the collective bargaining process as a mechanism for fixing the employment conditions of public servants. The Committee therefore considers, as it had in other previously examined cases concerning Colombia [see 337th Report, Case No. 2331, para. 594], that in this case the limits imposed upon public employees with regard to the possibility of collective bargaining are not in accordance with the terms of the abovementioned Conventions as public employees can present only "appropriate written representations", which are non-negotiable, in particular with regard to conditions of employment, which may be determined only by the authorities, which have exclusive competence in the matter. The Committee therefore requests the Government to take the necessary measures to ensure that, in consultation with the trade unions concerned, the legislation is amended to bring it into line with the Conventions ratified by Colombia so that the public employees in question can enjoy the right to collective bargaining. The Committee requests the Government to keep it informed of any measure adopted on this matter and reminds the Government that it may avail itself of the technical assistance of the Office if it so wishes.*
- 417.** *With regard to applying the collective agreement in force at the time of the split, the Committee, recalling the importance of abiding by judicial decisions, requests the Government to take the necessary measures to assure respect for acquired rights as established in the collective agreement in force at the ISS and applied at the Rafael Uribe*

and Uribe ESE, for the period it is in force and in accordance with the Constitutional Court decision.

- 418.** *With regard to the restriction on granting trade union leave to 20 hours per month contained in Circular No. 0005 of 2005 which, according to ASDESALUD allegations makes it much more difficult to carry out its activities given that it covers a wide area, the Committee notes that, according to the Government, the circular issued by the general management of the Rafael Uribe and Uribe ESE lays down the procedure to follow when granting trade union leave, which is not an automatic right, but is subject to strict criteria required by law so as to avoid affecting the provision of public services. The Committee notes that the Government states that Decree No. 2813 stipulates that trade union leave must be regulated by each company, taking into account the needs both of the trade union applying for the leave, and of the company; in granting the leave, it must be ensured that provision of the service is not affected. Circular No. 0005 therefore sought to comply with the parameters laid down in the aforementioned Decree.*
- 419.** *The Committee observes that ASDESALUD is an industrial trade union with many tasks to carry out and that the restriction of trade union leave to 20 hours per month could make it difficult for it to fulfil its functions. The Committee recalls that, while account must be taken of the characteristics of the industrial relations system of a country, and while the granting of such facilities should not impair the efficient operation of the undertaking concerned, Paragraph 10(1) of the Workers' Representatives Recommendation, 1971 (No. 143) provides that workers' representatives in the undertaking should be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions in the undertaking. Paragraph 10(2) adds that while a workers' representative may be required to obtain permission from his supervisors before he takes time off from work, such permission should not be unreasonably withheld. The affording of facilities to representatives of public employees, including the granting of time off, has as its corollary ensuring the "efficient operation of the administration or service concerned". This corollary means that there can be checks on requests for time off for absences during hours of work by the competent authorities solely responsible for the "efficient operation" of their services [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 1110 and 1111]. The Committee draws the Government's attention to the fact that trade union leave, its extension and conditions are another issue that can be a subject for negotiation by the parties concerned. The Committee, therefore, asks the Government, in the light of Decree No. 2813 according to which leave has to be regulated, while taking into account the needs of the trade union, to take the necessary measures to review Circular No. 0005 of 2005, which restricts the granting of trade union leave to 20 hours per month, after consultations with the trade unions concerned, in order to obtain a solution satisfactory to the parties.*
- 420.** *The Committee observes that the Government has not sent its observations regarding the disciplinary proceedings against Ms María Nubia Henao Castrillón, Ms Luz Elena Tejada Holguín and Ms Olga Araque Jaramillo for using their trade union leave. The Committee refers to the previous paragraph and requests the Government to ensure that the disciplinary measures are withdrawn and that adequate compensation is paid to them for any damages caused. It also requests the Government to ensure that trade union officials working at the Rafael Uribe and Uribe ESE can use their trade union leave in accordance with the principles set forth, having due regard for existing and future agreements.*
- 421.** *With regard to the allegations presented by the CUT concerning the Government of Colombia's failure to bargain collectively with the trade unions regarding the adoption of Act No. 909 of 23 September 2004 and its regulatory decrees on public employment and administrative posts, the Committee notes that the complainant organization states that the new legislation will mean that about 120,000 public service workers will have to sit*

competitive examinations to retain their jobs even though they fulfilled the required criteria at the time of obtaining the post, but were not entered into the official administrative database due to an oversight on the part of the public authorities. The Committee further notes that the CUT states that the Government did not negotiate with the trade unions before adopting this legislation, but merely consulted them. The Committee notes that, according to the complainant organization, the Government is unwilling to bargain collectively with public service workers, in violation of Conventions Nos 98, 151 and 154, ratified by Colombia.

- 422.** *The Committee observes with regret that the Government did not send its observations on this matter. The Committee further regrets that the Government did not bargain collectively before promulgating Act No. 909 of 23 September 2004 and its regulatory decrees as this legislation seriously affects the employment conditions of thousands of workers. The Committee, observing that this is contrary to the commitments made by the Government when it ratified Conventions Nos 98, 151 and 154, refers to the principles set forth in the previous paragraphs regarding collective bargaining in the public sector. The Committee requests the Government to fulfil its obligations under these Conventions and negotiate collectively with the trade unions concerned.*
- 423.** *On the subject of the allegations presented by SINSPUBLIC to the effect that Act No. 909 of 23 September 2004 and its regulatory decrees violate the collective agreement signed in 2003 between the public authorities and the trade union, article 24 of that agreement stipulating that in accordance with the law, the “Evaristo García” Valle University Hospital will continue for an indefinite period to maintain the employment relationship of all those public employees whose conditions of appointment and contract of employment is governed by the collective agreement, the Committee observes with regret that the Government has not sent its observations on this subject and recalls that agreements should be binding on the parties [see *Digest*, op. cit., para. 939]. In these circumstances, the Committee asks the Government to take the necessary measures to ensure that the collective agreement between the public authorities and SINSPUBLIC is duly applied. The Committee requests the Government to keep it informed on this matter.*

The Committee’s recommendations

- 424.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *With regard to the allegations presented by ASDESALUD relating to the refusal to grant the right to collective bargaining to public employees working at the Rafael Uribe and Uribe ESE and the failure to apply the collective agreement in force as a result of Decree No. 1750 of 2003, the Committee requests the Government:*
- (i) *to take the necessary measures to ensure that, in consultation with the trade unions concerned, the legislation is amended in order to bring it into line with the Conventions ratified by Colombia, so that the public employees in question can enjoy the right to collective bargaining. The Committee requests the Government to keep it informed of any measure adopted on this matter and reminds the Government that it may avail itself of the technical assistance of the Office if it so wishes;*
- (ii) *to take the necessary measures, recalling the importance of abiding by judicial decisions, to assure respect for acquired rights as established in the collective agreement in force at the ISS, and applied at the “Rafael*

Uribe and Uribe” State Social Company, for the period it is in force and in accordance with the Constitutional Court judgement.

- (b) *With regard to the ASDESALUD allegations stating that the restrictions on granting trade union leave to 20 hours per month, contained in Circular No. 0005 of 2005, make it much more difficult to carry out its activities properly, given that it is an industrial trade union covering a wide area, the Committee asks the Government, in the light of Decree No. 2813, stipulating that trade union leave must be regulated while taking into account the needs of the trade union, to take the necessary measures to review Circular No. 0005 of 2005, after consultations with the trade union organizations concerned, in order to obtain a solution satisfactory to the parties.*
- (c) *With respect to the disciplinary proceedings against Ms María Nubia Henao Castrillón, Ms Luz Elena Tejada Holguín and Ms Olga Araque Jaramillo for using their trade union leave, the Committee requests the Government to ensure the disciplinary measures are withdrawn and that adequate compensation is paid to them for any damage caused. It also requests the Government to ensure that trade union officials working at the Rafael Uribe and Uribe ESE can use their trade union leave, with due regard for existing and future agreements.*
- (d) *With regard to the allegations presented by the CUT referring to the Government of Colombia’s failure to bargain collectively with the trade unions regarding the adoption of Act No. 909 of 23 September 2004 and its regulatory decrees on public employment and administrative posts, the Committee, observing that this is contrary to the commitments made by the Government when it ratified Conventions Nos 98, 151 and 154, refers to the principles set forth in subparagraph (a) of these recommendations. The Committee requests the Government to fulfil its obligations under these Conventions and negotiate collectively with the trade unions concerned.*
- (e) *With regard to the allegations presented by the Union of Public Officials of the “Evaristo García” University Hospital ESE (SINSPUBLIC) stating that Act No. 909 of 23 September 2004 and its regulatory decrees violate the collective agreement signed in 2003 between the public authorities and the trade union, the Committee asks the Government to take the necessary measures to ensure that the collective agreement is duly applied and requests that the Government keep it informed on this matter.*

CASE NO. 2480

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

**Complaints against the Government of Colombia
presented by
the Single Confederation of Workers of Colombia (CUT) and
the Trade Union of Workers in the Bogotá Telecommunications Enterprise
(SINTRATELEFONOS)**

Allegations: The Single Confederation of Workers of Colombia (CUT) alleges that anti-union acts were committed by the enterprise Laboratorios Biogen against workers who were members of the National Trade Union of the Chemical Industry of Colombia (SINTRACQUIM), and, in particular, against six trade union leaders (Ms María Eugenia Reyes, treasurer, Mr Hugo Aguilar, Ms Nubia Marcela Avendaño, Mr David Villamizar, Ms Sandra Duarte, Ms Cristina Moore and Mr Luis Fernando Cárdenas) and that three workers who were members of the Trade Union of Workers of the Bogotá Telecommunications Enterprise (SINTRATELEFONOS) were dismissed by the Bogotá Telecommunications Enterprise (ETB) in the context of a voluntary redundancy programme, without advance notice to their trade union organization, with the aim of creating a climate of intimidation concerning the trade union

425. These complaints are contained in a communication of 5 April 2006 from the Single Confederation of Workers of Colombia (CUT) and a communication dated 21 July 2006 from the Trade Union of Workers of the Bogotá Telecommunications Enterprise (SINTRATELEFONOS).
426. The Government sent its observations in a communication dated 14 November 2006.
427. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

428. In its communication of 5 April 2006, the CUT alleges various anti-union acts, committed by the enterprise Laboratorios Biogen de Colombia, against workers who were members of the National Trade Union of Workers in the Chemical and/or Pharmaceutical Industry of

Colombia (SINTRAQUIM) and who enjoyed trade union immunity. The CUT claims that, in August 2000, the workers at the enterprise established a primary trade union but that, before it was able to notify the employers of its membership, the enterprise dismissed the entire executive board of the trade union. Around 80 workers therefore decided to join SINTRAQUIM. Despite this, the enterprise continued its repressive actions and today only 28 of these union members remain, all of whom have trade union immunity. The complainant organization adds that Ms María Eugenia Reyes, Mr Hugo Aguilar, Ms Nubia Marcela Avendaño, Mr David Villamizar, Ms Sandra Duarte, Ms Cristina Moore and Mr Luis Fernando Cárdenas were transferred to other enterprises to carry out tasks other than those for which they were recruited, for which they are not qualified, a deterioration in their working conditions, sanctions of two months' suspension from their posts and, finally, the receipt of a communication informing them that, owing to failures in certain machines, they must stay away from work until further notice, without receiving the corresponding wages. As a result of an action for protection of constitutional rights (*tutela*) filed by the workers, the last communication was not brought into effect and, subsequently, they were offered a "voluntary settlement", which they all rejected.

429. The complainant organization alleges that Ms María Eugenia Reyes, in particular, filed a *tutela* action against the two-month suspension that had been imposed on her without her being able to exercise her right to defence, and that the judicial authority ordered that she be reinstated without loss of wages. This decision was appealed by the enterprise and a ruling is now pending.
430. According to SINTRAQUIM, despite the many communications and complaints sent to the Ministry of Social Protection, the Ministry has not taken any measures to put an end to this situation.
431. In its communication of 21 July 2006, SINTRATELEFONOS alleges that three of its members, Mr Jhon Mauricio Bonilla Vargas, Mr Hugo Fabián Marín Tovar and Mr Ricardo Avila Peralte were dismissed from their jobs without due cause and their trade union organization being given advance notice, as required by the ruling of the Constitutional Court of Justice which, in a decision of 2005, had advised the ETB that, "should it choose to make legitimate use of the power of unilateral termination that labour legislation gives the employer in regard to unionized workers, it shall inform the appropriate trade union prior to taking such action".
432. According to the complainant organization, the dismissals were recorded as part of a voluntary retirement programme and were intended to intimidate the trade union organization.

B. The Government's reply

433. In its communication of 14 November 2006, the Government states, in response to the allegations made by SINTRATELEFONOS, that the three workers were indeed dismissed, but that this was done in accordance with the provisions of section 64 of the Substantive Labour Code (concerning payment of compensation) and with the conditions laid down in the collective agreement in force at the enterprise. The Government encloses a communication dated 12 July 2006 from the ETB to the chairperson of the trade union organization, providing information on the enterprise's decision to dismiss the three workers, in conformity with the Constitutional Court ruling, as well as copies of letters of the same date sent to the three workers notifying them of their dismissal.
434. In a communication from the enterprise to the Government, which the Government has sent to the Committee, the enterprise states that the workers' contracts were terminated in accordance with legislation and denies any intention of anti-union persecution, explaining

that the voluntary retirement programme was not intended for rank-and-file workers, the category to which all the dismissed workers belonged.

C. The Committee's conclusions

435. *The Committee observes that the present case relates to: (1) numerous anti-union acts alleged by the CUT to have been committed by the enterprise Laboratorios Biogen against workers who were members of the National Trade Union of Workers in the Chemical and/or Pharmaceutical Industry of Colombia (SINTRAQUIM), in particular, against seven trade union leaders (María Eugenia Reyes, Hugo Aguilar, Nubia Marcela Avendaño, David Villamizar, Sandra Duarte, Cristina Moore and Luis Fernando Cárdenas); and (2) the alleged dismissal of three workers (Jhon Mauricio Bonilla Vargas, Hugo Fabián Marín Tovar and Ricardo Avila Peralte), members of SINTRATELEFONOS, by the Bogotá Telecommunications Enterprise (ETB) without advance notice to the trade union organization, with the aim of creating a climate of intimidation towards the trade union organization, in the context of a voluntary retirement programme.*
436. *With respect to the CUT's allegations of numerous anti-union acts against the members of SINTRAQUIM by the enterprise Laboratorios Biogen de Colombia, and against seven leaders of the union in particular, the Committee notes that, according to the allegations, the enterprise has conducted a policy of repression against all workers wishing to exercise their trade union rights. According to the allegations, the enterprise first dismissed all of the members of the executive board of the primary trade union that had been created by the workers, and then, when 80 workers chose to join SINTRAQUIM, continued this repression, decimating the trade union organization and leaving it with a current membership of only 28. The Committee notes that, according to the allegations regarding the particular cases of María Eugenia Reyes, Hugo Aguilar, Nubia Marcela Avendaño, David Villamizar, Sandra Duarte, Cristina Moore and Luis Fernando Cárdenas, these individuals were transferred to other enterprises with less favourable working conditions, subjected to sanctions of up to two months' suspension from their posts and even pressured to accept a "voluntary settlement" in a communication ordering them to stay away from work until further notice, without payment of their corresponding salaries. The Committee notes that María Eugenia Reyes, in particular, filed a tutela action with the judicial authority for preventing her from exercising her right to defence, that the judicial authority ordered that she be reinstated without loss of pay, but that the enterprise lodged an appeal on which a decision is currently pending.*
437. *On this matter, the Committee regrets that the Government has not sent its observations concerning these allegations, which it considers extremely serious. The Committee recalls that anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions, and that no person shall be prejudiced in employment by reason of trade union membership or legitimate trade union activities, whether past or present [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 769 and 770]. The Committee therefore requests the Government to take the necessary measures to ensure that an independent investigation is instituted without delay into the enterprise Laboratorios Biogen de Colombia and if the allegations are confirmed, to ensure that all measures prejudicial to Ms María Eugenia Reyes, Mr Hugo Aguilar, Ms Nubia Marcela Avendaño, Mr David Villamizar, Ms Sandra Duarte, Ms Cristina Moore and Mr Luis Fernando Cárdenas remain without effect, that these individuals are reinstated in their posts with payment of wages owed and appropriate compensation and that those responsible are punished appropriately. The Committee requests the Government to keep it informed in this regard.*

438. *With regard to the alleged dismissal by the ETB, in the context of a voluntary retirement programme, of three workers (Jhon Mauricio Bonilla Vargas, Hugo Fabián Marín Tovar and Ricardo Avila Peralte) who were members of SINTRATELEFONOS, without advance notice to their trade union organization, with the aim of creating a climate of intimidation in the trade union organization, the Committee notes that according to the Government, the dismissals were carried out in accordance with section 64 of the Substantive Labour Code and the provisions of the collective agreement in force, and that the decision to dismiss the workers was communicated to the trade union organization in accordance with the ruling of the Constitutional Court (a copy of which the Government enclosed along with copies of the letters sent to the workers in question notifying them of their dismissal). The Committee likewise notes that, in its communication to the Government, the enterprise denies the allegations that the aim of the dismissals was to intimidate the trade union organization, as the voluntary retirement programme referred to by the complainant organization was not intended for the category of employees to which the dismissed workers belonged.*
439. *The Committee observes that it appears from the copies enclosed by the Government that the trade union organization was informed of the dismissal of the three workers on the same day as the workers themselves. However, the Committee also observes that, under the ruling of the Constitutional Court, the purpose of the decision to order the ETB to notify the trade union organization in advance of any dismissal without due cause was “so that the organization could act to protect and represent its collective interests and those of its members”. The Committee considers that, in notifying the trade union organization and the dismissed workers at the same time, the enterprise did not allow the trade union organization to exercise properly its right of protection and representation. The Committee regrets that the enterprise did not take due consideration of the judicial decision and firmly expects that, in future, the enterprise will consult with the trade union organization sufficiently in advance, should it have to dismiss unionized workers without good cause.*
440. *Moreover, given that the real motives for the dismissal of the three unionized members are unknown and that, according to the complainant organization, their purpose was to intimidate the trade union and was therefore anti-union in nature, the Committee requests the Government to take the necessary measures to ensure that an independent inquiry is carried out and, if it is found that the dismissals had anti-union motives, the workers are reinstated without delay and paid the wages owed and appropriate compensation.*

The Committee's recommendations

441. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *With regard to the allegations of the CUT concerning numerous anti-union acts against SINTRAQUIM members by the enterprise Laboratorios Biogen de Colombia, and against seven leaders of the trade union in particular (María Eugenia Reyes, Hugo Aguilar, Nubia Marcela Avendaño, David Villamizar, Sandra Duarte, Cristina Moore and Luis Fernando Cárdenas), the Committee requests the Government to take the necessary measures to ensure that an independent investigation is instituted without delay into the enterprise Laboratorios Biogen de Colombia and if the allegations are confirmed, to ensure that all measures prejudicial to these trade union leaders remain without effect, that these individuals are reinstated to their posts with payment of wages owed and appropriate compensation and that those responsible are punished appropriately. The Committee requests the Government to keep it informed on this matter.*

- (b) *With regard to the alleged dismissal by the ETB of three workers (Jhon Mauricio Bonilla Vargas, Hugo Fabián Marín Tovar and Ricardo Avila Peralte) who were members of SINTRATELEFONOS without advance notice given to their trade union organization, the Committee:*
- (i) *expresses the firm expectation that in future the enterprise will consult with the trade union organization sufficiently in advance, should it have to dismiss unionized workers without good cause; and*
 - (ii) *requests the Government to take the necessary measures to ensure that an independent inquiry is carried out and, if it is found that the dismissals had anti-union grounds, that the workers are reinstated without delay and paid the wages owed and appropriate compensation.*

CASE NO. 2489

INTERIM REPORT

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

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

442. This complaint is contained in a communication dated 23 May 2006 presented by the Single Confederation of Workers of Colombia (CUT).

443. The Government sent its observations in a communication dated 5 October 2006.

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

A. The complainant's allegations

445. The CUT alleges that the vice-chancellor of the University of Córdoba is putting pressure on the National Trade Union of University Workers of Colombia (SINTRAUNICOL) to persuade it to renegotiate the collective agreement in force, by denouncing the collective agreement before the Ministry of Social Protection. These acts of pressure started in December 2000 and, faced with the trade union's refusal to renegotiate, a persecution campaign was set in motion against it, involving not only the university management but also members of the paramilitary organization, the United Self-Defence Forces of Colombia (AUC). On 17 February 2003, a meeting was held during the conflict to analyse and debate the election of the new vice-chancellor. On 18 February, the members of the trade union were summoned to the camps of the paramilitary organization where they were subjected to pressure and threats to persuade them to renegotiate the collective agreement. Despite the trade union's continuing refusal, the university began to disregard the provisions of the collective agreement. On 26 September 2003, the Ministry of Social Protection informed the trade union, pursuant to decision No. 002534, that an alleged work stoppage carried out by the workers and teaching staff on 17 and 18 February was illegal. The trade union was not informed of the proceedings. By virtue of this decision, the trade union leaders were summoned by the university authorities to attend disciplinary proceedings that could culminate in the dismissal of the executive board.

446. On 14 November 2003, the national executive committee of SINTRAUNICOL received a communication from AUC, stating that 15 of the trade union's leaders, including the president of the sectional committee at the University of Córdoba, were considered to be military targets. According to the report issued by SINTRAUNICOL, a copy of which was included by the CUT, as a result of the many complaints made by the trade union to the public authorities regarding these events, on 6 February 2004 the Public Ombudsman's Office published a risk assessment describing the situation of the SINTRAUNICOL trade union leaders and other trade unions at the University of Córdoba as "high risk".

447. Finally, according to the allegations, in December 2005 the vice-chancellor and the Superior Council of the university approved agreements Nos 095 and 096, altering the status of the workers from public officials to public employees. This resulted in the collective agreement being invalidated.

B. The Government's reply

448. In its communication, dated 5 October 2006, the Government states, with regard to the pressure exerted by the administration to renegotiate the collective labour agreement, that in accordance with case law and article 479 of the Substantive Labour Code, if it is the employer alone who denounces the agreement, it remains in force, and may be extended as provided for in the law, because employers cannot present lists of demands and are therefore not able to initiate a collective dispute that results in another collective agreement or in an award being made by a mandatory arbitration tribunal. It is therefore not possible for employers to initiate a collective dispute, but they may present their point of view in denouncing the agreement when the dispute is started by the workers. According to the information supplied by the vice-chancellor, this is what happened at the University of Córdoba.

- 449.** With regard to the allegations that the former vice-chancellor of the University of Córdoba made the trade union leaders discuss the university's policies and the question of the collective agreement with the paramilitary commanders, the Government indicates that the vice-chancellor was unaware of these events.
- 450.** With regard to the alleged persecution of the trade union, in February 2003 the new vice-chancellor of the university sent a letter to the Government stating that, on 17 and 18 February 2003, the trade unions locked the doors of the university and he therefore requested that the Ministry of Social Protection take note of this and declare the strike illegal. The work stoppage was declared illegal in decision No. 0002534 of September 2003. The Government attaches a copy of the decision confirming that the Territorial Directorate of Córdoba verified the work stoppage; that article 56 of the Constitution guarantees the right to strike; that article 450 of the Substantive Labour Code stipulates that the collective suspension of work is illegal in the public services; that education is considered by the Constitutional Court to be an essential public service and that the constitutional and legal prohibition on suspending activities in essential public services is sufficient justification to declare the work stoppage illegal.
- 451.** In accordance with the Ministry's decision, the university initiated the relevant disciplinary proceedings in order to determine who participated actively in the work stoppage. The cases were sent to the Office of the Procurator General of the Nation, which had the necessary information. According to the Government, the proceedings are still under way.
- 452.** With respect to altering the workers' legal status and consequently invalidating the collective labour agreement, the Government states that the vice-chancellor of the university reported that the Colombian Institute for the Promotion of Higher Education (ICFES) and the Ministry of National Education/Organization of Ibero-American States for Education, Science and Culture (OEI) concluded contract No. 035/01 with the company "Asesoría y Gestión Cía. Ltda" (Consultancy and Management Co. Ltd), for the purpose of conducting studies to identify and define the characteristics of the financial, academic and administrative management of the Universities of Córdoba and Cartagena and the Industrial University of Santander in order to draw up an action plan.
- 453.** The Government states that, on the basis of the aforementioned report, the administration of the University of Córdoba issued agreements Nos 095 and 096, amending the general statutes by suppressing the posts of "public officials" and altering the workers' status from "public officials" to "public employees".
- 454.** On this matter, the Government states that the Supreme Court of Justice decision of 9 April 2003 ruled that public official status originates in law and takes only the forms provided for by the law. It is not feasible to elude or evade this classification system by affording agreed benefits to the worker. The judicial decision on the legal nature of the labour contract binding all workers must originate exclusively in law and, if they are working for a territorial body, an effort must be made to determine whether this is devoted to the upkeep and maintenance of public works, as that is the only circumstance in which it is possible to be employed as a public official.
- 455.** The Government adds that, according to the vice-chancellor of the University of Córdoba, the employees subjected to a change of status were invited to meetings on several occasions to inform them of the situation regarding their employment relationship, taking into account that they were not performing the functions of public officials. A few workers and trade union leaders participated in these meetings and in the discussions held by the Superior Council on the projected change of status, which later became agreement No. 096 (2005), as confirmed by the Superior Council's records Nos 025 (16 November 2005), 026

(25 November 2005), 027 (12 December 2005) and 028 (14 December 2005). The Government has attached copies of these documents.

- 456.** The Government stresses that the university has not been denied the right to freedom of association at any time, hence the change of status did not ignore the trade union. Likewise, the vice-chancellor stated that the university employees continued to perform the same functions as before the change in legal status and their monthly pay remained the same or higher. In fact, they occupy these posts provisionally, due to the fact that, according to Constitutional Court ruling No. C-030/97, the rules allow the appointment and continued employment of certain people who, because of their circumstances (filling in permanent posts), are not required to undergo a selection process to assess their merits and capacities. Hence the constitutional mandate, which requires public examinations to be held to fill permanent posts, and also the general principles implicit in the selection system, such as equality and efficiency in public administration, are disregarded. The exception laid down by the rules in question distorts the system itself, since the discretion of the recruiters overrides the system, hindering those who believe they fulfil the requirements to do the job on a national or territorial level from applying for it, simply because there is no mechanism for assessing their merits and capacities. The Court was absolutely clear: there can be no rule within our regulations that allows automatic appointment to permanent posts.
- 457.** The Government includes a copy of an agreement concluded between the University of Córdoba and SINTRAUNICOL on 17 April 2006 relating to the working conditions and benefits of workers.
- 458.** Finally, the Government reports that the Ministry of Social Protection, Territorial Directorate of Córdoba, has begun two investigations: one into the failure to pay wages and benefits, with a conciliation hearing being held between the trade union and the university to clarify the complaint registered by the trade union, and the second into the protection of the right to freedom of association, which is under way.

C. The Committee's conclusions

- 459.** *The Committee observes that according to the allegations presented by the CUT: (1) SINTRAUNICOL were put under pressure and threatened by the vice-chancellor of the University of Córdoba and paramilitary commanders of AUC to persuade them to renegotiate the collective agreement; (2) on 17 February 2003 a meeting was held at the university following the appointment of the new vice-chancellor, which was deemed by the authorities to be an illegal work stoppage resulting in disciplinary proceedings against the SINTRAUNICOL trade union leaders; and (3) in December 2005, despite the opposition of the trade union, agreements Nos 095 and 096 were approved, altering the status of university workers from public officials to public employees, which invalidated the collective agreement.*
- 460.** *With regard to the alleged pressure and threats suffered by SINTRAUNICOL at the hands of the vice-chancellor of the University of Córdoba and, subsequently, the paramilitary commanders of the AUC to persuade them to renegotiate the collective agreement, the Committee notes that faced with the trade union's persistent refusal to cede to the pressure, many of its officials, including the president of the trade union committee at the University of Córdoba, were declared military targets by the AUC and the trade union's situation was classified as "high risk". The Committee notes that, according to the Government, under article 479 of the Substantive Labour Code, if it is the employer alone who denounces the collective agreement and the workers do not accept the denunciation, they cannot be forced to renegotiate it. With regard to the pressure and threats on the part of the vice-chancellor and the AUC, the Committee notes that, according to the*

communication sent to the Government by the vice-chancellor of the university, he was unaware of these events.

- 461.** *The Committee expresses its most serious concern at these allegations. The Committee recalls as it has on numerous occasions when faced with various complaints against the Government of Colombia, that “freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 43]. Furthermore, the Committee underlines that the voluntary nature of collective bargaining and the autonomy of the bargaining partners in the absence of any recourse to measures of compulsion are fundamental to the principles of freedom of association. In view of the seriousness of these allegations, the Committee strongly urges the Government to take measures immediately to guarantee the safety of the threatened trade union officials. The Committee also strongly urges the Government to take immediately the necessary measures to have a truly independent investigation carried out without delay by a person who enjoys the confidence of both parties and, if these allegations are found to be true, to take the necessary measures to punish those responsible. The Committee condemns the existence and actions of paramilitary organizations, which, in violation of human rights and of freedom of association principles, regard trade unionists as targets. The Committee recalls that the responsibility to stop such organizations rests with the Government. The Committee requests the Government to keep it informed on this matter.*
- 462.** *With regard to the meeting held by SINTRAUNICOL on 17 February 2003 following the appointment of the new vice-chancellor, which was deemed by the administrative authorities to be an illegal work stoppage giving rise to disciplinary proceedings pending against the trade union officials, the Committee notes that the illegality ruling was based on article 450 of the Substantive Labour Code, under which exercise of the right to strike is prohibited in essential public services.*
- 463.** *In this respect, the Committee observes, first, that the trade union denies that there was a work stoppage, stating that a meeting was held. Secondly, the Committee recalls that, in any event, strikes or work stoppages can be prohibited only in cases where essential services, in the strict sense of the term, will be affected, i.e., those whose interruption would endanger the life, personal safety or health of the whole or part of the population. In this respect, the Committee has stated, on many occasions that the education sector does not constitute an essential service in the strict sense of the term [see **Digest**, op. cit., para. 587].*
- 464.** *The Committee observes, however, that the Ministry of Social Protection’s declaration that the meeting was illegal was made pursuant to article 451 of the Substantive Labour Code, which stipulates that the Ministry is the competent body to decide upon the legality of any collective work stoppage or strike. In this respect, the Committee recalls that it has stated on many occasions that “responsibility for declaring a strike illegal should not lie with the Government, but with an independent body which has the confidence of the parties involved” [see **Digest**, op. cit., para. 628]. In these circumstances, the Committee requests the Government to take the necessary measures to amend article 451 of the Substantive Labour Code in line with the aforementioned principle. Furthermore, taking into account that decision No. 0002534 of September 2003, which declared the work stoppage illegal (while the trade union denies it took place), was based on legislation that is not in accordance with the principles of freedom of association, it requests the Government to annul the Minister’s declaration and the disciplinary proceedings initiated pursuant to it. The Committee requests the Government to keep it informed on the matter.*

465. *With regard to the allegations stating that agreements Nos 095 and 096, issued in December 2005 despite the opposition of the trade union, alter the status of the university workers by changing them from public officials to provisional public employees and consequently invalidating the collective agreement, the Committee notes that, according to the Government, the aforementioned agreements resulted from the report prepared by the company “Asesoría y Gestión Cía. Ltda”. The report contains a study into the characteristics of the financial, academic and administrative management of several universities, including the University of Córdoba, for the purpose of formulating an action plan. The Committee notes that prior consultations on the agreements were held between the university authorities and SINTRAUNICOL and the trade union opposed the amendments proposed.*
466. *The Committee reminds the Government that by virtue of Convention No. 98 and Convention No. 154, ratified by Colombia, public authority employees, whether they are public officials or public employees, must be able to bargain collectively. The Committee notes, however, that among the documents sent by the Government there is an agreement concluded between representatives of the University of Córdoba and SINTRAUNICOL on 29 March 2006, and valid until 31 December 2007, on working conditions, pay, benefits and incentives, subsequent to the approval of agreements Nos. 095 and 096. The Committee observes that the agreement was signed before the CUT presented this complaint to the Committee. The Committee therefore requests the complainant organization to report on the circumstances in which this agreement was signed, if it was the result of free and voluntary negotiations and if it replaces the collective agreement that was in force when agreements Nos 095 and 096 were approved.*

The Committee’s recommendations

467. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *With regard to the alleged pressure and threats suffered by SINTRAUNICOL at the hands of the vice-chancellor of the University of Córdoba and the paramilitary commanders of AUC to persuade them to renegotiate the collective agreement, the Committee strongly urges the Government to take measures immediately to guarantee the safety of the threatened trade union officials without delay. The Committee further strongly urges the Government to take immediately the necessary measures to have a truly independent investigation carried out without delay by a person who enjoys the confidence of both parties and, if these allegations are found to be true, to take the necessary measures to punish those responsible. The Committee condemns the existence and actions of paramilitary organizations, which, in violation of human rights and of freedom of association principles, regard trade unionists as targets. The Committee recalls that the responsibility to stop such organizations rests with the Government. The Committee requests the Government to keep it informed on this matter.*
- (b) *With regard to the meeting held by SINTRAUNICOL on 17 February 2003 following the appointment of the new vice-chancellor, which was deemed by the administrative authorities to be an illegal work stoppage and gave rise to disciplinary proceedings which are still pending against the trade union officials, the Committee requests the Government:*

- (i) *to take the necessary measures to amend article 451 of the Substantive Labour Code so that illegality rulings are made by an independent authority which enjoys the confidence of both parties; and*
- (ii) *taking into account the fact that decision No. 0002534 of September 2003, issued by the Ministry of Social Protection, which declared the work stoppage illegal (while the trade union denies it took place), was based on legislation that is not in accordance with the principles of freedom of association, to annul the Minister's declaration and the disciplinary proceedings initiated pursuant to it. The Committee requests the Government to keep it informed on the matter.*
- (c) *With regard to the allegations stating that agreements Nos 095 and 096, approved in December 2005 despite the opposition of the trade union, led to the invalidation of the collective agreement, the Committee, noting the previous agreement on working conditions, pay, benefits and incentives signed on 29 March 2006 by representatives of the University of Córdoba and SINTRAUNICOL, requests the complainant organization to report on the circumstances in which this agreement was signed, if it was the result of free and voluntary negotiations and if it replaces the collective agreement that was in force when agreements Nos 095 and 096 were approved.*

CASE NO. 2504

DEFINITIVE REPORT

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

- **the Trade Union of Workers of the National Federation of Coffee Growers of Colombia (SINTRAFEC) and**
— **the Single Confederation of Workers (CUT)**

Allegations: The Council of State cancelled the entry of the new Bucaramanga SINTRAFEC Committee executive board in the trade union register, stating that this sectional committee, created before 1965, did not fulfil the requirements laid down in article 55 of Act No. 50 of 1990

- 468.** This complaint is contained in a communication dated 12 June 2006 presented by the Trade Union of Workers of the National Federation of Coffee Growers of Colombia (SINTRAFEC) and the Single Confederation of Workers (CUT).
- 469.** The Government sent its observations in a communication dated 27 November 2006.
- 470.** 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

- 471.** In their communication dated 12 June 2006, SINTRAFEC and the CUT state that the SINTRAFEC trade union was created in 1959. Its statutes provide for the establishment of sectional branches with regional jurisdiction by departments or regions as well as the establishment of sectional committees which group together the members of neighbouring municipalities.
- 472.** According to the complainant organizations, article 55 of Act No. 50, 1990, modified the existing legal situation by laying down the requirement that at least 25 members of the sectional branches must work in the same municipality, and in the case of the committees, at least 12 members must work in the same municipality. The Bucaramanga Regional Committee of SINTRAFEC does not have 12 members.
- 473.** However, SINTRAFEC statutes established the sectional branches and committees before Act No. 50, 1990, was adopted and, once it came into force, the administrative authority continued to recognize SINTRAFEC's right to maintain these bodies. In fact, article 55 of Act No. 50, 1990, was deemed to cover only trade unions founded after the standard was adopted.
- 474.** According to the allegations, the new executive board of the Bucaramanga SINTRAFEC Regional Committee in Santander Department was elected on 25 November 2000, in accordance with the statutes and the law. The administrative labour authority and the company were informed of the election. The administrative labour authority recognized the election and arranged for the new executive board of the Bucaramanga SINTRAFEC Regional Committee to be entered on the relevant register.
- 475.** The employers, however, applied to the administrative jurisdiction in question for the annulment of the administrative decision registering the sectional committee boards, which included the registration of the Bucaramanga Committee executive board. On 17 September 2004, the Council of State cancelled the registration, arguing that the body's structure did not comply with the stipulations of article 55 of Act No. 50, 1990. The Council of State considers that as the legislation concerns public order since it deals with labour standards, it must be applied generally with immediate effect.
- 476.** The problem is therefore the refusal to register the trade union boards elected, generally on expiry of their statutory term of office, to replace the sectional departmental boards legally established before Act No. 50, 1990 came into force, because article 55 of the Act, prohibiting the creation of these sectional committees, is deemed to be applicable.
- 477.** According to SINTRAFEC when it appealed against the cancelled registration, Bucaramanga SINTRAFEC has, since its inception, consisted of workers from the Bucaramanga branch of Almacafé, SA and the Santander Departmental Committee of Coffee Growers. The same holds good in other parts of the country where sectional and regional committees also exist and many of their executive boards have been renewed and approved by the Ministry of Labour and Social Security.
- 478.** The trade unions attached a copy of the 1965 collective agreement, which recognizes the existence of the Bucaramanga Committee of SINTRAFEC. They also attached copies of resolution No. 2237 of 1999 by which the amendments to the SINTRAFEC statutes regarding legal domicile were recorded in the trade union register.

B. The Government's reply

- 479.** In its communication dated 27 November 2006, the Government states that the Colombian State comprises three branches that function separately: the legislative, the executive and the judicial.
- 480.** The Government adds that it cannot intervene with regard to the allegations presented by the trade unions relating to the Council of State's quashing of the resolution in which the Santander Territorial Directorate ordered the registration of the new executive board of the Bucaramanga Regional Committee of SINTRAFEC. It adds that the Council of State's decision was based on article 55 of Act No. 50, 1990, which states that any trade union can provide in its statutes for the establishment of sectional sub-branches in municipalities outside its principal domicile in which it has no fewer than twenty-five (25) members. It can also provide for the creation of sectional committees in municipalities outside its principal domicile in which it has no fewer than twelve (12) members. There cannot be more than one sub-branch or committee per municipality.
- 481.** Article 55 was the subject of an appeal to the Supreme Court of Justice which ruled that it was applicable through decision No. 115 of 26 September 1991; subsequently, an appeal was brought before the Constitutional Court, which upheld in decision No. C-043 of 2006 that the article was applicable.
- 482.** In its arguments the Council of State indicated that there can be no doubt that it became operative immediately by virtue of articles 14 and 16 of the Labour Code, which state that labour standards, as they concern public order, take effect immediately. The following paragraph states that the Court considers that, even though the statutes of SINTRAFEC were approved by the Ministry of Labour, and the sectional committees existed before Act No. 50 of 1990 came into force, because labour standards concern public order, they take immediate effect; therefore the trade union branches must amend their statutes to bring them into line with the legal requirements of article 55 of Act No. 50, 1990, which is compulsory and must be complied with immediately.
- 483.** The Government concludes that it is incumbent on the trade union to align its structure with the new legal provisions. The Council of State, when ruling on the legality of the Santander Territorial Directorate's decision, stated that the trade union was disregarding the labour standards in force by not aligning its statutes with those standards, which concern public order and demand immediate compliance; this point is not contrary to Convention No. 87.

C. The Committee's conclusions

- 484.** *The Committee observes that this case refers to the allegations presented by the CUT and SINTRAFEC that the Council of State cancelled the entry of the new executive board of the Bucaramanga Committee of SINTRAFEC in the trade union register on the grounds that the sectional committee, created before 1965, did not fulfil the requirements laid down in article 55 of Act No. 50, 1990, regarding the minimum number of members, and their domicile, even though it complied with the legal provisions in force at its inception.*
- 485.** *The Committee notes that, according to the Government, since Act No. 50 is a labour standard it concerns public order and demands immediate compliance. The Committee further notes that, as a result, the Council of State decided to revoke the labour inspector's decision by which the new executive board of the Bucaramanga Sectional Committee would be registered.*

486. *The Committee observes, first, that this case relates to the cancellation of the registration of the new executive board of a sectional committee that existed long before the adoption of the Act in 1990. In fact, the Bucaramanga Sectional Committee was founded before 1965, while the new requirements laid down in article 55 of Act No. 50 were adopted in 1990. Furthermore, it observes that the sectional committee functioned for 14 years (until the Council of State decision of 17 September 2004) without any objections following the adoption of the new Act; that the trade union introduced modifications to its statutes on other issues, which were duly registered without the administrative authority's drawing attention to the failure to comply with the new requirements imposed by the Act; and that, according to the complainant organization, there are many sectional committees in the same situation which function without any problems. In these circumstances, the Committee requests the Government to take measures including, if necessary, legislative measures, so as to nullify the effects of the Council of State decision cancelling the registration and to register the new executive board of the Bucaramanga Sectional Committee without delay, and invites the trade union to adapt to the new legislation in force.*

The Committee's recommendation

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

With regard to the cancellation by the Council of State of the entry of the new Bucaramanga SINTRAFEC Committee executive board in the trade union register, the Committee requests the Government to take measures including, if necessary, legislative measures, so as to nullify the effects of the Council of State decision cancelling the registration and to register the new executive board of the Bucaramanga Sectional Committee without delay, and invites the trade union to adapt to the new legislation in force.

CASE NO. 1865

INTERIM REPORT

Complaints against the Government of the Republic of Korea presented by

- **the Korean Confederation of Trade Unions (KCTU)**
- **the Korean Automobile Workers' Federation (KAWF)**
- **the International Confederation of Free Trade Unions (ICFTU)**
- **the Korean Metalworkers' Federation (KMWF)**
- **the International Federation of Building and Wood Workers (IFBWW)**
- **the Korean Federation of Transportation, Public and Social Service Workers' Unions (KPSU)**
- **the Korean Government Employees' Union (KGEU) and**
- **Public Services International (PSI)**

Allegations: The complainants' pending allegations concern: the non-conformity of several provisions of the labour legislation, including the Establishment and Operation of

the Public Officials' Trade Unions Act, with freedom of association principles; the dismissal of several public servants connected to the Korean Association of Government Employees' Works Councils (KAGEWC) for the exercise of illegal collective action; the unjust prosecution and imprisonment of trade union organizers and officials from the Korea Federation of Construction Industry Trade Union (KFCITU) so as to prevent the effective organization of construction workers; severe measures of repression against the leaders of the Korean Government Employees' Union (KGEU). New allegations concern: the death of Kim Tae-hwan, head of the FKTU Chungju regional chapter, and Ha Jeung Koon, member of the KFCITU Pohang union; the closure of 125 (out of 251) KGEU offices nationwide, the arrest of KGEU members, some of which were beaten up by riot police, and the severe harassment of thousands of KGEU members, officers and their families in order to resign from the KGEU on the basis of a "Directive to Promote the Transformation of Illegal Organizations into Legal Trade Unions (Voluntary Withdrawal of Membership)"; harassment of union representatives during minimum wage negotiations which were concluded in their absence; repeated government intervention in strikes through the imposition of compulsory or emergency arbitration accompanied with instigation of criminal charges against trade union leaders for obstruction of business and financial suits against trade unions for compensation; the introduction of a new and excessively widened category of "public services" as well as "emergency arbitration" to put an end to legal strikes

488. The Committee already examined the substance of this case at its May–June 1996, March and June 1997, March and November 1998, March 2000, March 2001, March 2002, May–June 2003, November 2004 and March 2006 meetings, when it presented an interim report to the Governing Body [304th Report, paras 221–254; 306th Report, paras 295–346; 307th Report, paras 177–236; 309th Report, paras 120–160; 311th Report, paras 293–339; 320th Report, paras 456–530; 324th Report, paras 372–415; 327th Report, paras 447–506; 331st Report, paras 165–174; 335th Report, paras 763–841; 340th Report, paras 693–781 approved by the Governing Body at its 266th, 268th, 269th, 271st, 273rd, 277th, 280th, 283rd, 287th, 291st and 295th Sessions (June 1996, March and June 1997, March and

November 1998, March 2000, March 2001, March and June 2003, November 2004 and March 2006).

- 489.** In a communication dated 1 September 2006, the Korean Confederation of Trade Unions (KCTU), the Korean Federation of Transportation, Public and Social Service Workers' Unions (KPSU) and the Korean Government Employees' Union (KGEU) submitted new allegations. In a communication dated 11 September 2006, Public Services International (PSI) associated itself with the complaint. In a communication dated 24 October 2006, the International Confederation of Free Trade Unions (ICFTU), the KCTU and the KGEU provided additional information on the complaint. Finally, the KCTU provided additional information in a communication dated 27 April 2007.
- 490.** The Government provided its observations in communications dated 23 February 2007 and 30 April 2007.
- 491.** The Republic of Korea has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 492.** At its March 2006 session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:

- (a) The Committee notes with interest the adoption and entry into force of the Act on the Establishment and Operation of Public Officials' Trade Unions; it requests the Government to give consideration to further measures aimed at ensuring that the rights of public employees are fully guaranteed by:
- (i) ensuring that public servants at Grade 5 or higher obtain the right to form their own associations to defend their interests and that this category of staff is not defined so broadly as to weaken the organizations of other public employees;
 - (ii) guaranteeing the right of firefighters to establish and join organizations of their own choosing;
 - (iii) limiting any restrictions of the right to strike to public servants exercising authority in the name of the State and essential services in the strict sense of the term;
 - (iv) allowing the negotiating parties to determine on their own the issue of whether trade union activity by full-time union officials should be treated as unpaid leave.
- The Committee requests to be kept informed of any measures taken or contemplated in this respect.
- (b) As regards the other legislative aspects of this case, the Committee urges the Government:
- (i) to take rapid steps for the legalization of trade union pluralism at the enterprise level, in full consultation with all social partners concerned, so as to guarantee at all levels the right of workers to establish and join the organization of their own choosing;
 - (ii) to enable workers and employers to conduct free and voluntary negotiations in respect of the question of payment of wages by employers to full-time union officials;
 - (iii) to amend the list of essential public services in section 71(2) of the Trade Union and Labour Relations Amendment Act (TULRAA) so that the right to strike may be restricted only in essential services in the strict sense of the term;

- (iv) to repeal the notification requirement (section 40) and the penalties for violation of the prohibition on persons not notified to the Ministry of Labour from intervening in collective bargaining or industrial disputes (section 89(1) of the TULRAA);
- (v) to repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office (sections 2(4)(d) and 23(1) of the TULRAA);
- (vi) to bring section 314 of the Penal Code (obstruction of business) in line with freedom of association principles.

The Committee requests to be kept informed of the progress made in respect of all of the abovementioned matters.

- (c) Recalling that the prohibition of third party intervention in industrial disputes is incompatible with freedom of association principles and that justice delayed is justice denied, the Committee trusts that the appeals court will render its decision on Mr Kwon Young-kil without further delay, taking into account the relevant freedom of association principles. The Committee requests the Government to provide information in this respect as well as a copy of the court judgement.
- (d) The Committee expresses its deep regret at the difficulties faced by the 12 dismissed people connected to the Korean Association of Government Employees' Works Councils (KAGEWC), which appear to be due to the absence of legislation ensuring their basic rights of freedom of association, in particular the right to form and join organizations of one's own choosing, respect for which is now largely guaranteed by the entry into force of the Act on the Establishment and Operation of Public Officials' Trade Unions. Noting that four of them have been reinstated, the Committee requests the Government to reconsider the dismissals of Kim Sang-kul, Oh Myeong-nam and Min Jum-ki in the light of the adoption of the new Act and to keep it informed in this respect. It also requests the Government to provide information on the outcome of the pending administrative litigation and requests for examination concerning the dismissals of Koh Kwang-sik, Han Seok-woo, Kim Young-kil, Kang Dong-jin and Kim Jong-yun and expresses the hope that the new legislation will be taken into consideration in rendering the relevant decisions. The Committee finally requests the Government to provide copies of the relevant decisions.
- (e) With regard to the application of the provisions concerning obstruction of business, the Committee requests the Government: (i) to continue making all efforts to ensure a practice of investigation without detention for workers who have violated current labour laws, unless they have committed an act of violence or destruction, as indicated in its previous reports; (ii) to review the situation of Oh Young Hwan, President of Busan Urban Transit Authority Workers' Union and Yoon Tae Soo, first Executive Director of Policy of the Korea Financial Industry Union, who appear to have been penalized under this provision for non-violent industrial action and to keep it informed in this respect; (iii) to continue to provide details, including any court judgements, on any new cases of workers arrested for obstruction of business.
- (f) With regard to the new allegations made by the ICFTU, the Committee, recalling that the practice of arresting and prosecuting trade union leaders for their activities aimed at greater recognition of trade union rights is not conducive to a stable industrial relations system and that public servants should enjoy the right to strike as long as they are not exercising authority in the name of the State and do not carry out essential services in the strict sense of the term, requests the Government to look at the possibility of reviewing the convictions of KGEU President Kim Young-Gil and General Secretary Ahn Byeong-Soon given that they were convicted under the now repealed Public Officials Act for actions aimed at acquiring recognition, de facto and de jure, of the basic rights of freedom of association of public servants and that their sentences are subject to a two-year suspension. The Committee requests to be kept informed in this respect.
- (g) The Committee requests the Government to refrain from any act of interference in the activities of the KGEU and to provide its comments on the ICFTU allegations of violent police intervention in rallies, injury of trade unionists, intimidation and harassment of trade union leaders and members so as to discourage their participation in the strike of 15 November 2004 and finally, the initiation of a "New Wind Campaign" by MOGAHA

at the end of 2004 targeting the KGEU and promoting a “reformation of organizational culture, focusing on rearing workplace councils and healthy employee groups”.

- (h) With regard to the new allegations made by the IFBWW, the Committee expresses its deep regret at the intervention of the police and the criminal prosecution and sentencing of officials of the Korea Federation of Construction Industry Trade Union (KFCITU) to fines and imprisonment. The Committee requests the Government to issue appropriate instructions so that all actions of intimidation and harassment against the KFCITU officials cease immediately. It requests the Government to review all convictions and prison sentences, and to compensate the KFCITU officials for any damages suffered as a result of their prosecution, detention and imprisonment. It further requests the Government to inform it of the outcome of the trial of the three officials of the Kyonggido Subu local trade union and of the current situation of Park Yong Jae, President of the Chunahn local trade union who was convicted to one year imprisonment. The Committee requests to be kept informed on all of the above.
- (i) The Committee requests the Government to inform it of the outcome of the appeal lodged against the court decision which found that the collective agreements signed in 2004 did not apply to workers hired by subcontractors; it trusts that the appellate court will take due account of the freedom of association principles mentioned in the Committee’s conclusions.

B. The complainants’ new allegations

New allegations by the KCTU

493. In a communication dated 1 September 2006, the KCTU and its affiliates, the KPSU and the KGEU, indicate that the Government is obstructing the formation of stable and democratic industrial relations and seriously represses labour rights. In particular:

- (i) the Ministry of Government Administration and Home Affairs (MOGAHA) is trying to destroy the KGEU through its “Directives to Promote the Transformation of Illegal Organizations into Legal Trade Unions (Voluntary Withdrawal of Membership)”, requesting all the government organs, ministries and local governments to order government employees to withdraw from the KGEU;
- (ii) the Government submitted the strike of the Korean Railway Workers’ Union (KRWU), affiliated to the KPSU, to compulsory arbitration in March 2006; KRWU President, Kim Young-hoon, was detained for “obstruction of business” and 198 union members were sued;
- (iii) Jeon Jae Hwan, former President of the KCTU Emergency Committee and current President of the Korean Metal Workers’ Federation (KMWF) was arrested and imprisoned for “illegal demonstrations”;
- (iv) finally, the Government continues to promote “Measures for the Advancement of Industrial Relations Laws and Systems” (so-called roadmap) despite continuous opposition from trade unions.

New allegations by the Korean Federation of Transportation, Public and Social Service Workers’ Union (KPSU)

494. In particular, according to the KPSU, on 1 March 2006, some 17,000 of the 25,000-member KRWU went on strike. The Government issued successive warrants on 1, 3 and 17 March 2006 for the arrest of a total of 29 union leaders. Moreover, to pressure the striking unionists, the Korean Railroad Corporation (KORAIL) successively suspended on

2, 3 and 22 March 2006, a total of 2,680 workers who had participated in the strike. These workers are currently undergoing formal disciplinary procedures which have caused a climate of intimidation prejudicial to trade union activity. The KRWU appealed to the Seoul Regional Labour Relations Commission that the suspensions are illegal and the decision process is ongoing. Furthermore, KORAIL lodged charges of “obstruction of business” and infraction of the Trade Unions and Labour Relations Adjustment Act (TULRAA) against 198 union officers.

- 495.** Pursuant to the issuing of the initial warrants and suspensions at the beginning of March, rumours circulated that riot police were poised to raid the five mass assembly areas where the striking workers were holding sit-ins. Thus, the striking workers were dispersed throughout the country to avoid a clash with the police. On 4 March 2006, riot police forces hunted down and forcibly arrested – not by arrest warrant but as “criminals caught in the act of a crime” – at least 401 striking railway workers in public bathhouses, mountains, union offices and wherever they were hiding, and forced the arrested strikers back to work on the railway. Thus, through concerted intimidation and coercion, the railway strike was forcibly stopped by 7 p.m. on 4 March 2006.
- 496.** On 6 April 2006, the 29 KRWU officers against whom arrest warrants had been issued, were submitted to police investigation. The police initially detained all of them, releasing most of them after two days. However, the KRWU President, Kim Young-hoon, remained in custody and was moved to the Seoul detention centre on 13 April 2006 where he remained locked up until 22 June 2006. Later, the Chairperson of irregular workers of the KRWU, Lee Chul Yee, and KRWU Seoul provincial President, Kim Jeong Min, were arrested; Kim Jeong Min remained in jail at the time of the complaint (1 September 2006). Finally, KORAIL is preparing to lodge charges against the KRWU insisting that the company incurred damages of about US\$13,500,000 by the strike. The KRWU has already been sentenced by the Supreme Court to compensate the KORAIL about US\$2,440,000 for damages caused by a strike in 2003.
- 497.** The Korean compulsory arbitration machinery has made it possible to prohibit virtually all industrial action that has been attempted in the essential public services to date or end those strikes quickly. In the particular case brought before the Committee, the KRWU made all efforts to arrive at a settlement through bargaining and gave management the full opportunity to bargain through successive guarantees pledging “not to go on strike” (on 25 November and 16 December). However, every time the union gave a pledge, the National Labour Relations Commission (NLRC) followed up with a notice that compulsory arbitration would also be deferred for the period of the pledge (notices of 26 November and 13 December). The NLRC notices further stated that “when there exists a strong possibility that [the union will] undertake industrial action, we will immediately refer the dispute to compulsory arbitration”, thereby revealing that the explicit intention behind imposing compulsory arbitration would be to forestall strike action.
- 498.** After six months of trying to resolve issues through good faith bargaining and with negotiations deadlocked, the union finally announced that it would go on strike at 1 a.m. on 1 March 2006. Just four hours before the strike was set to begin, the NLRC referred the dispute to compulsory arbitration as it had said it would in the formal written deferral of compulsory arbitration notices of 26 November and 19 December. As soon as the strike began, the Government declared it illegal because the dispute had been referred to compulsory arbitration, and mass suspensions, detention and criminal prosecution to stop the strike ensued as indicated above.
- 499.** This serious restriction of the right to strike and victimization of trade union leaders and members is not an isolated incident. Rather, it follows a pattern of abuse that can be seen in the following cases of industrial action in the so-called “essential” public services.

Strikes in “essential” public services (starting date of industrial action)	Date compulsory arbitration was imposed
Seoul Subway Labour Union (SSLU) (21 July 2004)	20 July 2004
Seoul Metropolitan Rapid Transit Workers’ Union (SMR TWU) (21 July 2004)	20 July 2004
Korean Power Plant Industry Union (KPPIU) (25 February 2002)	28 February 2002
Seoul National University Hospital Workers’ Union (SNUHWU) (13 June 2001)*	13 June 2001

* In this case, compulsory arbitration was imposed while the union was holding an extraordinary union congress.

- 500.** In each of the above cases, none of the related union activity presented “a clear and imminent threat to the life, personal safety or health of the whole or part of the population”. Instead, the actual practice in each of these cases has been the expedient and abusive use of compulsory arbitration as a means to put a blanket ban on industrial action or stop strikes quickly or, as in one case (the SNUHWU) to stop a union congress quickly.
- 501.** Compulsory arbitration machinery also contravenes the right of collective bargaining in ILO Convention No. 98 as employers feel assured that their demands can be better met through compulsory arbitration machinery than through serious bargaining with the union.
- 502.** In addition to the above, the complainant (KPSU) indicates that section 314 of the Criminal Code (obstruction of business) carries heavy penalties: up to five years’ imprisonment or a fine of up to KRW15 million. Yet, the obstruction of business clause is highly vulnerable to discretionary interpretation; empirically, obstruction of business has been interpreted such that a broad range of union activity can be constituted as criminal obstruction of business.
- 503.** With regard to the at least 401 KRWU members arrested under obstruction of business charges, the Government claims it arrested the strikers red-handed while they were obstructing business. In truth, riot police forces apprehended railway strikers while they were gathered together, or travelling, or even sleeping. All these acts were found to constitute “criminal obstruction of business” that “hampered the railway operations” simply by the fact that the unionists were not working on the railroad at the time. Thus, the KRWU case shows that the refusal of work in itself can be considered criminal obstruction of business by “threat of force”; that is, a peaceful strike in and of itself was constituted to be an “obstruction of business using threat of force”. Thus, it would be possible for the clause to be used in any strike at the discretion of the authorities.
- 504.** Together with the criminalization of strikes (and extraordinary union congresses) by compulsory arbitration, obstruction of business charges have routinely led to heavy sanctions on union activity. All the unions above were saddled with lawsuits demanding “compensation for damages”, thereby leading, in some cases, to provisional seizure of part of the union assets and funds. Retaliatory suspensions ensued which can lead to dismissal (for reason of union activity), and disciplinary measures disadvantaging workers for their legitimate union activity. In all the cases above, union officials were incarcerated and made to face penal charges (obstruction of business) and fines as a direct result of attempting to defend and promote the economic and social interests of their union members through union activity. Use of extremely serious measures, including dismissal, for having participated in a peaceful strike, has also become routine and impedes the establishment of a climate of confidence for industrial relations.
- 505.** In the cases above, as the KRWU, the SSLU, the SMR TWU, the SNUHWU and the KPPIU are all categorized as “essential” public services, the workers’ right of freedom of

association and right of collective bargaining, were contravened. Thus, reducing the scope of the “essential” public services in the TULRAA is a pressing matter

- 506.** Furthermore, the KPSU alleges that although section 71 of the TULRAA does not include air transport in the list of essential public services subject to compulsory arbitration machinery, the Government achieved the same effect by reviving a dead letter of the law, the power to invoke “emergency arbitration”, which resulted in a 30-day prohibition on industrial action once invoked and ended with compulsory arbitration. The “emergency arbitration” section of the TULRAA (articles 76 to 80) is a relic from the military dictatorship period; however, even the authoritarian governments exercised greater restraint in the invocation of such powers which had only been used twice in all of Korean industrial relations history (once in 1969 at Korean Shipbuilding and a second time in 1993 at Hyundai Motors) prior to 2005. In 2005, the then labour minister invoked such powers twice in one year, for a strike at Asiana Airlines (10 August 2005), and for the Korean Airlines Flight Crew Union (KALFCU), on 11 December 2005. The complainant is concerned in particular with the latter strike.
- 507.** According to the complainant, the KALFCU bargaining began less than two months after emergency arbitration was used to break the Asiana Pilots’ Union (APU) strike. This created a climate whereby the union went from a bargaining stance of 8 per cent wage increase down to 6.5 per cent then to 3.5 per cent wage increase before resorting to industrial action, while in contrast, Korean Airlines (KAL) adopted an inflexible bargaining position. Indeed, KAL management initially suggested not bargaining with KALFCU at all, but instead applying the FKTU-affiliated Korean Airlines General Union (KAGU) contract of 2.5 per cent wage increase for KALFCU. The Construction and Transportation Minister’s calls for emergency arbitration powers to be invoked again further emboldened the KAL management to avoid serious bargaining with the union. Following the invocation of emergency mediation on 11 December 2005, the dispute was referred to compulsory arbitration on 26 December 2005. The NLRC laid down an arbitration award on 10 January 2006 along the lines of a 2.5 per cent wage increase, that is, the same level that management had suggested at the very beginning.
- 508.** Exercise of emergency arbitration powers is extremely serious in that it forcibly suspends constitutionally guaranteed rights (right of collective action). Yet, TULRAA does not strictly circumscribe the invocation of such powers. The Labour Minister can simply decide to impose emergency arbitration on a dispute (after hearing the opinion of the NLRC Chairperson) based on the following grounds: (1) if the dispute “relates to” any public services; (2) if the dispute is large in scale or has a “special” character such that the Labour Minister thinks the dispute is “likely” to make the economy “worse” or disrupt “normal life”. In reality, the issue is left to the discretionary power of the Minister of Labour.
- 509.** Thus, a mere public announcement by the Labour Minister at a 11 December 2005 press conference that “The Korean Airlines Pilots’ Union strike is causing great harm to the national economy and ... [so] I invoke powers of emergency mediation” was enough to put a 30-day prohibition on the KALFCU strike that had only begun on 8 December 2005. KAL instigated the criminal prosecution of 26 union officers for obstruction of business, as well as seven unionists for “violence” even though the seven pilots had only engaged in verbal arguments with the managers who had come down to the strike area to harass them. Currently, the union officers are still being investigated by the public prosecutor. KAL punished union members who participated in the strike with prejudicial acts such as transfers to standby. As management knows, KALFCU is a young union that was only formed in the year 2000, and such KALFCU-oriented anti-union discrimination could wreak great harm.

- 510.** Emergency arbitration can function fundamentally to undermine freedom of association and right to collective bargaining along the same lines as compulsory arbitration, but with larger potential scope since an enterprise does not even need to have been designated as an “essential public service” for emergency arbitration powers to be invoked.
- 511.** The complainant expresses the concern that as Korean labour laws are being gradually reformed, the Government increasingly turns to and strengthens alternative measures, such as criminal obstruction of business clauses, to crack down on union activity; the revival of emergency arbitration powers and invocation of such powers twice in one year fall in this same pattern. Thus, the KPSU expresses an overall deep concern regarding the promotion of the “Industrial Relations Roadmap to Mature (or “Advanced”) Industrial Relations”. The bill would further extend the authorities’ discretionary intervention and the criminalization of legitimate trade union activity.
- 512.** While the government-proposed bill would eliminate the current category of so-called “essential” public services, it proposes a renewed and excessively widened “public services” category that includes what was formerly called “essential” public services as well as: suppliers of heat and steam, harbour loading and unloading, railway, freight transport, airborne freight transport (airlines), and social insurance providers. This expanded category of “public services” could be subject to emergency arbitration powers, which leads to a 30-day prohibition of a strike and, if no agreement is reached, the NLRC can refer the matter to compulsory arbitration to “resolve” the dispute. Thus, the new bill adds more sectors to the “essential” public services and could subject such sectors to the possibility of emergency arbitration (30-day prohibition of industrial action; arbitration award takes the force of a collective bargaining agreement).
- 513.** The bill also adds a minimum services obligation to this expanded form of “public services”. Questions persist as to whether the scope of the “minimum services” can be designated such that the scope would genuinely and strictly be a *minimum* service while maintaining the effectiveness of a strike. If the scope of “minimum services” is excessively broad, the effectiveness of the pressure to bear from a strike would be lost. However, instead of using criteria that could be compatible with freedom of association principles namely, “in the event of strikes whose scope and duration would cause an acute national crisis”, the bill uses the criteria of: acutely endangering the “normal life” of the public. This (normal life criteria) is on a completely different level than the ILO criteria of “clear and imminent threat to the life, personal safety or health of the whole or part of the population” or “acute national crisis”. Designating the scope of minimum services becomes a crucial point, but the bill provides for compulsory arbitration to resolve the scope issue should management and labour fail to conclude an agreement demarcating the scope of minimum services. Because the compulsory arbitration machinery is a familiar tool used to suppress normal trade union activity in the public sector, stipulating that compulsory arbitration can be resorted to in deciding the scope of minimum services cannot be expected to create confidence in the decision-making process. Rather, the neutrality of the process would be compromised.
- 514.** Given the Government’s record of turning to various laws to repress trade union activities in the public services, serious doubts must persist as to the intent behind legislation of minimum services. The prohibition of strikes in minimum safety services has already been incorporated into the law in TULRAA section 42 (Prohibition of acts of violence), clause 2. “Industrial actions shall not be conducted to stop, close, or interrupt the normal maintenance and operation of facilities installed to protect safety of workplaces.” Even when essential public services unions have gone on strike, non-union members continue the provision of services and the strikes have not actually come near to halting services provision. What the Government views as an “imminent threat” has an extraordinary low threshold – the powers of emergency arbitration were invoked because companies began

actually feeling the effect of the strike, in which case any strike that puts effective pressure on employers could be seen as an acute threat – as can be seen in the cases covered in this complaint. Even if, for example, the Korean Airlines Pilots’ Union succeeded in the future in organizing a strike that grounded all KAL aircraft, there are numerous other carriers, such as Lufthansa, Air France and so on, that could be availed of. Likewise, truckers can transport freight in the event of an extended railway strike that could actually shut down services, and alternatives exist in other sectors as well. Given this reality, the rational question is why is the Government pursuing enactment of minimum services when minimum service levels have not been disturbed at essential public services even during a strike? The concern is that, under the guise of enacting minimum services, the Government will expand the anti-union discriminatory activities in the form of opening possibilities for replacing striking workers with replacement workers, for criminalization of any strike activity of workers performing “minimum services”, and for enhancing managerial control on the shop floor should managers be able to designate which workers (of the section considered as necessary for “minimum services” provision) should work, allowing further dismissal and victimization of workers who refuse to work.

- 515.** As concluding remarks, the KPSU alleges that in the past few years, the Government has wielded unilateral power in shedding workers and downsizing the public services. Moreover, by issuing budgetary guidelines (budget allocation to the public sector) and directives on assessment of managerial performance, the Government has been forcibly derogating from existing collective bargaining agreements voluntarily concluded between management and unions. At the same time, it denies public services workers the tools and means with which to address their social and economic interests as impacted by such policies. Thus, public sector workers are trapped in an industrial relations system that uses different components to delegitimize ordinary trade union activities, encourages routine discriminatory sanctions (disciplinary measures, dismissal and imprisonment) against union leaders and members, in which workers have no means to seek recourse owing to the effective prohibition of the right to strike. Such an industrial relations system is not sustainable.

New allegations by the KGEU

- 516.** In a complaint dated 7 September 2006, the KGEU alleges that the Government has launched a concerted campaign, with the coming into effect of the “Act on the Establishment and Operation, etc. of Public Officials’ Trade Unions” (hereafter, “Public Officials’ Trade Union Act”), to destroy the existing trade union of government employees in the civil service. The introduction of the new law, which is purportedly aimed at guaranteeing trade union rights of civil service government employees, is being used as the pretext for the Government’s attempt to deny the existence of the KGEU, which has a membership of 140,000. The Government is refusing to engage in any kind of dialogue with the KGEU; rather, it is intent on destroying it. Thus, the attitude and response of the Government towards trade unions of public officials are proving to be no different to what it had demonstrated in 2002, when it mobilized massive police force to disrupt the inauguration assembly of the KGEU, arresting 178 delegates attending the founding conference.
- 517.** The KGEU alleges that, on 8 February 2006, the Ministers of three government ministries – Ministry of Justice, Ministry of Government Administration and Home Affairs (MOGAHA) and the Ministry of Labour – held a joint press conference to issue an “announcement concerning illegal activities or organizations of public officials”. The joint announcement contained a declaration of the Government’s intent to take strict measures on illegal activities by illegal organizations of public officials, such as “the so-called KGEU”. The joint announcement was undertaken to “make clear that the Government is

committed to bring about voluntary withdrawal of membership from illegal organizations and to respond sternly to all illegal activities”.

- 518.** The joint announcement revealed the main forms of action that the Government was planning to take: (1) disallow any collective bargaining and conclusion of collective bargaining agreement with illegal organizations engaged in trade union activities without submitting notice of establishment as a trade union pursuant to the new law; disallow release from work to serve as full-time officers of the union, disallow check-off arrangement, provision of office space, and any other facilities to illegal organizations; (2) force the leaders and public officials who are members of illegal organizations to voluntarily withdraw membership from the illegal organizations; take legal sanctions against any illegal collective activities; but extend active assistance if the currently illegal organization is intending to transform themselves into legal trade unions; and (3) undertake administrative and financial sanctions against local governments which fail to comply with the Government’s directive and engage in collective bargaining or conclude collective bargaining agreements with an illegal organization, or engage in any other actions which overlook or facilitate illegal activities by the illegal organizations; sanctions may take the form of reduction in the allocation of special revenue, exclusion from various state projects, etc.
- 519.** The Government’s joint announcement outlined its basic position in conjunction with the coming into effect, on 28 January 2006, of the Public Officials’ Trade Union Act. The announcement came soon after the election of the new leadership of KGEU on 25 and 26 January and 2 and 3 February by the vote of all the members of the union and the referendum on the affiliation to the KCTU. In the announcement, the Government stated that “the so-called Korean Government Employees’ Union has elected a person who has been decommissioned or dismissed as a result of the illegal collective action on 15 November 2004, and thus cannot be qualified to represent a public officials’ trade union as its president; it has also publicly stated that it would refuse to comply with the law and remain an illegal organization and continue to conduct intense campaigns, causing deep insecurity among the people”.
- 520.** The Government mentioned that “some public officials have formed labour organizations and have conducted activities even before the coming into effect of the law. This was deemed to be a part of preparatory activities for the establishment of a trade union. As such, the Government had respected to a certain degree these collective activities”. However, the 8 February joint announcement made clear that the Government is determined to reject the government employees who had been decommissioned or dismissed as a result of the KGEU’s strike in November 2004, the KGEU declaration on freedom of political activities in March 2004, the “collective use of annual leave” in November 2002, the founding of the KGEU in March 2002, and for the activities of the Korean Association of Government Employees’ Works Councils (KAGEWC), the predecessor organization of the KGEU, as ineligible to be representative of a public officials’ trade union. The Government is intent on denying that the above listed “events” had taken place in the course of efforts to secure the basic rights of freedom of association and bringing about changes in law to firmly establish these rights.
- 521.** Furthermore, according to the KGEU, the “Directive to Promote the Transformation of Illegal Organizations into Legal Trade Unions (Voluntary Withdrawal of Membership)”, adopted by MOGAHA, and transmitted to all government ministries, agencies, and provinces and metropolitan cities, on 22 March 2006, is a clear case of “unfair labour practice” and campaign of repression against the KGEU, not to mention serious human rights violation. The Directive clearly denotes the KGEU as an illegal organization. The government logic is simple: the establishment and operation of a public officials’ trade union is only possible pursuant to the Public Officials’ Trade Union Act – therefore, the

KGEU is an illegal organization that has failed to submit notice of establishment pursuant to this law. The notice of establishment, however, is a matter that should be determined independently by a trade union; it is not a matter that the Government or an employer may order or instruct. The system of giving notice of establishment is intended to extend rights and protection to a trade union provided by the law. Therefore, it is not the case that a trade union cannot engage in activities for not having given notice of establishment. Furthermore, it is illegitimate to force the dissolution of an organization and to pressure its members to withdraw membership. The KGEU currently objects to the various problems inherent in the Public Officials' Trade Union Act. In refusing to submit notice of establishment pursuant to this flawed law, it may not be able to enjoy the protection that may be extended from this law, but this does not make it an illegal trade union – if legal status were to be sought, the KGEU could be characterized as a trade union outside the scope of the law.

- 522.** The efforts to bring about “transformation into legal trade union”, “voluntary withdrawal of membership” and disciplinary sanctions are clear cases of unfair labour practice. Even if the KGEU has opted to remain outside the law, forgoing the protection (to claim remedy for unfair labour practice) in case of the unfair refusal by the employer to engage in collective bargaining (section 81.3 of the TULRAA), because of its objection to the extreme restrictions contained in the law concerning collective bargaining, the “Directive to Promote the Transformation of Illegal Organizations into Legal Trade Unions (Voluntary Withdrawal of Membership)”, which also contains a threat of punitive sanctions, is a clear case of unfair labour practice as stipulated by subparagraphs 1, 2 and 5 of section 81 of the TULRAA.
- 523.** The Directive issued by MOGAHA directs that “The heads of central administrative agencies and offices at all levels and the heads of local governments shall, immediately upon the receipt of this Directive, press the member staff and the workplace associations which in reality engage in activities as illegal organizations to transform themselves into legal trade unions at the earliest date as possible, and issue work order to voluntarily withdraw membership from illegal organizations in the form of official letter”. At the same time, it directs that the “work order” should “indicate clearly and in detail the disciplinary measures and disadvantages to be enforced in case of failure to comply with the order”.
- 524.** The Directive outlines detailed measures aimed at destroying the union. It calls for a “prohibition of check-off arrangement for membership due” and threatens sanctions against public officials in supervisory positions who fail to comply fully with the Directive for negligence. It spells out “heavy disciplinary penalties against leaders (exclusion from appointment)”, “forceful measures such as closure of the offices of illegal organizations”, nullification of all existing agreements and prohibition of all consultation and assistance”, “removal of the name plaque” and instructs to “secure, if necessary, the cooperation of police”. The Directive directs all government offices to establish a “man-to-man persuasion team”, and “the high-ranking official charged with responsibility” to undertake “individual (joint) contact with the target member of the leadership, visit of the family and telephone calls, to persuade the person in question and his/her family members”. They are instructed to “make clear strongly that there will be disciplinary action for failure to comply with order and other disadvantageous measures, such as punitive fines for illegal use of the term ‘trade union’ (in the case of the organization and its elected representatives)”.
- 525.** According to the complainant KGEU, the proposed “individual contacts”, “home visits” and “telephone calls” to persuade the person in question and his/her family members are serious human rights violations. The establishment of “persuasion teams” to conduct individual contacts to press for withdrawal of membership is an abuse of the state power, infringing on the freedom of conscience that lies at the heart of human dignity. The idea of visiting family members to force withdrawal of membership from a trade union is no

different from threats against family, used widely in the past by military regimes in their anti-union drive. The State or local government should not collect personal information for the purposes of trade union repression, human rights violations and other illegitimate purposes. They cannot make use of the already collected information for the purposes of trade union repression, human rights violations and other illegitimate purposes. But, the Directive directs all local government authorities to collect and submit a list of the elected leaders of the KGEU branches, including those members who had been decommissioned or dismissed, in blatant violation of human rights.

- 526.** The Directive threatens that the names of the government agencies and local governments with “poor performance” shall be “made public through media release” and will be penalized in the “annual agency evaluation and other administrative and financial penalties will be applied”. The Government indicated in the Directive that it would, in April 2006, undertake a “comprehensive inspection of industrial relations in the public officials’ sector” in all “central government ministries and local governments where illegal organizations have been established”. This would be “conducted jointly by local government departments and audit departments under the coordination of the public officials’ organization supervision team of the Ministry of Government Administration and Home Affairs” with “police cooperation if necessary”. The Government also intended to hold a “public officials’ sector industrial relations countermeasure conference” to discuss “governmental-level measures for administrative and financial penalty for agencies and offices which have failed to comply with the Government’s Directive”. It intended to “hold consultation with the Office for Government Policy Coordination on penalty measures to be undertaken at each ministry”. The Government made thus clear in the Directive its intention to mobilize the whole of its resources in its union-busting drive.
- 527.** The KGEU further alleges that MOGAHA took action to implement the Directive. It sent out an official letter seeking cooperation of all government offices and organizations and the local governments in establishing and carrying out an “education plan” to press for the transformation of illegal public officials’ organizations into legal trade unions and to bring about voluntary withdrawal of membership. In its official letter, MOGAHA planned to hold education sessions at five ministries and two agencies and 14 province and metropolitan city governments, involving all of 15,519 public officials, to be completed by the end of March. The aim of the education was the same: to “press for the transformation of illegal organizations into legal trade unions and voluntary withdrawal of membership by individual public officials who were members”. The province and metropolitan city governments then proceeded to hold explanation sessions and circuit education coordinated by MOGAHA, and directed all the municipal governments and subsidiary organizations to “prohibit the check-off arrangement for the membership dues of illegal public officials’ organizations and illegal use of the term trade union”.
- 528.** The Directive of MOGAHA sent to all government ministries and province and metropolitan cities, then was sent further down the line of the government structure, to all municipal governments and lower level organizations. The Seoul Metropolitan City directed the Ku (municipality, county) office and organizations under its jurisdiction to press illegal public officials’ organizations to transform into legal trade unions and bring about voluntary withdrawal of membership by the public officials who were members of illegal public officials’ organizations in an effort to establish a sound and exemplary public officials’ industrial relations, uphold law and order, and to establish discipline in the public officialdom”. The municipal governments, thus instructed, began to carry out the Directive towards all public officials. The Directive was relayed to all lower level administrative offices at the *eup*, *myeon*, and *dong* levels, and all local branches of government agencies and service centres.

- 529.** The complainant annexes numerous documents in support of the above. It then goes on to describe the measures taken by public authorities (Wonju City, Gyeonggi-do Province, Cheongyang-gun County of South Chungcheong Province, the Agricultural Research and Extension Service of North Gyeongsang-do Province, the Buk-gu municipality of Dagu Metropolitan City, Wando-gun County of South Cholla Province) in order to put pressure on public officials to resign from the KGEU “voluntarily”. Resignation forms were prepared by the authorities, and resignations were preceded by official orders which on several occasions contained threats such as: “failure to comply with this order shall be subject to stern measures pursuant to the relevant laws”. On some occasions, the members who refused to fill in the application forms were met individually by higher ranking officers and were threatened with dire consequences for their continued refusal to join the new body. Other authorities, expressing concern at the lack of progress in obtaining withdrawal from the KGEU, spell out further measures to that effect, including: prohibition of check-off, closure of the office of the KGEU, nullification of all existing agreements, end to all assistance, prohibition of all dialogue and negotiations and further “stern measures” if no progress is achieved. These activities led to the formation of a Wando-gun Public Officials’ Trade Union in the Wando-gun County of South Cholla Province.
- 530.** The complainant then indicates that MOGAHA began to inspect the progress of the implementation of the Directive working on the basis of a plan which calls for “inspection of the reports submitted to the Ministry by 14 April 2006” and a second round of inspection involving “on-field verification in late April”. The Ministry had instructed all government offices to produce and submit a “checklist on the progress of transformation of illegal organizations into legal trade unions”. It planned to conduct on-field verification on the basis of an inspection of the submitted reports, after identifying those offices which failed to submit reports, those which had a poor performance record, and others which were deemed to need on-field verification. The Ministry planned to hold a government-wide “conference on countermeasures for public officials’ industrial relations”. The complainant attaches numerous inspection reports. According to the complainant KGEU, while the report contains some exaggeration to embellish the local government’s performance, it does shed light on the pressures felt by trade unions due to the Ministry’s Directive and the actions and threats of the local government authorities. The authorities seem to be aware of “confidential” plans of groups within some chapters of the KGEU which are considering transformation into legal trade union. The report shows clearly the various efforts undertaken by the authorities to undermine the KGEU, multifaceted pressures to force withdrawal of membership and to bring about a transformation into “legal trade union”. The Government’s own documents show clearly how it is going about publicly and covertly to pressure more than 140,000 members of the KGEU to withdraw membership and to join a “legal trade union”.
- 531.** According to the complainant, the actions of the Government can be seen as an effort to give legitimacy to the new Public Officials’ Trade Unions Act which has been subject to much criticism within and outside the Republic of Korea, as it fails to reflect the views of government employees and their organizations. The intention is to demonstrate that there are “legal” trade unions which accept to operate within the parameters of the new law. In doing so, it hopes to sweep away all the criticism that has pointed out the shortcomings and problems in the new law. The actions of the Government since the coming into effect of the Public Officials’ Trade Union Act, however, have demonstrated that it is not so committed to the principle of guaranteeing trade union rights of government employees in the civil service, which is the purported purpose of the new law but is, instead, intent on destroying the KGEU which has been established as an independent and democratic union. The “sound and exemplary public officials’ industrial relations” referred to in the Directive, that the Government seeks, is being established by repression and attacks on the KGEU.

- 532.** The KGEU further alleges that since May 2006, KGEU offices have been closed down by force throughout the country. The Gyeongnam Officials' Training Institute, an affiliated agency to the provincial government, issued an official letter on 29 August informing that it would execute the administrative action to forcefully close down the KGEU's branch office on 30 August (Gyeongnam Officials' Training Centre official letter, Department of Education Support-1641, 29 August 2006). The warrant attached to the official letter stipulates that, according to the government instruction that prohibits providing offices to unregistered government employees' unions by the Public Officials' Trade Union Act, the forceful administrative action would be executed.
- 533.** Hundreds of riot police were deployed around the union office right away. KGEU members were prohibited from entering the union office except four union staff working there. The KGEU Gyeongnam Regional Branch held a rally in front of the union office building on 30 August. During the rally, all the Chairpersons from the chapters of KGEU Gyeongnam Regional Branch shaved their hair in protest. Riot police were deployed again inside and outside the office building and blocked KGEU members from entering the union office. Several union members tried to block the forceful closing down of the union office in vain. They were oppressively moved out by the police. The union office was sealed off with thick plywood with a warning sign attached. The KGEU Gyeongnam Regional Branch had been using the office in the Gyeongnam Officials' Training Institute according to a written agreement between the union branch and the provincial government since April 2003.
- 534.** In Busan Metropolitan City, the host city of the ILO Asian Regional Meeting, official letters warned that if the KGEU Busan Regional Branch did not move out from the office in the city hall by 31 August, the union office would be forcibly closed down (Busan Metropolitan City official letter, Department of Civil Service-11316, 17 August 2006). All the municipalities under the Busan Metropolitan City had been proceeding with the same actions at the time of the complaint.
- 535.** On 7 June 2006, MOGAHA asked the local governments concerned to take disciplinary measures against the KGEU members who participated in the rally in front of the Rural Development Administration (RDA) on 25 May (MOGAHA official letter, public officials' organization supervision team-1588, 7 June 2006). The Ministry even pointed out the KGEU members concerned with an attached list. (It is provincial or metropolitan city governments that take disciplinary measures against local government employees.) The KGEU Chapter of the RDA tackled the undemocratic management of the RDA, which promotes the promotion review, and asked to introduce a single grade system. In response to this attempt, the administrator of the RDA announced that any action, even wearing the trade union jacket, would be punished and RDA cleared the site of the demonstration by use of violence. On 25 May, members of the KGEU moved to the main gate of the RDA to participate in the KGEU rally. The police blocked the gate despite the fact that the demonstration was legally reported to the authorities in advance. Members of the KGEU protested against this and were arrested by riot police from the Suwon Jungbu police station.
- 536.** On 21 June, MOGAHA disseminated another official document calling on local governments to execute the government directives and instructions and to take stern responses to all illegal activities (MOGAHA official letter, officials' organization supervision team-1771, 21 June 2006). During the campaign for the local elections on 31 May, several candidates answered to KGEU's policy questionnaires that they would recognize the unions and guarantee independent trade union activities when elected. MOGAHA document asked "to discard their written pledge or promise of the governor-elected on recognition of the KGEU". The Ministry claimed in the document that "connivance to activities of illegal organizations in discord with the Government Directive

would have bad effects on establishing labour relations in the civil service”. Moreover, the Ministry warned that “the local governments that bargain or even conclude a collective agreement with illegal organizations and give any support like overlooking full-time union staff, allowing union dues check-off and providing an office to illegal organizations will be taken to administrative and financial actions government-wide for disadvantages”.

- 537.** The KGEU held a rally on 8 July 2006 in protest against the government repression. More than 2,000 KGEU members participated in the rally, which was legally notified to the police in advance and held on Saturday. However, the Ministry requested local governments and agencies to take “thorough countermeasures in advance against the KGEU rally on 8 July, for its illegal activities, violating Public Officials’ Trade Union Act stipulating prohibition of collective activities” (MOGAHA official letter, officials’ organization supervision team-1861, 29 June 2006). At the rally, several officers from MOGAHA and the police videotaped and photographed the participants. Shortly after then, MOGAHA sent local governments and agencies an official letter with the videotape and the photos, requesting a list of the KGEU members participating in the rally (MOGAHA official letter, officials’ organization supervision team-61, 11 July 2006).
- 538.** On 3 August 2006, MOGAHA issued another Directive “to take thorough countermeasures including forceful closing down of the illegal government employees’ organizations against illegal activities” (MOGAHA official letter, officials’ organization supervision team-406, 3 August 2006). The Ministry requested all the local governments, ministries and agencies to take firm action against the KGEU. It asked “to close down all the KGEU offices in government buildings nationwide by 31 August”. It asked “to exclude KGEU members from personnel committees, to actively encourage all government employees joining illegal organizations to withdraw membership, to prohibit union dues check-off system and to block any financial support like voluntary contribution or donation to the organizations”. It asked for “positive efforts to stop payment of union dues through the cash management system (CMS)”. After prohibition of union dues check-off, KGEU encouraged its members to pay union dues through CMS from the bank account. Finally, the Directive stated that the Ministry would investigate the actual process and conditions for implementing government directives and instructions together with auditing departments and would take administrative and financial action government-wide against the local governments that did not implement the Directive.
- 539.** In a further section of its complaint, the KGEU delineates the problems and shortcomings it finds in the Act on the Establishment and Operation, etc. of Public Officials’ Trade Unions. The first such problem, is according to the KGEU, the lack of democracy in the legislation process, as the Act was announced unilaterally by the Ministry of Labour in May 2003, in total disregard of the earlier promise to draft a bill “through a process of sufficient hearing of views, as the substance would be of secondary importance”. The Ministry of Labour finally tabled the bill with the National Assembly in October 2004 without a process of consultation with government employees in the civil service.
- 540.** The Council of Representatives of Workplace Associations (predecessor of the KGEU) in the Ministry of Labour, issued a statement on 27 August 2004, declaring that “the government bill allows trade unions only in name. In terms of substance, it is a product of the deceitful intent not to allow genuine trade unions of public officials. The government bill, in prohibiting the right to collective action, aims to make the trade union powerless. The government bill is one that aims to repress trade unions of public officials”. The KGEU opposed the government bill for its failure to reflect the views of the very workers it is supposed to serve, and demanded a fresh start to draft a new bill. On 19 September 2004, at a meeting with the KGEU, held to present the union’s views, the Minister of Labour declared that “there is no problem at all with the draft bill for Public Officials’ Trade Unions Act produced by the Ministry of Labour, and there is no need to talk” and

left the meeting unilaterally. The Government subsequently tabled the unilaterally drafted bill with the National Assembly and forced through its passage. At the same time, the Government had violently cracked down on the KGEU's planned vote of all its members on strike against the proposed laws. In the process, some 3,000 public officials who were members of the KGEU were subject to disciplinary action and some 400 members who were leaders of the union were dismissed following the KGEU's strike.

541. The second issue pinpointed by the KGEU concerns the right to organize of public employees. Article 5 of TULRAA states that “workers are free to establish a trade union or join it” leaving the union itself to determine the scope of membership. Subparagraph 4 of article 2 disqualifies a union if it allows as a member “an employer or other persons who always act in their employer’s interest”. The actual scope of this exclusion is set through jurisprudence. The Act on the Establishment and Operation, etc. of Public Officials’ Trade Union however denies trade union rights to the following groups of public officials:

- public officials of Grade 5 and higher;
- public officials who exercise the right to direct and supervise other public officials or engage in generally managing other public officials’ affairs;
- public officials, such as those performing jobs related to personnel and remuneration, who stand in the position of administrative agencies in relation to a trade union;
- public officials who engage in correction, investigation and other similar jobs;
- public officials whose main jobs, such as mediating and inspecting labour relations, are considered incompatible with their status as union members (article 6).

542. MOGAHA estimated the total number of public officials eligible to be members of a trade union to be 330,000–360,000. The Ministry of Labour, following the finalization of the “Enforcement Decree” in January 2006, found that, as of November 2005, a total of 290,000 public officials out of a total of some 920,000 (excluding soldiers) would be eligible to be members of a trade union. All public officials of Grade 5 or higher are denied trade union rights, and many public officials of Grade 6 or lower are also excluded from union membership based on the eligibility criteria stipulated in the law or “Enforcement Decree”.

543. Given that a significant section of public officials of Grade 5 are engaged in administrative work, they cannot be deemed to be “persons always working in the interest of their employer”. The National Human Rights Commission, in its 2004 human rights report found that “today, it is quite common that public officials who hold ranks/positions of *bu-yisakwan* and *samukwan* are, in terms of work relations, middle-level managers and are not in a position of managerial responsibility for lower rank public officials. [...] It is not desirable that eligibility for union members be restricted by types of public official or excluding public officials of Grade 5 or higher in a monolithic manner”. In its rulings concerning “discrimination in retirement age according to the rank”, the National Human Rights Commission found “in actual central government industries, Grade 5 public officials are responsible for actual implementation work rather than policy and managerial and supervisory work, and in some ministries Grade 5 and Grade 6 public officials carry out same kind of work requiring deliberation and judgement. [...] In central government ministries, the required period for promotion from Grade 6 to Grade 5 differs according to the actual ministries, as in the Ministry of Justice, it takes four years and five months, but in the Ministry of Education and Human Resources Development, it takes 12 years and eight months. This means that it is not possible to make a blanket statement that public officials of Grade 5 or higher always have more experience and knowledge than public officials of Grade 6 or lower.”

544. Furthermore, with the introduction and expansion of the team systems which led to assignment of public officials with middle-level authorization powers who were mainly responsible for supervisory work to implementation jobs as a part of the effort to enhance work efficiency, a considerable portion of public officials of Grade 6 are assigned as team leaders. This brought about a situation where a majority of Grade 6 public officials come to fit the criteria denying eligibility to be a member of a union, that is, “exercise the right to direct and supervise other public officials” or “engage in generally managing other public officials’ affairs” (subparagraph 1, paragraph 1, article 6, Public Officials’ Trade Union Act). This has undermined the “principle” to extend trade union rights to public officials of Grade 6 and lower.

545. Furthermore, the Enforcement Decree of the Public Officials’ Trade Union Act establishes further restrictions in eligibility by excluding:

- public officials charged with directing or supervising other public officials with authority and responsibility to manage their work (including those public officials deputizing other public officials with this responsibility) in accordance with, on the basis of a law, by-law or regulations, rules and work division authorized by a law or a by-law;
- public officials mainly engaged in generally directing or supervising other public officials within a department in assistance to the head of the department (including those public officials deputizing those public officials with this responsibility);
- public officials engaged in work concerning appointments, work assignments, disciplinary measures, appeals review, remuneration, pension and other welfare-related matters;
- public officials engaged in work concerning drafting and allocation of budget and execution (excluding simple executions) and work concerning the organization and staff level of an administrative agency;
- public officials engaged in auditing work;
- public officials engaged in security, maintenance of office facilities, maintenance of order, defence security of office, secretarial job or driving of automobiles.

546. This means that a considerable number of not only Grade 6 public officials, but also Grade 7 public officials are excluded from joining a trade union. Thus, for example, in the case of Seo-ku Office of Pusan Metropolitan City, of the 512 public officials of Grade 6 or lower, 89 public officials are excluded due to subparagraph 1 of section 3; three due to subparagraph 2(a) of section 3; one due to subparagraph 2(b) of section 3; ten due to subparagraph 2(c) of section 3; three due to subparagraph 2(d) of section 3; 27 due to subparagraph 2(e) of section 3; and one public official due to subparagraph 4 of section 3. Some 134 public officials (26.2 per cent) out of a total of 512 public officials of Grade 6 and lower are ineligible to join a trade union. In the case of Wonju City of Kangwon-do Province, 387 public officials (43.2 per cent) out of 1,130 public officials of Grade 6 or lower are not eligible to become a member of a trade union. In the case of Haenam-kun in South Cholla Province, out of 691 public officials of Grade 6 or lower, 229 public officials (33.1 per cent) out of 691 public officials of Grade 6 or lower are prohibited from joining a trade union. In the case of Fair Trade Commission, a total of 51 out of 253 public officials of Grade 6 or lower (20.2 per cent) are not eligible to be members of a trade union. The situation is even worse in the education-related offices. There are 60,787 public officials of Grade 6 or lower in 16 education offices. Of these, 45,122 public officials work in state public schools. Most of these public officials work as administrative directors, security guards, drivers, or sanitation supervisors. As a result, the number of public officials who

are not eligible to join a trade union due to the criteria set out in section 3 of the Enforcement Decree is estimated to be more than 42,550 (those working in schools are 40,609). This represents 70 per cent of the public officials of Grade 6 or lower. In the case of public officials working in schools, the ratio is close to 90 per cent. Thus, Grade 6 public officials who become ineligible to join a union amount to 30 per cent of those employed in local governments. This surpasses the 16.7 per cent anticipated by the law itself. In this regard, the National Human Rights Commission, in its 28 November 2005 ruling found the “Enforcement Decree Draft” which “excludes more than 90 per cent of Grade 6 general public officials in city, kun, ku municipalities from joining a union” is unconstitutional and illegitimate.

- 547.** The third problem raised by the KGEU concerns collective bargaining. Paragraph 1 of section 8 of the Public Officials’ Trade Union Act removes “matters concerning policy decisions the State or local governments are authorized to make by laws, etc. and matters concerning the management and operation of the organization, such as exercising the right to appointment, but not directly related to working conditions” from becoming matters for collective bargaining. However, the TULRAA which proclaims the principle of autonomy of relations between labour and management, does not stipulate that certain matters are prohibited from collective bargaining. The Act on the Establishment and Operation, etc. of Teachers’ Trade Unions is the same in this regard. There are differing views concerning whether matters related to personnel decision, financial arrangement, business decisions, reinstatement of dismissed workers, release of workers from work to devote full time to the affairs of a union are legitimate matters for collective bargaining. In any case, however, it should be possible for a union to “demand” collective bargaining on matters that are listed in article 8, paragraph 1, and the employer may possibly entertain engaging in collective bargaining on these issues. The inclusion of specific matters to be excluded from becoming subject to collective bargaining, as in the Public Officials’ Trade Union Act, is a serious infringement of the principle of autonomy of industrial relations. According to a report produced by MOGAHA, collective bargaining agreements – albeit without legal status – have been concluded in 35 cities, kuns, or ku (various levels of municipality structure) in the last three years since the formation of the KGEU in March 2002. Many of these agreements contain provisions which call for “disclosure of project facilitation expenditure by heads of the organization”, “enhancement of transparency in matters of personnel decisions”, “avoidance of discretionary contracting in engaging private contractors and strengthening of objective bidding system”. All these provisions target the problems of corruption that are prevalent in the public sector. The proviso in section 8, paragraph 1, of the new Public Officials’ Trade Union Act provides a ground for the heads of organization to reject the demand of a trade union to include these matters concerning the reform of the government services and corruption issues in collective bargaining.
- 548.** Furthermore, according to the KGEU, section 10, paragraph 1, of the Public Officials’ Trade Union Act states, “in collective agreements concluded pursuant to section 9, provisions stipulated by laws, by-laws or budget and provisions stipulated by the authority delegated by laws or by-laws shall not have the effect of collective agreements”. However, most of the matters concerning wages and working conditions of public officials, including matters of appointment, dismissal, status, salary and other remuneration, and work assignment are governed by “laws, by-laws or budget and provisions stipulated by the authority delegated by laws or by-laws”, such as the State Public Officials’ Act, State Public Officials’ Duty Regulation, the Public Officials’ Remuneration Regulation, the Local Public Officials’ Act, Local Public Officials’ Duty Regulation, Local Public Officials’ Work By-law, Local Public Officials’ Remuneration Regulation, etc. Therefore, even if a collective agreement, which has precedence over these laws, by-laws, budget and other regulations is concluded, it fails to have any effect as a collective agreement on the basis of section 10, paragraph 1, of the Public Officials’ Trade Union Act.

- 549.** MOGAHA goes even further in extending the area of exclusion in its “Work Manual concerning Public Officials’ Organizations”. It provides an interpretation that “rules that set out provisions on the basis of authority delegated by a by-law cannot be subject matters for collective agreement”. MOGAHA further undermines the effect of collective agreement by stating that “the failure to implement those matters which the Government’s bargaining representative can legitimately manage and decide on through ‘enforcement decrees’ may be a subject of moral and political burden, but not legal responsibility”. However, it is possible to uphold the efficacy of collective agreements while fully respecting the power of the National Assembly or local councils on the basis of the principle of separation of power. Formulations such as the “Government has the legal obligation to present a legislative amendment bill, a by-law amendment bill, or supplementary budget bill incorporating the requirements arising from the conclusion of a collective agreement” or “the effect of a collective agreement is conditional upon the approval of the relevant legislature”, allow a collective agreement to be reflected in laws, by-laws or the budget. The power to initiate or amend “presidential decrees” or the “measures undertaken on the basis of delegation of authority of a law or a by-law” are in the hands of the State or local governments: they are, therefore, not matters that infringe the principle of separation of powers. Despite this, the Public Officials’ Trade Union Act denies the possibility of collective bargaining on these matters.
- 550.** The effect of the proviso leads to an unacceptable situation. A collective agreement concluded, for example, in 2006, on matters for which the State or local government have legal competence to decide may end up not having any effect because it stands contrary to the substance of a pre-existing “presidential decree” or “measures undertaken on the basis of delegation of authority of a law or a by-law”, which may have been unilaterally initiated by the State or a local government in the previous year. This runs in the face of the principle of acting in “good faith”.
- 551.** The fourth matter raised by the KGEU is the right to collective action. The Act on the Establishment and Operation of Public Officials’ Trade Unions prohibits collective action by any public official. Such a blanket prohibition, on top of the severe restrictions in the right of collective bargaining and the limitation on collective agreements on matters of working conditions, reduce trade unions and their activities to a state of meaninglessness. Section 18 stipulates that “a person who engages in strikes, work slowdowns and other activities undermining normal business operation ... shall be punished by imprisonment of up to five years or a fine not exceeding KRW50 million” to enforce the “prohibition of industrial action”. This provision only highlights the innate hostility held by the Government on the very idea of industrial relations and industrial action.
- 552.** The KGEU finally indicates that the Public Officials’ Trade Union Act, in stipulating [section 17(3)] that sections 88–92, and section 96(1)(3) of the Trade Union and Labour Relations Adjustment Act shall not apply to trade unions under this Act, removes penal action against an employer’s unfair labour practice. As a result, a public officials’ trade union, which does not have the right to take industrial action, has no legal means to counteract the unfair refusal of an employer to engage in collective bargaining or failure by an employer to implement a collective agreement.
- 553.** The Public Officials’ Trade Union Act also prohibits public officials’ trade unions and public officials from engaging in political activities (section 4). The current prohibition of political activities is a copy of the similar prohibition on trade unions in general in the past, reflecting the prevalent hostility to the very idea of trade union activities. Public officials are members of society, and should be able to engage in political activities, including expression of political views, at least as long as they do not infringe on the work they are responsible for as public officials. Trade unions of public officials should also be able to

engage in political activities. The general prohibition of political activities, regardless of their direct links with the actual work of public officials is a gross violation of basic rights.

- 554.** In a communication dated 24 October 2006, the KGEU adds that since 3 August 2006, when MOGAHA issued a directive instructing local government agencies “to take thorough countermeasures including forceful closing down of the offices of illegal government employees’ organizations against illegal activities”, the instruction was spread out along the line of the government structure throughout the country. On 7 August 2006, the Seoul Metropolitan City held a meeting of heads of general affairs departments in its municipalities (*gu* or *ku*) and agencies (Seoul Metropolitan City, material for meeting of heads of general affairs departments of municipalities and agencies, 7 August 2006). The metropolitan Government referred again to MOGAHA Directive on 22 March 2006, and clarified its plan to give advantages and disadvantages to its municipalities in accordance with the performance results implementing the Directive. According to the plan, Songpa-gu, that had not issued work orders instructing government employees in the municipality to voluntarily withdraw from the KGEU, would face administrative measures and financial disadvantages while Eunpyeong-gu, where the KGEU chapter disaffiliated from the union, would be granted incentives like a special subsidy.
- 555.** Thus, on 28 August 2006, the Gangwon-do (province) issued an official letter instructing municipalities to “force implementation of actions including forceful closing down of the offices of illegal government employees’ organizations. The Gangwon-do provincial government instructed its municipalities “to close down the offices of the KGEU in the government buildings by 31 August 2006, as well as to encourage government employees to withdraw from illegal organizations and to prohibit them from individually paying union dues through cash management system (CMS)”.
- 556.** On 17 August 2006, the Busan Metropolitan City warned the KGEU Busan Regional Branch with an official letter that if the union did not move out of the office in the occupied city hall by 31 August 2006, the city would forcefully execute the administrative order to close down the union office. All the municipalities under the Busan Metropolitan City have been proceeding with the same actions. The Seo-gu municipal government asked for the Busan Seo-gu Government Employees’ Work Council to close down the office by 31 August 2006.
- 557.** However, as of 31 August 2006, only two KGEU local offices had been forcefully closed down. Thus, MOGAHA issued new directives on 1 and 13 September 2006, that urged all government organs “to actively force implementation of actions to forcefully close down the offices of illegal government employees’ organizations by 22 September 2006” (MOGAHA, official letter, officials organization supervision team-778 and 875. The Ministry warned that those who were adopting a lukewarm attitude would be audited and examined later on. They underlined the schedule as follows: (a) issuing warrants of administrative execution of closing down of the union office by 15 September; (b) notifying implementation of the administrative execution by 20 September; (c) implementation of administrative execution of closing down of the union office (nationwide simultaneously) by 3 p.m. on 22 September. The same directives had been delivered down to all levels of the government structure.
- 558.** From 22 September 2006, the attacks started throughout the country. Since then, almost every working day saw violent attacks on the union offices and the arrests of the union members for more than ten days. The riot police and the specially hired thugs armed with fire extinguishers, fire-fighting dust, hammers, claw hammers, hammer drills and power saws raided the union offices from dawn until midnight. Some 125 KGEU local offices have been shut down and in many cases doors and walls of union offices were broken through while doors to union offices were sealed off, in some cases even welded, with iron

plates or bars. The KGEU members inside the offices were violently pulled out. More than 100 KGEU members and solidarity organizations' members were arrested and some of them were seriously injured (pictures on forceful closure of KGEU local offices are annexed and a video clip submitted with the complaint).

- 559.** On 22 September 2006, the first attack started against the KGEU Seoul Guro-gu Chapter office. While the specially hired thugs attacked the KGEU members to move them out, the riot police remained unconcerned and instead blocked up the union office. The KGEU members inside were forcefully pulled out, and the Chairperson of the KGEU Guro-gu Chapter, Mr Heo Won Haeng, was injured on his head and fell unconscious. He was hospitalized in the emergency ward, and fortunately regained consciousness in the hospital.
- 560.** The second target was the KGEU Seoul Jongro (Jongno)-gu Chapter. The police started from outside the building, with the aim of isolating KGEU members who were inside to protect the office. Dozens of people from the KGEU and other solidarity organizations, who were protesting the police blockade and violent closing down, were rounded up and arrested. One from the KGEU, two from the Korean Public Service Union (KPSU) and three from the Democratic Labour Party (DLP) were arrested. They were released almost 12 hours later.
- 561.** At about the same time, riot police and thugs stormed into the KGEU Seoul Yeongdeungpo-gu Chapter office, while dozens of members of the KGEU and solidarity organizations, such as the KCTU and the DLP, were arranging a press conference. They were blocked off by the police and arrested.
- 562.** The KGEU Seoul Mapo-gu Chapter was also attacked. Union members and solidarity organization members barricaded the office, while another 20–30 solidarity activists warded off the hundreds of riot police who were deployed outside the compound. Tensions gradually built up and from noon, riot police started to move down into the basement where the union office was located, while the municipal management cut off electricity. Two people inside the union office were suffering from severe cases of asthma. At around 2.20 p.m., the police broke through the barricade and arrested those who were inside. The Chairperson of the Chapter, Mr Lee Jae Seop, the Chairperson of the KGEU Women's Committee, Ms Lee Yeon Sook and the Executive Director of Politics and Reunification at the KGEU head office, Mr Kwon Jeon Hwan, were arrested with other KGEU members and solidarity organization members.
- 563.** Tensions also started to escalate from the morning at Songpa-gu, Seoul, as well, where the entrances leading to the union office were blocked and elevators stopped. The tenth floor of the municipality building, where the union office is located, was filled with riot police and specially hired thugs, and the union members inside were violently pulled out and the office was sealed off.
- 564.** In Yongsan-gu, Seoul, KGEU members had barricaded the union office. However, the municipality and the police eventually broke into the union office. Eighteen members of the KGEU and other solidarity organizations were arrested and released an hour later. In total, 19 KGEU offices in Seoul were forcefully closed down on 22 September 2006.
- 565.** Similar scenarios took place in Yeonsu-gu, Incheon Metropolitan City, Mangdon-gu and Bupyeong-gu, Incheon, Buk-gu, Ulsan Metropolitan City, Nam-gu, and Jung-gu. In the latter case, the director of general affairs of the municipality broke the window of the union office with a claw hammer, and, as a result, several union members were injured. A piece of glass hit and injured the eye of a KCTU member who had to be hospitalized due to severe bleeding. One KGEU member was also hospitalized from injuries during the raid.

- 566.** Almost all offices at Gwang-ju Metropolitan City were forcefully closed down. At Buk-gu and Seo-gu municipalities, more than 100 KGEU, KCTU and solidarity group members gathered at each building and tried to hold off the riot police for several hours in vain. As for Daegu/Gyeonbuk branch, riot police were deployed at all municipalities. Sixteen out of 18 chapter offices were closed down.
- 567.** The situation at Busan was also serious. The Busan branch office was inside the Busan City Hall. The police raided the branch office, which can only be interpreted as an attempt to decapitate all chapter unions in the city by targeting the branch union. Seventeen union members were forcefully dragged out and arrested. Of those arrested, the Prosecutors' Office called on the court to issue detention warrants against two local leaders, Mr Oh Bong Seop, Chairperson of the KGEU Busan Branch, and Mr Hwang Gi Joo, Director-General of the KGEU Busan Branch, but the court refused, and they were released almost two days after they were arrested. The other members were released around 26–32 hours after their arrest.
- 568.** Ten chapters out of 11 affiliated to the Chungbuk Branch were also closed down. At one of the chapters, Cheongwon, a pregnant union member fainted as riot police raided the union office.
- 569.** In Gangwon-do (province), six members from the KGEU and solidarity organizations were arrested in the morning when they came to make a protest with the Minister of MOGAHA, who happened to visit Jeongseon-gun, Gangwon-do, against repression on the KGEU.
- 570.** In Jeonbuk-do, riot police were deployed and attacks took place in almost all the KGEU local offices, which had to be forcefully closed down.
- 571.** In Gyeongyang-gun (county), Chungnam-do officials from the municipality came to the union office and ordered closure of the office. However, around 70 union members and solidarity group members continued their sit-in protest, in light of which the municipal officers gave up, tore apart the official warrant for the administrative execution and promised not to attack the union office.
- 572.** In Gyeongnam-do, hundreds of riot police stormed into the KGEU Gyeongnam Jinju Chapter office and tried to forcefully close it down. More than 300 KGEU members and solidarity organization members firmly stayed around the union office. Although the first wave of the police attack on 22 September was pulled back, a much stronger one was waiting. On 28 September, the union and solidarity organization members who held a protest sit-in overnight were forcefully pulled out, one by one and the union office was taken over by the riot police and the authorities.
- 573.** On 22 September 2006, out of the 251 KGEU chapters nationwide, 81 union offices had been forcefully closed down. Some local governments that had not raided the offices on 22 September, were expected to continue.
- 574.** On 25 September 2006, the forceful closing down of the KGEU offices restarted in Boryeong, Chungnam-do (province). The KGEU Chungnam Seocheon Chapter office was sealed off. The riot police were deployed around the KGEU Chungnam Yeongi Chapter office and tried to break into the office, where the union members were holding a sit-in protest. However, the riot police began using very dangerous “weapons” – welding machines. They brought four welding machines, which they started to use on the office door, aiming to literally “melt” a hole in the door. Sparks from the welding machines constantly jumped onto electric wires, setting them on fire, and filled the entire basement, where the union office was located, with thick smoke. The riot police swept into the union

office and 21 members from the KGEU and solidarity organizations were arrested. The union office was sealed off.

- 575.** The KGEU Chungnam Cheongyang-gun (county) Chapter, which made the police pull back on Friday, faced another wave of attacks. The riot police had been deployed again from 1.10 p.m. At 3.30 p.m., the union office was taken over. The KGEU Chungnam Onsan Chapter and the KGEU Chungnam Regional Branch in the same office were attacked on 25 September. The electricity was cut off and the basement where the union office was located was left in darkness. The doors were removed. A woman member was injured and bruised and 15 were arrested. They were released an hour later.
- 576.** In Buyeo-gun (county), Chugnam-do (province), the first attack to the union office was defeated but 30 minutes later the riot police began to break into the union office using a ladder truck and water cannons. They were trying to get in through the rooftop of the building spreading fire-fighting dust. The doors were broken and the union office was taken over by the riot police. Three KGEU members were arrested (Shin Dong Woo, Director-General of the KGEU Chungnam Regional Branch, Seo Jang Won, Chairperson of the KGEU Chungnam Buyeo-gun Chapter and Yoo Byeong Hwan, Chairperson of the KGEU Ghungnam Cheongyang-gun Chapter. An arrest warrant was issued against one more KGEU Chungnam Branch member who was arrested on 10 October 2006. Allegedly he was leading the struggle of the union to defend the office of the KGEU Buyeo Chapter. The Prosecutors' Office applied for a warrant of detention to the court, but the court did not accept the application of the warrant and he was released at night on the same day.
- 577.** On 26 September 2006, the riot police began to be deployed around the KGEU Chungnam Dangjin-gun Chapter office. More than 200 of the riot police and execution officials broke into the office and sealed it off at 8.40 p.m. In Jeonnam-do, six KGEU chapters had been facing the forceful closing down of the union offices. The office was sealed off in Yeongam-gun. In Wando-gun, the municipality mobilized a mobile crane (excavator), a ladder truck and a fire extinguisher in front of the municipality building. Also in Guyre-gun, the union members were pulled out of the union office and the municipality sealed off the office.
- 578.** The main targets on 27 September 2006, were the KGEU chapters in Gyeonggi-do (province). The union members inside the office of the KGEU Gyeonggi Gwacheon Chapter were severely beaten up and arrested. Four of those were seriously injured and hospitalized. While fortunately they recovered well, one of them has still to go to hospital every day to treat his back pain. In Suwon, the riot police and the execution officials broke into the union office. Seven more KGEU chapters in Gyeonggi-do were forcefully closed down: Osan Chapter office, Hwaseong Chapter, Anyang Chapter, Goyang Chapter, Pocheon Chapter, Pyeongtaek Chapter and Icheon Chapter. The same happened to the KGEU Gyeonggi Siheung Chapter and Gwangmyeong Chapter.
- 579.** At the same time, the KGEU RDA Chapter was also being attacked. The RDA (Rural Development Administration) is a research institute under the Ministry of Agriculture and Forestry. After the Directive on 22 March 2006 by MOGAHA was issued, the new administrator had broken agreements with the union and refused any negotiations. A peaceful protest rally by the KGEU on 25 May in front of the RDA had been attacked by the riot police and hundreds of the union members had been arrested. On 8 September, the seven leaders of the KGEU RDA Chapter were dismissed.
- 580.** The only province where the wave of attacks on the KGEU local offices had not been pouring down yet was Gangwon-do (province), but this began just a few days later. On 29 September 2006, the first attack on a KGEU local office in Hwacheon-gun (county) in Gangwon-do started. At first, the municipality officials tried to forcefully close down the

union office in vain. The riot police were deployed and a mobile crane (excavator) was mobilized. At last the riot police were pulled back and a meeting between the governor of the Hwacheon-gun and the KGEU Hwacheon Chapter was agreed to be held on 2 October. But, at dawn on the day when the meeting was supposed to be held, more than 350 riot policemen were deployed and swept into the union office taking it over and arresting three KGEU members.

- 581.** Following the crackdown of the KGEU Gangwon Hwacheon Chapter office, more attacks on the chapters of KGEU Gangwon Regional Branch followed on 3 October, which is a national holiday. The KGEU Chuncheon Chapter's office was taken over by the riot police. Another attack on a KGEU local office took place in Samcheok. Two KGEU members were arrested. During the attack, two people were injured by the police violence and hospitalized. One of them was Bro Lee Sang Gyun, Chairperson of the KGEU Samcheok Chapter, who inhaled too much of the fire-fighting dust. He recovered well but had to spend six days in a hospital. The other was a KGEU member's wife, who was also there to protect her husband and his colleagues with other KGEU members' families. She was pulled down by the riot police and injured on her head causing a concussion. Although shortly after being hospitalized she recovered consciousness and could leave the hospital the next day, she still needs to be carefully watched.
- 582.** As of 10 October 2006, in total the local offices of 125 out of 251 KGEU chapters had been forcefully closed down. Some 101 members from KGEU and solidarity organizations were arrested and several of them were severely beaten up and hospitalized. The arrested were expected to be prosecuted, depending on the results of investigation by the police. The charge would be violation of clauses on special obstruction of performance of official duties under the Criminal Act. In cases of government employees, the violation of Public Officials' Acts would be included in their charges. (The list of the arrested was annexed to the communication.)
- 583.** According to the complainant, besides physically and literally shutting down local KGEU union offices, the Government had also been trying to block and intervene in any activities of the KGEU. The Government instructed local governments and agencies "to obstruct KGEU's campaign against the Republic of Korea-US Free Trade Agreement (FTA) negotiations as well as to intensify supervision of government employees to stop them from joining KGEU's rally on 9 September" (MOGAHA, official letter, officials organization supervision team-819, 7 September 2006). The KGEU has been involved in a campaign against the Korea-US FTA with other public sector unions, like the Korean Teachers and Education Workers' Union (KTU) and the KPSU. MOGAHA stated that KGEU members' leafleting, hanging banners about the Korea-US FTA, publicizing and joining rallies on this question are illegal, since these activities are violating public officials' acts and especially government employees are subject to law and order above all. The instruction was sent further down the line of the government structure, to all municipal governments and lower level organizations. Referring to the MOGAHA instruction, the Chungbuk-do (North Chungcheong Province) directed its municipalities and agencies "to thoroughly supervise and persuade government employees not to get involved in illegal activities such as collective expression of opposition to government policies" (Chungbuk-do Province, official letter, General Affairs Department-11863, 8 September 2006).
- 584.** Regarding the rally on 9 September, MOGAHA even threatened to dismiss government employees playing a leading role in the rally and apply disciplinary punishment to union members who participate in the rally, even though the rally was legally notified to the police in advance. Hundreds of KGEU members had to be stopped from joining the rally and forced to get back. Thirteen KGEU leaders were under summons by the police for such union activities. Some of them were investigated just because they read aloud a

resolution or made a speech at the rally on 9 September 2006. (The list of the KGEU leaders under investigation is annexed to the complaint.) A KGEU vice-president was also investigated by the police under the National Security Law simply because the KGEU issued a statement on 17 August 2006 on a military exercise that mobilized government employees. The KGEU demanded that the military training be abolished because many government employees are mobilized in the “Ulchi Focus Lens (UFL)” exercise, causing much inconvenience to the population that government employees are supposed to give civil service to. Furthermore, claiming that a statement is violating the NSL is repression of freedom of expression. The KGEU issues more than 300 statements a year, on matters which are believed to be related to government employees. Moreover, more than 70 organizations and trade unions also issued statements on the UFL with the same demands as the KGEU. Out of these 70 organizations, the police and Government have targeted only the KGEU. Therefore, we can only conclude that this “investigation” on the KGEU under the NSL is aimed at egregiously singling out and repressing the KGEU. Also, the Government’s claim concerning the KGEU’s intervention in the issue of relocating an American military base is purposeful manipulation. The voicing of opposition to government policies that are against the interests of the people should be considered as normal trade union activity. At that time, the KGEU, together with the KCTU and many other NGOs, opposed the violent and unjust “administrative execution” against the peasants living in Pyongtek. The Government had used violence and inhumane methods against those who were demanding a stop to the “administrative execution” and expansion of the US military base. More than 600 trade unionists and NGO members were arrested and those who were seriously injured by police brutality and had to be hospitalized on that day were more than 200. Nine out of 11 KGEU members were arrested while being chased away by the military and the police. The other two were arrested while protesting against police violence. They were not using any violence. The Prosecutor’s Office requested the court to issue detention warrants against two KGEU members, but the court refused it.

- 585.** At the end of September, MOGAHA instructed “the local governments to be cooperative to constantly promote transformation of illegal organizations into legal trade unions (voluntary withdrawal of membership), to conclude forceful closing down of illegal organizations’ offices and to thoroughly monitor the offices closed down in order not to be used again” (Incheon Metropolitan City, official letter, General Affairs Department–19041, 4 October 2006). This instruction as well went down along the line of the government structure. Referring to the MOGAHA meeting and the Directive from the Seoul Metropolitan City, the Jongro-gu municipality instructed the heads of its departments “to thoroughly implement the government instruction, which are: (1) voluntary withdrawal of membership from illegal organizations; (2) prohibition of check-off of union dues (including cancellation of CMS); (3) thorough management after closing down of the KGEU office; (4) transformation and establishment of legal trade unions” (Seoul Jongro-gu Municipality, official letter, General Affairs Department–12289, 13 October 2006).
- 586.** The KGEU also refers to the report of the ICFTU/TUAC/GUFs joint mission to the Republic of Korea which took place from 24 to 26 August 2006. The mission pinpointed certain issues such as a deeply disturbing pressure on public sector workers (personal telephone calls outside working hours to the homes of KGEU members and their families; threats to local authorities that had no desire to impose restrictions on organizing, that their receipts of public funds could be at risk) and strongly condemned the violation of public servants’ right to freedom of association with the forced closure of many union offices which had accelerated in the course of 2006.
- 587.** The mission report also pointed out the informalization of the economy and the criminalization of trade unionists who attempted to organize informal sector workers. It referred in particular to the construction sector which had recently experienced a surge of

incarcerations (more than 100 construction sector trade union activists imprisoned for what in other countries would be normal trade union activities, i.e. collective bargaining with main building contractors). The most serious charges construed collective bargaining with main contractors on behalf of subcontracted workers as extortion, despite the fact that the contractors had come to the table and were ready to negotiate. According to the report of the more than 2 million workers in the construction industry, 80 per cent were irregular workers. The majority of workers worked 12 hours a day, seven days a week with no suitable facilities, medical benefits, vacation or other time paid. The system of payment was such that workers were not paid until at least one or two months after they had completed work. Notwithstanding the difficulties, construction unions had been actively trying to organize workers in the industry. If unions were capable of organizing them, then there were no excuses for not negotiating better working conditions for all workers, hence the heavy repression directed towards the unions.

- 588.** According to the mission report, this situation took a tragic turn in August 2006 with the death of Ha Jeung Koon, a member of the Pohang local union of the KFCITU who died after a severe beating by riot police during one of the demonstrations organized by the union. The mission report recalled that another worker, Kim Tae-hwan, Chairperson of FKTU's Chungju regional chapter was killed on 14 June 2005 when he was run over by a cement truck while on the picket line in front of the Sajo Remicon cement factory. The mission identified an intensifying precariousness of the workforce and accelerating attempts to weaken the principle of collective representation by the labour movement.
- 589.** Finally, the fact-finding mission was profoundly concerned at violence breaking out at peaceful rallies and demonstrations. Documented aggression had caused the deaths of two workers and injuries to many others and had led in recent months to the imprisonment of more than 100 unionists. The mission called for the immediate release of the detained trade unionists and urged the ILO and OECD to take all the appropriate steps to assist trade unions in the Republic of Korea in their legitimate claim to uphold workers' rights: (1) the ILO should provide technical assistance in redrafting current legislation; and (2) the Committee on Freedom of Association and the OECD ELSA Committee should send a mission to the Republic of Korea to reinforce their respective monitoring process.

New allegations by the ICFTU

- 590.** In a communication dated 24 October 2006, the ICFTU alleges that 126 members of the KGEU were arrested during a peaceful rally on 22 June 2005 in Wonju City, Gangwon-Do Province. The purpose of the rally was to call on the local Wonju City government to stop the repression of the KGEU and start talks instead. Before the rally the KGEU had sent a letter to the mayor to call for talks concerning disciplinary measures taken against 395 local government employees (amounting to 35 per cent of all government employees in Wonju City) following the general strike on 15 November 2004. Twenty workers were dismissed before or during the month of June 2005. Furthermore, the local government withdrew from the collective agreement already signed with the KGEU Wonju Chapter and prohibited union activists and workers from holding union office. It denied the union the use of city facilities, closed the union's office and refused to transfer union dues automatically. Hundreds of police officers surrounded the rally and used violence against the participants, despite their efforts to register the rally and its peaceful intentions to the police well in advance. All 126 unionists were released by 24 June 2005.
- 591.** Furthermore, the President of the KGEU, Kim Young-Gil, was sentenced to one year's imprisonment on 24 June 2005. The sentence was suspended for two years, and followed his arrest on 8 April 2005 on charges related to the industrial action and ballot held in November 2004 by the KGEU. He was released after 75 days of imprisonment.

- 592.** Contrary to the observation of the Committee on Freedom of Association in its interim report (340th Report, paragraph 763), the KGEU is still considered an illegal trade union notwithstanding the entry into force of the Act on the Establishment and Operation of Public Officials' Trade Unions on 28 January 2006. The KGEU continues to suffer repression, because it has refused to register under the new law. The ICFTU understands that if the KGEU were to register and become a legal trade union under the new law, it would have to expel present members, who are firefighters or public servants at Grade 5 or higher, or public servants exercising a number of different responsibilities. Due to the fact that the union has not been recognized as legal, it has been subject to heavy repression.
- 593.** Furthermore, on 14 May 2005, the police arrested the President of the new union Seoul-Gyeonggi-Incheon Migrant Workers' Trade Union (MTU), Mr Anwar Hossain. Due to his long prison stay he became mentally ill and he was released temporarily for three months on 25 April 2006 on medical grounds. He was treated at a hospital in Suwon City.
- 594.** In addition to this, the Asiana Pilots' Union (APU) went on strike on 17 July 2005 calling for participation in governing structures of the airline, more rest days, fewer flying hours and earlier retirement in order to guarantee safe flights. Management responded by trying to prevent pilots returning from flights from joining the strike by sending them to a hotel close to Incheon Airport. The APU consequently decided to go on a sit-in strike at the Sokrisan mountain youth hostel close to Incheon Airport to facilitate the participation of all pilots in the strike as no negotiation had taken place. After one week of the strike, the authorities tried to intimidate the APU to end the strike by threatening intervention. Finally, on 10 August, the Government decided to refer the dispute to emergency mediation, effectively ending the pilots' right to strike. After the Government decided to end the strike, it deployed 1,800 riot police to the hostel where more than 400 Asiana pilots had been staying since the strike had been declared.
- 595.** However, the criteria for ordering emergency mediation under the law were not met in the pilots' strike. Firstly, Asiana Airlines, the second biggest airline in the Republic of Korea, is a commercial airline. Commercial airlines do not come under the public service sector. Secondly, the strike did not spread to other sectors or other companies and could therefore not be considered vast under the law, and, thirdly, nothing indicated that the strike caused pronounced damage to the national economy within the 23 days that the strike lasted, or that it was endangering the daily life of the public. Using such drastic measures in this conflict seems disproportionate to the damage inflicted by the strike. The lack of proper legal basis for the Government's decision to order emergency mediation has prompted other unions such as the pilot's union at Korean Air to threaten solidarity strikes, and the KCTU threatened to urge its transport members to take similar action.
- 596.** Calls for including air transport under the category of essential public services were made immediately after the Asiana Airline strike. On 19 July 2005, Mokhee Lee, the fifth Chairperson of the ruling Uri Party (Our Open Party) policy coordination committee, who had previously stated that, "High-waged workers should be subject to certain limitations of their three basic workers' rights" (the right to organize, collective bargaining and strike), stated that the ruling party would consider extending essential public services status to airlines. On 21 July 2005, the Grand National Party announced that they would draft a bill for the September session of the National Assembly, to include airlines under the definition of essential public services. On 8 August 2005, the Construction and Transportation Minister, Choo Byung-Jik, announced, "Given the economic importance of air transport and government efforts to promote the Republic of Korea as a logistics hub, we are planning to proactively look into designating the airline industry an essential public service." Prior to 1996, the definition of public infrastructure (currently "essential public services") included the airline industry; however, airlines were excluded from the list after the labour law revision of 1996.

- 597.** The ICFTU also alleges that on 12 April 2005, the process of collective bargaining was launched between different hospitals such as Korea University Hospital, Kyung Hee University Hospital, Ewha Hospital and their employees represented by the Korean Health Care Workers' Union (KHWU). The employers did not bargain in good faith but awaited a government intervention. This attitude led the KHWU to announce that they would go on a one-day strike on 8 July. Despite the fact that the KHWU decided to maintain a minimum service, the Labour Relations Commission (LRC) decided to refer the dispute to ex-officio arbitration on 7 July 2005, just in time to prevent strike action from being taken. The KHWU continued to try and reach a negotiated collective bargaining agreement, but the employer only wanted to wait for the award, which was to be announced on 22 July. In response, the KHWU decided to go on strike on 20 July. Thirty-six hospitals were involved in the strike which touched all of the abovementioned hospitals. When the award was announced on 22 July, the KHWU decided to reject the award because it saw the arbitration as a way of effectively denying it the right to pursue collective bargaining and promote bargaining in good faith, a necessary prerequisite for future collective bargaining and harmonious industrial relations at the hospitals.
- 598.** Furthermore, the ICFTU alleges the harassment of union representatives during minimum wage negotiations. The minimum wage system in the Republic of Korea was first adopted in 1988. A Minimum Wage Council (MWC) was created with 27 members, of which nine members represent respectively workers', employers, and the public interest. The latter are appointed by the government; however, the ICFTU does not have information as to whether they are appointed after consultation with employers' and workers' representatives. The Council members decide on the legal minimum wage on the basis of majority vote by a majority of members present, according to article 17, section 3, of the Minimum Wage Act. Furthermore, one third or more employers' and workers' members respectively must be present in order for the decision to be valid, unless they have failed to attend without justifiable reasons after two or more summons according to article 17, section 4, of the Act.
- 599.** MWC negotiations about a new minimum wage in 2005 remained unresolved as workers' representatives left the meeting on 29 June because the meeting took place in a very hostile environment. Police were present on all floors of the building that holds the offices of the MWC. Furthermore, the police monitored the meeting from the room adjacent to the room in which the "negotiations" took place with open doors. The workers' representatives felt threatened by the heavy presence of the police officers and feared arrest at any time. The heavy presence of the police led the workers to believe that no real consultation or agreement was sought by the employer and government-appointed members of the council.
- 600.** Despite the walkout of the workers' representatives and contrary to the quorum rules in article 17 of the Minimum Wage Act governing the MWC, a minimum wage rate was decided in the absence of all nine worker members on 29 June 2005. The decision was taken immediately after their departure with only seven public interest members and nine employer members present. No summonses were issued to workers' representatives to ensure the proper quorum.
- 601.** In view of the above, the workers' representatives complained about the decision of the MWC on 29 June 2005, both for formal and material breaches of the Minimum Wage Act. Firstly the workers' representatives consider the decision invalid because quorum rules were not respected; secondly because social consideration and wealth distribution were not adequately taken into consideration during the negotiations at the Council before the decision was made. Regardless of the fact that the decision of the MWC was made in breach of the law, the Ministry of Labour chose to announce the decision of the new minimum wage level and it seems that it is determined to let the invalid decision taken by the MWC in June 2005 stand, contrary to Korean law.

- 602.** In addition to the above, the ICFTU alleges that Kim Tae-Hwan, head of the FKTU's Chungju regional chapter, was run down and killed by a cement truck during a rally in Chungju, North Chungcheong Province on 14 June 2005. He was killed while he and other labour unionists were trying to block a truck that was being driven by a replacement driver hired by Sajo Remicon, a cement company, to fill in for striking drivers.
- 603.** The workers began their protests in front of Chungju City Hall on 14 June in the afternoon and moved on to Sajo Remicon, following the instruction of the FKTU ad hoc committee to hold a rally in front of Chungju City Hall at 2 p.m. every day. They tried to prevent the trucks driven by replacement drivers from entering the company. The workers, with the help of the FKTU, had demanded the conclusion of a collective bargaining agreement and a pay rise. They also called for the Government to recognize their status as workers so that they would be covered under the labour law.
- 604.** Concrete truck workers in the Republic of Korea are not covered under labour laws because they are categorized as self-employed. The union believes that there is a misuse of the term "self-employed" under the law, and that those such as concrete truck workers are only labelled self-employed in order for their employer to avoid extending full labour rights to these workers.
- 605.** The Government of the Republic of Korea has not made any efforts to investigate the incident that led to the death of Kim Tae-Hwan. Nor has anybody been held criminally responsible for his death. The employer felt moral responsibility to a certain degree, and gave KRW100 million to the bereaved family in compensation. However, the employer has not admitted any legal responsibility and did not want to take responsibility for hiring substitute workers to fill in for the company's striking workers. The driver was arrested on charges of violation of the Road Traffic Law. However, he was held only briefly and released on probation. The driver was subsequently sentenced to ten months' imprisonment, suspended for two years and 120 hours of community service. The incident was considered to be a mere traffic accident and the FKTU believes that the only reason that there was a trial at all, was because of the heavy pressure from unions; however, the driver was not the sole person responsible, and the union is dissatisfied that the incident has been treated as a mere traffic accident. The two unions have called on President Roh Moo-Hyun to take political responsibility for Kim Tae-Hwan's death and dismiss the Labour Minister and the President's Secretariat on Labour and to immediately hold a tripartite meeting in order to conclude pending issues related to atypical workers. They also demanded that the National Assembly set up a fact-finding committee for thorough investigation into the incident. The FKTU has distributed a CD containing the scene in which the late Kim was brutally killed. The ICFTU has produced a written transcript of this video and a copy of the CD-ROM with English subtitles of the scene was forwarded with the complaint.
- 606.** Finally, the ICFTU notes that in 2004 a total of 121 workers were indicted and that in April 2004 the number of workers that requested amnesty from the Minister of Justice amounted to 2,400. These numbers along with the violations described above and the information sent to the Committee on 3 May give a picture of a general lack of respect of trade union rights in the Republic of Korea and the present situation remains a serious concern to the ICFTU and its Korean affiliates.

Latest allegations by the KCTU

- 607.** In its communication dated 27 April 2007, the KCTU provides the following additional information. The KCTU first indicates that Cho Ki Hyun, previous President of the Daegu local union and three other union members have been found not guilty of extortion or blackmail and bribery. The KCTU first recalls that, in 2005, the prosecution began to

investigate the Daegu local union's organizing efforts resulting in the signing of site agreements with main contractors of construction sites.

- 608.** In June 2006, the Daegu local union began a strike involving 1,500 union members. The main demand of the strike was for a wage increase. Cho Ki Hyun, then President of the local and five other union leaders and organizers were issued arrest warrants regarding the site agreements signed in 2005.
- 609.** On 30 June 2006, Cho Ki Hyun was arrested and imprisoned. On 5 July 2006, the remaining four union leaders and organizers who were issued arrest warrants voluntarily "gave themselves up" to the local authorities. In total five were arrested for charges of bribery and extortion resulting from signing site agreements and another 20 trade unionists were imprisoned for participating in the strike organized by the Daegu local union in June 2006. Cho Ki Hyun was imprisoned from 30 June 2006 to 5 April 2007. Moon Jung Woo was sentenced for a period from 5 July to 17 November 2006. Oh Sang Ryong was sentenced for a period from 2 July to 17 November 2006.
- 610.** The first preliminary trial for Cho Ki Hyun, Moon Jung Woo and Oh Sang Ryong resulted in a mixed verdict; the plaintiffs and the prosecution appealed. The trials for the other two union members (Chian Ji Baek and Kwang Yong Ha) arrested for similar charges were proceeding separately during the appeal process.
- 611.** On 5 April 2007, the Daegu High Court found Cho Ki Hyun, Moon Jung Woo and Oh Sang Ryong not guilty of bribery and extortion related to the signing of site agreements. In the charge related to obstruction of business and use of violence in relation to the strike conducted in June 2006, the judge found them guilty and sentenced them to probation.
- 612.** The Court made the following decisions of intent: (1) Even though the daily construction workers in the Daegu metropolitan area are hired by subcontractors and thus not directly employed by principal contractors overseeing construction projects, nevertheless, the main contractors are still responsible for these daily workers in the area of safety and health, workmen's compensation, contribution to retirement insurance, etc. Thus, the principal contractor is recognized as a bargaining partner for the union in the site bargaining agreement process; (2) As a result of the unique characteristics of local and industrial level union, the Daegu Construction Workers' Union includes the defendants as union members, who have served for the union as full-time trade union officials and have not worked at the specific construction sites. In spite of the fact that, as long as they are considered legally as workers who have the right to join the union, the issue whether the defendants can serve for the union as full-time officials should be subject to the union's independent decision.
- 613.** As regards the alleged threats to report occupational safety and health violations, the Court found: (1) From the viewpoint of workers whose interest is in conflict with employers', it is legitimate and natural for workers to report on any illegal actions taken by principal contractors if these actions endanger the workers. In addition, it is within the scope of the union's normal activities for the union to request the collective agreements and pressure the principal contractor to sign collective agreements; (2) In this case, the prosecution alleged that the union had threatened to report OHS and other environmental problems at the construction site as a pressure tactic to sign collective agreements. However, it should be noted that part of trade union activities is to ensure the safety of its members and that these provisions are included in a collective bargaining agreement. Thus, it is legitimate for the union to collect necessary information and data and take pictures in an effort to pressure the employer to sign a collective bargaining agreement. Since these activities are all part of normal trade union activities and the collective bargaining process, it cannot be viewed as forcing or blackmailing its manager to sign collective agreements. In addition, payment to union officials was part of the bargaining process and the payments were

agreed upon by the principal contractor and the union, and thus this cannot be viewed as a form of blackmail or extortion.

- 614.** The KCTU also refers to a recent directive from MOGAHA which calls upon local offices to take further measures to put pressure on the membership of the unregistered KGEU offices.

C. The Government's reply

- 615.** In a communication dated 23 February 2007, the Government indicates that, despite the recent remarkable progress achieved by tripartite agreement (i.e. abolishment of compulsory arbitration in essential public services, repealing notification requirement for third-party intervention and related penal provision, etc.), many major misunderstandings on the Korean situation remain or continue to occur because of some trade unions' exaggerated or false arguments. Therefore, the Government aims to provide the Committee with detailed information based on the facts so that it can have an accurate and correct understanding on the Korean situation and thus be able to reach balanced and objective conclusions.

I. Progress made and basic labour rights

- 616.** The Government indicates that it has made continuous efforts to respect basic labour rights and improve industrial relations' systems and laws. The present case dates back to March 1992. Since then, despite difficult social and economic situations caused by endlessly repeated general strikes and the financial crisis of 1997, most of the outstanding issues raised in the case have been completely resolved or at least improvements have been made as a result of the Government's consistent endeavours.
- 617.** In particular, with substantial expansion of democratization in Korean society and socio-economic development in the 1990s, workers' rights and working conditions have consequently improved. In terms of industrial relations, most workplaces have successfully maintained win-win relations through dialogue and compromise while avoiding the past confrontations and conflicts.
- 618.** Meanwhile, political as well as social systems are being developed and improved so as to enhance social and economic gains of all workers based on dialogue and participation. Some of these examples are the following: establishment of the Korea Tripartite Commission, a presidential advisory body, in 1999; operation of the High-level Tripartite Representatives' Meeting in 2006; institutionalization of workers' participation, such as the Korean Confederation of Trade Unions (KCTU), in various committees (e.g. Labour Relations Commission, Workplace Safety and Insurance Board, Employment Insurance Commission, Minimum Wage Council, etc.); establishment and operation of the Regional Tripartite Council; and reinforcement of the role of labour-management council in workplaces.
- 619.** The following points are the issues that had been resolved or improved by 2005 regarding complaints against the Government of the Republic of Korea: recognition of multiple unions at national level and legalization of the KCTU in 1999; enactment of the Teachers' Trade Union Act and legalization of the Korea Teachers' and Educational Workers' Union in 1999; enforcement of the Act on Establishment and Operations, etc. of Public Officials' Trade Unions on 28 January 2006; third-party intervention in labour disputes were changed from a permit system to a notification system in 1999; and guaranteed political activities of labour organizations and reduced the list of essential public services (dropped city bus services from the list).

620. Since March 2003, when consultation on measures to reform industrial relations was launched, social partners had undergone serious negotiations at numerous meetings, including the ones at the Tripartite Commission, High-level Tripartite Representatives' Meetings (established in June 2004, with the participation of both the KFTU and the KCTU), and Ministers'/Vice-Ministers' meetings of related ministries (33 times). These meetings and negotiations finally led to a tripartite compromise on the reform of industrial relations laws and systems on 11 September 2006. Sadly enough, and to the disappointment of all the partners involved, the KCTU refused to be a part of this historical milestone.

621. The highlights of the 11 September 2006 compromise are the following:

- abolishment of compulsory arbitration in essential public services;
- abolishment of notification requirements in the case of a third party's intervention;
- make recall of redundant workers compulsory for all companies;
- suspend multiple trade unions at the enterprise level and the ban on wage payment to full-time union officials for three years until 31 December 2009.

622. The compromise marked another very important turning point in the history of Korean industrial relations and resolved long-standing issues such as the abolishment of compulsory arbitration in essential public services. The National Assembly, which decided to respect the spirit of the compromise, passed a bill containing the contents of the compromise on 22 December 2006. This development has laid a foundation for advancing industrial relations systems and laws in the Republic of Korea.

II. Issues relating to public officials and the KGEU

623. With regard to the specific complaints concerning the freedom of association rights of public officials and the KGEU in particular, the Government indicated the following. According to the social compromise in 1998, the Government has taken measures to ensure freedom of association for public officials. Since a compromise was made in February 1998 among the tripartite partners to "establish Public Officials' Workplace Associations as a first step and allow trade unions as a second step", the Government enacted the Act on Establishment and Management of Public Officials' Workplace Associations in 1999. Later, based on public opinion and negotiations held at the tripartite commission for five years, the Act on the Establishment and Operation, etc. of Public Officials' Trade Unions designed to ensure public officials' right to organize and the right to bargain collectively and to conclude collective agreements was enacted on 27 January 2005. The right to strike was reserved and the Act came into force on 28 January 2006.

624. With the enforcement of this Act, 70 per cent of the total 900,000 public officials are able to enjoy the right to organize. As of 31 December 2006, 630 organizations (190,000 members), including labour unions and workplace associations, are active nationwide. Since the enforcement of the Act on the Establishment and Operation, etc. of Public Officials' Trade Unions on 28 January 2006, 70 public officials' trade unions have been established (58,836 members) as of 31 December 2006, and 46 of them have conducted collective bargaining with the Government. This clearly illustrates that public officials' union activities in the Republic of Korea are becoming more and more active.

625. The measures taken by the Government of the Republic of Korea such as closing some illegally occupied KGEU offices were the results of various illegal activities of the KGEU. During the one-year grace period between the enactment (27 January 2005) and

enforcement (28 January 2006) of the Act on the Establishment and Operation, etc. of Public Officials' Trade Unions, the Government maintained tolerance to public officials' activities related to preparation for establishing trade unions. However, the KGEU had undertaken illegal strikes and political activities long before the enforcement of the Act. When trade union activities were finally legalized on 28 January 2006, the KGEU still did not stop illegal activities. This time, they asked for the right to strike, while announcing directives for their members to refuse to obey the new law. The Government, which has to protect the Constitution and the public interest and maintain order, urged the KGEU to adhere to legal activities but the latter refused to do so and continued to resort to illegal means. As a result, the Government took a decision to close down illegally occupied offices in government buildings by the KGEU.

- 626.** The following paragraphs illustrate the KGEU's specific illegal actions and the reasons for government reactions. First, the KGEU went on general strike, demanding the right to strike and continued to conduct various illegal collective activities. The KGEU demanded full guarantee of labour rights (right to organize, to engage in collective bargaining and to strike). Therefore, at the representatives' meeting on 27 August 2005, they decided to nullify the Act on the Establishment and Operation, etc., of Public Officials' Trade Unions because it reserved the right to strike. Later on, they issued a directive to all local branches ordering non-compliance with the law and prohibiting registration as trade unions. The KGEU went on a general strike in November 2002 and again in November 2004, demanding the right to strike. In November 2006, the KGEU participated in the general strike led by the KCTU under the slogan of anti-FTA negotiations on a pretext of solidarity.
- 627.** Meanwhile, the KGEU forcibly blocked some of its branches from registering as legal entities (Gyeongnam and North Daegu Provincial Government in May 2006), and expelled branches and their presidents from the membership for conducting votes on registration as legal entities. Also, KGEU members undertook other illegal collective action including refusing to work on shifts for the civil service during lunchtime in October 2004, illegally occupying the office of the Minister of Government Administration and Home Affairs, taking collective leaves, supporting a particular political party and candidates, holding rallies to oppose relocation of the United States armed forces and military exercises, preparing for national emergencies, etc.
- 628.** Many ILO member countries (including the United States, Australia, Japan, Germany, etc.) reserve the right to strike for public officials. In addition, the Committee on Freedom of Association has confirmed on many occasions that, as for public officials, the right to strike is separate from the right to organize and the right to bargain collectively and it can be limited.
- 629.** Second, the KGEU systematically and illegally interfered in political affairs by violating constitutional principles of political neutrality and related laws. Article 7 of the Korean Constitution provides that the "status and political neutrality of public officials shall be guaranteed as prescribed by the Act", which explicitly stipulates public officials' duty to be politically neutral. Mandated by this article, the National Election Act and the State Public Officials' Act prescribes that "Public officials shall not participate in political activities and be neutral in elections". Less than three years in prison or a fine is imposed on those who violate this.
- 630.** Nevertheless, the KGEU members, who have the duty above and beyond others to abide by the law as public officials, frequently violated the constitutional responsibility of maintaining political neutrality and other related laws. The KGEU publicly declared that it would intervene in politics and would support the DLP in the election of members of the National Assembly (March 2004), called a press conference to announce that they would

intervene in local elections (April 2006) and participated in election campaigns for the DLP at 670 election districts nationwide.

- 631.** The principle of political neutrality of public officials has been applied to all public officials in a fair and universal manner, and it has nothing to do with trade union activities. This principle is based on a social agreement to prevent public officials from being abused by a particular political power and to maintain their status and duties impartially as servants for the general public. The Constitutional Court ruled that “if public officials participate in election campaigns, they are likely to abuse their status and authorities for the sake of a particular candidate, and work or apply related laws unfairly in favour of certain election campaigns. Thus, prohibition of public officials from participating in election campaigns is constitutional” (June 2005). The principle of political neutrality of public officials has paved the way for the democratization of the country. Violation of this constitutional principle has nothing to do with the protection of the benefits of public officials and their trade unions and is rather more of a concern for the socio-political conflict and chaos that could ensue. In short, the KGEU’s intervention in elections undermines the principle of political neutrality enshrined in the Constitution and the State Public Officials’ Act, and is a violation of other election-related laws. This is irrelevant to a “unilateral prohibition of political activities of public officials’ trade unions” as argued by the KGEU or “a general prohibition of political activities of trade unions” as stated in the Committee on Freedom of Association’s 340th Report in paragraph 763.
- 632.** Meanwhile, with regard to KGEU’s systematic political interference, the Supreme Court ruled that Mr Kim Young-Gil, the former President of the KGEU, was guilty for violation of the State Public Officials’ Act and the Election Act of 2006.
- 633.** Third, the KGEU is engaging in political struggles with a biased ideology. The KGEU has been leading protests against major diplomatic and economic policies of the Government, which are unrelated to public officials’ socio-economic benefits, and taking part in various political demonstrations by systematically mobilizing its members. In addition, the KGEU orders its members to put up various political slogans and propaganda papers in government buildings and educate public officials politically and ideologically. The Government refers to the following examples:
- demonstration to oppose the Iraq war and troop dispatch to Iraq (2003–present);
 - demonstration to oppose the WTO Ministerial Meeting and negotiations (October 2003);
 - demonstration to oppose relocation of the United States military base to Pyongtaek City and demand withdrawal of United States armed forces (March 2005–present);
 - demonstrations to oppose the APEC Summit and the visit of the United States President, to the Republic of Korea (November 2005); and
 - holding of a press conference to demand abolition of the annual pan-governmental preparedness exercise in case of a Korean peninsula emergency, which started in 1976 by regarding it as the “military exercise targeting North Korea” (April 2006).
- 634.** Various directives for such political struggles are delivered to all the branches under a master plan designed by the KGEU, and members of the headquarters and branches participate in them in an organized manner. For example, the struggle plan for the second half of 2005, confirmed at the 12th Representatives Meeting on 27 August 2005, set “stopping globalization and neo-liberalism” as the major objective and protest against the APEC Summit Meeting and the United States President’s visit to the Republic of Korea was launched.

- 635.** On 4 May 2006, the KGEU issued another directive to its members on a purely political issue of United States military base relocation to Pyongtaek City. According to this directive, the KGEU joined the KCTU and the South Korean Federation of University Student Councils (the leftist student organization in the Republic of Korea) to organize a sudden raid. They destroyed barbed wires, broke into the military base and attacked soldiers with bamboo pipes which are particularly lethal as they are split at the end so that they can pierce into front nets of protection gear of police or soldiers and destroy their eyes. As a result, more than 30 young soldiers were wounded and several military tents and temporary guard posts were destroyed. (The Government attaches a relevant photo and press release).
- 636.** The Government notes in this respect that in its additional allegation of 24 October 2006, the KGEU falsely insisted that the violent demonstration in Pyongtaek City was the Government's purposeful manipulation and that the Ulchi Focus Lens (annual pan-governmental emergency exercise) and the Pyongtaek City issue caused inconvenience to the general public and went against its interests and so protesting against these issues was a perfectly normal union activity.
- 637.** Recalling paragraph 502 of the *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, the Government emphasizes that as the only divided nation in the world since the Korean War, the Republic of Korea still faces military confrontations and tension. Against this background, the KGEU led political struggles with biased ideologies which are very much likely to bring about ideological confrontation and conflicts in Korean society (KGEU directives attached). Public officials' organized strikes opposing the Government's political and diplomatic policies with a particular political ideology, is definitely different from the opposition by the general public or social organizations. The same standard cannot be applied to public officials' trade union activities and those of other trade unions.
- 638.** Fourth, the Government is not obliged to offer government buildings as a hotbed for illegal activities. So far, the KGEU has been occupying and using offices in government buildings without the approval of the person in charge of the maintenance of the buildings (chief executives of local government). Furthermore, even those who are not public officials have resided in government buildings, leading various illegal activities. Meanwhile, the chief executives of the local governments can order office users to move out before a certain deadline according to the Public Property Management Act and take forceful measures in case of non-compliance. Government buildings are not private offices for KGEU members and the Government has no obligation to offer buildings run on the people's taxes to the KGEU who conduct illegal activities. Article 8 of the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), prescribes that "in exercising the rights provided for in this Convention, workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land".
- 639.** Fifth, the Government's measures to shut down offices are strictly limited to KGEU branches conducting illegal activities. Those branches conducting legal activities have been excluded from the Government's measures (ten branches, including Busan Regional Branch). In addition, as stated earlier, the Government is conducting collective negotiations at the request of many other public officials' trade unions affiliated with the Korean Federation of Government Employees (KFGE) while guaranteeing their legitimate union activities.
- 640.** Sixth, the Government's decision to close down KGEU offices, was implemented in a due manner according to the related laws and regulations and the KGEU refused to follow the objection procedures prescribed by law. According to the provisions and procedures of the

Administrative Execution Act, the Government can execute administrative orders in case of negligence in performance of a duty. For example, the Government may issue an order of correction against illegal facilities in or unlawful occupation of state-owned properties with a certain time limit. If the order is not fulfilled, the Government itself can execute the order after warnings and notices.

- 641.** Against the Government's warnings and notices to close down illegally occupied offices in government buildings, the KGEU could have submitted an administrative appeal or filed a lawsuit to the court to apply for interim measures to suspend the execution. If the appeal is accepted, the execution in question (in the case of the KGEU, this would be the closing down of offices) will be suspended until the closure of the lawsuit according to relevant laws. In fact, in the case of the KGEU Wonju City Branch, the shutdown of the office was reserved because of the application for interim measures to the court to suspend the execution. However, the KGEU executive members decided not to follow the objection procedure guaranteed in the law. Instead, they chose to forcefully block the execution of the government orders by mobilizing all available means. Thus, in prediction of possible physical conflict with the KGEU following the so-called "die rather than surrender struggles" of the KGEU, government agencies carried out the shutting down of the KGEU offices with the protection of the police.
- 642.** With regard to the guidelines of the Ministry of Government Administration and Home Affairs (MOGAHA) and the Act on the Establishment and Operation, etc. of Public Officials' Trade Unions, the Government indicates that long before the enforcement of the Act on the Establishment and Operation, etc. of Public Officials' Trade Unions, the KGEU had been more interested in political interference, such as support of a certain party, which is prohibited in the State Public Officials' Act, rather than in its true function as a trade union. Despite the fact that trade union activities have been legalized with the enforcement of the Act on 28 January 2006, the KGEU has demanded the right to strike for public officials and refused to carry out union activities in line with the law, only to cause problems such as leading illegal strikes and demonstrations, etc.
- 643.** After enforcement of the Act on the Establishment and Operation, etc. of Public Officials' Trade Unions, the KGFE, the other umbrella union of public officials, registered as a trade union according to the law on 4 September 2006, in order to carry out legal union activities. As of the end of December 2006, a large number of public officials in 70 trade unions conducted legitimate union activities such as registering the establishment of labour unions according to the Act on the Establishment and Operation, etc. of Public Officials' Trade Unions and requesting collective negotiations. The KGEU, however, has refused to abide by the law and continues to resort to illegal activities.
- 644.** Because of the obligation to protect the public interest and to maintain legal order, the Government cannot simply turn a blind eye to illegal activities of the KGEU. It is inevitable for the Government to put a restraint on violations of the law, and any country would have done the same. The government "directives" aim at protecting the right to organize of most public officials by preventing illegal activities, punishing law offenders, and recommending legal and rational union activities.
- 645.** With regard to the KGEU claim that the Act on the Establishment and Operation, etc. of Public Officials' Trade Unions limits the right to organize because a large number of public officials are excluded from joining trade unions and that the right to act collectively is limited, the Government indicates that the Act was established in careful consideration of other countries' legislation and the peculiarity of the Republic of Korea's public official system, so as to meet internationally accepted standards. The Act limits the right to organize of certain public officials in consideration of the particular status of public officials, the nature of their job, and the peculiar labour relations of public officials in the

Republic of Korea. However, considering examples from other countries, this is not an excessive limitation as claimed by the KGEU. Joining trade unions is restricted for uniformed public officials in particular positions such as soldiers, police officers, firefighters, etc. who perform jobs related to national security and the protection of the life and safety of the people. Public officials of Grade 5 or higher are directly engaged in policy decision-making and in managerial positions. Considering this, they are excluded from joining a trade union. This follows the provisions of ILO Conventions according to which those who make policy decisions and are in the position of senior administration can be restricted from joining a trade union according to domestic laws.

- 646.** Also, some public officials of Grade 6 or lower have been excluded from joining a trade union as they work on behalf of employers: those who direct and supervise other public officials or perform jobs related to personnel and remuneration, etc. If these public officials join a trade union, they are likely to undermine its autonomy by controlling it or intervening in its internal affairs. Also, the restriction of these public officials from joining a trade union aims to guarantee a balance of power between labour and management in order to secure the collective autonomy of labour and management.
- 647.** Unlike workers in the private sector, the status of public officials is guaranteed by the Constitution and related laws and most of their working conditions such as wages are determined within the limits set by laws and the budget at the National Assembly, which represents the people. Thus, an agreement based on free collective bargaining between the Government and public officials' trade unions cannot be regarded as a final confirmation of all the working conditions of public officials. This is the case also in France, where collective agreements are regarded as gentlemen's agreements. Therefore, there has to be at least partial limitations on the subjects of collective bargaining or the effectiveness of collective agreements and it is not proper to regard these limitations as a fundamental restriction of the principle of labour-management autonomy. Consequently, collective agreements for public officials cannot take precedence over the law and budget and matters relating to policy decisions or appointment of officers cannot be subject to collective bargaining.
- 648.** Meanwhile, considering the uniqueness of their status, public nature of their work, the fact that working conditions are fixed by law, and the need for continued national functions, the right to collective action is limited by law. Instead, the "Labour Relations Mediation Commission for Public Officials", a neutral organization for dispute mediation between labour and management, has been established and is in operation. There are no ILO Conventions that guarantee the right to act collectively such as the right to strike for public officials and the Committee on Freedom of Association recognizes that this right can be restricted for public officials who exercise authority in the name of the State. Furthermore, given that Japan and Germany, which have similar legal systems to the Republic of Korea, prohibit the right to act collectively for public officials, restricting this right for public officials who exercise authority in the name of the State, is not questionable.
- 649.** Meanwhile, the ICFTU's report (attached in the KCTU/KGEU complaint of 24 October 2006) extremely distorted the facts. The Government, therefore, will concentrate on a few simple facts.
- (a) Regarding the "Directive establishing possible prison terms for wearing a vest with trade union insignia during working hours", practices in violation of uniform codes of public officials could be followed by disciplinary measures including warnings according to internal procedures of the institution in question, but criminal punishment cannot be carried out by the MOGAHA Directive. It is common sense that judicial measures are taken according to a court decision when there is a

prosecution on a crime clearly stated in the law. The so-called MOGAHA Directive does not have the contents asserted by the ICFTU.

- (b) Dismissal-related assertions of public officials of the RDA are unfounded. The reason for their dismissal was not their “demand for negotiations” but the fact that they violated the State Public Officials’ Act, organizing illegal collective actions and deserting their posts without leave to lead unlawful gatherings. In particular, it is argued that the Government designated them as workers in essential public services but this only proves ignorance of the facts. Essential public services are not associated with government agencies at all. Instead, some public enterprises that exert an important influence on the people’s life and safety are designated as essential public services. Thus, the issue of essential public services is not related to the public officials in the RDA, which is a government agency.

Meanwhile, as part of efforts to persuade illegal organizations to convert into legal labour unions, some chief executives of local governments, etc. sent staff members and their families a letter persuading them to withdraw from illegal organizations. The letter is to allow the family members to acknowledge possible domestic problems caused by illegal activities, because in struggles and demonstrations of trade unions, union members’ families are mobilized with an aim to encourage unionists to struggle for a longer period of time and to conduct propaganda. If public officials, who are heads of the household, are disadvantaged after conducting illegal collective action, their family members will have difficulty maintaining their livelihood. Thus, this is an active measure to protect union members’ families.

III. Issues relating to trade unions in the construction industry

- 650.** The Government points out that the recent surge in the number of arrests among construction union members, has been the result of extremely violent behaviour and corruption on their part and is totally unrelated to freedom of association.
- 651.** With regard to the arrest of union members and the deaths of unionists, the Government indicates that negotiations between the local construction unions and the specialized construction companies’ council showed little progress because of issues such as giving priority to trade union members in hiring. Then the local construction unions forcibly occupied the original contractor’s office – the third party who placed the construction order – and behaved extremely violently, destroying facilities and assaulting policemen (the Government attaches a photo and press report).
- 652.** With regard to the Pohang local construction unions (July 2006) the Government indicates that 1,500 unionists broke into POSCO, the company that originally placed the construction order, temporarily confined 600 employees, occupied the company building for a period of nine days and destroyed and damaged offices and properties. They claimed that the occupation was accidental but the huge amount of prepared food and water, plus various weapons disprove their assertion. In addition, they assaulted and injured policemen by firing private made flamethrowers, pouring boiling water and wielding iron pipes, etc.
- 653.** With regard to the Daegu and Gyungbook construction unions (June 2006), the Government indicates that more than 700 unionists occupied the street in front of the police office, destroyed the civil service centre of the police station and exerted violence with iron pipes, etc. In order to put pressure on the original contractor, unrelated third party, some 70 unionists occupied the 33rd floor of an apartment building in a construction site for 12 days to go on a sit-in strike (the Government attaches photos).

- 654.** With regard to the Ulsan plant construction unions (May 2005), the Government indicates that unionists occupied an important security facility (oil refinery tower) of the SK company, the original contractor (the third party), as well as the Ulsan City Hall. In the course of trespassing into the SK plant, some 700 unionists used iron pipes and sharply filed iron spears to attack policemen who were blocking them (the Government attaches a photo). As a result, some 100 policemen were seriously wounded.
- 655.** The death of Mr Ha Jeung Koon, a member of the Pohang local union, on 16 July 2006, referred in the report of the international trade unions including the ICFTU, occurred in the chaos of extreme violence led by the Construction Confederation of the KCTU to support the Pohang local union's forceful occupation struggle on POSCO. The prosecutors are investigating the cause of his death, and measures will be taken based on the results. Meanwhile, the violent struggle on that day was also organized on purpose; the unionists wore masks and assaulted policemen with iron pipes as soon as the assembly was over. Over 2,500 iron pipes were collected at the scene of the violence.
- 656.** The death of Mr Kim Tae Hwan, chief director of Chungbuk Province branch of the FKTU, claimed by the ICFTU, was regretful, but it was a traffic accident; Mr Kim tried to stop a car carrying goods of the company during the strike and was hit by the car. The driver of the vehicle was punished accordingly.
- 657.** With regard to the efforts undertaken by the Government to support construction workers and unions, it is indicated that in order to promote job security and the welfare of construction workers, the "Act on the Employment Improvement, etc. of Construction Workers" was enacted in February 1998, and the "Basic Plan for Employment Improvement of construction workers" was established and is now being implemented. In addition to industrial accident compensation insurance and health insurance, the coverage of employment insurance was extended to construction workers in 2004. Also, in August 2001, the coverage of social insurance and the mutual retirement aid system for construction workers was expanded, and various measures have been implemented such as support for vocational training costs and living expenses. In terms of safety at work, the "Five Year Plan for the Prevention of Industrial Accidents" has been established.
- 658.** Meanwhile, since the financial crisis in 1998, the Government has supported union projects and activities by subsidizing operating expenses for construction union job placement centres run by local construction unions and providing working expenses for construction worker training projects carried out by trade unions. Also, in regional labour administrations and local governments, the Government helped local construction unions and employers (or employers' associations) engage in collective bargaining.
- 659.** Thus, the Government makes very clear that it has never blocked construction workers' efforts to organize trade unions or suppress union activities, nor does it have any reason to do so. With regard to the claim that the judicial authorities are deliberately suppressing trade union activities in the absence of a complaint by the employers, the Government indicates that, as in other countries, the Republic of Korea's judicial authorities can carry out investigations regardless of complaints. Moreover, concerning the unions' systematic extortion in the apartment construction sites, the employers' association clearly raised an issue and filed a complaint to the authorities concerned. In November 2005, these employers filed a complaint to the Minister of Labour against the unions' demand for money in the name of wage payment to full-time union officers. Likewise, the employers demanded a punishment of the unionists' illegal activities according to the law, and some companies actually declared that the collective bargaining agreements were illegal and that they would file a civil suit to claim the money paid.

660. It is true that some working conditions of construction workers are relatively poorer than those of other industries. Thus, the Government has adopted additional laws for job security and welfare promotion and is now implementing comprehensive measures unlike in other industries. However, much of the unions' claims on working hours, social security, industrial safety, statistics on non-regular workers, etc. are groundless and extremely exaggerated. This document will not try to touch upon all of the issues, but some examples are illustrated below:

- The main concern for construction workers is not specific working conditions, such as wages, working hours or safety at work. It is rather job precariousness because their jobs are not permanent and are unstable depending on business fluctuations and seasonal factors. As evidenced by recent labour-management conflicts (e.g. Pohang construction unions, Ulsan plant unions, and Daegu construction unions), the most outstanding issue has always been "giving priority to labour union members in hiring".
- The average working hours of construction workers per week stand at 42.8 hours, and overtime premium (150 per cent) is guaranteed in the law. Health insurance and industrial accident compensation insurance is provided. One cannot say that their wages are low, although variations exist by occupation.
- According to the criteria agreed by the tripartite partners, non-regular workers in the Republic of Korea account for 35.6 per cent of the entire workforce, including short-term or fixed-term contract workers, part-time workers and non-standard forms of employment like dispatched workers. This range of non-regular workers is wider than that of the OECD.
- The unions' claim that they cleared overdue wages of US\$1.25 million in the first half of 2003 is distorted. In the Republic of Korea, labour inspectors and prosecutors take charge of the clearance of overdue wages. When the clearance is impossible due to bankruptcy, etc., the Government pays overdue wages to workers through the wage claim guarantee system. Thus, if an employer does not pay wages, construction workers and labour unions file a complaint to the regional labour offices.

IV. Protests and demonstrations

661. With regard to measures taken against protests and demonstrations, the Government indicates that peaceful assembly and demonstration are guaranteed in the Constitution and in other laws. In 2006 alone, up until October, there were an average of 30 street assemblies and demonstrations per day (a total of 8,553 cases involving an average of 6,700 daily participants). Thus, various assemblies held by unions have become a part of daily life and, in most cases, they are held in the street illegally, causing inconvenience to citizens.

662. In particular, on 22 November 2006, during the general strike led by the KCTU, the KCTU and its affiliated demonstrators opposing FTA negotiations attacked seven city halls and local government buildings across the nation, damaged properties, used violence, such as arson, and assaulted policemen who guarded government offices (the Government attached a photo). Three thousand KCTU members protested on 1 December 2006, against the passing of the Non-Regular Workers' Protection Bill by the National Assembly. In the course of their forceful march into the National Assembly, they physically abused policemen with bamboo bars, etc. From 1 to 5 December 2006, the KCTU and the Korean Automobile Workers' Federation (KAWF) assaulted automobile workers all over the nation, who did not participate in the strike, throwing stones at travelling trucks to damage 89 trucks, throwing Molotov cocktails and 17 trucks were burnt down. Ironically, most of

the issues that the unionists asked the Government during these general strikes were to withdraw major legislations that the Government pursued for the protection of workers' rights, which were the final products of long and difficult social dialogues and debates that accommodated most of the unions' demands. Introduction of the five-day work-week system and the Non-Regular Workers' Protection Act are good examples, to name a few.

- 663.** In addition, in some general strikes, political or obscure issues not related to an improvement of workers' socio-economic benefits, such as the withdrawal of Korean troops from Iraq, termination of neo-liberalism, opposition to FTA negotiations, etc. are the main demand to the Government. Also, unions actively participate in illegal assemblies and demonstrations such as demonstrations against relocation of the United States armed forces bases, and demonstrations against the APEC Summit, etc., using violent means.
- 664.** The same goes for the Reform Measures for Advanced Industrial Relations Laws and Systems (Roadmap), and the Act on Establishment and Operations etc. of Public Officials' Trade Unions, etc. The KCTU is claiming that the Government is pursuing these measures in a unilateral manner. However, they are refusing to participate in any dialogue, or when extreme claims (for example, complete recognition of the right to strike for public officials in general) are not met, they often make distorted assertions and refuse dialogue with the Government.
- 665.** For the past three years, 2,263 police officers were injured with Molotov cocktails, iron pipes, bamboo bars, square bars, privately made flamethrowers, etc. during unlawful violent demonstrations. People outside the Republic of Korea may often misinterpret conflicts and confrontations between the Government and the KCTU as a suppression of peaceful and legal union activities. However, this misinterpretation comes from a lack of awareness of the militant and political tendency of the KCTU. It is not proper for those who should assume the responsibility for these violent acts to condemn the Government for "using violent means on peaceful demonstrations" and "prosecuting a number of unionists", as the ICFTU did.
- 666.** Currently, the KCTU represents less than 6 per cent of the entire wage earners. However, they are mainly composed of unions from large companies and the public sector that have big socio-economic repercussions, so their power and social responsibilities are considerable. Nevertheless, some KCTU members with much better working conditions than other workplaces have waged annual strikes. This, together with a series of recent corruption scandals involving unions, has been faced with a growing social criticism from the people. Furthermore, within the unions themselves, there is a marked increase in voices calling for self-examination of the labour movement.
- 667.** Meanwhile, their strike campaigns are led by a number of high-ranking union officials who receive full wages from employers for doing nothing for the company but only to concentrate on organizing struggles. During strikes, completely blocking the entrances into the workplace, threatening and using violence on those who do not participate in the strike and on company managers is a common occurrence. Demanding exemption from civil and penal responsibility for illegal activities and compensation of wage losses during a strike has become customary practice, in violation of the "no work, no pay" principle. Given this background, a series of withdrawals of membership from the KCTU of many leading companies, including the GS Caltex (October 2004), Hyundai Heavy Industries Co Ltd (September 2004), Hyosung (February 2002), Daerim (2006) and Kolon (end of 2006) represents the views of the people towards excessive and violent labour movements in the Republic of Korea.

V. Individual cases in the public service (railroad/Asiana/Korean Air/power/hospitals)

668. With regard to the allegations of the KPSU of 1 September 2006, the Government indicates that compulsory arbitration in essential public services, such as the railroad, power industry and hospitals, etc., was not to undermine the right of trade unions to act collectively. It was an inevitable measure in consideration of the public interest such as people's daily lives, safety, health and the national economy, etc. The Constitutional Court ruled with regard to compulsory arbitration in essential public services, that its legislative purpose is legitimate, and there is a balance between the public interest that it intends to protect and the private interest that is restricted, so that compulsory arbitration in essential public services is not in violation of the constitutional principle of proportionality. Thus, the Constitutional Court ruled that compulsory arbitration in essential public services was constitutional (see 2001Hun-Ka31 Decisions of the Korean Constitutional Court 2001).
669. However, respecting the ILO recommendations, compulsory arbitration in essential public services has been abolished based on the social compromise of 11 September 2006, while maintaining minimum services and allowing the use of replacements in the event of a strike. (A related bill was passed in the National Assembly on 22 December 2006.) This made it possible to achieve a balance between the exercise of the right to strike and the protection of the public interest and allow disputes to be settled between trade unions and management.
670. The KCTU is arguing that the Government of the Republic of Korea intends to broaden anti-union activities through expansion of the scope of essential public services, and introduction of the obligation to maintain minimum services, etc. This is not true. The ILO mentions the "minimum service" as a legislation to limit the exercise of the right to strike in public services, in cases where suspension or closure of those services manifestly endangers the daily life of the general public. The minimum services must be ensured even in the event of a strike for the protection of the public interest. In its *Digest*, the Committee on Freedom of Association noted that minimum services include companies' loading and unloading services, managing port facilities, subway services, passenger and freight traffic, railroad services, mail services, etc. Thus, the scope of essential public services, subject to the requirement of the minimum service, is in line with internationally accepted standards. Also, in terms of the process for determining the minimum services, the Government only provides legal standards, while labour and management specifically agree on the details. This is in line with the basic principles of the ILO.
671. In addition, reflecting the recent changes in industrial structure and lifestyle, the expansion of the scope of essential public services was agreed by labour, management and the Government for the protection of the public interest (the KCTU refused to participate in the talks). In the case of air traffic, it was considered that it bears an intimate relationship with the daily life of the general public and significantly affects the national economy, and there are limits on the replacement by other transportation means. The blood supply service was added in essential public services because it is closely related to the life and health of the general public, and was impossible to substitute with other industries (in this case, strikes are allowed, but minimum services must be maintained).

VI. Claims concerning the minimum wage

672. With regard to the allegations of the ICFTU of 24 October 2006, the Government indicates that, in the Republic of Korea, the minimum wage is decided with the attendance of a majority of all members on the register of the Minimum Wage Council and by a concurrent vote of a majority of members present. It would have been a violation of this provision if the Council scheduled or conducted a vote without the presence of worker members. In the

case of the vote on the minimum wage in 2005, although the sixth meeting (June 2005), was repeatedly suspended, it continued for a long time with the participation of worker members. When the chairperson put the bill to a vote, worker members walked out, which was considered as giving up their voting rights and abstaining from voting. In fact, in the past, when one party, be it employer members or public interest members or worker members, walked out after the declaration of the beginning of the vote, this was regarded as an abstention. Thus, the voting was conducted legitimately according to the Minimum Wage Act and established practices of the Council (the worker members have walked out five times (1988, 1993, 1994, 2003 and 2005) while the employer members have walked out three times (1989, 1991 and 1996)).

673. With regard to the allegation that worker members walked out without exercising their voting rights because of threats to arrest them using police force, the Government indicates that the police were placed outside the meeting room just in case, because KCTU unionists illegally occupied the meeting room during the plenary session on the previous day (28 June) and the session was discontinued. Thus, the trade unions' assertion that the meeting was held in threatening circumstances is false.

VII. The Government's position on the 340th Report of the Committee on Freedom of Association (March 2006)

674. The Government of the Republic of Korea is greatly disappointed and concerned that the 340th Report of the Committee on Freedom of Association is considerably biased and that, in some parts of the report, the Committee unilaterally accepted trade unions' claims without providing clear evidence to support them, and criticized the Government of the Republic of Korea.

675. With regard to the information requested by the Committee on the dismissed KGEU members, the Government indicates that Kim Sang-Geol, Oh Myeong-Nam, and other persons, have been found guilty in the courts. For this reason, they have been automatically retired from public service according to the Local Public Officials' Act. With regard to the administrative lawsuits involving Ko Gwang-Sik, Han Seok-Woo, Kim Young-Gil, Kang Dong-Jin, Kim Jong-Yeon and other persons, the Government provides the following information:

Name (position)	Date of reprimand	Reasons for reprimand	Results	Appeals	Lawsuit	Current status
Han Seok-Woo (Busan, Grade 7)	December 2002	Led organization of KAGEWC and illegal assembly	Discharged	Case dismissed (July 2003)	– First trial: One-year imprisonment with a two-year suspension of execution/a fine of KRW500,000 (February 2003) – Second trial: KRW10 million fine (November 2003)	Dismissed
Ko Gwang-Sik (Incheon, Grade 7)	December 2002	Led organization of KGEU	Discharged	Case dismissed (March 2003)	– First trial: Case dismissed (July 2005) – Second trial: Case dismissed (July 2006) – Third trial: Case dismissed (November 2006)	Dismissed

Name (position)	Date of reprimand	Reasons for reprimand	Results	Appeals	Lawsuit	Current status
Oh Myeong-Nam (Incheon, Grade 8)	December 2002	Led organization of KAGEWC, etc.	Discharged	Suspended from office for two months (February 2003)	– First trial: One-year imprisonment with a two-year suspension of execution (July 2003) – Second trial: Case dismissed (September 2003) – Third trial: Case dismissed (December 2003)	Dismissed (automatic retirement)
Kim Jong-Yeon (Gyeonggi, Grade 7)	2005	Illegal collective actions, insubordination, abandoning of post	Dismissed	Case dismissed (March 2005)	– First trial: Case dismissed (January 2006) – Second trial: Ongoing	Dismissed
Kim Sang-Geol (Chungbuk, Grade 7)	December 2002	Illegal collective actions	Discharged	Case dismissed (August 2003)	– First trial: Case dismissed (July 2004) – Second trial: Withdrawal	Dismissed
Min Jeom-Gi (Jeonnam, Grade 6)	December 2002	Illegal collective actions	Discharged	Suspended from office for two months (September 2003)	– First trial: Ten-year imprisonment with a two-year suspension of execution (February 2005) – Second trial: Case dismissed (June 2005)	Dismissed (automatic retirement)
Kim Young-Gil (Gyeongnam, Grade 6)	November 2004	Political interference, illegal collective actions	Dismissed	Case dismissed (November 2006)	– First trial: To be filed	Dismissed
Kang Dong-Jin (Gyeongnam, Grade 7)	January 2005	Illegal collective actions	Dismissed	Case dismissed (October 2005)	– First trial: Case dismissed (June 2006) – Second trial: Ongoing	Dismissed

676. Concerning the appeal case of Kwon Young-Gil, the former President of KCTU, on 11 January 2006, he was sentenced to a fine of KRW15 million. An appeal was taken to the Supreme Court and the trial is ongoing. With regard to Oh Young-Hwan (President of Busan Urban Transit Authority Workers' Union) and Yoon Tae-Soo (First Executive Director of Policy of the Korean Financial Industry Union), the Government indicates that it respects the ILO recommendations and is making efforts to keep criminal punishment to a minimum by, for instance, minimizing arrests as much as possible, even in the case of an illegal strike, if the strike did not involve acts of violence. Oh Young-Hwan was sentenced to a fine of KRW10 million at the second trial on 18 June 2004. The fine was finally confirmed at the third trial on 15 October 2004, after his appeal filed with the Supreme Court was dismissed. Yoon Tae-Soo was sentenced to one year in prison with a three-year suspension of execution in the first trial on 2 September 2003. His appeals taken to a higher court and the Supreme Court were both dismissed and the sentence was confirmed on 12 November 2004.

677. Furthermore, with regard to the KGEU, the Government expresses concern that, in its report, the Committee on Freedom of Association saw the KGEU's illegal activities, such as strikes and political interventions, as legitimate union activities, and expressed itself as

if the Government had suppressed those activities. Concerning the public officials' right to strike (paragraph 781(a)(iii), (f), (g), and paragraphs 764 and 766 of the 340th Report of the Committee on Freedom of Association), the Government recalls that, so far, the Committee has clearly and consistently confirmed that "the right to strike can be restricted for public servants exercising authority in the name of the State". The Government does not want to believe that the Committee has lost its consistency only in the case of the KGEU. However, unlike its stance mentioned above and unlike what it has recommended for other member countries, the Committee's recommendation, made in the 340th Report, said that the Government of the Republic of Korea should, without exception, grant the right to strike to public officials (narrowly defined as public officials working for the Government). If not, at least the recommendation leaves such a possibility of misunderstanding wide open. Above all, it seems that the Committee's conclusions mainly resulted from its lack of understanding of the Republic of Korea's public officials system and the outstanding issues regarding the KGEU.

678. Firstly, KGEU members are "professional government officials" and "public servants exercising authority in the name of the State". The Korean public officials' system is composed of professional government officials exercising authority in the name of the State, who are subject to the Public Officials' Act. Meanwhile, according to the recent Act on Establishment and Operation of Public Officials' Trade Unions, these government officials have come to enjoy the right to organize and the right to collective bargaining but the right to collective action has been limited. Members of the KGEU fall under this particular category of government officials and are, therefore, professional government officials, who exercise authority in the name of the State. On the other hand, the right to collective action had already been recognized for the officials engaged in manual labour and not exercising authority in the name of the State, such as those in postal services and the National Medical Center.

679. Secondly, KGEU members are distinguished from government employees. In the Government, there are government employees who are not professional government officials. Even though they work in the government organization, their status is that of a civilian. Therefore, these government employees are not subject to the Public Officials' Act as well as the Act on Establishment and Operation of Public Officials' Trade Unions. Instead, they have already been guaranteed the three labour rights (to organize, collective bargaining, strike), including the right to collective action, in accordance with general labour laws. They have their own union and are not members of the KGEU. For example, public officials of the Ministry of Labour (union members) are subject to public officials-related laws and the Act on Establishment and Operation of Public Officials' Trade Unions and are denied the right to collective action, while government employees (civilian status) and civilian employees working in job centres of the Ministry are guaranteed all labour rights pursuant to general labour laws (for example, the Job Counselors' Trade Union of the Ministry of Labour went on strike and signed collective agreements with the Ministry in 2003). In relation to this, the KGEU has adopted the term "government employee" in English. But this term is misleading. If its Korean name were correctly translated, the English name would have been the "Korean Government Officials' Trade Union". In fact, this is exactly what the KGEU call themselves in Korean, which implies that they are differentiating themselves from the other government employees.

680. Thirdly, in the Republic of Korea, the issue of essential/non-essential services is completely unrelated to the issue of government officials. In other words, only those state-run companies (power plant, railways, etc.) or private firms (hospitals, oil refineries and supply) where all three basic rights are recognized but have direct influence on people's lives and safety, are designated as essential public services. Workers in essential/non-essential public services all have a civilian status and are subject to general labour laws, so there cannot be any KGEU members involved in essential/non-essential public services.

- 681.** Fourthly, KGEU members are public officials for whom the right to strike can be limited according to ILO standards. Therefore, the Committee's conclusion is not correct, both in the factual and legislative contexts. Judging from the Committee's conclusion, the Committee seems either to confuse members of the KGEU with government employees for whom the three labour rights are recognized or to consider that the KGEU's membership covers civilians engaged in essential public services. The Committee in its report apparently describes strikes staged by the KGEU to demand the right to strike as legitimate union activities ("their activities aimed at greater recognition of trade union rights ...", "the public servants should enjoy the right to strike ..." (paragraphs 766 and 781(f)) and "requests the government to refrain from any act of interference in the activities ..." (paragraph 781(g)). In order to reach a conclusion like this, there must be an assumption: the right to strike must be recognized for the KGEU and the strikes by the KGEU are legitimate.
- 682.** In the case of public officials whose right to strike is restricted, their activities aimed at acquiring the right to strike, such as internally collecting opinions, externally expressing their opinions or appealing to the general public, may be allowed. However, these activities must be distinguished from industrial action.
- 683.** Meanwhile, because of the recommendations made by the Governing Body in March 2006, with which the Government of the Republic of Korea disagrees, the KGEU keeps making wrong demands that public officials, except for those who carry out essential work, must universally be given the right to collective action (strike). What they mean by essential work is clearly different from the concept of essential public services. Also, it is impossible to determine whether work performed by public officials is essential or non-essential.
- 684.** Fifthly, the Committee should provide reasons why strikes by the KGEU are legitimate. The Government takes note of paragraph 764, in particular. With regard to the legitimacy of the strike staged on 14 November 2004, the Committee seems to argue that the KGEU's right to strike must be recognized because its members are neither public servants exercising authority in the name of the State nor are they engaged in essential public services. However, regrettably, the Committee did not provide grounds to support such arguments. The Committee, before making any conclusions on the issue of the KGEU, should have clearly stated the reasons why it saw public officials of the KGEU as public servants whose right to strike is not restricted, that is, why it did not see them as public servants acting in their capacity as agents of the public authority.
- 685.** The Government does not know the job status of each and every individual KGEU member because the latter is refusing to register itself with the authorities according to the Act on Establishment and Operation of Public Officials' Trade Unions, demanding the recognition of its right to strike. However, based on the standards that the Committee has so far used, at least the majority of the members and its leaders at the centre of controversy over the issue of the KGEU are apparently considered public officials whose right to strike can be restricted. Even in case few, if any, members do not fall into the category of public officials whose right to strike can be restricted, the KGEU's act of going on an all-out strike, demanding the right to strike prescribed by the Trade Union and Labour Relations Adjustment Act cannot be seen as a legitimate collective action. Therefore, the Government would like to point out that the Committee should clarify its position on the right to strike in order to prevent any more confusion.
- 686.** With regard to the nature of the KGEU, the Government recalls that, according to the Committee, the KGEU should be considered a legitimate trade union as institutional obstacles have been removed with the passage of the Act on Establishment and Operation of Public Officials' Trade Unions, and clarifies that the KGEU can never be regarded as a

legitimate trade union as long as it demands the right to strike, refuses to register itself with the authorities pursuant to the Act on Establishment and Operation of Public Officials' Trade Unions, engages in illegal and violent political struggles and violates the principles of the Constitution, public officials-related laws and election laws. Many local chapters of the KGEU have already vowed to be engaged in legitimate activities according to laws and registered themselves with the authorities after holding a yes-or-no vote among their members, so their legitimate union activities are firmly protected according to laws and principles.

- 687.** With regard to the right to organize for firefighters and public officials of Grade 5 or above (paragraph 781(a)(i) and (ii)), the Government considers that, given their unique status, the public nature of their work and the distinctiveness of industrial relations of the Republic of Korea's public officials, the right to organize has been restricted for certain public officials according to the Constitution and laws and along the line of international standards. The restriction is not considered excessive compared with legislative examples in other countries. It cannot be seen as excessive that special public officials, such as soldiers, policemen, firefighters, etc., who perform work critical for maintaining national functions, such as ensuring national safety, protecting people's lives and safety, etc., and wear uniforms at work, are restricted from joining a trade union. Public officials of Grade 5 or higher tend to directly take part in major policy decision-making and usually hold a managerial post, which is a characteristic of the Republic of Korea's strongly hierarchical public official system. Given this, they are excluded from those eligible to join a trade union. Such exclusion also conforms to the ILO Convention that allows restriction of the right to organize by national laws of "policy decision-makers or those in high-ranking managerial posts".
- 688.** With regard to the request for a re-examination of the prosecution of Kim Young-Gil and Ahn Byeong-Soon, the Government indicates that the re-examination would be inappropriate for the following reasons. Firstly, Kim Young-Gil and Ahn Byeong-Soon fall into the category of public officials whose right to strike, like other KGEU public officials, is restricted. Both of them are responsible for planning policies for their Government agencies and exercise authority in their duties on behalf of their government agencies. Therefore, as mentioned above, the Committee's prejudgement that KGEU members are public officials whose right to strike should be recognized is wrong in the factual and legislative contexts. Secondly, the Government of the Republic of Korea would like to point out that the Committee clearly stated in other cases that disciplinary punishment, such as dismissal, for collective action by public officials whose right to strike is restricted, do not run counter to the freedom of association principles (Case No. 1528, 291st Report). Thirdly, the Committee said that they were prosecuted for their activities aimed at acquiring recognition of their union in violation of the State Public Officials' Act, but this is wrong in the factual and legislative contexts. They staged strikes to demand their right to strike rather than to acquire recognition of their union, which was and is apparently against public officials-related laws, and they also interfered in political activities against election laws. Although the current Act on Establishment and Operation of Public Officials' Trade Unions was enacted in January 2005, the legislation had already been promised to the nation as a campaign pledge (guarantee of the right to organize and the right to collective bargaining) during the 2002 presidential election, and with the announcement of a related government bill in June 2003, the recognition of public officials' right to organize was prearranged. However, even after the announcement of the bill, they committed illegal acts, such as announcing a strike, holding strike ballots and staging a strike, demanding their right to strike. Fourthly, in relation to this, the Government of the Republic of Korea requests the Committee to explain the following points. (i) Does the Committee not view Kim Young-Gil and Ahn Byeong-Soon as public officials whose right to strike is restricted? If so, what is the ground for this? (ii) If they are seen as public officials whose right to strike is restricted, is dismissing and prosecuting them for their illegal collective

action, such as strikes, illegal interference in election activities, etc., considered a breach of freedom of association?

689. With regard to paragraphs 781(g) and 767 of the Committee's 340th Report which requested the Government to give its opinions on the prohibition of interference in the KGEU's activities and the ICFTU's claims (15 November 2004) concerning the issue of unionists on strike injured during their arrest, and the issue of the anti-union campaign by MOGAHA, the Government indicates that it has made it clear that it has neither interfered in nor obstructed legal activities by trade unions and has no intention of doing so. When the Government enforces laws to deal with illegal, violent demonstrations by some labour groups, such as the KCTU and the KGEU, some injuries may be unintentionally inflicted due to physical clashes between demonstrators and the police. But contrary to expectations, in reality, many policemen have been injured by violence committed by the demonstrators. It is not true that MOGAHA launched a "New Wind Campaign" targeted at the KGEU in late 2004 to encourage "the reform of organizational culture with a focus on fostering public officials' workplace councils and sound labour groups". The "Hanmadang Festival for Harmony and Understanding", organized by the workplace council of MOGAHA, was held on 21 December 2004. This event is misunderstood as the one organized by MOGAHA that intended to bring together all government officials workplace councils across the nation.

690. With regard to the Committee's recommendations on construction workers' unions, in particular, the arrests of some local construction workers' union officers for blackmailing employers and extorting money, the Government provides additional information to supplement its response already submitted on 28 February 2005, and to explain its position on the 340th Report of the Committee on Freedom of Association. These union officers visited many apartment construction sites where they have no employment relationship, extorted or made an attempt to extort money under the pretext of collective agreements, and threatened project managers who refused to accept their demand. They were convicted on blackmail charges by district courts after trial, and related appeals filed with a high court are under way. Considering diverse evidence verified by the competent authorities and their acts recognized by the courts, what they did and demanded can hardly be seen as legitimate union activities and wages for union officers that can be accepted by social norms.

691. The following are the reasons for punishing them on charges of blackmail:

- (i) The union officers belonged neither to the original contractor (principal contractor) nor to any of the local subcontractors, had no employment relationship with, nor worked for, any of the workplaces. They designated themselves as union officers and visited in a group apartment building sites where they demanded the signing of collective agreements requiring some money to be paid to them in the name of activity fees.
- (ii) When asked to show a roster of union members, the union officers failed to show it. Even when workplaces refused to give money because there were no union members, they said that regardless of whether there was a union member or not, collective agreements should be signed, and demanded the workplaces to send KRW400,000 to their bank accounts in the name of activity fees every month. They also threatened the workplaces by saying that if the workplaces refused to pay the money, they would find various violations, including lack of safety equipment, and report them to the regional labour office, along with relevant photographs.
- (iii) The union officers, whose aim was to get money from the management, did not care much about the signing of collective agreements. Even after the signing of collective

agreements, they never appeared in the workplaces to keep watch on their industrial safety, once the workplaces sent the money promised.

- (iv) If the construction sites refused to pay money, the union officers obstructed their business by staging a sit-down protest, blocking workers' access to workplaces or by hindering the use of machines, causing a delay in construction schedules.
- (v) If the construction sites did not accept their demands, the union officers took a photograph of any violations, such as failure to wear safety helmets (wearing safety helmets is an obligation union officers themselves must meet), and reported them to the Ministry of Labour or other relevant organizations, or even made a false report without checking the facts, as if the workplaces had violated mandatory safety measures.
- (vi) Some of the reported workplaces were punished for their violations after investigation by authorities. Others turned out to have been fraudulently reported so the unions were punished on charges of false accusation. Many of the workplaces accepted their demand for fear of receiving unfavourable treatment as a result of accusation, such as delay of construction or prohibition from bidding for government construction contracts, so the project managers (supervisors sent by a construction firm to oversee construction sites) or working-level managers (managers and assistant managers) signed collective agreements and sent money to their bank accounts.
- (vii) The union officers extorted money in the name of activity fees from many of the construction sites every month regularly (some construction sites paid once). Many of the union officers used their private bank accounts to receive the money from the companies. Half of them spent the money for their personal purposes irrelevant to their union. The other half divided the money among themselves and then spent it for their personal purposes instead of for union activities. The Cheonan/Asan Construction Workers' Union extorted KRW42.55 million (US\$42,000) and attempted to extort KRW6.99 million (US\$7,000) per month from 22 construction sites from December 2004 to June 2006.

692. With regard to this issue, the Government of the Republic of Korea reaffirms its position expressed at the 295th Session of the ILO Governing Body and expresses its grave regret over the conclusion and recommendations made in the 340th Report. It is greatly disappointing that the Committee, which had maintained its cautious stance on the issues pending before the courts by, for instance, asking for information, recommended in paragraph 781(h) that the Government of the Republic of Korea should re-examine the prosecution and conviction of those construction union members and make compensation to them. (In the Republic of Korea the executive cannot take any administrative measures to overturn decisions made by the judiciary.) The Government would like to point out that such Committee's recommendations, particularly over the issues currently under trial, could be considered an act of interference with the principle of democracy and the independence of the judiciary and its trials.

693. Concerning the court decisions (paragraphs 706–707, 772, 781(h)(i) of the Report), the Government has already explained why trade unions' claims are in large part groundless. In this response, additional information is given to show that unions' assertions on court decisions related to Daejeon/Chungcheong Construction Workers' Union (six people) and Cheonan/Asan Construction Workers' Union (two people) are factually wrong. Their claims are quoted from the Report of the Committee (paragraphs 772 and 781(h)(i), 340th Report). Firstly, unions claimed that the Daejeon District Court had handed down a light sentence against those construction union officers on 16 February 2004, ruling that they were not personally liable because they spent "activity fees" for the purposes of their organization. However, unlike the union's arguments, the Court had not made such a

ruling. With regard to blackmail and habitual blackmail charges, the Prosecutor's Office brought against the union officers, the Court only said that "though they (union officers) are considered guilty of blackmail charges, their extortion of money does not constitute habitual blackmail because the act was committed according to the organization's policy rather than their person habit". "The term 'habitual' is used to describe the nature of an offender. So the fact that the dependants repeated the same crime several times cannot be enough of a reason to consider their act habitual. And they demanded activity fees according to their union's policy. Therefore, there is no ground to see their act as habitual in terms of motives, circumstances and criminal records." [Daejeon District Court on 16 February 2004, Cheonan Branch Court, on 27 August 2004, 8.27, etc.]

- 694.** Secondly, unions claimed that the court had ruled that the collective agreement made between the original contractor and the union shall apply only to the original contractor and union members concerned. But the claim is not true. On the contrary, the court acknowledged that even when an original contractor had no direct employment relationship with daily construction workers, in certain cases, the original contractor shares the responsibility to conduct collective bargaining with them. Notwithstanding, the union officers (dependants) were declared guilty because their acts and receipt of money were considered extortion as described above. The Daejeon District Court found in particular on 15 September 2004 (2004, No. 583):

Despite the fact that the original contractor has no direct employment contract with the daily construction workers, if the original contractor is in a position to realistically and specifically govern basic working conditions for the said workers to the point that it can be identified with the subcontractor which is the actual employer of the workers, the original contractor can be seen as the employer of the said workers and thus is responsible as much for conducting collective bargaining with them.

- 695.** Thirdly, the ICFTU, inter alia, claimed that the Vice-President of Cheonan/Asan Construction Workers' Union, Rho Seon-Kyun, who joined the trade union in August 2003, was mistakenly prosecuted and fined lightly for what had happened before he joined the union. Again, this is not true. The court sentenced Rho Seon-Kyun to a fine based on the judgement that he joined the trade union on 1 August 2003 and extorted KRW9.45 million from 19 construction sites between 1 August and the end of September 2003 by forcing them to send money to his own bank account. On the other hand, the President of the Union, Park Young-Jae who was charged with collective blackmail during night-time, was sentenced to one year in prison. After sentencing, he was instantly arrested in the court because, at that moment, he was serving his term of suspension of execution after having been sentenced to imprisonment of eight months with a two-year suspension of execution on different charges on 9 July 2003. Unlike other union officers, Park was sentenced to one year in prison and arrested in the court for committing another offence during his suspension of execution (see paragraph 781(h) of the Report).
- 696.** As said before, the courts at each level recognized that all the union officers were found guilty of threat and coercion charges. They were convicted on charges of blackmail, collective blackmail during night-time, attempted blackmail, etc. (not guilty of habitual blackmail charges) under the Criminal Code and the Act on Punishment of Violence, etc. All of them, except Park Young-Jae, who was arrested in the court, were either sentenced to imprisonment of eight months to one year with a suspension of execution and released or fined. Their cases are still pending before either the second instance court or the Supreme Court.

Daejeon/Chungcheong Construction Workers' Union (six people)

- First instance (Daejeon District Court, 16 February 2004): All six, including Lee Seong-Hui, were released after being sentenced from ten months to one year in prison with a two-year suspension of execution.
- Second instance (15 September 2004): All six were sentenced from six to eight months in prison with a two-year suspension of execution.
- Third instance (25 May 2006): Appeals filed with the Supreme Court were dismissed.
- Cheonan/Asian Construction Workers' Union (two people)
 - First instance (Cheonan Branch Court, 27 August 2004): Park Young-Jae was arrested in the court after being sentenced to one year in prison. Rho Seon-Kyun was fined.
 - The sentence was finally confirmed in the Supreme Court on 25 May 2006.
- Western Gyeonggi Construction Workers' Union (nine people)
 - First instance (Suwon District Court): Three people, including Kim Ho-Jung, were sentenced from eight months to one year in prison with a two-year suspension of execution. The remaining six were fined (KRW3 million (approximately US\$3,000)).
 - The case is pending before the second instance court.

697. The Committee's previous conclusions in this case (paragraphs 778–779 of the 340th Report) is an extreme simplification of overall circumstances and the Government cannot agree to it. Some local construction workers' unions were organized long ago and have been up and running since then. The Government has provided support for construction workers' unions both in their collective bargaining and in financial aspects. Therefore, there is no reason for the Government to block the establishment of such unions. The union officers were prosecuted and convicted in the courts because, given the overall circumstances, including their purpose, the circumstances of the signing of collective agreements, their behaviour and methods, etc., what they call collective bargaining, is considered a threat aimed at extorting money rather than a normal collective bargaining that can be accepted by social norms. In the three regions discussed above, or at any construction sites in other regions, there is no such practice of unions to demand money during negotiations with the employers. The union officers targeted only apartment construction sites, not only because it is relatively easy to extort money, but also because there are plenty of such construction sites so that they can collect a relatively small amount from each of them.

698. In addition, as revealed during investigations and trials by the judicial authorities, the union officers refused to show a roster of union members and demanded to sign a collective agreement and pay activity fees regardless of whether there is a union member or not. This proves that their acts are only aimed at extorting money. They also reported violations committed only by workplaces refusing to pay money and did not even hesitate to make a false report. They used illegal methods, such as visiting workplaces in groups to threaten managers, blocking the entrance to workplaces, creating disturbances at offices and swearing at managers. Based on detailed information on overall circumstances, including arguments made by the union officers during the trial and the results of investigations by the competent authorities, the courts decided whether the union officers'

acts were threatening to the employers of the apartment construction projects or not. Related cases are either on trial in a higher court or were closed, so it would be desirable to leave the judgement to the independent courts.

- 699.** With regard to the legislative aspects of the case, the Government indicates that wage payment to full-time officers by employers was going to be banned from the beginning of 2007 in an effort to improve irrational practices involving full-time union officers. At the same time, determined to allow union pluralism from 2007, the Government had actively pursued it. However, the ban on wage payment to full-time union officers became a burden for unions, while union pluralism became a burden for employers. Therefore, the labour and management agreed to postpone the implementation of these two systems. Respecting the agreement between them, the Government inevitably decided to postpone the implementation.
- 700.** The ban on wage payment to full-time union officers and union pluralism at the enterprise level are issues likely to bring great changes to overall industrial relations in the Republic of Korea. In spite of this, labour and management were not sufficiently prepared to cope with the introduction of multiple unionism on 1 January 2007, the consequent adjustment of bargaining channels and the limitation on wage payment to full-time union officers, and there were still wide differences of opinions between labour and management over rational measures to implement these two systems. Therefore, it was expected that the full implementation of these systems would inevitably cause labour–management conflicts and confusion at industrial sites.
- 701.** Under the perception that stable industrial relations are important more than anything else in achieving social integration and sustainable national development, the High-level Tripartite Representatives' Meeting agreed to give a three-year grace period before the implementation of these two systems (11 September 2006). During the grace period, the Tripartite Commission will come up with specific standards and implementation methods by setting up a framework for discussion and intensively discussing two controversial issues, such as how to minimize confusion that might be caused by the introduction of union pluralism at the enterprise level and how to make trade unions financially independent enough to pay wages to their union officers on their own.
- 702.** Furthermore, regarding the ban on third-party intervention in case of failure to notify, the Government indicates that, with the passage of the bill on advancement of industrial relations by the National Assembly on 22 February 2006, this ban was abolished to strengthen labour–management autonomy and improve laws and institutions in line with international standards.
- 703.** With regard to the union membership of dismissed and unemployed people, the Government indicates that, given that most unions are enterprise-level unions in the Republic of Korea, the courts had interpreted that the dismissed and unemployed are not workers who are eligible to join a trade union of a company in question, nor could they be elected as union officers. As the Tripartite Commission agreed to allow the unemployed to join a non-enterprise-level union in 1998, the legislative process to amend related laws was pushed for, but only to stall. The Research Committee on Advancement of Industrial Relations Systems proposed that the dismissed and unemployed should be allowed to have membership of an industry- or a regional-level union while, given the realities of the Republic of Korea's industrial relations, in which union activities are conducted mostly at the enterprise level, membership of an enterprise-level union should be limited to employees of the enterprise concerned (industry-level unions and federations of unions autonomously decide their membership eligibility).

- 704.** Based on the results of discussions at the Tripartite Commission, the Government pushed legislation in the direction of allowing the unemployed to freely join a non-enterprise-level union and to engage in its activities, but restricting them from joining an enterprise-level union. However, at the High-level Tripartite Representatives' Meeting held on 11 September 2006 to advance industrial relations laws and systems, tripartite parties agreed that the issue of allowing the unemployed to join a trade union and run for union officers will be excluded from the revision of related laws. Rational measures to address the issue of allowing the unemployed to join a trade union will be designed by considering court rulings and through in-depth discussion between labour, management and the Government.
- 705.** With regard to the issue of obstruction of business under the Criminal Code, the Government indicates that obstruction of business (article 314 of the Criminal Code) means "interfering with another person's economic and social activities by spreading false information or using a deceptive scheme or by threat of force". An obstruction of business charge can be seen as a kind of coercion charge intended to punish acts of compelling another person's action or inaction or making another person give up exercising his/her right, against laws, in that it is intended to punish acts of interference with another person's business using illegal force. The provision on obstruction of business is intended not to regulate industrial action itself but to punish illegal industrial action, such as refusal to work under the pretext of industrial action, which actually obstructs an employer's business and other economic activities and causes damage to them.
- 706.** In other countries, in case a trade union obstructs non-union workers and replacement workers in performing their jobs or forces its members to participate in industrial action, it is punished on charges of coercion, etc. This is the same logic and mechanism that the provision on an obstruction of business charge in the Republic of Korea follows in its application. In many cases, strikes in the Republic of Korea involve illegal and violent methods, such as occupying workplaces to block workers' access to workplaces, destroying facilities, physically abusing managers and policemen, and physically interfering with employers and other workers' work. In fact, most of the reasons for the arrests of workers have been for committing violence using dangerous weapons. Even those arrested on charges of obstruction of business are mostly union officers who gathered union members in one place and operated a front-line team of unionists to prevent individual members from giving up the strike or returning to work. They also blocked union members' return to work or occupied workplace facilities for a long period by actively exerting threat of force or committing violence with iron pipes, etc. Even by legal standards in other countries they would be subject to criminal punishment.
- 707.** In relation to this, it is stipulated in Article 8(1) of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), that in exercising the rights provided for in this Convention, workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the laws and regulations of the land. The Committee on Freedom of Association also clearly stated that freedom of association principles do not protect the abuse of the right to strike, which constitutes a criminal act in exercising the right to strike (paragraph 598). Given this, punishing illegal acts according to national laws cannot be seen as against freedom of association principles. Respecting the ILO's recommendations, the Government of the Republic of Korea is making efforts to minimize criminal punishment by refraining from making an arrest even in the case of an illegal strike, if the strike does not entail any violence.
- 708.** Finally, with regard to major institutional improvements, the Government indicates the following:

- *Public services where the right to strike is restricted:* With the enactment of the Trade Union and Labour Relations Adjustment Act in 1997, services, where the right to strike is restricted, was changed from public services to essential public services. Banks, other than the Bank of Korea, and inner city bus services, were excluded from essential public services in 2001 and since then their right to strike has not been restricted. As the revision bills to improve industrial relations laws and systems, confirmed through the Grand Tripartite Agreement of 11 September 2006, passed through the National Assembly on 22 December 2006, compulsory arbitration for disputes in essential public services where the right to strike is restricted was abolished and the requirement for maintaining minimum services and the use of a replacement workforce (the proportion should not exceed 50 per cent of strike workers), in the event of a strike, were introduced. This made it possible to achieve balance and harmony between exercising the right to strike and protecting the public interest.
- *Union pluralism at the non-enterprise level:* With the enactment of the Trade Union and Labour Relations Adjustment Act in 1997, multiple unions were recognized. However, union pluralism at the enterprise level will be allowed, beginning in 2010, according to the tripartite agreement of 11 September 2006.
- *Third-party intervention:* With the enactment of the Trade Union and Labour Relations Adjustment Act in 1997, the ban on third-party intervention was abolished and instead notification requirement for third-party assistance was introduced, under which third-party intervention not notified to the administrative authorities is subject to criminal punishment. As the revision bills to improve industrial relations laws and systems, resulting from the tripartite agreement of 22 December 2006, passed through the National Assembly, the notification requirement for third-party assistance and the related penal provisions were completely repealed.
- *Guarantee of teachers' right to organize:* With the enactment of the Act on the Establishment and Operation, etc. of Teachers' Trade Unions in 1999, teachers began to be guaranteed the right to organize and the right to collective bargaining. As a result, the Korean Teachers' and Education Workers' Union was legitimately recognized and is actively operating now.
- *Recognition of the KCTU as a legitimate union:* The KCTU has been regarded as an illegal group since its launch on 11 November 1995, because it had not satisfied the required legal standards. However, on 12 November 1999, it was legitimately recognized, making a great breakthrough in guaranteeing workers' right to organize.
- *Involvement of unions in political activities:* In 1998, the Tripartite Commission agreed to allow labour groups to be engaged in political activities by revising election laws and political funds laws. With the revision of the Act on election for public office and election malpractice prevention in 1998, labour groups were allowed to participate in election campaigns and, in 1999, they were allowed to donate political funds. By revising the Act on election for public office and election malpractice prevention and the political funds Act in 2000, the involvement of labour groups in election campaigns was permitted and labour groups, other than enterprise-level unions, were allowed to set up a separate fund and donate political funds.
- *Guarantee of public officials' labour rights:* In the Grand Tripartite Agreement of February 1998, tripartite representatives agreed to allow public officials' trade unions in stages. The Act on the Establishment and Operation of Public Officials' Trade Unions was enacted on 27 January 2005, and entered into force on 28 January 2006, after discussion at the Tripartite Commission, public hearings and in-depth discussion

at the National Assembly. Thanks to this, a number of public officials' unions at central and local government level are legitimately engaging in union activities now.

VIII. Additional information from the Government

709. In a communication dated 30 April 2007, the Government provides the following additional information. As regards allegations from the KGEU relating to the existence of a "New Wind Campaign", the Government indicates that initially MOGAHA stated that it had no information concerning such a campaign. However, recently MOGAHA has said that they discovered that there are documents concerning "measures to resolve the issue of the KGEU as soon as possible and stabilize and revitalize local public officialdom". The measures mentioned above had been devised to reinvigorate and stabilize local public officialdom as soon as possible by resolving conflicts and divisions within local public officialdom due to the issue of the KGEU and by boosting sagging morale among local government employees.

710. The main features include:

- (i) pursuing sweeping organizational reform: creating a conciliatory, cooperative and joyful atmosphere in the workplace (reinforcing the horizontal network between the head, managers and general employees of each local government); and laying the foundation for being able to start in earnest the innovation of local administration (self-reflection and organizational reform for this new start);
- (ii) creating the basis for sound union activities: forging a partnership with groups of public officials (activating dialogue and cooperation channels); and making thorough preparations for the launch of legitimate trade unions for public officials (cultivating organizations and personnel specializing in trade unions and collective bargaining);
- (iii) striving to restore people's trust in public officialdom.

711. At present, there are 91 trade unions (83,687 union members) for public officials of which 42 are conducting collective bargaining and 15 concluded collective agreements through negotiation with the Government.

712. The KFGE, since its registration in September 2006, has been preparing for negotiation with the Minister of Government Administration and Home Affairs – the bargaining representative of the Government – to discuss major working conditions for public officials, including pensions, extension of the retirement age, wages, etc. It is expected that central-level collective bargaining between the Government and public officials' unions organized around the KFGE will take place for the first time since the establishment of the Republic of Korea.

713. Even within the Korean Government Employees' Union (KGEU), growing numbers of union members are calling for it to convert into a legitimate union and conduct union activities within the boundaries of the law, as more and more unions are organized and conduct collective bargaining according to the law.

714. By 5 April 2007, a total of 23 regional chapters (11,229 union members) had withdrawn from the KGEU and converted into legitimate unions. The issue of putting to a vote its conversion into a legitimate union was placed on the agenda during its two national conventions of union delegates held in November 2006 and February 2007. The Government states, however, that some union officials thwarted the attempt to follow democratic decision-making procedures by occupying the podium and physically obstructed the process. Nevertheless, given the fact that the sentiment in favour of

converting into a legitimate union is spreading among field union members, the KGEU is expected to convert into a legitimate union and carry out legitimate union activities soon, unless any big change in circumstances takes place.

- 715.** As regards the construction industry, the Government explains that labour–management conflicts are attributed to structural reasons:
- (i) Due to its industrial characteristics, a division of labour and subcontracting is a common practice in the construction industry, which results in poor overall conditions on construction sites.
 - (ii) Construction firms which have direct employment relationships with construction workers have a limitation in improving their working conditions, including wages, through labour–management negotiation because of their lack of bargaining experiences and ability to pay.
 - (iii) In the construction industry where workers are employed on a temporary or short-term basis, there are huge swings in labour demand between high- and low-demand seasons (e.g. winter season), causing employment insecurity.
- 716.** Professional construction firms are relying on the use of foreign labourers as a way to cut costs while unions are demanding to stop bringing in foreign labourers and give preferential treatment to their members.
- 717.** Due to such structural problems in the construction industry it often happens that construction workers' unions go on strike without sufficient negotiation, though ostensibly complaining about their working conditions, such as working hours, a guarantee of employment, etc.
- 718.** Considering professional construction firms' lack of ability to pay, unions are calling for companies issuing the order (order issuers which have nothing to do with employment relationship with construction workers) or original contractors to directly participate in negotiation as bargaining partners. However, order issuers are usually the owners of the building, who selects a constructor (usually original contractors) and awards a construction contract, and thus cannot be a bargaining partner.
- 719.** On the other hand, original contractors make a subcontract with multiple professional construction firms and pay construction costs according to the contract, so they have no direct employment relationship with workers belonging to professional construction firms. However, in certain cases, original contractors, together with professional construction firms, can bear the responsibility for conducting collective bargaining in the capacity of an employer. In spite of this, it is not easy to see smooth bargaining in the construction industry due to lack of bargaining experiences and high labour mobility.
- 720.** Therefore, to increase the effect of their strikes, construction workers' unions carry out activities directed at order issuers and original contractors to which their members do not directly belong, such as blocking an entrance or hindering workers from going to work, and thus are often involved in obstruction of business, and violence.
- 721.** As regards the death at POSCO of Ha Jun-Koon, the Government indicates that over 1,200 members of the KFCITU held a rally in Pohang on 16 July 2006 aimed at denouncing POSCO and desperately defending the strike by the Pohang Construction Workers' Union in support of construction union members illegally occupying POSCO, the company that issued the construction order.

- 722.** After the rally, union members attempted to march on the streets. When the police tried to stop them, they threw stones and physically abused policemen with iron or wooden pipes, flamethrowers and boiling water, leaving 59 policemen injured. They also blocked general traffic. A total of 2,500 iron pipes were reported to have been found at the demonstration site some time between 16–19 July. In the course of this radical and violent demonstration and the police’s efforts to stop it, many people, including Ha Jung-Koon, were injured.
- 723.** The Government reiterates that Kim Tae-Hwan died after being run over by a vehicle transporting the company’s goods while he tried to stop it on 14 June 2005. The driver who caused the accident was judicially charged for violating the Act on Special Cases concerning the Settlement of Traffic Accidents.
- 724.** After the accident, the trade union, the three ready-mix truck companies and other organizations involved talked over the unit price of transport service, a guarantee of contract periods, compensation for the bereaved family members and the funeral service and reached an agreement.
- 725.** As regards the assets of construction workers, the Government recalls that, as negotiation was delayed, the construction union members occupied by force the buildings of the order issuers and original contractors, destroyed facilities, occupied roads, destroyed the facilities and properties of police stations, and occupied city halls, as acts that are beyond the boundaries of legitimate union activities.
- 726.** In addition, construction union officials in some areas visited many apartment construction sites where they had no direct employment relations, extorted or attempted to extort money under the pretext of collective agreements, and threatened project managers who refused to accept their demand. They were prosecuted on blackmail charges for committing these acts.
- 727.** As a result of trials in each district court, based on various evidence, they were convicted on charges of blackmail, attempted blackmail or night and collective blackmail under the Criminal Code or the Act on Punishment of Violence, etc. These cases either were concluded with the confirmation of sentences or are on trial in a higher court.
- 728.** The Government provides new information as regards the trial of Park Young-Jae and Rho Seon-Kyun from Cheonan Construction Workers’ Union, which it now indicates is pending before the third instance. As regards the Western Gyeonggi Construction Workers’ Union, the sentencing of the three members was upheld in the second instance court and the punishment was increased due to additional offences. Their cases are now pending before the third instance.
- 729.** In another case, eight members of the Daegu Construction Workers’ Union, including its president Cho Gi-Hyeon, were convicted and sentenced on charges of blackmail, etc. (bodily injury, violence or illegal confinement in a group or with dangerous weapons) on 17 November 2006, under the Act on Punishment of Violence in a district court. Cho Gi-Hyeon was sentenced to three years in prison, and Oh Sang-Ryong, Moon Jeong-Woo were sentenced to two and a half years in prison.
- 730.** At the first instance trial, Cho Gi-Hyeon, Oh Sang-Ryong and Moon Jeong-Woo were convicted on blackmail charges for the following reasons: (1) the three defendants failed to provide basic information on their organization, such as its composition and identity, and each construction site had only a few or even none of its members; (2) when the defendants visited construction sites, they always carried a camera to secure evidence of violations. They did report violations to the authorities but once collective agreements were signed after the reporting, they did not take any specific measures for the workplace;

(3) the spread of news about their reporting activities prompted construction workplaces to conduct collective bargaining, which could be considered as an act of giving notice about danger as a means of intimidation; (4) they demanded the payment of full-time union activity fees without specifically indicating full-time union officials; (5) some workplaces transmitted certain amounts of money in the name of support fees, even though they had not signed collective agreements; (6) in many cases, they showed no interest in matters other than full-time union activity fees so that the main purpose of their collective bargaining seems to be to collect such fees; (7) aware that if an original contractor is threatened with reporting of violations, it will have no choice but to assume the defensive for fear of consequent disadvantages, they pushed original contractors into collective bargaining by threatening to report their lack of safety facilities to the authorities. This is considered as an act of giving notice about danger as a means of intimidation. In effect, the original contractors signed collective agreements that mainly concern the payment of full-time union activity fees, for fear of such danger.

- 731.** However, at the second instance trial on 5 April 2007, the High Court stated: (1) the original contractors are recognized as having the status of an employer along with their subcontractors, such as professional construction firms, because they have actual employment relations with the construction workers; (2) the act of demanding the payment of full-time union activity fees falls within the boundaries of legitimate collective bargaining activities, and in the case of a regional or industry level union, whether to regard a worker who does not belong to a specific construction site as a full-time union official should be decided autonomously by the union.
- 732.** For the following reasons, the court determined that the defendants were not guilty of blackmail charges: (1) it is seen as the natural and legitimate exercise of workers' rights that workers warn that they will report employers' illegal acts to the authorities, and putting pressure on employers to sign collective agreements is within the scope of normal union activities; (2) the project managers' freedom to make and execute decisions is not considered as having been restricted or obstructed during the signing of collective agreements; (3) the amount of money described as full-time union activity fees in the collective agreements was received through bank accounts under the name of the union and spent to pay the cost of operating the union office, etc. The project managers also treated that amount as petty expenses in their account books; (4) the defendants regularly provided safety education at the construction sites; (5) it is hard to see their reporting of violations or readiness to report as the main motive behind the signing of collective agreements; (6) although the number or list of union members, full-time union officials, etc., were not specifically indicated, the project managers did not ask for such information, either.
- 733.** However, their conviction on other charges (bodily injury, violence or confinement in a group and/or with dangerous weapons), including violations of the Act on Punishment of Violence, etc., were upheld as in the previous trial.
- 734.** Concerning cases involving construction workers' unions, court rulings are made on a case-by-case basis. Therefore, the Government thinks that it would be better to leave the decision on individual cases to the independent judgement of the courts.
- 735.** On a general note, the Government indicates that the recently elected President of the KCTU has announced that it would refrain, as much as possible, from holding a general strike and attempt to solve problems through dialogue. Tripartite dialogue is resuming as labour circles have begun to talk with business representatives and government ministers. The Government wholeheartedly welcomes such a policy line and will make continuous efforts to seek solutions on various issues through open-minded dialogue with labour circles, including the KCTU. The Government hopes that international society will

continue to show support and cooperation as well as make an impartial judgement so that Republic of Korea will be able to enter a new era of cooperative and productive industrial relations.

C. The Committee's conclusions

736. *The Committee recalls that it has been examining this case, which concerns both legislative and factual issues, since 1996. The Committee observes that, in the meantime, significant progress has been achieved in terms of legislation, but important problems persist with regard to the respect of freedom of association principles in practice; the mere volume of the new allegations brought to the Committee's attention, as well as the gravity of the issues raised therein indicate that, despite considerable advances, there is still room for progress towards the establishment of a stable and constructive industrial relations system in the country.*

Legislative issues

737. *The Committee recalls that the outstanding legislative issues concern, on the one hand, the Act on the Establishment and Operation of Public Officials' Trade Unions, which concerns the public sector only, and, on the other hand, the TULRAA and other legislation which is generally applicable.*

Public officials

738. *More specifically, with regard to the Establishment and Operation of Public Officials' Trade Unions, the Committee's previous recommendations referred to: (i) the right to organize for all public servants, including those at Grade 5 or higher and firefighters; (ii) the right to strike for public servants not exercising authority in the name of the State and not working in essential services in the strict sense of the term; (iii) leaving to public officials' trade unions and public employers to determine on their own whether trade union activities should be treated as unpaid leave. New allegations by the KGEU concern: (i) restrictions on the scope of collective bargaining with public officials; (ii) the non-binding nature of collective agreement provisions which are regulated by laws, by-laws or the budget; (iii) the lack of legal means to counteract the unfair refusal of an employer to engage in collective bargaining or failure to implement a collective agreement; and (iv) the prohibition of political activities by public employees.*

739. *With regard to the right to organize of public servants, the Committee notes the new allegations made by the KGEU according to which, based on estimates by the Ministry of Labour, only 290,000 public officials out of a total of 920,000 (excluding soldiers) are eligible to join a trade union as a result of exceptions introduced in the Act on the Establishment and Operation of Public Officials' Trade Unions as well as its Enforcement Decree with regard not only to public servants at Grade 5 or higher but also a considerable number of Grade 6 and Grade 7 officials as well as those engaged in labour inspection, correctional services, firefighters, etc.; in education-related offices in particular, the number of public officials who are allegedly not eligible to join a trade union amount to 70 per cent of the officials of Grade 6 or lower and in the case of public officials working in schools, the ratio is close to 90 per cent. Moreover, Grade 6 public officials who become ineligible to join a union amount to 30 per cent of those employed in local government.*

740. *The Committee notes that, according to the Government, 70 per cent of the total 900,000 public officials are able to enjoy the right to organize. As at 30 April 2007, 630 organizations (trade unions and workplace associations with 190,000 members) have*

been created; 91 public officials' trade unions had been established (83,687 members); 42 of them were conducting collective bargaining with the Government and 15 had concluded collective agreements. The exclusion of public officials of Grade 5 and higher (which is justified according to the Government by the exclusions introduced in Convention No. 151), but also Grade 6 or lower, essentially aims at safeguarding the autonomy of the unions.

- 741.** *The Committee recalls that public servants, like all other workers, without distinction whatsoever, have the right to establish and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests [Digest of decisions and principles of the Freedom of Association Committee, fifth edition, 2006, para. 219.] Thus, public officials of all grades (Grade 5 or higher or Grade 6 or lower), are not excluded from the scope of freedom of association principles; on the contrary, all public employees (with the sole possible exception of the armed forces and the police, by virtue of Article 9 of Convention No. 87) should, like workers in the private sector, be able to establish organizations of their own choosing to further and defend the interests of their members [Digest, op. cit., para. 220]. The exclusion found in Convention No. 151 with regard to policy decision-makers or high-ranking public officials relates to the issue of collective bargaining and not to the right to organize which should be guaranteed to all public officials without distinction. Nevertheless, as concerns persons exercising senior managerial or policy-making responsibilities, the Committee is of the opinion that while these public servants may be barred from joining trade unions which represent other workers, such restrictions should be strictly limited to this category of workers and they should be entitled to establish their own organizations. It is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to establish their own associations to defend their interests and, second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present or potential membership [Digest, op. cit., paras 253 and 247]. The Committee further recalls that the functions exercised by firefighters do not justify their exclusion from the right to organize. They should therefore enjoy the right to organize. Prison staff should enjoy the right to organize. Finally, the denial of the right to organize to workers in the labour inspectorate constitutes a violation of Article 2 of Convention No. 87 [Digest, op. cit., paras 231, 232 and 234.] The Committee therefore once again requests the Government to review the exclusions from the right to organize introduced in the Act on the Establishment and Operation of Public Officials' Trade Unions as well as its Enforcement Decree so as to ensure that public servants at all grades, including those at Grades 7, 6, 5 or higher, regardless of their tasks or functions, including firefighters, prison guards, those working in education-related offices, local public service employees and labour inspectors, have the right to form their own associations so as to defend their interests.*
- 742.** *With regard to section 10(1) of the Act on the Establishment and Operation of Public Officials' Trade Unions, according to which provisions on matters stipulated by laws, by-laws or the budget or stipulated by authority delegated by laws or by-laws, shall not have binding effect when included in collective agreements, the Committee recalls that a distinction should be drawn between those public employees who are engaged in the administration of the State, who can be excluded from the scope of Convention No. 98 on the basis of Article 6, and those who are not engaged in the administration of the State and who should enjoy collective bargaining rights in accordance with Article 4 of Convention No. 98.*

743. *The Committee would like to emphasize that those public employees and officials who are not acting in the capacity of agents of the state administration (for example, those working in public undertakings or autonomous public institutions) should be able to engage in free and voluntary negotiations with their employers; in that case, the bargaining autonomy of the parties should prevail and not be conditional upon the provisions of laws, by-laws or the budget. Most importantly, the reservation of budgetary powers to the legislative authority should not have the effect of preventing compliance with collective agreements entered into by, or on behalf of, that authority; the exercise of financial powers by the public authorities in a manner that prevents or limits compliance with collective agreements already entered into by public bodies is not consistent with the principle of free collective bargaining [Digest, op. cit., paras 1033 and 1034].*
744. *On the other hand, with regard to those officials who are acting in the capacity of agents of the state administration (for example, those working in the ministries and other comparable government bodies) the Committee acknowledges, as the Government maintains, that Article 7 of Convention No. 151 allows a degree of flexibility in the choice of procedures to be used in the determination of the terms and conditions of employment. [see Digest, op. cit., para. 891]. In this case, and in light of the recognition of collective bargaining rights for public servants under the Act on the Establishment and Operation of Public Officials' Trade Unions, the Committee recalls that the establishment of upper and lower limits for wage negotiations or of an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or provisions giving the financial authorities the right to participate in collective bargaining alongside the direct employer, are compatible with the Convention, provided they leave a significant role to collective bargaining.*
745. *With regard to the alleged lack of legal means to counteract the unfair refusal of an employer to engage in collective bargaining or failure by an employer to implement a collective agreement in the public sector, especially as these agreements are often deprived of binding legal effect, the Committee underlines the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations and emphasizes that, as part of the obligation to negotiate in good faith, agreements should be binding on the parties; mutual respect for the commitment undertaken in collective agreements is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground [Digest, op. cit., paras 934, 939 and 940].*
746. *The Committee therefore requests the Government to ensure that, in the case of negotiations with trade unions of public servants who are not engaged in the administration of the State, the autonomy of the bargaining parties is fully guaranteed and the reservation of budgetary powers to the legislative authority does not have the effect of preventing compliance with collective agreements. More generally, as regards negotiations on matters for which budgetary restrictions pertain, the Committee requests the Government to ensure that a significant role is given to collective bargaining and that agreements are negotiated and implemented in good faith.*
747. *With regard to the exclusion from the scope of collective bargaining, by virtue of section 8, paragraph 1 of the Act on the Establishment and Operation of Public Officials' Trade Unions of "matters concerning policy decisions" of the State or local government and "matters concerning the management and operation of the [public] organization, such as exercising the right to appointment, but not directly related to working conditions", the Committee notes that, in a previous case on allegations concerning the refusal to bargain collectively on certain matters in the public sector, the Committee had recalled the view of*

the Fact-Finding and Conciliation Commission on Freedom of Association that “there are certain matters which clearly appertain primarily or essentially to the management and operation of government business; these can reasonably be regarded as outside the scope of negotiation”. It is equally clear that certain other matters are primarily or essentially questions relating to conditions of employment and that such matters should not be regarded as falling outside the scope of collective bargaining conducted in an atmosphere of mutual good faith and trust [Digest, op. cit., para. 920]. In the absence of a clear definition of what constitutes “policy decisions of the State” and the “management and operation of government business”, and in the light of the blanket prohibition of negotiations over these matters introduced in the Act on the Establishment and Operation of Public Officials’ Trade Unions, the Committee requests the Government to ensure that, in so far as concerns the application of the Act to public servants who cannot be properly considered as engaged in the administration of the State, the consequences of policy and management decisions as they relate to the conditions of employment of public employees, are not excluded from negotiations with public employees’ trade unions.

- 748.** *In connection with the above, the Committee also observes that the Government does not provide any information in respect of the Committee’s previous request to consider further measures aimed at allowing the negotiating parties to determine on their own the issue of whether trade union activity by full-time union officials should be treated as unpaid leave. The Committee reiterates this request.*
- 749.** *With regard to section 4 of the Act on the Establishment and Operation of Public Officials’ Trade Unions which prohibits political activities by public officials’ trade unions – while duly noting that the status of public servants is such that certain purely political activity can be considered contrary to the code of conduct that is expected of these servants and that trade union organizations should not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests – the Committee recalls that a general prohibition on trade unions from engaging in any political activities would not only be incompatible with the principles of freedom of association, but also unrealistic in practice. Trade union organizations may wish, for example, to express publicly their opinion regarding the government’s economic and social policy [Digest, op. cit., paras 502 and 503]. The Committee therefore requests the Government to ensure that public officials’ trade unions have the possibility to express their views publicly on the wider economic and social policy questions which have a direct impact on their members’ interests, noting though that strikes of a purely political nature do not fall within the protection of Conventions Nos 87 and 98.*
- 750.** *With regard to section 18 of the Act on the Establishment and Operation of Public Officials’ Trade Unions which establishes a blanket prohibition of collective action by public officials in conjunction with penal sanctions and fines, the Committee, observing that the complainant’s allegations refer to certain public sector workers covered by the legislation which would not be considered as exercising authority in the name of the State (e.g. public officials in state public schools, such as drivers or sanitation supervisors), once again requests the Government to ensure that the restrictions of the right to strike in the Act on the Establishment and Operation of Public Officials’ Trade Unions are limited to public servants exercising authority in the name of the State and public servants who are involved in essential services in the strict sense of the term.*

Generally applicable legislation

- 751.** *With regard to the TULRAA and other generally applicable legislation, the Committee recalls that the pending issues concern the need to: (i) legalize trade union pluralism at the enterprise level; (ii) resolve the issue of payment of wages to full-time union officers in a manner consistent with freedom of association principles; (iii) amend section 71 of the*

TULRAA so that the right to strike may be prohibited only in essential services in the strict sense of the term; (iv) repeal the notification requirement in section 40 of the TULRAA and the penalties provided for in section 89(1) concerning the prohibition on persons not notified to the Ministry of Labour from intervening in collective bargaining or industrial disputes; (v) amend the prohibition on dismissed and unemployed workers from remaining union members or holding trade union office (sections 2(4)(d) and 23(1) of the TULRAA); and (vi) amend section 314 of the Criminal Code concerning obstruction of business to bring it into line with freedom of association principles. New allegations by the KPSU concern the introduction of a new expanded category of public services subject to a minimum service requirement and the imposition of emergency arbitration to put an end to legal strikes.

- 752.** *The Committee recalls in this connection that in its previous examination of the case it requested the Government to amend the **list of “essential public services”** in section 71(2) of the TULRAA so that the right to strike may be restricted only in essential services in the strict sense of the term. The Committee notes with interest from the Government’s reply that the revision bills to improve industrial relations laws and systems, confirmed through the Grand Tripartite Agreement of 11 September 2006, were passed through the National Assembly on 22 December 2006; thus compulsory arbitration for disputes in essential public services, where the right to strike is restricted, was abolished and a requirement was introduced to maintain minimum services and use of replacement workers (not exceeding 50 per cent of striking workers) in the event of a strike in essential public services.*
- 753.** *In this respect, the Committee also notes the allegations made by the KPSU and the ICFTU according to which the new “public services” category includes what was formerly called “essential public services” (railroad services, inter-city railways, water, electricity, gas supply, oil refinery and supply services, hospital services, telecommunication services and the Bank of Korea) as well as: supply of heat and steam, harbour loading and unloading, railway, freight transport, airborne freight transport and social insurance providers; a minimum services obligation is added to the expanded list of “public services” in case where the “normal life” of the public is acutely endangered. The bill provides for compulsory arbitration machinery to resolve the crucial issue of the scope of the minimum service. The Committee notes that according to the KPSU serious doubts persist as to the intent behind legislation on minimum services; the concern is that it will serve to expand the anti-union discriminatory activities in the form of replacing striking workers, criminalizing any strike activity of workers performing minimum services and enhancing managerial control on the shop floor if managers are able to designate which workers should work.*
- 754.** *The Committee takes note of the Government’s reply, according to which the expansion of the scope of essential public services to include additional sectors was agreed through tripartite discussions although the KCTU refused to participate in the talks, and the details of the minimum service are to be agreed between the social partners.*
- 755.** *Recalling that the transportation of passengers and commercial goods is a public service of primary importance where the requirement of a minimum service in the event of a strike can be justified and that the Mint, banking services and the petroleum sector are services where a minimum negotiated service could be maintained in the event of a strike so as to ensure that the basic needs of the users of these services are satisfied [**Digest**, op. cit., paras 621 and 624], the Committee requests the Government to keep it informed of the specific instances in which minimum service requirements have been introduced in case of strikes in essential public services, the level of minimum service provided and the procedure through which such minimum service was determined.*

756. *The Committee notes with regret that the Government does not provide a response to the allegations of the KPSU according to which: (i) despite the repeal of the provisions on essential public services subject to compulsory arbitration, “emergency arbitration” can still be imposed if the dispute “relates to” any public services, or if the dispute is large in scale, has a “special” character such that the Labour Minister thinks the dispute is “likely” to make the economy “worse” or disrupt “normal life” (sections 76-80 TULRAA); (ii) since 2005, the Government has begun to make use of these provisions to end strikes, notably in the airline sector (to end a strike by the Asiana Pilots’ Union on 10 August 2005 and then by the Korean Airlines Flight Crew Union (KALFCU) on 11 December 2005); (iii) thus, a mere public announcement by the Labour Minister on 11 December 2005 at a press conference that “the Korean airlines pilots’ union strike is causing great harm to the national economy and ... [so] I invoke powers of emergency mediation” was allegedly enough to put a 30-day ban on the KALFCU strike that had begun three days earlier (on 8 December 2005); (iv) pursuant to this, Korean Airlines instigated criminal prosecution of 26 union officers for obstruction of business as well as seven unionists for “violence” (verbal arguments – still under investigation at the time of the complaint); (iv) as Korean labour laws are gradually reformed, the Government turns increasingly to alternative measures such as emergency arbitration or criminal obstruction of business clauses, to victimize trade unionists and crack down on union activity, raising concerns about the promotion of the “Industrial Relations Roadmap to Mature Industrial Relations”.*
757. *The Committee recalls that a system of compulsory arbitration through the labour authorities, if a dispute is not settled by other means, can result in a considerable restriction of the right of workers’ organizations to organize their activities and may even involve an absolute prohibition of strikes, contrary to the principles of freedom of association [Digest, op. cit., para. 568]. The Committee once again emphasizes that compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute or, if the strike in question may be restricted, even banned, i.e., in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population [Digest, op. cit. para. 564]. Furthermore, responsibility for suspending a strike on the grounds of national security or public health should not lie with the Government, but with an independent body which has the confidence of all parties concerned [Digest, op. cit., para. 571.] Finally, the Committee recalls that the hiring of workers to break a strike in a sector which cannot be regarded as an essential service in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association [Digest, op. cit., para. 632]. Considering that the recent use of these provisions in the case of the airline services did not meet these criteria, the Committee requests the Government to take all necessary measures to amend the emergency arbitration provisions in the TULRAA (sections 76–80) so as to ensure that such a measure can only be imposed by an independent body which has the confidence of all parties concerned and only in cases in which strikes can be restricted in conformity with freedom of association principles.*
758. *With regard to the issue of **obstruction of business provisions** in section 314 of the Penal Code, the Committee expresses its deep concern over the allegations of numerous arrests and detentions on grounds of obstruction of business after the introduction of compulsory arbitration to put an end to industrial action in the railway sector and notes that, according to the allegations, the provisions of section 314 of the Penal Code serve systematically as a means to victimize trade unionists for exercising their right to strike. The Committee will examine these allegations in the section on the factual aspects of obstruction of business. For the time being, the Committee notes with regret that in its reply the Government does not indicate any steps taken to review section 314 of the Penal*

Code so as to bring it into conformity with freedom of association principles, despite requests that it has been making in this respect since 2000. The Committee expresses the firm hope that the recent legislative amendments which abolished the possibility of recourse to compulsory arbitration for disputes in essential public services will lead to an attenuation of the practice of instigating criminal prosecution in relation to strikes over which compulsory arbitration has been imposed and once again requests the Government to refrain from imposing emergency arbitration in cases which fall outside those admissible under freedom of association principles. The Committee once again requests the Government to take measures so as to bring section 314 of the Penal Code (obstruction of business) in line with freedom of association principles.

- 759.** *The Committee further notes with regret, from the information provided by the Government with regard to its other recommendations, that according to the Tripartite Agreement of 11 September 2006, **the prohibition of wage payment to full-time officers and the introduction of trade union pluralism** at the enterprise level (both of which were to be implemented in 2007) were once again postponed until 31 December 2009. The Committee once again emphasizes that the free choice of workers to establish and join organizations is so fundamental to freedom of association as a whole that it cannot be compromised by delays [**Digest**, op. cit., para. 312]. The Committee once again requests the Government to take rapid steps for the legalization of trade union pluralism at the enterprise level, in full consultation with all social partners concerned, so as to ensure that the right of workers to establish and join the organization of their own choosing is recognized at all levels and recalls that the question of wage payment to full-time union officers should not be subject to legislative interference and requests the Government to ensure that this matter is resolved in accordance with freedom of association principles so as to enable workers and employers to conduct free and voluntary negotiations in this regard.*
- 760.** *The Committee further notes with interest from the Government's report that, with the passage of the bill on advancement of industrial relations by the National Assembly on 22 December 2006, **the ban on third-party intervention** in case of failure to notify and the related penal provisions were abolished.*
- 761.** *The Committee also notes from the Government's reply that, despite steps taken by the Government to adopt legislation in the direction of allowing the unemployed to freely join a non-enterprise level union and to engage in its activities, the tripartite representatives decided at the meeting held on 11 September 2006, that the issue of **allowing the unemployed to join a trade union and run for union office** would be excluded from the revision of related laws. Rational measures to address the issue would be designed according to the Government, by considering court rulings (which had found that the dismissed and unemployed are not eligible to join enterprise trade unions or be elected as union officers) and through in-depth discussions between the social partners and the Government. The Committee once again recalls that a provision depriving workers of the right to union membership is incompatible with the principles of freedom of association since it deprives the persons concerned of joining the organization of their choice. Such a provision entails a risk of acts of anti-union discrimination being carried out to the extent that the dismissal of trade union activists would prevent them from continuing their trade union activities within their organization [**Digest**, op. cit., para. 268]. It therefore once again requests the Government to repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office (sections 2(4)(d) and 23(1) of the TULRAA).*
- 762.** *Noting once again that significant progress has been achieved in terms of legislation, although serious issues remain pending, the Committee urges the Government, in the*

interests of establishing a constructive industrial relations climate in the country, to take all possible steps to find solutions to the remaining legislative matters noted above, in full consultation with all the social partners concerned, including those not presently represented on the Tripartite Commission. The Committee requests to be kept informed in respect of all the abovementioned matters.

Factual issues

- 763.** *The Committee recalls that the pending factual issues in this case concern: (i) the arrest and detention of Mr Kwon Young-kil, former president of the KCTU; (ii) the dismissal of leaders and members of the KAGEWC; (iii) the arrest and conviction of the KGEU President Kim Young-Gil and General Secretary Ahn Byeon-Soon; (iv) violent police intervention in KCTU and KGEU rallies; (v) interference by MOGAHA in the internal affairs of the KGEU through the initiation of a “New Wind Campaign” at the end of 2004; (vi) the criminal prosecution and imprisonment of officials of the KFCITU and restrictions over collective agreements concerning subcontracted workers in the construction sector. The Committee further notes with regret the new allegations made by the KGEU and the ICFTU, which concern notably the death of two trade unionists, the forced closure of 125 out of 251 KGEU offices nationwide, violent clashes between trade unionists and the police, and harassment of union representatives during minimum wage negotiations.*
- 764.** *Noting from the information provided by the Government that Kwon Young-kil, former president of the KCTU, was sentenced to a fine of 15 million won on 11 January 2006, the Committee requests the Government to keep it informed of the progress of the appeal proceedings.*
- 765.** *As regards the dismissals of eight public servants connected to the precursor of the KGEU, KAGEWC (the dismissals of Kim Sang-kul, Oh Myeong-nam and Min Jum-ki were final while those of Koh Kwang-sik, Han Seok-woo, Kim Young-kil, Kang Dong-jin and Kim Jong-yun were pending examination) for having committed illegal activities (attempt to establish a trade union, holding of illegal outdoor assemblies, break-in at the offices of the Minister of Government and Home Affairs (MOGAHA) and consequent damage, illegal decision to go on a general strike and taking of annual leave and absences, without permission, so as to wage that strike) the Committee notes that, according to the information provided by the Government, the dismissal of Koh Kwang-sik appears to have become final while the cases of Kang Dong-jin and Kim Jong-yun are still pending; finally, the status of the cases of Han Seok-woo and Kim Young-kil is unclear (they do not appear to have lodged an appeal). Noting with regret that the Government does not indicate any measures to reconsider the dismissals of the above public servants, the Committee once again expresses its deep regret at the difficulties faced by them, which appear to have been due to the absence of legislation ensuring their basic rights of freedom of association, in particular the right to form and join organizations of one’s own choosing, respect for which should now be guaranteed by the entry into force of the Act on the Establishment and Operation of Public Officials’ Trade Unions. The Committee therefore once again requests the Government to reconsider the dismissals of Kim Sang-kul, Oh Myeong-nam, Min Jum-ki and Koh Kwang-sik in the light of the adoption of the new Act and to keep it informed in this respect. It also requests the Government to provide information on the outcome of the pending administrative litigation and requests for examination concerning the dismissals of Han Seok-woo, Kim Young-kil, Kang Dong-jin and Kim Jong-yun and expresses the hope that the new legislation will be taken into consideration in rendering the relevant decisions. The Committee once again requests the Government to provide copies of the relevant decisions.*
- 766.** *With regard to Oh Young Hwan, president of Busan Urban Transit Authority Workers’ Union, and Yoon Tae Soo, first executive director of policy of the Korea Financial Industry*

Union who had been convicted on obstruction of business charges under section 314 of the Penal Code without having committed any violent act, the Committee notes with regret from the information provided by the Government that their convictions had already been confirmed in the final instance case and that no new steps have been taken to review their situation, despite the request made by the Committee in its previous examination. Oh Young Hwan received a fine of 10 million won on 15 October 2004 and Yoon Tae Soo was convicted to one-year imprisonment with a three-year suspension of execution on 12 November 2004.

- 767.** *The Committee further notes with regret the allegations of the KPSU concerning numerous arrests and detentions under obstruction of business charges, in relation to a strike staged by the KRWU in March 2006 which was stopped through compulsory arbitration. The Committee observes that at least 401 KRWU members were allegedly arrested by riot police while they were gathered together, or traveling or even sleeping in public bathhouses, mountains, union offices and wherever they were hiding (after rumours that riot police were poised to raid the five mass assembly areas where they were holding sit-ins); all these acts were found to constitute “criminal obstruction of business” that “hampered the railway operations” simply by the fact that the unionists were not working. Thus, a peaceful strike in and of itself was constituted to be an “obstruction of business using threat of force”. Furthermore, on 6 April 2006, 29 union leaders were arrested and detained on obstruction of business charges for the above incident, including KRWU president Kim Young-hoon who remained in custody until 22 June 2006; later on, Lee Chul Yee, chairperson of irregular workers of the KRWU and Kim Jeong Min, Seoul provincial president, were arrested. The latter remained in jail at the time of the complaint (1 September 2006). Furthermore, the employer KORAIL was preparing to lodge charges of “obstruction of business” and infraction of the TULRAA against 198 union officers, claiming damages of about US\$13,500,000 (the union had been recently forced to pay US\$2,440,000 for a strike staged in 2003). Furthermore, the Committee notes that 26 officers of the KALFCU were prosecuted on obstruction of business charges by their employer, Korean Airlines, after the Government imposed emergency arbitration to end a strike by the union.*
- 768.** *The Committee notes with regret that the Government does not provide a reply on the above allegations. Although the Committee notes more generally from the Government’s reply that the Government is making efforts to minimize criminal punishment for obstruction of business by refraining from making arrests even in the case of an illegal strike if the strike does not entail any violence, it also notes that according to the allegations, obstruction of business is systematically resorted to in an effort to victimize and intimidate trade unionists who decide to go on strike. In the light of this information, the Committee must once again express its concern that section 314 of the Penal Code concerning obstruction of business, as drafted and applied over the years, has given rise to the punishment of a variety of acts relating to collective action, even without any implication of violence, with significant prison terms and fines. The Committee recalls that, in previous examinations of this case, it had noted with interest the Government’s general indication that it would establish a practice of investigation without detention for workers who violated current labour laws, unless they committed an act of violence or destruction – a statement considered to be of paramount importance, particularly in a context where certain basic trade union rights have yet to be recognized for certain categories of workers and where the notion of a legal strike has been seen as restricted to a context of voluntary bargaining between labour and management uniquely for maintaining and improving working conditions [see 331st Report, para. 348; 335th Report, para. 832]. The Committee once again urges the Government: (i) to continue making all efforts to adopt a general practice of investigation without detention of workers; (ii) to provide information on the specific grounds for the criminal prosecution of 26 KALFCU officers and 198 KRWU officers for obstruction of business in relation to*

strikes staged in the railroad and airlines sectors and to communicate any court judgements handed down in these cases; (iii) to inform the Committee of the current status of Kim Jeong Min, Seoul provincial president of the KRWU who was still in prison at the time of the complaint on obstruction of business charges; and (iv) to continue to provide details, including any court judgements, on any new cases of workers arrested for obstruction of business under the terms of the present section 314 of the Penal Code.

- 769.** *The Committee also notes with regret the allegations of numerous suspensions, transfers and disciplinary measures against workers staging strikes which were interrupted by compulsory or emergency arbitration (2,680 KRWU members suspended by the Korean Railroad Corporation and undergoing disciplinary procedures causing a climate of intimidation prejudicial to trade union activity; KALFCU members transferred to standby by Korean Airlines causing harm to this young union). The Committee recalls that no person should be prejudiced in employment by reason of trade union membership or legitimate trade union activities, whether past or present and that anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions [Digest, op. cit., paras 769 and 770]. The Committee once again urges the Government to refrain from imposing compulsory or emergency arbitration for strikes which fall outside essential services in the strict sense of the term and public servants exercising authority in the name of the State and requests the Government to keep it informed of the status of the 2,680 KRWU members suspended by the Korean Railroad Corporation and undergoing disciplinary procedures as well as any KALFCU members transferred to standby pursuant to the Government's intervention in their industrial dispute, through compulsory or emergency arbitration.*
- 770.** *With regard to the arrest and conviction of the KGEU president Kim Young-Gil and general secretary Ahn Byeong-Soon under the now repealed Public Officials Act for actions aimed at obtaining a greater recognition of public servants' freedom of association rights in the Act on the Establishment and Operation of Public Officials' Trade Unions, the Committee observes that the Government considers that the actions of KGEU officials and the rallies, demonstrations and strike of 15 November 2004 aimed at obtaining recognition of the right to strike by public officials went beyond the scope of freedom of association principles as public servants exercising authority in the name of the State can be subject to limitations or even a prohibition of the right to strike. The Committee notes the Government's comments to the effect that: (i) despite the passage of the Act on Establishment and Operation of Public Officials' Trade Unions, which removed any institutional obstacles to the legalization of the KGEU, this organization can never be considered as legitimate as long as it demands the right to strike, refuses to register itself with the authorities, engages in illegal and violent political struggles and violates the principles of the Constitution, public officials' related laws and election laws; on the contrary, the activities of those chapters of the KGEU, which vowed to engage in legitimate activities, are firmly protected; (ii) the Committee treats illegal activities by the KGEU (i.e., strikes and political interventions in favour of the Democratic Labour Party (DLP) candidates at the 17th general election) as legitimate union activities in deviation from its standard case-law; (iii) although the Government does not know the exact job status of each KGEU member because this organization refuses to register with the authorities, it considers that at least the majority of the members and its leaders at the centre of the controversy are public officials whose right to strike can be restricted; KGEU members are "professional government officials" and therefore, public servants exercising authority in the name of the State, and their status is different from that of other government employees who have civilian status and whose right to strike is guaranteed (moreover, the right to strike has already been recognized for the officials engaged in manual labour and not exercising authority in the name of the State, such as those in postal services and the National Medical Center); (iv) the Committee's previous conclusions and recommendations seem to be based on the assumption that these*

government officials should have the right to strike which is not the case, although other activities short of industrial action by these officials aimed at acquiring the right to strike may be allowed; and (v) the Committee clearly stated in other cases that disciplinary punishment, such as dismissal, for collective action by public officials whose right to strike is restricted, do not run counter to the freedom of association principles (Case No. 1528, 291st Report). Thus, the Government queries: (i) are not Kim Young-Gil and Ahn Byeong-Soon public officials whose right to strike is restricted and if not, on which ground? (ii) if they are seen as public officials whose right to strike is restricted, is dismissing and prosecuting them for their illegal collective action, such as strikes, illegal interference in election activities, etc. considered a breach of freedom of association?

- 771.** Observing that the Act on the Establishment and Operation of Public Officials' Trade Unions is not strictly limited to employees exercising authority in the name of the State (see section on legislative issue), the Committee does not have the necessary information at its disposal concerning the functions relating to the posts of Kim Young-Gil and Ahn Byeong-Soon and whether their specific right to strike can be restricted. The Committee considers, however, that even if these trade union leaders fall in their individual capacity within the category of public officials whose right to strike may be restricted, in their quality of trade union leaders they should be able to defend their members' interests, in particular as regards the greater recognition of freedom of association rights more generally for public employees. The Committee recalls that, for the contribution of trade unions and employers' organizations to be properly useful and credible, they must be able to carry out their activities in a climate of freedom and security. This implies that, in so far as they may consider that they do not have the basic freedom to fulfil their mission directly, trade unions and employers' organizations would be justified in demanding that these freedoms and the right to exercise them be recognized and that these demands be considered as coming within the scope of legitimate trade union activities. Moreover, although holders of trade union office do not, by virtue of their position, have the right to transgress legal provisions in force, these provisions should not infringe the basic guarantees of freedom of association, nor should they sanction activities which, in accordance with the principles of freedom of association, should be considered as legitimate trade union activities [*Digest*, op. cit., paras 36 and 40].
- 772.** The Committee recalls in this respect from the KGEU allegations on the legislative aspects of this case, that the prohibition of strikes in the Act on the Establishment and Operation of Public Officials' Trade Unions covers a large variety of public employees including for instance, those working in education-related offices and employees of local authorities, and is not limited to just those public employees exercising authority in the name of the State. The Committee recalls that in a previous case which the Government itself raises as an example of the Committee's decisions on this question (Case No. 1528 (Federal Republic of Germany)), the Committee had found that "workers in education are not covered by the definition of essential services or of the public service exercising the powers of public authority" and should therefore have the right to strike, except for school principals and deputy principals who exercise the prerogatives of the public authority and whose right to strike can be limited [277th Report, paras 285 and 289]. The Committee recalls moreover that local public service employees should enjoy the full right to further and defend the interests of the workers whom they represent [*Digest*, op. cit., para. 230].
- 773.** Furthermore, the Committee considers that the criminal prosecution and conviction to imprisonment of trade union leaders by reason of their trade union activities are not conducive to a harmonious and stable industrial relations climate. In the case which the Government itself raises as an example (Case No. 1528 (Federal Republic of Germany)), the Committee had confirmed that public servants exercising authority in the name of the State may face disciplinary, but not penal, sanctions for having illegally exercised the right to strike; it is important to recall, moreover, that the sanctions in question consisted in

light pecuniary fines and in no way included dismissals as indicated by the Government in its comments, much less incarceration [277th Report, para. 277(b)].

- 774.** *Therefore, the Committee maintains its deep concern at the imposition of serious criminal sanctions on leaders of the KGEU on account of their trade union activities aimed at obtaining a greater recognition of public servants' freedom of association rights, and emphasizes that the criminalization of industrial relations is in no way conducive to harmonious and peaceful industrial relations. Moreover, the Committee notes that trade union activities should be seen in the context of situations which may be especially strained and difficult, and recalls once again that it is not possible for a stable industrial relations system to function harmoniously in the country as long as trade unionists are subject to arrests and detentions [see 327th Report, para. 505; 331st Report, para. 352; and 340th Report, para. 765]. The Committee trusts that there are no further charges pending against KGEU president Kim Young-Gil and general secretary Ahn Byeong-Soon for actions aimed at acquiring recognition, de facto and de jure, of the basic rights of freedom of association of public servants and that there is no penalty remaining in relation to the previous convictions under the now repealed Public Officials Act.*
- 775.** *With regard to the allegations made by the ICFTU during the Committee's last examination of this case, concerning violent police intervention in KCTU and KGEU rallies, the injury of trade unionists, and intimidation and harassment of trade union leaders and members so as to discourage their participation in a general strike to be staged on 15 November 2004 in protest at the Act on the Establishment and Operation of Public Officials' Trade Unions, the Committee notes that further allegations are made by the ICFTU, according to which: (i) 126 members of the KGEU were arrested during a peaceful rally on 2 June 2005 in Wonju City, Gangwon-Do Province, aimed at calling on the local government to stop the repression of the KGEU and start talks instead, especially with regard to the previously adopted disciplinary measures against 395 local government employees following a general strike on 15 November 2004; (ii) on 14 May 2005, the police arrested the president of the new union Seoul Gyeonggi-Incheon Migrant Workers' Trade Union (MTU), Anwar Hossain, who became mentally ill due to his long prison stay and was released temporarily for three months on 25 April 2006 on medical grounds; (iii) in 2004 a total of 121 workers had been indicted and in April 2004 the number of workers that had requested amnesty from the Minister of Justice amounted to 2,400. The Committee observes that further allegations in this sense are contained in the ICFTU/TUAC/GUF mission report which was brought to the Committee's attention by the KGEU. The mission report expressed profound concern over violence breaking out at peaceful rallies and demonstrations. Aggression had caused the deaths of two trade unionists (see below) and injuries to many others and had led to the imprisonment of more than 100 unionists.*
- 776.** *The Committee notes with regret that the Government does not reply to the allegations concerning the imprisonment of the president of the MTU, Anwar Hossain. The Committee requests the Government to provide information on the grounds for his imprisonment and his current status in its next report.*
- 777.** *In reply to the allegations of violent police intervention in KCTU and KGEU rallies, the Committee notes that the Government gives a detailed account of acts of violence committed by workers during demonstrations and strikes staged by the KCTU on 26 November and 1 December 2006 (attacks against city halls and local government buildings, arson, assault against policemen using bamboo bars, etc.). The Committee notes that, according to the Government, general strikes are aimed either at the withdrawal of major legislation pursued for the protection of workers' rights or issues not related to an improvement of workers' socio-economic conditions such as withdrawal of Korean troops from Iraq, termination of neo-liberalism, opposition to free trade agreement negotiations,*

opposition to the APEC summit, opposition to the relocation of a military base, abolition of the annual pan-governmental preparedness exercise in case of a Korean Peninsula emergency, etc. The Committee notes that, according to the Government, for the past three years 2,263 police officers were injured with Molotov cocktails, iron pipes, bamboo bars, etc. during unlawful violent demonstrations.

- 778.** *The Committee once again expresses deep regret and concern at the prevalent climate of violence which emerges from the allegations and the Government's reply. It notes on the one hand, that trade unions must conform to the general provisions applicable to all public meetings and must respect the reasonable limits which may be fixed by the authorities to avoid disturbances in public places [Digest, op. cit., para. 144]. With regard to the participation by trade unions in rallies concerning wider socio-economic issues linked to globalization, the Committee notes that the fundamental objective of the trade union movement should be to ensure the development of the social and economic well-being of all workers; it is only in so far as trade union organizations do not allow their occupational demands to assume a clearly political aspect that they can legitimately claim that there should be no interference in their activities. On the other hand, it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character. These two notions overlap and it is inevitable, and sometimes usual, for trade union publications to take a stand on questions having political aspects, as well as on strictly economic and social questions [Digest, op. cit., paras 27 and 505.] The Committee also notes, however, in these specific circumstances regarding certain categories of public servants, that activities on issues going beyond socio-economic matters and touching upon national security issues do not fall within the scope of protection afforded by freedom of association principles.*
- 779.** *On the other hand, the Committee emphasizes that the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace [Digest, op. cit., para. 140].*
- 780.** *In this context, the Committee notes with concern that, in its reply, the Government considers it appropriate to express criticism against the KCTU for staging strikes in large companies despite the fact that these companies provide much better working conditions than other workplaces, and causing large losses to them, stating moreover that "the strike campaigns are led by a number of high-ranking union officials who receive full wages from employers for doing nothing for the company but only to concentrate on organizing struggles". The Committee considers that constructive and stable industrial relations can only emerge in a climate of mutual appreciation between the Government and the social partners and the legitimate exercise of their rights. It recalls moreover that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests [Digest, op. cit., para. 522]. While noting the Government's comments about recent corruption scandals involving unions and growing social criticism from the people which has led to a marked increase in voices calling for self-examination of the labour movement, the Committee considers that such matters, in the absence of actual court judgements relating to illegal activities, is a matter of trade union internal affairs.*
- 781.** *In light of the above, the Committee calls on all sides to exercise maximum restraint so as to avoid escalating violence and to undertake genuine dialogue conducive to the establishment of a constructive and stable industrial relations climate.*

- 782.** *With regard to allegations concerning the initiation of a “New Wind Campaign” by MOGAHA at the end of 2004, targeting the KGEU and promoting a “reformation of organizational culture, focusing on rearing workplace councils and healthy employee groups”, the Committee notes that, according to the Government, there has been no interference or obstruction of the legal activities of trade unions and no intention to do so, whereas it has acknowledged in its latest communication that MOGAHA had issued documents concerning “measures to resolve the issue of the KGEU as soon as possible and stabilize and revitalize local public officialdom”.*
- 783.** *The Committee notes in this respect the new allegations made by the KGEU and the ICFTU, according to which, the Government embarked on a concerted campaign to destroy the KGEU on the pretext that the trade union is an illegal organization because it is refusing to register under the Act on the Establishment and Operation of Public Officials’ Trade Unions. The KGEU admits that it refuses to submit a notice of establishment as it currently objects to various provisions of the Act; in particular, if it were to register, it would have to expel present members who do not qualify under the Act for trade union membership. The Committee notes that, according to the KGEU, even if the union has opted to remain outside the legal framework established by the Act and thereby forego the protection afforded by its provisions, it does not constitute an “illegal” trade union as purported by the Government; if legal status was to be sought, it should be characterized as a trade union outside the scope of the law.*
- 784.** *The Committee notes with concern the allegations concerning numerous acts of extensive interference by the Government, in particular MOGAHA in the KGEU internal affairs, with the aim to “bring about voluntary withdrawal of membership from illegal organizations” i.e. the KGEU (joint announcement of 8 February 2006, MOGAHA Directive of 22 March 2006). The Committee notes that these acts include: (i) prohibition of collective bargaining with the KGEU, withdrawal of all trade union facilities including check-off, release from work to serve as full-time officers, provision of office space, etc.; (ii) “man-to-man persuasion teams” including “individual (joint) contact [by higher ranking officials] with the target member of the leadership, visit of the family, telephone calls, to persuade the person in question and his/her family members” and to “make clear strongly that there will be disciplinary action for failure to comply with the order and other disadvantageous measures, such as punitive fines for illegal use of the term “trade union”; (iii) the presentation of resignation forms to KGEU members along with official orders which on several occasions contained threats such as: “Failure to comply with this order shall be subject to stern measures pursuant to the relevant laws”; (iv) establishment of an “education plan” and education sessions to obtain withdrawal of membership; (v) inspection reports on the progress of the campaign which contain “confidential” information on trade union intentions to transform into a legal trade union; (vi) directives to prevent the carrying out of KGEU elections scheduled for 25–26 January and 2–3 February 2006 (prevent the establishment of voting booths, prohibit voting during work hours, block traveling for voting within the office, etc.); official announcement by the Government expressing its disapproval for the election result, as the president of the KGEU had been previously dismissed pursuant to illegal collective action; (vii) active assistance to those committees who decided “to transform themselves into legal trade unions”; (viii) administrative and financial sanctions (reduction in the allocation of special revenue, exclusion from various state projects, etc.) against local governments which fail to comply with the government’s directive and engage in collective bargaining with an illegal organization or engage in any other actions which overlook or facilitate illegal activities by the illegal organizations; (ix) orders to local governments, with regard to pledges given during the local elections campaign to “discard their written pledge or promise of the governor-elect on recognition of the KGEU”, warning that “the local governments that bargain or even conclude a collective agreement with illegal organizations and give any support like overlooking of full-time union staff, allowing of*

union dues check-off and providing an office to illegal organizations will be taken to administrative and financial actions government-wide for disadvantages”; and (x) victimization of KGEU members who participated in rallies in May and July 2006 in protest against these practices (MOGAHA instructions to adopt disciplinary measures against participants in a rally held in front of the Rural Development Administration on 25 May 2006 and arrest of 126 KGEU members during a peaceful rally on 22 June 2005 in Wonju City, Gangwon-Do Province).

- 785.** *In addition to the above, the Committee notes with regret that the acts of interference included the forced closing down of KGEU offices since May 2006 with the help of riot police; the closing down of these offices was followed closely by MOGAHA which requested all the local governments and agencies to submit weekly “performance records”. These acts were intensified in September 2006 when MOGAHA instructed local governments and agencies that all the KGEU local offices at government buildings should be closed down by 22 September 2006 and warned that those who adopted a lukewarm attitude would be audited. Thus, according to the KGEU, from 22 September 2006, its local offices nationwide were attacked by riot police and specially hired thugs armed with fire extinguishers, firefighting dust, hammers, claw hammers, hammer drills and power saws to forcefully close offices down. One hundred twenty five KGEU offices have been shut down and sealed off, in some cases even welded with iron plates or bars. The KGEU members inside the offices were violently pulled out, several were arrested (and released thereafter) and some seriously injured.*
- 786.** *The Committee notes that the information provided by the Government basically corroborates the facts alleged by the KGEU. The Government considers however that it is within its rights to take the above measures against the KGEU for the following reasons: (i) this trade union is an illegal organization as it has refused to register under the Act on the Establishment and Operation of Public Officials’ Trade Unions; (ii) it has engaged in general strikes, demanding the right to strike for public officials; (iii) it has systematically and illegally interfered in political affairs (support for the DLP) in violation of the constitutional principle of political neutrality of public officials and other election related laws; and (iv) it carries out political struggles with a biased ideology (leading protests against the Iraq War, the WTO Ministerial Meeting and trade negotiations, the relocation of a United States military base, the APEC Summit and the annual pan-governmental preparedness exercise in case of a Korean Peninsula emergency). The Government considers that it is not obliged to offer government buildings as a seedbed for illegal activities and emphasizes that its measures to shut down KGEU offices are strictly limited to KGEU branches conducting illegal activities and implemented in a due manner according to the related laws and regulations while the KGEU refused to follow the objection procedures prescribed by law.*
- 787.** *In exercising freedom of association rights, workers and their organizations should respect the law of the land, which in turn should respect the principles of freedom of association. The Committee expresses its deep regret at the gravity of the allegations involving serious acts of extensive interference in the activities of the KGEU. The Committee recalls that the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights [Digest, op. cit., para. 178]. The Committee emphasizes that the entry by police or military forces into trade union premises without a judicial warrant constitutes a serious and unjustifiable interference in trade union activities [Digest, op. cit., para. 181]. Moreover, the Committee underlines that a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty [Digest, op. cit., para. 45]. All appropriate measures should be taken to guarantee that, irrespective of trade union affiliation, trade union rights can be exercised in normal conditions with respect for basic human rights and in a climate free of violence, pressure fear and threats of any kind [Digest, op. cit., para. 35].*

- 788.** *With regard to MOGAHA directives, orders and inspection reports aimed at “voluntary withdrawal” from the KGEU and the “active assistance” of committees which decide to submit notice of registration under the Act on the Establishment and Operation of Public Officials’ Trade Unions, the Committee notes that respect for the principles of freedom of association requires that the public authorities exercise great restraint in relation to intervention in the internal affairs of trade unions. It is even more important that employers, including governments in their quality of employer, exercise restraint in this regard. They should not, for example, do anything which might seem to favour one group within a union at the expense of another [Digest, op. cit., para. 859]. Noting that the presentation of statements of resignation were accompanied by warnings of “dire consequences”, letters and telephone calls to the families of trade unionists, as well as private meetings with and home visits by hierarchical superiors, the Committee recalls that in a previous case regarding allegations of anti-union tactics aimed at union members to encourage their withdrawal from the union and the presentation of statements of resignation to the workers, as well as the alleged efforts made to create puppet unions, the Committee considered such acts to be contrary to Article 2 of Convention No. 98, which provides that workers’ and employers’ organizations shall enjoy adequate protection against any acts of interference by each other or each other’s agents in their establishment, functioning or administration [Digest, op. cit., para. 858]. The Committee further notes that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [Digest, op. cit., para. 475].*
- 789.** *With regard to MOGAHA instructions to prevent the conduct of KGEU elections and the public disapproval expressed by the Government at the election results, the Committee notes that the right of workers’ organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves [Digest, op. cit., para. 391].*
- 790.** *Furthermore, with regard to the legal nature of the KGEU, the Committee recalls that as far as its own procedures are concerned, the fact that an organization has not been officially recognized does not justify the rejection of allegations when it is clear from the complaints that this organization has at least a de facto existence [Procedures for the examination of complaints alleging violations of freedom of association, para. 35].*
- 791.** *In light of the above, and of the new allegations concerning a recent directive from MOGAHA to follow up on the initial campaign, the Committee requests the Government to immediately cease all acts of interference against the KGEU, in particular the forced closure of its offices nationwide, the discontinuance of the check-off facility, the disallowance of collective bargaining, the pressure on KGEU members to resign from the union as well as administrative and financial sanctions against local governments which fail to comply with the Government’s directives. It further calls upon the Government to abandon these directives and to take all possible measures with a view to achieving conciliation between the Government (in particular MOGAHA) and the KGEU so that the latter may continue to exist and ultimately to register within the framework of the legislation which should be in line with freedom of association principles. The Committee requests to be kept informed in this respect.*
- 792.** *The Committee notes with deep regret the death of two trade unionists, Ha Jeung Koon, member of the Pohang local union of the KFCITU, who died in August 2006 allegedly after severe beating by riot police during a demonstration organized by the union, and Kim*

Tae-hwan, president of the FKTU Chungju regional chapter who was run over by a cement truck on 14 June 2005 while on the picket line in front of the Sajo Remicon cement factory.

- 793.** *The Committee notes that, according to the Government, the death of Ha Jeung Koon occurred in the chaos of extreme violence led by the Construction Confederation of the KCTU (i.e. the KFCITU) to support the Pohang local union's forceful occupation of offices of construction companies. The prosecutors are investigating the cause of his death and measures will be taken based on the results. However, according to the Government, the violent struggle on that day was organized purposely by unionists with masks who assaulted policemen with iron pipes (over 2,500 pipes were collected at the scene of the violence). As for Kim Tae Hwan, his death was regretful, but was a traffic accident. Mr Kim tried to stop a car carrying goods of the company during the strike and was hit by the car. The driver was punished accordingly.*
- 794.** *With regard to the death of Kim Tae Hwan, president of the FKTU Chungju regional chapter, the Committee observes that a reading of the relevant video transcript provided by the ICFTU demonstrates that this death was the result of not just a simple car accident, given that it took place in the context of an industrial dispute and in particular: (i) during a picket while workers were trying to stop a truck driven by a replacement worker from leaving the worksite; and (ii) in a particularly contentious situation since the police along with unidentified civilians instructed the truck driver to move forward in spite of the trade unionists standing in front of the truck. The Committee also notes that, according to the ICFTU, the employer offered pecuniary compensation to the widow of the trade union leader, without however accepting legal responsibility. The Committee recalls that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [Digest, op. cit., para. 48]. The Committee therefore expresses its deep regret at the treatment of the death of Kim Tae Hwan, president of the FKTU Chungju regional chapter, who was run over by a cement truck on 14 June 2005 while on the picket line in front of the Sajo Remicon cement factory, as a simple car accident. It requests the Government to institute an independent investigation into the circumstances of his death and in particular the role of the police and unidentified civilians, so as to shed full light onto the incident, determine where responsibilities lie, punish any guilty parties and prevent the repetition of similar events.*
- 795.** *With regard to the death of Ha Jeung Koon, member of the Pohang local union of the KFCITU in August 2006, the Committee recalls that in cases in which the dispersal of public meetings by the police has involved loss of life or serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities [Digest, op. cit., para. 49]. The Committee requests the Government to keep it informed of the outcome of the investigation under way concerning the death of Ha Jeung Koon, and trusts that the investigation will be concluded swiftly and will determine where responsibilities lie, allowing for the guilty parties to be punished and the repetition of similar events to be prevented.*
- 796.** *With regard to the allegations by the IFBWW which were examined by the Committee in its previous report and concerned the criminal prosecution and imprisonment of officials of the KFCITU and restrictions over collective agreements concerning sub-contracted workers in the construction sector, the Committee takes note of the report of the ICFTU/TUAC/GUF joint mission to the Republic of Korea which was communicated with the KGEU's complaint. The mission report refers to a surge of incarcerations in the*

construction sector (more than 100) for what in other countries would be normal trade union activities, i.e. collective bargaining with main building contractors. It also pinpoints a trend of informalization of the economy in general, along with a criminalization of trade unions which attempt to organize informal sector workers like, for instance, in the construction sector, where the most serious charges construed collective bargaining with main contractors on behalf of subcontracted workers as extortion, despite the fact that the contractors had come to the table and were ready to negotiate. The report also makes reference to precariousness and substandard working conditions in the construction sector, and indicates that the police crackdown aimed at preventing trade unions from organizing the irregular workers and negotiating better working conditions for them.

- 797.** *The Committee also notes that, in its reply to the allegations, the Government enumerates several incidents of violent protests by construction workers' unions, including occupations of the offices of main contractors in protest at job precariousness, with the use of iron pipes, self-made flamethrowers, etc. The Government also describes the efforts undertaken to improve the conditions of work of construction workers through legislation. With regard to the allegations concerning the penal pursuit of trade unionists from the construction sector in the absence of complaints by the contractors, the Government indicates that in November 2005 the construction industry employers' association filed a complaint with the Minister of Labour against the union's demand for money as wage payment to full-time union officers and some actually declared that the collective agreements had been illegal and that they were planning to file suit in the courts.*
- 798.** *The Committee further takes note of the additional information provided by the Government to supplement its previous response to the IFBWW allegations. The Committee notes that, according to the Government, the union officers in question visited many apartment construction sites where they had no employment relationship, extorted or made an attempt to extort money under the pretext of collective agreements and threatened project managers who refused to accept their demand. Considering the evidence verified by the competent courts, they were punished for the following: they did not belong either to the original contractor nor to any of the local subcontractors, had no employment relationship with, nor worked for any of the workplaces; when asked to show a roster of union members, they failed to produce it and insisted that collective agreements should be signed regardless of whether there were members; they demanded the employers to send 400,000 won to their bank accounts in the name of activity fees every month (approx. US\$400) and threatened that, if the employer refused to pay the money, they would find various violations, including lack of safety equipment, and report them to the regional labour office, along with photos; after the signing of collective agreements and the sending of the money, they never appeared in the workplaces to keep watch on their industrial safety; if the construction sites did not accept their demand, the officers took photos of any violations, such as failures to wear safety helmets (which is an obligation even for union officers themselves) and reported them to the Ministry of Labour or even made false reports; some of the reported workplaces were punished for violations after investigation by the authorities but others turned out to have been fraudulently reported, so the unions were punished on charges of false accusation; many workplaces accepted their demand for fear of receiving unfavourable treatment as a result of accusations, such as delays in construction or prohibition from bidding for government construction contracts; the union officers extorted money either monthly or in one payment and many of them used their private bank accounts to receive the money; half of them spent the money for personal purposes irrelevant to the union and the other half divided the money among themselves and spent it for personal purposes; the Cheonan/Asan Construction Workers' Union extorted 42.55 million won (US\$42,000) and attempted to extort 6.99 million won (US\$7,000) per month from 22 construction sites from December 2004 to June 2006.*

- 799.** Furthermore, the Committee notes that additional information is provided by the Government to show that the allegations of the complainant IFBWW in its previous examination of the case were groundless: (i) the complainant claimed that the Daejeon District Court had handed down a light sentence against construction union officers on 16 February 2004, ruling that they were not personally liable because they spent the activity fees for the purposes of their organization; however, the Court had only said that although the union officers “are considered guilty of blackmail charges, their extortion of money does not constitute habitual blackmail because the act was committed according to their organization’s policy rather than their personal habit”; and (ii) with regard to the collective agreement made between the original contractor and the union the Court acknowledged that even when an original contractor had no direct employment relationship with daily construction workers, it might share the responsibility to conduct collective bargaining with them “if the original contractor is in a position to realistically and specifically govern basic working conditions for the said workers to the point that it can be identified with the subcontractor which is the actual employer of the workers” (Daejeon District Court Decision of 15 September 2004, No. 583); the allegation that the vice-president of Cheonan/Asan Construction Workers’ Union, Rho Seon-Kyun, was mistakenly prosecuted and fined lightly for facts which had taken place before he joined the union in August 2003, is false; the Court sentenced him to a fine for extorting 9.45 million won from 19 construction sites between 1 August and the end of September 2003; the president of the union, Park Young-Jae, who was charged with collective blackmail during nighttime, was sentenced to one year in prison. He was immediately arrested after his conviction because at that moment he was already serving his term of suspension of execution after having been sentenced to imprisonment of eight months with a two-year suspension of execution on different charges on 9 July 2003.
- 800.** The Committee therefore notes that, according to the Government, the courts found all the union officers guilty of threat, blackmail and coercion charges. Six unionists from the Daejeon/Chungcheong Construction Workers’ Union were convicted to six to eight months’ imprisonment with a two-year suspension of execution; appeals filed with the Supreme Court were dismissed on 25 May 2006; Park Young-Jae, president of the Cheonan/Asan Construction Workers’ Union, was immediately arrested after being sentenced to one year imprisonment; Rho Seon-Kyun was fined; the sentence was confirmed in the Supreme Court on 25 May 2006; of the nine trade unionists from the Western Gyeonggi Construction Workers’ Union, three, including Lee Ho-Jung, were sentenced to eight months to one year in prison with a two-year suspension of execution; the remaining six were fined 3 million won; the case is pending before the Second Instance Court.
- 801.** While observing that it does not have at its disposal the text of the court judgements in this case so as to have full knowledge of the evidence presented, the Committee notes that the Government’s reply and the complainant’s allegations represent divergent views of the facts. The Committee requests the Government to transmit all additional information in this regard, including relevant court judgements, and to keep the Committee informed of the outcome of the appeal in this case. The Committee further invites the complainant, IFBWW, to transmit any further information it considers appropriate in response to the information provided by the Government.
- 802.** In addition, the Committee notes from the new allegations and latest information provided by the Government in respect of the union officers of the Daegu Construction Workers’ Union charged with blackmail under what had been reported to be similar conditions, that the court of second instance found these not guilty. In particular, the Committee observes that the court found that: (1) original contractors are recognized as having employer status along with the subcontractors; (2) request for payment of full-time union activity is a legitimate trade union activity; (3) it is also a legitimate trade union activity to warn of

possible reporting of illegal employer acts and to use this as pressure for the signing of collective agreements; (4) the money for union activity was received in a union bank account and used for union activity; and (5) the union officials regularly provided safety education at the construction sites. The Committee recalls in this respect its previous conclusions, similar to that described above, in respect of the various conflicts in the construction industry that: (1) denouncing insufficient OSH measures was a legitimate trade union activity and any warnings in this respect should not be considered to be illegal coercion; (2) the conclusion of a collective agreement with a main contractor is a viable option; and (3) a main contractor on a construction site should be able to voluntarily recognize a worker on the site as a full-time unionist even if the worker does not work directly for the main contractor. [See 340th Report, paras 774–776.] Noting, however, in this particular case, the Government's indication that the second instance court upheld the convictions of the officials at Daegu Construction Workers' Union on other charges, including violations of the Act on Punishment of Violence, the Committee requests the Government to provide a copy of the court judgement in question and to keep it informed of the outcome of any further appeals.

- 803.** *The Committee, more generally, wishes to emphasize that these cases concern precarious and particularly vulnerable construction workers recently exercising their right to organize and bargain collectively in a complex bargaining context, involving several layers of subcontractors over which only the main contractor has a dominant position. Thus, the Committee deeply regrets the decision of those courts that had concluded that collective agreements signed by the KFCITU and the main construction company were only applicable to employees of the main company and did not apply to workers hired by subcontractors. Finally, the Committee notes that according to the Government, construction firms which have direct employment relationships with construction workers have a limitation in improving their working conditions, including wages, through labour-management negotiation because of their lack of bargaining experience. Recalling its conclusions noted above, the Committee requests the Government to undertake further efforts for the promotion of free and voluntary collective bargaining over terms and conditions of employment in the construction sector covering, in particular, the vulnerable "daily" workers. In particular, the Committee requests the Government to provide support to construction sector employers and trade unions with a view to building negotiating capacity and reminds the Government that it may avail itself of the technical assistance of the Office in this regard if it so wishes. The Committee requests to be kept informed of developments in this respect.*
- 804.** *Finally, with regard to the allegations of harassment of union representatives during minimum wage negotiations in June 2005, the Committee observes from the ICFTU allegations and the Government's reply, that police forces were present outside the meeting room in which the minimum wage negotiations were taking place between representatives of employers, workers and public interest groups. The Committee considers that the presence of police forces in close proximity to the room where minimum wage negotiations take place is liable to unduly influence the free and voluntary nature of negotiations. The Committee therefore considers that any police presence in the vicinity of meeting rooms where negotiations are taking place must be strictly justified by the circumstances and requests the Government to provide details of the circumstances giving rise to the presence of the police force in this instance.*
- 805.** *The Committee reminds the Government of its commitment to ratify Conventions Nos 87 and 98 made to the ILO High-Level Tripartite Mission which visited the country in 1998 and was reposted to the Governing Body in March 1998 (see document GB.271/9).*

The Committee's recommendations

806. *In the light of its foregoing interim conclusions, and recognizing the value of continuing tripartite consultations, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *With regard to the Act on the Establishment and Operation of Public Officials' Trade Unions and its Enforcement Decree the Committee requests the Government to give consideration to further measures aimed at ensuring that the rights of public employees are fully guaranteed by:***
- (i) *ensuring that public servants at all grades without exception and regardless of their tasks or functions, have the right to form their own associations to defend their interests;***
 - (ii) *guaranteeing the right of firefighters, prison guards, public service workers in education-related offices, local public service employees and labour inspectors to establish and join organizations of their own choosing;***
 - (iii) *limiting any restrictions of the right to strike to public servants exercising authority in the name of the State and essential services in the strict sense of the term;***
 - (iv) *allowing the negotiating parties to determine on their own the issue of whether trade union activity by full-time union officials should be treated as unpaid leave.***

The Committee requests to be kept informed of any measures taken or contemplated in this respect.

- (b) *The Committee requests the Government to ensure that the following principles are respected in the framework of the application of the Act on the Establishment and Operation of Public Officials' Trade Unions:***
- (i) *that in the case of negotiations with trade unions of public servants who are not engaged in the administration of the State, the autonomy of the bargaining parties is fully guaranteed and the reservation of budgetary powers to the legislative authority does not have the effect of preventing compliance with collective agreements; more generally, as regards negotiations on matters for which budgetary restrictions pertain, to ensure that a significant role is given to collective bargaining and that agreements are negotiated and implemented in good faith;***
 - (ii) *that the consequences of policy and management decisions as they relate to the conditions of employment of public employees are not excluded from negotiations with public employees' trade unions;***
 - (iii) *that public officials' trade unions have the possibility to express their views publicly on the wider economic and social policy questions which have a direct impact on their members' interests, noting though that***

strikes of a purely political nature do not fall within the protection of Conventions Nos 87 and 98.

The Committee requests to be kept informed in this respect.

- (c) *As regards the other legislative aspects of this case, the Committee urges the Government:*
- (i) *to take rapid steps for the legalization of trade union pluralism at the enterprise level, in full consultation with all social partners concerned, so as to ensure that the right of workers to establish and join the organization of their own choosing is recognized at all levels;*
 - (ii) *to ensure that the payment of wages by employers to full-time union officials is not subject to legislative interference and thus enable workers and employers to conduct free and voluntary negotiations in this regard;*
 - (iii) *to amend the emergency arbitration provisions of the TULRAA (sections 76–80) so that emergency arbitration can only be imposed by an independent body which has the confidence of all parties concerned and only in cases in which strikes can be restricted in conformity with freedom of association principles;*
 - (iv) *to repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office (sections 2(4)(d) and 23(1) of the TURLAA);*
 - (v) *to bring section 314 of the Penal Code (obstruction of business) in line with freedom of association principles.*

The Committee requests to be kept informed of the progress made in respect of all of the abovementioned matters.

- (d) *Noting with interest that compulsory arbitration for disputes in essential public services has been abolished and a minimum services requirement was introduced instead in strikes in public services, the Committee requests the Government to keep it informed of the specific instances in which minimum service requirements have been introduced in case of strikes in essential public services, the level of minimum service provided and the procedure through which such minimum service was determined.*
- (e) *The Committee requests the Government to keep it informed of the progress of the appeal proceedings in respect of Kwon Young-kil.*
- (f) *The Committee requests the Government to reconsider the dismissals of Kim Sang-kul, Oh Myeong-nam, Min Jum-ki and Koh Kwang-sik in the light of the adoption of the Act on the Establishment and Operation of Public Officials' Trade Unions and to keep it informed in this respect. It also requests the Government to provide information on the outcome of the pending administrative litigation and requests for examination concerning*

the dismissals of Han Seok-woo, Kim Young-kil, Kang Dong-jin and Kim Jong-yun and expresses the hope that the new legislation will be taken into consideration in rendering the relevant decisions. The Committee once again requests the Government to provide copies of the relevant decisions.

- (g) *With regard to the application of the provisions concerning obstruction of business, the Committee requests the Government:*
- (i) *to continue making all efforts to adopt a general practice of investigation without detention of workers;*
 - (ii) *to provide information on the specific grounds for the criminal prosecution of 26 KALFCU officers and 198 KRWU officers for obstruction of business in relation to strikes staged in the railroad and airlines sectors and to communicate any court judgements handed down in these cases;*
 - (iii) *to inform the Committee of the current status of Kim Jeong Min, Seoul provincial president of the KRWU, who was still in prison at the time of the complaint on obstruction of business charges; and*
 - (iv) *to continue to provide details, including any court judgements, on any new cases of workers arrested for obstruction of business under the terms of the present section 314 of the Penal Code.*
- (h) *The Committee once again urges the Government to refrain from imposing compulsory or emergency arbitration in cases which fall outside essential services in the strict sense of the term and public servants exercising authority in the name of the State, and requests the Government to keep it informed of the status of the 2,680 KRWU members suspended by the Korean Railroad Corporation and undergoing disciplinary procedures as well as any KALFCU members transferred to standby, pursuant to the Government's intervention in their industrial dispute, through compulsory or emergency arbitration.*
- (i) *The Committee trusts that there are no further charges pending against KGEU president Kim Young-Gil and general secretary Ahn Byeong-Soon for actions aimed at acquiring recognition, de facto and de jure, of the basic rights of freedom of association of public servants and that there is no penalty remaining in relation to the previous convictions under the now repealed Public Officials Act.*
- (j) *Noting with regret that the Government does not reply to the allegations concerning the imprisonment of the president of the Seoul Gyeonggi-Incheon Migrant Workers' Trade Union (MTU) Anwar Hossain, the Committee requests the Government to provide information on the grounds for his imprisonment and his current status in its next report.*
- (k) *The Committee expresses regret and deep concern at the prevalent climate of violence which emerges from the complainants' allegations and the Government's reply and calls on all sides to exercise maximum restraint so*

as to avoid escalating violence and to undertake genuine dialogue conducive to the establishment of a constructive and stable industrial relations climate.

- (l) While noting that the KGEU has refused to register under the relevant Act because it considers it not to be in line with freedom of association principles, the Committee expresses deep regret at the gravity of the allegations involving serious acts of extensive interference in the activities of the KGEU and requests the Government to immediately cease all acts of interference, in particular the forced closure of KGEU offices nationwide, the unilateral discontinuance of the check-off facility, the disallowance of collective bargaining, the pressure on KGEU members to resign from the union as well as administrative and financial sanctions against local governments which fail to comply with the Government's directive. It further calls upon the Government to abandon these directives and to take all possible measures with a view to achieving conciliation between the Government (in particular MOGAHA) and the KGEU so that the latter may continue to exist and ultimately to register within the framework of the legislation which should be in line with freedom of association principles. The Committee requests to be kept informed in this respect.*
- (m) The Committee expresses its deep regret at the death of Kim Tae Hwan, president of the FKTU Chungju regional chapter, who was run over by a cement truck on 14 June 2005 while on the picket line in front of the Sajo Remicon cement factory, and the treatment of his death as a simple car accident. It requests the Government to institute an independent investigation into the circumstances of Kim Tae Hwan's death and in particular the role of the police and unidentified civilians in the incident, so as to shed full light, determine where responsibilities lie, punish any guilty parties and prevent the repetition of similar events.*
- (n) The Committee expresses its deep regret at the death of Ha Jeung Koon, member of the Pohang local union of the KFCITU, during a demonstration organized by the union; it requests the Government to keep it informed of the outcome of the investigation under way, and trusts that such investigation will be concluded swiftly and will determine where responsibilities lie, allowing for the guilty parties to be punished and the repetition of similar events to be prevented.*
- (o) The Committee requests the Government to communicate the text of the court decisions convicting: six unionists from the Daejeon/Chungcheong Construction Workers' Union to six to eight months' imprisonment with a two-year suspension of execution; Park Young-Jae, president of the Cheonan/Asan Construction Workers' Union, to one year imprisonment and Rho Seon-Kyun, vice-president of the same union, to a fine; three trade unionists from the Western Gyeonggi Construction Workers' Union to eight months to one year in prison with a two-year suspension of execution and another six to a fine of 3 million won; and to keep the Committee informed of the outcome of the appeals in these cases. The Committee further invites the complainant, IFBWW, to transmit any further information it considers appropriate in response to the information provided by the Government.*

- (p) *Noting the Government's indication that the second instance court upheld the convictions of the officials at Daegu Construction Workers' Union on charges under the Act on Punishment of Violence, the Committee requests the Government to provide a copy of the court judgement in question and to keep it informed of the outcome of any further appeals.*
- (q) *The Committee requests the Government to undertake further efforts for the promotion of free and voluntary collective bargaining over terms and conditions of employment in the construction sector covering, in particular, the precarious "daily" workers. In particular, the Committee requests the Government to provide support to construction sector employers and trade unions with a view to building negotiating capacity and reminds the Government that it may avail itself of the technical assistance of the Office in this regard, if it so wishes. The Committee requests to be kept informed of developments in this respect.*
- (r) *Considering that the presence of police forces in close proximity to the room where minimum wage negotiations take place is liable to invalidate the free and voluntary nature of negotiations, the Committee considers that any police presence in the vicinity of meeting rooms where negotiations are taking place must be strictly justified by the circumstances and requests the Government to provide details of the circumstances giving rise to the presence of the police force in this instance.*
- (s) *The Committee reminds the Government of its commitment to ratify Conventions Nos 87 and 98 made to the ILO high-level tripartite mission which visited the country in 1998 and reported to the Governing Body in March 1998 (see document GB.271/9).*

CASE NO. 2409

DEFINITIVE REPORT

**Complaint against the Government of Costa Rica
presented by
the National Association of Public Employees of Costa Rica (ANEP)**

Allegations: Anti-union harassment of officials of the Costa Rican Association of Diplomatic and Equivalent Officials (ASODIPLOMATICOS) which resulted in the dismissal of three such officials

807. The complaint is set out in a communication by the National Association of Public Employees of Costa Rica (ANEP) dated 7 December 2004. This organization sent further allegations in communications dated 1 May and 14 June 2006. The Government sent its comments in communications dated 6 July 2005 and 23 April 2007.

808. In its previous examination of the case, in November 2006, the Committee deemed the complaint to be receivable.

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

A. The complainant's allegations

810. In its communication dated 7 December 2004, ANEP alleges that a campaign of anti-union harassment has been conducted against Rodolfo Jiménez Morales and Francisco Bolaños, the President and the Secretary-General of the Costa Rican Association of Diplomatic and Equivalent Officials (ASODIPLOMATICOS), which was established on 2 April 2004 – the notarized document to that effect is attached hereto – on the basis of an existing association (for the safety and protection of its members, the relevant agreements that were adopted were not included in the register of associations). Messrs Jiménez and Bolaños, who are also ANEP trade union officials, were dismissed “without employer’s liability” and removed from their posts in the diplomatic service for having reported irregularities within the Ministry of Foreign Affairs of Costa Rica, which involved the alleged siphoning of funds donated by the Government of Taiwan, China. Their dismissal was shrouded in what was supposed to be a disciplinary administrative procedure at the request of the Minister for Foreign Affairs, after a letter of condolences was sent to the President of Chile reporting irregularities within the Ministry on the basis of a report prepared by the Government of Chile. ANEP also alleges that documents were confiscated and a search was carried out by staff of the Department of Intelligence and Security, without a legal warrant, in the offices of ASODIPLOMATICOS.
811. According to ANEP, the two trade union officials joined the Ministry of Foreign Affairs and Religion on 1 December 2003 after the Supreme Court of Justice ruled in favour of an appeal lodged by ANEP for *amparo* (protection of constitutional rights) following the discrimination they faced upon joining the diplomatic service, in reprisal against them for being officials of ASODIPLOMATICOS and for having reported that the diplomatic and consular service was being used as a source of funds for politicians in office. On 4 December 2003, the Minister decided to dismiss Ernesto Jiménez Morales, the brother of Rodolfo Jiménez Morales (of the 19 public servants whose contracts were due to be terminated around that time and the 66 in total whose terms of appointment were identical to those of Ernesto Jiménez Morales, he was the only one to be dismissed). On 20 April 2004, Rodolfo Jiménez and Francisco Bolaños were appointed as the ANEP trade union officials responsible for the forthcoming establishment of a branch of ANEP.
812. ANEP adds that, on 24 May 2004, Rodolfo Jiménez and Francisco Bolaños requested the parliamentary groups of the Legislative Assembly to establish a special committee to investigate allegations of corruption (it was alleged that senior officials of the Ministry of Foreign Affairs, including the Minister himself, had siphoned US\$4.8 million donated by the Government of Taiwan, China, for projects to develop the economy and the tourist sector, to a parallel private structure known as the Association for the Development of Costa Rica’s Foreign Policy. This association was set up to pay bonuses and benefits to 13 Foreign Ministry officials, including most of the members of the Foreign Service Assessment Committee, which is responsible for recommending appointments to or dismissals from the diplomatic service). The special committee was also to investigate allegations of irregularities in connection with money donated by the Government and enterprises of Taiwan, China, and used by the President of the Republic to fund his electoral campaign in 2002, while the Minister for Foreign Affairs was supposed to be acting as the “administrator” of the said donations. The trade union officials Rodolfo Jiménez and Francisco Bolaños filed a formal complaint with the Government Procurator’s Office; they also informed the press and the authorities that the ruling by the Supreme Court of Justice of 1 October 2003 had been flouted, as the Minister for Foreign Affairs had fraudulently and illegally kept in office 66 individuals who had been appointed

to the diplomatic service during the administration at that time even though they did not meet the legal requirements for their appointment; Mr Jiménez and Mr Bolaños therefore called for the appointments of these persons to be withdrawn.

- 813.** This resulted in a serious penalty being issued against Rodolfo Jiménez for failing to attend a meeting which was held outside working hours; he was unilaterally assigned to new duties on 21 April 2004 (he was removed from his former post) and was accused retroactively of having been derelict in his previous duties over a period of weeks; then, when he asked to be reinstated in his former post, Rodolfo Jiménez was sanctioned with a verbal warning. Rodolfo Jiménez refused to receive any documents until he was reinstated in his post. Then he was issued with a written warning for requesting that the harassment against him be stopped. Furthermore, documents were confiscated from him without a legal warrant (on the basis of a note issued by the Ministry of Foreign Affairs, stating that written authorization was required for the removal of documents or files from the Ministry in order to conceal the alleged irregularities). ANEP refers to a press release which indicated that Mr Rodolfo Jiménez was carrying documents relating to international cooperation with the intention of handing them over to members of the Legislative Assembly; he was the only public servant who was searched on 26 May 2004.
- 814.** At the end of May 2004, as a ploy to intimidate Rodolfo Jiménez, agents from the Department of Intelligence and Security conducted a covert search of his office under the pretext of checking whether or not his telephone line was tapped.
- 815.** As a result of this harassment and hostility on the part of the Minister for Foreign Affairs, the state of health of Rodolfo Jiménez deteriorated and the Costa Rican Social Security Fund deemed him unfit for work from 1 July to 18 November 2004.
- 816.** In reprisal for the complaints which were submitted, the Minister dismissed Rodolfo Jiménez and Francisco Bolaños on 5 and 8 November 2004, on the basis of a so-called “resolution” adopted by members of the Foreign Service Assessment Committee (who were among those accused by the two trade union officials of having benefited from the siphoning of Taiwanese funds). It was this Committee that was approached by the Minister on 11 August 2004 to investigate a letter of condolences to the President of Chile in connection with the tragic events which took place at the Embassy of Chile in Costa Rica on 29 July 2004 in which three Chilean diplomats died. As early as 1998, Chilean public servants had prepared a report revealing security shortcomings at embassies in Costa Rica. The grounds for the dismissal are that Rodolfo Jiménez and Francisco Bolaños acted on behalf of ASODIPLOMATICOS, which is neither recognized by the authorities nor registered with the Ministry of Labour’s Department of Social Organizations, thereby concealing the fact that they are officials representing Costa Rican diplomats; as far as the Assessment Committee is concerned, ASODIPLOMATICOS does not exist.
- 817.** ANEP indicates that Rodolfo Jiménez was never notified of the alleged “offences” attributed to him and that, like Francisco Bolaños, he had been certified unfit for work, which had prevented him from exercising his rights to defence and a fair hearing.
- 818.** In its communication of 1 May 2006, ANEP alleges that the trade union official Rodolfo Jiménez Morales was excluded from the worker–employer contribution scheme set up by the Ministry of Foreign Affairs under the Costa Rican Social Security Fund to cover the payment of incapacity allowances, the accrual of pension entitlements and other social security benefits. For this reason, in August 2004, Rodolfo Jiménez Morales lodged an appeal with the Constitutional Chamber of the Supreme Court of Justice for the protection of *amparo* against the Minister for Foreign Affairs. The appeal was sustained (the respondents cited technical errors) and the final ruling (which has been forwarded) was that Mr Jiménez had to be included in the worker–employer contribution scheme.

ANEP adds that certain members – including the chair – of the Foreign Service Assessment Committee (the committee which recommended the dismissal of trade union officials Rodolfo Jiménez and Francisco Bolaños further to allegations that they had sent a letter of condolences to the President of the Republic of Chile in their capacity as officials of ASODIPLOMATICOS) were those who had been reported by the trade union officials to the press and to the Government Procurator's Office (as of 24 May 2004) for allegedly siphoning off international cooperation funds donated by the Government of Taiwan, China (US\$4.8 million), by receiving on top of their monthly wage an additional sum from the "Association for the Development of Foreign Policy". These members did not, however, recuse themselves from the dismissal procedure.

ANEP alleges that Sara Quirós Maroto, Vice-President of ANEP, ASODIPLOMATICOS has been a victim of hostility and harassment in the workplace by the Minister for Foreign Affairs and his immediate subordinates aimed at forcing her to give up her post in the Ministry's Legal Department in reprisal for her trade union activities; as a result, Ms Quirós has lodged an appeal for *amparo* with the Constitutional Chamber and the Civil Service Tribunal to be reinstated in her post and resume her duties; at the time of the appeal, she had been transferred to the Treaty Office. The summary of complaints brought by Sara Quirós Maroto against the authorities of the Ministry of Foreign Affairs and Religion, as reflected in the case files, is set out below:

The appellant participated in the open competition for the appointment of an acting chief of the Legal Department of the Ministry of Foreign Affairs. She indicates that, in May 2005, the Minister for Foreign Affairs unilaterally authorized the appointment of Alejandra Solano Cabalceta, who was an employee of the Foreign Service, to the post, and subsequently appointed Danilo González, also an employee of the Foreign Service. In her opinion, these two individuals neither met the necessary requirements nor were qualified to occupy the post. In official letter No. DVM-224-2005 of 9 December 2005, the Acting Minister for Foreign Affairs informed her that she was to transfer to the Treaty Office. As she did not agree to the transfer, in a note dated 12 December 2005 and submitted on 5 January 2006, she lodged a formal objection. That same day, she presented a written submission to the Director-General in which she outlined the problems associated with her transfer. In official letter No. DVM-011-06 of 6 January 2006, notified on 7 March 2006, the Minister for Foreign Affairs and Religion informed her that, as no action had been taken in response to official letter No. DVM-224-2005 and that, in the light of the prevailing requirements of the Treaty Office, she would be transferred to that office, but that her actual place of work would be another Ministry building which was totally isolated from the Legal Department, which remained the Department to which she reported. Upon her reassignment, her duties changed to such an extent that at the current time she has virtually no work to do, a situation which, in her view, is evidence that she is facing discrimination in the workplace and is a way of humiliating her in front of her colleagues. She alleges that, on 16 March 2006, she submitted to the Minister for Foreign Affairs a further objection to her transfer. She indicates that her concerns have not been taken into account. She states that the actions taken by the authorities infringe her rights to privacy, to lodge complaints and to obtain prompt redress, to equality, to due process, to timely and complete administrative proceedings, and also her right to work, and run counter to the principle underlying the recruitment of qualified public servants, as set out in sections 24, 27, 33, 39, 41, 56 and 192 of the Constitution, because, even though she is fully qualified and participated in the competition for the abovementioned post of chief of the Legal Department, other public servants were appointed, who lack the basic qualifications for the post and did not participate in the competition. Furthermore, nothing has been done to follow up on the various objections that she made in writing in connection with her transfer to the Ministry's Treaty Office and she has instead suffered discrimination in the workplace and has been treated in a humiliating way. In the light of her claims, her appeal is sustained and the current Chief of the Legal Department is ordered not to exercise the functions of that post pending the confirmation of his or her appointment through official public channels. Furthermore, the Minister for Foreign Affairs is ordered to hold a competition to appoint an acting chief, not to appoint any public servant who is not part of the civil service system and to reinstate the appellant to the post that she occupied prior to the ruling made in official letters Nos DVM-224-2005 and DVM-011-06. In addition, a response should be given to the concerns raised on 12 December 2005 and 16 March 2006.

As indicated in documentation provided by ANEP, ASODIPLOMATICOS is the new name of a pre-existing association of diplomats (which has existed since 1994), which, according to the notarized records of an extraordinary meeting, began to use its new name on 1 April 2004. Mr Jiménez and Mr Bolaños were elected President and Secretary-General in 2002 and were re-elected in April 2004, together with four other trade union officials. ANEP highlights that the decision not to include ASODIPLOMATICOS in the register of associations was taken for safety reasons and to preclude anti-union reprisals and, for the same reason, the names of its members, as agreed by them, are not disclosed.

B. The Government's reply

- 819.** In its communication dated 6 July 2005, the Government states that Rodolfo Jiménez, Francisco Bolaños and Ernesto Jiménez are not trade union officials; rather, they were appointed by ANEP to establish a branch of ANEP within the Ministry of Foreign Affairs and Religion but had neither carried out that task nor held a single meeting of public servants for that purpose. The name ASODIPLOMATICOS is fictitious; no such association has been registered with the Ministry of Labour and the name appears neither on the register of social organizations nor on the register of legal entities (documents attached). The only organization which exists within the Ministry of Foreign Affairs is the Costa Rican Association of Career Public Servants. In other words, Rodolfo Jiménez and Francisco Bolaños fraudulently used the name of a non-existent association in an attempt to give legitimacy to ill-intentioned acts. They were dismissed through a legal process which did not involve “employer’s liability” on grounds of serious misconduct during their probationary period, as established by the Foreign Service Assessment Committee.
- 820.** Contrary to claims by the Secretary-General of ANEP in his written submission, the letter which was sent by Rodolfo Jiménez Morales and Francisco Bolaños – acting on behalf of the fictitious ASODIPLOMATICOS – to the President of the Republic of Chile (a copy is attached) was not a simple “letter of condolences”.
- 821.** Before explaining the administrative proceedings which applied to Jiménez and Bolaños and the professional responsibilities which they infringed by sending the abovementioned letter, it is worth noting that the sending of the letter was not an isolated incident, but was one of many actions carried out by these individuals, which will be described below. For now, it is necessary only to note that Rodolfo Jiménez Morales had already been served warnings by his immediate superior for failure to carry out his duties and functions and by the Minister for showing a serious lack of respect towards his immediate superior – the Director of International Cooperation – and the Minister himself.
- 822.** In its written submission to the ILO, ANEP has attempted – just as Jiménez and Bolaños had already endeavoured to do with national public opinion – to present the warnings served on Jiménez as “acts of harassment” ensuing from the allegations of irregularities made by himself and Bolaños which were emphatically rejected and denied in the relevant courts by the Ministry of Foreign Affairs on the basis of supporting evidence. There is no doubt that, shortly after their probationary period began in December 2003, these individuals began to demonstrate a clear intention to undermine the image of the institution and that of its senior officials through false accusations. Their intention is apparent in the numerous articles provided by ANEP in its written submission. The aim of their actions, however, remains a mystery.
- 823.** What is incontrovertible is that, presenting themselves as the President and the Secretary-General of the non-existent “Costa Rican Association of Diplomatic and Equivalent Officials (ASODIPLOMATICOS)”, Rodolfo Jiménez Morales and Francisco Bolaños González, as public servants in their probationary period, sent letter ADCR-911-04 dated 31 July 2004 to the President of the Republic of Chile, in which they claimed to

be writing “on behalf of the diplomats of Costa Rica who are members of ASODIPLOMATICOS”; they were clearly trying to assume a representative role to which they were not entitled by presenting themselves as spokespersons for other Costa Rican diplomats. Some paragraphs of the letter, which is, not surprisingly, full of spelling mistakes and is couched in language which is highly disrespectful to the President of another country, are set out below:

... we would like to express our deep sorrow and concern over the murder of three dear colleagues who were working in our country for the Chilean Diplomatic Service and who were killed by an officer of the Costa Rican police force, which has not received any diplomatic or psychological training on how to “protect” those who work in the esteemed Embassy of Chile in San José.

Regrettably, this situation reaffirms the comments made in August 1998 by the Ministry of Foreign Affairs of Chile on the shortcomings of the foreign service in Costa Rica, in a joint report highlighting the lack of coordination which exists between the Ministry of Foreign Affairs and the Ministry of Security in terms of offering “effective protection” to the diplomats who are posted in Costa Rica. In fact, the issue of the Costa Rican Government’s inability to provide “effective protection” to diplomatic delegations in San José because of a lack of coordination between the Ministry of Security and the Ministry of Foreign Affairs

... In view of the pain and sorrow of both countries, we would respectfully but firmly call on the Government of the Republic of Costa Rica to implement immediately the recommendations kindly put forward by the Ministry of Foreign Affairs of Chile on the reform of the Ministry of Foreign Affairs and the Foreign Service of Costa Rica, as set out in the abovementioned report, so that there is no recurrence of the terrible acts described through “negligence” and “lack of skill” on the part of our governmental authorities managing the Foreign Service, which, according to the abovementioned report, are more interested in “partisan politics and culture than in adopting professional and objective criteria”

- 824.** It is clear that the main purpose of this letter was not to offer condolences to the people of Chile but rather to take advantage of the opportunity to discredit the Government of Costa Rica and in particular the authorities of the Ministry of Foreign Affairs and Religion.
- 825.** Because of the serious implications of this letter, the Costa Rican Association of Career Public Servants deemed it necessary to write to the Chilean press, clarifying that Jiménez and Bolaños were not speaking on behalf of Costa Rican diplomats. Likewise, the Deputy Minister for Foreign Affairs of Costa Rica wrote to the chargé d’affaires of Chile in Costa Rica, clarifying that Jiménez and Bolaños were not career diplomats but rather aspiring diplomats on a period of probation and that the body they claimed to be representing bore no relation whatsoever to the Costa Rican Association of Career Public Servants, to which they did not belong.
- 826.** With the aim of causing maximum damage at the national level to the Government, the Ministry of Foreign Affairs and senior officials, Rodolfo Jiménez Morales arranged an interview with the *Diario Extra* newspaper, which was published in the 5 August 2004 edition. In the interview, in which he introduced himself as President of the non-existent ASODIPLOMATICOS, Jiménez recapitulates most of the abovementioned letter. This action clearly confirms that the purpose of both the letter and the interview was essentially to damage the reputation of the Ministry and its senior officials; after all, if the real reason for the letter had simply been to offer condolences to the President of Chile, there would have been no need for him to approach the national press.
- 827.** In view of its serious implications, the Minister for Foreign Affairs forwarded the letter to the Foreign Service Assessment Committee “to take appropriate legal action”. After having analysed the letter and its possible implications, the Assessment Committee issued resolution No. CCSE-85-04 of 25 August 2004, in which it resolved to initiate administrative proceedings with regard to Rodolfo Jiménez Morales and Francisco

Bolaños González on the basis of the legal authority set out in section 42 of the Costa Rican Foreign Service Rules “to verify the facts of the matter in accordance with sections 36, 37, 40, 41, 42, 43 and 134 of the Foreign Service Rules, sections 122–137 and related aspects of the Regulations under the Foreign Service Rules, section 308 and subsequent sections of the Public Administration Act pursuant to decisions 1739-92, 216-98, 7615-98, 718-99, 5733-99 and 1638-99 of the Constitutional Chamber and its case law relevant to due process, and decisions C-049-99, C-261-2002 and C-340-2002 of the Procurator-General’s Office”, in order to determine whether Jiménez and Bolaños had written letter ADCR-911-04, addressed to the President of the Republic of Chile.

- 828.** In the abovementioned resolution initiating the administrative proceedings, Mr Jiménez and Mr Bolaños were warned that the act of sending the letter and the act by Jiménez of giving an interview to the *Diario Extra* newspaper might constitute breaches of: sections 34 and 35 of the Foreign Service Rules; section 5, section 6, paragraph 3, and section 11, paragraphs 13, 14, 19 and 21, of the Regulations under the Foreign Service Rules; sections 48 and 51(d) and (p) of the Rules of Procedure of the Ministry of Foreign Affairs and Religion; sections 81(b) and (l) of the Labour Code; and section 211, paragraph 1, of the Public Administration Act. If deemed to be offences, these acts would constitute grounds for dismissal without employer’s liability, in accordance with the relevant regulations.
- 829.** In resolution No. CCSE-85-04, Jiménez and Bolaños were also granted in writing a period of five working days, from the date on which they were notified of that resolution, to exercise their right to defend themselves or to seek counsel, to indicate whether they accepted or rejected the facts and to provide relevant evidence. They were informed that, once they had been notified, they should indicate an address in order to receive notifications and that, if they failed to do so, any future resolutions would be deemed to have been notified, in accordance with Act No. 7637 on Notifications, Citations and other Legal Communications in Force; in addition, they were informed that they could be subject to specialized investigation; that the notification document allowed for the remedy of revocation and appeal within a period of three days, in accordance with section 134 of the Regulations under the Foreign Service Rules and sections 342, 345.1, 346 and 349 of the Public Administration Act; and that the case file would be kept in the custody of the Foreign Service Assessment Committee and would be available for consultation and photocopying in the office of the Director of the Diplomatic Institute of the Ministry of Foreign Affairs and Religion, Manuel María de Peralta.
- 830.** At 11 a.m. on 27 August 2004 at his home (condominium No. 12 at the Córdoba Condominium Apartments), Rodolfo Jiménez Morales was duly notified of the resolution to initiate administrative proceedings. A person who identified herself as his wife was not allowed to sign receipt of the notification document, as is indicated in that document, which was signed by Jorge Aguilar Castillo (who is a member of the Assessment Committee), Susana Araya Zamora and Paola Porras Pastan, who acted as witnesses. Mr Jiménez had to be notified at his home because he had not been to work at the Ministry for several months, claiming that he was medically unfit, even though during that period it was common knowledge that he visited the offices of the Legislative Assembly and even appeared in the press.
- 831.** At 11.55 a.m. on 27 August 2004, on the premises of the Department for the Promotion of the Ministry of Foreign Affairs and Religion, Francisco Bolaños González was notified in person of the resolution to initiate administrative proceedings, as indicated in the notification document in question, which was signed by Mr Bolaños González himself and witnesses Marcela Zamora Ovarés (who is a member of the Assessment Committee) and Jorge Martín Jiménez.

- 832.** Despite all the warnings given to Mr Jiménez and Mr Bolaños, they chose neither to refute the charges in writing nor to exercise their right to defence and they did not even indicate where they could receive future notifications. It is noted that, even though the facts were common knowledge, the Foreign Service Assessment Committee tried to provide Jiménez and Bolaños with every possible guarantee of due process and gave them the opportunity to exercise their right to defence, but they chose not to do so. Instead, they based their strategy on launching personal attacks against the members of the Assessment Committee, which is what the Secretary-General of ANEP is doing now in his written submission.
- 833.** On the basis of the administrative procedure which was carried out and after it had been completed, the Assessment Committee confirmed evidence that Jiménez and Bolaños did in fact send letter ADCR-911-04 to the President of the Republic of Chile and that Jiménez subsequently gave an interview which was published in the *Diario Extra* newspaper on 5 August 2004. These actions, in the opinion of the Assessment Committee, infringed the following regulations, as indicated in the resolutions relating to the dismissal, the pertinent parts of which are paraphrased below:

Foreign Service Rules

Section 34. The duties of diplomatic and consular officials in service are: (a) to uphold the interests and the reputation of the Republic.

In the light of the above, the letter sent by Jiménez Morales and Bolaños González to the President of the Republic of Chile, in which they blamed the Ministry of Foreign Affairs of Costa Rica for the tragic events that took place at the Chilean Embassy on 27 July 2004, is damaging to the reputation of the Republic of Costa Rica, given that there is no legal or administrative document that attributes responsibility to the Ministry of Foreign Affairs and Religion; consequently, the claims made in the letter are false and defamatory.

Section 35. Public servants in the Foreign Service are prohibited from: ... (c) removing documents from the archives of a mission, consulate or ministry for their personal use, or publishing them without the authorization of the Ministry of Foreign Affairs.

In the light of the above, Rodolfo Jiménez Morales and Francisco Bolaños González made personal use, without the authorization of the Ministry, of the report in question on enhancing the professionalism of the Foreign Service of Costa Rica. The Assessment Committee considered that the letter which was written and sent is adequate proof that these individuals had access to the report and used it inappropriately without the authorization of the Ministry of Foreign Affairs and Religion.

Regulations under the Foreign Service Rules

Section 5. Functions. The functions of the Foreign Service are: (a) to promote and protect the interests of the country and its nationals in its dealings with foreign States, as well as in the international bodies and meetings in which Costa Rica participates.

In the light of the above, the letter sent by Mr Jiménez and Mr Bolaños to the President of the Republic of Chile unquestionably undermines the interests of the country, by blaming the Ministry of Foreign Affairs and Religion and the country for the tragic events which resulted in the death of three Chilean diplomats, an action which could have jeopardized diplomatic relations between the Republic of Chile and the Republic of Costa Rica.

Section 6. General obligations. Without prejudice to the provisions of the Foreign Service Rules, the Public Administration Act, the Labour Code, the Financial Administration Act and the Sexual Harassment Act, the obligations of public servants in the Foreign Service are: ... 3. to show respect and courtesy for all Ministry staff, in particular senior Ministry officials.

In the light of the above, the letter sent by Mr Jiménez and Mr Bolaños to the President of the Republic of Chile, specifically the part which states "... so that there is no recurrence of the terrible acts described through "negligence" and "lack of skill" on the part of our governmental authorities managing the Foreign Service, which are more interested in "partisan politics and culture than in adopting professional and objective criteria" is a serious breach of the obligation to show respect for senior Ministry officials. It is assumed that the

intention of Rodolfo Jiménez Morales and Francisco Bolaños González was not only to blame the Ministry and the country for such a terrible act, but at the same time to make a political statement in an underhand and offensive way, which is a mark of disrespect for the senior officials of the Ministry of Foreign Affairs and Religion.

Section 11. General prohibitions. In addition to the prohibitions provided in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Labour Code, the Foreign Service Rules and the associated Regulations, the Financial Administration Act, the Regulations on the Ethics of the Ministry and other relevant regulations, public servants in the Foreign Service are prohibited from: ... 13. exceeding the authority to which they are entitled by virtue of their functions or duties and assuming authority to which they are not entitled; 14. disclosing the contents of reports, documents, instructions or directives of the mission or Ministry or making public any internal or private office matter without the express authorization of the Ministry; ... 19. behaving in a way that undermines ethics and good conduct without regard for the responsibilities that are inherent in their posts and which are common to all public servants; ... 21. expressing any personal opinions to the press on work-related matters, international politics or the internal affairs of the host State which could compromise their country, without the express authorization of their senior officials.

In the light of the above, in the letter they sent to the President of the Republic of Chile, Jiménez Morales and Bolaños González exceeded their functions and duties and assumed authority to which they were not entitled, in breach of section 11, paragraph 13, of the Regulations and in clear violation of the basic rules on the customs and usages of international protocol and diplomacy, according to which only those of an equivalent rank should send correspondence to the Head of State of another country. As public servants in their probationary year in the Foreign Service of the Republic, they did not have the authority to write to the Head of State of another country, as they did. Furthermore, to make matters worse, the letter clearly contains inappropriate language and spelling mistakes throughout, which is in itself a mark of disrespect for the Head of State of another country. With regard to section 11, paragraph 14, of the Regulations, Jiménez and Bolaños make improper use of a document which is the property of the Ministry of Foreign Affairs and Religion by disclosing some of its contents without authorization, as has been demonstrated. To make matters worse, it was used, knowingly and with wrongful intent, with the aim of damaging the image of the Ministry of Foreign Affairs and Religion. With regard to paragraph 19, relating to conduct, Jiménez and Bolaños failed to demonstrate, even during their period of probation, the ethics and good habits that should be common to all public servants, in particular those in the Foreign Service, with regard to safeguarding the good image of the country and of the Ministry of Foreign Affairs and Religion and upholding and protecting the image of other public servants and diplomatic colleagues, whom they claimed to represent in a letter which purported to present the position of career diplomats. None of these diplomats, however, with the exception of Jiménez and Bolaños, are members of the association in question, which moreover does not even exist in legal terms, as it is not listed on the National Public Register, as was established by the Assessment Committee and stated in pages 18–20 of the administrative file on the present case. With regard to paragraph 21 of the cited section, in the letter in question, Jiménez and Bolaños clearly expressed personal opinions on a document to which they must have gained access undoubtedly through their work, as that is the only way in which they could have gained access to it. The situation is worse where Jiménez is concerned, because he also expressed his personal opinion and moreover made this opinion known in the national press, in other words in the newspaper *Diario Extra*.

Rules of procedure of the Ministry of Foreign Affairs and Religion

Section 48. In addition to the obligations provided in the Civil Service Rules and the associated Regulations, the Public Administration Act, the Labour Code and other regulations, public servants are obliged: ... (k) to ensure that the good image of the Ministry is neither undermined nor compromised through immoral or inappropriate behaviour, even outside working hours.

Letter ADCR-911-04 written by Mr Jiménez and Mr Bolaños and the overt statements by Mr Jiménez Morales which appeared in the national press could have caused serious damage to the image of the Ministry of Foreign Affairs. As public servants in the Foreign Service, Jiménez and Bolaños were aware that writing and sending the letter in question and

the statements made by Jiménez to the *Diario Extra* newspaper could be damaging to the institution and on these grounds their actions are considered inappropriate and immoral and constitute serious misconduct in the Foreign Service and a violation of the Rules of Procedure of the Ministry of Foreign Affairs and Religion.

Section 51. In addition to the prohibitions provided in the Civil Service Rules and the associated Regulations, the Labour Code, the Public Administration Act and other legal provisions, employees are strictly prohibited from: ... (d) making statements or issuing publications which could undermine or damage the good reputation of the Ministry or of any of its public servants or employees; ... (p) exceeding the authority conferred upon them by virtue of their assigned functions or duties and assuming authority to which they are not entitled.

Regarding paragraph (d) of this section, both the writing of the letter in question by the two public servants and the statements made to the *Diario Extra* newspaper by Mr Jiménez could have damaged the image of the Ministry of Foreign Affairs, both at the national and international levels. Likewise, by writing the letter, Jiménez Morales and Bolaños González acted beyond the legal scope of their functions, as they had not been instructed by their superiors to take such action and there are no legal regulations to authorize it.

Labour Code

Section 81. An employer has just cause to terminate a work contract: (a) when the worker, while in the workplace, behaves in an openly immoral manner or insults, abuses or carries out acts of violence against his or her employer; ... (c) when the worker outside the workplace and outside working hours insults, abuses or carries out acts of violence against his or her employer or a representative of the employer in work-related matters, if such acts are unprovoked and would make it impossible to maintain good working relations and harmony in the workplace; ... (l) when the worker commits any other serious misconduct in breach of the terms of his or her contract. It is understood that, whenever a dismissal is based on action which is also punishable by criminal law, the employer retains the right to take appropriate action with the public law enforcement agencies.

With regard to paragraphs (a) and (c) of section 81, given the serious nature of the claims in the letter in question, there is no doubt that Mr Jiménez Morales and Mr Bolaños González insulted senior Ministry officials and employer representatives by blaming them for the events that took place in the Embassy of Chile on 27 July 2004. Bolaños González made the claims while he was at work, consistent with the situation set out in paragraph (a) of the section, while Jiménez Morales made them outside the workplace during the period when he was unfit for work, consistent with the situation set out in paragraph (c) (his certificate of incapacity can be found on page 7 of the file on the administrative proceedings). Furthermore, the actions of Mr Jiménez Morales and Mr Bolaños González constitute, as described in the paragraphs above, a serious failure on their part to fulfil their obligations as public servants in the Ministry of Foreign Affairs and Religion under the abovementioned regulations; this being the case, as demonstrated in the present proceedings, the penalty is dismissal without employer's liability, in accordance with paragraph (l) of section 81.

Public Administration Act

Section 211.1. Public servants shall be liable to disciplinary responsibility for their actions, acts or deeds which are in breach of regulations, when they have acted with malice or gross negligence, without prejudice to the more serious disciplinary measures provided under other laws.

In the light of the above, the letter sent to the President of the Republic of Chile by Mr Jiménez Morales and Mr Bolaños González and the subsequent statements by Mr Jiménez Morales to the *Diario Extra* newspaper are acts which constitute serious misconduct, as described and confirmed in the present proceedings. Mr Jiménez Morales and Mr Bolaños González were fully aware of the implications of their acts, which constituted an infringement of their duties and obligations as public servants of the Ministry of Foreign Affairs and Religion and consequently a violation of the Public Administration Act.

Associations Act

Article 5. All associations must be established on the basis of a set of general rules that governs their activities and which shall be known as their "statute".

For an association to conduct its activities legitimately, it must be included on the Register of Associations which is maintained for this purpose by the Ministry of Governance and which forms part of the National Register. The legal status of the association and that of its representatives is conferred upon its registration.

- 834.** The Assessment Committee notes that the actions of Mr Jiménez Morales and Mr Bolaños González were conducted under the name of the “Costa Rican Association of Diplomatic and Equivalent Officials (ASODIPLOMATICOS)”. Thus, letter ADCR-911-04 of 31 July 2004 to the President of the Republic of Chile begins with the words: “On behalf of the diplomats of Costa Rica who are members of ASODIPLOMATICOS ...”. Similarly, the Assessment Committee has noted and demonstrated that the letterhead used for the communication in question contains the following information: “Costa Rican Association of Diplomatic and Equivalent Officials (ASODIPLOMATICOS). San José, tel.: (506) 393 32 32, fax.: (506) 233 24 28, asodiplomaticos@hotmail.com”. The day after the 13th extraordinary meeting of the Assessment Committee, which was held on Monday, 16 August 2006, and as agreed at that meeting, the chair of the Committee requested the Registry of Legal Entities to provide confirmation of the existence, registration and statute of the “Costa Rican Association of Diplomatic and Equivalent Officials (ASODIPLOMATICOS)”, indicating that the association in question might also be known as the “Manuel María de Peralta Costa Rican Association of Diplomats and Equivalent Officials (ASODIPLOMATICOS)”. In response to this inquiry, the Registry of Legal Entities issued certificate No. 20238-2004 at 3.01 p.m. on 17 August 2004 and certificate No. 20239-2004 at 3.03 p.m. on 17 August 2004, which are set out on pages 18–20 of the case file, which confirm that neither the Costa Rican Association of Diplomats and Equivalent Officials nor the Manuel María de Peralta Costa Rican Association of Diplomats and Equivalent Officials had been listed in the register and that the names had not been reserved. Consequently, it is established that Jiménez Morales and Bolaños González claimed to be representing Costa Rican diplomats using the name of an association which is non-existent in so far as it neither exists in law nor in fact. This constitutes a breach of national legislation under section 5 of the Associations Act and sections 343 and 344 of the Labour Code, and also constitutes serious misconduct under paragraph (1) of section 211 of the Public Administration Act, which, in accordance with the legislation referred to in the present proceedings, constitutes a ground for dismissal without employer’s liability.
- 835.** On the basis of the above reasoning, as set out in resolutions CCSE-94-04 and CCSE-95-04, the Assessment Committee decided to apply the sanction of dismissal without employer’s liability. In order to enforce this decision, the Minister and the President of the Republic signed agreements Nos 505-2004-RE and 506-2004-RE ordering the dismissal of Francisco Bolaños González and Rodolfo Jiménez Morales.
- 836.** To counter his dismissal, Jiménez Morales proceeded to use (or abuse) the remedy of *amparo* against the Minister and the Foreign Service Assessment Committee, alleging violations of due process. It is interesting to note that the written submission by the Secretary-General of ANEP reproduces almost exactly, with some additional details, the arguments made by Jiménez Morales on that occasion.
- 837.** In essence, the complaint presented by the Secretary-General of ANEP is virtually identical, with some additional information and a few new details, to the complaint submitted to the Constitutional Chamber by Jiménez Morales on that occasion. Regrettably, the Secretary-General of ANEP also reproduced *in writing* many of the *lies* which Jiménez had told at the time.
- 838.** The appeal for the protection of *amparo* lodged by Jiménez was accepted for consideration as case No. 04-011738-0007-CO and was rejected by the Supreme Court of Justice.

- 839.** The Committee on Freedom of Association can be assured that if, following its consideration of the case, the Constitutional Chamber endorsed the dismissal procedure applied to Jiménez Morales and Bolaños González, it is because the court found no irregularities in the procedure and in particular no infringements of the right to due process or of the country's legal or constitutional standards. Therefore, given that the present complaint reproduces almost exactly the main allegations made by Jiménez in his appeal for the protection of *amparo* in respect of his dismissal, which was rejected, it would seem logical that this complaint should also be rejected.
- 840.** Furthermore, the Government states that, just as Rodolfo Jiménez Morales had done previously in his appeal for the protection of *amparo* and as both he and Francisco Bolaños had done in their letter to the Procurator-General's Office, ANEP is attempting in the present complaint/request to create a smokescreen by making reference to wrongful activities supposedly carried out by the authorities of the Ministry of Foreign Affairs – claims which are completely false – in its efforts to present the dismissal of these individuals as an act of harassment.
- 841.** The complaint presented by ANEP is based on the following central issues: (a) that Rodolfo Jiménez and Francisco Bolaños were trade union officials; (b) that, in exercising their leadership and function as trade union officials, they made serious allegations of corrupt activity in the Ministry of Foreign Affairs; and (c) that, in reprisal for these allegations and for their trade union activities, they were harassed by Ministry authorities, initially by the Director of International Cooperation in his capacity as the immediate superior of Rodolfo Jiménez and subsequently by the Minister and the Foreign Service Assessment Committee, leading to their dismissal without employer's liability.
- 842.** Given the serious nature of the accusations originally presented by Jiménez and Bolaños and now repeated and taken up by the Secretary-General of ANEP, and mainly because of the damage to the reputation and honour of the individuals mentioned in the present complaint, it is necessary to provide some additional details to demonstrate that all these claims are blatant lies and distortions, which is evidence once again of the bad faith that has characterized from the outset the actions of Rodolfo Jiménez and Francisco Bolaños and now those of the Secretary-General of ANEP.
- 843.** Throughout the complaint by ANEP, reference is made to the so-called siphoning of Taiwanese cooperation funds by senior Ministry officials. The content of the criminal charge is summarized below:
- On 24 May, Rodolfo Jiménez and Francisco Bolaños, in their capacity as President and Secretary-General (sic) of ASODIPLOMATICOS, made allegations publicly and to the Legislative Assembly (Congress of the Republic) of irregularities supposedly committed by senior Ministry officials, under the leadership of the Minister, Roberto Tovar Faja, who is hereby accused of fraudulently siphoning US\$4.8 million which had been generously donated by the Government of Taiwan, China, for projects to develop the economy and the tourist sector in Costa Rica's northern zone, to a parallel private structure established to pay salaries, bonuses and benefits to 13 Ministry officials
- 844.** This paragraph sums up and reflects the essence of the false and ill-intentioned accusations presented by Jiménez and Bolaños against the Minister for Foreign Affairs and Religion. It is worth noting, first of all, that the case does not involve a criminal charge, as is suggested in the complaint presented by ANEP, given that, to date, no charges have been brought; but rather it involves a complaint by individuals which is being examined by the Office of the Public Prosecutor to determine whether there are sufficient grounds for an inquiry and possibly a formal charge by that Office. The contents of the case file in question are based largely on the account of events set out in a complaint presented to the Judicial Investigation Department by Rodolfo Jiménez Morales on 13 September 2004 and on the

written account that Jiménez Morales and Francisco Bolaños González submitted to the Procurator-General on 25 October 2004.

845. On 15 February 2005, the Minister for Foreign Affairs and Religion submitted to the Office of the Public Prosecutor a 42-page document and a significant amount of documentary evidence which clearly demonstrate that the accusations made by Jiménez and Bolaños, which are now also being made by the Secretary-General of ANEP, are all unfounded and actually involve blatant lies, the manipulation of the truth and the distortion of statements made by third parties. Above all, it is clear that Jiménez and Bolaños acted in an openly ill-intentioned way when they issued these statements.

846. To sum up, the conclusions drawn by Roberto Tavar Faja in his written submission are set out below:

IV. Conclusions

The aim of the complainants in their accusations against me, which are completely unfounded and totally untruthful, was to report a totally false set of circumstances to the Office of the Public Prosecutor.

In an attempt to hold me responsible for a crime – possibly the misappropriation of public funds – they have put forward a fictitious version of events based on the following untruths:

- that, during the period when Mr Tovar Faja was Minister for Foreign Affairs, the Government of Taiwan, China, donated to Costa Rica the sum of US\$4,800,000 for various development projects in Costa Rica's northern zone;
- that the Minister for Foreign Affairs of Taiwan, China, and the Taiwanese Ambassador confirmed, in the Costa Rican newspapers, that this sum of US\$4,800,000 was donated to the Government for such development projects in Costa Rica's northern zone;
- that Mr Tovar Faja was responsible for the administration of the US\$4,800,000, which he siphoned off to pay bonuses to 21 public servants;
- that, in addition to this amount, Mr Tovar Faja received the sum of 836,000.39 Costa Rican colones in expenses;
- that Mr Tovar Faja never provided an explanation as to why he siphoned off the sum of US\$4,800,000 for the payment of bonuses, when he should have used that money for a project to develop the economy and the tourist sector in Costa Rica's northern zone.

In order to counter such claims, throughout this document we have presented the truth with total transparency. Specifically for the complaint in question, the following truths have been established:

- that the case involves regional cooperation by Taiwan, China, in the context of the Central American Integration System (SICA), and not a donation by Taiwan, China, to the Government of Costa Rica;
- that decisions relating to regional cooperation funds and programmes are made by a joint committee which operates within the legal framework of SICA, not by any one minister in particular;
- that approximately US\$4,800,000 was earmarked for Costa Rica under a project to build the capacities of foreign ministries throughout Central America. Of this amount, approximately US\$3,300,000 was earmarked for the period when Roberto Rojas López was Minister for Foreign Affairs. The remaining amount was earmarked for the period when Roberto Tovar Faja was in office;
- that, with the agreement of SICA and the Embassy of Taiwan, China, these funds are disbursed in line with the subprogrammes being implemented and developed by the foreign ministry of each Central American country, in accordance with the specific jurisdiction of each ministry;

- that, within the Ministry’s specific jurisdiction during the term of office of Roberto Rojas López, all subprogrammes to promote the project to build the capacities of foreign ministries were approved and, as such, these subprogrammes would continue during Mr Tovar Faja’s term of office;
- that, within the Ministry’s specific jurisdiction during the term of office of Roberto Rojas López, the funds would be distributed through the Association for the Development of Costa Rica’s Foreign Policy, as had been the case during the periods of office of previous ministers such as Bernd Niehaus and Fernando Naranjo, both of whom made use of such foundations and associations. The ministers all, respectively, presided over the foundation or association in question;
- that, during the term of office of Tovar Faja, the Association for the Development of Costa Rica’s Foreign Policy continued to be used for the purposes of implementing the project to build the capacities of foreign ministries. In this case, Tovar Faja was neither chair nor a member of the Association’s executive board;
- that Tovar Faja has provided members of parliament with absolutely all the information that has been requested of him in relation to the case;
- that, in particular, he has provided them with a detailed statement prepared by the association relating to each and every one of the cheques cashed for the implementation of the abovementioned subprogrammes;
- that the only statements made by the Minister for Foreign Affairs of Taiwan, China, and the Taiwanese Ambassador in connection with the case have been in reference to a cheque for US\$250,000 which was received for another regional programme, on the Central American system for the promotion of and information on foreign trade, investments and tourism, the full amount of which is still deposited in the relevant current account.

From all the above, it is clear that the case in question does not involve a donation by the Government of Taiwan, China, to the Government of Costa Rica. Far less does it involve the siphoning of funds, as the project to build the capacities of foreign ministries is part of a Taiwanese regional cooperation project with SICA and has been implemented both in terms of form and content, in accordance with the specific jurisdiction of each of the foreign ministries of Central America. With regard to the regional programme to promote and provide information on foreign trade, investments and tourism, not a single payment had been made at the time of the complaint. Furthermore, as has been amply demonstrated, there is not and never has been any sort of project to promote social and economic development and tourism among the marginal populations in the country’s northern zone.

The only thing that remains unclear is what the complainants really hope to achieve by their action.

San José, 15 February 2005.

847. As has been noted, the information set out in the fifth point of the written submission by ANEP is totally false and is, in fact, slanderous. First of all, the figure of US\$4.8 million corresponds to the total amount of Taiwanese cooperation disbursed between 1998 and the present, and only a quarter of that amount was actually disbursed during Tovar Faja’s term of office. Secondly, none of this money has been used for purposes other than those agreed by the Ministry of Foreign Affairs, in accordance with the rules established for this type of cooperation. Thirdly, there is not and never has been a project to develop the economy and the tourist sector in the country’s northern zone, as the Secretary-General of ANEP erroneously claims; there is, therefore, absolutely no way that funds could have been siphoned from a project that does not exist. There is a project, however, set up by a joint committee for cooperation between Central America and Taiwan, China, which is channelled through the Central American Integration System, implemented by the foreign ministries of Central America and aimed at building the capacities of those ministries, under which the Ministry of Foreign Affairs receives support from staff employed by the Association for the Development of Costa Rica’s Foreign Policy.

- 848.** With regard to the warnings received by Rodolfo Jiménez, the Government indicates that in various parts of the written submission by the Secretary-General of ANEP, it is noted that, as a result of the complaints lodged by Jiménez and Bolaños in May 2004 in connection with the alleged siphoning of funds, Rodolfo Jiménez was a victim of harassment by the authorities of the Ministry of Foreign Affairs. It is noted that “as a result of the complaints he lodged, Mr Jiménez has been the victim of a campaign of harassment and hostility conducted by his immediate superior Carlos Manuel Echevarría Esquivel and also by Roberto Tovar Faja, the Minister for Foreign Affairs, with the aim of forcing him to resign from his post ...”.
- 849.** Once again, the Secretary-General of ANEP is not telling the whole truth. The warnings received by Rodolfo Jiménez Morales from both the Director of International Cooperation and the Minister for Foreign Affairs were for recurring acts of professional misconduct committed by Jiménez, some of which shall be explained below. First of all, however, it is worth noting that there are two factors which from the outset demonstrate just how false the arguments put forward by ANEP are: (a) although Jiménez and Bolaños lodged their first complaint in May 2004, the warnings received by Jiménez began at the latest in February 2004, following serious failures on his part to fulfil his professional duties, which demonstrates that the warnings were clearly not issued in reprisal for his complaints; and (b) if the warnings had been issued in reprisal for complaints made by both Rodolfo Jiménez Morales and Francisco Bolaños González, why did only Jiménez receive them?
- 850.** The truth of the matter is that, practically as soon as he commenced his probationary year, Rodolfo Jiménez Morales behaved in an undisciplined, disrespectful and defiant manner, with regard to both his colleagues and his superiors. The Government has attached some relevant documents as proof of this behaviour, including copies of an e-mail exchange between Carlos Manuel Echevarría, the Director of International Cooperation, and his subordinate Rodolfo Jiménez, which show how Jiménez failed to fulfil the duties assigned to him; records of the repeated and unjustified absences of Jiménez; and the written warnings that Jiménez received from both the Director of International Cooperation and the Minister. Attention is drawn, in particular, to the hand-written annotations by Jiménez on some of the letters addressed to him by the Director of International Cooperation and the Minister, which are an indication of his blatant lack of respect for his superiors.
- 851.** With regard to the confiscation of documents and the so-called search of Rodolfo Jiménez’s office, the Government indicates that, in his attempts to claim that Rodolfo Jiménez was a victim of harassment – just as Jiménez and Bolaños had already endeavoured to do with national public opinion – the Secretary-General of ANEP makes reference to the so-called confiscation of documents from Jiménez to prevent him from removing them from the Ministry, as well as to the so-called search of his office (which is referred to as the office of ASODIPLOMATICOS).
- 852.** According to ANEP, the Minister “authorized other subordinates to conduct ‘covert’ acts of hostility and harassment against Mr Jiménez, which included searching him without a legal warrant to determine whether he had in his possession ‘public documents belonging to the Department of International Cooperation’ relating to the irregularities which had been uncovered and which are described above ...”. “The Director of International Cooperation in the Ministry conducted the search on the basis of a directive which had been drawn up for that purpose the same day The purpose of searching him and confiscating the information, according to what Mr Jiménez told the press, was to establish a ‘gagging law in the Ministry’, to conceal the extent and scale of the prevailing irregularities. The result was that Rodolfo Jiménez Morales was the only person to be searched, as is reported in the newspaper *La Nación* ...”. “At the same time as this measure to search only Mr Jiménez in connection with ‘confidential documents’ of public interest, the Minister for Foreign Affairs requested the Minister of the President’s Office, Ricardo

Toledo Carranza, to deploy the Rapid Intervention Officers of the Department of Intelligence and Security – known by the abbreviation ‘DIS’ – to carry out a ‘covert search’ without a warrant of the office occupied by Rodolfo Jiménez Morales in the Department of International Cooperation of the Ministry of Foreign Affairs, with the clear intention of intimidating and instilling fear in Mr Jiménez in the light of the complaints made public by him and others ...”.

853. These claims – which are emphatically rejected as being false – are a good example of the strategy frequently employed by these individuals to manipulate facts, as part of their ploy to present themselves to the public as victims of harassment as a result of their complaints relating to the alleged irregularities that they “uncovered” in the Ministry. For several months last year, Jiménez and Bolaños devoted themselves to spreading a string of lies to members of Parliament and the press in connection with the alleged siphoning of Taiwanese cooperation funds, which were duly rejected by the relevant courts, as is described above; many of these lies have been reproduced in the written submission by ANEP. In this context, there were many examples of misconduct, such as the removal by Jiménez and Bolaños of numerous documents from various Ministry offices. Under the circumstances, the Director-General of the Ministry was obliged to issue circular DG 278-04 of 26 May 2004, which informed security officials that “as of tomorrow, any public servant from a Ministry department who needs to remove work-related files or documents from the premises must have the written authorization of the relevant manager”. The circular does not prohibit the removal of documents or copies of documents; it simply establishes the need to have written permission from the relevant manager.

854. The reason for this directive is obvious: government offices are depositaries of official and public information and it is their duty to safeguard it, not to conceal it. This duty is all the more important in the case of the Ministry of Foreign Affairs, which is the depositary of official documents of nationwide importance, including the originals of international instruments such as treaties, protocols and bilateral agreements. Under no circumstances should public servants be permitted to take the liberty of removing documents as they wish from the offices in which they work. In fact, the Foreign Service Rules expressly provide for this prohibition:

Section 3. Public servants in the Foreign Service are prohibited from: ... (c) removing documents from the archives of a mission, consulate or ministry for their personal use or publishing them without the authorization of the Ministry of Foreign Affairs.

855. The aim of the circular was therefore to prevent abuse by unscrupulous public servants such as Jiménez and Bolaños, who, in blatant disregard for the Ministry authorities and showing an arrogant contempt for the basic principles of public office, felt that they had the authority to act as they pleased in the Ministry.

856. It is noted that Jiménez deliberately acted with brazen assurance on the occasions that he took documents, knowing full well that such action was prohibited by the Foreign Service Rules. His aim was to defy the Ministry authorities and thus create a situation which he could later present to the public as an attempt to silence him, which is in fact what he did and what ANEP continues to do in its written submission. This was certainly the case with the incident of 27 May 2004, to which reference is made on page 15 of the written submission by ANEP and which was the subject of a newspaper article, which is cited in part in the written submission. Nevertheless, there is one detail which demonstrates that the incident was deliberately engineered by Jiménez: the presence of the press at the very time and place of the incident. The journalist from the newspaper *La Nación* was present because he had been invited by Jiménez to witness the performance that he had staged. As is clear from the photograph which accompanies the article, Mr Jiménez appears carrying a large package of files and documents, which he refused to show and then removed from

the Ministry. The article concludes by indicating that Jiménez “left the Ministry with the files”.

- 857.** Furthermore, the press release dated 26 May 2004 attributed to Francisco Bolaños is another example of how these individuals manipulated the facts as part of a publicity campaign, on this occasion referring to circular DG 278-04 as a “gagging law”, with Jiménez alleging, according to the press release, that “the aim of the measure was to cover up for corrupt individuals ...”. The Government is attaching copies of circular DG 278-04, the complete press release attributed to Bolaños and the newspaper article from *La Nación* of 28 May, in which Jiménez is shown removing files and documents from the Ministry.
- 858.** Lastly, the issue of the so-called search of Jiménez’s office involves another blatant manipulation of the facts. As indicated in the copy of the article which featured in the *Diario Extra* of 27 May 2004 and which is reproduced on page 11 of the written submission by ANEP, Jiménez stated publicly: “They also tapped my telephones ...”. These irresponsible and unfounded statements, which are typical of Jiménez and Bolaños in their efforts to stir up trouble, could not be ignored by the Ministry, because of their serious nature. Therefore, in an attempt to determine whether or not these statements by Jiménez had any truth in them, the Department of Intelligence and Security (DIS) was asked to assist by conducting an investigation of the telephone line used by Jiménez, to confirm or dismiss these allegations of phone tapping.
- 859.** The investigation of the telephone line used by Jiménez was conducted on 1 June 2004 by two experts from the DIS, in the presence of two public servants from the Legal Department of the Ministry who acted as witnesses and who prepared a report on the matter (which is attached). The investigation revealed that the telephone line used by Jiménez *was not tapped*, which shows that the public statement he made to the press *was false*, as were many of his other statements.
- 860.** In any case, it is clear that checking whether or not a telephone line is tapped can in no way be considered a “search”. First of all, the telephone line in question belongs to the Ministry, not to Jiménez, and the Ministry is perfectly entitled to carry out whatever inspections of its own equipment that it deems necessary. Secondly, the objective of a “search”, which has to be authorized by a court and carried out by the Judicial Police, is usually to seize or confiscate evidence that might be of interest for a legal investigation or help to detain a suspect. This was not the case here, as the desk assigned to Jiménez and its contents were not even touched. As indicated in the report, the action taken was limited to “the internal analysis of extension 239 of this Ministry’s telephone exchange”.
- 861.** It has been demonstrated, therefore, that there is absolutely no substance in the claims that a search was carried out of Jiménez’s office (far less the office of ASODIPLOMATICOS). The claim that the telephone line used by Jiménez had been “tapped” was also false.
- 862.** With regard to the case of Ernesto Jiménez Morales, the brother of Rodolfo Jiménez, it is suggested that Ernesto Jiménez Morales was dismissed from his post in reprisal for acts committed by his brother, although there is no indication of what those acts might have been and the motives for taking such reprisals against him.
- 863.** “According to ANEP, four days after Rodolfo Jiménez had started work at the Ministry, the Minister took the decision to dismiss his brother, Ernesto Jiménez Morales, from his post as General Consul and Counsellor at the Embassy of Costa Rica in the Russian Federation ... making him the only person appointed during this administration of President Pacheco de la Espriella to be dismissed from the diplomatic and consular service ... The Minister proceeded to dismiss only Ernesto Jiménez Morales, the brother of

Rodolfo Jiménez Morales, who was acting as the Under-Secretary of International Affairs of ASODIPLOMATICOS.”

- 864.** It is striking that Ernesto Jiménez Morales is described as the “Under-Secretary of International Affairs of ASODIPLOMATICOS”. Also, Ernesto Jiménez Morales is surprisingly listed in the complaint among the “trade union officials of ASODIPLOMATICOS and ANEP, with all the trade union rights which derive from their trade union status ...”. In the petition, he is also mentioned in these two capacities, although no evidence at all is provided in support of such claims. This is inexplicable, as it is the first time ever that this individual is presented as a member of the inexistent ASODIPLOMATICOS and his name does not appear on what is claimed to be the letter of accreditation of ANEP. What makes this all the more strange is that Ernesto Jiménez Morales is not even a diplomat, but is temporarily occupying a diplomatic post on secondment, as is explained below. This information demonstrates once again the lack of sincerity which characterizes the complaint.
- 865.** With regard to the dismissal of Ernesto Jiménez Morales, it is important to note first of all that the individual in question was a public servant who had been appointed to work for the Foreign Service on secondment. The Foreign Service Rules establish the legal authority of the Executive Power to appoint public servants on a temporary basis in the Foreign Service, known as “staff on secondment”. According to section 48 of the Foreign Service Rules, “public servants on secondment shall be those who, either for special reasons of national interest, because of a shortage of career public servants or for other pressing reasons, are called on to discharge those duties in the Foreign Service which are usually reserved, in accordance with the present law, for persons who are members of the Foreign Service.” Section 49 establishes that “public servants on secondment shall be freely appointed and dismissed by the Executive Power and may be called on to discharge their duties *ad honorem*, on the condition that they are appointed for a period of no more than six months”.
- 866.** Section 26 of the Regulations under the Foreign Service Rules confirms that seconded public servants may be freely appointed or dismissed: “Public servants on secondment shall not benefit from security of employment by the State and shall be freely appointed and dismissed by the Executive Power in accordance with section 49 of the Rules ...”.
- 867.** It has been established that the dismissal of Ernesto Jiménez – which was totally legitimate under the abovementioned rules – was part of the process of restructuring the diplomatic service because, as indicated by the Constitutional Chamber in resolutions Nos 2003-11252 and 2003-11253 of 1 October 2003, all public servants on secondment whose appointments were not covered by the exceptions set out in section 48 of the Foreign Service Rules had to be dismissed and replaced by career public servants or public servants on their probationary period.
- 868.** This was in no way an isolated case and far less was it an act of harassment or reprisal. A number of other seconded public servants had their contracts terminated at around the same time as Ernesto Jiménez Morales: four were dismissed in December 2003 and a further six were dismissed in February 2004. As a result of this gradual process of replacing seconded public servants by career public servants, to date, of the 210 posts which exist in the Foreign Service, only 30 are occupied by public servants on secondment; the others, with the exception of ambassadors, are occupied by career public servants or those on their year of probation.
- 869.** In any case, Ernesto Jiménez Morales was not adversely affected in any way by his dismissal because he is a public servant employed by the Legislative Assembly who had requested leave without pay for the period he hoped to work temporarily in the Foreign

Service. In support of this claim, the Government has attached a statement from the Department of Human Resources of the Legislative Assembly, demonstrating that Ernesto Jiménez Morales had been working since 1 July 1996 in his post for the Legislative Assembly, as a C-category professional.

870. It is ironic that, although Rodolfo Jiménez was so keen, as is demonstrated in the written submission by ANEP, for the Minister for Foreign Affairs to dismiss all public servants from the Foreign Service who were neither career public servants nor on their probationary year, now that this involves the dismissal of his brother, it is an act of harassment. It is even more ironic that one of the alleged pretexts that Rodolfo Jiménez gave for disobeying and openly defying his superior, the Director of International Cooperation, for the sole purpose of stirring up trouble to serve his own interests, was precisely that he had not been given any authority because he was “not a career public servant”. How can Rodolfo Jiménez, and the Secretary-General of ANEP, now call on the ILO to order the reinstatement of his brother if he is not a career diplomat, as this would be in contradiction not only of the ruling of the Constitutional Chamber but also of the argument that Rodolfo Jiménez has used in his campaign to enhance the professionalism of the Costa Rican Foreign Service? This blatant contradiction demonstrates once again the lack of sincerity and the hypocrisy that has characterized this whole matter from the time Rodolfo Jiménez Morales and Francisco Bolaños González joined the Ministry of Foreign Affairs and Religion on their probationary year, until the time that they unscrupulously made false and ill-intentioned allegations to the Costa Rican public and when the Secretary-General of ANEP lodged the present complaint, which reproduces the same lies which were previously spun by Jiménez and Bolaños to other bodies. Regrettably, as a result of this complaint, the sincerity and credibility of ANEP has been jeopardized. In the light of all the above, the Government requests that this complaint be rejected in its entirety.

871. In its communication dated 23 April 2007, the Government sent documentation in support of the non-existence of ASODIPLOMATICOS, as well as information on the alleged transfer of Sara Quirós Maroto. According to the Government, the Constitutional Chamber of the Civil Service Tribunal rejected her appeals; moreover, she did not present herself in the court proceedings either as a member or officer of the non-existent ASODIPLOMATICOS and did not carry out any trade union activity in the Legal Department of the Ministry of Foreign Affairs.

C. The Committee’s conclusions

872. *The Committee observes that, in the present complaint, the complainant organization alleges that the authorities at the Ministry of Foreign Affairs were responsible for various acts of anti-union harassment which resulted in the dismissal of ASODIPLOMATICOS trade union officials Rodolfo Jiménez, Francisco Bolaños and Ernesto Jiménez (the brother of Rodolfo Jiménez) for reporting acts of corruption involving the most senior Ministry officials. The Committee takes note that the Government states that the individuals in question are not trade union officials and that the association ASODIPLOMATICOS neither exists nor is included in any register of legal entities; the complainant organization has sent a notarized document on the process of electing the executive committee of ASODIPLOMATICOS, which is the new name of an existing association, and adds that the agreements on these matters were not recorded in the register of associations for the safety of the association’s members and to protect them from anti-union reprisals. The Committee considers that this failure to publicize the association by not registering it, even for the reasons set out above, means that, in practice, there may be uncertainty about its legal status.*

873. *With regard to the dismissals, the Committee observes that: (1) the Supreme Court rejected the appeal lodged by Rodolfo Jiménez after determining that, contrary to what he*

maintained in the appeal, his disciplinary proceedings had been duly notified; (2) according to the Government, Francisco Bolaños chose (as did Rodolfo Jiménez) not to attend the disciplinary proceedings which led to his dismissal; (3) according to the Government, the case involves public servants who were on a period of probation and who were dismissed on the basis of a letter that they sent to the President of Chile on behalf of the non-existent ASODIPLOMATICOS, which undermined the image of the country and the Ministry of Foreign Affairs and constituted a serious violation of various national and international legal standards. Concerning the allegations of the third dismissal (Ernesto Jiménez), the Government states that this was not a dismissal but rather the termination of a period of secondment to the Ministry of Foreign Affairs (in fact he was and still is a public servant in the Legislative Assembly) which, in his and other cases, was the result of a Supreme Court of Justice ruling on public servants on secondment; the public servant in question then resumed his duties in the Legislative Assembly.

- 874.** *The Committee takes note of the Government's statements denying the allegations of corruption in the Ministry of Foreign Affairs and qualifying the charges in the complaint against senior officials of the Ministry of Foreign Affairs as false and ill-intentioned; it observes that, in the light of the formal complaint on the matter lodged with the Government Procurator's Office by Rodolfo Jiménez and Francisco Bolaños on 24 May 2004, the Government states that the case does not involve a criminal charge (to date, no charges have been brought) but rather an examination by the Office of the Public Prosecutor to determine whether there are sufficient grounds for an inquiry and possibly a formal charge. The Committee considers that this matter falls beyond its mandate.*
- 875.** *Concerning the allegations of the anti-union harassment of Rodolfo Jiménez (warnings, transfer, confiscation of documents and search of his office), the Committee observes that the Government's account totally contradicts these allegations; according to the Government, the warnings were the result of professional misconduct (repeated and unjustified absences, lack of respect for superiors, etc.); the so-called office search was a telephone inspection following a (false) claim by Jiménez that someone had tampered with his telephone; and the alleged confiscation of documents involved a legitimate ban on removing official documents without authorization by the relevant manager. With regard to the exclusion of Rodolfo Jiménez from the worker–employer contribution scheme (which is a requirement for entitlement to the incapacity allowance), the Committee notes that the Supreme Court ordered that this situation be corrected.*
- 876.** *The Committee concludes that, in the present case, there is some controversy over whether or not the dismissed persons are trade union officials from the association ASODIPLOMATICOS (according to the Government, the organization does not exist and does not feature in any register of legal entities, while the complainant alleges that it was not registered for fear of anti-union reprisals). With regard to the dismissals, the Committee notes more specifically that Rodolfo Jiménez and Francisco Bolaños chose neither to appear nor to defend themselves in the administrative proceedings resulting from the letter they sent to the President of Chile, that the former lost an appeal to the Supreme Court of Justice (claiming that he had not been notified of the administrative proceedings leading to his dismissal) and the latter did not take any action, to the effect that, in both cases, it seems unviable to reinstate these public servants on probation in the posts that they occupied in the Ministry. The Committee considers that, in so far as Mr Jiménez and Mr Bolaños favoured that approach, it would be difficult for them to rely on the argument that they have put forward that the public servants in the Committee which recommended their dismissal should have recused themselves from the case on the grounds that they had previously been accused of corruption by Mr Jiménez and Mr Bolaños. The Committee observes in any case that the grounds for the dismissal were not the allegations of corruption made by the dismissed employees but rather activities that were not covered by trade union immunity, especially in the diplomatic service where*

international codes of conduct and standards require adherence to certain obligations. The Committee will not, therefore, consider these allegations further.

877. *With regard to the recent allegation relating to the transfer of trade union official Sara Quirós Maroto, the Committee notes the information provided by the Government according to which: (1) the person in question did not present herself in the court proceedings either as a member or officer of the non-existent ASODIPLOMATICOS and did not carry out any trade union activity in the Legal Department of the Ministry of Foreign Affairs; (2) the appeals that this person brought to the Constitutional Chamber of the Civil Service Tribunal were rejected (the Government annexes the relevant rulings).*

The Committee's recommendation

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

Annex

Letter from Rodolfo Jiménez and Francisco Bolaños to the President of the Republic of Chile

Costa Rican Association of Diplomatic and Equivalent Officials (ASODIPLOMATICOS)

31 July 2004
ADCR-911-04

His Excellency
Mr Ricardo Lagos
President of the Republic of Chile
Office of the President

Your Excellency,

On behalf of the diplomats of Costa Rica who are members of ASODIPLOMATICOS we would like to express our deep sorrow and concern over the murder of three dear colleagues who were working in our country for the Chilean Diplomatic Service and who were killed by an officer of the Costa Rican police force, a force which has not received any diplomatic or psychological training on how to "protect" those who work in the esteemed Embassy of Chile in San José.

Regrettably, this situation reaffirms the comments made in August 1998 by the Ministry of Foreign Affairs of Chile on the shortcomings of the foreign service in Costa Rica, in a joint report highlighting the lack of coordination which exists between the Ministry of Foreign Affairs and the Ministry of Security of Costa Rica in terms of offering "effective protection" to the diplomats who are posted in Costa Rica.

In fact, the issue of the Costa Rican Government's inability to provide "effective protection" to diplomatic delegations in San José because of a lack of coordination between the Ministry of Security and the Ministry of Foreign Affairs had, paradoxically, been identified in August 1998 by two officials from the Ministry of Foreign Affairs of Chile who prepared a proposal to "enhance the professionalism of and modernize Costa Rica's Foreign Service", making reference to the following:

The organizational structure of the Ministry of Foreign Affairs of Costa Rica reflects the traditional requirements of a medium-sized foreign ministry and is characterized by ...

4. *Difficulties of coordination with other ministries.* During the meetings it became apparent that there is widespread acknowledgement of the lack of coordination with other

ministries and that this had led to an overlap of responsibilities. Furthermore, there is no unit within the Ministry of Foreign Affairs responsible for coordinating policies with other Government institutions, “especially in relation to public security”. (Report prepared by consultants of the Ministry of Foreign Affairs of Chile. Proposal for institutional modernization. Ministry of Foreign Affairs and Religion of Costa Rica, pages 13 and 14, 5 August 1998.)

In view of the pain and sorrow of both countries, we would respectfully but firmly call on the Government of the Republic of Costa Rica to implement immediately the recommendations kindly put forward by the Ministry of Foreign Affairs of Chile on the reform of the Ministry of Foreign Affairs and the Foreign Service of Costa Rica, as set out in the abovementioned report, so that there is no recurrence of the terrible acts described through “negligence” and “lack of skill” on the part of our governmental authorities managing the Foreign Service, which, according to the abovementioned report, are more interested in “partisan politics and culture than in adopting a professional and objective criteria” (page 15, op. cit.).

In the light of these considerations, your Excellency, we would like to offer our condolences to the families of our colleagues Roberto Nieto Maturana, Cristián Yusejf and Rocío Sariego and we sincerely hope that this incident will not affect the excellent relations of friendship and solidarity that have existed between our countries.

Please accept, your Excellency, the assurances of our highest consideration,

Rodolfo Jiménez, President.

Francisco Bolaños, Secretary-General.

CASE NO. 2511

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

**Complaint against the Government of Costa Rica
presented by
the International Confederation of Free Trade Unions (ICFTU)**

Allegations: The complainant organization objects to the slowness of procedures in resolving cases involving anti-union acts. Furthermore, it alleges that only a small number of collective agreements have been concluded in the country, while a great many direct agreements have been signed with non-unionized workers and that various members of the executive committee of the Independent Union of Workers of DINADECO (SINTRAINDECO) were dismissed a few months after the trade union was established

879. The complaint is contained in a communication from the International Confederation of Free Trade Unions (ICFTU), dated 21 August 2006.

880. The Government sent its observations in a communication of 21 December 2006.

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

A. The complainant's allegations

882. In its communication of 21 August 2006, the ICFTU states that, in accordance with the political Constitution of Costa Rica, the executive authority shall respect the autonomy of the judicial authority and the Constitution clearly indicates that neither branch may delegate the exercise of the functions attributed to them. According to the ICFTU, it is here that a conflict arises with the President's good intentions to the effect that, for the Government of Costa Rica, there are not and cannot be any concessions in the protection of workers' rights and with his wish for Costa Rica to continue, above all, to be a country of law, in which court decisions are always complied with, but also in which the courts undertake to give effect to the principle of rapid justice for all workers. The conflict lies in the fact that the Constitutional Chamber of the Supreme Court of Justice, the highest court in the country, the judgements of which are binding and applicable to everyone, has ruled unconstitutional clauses in collective agreements in the public sector on the basis of the criteria, among others, of proportionality, equality, rationality. In addition to all these problems, judicial procedures to solve cases involving anti-union acts which arose are slow and often ineffective.

883. The ICFTU adds that, with regard to the private sector, the context put in place favours the establishment of solidarist associations and there are now 130 agreements signed by non-unionized workers, compared with only 12 collective agreements. This is due to the fact that any workers who attempt to establish a trade union are dismissed immediately. If they are not reinstated, these individuals are obliged to find work elsewhere and are often placed on a black list known only to the employers, the purpose of which is to prevent them from finding a new job.

884. In this regard, the ICFTU states that, on 5 June 2006, the workers of the National Community Development Office (DINADECO) decided to form a trade union known as the Independent Union of Workers of DINADECO (SINTRAINDECO), invoking article 60 of the political Constitution and ILO Conventions Nos 87 and 98. On 6 July 2006, the Register of Civil Organizations of the Ministry of Labour and Social Security formally acknowledged receipt of the document containing all the paperwork supporting the establishment of the trade union, its statutes and the appointment of the elected executive committee. In a note attached to the document establishing the trade union, the trade union expressly requests the said office to take into consideration the names of all the workers contained in the document establishing the trade union with regard to the enjoyment of trade union immunity.

885. The ICFTU adds that despite this request and the fact that it was fully aware that the trade union had been established (the constituent assembly was held on DINADECO premises), the body in question proceeded to send letters of dismissal between 14 July and 15 August 2006 to workers on the elected executive committee. The letters were addressed to the following individuals: Lucrecia Garita Argüedas, Oscar Sánchez Vargas, Irving Rodríguez Vargas, Rafael Ayala Häusermann and Giselle Vindas Jiménez.

B. The Government's reply

886. In its communication of 21 December 2006, the Government states that it is serious in its statements and that it is committed to seeing them through in the time period allowed it by the democratic, open and participative regime, subject to those procedures, laws and rules

ensuring effective action. It stresses that it does not share the feelings expressed by the complainant organization regarding the statements made by the President of the Republic during the 95th Session of the International Labour Conference and fully supports the commitment voiced, in particular with regard to the recognition of dialogue as an effective instrument in the application of international labour standards. The Government states that it hopes that the trade union organizations, which turn to the ILO without having exhausted the appropriate procedures in cases of unfair labour practices when such cases arise, will make a similar commitment. The Government states that it was in just such a way that the complainant organization abruptly and inexplicably turned its back on the prevailing rule of law, with no real justification and with the sole intent of increasing its chances of winning the action by taking it to an international level. The complainant organization puts forward (in a disorganized fashion) a series of observations that have been examined by the Committee on Freedom of Association and by the Committee of Experts on the Application of Conventions and Recommendations in their periodical comments with regard to the application of Convention No. 98 and Case No. 2104, which involves, among other things, the issue raised by the complainants with regard to the use of a plea of unconstitutionality against collective agreements in the public sector.

- 887.** The Government recalls that, under the political Constitution, the Government is elected by the people, is representative, in rotation and responsible. It is exercised by the people and three distinct and independent authorities: the executive, the legislative and the judicial authorities. None of the authorities may delegate the exercise of functions attributed to them. Against this background, the Constitution states that public officials are merely trustees of authority and cannot assume powers which have not been bestowed upon them by law. The complainant organization appears to disregard this last point and is attempting, through this international body, to introduce procedures in relation to actions which are duly regulated by law and with regard to which due process and legitimate defence have clearly been respected, as will be demonstrated. In Costa Rica, the administrative and judicial procedures end when all stages, both administrative and judicial, have been completed, and not before. Omitting part of the due process of law established in the legislation, be it administrative or judicial, is tantamount to ignoring the Constitution.
- 888.** The Government states that the complainant organization contributes to this lack of respect every time it turns to this body without having previously exhausted the procedural instruments provided for in substantive law, thus making undue use of the bodies of the ILO. The Government states that it has made it clear that it is more than willing to resolve administrative and judicial proceedings concerning allegedly unfair labour practices, such as those referred to by the complainant, through the definition of reasonable policies protecting the rights of unionized workers, in accordance with the constitutional guarantees of due process and legitimate defence. As can be seen from the report of the General Board of Labour Affairs, a body which acts as a mediator during both individual and collective labour conflicts, the Ministry of Labour and Social Security fulfilled its function of mediator between the conflicting parties, dealing in an appropriate manner, through the use of the conciliation channels placed at its disposal by the legalization in force, with each of the cases denounced, and urged the parties to find a solution that would guarantee social and labour peace. In no case did the authority attempt to impose measures the imposition of which is attributed to the courts of law.
- 889.** The Government recalls that, in light of the prevailing rule of law in Costa Rica, with regard to this matter, article 153 of the political Constitution provides that it shall be the responsibility of the judicial authorities, in addition to their other constitutional functions, to investigate civil, criminal, commercial, labour and administrative acts, irrespective of their nature and the status of those involved, to reach final conclusions and to ensure the implementation of their rulings, where necessary with the assistance of the forces of order. In this regard and in accordance with the principle of separation of powers, the

Government states that it had no interest whatsoever in refusing to mediate in accordance with the law, or even in halting mediation activities, with regard to the situations referred to by the complainant organization. Proof of this can be seen in the meetings organized by the authorities of the Ministry of Labour and Social Security with the parties concerned, in an attempt to find a solution which would bring about social and labour peace within DINADECO.

- 890.** It is important to point out that with regard to the administrative proceedings for the reinstatement of a trade union official, that, aware of the need to improve the regime of trade union protection provided for in the labour legislation, the Executive has presented the Legislative Assembly with a draft reform of the chapter on trade union protection of the Labour Code, which is presently on the parliamentary agenda under file No. 14676. This draft is intended to expand the legal protection of unionized workers and workers' representatives, in order to reinforce and guarantee the right of union affiliation for Costa Rican employees, as well as the free exercise by the leaders of representative functions. The possibility is thus given to unions to give their opinion concerning the formulation and application of government policies which could affect their interests. Unions are also given a major role during conciliation procedures in economic and social collective disputes. The framework for the action of unions and their representatives is thus enlarged.
- 891.** On the other hand, the draft reform in question tends to establish a procedure at the management level which should be observed by every employer prior to a justified dismissal; the dismissal being null and void in the event that the aforementioned procedure has not been applied. In such a case, the worker would be able to request reinstatement with entitlement to unpaid wages. An accelerated judicial procedure is also being introduced which can be used by both union leaders and affiliated members in case of dismissal for reasons linked to their union activities, and which would reply to the comments concerning the slowness of procedures in cases of anti-union discrimination and the need to expand the legal protection of union representatives. The introduction of joint liability of unions, federations and confederations of workers or employers for damages and prejudice that they have caused (duly provided for under the legislation) constitutes another innovation which will be made by the reform. The proposed reform thus tends to include all situations relating to freedom of association which occur in practice by establishing special protection and legal security for persons exercising the fundamental right to organize.
- 892.** In addition, and in keeping with the wish to ensure that judicial procedures are flexible and swift, the Government is pleased to announce that a "Bill to reform labour proceedings" (file No. 15990) is currently on the parliamentary agenda. This Bill is the result of work carried out involving magistrates and principal and alternate magistrates of the Second Chamber of the Supreme Court of Justice, judges and labour judges, experts in labour law, officials of the Ministry of Labour and Social Security and representatives of employers' organizations and the trade union sector. All the social partners contributed to this proposal, which seeks to regulate the issues it addresses in a balanced fashion, taking account of the varied interests at stake, and to stand as an effective tool for the resolution of the various conflicts which arise within the world of work. It has also been designed to make possible the peaceful coexistence of the various factors of production at a time of significant change when there is a need for evermore instruments protecting rights as an essential basis for appropriate human development.
- 893.** Important aspects of the Bill relating to issues that come under "special labour jurisdiction" include the fact that it resolves various questions, such as those brought up by the complainant organization with regard to the slowness of procedures in trade union cases. It should be pointed out here that a special procedure for the protection of persons with specific protected status and the respect of due process has been established. This is a very

brief procedure, similar to a claim for the enforcement of constitutional rights (*amparo constitucional*), involving the automatic, but revisable, suspension of the application of the decision. The following categories of individual are covered by this procedure: pregnant or breastfeeding women, workers enjoying trade union immunity, victims of discrimination and, more generally, any public or private sector worker upon whom any type of immunity has been bestowed through law or through a collective instrument. Furthermore, collective procedures have been simplified, a special process has been established for the official designation of situations as strikes and steps have been taken regarding the promotion of the application of the principle of oral proceedings, one of the most important innovations as its application permeates all the procedures and makes it possible to apply other principles, such as mediation, concertation and publicity. At this point, and owing to the significant joint effort made by the executive and judicial authorities and the main social partners, with guidance provided through the technical assistance of the ILO, the Government hopes that, once it has been analysed and studied by the Legislative Assembly, the Bill will become law in the Republic in the near future.

894. The Government regrets the number of subjective observations issued by the complainant organization with regard to the case in question and, in order to contribute to the analysis of the complaints being carried out by this international body, it fully associates itself with the reports issued by the Director-General of Labour Affairs and the National Director of Community Development which state the following:

- (i) On 11 July 2006, Mr Mario Rojas Vilchez, in his role as Secretary of Legal, Human Rights and Trade Union Matters of the Rerum Novarum Confederation of Workers (CTRN), informed the Minister of the need to convoke an urgent meeting of representatives of DINADECO, SINTRAINDECO (the trade union was in the process of being established at that point) and the Workers' Confederation of Costa Rica (CTCR) and requested that this be done, in order to seek without delay a solution to the labour conflict surrounding the dismissal of members of the executive committee of SINTRAINDECO and workers who had actively participated in the establishment of the trade union.
- (ii) In line with the request, as of 19 July 2006, a series of efforts were undertaken at a ministerial level to find a solution to the conflict through conciliation–mediation, with several conciliation meetings being held at the office of the Minister in which he participated. It was difficult to get both parties to turn up for these meetings, with the representatives of the employers claiming on several occasions that they were unable to attend. Unfortunately, the conciliation process failed and no satisfactory agreement was reached. In view of this, the matter passed into the hands of the National Labour Inspection Directorate, in line with the procedure provided for by the Labour Code concerning unfair labour practices. The procedure is still ongoing before this body.
- (iii) The following information is provided with regard to the workers referred to by the complainant organization:
 - The case of Giselle Vindas Jiménez: in response to institutional needs and opportunities, the National Directorate, through document No. DND-776-06, requested that the job content of post No. 097258, which was, at the time, occupied by the worker in question, be altered. This process was carried out on 28 June 2006. As a consequence, the institution was obliged to make the holder of the post at the time redundant, owing to the fact that she no longer fulfilled the requirements for that post because her academic qualifications (she has a BA in systems analysis) were incompatible with the work of the Specialized Group for Social Promotion. On 30 June 2006, through communication No. 243-2006-DRH, the Administrative Director of DINADECO informed Mrs Giselle Vindas Jiménez of her redundancy as of that date, as a result of a study that had called

for changes to the job content of her post. On 10 July of that year, the office received an *amparo* action (appeal for protection of constitutional rights) lodged by Mrs Vindas Jiménez. The abovementioned *amparo* action was challenged through document No. DND-1044-2006 in the Constitutional Chamber, on 12 July. Through communication No. DND-1248-2006, dated 1 August 2006, Mrs Vindas Jiménez was provided with the documentation relating to the administrative steps that led to her redundancy.

- The case of Lucrecia Garita Argüedas: on 24 January 2005, the National Directorate of DINADECO, through request No. 2005.016, announced the postponement of the appointment of a candidate to post No. 097237. On 29 June 2006, the Human Resources Department of DINADECO sent telegrams to the candidates for the said post, informing them that the requisite interviews would be held on 7 July 2006. A candidate was appointed to post No. 097237 by the authorized head. On 10 July 2006, Mrs Lucrecia Garita Argüedas was informed through communication No. 264-2006-DRH that she was to be made redundant as of 15 July 2006, as a result of the selection of a candidate for post No. 097237. On 12 July 2006, the office received an appeal from Mrs Lucrecia Garita Argüedas for the decision to be revoked or, failing that, reviewed and for all the proceedings instituted to be declared null and void. On 17 July 2006, Mrs Lucrecia Garita Argüedas submitted further information regarding allegations concerning ordinary appeals. Through resolution No. DND-45-2006, of 20 July 2006, it was resolved: firstly, to reject the appeal for the decision to be revoked; secondly, to transmit the appeal for the decision to be reviewed to the Ministry of Governance, Police and Public Security. Through communication No. DND-1217-2006, of 7 August 2006, Mrs Lucrecia Garita's file was sent to the Ministry of Governance, Police and Public Security.
- The case of Rafael Ayala Häusermann: the central offices of DINADECO are located between Avenues 16 and 18, Streets 0 and 2 of the city and, owing to the high crime rate, there must be security guards present on the premises 24 hours a day, 365 days a year. Because of a shortage of appropriate staff, agents have, in the past, been provided on secondment by the forces of order. Owing to a change of administration, new government policies and the needs and duties of this body, it was decided to reduce or end the cooperation previously provided by the forces of order, as stated by the Head of the Integrated Services Department of DINADECO in communication No. SI-053-06. In response to institutional needs and opportunities, through communication No. DND-929-06, the National Directorate sought the alteration of the job content of posts Nos 097241 and 097257 (mobile equipment operator 1). These posts are currently vacant, with no one having yet been appointed to them. Therefore it is entirely understandable that the institution should seek to satisfy its staffing requirements through posts which do not affect projected budgetary spending and to which no one has been appointed and this does not in any way undermine consolidated substantive rights. The Directorate is acting in the public interest, with a view to providing services. Technical study No. ETR-004-2006 is the result of an instruction issued by the National Directorate in which it recommended that the Decentralized Office of the Civil Service of the Ministry of Public Security should alter posts Nos 097241 and 097257 (mobile equipment operator 1) to security and surveillance 1 class. Thus, the institution was obliged to make the individual who was temporarily holding post No. 097241, Mr Rafael Ayala Häusermann, redundant because he did not fulfil the requirements relating to that post, more specifically, those requirements applying to the specialized group for security and surveillance 1, in particular, a licence to carry a firearm. On 3 August, an *amparo* action (appeal for protection of constitutional rights) was received which had been lodged by Mr Rafael Ayala Häusermann. There is no

truth whatsoever to the claim that the documentation relating to the aforementioned procedures was withheld from Mr Rafael Ayala Häusermann, indeed there is no record of any request having been made regarding the documentation. However, in order to show that the administration was acting in good faith, through communication No. DND-1278-06, of 7 August 2006, the appellant was provided with the relevant documentation. The *amparo* action lodged by Mr Ayala Häusermann was challenged in the Constitutional Chamber through communication No. DND-1279-2006, dated 7 August 2006.

895. Finally, the Government states that it has shown through its actions that it utterly deplores any anti-union practice and shall not hesitate to bring to bear the full might of the law in those cases where it has been successfully demonstrated that such illegal acts have been committed. To date, with regard to the cases referred to by the complainant organization, it has not been demonstrated in accordance with law that illegal acts have been committed.

C. The Committee's conclusions

896. *The Committee notes that in the present case the complainant organization objects, in general, to the slowness of procedures in cases of anti-union discrimination; alleges that only a small number of collective agreements have been concluded in the country (12), while very many direct agreements have been signed with non-unionized workers, and that various members of the executive committee of the Independent Union of Workers of DINADECO (SINTRAINDECO) were dismissed a few months after the trade union was established.*
897. *Firstly, the Committee wishes to refer to the Government's statement to the effect that: (1) in Costa Rica, the administrative and judicial procedures end when all stages, both administrative and judicial, have been completed, and not before; (2) omitting part of the due process of law established in the legislation, be it administrative or judicial, is tantamount to ignoring the Constitution; (3) the complainant organization contributes to this lack of respect every time it turns to the Committee without having previously exhausted the procedural instruments provided for in the law, thus making undue use of the bodies of the ILO. In this regard, the Committee recalls that although the use of internal legal procedures, whatever the outcome, is undoubtedly a factor to be taken into consideration, the Committee has always considered that, in view of its responsibilities, its competence to examine allegations is not subject to the exhaustion of national procedures.*
898. *As to the alleged slowness of procedures in resolving cases involving anti-union acts, the Committee notes that the Government states that: (1) in order to ensure that judicial procedures are flexible and swift, a "Bill to reform labour proceedings" (file No. 15990) is currently on the parliamentary agenda; (2) this Bill is the result of work carried out involving magistrates and principal and alternate magistrates of the Second Chamber of the Supreme Court of Justice, judges and labour judges, experts in labour law, officials of the Ministry of Labour and Social Security and representatives of employers' organizations and the trade union sector; (3) all the social partners contributed to this proposal, which seeks to regulate the issues it addresses in a balanced fashion, taking account of the varied interests at stake, and to stand as an effective tool with regard to the resolution of the various conflicts which arise within the world of work; (4) important aspects of the Bill relating to issues that come under "special labour jurisdiction" include the fact that it resolves various questions, such as those brought up by the complainant organization with regard to the slowness of procedures in trade union cases; (5) it should be pointed out here that a special procedure for the protection of persons with specific protected status (among them, workers enjoying trade union immunity) and the respect of due process has been established. This is a very brief procedure, similar to a claim for the enforcement of constitutional rights, involving the automatic, but revisable, suspension of*

the application of the decision; (6) collective procedures have been simplified, a special process has been established for the official designation of situations as strikes and steps have been taken regarding the application of the principle of oral proceedings, one of the most important innovations as its application permeates all the procedures and makes it possible to apply other principles, such as mediation, concertation and publicity; (7) the Bill represents a significant joint effort on the part of the executive and judicial authorities and the main social partners, with guidance provided through the technical assistance of the ILO, and the Government hopes that, once it has been analysed and studied by the Legislative Assembly, it will become law in the Republic in the near future. The Committee requests the Government to keep it informed of developments regarding the Bill in question and expects that it will resolve the problem of the excessive slowness of procedures.

- 899.** *As to the alleged dismissal of several members (Lucrecia Garita Argüedas, Oscar Sánchez Vargas, Irving Rodríguez Vargas, Rafael Ayala Haüsermann and Giselle Vindas Jiménez) of the executive committee of SINTRAINDECO, a few months after the trade union was established, the Committee notes the Government's statements to the effect that: (1) in the case of Giselle Vindas Jiménez, the job content of her post was altered and the institution was obliged to make her redundant because her qualifications were no longer compatible with the post. The worker in question lodged an amparo action which is currently before the Constitutional Chamber; (2) in the case of Lucrecia Garita Argüedas, a process of selection of candidates for that post was held and another individual was chosen. The worker in question presented an unsuccessful appeal for the decision to be revoked, followed by an appeal for the decision to be reviewed, which is currently before the Ministry of Governance, Police and Public Security; (3) in the case of Rafael Ayala Haüsermann, the job content of the post he was temporarily occupying was altered and he had to be made redundant because he did not meet the necessary requirements (in particular, a licence to carry a firearm). The worker in question lodged an amparo action, which is currently before the Constitutional Chamber. The Committee affirms that realignment of duties, qualifications as well as other bona fide occupational experience, skills, knowledge and ability requirements, especially in the case of positions held by trade union leaders, should be undertaken with a view to prevent adverse effects to sound industrial relations with trade unions. The Committee requests the Government to keep it informed of the outcome of the judicial or administrative proceedings relating to the dismissals of the trade union leaders in question, and, should it be found that they were dismissed on anti-union grounds, to take measures to ensure that they are reinstated in their posts or in similar posts corresponding to their abilities, with payment of wages due and appropriate compensation. Moreover, if the competent judicial authority finds that reinstatement is not possible, the Committee requests that they be fully compensated.*
- 900.** *Furthermore, the Committee regrets that the Government has not sent its observations concerning the alleged dismissal of the leaders of DINADECO (SINTRAINDECO), Oscar Sánchez Vargas and Irving Rodríguez Vargas. The Committee requests the Government to take measures to ensure that an independent investigation is carried out in this regard and, should it be found that they were dismissed on anti-union grounds, to take measures to ensure that they are reinstated in their posts or in similar posts, with payment for wages due and appropriate compensation. The Committee requests the Government to keep it informed in this regard. If the competent judicial authority finds that reinstatement is not possible, the Committee requests that they be fully compensated.*
- 901.** *As to the allegations relating to the small number of collective agreements concluded in the country and the very high number of direct agreements signed with non-unionized workers, the Committee notes that the Government states that this issue was already examined by the Committee and by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) when examining the application of Convention No. 98. In this regard, the Committee notes that the Government informed the*

CEACR that “the Administrative Directive of 4 May 1991 requires the labour inspectorate to certify that the enterprise concerned does not have a union recognized for bargaining purposes before registering direct agreements with non-unionized workers; however, the Government adds that there were 67 collective agreements in force in the public sector in August 2006 and 13 in the private sector, whereas the number of direct agreements was 69.” [See Report of the Committee of Experts, 2007, Part 1A, p. 72 of the English-language text]. Furthermore, the Committee notes that the said CEACR report states that the problem of the increased number of direct agreements with non-unionized workers in relation to the number of collective agreements would be addressed by an independent expert appointed by the ILO who would undertake an independent inquiry in Costa Rica in February 2007. The Committee expresses its concern at the situation with regard to collective bargaining and requests the Government to keep it informed in that respect, as well as with regard to all measures adopted in relation to the low number of collective agreements with a view to ensuring the application of Article 4 of Convention No. 98 regarding the promotion of collective bargaining with workers’ organizations.

The Committee’s recommendations

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

- (a) *As to the alleged slowness of procedures in resolving cases involving anti-union acts, the Committee, while noting that according to the Government, a “Bill to reform labour proceedings” is currently on the parliamentary agenda in order to ensure flexible and swift judicial procedures, requests the Government to keep it informed of developments regarding the Bill in question and expects that it will resolve the problem of the excessive slowness of procedures.*
- (b) *As to the dismissal of the members of the executive committee of DINADECO (SINTRAINDECO) (Lucrecia Garita Argüedas, Rafael Ayala Häusermann and Giselle Vindas Jiménez) a few months after the trade union was established, the Committee requests the Government to keep it informed of the outcome of the judicial or administrative proceedings relating to the dismissals of the trade union leaders in question, and should it be found that they were dismissed on anti-union grounds, to take measures to ensure that they are reinstated in their posts or in similar posts corresponding to their abilities, with payment of wages due and appropriate compensation. Moreover, if the competent judicial authority finds that reinstatement is not possible, the Committee requests that they be fully compensated.*
- (c) *Regretting that the Government has not sent its observations concerning the alleged dismissal of the leaders of SINTRAINDECO, Oscar Sánchez Vargas and Irving Rodríguez Vargas, the Committee requests the Government to take measures to ensure that an independent investigation is carried out in this regard and, should it be found that they were dismissed on anti-union grounds, to take measures to ensure that they are reinstated in their posts, or in similar posts, with payment of wages due and appropriate compensation. The Committee requests the Government to keep it informed in this regard. Moreover, if the competent judicial authority finds that reinstatement is not possible, the Committee requests that they be fully compensated.*

- (d) *As to the allegations relating to the small number of collective agreements in the country and the very high number of direct agreements signed with non-unionized workers, the Committee expresses its concern at the situation regarding collective bargaining and requests the Government to keep it informed in that respect, as well as with regard to all measures adopted in relation to the small number of collective agreements with a view to ensuring the application of Article 4 of Convention No. 98 regarding the promotion of collective bargaining with workers' organizations.*

CASE NO. 2435

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

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

— **the National Trade Union Federation of Workers of El Salvador
(FENASTRAS)**

supported by

— **the International Confederation of Free Trade Unions (ICFTU)**

Allegations: Anti-union dismissals at Industria de Hilos de El Salvador, SA de CV, CMT, SA de CV and Diana, SA; other anti-union practices (offer of money to union officials, harassment of trade union members, illegal work stoppages by enterprises, etc.)

- 903.** The Committee examined this case at its November 2006 meeting and on that occasion submitted an interim report to the Governing Body [see 343rd Report, paras 649–688, adopted by the Governing Body at its 297th Session (November 2006)].
- 904.** The Government sent its observations in a communication dated 18 January 2007.
- 905.** El Salvador ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151), on 6 September 2006.

A. Previous examination of the case

- 906.** At its November 2006 meeting, the Committee made the following recommendations on the issues that were still pending [see 343rd Report, para. 688]:

...

- (b) Regarding the alleged anti-union dismissal of trade union official Oscar López Cruz on 12 November 2004, the Committee requests the Government to inform it of the outcome of the proceedings to impose a fine on Industria de Hilos de El Salvador SA de CV, and to continue urging the company to reinstate this official and to pay him the wages that are due to him, or – as Oscar López Cruz reportedly appears to prefer, due to the death

threats he received – only to pay him the wages and compensation due to him by law for dismissal by fault of the employer.

...

- (d) The Committee regrets that the Government has not sent its observations on the allegations described below and calls on it to do so without delay:
- an illegal work stoppage “for lack of raw materials” by Hermosa Manufacturing SA de CV, without a proper ruling by the Ministry of Labour, in order to avoid the list of demands submitted by the Executive Board of the STITAS union section, and the transfer of machinery to another company belonging to the same owner; the ruling of a – supposed – strike as illegal by the judicial authority at the request of the enterprise (the ruling was subsequently revoked by the said authority); another illegal work stoppage by the company affecting 64 union officials or members; and the offer of money to officials of the Executive Board of the section to leave the trade union or speak out against it;
 - the anti-union dismissal of María Esperanza Reyes Sifontes, an official of the STITAS section’s Executive Board at CMT, SA de CV, and of another 11 members of the union section in September 2005, as well as the harassment and hounding at their home of other officials of the section (Blanca Lucia Osorio and María Esperanza Reyes Sifontes); the dismissal of seven other trade union officials in October 2005; and
 - the anti-union dismissal of four officials and two members of the SIDPA trade union section at the Diana, SA, company.

B. The Government’s reply

907. In its communication of 18 January 2007, the Government states the following:

- Industria de Hilos de El Salvador, SA de CV: in this case, as previously stated, the Ministry has made use of all the legal machinery provided by labour legislation to endeavour to have the worker and trade union official Oscar López Cruz reinstated in his post and to provide legal assistance to the worker at his request. Two procedures are currently under way to impose fines in connection with the dismissal proceedings and the payment of wages owed because of a fault on the part of the employer of worker and trade union official Oscar López Cruz. The Government will report on the outcome of the abovementioned proceedings in due course.
- Hermosa Manufacturing SA de CV: the results obtained through legal channels are being investigated in order to follow up on the rulings made in connection with the payment of compensation, wages and other benefits owed to the workers by the enterprise; these results will be made known as soon as they are available. In addition, the third court of the first instance found the legal representative of Hermosa Manufacturing SA de CV guilty of retaining workers’ contributions and imposed a criminal sentence of two years’ imprisonment and a civil fine of US\$144,724.05.
- CMT, SA de CV: the outcome of the proceedings was that the enterprise was required to pay a fine amounting to US\$342.84. Notwithstanding the above, the Ministry of Labour and Social Welfare will provide legal assistance to the workers concerned upon their request.
- Diana, SA: with regard to the dismissal of four officials from the trade union section at Diana, SA de CV (Yanira Isabel Chávez Rodríguez, Heidi Sofía Chávez Leiva, José Alfredo Ramírez Merino and Daniel Ernesto Morales Rivera), it is reported that, although Daniel Ernesto Morales Rivera has not been reinstated in his post, the enterprise is still paying the wages owed to him because of a fault on the part of the employer as well as the other benefits of the collective labour agreement between the

enterprise and the trade union. However, with regard to the dismissal of Yanira Isabel Chávez Rodríguez, Heidi Sofía Chávez Leiva and José Alfredo Ramírez Merino, the employer's representative indicated that they had been dismissed because of repeated disciplinary offences and could not therefore be reinstated, as it would set a bad precedent for the other employees. Furthermore, on 18 August 2005, the day on which they were dismissed, they did not hold the status of trade union officials and there was therefore no breach of trade union immunity. Furthermore, as the certificates of medical incapacity submitted by the workers in question were issued on 18 August, hours after the time of dismissal, they did not lead to the suspension of work contracts, as the contracts had already been terminated. In a decision of 3 February 2006, the General Labour Inspection Directorate waived the fine imposed on Diana, SA de CV as the enterprise had proved that there had been no breach of section 248 or section 29 of the Labour Code, because at the time of their dismissal, José Alfredo Ramírez Merino, Yanira Isabel Chávez Rodríguez and Heidi Sofía Chávez Leiva had the status of ordinary workers and were not entitled to the guarantee of stable employment provided under section 248 of the Labour Code. In the case of Carlos Mauricio Flores Saldaña and Rafael Antonio Soriano of Diana, SA de CV, who were dismissed from that enterprise and were members of the Sweets and Pastry Industrial Trade Union (SIDPA), after reviewing the record of complaints, it was found that they have not initiated any proceedings or action.

C. The Committee's conclusions

- 908.** *The Committee observes that the allegations pending in this case refer to anti-union dismissals, the work stoppage by an enterprise in order to avoid a list of demands, the declaration that a strike was illegal, the offer of money to trade union leaders to leave the trade union, and the harassment and hounding at their homes of trade union officials.*
- 909.** *Regarding the alleged anti-union dismissal of trade union official Oscar López Cruz on 12 November 2004, at its November 2006 meeting, the Committee requested the Government to inform it of the outcome of the proceedings – to impose a fine that had been initiated on Industria de Hilos de El Salvador SA de CV and to continue urging the enterprise to reinstate the official and to pay him the wages due to him or – as Oscar López Cruz reportedly appears to prefer, due to the death threats he received – only to pay him the wages and compensation due to him by law for dismissal by fault of the employer. The Committee notes that, according to the Government, the Ministry has made use of all the legal machinery provided by labour legislation to endeavour to have the worker and trade union official Oscar López Cruz reinstated in his post and to provide him with legal assistance at his request. Two procedures are currently under way to impose fines in connection with the dismissal proceedings and the payment of wages owed because of a fault on the part of the employer of the worker and trade union official Oscar López Cruz. The Government will report on the outcome of these proceedings in due course. The Committee requests the Government to keep it informed of the final outcome of the proceedings, which should be expeditious, relating to the fine imposed on the enterprise for its dismissal of the trade union official Oscar López Cruz and to the payment of the wages owed to him and appropriate compensation.*
- 910.** *With regard to the allegations pending concerning the illegal work stoppage “for lack of raw materials” by Hermosa Manufacturing SA de CV, without a proper ruling by the Ministry of Labour, in order to avoid the list of demands submitted by the Executive Board of the STITAS union section, and the transfer of the firm's machinery to another enterprise belonging to the same owner; the ruling of a – supposed – strike as illegal by the judicial authority at the request of the enterprise (the ruling was subsequently revoked by the said authority) and of another illegal work stoppage by the enterprise affecting 64 union officials or members, and the offer of money to officials of the Executive Board of the*

section to leave the trade union or to defame it, the Committee notes that, according to the Government, the results obtained through legal channels are being investigated to follow up on the rulings made in connection with the payment of compensation, wages and other benefits owed to the workers by the enterprise. In addition, the Third Court of the First Instance found the legal representative of Hermosa Manufacturing SA de CV guilty of withholding workers' contributions and imposed a criminal sentence of two years' imprisonment and a civil fine of US\$144,724.05. The Committee requests the Government to keep it informed of the final outcome of these legal proceedings. Moreover, the Committee requests the Government to take the necessary measures to conduct an investigation without delay to determine whether, as claimed by the complainants, the work stoppages in the enterprise were carried out in order to avoid the list of demands submitted by the STITAS trade union and to keep it informed of the outcome of that investigation.

- 911.** *Regarding the alleged anti-union dismissal of María Esperanza Reyes Sifontes, an official of the STITAS section's Executive Board at CMT, SA de CV, and of another 11 members of the union section in September 2005, as well as the harassment and hounding at their homes of officials of the section, Blanca Lucia Osorio and María Esperanza Reyes Sifontes, and the dismissal of seven other trade union officials in October 2005, the Committee notes that, according to the Government, the outcome of the fine proceedings against CMT, SA de CV was that a fine amounting to US\$342.84 was imposed. The Government also stated that, notwithstanding the above, the Ministry of Labour and Social Security will provide legal assistance to the workers concerned, at their request. The Committee requests the Government to keep it informed of any legal action initiated by the officials of the STITAS trade union who were dismissed from CMT, SA de CV; furthermore, the Committee requests the Government to take the necessary steps to reinstate the officials in question without loss of salary, if it is found that they were dismissed on anti-union grounds. Likewise – noting that the Government has not replied to this allegation – the Committee requests the Government to take immediate action to stop the harassment and hounding at their homes of the STITAS trade union officials, where this is taking place, and punish those guilty of these acts and provide compensation to the victims.*
- 912.** *Finally, the Committee recalls the pending allegations concerning the anti-union dismissal of four officials and two members of the SIDPA trade union section at the Diana SA de CV enterprise. In this matter, the Committee notes that, according to the Government: (1) although Daniel Ernesto Morales Rivera has not been reinstated in his post, the enterprise is still paying the wages owed to him and the other benefits of the collective labour agreement between the enterprise and the trade union because of a fault on the part of the employer; (2) with regard to the dismissal of Yanira Isabel Chávez Rodríguez, Heidi Sofía Chávez Leiva and José Alfredo Ramírez Merino, the employer's representative indicated that they were dismissed for a series of disciplinary offences and they could not therefore be reinstated, as it would set a bad precedent for the other employees. Furthermore, on 18 August 2005, the day on which they were dismissed, they did not have the status of trade union officials and there was therefore no breach of trade union immunity; moreover, as the certificates of medical incapacity submitted by the workers in question were issued on 18 August, hours after the time of dismissal, they did not lead to the suspension of work contracts, as the contracts had already been terminated; (3) in a decision of 3 February 2006, the General Labour Inspection Directorate waived the fine imposed on Diana, SA de CV as the enterprise had proved that there had been no breach of sections 248 or 29 of the Labour Code, because at the time of their dismissal, José Alfredo Ramírez Merino, Yanira Isabel Chávez Rodríguez and Heidi Sofía Chávez Leiva held the status of ordinary workers and were therefore not entitled to the guarantee of employment security provided under section 248 of the Labour Code; and (4) in the case of Carlos Mauricio Flores Saldaña and Rafael Antonio Soriano of Diana, SA de CV, who*

were dismissed from that enterprise and were members of the Sweets and Pastry Industrial Trade Union (SIDPA), after reviewing the record of complaints, it was found that they have not initiated any proceedings or action. The Committee requests the Government: (1) to keep it informed of the employment situation of Daniel Ernesto Morales Rivera who, according to the Government, is being paid wages but has not been reinstated in his post; (2) to initiate an investigation without delay to determine the reasons for which Carlos Mauricio Flores Saldaña and Rafael Antonio Soriano, members of the SIDPA trade union, were dismissed from Diana, SA de CV and to keep it informed on that matter; and (3) to initiate an investigation without delay to determine the specific facts which led to the disciplinary sanctions resulting in the dismissal of José Alfredo Ramírez Merino, Yanira Isabel Chávez Rodríguez and Heidi Sofía Chávez Leiva and to keep it informed on the matter.

The Committee's recommendations

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

- (a) *The Committee requests the Government to keep it informed of the final outcome of the proceeding, which should be expeditious, relating to the fine imposed on Industria de Hilos de El Salvador, SA de CV for the dismissal of trade union official Oscar López Cruz and for the payment of the wages owed to him and appropriate compensation.*
- (b) *The Committee requests the Government to keep it informed of the final outcome of the legal proceedings it mentioned concerning payment of compensation, wages and other benefits to the workers by the enterprise Hermosa Manufacturing SA de CV. Furthermore, the Committee requests the Government to take the necessary steps to conduct an investigation without delay to determine whether, as claimed by the complainants, the work stoppages in the enterprise were carried out in order to avoid the list of demands submitted by the STITAS trade union, and to keep it informed of the outcome of the investigation.*
- (c) *The Committee requests the Government to keep it informed of any legal action initiated by the officials of the STITAS trade union who were dismissed from CMT, SA de CV; the Committee also requests the Government to take the necessary steps to reinstate the officials in question without loss of salary if it is found that they were dismissed on anti-union grounds. Likewise – noting that the Government has not denied this allegation – the Committee requests the Government to take immediate action to stop the harassment and hounding at the homes of the STITAS trade union officials, where this is taking place, and punish those guilty of these acts and provide compensation to the victims.*
- (d) *With regard to Diana, SA de CV, the Committee requests the Government: (1) to keep it informed of the employment situation of Daniel Ernesto Morales Rivera who, according to the Government, is being paid wages but has not been reinstated in his post; (2) to initiate an investigation without delay to determine the reasons for which Carlos Mauricio Flores Saldaña and Rafael Antonio Soriano, members of the SIDPA trade union, were dismissed and to keep it informed on that matter; and (3) to initiate an*

investigation without delay to determine the specific facts which led to the disciplinary sanctions resulting in the dismissal of José Alfredo Ramírez Merino, Yanira Isabel Chávez Rodríguez and Heidi Sofía Chávez Leiva.

CASE No. 2487

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

**Complaint against the Government of El Salvador
presented by
the National Trade Union Federation of Salvadorian Workers (FENASTRAS)**

Allegations: The National Trade Union Federation of Salvadorian Workers (FENASTRAS) alleges that the company Servicios San José SA de CV carried out an anti-union campaign against the Servicios San José SA de CV Workers' Trade Union (SETRASSAJO), which included transferring the executive committee to work next to the refuse area, dismissing the trade union executive committee and 11 other members on 14 February 2006, attacks on and violence towards the dismissed workers during a peaceful demonstration in front of the company premises, frequent changes in the company's name to prevent trade unions from forming, and putting pressure on workers to resign from their union, including making death threats

- 914.** This complaint is contained in a communication dated 17 May 2006 presented by the National Trade Union Federation of Salvadorian Workers (FENASTRAS).
- 915.** The Government sent its observations in a communication dated 16 November 2006.
- 916.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 917.** In its communication dated 17 May 2006, the FENASTRAS alleges that, after the Servicios San José SA de CV Workers' Trade Union (SETRASSAJO) acquired legal personality and its executive committee was registered in December 2005 and January 2006, the company Servicios San José SA de CV initiated an anti-union campaign against the 35 workers in the trade union. In fact, first it moved all the trade union leaders next to the refuse area and on 14 February 2006 it dismissed the trade union's executive committee and 11 members without any justification.

- 918.** The SETRASSAJO organization initiated administrative proceedings with the General Labour Directorate of the Ministry of Labour and Social Welfare; however, despite the many conciliation hearings held, no agreement was reached.
- 919.** The complainant organization adds that on 21 February the dismissed workers held a demonstration in front of the company premises, demanding their reinstatement and payment of their wages. On that occasion, some female workers were beaten up by the company's private security services.
- 920.** The SETRASSAJO alleges, moreover, that the company is seeking to change its registered name in order to invalidate the legality of the company trade union before the authorities have completed their investigation. According to the complainant, the company has taken action to change its registered name on several occasions in order to prevent company trade unions from functioning. For example, the company was called "Confecciones San José SA de CV" until 2002. In that year, it changed to "Servicios San José SA de CV" and in 2005 it became "Recursos San José SA de CV". Each time it dismissed the workers and made them sign contracts with the new company.
- 921.** According to the allegations, despite the fact that the company has paid the dismissed officials' wages for the first two weeks of February 2006, it will not allow them to enter the company premises and has not resolved the complaints filed against it at the Ministry of Labour and Social Welfare.
- 922.** The SETRASSAJO also alleges that the company is putting pressure on workers to resign from their trade union by making death threats. Finally, with the aim of destroying the trade union, the company reported the union to the Attorney General's Office, accusing it of falsifying documents when the trade union was formed.

B. The Government's reply

- 923.** In its communication dated 16 November 2006, with regard to the alleged reprisals against the executive committee members of the SETRASSAJO, the Government states that these actions were not duly reported to the labour inspectorate so that the necessary investigations could be carried out to determine whether trade union rights had been violated.
- 924.** The Government states that the SETRASSAJO used only the conciliation mechanism and requested the labour directorate to summon the employer's representatives in order to come to a mutual conciliation settlement. The Government states that, in this case, the authorities' function is restricted to promoting a conciliation agreement between the parties. On 22 February 2006, the SETRASSAJO applied to the General Labour Directorate to promote a conciliation settlement regarding the dismissal of the members of the union executive committee and 11 members on 14 February 2006. The company justified the dismissals, stating that the workers had disrupted the normal functioning of the company on several occasions by preventing workers from entering to do their jobs by threatening to lock them in. According to the Government, the conciliation hearings have not been fruitful since the dismissed workers have not been reinstated, although their wages are being paid.
- 925.** The Government adds that the SETRASSAJO asked the special unit on gender and the prevention of discrimination in respect of employment to conduct an inspection to promote the reinstatement of the trade union officials but the company has refused to comply. The relevant sanctioning process has begun, imposing a fine for the infringement of article 248 of the Labour Code.

C. The Committee's conclusions

926. *The Committee observes that this case relates to the allegations presented by the FENASTRAS which state that the company Servicios San José SA de CV carried out an anti-union campaign against the company union, SETRASSAJO, which included moving the executive committee to work next to the refuse area, dismissing the entire trade union executive committee and 11 other members on 14 February 2006, attacks on and violence towards the dismissed workers during a peaceful demonstration in front of the company premises, frequent changes in the company's registered name to prevent the formation of trade unions, and putting pressure on workers to resign from their union, including making death threats. The Committee notes that, despite the steps taken by the SETRASSAJO and the conciliation hearings held in the presence of officials from the Ministry of Labour, the dismissed workers have not been reinstated and anti-union acts appear not to have ceased.*
927. *The Committee further notes the Government's statement that the SETRASSAJO did not report the alleged persecution to the labour inspectorate and that the administrative authority's actions were therefore restricted to conciliation with respect to the dismissal of the trade union officials and the 11 members, namely, endeavouring to get them reinstated. The Committee also notes that the Government adds that the SETRASSAJO finally reported the events to the special unit on gender and the prevention of discrimination in respect of employment and that, as the company is refusing to reinstate the dismissed officials and members, the sanctioning process has begun to impose a fine on the company.*
928. *The Committee observes that these are serious allegations of anti-union acts committed against a trade union executive committee and 11 of its members for legitimately exercising their trade union activities; the acts include dismissals, threats, pressure and the alleged continual changing of the company's name to prevent the formation of trade unions. The Committee recalls, first, that, under Article 2 of Convention No. 87, recently ratified by El Salvador, workers, without distinction, shall have the right to establish or join trade union organizations of their own choosing, and that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 771]. Taking into account the Government's statement that it has started the sanctioning process against the company, with the intention of imposing a fine on it because of its refusal to reinstate the dismissed workers, the Committee requests the Government to take the necessary measures so that the sanctions imposed in this process are sufficiently dissuasive to ensure that the company allows its workers to freely exercise their trade union rights by putting an end immediately to all anti-union acts against the officials and members of the SETRASSAJO and by reinstating them without delay, and paying the wages they are owed and appropriate compensation. The Committee requests the Government to keep it informed on this matter.*
929. *The Committee urges the Government to ensure that an independent investigation is carried out without delay into the allegations of assaults on SETRASSAJO workers by the company's private security services and into the alleged death threats used to urge workers to resign from their trade union. The Committee requests the Government to take measures to punish those guilty of the assaults and to provide protection to the threatened workers.*

The Committee's recommendations

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

- (a) *The Committee requests the Government, in the framework of the sanctioning process initiated against the Servicios San José SA de CV enterprise, to ensure that the sanctions imposed are sufficiently dissuasive to ensure that the company allows its workers to freely exercise their trade union rights, by putting an end immediately to all anti-union acts against the officials and members of the SETRASSAJO, and by reinstating them without delay and paying the wages they are owed and appropriate compensation. The Committee requests the Government to keep it informed on this matter.*
- (b) *The Committee urges the Government to ensure that an independent investigation is carried out without delay into the allegations of assaults on the SETRASSAJO workers by the company's private security services and into the alleged death threats used to urge workers to resign from their trade union. The Committee requests the Government to take measures to punish those guilty of the assaults and to provide protection to the threatened workers.*

CASE No. 2514

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

**Complaint against the Government of El Salvador
presented by**
— **the Trade Union Confederation of El Salvador
Workers (CSTS) and**
— **the Baterías de El Salvador Workers' Trade
Union (SITRAEBES)**

Allegations: Dismissal of union leaders for having formed a trade union in the Baterías de El Salvador enterprise and other anti-union acts, such as offering money to or pressuring workers to leave the trade union, and threats of dismissal

- 931.** The complaint is contained in a joint communication of the Trade Union Confederation of El Salvador Workers (CSTS) and the Baterías de El Salvador Workers' Trade Union (SITRAEBES) dated 23 August 2006. These organizations sent additional information in a communication dated 4 October 2006. The Government sent its observations in a communication dated 23 November 2006.
- 932.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 933.** In their communication dated 23 August 2006, the CSTS and the SITRAEBES allege that, in view of persistent and repeated violations of labour rights and health problems caused by inadequate occupational safety and health programmes, a group of 36 workers decided to form a trade union in the Baterías de El Salvador enterprise, which has an assembly plant in San Juan Opico, employing some 800 workers.
- 934.** It should be pointed out that, from the outset, the CSTS supported the efforts of the workers employed in Baterías de El Salvador SA de CV, and on 28 January 2006 the trade union was established – on a weekend because the enterprise had threatened to dismiss three workers who were preparing the membership campaign.
- 935.** The complainants state that the constituent assembly of the SITRAEBES was held on 28 January 2006, and Rafael Méndez was elected provisional President and Salvador Mejía provisional Vice-President. The documentation was duly submitted on Monday, 30 January 2006 to the Ministry of Labour, including the founding document, by-laws and list of founding members. The enterprise began dismissing the founding members on the same day. Arnulfo Cáceres, one of the founding members, was dismissed on the pretext of inefficiency. On 31 January, Salvador Mejía was informed that 15 February would be his last day at work. On 2 February 2006, the following founding members were dismissed: Juan Antonio Pulunto, Melvin Alvarado and José Roberto Blanco.
- 936.** On 4 February 2006, the Ministry of Labour officially transmitted the list of founding members of SINTRAEBES to the enterprise. Starting on that date, the enterprise began to call in the founding members one by one to offer them money in exchange for signing a letter of withdrawal of membership.
- 937.** On 8 February 2006, the enterprise called Rafael Cáceres to offer him money. Others reported that he was offered more than the amount due for length of service. He took it and left the enterprise, never to return. The enterprise made him sign an irrevocable letter of withdrawal, dated 28 February, as a means of cancelling his status as founding member of the trade union. Representatives of the enterprise began asking for signed letters of withdrawal, which they then blatantly altered by erasing the original date of the signature with correcting fluid and replacing it with 29 January. On the same day, the following founding members were dismissed: Armando de Jesús Bojorquez, Porfirio Pérez Saldaña and Juan de Dios Sánchez. The enterprise hired a lawyer who is well known for his anti-union stance in El Salvador, and his participation in a number of cases has been reported in several complaints to international organizations.
- 938.** The trade unions point out that eight of the 36 founding members accepted the money, including Rafael Méndez, provisional President of the trade union. After making the same offer to 12 more persons and realizing that the workers were not accepting it, the enterprise stopped offering money but continued looking for ways of forcibly dismissing founding members of the trade union and making them sign letters of withdrawal.
- 939.** On 15 February 2006, Salvador Mejía (Vice-President of the union), who had been carrying out the duties of provisional President, was dismissed on grounds of inefficiency. At the time, 11 of the founding members had been dismissed and 13 were still working in the plant. Complaints were filed with the Ministry of Labour, requesting inspections. The Ministry only responded many days later. The enterprise began threatening the 13 members who were still employed with dismissal without compensation.
- 940.** On 16 March 2006, the members of SITRAEBES held a peaceful demonstration in front of the enterprise in protest against the situation and calling for reinstatement of the dismissed

workers. The enterprise stated that the protesters were not employed in the enterprise. The police arrived, saying that they were not employees and were blocking the entrance to the enterprise; fortunately, no acts of violence were committed.

- 941.** On 17 March 2006, the enterprise announced that it would give a “vacation” to all the founding members and the workers who had participated in the previous day’s protest. The leave was granted according to each worker’s length of service; it began on that day, although it was counted from 20 March. The workers suspected that those three days could be used by the enterprise to allege dereliction of duty. Faced with this situation, SITRAEBES again requested the Ministry of Labour to carry out an inspection to verify this irregularity.
- 942.** On 19 March 2006, the Ministry of Labour conducted an inspection. Faced with this situation, the enterprise decided to pay the three days (17, 18 and 19 March) in addition to the leave. It stated that it had granted leave for lack of raw materials. The trade union filed more complaints in view of the discriminatory measures.
- 943.** On 20 and 27 March 2006, the workers went to collect their leave pay. The enterprise demanded that if they wanted to be paid for their leave, they were to sign a receipt for an unspecified purpose as employees of Baterías Record, whereas that was the brand of batteries they produced, not the name of the enterprise. The workers refused to sign that document, as it could be used as proof that they had accepted severance pay.
- 944.** On 3 April 2006, the Ministry of Labour granted SITRAEBES legal personality and on 9 April the union held its first general assembly and elected its first executive: Douglas Guardado was elected General Secretary, Guillermo Antonio Zaravia, organizing secretary, José Nicandro Cerón, disputes secretary, and Arístides Zelaya, second disputes secretary. On 10 April, the enterprise announced that those who had taken leave had been dismissed as of that date (20 March) and refused to let them into the enterprise. On 11 April, the enterprise effectively dismissed six more workers, on grounds that their contract had come to an end. The enterprise claimed to be unaware that the union had obtained legal personality. The union attempted to talk to the plant manager, saying that, as the trade union, they wanted to resolve the situation of the dismissed workers; the manager refused to talk to them, pointing out that he had neither the power nor the authorization to reach settlements with the trade union.
- 945.** On 12 April 2006, the workers held another demonstration in front of the enterprise in protest against the dismissals, and to inform the other workers of the situation. Representatives of the enterprise brought in a bus and made the workers supporting the protest get in, after which they were taken to a nearby gas station; there, the representatives told the workers that those who had organized the protest were no longer employees of the enterprise. The organizers of the event had been at the factory entrance all day.
- 946.** The complainants emphasize that from mid-April to August, the dismissed workers filed a series of complaints with the Ministry of Labour. Finally, on 14 August 2006, the latter transmitted the reports of the inspections held in Baterías de El Salvador on 3 April 2006 – that interval clearly shows the excessive delay in providing the workers’ representatives with legal documents/instruments, such as certified reports which they needed to continue their legal proceedings to resolve their claims. It should also be noted that, as of 15 March, the enterprise had been issued with a recommendation to reinstate all the founding members of SITRAEBES pursuant to the recommendations of the special inspection conducted specifically on that matter. The Ministry of Labour itself noted that that recommendation had been disregarded and began proceedings to impose a fine; the certified reports of the inspections carried out on 15 March were given to the workers five months later, on 14 August 2006. During another inspection by the Ministry of Labour on

13 June, it was noted that the recommendations to reinstate the trade union officers had not been complied with. Accordingly, on 7 June, SITRAEBES requested the Ministry of Labour in writing to inform the Attorney-General's Office that the offence of "labour discrimination" described in section 246 of the Penal Code had been committed. To date, the Ministry of Labour has not informed the Attorney-General's Office of that offence, which is deemed by the complainants to constitute another offence, that of "failure to notify", also provided for in the Penal Code.

- 947.** On 31 July 2006, Baterías de El Salvador paid compensation to the entire workforce of the enterprise, with the clear intention of casualizing employment and transferring the employees to ten different enterprises of Baterías de El Salvador.
- 948.** The Ministry of Labour is clearly guilty of a serious omission with regard to its responsibilities since, at the trade union's request, its representatives visited the enterprise on 31 July, but only for a moment, and accepted the explanation given by the company lawyer saying that all was well and that the workers would benefit from that measure. The Ministry failed to verify whether at least six of the enterprises to which the Baterías de El Salvador employees were transferred had been duly registered, whether they had internal employment regulations, whether they had been authorized by the competent ministries to operate as companies employing workers and engaging in the production of batteries, whether the workers were receiving the amount due for length of service, and whether the new contracts did not undermine the workers' length of service and benefits.
- 949.** A further aggravating circumstance is that SITRAEBES requested the Ministry of Labour, on 14 July, to carry out a special inspection to verify all the above concerns since, by that time, the mass payment of compensation was more than just a rumour. That inspection was conducted on 25 July and was also supposed to ascertain the reasons for the abusive working conditions and acts of anti-union intimidation. The Ministry of Labour did not manage to complete the inspection, which gave the enterprise the time it needed to carry out its plans for the mass payment of compensation and transfer of all the employees to new companies.
- 950.** The complainants sent a number of attachments with their communication dated 4 October 2006, including labour inspection reports.

B. The Government's reply

- 951.** In its communication dated 23 November 2006, the Government states that on 29 March 2006, the Ministry of Labour and Social Welfare granted the application for legal personality submitted by the members of the SITRAEBES; in addition, the executive committee was registered and its members issued with the appropriate credentials certifying their status as trade union officers.
- 952.** Concerning the allegations of violation of trade union rights, and specifically the reprisals by representatives of the enterprise against members of the executive of the SITRAEBES in the form of unjustified dismissal of the officers and members of the trade union, the Government states that the complainant sought legal protection from the General Labour Directorate, with the aim of engaging in conciliation proceedings. To that end, the Labour Directorate summoned the employer's representative in order to reach a conciliatory settlement with the aim of reinstating the workers who had been dismissed without justification and securing the payment of wages that had not been paid for reasons imputable to the employer. In view of the negative outcome of the conciliation hearings, and of the refusal by the employer's representative to recognize the existence of a trade union and the dismissed workers' status as trade union officers and members, the

complainant requested that labour inspections be carried out at the enterprise to verify non-compliance with sections 248 and 214 of the Labour Code.

- 953.** The Government adds that the inspections carried out since 7 February found that Baterías de El Salvador had infringed the abovementioned provisions by dismissing, without justification, the 11 trade union officers and a group of members, and determined the wages that had not been paid for reasons imputable to the employer; accordingly, proceedings to impose a fine were instituted. It is important to point out that despite the fact that the trade union officers had not been reinstated, the enterprise continued to pay the wages that had been unpaid for a reason imputable to the employer, in the same amount and manner as they had been when the workers were employed by the enterprise.
- 954.** Notwithstanding the above, the Government points out that on 28 September 2006, another inspection was carried out in the Baterías de El Salvador, SA de CV enterprise, which found that on 31 July 2006 the enterprise had paid the statutory compensation to all of the workers still employed by it, after the workers had presented notarized letters of resignation and the applicable benefits had been calculated.
- 955.** The Government states that despite the fact that the administrative procedure was complied with, the complainants have the right to seek redress in the courts in order to claim their labour rights that had been infringed, of which they have been duly informed.
- 956.** Lastly, the Government reiterates categorically that the Ministry of Labour has not failed to provide the legal protection sought by the complainants, and that its interventions have complied with the requirements laid down in the law.

C. The Committee's conclusions

- 957.** *The Committee observes that in this case the complainants allege the dismissal of 11 founding members of SITRAEBES, the dismissal of another group of workers, offers of money to the founding members to make them leave the trade union (which eight of them allegedly accepted), threats of dismissal against those who did not agree to withdraw from membership of the trade union, interference by the enterprise in protest action by the workers and mass payment of compensation to the entire workforce in order to transfer it to ten different companies, thus dissolving the SITRAEBES (according to labour inspection reports, the Baterías de El Salvador enterprise concluded service contracts with ten different enterprises which hired former employees of Baterías de El Salvador). The complainants point out that the trade union was established by 36 workers and that there are some 800 workers in the enterprise.*
- 958.** *The Committee notes the Government's statements to the effect that: (1) the Labour Directorate had sought to reach a conciliatory settlement with the aim of reinstating the workers who had been dismissed without justification and securing the payment of wages that had not been paid for reasons imputable to the employer; (2) the labour inspectorate found that the enterprise had infringed the Labour Code by dismissing, without justification, 11 trade union officers and a group of members; (3) proceedings to impose a fine were instituted; (4) the dismissed trade union officers continued to receive their wages despite having been dismissed; (5) on 31 July 2006, the enterprise had paid the statutory compensation to all of the workers still employed by it, and presented to the labour inspectorate notarized letters of resignation from the workers and the calculation of the applicable benefits; and (6) the trade union has the right to seek redress in the courts to claim its rights.*
- 959.** *The Committee deplores the dismissal of a large number of trade unionists by the Baterías de El Salvador enterprise on account of the establishment of the trade union, as well as the*

other anti-union practices referred to by the complainants, aimed at making the members withdraw from membership of the trade union (to which the Government did not reply; a report by the labour inspectorate provided by the complainants, however, points out that most of the workers interviewed denied that there had been threats of dismissal or blacklisting on account of trade union membership), including threats of dismissal, offers of money to get trade unionists to withdraw from the trade union and interference by the enterprise in protest action by the workers. In this respect, the Committee wishes to reiterate its conclusions in previous cases concerning El Salvador [see, for example, 344th Report, Case No. 2423, para. 938], in which it stated the following:

The Committee is obliged to note once again that the present case shows that the exercise of trade union rights – whether the right to establish trade union organizations or the right to adequate and effective protection against acts of anti-union discrimination – is guaranteed neither in the legislation, whose fines do not appear to have any dissuasive effect, nor in practice. The Committee reiterates its earlier recommendations and reminds the Government once again that it may avail itself of ILO technical cooperation in the context of the preparation of future trade union legislation. The Committee considers that, among other things, the new legislation should guarantee the right to establish trade unions without restrictions, and that proceedings in the case of anti-union discrimination should be rapid and effective, providing for sufficiently dissuasive sanctions.

- 960.** *The Committee observes that the question of reinstating the dismissed trade unionists no longer arises in this case, given that, according to the Government, the entire workforce still employed by the enterprise agreed to terminate their contracts of employment subject to payment of their statutory benefits and to be transferred to ten different enterprises. The Committee nonetheless requests the Government to inform it of any administrative or judicial sanctions imposed on the Baterías de El Salvador enterprise for violating the trade union rights enshrined in the legislation, to indicate whether the Attorney-General's Office has been notified of the facts, as requested by the complainants, to keep it informed in this respect, and to confirm that, in addition to the unpaid wages (which they had in fact received, according to the Government and the documents provided by the complainants), all the dismissed trade unionists have been paid their statutory dismissal compensation.*
- 961.** *Lastly, in regard to the alleged delays by the Ministry of Labour in taking action or in transmitting inspection reports to the trade unions, the Committee observes that the Government states that it has not failed to provide the legal protection requested by the complainants and that its interventions have complied with the law.*
- 962.** *Given the general nature of these statements and the different specific allegations made by the complainants concerning delays, in particular delays of up to five months in transmitting inspection reports, the Committee requests the Government to ensure in future that labour inspection reports are transmitted without delay to the enterprises and trade unions concerned.*

The Committee's recommendations

- 963.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Deploing the serious anti-union nature of the dismissals of trade unionists of the SITRAEBES, the Committee requests the Government to inform it of any administrative or judicial sanctions imposed on the Baterías de El Salvador enterprise for violating the trade union rights enshrined in the legislation, as noted by the labour inspectorate, to indicate whether the Attorney-General's Office has been notified of the facts, as requested by the*

complainants, to keep it informed in this respect, and to confirm that all the dismissed trade unionists have been paid their statutory dismissal compensation.

- (b) *Noting once again that the present case shows that the exercise of trade union rights – whether the right to establish trade union organizations or the right to adequate and effective protection against acts of anti-union discrimination – is guaranteed neither in the legislation, whose fines do not appear to have any dissuasive effect, nor in practice, the Committee reiterates its earlier recommendations and reminds the Government once again that it may avail itself of ILO technical cooperation in the context of the preparation of future trade union legislation. The Committee considers that, among other things, the new legislation should guarantee the right to establish trade unions without restrictions, and that proceedings in the case of anti-union discrimination should be rapid and effective, providing for sufficiently dissuasive sanctions.*
- (c) *The Committee requests the Government to ensure in future that labour inspection reports are transmitted without delay to the enterprises and trade unions concerned.*

CASE NO. 2475

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

**Complaint against the Government of France
presented by
the Trade Union of Qualified Teachers of Higher Education
(holders of the “agrégation”) (SAGES)**

Allegations: The complainant organization alleges that Decree No. 2004-836 amending civil procedure, which amends the Labour Code, makes representation by a lawyer compulsory in appeals at the highest level on points of law, thereby depriving it of the right to represent its members and infringing the right of workers’ organizations to organize freely their administration and activities

964. The complaint is set out in a communication by the Trade Union of Qualified Teachers of Higher Education (holders of the “agrégation”) (SAGES) dated 9 March 2006. The complainant sent additional information in a communication dated 10 April 2007.

965. The Government of France sent its reply in communications dated 24 May 2006 and 14 March 2007.

966. The Government of France 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

967. The SAGES is an occupational trade union which was established on 13 January 1996 in Marseilles (France). The statutes currently in force were adopted on 23 May 2003. Since its establishment, the SAGES has constantly fulfilled the role of being a representative trade union eligible to stand for trade union elections. Among its other characteristics, the SAGES uses legal recourse as a priority course of action to uphold both collective and individual interests and it has engaged in a considerable number of legal actions, which it has taken either on its own behalf or on behalf of specific workers.

968. The SAGES notes that labour disputes in the *private sector* are referred in the first instance to the labour courts, at the appeal stage to the social chamber of the Court of Appeal and at the highest level to the social chamber of the Court of Cassation, which is the highest court of appeal. According to section R.516-5 of the Labour Code, “[t]he persons entitled to assist or represent parties in labour matters include: ... permanent or non-permanent representatives of trade unions or employers’ associations ...”. According to the same section, “[t]he employer may also be assisted or represented by a member of the enterprise or institution”. The rules applicable to assistance and representation are the same at the appeal stage and in courts of first instance. With regard to the highest level of appeal, section R.517-10 of the Labour Code provided, until the entry into force of the contested Decree, that “[in] labour matters, appeals at the highest level shall be lodged, considered and judged in accordance with procedure and without representation by a lawyer in the Council of State (*Conseil d’Etat*) and the Court of Cassation”. Decree No. 2004-836 of 20 August 2004 amending civil procedure repeals section R.517-10 of the Labour Code. The SAGES underscores that, before section R.517-10 was repealed, workers could be assisted and represented by trade union representatives. Moreover, as an employer, the complainant trade union was exempt from compulsory representation by a lawyer at the highest level. The complainant trade union was therefore in a position to assist and represent in the labour courts not only its own members, but any worker requesting its intervention, whether in courts of first instance, at the appeal stage or at the highest level, as French constitutional law provides that “all persons may defend their rights or interests through trade union action”. By repealing section R.517-10 of the Labour Code, the executive power has made it impossible for workers to be assisted and represented at the highest level by trade unions and impossible for trade unions to defend their own interests as employers or to assist and represent workers at the highest level.

969. In labour disputes involving *government-employed civil servants*, the SAGES states that it is not the judicial authorities which are competent, but rather the administrative authorities (administrative courts in the first instance, administrative courts of appeal at the appeal stage and the Council of State at the highest level). In these administrative courts, unlike in the labour courts, there is no provision for representation or assistance by a trade union representative; while this does not preclude trade union assistance in courts of first instance and at the appeal stage, in so far as civil servants are exempt from compulsory representation by a lawyer and the proceedings are in writing, the difference is significant at the highest level, where representation by a lawyer is compulsory in administrative matters but not (prior to the publication of the disputed Decree) in judicial matters. At the time the disputed Decree was introduced, the SAGES was planning to take action aimed at bringing the system of administrative appeals into line with that of labour appeals, notably on the basis of Article 26 of the International Covenant on Civil and Political Rights. The reform of the system of labour-related appeals at the highest level has, therefore, also had the effect of depriving the complainant trade union of the possibility of obtaining

exemption from compulsory representation by a lawyer at the highest level in cases between civil servants and their employer, State, local government or public institution.

- 970.** The complainant trade union lodged an appeal to set aside the Decree repealing the exemption from compulsory representation by a lawyer in labour matters (see document attached to the complaint). The French Council of State was competent at the first and last instances to give a ruling on the appeal. The appeal by the SAGES set out numerous points of fact and law, both on the merits of the case and the admissibility of its action, as do the written replies (attached to the complaint). In addition, Mr Denis Roynard, the president of the SAGES, lodged an appeal in his own name to set aside the Decree, containing the same arguments. The case was still pending at the Council of State at the time of the complaint.
- 971.** In its ruling of 18 May 2005, the Council of State dismissed the appeal by the SAGES because “the disputed provision in itself in no way undermines the rights of the officials concerned under their statutes, the prerogatives of the bodies to which they belong or the conditions in which they exercise their duties”, “and consequently, the Minister for Justice has good cause to maintain that the claimant is not affected and is therefore not entitled to request that the contested regulatory provision be set aside”, and “the application is therefore not receivable and must be rejected” (see attachment). The SAGES considers that the Government’s legislation constitutes a violation of freedom of association. The SAGES cites in particular Articles 3, 8(2) and 11 of Convention No. 87, certain provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In its communication dated 10 April, the SAGES informs that the General Confederation of Labour (CGI) referred the issue to the Council of State with the same object but the appeal was dismissed.
- 972.** In its appeal to the Council of State, the SAGES aimed to: (1) uphold the right of qualified teachers (holders of the “agrégation”) to be assisted and represented, if necessary, by a trade union representative from the SAGES or elsewhere in labour matters before the Court of Cassation, given that the freedom of the teachers in question to choose freely a trade union to defend them in court is at stake; (2) uphold its right to assist and represent workers in labour matters in the Court of Cassation, irrespective of whether they are holders of the “agrégation” or not, given that the freedom of the trade union to choose its own subject and form of intervention is at stake; (3) obtain recognition of its status as a prospective employer and consequently its freedom to employ its own workers, given that the trade union’s freedom of association is at stake. Freedom of association has therefore been violated by the respondent State mainly in these three areas. An additional area is the discrimination suffered by the complainant trade union in the treatment of freedom of association. These issues are discussed further below.
- 973.** The SAGES alleges an infringement of the freedom of association of qualified teachers of higher education (holders of the “agrégation”) who are employed by private teaching establishments or who are at the disposal of or seconded to private establishments but who still belong to the body of qualified teachers in question. Teachers in this category belonging to the SAGES – or who wish to join it or call upon its services to defend their rights before the labour courts against the private establishment for which they work or used to work – are deterred from joining the SAGES by the Council of State ruling of 18 May 2005. This ruling prevents the SAGES both de facto and de jure from helping or representing them in labour matters, not only at the highest level but also in courts of first instance and at the appeal stage, as its general wording does not limit the scope of the SAGES only at the highest level of appeal; indeed, as established by the Council of State, an employer in a dispute with a worker who is being assisted and defended by a representative of the SAGES might raise an objection in the court of first instance and at the appeal stage. The Council of State ruling of 18 May 2005 thus deprives qualified teachers (holding an “agrégation”) employed in private establishments (for example, under

partnership agreements with the State), as well as those who are at the disposal of or seconded to independent employers, of the possibility of calling on the SAGES to assist and represent them in cases against such independent employers. It also makes it impossible for them to claim back any costs arising from consultations with trade unions relating to legal action to defend their interests. National case law, however, indicates explicitly and unambiguously that teachers who are placed in the situations outlined above can apply to labour courts and then to the Court of Cassation to defend their rights.

- 974.** According to the SAGES, Article 1 of Convention No. 98 applies to the present case. It provides that the “protection” of “workers” against “acts of anti-union discrimination in respect of their employment” “shall apply more particularly in respect of acts calculated to” “[...] prejudice a worker by reason of union membership”. Moreover, the SAGES highlights that the European Convention on Human Rights is incorporated into domestic legislation and that restrictions on the freedom of workers to join the SAGES or on the effectiveness and efficiency of this freedom are neither “prescribed by law” nor “necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others” (Article 11, paragraph 2, of the Convention).
- 975.** The SAGES alleges that the impact of the Council of State ruling extends far beyond the Court of Cassation itself, as the basis for its interpretation applies also to cases brought before the labour courts and the social chambers of the courts of appeal. The freedom of workers to call on the SAGES and the freedom of the SAGES to assist and represent workers in the labour courts are limited by the Council of State ruling to an extent far greater than that provided for in the disputed Decree; this is on account of the authority inherent in Council of State rulings – in particular (but not uniquely) in the labour courts (first instance), which are staffed by non-professional judges who are unfamiliar with the subtleties associated with the relative and absolute effects of rulings which have the force of *res judicata*.
- 976.** The SAGES states, moreover, that the freedoms and rights which it has cited include the freedom of the complainant organization to act as an employer and to have its status as such taken into account by national courts.
- 977.** The SAGES considers that its right to be heard in cases relating to the freedom of association has been violated. There is no doubt that, unless it is to be drained of all but symbolic substance, the freedom of trade unions to organize their own administration and activities and to formulate their own programmes can only be achieved if the organizations chosen by workers to represent them have their own legal means to take collective action, within a democratic State, to guarantee the protection of that freedom – which should, of course, include as a priority the means to take legal action. In view of their commitment to uphold that freedom, both through their legislation and the manner in which they implement it, States should aim to achieve more than a purely formal recognition of that freedom; they also need to consider the approach – which should first and foremost be legislative – used to guarantee that freedom. This is reflected in particular in the provisions of the International Covenant on Civil and Political Rights which, like the European Convention on Human Rights, “is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective” (European Court of Human Rights, 9 October 1979, *Airey v. Ireland*, paragraph 24). The United Nations Human Rights Committee has established that “the fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights” (General Comment No. 31 (paragraph 6) on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant:

21 April 2004, CCPR/C/74/CRP.4/Rev.6). The SAGES considers that the actions or omissions of the respondent State which are hereby being challenged, and not only those which affect it as a trade union but also those which affect the rights and interests of its members which are at the disposal of private educational establishments, including those which threaten the rights set out in Article 2 (right to effective recourse) and Article 14 (right to fair trial) of the Covenant, are receivable and sufficiently well-founded to be brought before the ILO.

978. The SAGES also cites the discriminatory nature of the violations that have been and continue to be suffered by the complainant trade union. Article 26 of the International Covenant on Civil and Political Rights provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination”. In accordance with the case law of the Human Rights Committee, the term “law” in this context should be understood not in the constitutional sense, but in the material sense.

979. In the case in point, it is clear to the SAGES: (1) that natural or legal persons who are eligible to bring legal action are competent to submit for review by a national administrative court on the basis of their merits any decrees amending the rules of procedure which affect the implementation of those legal actions (Council of State, 17 December 2003, *Meyet et al.*, attached to the complaint); (2) that French trade unions are entitled to assist and represent in court any workers employed in the private sector who call on them and that national legislation does not make any distinction between trade unions with regard to this entitlement; (3) that it is therefore the Council of State which, by its ruling of 18 May 2005, introduced distinctions and restrictions which are to the detriment of the complainant trade union and that the statutes of the complainant trade union could not form the basis of its ruling, much less the only basis of the ruling, which is regrettably what nevertheless happened. The Council of State ruling of 18 May 2005 therefore constitutes illegal discriminatory treatment which is to the detriment of the complainant trade union and places a restriction on the rights set forth in the abovementioned standards of the ILO, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights, as it does not meet the requirements of Article 22(2) of the International Covenant on Civil and Political Rights and Article 11(2) of the European Convention on Human Rights. These restrictions not only fail to comply with the abovementioned requirements but also affect the SAGES exclusively and in a disproportionate way, since it was this union’s freedom of association and that of its teachers – which it has always undertaken to represent and defend – that was restricted by the ruling of 18 May 2005. They are thus discriminatory in nature, as may be seen by comparing this ruling with the abovementioned ruling on *Meyet et al.*

980. The SAGES was directly concerned by the issue brought before the highest legal authority and is directly concerned by the review and the recommendations by the ILO relating to the present case, because: (1) some of its members are likely to lodge labour-related appeals at the highest level, as described above; (2) its ability to employ its own workers is dependent in particular on its ability to defend itself at the highest level of appeal, given how expensive it is to engage a lawyer in the Council of State and the Court of Cassation (minimum 3,000 euros); (3) the outcome of the consideration of the case by the national court was a decisive factor in being able to take action to obtain an exemption from compulsory legal representation in labour disputes involving civil servants at the highest level of appeal in the Council of State.

981. The complainant trade union requests the competent bodies of the ILO to determine that there was indeed a violation of freedom of association by the respondent State as a result

of the ruling by the national court, for the reasons set out above. The complainant trade union also requests that it be compensated for the abovementioned violations. This should initially involve specific and non-equivocal recognition by the respondent State of the right of the SAGES to assist and represent workers in the labour courts, in the court of the first instance and at the level of appeal. This recognition requires new or amended legislation or regulations to prevent the Council of State from declaring again that the appeal of the SAGES is inadmissible, on the grounds that it has already been set aside. With regard to the issue of assistance and representation in labour matters at the highest level of appeal, it would be useful if, first, the Council of State could examine the merits of the appeal lodged by Mr Denis Roynard, taking into consideration the requests and recommendations put forward by the ILO; and second, if the Council of State were to declare this other appeal inadmissible, the national executive authority could reintroduce the exemption from compulsory representation by a lawyer in labour matters at the highest level of appeal. Although the national courts are primarily responsible for taking ILO standards into account in the national context, they must do this in accordance with the interpretation of these standards given by the ILO bodies.

- 982.** The trade union is of the view that it will not be possible to lodge an appeal on a point of law (*un pourvoi dans l'intérêt de la loi*) at the national level to obtain a review of the Council of State ruling of 18 May 2005. Nevertheless, if such an appeal were possible, if the Government of France wished to take such action and was prepared to cover all the legal costs and if the Council of State respected the right to freedom of association and recognized the complainant trade union's concern with the matter, such an appeal might constitute, if the trade union's arguments were incorporated in essence, effective and adequate recourse at the national level.

B. The Government's reply

- 983.** In a communication of 24 May 2006, the Government states that the complainant trade union had challenged before the Council of State Decree No. 2004-836 of 20 August 2004 amending civil procedure, in particular the provisions of article 39 repealing section R.517-10 of the Labour Code, under which "in labour matters, appeals at the highest level will be lodged, considered and judged in accordance with procedure and without representation by a lawyer in the Council of State and the Court of Cassation". By its ruling of 18 May 2005, the Council of State dismissed the application by the SAGES on the grounds that it was not receivable.
- 984.** In a communication of 14 March 2007, the Government underscores that, by a decision of 6 April 2006, the Council of State ruled on the receivability of the abovementioned ruling of 20 August 2004 amending civil procedure, further to an appeal lodged by the General Confederation of Labour (CGT) calling for the annulment for excess of authority (*excès de pouvoir*) of articles 8, 24, 25, 28, 29, 39, 40, 41, 42 and 43 of the Decree of 20 August 2004. The appeal by CGT was dismissed by the Council of State and the provisions of the Decree of 20 August 2004 were judged to be in accordance with the cited national and international standards.
- 985.** In its complaint to the Committee, SAGES maintains that the decisions of the French Government violate freedom of association because they deprive teachers of higher education (holders of the "agrégation") of the possibility of being assisted and represented by a trade union representative in the Court of Cassation on labour matters, thereby limiting the freedom of the teachers concerned to choose freely their own trade union defendant. Article 39 of the Decree of 20 August 2004 repealed section R.517-10 of the Labour Code, which provided that, in labour matters, appeals at the highest level were to be lodged, considered and judged in accordance with procedure and without representation by a lawyer in the Council of State and the Court of Cassation. Contrary to what was put

forward by the SAGES, the Council of State rulings of 18 May 2005 and 6 April 2006 in no way prevent the trade union from assisting its members at the first instance in the labour courts and at the appeal stage in the civil courts. Furthermore, trade union action is not limited to defending its members in court. Strikes (paragraph 7 of the Preamble of the Constitution of 27 October 1946) and collective bargaining (paragraph 8 of the abovementioned Preamble) are other forms of trade union action. In addition, compulsory representation by a lawyer in the Court of Cassation would not in itself constitute a violation of freedom of association. In view of the establishment by the legislator of a mechanism to provide legal assistance, compulsory representation by a lawyer does not violate the right of those subject to trial to seek effective recourse in court (Council of State, 21 December 2001, Mr and Mrs Hofmann, page 652). Likewise, the monopoly held by the lawyers of the Court of Cassation (*avocats aux conseils*) has been deemed by the European Court of Human Rights to meet the requirements for a fair trial (26 July 2002, *Meftah v. France*).

986. The SAGES also claims that the French Government's actions prevent it from assisting and representing teachers in the Court of Cassation in labour matters, irrespective of whether they are holders of the "agrégation" or not, and therefore constitutes an infringement of the freedom of trade unions to choose their own subjects and areas of intervention. It is worth recalling in this respect that French legislation reserves for professionals the monopoly on legal representation (article 4 of the Act of 31 December 1971 reforming certain judicial and legal professions for lawyers, article 1 of Order No. 45-2591 of 2 November 1945 on the status of solicitors and the Order of 10 September 1917 on the lawyers of the Court of Cassation). Thus, in civil matters, representation by a lawyer of the Court of Cassation is normally compulsory. According to article 973 of the new Code of Civil Procedure, "parties shall be obliged, unless otherwise provided, to appoint a lawyer to conduct proceedings at the Council of State and the Court of Cassation". The purpose of this appeal on a point of law at the highest level is to try and make the Court of Cassation determine that the ruling is not in conformity with the rules of law (section 604 of the new Code of Civil Procedure), calling upon lawyers who have specialized knowledge of these high-level procedures is therefore justified. At the European level, Directive No. 98/5/EC of the European Parliament and the Council of the European Community of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained provides that "in order to ensure the smooth operation of the justice system, Member States may lay down specific rules for access to supreme courts, such as the use of specialist lawyers" (article 5, paragraph 3.2). It is worth highlighting in this regard that, in many Member States of the European Union, representation by a lawyer is compulsory in civil and even social matters in the highest court of appeal, either by a specialized lawyer (Austria, Belgium, Denmark, Germany, Greece, Italy and Norway) or by a non-specialized lawyer (Luxembourg, Portugal, Spain and the United Kingdom).

987. The SAGES maintains, moreover, that the French Government's legislation prevents it from obtaining recognition as an employer and therefore infringes its freedom to employ its own workers and more broadly speaking threatens its freedom to organize its internal activities. The elements which have been cited in no way involve a violation of freedom of association. Article 39 of the Decree of 20 August 2004 and the two Council of State rulings of 18 May 2005 and 6 April 2006 in no way infringe on the freedom of the SAGES to organize its internal activities. Thus, the fact that the Council of State rejected by its ruling of 18 April 2005, and on the basis of a review of receivability, the appeal lodged by the SAGES against article 39 of the Decree of 20 August 2004 on the grounds that the SAGES lacked legal interest and was not competent to take action, does not in any way affect the freedom of the SAGES to organize its internal activities.

988. Lastly, the SAGES cites discriminatory treatment with regard to freedom of association. The abovementioned legislation does not constitute discrimination against the SAGES as it is intended to apply to all trade unions and occupational associations. None of the factors set out above provide evidence of the violations of freedom of association referred to by the SAGES.

C. The Committee's conclusions

989. *The Committee notes that the complainant trade union alleges that Decree No. 2004-836 amending civil procedure, which amends the Labour Code, makes representation by a lawyer compulsory in appeals at the highest level, thereby depriving it of the right to represent its members and infringing the right of workers' organizations to organize freely their administration and activities.*

990. *The Committee notes that Decree No. 2004-836 of 20 August 2004 repeals section R.517-10 of the Labour Code, which provided that "in labour matters, appeals at the highest level shall be lodged, considered and judged in accordance with procedure and without representation by a lawyer in the Council of State and the Court of Cassation". Representation by a lawyer is now compulsory in labour matters (in private law), following the adoption of Decree No. 2004-836. The Committee also notes that representation by a lawyer is compulsory at the highest level of appeal in administrative matters. In addition, the Committee notes that the complainant trade union lodged an appeal to set aside the Decree repealing the exemption from compulsory representation by a lawyer in labour matters and that the French Council of State was competent at the first and last instances to give a ruling on this appeal. In its ruling of 18 May 2005, the Council of State dismissed the appeal by the SAGES because "the contested provision in itself in no way undermines the rights of the officials concerned under their statutes, the prerogatives of the bodies to which they belong or the conditions in which they exercise their duties", "and consequently, the Minister of Justice has good cause to maintain that the claimant is not affected and is therefore not entitled to request that the contested regulatory provision be set aside", and "the application is therefore not receivable and must be rejected". The Committee notes that, according to the Government, on 6 April 2006, the Council of State ruled on the receivability of the Decree, further to an appeal by the General Confederation of Labour, and that the Decree was judged to be in accordance with both the national and international standards which were cited. The Committee notes that the SAGES claims that the decision by the Council of State violates the rights of some of its members to be assisted or represented, that it violates the right of the SAGES to organize its own administration and activities and to develop its own programme of action, that its status as employer was not taken into consideration, that the Council of State should have heard the case on its merits and should have reached a decision on the issue of the interpretation of its statutes by an ordinary court and that there was discriminatory treatment.*

991. *The Committee notes that the allegations of the SAGES are directed more specifically against the Council of State ruling of 18 May 2005 than the Decree in question. The Committee observes that the SAGES alleges that the Decree infringes the freedom of association of qualified teachers (holders of the "agrégation") who are employed by private teaching establishments or who are at the disposal of, or seconded to, private establishments, because it deprives workers of the possibility they previously enjoyed of being assisted and represented at the highest level of appeal by the SAGES; it also denies the SAGES the possibility of defending its own interests as an employer or of assisting and representing workers at the highest level. In addition, the SAGES alleges that the general wording of the Council of State ruling of 18 May 2005 limits this possibility in courts of first instance and at the appeal stage. Teachers belonging to the SAGES – or those wishing to join it or call upon its services to defend their rights before the labour court against the private establishment for which they work or used to work – are therefore, according to*

the SAGES, deterred from joining the SAGES by the Council of State ruling of 18 May 2005. The Committee takes note of the Government's arguments that, contrary to what was put forward by the SAGES, the Council of State rulings of 18 May 2005 and 6 April 2006 in no way prevent the trade union from assisting its members in a labour court of first instance and at the appeal stage in a civil court. The Committee notes that the Government then underscores that trade union action is not limited to defending its members in court, as strikes and collective bargaining are other forms of trade union action. The Government also states that compulsory representation by a lawyer in the Court of Cassation would not in itself constitute a violation of freedom of association (it cites in this regard decisions of the Council of State and the European Court of Human Rights). Moreover, the Committee notes that the Government underscores that French legislation reserves for professionals the monopoly on legal representation and stresses that appeals on a point of law at the highest level justify recourse to lawyers who have specialized knowledge of processing appeals at that level. At the European Union level, Directive No. 98/5/EC provides that "in order to ensure the smooth operation of the justice system, Member States may lay down specific rules for access to supreme courts, such as the use of specialist lawyers" (article 5, paragraph 3.2). The Committee notes that the Government points out that, in many Member States of the European Union, representation by a lawyer is compulsory in civil and even social matters in the highest court of appeal, either by a specialized lawyer (Austria, Belgium, Denmark, Germany, Greece, Italy and Norway) or by a non-specialized lawyer (Luxembourg, Portugal, Spain and the United Kingdom). The Government underscores that the monopoly of the lawyers of the Court of Cassation (avocats aux conseils) has been deemed by the European Court of Human Rights to meet the requirements for a fair trial.

992. The Committee recalls that its mandate is to determine 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**, fifth (revised) edition, 2006, para. 6]. Recalling also that freedom of association implies not only the right of workers and employers to form freely organizations of their own choosing, but also the right for the organizations themselves to pursue lawful activities for the defence of their occupational interests [see **Digest**, op. cit., para. 495], the Committee considers that the restriction imposed on trade unions to represent their members in cases of appeal at the highest level or the restriction imposed on members to be represented by a lawyer rather than by their trade union, does not in itself constitute undue interference with this principle. The Committee is also of the view that the right of trade unions to organize their own administration and activities and to formulate their own programmes is not affected by the introduction of compulsory representation by a lawyer in the national courts. The Committee considers, however, that the introduction of a costly and previously non-existent obligation to be represented by a lawyer of the Court of Cassation, in other words a specialized lawyer, could, among other things, result in limiting the number of appeals lodged by trade unions or workers. The Committee also recognizes that this Decree could affect the rate of trade union membership, because fewer workers might be interested in joining trade unions if one of the trade union functions is removed. The Committee therefore requests the Government to monitor closely the consequences of this Decree, in consultation with the trade unions, and to verify in particular that it does not have any adverse or unduly unbalanced effects on the capacity of trade unions to represent their members, in particular by facilitating their appeals to the Court of Cassation. The Committee requests the Government to keep it informed in this regard.

993. Furthermore, the Committee takes note of the complainant organization's argument concerning the infringement of its rights to defend its own interests as an employer and of the Government's reply. Considering its mandate, as described above, the Committee is of the view that its mandate does not extend to making decisions on issues involving general

labour rights and not freedom of association. The issue of the status of the SAGES as an employer is not relevant to freedom of association.

994. *The Committee takes note of the allegation of discriminatory treatment lodged by the complainant organization. According to the latter, the Council of State ruling of 18 May 2005 constitutes discriminatory treatment against the complainant trade union and is an infringement of the rights set out in the ILO standards. The SAGES adds that, given that these restrictions affect the SAGES exclusively and in a disproportionate way, since it was this union's freedom of association and that of the teachers which was restricted by the Council of State's ruling of 18 May 2005, those restrictions are of a discriminatory nature. The Committee takes note of the Government's reply that the legislation in question does not constitute discrimination against the SAGES because it is designed to apply to all trade unions and occupational associations. In these circumstances and recalling that it considers that the Decree is not in violation of the principles of freedom of association, the Committee considers that there is no discrimination in this case.*

The Committee's recommendation

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

The Committee requests the Government to monitor closely the consequences of Decree No. 2004-836, in consultation with the trade unions, and to verify in particular that it does not have any adverse or unduly unbalanced effects on the capacity of trade unions to represent their members, in particular by facilitating their appeals to the Court of Cassation. The Committee requests the Government to keep it informed in this regard.

CASE NO. 2521

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

Complaint against the Government of Gabon presented by the Gabonese Confederation of Free Trade Unions (CGSL)

Allegations: The complainant organization alleges interference in its activities, suspensions of employment contracts, dismissals, threats, arbitrary arrests and detentions of trade unionists, as well as illegal mass dismissals on the pretext of economic grounds

996. This complaint is contained in a communication from the Gabonese Confederation of Free Trade Unions (CGSL) dated 25 August 2006.

997. The Government of Gabon sent its observations in a communication dated 26 February 2007.

998. Gabon 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

- 999.** In its communication dated 25 August 2006, the CGSL alleges that the Government did not respect its commitments and interfered in the activities of the trade union. The trade union also alleges that arbitrary arrests and detentions took place, as well as the suspension of contracts and illegal mass dismissals.
- 1000.** The complainant organization indicates that the Government is engaging in actions which tend to favour trade union organizations that are “structured and not organized either vertically or horizontally” and are not representative, by granting them financial means to enable them to participate in international conferences and other of the Republic’s institutions, without these being represented in at least two of the nine provinces in Gabon.
- 1001.** Likewise, the complainant states that the Government has not adhered to the conclusions contained in the general report of the tripartite seminar concerning the representativeness of occupational employers’ and workers’ organizations, held in Libreville on 5, 6 and 7 October 2004 with the participation of an expert appointed by the ILO on the express request of the Government of Gabon. Four recommendations were adopted by the participants, including the establishment of an electoral committee before the end of November 2004 and the organization of trade union elections in March 2006. The result was the creation of “interunion associations” which are not formal trade union structures under the terms of Convention No. 87.
- 1002.** The CGSL alleges that the Government interfered in its internal affairs by deciding to exclude the members of the properly elected executive committee and to replace them in national and international institutions, such as the Maritime Conference or the 95th Session of the International Labour Conference in 2006.
- 1003.** The complainant also states that the Government unilaterally denounced a bipartite agreement relating to the grant it obtained following a power struggle, the new distribution of which has been carried out according to the wishes of the Government without the slightest concession.
- 1004.** Likewise, the labour inspector prohibited one of the members of the complainant organization, already a trade union delegate of the CGSL, from being elected staff delegate, although it was a choice all the workers had made. The complainant stresses that the attitude of the labour inspector constitutes a violation of ILO Conventions Nos 87 and 98.
- 1005.** The CGSL also alleges the violation of Conventions Nos 87, 98 and 144 and of the provisions of article 3.5 of the Constitution of the ILO by the Government, following the appointment of members of the constituent assembly of the Economic and Social Council (CES), which extended its mandate without any pre-established objective criteria, with more than 60 unions, all sectors taken together, in a country of less than 2 million inhabitants. According to the CGSL, the most serious aspect is that the CES still has no organizational law adapted to the Republic’s new constitutional provisions.
- 1006.** In the same communication, the complainant organization alleges the occurrence of mass arrests and arbitrary imprisonments of its members: the Secretary-General of the Inter-occupational Trade Union of Ogooué Lolo, for having refuted the allegations of ill-intentioned gendarmes; and the provincial representative of Moyen Ogooué, Thierry

Kerry, an employee of the RIMBUNAN enterprise in Lambaréné, who spent two months in prison with three of his union members. In this last case, everything began with his appointment as provincial representative of the CGSL, and his fixed-term contract was interrupted before its expiry. Being accommodated by the enterprise, the complainant organization considered that he should be paid damages, in accordance with the document elaborated by the provincial labour director, Mr Boulepa. A judicial procedure was opened in which the gendarmerie, the police, the president of the court and the provincial labour director were implicated. These three people were imprisoned not for having asked for their rights to be respected, but primarily for their membership of the trade union.

- 1007.** Mass dismissals were announced, using economic grounds as a pretext, while Decree No. 00407 of 16 April 1976 is not adapted to the new provisions of Act 3/94 of 21 November 1994 (amended by Act 12/2000 of 12 October 2000), article 59, concerning the Standing Committee for Economic and Social Conciliation, the only body competent to assess the economic nature of dismissals.
- 1008.** Meye Sima, trade union official of the FLEEMA affiliated to the CGSL, was held in police custody on a number of occasions, and was imprisoned and suspended for a period of six months, after his employer, the enterprise Total Marketing, accused him of theft. This model employee, who had excelled in the management of a profit centre for oil products, had his life turned upside down when he was elected staff delegate on the CGSL list, and then trade union official of the FLEEMA affiliated to the CGSL. The complainant states that this trade unionist was dismissed although no proof of his guilt was ever established.
- 1009.** Jean Bernard Mougounguy, a member of the federal office of the FLEEMA affiliated to the CGSL, was questioned by the Konltang gendarmerie and the judicial police of Libreville on a number of occasions concerning a fatal car accident, although he had not been driving the car and neither the results of the accident report nor of the inquiry were ever known. Mr Mougounguy suffered ill-treatment at the hands of the police as a result of his trade union activities. According to the CGSL, the enterprise “Ciments du Gabon”, the employer of the FLEEMA/CGSL trade unionist, wanted to part with him.
- 1010.** Gilbert Ngorro, Secretary-General of the works union COMILOG, member of the FLEEMA affiliated to the CGSL, received threats from the enterprise’s general management, during a working session, for the stands he took. Mr Ngorro was arrested and then transferred and held in police custody at the CEDOC in Libreville. This situation led to a nine-day strike which paralysed the economic activity of the COMILOG. The reasons for this arrest have never been clarified and the request for a statement has remained unanswered.
- 1011.** Mr Mandza, a member of the executive committee of the COMILOG works union, was held in police custody before being dismissed with the complicity of the departmental inspectorate of Lebombi Franceville, following an accusation of theft by his employer. Mr Mandza was questioned and held by the police for two days until the dismissal authorization was issued by the labour inspector, following an inquiry in which Mr Mandza’s guilt was not established. According to the complainant organization, the objective of the administrative, judicial, political and labour leaders and authorities was to remove anyone who tried to perform trade union activities in the COMILOG enterprise and throughout the province on behalf of the CGSL.
- 1012.** Two CGSL members were dismissed from the Gabon Surveillance Society (SGS) for having been candidates in the elections of staff delegates, for having belonged to the CGSL and encouraging other employees to strike. A third person who had a CGSL membership card was able to keep his job after having renounced his membership of the CGSL, under pressure; the COSYGA being the only trade union authorized in the SGS.

1013. Lastly, Mr Taleyra's job site in Ngongue was the scene of a repression of workers and their families who had requested better living and working conditions, by the gendarmerie, who set off from Libreville on the Government's instructions.

B. The Government's reply

1014. In its communication of 26 February 2007, the Government of Gabon states that it does not favour any trade union organization that is "structured and not organized either vertically or horizontally". All workers' organizations are treated equally by the Government. Of course, the problem of their representativeness has not yet been solved, but an estimation of this representativeness has been possible by taking into consideration certain objective criteria listed in the Labour Code and observations in the field. Thus, an order has been issued organizing the trade union confederations into a hierarchy for the purposes of distributing the State-allocated grant. The CGSL is in second position in this hierarchy. Nevertheless, in view of the internal dispute which split this confederation into two branches following contested elections, the share of the grant that falls to the confederation has been frozen until the dispute is resolved. Likewise, it does not seem reasonable to include in delegations to international meetings the members of each of the two groups before their disagreement has been settled.

1015. On the matter of the tripartite workshop on representativeness, the Government indicates that the workshop did make a certain number of recommendations, including the organization of trade union elections in order to determine the representativeness of the country's trade unions. The Government adds that the estimated budget for this operation, established by the services of the Ministry of Labour in 2003, was 1.5 billion CFA francs. Given the urgency of the establishment of the Standing Secretariat for Social Dialogue, and in order to make industrial relations more harmonious, the representatives of the trade union confederations, brought together by the Minister of Labour on 20 October 2006, subscribed to his proposal whereby, until the elections were held, representativeness should be in keeping with the hierarchy established in Order No. 0022/MTE/CAB dated 23 September 2005, concerning the distribution of the grant allocated to trade union confederations. The trade union representatives nevertheless expressed the wish that these elections be held in 2008. The CGSL would like, even demands, that the elections be held in 2007. The support for the proposal of the Ministry of Labour was formalized by an interim agreement signed by all the representatives of the trade union confederations and submitted to the Council of Ministers which ratified it.

1016. With reference to Government interference in the activities of the CGSL, the Government states that it is difficult, given the anonymity maintained by the CGSL, to explain the situation denounced by the confederation. In effect, the Government would like to know which delegate is concerned and in which enterprise the events occurred.

1017. As to the violation of Conventions Nos 87, 98 and 144, the Government indicates that it is difficult to establish a link between the appointment of members of the Economic and Social Council (CES) and the application of those Conventions. However, with regard to representatives of civil society in the CES, and in particular of workers' organizations, only the most representative sit on it, which brings us back to the problem of representativeness. At present, all the confederations having signed the abovementioned interim agreement sit on this high institution of the Republic.

1018. Furthermore, the Government adds that the Standing Committees for Economic and Social Conciliation, established by article 302 of the Labour Code, are not yet operational as the implementing decrees have not yet been published, specifically the decree establishing the structure of the Standing Committees for Economic and Social Conciliation. The

Government indicates that it is an exaggeration and even imprecise to maintain that this situation promotes “mass dismissals on the pretext of economic grounds”.

- 1019.** In effect, according to article 59 of the Labour Code, “An employer who considers carrying out an individual or collective dismissal on economic grounds must provide the staff delegates, the officials of the most representative trade union and the members of the Standing Committee for Economic and Social Conciliation with the necessary information on the planned dismissals.” Pending the decree establishing the structure of the Standing Committees for Economic and Social Conciliation, the enterprises speak to the staff delegates and the trade union officials, and require the authorization of the labour inspector before proceeding with any dismissal on economic grounds. In this way, the procedure of dismissal on economic grounds is kept under control.
- 1020.** As concerns the arbitrary arrests and detentions of members of the CGSL, the Government has sent the following information: Thierry Kerry Nziengui was arrested, as well as four other former workers from the enterprise RIMBUNAN, for “verbal death threats, violence and assault”. The Government specifies that the case has been heard by a court.
- 1021.** The case of Meye Sima was the subject of a conciliation hearing before the labour inspector before being transmitted to the labour court. The Government indicates that the employer had lodged a complaint following the announcement of numerous cases of theft. The inquiry led to the arrest of Meye Sima, presumed perpetrator of the “misappropriation of gas cylinders”. A report of partial conciliation was established by the labour inspectorate, then transmitted to the competent court to rule on the request for damages. This case is under examination before the labour court.
- 1022.** Mr Mougounguy, working at Ntoun cemetery, caused a fatal accident when he went to do some personal shopping in a neighbouring village without permission from his superiors, in violation of the provisions of the work regulations which prohibited the use of service vehicles outside the perimeter of the town. The Government indicates that a request of authorization for dismissal was made by the employer to the competent labour inspectorate, which gave its agreement. The Government adds that no arrest or ill-treatment occurred.
- 1023.** Mr Ngorro was arrested, then transferred and held in police custody at the General Directorate of Documentation Services (CEDOC), so that his identity could be checked by the immigration services. The Government specifies that there was a doubt as to his nationality, as those around him referred to him as being Congolese. This doubt was the only reason for his arrest. Nevertheless, in view of his status as Secretary-General of the enterprise union, this arrest caused a nine-day collective work stoppage which paralysed the enterprise’s activities. The Government adds that Mr Ngorro was released after his identity had been checked. He has never again been questioned on this matter and freely exercises his trade union activities.
- 1024.** Mr Mandza was held in police custody following a complaint made by his employer concerning a theft of oil. The Government indicates that the inquiry established the guilt of the accused in organizing a network for the theft of oil at the expense of the COMILOG. Mr Mandza, who acknowledged the facts, was dismissed for gross negligence following authorization from the labour inspector.
- 1025.** As regards the anti-union dismissals and suspensions of contracts of Mavoungou Moukelia and Juvéanal Mbogou, members of the CGSL in the Gabon Services (sic.) Society (SGS), the Government indicates that the persons concerned were dismissed following the distribution of leaflets calling on the other workers to pursue the strike, although

negotiations had just been held and work had returned to normal. The employer had warned the people concerned about such conduct and ended up by dismissing them.

- 1026.** Concerning the threats and repression by the forces of the gendarmerie, this case relates to a collective dispute in 2001 between the enterprise LUTEXFO SOFORGA, of which Mr Taleyra is the President Director-General, and his workers at the Doumé job site. The Government indicates that this dispute resulted from a strike for which the strike notice was not respected, triggered on the instigation of five workers, including Nicaise Mba Allogho and two others answering to the assumed names of “Minister” and “Teacher”. Everything allegedly began with the CGSL, not represented in the enterprise at the time, being cited in a dispute opposing Mr Mba Allogho and LUTEXFO. A member of the CGSL arrived at Doumé and his attitude did not help the situation: use of LUTEXFO vehicles to cut across the site, publicity, hindering workers from doing their jobs. The Government adds that the events caused the enterprise a loss of 1.6 billion CFA francs. Consequently, dismissal measures were taken against the ringleaders and those whose presence constituted a danger for the staff delegates accused of taking the employer’s side.
- 1027.** The Government specifies that this dispute was certainly one of the consequences of the failure to satisfy recurrent grievances contained in the list of claims and relating to general working conditions. The enterprise LUTEXFO was ordered by the Ministry of Labour to respond favourably to the grievances submitted. Some of them were satisfied, namely the fitting out of an infirmary at the Doumé camp, the provision of medicines to a value of 3 million CFA francs, the arrangement of bimonthly medical visits by a doctor based in Lastourville. The Government adds that one of the determining factors triggering and prolonging this dispute was the well-known absence of worker education and trade union training; the workers conducted the dispute in a manner which bears witness to a clear lack of awareness of the procedures for the settlement of collective labour disputes. This was followed by the excessive involvement of the CGSL which, by being both judge and judged, greatly overstepped its powers. In effect, a trade union, when defending its members’ interests, cannot also play the role of conciliator – that pertains to the labour administration. In the end, the desire expressed by the employer to respond favourably to the workers’ grievances helped to soothe the tensions and calm was restored, continuing to this day.

C. The Committee’s conclusions

- 1028.** *The Committee observes that this case relates to a number of allegations, namely allegations of interference by the public authorities in trade union activities, including with regard to the appointment of trade union representatives to national and international conferences, which occurs without consultation with the organization; suspensions of employment contracts, dismissals, threats, arbitrary detentions and arrests of trade unionists, as well as mass illegal dismissals using economic grounds as a pretext. As regards the allegations relating to favouritism by the Government, the Committee notes the Government’s reply whereby it does not favour any trade union organization, as an order establishing a hierarchy among the trade union confederations was signed for the purpose of the distribution of State-allocated grants.*
- 1029.** *The Committee notes that the grant initially earmarked for the complainant organization was frozen because of the internal dispute which divided the confederation following contested elections, and that it would remain so until the end of the dispute. The Committee also notes that the Government did not consider it reasonable to include in delegations to international meetings the members of each of the two groups before their disagreement had been settled. The Committee invites the Government to inform it as soon as the dispute is settled.*

- 1030.** *With regard to the matter of the interference of the labour inspector, who prohibited the trade union delegate from the CGSL from being elected to the position of staff delegate, the Committee invites the complainant organization to provide further information, particularly concerning the delegate in question and the enterprise in which these events occurred.*
- 1031.** *The Committee notes that a certain number of problems raised in this case, as well as the general question relating to the need to establish a harmonious professional climate, are linked to the representativeness of trade union organizations. The Committee therefore invites the Government to pursue its efforts in this regard and recalls that the technical assistance of the Office is at its disposal in order to clarify the situation and to put in place a mechanism to determine whether trade union organizations are representative or not.*
- 1032.** *On the matter of allegations relating to the mass arrests and arbitrary imprisonments allegedly suffered by members of the complainant organization, the Committee notes the explanations provided by the Government, as well as the documents attached, showing that these arrests were not carried out owing to the trade union activities of the workers in question. Nevertheless, the Committee invites the Government to keep it informed of the procedure under way before the labour court concerning the request for damages made against Meye Sima, trade union delegate of the FLEEMA affiliated to the CGSL, and to provide the judgements handed down in the cases of Thierry Kerry Nziengui, representative of the CGSL for the province of Moyen Ogooué, and the other former employees of the enterprise RIMBUNAN.*
- 1033.** *In respect of the arrest of Mr Ngorro, Secretary-General of the works union COMILOG and member of the FLEEMA affiliated to the CGSL, the Committee notes the Government's reply whereby this arrest was for the purpose of carrying out an identification control. Nevertheless, the Committee expresses its deep concern as to the procedure used, namely holding him in police custody, in order to carry out this control.*
- 1034.** *With regard to the alleged anti-union dismissals and suspension of contracts of Mavoungou Moukelia and Juvénal Mbogou, members of the CGSL and candidates for the election of staff delegates, the Committee notes the Government's reply whereby the persons in question had been dismissed following the distribution of leaflets calling the other workers to pursue the strike, while negotiations had just been held and work had returned to normal. The Committee wishes to recall, in this regard, that freedom of association implies not only the right of workers and employers to form freely organizations of their own choosing, but also the right for the organizations themselves to pursue lawful activities for the defence of their occupational interests. While it has no detailed information concerning this specific case, the Committee considers that, as a general rule, the distribution of leaflets calling on workers to take industrial action is a legitimate trade union activity. The Committee therefore invites the Government to review the workers' situation and seek their possible reinstatement in the enterprise.*
- 1035.** *As to the repression of the workers on Mr Taleyra's job site suffered at the hands of the gendarmerie, the Committee notes the complainant organization's allegations, as well as the Government's reply, whereby the matter related to a disagreement resulting from a strike for which the period of notice had not been respected and to the failure to satisfy recurrent grievances contained in the list of claims of the enterprise LUTEXFO SOFORGA. Noting that, according to the Government, the employer's favourable reply to the workers' grievances helped to ease tensions and that calm was re-established, the Committee considers that this matter does not call for further examination unless the complainant organization wishes to provide more detailed information.*

The Committee's recommendations

1036. *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 inform it as soon as the dispute that arose within the Gabonese Confederation of Free Trade Unions (CGSL) is settled.*
- (b) *Concerning the representativeness of the trade union organizations, the Committee requests the Government to pursue its efforts in this regard, and recalls that the technical assistance of the Office is at its disposal in order to clarify the situation and to put in place a mechanism to determine whether trade union organizations are representative or not.*
- (c) *The Committee requests the Government to keep it informed of the procedure under way before the labour court concerning the request for damages lodged against Meye Sima, and to provide the judgements handed down in the case of Thierry Kerry Nziengui and the other former employees of the enterprise RIMBUNAN.*
- (d) *The Committee requests the Government to review the situation of workers who were dismissed for having distributed leaflets inciting to strike action, and seek their possible reinstatement in the enterprise.*

CASE NO. 2506

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

Complaint against the Government of Greece presented by

- the International Transport Workers' Federation (ITF)
- the Pan-Hellenic Seamen's Federation (PNO) and
- the Greek General Confederation of Labour (GSEE)

Allegations: The complainants allege that the Government has issued a "Civil Mobilization Order" (requisition of workers' services) of indefinite duration to put an end to a legal strike of seafarers on passenger and cargo vessels, which do not constitute essential services

1037. The complaint is contained in a communication from the International Transport Workers' Federation (ITF) and the Pan-Hellenic Seamen's Federation (PNO) dated 12 July 2006. In a communication dated 11 August 2006, the Greek General Confederation of Labour (GSEE) associated itself to the complaint and made additional allegations.

1038. The Government replied in communications dated 14 September and 30 October 2006.

- 1039.** Greece has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 1040.** In their joint communication of 12 July 2006, the ITF and its affiliate PNO, which is the supreme Greek trade union organization for seafarers with 14 individual affiliates, indicated that the PNO Executive Board (which is the Federation's third in order constitutional body – the first being the Congress and the second the General Council) decided at its meeting of 1 February 2006, in implementation of the decision of the PNO General Council of 16 December 2005: (i) to issue a press release which would communicate the intention of the PNO to proceed to rolling strikes on 16 February 2006 for the resolution of long-standing demands appertaining to employment and social security issues; (ii) to address a letter to the competent Ministry of Merchant Marine and its services as well as the employers' and workers' organizations notifying the commencement, the length and the prospect of escalation of the strike. In particular, the PNO demands were: to secure the constitutionally safeguarded right to work and ensure the immediate absorption of all unemployed seafarers; to man coastwise passenger vessels for ten-month periods; to revoke the so-called "approving acts" of ship registration; to double provident fund benefits for officers and ratings; to establish an Independent Special Unemployment Fund; to grant exemptions for Greek seafarers (officers and ratings) from income tax or at least reinstate the special taxation regime for Greek seafarers (Act No. 3323/55) and abolish Act No. 2214/94 for both active and retired seafarers; to cover from the state budget all deficits in the Seafarers' Retirement Fund (NAT) in order to ensure payment of the main pensions granted by NAT as well as payment of provident fund benefits for officers and ratings and auxiliary pensions; to start collective bargaining negotiations with immediate effect for the conclusion of national collective agreements for 2006 in accordance with the PNO pay claims; and to immediately withdraw the draft legislation on the "upgrading and restructuring of maritime education and other provisions".
- 1041.** Following the delivery of these demands and the expiry of the time limit, as prescribed by the relevant Greek legislation, the PNO Executive Board met on 1 February 2006 and decided by secret ballot to announce a 48-hour warning strike in all ship categories from Thursday, 16 February 2006 at 6 a.m. to Saturday, 18 February at 6 a.m., which could be escalated. On 16 February 2006, a meeting took place between the Minister of Merchant Marine and the PNO Executive Board which confirmed in principle the Ministry's unfavourable and negative position vis-à-vis the demands of the Federation. By decision of the PNO Executive Board, the strike continued from 18 to 20 February 2006 and then from 20 to 22 February 2006. In a petition lodged on 20 February 2006 before the Piraeus Court of First Instance (Procedure of Interim Injunction Measures), the Association of Coastwise Passenger Vessels claimed that the strike was illegal and abusive and asked the court to prohibit or suspend it. The court dismissed the petition.
- 1042.** On 21 February 2006, the Prime Minister, acting on a proposal by the Minister of Merchant Marine, issued a "Civil Mobilization Order" (requisition of workers' services) for Greek seafarers effective from 6 a.m. on 22 February 2006 and until further notice (i.e., for an indefinite period), applicable to crews on passenger, R/R passenger and R/R cargo vessels of the merchant marine. Despite the Civil Mobilization Order, the strike continued for 36 hours and the PNO Executive Board decided on Thursday, 23 February 2006 to suspend the strike from 6 p.m. on that day.
- 1043.** According to the complainants, the Government's Civil Mobilization Order was in clear breach of Convention No. 87 ratified by Greece, and a number of other national, EU and

Council of Europe provisions which established non-obstructed exercise of freedom of association. It was also an attack on the right of personal freedom recognized in article 5 of the Greek Constitution and contrary to the ILO Maritime Labour Convention, 2006. The complainants also recalled Case No. 2212, examined by the Committee in March 2003 (330th Report), which concerned the same parties and involved similar facts. The complainants emphasized that the Committee recommended, *inter alia*, that “unilateral measures are not conducive to harmonious industrial relations and are contrary to Conventions Nos 87 and 98” and requested the Government “to refrain from such measures in the future”. Finally, the complainants recalled that transport does not constitute an essential service in the strict sense of the term according to the Committee, and therefore the right to strike in that sector should not be subject to a prohibition. They concluded by noting that to date, the Civil Mobilization Order was still in force.

1044. In its communication of 11 August 2006, the GSEE associated itself to the complaint and added that over the last 32 years, Governments in Greece, without exhausting proportionally milder measures and procedures, had often resorted to civil mobilization that under threat of severe penalties compelled workers to terminate their strike action and return to work. The legal ground for the civil mobilization of workers on strike was Legislative Decree (LD) 17/1974 on “civil emergency planning” the validity of which was disputed by an overwhelming majority of the country’s jurists. LD 17/1974 was passed in September 1974, a few weeks after the fall of the seven-year military dictatorship in Greece (1967–74), before parliamentary elections and before the adoption of the 1975 Constitution currently in force. In a period of transition in Greece from an authoritarian dictatorial regime to democracy, LD 17/1974 aimed at regulating crucial matters of extreme emergency. Nevertheless, even this particular LD tolerated the existence of a state of emergency only in cases of “natural or other, technological or war-related events that result or threaten to result in extensive losses–damages and destruction of the human and material resources of the country or to hinder and disrupt the social and economic life of the country”. LD 17/1974 did not stipulate strike action as a cause of disruption of the social and economic life, as the Government – and previous Governments – had alleged, hence the civil mobilization imposed on striking workers, in this case maritime workers, was unjustified and unfounded. Furthermore, the issuing of LD 17/1974 was followed by the promulgation of the Greek Constitution in June 1975. The right to strike was for the first time recognized in article 23 of the Constitution. Exceptionally, the requisition of personal services was allowed in the event of war or conscription or for meeting the defence needs of the country, or in cases of social necessity resulting from natural disasters, or in situations likely to endanger public health (article 22, paragraph 4). Governments in Greece have been making use of civil mobilization in order to end “annoying” strikes ever since, invoking article 22, paragraph 4, of the Constitution even though the prerequisites do not exist and civil mobilization (requisition of personal services) of strikers cannot be acceptable. Strike action in itself cannot be interpreted as constituting a case of emergency, even if a court declared it illegal and abusive. Moreover, the particular strike by PNO was declared legal by the Piraeus Court of First Instance (ruling 1701/2006). Given that, in their overwhelming majority, strikes in Greece were declared illegal and/or abusive by courts, this constituted an exceptional ruling in the judicial history of Greece.

1045. The complainants added that the Civil Mobilization Order – seafarers and crew members of all ships under Greek flag comprising passenger ships, carrier ships, ferry boats – was enacted as from 22 February 2006 and pending a new decision to address the matter, it indefinitely remained in force and was still in force at the time of the complaint, five months being by all accounts a considerably long period of time that did not justify a state of national emergency (e.g. public health hazards, particularly on the islands). The complainants acknowledged that in Greece, a country with many inhabited islands, maritime transport played an important role in ensuring the regular function of the social

and economic life of the islands' inhabitants. However, given that important works of infrastructure and alternative methods of transport (e.g. many airports on the islands) had been developed to ensure the regular provision of food supplies and the health care of their inhabitants, the prohibition of strike action and the compulsory return to work of seafarers, constituted an obviously disproportionate infringement of their fundamental rights. It was therefore evident that, under threat of penalties and by the imposition of civil conscription, seafarers were not able to effectively exercise the right to bargain collectively with their employers while their right to freedom of association was seriously violated.

B. The Government's reply

- 1046.** In a communication dated 14 September 2006, the Government indicated that the principles, rights and requirements set out in Conventions Nos 87 and 98, ratified by Greece, were embodied in the Constitution of Greece which also contained a fundamental democratic principle according to which "all persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe on the rights of others or violate the Constitution and moral values" (article 5, paragraph 1). These rights included the right to protection of health (article 5, paragraph 5, of the Constitution) which, like all the rights of the human being, both as an individual and as a member of society, were safeguarded by the State (article 25, paragraph 1, of the Constitution). The latter had the right to require from all citizens to perform their duty of social and national solidarity (article 25, paragraph 4, of the Constitution). As commonly acknowledged, having and exercising a right did not imply that the person was released from fundamental obligations and the Constitution of Greece disallowed the abusive exercise of a right. As explained below, the decision of the Government to proceed to the civil mobilization of seafarers had as its exclusive objective and result the protection of the public health, for which the Constitution provided for the requisition of personal services.
- 1047.** With regard to the background of the case, the Government indicated that the PNO announced by means of a document the calling of a 48-hour warning pan-Hellenic strike of seafarers in all ship categories, with the prospect of escalating it, starting at 6 a.m. on 16 February 2006 and lasting until 6 a.m. on 18 February 2006. During the said strike, the PNO, by means of successive documents, announced that the strike would continue from 18 to 20 February 2006, from 20 to 22 February 2006 and from 22 to 24 February 2006.
- 1048.** According to the Government, by Decision No. Y180/21-02-2006, taken in conformity with the law, the Prime Minister issued a Civil Mobilization Order applicable to the crews on passenger, R/R passenger and R/R cargo vessels of the merchant marine. By decision No. Y181/21-02-2006, taken in conformity with the law, the Prime Minister authorized the Minister of Merchant Marine to order a general civil mobilization of the crews on passenger, R/R passenger and R/R cargo vessels of the merchant marine and to take any other measure necessary in order to ensure the smooth functioning of the social and economic life of the State and the prevention of health risks of islanders who were isolated. By decision No. 39/21-02-2006, taken in conformity with the law, the Minister of Merchant Marine ordered a general civil mobilization of the crews on passenger, R/R passenger and R/R cargo vessels of the merchant marine; the civil mobilization took effect on 22 February 2006.
- 1049.** With regard to the reasons for taking these decisions, the Government indicated that as known, Greece had a large number of inhabited islands. The smooth and orderly life on the islands was directly, and on certain islands decisively, linked to sea transportation irrespective of season. Merchant ships were the main and, in some cases, the only means of transportation of food, water, pharmaceuticals and other supplies, such as fuel, the lack of which jeopardized the public health and caused further negative social effects.

Furthermore, merchant ships substantially contributed to the transport of patients as well as medical personnel to primary and secondary units of the national health system in the islands. These transports took place both among islands and between the islands and the mainland on an almost daily basis. Prior to the adoption of the decisions in question, almost six days had passed without any sea transport with evident results and risks for the public health. The Government, before adopting and implementing its decisions, had received information about numerous cases of shortage of basic food supplies and pharmaceuticals on islands. The Government attached copies of nine letters sent by various public and local administration bodies, as well as bodies providing medical care and private associations, in which the shortage of bare life necessities and the inability to provide medical care were pointed out.

- 1050.** The Government emphasized that as soon as the PNO announced its decision to proceed to a strike: (i) the Minister of Merchant Marine met with the PNO representatives and discussed with them the demands of their federation, which had led to the calling of the strike; (ii) on 16 February 2006, the Minister of Merchant Marine sent to the General Secretary of the PNO a letter which presented in detail the position of the Ministry on the demands of the PNO and asked to inform the PNO members and seafarers' trade unions accordingly; (iii) the Ministries of Economy and Finance and of Merchant Marine issued a press release concerning their joint examination of the economic demands of the PNO; (iv) on 21 February 2006, the Minister of Merchant Marine called the PNO representatives to discuss the seafarers' demands. He also invited the PNO to make safety personnel available, so that ships sail with a view to meeting fundamental needs of the islanders and, in particular, of persons belonging to vulnerable social groups; the PNO did not respond positively to the Minister's invitation. The Government attached copies of the press releases and the Minister's letter. The Government added that the applicable national legislation provided that during a strike called by workers providing services of vital importance to meet the needs of society – the sea transport of persons being explicitly defined as a service of vital importance due to the special geographical features of Greece – the trade union organization concerned was to make the necessary safety personnel available, with a view to meeting emergency or fundamental needs of society. The Government emphasized that no safety personnel was made available.
- 1051.** The Government summed up the above by saying that it sought all kinds of dialogue with the PNO which totally rejected the Government's initiatives; for this reason, the Government took the decision to tackle the serious disturbance of the social life of the country and to face the direct threat to the islanders' health due to the shortage of food supplies, fuel, medicines and the bare necessities of life caused by the interruption of transport between the islands and continental Greece, as a result of the seafarers' strike action.
- 1052.** The Government considered that the relevant decisions were entirely lawful and within the scope of the Constitution, and could in no circumstances be characterized as contrary to the obligations undertaken by the country as a result of the ratification of Conventions Nos 87 and 98. The undue exercise of the right to strike by workers in sea transport (taking into account its harmful effect on a large category of the population living on the Greek islands including men, women, old people, children and a large number of workers) led to a serious disturbance of the social life of the country, jeopardizing the safety and health of Greek islanders including persons working in other fields of economic activity in local societies.
- 1053.** With regard to the recommendations made by the Committee in Case No. 2212 which the complainants partially quoted, the Government emphasized that in its recommendation the Committee also pointed out that "the establishment of a requirement to ensure a minimum service in the particular circumstances of this case would not be contrary to freedom of

association principles". Thus, taking into account the geographical situation of Greece and, especially, the fact that Greece comprised a large number of islands, and the increased dependence of islanders on the smooth operation of sea transport, it was clear that in this case the Government, by safeguarding the provision of minimum sea transport services, did not violate the principles of freedom of association. The Government also noted that according to the fifth preambular paragraph of the International Covenant on Civil and Political Rights, "the individual having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant". Concerning the reference made by the complainant to the ILO Maritime Labour Convention, 2006, the Government stressed that it actively participated in the preparation and adoption of the Convention and its positive contribution was recognized, among others, by 37 foreign seafarers' organizations including the European Transport Workers' Federation and the International Confederation of Free Trade Unions.

- 1054.** The Government noted that according to the Committee of Experts on the Application of Conventions and Recommendations, the right to peaceful strike action must be recognized in general for trade unions, federations and confederations in the public and private sectors. This right may only be prohibited or subjected to important restrictions for the following categories of workers or in the following situations: members of the armed forces and the police; public servants exercising authority in the name of the State; workers in essential services in the strict sense of the term (those the interruption of which would endanger the life, personal safety or health of the whole or part of the population); and in the event of an acute national crisis. For Greece, like any other country with a large number of inhabited islands, the security, health and survival of islanders were directly and decisively linked to sea transport which connected islands between them and with continental Greece. Therefore, it was understood that persons employed in such transport offered essential services, the interruption of which constituted a direct risk to life, personal security and health of a major section of the islanders.
- 1055.** In light of the above, it was clear that Decisions Nos Y180/21-02-06 and Y181/21-02-06 of the Prime Minister and Decision No. 39/21-02-06 of the Minister of Merchant Marine were only adopted when the Greek Government, having exhausted all other means, faced a situation which amounted to an acute national crisis. The implementation of these decisions resulted in the restoration and maintenance of the conditions necessary for preventing public health risks; it was therefore, directly and substantially linked to reasons of general interest, without infringing seafarers' labour or association rights. The Government acted within the framework of its international obligations taking into account the totality of the Committee's recommendations in Case No. 2212.
- 1056.** In a communication dated 30 October 2006, the Government replied to the allegations made by the GSEE. The Government acknowledged that strikes were not considered to be a state of emergency. However, the consequences of the long duration of a strike in maritime cabotage in a country with a large number of inhabited islands inevitably created a state of emergency and obliged the State to fulfil its obligation to protect the rights of individual citizens, in particular, the right to health. The great majority of the islands was connected with the mainland exclusively by ships, while very few islands were connected by airplanes. For this reason, it was obvious that the prolonged strike resulted not only in the isolation of the inhabitants of the islands, but also in the interruption of their economic activities. This happened because the transportation of goods to and from the islands was discontinued and most of the goods were damaged or spoilt. Thus, the local products of the islands could not be supplied to the mainland and it was absolutely impossible to cover even a very small part of the important needs of the thousands of inhabitants of the islands for food, fuel, medical and pharmaceutical material for the medical care units and other

bare necessities of life; this affected adversely both public health and the economy not only of the islands, but also of the entire country.

- 1057.** The Government added that the decisions of the Prime Minister and the Minister of Merchant Marine did not in any case restrict the rights of the PNO to negotiate collectively with the shipowners or its right to freedom of association. In this respect, the Government attached six documents whereby the PNO and the relevant shipowners' associations submitted collective agreements to the Ministry of Merchant Marine in respect of various categories of vessels. In addition, it forwarded a recent decision of the Minister of Merchant Marine for the formation of a committee to which PNO was invited to participate along with the shipowners' unions.
- 1058.** The Government finally indicated that the Ministry of National Defence was elaborating a draft law with a view to partly or wholly abrogating Legislative Decree No. 17/74.
- 1059.** In a communication dated 7 March 2007, the Government adds that the civil mobilization order of the crews of merchant marine vessels was suspended by Ministerial Decision No. 209/01.02.2007 (Official Gazette B' 120). This Ministerial Decision, followed the decision of the State Legal Council according to which the phrase "civil mobilization takes effect until further decision" found in the text of the Order, was interpreted to mean that the Minister of Merchant Marine who issued the Order reserved the right to examine whether the suspension of the civil mobilization even before the end of the strike was justified, but not that this Order continued to apply without a time limit after the expiration of the time period for which the strike had been called. Thus, the Ministerial Decision which was formally repealed on 1 February 2007 in fact stopped having legal effect as of 6 p.m. on 23 February 2006 when the strike ended.
- 1060.** The Government further adds that the Act concerning "Special Regulations of Migration Policy Issues and other issues under the competence of the Ministry of the Interior, Public Administration and Decentralization", which is awaiting publication in the Official Gazette, and especially its section 41 concerning "regulations on facing emergencies in times of peace" (attached to the reply) regulates issues of requisition of personal services and goods to face an emergency in times of peace. Thus, from now on, the provisions of Legislative Decree No. 17/1974 will apply only at times of war. According to paragraph 2 of section 41 of the new law, "an emergency in times of peace, which demands the requisition of personal services, is every sudden situation requiring the taking of immediate measures to face the Country's defensive needs or a social emergency against any type of imminent natural disaster or emergency that might endanger the public health". Thus, the institution of civil mobilization in times of peace is reformed and modernized, with a view to further protecting the constitutionally safeguarded human rights. Moreover, by virtue of the same section, from now on, civil mobilization is ordered by the Prime Minister on proposal by the Minister who has competence to deal with the cause that resulted in the emergency. Until now, civil mobilization was to be ordered on proposal by the Minister of National Defence in both times of peace and war. The said provision is based on the principle of proportionality, according to which this stringent measure, applied by means of an administrative act, must be proportional to the public or private interest under protection.

C. The Committee's conclusions

- 1061.** *The Committee notes that the present case concerns allegations that the Government has issued a "Civil Mobilization Order" (requisition of workers' services) of indefinite duration to put an end to a legal strike of seafarers on passenger and cargo vessels, which do not constitute essential services.*

- 1062.** *The Committee notes that according to the complainants, on 1 February 2006, the PNO announced its intention to stage rolling strikes as of 16 February 2006 in all ship categories for the resolution of long-standing demands pertaining to employment and social security issues. The Committee understands that these demands were addressed to the Government as they concerned, inter alia, the promotion of seafarers' employment (including the establishment of an Independent Special Unemployment Fund for seafarers), social security issues (including the coverage of any deficits in the Seafarers' Retirement Fund from the state budget) and terms and conditions of employment which are in the hands of the Government (pay claims). After an inconclusive meeting with the Minister of Merchant Marine and the PNO which took place on 16 February, the strike continued from 18 to 20 February 2006 and then from 20 to 22 February 2006. A petition lodged on 20 February 2006 by the Association of Coastwise Passenger Vessels (i.e., apparently a shipowners' organization) to the effect that the strike was illegal and abusive, was rejected by the Piraeus Court of First Instance. On 21 February 2006, the Prime Minister, acting on a proposal by the Minister of Merchant Marine, issued a Civil Mobilization Order for all seafarers (crews on passenger, R/R passenger and R/R cargo vessels of the merchant marine) as of 6 a.m. on 22 February 2006 and until further notice, i.e., for an indefinite period. Despite the Civil Mobilization Order, the strike continued for another 36 hours and was finally suspended on 23 February 2006 at 6 p.m.*
- 1063.** *The Committee also notes that according to the complainants, over the last 32 years, successive Governments have often resorted to civil mobilization measures, without exhausting proportionally milder measures. Civil mobilization compelled workers to terminate their strike and return to work under threat of severe penalties. The legal ground for the civil mobilization was Legislative Decree No. 17/1974 on "civil emergency planning" which was passed during a period of transition from an authoritarian dictatorial regime to democracy and aimed at regulating crucial matters of extreme emergency. Even this particular Legislative Decree tolerated the existence of a state of emergency only in cases of "natural or other, technological or war-related events that result or threaten to result in extensive losses-damages and destruction of the human and material resources of the country or to hinder and disrupt the social and economic life of the country". The Legislative Decree did not stipulate strike action as a cause of disruption in the social and economic life, as the Government (and previous Governments) maintained. Thus, according to the complainants, the civil mobilization imposed on striking workers, in this case, maritime workers, was unjustified and unfounded. Furthermore, the Legislative Decree was followed by the promulgation of the Greek Constitution which recognized the right to strike in its article 23. Exceptionally, the Constitution allowed for the requisition of personal services in the event of war or conscription or for meeting the defence needs of the country, or in cases of social necessity resulting from natural disasters, or in situations likely to endanger public health (article 22, paragraph 4). Governments had been making use ever since of civil mobilization in order to end "annoying" strikes on the basis of article 22, paragraph 4, of the Constitution notwithstanding that strike action in itself could not be interpreted as constituting a case of emergency, even if a court declared it illegal and abusive. The complainants emphasize that given that in their overwhelming majority, strikes in Greece were declared illegal and/or abusive by the courts, the fact that the Piraeus Court of First Instance found the particular strike in question to be legal was of great importance.*
- 1064.** *Finally, the Committee notes that according to the complainants, the Civil Mobilization Order has remained in force indefinitely since 22 February 2006, pending a new decision to address the matter. According to the complainants, this long period over which seafarers cannot exercise their right to strike is not justified by a state of national emergency although the complainants acknowledged that in Greece, which has many islands, maritime transport plays an important role in ensuring a regular social and economic life. Nevertheless, important works of infrastructure and alternative methods of*

transport (e.g. many airports on the islands) have been developed to ensure the regular provision of food supplies and the health care of the inhabitants. Thus, the prohibition of strike action constitutes an obviously disproportionate measure which infringes seafarers' fundamental rights. Moreover, under these conditions, seafarers are not able to effectively exercise the right to bargain collectively with their employers while their right to freedom of association is seriously violated.

- 1065.** *The Committee notes that according to the Government, the decision to proceed to the civil mobilization of seafarers had as its exclusive objective and result the protection of the public health for which the Constitution allowed the requisition of personal services. The Government adds that the PNO announced in successive documents its intention to stage strikes from 16 to 18 February 2006 and then from 18 to 20 February, from 20 to 22 February and from 22 to 24 February 2006. On 21 February 2006, the Prime Minister, by Decisions Nos Y180/21-02-2006 and Y181/21-02-2006 issued a Civil Mobilization Order of the crews on passenger, R/R passenger and R/R cargo vessels of the merchant marine and authorized the Minister of Merchant Marine to order the civil mobilization and take any other measure deemed necessary in order to ensure the smooth social and economic life of the State and the prevention of health risks of islanders who were isolated. By Decision No. 39/21-02-2006, the Minister of Merchant Marine ordered a general civil mobilization which took effect on 22 February 2006. Prior to this, according to the Government, the Minister of Merchant Marine had sought dialogue with the PNO by meeting with PNO representatives, exchanging letters with them clarifying the Ministry's position, issuing press releases jointly with the Ministries of Economy and Finance concerning the joint examination of the economic demands of the PNO and calling on PNO representatives to discuss their demands (letters and press releases attached to the Government's response). However, according to the Government, the PNO totally rejected the Government's initiatives.*
- 1066.** *With regard to the reasons which led to the decision to impose a civil mobilization, the Committee notes that according to the Government, the smooth and orderly life on the numerous inhabited Greek islands is directly and in certain cases decisively, linked to sea transport. The great majority of the islands is connected with the mainland exclusively by ships, while very few islands are connected by airplanes. Merchant ships are the main and, in some cases, the only means of transportation of food, water, pharmaceuticals and other supplies such as fuel. The lack of such items jeopardizes public health and has further negative social effects. Furthermore, merchant ships substantially contribute to the transport of patients as well as medical personnel to primary and secondary units of the national health system both among islands and between the islands and the mainland on an almost daily basis. Prior to the adoption of the decisions in question, almost six days had passed without any sea transport with evident results and risks for public health. The Government, before adopting its decision, had received information about numerous cases of shortage of basic food supplies and pharmaceuticals on islands. The Government attaches copies of nine letters sent by public and local administration bodies, as well as bodies providing medical care and private associations (a local trade union), in which the shortage of bare life necessities and the inability to provide medical care are pointed out.*
- 1067.** *The Committee notes that the Government emphasizes that the decisions of the Prime Minister and the Minister of Merchant Marine were taken only after all other means had been exhausted, and in the face of a situation which amounted to an acute national crisis. The long duration of the strike inevitably created a state of emergency obliging the State to fulfil its obligation to protect the rights of individual citizens, in particular, the right to health, which is protected by the Constitution. The implementation of the decisions resulted in the restoration of the conditions necessary for preventing public health risks and did not infringe seafarers' labour or association rights. In particular, the PNO continued to negotiate collectively with shipowners' associations (the Government*

attached six documents by which collective agreements were submitted to the Ministry of Merchant Marine in respect of various categories of vessels).

- 1068.** *Alternatively, the Government also submits that in a country with a large number of inhabited islands, the security, health and survival of islanders is directly and decisively linked to sea transport which constitutes under the circumstances an essential service, given that its interruption may lead to risks for the life, personal security and health of a major section of the islanders.*
- 1069.** *Finally, the Committee notes that following a decision by the State Legal Council, the Civil Mobilization Order was formally suspended on 1 February 2007 by Ministerial Decision No. 209, and is considered as retroactively having no legal effect after 23 February 2006, when the seafarer's strike ended.*
- 1070.** *The Committee recalls the conclusions and recommendations it had reached in Case No. 2212 which involved the same parties and similar facts [330th Report approved by the Governing Body at its 286th Session, March 2003, paras 721–755]. On that occasion, the Committee, taking note of the fact that the Civil Mobilization Order had already been lifted, emphasized that unilateral measures are not conducive to harmonious industrial relations and are contrary to Conventions Nos 87 and 98 and requested the Government to refrain from such measures in the future. It also noted that the establishment of a requirement to ensure a minimum service in the particular circumstances of this case would not be contrary to freedom of association principles.*
- 1071.** *With regard to the Government's view that sea transport might be considered as an essential service in the specific circumstances of this case (Greece having a large number of inhabited islands), the Committee recalls that the ferry service is not an essential service. However, in view of the difficulties and inconveniences that the population living on islands along the coast could be subject to following a stoppage in ferry services, an agreement may be concluded on minimum services to be maintained in the event of a strike. Similarly, the transportation of passengers and commercial goods is not an essential service in the strict sense of the term. However, this is a public service of primary importance where the requirement of a minimum service in the event of a strike can be justified [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 615 and 621]. In general, the establishment of minimum services in the case of strike action could be possible in services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population [**Digest**, *op. cit.*, para. 606].*
- 1072.** *The Committee notes in this respect from the Government's reply as well as the letters and press communiqués transmitted therein, that on 21 February 2006, the Government requested the PNO to make "safety personnel" available so that a minimum service could be ensured and ships could sail to the inhabited islands with a view to meeting fundamental needs of the islanders; however, no safety personnel was made available. The Committee also notes that according to the applicable national legislation, during a strike in services of vital importance – sea transport of persons being explicitly defined as a service of vital importance due to the special geographical features of Greece – the trade union concerned should make the necessary safety personnel available with a view to meeting emergency or fundamental needs of society. The Committee recalls that similar facts had been communicated by the Government in Case No. 2212. However, the Committee had noted at the time that there seemed to be no negotiated definition of what constituted "safety personnel" (e.g. how many crossings per day/week, the necessary personnel for manning the ships, etc.) [330th Report, para. 750].*

- 1073.** *The Committee emphasizes that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services [Digest, op. cit., para. 612]. The Committee considers that negotiations over this issue should be ideally held prior to a labour dispute, so that all parties can examine the matter with the necessary objectivity and detachment. Any disagreement should be settled by an independent body, like for instance, the judicial authorities, and not by the ministry concerned. The Committee therefore invites the Government and the PNO to engage in negotiations as soon as possible over the determination of the minimum service to be made available in case of strikes in the maritime sector, in conformity with national legislation on security personnel and freedom of association principles. The Committee requests to be kept informed in this respect.*
- 1074.** *With regard to the Civil Mobilization Order in particular, the Committee takes note of nine letters communicated by the Government in which various public and private bodies describe the impact of the strike on local communities on the islands. In particular, the letters make reference to shortages in oxygen in 14 hospitals (one having oxygen for one and a half days, seven others for two to five days, three others for six days, one for ten days and another for less than 20 days). The letters also indicate problems on islands without airports with regard to the transport of patients, primary necessity items, fuel, medicine and food and problems even on islands with an airport, as the airplane's capacity did not suffice to cover the needs of the island. Two letters from the Prefectures of Lasithion and Heraklion in Crete requested that the prefectures be placed in a state of emergency.*
- 1075.** *The Committee notes that whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, a back-to-work order might be lawful, if applied to a specific category of staff in the event of a strike whose scope and duration could cause such a situation. However, a back-to-work requirement outside such cases is contrary to the principles of freedom of association [Digest, op. cit., para. 634]. Given the information provided by the Government, the Committee considers that a back-to-work order was justified in relation to the protection of public health, but should have been restricted only to the number of seafarers actually needed to provide for such a minimum service.*
- 1076.** *Nevertheless, the Committee observes that the Civil Mobilization Order remained in force almost one year after its issuance while the issue was pending before the courts even though it was subsequently considered retroactively as having no legal effect as from the end of the strike. The Committee considers, as apparently confirmed by the State Legal Council decision, that this prolonged duration was out of proportion to the objective of the Civil Mobilization Order (protection of public health) and amounts to a denial of the right to strike of seafarers contrary to Convention No. 87 ratified by Greece. The Committee emphasizes in this respect that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87 and that organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living [Digest, op. cit., paras 523 and 527]. Observing with regret that the issuance of a Civil Mobilization Order in this case had the effect of preventing seafarers from exercising the*

right to strike for over a year, while the issue was pending before the Courts, the Committee expects that the Government will ensure that any restrictions placed on the right to strike are in conformity with freedom of association principles and Convention No. 87, ratified by Greece.

- 1077.** Furthermore, the Committee notes that there is no information on the outcome of the negotiations over the list of demands presented by the PNO to the Government. The Committee observes from the information available to it, that the list of the PNO demands was apparently discussed with the Government in face-to-face negotiations only on two occasions: on 16 February, i.e., the day the strike began, and on 21 February, i.e., the day on which the Civil Mobilization Order was issued. The Committee observes that under these circumstances, it is not very clear whether genuine negotiations took place between the parties prior to or during the strike. The Committee recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations. It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties; satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence [*Digest*, op. cit., paras 934–936]. The Committee therefore requests the Government to take all necessary measures to ensure that negotiations with the PNO recommence as soon as possible and are conducted in line with collective bargaining agreements and processes with a view to ending the dispute and reaching an agreement over the demands presented by the trade union. The Committee requests to be kept informed of developments in this respect.
- 1078.** Finally, the Committee takes note of the complainants' allegation that over the last 32 years, successive Governments have often resorted to civil mobilization measures to end strikes in various sectors on the basis of Legislative Decree No. 17/1974. In this regard, the Committee notes with interest that according to the Government, pursuant to recent legislative amendments, Legislative Decree No. 17/1974 will only apply in times of war. As for requisition in times of peace, section 41 of the Act concerning "Special Regulations of Migration Policy Issues and other issues under the competence of the Ministry of the Interior, Public Administration and Decentralization" which is awaiting publication in the Official Gazette, provides that the requisition of personal services is possible only in case of emergency, i.e., "every sudden situation requiring the taking of immediate measures to face the Country's defensive needs or a social emergency against any type of imminent natural disaster or emergency that might endanger the public health". The Committee also notes that the decision to order a civil mobilization shall be taken by the Prime Minister on proposal by the Minister who has competence to deal with the specific emergency instead of the Minister of National Defence who had competence in all cases.
- 1079.** In view of the allegations that over the last 32 years the Government has resorted to civil mobilization orders in order to end strikes in various sectors, the Committee, noting that the new law still allows for the requisition of services in case of danger to public health, which could therefore continue to be used as grounds for suspending strikes in the future, recalls that the responsibility for suspending a strike on the grounds of national security or public health should not lie with the Government, but with an independent body which has the confidence of the parties concerned [*Digest*, op. cit., para. 571] and requests the Government to take the necessary measures to ensure that any general suspension or termination of strike is decided in accordance with this principle. It requests the Government to keep it informed of developments in this regard.

The Committee's recommendations

1080. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee invites the Government and the PNO to engage in negotiations as soon as possible over the determination of the minimum service to be made available in case of strikes in the maritime sector, in conformity with national legislation on security personnel and freedom of association principles. The Committee requests to be kept informed in this respect.*
- (b) Observing with regret that issuance of a Civil Mobilization Order in this case had the effect of preventing seafarers from exercising the right to strike for over a year, while the issue was pending before the Courts, the Committee expects that the Government will ensure that any restrictions placed on the right to strike are in conformity with freedom of association principles and Convention No. 87, ratified by Greece.*
- (c) The Committee requests the Government to take all necessary measures to ensure that negotiations with the PNO recommence as soon as possible and are conducted in line with collective bargaining agreements and processes, with a view to ending the dispute and reaching an agreement over the demands presented by the trade union. The Committee requests to be kept informed of developments in this respect.*
- (d) In view of the allegations that over the last 32 years the Government has resorted to civil mobilization orders in order to end strikes in various sectors, the Committee, noting that the new law still allows for the requisition of services in case of danger to public health, which could therefore continue to be used as grounds for suspending strikes in the future, recalls that the responsibility for suspending a strike on the grounds of national security or public health should not lie with the Government, but with an independent body which has the confidence of the parties concerned [Digest, op. cit., para. 571] and requests the Government to take the necessary measures to ensure that any general suspension or termination of strike is decided in accordance with this principle. It requests the Government to keep it informed of developments in this regard.*

CASE NO. 2482

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

**Complaint against the Government of Guatemala
presented by
the Inter-American Regional Organization of Workers (ORIT)**

Allegations: The complainant organization alleges that unknown persons burglarized the headquarters of the Trade Union Confederation of Guatemala (CUSG) on 6 April 2006 stealing computer equipment, books and other documents of importance to trade union politics

- 1081.** The complaint is contained in a communication from the Inter-American Regional Organization of Workers (ORIT) dated 19 April 2006.
- 1082.** The Government sent its observations in communications dated 23 January and 19 March 2007.
- 1083.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1084.** In its communication dated 19 April 2006, the ORIT alleges the severe persecution and harassment suffered by Guatemalan trade union officials, especially members of the Trade Union Confederation of Guatemala (CUSG), whose headquarters were burgled on 6 April 2006 by unknown persons who stole computer equipment, books and other documents of importance to trade union politics.
- 1085.** The ORIT states that this practice – which constitutes a violation of Convention No. 87 – has taken place at other Guatemalan trade union organizations and is becoming a systematic practice in the country. The ORIT supported by trade union organizations in Central America and the Dominican Republic, which are active in the Union Coordinating Committee for Central America and the Caribbean (CSACC), international trade union federations, the ICFTU/ORIT, the cooperating international trade unions, the FES (gathered in Guatemala on 19 April 2006, for a meeting on cooperation to strengthen trade unions), requests that the: (1) repression and all acts of harassment against Guatemalan trade union officials cease immediately; (2) competent authorities investigate thoroughly the events and establish who is responsible in the matter; and (3) Government of Guatemala guarantee respect for freedom of association in the country.

B. The Government's reply

- 1086.** In its communication dated 23 January 2007, the Government summarizes the complaint as follows: the headquarters of the CUSG were burgled on 6 April 2006 by unknown persons who stole computer equipment, books and other documents of importance to trade union politics.

1087. The Government states that it was informed by the Prosecutor for Offences against Journalists and Trade Unionists of the Public Prosecutor's Office that crime scene experts from the National Civil Police (PNC) and the Public Prosecutor's Office visited the scene of the crime and stated in their reports that: "fragments of latent prints were observed, but they lacked the necessary general and specific characteristics for identification through a comparative study". The Prosecutor received the complaint, and subsequently the report from the PNC investigators stating that no one had been found at the premises where the offence was committed. None of those affected (from the CUSG) has so far come to the Prosecutor's office, even though the investigation is proceeding.

1088. The Government attaches a communication from the aforementioned prosecutor dated 26 October 2006 which is cited below:

- On 7 April this year crime scene experts from the National Civil Police (PNC) and the Public Prosecutor's Office attended (street 12 "A" 0-37 zone 1) in this city, where the events took place, and stated in their reports that fragments of latent prints were observed, but they lacked the necessary general and specific characteristics for identification through a comparative study; they concluded in the reports that there were no lophoscopic prints that could be used for a comparative study which could not therefore be carried out as requested.
- The Public Prosecutor received the complaint on 17 May 2006 [...].
- In the report sent to the Prosecutor by the PNC investigators, it was stated that no one was found at the premises where the offence was committed. Neighbours in the area informed them that the trade unionists who worked at the headquarters had left some days earlier and that they did not know where they had moved to.
- None of the persons affected has so far come to the Prosecutor's office, but the investigation is proceeding.

1089. In its communication dated 19 March 2007, the Government adds some further observations to those sent previously. The Prosecutor for Offences against Journalists and Trade Unionists of the Public Prosecutor's Office reported on the follow-up to this case, stating that on 9 November 2006 the trade unionist Mr Carlos Humberto Carballo Cabrera came to make a statement and to report intimidating telephone calls that he had received on his mobile telephone and on the office telephone, urging him to abandon the investigation into the burglary of the CUSG headquarters. On 1 February, the Prosecutor applied for authorization to demand the details of the reported telephone calls.

1090. The Government sent a new report from the Prosecutor cited below:

- (1) On 7 April 2006 at around 1 p.m., the Prosecutor received a telephone call reporting that a robbery had been carried out at the Trade Union Confederation of Guatemala (CUSG) headquarters (street 12 "A" 0-37 zone 1) of this city in the early hours of that morning.
- (2) The Prosecutor attended the crime scene in person, with two assistants and crime scene experts. Before the arrival of the personnel from the Public Prosecutor's Office, personnel from the Criminal Investigation Division, Theft and Robbery Section of the National Civil Police were present at the scene.
- (3) Police Station No. 11 of the National Civil Police registered the case as No. 202, reference JLT.gem, with the Public Prosecutor's Office on 7 April 2006.
- (4) Mr Carlos Humberto Carballo Cabrera was summoned to Agency 07 for Economic Offences to make a statement and report everything that had been stolen, which included computer equipment, a 20-inch television set, a microwave, a scanner, a telephone with fax, minutes and account books belonging to the Confederation and an activity planner.
- (5) On 1 May 2006, the Crime Scene Specialists Unit of the Criminal Investigation Department (DICRI), sent a set of photographs and the report on the evidence found at the scene of the crime.

- (6) On 8 May 2006, the Criminal Investigation Division, Theft and Robbery Section of the National Civil Police reported on the investigation into the burglary of the office of the Trade Union Confederation of Guatemala (CONFEDE). The reference number of the communication is 418-2006, ref. Salvador.
- (7) On 25 May 2006, the Lophoscopy Section, Technical and Scientific Department of the Office of the Director for Criminal Investigations of the Public Prosecutor's Office, gave the result of the lophoscopic report, which concluded that, among the prints found at the scene, there were no fragments of lophoscopic prints that could be used for a comparative study. It was therefore not possible to carry out the requested comparison.
- (8) In its communication dated 25 May 2006, under reference No. 261 2006, ref. LFMM vinsa, the Criminal Investigation Division, Visual Inspections Section of the National Civil Police gave the names of the technicians involved in the investigation.
- (9) On 6 June 2006, the Prosecutor received the report from the Laboratory for Processing "Smudged and Latent" Finger Prints of the Criminal Section of the National Civil Police, under case reference No. 060407-06/LPHDELGC/316-06/Ref.sdmg. According to its conclusions, the search determined that there were no matches with fingerprint records. The aforementioned fragments were also entered into the Automated Fingerprint Identification System (AFIS) database, where they were not already recorded.
- (10) On 26 October, Mr Carlos Humberto Carballo Cabrera was summoned to make a statement and to be informed of the results of the investigation, but did not attend.
- (11) On 9 November 2006, Mr Carlos Humberto Carballo Cabrera came forward to make a statement and to report intimidating telephone calls that he had received on his mobile telephone and on the office telephone, urging him to abandon the investigation into the burglary of the Trade Union Confederation of Guatemala headquarters.
- (12) On 1 February 2007, the Prosecutor applied for authorization to demand details of the reported telephone calls.

C. The Committee's conclusions

- 1091.** *The Committee observes that in this case the complainant organization alleges that unknown persons burgled the CUSG headquarters on 6 April 2006, stealing computer equipment, books and other documents of importance to trade union politics.*
- 1092.** *The Committee notes the Government's statements that the PNC investigators found no one at the address where the offence was committed (neighbours in the area informed them that the CUSG trade unionists who worked at the headquarters had left some days earlier and they did not know where they had moved to) and that on 26 October and 9 November 2006 one of the CUSG officials concerned was summoned to the office of the Prosecutor for Offences against Journalists and Trade Unionists of the Public Prosecutor's Office. The Committee notes that the crime scene experts of the PNC and the Public Prosecutor's Office stated in their reports that the latent prints lacked the necessary general and specific characteristics for identification through a comparative study. The Committee observes with concern that the Government's last reply refers to intimidating telephone calls to a trade unionist, urging him to abandon the investigation; the calls are being investigated.*
- 1093.** *The Committee can only deplore the limited actions of the police and the Public Prosecutor, as related by the Government, in connection with the burglary of the CUSG and the theft of its property and documents, facts which are placed moreover by the complainant organization within a more general context of persecution and harassment against Guatemalan trade union officials. The Committee notes that the Government refers to the telephone calls aimed at intimidating the trade unionist Carlos Humberto Carballo Cabrera.*

- 1094.** *The Committee urges the Government to take the necessary measures to reactivate and intensify the police and Public Prosecutor investigations into the burglary of the CUSG headquarters and the theft of trade union property and documents. The Committee wishes to emphasize the gravity of these events. The Committee recalls that when examining allegations of attacks carried out against trade union premises and threats against trade unionists, the Committee underlined that activities of this kind create among trade unionists a climate of fear which is extremely prejudicial to the exercise of trade union activities and that the authorities, when informed of such matters, should carry out an immediate investigation to determine who is responsible and punish the guilty parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 184].*
- 1095.** *The Committee states that, at present, it still lacks sufficient information to be able to determine in all certainty whether the offences had an anti-union objective or if they were acts of vandalism. The Committee recalls that the burglary of trade union headquarters and theft from trade union organizations or trade unionists are matters in which it has full competence and demands that judicial investigations be promptly carried out in order to clarify fully as soon as possible the events and the circumstances in which they occurred, so as to be able to identify, to the extent possible, those responsible, to determine the motives of the offences, to punish those responsible, to prevent the repetition of such acts and to make possible the recovery of the stolen property. The Committee requests the Government to guarantee the security of the trade unionists.*
- 1096.** *In these circumstances, the Committee firmly expects that the new investigations it has requested of the authorities will allow those responsible to be identified and punished severely as soon as possible, and requests the Government to keep it informed on the progress of the investigations and any judicial decision which is handed down.*

The Committee's recommendations

- 1097.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee deplores the seriousness of the alleged events, which include the burglary of the CUSG headquarters and the theft of trade union property and documents, subsequent threatening phone calls to the trade unionist Carlos Humberto Carballo Cabrera, as well as the limited investigations carried out by the authorities.*
 - (b) The Committee urges the Government to take the necessary measures immediately to reactivate and intensify the police and Public Prosecutor investigations into the alleged offences.*
 - (c) The Committee firmly expects that the new investigations requested of the authorities will enable them to determine the motives behind the offences, to identify those responsible and punish them severely, and to make it possible to recover the stolen property. The Committee also requests the Government to guarantee the security of the trade unionists. It requests the Government to keep it informed on the progress of the investigations and any judicial decision which is handed down.*

CASE NO. 2323

INTERIM REPORT

**Complaint against the Government of the Islamic Republic of Iran
presented by
the International Confederation of Free Trade Unions (ICFTU)**

Allegations: The complainant organization alleges violent police repression of the May Day 2004 rally as well as of other strikes and related protests, and the arrest, detention and conviction of several trade union leaders and activists for their trade union activities

- 1098.** The Committee last examined this case at its June 2006 meeting and submitted an interim report to the Governing Body [see 342nd Report, paras 629–697, approved by the Governing Body at its 296th Session (June 2006)].
- 1099.** The International Trade Union Confederation (ITUC) submitted new allegations in a communication dated 4 December 2006.
- 1100.** The Government sent new observations in a communication dated 9 March 2007.
- 1101.** The Islamic Republic of Iran has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 1102.** At its May–June 2006 meeting, the Committee made the following recommendations in relation to this case [see 342nd Report, para. 697]:
- (a) The Committee requests the Government to take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace. Noting that the issue of the killing of four innocent persons by the police force during the incidents in Shahr-e-Babak is currently pending before the Supreme Court, the Committee requests the Government to keep it informed of the progress of the proceedings and to communicate the final decision once it has been handed down.
 - (b) Regretting that the Government has provided no information on the names, occupations and any trade union affiliation of the six persons convicted, as a result of the events in Shahr-e-Babak, nor as to the specific acts with which they were accused and the grounds on which they were convicted, the Committee requests the Government to communicate detailed information in this regard, including the court decisions handed down against these persons, without delay.
 - (c) The Committee firmly expects that, upon re-examination, the Court of First Instance will take fully into account all of the principles set forth in its conclusions and that Messrs Salehi, Hosseini, Hakimi, Divangar and Abdlpoor will be fully acquitted of all remaining charges rapidly. It requests the Government to keep it informed of developments in this regard.
 - (d) The Committee firmly urges the Government to drop all charges against Mr Salehi related to his article “Preparing a cost of living index for a family of five in Iran”, which

the Committee considers constitutes a legitimate trade union activity. The Committee requests the Government to keep it informed of the measures taken in this respect.

- (e) Noting with concern the additional information provided by the complainant with regard to the arrest, detention, alleged severe beating and court summons of Borhan Divangar in August 2005 who was charged among other things with membership of the Coordinating Committee to Form Workers' Organizations (established by Mahmoud Salehi and Mohsen Hakimi on 4 May 2005), membership of the newly formed unemployed workers' organization, managing a labour web site in Iran called "Tashakol" and participating in the wave of demonstrations in Saqez that followed the shooting of Kurdish opposition activist Shivan Qaderi, the Committee requests the Government to communicate immediately its comments in this regard.
- (f) The Committee requests the Government to provide detailed information on any charges brought against Mahmoud Beheshti Langarudi, General Secretary, and Ali-Ashgar Zati, spokesperson of the Teachers' Guild Association, as well as any court decisions handed down, and to take all necessary measures to ensure that where these charges are related to their trade union activities, they are dropped by the competent authorities in light of the abovementioned principles. The Committee requests to be kept informed in this respect.
- (g) The Committee urges the Government to institute an independent inquiry into the allegations that the Intelligence Ministry interrogated, threatened and harassed Shis Amani, Hadi Zarei and Fashid Beheshti Zad and to keep it informed of the outcome.
- (h) Regretting that the Government has not provided any information with respect to its previous request concerning the allegations relating to the proposal and adoption of legislation that would restrict the trade union rights of a large number of workers (i.e. the exemption from the labour legislation of workshops of less than ten employees and proposals to exempt temporary workers), the Committee requests the Government to provide its observations in this respect without delay.

B. New allegations

1103. In a communication dated 4 December 2006, the ITUC submits the following additional information with regard to the trade unionists who attempted to celebrate May Day in 2004.

1104. On 11 November 2006, Mr Mahmoud Salehi, the former president of the Bakery Workers' Association of the city of Saqez, was sentenced to four years of imprisonment by the Saqez Revolutionary Court. He was found guilty under article 610 of the Islamic Punishment Act, for congregating to conspire to commit crimes against national security. Furthermore, the ITUC expresses its concern that some of the charges against Mr Salehi that were referred to the Public Court for "public opinion disturbance" because of his article "Preparing a cost of living index for a family of five in Iran" may still be pending.

1105. On 17 October 2006, Mr Borhan Divangar, who was also involved in the attempt to celebrate May Day in 2004, was sentenced to two years of imprisonment. The ITUC was not aware whether this sentence related to the same case or rather to the charges brought against him when he was arrested on 7 August and detained for two months. According to the ITUC, Mr Divangar was now in Turkey. On 11 November 2006, Mr Jalal Hosseini was sentenced to two years of imprisonment and on 27 November, Mr Mohsen Hakimi was also sentenced to two years of imprisonment under similar charges in the same case. Mr Mohammad Abdipoor was acquitted.

1106. The ITUC stresses that while according to the Government, the seven activists were initially arrested and charged with the alleged connections with banned political organizations like the Komala and the Communist Party, all seven of them, including the four who have been convicted, were cleared of these charges in court. The ITUC therefore

concludes that the four trade union activists were convicted exclusively due to their trade union activities.

C. The Government's reply

1107. In its communication dated 9 March 2007, the Government reiterates its respect for the freedom of association principles and the right of workers to organize and its strive to ensure the promotion of social and economic conditions of workers throughout the country. This commitment is now officially declared as one of the 14 strategic objectives of the Ministry of Labour and Social Affairs, which calls for the promotion of employers' and workers' organizations. The Government considers the right to organize assemblies as an indisputable and important aspect of trade union rights. Hundreds of different gatherings and rallies are held all around the Islamic Republic of Iran on May Day each year in peace and tranquillity, provided that the organizers obtain prior approval from the relevant authorities.

1108. With regard to the latest developments concerning this case, the Government provides the following information.

Khatoonabad and Shahr-e-babak

1109. The family members of one of the four victims of the incident appealed the decision, which, while having acquitted the military force, recognized the right of the victims' families to receive compensation to the National Supreme Court. The National Supreme Court rejected the appeal and confirmed the military court verdict No. 31/470 dated 10 September 2005. Thus, in accordance with the military court verdict, the families of the four victims shall receive compensation. In addition, according to the latest investigations on the occupations of the deceased, it was confirmed that they were not workers of the Khatoonabad smelting plant and had no records of membership in the workers' associations, but rather, they were a farmers, salespersons and students from Khatoonabad.

1110. On 8 June 2004, Messrs Mohammad Fahim Mahmoodi, Abbas Meimandinia, Hossein Moradian, Momen Pourmahmoodieh, Saeed Zadegangi, Ali Asghar Soflari were arrested during the incident in Shahr-e-babak and were later sentenced from four to nine months of imprisonment by the Court of First Instance. The abovementioned persons were not employed in the copper complex in Khatoonabad and were ex-criminals.

Saqez

1111. Under verdict No. 965 dated 17 October 2006 issued by the Saqez Islamic Revolutionary Court, Mr Mahmood Salehi was sentenced to four years of imprisonment, commencing from the date of the arrest, for organizing illegal assembly and congregating to conspire to commit crimes. No case has been lodged against him charging him with "public opinion disturbance" following the publication of his article "The index of cost of living for a family of five in Iran".

1112. Under verdict No. 694 dated 21 August 2006, Mr Boran Divangar was sentenced to two years of imprisonment, commencing from the date of the arrest, for illegal gathering and congregating to commit crimes against national security. At the request of his lawyer, the case was referred to the Seventh Branch of the Court of Appeal, where it is presently pending. No complaint has been lodged against him accusing him of membership in the coordination committee to form a workers organization.

Sanandaj Textile Factory

1113. Concerning the allegations of interrogation, harassment and threatening of Messrs Shis Amani, Farshid Beheshti Zad, Hadi Zarei by the personnel of the Ministry of Intelligence (public security) during the workers' strike in the Sanandaj Textile Factory, the Government indicates that according to the information received from the Director General for Kurdistan, these claims are baseless and unfounded. Messrs Shis Amani and Hadi Zarei have requested (in writing) to be dismissed and receive their severance pay and other legal allowances.

Teachers' Guild Association

1114. There are no official records in the Ministry of Justice concerning Mr Mahmoud Beheshti Langarudi, the General Secretary of the Teachers Guild Association, and Mr Ali-Asghar Zati, the spokesperson of the same organization.

Labour law amendment

1115. Due to the rapidly changing patterns of the world of work, the recent social and economic developments in the Islamic Republic of Iran, the dire consequences of the unfair globalisation of the Islamic Republic of Iran's labour relations and the Islamic Republic of Iran's Decent Work Country Programme requirements, the Ministry of Labour and Social Affairs has embarked serious campaign to amend the existing labour laws. Together with social partners, academics and experts in the field of labour law and labour relations, the Government is seriously disposed towards amending the existing labour law with regard to such issues as temporary employment contracts, social protection and vocational training courses for the dismissed workforce, skills development for the unemployed through the Unemployment Insurance Fund, employers and workers organization's rights and registration requirements for such organizations. To this end, public notices have been placed in the press by the Government to gather the viewpoints of different research centres and experts in the pertinent fields. The Minister of Labour and Social Affairs and the social partners held many meetings to discuss the amendment process. Moreover, the draft of the prepared amendment was officially submitted to the ILO. During the 297th Session of the Governing Body, the Government requested further technical cooperation through an ILO mission, which was carried out in February. Incorporating the insightful and constructive comments of the ILO mission on the subject, the Ministry of Labour and Social Affairs shall submit the final draft of the amendments to Parliament for final approval within two months from the end of February 2007.

D. The Committee's conclusions

1116. *The Committee recalls that this case concerns allegations of violent police repression of strikes, protests and the May Day 2004 rally in Saqez; the arrest, detention and conviction of several trade union leaders and activists for their trade union activities; the arrest of trade union leaders of the Teachers' Guild Association; intervention in a strike at the Sanandaj Textile Factory and subsequent harassment of the workers' representatives; and the proposal and adoption of legislation that would restrict the trade union rights of a large number of workers.*

Khatoonabad and Shahr-e-babak

1117. *The Committee recalls that it had previously requested the Government to take measures to ensure that the competent authorities receive adequate instructions so as to eliminate*

the danger entailed by the use of excessive violence when controlling demonstrations, which might result in a disturbance of the peace. It further requested the Government to provide information with regard to the proceedings before the Supreme Court on the issue of the killing of four innocent persons by the police force during the incidents in Shahr-babak and to communicate the final decision once it has been handed down.

- 1118.** *The Committee further notes that according to the information provided by the Government, the family members of one of the four victims appealed the decision of the military court to the National Supreme Court, which acquitted the military force but recognized the right of the victims' families to receive compensation. The National Supreme Court rejected the appeal and confirmed the military court verdict. The Committee regrets that the Government did not provide a copy of the Supreme Court's judgment. While noting that the family of the four victims are entitled to compensation, the Committee regrets the absence of any judgement against those responsible for the incident and emphasizes that a situation of impunity reinforces the climate of violence and insecurity and is extremely damaging to the exercise of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 52]. In cases in which the dispersal of public meetings by the police has involved loss of life, the Committee attaches special importance to the circumstances being fully investigated, responsibility determined and those responsible punished. The Committee therefore requests the Government to communicate a copy of the Supreme Court final decision and to indicate the measures the Government has taken or envisaged in order to determine responsibility, punish the guilty parties and prevent the repetition of such acts.*
- 1119.** *The Committee further regrets that no information was provided by the Government with regard to the concrete measures taken to ensure that the competent authorities receive instructions on the use of force when controlling demonstrations so as to avoid the use of excessive violence and therefore once again urges the Government to take the necessary measures to this effect and to keep it informed in this respect.*
- 1120.** *The Committee recalls that it had previously requested the Government to communicate detailed information on the six persons convicted as a result of the events in Shahr-e-Babak. The Committee notes that in its reply, the Government states that Messrs Mohammad Fahim Mahmoodi, Abbas Meimandinia, Hossein Moradian, Momen Pourmahmoodieh, Saeed Zadegangi, Ali Asghar Soflaei were arrested on 8 June 2004, during the incident in Shahr-e-babak, and sentenced from four to nine months of imprisonment by the Court of First Instance, whereas in its previous reply, the Government had indicated that these six arrested persons were found guilty of civil disorder and commotion for involvement in the incidents in January 2004. The Government adds in its recent reply that these persons were not employed in the copper complex in Khatoonabad and are ex-criminals. In light of the information thus provided to it, it remains difficult for the Committee to determine the precise reasons for the arrest of these persons and their relationship to the industrial unrest. The Committee therefore once again requests the Government to clarify this matter by providing information on the occupations and any trade union affiliation of the six persons convicted as a result of the events in Shahr-e-babak, as well as on the specific acts with which they were accused and the grounds on which they were convicted. The Committee requests the Government to communicate the court decisions handed down against these persons.*

Saquez

- 1121.** *The Committee recalls that it had previously expressed its trust that Messrs Salehi, Hosseini, Hakimi, Divangar and Abdipoor would be fully acquitted of all charges related to the organization of the 2004 May Day rally and the participation therein. The Committee notes the Government's indication that under verdict No. 965, dated 17*

October 2006, issued by the Saez Islamic Revolutionary Court, Mr Mahmood Salehi was sentenced to four years of imprisonment, commencing from the date of arrest, for organizing illegal assembly and congregating to conspire to commit crimes. Furthermore, under verdict No. 694 dated 21 August 2006, Mr Boran Divangar was sentenced to two years of imprisonment for illegal gathering and congregating to commit crimes against national security, commencing from the date of the arrest. At the request of his lawyer, the case was referred to the Seventh Branch of the Court of Appeal, where it is presently pending. The Committee notes that this information is also confirmed by the complainant. While regretting that the Government provided no information in respect of Messrs Hosseini, Hakimi and Abdlpoor, the Committee notes that according to the information provided by the complainant, Messrs Hosseini and Hakimi were sentenced to two years of imprisonment under similar charges and that Mr Abdlpoor was acquitted.

- 1122.** *The Committee recalls from the previous examination of the case that all five trade unionists had been acquitted of the charges of sympathizing with subversive groups and acquitted by the Court of Appeal of the charges of illegal assembly and social unrest for which they had been sentenced by the Court of First Instance. In the absence of a conviction on these political grounds, the Committee had great difficulty in seeing how the remaining charges could have been related to anything other than their trade union activities. Furthermore, the Committee noted that the Government had not provided any specific information as to the manner in which the peaceful rally in Saez became violent, nor as to the actual necessity of intervention by the security forces [see 342nd Report, paras 682–684]. The Committee deplores that heavy penal sentences have been retained against these trade unionists. It recalls that no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike, public meetings or processions, particularly on the occasion of May Day. With this in mind and further noting that the two years sentence imposed on Messrs Hosseini and Hakimi should have expired by now, the Committee requests the Government to ensure the immediate release of any of these trade unionists who may still be detained and take steps to ensure that the charges brought against them are dropped and to keep it informed in this respect. Noting that the case of Mr Divangar is currently on appeal, the Committee expects that the Court of Appeal will re-examine this case having regard to the provisions of Conventions Nos 87 and 98 and that Mr Divangar will be acquitted of the remaining charges which appear now to be strictly related to his trade union activities. The Committee requests the Government to keep it informed in this respect.*
- 1123.** *The Committee notes with satisfaction that Mr Abdlpoor was acquitted. It further notes that, according to the Government, no case has been lodged against Mr Salehi charging him with “public opinion disturbance” because of his article under the title of “The index of cost of living for a family of five in Iran”.*
- 1124.** *The Committee notes with regret that the Government, other than stating that no complaint has been lodged against Mr Divangar accusing him of a membership of the Coordinating Committee to Form Workers’ Organizations, has provided no detailed information in reply to the additional allegations made by the complainant with regard to the arrest, detention, alleged severe beating and court summons of Borhan Divangar in August 2005 who was charged among other things with membership of the Coordinating Committee to Form Workers’ Organizations (established by Mahmoud Salehi and Mohsen Hakimi on 4 May 2005), membership of the newly formed unemployed workers’ organization, managing a labour web site in The Islamic Republic of Iran called “Tashakol” and participating in the wave of demonstrations in Saez that followed the shooting of a Kurdish opposition activist. The Committee therefore once again reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations concerning violations of freedom of association is to ensure respect for the rights of employers’ and workers’ organizations in law and in fact. If this*

procedure protects governments against unreasonable accusations, governments on their side should recognize the importance of formulating, for objective examination, detailed factual replies concerning the substance of the allegations brought against them [see First Report, para. 31]. Stressing that detention of trade unionists and violence exercised against them is unacceptable and constitutes a serious violation of civil liberties, the Committee requests the Government to institute an independent inquiry into the complainant's allegation of Mr Divangar's arrest, detention, alleged severe beating and court summons in August 2005 and to provide full particulars in this regard.

Teachers' Guild Association

1125. *The Committee recalls from the previous examination of the case, that, referring to information from the official Iranian news agency, the Islamic Republic News Agency (IRNA), the complainant alleged that Mr Mahmoud Beheshti Langarudi, the General Secretary of the Teachers' Guild Association, and Mr Ali-Ashgar Zati, the spokesperson of the same organization, were arrested on 12 July 2004. The complainant further alleged that they were arrested for their trade union activities and strikes that they organized in March and June 2004 for the non-payment of wages. Mr Langarudi was summoned to court in May 2004 on charges linked to the strike staged in March 2004. He was accused of entering a school illegally, leaving his job during working hours and mobilizing "agitating" teachers to strike. The complainant understood from the IRNA that the arrest in July 2004 could result in charges of violation of national security and organization of two protests in June in demand of higher wages and wage arrears of 5.2 billion rials (US\$620 million). The complainant added that Messrs Mahmoud Beheshti Langarudi and Ali-Asghar Zati were only released on bail in mid-August 2004. Mr Zati had to pay a bail sum of 70 million tomans and Mr Beheshti 50 million tomans. However, it had been reported that other members of the same association had been arrested in the northern province of Mazandaran. With regard to these allegations, the Committee had requested the Government to provide detailed information on any charges brought against Mahmoud Beheshti Langarudi and Ali-Ashgar Zati, as well as any court decisions handed down, and to take all necessary measures to ensure that where these charges are related to their trade union activities, they are dropped by the competent authorities [see 342nd Report, paras 690–691].*

1126. *The Committee notes that the Government confines itself to indicating that there are no official records in the Ministry of Justice concerning Mr Mahmoud Beheshti Langarudi, the General Secretary of the Teacher' Guild Association and Mr Ali-Asghar Zati, the spokesperson of the same organization. It is therefore not clear to the Committee whether this information means that there were no charges brought against these two trade union leaders. It requests the Government to carry out a full and independent investigation into this matter and to provide detailed information in this respect.*

Sanandaj Textile Factory

1127. *The Committee recalls that it had previously urged the Government to institute an independent inquiry into the allegations that the Intelligence Ministry interrogated, threatened and harassed Messrs Shis Amani, Hadi Zarei and Fashid Beheshti Zad and to keep it informed of the outcome. The Committee regrets that the Government confines itself to indicating that according to the information received from the Director General for Kurdistan, these claims are baseless and unfounded and that Messrs Shis Amani and Hadi Zarei requested to be dismissed and received their severance pay and other legal allowances. The Government has not indicated whether an independent inquiry was instituted and carried out, nor has it provided any documentation corroborating the voluntary nature of the workers' dismissals. The Committee therefore once again urges the*

Government to institute an independent inquiry into the above allegations and to keep it informed of the outcome.

- 1128.** *With regard to its previous request concerning the allegations relating to the proposal and adoption of legislation that would restrict the trade union rights of a large number of workers, the Committee notes the Government's indication that the Ministry of Labour and Social Affairs, together with the social partners, academics and experts in the field of labour law and labour relations, as well as with ILO assistance, was working on the labour law amendments. The Committee notes that according to the Government, the Ministry of Labour and Social Affairs shall submit the final draft of the amendments, which should incorporate the comments of the ILO, to Parliament for final approval within two months from the end of February 2007. The Committee requests the Government to keep it informed of the developments in this regard and to transmit a copy of the final proposed amendments so that it may examine this case in full knowledge of the facts.*

The Committee's recommendations

- 1129.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee requests the Government to communicate a copy of the Supreme Court final decision concerning the killing of four innocent persons by the police force during the incidents in Shahr-e-babak and to indicate the measures the Government has taken or envisaged in order to determine responsibility, punish the guilty parties and prevent the repetition of such acts.*
- (b) The Committee urges the Government to keep it informed of measures taken to ensure that the competent authorities receive adequate instructions so as to eliminate the use of excessive violence when controlling demonstrations, which might result in a disturbance of the peace.*
- (c) The Committee once again requests the Government to provide information on the occupations and any trade union affiliation of the six persons convicted as a result of the events in Shahr-e-babak, as well on the specific acts with which they were accused and the grounds on which they were convicted. The Committee requests the Government to communicate the court decisions handed down against these persons.*
- (d) The Committee requests the Government to ensure the immediate release of any of trade unionists who may still be detained in connection with the 2004 May Day celebration and to take steps to ensure that the charges brought against them are dropped and to keep it informed in this respect. Noting that the case of Mr Divangar is currently on appeal, the Committee expects that the Court of Appeal will re-examine this case having regard to the provisions of Conventions Nos 87 and 98 and that Mr Divangar will be acquitted of all remaining charges which appear now to be strictly related to his trade union activities. The Committee requests the Government to keep it informed in this respect.*
- (e) The Committee requests the Government to institute an independent inquiry into the complainant's allegation of Mr Divangar's arrest, detention, alleged*

severe beating and court summons in August 2005 and to provide full particulars in this regard.

- (f) *The Committee requests the Government to carry out a full and independent investigation into the allegation of the arrest of trade union leaders of the Teachers' Guild Association in July 2004 and to provide detailed information in this respect.*
- (g) *The Committee once again urges the Government to institute an independent inquiry into the allegations that the Intelligence Ministry interrogated, threatened and harassed Messrs Shis Amani, Hadi Zarei and Fashid Beheshti Zad and to keep it informed of the outcome.*
- (h) *The Committee requests the Government to keep it informed of the developments with regard to the amendment of the Labour Law and to transmit a copy of the final proposed amendments so that it may examine this case in full knowledge of the facts.*

CASE NO. 2508

INTERIM REPORT

**Complaint against the Government of the Islamic Republic of Iran
presented by**

- **the International Confederation of Free Trade Unions (ICFTU) and**
- **the International Transport Workers' Federation (ITF)**

Allegations: The complainants allege that the authorities and the employer committed several and continued acts of repression against the local trade union at the bus company, including: harassment of trade unionists and activists; violent attacks on the union's founding meeting; the violent disbanding, on two occasions, of the union general assembly; arrest and detention of large numbers of trade union members and leaders under false pretences (disturbing public order, illegal trade union activities); the mass arrest and detention of workers (more than 1,000) for planning a one-day strike. The complainant organizations also allege that the authorities have arrested Mr Mansour Osanloo, chairperson of the union executive committee, on very serious charges (including contacts with Iranian opposition groups abroad and instigating armed revolt against authorities), and that he had been detained for over six

months as of the time of the filing of the complaint and is being denied due legal process

- 1130.** The complaint is contained in a communication from the International Confederation of Free Trade Unions (ICFTU) and the International Transport Workers' Federation (ITF) dated 25 July 2006. The complainants submitted additional information in a communication of 5 December 2006.
- 1131.** The Government transmitted its observations in a communication dated 9 March 2007.
- 1132.** The Islamic Republic of Iran has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 1133.** In its communication of 25 July 2006, the complainants state that the Syndicate of Workers of Tehran and Suburbs Bus Company (Sandikaye Kargarane Sherkate Vahed Otobosrani Tehran va Hoomeh), hereafter referred to as "the union", is an official affiliate of the ITF. The union was originally formed in 1968 but was later disbanded by the Government and replaced by the Workers' House and Islamic Labour Council; it was re-established in 2005 after a few years' preparation work by the employees of the company.
- 1134.** The complainants allege that since the 1979 Islamic revolution in the Islamic Republic of Iran, the Government has not permitted the existence of independent trade unions. The only workers' organization authorized by the Government is the Workers' House, and the 1990 Labour Code stipulates that "the workers ... may establish Islamic societies and associations at a workplace". These organizations are called Shoraya Esiami and at worksites in industrial, agricultural and service organizations of more than 35 employees an Islamic labour council can also be established; these councils are overseen by the Workers' House, which, according to the complainant, is essentially a channel for the Government to control the workers; though it appears to sometimes address workers' issues, such as raising the matter of wage arrears or organizing a May Day demonstration in 2006, these activities possess little substance and are merely carried out in order to control and contain workers' discontent.
- 1135.** The complainants indicate that whenever workers have been persecuted for trying to organize or bargain collectively, or whenever strikes have been repressed – even violently – there has been no evidence of intervention by the Workers' House on the side of the workers. In spite of several requests from the complainants, the Workers' House has been unable to provide evidence of having protested to the Government with regard to imprisoned workers. There is also no evidence that either the Workers' House or the Islamic work councils have attempted to engage in collective bargaining with employers.
- 1136.** According to the complainants, the employees at the Tehran and Suburbs Bus Company (Sherkate Vahed), hereafter referred to as "the company", had been dissatisfied for a long time, as the workers' organizations established in the company had not addressed workplace issues. Problems at the workplace include low wages and long working hours, the use of outdated buses, drivers' fatigue caused by heavy road congestion, staff redundancy and management corruption. The company's employees took it upon themselves to study ILO literature on trade union and human rights through regular study circles; after a few years, this process eventually led to the decision to form their own organization to represent the interests of the company's workers.

- 1137.** The complainants allege that throughout 2005, the workers' efforts to establish the union were met with determined – and often brutal – repression from employers, security forces and official labour organizations. Prior to, during and after the union's re-inauguration meeting on 3 June 2005, vicious attacks against and unlawful arrests of the workers and their supporters had taken place. According to the complainant, two factors contributed to making the union a *cause célèbre* amongst both Iranian and international trade union activists: the numbers involved (at one point over half of the company's 16,000 employees took part in union organizing activities) and the ruthless reaction of the political and judicial establishment. Management also proved consistently hostile to the workers' efforts to organize, with the company manager and his deputy said to be particularly engaged in quelling the workers' organizing activities.
- 1138.** The repression of the employees' attempts to organize began in early 2005, when a large number of activists started to be harassed. Ali Rafil was frequently transferred and Parviz Faminbar was not only compulsorily transferred, but also frequently summoned for questioning. He also received threatening phone calls at home. Moosa Paykyar was compulsorily transferred, saw his overtime cancelled and was frequently summoned to the company's security office for irrelevant questioning.

Initial harassment of union activists

- 1139.** Between March and June 2005, seven union members were harassed and subsequently fired. Before eventually losing their jobs, they were compulsorily transferred or demoted, had their overtime cancelled and had either their promotions or salaries suspended. Several of them were summoned to the company's security office and interrogated, at times outside the company's premises and always without any official warrant. The workers involved were: Abdollah Haji Romanan, Abdolreza Tarazi, Ahmad Farshi, Ali Zadeh Hosseini, Ayat Jadidi, Ebrahim Madadi and Mansour Osanloo. Mr Osanloo, a worker at the company for 20 years, was especially targeted for harassment as he was a member of the workers' group that established the union and later became the chairperson of the union's executive committee. According to the complainants, ten other union members were also fired: Abbas Najand Kodaki, Allakbar Pir Hadi, Amir Takhiri, Atta Babakhani, Hassan Karimi, Hassan Mohammadi, Mahmoud Hojabeti, Naser Gholami, Reza Nematipour and Seyed Behrooz Hosseini.

Attack on the union's founding meeting

- 1140.** On 9 May, a meeting called to formally establish an independent union at the company was held at the offices of the Bakery Workers' Association (BWA), an independent workers' organization which had lent its premises to the union. The complainants allege that the meeting was violently broken up by a large number of men from the official workers' organization, the Workers' House and from the company's Islamic Shora. The attack occurred at about 2 p.m., when an estimated 300 men arrived at the BWA offices and began smashing the doors and windows, tearing up documents and destroying library books. They also attacked ten members of the union's founding committee. The complainants indicate that Mansour Osanloo suffered knife wounds during this raid. Some sources claim that the perpetrator was Jalal Saidmanesh, of the company's Islamic Shora, who said he was going to cut out Mr Osanloo's tongue and behead him. Mr Osanloo's hands were reportedly tied behind his back by Hassan Sadeghi, the Chief Executive of the Supreme Council for the Coordination of the Islamic Shoras. As a result of the attack, Mansour Osanloo had to have stitches in his neck and tongue. Ebrahim Madadi, a technical worker who was already facing disciplinary action and several other union activists were beaten up during the raid. The security forces, though present, did not intervene and

actually filmed the events; they also confiscated press cameras and tape recorders from the national news agency and newspaper reporters.

- 1141.** The complainants allege that the union's general assembly was violently disbanded on two further occasions. On 13 May 2005, when union members tried to hold their general assembly, security forces, accompanied by members of the Workers' House, again stormed the meeting. On 1 June, during the workers' third attempt to hold a general assembly at the BWA premises, they were attacked with "Molotov cocktails" or similar firebombs which damaged the building. The meeting was finally held on 3 June. According to reports, nearly 8,000 of the company's 16,000 workers attended the meeting and decided to join the union.

Arrest and detention of union members

- 1142.** The complainants state that on 7 September 2005 security forces arrested several members of the union during a protest against unpaid wages. Those arrested included Mansour Osanloo, Ebrahim Madadi, the deputy chairperson of the union's executive committee, Abbas Najand Kodaki, Naser Gholami, Davood Norouzi, Hassan Haj Alivand and Nemat Amirkhani. They were taken to court the following day and charged with "disturbing public order", then provisionally released in the days that followed. On 22 December 2005, 13 trade union leaders from the union were arrested by Information Ministry agents and taken to Evin Prison in Tehran, a prison that according to the complainants has for decades been notorious as a detention and torture centre for political prisoners. The charges were for "illegal trade union activities" and those detained were: Mansour Osanloo, Ebrahim Madadi, Mansour Hayat Gheibl, Abbas Najand Kodaki, Abdolreza Tarazi, Ali Zadeh Hosseini, Qlamreza Mirsa'l, Akbar Ya'qoubi, Reza Bour Bour, Hamld Reza Reza'l Far, Javad Kefayati, Seyyed Javad Seyyedvand and Morteza Kamsari. A further 16 trade unionists from the union were detained around that time. They were board members Naser Gholami, Dawood Razavi, Saeed Torablan and Yagoub Salimi; and union members Reza Shahabi, Amir Takhiri, Sadeg Ghandan, Ali Ebrahimi, Sadeg Mohammadi, Hamid Zandi, Ali Gorbani, Arsalan Zarbarnia, Hossein Mehdikhani, Hossein Gavadi, Majid Talai and Akbari. Following a transport strike by Tehran's bus drivers on 25 December, all of those detained were released, with the exception of Mansour Osanloo. At the end of 2005, six of those originally detained – Mansour Hayat Gheibi, Ebrahim Madadi, Abdolreza Tarazi, Qlamreza Mirza'l, Abbas Najanci Kodaki and Ali Zadeh Hosseini – were summoned to appear in court in January 2006 on charges of "disturbing public order".

Mansour Osanloo charged with instigating an armed revolt

- 1143.** According to the complainant, by the end of 2005, Mansour Osanloo had yet to be granted access to a lawyer and it was reported that he was facing charges including contact with Iranian opposition groups abroad and instigating an armed revolt against the authorities. Since then, for over six months at the time of the submission of the complaint, Mr Osanloo has remained in detention at Evin Prison. For most of this time, access to his lawyer, members of his family and fellow colleagues has been denied. Prior to his arrest, he was due to visit his doctor for eye treatment, possibly due to the injuries he sustained in the abovementioned incident of 9 May 2005; his health condition is increasingly becoming a matter of serious concern.
- 1144.** The complainants indicate that the union has been campaigning for Mr Osanloo's immediate and unconditional release. Furthermore, it has been demanding that the Government and the company recognize the union and that a collective bargaining agreement with the company be negotiated. None of these demands has been met. Instead,

the Government and its agents, together with the company, have continued to interfere with legitimate trade union activities such as a work stoppage or celebrating May Day in 2006. More arrests and assaults have taken place since then.

- 1145.** The complainant states that the mass arrests that took place towards the end of January 2006 were of a size that trade unions around the world had not witnessed over the past two decades. At their peak, more than 1,000 people were detained for planning a one-day strike action. Furthermore, the company continues to threaten those workers who are sympathetic to the union with dismissal and some have been out of work for a few months.

Chronology of events since January 2006

- 1146.** On 1 and 2 January 2006, bus workers rallied in Tehran calling for the immediate and unconditional release of Mansour Osanloo. The union announced a one-day strike on 28 January. As the date for the planned strike reached nearer, eight members of the union's executive committee were summoned by the court and subsequently prevented from leaving the court building. The Mayor of Tehran, who had earlier made some promises to the union, now called the union illegal and vowed to stop the strike. The Government and its security forces, as well as the company, brought in new buses and drivers to break the strike. They accused the union of being made up of "subversives" and "saboteurs". About 100 union members were arrested on 27 January. The following day, the security forces and members of the company beat up and forced the drivers to drive the buses. Hundreds of drivers and their wives and even children were transferred to the Evin Prison. The 12-year old daughter of one of the union members who was beaten and arrested was thrown into a police car at night. To crush the strike, the security forces used tear gas, batons and threatened to shoot the strikers. The police raided the homes of the union members and its leadership. After that day, more than 700 members of the union and a number of supporters still remained in custody. Several reports claimed that more than 1,000 people were detained during the day. Some 30 arrested workers were seriously injured and required immediate medical attention.
- 1147.** The complainants indicate that unions and NGOs around the world have expressed solidarity with the bus drivers. The ICFTU and ITF and a number of their affiliated unions in Argentina, Australia, Japan, Kenya, Luxembourg, Norway and United Kingdom demanded the release of the detained workers. Protest rallies, in which Amnesty International joined, took place in Ottawa and London. A group of family members and spouses of the jailed union workers rallied in Tehran and the "Global Unions" grouping, led by the ICFTU and the ITF, announced that an international day of union protest would be held on 15 February.
- 1148.** The complainant alleges that, on 6 February the Islamic Republic of Iran's reformist party, the Participation Front lodged a protest; the authorities began to release the workers from prison, leaving 15 detainees in custody. However, new arrests also took place during this period and some 100 workers staged a protest in front of the Labour Ministry in Tehran for two consecutive days.
- 1149.** The Government's Iranian Labour News Agency (ILNA) reported on 11 February that a "Committee to Defend Workers' Trade Organizations in Iran", comprised of 14 "traditional" unions, had released a statement demanding the unconditional release of all bus workers in Tehran. The statement was sent to the Minister of Justice, the Iranian President, the Head of the Iranian Parliament, members of the Labour and Social Affairs Caucus of Parliament, the Minister of Labour and Social Affairs, Mayor of Tehran, and all news agencies and Iranian newspapers. The following organizations were reported by the ILNA to have signed the statement in question: the Driver Training Organization of Iran, the Organization of Inter City Bus Drivers of Iran, the Trade Organization of Inter City

Bus Drivers of Kerman, the Driving School Teachers' Trade Organizations of Tehran, Mashad, Arak, Shahrekord and Esphahan, the Free Newspaper Reporters' Trade Organization of Tehran, the Painters' Trade Organization of Tehran, the Trade Organization of the Employees of Khatamolnbiya Hospital, the Driving School Teachers' Trade Organization of Khoramabad, the Islamic Labour Council of Tehranshimi Company, the Trade Organization of Mehrad Hospital Employees.

- 1150.** On 15 February, the International Union Action Day on Iran worldwide protest actions took place. The initiative enjoyed participation from many unions worldwide, including many unions in the Middle East. Unions met with Iranian diplomatic representatives in Geneva, Tokyo, Bangkok, Mumbai and Wellington, and protest actions took place in front of Iranian embassies in Australia, Canada, Norway, the Philippines and United Kingdom. Unions in Austria, Bangladesh, Egypt, Iraq, Jordan, Morocco, Tunisia and United States also held protests, and unions in Australia, Canada, Republic of Korea, New Zealand, Russian Federation and Turkey and many others sent protest letters to the Iranian Government. The union released its statement "on the support and solidarity of workers internationally" on 16 February. It disclosed the authorities' announcement that the detainees would only be released if they signed a pledge to stop participating in union activities. Apparently, the authorities also said that it was not "wise at this time to allow the formation of trade unions in the country, and anyone deciding to participate in the union's activities would be considered the opponent of the Islamic Republic System and thus will be prosecuted".
- 1151.** The complainant states that between 17 and 22 February, all detainees were released except the seven executive committee members (Mansour Osanloo, Ebrahim Madadi, Mansour Hayat Gheibi, Yussaff Moradi, Yagoub Salimi, Ali Zadeh Hosseini, Mohammad Ebrahim Noroozi Gohari). The authorities and the official press initially were silent about the case, however Justice Minister Jamal Karimi-Rad admitted that these men were being held for "illegal acts" but failed to specify the charges. Bus workers held a protest rally outside the Ministry of Labour on 22 February demanding their reinstatement.
- 1152.** The union's spokesperson, Gholamreza Mirzaie, was arrested in Tehran on 4 March. From 13 to 15 March around 120 workers once again gathered outside various government offices and the bus company headquarters in protest at the continued barring from work of around 1,000 bus workers who had been without pay for the past six weeks. Meanwhile, a list of 46 workers whose contracts had been terminated was published by the company. The list included five members of the union's executive committee who were still in prison; the company stated that the orders had come from the regime's intelligence authorities. The dismissed workers were: Mohammad Ebrahim Noroozi Gohari, Hassan Karimi, Gholamreza Khoshmaram, Hadi Kabiri, Mohammad Eslamian, Gholamreza Fazeli, Abbas Najand Kodaki, Masoud Ali Babaiee Nahavandi, Hasan Mirzaee, Seyed Behrooz Hosseini, Abdolreza Tarazi, Gholamreza Mirzale, Nematollah Amirkhani, Hossein Karimi Sabzevar, Yagoub Salimi, Habib Shami Nejad, Hassan Mohammadi, Hassan Karimi, Mohammad Na'mani Poor, Soltan Ali Shekari, Atta Babakhani, Fazlollah Mazaheri, Ahmad Moradmand, Allakbar Pir Hadi, Vahaab Mohammadi Zarankesh, Davood Norouzi, Saeed Torabian, Amir Ghanele, Mahmoud Hojtabi, Ayat Jadidi, Ali Zadeh Hosseini, Gholamreza Gholamhosseini, Seyed Reza Nematipoor, Gholamreza Khani, Amir Takhiri, Ebrahim Gholami, Seyed Davoud Razavi, Seyed Mohammad Hossein Dadkhah, Masoud Foroghi Nejad, Mohammad Sadegh Khandan, Jamil Bahadori, Mansour Hayat Gheibi, Ebrahim Madadi, Seyed Hossein Rekhshat, Naser Gholami, Reza Shahabi Dekarba.
- 1153.** The complainants allege that from 18 March to 10 April all detainees except Mansour Osanloo were released. However, Mansour Hayat Gheibi was re-arrested within 24 hours of his release, then subsequently released again.

- 1154.** On 1 May, 1,000 police and security forces surrounded 250 bus workers who had gathered at the Tehran Bus Company for a May Day rally and arrested 13 members, including Abbas Najand Kodaki, Yagoub Salimi, Mahmoud Hojabti, Gholamreza Gholamhossaini, Gholamreza Mirzaie, Hassan Dehghan Gholamreza Khani, Fazeli and Ebrahim Madadi. The above were released on 6 May. According to the complainant, on 15 July, eight members of the union were arrested after a peaceful rally in front of the Labour Ministry. They were released on 19 July.
- 1155.** The complainants state that they as well as a large number of their affiliates, have consistently campaigned since December 2005 for the release of Mansour Osanloo, and the union's right to be recognized and to negotiate a collective agreement with the company. Since March 2006, the Government, through its Ministry of Labour and Social Affairs (MOLSA), has on repeated occasions provided very firm guarantees, both orally and in writing, that it was doing all it could to secure the release of Mr Osanloo. Direct contacts were held between senior representatives of the Labour Ministry and the ICFTU General Secretary in Geneva, at the time of the March 2006 session of the ILO Governing Body. Subsequent contacts were held between the Ministry and ICFTU representatives during the same Governing Body session as well as before and after the Labour Day (1 May 2006) events described above, and subsequently during the 95th Session of the International Labour Conference in June 2006. In mid-May, in particular, MOLSA wrote on at least three occasions to the ICFTU indicating that it was actively seeking Mr Osanloo's release and expressed the hope that these efforts were "soon to bear fruit" and that "good news [was] coming to [the ICFTU] shortly". Similar assurances were repeated during the 95th Session of the International Labour Conference by a MOLSA representative to an ICFTU official. Several of the letters sent by MOLSA to the ICFTU in mid-May 2006 were also copied to the ILO Director-General as well as to a number of senior ILO officials. At the same time, however, MOLSA had repeatedly hinted that the difficulty in obtaining Mr Osanloo's release rested not with the Labour Ministry, but with the judicial authorities of the Islamic Republic and, more specifically, with the Information Ministry, with which the Labour Ministry had held several high-level meetings. While MOLSA acknowledged that these efforts had hitherto been unsuccessful, it also referred to some undisclosed elements in Osanloo's file which, in its view, tended to establish that he was detained not for trade union-related but other, unspecified charges. The complainants indicate that the Ministry representative also repeated an earlier invitation for an ICFTU delegation to visit the country and provided assurances that such a mission would be allowed to meet with Mr Osanloo, outside or inside his prison, and that the prisoner would at the time offer assurances to the ICFTU that he had abandoned any trade union activity and no longer considered himself as a trade unionist. These latest elements, in particular, are a source of extreme concern to the complainants, inasmuch as they cast an ominous shadow on Mr Osanloo's current physical and psychological integrity. On each occasion, therefore, the complainants had made it very clear that they could not determine their position in this case on unspecified elements and that, if the Government had other charges against Mr Osanloo besides those stemming from his commitment to trade unionism and his participation in and leadership of legitimate trade union activities, it should produce the prisoner in open court, formally indict him and, in the meantime, allow him unrestricted access to defence counsel. To the best of the complainants' knowledge, however, the Government has yet to do so.
- 1156.** The complainants allege that the first meeting between Mr Osanloo and his lawyers, to the best of their information, took place very recently – on or around Saturday, 24 June 2006. On or around that date, according to the Government's official Iranian Students' News Agency (ISNA), Mr Osanloo's lawyers, Messrs Youssef Molayee and Khorshid, met him in Evin Prison. They were reportedly quoted as expressing concern for his health, in particular his eye condition, and reportedly also stated that they had – hitherto unsuccessfully – applied for his file to be transferred from the prison to the Revolutionary

Court. In the complainants' understanding, this request is motivated by the defence counsel's desire to see his legal case transferred from supervision by the Information Ministry to the country's judicial authorities.

- 1157.** In their communication of 5 December 2006 the complainants indicate that Mr Osanloo was released on bail on 9 August 2006, shortly after they had submitted their complaint to the Committee. Bail was set at the exorbitant amount of 150 million toman (US\$165,000) by a Tehran court. The complainants allege that Mr Osanloo's union colleagues, friends and relatives had to commit their private property as collateral in order to secure his release.
- 1158.** According to the complainants, Mr Osanloo was re-arrested on 19 November 2006. He is again being held in Evin Prison's high-security area "section 209", where prisoners charged with political offences are held. Our sources have informed us that Mansour Osanloo was arrested while he, Ebrahim Madadi and Haiat Gaibi were on their way to the office of the Ministry of Labour in East Tehran to discuss the dismissal by the company of over 50 employees, all members of the union.
- 1159.** Mr Osanloo had undergone eye surgery a week prior to his arrest. The complainants allege that at least five agents told Mr Osanloo that he was under arrest but refused to show an arrest warrant or explain to him and his companions the reason for his arrest. Instead they fired gunshots into the air and threw Mr Osanloo violently into a waiting car, ignoring his delicate condition. They also kicked Mr Madadi, who was protesting the arrest.
- 1160.** The complainants state that a judge subsequently informed Mr Osanloo's wife that he was being held in section 209 of Evin Prison for negotiations and discussions with the authorities. According to some sources, his family was informed that an arrest warrant did exist and was issued by Tehran's Deputy Prosecutor. They were also informed that his mother could visit him, but despite waiting for several hours outside Evin Prison his mother was not allowed to see Mr Osanloo. It was not until 26 November that his wife was allowed to see him, and then only briefly, while he was transferred to court.
- 1161.** The complainants allege that Mr Osanloo did not have access to his lawyers before 5 December 2006 and that furthermore they had just been informed that on 5 December the judge had asked for an additional 30 million toman bail for the release of Mr Osanloo, on condition that only his wife could act as guarantor. Mrs Osanloo refused. According to the ILNA, Mansour Osanloo was taken from Evin Prison to branch 14 of the Revolutionary Prosecutor's Office in Tehran on 26 November for failing to appear in court to face the charges pending against him since his arrest on 22 December 2005. These charges are clearly unfounded, given that his case was scheduled for 20 November 2006 and he was arrested the day before. The complainants state that, as members of Mr Osanloo's family had put up their houses as collateral in order to secure his release on 9 August 2006, it would be highly unlikely that he would refuse to cooperate with the prosecutor.
- 1162.** According to the complainants, during his time in prison from 22 December 2005 to 9 August 2006, Mr Osanloo was held in solitary confinement for three months and 23 days. He was under severe psychological pressure throughout his prison stay, was blindfolded and handcuffed at times, and during interrogations was harassed and threatened that he would stay in prison for as long as the police wanted to keep him. At times his visiting rights, use of telephone and access to the courtyard were suspended. Interrogation teams changed frequently and the questions were not all connected to the charges against him. He was forced to share details about his private life, his work, and his relationship with friends and colleagues under threat of being kept in prison for 15 years; the interrogations created an atmosphere which made him fear for his own life and that of members of his family. He was told that if he were to leave the county his family would be

annihilated. Even after he was released from prison, the harassment continued: he was repeatedly asked to report to the police, who also called his son and his wife at their workplaces. Mr Osanloo complained to the United Nations office in Tehran about his situation and shortly after that he was summoned to the Revolutionary Court and threatened with imprisonment.

- 1163.** The complainants state that Mr Osanloo and his wife were asked to sign a statement saying they would cut ties with friends and colleagues. Due to this continued persecution Mr Osanloo wrote a letter to Tehran's Human Rights Commission describing the treatment he had been subject to both while in prison and after his release; the letter is attached as Appendix I to this communication. Despite this ongoing harassment, Mr Osanloo has continued his trade union activities and participated in and chaired meetings of the union while maintaining his contacts with the international trade union movement. The complainants state that they believe that Mr Osanloo's continued trade union activities and his contact with international organizations such as the ILO, the United Nations, the ITF and themselves are the key reasons behind his arrests; this in turn calls into question whether the Government is genuinely committed to workers' rights, dialogue with the international trade union movement and cooperation with the ILO.
- 1164.** The complainants state that the union had been invited to attend a workshop on "globalization and privatization" organized by the ILO's Subregional Office for South Asia on 8 November 2006. On their way to the workshop, Mr Osanloo and nine other executive board members of the union were arrested in the city of Tabriz; they were held for five hours by the local police. Other participants in the workshop included representatives of the Islamic Labour Councils, but they apparently were not arrested.

Arrest of union members on 3 December 2006

- 1165.** The complainants indicate that two members of the union's board of directors, Seyed Davoud Razavi and Abdolreza Tarazi, as well as trade union activist Golamreza Golam Hosseini were arrested on 3 December 2006 and brought to police station division No. 6. They were arrested at Tehran's Khavaran bus terminal while distributing trade union leaflets to fellow bus drivers. One leaflet was the translation of the most recent protest letter sent by the International Trade Union Confederation (ITUC) to President Ahmadinejad regarding the continued arrest of Mansour Osanloo. The other leaflet was a statement by the union regarding its activities. Seyed Davoud Razavi and Abdolreza Tarazi were released the same evening; Golamreza Golam Hosseini was still in detention as his family has not been able to provide bail, according to the complainant's information. The three are among the 50 bus drivers who have been suspended since their protest actions last year. They were scheduled to appear in court the following day.
- 1166.** The complainants have submitted two documents in support of their allegations: (1) a statement from Mr Osanloo's lawyers, dated 12 December 2006, indicating inter alia that the authorities have failed to sufficiently explain the charges brought against Mr Osanloo, that they have been denied access to his court file, thus impairing the discharge of their professional duties, and that his continued arrest remains unjustified; and (2) a statement made by Mr Osanloo attesting to repeated instances of harassment during his detention in Evin Prison, including a period of solitary confinement and several interrogations.

B. The Government's reply

- 1167.** In its 9 March 2007 communication, the Government states that the present case is rooted in a controversy concerning the legitimacy and right of representation of workers' organizations. Increases in the concerned workers' professional and welfare-related

demands, on the one hand, and the apparent failure of the Workers' House-affiliated Islamic Labour Council of Sherkate Vahed Autobusrani Tehran va Hume, hereinafter referred to as SHVATH, to meet them, gave rise to the re-emergence of the union in a climate of heated controversies and the absence of tolerance among different workers belonging to SHVATH.

- 1168.** The Government indicates that, according to the existing records, both prior to and during clashes between the conflicting workers' parties, the Government maintained an impartial role and has sought amicable means to bring about a rapprochement between the opposed workers' factions. In the ensuing clashes between the members of the SHVATH Islamic Labour Councils and the members of the union on 19.12.84 (by the Iranian calendar) in the latter group's office, the police were forced to intervene to maintain discipline, to stop the loss of public buses and other public property, to prevent the spread of social unrest to the neighbourhood and to improve the atmosphere of animosity. Suspects from both sides were taken into custody; most were released and some were later brought before the court.
- 1169.** The Government maintains that the disciplinary measures it adopted to maintain peace between the opposed workers' groups were all authorized by the judiciary. A review of the reports of similar workers' events and their assemblies demonstrates that, as far as the workers maintain their poise and exercise a bit of self-restraint even in the unlawful assemblies, the police refrain from intervening in their affairs. The Government alleges that accusations of breaking the law, unauthorized gatherings and unlawful entrance, disturbing social and security conditions, endangering the life and security of innocent citizens including children, women, and the elderly, destroying public properties and public buses and disturbing traffic at its peak time, all of which required police intervention, were equally brought against both antagonistic sides. According to the chief of the police there seemed to be no better option but to arrest the leaders and instigators of both groups so as prevent the alteration of a deeply rooted labour dispute to avoid potential social unrest. The Government states that it believes the above-described actions to be fully in line with the rights attributed to Government under Article 8 of Convention No. 87.
- 1170.** According to the Government the police records on the arrested union members reveal that the length of their terms in custody in the majority of cases did not go beyond two hours. The most severe cases, attributed to the seven members of the union, was a week's detention without any social and security track records for them. The records, the Government adds, indicate the leniency of the court toward the workers in the related hearings, despite substantial losses to public property. The Government states that it is fully against the prevalence of any level of animosity in social disputes and strongly promotes the spirit of collaboration, constructive dialogue and cogent argumentation among the social partners. The aim of the temporary arrest of the angry workers was not their detention, nor a blatant act of terror against labour forces, as the complainant alleges; it was rather aimed at tranquilizing the then-heated tension, which could have had horrendous consequences for both of the opposed faction.
- 1171.** The Government adds that, contrary to some of the allegations brought against it, according to the information it has received from its departments no one was ever made to sign letters of repentance for conducting trade union activities. The Government stated however that it would seriously look into any such letter upon receipt and would comment on them accordingly.
- 1172.** The Government alleges that it has no record of the union's registration, and that those union members who believed that the Islamic Labour Councils had defaulted in furthering workers' interests and wished to break away from the Islamic Labour Council of their workplace should have employed the legal mechanism stipulated in the Labour Law of the Islamic Republic of Iran for dissolving their Islamic Labour Council (article 26 of the

Administrative Code of Practice of the Islamic Labour Councils) and starting their own independent workers' organization. As unionists, who are familiar with the rules of the trade union activities, they should have sought the national legal procedures to give force to their rightful demands, such as those laid down in article 23 of the Islamic Labour Councils Law. They instead have chosen to take this dispute to the international tribunals before exhausting all available domestic solutions. The Government indicates that the union's failure to register should not be interpreted as reluctance on the part of the Government to observe the legitimate need of workers to form their independent trade unions. The Government is legally and officially obliged to follow the law and until the existing Labour Law is duly amended by the Parliament nothing may be done for the recognition of the said syndicate.

- 1173.** According to the employer the main reasons for the dismissal of the workers were due to the extensive damage they inflicted on its premises and properties, as well as negligence in the execution of their duties. The Government investigation further revealed that no worker was dismissed due to labour protests. Their suspension was attributed to other reasons such as unlawful labour-related deeds and lack of discipline and misdemeanours in the workplace. Supporting syndicalism or favouring any other labour union causes did not in any way bear upon their dismissal. The Government adds that the disciplinary action taken against the at-fault workers was very mild: all were set free, including Mr Osanloo, and reinstated after four months; additionally wage arrears for the suspension period were remitted in full.
- 1174.** Despite much of the unfounded rumours spread and echoed globally, the Government maintains that it intervened to safeguard the wages and interests of the founders of the union. Through instructions to the pertinent Labour Dispute Board in Tehran, the Ministry ensured that articles 157 and 158 of the Labour Law of the Islamic Republic of Iran were extended to and positively and leniently interpreted in their favour. The negotiation of their reinstatement was also diligently pursued by the pertinent Reconciliatory Board and in certain cases the Board of Inquiry directly ruled for their return to work. The aforementioned boards also addressed and ruled for the payment of wage arrears of the dismissed workers. Preparing the ground for the release of all union founders arrested temporarily, including Mr Osanloo, and increasing the minimum wages and other compensation of the SHVATH were among other government initiatives to promote the rights of workers where the Government realized them as legitimate. The Government obliged the pertinent employer to immediately meet them through the rulings of the Dispute Settlement Board of the MOLSA and the resolutions of the Tehran Security Council. Through the constructive approach adopted by the Government and the official transfer of the SHVATH to Tehran municipality many of the existing problems of the SHVATH workers as to their rightful and legitimate demands such as increases in the minimum wage, raising loans, annual clothing rations, etc., are already duly met or are to be fulfilled shortly.
- 1175.** The Government states that, in line with the joint statement of the Ministry and the ILO mission (Freedom of Association Branch), and in order to protect and to promote the rights and interests of workers and employers at all levels, the Ministry embarked on registering independent trade unions for the first time after a quarter of a century. Additionally, through dialogue with the employers' and workers' representative organizations specific framework regulations are drafted to ensure the abovementioned organizations are registered once their constitutions are in conformity with the required laws and regulations.
- 1176.** According to the Government, it is determined to amend the Labour Law to meet both the requirements of the Islamic Republic of Iran's Decent Work Country Programme and to cope with the new social, economic, and financial developments in the labour market and the field of labour relations. The Government states that the organizations of the social

partners, parliamentarians, university scholars and related NGOs together with social engineers were invited for the study and the examination of the labour law. The Government had also received technical assistance from the ILO with respect to freedom of association issues, including an ILO mission to the Islamic Republic of Iran which resulted in the preparation of proposed amendments to Chapter 4 of the Labour Law on workers' and employers' organizations; additionally, in February 2007, the Government had sought anew a technical assistance mission from the Labour Law and Labour Administration Department of the ILO so as to maintain ongoing dialogue and cooperation and critically review some of the proposed amendments made by the Government and its social partners.

1177. The Government alleges that a false and longstanding assumption has long been held by the ITUC and ITF as to the function and role of the workers' organizations in the Islamic Republic of Iran and those of the Government in handling labour market disputes and developments. The Government states that the complainants perhaps recall the long unyielding monopoly held by the Workers' House as the then most representative workers' organization and do not wish to change their attitude by acknowledging the changing patterns and new developments in the Islamic Republic of Iran's labour relations. Respecting the freedom of workers to choose the Islamic Labour Councils, despite its apparent contradiction with the definition of workers' organization and the questionable presence of management representatives within them, does not by any means equate to their being used as arms of the Government in the workplace. According to the Government, although it has not ratified Conventions Nos 87 and 98, it is determined to further promote the establishment of free employers' and workers' organizations. The new amendments currently under way allow for a multiplicity of employers' and workers' organizations and the break-away faction of the Islamic Labour Councils of the SHVATH to form their own independent trade unions.

1178. The Government states that the Citizen's Rights Supervisory and Inspection Board has heard the union's case and ruled in their favour. Concurrently, the National Committee on Human Rights (established within the judiciary) is also diligently looking into the union's case; its report will be provided shortly.

C. The Committee's conclusions

1179. *The Committee notes that the present case concerns acts of harassment against members of the union, including: demotions, transfers, and suspensions without pay of union members; acts of violence against trade unionists; and numerous instances of the arrest and detention of trade union leaders and members.*

1180. *The Committee notes the numerous alleged violations stemming from the period of the union's founding, from March to June 2005, according to which several trade unionists were summoned for questioning and interrogated in the company's offices, transferred, demoted, and fired. According to the complainant, the trade unionists Ali Rafil, Parviz Faminbar and Moosa Paykyar were all subject to compulsory transfers, whereas the latter two were also frequently summoned to the company's security office for questioning. The following were subject to various forms of harassment, including demotions, transfers, and the cancellation of overtime, before being dismissed: Abdollah Haji Romanan, Abdolreza Tarazi, Ahmad Farshi, Ali Zadeh Hosseini, Ayat Jadidi, Ebrahim Madadi and Mansour Osanloo. In addition to these trade unionists, the complainants allege that ten others were also dismissed: Abbas Najand Kodaki, Allakbar Pir Hadi, Amir Takhiri, Atta Babakhani, Hassan Karimi, Hassan Mohammadi, Mahmoud Hojabti, Naser Gholami, Reza Nematipour and Seyed Behrooz Hosseini.*

- 1181.** *The Committee recalls in this respect that acts of intimidation and harassment against workers, by reason of trade union membership or legitimate trade union activities, violate the right to organize. Moreover, the Government is responsible for preventing all acts of anti-union discrimination and must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 786 and 817]. The Committee notes that, regrettably, the Government's reply provides no specific information respecting the many allegations of anti-union discrimination noted, particularly as regards the harassment and interrogations at the workplace and the numerous demotions and transfers. The Committee therefore requests the Government to ensure that a full and independent investigation is carried out into the allegations of various types of workplace harassment and to transmit a detailed report in this regard. It further requests the Government, in light of the information revealed by the investigation, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities.*
- 1182.** *The Committee notes that, in addition to the 17 trade unionists dismissed from March to June 2005, the complainant also alleges the mass dismissal of 46 workers in March 2006, at around the same time that mass actions were being organized by the union, outside various government offices and the company's headquarters, to protest the continued barring from work of 1,000 workers who had been without pay for six weeks. The Committee notes the Government's indication that the employer had dismissed the concerned parties due to the damages they inflicted on work premises and property, as well as for negligence in the execution of their duties, and that furthermore no workers were dismissed due to labour protests. Additionally, the Government states that the disciplinary action taken against the workers was very mild: all were set free and reinstated after four months with full wage arrears for the period of suspension.*
- 1183.** *The Committee notes that the Government's brief and general statement concerning the activities of the employer in relation to the union members are in direct contradiction with the complainant's allegations. It observes with regret, nevertheless, that the Government's reply respecting this matter is of a vague and general nature. The information provided does not specify which workers were dismissed, and on which occasions; nor does it indicate whether or not the workers alleged to have damaged company property were convicted of such wrongdoing by a court, following a trial in which all guarantees of due process of law were observed. It further notes the Government's general comment that most of these issues have been resolved, without any particular details in this respect. In these circumstances, and moreover in light of the seriousness of the complainant's allegations, the Committee requests the Government to undertake a full and independent inquiry into all the dismissals alleged by the complainant, both during the March–June 2005 period and in March 2006, and to take the necessary measures to ensure that those trade unionists who have not yet been reinstated and were found to have been the subject of anti-union discrimination are fully reinstated in their previous positions without loss of pay. It further requests the Government to keep it informed of the employment status of all those workers named in the complaint and indicate, for those who have not been reinstated, the reasons why reinstatement has not occurred.*
- 1184.** *The Committee notes with grave concern the allegations respecting the attack on the union's founding meeting on 9 May 2005 in which members of the Workers' House and the company's Islamic Shora wounded ten members of the founding committee – trade union leader Mansour Osanloo suffered knife wounds – and caused significant damage to the meeting premises. The complainant alleges moreover that union meetings were violently disbanded on two other occasions, 13 May and 1 June 2005; at the latter meeting,*

members were attacked by “Molotov cocktails” or similar firebombs, which caused damage to the building in which the meeting was held. The Committee stresses, with respect to these allegations, that a climate of violence, such as one in which the premises and property of workers are attacked, constitutes a serious obstacle to the exercise of trade union rights and requires severe measures to be taken by the authorities [see *Digest*, *op. cit.*, para. 46]. Accordingly, the Committee urges the Government to immediately institute a full and independent judicial inquiry into the attacks, in order to clarify the facts, determine responsibilities, punish those responsible and prevent the repetition of such acts and to keep it informed of the outcome.

1185. *The Committee notes with grave concern the many alleged instances concerning the arrest and detention of trade unionists, often attended by acts of violence by the authorities, which it summarizes as follows:*

- *The 7 September 2005 arrest of several union members, including Mansour Osanloo, during a protest against unpaid wages. The arrested members were charged with “disturbing public order”, then provisionally released in the days that followed.*
- *The 22 December 2005 arrest, for “illegal trade union activities”, of 13 trade union leaders, including Mansour Osanloo. By 25 December all of the detained were released, with the exception of Mr Osanloo; however six trade union members – Mansour Hayat Gheibi, Ebrahim Madadi, Abdolreza Tarazi, Qlamreza Mirza’l, Abbas Najanci Kodaki and Ali Zadeh Hosseini – were summoned to appear in court on 6 January 2006 on charges of “disturbing public order”.*
- *The arrest of 100 union members on 27 January 2006, one day before the staging of an announced strike to call for the release of union leader Mansour Osanloo. On 28 January 2006, the strike was repressed by security forces using tear gas and batons, resulting in serious injury to approximately 30 workers. Hundreds of bus drivers, their wives and even children were transferred to the Evin Prison and, according to several sources, more than 1,000 people were detained on that day. By 22 February 2006 all detainees had been released, except the seven executive committee members of the union: Mansour Osanloo, Ebrahim Madadi, Mansour Hayat Gheibi, Yussaff Moradi, Yagoub Salimi, Ali Zadeh Hosseini, and Mohammad Ebrahim Noroozi Gohari.*
- *The arrest of 13 trade unionists in connection with the 1 May 2006 rally outside the company. The 13 union members were released on 6 May 2006.*
- *The 15 July 2006 arrest of eight trade unionists in connection with a peaceful rally in front of the Labour Ministry. They were released on 19 July 2006.*
- *The arrest of two members of the union’s board of directors, Seyed Davoud Razavi and Abdolreza Tarazi, as well as trade union activist Golamreza Golam Hosseini, on 3 December 2006 while distributing trade union leaflets to fellow bus drivers. Messrs Razavi and Tarazi were released the same evening, whereas Mr Hosseini remained in detention as his family could not provide bail. All three were scheduled to appear in court the following day.*

1186. *With regard to these allegations, the Committee again observes that, regrettably, the Government provides little information and instead largely confines itself to declarations of a vague and general nature. The Government refers to clashes between the union and members of the SHVATH Islamic Labour Council, stating that the police were forced to intervene to maintain discipline, stop the loss of public property and prevent the spread of social unrest, and that individuals from both sides were taken into custody and subsequently released. The Committee also takes note of the Government’s indications*

that, as long as workers maintained their poise in assemblies, the police refrained from intervening in their affairs, and that furthermore the majority of arrests lasted no more than two hours. Recalling that the arrest and detention, even if only briefly, of trade union leaders and trade unionists for exercising legitimate trade union activities constitute serious violations of the principle of freedom of association [see *Digest*, op. cit., paras 62 and 66], the Committee urges the Government to take the steps necessary to ensure that trade unionists may exercise their freedom of association rights, including the right to peaceful assembly, without fear of intervention by the authorities.

- 1187.** *The Committee notes with grave concern the allegations surrounding the arrest and detention of Mansour Osanloo, who according to the complainant was arrested on 22 December 2005 and allegedly charged with having contact with Iranian opposition groups and instigating an armed revolt against the authorities, without being granted access to a lawyer and remaining in prison without trial for over six months. The Committee notes the alleged irregularities respecting Mr Osanloo's detention, in particular that: (1) Mr Osanloo was detained for roughly nine months, in Evin Prison's high security "section 209"; (2) his first meeting with his lawyers came six months after his arrest, on 24 June 2006; (3) he was subject to frequent interrogations and periods of solitary confinement; (4) he was released on 9 August 2006, with bail set at the exorbitant amount of 150 million toman (US\$165,000); (5) Mr Osanloo was re-arrested on 19 November 2006.*
- 1188.** *The Committee deplores the fact that the Government provides no information respecting the extremely serious allegations respecting Mansour Osanloo, other than to say that it is "preparing the ground for his release". The Committee emphasizes that union leaders should not be subject to retaliatory measures, and in particular arrest and detention without trial, for having exercised their freedom of association rights. Furthermore, the apprehension and systematic or arbitrary interrogation by the police of trade union leaders involves a danger of abuse and could constitute a serious attack on trade union rights. Moreover, measures of preventive detention may involve a serious interference with trade union activities which can only be justified by the existence of a serious situation or an emergency and which would be open to criticism unless accompanied by adequate judicial safeguards applied within a reasonable period [see *Digest*, op. cit., paras 74 and 76]. Given the length of Mr Osanloo's detention and the allegations of his lengthy imprisonment without access to legal counsel – not denied by the Government – the Committee considers that the preventive detention of Mr Osanloo was a clear interference in the union's exercise of its activities in defence of its members' interests. The Committee therefore urges the Government to take the necessary measures to ensure Mr Osanloo's immediate release from detention and to drop all charges against him relating to the exercise of legitimate trade union activities. In addition, the Committee urges the Government to duly inform Mr Osanloo of any other charges brought against him and ensure that his case is brought to trial without delay and that he enjoys all the guarantees of due process of law, including the right to a full and fair hearing by an independent and impartial tribunal and the right to appeal, with full rights of representation by legal counsel and adequate time and facilities for the preparation of his defence. The Committee urges the Government to provide full, detailed and precise information respecting Mansour Osanloo's case and his current circumstances.*
- 1189.** *The Committee requests the Government to provide full and detailed information respecting the situation of Mansour Hayat Gheibi, Ebrahim Madadi, Abdolreza Tarazi, Qlamreza Mirza'l, Abbas Najanci Kodaki and Ali Zadeh Hosseini – all of whom were charged with "disturbing public order", and to transmit any court judgements rendered in this respect.*

1190. *As regards the question of the registration of the union, the Committee notes the Government's statement that the current legal framework does not permit the existence of both an Islamic Labour Council and a union at the same enterprise and that it has no record of any registration on the part of the union. While noting the Government's indication that it determined to amend the Labour Law to address this issue, the Committee observes that it has been taking note of the Government's efforts in this regard for a number of years. The Committee therefore urges the Government to deploy all efforts as a matter of urgency to amend the labour legislation so as to bring it into full conformity with the principles of freedom of association and to keep it informed of the progress made in this regard. The Committee reminds the Government that it may avail itself of the technical assistance of the Office in this regard. In the meantime, the Committee urges the Government to take all measures to ensure that trade unions can be formed and function without hindrance, including through the de facto recognition of the union.*

The Committee's recommendations

1191. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee requests the Government to ensure that a full and independent investigation is carried out into the allegations of various types of workplace harassment during the period of the union's founding from March to June 2005, and to transmit a detailed report in this regard. It further requests the Government, in light of the information revealed by the investigation, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities.*
- (b) The Committee requests the Government to undertake a full and independent inquiry into all the dismissals alleged by the complainant, both during the March–June 2005 period and in March 2006, and to take the necessary measures to ensure that any trade unionists who have not yet been reinstated and were found to have been the subject of anti-union discrimination are fully reinstated in their previous positions without loss of pay. It further requests the Government to keep it informed of the employment status of all those workers named in the complaint and indicate for those who have not been reinstated, the reasons why reinstatement has not occurred.*
- (c) The Committee urges the Government to immediately institute a full and independent judicial inquiry into the attacks on union meetings in May and June 2005, in order to clarify the facts, determine responsibilities, punish those responsible and prevent the repetition of such acts and to keep it informed of the outcome.*
- (d) The Committee urges the Government to take the steps necessary to ensure that trade unionists may exercise their freedom of association rights including the right to peaceful assembly without fear of intervention by the authorities.*
- (e) The Committee urges the Government to take the necessary measures to ensure Mr Osanloo's immediate release from detention and to drop all*

charges against him relating to the exercise of legitimate trade union activities. In addition, the Committee urges the Government to duly inform Mr Osanloo of any other charges brought against him and ensure that his case is brought to trial without delay and that he enjoys all the guarantees of due process of law, including the right to a full and fair hearing by an independent and impartial tribunal and the right to appeal, with full rights of representation by legal counsel and adequate time and facilities for the preparation of his defence. The Committee urges the Government to provide full, detailed and precise information respecting Mansour Osanloo's case and his current circumstances.

- (f) *The Committee requests the Government to provide full and detailed information respecting the situation of Mansour Hayat Gheibi, Ebrahim Madadi, Abdolreza Tarazi, Qlamreza Mirza'l, Abbas Najanci Kodaki and Ali Zadeh Hosseini – all of whom were charged with “disturbing public order” and to transmit any court judgements rendered in this respect.*
- (g) *The Committee urges the Government to deploy all efforts as a matter of urgency to amend the labour legislation by allowing trade union pluralism at the enterprise level, so as to bring it into full conformity with the principles of freedom of association, and to keep it informed of the progress made in this regard. The Committee reminds the Government of the availability of the technical assistance of the Office in this regard. In the meantime, the Committee urges the Government to take all measures to ensure that trade unions can be formed and function without hindrance, including through the de facto recognition of the union.*

CASE NO. 2503

DEFINITIVE REPORT

**Complaint against the Government of Mexico
presented by
the Revolutionary Confederation of Workers
and Peasants (CROC)**

Allegations: Registration (acknowledgement of validity) by the competent administrative authority of the extension of the executive committee of the Labour Congress, in violation of the trade union statutes

- 1192.** The complaint is contained in a communication from the Revolutionary Confederation of Workers and Peasants (CROC) dated 24 February 2006. The Government sent its observations in a communication dated 22 January 2007.
- 1193.** Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but it has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

1194. In its communication dated 24 February 2006, the CROC states that Isaías González Cuevas is president elect of the Labour Congress and Napoleón Gómez Urrutia and Ignacio Cuauhtemoc Paleta, are secretaries-general, respectively, of the CROC and of the Union of Mineworkers of the Republic of Mexico, as well as of the Mexican Regional Confederation of Labour (CROM). The CROC adds that 40 years ago the workers constituted a group called the "Labour Congress", which is governed by its own statutes. Under the terms of the statutes, the president of the Labour Congress convened an election assembly for 15 February 2006 at its headquarters in Mexico City, which was attended by 15 of the 25 organizations that are officially recognized as members of the Labour Congress. At that assembly, a list was presented which included Isaías González Cuevas, Napoleón Gómez Urrutia and Ignacio Cuauhtemoc Paleta, the first as president and the other two as vice-presidents. Following an election involving 15 votes, this executive committee was elected to represent the Labour Congress for one year. The CROC goes on to say, however, that a group led by the outgoing president (Víctor Flores) met in another building outside the premises of the Labour Congress, and without adhering to the relevant requirements relating to convening meetings, extended the period of office of the outgoing president of the Labour Congress, which constituted a violation of the statutes of the Labour Congress as: (1) the assembly was convened for an election; (2) the statutes make no provision for extensions; (3) according to the statutes, the outgoing president could not opt to be re-elected on the grounds that that possibility had already been exhausted; and (4) the time and place of the convening of the assembly was specifically the headquarters of the Labour Congress. According to the CROC, those who met elsewhere sent a notarial certificate to the Ministry of Labour, in which the period of office of the outgoing president (Víctor Flores) was extended, without having the authority to do so, and the Ministry of Labour registered the notarial document which the illegally elected committee sent to it, and validated the extension of the executive committee, with surprising rapidity, without checking whether the statutory requirements had been met; that Ministry did not receive the documentation presented by the signatories of the present complaint.

1195. In the view of the CROC, with its actions the Ministry of Labour violated freedom of association, the Constitution of the ILO and Conventions Nos 87 and 98.

B. The Government's reply

1196. In its communication dated 22 January 2007, the Government states that the argument of the CROC, whereby the Ministry of Labour and Social Welfare (STPS) violated the statutes of the Labour Congress by registering and thus acknowledging the extension of the mandate of Víctor Flores as president of that trade union organization, thereby attributing to him powers he should not have had is wrong and, consequently, there is no non-compliance with the principle of freedom of association.

1197. The events reported by the CROC derive from an intra-union dispute, consisting of differences that arose between two factions of organizations belonging to the Labour Congress during the process of electing their president, and as such this matter falls outside the framework of examination of the Committee on Freedom of Association, as the following principles of the Committee itself confirm:

- A matter involving no dispute between the Government and the trade unions, but which involves a conflict within the trade union movement itself, is the sole responsibility of the parties themselves [see *Digest of decisions and principles of the Freedom of Association Committee*, fourth edition, 1996, para. 962].

- Conflicts within a trade union lie outside the competence of the Committee and should be resolved by the parties themselves or by recourse to the judicial authority or an independent arbitrator [see *Digest*, op. cit., para. 972].
 - In cases of internal conflict, the Committee has pointed out that judicial intervention would permit a clarification of the situation from the legal point of view for the purpose of settling questions concerning the management and representation of the trade union federation concerned. Another possible means of settlement would be to appoint an independent arbitrator to be agreed on by the parties concerned, to seek a joint solution to existing problems and, if necessary, to hold new elections. In either case, the Government should recognize the leaders designated as the legitimate representatives of the organization [see *Digest*, op. cit., para. 973].
- 1198.** For these reasons, the Committee on Freedom of Association should not examine the present communication and the Government of Mexico cannot accept the complaint submitted. However, in order to contribute in good faith to the work of the Committee on Freedom of Association, and taking into consideration the fact that its mandate is limited to examining communications on the alleged violation of the principle of freedom of association and the right to collective bargaining, the Government will permit itself to comment on the statements made by the CROC in its communication.
- 1199.** The Government indicates that on no occasion did it intervene in the life or internal organization of the Labour Congress. Whatever the case may be, and with respect to the facts with which the STPS is charged, it should be pointed out that the STPS, under the powers vested in it, only proceeded to register the extension of the executive committee of the trade union organization in question, but did not intervene in any way in the elections that culminated in that extension.
- 1200.** It should be noted that the facts indicated by the CROC do not constitute alleged non-compliance by the Government of the principle of freedom of association and of the right to organize contained in ILO Convention No. 87.
- 1201.** The CROC does not indicate in its communication that it was prevented from freely exercising its right to set itself up, with its own legal personality and assets, to defend the interests of its members, in the manner and terms considered appropriate. Neither has it been prevented from exercising its right to draft its statutes and regulations, freely elect its representatives, organize its administration and activities, and draw up its programme of action.
- 1202.** The aspects detailed by the CROC do not relate to the right to collective bargaining set forth in the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Mexico has not ratified this instrument. The CROC states that the STPS registered the notarial document submitted to it by a faction of the Labour Congress resulting from the elections in which it was agreed to extend the presidency of Víctor Flores. No provision is made for such an extension in the statutes of the Labour Congress. In so doing, the Ministry, adds the CROC, gave immediate acknowledgement to the extension of the presidency of Mr Flores without checking whether he met the statutory requirements, not having received the documentation from the parallel election conducted by another faction of the Labour Congress – to which the CROC belongs – in which the list comprised of Isaías González Cuevas, Napoleón Gómez Urrutia and Ignacio Cuauhtemoc Paleta was elected, which was in keeping with the law and the statutes of the Labour Congress.
- 1203.** The Government states that respecting the wishes of the trade union groupings of the Labour Congress, set forth in its statutes, dated 17 February 2006, the General Directorate for the Registration of Associations registered the extension of the abovementioned

executive committee until 18 December 2006. This was done on the basis of articles 371, part VIII, final paragraph; 377, part II, of the Federal Labour Act; 19, part III of the internal rules of the STPS, and 9, part II; 18, 21, 23 and 30, part XI of the statutes of the Labour Congress, and of the quorum to hold meetings having been reached in view of the fact that 26 of the 35 groupings listed on the last electoral roll in the possession of the General Directorate were represented.

1204. On 10 March 2006, Isaías González Cuevas, Secretary-General of the CROC, deposited with the General Directorate for the Registration of Associations of the STPS a document with annexes, in which he requested that the executive committee and standing committees of the Labour Congress be registered.

1205. In that document it was stated that, on 15 February 2006, the plenary of the National Council held an extraordinary session with the purpose of extending the mandate of the executive committee and the standing committees for the financial year from 18 February 2006 to 18 February 2007, with, according to their own declaration, Isaías González Cuevas being elected president of the Labour Congress and Napoleón Gómez Urrutia and Ignacio Cuauhtemoc Paleta, vice-presidents.

1206. On 28 April 2006, the General Directorate for the Registration of Associations sent the following communication to Isaías González Cuevas:

On 17 February 2006, the General Directorate for the Registration of Associations registered the extension of the abovementioned executive committee until 18 December 2006. This was done on the basis of articles 371, part VIII, final paragraph; 377, part II, of the Federal Labour Act; 19, part III of the internal rules of the Ministry of Labour and Social Welfare, and 9, part II; 18, 21, 23 and 30, part XI of the statutes, and of the quorum to hold meetings having been reached in view of the fact that 26 of the 35 groupings recognized by this authority were represented.

1207. As observed from the above, the General Directorate for the Registration of Associations, in the exercise of its powers, limited itself solely to sending the acknowledgement of having registered the extension of the executive committee of the Labour Congress, which would remain in force until 18 December 2006, as requested by the representatives of said trade union organization, on the basis of the approval of 26 of the 35 groupings that make it up.

1208. As regards the statement by the CROC that there is no provision for the extension in the statutes of the Labour Congress, it should be pointed out that this is inconsistent, as article 27 of the statutes expressly provides:

Article 27: The president and the vice-presidents of the executive committee will remain in office for one year as from their election, with the possibility of being re-elected for one further year.

1209. It can be seen from the above that the statutes of the Labour Congress provide for the possibility that the president of the executive committee may extend his duties for a further year, so it can therefore be inferred that the extension of the abovementioned committee would not constitute an internal violation of the statutory regime.

1210. It is known that the registration in question that occurred on 17 February 2006, in respect of the extension of the executive committee of the Labour Congress, was contested by Isaías González Cuevas and others, in *amparo* (protection of constitutional rights) action No. 424/2006 before the competent district labour court of the Federal District.

1211. In addition, the Government indicates that on 22 November 2006, in accordance with articles 21, 22, 23, part IV, 24, 25, 27 and other relevant and applicable articles of the statutes of the trade union organization, the Labour Congress held an extraordinary plenary assembly of the National Council during which, by means of internal elections, it elected the president and vice-presidents of the executive committee as well as the president and vice-presidents of the standing committees that form the executive committee of the Labour Congress for the period from 24 November 2006 to 24 November 2007.

1212. On 23 November 2006, upon the express request of the abovementioned trade union organization, by way of a document dated 22 November last, the General Directorate for the Registration of Associations dispatched the acknowledgment of registration of the new executive committee of the Labour Congress, which elected as president, Enrique Aguilar Borrego, on the basis of articles 377, part II of the Federal Labour Act; 19, part III of the internal rules of the STPS; and 24, 25, 27, 33, 35 and 36 of the statutes of the Labour Congress itself. As a result of this, the registration by the executive committee of the Labour Congress that occurred on 17 February 2006, which gave rise to the submission of the present complaint by the CROC, ceased to have effect.

1213. Lastly, the Government formulates the following conclusions:

- The communication by the CROC relates to a dispute of an internal nature in the life of the trade unionists, in which the Government of Mexico cannot act in an official manner as it is not permitted to intervene in the organization of trade unions. From the facts related by the CROC it can be seen that the dispute mentioned is of an inter-union nature, and as such it should be resolved in the first instance by the trade unions and their members themselves in accordance with internal regulations, that is to say, applying the statutes that govern the Labour Congress. Proof of this is that on 22 November 2006, the Labour Congress convened an extraordinary plenary assembly of the National Council to elect a new executive committee.
- The CROC had access to the legal means to contest the extension of the registration of the executive committee of the Labour Congress dated 17 February 2006. It lodged *amparo* action No. 424/2006 before the competent district labour court of the Federal District, which it is considered will be dismissed, as the legal situation has changed as the act appealed against has been vacated.
- The CROC neither properly substantiates nor explains the legally valid reasons or causes to consider the existence of possible violations of trade union rights; the fact that the internal election procedure of the executive committee was not in their favour is not a reason to attribute possible involvement to the Government or the violation of trade union rights.
- The present communication must be rejected by the Committee on Freedom of Association on the grounds that the cause that gave rise to it has ceased, which was the registration by the General Directorate for the Registration of Associations dated 17 February 2006.

C. The Committee's conclusions

1214. *The Committee observes that in this case the complainant organization alleges the illegal "registration" (acknowledgement of validity) by the Ministry of Labour and Social Welfare (STPS) of the extension of the executive committee of the Labour Congress presided over by Víctor Flores to the detriment of the executive committee presided over by Isaías González Cuevas, sole person elected, according to the complainant organization, in accordance with the statutes.*

- 1215.** *The Committee notes that the Government supports the legality of the extension of the executive committee of Víctor Flores, the quorum to hold meetings, for example, having been reached (presence and approval of 26 of the 35 organizations of the Labour Council). The Government stresses that the possibility of extension can be inferred from the statutes (which allow for re-election), and that the present case constitutes an internal dispute within the Labour Congress.*
- 1216.** *The Government emphasizes, lastly, that Isaías González Cuevas and others lodged an amparo action before the judicial authority against the extension in question.*
- 1217.** *The Committee notes the other statements by the Government on the subsequent evolution of the situation that show: (1) that the inter-union dispute set forth in the complaint has been resolved by the trade union organization itself as the executive committee presided over by Víctor Flores stopped operating after nine months when the extraordinary assembly of the Labour Congress dated 22 November 2006 appointed a new executive committee; and (2) that as a result, presumably the judicial authority, when it hands down its decision on the amparo action lodged by Isaías González Cuevas, will dismiss it as the act appealed against (registration of the extension of the executive committee of Víctor Flores) has been vacated.. In view of these circumstances, the Committee considers that this case does not call for further examination.*

The Committee's recommendation

- 1218.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.*

CASE NO. 2525

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

**Complaint against the Government of Montenegro
presented by
the Confederation of Trade Unions of Montenegro (CTUM)
supported by
the International Trade Union Confederation (ITUC)**

***Allegation: The complainant organization
alleges violation of the right to strike of workers
of the Podgorica Aluminium Factory (KAP)***

- 1219.** The complaint is contained in communications dated 23 October and 22 November 2006 from the Confederation of Trade Unions of Montenegro (CTUM). By a communication dated 18 December 2006, the International Trade Union Confederation (ITUC) associated itself with the complaint.
- 1220.** The Government forwarded its observations in a communication dated 11 December 2006.
- 1221.** Montenegro has neither ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1222.** In its communications dated 23 October and 22 November 2006, the Confederation of Trade Unions of Montenegro (CTUM) alleges violation of the right to strike in the Republic of Montenegro. The CTUM explains that the Podgorica Aluminium Factory (KAP), which employed over 3,000 workers and the production of which consisted of approximately 60 per cent of the total export and approximately 10 per cent of the Montenegrin GDP, was bought by the Russian company "Basic elements". However, to the workers' discontent, the contract of sale did not provide for the social redundancy programme. Therefore, the new owner was permitted to start dismissing employees as from 1 December 2006, 12 months after the sale of the enterprise. Due to the absence in the collective agreement of provisions on redundancy, the new owner was obliged to sign a new collective agreement with the KAP trade union. However, the management wilfully delayed the negotiation process and offered a humiliating social programme for future dismissals. Afraid that the new management could start dismissing workers before the collective agreement was signed, the union decided to conduct a strike in order to approach seriously the negotiation process and accelerate the conclusion of a new collective agreement. Having learned about the union's intentions, the employer passed a resolution on minimum services without any consultations with the trade union. The resolution provided for a production of 20 per cent higher than the regular production capacity. Furthermore, the employer submitted a complaint to the Labour Inspection and asked its intervention to postpone the strike and to warn the strike committee of the KAP trade union that it was obliged to respect the employer's resolution on the minimal labour service. The Labour Inspection agreed with the employer.
- 1223.** Concerned about possible legal penalties, the KAP trade union respected the Labour Inspection's warrant, but requested the Inspection to intervene with respect to the employer's unreasonable resolution requiring a 20 per cent production increase, which could not be viewed as a minimum service. However, the Labour Inspection failed to intervene and did not answer in writing to the union. Instead, the Labour Inspection considered that the strike committee should apply the employer's resolution on minimum services.
- 1224.** During the strike, which lasted from 19 June to 13 August 2006, not once did the Labour Inspection intervene upon the notification of the strike committee, but it did intervene upon the request of the employer. By the time of the strike, the employer had engaged over 50 security guards, armed and uniformed, to intimidate the strikers. After the strike had ended, the employer submitted a claim against eight members of the strike committee, asking them to redress damages of 1,251,933.76 euros. In the complainant's view, by submitting this claim, the employer wanted to ensure that the trade union officers and workers of the KAP would not conduct strikes in the future.
- 1225.** The complainant considers that the Labour Inspection and the Ministry of Labour and Social Protection, by siding with the employer, violated trade union rights. The complainant further considers that there is a necessity to change the provisions of the Law on Strike concerning minimum services.

B. The Government's reply

- 1226.** In its communication dated 11 December 2006, the Government indicates that the Ministry of Labour and Social Protection, through the National Labour Inspection, monitors the application of the labour legislation, including the Law on Strike of 2003, as amended in 2005. This Law regulates the right to strike and is applicable to employees and employers.

- 1227.** With regard to the particulars of this case, the Government indicates the following. On 10 May 2005, the KAP trade union adopted decision No. 9 on the declaration of strike. The decision contained the claims of workers, the date and the hour of the beginning of the strike, its duration and location and provided for the composition of the strike committee. According to the decision, the strike was going to commence on 16 May 2006 at 7 a.m. The decision was communicated to the KAP executive director on 10 May 2006. On 15 May 2006, the Labour Inspection carried out an inspection and concluded that the trade union had violated section 11 of the Law on Strike, according to which, a notice of strike should be sent to the employer at least ten days prior to the beginning of the strike. Moreover, workers of the “Kovacnica”, the “Prerada” and the “FAK Kolasin” factories which were distinct legal entities from the KAP would go on strike illegally as they wrongfully sent their claims to the KAP management. Lastly, the strike notice should have provided for the minimum services to be ensured during the duration of the strike.
- 1228.** The inspection also revealed that the trade union representatives were invited by the employer for discussions with the view to resolving the contentious issues in respect of the conclusion of a collective agreement. However, the trade union representatives did not respond to this invitation.
- 1229.** On 23 May 2006, having learned of the union’s intention to begin the strike on 25 May, the KAP executive director requested the Labour Inspection to conduct an inspection of the KAP trade union. The Inspection concluded that the decision to strike was illegal as it was taken by the KAP trade union (in accordance with section 3 of the Law on Strike, the competent body to declare a strike within a branch or industry is the National Trade Union of Montenegro). Moreover, the strike, originally declared for 16 May 2006, was postponed until 25 May 2006 without a new decision to strike being taken, which is contrary to section 8(2) of the Law on Strike, which provides that “for each new strike, participants shall take a new decision to strike”.
- 1230.** On 15, 16, 18 and 19 May 2006, the KAP trade union requested the Labour Inspection to provide its opinion on the minimum services to be maintained during the strike on 25 May 2006. The National Labour Inspection informed the KAP trade union and its strike committee that it did not have the competence to provide opinions on the minimum services and suggested they address a tribunal. However, the Labour Inspection, having the competence to monitor the conformity of the acts of management with the legislation in force, proceeded with an inspection of application of section 10 and 10a of the Law on Strike, which provide:

Section 10

(1) Employees who conduct activities listed under section 9 of this Law may call a strike if the minimum of production process that ensures the safety of people and property, or is essential to life and work of citizens or work of other employer, i.e. legal entity or entrepreneur carrying out an economic or other activity or providing services.

(2) The minimum of production process in the sense of subsection (1) of this section is determined on the basis of the nature of the activity, the level of risk for people’s lives and health and other important circumstances for meeting the needs of citizens, employers and other subjects (time of the year, tourist season, school year, etc.).

(3) The minimum of production process and ways of ensuring it shall be determined by the enterprise’s founder or the employer, in accordance with the criteria of subsection (2).

(4) When defining the minimum of production process in terms of subsection (2), the enterprise’s founder or the employer shall request the opinion of the competent body of the competent trade union organization or of over a half of the employees with a view to conclude an agreement.

(5) The employees who have to work during the strike for the purposes of ensuring the minimum of production process shall be appointed by the manager or executive manager and the strike committee no later than five days prior to the beginning of the strike.

Section 10a

(1) If the minimum production process is not determined as provided for in section 10 of the Law, the minimum production process is then determined by the founder of the enterprise, i.e. its manager or executive director.

- 1231.** On 12 June 2006, the KAP trade union once again requested the Labour Inspection to examine the legality of the employer's decision on minimum services. The inspection established that the KAP management had acted in conformity with the legislation when determining the minimum services. The employer sent decision No. 91-409 of 6 April 2006, accompanied by Act No. 92-622 of 6 April 2006, to the KAP trade union, requesting to proceed in conformity with section 10 of the Law on Strike. The KAP trade union forwarded its observation on this decision in its communications dated 18 April and 10 May 2006. Referring to section 10a of the Law on Strike, on 13 May 2006, the employer took a new decision on the minimum service and transmitted it to the strike committee.
- 1232.** On 13 June 2006, the KAP executive director addressed the Labour Inspection with a request to re-examine the legality of Decision No. 13 of 7 June 2006, issued by the KAP trade union calling a strike on 19 June 2006, as well as of the decision of the KAP strike committee not to comply with the employer's decision on minimum services. The inspection reminded the trade union of the obligation to inform the competent authorities of the decision to go on strike. On 7 June 2006, the trade union transmitted its decision to strike to the Ministry of Interior, the Ministry of Economy and the secretariat for the enterprise development.
- 1233.** The inspection carried out on 16 June 2006 determined that decision No. 13 contained claims against legal entities other than the KAP. It further established that the strike committee determined the minimum services to be provided during the strike in Act No. 14 of 7 June 2006. In this respect, the inspection pointed out to the strike committee that only the employer had the competence to determine minimum services and recalled that a strike could be organized only in accordance with the provisions of the Law on Strike and that the strike could not begin prior to ensuring the minimum services determined by the competent body (sections 10 and 10a of the Law).
- 1234.** On 19 June 2006, the KAP executive director requested the Labour Inspection to confirm the legality of the note on minimum services provided by the trade union. The inspection carried out on the same day established that the trade union had issued the note on services to be provided in violation of the Law on Strike and that the strike had begun on 19 June 2006 without ensuring the minimum services as determined by the employer. The inspection established that the management had fixed the obligation to produce and to cast 110,000 tonnes of aluminium. According to the statements made by the members of the strike committee, while the indicated quantity was produced, it was not cast and delivered to the foundry. However, other services were provided. Furthermore, the members of the strike committee declared that the strikers would not respect the minimum services determined by the employer, as they considered that the workload was 20 per cent higher than the capacity of the installations. The strike committee also stated that certain workers were striking at their workplaces without causing inconvenience to those working.
- 1235.** On 20 June 2006, the Labour Inspection requested an opening of proceedings against the strike committee of the KAP trade union on the grounds of its refusal to collaborate with the employer to ensure the minimum services and thereby violating section 7 of the Law on Strike. During the proceedings, the members of the strike committee agreed with the

findings of the Labour Inspection and declared that they were willingly infringing the Law on Strike but that they were forced to do so to protect their labour rights. By decision PP No. 83/2006-4 dated 22 September 2006, the members of the strike committee were found guilty of violation of the Law on Strike.

- 1236.** In the light of the above, the Labour Inspection considers that the KAP trade union and the strike committee have violated the procedure for declaration of the strike. It further considers that the rights of employees were not violated. However, the KAP employees were informed of their right to address a tribunal if they consider that their rights have been violated.

C. The Committee's conclusions

- 1237.** *The Committee notes that this case concerns alleged violations of the right to strike of workers of the KAP. The Committee notes that according to the complainant, the KAP trade union, faced with the employer's refusal to negotiate in good faith on the issue of the redundancy system, declared a strike, which lasted from 19 June to 13 August 2006. During the strike, the trade union was obliged to provide minimum services as determined by the employer and equivalent to a 20 per cent production increase. The complainant alleges that the employer hired over 50 armed and uniformed security guards to intimidate the strikers. After the strike ended, the employer submitted a claim against eight members of the strike committee seeking to redress damages of 1,251,933.76 euros. The complainant further alleges that the Labour Inspection has failed to intervene in response to the union's request on several occasions. Finally, the complainant considers that the provisions on minimum services of the Law on Strike are not in conformity with the principles of freedom of association.*
- 1238.** *The Committee notes that according to the Government, the strike was conducted in violation of the procedure provided for in the Law on Strike of 2003, as amended in 2005. In particular, the Government explains that, initially, the decision to begin a strike on 16 May 2006 was adopted on 10 May 2006 and notified to the employer on the same day. However, in accordance with section 11 of the Law on Strike, the decision to strike should be notified to the employer at least ten days prior to the beginning of the strike. Moreover, workers' claims from the "Kovacnica", the "Prerada" and the "FAK Kolasin" factories were wrongfully sent to the KAP management, which is a distinct legal entity from the above factories. Lastly, the notice of strike did not provide for the minimum services to be ensured during the strike. The KAP trade union then postponed the strike until 25 May 2006. This decision was also declared illegal by the Labour Inspection for the following reasons: (1) according to section 3 of the Law on Strike, the competent body to declare a strike within a branch or industry is the National Trade Union of Montenegro and not the enterprise trade union; and (2) according to section 8(2) of the same Law, a new decision to strike should have been taken. On 7 June 2006, the KAP trade union took a decision to begin a strike on 19 June. In this decision, the strike committee provided for the minimum services to be ensured during the strike. Nevertheless, the Labour Inspection considered that the strike was illegal because: (1) it was up to the employer to determine the minimum services to be provided during the strike; and (2) the union did not ensure the minimum services as determined by the employer. The Labour Inspection therefore requested an opening of proceedings against the strike committee of the KAP trade union on the grounds of refusal to collaborate with the employer. On 22 September 2006, the members of the strike committee were found guilty of violation of the Law on Strike.*
- 1239.** *The Committee notes that the complaint relates to the strike conducted from 19 June to 13 August 2006. In this respect, the complainant raises three sets of issues, namely: whether the minimum services imposed by the employer, the hiring of security guards to*

intimidate strikers and the penalty sought by the employer against the members of the strike committee are in conformity with the freedom of association principles.

- 1240.** *With regard to the question of minimum services, the Committee understands from the text of section 10 and 10a, as set out in the Government's reply, that the minimum services, where negotiation has failed, are to be determined by the employer. The Committee further notes that in this case, the KAP management required a 20 per cent production increase to be ensured during the strike. In the circumstances of this case, the Committee considers that the production of aluminium cannot be viewed as an essential public utility for which a minimum service can be imposed. The Committee requests the Government to amend the Law on Strike, in consultation with the social partners, so as to bring it into conformity with the principles of freedom of association and to keep it informed in this respect.*
- 1241.** *With regard to the complainant's allegation that the enterprise hired armed security guards to intimidate strikers, the Committee notes with regret that the Government did not provide any observation in this respect. The Committee considers that it has insufficient information in this particular case to determine whether the use of security guards was contrary to the principles of freedom of association. The Committee considers that such acts by an enterprise can hinder the activities of a trade union and may constitute undue interference in the functioning of these organizations.*
- 1242.** *Finally, with regard to the damages claimed by the employer from the eight members of the strike committee, regretting that the Government has provided no information in reply to this allegation, the Committee recalls that no one should be penalized for carrying out a legitimate strike and that sanctions could be imposed only in respect of violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. The Committee requests the Government and the complainant to provide further information on the employer's claim and, specifically, on the authority to which the claim was submitted and on the outcome, if any, of such proceedings.*

The Committee's recommendations

- 1243.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to amend the Law on Strike, in consultation with the social partners, so as to bring it into conformity with the principles of freedom of association and to keep it informed in this respect.*
 - (b) With regard to the damages claimed by the employer from the eight members of the strike committee, the Committee requests the Government and the complainants to provide further information on the employers' claim and, specifically, on the authority to which the claim was submitted and on the outcome, if any, of such proceedings.*

CASE NO. 2510

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

**Complaint against the Government of Panama
presented by
the National Federation of Public Employees and Public Service
Enterprise Workers (FENASEP)**

*Allegations: Refusal to grant legal personality to
a trade union association; dismissal of eight
trade union leaders and failure to pay their
salaries and statutory benefits*

- 1244.** The complaint is contained in a communication from the National Federation of Public Employees and Public Service Enterprise Workers (FENASEP), dated 30 July 2006. The organization sent further allegations in communications dated 30 November 2006 and 17 April 2007. The Government replied in communications dated 20 October 2006 and 15 March 2007.
- 1245.** Panama 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

- 1246.** In its communication dated 30 July 2006, FENASEP alleges the illegal dismissal of eight leaders of the Association of Officials of the Interoceanic Regional Authority (AFARI) on 13 July 2005, namely: Vidalia Quiroz, Secretary-General; Rolando Román, Secretary for Education, Culture and Sports; Beatriz Barría, Undersecretary for Administrative Careers; Leopoldo Hernández, Secretary for Defence and Labour Issues; Felipe Carrasco, Secretary for Organizational Matters; Doris Guillén, Minutes and Correspondence Secretary; Rodolfo Villacís, Press and Information Secretary; and Harry Vásquez, Secretary for Administrative Careers.
- 1247.** In its communication of 30 November 2006, FENASEP adds that the eight dismissed persons managed to persuade the Government to reassign them to posts in another institution with guarantees that they would be paid the salaries and benefits due to them. However, the eight persons have not received these payments and, in the new institutions, where they work as temporary workers, they have not received their salaries. In the case of the Secretary-General of the AFARI, her salary in the new institution has been reduced in relation to her previous salary. In its last communication, FENASEP indicates that the salaries and legal benefits corresponding to the months of December 2006 and March 2007 were not paid to the dismissed trade union leaders.
- 1248.** Finally, FENASEP adds that the Ministry of the Interior and Justice turned down the application for legal personality made by AFARI in February 2005, thereby violating ILO Conventions Nos 87 and 98 and Act No. 9 on administrative careers. In the attached documentation, the Ministry indicates that the reason for the refusal in the decision of 5 June 2006 is that the transfer of the Interoceanic Regional Authority (ARI) was planned for December 2005.

B. The Government's reply

1249. In its communication of 20 October 2006, the Government affirms that the allegations are incorrect. The issue of the renewal of the contracts of the officials who are members of the AFARI did not involve arbitrary dismissal, but rather the fact that the institution for which they were working, the ARI, ceased to exist, in accordance with the legal provisions under which it was established. The ARI was created by Act No. 5 of 25 February 1993 as an autonomous state body, with the principal objective of exercising autonomously the custody, exploitation and administration of property under the general plan and the partial plans approved with a view to its optimal use, in coordination with the competent state bodies, so that such properties could be gradually incorporated into the overall development of the nation. The properties concerned include the land, buildings, installations and other properties reverting to Panamanian control in accordance with the 1977 Panama Canal Treaties and their appendices (the Torrijos–Carter Treaties). Section 46 of the Act originally determined that the ARI would exist for as long as necessary to achieve its aims, but that in no case would it continue to exist beyond 2009.

1250. Nevertheless, in view of the progress made by the ARI in achieving its objectives, this provision was amended by Act No. 7 of 7 March 1995 to amend and add certain sections to Act No. 5 of 25 February 1993 establishing the ARI and adopting measures on the properties reverting to Panamanian control. The Act advanced the duration of the ARI's operation, providing in section 20 that it would function up to 2005. Section 46 reads as follows:

The Authority shall operate for the period necessary for the achievement of its aims, but in no case shall this period go beyond the year 2005, unless an extension is decided upon by law. Upon the expiry of the period indicated in this section, its functions shall be transferred to the state bodies with the respective competence, as determined by the Cabinet Council.

1251. At the end of the period of operation of the ARI, the Government transferred its functions to the Administrative Unit for Reverted Property of the Ministry of the Economy and Finance (MEF), for which reason the contracts of the staff working for the ARI were terminated. This is what really happened. The allegations made in this case are therefore all the more surprising as it was common knowledge that the former ARI was subject to a date on which its functions would come to an end, as determined when it was created. It is regrettable that such a denunciation should have been made in full knowledge that there are no legal grounds for the reinstatement of the officials concerned, especially as they were working under contracts that were not renewed for obvious reasons.

1252. The Government adds that all the officials of the former ARI, including those who are members of the AFARI, who worked temporarily from January to June 2006 in the Administrative Unit for Reverted Property of the MEF, were paid in full right up to the last two weeks corresponding to the period during which they were temporarily reassigned, which came to an end on 30 June 2006. Furthermore, the officials were paid for the 13 days that they worked following the expiry of their appointments (1–13 July 2006), as well as the 13th-month payment calculated on the basis of the period worked, and only their proportional leave payments are still pending. In light of the above, the Government considers that it has not violated the provisions giving effect to Conventions Nos 87 and 98 and indicates that, because of the budgetary restrictions affecting public finances, it would be impossible for economic and administrative reasons related to government administration to assign the leaders of the AFARI to other state institutions, as the same would have to be done for all the other former officials of the ARI.

1253. In its communication dated 15 March 2007, with regard to the AFARI, the Government states that the legal personality requested is not that of a trade union organization, rather it is that of a not-for-profit association. Not-for-profit associations are processed by the

Ministry of Government and Justice and are governed by the Civil Code (sections 64–75), as stated in the request for legal personality enclosed by the party presenting the allegations. Furthermore, it should be noted that the procedure for such legal personalities is covered by provisions not contained in the Labour Code, such as Act No. 33 of 8 November 1984, “Through which measures concerning administrative procedures are taken and other provisions are issued”, and Presidential Decree No. 524 of 31 October 2005, “repealing Presidential Decree No. 160, of 2 June 2000, and Presidential Decree No. 3 of 24 January 2001, and issuing provisions concerning the recognition of legal personality of private, not-for-profit associations and foundations”. The request for legal personality was refused on the basis of these provisions, in view of the fact that, as is pointed out in Resolution on Legal Personality No. 367-77, of 5 June 2006, of the Ministry of Government and Justice, observations had been made regarding the request but the applicant organization failed to act upon these observations within the period of time set out in the relevant provisions and in the said Resolution (enclosed by the complainants), which state that: “If the party concerned does not implement changes within three (3) months of the date of notification of the said changes, then the request for legal personality shall be refused through a Resolution, and the file shall be closed.” Therefore, in this instance, legal personality was refused to a civil, rather than a trade union organization and, moreover, it was refused owing to the expiry of the period of time allotted.

- 1254.** With regard to the cases of dismissal, the Government states that the officials concerned were employed at an institution known as the ARI, whose main function was the administration of the property that reverted to the control of the Republic of Panama following the conclusion of the Torrijos–Carter Treaties, and that the ARI was established for a fixed period ending on 31 December 2005. On this date, officials working for the ARI were to be made redundant, a fact of which they were aware. Moreover, the said functions concerning the remaining reverted property were transferred to the MEF. For humanitarian reasons, and having taken account of FENASEP’s views, some of these officials have been placed in posts in public institutions and there have been ongoing talks aimed at resolving the situation of the remaining officials. It is, therefore, inaccurate to speak of reprisals against the organization or against trade unionism.

C. The Committee’s conclusions

- 1255.** *The Committee observes that, in the present case, the complainant organization alleges the dismissal of eight officials of the AFARI (which is in the process of being established) on 13 July 2005, and that the authorities refused to grant the association legal personality for which it applied in February 2005. In its last communication, the complainant organization states that the eight trade union leaders were reassigned to another institution as temporary workers, but did not receive the salaries and benefits due, and that the Secretary-General, Ms Vidalia Quiroz, received a lower salary than she had earned previously.*
- 1256.** *The Committee notes the Government’s statements that all of the workers who were members of the AFARI were paid their salaries and other benefits. The Committee also notes that the contracts of those members of the AFARI who were working under contract could not be renewed under the terms of Act No. 7 of March 1995, which provides that the mandate of the Interoceanic Regional Authority (ARI) shall not extend beyond the year 2005. The Committee notes with interest that the Government states that for humanitarian reasons, and having taken account of FENASEP’s views, some of the officials from what was formerly the ARI were placed in posts in public institutions and an ongoing dialogue was maintained to resolve the situation of the remaining officials. The complainant organization indicates that they were reassigned to another institution as temporary workers. In view of the fact that, according to the complainant organization, the Secretary-General of AFARI, unlike the other reinstated union leaders, is receiving a lower salary*

than she earned prior to her dismissal, the Committee requests the Government to examine this issue, in conjunction with the complainant federation, in order to determine whether anti-trade union discrimination occurred and, if so, to take measures to ameliorate, correct and resolve the situation. Moreover, with regard to the issue of the payment of salaries and other statutory benefits to the eight dismissed leaders, as in its last communication the complainant organization affirms that these payments were not made, the Committee requests the Government to ensure that the payments in question have indeed been made. The Committee requests the Government to keep it informed of developments in this respect.

- 1257.** *With reference to the refusal to grant legal personality to the AFARI, the Committee notes that the documentation provided by the complainant organization includes the resolutions of the Ministry of the Interior and Justice of 20 April and 5 June 2006 refusing to grant legal personality to the AFARI on the grounds that the ARI's legal mandate expired in December 2005 and that Executive Decree No. 160 of 2 June 2000 (as amended by Executive Decree No. 3 of 24 January 2001), repealed by Executive Decree No. 524 of 31 October 2005, requires that, to be able to apply for legal personality, an association has to have a five-year plan, that is, it has to exist for at least five years. The Government states that the legal personality requested was not that of a trade union, rather it was that of a not-for-profit organization. Moreover, the ARI had not acted upon the observations made regarding its request within the three-month time period. The Committee deeply regrets in this regard that Panamanian legislation does not authorize public officials to unionize.*
- 1258.** *In this regard, the Committee emphasizes that the requirement for public employees' associations to have a five-year plan and, indirectly, a minimum duration of five years, is in contradiction with the right of workers' organizations to draw up their constitutions in full freedom, as established in Article 3 of Convention No. 87. The Committee therefore urges the Government to take measures to amend Executive Decree No. 524 of 31 October 2005, so that the minimum period of existence of trade union associations is determined by their constitutions, and not by the law. The Committee regrets that the AFARI has been unable to obtain legal personality precisely at a time when the institution in which it was operating was on the verge of disappearing, thus preventing the association from adequately defending the interests of its members, including the payment of the salaries and benefits due.*

The Committee's recommendations

- 1259.** *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 examine, in conjunction with the complainant federation, the situation regarding the Secretary-General of the AFARI, Ms Vidalia Quiroz, who contrary to the other reinstated union leaders, is receiving, according to the allegations, a lower salary in the new institution to which she has been reassigned than she earned previously. The Committee requests the Government to ameliorate, correct and resolve the situation if it finds that anti-union discrimination occurred. The Committee requests the Government to keep it informed of developments in this respect.*
 - (b) The Committee requests the Government to ensure that the leaders of the AFARI have been paid the salaries and other benefits due to them and to keep it informed of developments in this respect.*

- (c) *The Committee requests the Government to take measures to amend Executive Decree No. 524 of 31 October 2005, so that the minimum period of existence of trade union associations of public officials is determined by their constitutions, and not by law.*

CASE NO. 2372

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

**Complaint against the Government of Panama
presented by
the Panamanian Trade Union of Maritime Tugging, Barges and
Related Services (SITRASERMAP),
supported by
the International Federation of Transport Workers (ITF)**

Allegations: The complainant organization objects to Decree No. 8 of 1998 which regulates work at sea and on waterways and which, in the opinion of the organization, denies it the right to collective bargaining and to strike; it also alleges that the General Secretary of the Panamanian Trade Union of Maritime Tugging, Barges and Related Services (SITRASERMAP) was dismissed from the enterprise Smit Harbour Towage Panama in April 2002

- 1260.** The Committee examined this case at its June 2006 meeting and submitted an interim report to the Governing Body [see 342nd Report, paras 879-891, approved by the Governing Body at its 296th Session (June 2006)].
- 1261.** The Government sent new observations in a communication dated 30 November 2006.
- 1262.** Panama has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 1263.** At its June 2006 meeting, the Committee made the following recommendations concerning the questions that were still pending [see 342nd Report, para. 891]:
- (a) With regard to the contested Decree No. 8, which regulates work at sea and on waterways, noting that the Government does not deny the allegation that this Decree obstructs the right to collective bargaining and the right to strike, the Committee requests the Government to take the necessary measures to amend section 75 of the Decree and to promote the full development and use of machinery for voluntary negotiation between employers or employers' and workers' organizations of the sector, with a view to the regulation of terms and conditions of employment through collective agreements. The Committee requests the Government to hold proper consultations with the most

representative employers' and workers' organizations in this regard. The Committee also requests the Government to keep it informed of any ruling handed down by the Supreme Court on the unconstitutionality of various sections of Decree No. 8, as well as on any new bill on the maritime sector presented to the Legislative Assembly.

- (b) As to the dismissal in April 2002 of the General Secretary of the Panamanian Trade Union of Maritime Tugging, Barges and Related Services (SITRASERMAP), Mr. Luis Fruto, at the enterprise Smit Harbour Towage Panama, the Committee regrets the long time that has lapsed since the beginning of the court case (April 2002) relating to the dismissal, trusts that the Supreme Court of Justice will soon hand down a ruling on the matter, taking into account the fact that the Ministry of Labour had ordered the reinstatement of this trade union leader in his post, the Committee requests the Government, if it is confirmed that the dismissal of this union official was due to his trade union activities, to take the necessary measures to ensure that he is reinstated in his post without delay with the payment of the wages owed to him and any other legal entitlements. The Committee requests the Government to keep it informed of the ruling of the Supreme Court of Justice.

B. The Government's reply

1264. In its communication dated 30 November 2006, the Government states that, by a ruling of 2 October 2006, the Supreme Court of Justice gave a decision regarding the claim of unconstitutionality made against Decree No. 8 of 1998, which regulates work at sea and on waterways. In this ruling, the Supreme Court stated that a number of provisions in the Decree, including section 75 (which had been called into question by the complainant organization, which believed that the section denied it the right to collective bargaining and to strike), were unconstitutional. The Government has provided the text of the ruling in question.

1265. In the light of this ruling and the recommendations issued by the Committee on Freedom of Association regarding this case, the Government states that it will take the appropriate measures to promote the full development and use of machinery for voluntary negotiation between seafarers' employers or employers' and workers' organizations, with a view to the regulation, through collective agreements, of terms and conditions of employment.

1266. The Government adds that this will also be taken into account in the development of the draft bill to revise this Decree, since it expects to ratify the ILO Maritime Labour Convention, 2006, in 2007 for which national legislation and practice will have to be brought into line with the new international maritime labour standard.

1267. With regard to the dismissal of Mr Luis Fruto from the enterprise Smit Harbour Towage Panama in April 2002, the Government reports that it is awaiting the ruling of the Supreme Court of Justice on the appeal submitted by Mr Luis Fruto.

C. The Committee's conclusions

1268. *The Committee notes with satisfaction that, by its ruling of 2 October 2006, the Supreme Court of Justice declared unconstitutional section 75 of Decree No. 8 of 1998, which regulates work at sea and on waterways and which the Committee had asked to be revised (in the ruling forwarded by the Government, the Supreme Court indicates that "section 75 of Decree No. 8 of 1998 does indeed violate articles 64 and 65 of the Political Constitution"), and which according to the allegations, denied the right to collective bargaining and to strike. In this respect, the Committee also takes due note of the Government's statement that it will take appropriate measures to promote collective bargaining in the maritime sector.*

1269. *The Committee further notes the Government's statement that it is awaiting the ruling to be handed down by the Supreme Court of Justice regarding the dismissal of the maritime sector trade union leader Mr Luis Fruto, and expects that the ruling will be handed down in the very near future. The Committee once again regrets the length of time that has elapsed since the beginning of the court case, and requests the Government to keep it informed on this matter and to communicate to it the content of the ruling as soon as it is handed down.*

The Committee's recommendation

1270. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

Regretting once again the length of time that has elapsed since the beginning of the court case, the Committee requests the Government to keep it informed with regard to the appeal to the Supreme Court of Justice against the dismissal of the maritime sector trade union leader, Mr Luis Fruto, and to communicate the content of the ruling as soon as it is handed down; it also expects that the ruling will be handed down in the very near future.

CASE No. 2488

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

Complaint against the Government of the Philippines presented by the Federation of Free Workers (FFW) – Visayas Council

Allegations: The complainants allege that the University of San Agustin dismissed all 15 officers of the University of San Agustin Employees' Union – FFW (USAEU) in retaliation for the staging of a strike which was initially found legal by the Department of Labor and Employment and subsequently declared illegal by the courts. The complainant also alleges partiality on behalf of the judicial authorities including the Supreme Court, leading to decisions which are alarmingly dangerous for the rights of the workers to collectively bargain, strike and obtain protection against anti-union discrimination, thus encouraging other employers (Eon Philippines Industries Corporation and Capiz Emmanuel Hospital) to engage in further acts of anti-union discrimination

- 1271.** The complaint is contained in communications from the Federation of Free Workers (FFW) – Visayas Council dated May, 27 July, 7 October and 21 November 2006.
- 1272.** The Government replied in communications dated 1 September, 6 November and 26 December 2006.
- 1273.** The Philippines has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 1274.** In its communication of May 2006, the complainant indicates that the University of San Agustin Employees' Union – FFW (USAEU) is the recognized exclusive bargaining agent composed of academic, non-academic and maintenance personnel in the University of San Agustin (the university) in Iloilo City, Philippines. The university is a non-stock, non-profit educational institution engaged in educating the minds of the youth of the country not only on matters pertaining to science but also on Catholic Christian formation.
- 1275.** The complainant alleges that on 2 April 2003, the USAEU submitted to the management of the university its collective bargaining agreement (CBA) proposals pertaining to benefits of workers. The university submitted to the USAEU its counterproposals dated 10 April 2003 (documents annexed to the complaint). On 20 May 2003, both parties, the university and the union, commenced their series of meetings to thrash out the disagreements on the submitted proposals and counterproposals. The university increased its tuition fee rate by 10 per cent during the school year 2003–04. According to Republic Act (R.A.) 6728 of the Republic of the Philippines, at least 70 per cent of the tuition fee increase or tuition incremental proceeds (TIPs) should go to the increases in salaries and other benefits of the employees of the university (80 per cent in the case of the university as per existing CBA). Almost all of the proposals of the USAEU were rejected by the university, including the proposal to apply the increase in non-taxable fringe benefits instead of increase in monthly salary. The USAEU opted for increase in non-taxable fringe benefits so the workers can have higher take-home pay. This proposal was also advantageous even to the university for it would no longer increase the amount of the employer's share in every worker's contribution to the Social Security System. It could also earn interests in the bank since the benefit was not given monthly. Despite this proposal being advantageous to both the USAEU and the university, the management rejected it.
- 1276.** According to the complainant, to make matters worse, the university's proposed increase in salary was 3,000 pesos per month for teachers with a master's degree and only 300 pesos per month for teachers without a master's degree and the rest of the employees in the university. Almost 70 per cent of teachers in the university were without a master's degree, without counting the non-academic and maintenance personnel. There was already an existing substantial difference between the monthly salary of teachers with a master's degree and those without a master's degree. In fact, the existing CBA provided for an across-the-board increase to all employees in the university. Yet, the university took a hard-line stance, as always. The university's counterproposal obviously favoured only those in the managerial and supervisory positions like the Departmental Heads and the Deans of different colleges. The gap between the salaries of the Heads/Deans and that of the ordinary worker would only widen and eventually result in wage distortions, resentment and unproductiveness if the counterproposal of the university were put in place. These caused the deadlock in the collective bargaining.
- 1277.** Article 263(c) of the Labor Code of the Philippines provides that "In cases of bargaining deadlocks, the duly certified or recognized bargaining agent may file a Notice of Strike or

the employer may file a notice of lockout with the Department at least 30 days before the intended date thereof.” In its effort to settle the matter amicably, instead of filing the Notice of Strike, the USAEU filed a notice for preventive mediation before the office of the National Conciliation and Mediation Board (NCMB) in its regional office in Western Visayas. The NCMB is an agency under the Department of Labor and Employment (DOLE) tasked to mediate and conciliate disputes between labour and management. The conciliation proceedings were conducted by the NCMB Regional Director himself, who exerted every effort to settle the deadlock. During the conciliation proceedings, the university brought in a new lawyer and spokesperson from Manila. The attorney immediately introduced a new formula to be used in computing the share of the employees in the tuition fee increase or TIPs. This set aside the issue on whether the increase should be in the form of non-taxable fringe benefits or salary increase. The USAEU wanted to retain the traditional formula used by the university since the time of the enactment of R.A. 6728 in June 1988. If the traditional formula was used, the share of the employees in the TIPs would be around 12 million pesos, but if the new formula of the attorney was used, the employees’ share would be less than 4 million pesos. The USAEU proposed to lower their share to 10 million pesos. However, the university, again adopting a hard-line position, insisted and stuck to their new formula. (It is worth noting here that the Supreme Court, in the St Joseph College case, G.R. No. 155609, where the same issue on the formula to be used was involved, had decided with finality the formula to be used in favour of the union.)

1278. Confronted with the ever hard-line position of the university, the USAEU filed the Notice of Strike with the NCMB where the 30-day cooling-off period, as required by law, was to be observed. Conciliation efforts which continued to be exerted during the cooling-off period failed. Thus, after complying with all the mandated legal requirements, the USAEU decided to go on strike on 19 September 2003. The university, for its part, petitioned the Secretary of Labor and Employment (SOLE) to assume jurisdiction over the dispute. On 19 September 2003, at 7.30 a.m., members of the USAEU went outside the walls of the university to go on strike. They set up streamers, placards, tents, a public address system and other strike paraphernalia. The USAEU President, Theodore Neil Lasola, was heard over the radio announcing, for the benefit of all members as well as the interested public, the start of the strike. Afterwards, he was heard being interviewed on different radio stations. The USAEU President had to announce the strike through different radio stations since there were three strike areas: one at the main gate of the university, one at the side gate located in the adjacent street beside the university and another at the extension campus which is around a 15-minute drive from the main campus.

1279. At around 8.45 a.m., two sheriffs from Manila together with the university Director arrived at the main gate to serve the Assumption of Jurisdiction Order (AJO) from the Secretary of Labor. The sheriffs were told that the USAEU President was the one authorized to receive the AJO. A board resolution was executed to that effect to safeguard the members from unauthorized instructions that might jeopardize the very peaceful and legal strike. The sheriffs, however, without exerting any effort to locate the USAEU President or wait for him to effect personal service of the AJO, just immediately proceeded to post a copy of the AJO on the wall near the main gate of the university and then left. Meanwhile, after the interviews on different radio stations, the USAEU President proceeded to the extension campus to monitor the strike. At around 11 a.m., the USAEU President also observed the very peaceful strike being undertaken near the main gate as well as the strike near the side gate of the university. He did not see any of the sheriffs even if he went back near the main gate at around 3 p.m. Again, at around 5.25 p.m., he went back to the main gate. This time, the sheriffs were there waiting to serve the AJO upon him.

1280. A lot of witnesses were able to hear a man, who turned out to be the new legal counsel of the university, son of the university’s spokesperson, dictating upon the sheriffs to write on

their copy of the AJO that the said AJO should be considered received at 8.45 a.m. instead of 5.25 p.m. It was only then that the sheriffs told the union members that the AJO was already considered served at 8.45 a.m. No one from the USAEU knew the new legal counsel of the university from Manila. When he was asked by the union's legal counsel if he were from the NCMB, he answered "yes" without hesitation.

- 1281.** Within ten minutes of receiving the AJO, the USAEU President announced through the public address system that the strike was lifted and gave instructions to the members on what to do in compliance with the AJO of the SOLE. The USAEU members proceeded to take care of the different strike paraphernalia as well as the public address system and brought these to a safe place. Those who still had classes in the evening proceeded to meet their classes. In all cases of strike in the Philippines, the SOLE always gives 24 hours to the workers as the reasonable time within which to return to work. The USAEU in this case was able to return to work the same day the strike began. And so the strike which started on 19 September 2003 also ended that same day. The next day, which was a Saturday, the university published in local newspapers its official statement giving the workers until Monday, 22 September 2003, to return to work or else they would be declared by the university to have lost their employment status. This was amply complied with since striking workers were able to return to work well before the deadline set by the university in its published statement.
- 1282.** The USAEU and the university, in compliance with the AJO, submitted their position papers to the SOLE for the latter to make his ruling. Yet, despite compliance with the AJO of the SOLE and the deadline set by the university, the university management was hell bent on going after the workers who participated in the strike. On 24 September 2003, the university filed with the National Labor Relations Commission (NLRC) in its regional office in Iloilo City, a petition to declare the strike of 19 September 2003 as illegal and to declare all the USAEU members and officers who participated in the strike to have lost their employment status. This petition was later consolidated on a motion by the university, with the issues to be decided by the SOLE. The action of the university to go after the workers who participated in the strike sowed fear among union members who suddenly became afraid to go out into the open and actively participate in union affairs.
- 1283.** The complainant adds that the next month, October 2003, four theology teachers who participated in the strike and were identified as close associates of the union President were dismissed from their jobs on the flimsy excuse that they had no master's degree. The four teachers were John Mirasol (a union officer), Benonie Dela Cruz, Alexander Sardon and Victoria Callanga. The four were dismissed from their jobs obviously because of their union activities. The four dismissed teachers filed with the NLRC a motion to declare the dismissal illegal but unfortunately, in a very apparent pro-management ruling, the NLRC decided in favour of the university. After two months, during the month of December 2003, when the USAEU was supposed to have its general assembly meeting (as the union had been allowed for several years, two meetings every semester during class days, per their CBA), the university no longer allowed the union to hold its meetings during class days. In fact, many union members were no longer attending the general assembly meetings for fear of being identified and a backlash from the university management.
- 1284.** Another USAEU member, Melvin Garrido, from maintenance personnel, in charge of the water pump in the university, was accused of stealing two plastic bags of chlorine and was dismissed. Mr Garrido vehemently denied the accusation. Melvin Garrido was one of those who joined the strike. The university's main witness testified during the investigations conducted by the university that she was asked to sign by the head of the maintenance personnel, without understanding the seriousness of the affidavit against Mr Garrido.

Again another case was filed with the NLRC to declare the dismissal of Mr Garrido as illegal and unfortunately, again, the NLRC ruled in favour of the university.

1285. The complainant states that the abovementioned acts of the university as well as the decisions of the NLRC clearly violated Article 1 of Convention No. 98. According to the complainant, even the practice by the Secretary of the DOLE of issuing AJOs every time there was an impending strike has become a hindrance to the workers' exercise of their basic constitutional right to concerted actions for the promotion of their benefits and mutual protection.

1286. The complainant specifies that article 263(g) of the Labor Code of the Philippines states:

When, in his opinion, there exists a labor dispute causing or likely to cause a strike or lockout in an industry indispensable to the national interest, the Secretary of Labor and Employment may assume jurisdiction over the dispute and decide it or certify the same for compulsory arbitration. Such assumption or certification shall have the effect of automatically enjoining the intended or impending strike or lockout as specified in the assumption or certification order.

The Secretary of the DOLE issued the AJO on 18 September 2003, a day before the strike staged by the workers although the same was received by the USAEU on the day of the strike. Why the university in Iloilo City was considered by the Secretary of the DOLE as an industry indispensable to national interest is beyond the understanding of the USAEU members. In Iloilo City alone there are six universities not counting the nine private colleges.

1287. The complainant adds that in fact, every industry where there has been an impending strike, has always been considered by the DOLE as indispensable to national interest. The DOLE therefore will immediately issue an AJO even before the workers can stage a strike. Thus, while the complainant expresses appreciation for the favourable decision of the Secretary of the DOLE in the present case, it also finds that the practice of issuing AJOs every time there is an impending strike has become a burden to all labour groups. The practice effectively puts the union at the mercy of the employer who negotiates in bad faith and who can get away with it through the simple expediency of asking for an AJO from the office of the Secretary of the DOLE if the union files a Notice of Strike. The union then is put at a disadvantage and would be left with no choice but to submit to the Order of the Secretary of the DOLE and go through the atrociously long process of legal battle. This is compounded by the many legal requirements required by the Labor Code for a strike to become legal. And worse, when the strike is declared illegal by the proper authority, all union officers may be declared to have lost their employment status by their employers (article 264, paragraph 3, Labor Code). The issuance of AJOs even before any strike takes place, in all kinds of industry clearly violates Articles 3(2) and 8(2) of Convention No. 87.

1288. The complainant further alleges that the Secretary of the DOLE handed down her decision dated 6 April 2004 (decision annexed to the complaint). Again, on the basis of article 263(g) of the Labor Code of the Philippines, the Secretary opted to decide on this case. On the issue of the legality of the strike, the Secretary ruled that the USAEU was able to comply with her Order as well as the mandated legal requirements, hence, the strike was legal. On the issue of benefits, the Secretary ruled that the formula to be used in computing the 70 per cent share of the employees in the TIPs (80 per cent in the case of the university) is the formula traditionally used by the university. This is the position of the union. It must be noted that the increases in salaries and other benefits are taken from the 70 per cent of the TIPs. The dispositive portion of the Secretary's decision:

WHEREFORE, the parties are hereby directed to conclude a memorandum of agreement embodying the foregoing dispositions to be appended to the current CBA. The petition to

declare the strike illegal is hereby DISMISSED for want of legal and factual basis. Consequently, there is no basis whatsoever to declare loss of employment status on the part of any of the striking union members.

Usually, the union and the management will then proceed to sign a new CBA based on the decision of the Secretary. But, the university did not implement the decision even if article 263(i) of the Labor Code provides that the decision of the Secretary of the DOLE is final and executory. After their motion for reconsideration was denied by the Secretary, the university elevated the case to the Court of Appeals on the ground that the Secretary of the DOLE committed grave abuse of discretion.

- 1289.** On 15 March 2005, the USAEU received its copy of the decision of the Court of Appeals dated 4 March 2005 (decision annexed to the complaint). On the issue of the legality of the strike, the Court of Appeals reversed the decision of the DOLE and ruled that the strike was illegal. It stated that the USAEU defied the order of the Secretary by continuing with the strike until the afternoon. It stated further that the USAEU acted in bad faith for coming up with a board resolution authorizing only the President of the union to receive the AJO. On the issue of the benefits, the Court of Appeals affirmed the decision of the Secretary of the DOLE. On 28 March 2005, the union filed a partial motion for reconsideration on the ruling of the court on the illegality of the strike (annexed to the complaint). For its part, the university also filed a partial motion for reconsideration on the issue of benefits (annexed to the complaint).
- 1290.** The complainant alleges that in its obsession and haste to destroy the USAEU for good and in blatant violation of existing laws, the university President dismissed all union officers effective upon receipt of their dismissal letters throwing 15 families into financial turmoil and emotional agony (dismissal letters annexed to the complaint). The university President did not give the union officers as much as one day to prepare. He knew that the decision was not yet final and executory but he implemented it. He knew of the pending motion for reconsideration filed on time by the union. He himself had filed a motion for reconsideration. In unparalleled bad faith, the university implemented one portion of the decision, that is, the “illegal strike” by dismissing all the USAEU officers “effective upon receipt” of their dismissal letter but refused to implement the issue on benefits affirmed by the Court of Appeals. The university argued that they filed a motion for reconsideration and planned to elevate the case to the Supreme Court should their motion be denied. However, the union had also filed a motion for reconsideration and planned to elevate the same to the Supreme Court. Thus, there was no justification for the university to implement only one portion of the decision by terminating all union officers and not implement the other portion of the decision of the Court of Appeals on benefits. The complainant emphasizes that Rule 52, section 4, of the Rules of Court of the Philippines provides that if there is a pending motion for reconsideration filed on time, the decision cannot be implemented since it is not yet final and executory. It is contemptuous to pre-empt possible decision of the court. The plan of the university management was crystal clear: dismiss all USAEU officers who have been a pain in the neck and crush the backbone of unionism in the university. This was the price that these union officers had to pay for knowing and exercising their rights and for fighting for the rights of others. Being a union officer had become a very dangerous and thankless job. Worse, union members became all the more afraid.
- 1291.** The USAEU wrote a letter to the university President for him to reconsider its decision on the premature dismissal of the union officers. The President replied denying the request saying that he was only implementing the decision of the Court of Appeals and that his action would withstand judicial scrutiny. The USAEU was constrained again to file a Notice of Strike on the ground of union busting. And, after complying with all the mandated legal requirements, the union went on strike on 25 April 2005. This time, however, no AJO came from the Secretary of the DOLE. This time, not many members

joined the strike. Most wanted to be safe in their jobs and closed their eyes to the ultimate punishment being meted out on their union officers who had defended them. The union members were overcome by great fear of reprisal from management.

1292. On 23 August 2005, the Court of Appeals promulgated a decision on the partial motions for reconsideration by both the union and the university. On the issue of the strike, it was still held illegal by the court. On the issue of benefits, the court, in a bizarre twist and in blatant disregard of existing jurisprudence that all issues on the labour dispute shall be decided by the Secretary of the DOLE, ruled that the same shall be referred back to voluntary arbitration for decision (decision annexed to the complaint). The decision did not address the very important issue on the contemptuous illegal dismissal of all the union officers even if this issue was raised by the USAEU in its motion to cite the university President and the university in contempt (annexed to the complaint).

1293. The workers elevated the case to the Supreme Court by way of a Petition for Review (annexed to the complaint). After more than five months of joining the strike without receiving their salaries, the few USAEU members who joined the strike returned to work upon the advice of their dismissed officers so they could start earning their salaries again. Meanwhile, the dismissed USAEU officers and one member, Mr Jerome Esabra, who decided not to return to work if the union officers were not reinstated, continued with their strike while waiting for the decision of the Supreme Court. Several dismissed officers experienced the unseen hand of the university when applying for jobs in other schools. They were considered at first because of their good credentials, but were eventually rejected for reasons not clear to them. They asked the help of local leaders both in the Government and in the Church. Local leaders in the Province of Iloilo tried to intervene (the governor, mayor and the Provincial Board of the Province of Iloilo, as well as the Archbishop of the Archdiocese of Jaro). However, the Augustinian priests were adamant in their position not to reinstate the union officers since they were allegedly given the “option” by the Court of Appeals “to serve notice of dismissal”. Instead, the Augustinian priests insulted the union officers as “greedy with money” and told them that because of the strike in 2003, they would “find ways to dismiss the union officers”, in the presence of the mayor of the City of Iloilo.

1294. On 20 April 2006, the union received a copy of the decision appearing to have come from the Supreme Court on the USAEU’s Petition for Review dated 28 March 2006 (decision annexed to the complaint). The dispositive portion of the Supreme Court decision read:

WHEREFORE, the petition is DENIED. The partially amended Decision dated 23 August 2005 of the Court of Appeals in CA – G.R. SP No. 85317 is AFFIRMED.

Aside from affirming the decision of the Court of Appeals, the court did not rule on the very crucial issue of illegal dismissal of all union officers. These union officers had worked in the university for 12, 18, 20 and 25 years of unblemished and excellent records. The dismissed union officers pinned their hopes on the highest court of the land to attain justice for their long agony caused by the illegal and unjust dismissal. Clearly, the university was guilty of illegal dismissal resulting in union busting when it dismissed all union officers even if there was a pending Motion for Reconsideration filed on time by both parties. This act of premature dismissal violated the rule on finality of judgement (Rule 52, section 4, of the Rules of Court of the Philippines) and had effectively sowed fear among union members, and also effectively suppressed unionism in the university.

1295. The complainant considered that it was obvious that the real intention of the university in dismissing the officers, while the decision was not yet final and executory was to eradicate all possible resistance, terrorizing in the process those who intended to get the employees’ just share in the TIPs. Nobody among the remaining union members in the university had the courage to pursue in court their share in the TIPs for fear of a backlash from the

university management. How could the Supreme Court not see this? Clearly, the university had acted in bad faith and wanted to suppress unionism and terrorize union members into submission to its every whim and caprice. The complainant commented that after more than a year, and still counting, of camping outside the walls of the university enduring all forms of difficulties, financial turmoil and emotional distress suffered by the workers and their families, the one government institution the workers hoped could give them justice had failed them. With regard to the decision of the Supreme Court on the issue of benefits in particular, the complainant states that the Supreme Court is not unaware that it has already decided the same issue on the correct formula to be used in computing the TIPs in its decision on the St Joseph College case. It is even more frustrating that on the issue of benefit, the Supreme Court ruled that the voluntary arbitrator will decide again on what has already been decided by the SOLE, and what has already been decided by the Supreme Court itself.

- 1296.** Thus, according to the complainant, the decision of the Court of Appeals and, eventually, that of the Supreme Court of the Philippines with the aforescribed circumstances are clear violations of Articles 3 and 8 of Convention No. 87 and Article 1 of Convention No. 98. The decisions of the courts which ruled that the very peaceful strike of the USAEU of 13 September 2003 was illegal even if the union complied with all the stringent mandated legal requirements, and its referring the issue on benefits back to voluntary arbitration even if these were already decided by the Secretary of the DOLE and the Supreme Court itself, and the failure of these courts to address the crucial issue on the illegal dismissal of all union officers are gross violations of Conventions Nos 87 and 98.
- 1297.** The complainant points at some irregularities in the Supreme Court decision. In particular, the case was originally assigned to the Third Division of the Supreme Court. Sometime in January 2006, the union received its copy of the Second Endorsement of its case dated 12 January 2006 addressed to the Clerk of the Court, this time, of the Second Division. For reasons known only to the Supreme Court, the said case was transferred from the Third Division to the Second Division of the said court. On 1 April 2006, a Saturday, many union members of the university received similar text messages which read: "Frm Atty Padilla – decision of d Supreme Court is in d internet. San ag wins in all issues." The following day, 2 April 2006, *Panay News*, a local news tabloid, published the university of San Agustin press statement on the Supreme Court decision on this case. The next day, 3 April 2006, the university attorney flew into Iloilo City from Manila and called for a press conference regarding the decision of the Supreme Court on the instant case posted in its official web site. He admitted to the media that he, too, had not yet received his official copy from the Supreme Court. Again, local tabloids printed a news item on this press conference and one whole page dedicated to the official statement of the university regarding the decision. The university published its official statement regarding the decision even before the parties received their official copies of the decision. The university attorney, while admitting that he had not yet received an official copy of the decision, already had a copy in his possession which he alleged as having been taken from the internet, and which was reproduced and posted in conspicuous places in the university. Members of the petitioner union saw posted copies of the said decision in the university bulletin boards numbering 21 pages. The union was able to download the decision and printed a copy from the Supreme Court web site. Thirteen pages contained the decision. On 20 April 2006, the USAEU received via registered mail the decision (G.R. No. 169632) which appeared to have come from the Supreme Court. It contained 21 pages just like the one reproduced and posted by the university around the university campus.
- 1298.** Moreover, the complainant alleges that the copy of the decision received by the USAEU which appears to have come from the Supreme Court, has the following features:

- (1) A smaller brown envelope is pasted on the face of a big brown envelope. The face of the smaller brown envelope bears:
 - (a) “*en banc*” label on the upper left side of the envelope. Yet, inside the envelope, the decision was promulgated by the Second Division only and signed by the five justices of the Division;
 - (b) the case number “G.R. No. 169632” is handwritten; and
 - (c) the addressee, President of the USAEU and his address are handwritten photocopies lifted from the Notice of Judgement and taped on the addressee position of the envelope except that the handwritten word “(Reg)” found after the word “Pres” is cut.

The complainant wonders why the Supreme Court accorded the union such very unusual informality. It also emphasizes that:

- (2) The Notice of Judgement bears the following features:
 - (a) the Notice of Judgement is printed on a white bond paper. The Notice of Judgement is colour-coded as is the custom of court;
 - (b) the Notice of Judgement is a photocopy, not an original;
 - (c) the case title contains an inserted handwritten addition which reads: vs. “Court of Appeals”;
 - (d) the date of the promulgation of the decision is also handwritten;
 - (e) the USAEU President and its address is handwritten in the extreme left portion as an additional person to be furnished a copy. This is exactly the same handwritten addressee taped on the face of the brown envelope except that the handwritten “(Reg.)” is found after the word “Pres”;
 - (f) there is an absence of the copy of the Notice sent to the respondent university; and
 - (g) the case number “G.R. (CA) No. 85317” is handwritten.

The complainant again inquires why this informality and irregularity is happening right in the records of the highest court of the land and whether this is the kind of respect afforded to citizens who have suffered from illegal dismissal and whose families are so much affected.

1299. The complainant adds that on 5 May 2006, the USAEU filed with the Supreme Court its Motion for Reconsideration for the Supreme Court to reverse its decision dated 28 March 2006 (annexed to the complaint). The complainant states that it is so alarmed by this recent decision which undermined the right of the workers to collectively and effectively bargain for their rights and mutual protection as well as their right to strike as its last recourse. It is even more alarmed at the effects of this decision on labour groups in the Province of Iloilo. What happened to their fellow workers in the university run by priests has been monitored by different labour groups as well as by the other companies all throughout the Province of Iloilo and the neighbouring provinces. The other employers have taken their cue from the university – they can just dismiss workers and win in the Supreme Court. In the Philippines, decisions of the Supreme Court which are final and executory become part of the law of the land and have the effects thereof.

- 1300.** Thus, according to the complainant, workers from Eon Philippines Industries Corporation have been dismissed allegedly on the ground of “business losses” and “excess manpower” without presenting proof that the company is indeed losing (letter of dismissal annexed to the complaint). This is just a newly organized union by the FFW in the Visayas. Having talked with the workers, only those who signed a complaint against the management with the DOLE were being dismissed. Seven of the dismissed union members were officers of the union. They were told that the next batch to be dismissed would follow. This is a clear case of dismissal by reason of union activities. The company’s claim is refuted by the fact that they continue to hire more personnel to the company.
- 1301.** Moreover, according to the complainant, in Roxas City, capital city of the neighbouring Province of Capiz, a union officer of the Capiz Emmanuel Hospital Employees’ Union (CEHEU) was suspended for 30 days effective upon receipt of the suspension letter after sudden fabricated charges (letter attached to the complaint). It was certain that dismissal would follow because the union officers were bluntly told by the hospital administrator that they would suffer the same fate as the union officers of the university. There was brutal and actual harassment committed against labour organizations in the region. The highly questionable posting of the Supreme Court decision through its official web site, even if the parties had not yet received their official copies as well as the press releases made by the university on the decision taken from the web site, also made matters worse. The unfortunate decision of the Supreme Court in the case of the USAEU had a chilling effect. With this decision, the employers in the region became aggressively engaged in union-busting activities and dismissed employees without fear of sanctions.
- 1302.** In a communication dated 27 July 2006, the complainant alleges that another batch of 15 union members was dismissed from their jobs by the management of Eon Philippines Industries Corporation in addition to the first 12 dismissed members and officers of the newly organized union mentioned in the initial complaint. The union officer at Capiz Emmanuel Hospital in Roxas City, Imelda Juridical, who was suspended first for two months, had now been dismissed from her job. More dismissals of union officers were certain, for as mentioned in the initial complaint, the officers of the union were bluntly told by the hospital administrator that they would suffer the same fate as the union officers of the USAEU.
- 1303.** The complainant (FFW) adds that on 5 June 2006, it filed a “Motion for Intervention” with the Supreme Court arguing among other things, that the decision set a dangerous precedent, as there was no longer any distinction between compliance and defiance vis-à-vis the law when staging a strike, something that would definitely affect all the unions affiliated with the Federation as well as all labour groups in the entire country. In the meantime however, the Supreme Court came out with its decision acting on the USAEU “Motion for Reconsideration” dated 5 May 2006. In a resolution dated 14 June 2006 (attached to the complaint) which was received by the union only on 24 July 2006, the Supreme Court denied with finality the Motion for Reconsideration on the ground that the issues raised had already been “considered and passed upon by the Court” in its decision dated 28 March 2006 (decision attached to the complaint).
- 1304.** This shocked the union as it had raised several serious issues in the Motion for Reconsideration (consisting of 64 pages). Among these issues were the following: serious errors in the court’s finding of facts, and the constitutionality of its interpretation of the Labor Code’s provision on “immediately return to work” as “instantaneous” or “automatic” (since this is impossible to comply with); the violation of the workers’ constitutional right on “equal protection of Law” (since the giving of a reasonable period of time has always been applied in all cases of strike, except the one staged by the USAEU); the sheriffs’ report which was not a sworn statement as against the USAEU “Comment on the Sheriffs’ Report” which was a duly sworn statement (it must be

remembered that the courts, the Court of Appeals and the Supreme Court, relied solely on the sheriffs' report in coming up with a decision); that the USAEU complied with the AJO as evidenced by the ruling of the Secretary of the DOLE, the one who issued the Order; that the USAEU complied with all the stringent mandated legal requirements for a strike to be legal; that the sheriffs' claim of a "standard operating procedure" had no legal basis; that the union president was being interviewed on different radio stations in Iloilo City on the morning of the strike as evidenced by the sheriffs' report and not avoiding the service of the AJO; the erroneous ruling that CBA deadlock was a matter arising from "interpretation or implementation of the CBA" such being contrary to article 263(c) of the Labor Code; the erroneous ruling that the Secretary of the DOLE committed grave abuse of discretion when it proceeded to decide on the dispute, when all the Secretary did was to abide by the provision of article 263(g) of the Labor Code; and the refusal of the court to rule on the premature and illegal dismissal of all union officers pending Motions for Reconsideration filed on time by both parties in violation of Rule 52, section 4, of the Rules of Court of the Philippines and in violation of the required 30-day notice. These issues were not addressed by the Supreme Court in its decision dated 28 March 2006. Most importantly, the court did not address the question of the authenticity of the decision and the irregularities which attended its promulgation. Its only answer to all of the above was that this question had already been "passed upon by the Court".

1305. The complainant comments that the kind of justice that an ordinary worker gets from the highest Court of the Land, after doing everything to abide by the existing laws, is frustrating and dangerous and can lead to even more chaos and serious threat to the already volatile labour-management relationship. The decision is clearly contrary to the national law and settled jurisprudence and violates ILO Conventions Nos 87 and 98. According to the complainants, the idea could not be avoided that big money and the well-placed connections of the university's lawyer influenced the decision. The union indicated further that it would be filing with the Supreme Court a Motion for a referral to an *en banc* decision or probably a second Motion for Reconsideration. However, it would be the same Second Division of the Supreme Court that would decide on whether to grant the motion or not.

1306. In its communication dated 7 October 2006, the complainant (FFW) further alleged that the Intervention it filed before the Supreme Court was simply noted "without action" by the Second Division of the Supreme Court. All the subsequent pleadings were simply noted "without action". The only Motion which had not been acted upon yet by the Supreme Court was the Motion of the USAEU for referral to an *en banc* decision. The complainant repeated its belief that the Supreme Court had committed serious errors in deciding this case, as it came out with a decision which violates the constitutional rights of workers to peaceful concerted action as well as the equal protection of law, and deviates from the already established rulings of the Supreme Court itself regarding the right to strike. The complainant considered that the decision represented a great danger to the entire trade union movement in the country as it did not matter anymore whether a trade union abided by the legal requirements or not and the employers, especially in the Visayas Region, were on a union busting rampage. Taking their cue from what the management of the university did to the union officers and its win in the Supreme Court, in September 2006, a third batch of 12 union members were mercilessly dismissed from Eon Philippines Industries Corporation again on the ground of company losses even if there were many casual and contractual workers in that company. Moreover, another union member was suspended from the Capiz Emmanuel Hospital.

1307. In a communication dated 21 November 2006, the complainant alleged that on 13 November 2006, the USAEU legal counsel received a copy of the resolution dated 4 October 2006 from the Second Division of the Supreme Court stating that the union's Motion for an *en banc* resolution was denied with finality and that "no further pleadings

shall be entertained” by the court. Furthermore, the resolutions of the Supreme Court regarding the USAEU case (G.R. No. 169632) dated 14 June 2006, 10 August 2006 and 4 October 2006, were not found in the official web site of the Supreme Court. All the decisions and resolutions up to the second week of November had already been posted except that of the USAEU’s case.

B. The Government’s reply

- 1308.** In a communication dated 1 September 2006, the Government indicated that as a signatory to ILO Conventions Nos 87 and 98, it has religiously observed the mandate of the said Conventions. As part of its commitment to abide by the provisions of the Conventions, it strictly enforces the provisions of the Labor Code on self-organization and collective bargaining. It sees to it that, while it protects the rights of workers and labour organizations, its strong arms are not to be used as a means for the destruction of the employers. As such, the Government, when called upon to intervene in labour disputes between labour organizations and employers, renders decisions only on the basis of evidence presented before it and with the end view of maintaining industrial peace. This protective policy of the Government may be viewed from the decision of the SOLE in the USAEU case.
- 1309.** The Government has never adopted the policy of violating the trade union rights of workers who participate in concerted activities to seek redress of grievances against their employers. On the contrary, it encourages free trade unionism and free collective bargaining. The rights of workers to engage in concerted activities for purposes of collective bargaining or for mutual benefit and protection and the rights of legitimate labour organizations to strike and picket and of employers to lockout, consistent with the national interest, have always been recognized and respected by the Government. In fact, the complainant itself alleged that on 25 April 2005, it went on strike, and the Department did not intervene. Official records show that 559 other strikes were staged from 1996 to 2005 without the Department intervening. Over the past ten years, there has been at least one new strike staged every week – an average of 56 strikes a year – without State intervention. This indicates the free exercise of the workers’ freedom of association in the Philippines.
- 1310.** Regarding the cases in the appellate courts, the Government indicated that although the last two decisions of the appellate courts were not to the satisfaction of the union, voluntary arbitration ordered by the Supreme Court, could not be considered a violation of the union’s right to organize or to bargain collectively.
- 1311.** The Government finally recalled that in several communications concerning other cases, the Committee has been constantly informed that the Secretary of the DOLE has made specific instructions to review and revise the entire Labor Code. In response to the said instructions, the DOLE has initiated consultations on the proposed amendments. On the proposal to amend article 263(g) of the Labor Code, the DOLE has extended resource persons in the discussions and deliberations on House Bills Nos 1505 and 2728, known as “An act establishing the new Labor Code and for other purposes”. House Bill No. 1505 proposes to amend article 263(g) of the Labor Code, as amended, by limiting the Secretary of the DOLE’s assumption of power to enterprises engaged in providing essential services such as hospitals, electrical and water supply services and communication and transportation services. Senate Bill No. 1027 also proposes to amend article 263(g) of the Labor Code. The said legislative bills are pending deliberation and consideration by the Committee on Labor of the Philippine Senate and House of Representatives, respectively.
- 1312.** In a communication dated 6 November 2006, the Government sums up the facts of the case as follows, in accordance with the findings of the Supreme Court in its decision of

28 March 2006: on 27 July 2000, the USAEU concluded a collective agreement with the university, a non-profit educational institution, for a term of five years. The agreement provided for economic benefits to the workers for the first three years, subject to re-negotiation of these benefits for the remaining two years. It also provided for a “no strike, no lockout” clause and a grievance procedure that culminates in voluntary arbitration in case of disputes between parties during the period of the agreement.

1313. During the re-negotiation for school years 2003–05, the parties could not agree on the manner of computing the proceeds from tuition fee increases, which appeared to be material in fixing the economic benefits for the two school years. Mediation by the NCMB failed in bringing the parties to an agreement. The USAEU then filed a Notice of Strike which the university opposed with a Motion contending that the action of the union violated the “no strike, no lockout” clause and the recourse to the grievance procedures and voluntary arbitration provided in the collective agreement. The parties then filed a joint request for the Secretary of the DOLE to assume jurisdiction over the dispute. Acting on the joint request, the Secretary issued an Order on 18 September 2003 notifying the parties that her office was assuming jurisdiction over the dispute and that parties were accordingly being enjoined from taking strike or lockout action. On 19 September 2003 the union went on strike. At 6.45 a.m. of that day, government sheriffs served a copy of the Order on the USAEU through its vice-president who was in the strike area but who claimed that the Order could be received by the USAEU only through its president who was not there. The sheriffs informed the union vice-president that the Order would be considered served upon its posting at the university’s main entrance and the union’s office, which the sheriffs did at 8.45 a.m. That did not stop the strike. At 5.25 p.m. the USAEU president arrived and received the Order from the sheriffs. On 24 September 2003, the university filed a Petition to declare the strike illegal. The Petition was consolidated with the case assumed by the Secretary of the DOLE on the motion of the university. On 6 April 2004, the Secretary of the DOLE rendered a Decision resolving the issues on the economic provisions of the collective agreement for school years 2003–05 and dismissing the Petition to declare the strike illegal. The university contested the Decision before the Court of Appeals. On 4 March 2005, the Court of Appeals rendered a Decision affirming the Secretary on the economic issues but declaring the strike of 19 September 2003 illegal. Both the USAEU and the university moved for reconsideration. On 7 April 2005, the university served notices of dismissal on the union officers who were deemed by the Court of Appeals to have lost their employment status on account of the illegal strike. In response, the USAEU filed another Notice of Strike. On 22 April 2005, the parties commenced negotiations for a new collective agreement. An early impasse ensued. On 25 April 2005, the union again went on strike, on account of which the university served notice that it was withdrawing from further negotiations. On 23 August 2005, the Court of Appeals promulgated a Decision on the Motions for Reconsideration. It affirmed the illegality of the strike of 19 September 2003 but set aside the decisions on the economic issues, ruling instead that “said issues were (a) proper subject of the grievance machinery as embodied in the parties’ CBA”. The court directed the parties to refer the issues to voluntary arbitration. On 20 September 2005, the USAEU and its dismissed officers filed a Petition for Review with the Supreme Court. Two basic issues were raised: the legality or illegality of the strike and the referral to voluntary arbitration. On 28 March 2006, the Supreme Court rendered a Decision denying the Petition and affirming the Decision of the Court of Appeals, dated 23 August 2005. In brief, the Supreme Court declared that the Court of Appeals committed no error in ruling that the collective agreement bound the parties to refrain from strike or lockout and to refer their disputes to voluntary arbitration during the life of the agreement. On 5 May 2006, the USAEU filed a Motion for Reconsideration.

1314. On 29 May 2006, the USAEU filed the complaint against the Government of the Philippines with the ILO. On 14 June 2006, the Supreme Court denied “with finality” the union’s Motion for Reconsideration, “the basic issues raised therein having been duly

considered and passed upon by the court in the aforesaid decision and no substantial argument having been adduced to warrant the reconsideration sought”.

1315. In respect of the alleged dismissals (other than the dismissals of the USAEU officers) and intimidation (interference with the USAEU General Assembly), some of these cases were brought to arbitration before the National Labor Relations Commission (NLRC), a tripartite body with equal number of members from the workers, employers, and the public sector, but it ruled for the university; the union did not indicate whether it appealed the Commission’s decisions. Neither did the union indicate the legal steps it took, if any, regarding the cases in Eon Philippines and Capiz Emmanuel Hospital. The Government did not therefore see the need to make any comments on this issue.

1316. Touching on this issue, the Government points out that Philippine law provides the workers adequate protection against unjust dismissal. The following provisions of the Labor Code may be cited:

ART. 279. *Security of tenure.* – In cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full back wages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.

ART. 280. *Regular and casual employment.* – The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season.

ART. 277. *Miscellaneous provisions.* (b) Subject to the constitutional right of workers to security of tenure and their right to be protected against dismissal except for a just and authorized cause and without prejudice to the requirement of notice under article 283 of this Code, the employer shall furnish the worker whose employment is sought to be terminated a written notice containing a statement of the causes for termination and shall afford the latter ample opportunity to be heard and to defend himself with the assistance of his representative if he so desires in accordance with company rules and regulations promulgated pursuant to guidelines set by the Department of Labor and Employment. Any decision taken by the employer shall be without prejudice to the right of the worker to contest the validity or legality of his dismissal by filing a complaint with the regional branch of the National Labor Relations Commission. The burden of proving that the termination was for a valid or authorized cause shall rest on the employer. The Secretary of the Department of Labor and Employment may suspend the effects of the termination pending resolution of the dispute in the event of a prima facie finding by the appropriate official of the Department of Labor and Employment before whom such dispute is pending that the termination may cause a serious labor dispute or is in implementation of a mass lay-off.

The law is even more protective in the case of union members:

ART. 246. *Non-abridgment of right to self-organization.* – It shall be unlawful for any person to restrain, coerce, discriminate against or unduly interfere with employees and workers in their exercise of the right to self-organization. Such right shall include the right to form, join, or assist labor organizations for the purpose of collective bargaining through representatives of their own choosing and to engage in lawful concerted activities for the same purpose for their mutual aid and protection, subject to the provisions of article 264 of this Code.

ART. 248. *Unfair labor practices of employers.* – It shall be unlawful for an employer to commit any of the following unfair labor practice:

- (a) To interfere with, restrain or coerce employees in the exercise of their right to self-organization;
- (b) To require as a condition of employment that a person or an employee shall not join a labor organization or shall withdraw from one to which he belongs;
- (c) To contract out services or functions being performed by union members when such will interfere with, restrain or coerce employees in the exercise of their rights to self-organization; ...
- (e) To discriminate in regard to wages, hours of work and other terms and conditions of employment in order to encourage or discourage membership in any labor organization.

ART. 247. *Concept of unfair labor practice and procedure for prosecution thereof.* – Unfair labor practices violate the constitutional right of workers and employees to self-organization, are inimical to the legitimate interests of both labor and management, including their right to bargain collectively and otherwise deal with each other in an atmosphere of freedom and mutual respect, disrupt industrial peace and hinder the promotion of healthy and stable labor-management relations.

Consequently, unfair labor practices are not only violations of the civil rights of both labor and management but are also criminal offenses against the State which shall be subject to prosecution and punishment as herein provided.

ART. 288. *Penalties.* – Except as otherwise provided in this Code, or unless the acts complained of hinge on a question of interpretation or implementation of ambiguous provisions of an existing collective bargaining agreement, any violation of the provisions of this Code declared to be unlawful or penal in nature shall be punished with a fine of not less than One Thousand Pesos (P1,000.00) nor more than Ten Thousand Pesos (P10,000.00) or imprisonment of not less than three months nor more than three years, or both such fine and imprisonment at the discretion of the court. ...

1317. Thus, the Government stresses that while it is incumbent upon the employer, under article 277 of the Labor Code, to notify the worker, in writing, the reasons for his dismissal, the worker must “contest the validity or legality of his dismissal by filing a complaint with the regional branch of the National Labor Relations Commission” in order to be reinstated. If he files a complaint, the “burden of proving that the dismissal was for a valid or authorized cause shall rest on the employer”. If he does not, the dismissal will be deemed valid. The justified or uncontested dismissal of a worker should not be considered a violation by the Government of Conventions Nos 87 and 98.

1318. In a communication dated 26 December 2006, the Government recalls that on 5 May 2006, the USAEU filed a Motion for Reconsideration of the Decision of the Supreme Court, dated 28 March 2006. On 31 May 2006, the union president wrote to the Supreme Court pointing to irregularities which allegedly cast doubt on the authenticity of the 28 March 2006 Decision. On 1 June 2006, the FFW filed a motion for leave to intervene praying that the Decision dated 28 March 2006 be recalled. On 14 June 2006, the Second Division of the Supreme Court issued a resolution deciding “to DENY the motion (for reconsideration of the Union) with FINALITY, the basic issues raised therein having been fully considered and passed upon by the court in the aforesaid decision and no substantial argument having been adduced to warrant the reconsideration sought”. In the same resolution, the court “NOTED” the letter of the union president and “NOTED WITHOUT ACTION” the FFW’s motion for leave to intervene.

1319. On 27 July 2006, the union wrote to the ILO again complaining that the court had denied its Motion for Reconsideration in such a manner and contending that the union raised in its motion issue “questioning the decision which were never raised in the Petition for Review and were definitely not addressed by the Supreme Court”. Apparently, it felt aggrieved by the long-standing rule of Philippine appellate courts to decide only issues raised on appeal by the Petition for Review – and not new issues brought for the first time in a Motion for Reconsideration.

- 1320.** On 31 July 2006, the movant-intervenor FFW filed a motion for reconsideration to set aside the decision of 28 March 2006 and to give due course to its intervention, dated 1 June 2006, which was denied by the court on 14 June 2006. On 3 August 2006, the Supreme Court issued a resolution declaring that it “notes without action” the motions filed on 13 June and thereafter particularly the FFW’s motion for the nullification of the court’s decision. On 4 October 2006, the Supreme Court issued a resolution declaring that the USAEU motion for resolution by the court *en banc* was denied with finality.
- 1321.** With regard to the publication of the court decisions and resolutions in the web site, it must be stated that the court does not publish minute resolutions, except on cases of extreme importance. It bears noting that the authenticity of the Decision of 28 March 2006 was affirmed by the court in its resolution of 14 June 2006. The acts of the Clerk of Court, particularly its choice or use of paper, pen and envelope in the Notice of Judgement, do not detract from the authenticity of the Decision. The Notice is not an integral part of the Decision. It cannot be overstressed that the allegation that the Supreme Court took bribes – as stated in the union’s communication to the ILO, dated 27 July 2006 – is false and malicious and is a grave affront to the dignity both of the court and the ILO. Moreover, the insistence of the union to have the case referred to the court *en banc* – after it filed with the Second Division (then presided by the current Chief Justice who presides over the court *en banc*) a motion for it to reconsider its unanimous decision and after it asked the ILO to throw its weight on the court while the case was pending with that division, and failed to obtain a favourable ruling – is against all norms of fairness and justice. Under the Constitution of the Philippines, the decision of a division of the Supreme Court is considered a decision of the Supreme Court.
- 1322.** The Government finally indicates that the Supreme Court Decision of 28 March 2006 has become final. The Rules of Court, issued by the Supreme Court, under which the union filed its Petition for Review, bars a second motion for reconsideration. The insistence of the union for the ILO to interfere with the final ruling of the court lends no credit to trade unionism nor to the sound working of collective bargaining. The right to freedom of association and collective bargaining is fully guaranteed by the Constitution of the Philippines and labour laws – and is recognized and respected by the courts. However, when trial becomes necessary, unions must still present evidence and sound arguments before the court and should not rely solely on threats of intervention by international bodies and organizations and the possibility of economic and political sanctions. Without evidence, a good law cannot apply. With ample evidence, a good law – even without the intervention of foreign entities – will prevail in a case and bring justice to the parties concerned.

C. The Committee’s conclusions

- 1323.** *The Committee notes that the present case concerns allegations that the university) dismissed all 15 officers of the University of San Agustin Employees’ Union – FFW (USAEU) in retaliation for the staging of a strike which was initially found to be legal by the Department of Labor and Employment (DOLE) and subsequently declared illegal by the courts. The complainant also alleges partiality on behalf of the judicial authorities including the Supreme Court, leading to decisions which are alarmingly dangerous for the rights of the workers to collectively bargain, strike and obtain protection against anti-union discrimination, thus encouraging other employers to engage into further acts of anti-union discrimination.*
- 1324.** *In particular, the Committee observes from the complainant’s allegations and the Government’s reply as well as the numerous judicial documents brought to its attention as attachments to the complaint, that the facts of the case are as follows: the university and the USAEU concluded a collective agreement for a term of five years from 27 July 2000 to*

27 July 2005. The economic provisions of the agreement had a duration of three years, until 27 July 2003. The agreement contained a “no strike clause” whereby USAEU undertook not to go on strike during the duration of the agreement. It also contained a grievance procedure culminating in voluntary arbitration in case of grievances arising from the interpretation or application of the agreement (Articles 5, 13 and 14 of the agreement).

1325. *The Committee further observes that when the economic provisions of the agreement approached expiration, the parties undertook negotiations over the economic terms and conditions of employment for the period 2003–05. However, the negotiations reached a deadlock and mediation by the National Conciliation and Mediation Board (NCMB) failed. On 14 August 2003 the USAEU filed a Notice of Strike. On 12 September 2003, the USAEU submitted to the authorities its strike vote showing a majority voting to strike. On 15 September 2003, after a one-month cooling off period, the last conciliation efforts of the NCMB failed. On the same date, the university filed with the NCMB a “Motion to Strike Out Notice of Strike and to Refer Dispute to Voluntary Arbitration” on the ground that the action of the USAEU violated the “no strike” clause and the grievance procedure provided for in the collective agreement. The application was not acted upon by the NCMB. On 18 September 2003, the university wrote to the Secretary of the DOLE requesting her to assume jurisdiction over the labour dispute. On the same day, the Secretary of the DOLE issued an AJO assuming jurisdiction over the dispute pursuant to article 263(g) of the Labor Code and enjoining any strike.*

1326. *The Committee first observes that there are two separate issues in the complaint: first, the abuse of recourse to section 263(g) of the Labour Code – a provision which the Committee has commented upon in earlier cases; and second, the legal nature of the strike action in this specific case and the imposition of compulsory arbitration to determine the wage increase at the university.*

1327. *The Committee recalls that article 263(g) of the Labor Code states the following:*

When, in his opinion, there exists a labour dispute causing or likely to cause a strike or lockout in an industry indispensable to the national interest, the SOLE may assume jurisdiction over the dispute and decide it or certify the same for compulsory arbitration. Such assumption or certification shall have the effect of automatically enjoining the intended or impending strike or lockout as specified in the assumption or certification order.

1328. *The Committee recalls the conclusions and recommendations it reached in Case No. 2252 concerning the Philippines [332nd Report, paras 848–890] with regard to article 263(g) of the Labor Code. It recalls in particular that this article is contrary to freedom of association principles which provide that to determine situations in which a strike should be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health or the whole or part of the population [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 581 and 332nd Report, para. 883.] The Committee further recalls that the Government had indicated in that case (in a communication dated 25 June 2003 – a date close to the events under examination in the present case), that it had submitted a proposal of amendment with respect to article 263(g) to the labour committees of the Senate and the House of Representatives, in order to limit the intervention of the Secretary of DOLE to disputes involving essential services [332nd Report, paras 849 and 883]. In successive communications, the Government has kept the Committee informed of progress made in this respect. The Committee notes from the Government’s reply to the allegations in the present case that House Bill No. 1505 proposes to amend article 263(g) of the Labor Code by limiting the Secretary of DOLE assumption power to enterprises engaged in providing essential services such as hospitals, electrical and water supply services and communication and transportation services. Senate Bill No. 1027 also proposes to amend*

article 263(g) of the Labor Code. The said legislative bills are pending deliberation and consideration by the Committee on Labor of the Senate and House of Representatives, respectively.

- 1329.** *The Committee is bound to make two observations in respect of the House Bill No. 1505 and Senate Bill No. 1027 concerning the amendment of article 263(g) of the Labor Code. First, the Committee observes that the Government has been providing information on the draft amendment of article 263(g) since June 2003 without the amendment having been considered by the Senate or the House of Representatives yet. The Committee notes from the complainant's allegations that: (i) this delay has serious effects on the industrial relations climate in the country, as the alleged practice of the DOLE in issuing AJOs every time there is an impending strike, has become a burden to all labour groups (in this case for instance, it is difficult according to the complainant, to imagine that the particular university was considered as an industry indispensable to the national interest); (ii) the practice effectively puts the union at the mercy of the employer who may negotiate in bad faith and get away with it through the simple expedience of asking for an AJO from the Secretary of the DOLE if the union files a Notice of Strike; the union then is put at a disadvantage and would be left with no choice but to submit to the Order of the DOLE and go through the long process of legal battle; (iii) this is compounded by the many legal requirements found in the Labor Code for a strike to become legal; (iv) worse, when the strike is declared illegal, all union officers may be declared to have lost their employment status (article 264, paragraph 3, of the Labor Code).*
- 1330.** *While the Committee takes note of the Government's reply according to which 559 strikes were staged from 1996 to 2005 without intervention from the DOLE, and therefore the right to strike is respected, the Committee must also observe that the mere possibility of intervention by the DOLE in strikes beyond essential services in the strict sense of the term, which is firmly entrenched in the law, along with the practice of intervening in areas which do not seem, at first sight, to be indispensable to the national interest, and the many modalities required for a strike to become legal as well as the serious penalties incurred in case of recourse to an illegal strike, unavoidably have a bearing on the framework and climate within which negotiations take place.*
- 1331.** *The Committee recalls that compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population [Digest, op. cit., para. 564]. Moreover, the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not be such as to place a substantial limitation on the means of action open to trade union organizations [Digest, op. cit., para. 547]. Finally, 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, op. cit., para. 666]. The Committee therefore expresses the firm hope that the amendment of article 263(g), which has been under consideration for at least four years now, will be adopted without further delay.*
- 1332.** *Second, the Committee recalls that the transportation of passengers and commercial goods is not an essential service in the strict sense of the term; however, this is a public service of primary importance where the requirement of a minimum service in the event of a strike can be justified [Digest, op. cit., para. 621]. Thus, the Committee emphasizes that transportation should not be included among the essential services over which the Secretary of the DOLE may exercise the power of assumption or certification. The*

Committee urges the Government to take the necessary measures to ensure that the amendment of article 263(g) of the Labor Code does not include transportation among the essential services in the strict sense of the term. The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.

- 1333.** *To return to the facts of this case, the Committee observes that the strike of the USAEU took place on 19 September 2003. With regard to the conditions under which this strike took place, the Committee notes from the numerous judicial documents brought to its attention that on 19 September at 8.45 a.m., a sheriff from the DOLE attempted to serve on the USAEU officers the AJO which had been issued the previous day. The officers refused to acknowledge receipt of the AJO on the basis of a union resolution dated 17 September 2003 granting sole authority to receive the AJO to its President, Theodore Neil Lasola. The sheriffs posted the AJO at the door of the union's office and at the entrance of the university. The USAEU President Lasola finally got a copy of the AJO from the sheriff at 5.25 p.m. The sheriff informed the union President that the AJO was considered served and received by the USAEU at 8.45 a.m.. The President wrote "actual time of receipt" 5.25 p.m. next to his signature.*
- 1334.** *The Committee notes that according to the complainants, the union resolution of 17 September 2003 exclusively authorising the President to receive the AJO was aimed at safeguarding union members from unauthorized instructions that might jeopardize the very peaceful and legal strike. The sheriffs did not exert any effort to locate the USAEU President or wait for him at the site of the strike, where he was present at 11.00 a.m. and 3.00 p.m. after having finished his interviews in different radio stations. At around 5.25 p.m., the USAEU President went back to the main gate and this time, the sheriffs were there waiting to serve the AJO upon him. The sheriffs said that the AJO was considered as already served at 8.45 a.m. at the insistence of the legal counsel of the university, son of the university's spokesperson, who allegedly dictated upon the sheriffs what to write on their copy concerning the time. Within ten minutes after receiving the AJO, the USAEU President announced through the public address system that the strike was lifted and gave instructions to USAEU members on what to do in compliance with the AJO of the Secretary of DOLE. The USAEU members proceeded to take care of the different strike paraphernalia and those who still had class in the evening proceeded to meet their classes. The complainant adds that its position is that the AJO was served at 5.25 p.m.; however, even if the AJO was taken to have been served at 8:45 a.m., the strike had already started at that time and in these cases, it is the settled practice of the Secretary of the DOLE to give 24 hours to strikers as a reasonable time within which to return to work; the USAEU respected this deadline. In fact, the strike ended on the day it started and workers returned to work earlier than the deadline set by the university itself in a public announcement which appeared the following day in the local newspapers (the deadline set by the university was Monday 22 September 2003).*
- 1335.** *The Committee observes from the documents before it, that on 18 September 2003, the university wrote to the Secretary of the DOLE requesting her to assume jurisdiction over the labour dispute, which the Secretary did, by issuing an AJO the same day on the basis of article 263(g) of the Labor Code. Furthermore, on 24 September 2003 the university filed with the NLRC a Petition to declare the strike illegal and declare all the USAEU members and officers who participated in the strike to have lost their employment status. This petition was later consolidated, on motion by the university, with the issues to be decided by the Secretary of the DOLE in the framework of her authority to decide all aspects of the dispute on the basis of article 263(g) of the Labor Code.*
- 1336.** *The Committee further notes that the decision of the Secretary of the DOLE on both the economic aspects of the dispute and the legality of the strike was issued on 6 April 2004.*

On the economic aspects of the dispute, the Secretary's decision was in favour of the USAEU's position and the Secretary directed the parties to amend the collective agreement in conformity with her findings. Moreover, with regard to the issue of the strike the Secretary of the DOLE reached the following decision:

Assuming for the sake of argument, that there was a technical flaw vis-à-vis the letter of the "no strike, no lockout" clause [in the parties' collective agreement], the facts of this case indicate indubitably that there was good faith on the part of the strikers. Since this involves a social legislation, the law on strike should be interpreted "not by the letter that killeth but by the spirit that giveth life." Moreover, there was no blatant or naked display of arrogance to merit the ultimate penalty of loss of employment. Extreme care should be taken in imposing the said penalty of dismissal because it brings untold miseries to the employees and to their families. Needless to say, the strikers' employment is their primary means of livelihood.

The university's claim of defiance by the union when they allegedly refused or evaded the service of the Assumption Order is not meritorious. Records reveal that the Order was received by the union President only at 5.25 p.m. and the same does not constitute defiance because after receipt of the Order the union President directed the Officers and participating members to lift the strike.

Assuming *arguendo* that effective notice has already been served on the strikers upon the posting by the sheriff of the Assumption Order in the union's bulletin board, in the morning, still the record undoubtedly shows that the union did comply within the period set forth by this Office, within which to return to work. The university should look at the totality of the conduct of the strikers and realize that they have not manifested a naked display of recalcitrance nor have they shown bad faith to the university. In the spirit of Christian charity [n.b. the university is run by Christian priests] and compassion, the Administration ought to realize that loss of employment status is too harsh a penalty given the substantial compliance undertaken by the strikers. For all these reasons, this Office holds that the evidence do not warrant a declaration of illegality of the strike, much less loss of employment of all strikers.

...

The strikers have not, based on evidence, contravened any public policy nor manifested any disorderly behaviour, much less, performed any act inconsistent with national interest. On the contrary, the members of the union, in this case has shown a spontaneous obedience to the Order of this Office and has not shown any sign of recalcitrance. Therefore, the force of law and jurisprudence makes it imperative not to give due course to the petition to declare the strike illegal.

...Consequently, there is no basis whatsoever to declare loss of employment status on the part of any of the striking union members [pp. 18-19].

1337. *The Committee notes from the complainant's allegations that despite the fact that the decision of the Secretary of the DOLE was final and executory according to article 263(i) of the Labor Code, the university contested the decision before the Court of Appeals on the ground that the Secretary committed a grave abuse of discretion. In the meantime, according to the complainant, the university proceeded to dismiss five workers (John Mirasol, a USAEU officer, Benonie Dela Cruz, Alexander Sardon, Victoria Callanga, Melvin Garrido) on various pretexts, but in reality on account of their trade union activities as they were close associates of the union President and had participated in the strike. The dismissals were contested before the NLRC which gave, according to the complainant, pro-management rulings and dismissed the appeals. Finally, according to the complainant, in December 2003 the university prevented the USAEU from holding its general assembly during class days as had been the practice for many years and as provided in the collective agreement. By that time, most trade USAEU members had reportedly been intimidated by the stance of the management and did not participate in the general assembly.*

1338. *The Committee further notes that on 4 March 2005 the Court of Appeals handed down its decision on the appeal lodged by the university against the decision of the Secretary of the*

DOLE. On the issue of benefits, the Court of Appeals upheld the decision of the Secretary of the DOLE. On the issue of the legality of the strike, the Court of Appeals reversed the previous decision and ruled that the strike was illegal because the USAEU defied the AJO by continuing the strike until the afternoon of 19 September 2003. In particular:

[The Secretary of the DOLE] acted with grave abuse of discretion in disregarding the sheriffs' report stating that the AJO was considered served as of 8.45 p.m. of September 19, 2003. Hence, the strike conducted by the union which lasted until the receipt by their union president of the AJO at 5.25 p.m. was clearly illegal

A cursory reading of [article 263(g) of the Labor Code] shows that, when the Secretary of Labor assumes jurisdiction over a labour dispute in an industry indispensable to national interest or certifies the same to the NLRC for compulsory arbitration, such assumption or certification shall have the effect of automatically enjoining the intended or impending strike or lockout. Moreover, if one had already taken place, all striking workers shall immediately return to work

Once an [AJO] is issued by the [Secretary of the DOLE] strikes are enjoined or if one has already taken place, all strikers shall immediately return to work. An assumption and/or certification order of the Secretary of Labor automatically results in a return-to-work of all striking workers

The union officers, as a result, are deemed to have lost their employment status for having knowingly participated in an illegal act. The [university] may at its option serve notice of their termination from employment. However, an ordinary striking worker cannot be discharged for mere participation in an illegal strike. There must be proof that he committed illegal acts during a strike [pp. 7, 9–10 emphasis added].

1339. *The Committee further notes that according to the complainant, pursuant to this decision the university filled a partial Motion for Reconsideration of the part of the decision which upheld the Secretary of the DOLE findings with regard to the workers' economic benefits, while the USAEU filed a Motion for Reconsideration concerning the part of the decision relevant to the strike and the loss of employment status of the trade union officers. Despite this however, and in total disregard of the fact that the decision had not become final and executory due to the appeals filed by both parties, the university proceeded to dismiss all USAEU officers immediately (Theodore Neil Lasola, Merlyn Jara, Julius Mario, Flaviano Manalo, Rene Cabalum, Herminigildo Calzado, Luz Calzado, Ray Anthony Zuñiga, Rizalene Villanueva, Rudante Dolar, Rover John Tavarro, Rena Lete, Alfredo Goriona, Ramon Vacante and Maximo Montero).*

1340. *The Committee further observes that the Court of Appeals in its decision of 23 August 2005 did not comment on the way the university proceeded to dismiss the workers and simply rejected the appeal lodged by the USAEU, upholding the decision previously reached by the court on this matter. However, on the issue of benefits which had been appealed upon by the university, the court ruled that the Secretary of the DOLE "abused her discretion in resolving" this question which should be referred once again back to voluntary arbitration. The Committee notes that according to the court's decision:*

... [the issues in dispute] arise from the interpretation or implementation of the CBA [collective bargaining agreement] and [...] from the interpretation or enforcement of company personnel policies. Thus, these are proper subjects of the grievance machinery as embodied in the parties' CBA. It must be remembered that the CBA is the law between the parties. It is an agreement freely and voluntarily entered into by them. All terms and conditions therein must be complied with. The parties have further agreed that, should the grievance machinery as provided in the CBA fail to resolve the dispute, the same shall be referred to a Voluntary Arbitrator for arbitration and final resolution.

Clearly therefore, the issues on the economic provisions of the CBA must be resolved through the grievance machinery agreed upon by the parties. As had been consistently held, voluntary arbitration takes precedence over other dispute settlement devices [pp. 11–12].

- 1341.** *The Committee further notes that the USAEU filed a Petition for Review of this decision with the Supreme Court arguing that the Secretary of the DOLE did not commit a grave abuse of discretion but simply abided by article 263(g) of the Labour Code which empowers her to assume jurisdiction over a dispute; moreover, the decision of the Secretary of the DOLE reflected the case law of the Supreme Court which had already ruled on the issue of benefits with finality in the St Joseph College case. However, in the decision reached on 28 March 2006 the Supreme Court affirmed the decision of the Court of Appeals.*
- 1342.** *The Committee further notes that the Supreme Court did not rule on the issue of the dismissal of all union officers on the basis of a decision which was not final and executory. The Committee thus notes that according to the complainant, the trade union officers were discharged despite 12, 18, 20 and 25 years of unblemished and excellent records. According to the complainant, the university's actions were aimed at union busting as these premature dismissals had "sown fear" among USAEU members and effectively suppressed unionism in the university, "terrorizing" those who intended to negotiate higher terms and conditions of employment; nobody among the remaining USAEU members had the courage to pursue in court their share in the benefits for fear of a backlash from the university management.*
- 1343.** *The Committee notes that the Supreme Court decided inter alia on the following points: (i) the strike was illegal because the union officers should have "immediately" returned to work once the AJO was served upon posting instead of circumventing the standard operating procedure (according to which an AJO is considered served upon posting); the alleged well settled practice of the DOLE to give 24 hours within which to return to work has no basis in law and jurisprudence; the courts have never interpreted the phrase "immediately return to work" found in article 263(g) to mean "within 24 hours"; on the contrary, the tenor of this phrase indicates "an almost instantaneous or automatic compliance for a striker to return to work once an AJO has been duly served"; (ii) the Secretary of the DOLE should not have exercised the discretion granted to her under article 263(g) of the Labor Code in assuming jurisdiction over this dispute, the reason being that the issues under dispute fell under the grievance procedure clause found in the collective agreement as matters arising from the interpretation or implementation of the collective agreement or from company personnel policies; (iii) thus, the DOLE was not the appropriate body to carry out arbitration and the fact that the employer had already given its accord to such arbitration was immaterial; the university only did so, according to the Supreme Court, because the NCMB had previously failed to grant the university with the legal protection it should receive, by wrongfully enabling the union to stage the strike of 19 September 2003; thus, deprived of a remedy against the strike, the university was left with no option but to refer the dispute to the DOLE; (iv) as a result, the Supreme Court decided to refer the dispute to arbitration once again as an exception to the general rule according to which the Secretary of the DOLE has jurisdiction over all aspects of a labour dispute. The Supreme Court adds:*

We are not unmindful ... that the [Secretary of the DOLE] jurisdiction over labour disputes must include and extend to all questions and controversies arising therefrom, including cases over which the Labor Arbiter has exclusive jurisdiction. However, we are inclined to treat the present case as an exception to that holding. For, the NCMB's inaction on the university's motion to refer the dispute to voluntary arbitration veritably forced the hand of the university to seek and accordingly submit to the jurisdiction of the [Secretary of the DOLE]

In short, the peculiar facts of the instant case show that the university was deprived of a remedy that would have enjoined the union strike and was left without any recourse except to invoke the jurisdiction of the [Secretary of the DOLE] [pp. 15–17, 19].

- 1344.** *The Committee further notes that on 5 May 2006 the USAEU filed with the Supreme Court a Motion for Reconsideration bringing to the court's attention various objections including alleged irregularities in its decision. On 5 June 2006 the complainant in this case (FFW) filed a "Motion for Intervention" with the Supreme Court arguing among other things, that the imputed decision set a dangerous precedent as there was no longer any distinction between compliance and defiance of the legal requirements for staging a strike. The court, in a Resolution of 14 June 2006, rejected the USAEU Motion "with finality", "the basic issues raised therein having been duly considered and passed upon by the court in the aforesaid decision and no substantial argument having been adduced to warrant the reconsideration sought." The intervention filed by the FFW was simply noted "without action". The Committee notes that the complainant expressed its shock for the fact that the objections raised in its 64-page Motion were left unanswered. The USAEU then filed a Motion for referral to an en banc decision. On 4 October 2006, the Second Division of the Supreme Court issued a Resolution denying the Motion with finality stating that "no further pleadings shall be entertained" by the court.*
- 1345.** *The Committee finally observes that according to the complainant in the meantime, i.e., since 25 April 2005, the USAEU went on strike on the ground of union busting. This time however, not many members joined the strike and no AJO came from the DOLE. The USAEU members were allegedly overcome by great fear of reprisal from management according to the complainant. After more than five months of strike, the few members who joined the strike returned to work. Meanwhile, according to the complainant's allegations, several discharged officers experienced the "unseen hand" of the university when applying for jobs in other schools as they would be considered at first because of their good credentials but would eventually be rejected for reasons not clear to them.*
- 1346.** *The Committee notes that the Government replied to the above allegations by indicating that the union apparently felt aggrieved by the long-standing rule of the appellate courts to decide only issues raised on appeal by the Petition for Review – and not new issues brought for the first time in a motion for reconsideration. Moreover, the successive communications of the complainant to the ILO, and the insistence of the USAEU to have the case referred to the Supreme Court en banc – after it filed with the Second Division (then presided by the current Chief Justice who presides over the court en banc) a motion for it to reconsider its unanimous decision and after it asked the ILO to throw its weight on the court while the case was pending with the Division, and failed to obtain a favourable ruling – is against all norms of fairness and justice. The Supreme Court Decision of 28 March 2006 has become final and the insistence of the complainant for the ILO to interfere with the final ruling of the court lends no credit to trade unionism nor to the sound working of collective bargaining. The right to freedom of association and collective bargaining is fully guaranteed by the Philippine Constitution and labour laws and is recognized and respected by the courts. However, when trial becomes necessary, unions must still present evidence and sound arguments before the court and should not rely solely on threats of intervention by international bodies and organizations and the possibility of economic and political sanctions. Without evidence, a good law cannot apply. With ample evidence, a good law – even without the intervention of foreign entities – will prevail in a case and bring justice to the parties concerned.*
- 1347.** *Finally, the Committee notes that with regard to the allegations of the initial five dismissals of workers and interference in the USAEU general assembly, the Government points at the legal provisions which afford protection against anti-union discrimination and recalls that some of these cases were brought before the NLRC, a tripartite body with equal number of members from the workers, employers and the public sector, which ruled for the employer. The Government therefore does not see any need to make specific comments on this case.*

- 1348.** *With regard to the decisions of the Court of Appeals and the Supreme Court which declared the strike of 19 September 2003 illegal and the workers to have “automatically” lost their employment status, the Committee notes that little consideration had been given to: (i) the fact that the workers went on strike in the certainty that they had complied with all the stringent legal prerequisites for the staging of strikes, as evidenced by the fact that the NCMB did not act upon a university Motion to prevent the strike filed on 15 September 2003; and (ii) the fact that the Secretary of the DOLE, empowered by article 263(g) and (i) to issue final decisions on such matters, found that there was no ground for declaring the loss of employment status for the 15 trade union officers, as the strike had been lifted within the legal deadlines and that the union leaders had demonstrated good faith in their acts once the AJO was officially received by the president of the union.*
- 1349.** *While taking due note of the no strike clause set out in the collective agreement in force, the Committee also observes that the economic provisions of that agreement came to an end two years prior to the expiration of the agreement as a whole and thus would certainly give rise – at the very least – to an ambiguity as to how the negotiations of the new economic conditions would be carried out. The Committee observes that there are diverging opinions as to the applicability of these provisions, including those concerning the grievance mechanism, in this specific case. The Committee nevertheless, in light of the facts of the case and the appreciation brought to bear by the Secretary of Labor, considers that greater consideration could have been given by the courts to: (i) the need to ensure proportionality between the sanction imposed, i.e., the automatic loss of the employment status of 15 trade union officers (the entire trade union committee), and the gravity of any offence committed through a peaceful strike which lasted less than nine hours and was lifted even before the deadline set by the employer; (ii) the impact that the dismissals of the entire trade union committee was likely to have on the continuing existence of the trade union in the university as well as on the ongoing negotiations between the university and the USAEU; (iii) the fact that the employer carried out the dismissals before the court decision became final and executory, refusing at the same time to implement that part of the decision which was favourable to the workers, as well as the intimidating effect that this might have on the trade union officers and members who were faced with a fait accompli.*
- 1350.** *The Committee recalls that the use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association [Digest, op. cit., para. 666].*
- 1351.** *The Committee observes that in the circumstances of this case, the USAEU was not able to have its allegations of anti-union discrimination and interference examined by the courts, as the latter apparently considered such allegations as new facts which emerged for the first time in the course of the case, and rejected their examination on appeal.*
- 1352.** *In these circumstances, the Committee requests the Government to review the question of the 15 dismissed trade union officials and to ensure a conciliation with the university regarding their reinstatement and to keep the Committee informed of developments in this respect.*
- 1353.** *With regard to the court decisions on the workers’ benefits, the Committee recalls that the determination of wages, including benefits, is a subject for collective bargaining in a free and voluntary framework [see Digest, op. cit., para. 913]. The Committee recalls that Article 4 of Convention No. 98, ratified by the Philippines, requires the promotion of collective bargaining. 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. 881].

- 1354.** *In light of the above, the Committee considers that recourse to article 263(g) of the Labour Code for compulsory arbitration was inappropriate and requests the Government to inform it of the outcome of voluntary arbitration ordered by the court over the terms and conditions of employment of the university workers for the period 2003–05. It also requests the Government to take all necessary measures so as to provide for consultations between the university and the USAEU without delay aimed at promoting good faith negotiations between the parties with a view to determining the future terms and conditions of employment of the workers by means of a new collective agreement. The Committee requests to be kept informed in this respect.*
- 1355.** *As for the allegations of blacklisting, while noting with regret that the Government does not provide any reply in this respect, the Committee recalls that all practices involving the blacklisting of trade union officials or members constitute a serious threat to the free exercise of trade union rights and, in general, governments should take stringent measures to combat such practices [*Digest*, *op. cit.*, para. 803.]*
- 1356.** *As to the allegations of undue influence of the university attorney upon the Supreme Court, the Committee, expresses regret at the bitterness of the dispute brought before it, observes that the employer also formulated accusations of corruption against the DOLE for the decision of 6 April 2004 which was favourable to the union (see Motion for Partial Reconsideration of 6 April 2005, paragraph 17) and considers that it is not in a position to address these issues.*
- 1357.** *The Committee also notes that according to the complainant, the abovementioned decisions, especially the Supreme Court decision which automatically becomes part of the law of the land, incited the employers in the Visayas region to become aggressively engaged in union busting and dismiss employees without fear of sanctions. Thus, according to the complainant, 39 union members from Eon Philippines Industries Corporation were dismissed on the ground of “business losses” and “excess manpower” without the company presenting proof to this effect (the company continued to hire personnel). This was a newly organised union by the Federation of Free Workers in the Visayas. Only those workers who signed in a complaint against the management with the DOLE were discharged. Seven of the discharged union members were union officers. Moreover, one union officer at Capiz Emmanuel Hospital in Roxas City, was dismissed after fabricated charges (financial mismanagement), while the other officers of the union were bluntly told by the Hospital Administrator that they would suffer the same fate as the union officers of the USAEU.*
- 1358.** *The Committee notes that in reply to these allegations, the Government confines itself to noting that the complainant does not indicate any legal steps taken against these acts.*
- 1359.** *The Committee observes that the letters of dismissal brought to its attention are confined to informing the trade union officers and members that their employment is terminated due to a worker reduction process without any indication as to the reasons for which the specific workers were selected for dismissal or any prior consultation with the union. The Committee recalls that the application of staff reduction programmes must not be used to carry out acts of anti-union discrimination [*Digest*, *op. cit.*, para. 796]. In a case involving a large number of dismissals of trade union leaders and other trade unionists, the Committee considered that it would be particularly desirable for the government to carry*

out an inquiry in order to establish the true reasons for the measures taken [*Digest*, op. cit., para. 812]. The Committee therefore requests the Government to ensure that an independent inquiry is carried out immediately into the allegations of anti-union discrimination in the Eon Philippines Industries Corporation and the Capiz Emmanuel Hospital in Roxas City and if the acts of anti-union discrimination are confirmed, to ensure that the workers concerned are reinstated in their posts without loss of pay. The Committee requests to be kept informed in this respect.

The Committee's recommendations

1360. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee urges the Government to take the necessary measures to ensure that the amendment of article 263(g) of the Labor Code, which has been under consideration for at least four years now, will be adopted without further delay and that it does not include transportation among the essential services in the strict sense of the term. It draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*
- (b) *The Committee requests the Government to review the dismissal of the entire committee of the USAEU (Theodore Neil Lasola, Merlyn Jara, Julius Mario, Flaviano Manalo, Rene Cabalum, Herminigildo Calzado, Luz Calzado, Ray Anthony Zuñiga, Rizalene Villanueva, Rudante Dolar, Rover John Tavarro, Rena Lete, Alfredo Goriona, Ramon Vacante and Maximo Montero) and to ensure a conciliation with the university regarding their reinstatement and to keep it informed of development in this respect.*
- (c) *The Committee requests the Government to inform it of the outcome of voluntary arbitration over the terms and conditions of employment of the workers of the San Agustin university for the period 2003–05. It also requests the Government to take all necessary measures so as to provide for consultations between the university and the USAEU without delay aimed at promoting negotiations between the parties with a view to determining the future terms and conditions of employment of the workers by means of a new collective agreement. The Committee requests to be kept informed in this respect.*
- (d) *The Committee requests the Government to ensure that an independent inquiry is carried out immediately into the allegations of anti-union discrimination in the Eon Philippines Industries Corporation and the Capiz Emmanuel Hospital in Roxas City and if the acts of anti-union discrimination are confirmed, to ensure that the workers concerned are reinstated in their posts without loss of pay. The Committee requests to be kept informed in this respect.*

CASE NO. 2528

INTERIM REPORT

**Complaint against the Government of the Philippines
presented by
the Kilusang Mayo Uno Labor Center (KMU)**

Allegations: The complainant alleges killings, grave threats, continuous harassment and intimidation and other forms of violence inflicted on leaders, members, organizers, union supporters/labour advocates of trade unions and informal workers' organizations who actively pursue their legitimate demands at the local and national levels

- 1361.** The complaint is contained in a communication from the Kilusang Mayo Uno Labor Center (KMU) dated 31 October 2006.
- 1362.** The Government replied in a communication dated 1 March 2007.
- 1363.** The Philippines has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1364.** In a communication dated 31 October 2006, the KMU explains that it is a labour centre in the Philippines representing approximately 300,000 members all over the country. Founded on 1 May 1980, it has 11 national federations and two mass organizations of informal workers under its wing. It has local unions as members in the industrial, service and agricultural sectors.
- 1365.** The acts complained of include killings, grave threats, continuous harassment and intimidation and other forms of violence inflicted on leaders, members, organizers, union supporters/labour advocates of trade unions and informal workers' organizations who are actively pursuing their legitimate demands at local and national levels. Data gathered indicate that these violations are widespread and systematically committed directly and indirectly by government agencies, instrumentalities and officers in the current civilian Government and/or in the military, including their agents which, to a large extent, effectively crushed a number of existing labour and informal workers' organizations, and if not stopped will dramatically weaken the country's trade union movement.
- 1366.** According to the complainant, these acts are being committed by the Government of the Philippines, in pursuance of its neo-liberal policies of deregulation, liberalization and privatization which gravely affect the working people in order to attract foreign investment. In concrete terms, the acts complained of include, among others, the following: (1) summary killings of 64 trade union leaders, members, organizers and union supporters and informal workers at the height of the Government's scheme to prevent workers and informal workers from exercising their freedom of association and their right to organize and bargain collectively; (2) abduction and enforced disappearances of trade union leaders, members, organizers and union supporters and informal workers committed

by elements of the military and police, not only to intimidate and/or terrorize workers and informal workers from continuing their economic and political activities, but to ultimately paralyse and render the union or organization useless; (3) harassment, intimidation, witch-hunting and grave threats committed by the military and police forces against trade union leaders, members, organizers and union supporters and informal workers; (4) militarization of workplaces in strike-bound companies or where a labour dispute exists between management and workers and where existing unions or unions being organized are considered progressive or militant, by means of establishing military detachments and/or deployment of police and military elements under the pretext of counter-insurgency operations; and (5) arrest and detention of and subsequent filing of criminal charges against trade union leaders, members, organizers and union supporters and informal workers due to their involvement and active participation in legitimate economic and political activities of trade unions and informal workers' associations. These acts directly contravene Articles 3, 5 and 11 of Convention No. 87 and Article 1 of Convention No. 98, as well as the Constitution of the Philippines.

- 1367.** However, although the right to self-organization provided for under article III and article XIII, section 3, of the 1987 Philippine Constitution means that the rights of workers to organize or join unions of their choice could not be thwarted, the workers' exercise of those rights has proven to be not as easy in practice. A combination of factors, such as flexibilization of labour, stringent legal requirements for union registration and recognition and the employers' calculated move to frustrate union organizing, such as summary dismissals of union officers and active members and enterprise closures, to name a few, have, to a great extent, barred the growth of trade unions in the country. In the last five years, KMU alone has lost 30 unions with an estimated total membership of 20,000 from factory closures at the time when the union was either being organized, or a collective bargaining agreement (CBA) was being renegotiated. These companies resumed operation, hiring new workers after several months.
- 1368.** The complainant refers to a number of obstacles to the establishment and operation of trade unions including: (i) the process of union organizing starting from petition for certification up to union recognition, which is in itself a labyrinth; (ii) an unwritten policy of no union and no strike, especially in the export processing zones and industrial enclaves where foreign investors are concentrated remains; (iii) labour flexibilization, locally known as contractualization which practically prevents the flexible workers (trainees, casual, probationary, apprentice, on-call, back-up, reliever, project worker, temporary, *pakyaw*, etc.) to exercise their right to freedom of association, to organize and to bargain collectively or simply to demand the implementation of labour standards, by fear of being dismissed; (iv) dismissals of union leaders and active members and company-instigated petitions to cancel the union registration, which virtually paralyses the union in its formative stage; in various cases, this condition prompted budding unions to launch concerted actions including strike in protest against union busting, only to face another stage of complex legal and political battle; (v) the powers of the Department of Labor and Employment (DOLE) secretary to impose compulsory arbitration ending strikes where in his/her view, the companies are indispensable to the national interest, (article 263(g) of the Labor Code of the Philippines) non-compliance with the Assumption of Jurisdiction Order (AJO) together with its accompanying Return to Work Order within 24 hours would risk the strike being declared illegal, as well as the loss of employment status of the officers who led the strike including those who defied the Return to Work Order. Union defiance to the AJO has resulted to police and military's violent dispersal of strikes in Hacienda Luisita, Tarlac, for example, enforcement of the AJO claimed the lives of at least seven strikers and seriously injured 70 workers and supporters.
- 1369.** According to the complainant, nearly all the unions that were able to withstand the above were unions affiliated to KMU or unions which shared a similar progressive and militant

orientation with the KMU. This has given the Government a convenient excuse to tag the KMU unions as factory terrorists and communist fronts. Thus, in a speech before newly elected *barangay* officials in Sta. Cruz, Laguna on 22 September 2002, the President said in part: “Let us fight against criminals, gambling lords, drug lords ... and those who terrorize factories that create jobs ...”. The speech, an obvious reference to militant trade unionism, immediately led to the strikes at Nestlé Philippines, Nissan Motors, a host of companies in Laguna’s several economic enclaves being harassed and dispersed violently by the Special Action Forces (RSAF), Philippine National Police (PNP) regulars and private guards.

1370. KMU’s local union members and sympathizers were terrorized, harassed and intimidated, the name of KMU is demonized and, in order to create fear amongst workers, its leaders are tailed; some fortunately escaped attempts against their lives, others were killed.

1371. Despite the workers’ distrust of the existing justice system, the workers particularly KMU members and sympathizers, have worked hard to help establish the Anakpawis Partylist (Party of toiling masses) in 2004. The KMU embraced as one of its tasks the organizing and strengthening of the Anakpawis Partylist, so its demands for reforms particularly on across-the-board wage increases could be brought to the halls of Congress. Many KMU leaders at the local, regional and national levels accepted key responsibilities in the political party in an effort to bring trade unionism to new heights. The effort paid off, with Anakpawis getting two seats at the House of Representatives. Like other conscientious critics of the administration, Anakpawis Partylist is also tagged as a communist front and the subject of the Government’s counter-insurgency operation or Oplan Bantay Laya (Operation Freedom Watch), thereby registering heavy losses in its leaders and organizers. Rep. Beltran – a long-time KMU leader and labour veteran – was subjected to an illegal warrantless arrest on 25 February and had remained in detention despite local and international protests.

1372. Similarly, KMU continuously finds itself attacked in every counter-insurgency documents, assemblies, forums, media blitz and activities that the PNP and Armed Forces of the Philippines (AFP) hold and conduct in areas where KMU union organizing is expanding. KMU finds itself in the AFP’s “Know the Enemy” – a CD containing a PowerPoint presentation listing nearly all progressive legal organizations, as communist fronts and targets of military operations under the Oplan Bantay Laya (Operation Freedom Watch) – the Government’s national counter-insurgency programme.

1373. The whole gamut of the Oplan Bantay Laya, in its concept and implementation essentially eliminates the distinction between the exercise of the workers’ legitimate rights and the acts perceived by the State as a threat to its security and deterrent to foreign investment. Thus, union organizing to launching concerted actions in pursuit of improving wages, benefits and job security to achieving meaningful reforms, as embodied in the Constitutions and ILO Conventions, are treated under Oplan Bantay Laya as inimical to state security. Lamentably, this virtually places every individual, every worker, every unionist and every union leader as open targets of this militaristic madness, resulting not only to strings of violations but further degradation of workers’ economic, social and political condition.

1374. The complainant then goes on to make the following specific complaints.

1375. Summary killings of 64 trade union leaders, members, organizers and union supporters and informal workers, most of whom were KMU members. For workers to be able to effectively pursue and get a meaningful result on their demands for better wages and benefits, job security and other economic and political benefits, it is necessary that they organize their unions or associations, get them recognized and sign a collective

bargaining agreement (CBA). To a certain extent, it is also necessary that in between processes of organizing a local union to signing a CBA, they bring their local issues into the public consciousness through networking, alliances, lobbying and common advocacies including concerted actions. However, the Government's answer to these legitimate actions is rampant repression.

1376. A report released by the Center for Trade Union and Human Rights (CTUHR), an independent, non-governmental organization documenting and monitoring human rights violations committed against workers and trade unions, concluded that from 2001 to 30 September 2006, there were 410 cases of violations victimizing 30,825 workers. The summit of these violations was the unprecedented rise in the number of trade unionists, organizers, leaders, union supporters and informal workers killed in the last five years in the course of their union activities or in the case of ordinary workers, while they were protesting an illegal dismissal case. Most of these union leaders and organizers belonged to the KMU unions or its regional and provincial chapters and/or Anakpawis Partylist whose main tasks include organizing workers. Prior to their murders, they reported surveillances and threats from suspected military intelligence forces.

1377. Notable cases are:

- (1) Felipe Lapa – 49 years old, union president of Milagrosa Farm Workers' Union – NAFLU–KMU, in Nagcarlan, Laguna, killed by a CAFGU paramilitary group on 25 October 2001 several metres away from his house. The day before he was killed, he collected food supplies (meat, sweet potato) from the union members and sent this food support to the striking workers of Nissan Motors Corp., in Santa Rosa, Laguna. As union president, he was elected community leader, and his advice often sought by residents. Prior to his death, he had been warned by CAFGU to stop supporting union activities and on several occasions accused of being an NPA supporter.
- (2) Nenita Labordio – member of Samahan ng Manggagawa sa Footjoy Manufacturing-Independent, Marilao, Bulacan. Although not affiliated to a labour federation, the local union is a member of KMB (Bulacan Workers' Movement) – a provincial workers' alliance under Workers Alliance in Region III – KMU chapter. Labordio died when a company truck ran her over at the picket line in December 2002.
- (3) Angelito Mabansay – KADAMAY organizer from Tondo, Manila, who was killed near his house in August 2003 by SPO4 Bartolome Tupaz of PNP anti-terrorist group. KADAMAY, an organization of informal workers and urban poor is an affiliate of KMU.
- (4) Samuel Bandilla – 40 years old, KMU organizer in Tacloban, Leyte, Eastern Visayas, and at the same time, Anakpawis Partylist leader, shot dead by an unidentified man on a motorbike on his way home after speaking in front of striking workers of Metro Tacloban Water District on 4 May 2004.
- (5) Seven victims of the Hacienda Luisita massacre of 16 November 2004; this was the most violent and bloody strike dispersal in recent years, committed by composite forces of the army and national police as an implementation of the AJO issued by the then DOLE secretary. The strike was jointly led by the United Luisita Workers' Union or ULWU–NLU (the farm workers' union) and Central Azucarera de Tarlac Labor Union (CATLU) (the millworkers' union). ULWU and CATLU, though not affiliated to any KMU federation, are in fact members of the Workers' Alliance in Region III – KMU's regional chapter.
 - (i) Jesus Laza, 34 years old, male, farm worker and an active member of the United Luisita Workers' Union (ULWU), sustained two gunshot wounds to the chest.

- (ii) Jun David, 28 years old, farm worker since he began working and an active ULWU member, sustained a gunshot wound to the shoulder that penetrated downward to his left lung.
- (iii) Adriano Caballero, 23 years old, male, part-time caddie at Hacienda Luisita Golf and Country Club, supported the strike. He sustained a gunshot wound to the chest that penetrated and lacerated his left liver, stomach and heart.
- (iv) Jhaivie Basilio, 20 years old, male, worker with Central Azucarera de Tarlac, member of CATLU, sustained a gunshot wound to the left buttock and to the chest that penetrated his left lung and the base of his heart.
- (v) Jaime Pastidio, 46 years old, male, farm worker and ULWU member, sustained a gunshot wound to the mandibular area, lacerating the neck and his left carotid artery and vein.
- (vi) Juancho Sanchez, 20 years old, male, son of a retrenched farm worker of HLI and a jeepney driver, sustained a gunshot wound to the left pelvic area that penetrated his stomach. His family supported the strike and his father, a unionist, actively participated.
- (vii) Jessi Valdez, 30 years old, male, farm worker of HLI and ULWU member. He sustained gunshot wounds to the right thigh but was taken by the army to the military camp instead of a hospital. He died of severe blood loss.

Congressional and senate inquiries were carried out on the incident. The House of Representatives, through the Committees of Human Rights, Labour and Employment and Agriculture, concluded in part:

... The Committees have arrived at the conclusion that human rights violations were committed against the striking workers of Hacienda Luisita by the elements of the Philippine National Police and the Armed Forces of the Philippines, including the officers and the staff of the Department of Labor and Employment. Hence it is imperative that the officers concerned be held responsible directly or by reason of command responsibility for the said acts after proper investigation has been concluded.

- (6) Abelardo Ladera, 45 years old, male, Tarlac City councillor, supporter of Hacienda Luisita strike, was killed on 3 March 2005 and the only motive known was his strong support for the strike and for pushing for the investigation of the Hacienda Luisita massacre at the Tarlac City Council.
- (7) Father William Tadena, 37 years old, priest from the Iglesia Filipina Independiente, supporter of the Hacienda Luisita strike, was killed on 13 March 2005 immediately after he celebrated mass in his church and called on parishioners to donate rice and goods to the striking workers of Hacienda Luisita.
- (8) Edwin Bargaento, 46 years old, male, National Federation of Sugar Workers (NFSW–KMU) Regional Executive Committee member. He was murdered on 13 April 2005, sustained 22 gunshot wounds, on his way to a friend's house after attending a series of labour protests in Bacolod City, Negros. Prior to his murder, he received threats from members of RPA–ABB, an armed group linked to the AFP, asking him to stop his NFSW organizing in Negros Occidental.
- (9) Mario Fernandez, 22 years old, National Federation of Sugar Workers (NFSW–FGT–KMU) organizer, was killed on 10 June 2005 in Silay City, Negros Occidental by suspected elements of the Regional Mobile Group of the PNP. The only possible

motive known was to create an atmosphere of intimidation against organized masses who were set to join the 12 June Day of Mourning rally.

- (10) Manuel Batolina, 50 years old, National Federation of Sugar Workers' president and organizer of several haciendas in Manapla. He was killed on 13 June 2005 by unidentified armed men who opened fire on him while resting inside his nipa hut, killing him instantly. Prior to his murder – on the account of his daughter, Laura Batolina, at the Commission on Human Rights (CHR) – he had received threats from RPA–ABB to stop his NFSW organizing in his area.
- (11) Antonio Pantonial, National Federation of Sugar Workers in Negros, was killed on 6 July 2005. Incidents surrounding Pantonial's murder resembled that of other NFSW organizers/leaders killed before him.
- (12) Diosdado Fortuna, president of the Union of Filipino Employees at Nestlé Philippines, who had led the workers' strike since 14 January 2002. He was also the chairperson of PAMANTIK–KMU and chairperson of Anakpawis Partylist in the region. He was shot and killed on 22 September 2005, sustaining two gunshot wounds that pierced his lungs. Prior to his death, he reported constant surveillance since the strike began. He was the second Nestlé union president who was killed during the workers' strike. Meliton Roxas, his predecessor, was killed in front of the picket line in 1989. Fortuna was elected union president a year later.
- (13) Victoria Samonte, 50 years old, female, president of the Andres Soriano College Employees' Union, vice-chairperson of KMU–CARAGA region, was killed on 30 September 2005. Her active involvement in different organizations as a long-time trade union leader was the only motive seen for her murder.
- (14) Ricardo Ramos, 47 years old, male, president of CATLU, was killed on 25 October 2005, inside a bamboo hut by unidentified armed men believed to be led by Sgt Castillo and Sgt de la Cruz of the 7th Infantry Division, PA. Ramos was a leader of the strike and at the time of his murder, he had just finished distributing to union members the unpaid wages they had won during the strike.
- (15) Ramon Namuro, AJODOM–PISTON–KMU member, was killed on 15 December 2005 by a Guardian (paramilitary group) member, who wanted to take control of the jeepney terminal managed by the association.
- (16) Federico de Leon, 53 years old, tricycle driver, spokesperson of the Bulacan Confederation of Operators' and Drivers' Association (BCODA–PISTON–KMU) and chairperson of Anakpawis Partylist in Bulacan. He died from three gunshot wounds fired by an unidentified man and woman acting as passengers and who asked to be specially driven by de Leon in the afternoon of 26 October 2005. De Leon was a well known transport worker leader and was active in protest actions against oil price hikes and other government regulations affecting tricycle operations in the area.
- (17) Florante Collantes, former president of the Ford Philippines union, used to work in the Bataan export processing zone, one of the organizers of the Workers' Alliance in Region III–KMU and assigned to Hacienda Luisita and, at the same time, BAYAN MUNA coordinator in Camiling, Tarlac. He was shot while tending his *sari-sari* (retail) store by gunmen who posed as customers on 15 October 2005. According to his wife, Adelia Simon-Collantes, it was the second attempt to kill her husband; the first, which failed, was in 1985 when he was still organizing workers in the Bataan export processing zone. His wife gave an oral statement but politely refused to execute an affidavit, as she remained in the same house where her husband was killed.

- (18) Crisanto Teodoro, was the former organizer of the Association of Democratic Labor Organizations – KMU, organizer of several transport workers’ associations in Bulacan and chairperson of Bagong Alyansang Makaban – Malolos, Bulacan, when he was killed on 9 March 2006. Teodoro was a key person in many protest actions held by transport workers in Bulacan against oil price hikes.
- (19) Tirzo Cruz, board member, ULWU, killed on 17 March 2006, sustained nine gunshot wounds.
- (20) Leodegario Punzal, informal workers, labour and community organizer and local leader of Anakpawis in Norzagaray, Bulacan, was killed on 13 September 2005 in his home while doing his job as an artist (making streamers, signages, t-shirts, etc.). The second bullet hit him while being cuddled by his crying mother. In an oral testimony by his mother and witness to the incident, Maxima Punzal, 70 years old, affirmed that her son did not have a known personal enemy and she only knew that he had been helping many people in their community.
- (21) Rolando Mariano, male, former president of TARELCO 1 Workers’ Union, was an active union officer and community leader of Bayan Muna at the time of his murder on 7 October 2005. Following his murder, his family moved out of Tarlac to an undisclosed place in Metro Manila and, thus, getting a written testimony has proven difficult.
- (22) Dante Teotino, union member of Schneider Packaging Corporations, in Kaybiga, Kaloocan City, was shot and killed by security guards on the order of the management to shoot the striking workers protesting about underpayment of minimum wages on 13 September 2005.
- (23) Noel Daray, contractual worker of WL Food Inc., Valenzuela City, was killed by company security guards when he protested his being dismissed illegally on the night of December 2005. Witnesses to the incident refused to give detailed accounts for fear that they would be dismissed from their jobs or killed.
- (24) Roberto Dela Cruz, 43 years old, male, former driver of Tritran Bus Company, was a board member of the Workers’ Union of Tritran, vice-chairperson of Alyansa ng mga Manggagawa ng Bus Company (AMB; Alliance of Bus Workers) and a member of Anakpawis. He was shot dead by motorcycle-riding men inside his eatery on 25 January 2006. Prior to his death, he had been pursued by military agents and was accused of helping the New People’s Army. A few days before he was killed, Dela Cruz presented himself to the Intelligence Service of the Armed Forces of the Philippines (ISAFP) to clear his name.
- (25) Paquito Diaz, 44 years old, regional chairperson of the Confederation for Unity, Recognition and Advancement of Government Employees (COURAGE–EV) based in Tacloban, Leyte, was murdered on 6 July 2006. Prior to his murder, he had a long record of involvement in union struggles in various government agencies in the region.
- (26) Ronald Adrada, male, KADAMAY–KMU, was killed by the Philippine National Construction Corporation (PNCC) highway patrol allegedly due to his illegal vending on 24 September 2005.
- (27) Nilo Bayas, male, vice-chairperson of the Association of Charcoal Makers in Bulacan and member of Anakpawis, was killed on 17 July 2005 allegedly by members of the military.

(28) Albert Terradeno, president of the DAR Employees Association in Abra and member of COURAGE, was killed on 29 November 2005. Terradeno is a known trade union leader/organizer of government employees.

The complainant attaches further names of workers, trade unionists, organizers and informal workers who were killed allegedly by the PNP or military elements but the motives were quite difficult to establish.

1378. The complainant points out, with regard to the manner by which the victims were killed, that 98 per cent were gunned down by motorcycle-riding men wearing either ski masks or helmets. Initial investigations revealed that most of the cases were premeditated, that is victims were under surveillance by suspected elements of the AFP or the PNP before their deaths.

1379. The complainant further states that, alarmed by these heightening human and trade union rights violations in the country, the Ecumenical Institute for Labor Education and Research (EILER), the Center for Trade Union and Human Rights (CTUHR) and the Alliance of Concerned Teachers (ACT) spearheaded an international labour solidarity mission (ILSM) from 30 April to 8 May 2006, aimed at investigating the spate of trade union killings and violations in the country. Thirty international delegates from 12 countries participated in the ILSM and went to four areas in the country – Central Luzon and Southern Tagalog on Luzon Island, Negros on Visayas Island and Compostela Valley on Mindanao Island. At the end of the mission, the ILSM, in its public presentation of its findings, noted in part:

... ILSM noted with alarm and condemnation that the number of killings has substantially increased under the Arroyo government, that the “violation of labor rights and human rights in the Philippines is systematic and nationwide in scope” and that “the rampant attacks on workers are meant to create an environment of fear”.

1380. In a similar manner, an Amnesty International (AI) report on political killings in the Philippines issued in August 2006 had concluded that “the attacks are not an unconnected series of criminal murders but constitute a politically motivated pattern of killings”. Expressing its grave concern “that members of the security forces may have been directly involved in the killings, or else have tolerated, acquiesced to, or been complicit in them,” AI recommended that “... investigations must then lead to the arrest, prosecution, conviction and punishment of the perpetrators” in order to stop the culture of impunity in the country.

1381. Meanwhile, in a letter of concern dated 11 July 2006 and sent to the President of the Philippines, the International Confederation of Free Trade Unions (ICFTU) said “the violation of trade union and democratic rights directed against workers and their leaders in your country is of very grave concern and has captured the attention of the international trade movement”. It noted that “the number of labour-related killings in the Philippines now places it in a similar category to Colombia ... The Philippines appears to be heading rapidly towards second place”. In addition to these international bodies, a growing number of international organizations including trade unions, human rights groups and churches expressed grave alarm and concern over the spate of extrajudicial killings and the prevailing climate of impunity in the Philippines and have condemned the killings and the Government’s complicity or inaction against this systematic campaign.

1382. In an attempt to temper the international pressure and protests, the Government was forced to create a task force, Usig, and later the Melo Commission to look into and solve these cases of extrajudicial killings. The public, particularly the victims, received the task force and the commission with a grain of salt, and in fact questioned its integrity. Military men or personalities known to be allies of the Government form the two bodies.

- 1383.** To date, not a single perpetrator has been apprehended in spite of strong indications that these killings, abductions and disappearances were the handiwork of either the police, military or their agents. Worse, perpetrators like Major General Jovito “the butcher” Palparan, accused of being the brains behind many of these killings, has been showered with lavish praises for his “good work” further reinforcing the culture of impunity.
- 1384. Abduction and enforced disappearances of trade union leaders, members, organizers and union supporters and informal workers committed by elements of the military and police.** According to the complainant, the CTUHR has recorded 22 cases of abduction and enforced disappearances, victimizing 52 unionists and union supporters from 20 January 2001 to 30 June 2006. The bulk of the cases occurred in 2005 (eight cases) and 2006 (ten cases). One of the prominent cases in 2005 was the disappearance of Perseus Geogoni, an organizer of the National Federation of Sugar Workers (NFSW) in Negros. Geogoni was last seen on the evening on 5 December 2005 when he followed up organizational matters in Bacolod City. Prior to his disappearance, he reported being tailed and that two unidentified individuals suspiciously asked of his whereabouts. A military man relayed that a group of 30 intelligence operatives led by First Lt Clarence Garrido of the 11th Infantry Division under the supervision of Visayas Military Intelligence command were responsible for Geogoni’s abduction. Geogoni remains missing up to this day. It is believed that the motive behind his abduction was related to his work as an organizer in sugar cane areas and peasant communities and his involvement in progressive organizations critical of anti-people government policies.
- 1385.** In 2006 alone, partial data gathered by CTUHR showed that there were ten cases of abductions involving 57 victims. Of the 33 victims, 11 remained missing, one was found dead and 21 were returned to their families, four were handed over to the PNP and were slapped with fabricated criminal charges. A summary of the accounts and victims is provided by the complainant and reproduced in part in Appendix II.
- 1386. Harassment, intimidation, witch hunting and grave threats committed by the military and police forces against trade union leaders, members, organizers and union supporters and informal workers.** According to the complainant, in collusion with foreign investors and local capitalists, the Government engaged in harassment, intimidation, witch hunting and grave threats aimed at trade union leaders, members, organizers, union supporters and informal workers. From 1 January 2001 to 30 June 2006, the CTUHR has recorded 81 cases of grave threats victimizing 16,276 workers and informal workers. Likewise, there were 114 cases of intimidation victimizing 13,454 workers and informal workers recorded during the same period. The Government through the military has included leaders, members, organizers and supporters of trade unions and informal workers’ organizations in their list of alleged terrorists and communists. This list is being used to justify harassment and intimidation, arrest and detention, and their eventual incarceration or summary execution. The military also uses the same list to intimidate and urge union members to dissociate from their union officers and organizers.
- 1387.** In a press conference organized at Camp Vicente Lim on 4 April 2001, the Philippine National Police Region IV Director, Domingo Reyes, admitted that 94 factories with militant unions under the Solidarity of Workers in Southern Tagalog, the Organized Labor Association in Line Industries and Agriculture (OLALIA–KMU) and the Alliance of Workers in Laguna are under surveillance.

Some notable cases of grave threats are the following:

- (a) Angelina Ladera, 38 years old, female, acting chairperson of the Workers’ Alliance of Region 3 (WAR 3) and former president of the International Wiring Services Corporation Workers’ Union. Ladera is included in the military’s Order of Battle and

is among the ten persons considered as threats to national security and branded as “enemies of the State” in a PowerPoint presentation entitled “Trinity of War” distributed by the Northern Luzon Command in January 2005.

- (b) Romeo Legaspi, male, union president of Lakas Manggagwa Nagkakaisa sa Honda (United Workers’ Strength in Honda) and the current national president of the OLALIA–KMU, where the Honda union is affiliated. Since October 2005, Legaspi was forced to refrain from going home and had to transfer from one place to another due to threats to his life as a result of his active involvement in trade union and community activities.
- (c) Harassment and surveillance activities on a number of union leaders and members of the Nestlé Workers’ Union in Cabuyao, which included tailing the workers in the strike area, in their activities and in their homes and being threatened with arrest. Among those who have executed their affidavits are Reynaldo B. Batites, union board member, Roberto L. Berroya Jr, union office and shop steward, Rene A. Manalo, Ariel G. Legaspi and Noel T. Sanchez. In their affidavits, they attested that these cases of intimidation and harassment were related to their active involvement in the ongoing strike of the Nestlé Philippines’ workers.
- (d) Interrogation of a number of union leaders and members of the NAMAOS in Compostela town, Compostela Valley. On separate occasions, union leaders and members were “invited” for questioning by members of the Special Operating Team of the 36th Infantry Battalion, PA under M/Sgt Alexander Iscarten. The military accuses NAMAOS of being backed up by the NPA, that all NAMAOS members are NPA members and that monthly union dues are being given to the NPA as support.
- (e) Vicente Barrios, male, president of the United Workers in Suyapa Farms (NAMASUFA) – summoned by the military on several occasions in September 2005. The military accused NAMASUFA of being led by the NPA rebels and accused Barrios of being an NPA organizer. The company used the military to interfere in the union’s concerted actions aimed at airing the workers’ grievances. Barrios has received several warnings about a supposed plot to kill him because of his union activities.
- (f) Console Farm Workers’ Union in San Miguel, Bulacan. Continuous military harassment against union members and officers which included coercion to withdraw affiliation from their labour federation, the Association of Nationalist and Genuine Labor Organization (ANGLO–KMU), auditing union books of accounts, closely monitoring the workers’ movements, branding union organizers and leaders who join legitimate protest rallies as terrorists, communists and NPA sympathizers. The military twice assembled the workers for a meeting inside the company in 2005.
- (g) NAMASUFA, the workers’ union in Packing Plant 90 of the Fresh Banana Agricultural Corporation, located in Purok 4, Barangay Siocon, Compostela, Compostela Valley. The military, under the 28th Infantry Battalion of the PA, called a meeting with the workers on 16 August 2005. The military told them not to form a union because the business would close down and their families would not be able to find jobs because they were unionists. Union members were also tagged as rebels and were told to clear their names or else be tailed and summoned for investigation.
- (h) United Workers of San Jose (NAMASAN), the workers’ union in Packing Plant 95 of the Fresh Banana Agricultural Corporation, located in Barangay San Jose, Compostela. The military conducted a meeting with about 160 workers on 21 August 2005. The workers were told not to participate in the union because it would cause the plant to close down; their families would not be able to find jobs because of their

union involvement; that KMU members are Satanists and rebels and that it was okay to form a union but not under the KMU.

- (i) Harassment of the workers of Packing Plant 92 of the Fresh Banana Agricultural Corporation, located in Barangay New Alegria, Compostela. The military called a meeting with more than 100 workers on 18 August 2005. The military told them that they were called for a meeting because they were forming a union, that the union they were approaching for assistance – NAMAOS – were rebels and that the NAMAOS and the KMU were fake unions.
- (j) Surveillance on labour lawyers belonging to the Pro-Labor Assistance Center (PLACE). On 6 October 2006, Pfc Rommel Felipe Santiago, an intelligence officer of the PA admitted doing surveillance work, after he was apprehended by security guards of the Food Terminal Inc. (FTI) when he tailed a group of union officers from the labour office to the FTI. A blotter was entered in the Taguig police precinct but Pfc Santiago was later released after and unidentified inspector general called the Taguig police and vouched that Santiago was “on official duty”. As of this writing, men in various vehicles continue their surveillance work at the labour office whose clients are mostly from militant and independent unions.

1388. Militarization of workplaces through the establishment of military detachments and/or deployment of police and military elements in strike-bound companies or where there exists a labour dispute between management and workers and where existing unions or unions being organized are considered progressive or militant. The complainant alleges that, as part of the Government’s objective of maintaining “industrial peace”, military detachments are being established and/or military elements are deployed in strike-bound companies or where there is a presence of militant unions. These detachments are used to violently disperse legitimate workers’ strikes and protest actions and to “safeguard” the companies against disruption by “untoward elements”. Even after a strike has been dismantled, military detachments remain to ensure that no similar strike will occur in the near future, to harass and intimidate workers and to ultimately crush the workers’ union into the ground.

1389. The presence and direct intervention of military and police in labour disputes is a growing practice. The presence of elements of Regional Special Action Forces, the PNP Mobile Group and the Special Weapons Action (SWAT) in full battle gear are a common sight in companies in Southern Tagalog and Central Luzon, two of the industrial areas in the country where most of the foreign investors are concentrated. In Nestlé Cabuyao, the military has maintained operations inside the factory from 2002 until the present.

1390. Some of the recorded cases of militarization are the following:

- (a) Console Farm Workers’ Union in San Miguel, Bulacan – The military has forced the workers to become members of the Barangay Defence System (BDS), a paramilitary unit, allegedly set up to keep peace and order in the area. As members of the BDS, workers are compelled to render on a rotation basis at least two hours’ military duty every day. Refusal to follow orders is tantamount to being treated as terrorists or communists or listed in the military’s Order of Battle.
- (b) Robina Farms Workers’ Union – The military has set up a detachment within Robina Farms, conducted military census, roamed the area in full battle gear and harassed the union members, asking them to disaffiliate from the Kilusang Mayo Uno, the union’s centre. Workers fear for their lives and union officials are afraid to even go home.
- (c) In Compostela Valley, members of the 28th Infantry Battalion held assembly meetings inside the packing plants of the Fresh Banana Plantation. These

military-initiated meetings coincided with the establishment of unions in Packing Plants 95, 90 and 92.

- (d) NAMASAN, United Workers in San Jose – Military elements under the 28th Infantry Battalion conducted a meeting with the workers inside Packing Plant 95 and told the workers to refrain from participating in the union and especially with the KMU. When asked by the workers who had hired them to conduct the meeting, the soldiers replied that it was part of their jurisdiction.
- (e) In the NAMAOS, leaders were tailed following the conclusion of their collective bargaining agreement and, on 14 November 2004, soldiers roamed around the NAMAOS office in the middle of the night and put up posters depicting the KMU as a devil and warning workers not to “be used by Communists”.
- (f) In Japanese-owned Sun Ever Lights in Santa Rosa, Laguna, elements of the Special Weapons Action Group (SWAG) were deployed to man the production line and keep watch on union leaders of the newly formed union. This occurred during the period when the union was heading for a certification election.

1391. Arrest and detention of trade union leaders, members, organizers and union supporters and informal workers due to their involvement and active participation in the economic and political activities of trade unions and informal workers’ associations. The complainant alleges the following:

- (a) Illegal arrest and detention of Rep. Crispin Beltran, KMU Chairman Emeritus and Anakpawis Partylist representative – Beltran was abducted and arrested in Bulacan on 25 February 2006, a day after the President of the Philippines declared a state of emergency. He was arrested on the basis of trumped-up charges dating back two decades and already quashed by the Philippine courts. Later, the Government through the Department of Justice implicated Beltran in failed attempts to overthrow the Government. He continues to be in hospital detention at the moment, owing to his failing health.
- (b) Arrest and detention of five members of the National Federation of Sugar Workers (NFSW–KMU) and two others on 30 September 2005 near the detachment of the Alpha company of the 12th Infantry Battalion at Carmingawan, Kabankalan City, Negros Occidental. The military accused those arrested of being high-ranking officers of the Communist Party of the Philippines and the New People’s Army (CPP/NPA).

1392. Finally, the complainant indicates that, although most of the victims and their families were reluctant to give written testimonies and/or execute affidavits, for fear of being harassed, it attaches the Fact-Finding Mission Reports of the International Labor Solidarity Mission (ILSM) which was conducted from 30 April to 8 May 2006, as well as several fact sheets, affidavits and sworn statements, reports, newspaper clippings, photographs and other documents as part of the evidence which can draw more light to the complaint.

B. The Government’s reply

1393. In a communication dated 1 March 2007, the Government indicated that the President of the Philippines established the Independent Commission to Address Media and Activist Killings (Melo Commission) – headed by retired Philippine Supreme Court Justice Jose A.R. Melo and having the following members: director Mantaring (National Bureau of Investigation); Jovencito R. Zuno (chief state prosecutor); Nella I. Gonzales (regent, University of the Philippines); and Rev Juan DeDios M. Pueblos, D.D. (Catholic Bishop of

Butuan). The report of this Commission was submitted on 30 January 2007 and released on 22 February 2007.

1394. The Government considers it significant to point out that the complainant KMU has failed and refused to participate in the proceedings of the Melo Commission and has instead chosen to file the present complaint.

1395. The Melo Commission concluded in its report that:

From the evidence gathered and after an extensive study of the same, the Commission comes to the conclusion that there is no direct evidence, but only circumstantial evidence, linking some elements of the military to the killings. There is no official or sanctioned policy on the part of the military or its civilian superiors to resort to what other countries euphemistically call “alternative procedures” – meaning liquidations. However, there is certainly evidence pointing the finger of suspicion at some elements and personalities in the armed forces ... as responsible for the undetermined number of killings, by allowing, tolerating and even encouraging the killings.

[...]

... due to lack of cooperation from the activist groups, not enough evidence was presented before the Commission to allow it to pinpoint and eventually recommend prosecution of the persons ultimately responsible for the killings. There is no definite or identifiable person, entity or interest behind the killings. There is likewise no definitive account of the actual number [of] activist killings. Even Karapatan and Amnesty International have wildly differing figures.

[...]

In any case, further in-depth investigation into the numerous killings, including extensive evidence gathering, is necessary for the successful prosecution of those directly responsible. In this, the testimony of witnesses and the presentation of evidence from the victims and their families and colleagues would be indispensable.

1396. The Commission thereafter made the following recommendations:

1. **Political will** – “It is urged that the President reiterate in the strongest possible manner her expressions or pronouncements of determination and firm resolve to stop the same ... the Government must consistently and at all levels condemn political killings. The President and all the departments of Government should make clear to all members of the police and military forces that extrajudicial executions will not be countenanced under any circumstances.”
2. **Investigation** – “The investigation must be conducted by a body or agency independent from the armed forces ... This civilian investigative agency should ... have control of its own budget, with personnel trained in enforcement and investigative work, authorized to execute warrants and make arrests, provided with adequate technology ...”
3. **Prosecution** – “the DOJ must create a special team of competent and well-trained prosecutors to handle the trial of said cases. Also the DOJ should request the Supreme Court to designate special courts to hear and try said cases”.
4. **Protection of witnesses** – “The Government must give the highest priority to the improvement, strengthening, and funding of the Witness Protection Program.”
5. **Special law for strict chain-of-command responsibility** – “The President should propose legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority.”
6. **Proper orientation and training of security forces** – “The AFP should be encouraged and supported to conduct intensive seminars, orientations, or training for mid to high ranking officers to make them conscious of the prevailing doctrines of command responsibility and the ramifications thereof.”

1397. Subsequent to the report, the President gave the following instructions:

- (1) She asked the Melo Commission to continue its work and submit supplementary reports from time to time (thus, clarifying that the work of the Melo Commission is not yet finished).
- (2) She instructed the Department of Foreign Affairs to submit a formal proposal to the European Union, Finland, Spain and Sweden to send investigators to assist the Melo Commission.
- (3) She ordered the Departments of Justice and National Defense to coordinate with the Commission of Human Rights for the constitution of a joint fact-finding body to delve deeper into the matter of involvement of military personnel in unexplained killings, file the corresponding charges against and prosecute the culpable parties.
- (4) She ordered the Department of Justice to broaden the Witness Protection Program to cover all witnesses to the unexplained killings of an ideological/political nature.
- (5) She requested the Supreme Court to create special courts for the trial of charges involving unexplained killings of ideological/political nature.

1398. Since then, the Supreme Court has responded by designating – through Administrative Order No. 25-2007 – 99 regional trial courts in the country as special tribunals that shall expeditiously resolve or decide the cases of extrajudicial killings. Administrative Order No. 25-2007 enjoined the special courts to give priority to cases of activists and media personnel; mandated a continuous trial that shall be terminated within 60 days from the commencement of the case and required a judgment to be rendered within 30 days from submission for decision; and prohibited the filing of motions for postponements or other dilatory pleadings or motions.

1399. From this summary of recent developments, it is at once apparent that much remains to be done before definite results can be achieved in the matter of the unsolved killings generally, and on the issue of trade union rights violations in particular. In this sense, action on the killing of activists, including those complained of by KMU, is a work in progress.

1400. The Government submits to the Committee on Freedom of Association that:

- (1) It is premature to entertain the present complaint, based on the generalized and unsubstantiated allegations of the complainant, which fails to present prima facie that the Government has violated trade union rights under Conventions Nos 87 and 98. The burden of evidence is on the complainant and in the absence of evidence supporting a prima facie case, then the complaint should be dismissed.
- (2) The complainant is effectively shopping for a forum that it hopes would give it the greatest publicity mileage. The Government invites the Committee's attention to the view that the local forum – i.e. the Philippines' internal investigative processes – should take priority when it is clear that such a forum is available, before the Committee formally recognizes a complaint as valid for proper ILO investigation. The Government likewise invites the Committee's attention to the fact that the complainant KMU has failed and refused to come forward to prove its case before the Government of the Philippines' Melo Commission.
- (3) The Philippines has been facing an insurgency problem for the past 60 years that had been compounded by worldwide terrorism over the past 20 years. The Government invites the Committee to recognize that the complainant, KMU, is an arm of an

insurgent movement – the CPP/NPA – and distinctions should be made between legitimate trade union activities fully entitled to ILO protection, and subversive activities in violation of Philippine law, which lie outside the parameters of the ILO Conventions alleged to have been violated.

- (4) In considering a complaint, the Committee should take into account, not only the plain allegations of the complainant but the general ILO record of the Government complained against. For the Philippines, its ratification and active participation record, its overall labour situation, and the comments of the ILO offices in the country should be take into account.
- (5) In sum, the Government has no past record of and no present grand design to suppress trade union rights; much less will it condone or tolerate the police and the military if and when they violate these rights.

1401. With regard to the complainant, KMU, the Government indicates that the KMU is a trade union centre founded in 1980. It is not registered with the Government of the Philippines, yet has been operating unhampered for the past 27 years. It is linked to 11 federations, two mass organizations and 300,000 workers as members. The KMU was founded by Felixberto Olalia. Felixberto's son, Rolando, succeeded Felixberto at the helm of KMU. After Rolando's death, KMU's leadership was transferred to Crispin Beltran. After bolting prison in the early 1980s, Crispin Beltran joined the NPA. Later he co-founded Partido ng Bayan (PnB), Bagong Alyansa ng mga Makabayan (BAYAN), Partido Bayan Muna and, lately, Anakpawis which he currently represents in Congress. In this respect, the Government notes that according to the complainant, KMU unions embraced as one of their tasks the organizing and strengthening of Anakpawis and many KMU leaders at the local, regional and national levels accepted key responsibilities in the political party in an effort to bring trade unionism to new heights. The Government adds that BAYAN and Anakpawis are left-leaning political organizations associated with the CPP/NPA and the National Democratic Front (NDF). In fact, KMU has Marxist–Leninist–Maoist orientation similar to those of the CPP/NPA and the NDF, and the NPA counts in its fold KMU members.

1402. The Philippines has about the longest-running insurgency in Asia where the NPA boasts a 10:1 tactical advantage, with workers' support, over the armed forces. It is identified as the author of the murder of Col Rowe, Congressman Rodolfo Aguinaldo and Congressman Marcial Punzalan Jr. It is also the author of internal purges, the summary killing of its members, and the killing fields unearthed in Misamis Occidental reminiscent of the Pol Pot regime. It has set up a parallel government engaged in its own taxation, interference in election, and harassment of workers who shun foreign ideology and strikes.

1403. In August 2002, the NPA and the CPP were listed as terrorist organizations by the United States and the European Union. This resulted in massive withdrawal of foreign financial support to left-leaning organizations and affiliated unions. From 9 August 2002 to the present, the NPA has been besieged by internal dissension, retaliatory action by private enemies, international pressure and successful campaigns by the armed forces. The fight against terrorism continues. At the same time, the Government of the Philippines ensures full observance of the Bill of Rights. The President in fact condemns the spate of extrajudicial killings in the strongest terms possible and it is for that reason that open hearings by Congress and special commissions to identify the culprits are ongoing.

1404. With regard to the labour relations record of the Philippines, the Government indicates that the Philippines has ratified both Conventions Nos 87 and 98. In fact the Philippines was the 11th country in the world and the fourth country outside Europe to ratify both Conventions Nos 87 and 98. The 1987 Constitution of the Philippines categorically

provides that the workers shall be entitled to the right to self-organization, the right to collective bargaining and negotiations and the right to strike and to engage in concerted activities.

- 1405.** The Department of Labor and Employment of the Philippines recorded 260 strikes in 1981, topping by 66 per cent the previous high of 157 counted in 1971. The 1981 numbers rose to 282 in 1984, to 371 in 1985 and to 581 – or one new strike every 15 hours – in 1986. It was that same year (1986) that the number of registered unions in the Philippines passed the 2,000 mark. It breached the 3,000 total in 1988, the 4,000 mark in 1990 and grew steadily thereafter. Under this climate, the complainant expanded and raised its membership to 300,000 workers, as stated in the complaint. Its membership would not have risen to where it is had there been an active design to suppress it and its legitimate activities.
- 1406.** In the last two months of 2007, only 61 notices of strikes have been filed. Of these, the Department of Labor assumed jurisdiction over one case and certified another to the National Labor Relations Commission for compulsory arbitration. Some of these cases were settled through conciliation. Only one notice of strike ripened into an actual strike. This record is a source of pride for the Government and one that investors have taken notice of. It would be grossly unfair to the Government if this achievement were to be weakened by a premature complaint with anaemic allegations of ILO violations.
- 1407.** The best reliable source of information perhaps for the Committee is the ILO's own Subregional Office in the Philippines. The Government recommends that, even if only on the issue of the general state of health of labour in general and unionism in particular, the Committee should secure information from its Subregional Office which can best attest to the efforts of the Government of the Philippines, not only in unionism but in the fields of decent work, child labour and other live areas of ILO intervention.
- 1408.** With regard to the allegations on KMU chairman, Crispin Beltran, and seven other leaders and members of the National Federation of Sugar Workers (NFSW–KMU) who had been the subject of a warrantless arrest in Bulacan on 25 February 2006 – one day after President Arroyo declared a state of emergency – the Government indicates that Beltran had been arrested on the basis of a warrant of arrest. The allegation that a previous charge against Beltran had been quashed remains an unsupported allegation as the KMU cannot show any proof in this respect. Moreover, the charge for which Beltran was arrested has no bearing on trade union activities, as it relates to the charge of rebellion. Significantly, the Government later implicated Beltran in the failed attempts to overthrow the Government; he is currently still under hospital detention because of failing health.
- 1409.** An examination of the KMU's complaint and its attachments would also show lack of linkage between the arrest and detention of NFSW members and trade union activities. The members/leaders of NFSW were arrested on 30 September 2005 near the detachment of the Alpha Company of the 12th Infantry Battalion at Camingawan, Kabankalan City, Negros Occidental, after they were accused of being high-ranking officers of the Communist Party of the Philippines and the New People's Army (CPP/NPA). These cases are pointed out early on because they show the overriding patterns in the KMU complaint. It is strong on allegations but very soft and non-existent on support, particularly with respect to allegations and evidence of violation of trade union activities.
- 1410.** With regard to the Hacienda Luisita case, the KMU allegations that law enforcers shot and killed Jesus Laza, Jun David, Adriano Caballero, Jhaivie Basilio, Jaime Pastidio, Juancho Sanchez and Jessie Valdez at the height of the dispersal of the strike and while the composite forces of the police and the military were enforcing the AJO issued by the Secretary of Labor, the Government indicates that congressional hearings were held on the

incident and the Congressional Committees on Human Rights, Labor and Employment and Agriculture concluded in part that human rights violations were committed against the striking workers of Hacienda Luisita.

- 1411.** The Government stresses, however, that the Hacienda Luisita case was not a pure case of police action against strikers. The records show that the dispersal of the strike came several days after the strike and not immediately after its commencement; there were clear indications of provocation on the part of the strikers that compelled the police and the military forces to forcibly enforce the return to work order of the Department of Labor and Employment. To be sure, the strikers and most especially the trade union leaders, could have actually contributed to the peaceful resolution of the dispute had they complied with the legal orders issued by the lawfully constituted authority – the AJO issued by the Secretary of Labor. Had the striking workers returned to their work as ordered, the Hacienda Luisita incident would not have resulted in the death and injuries to workers.
- 1412.** The exercise of the right to strike carries with it the correlative obligation to observe the limitations imposed by law, especially those that are essential to the maintenance of peace and order of the community. Under Philippine law, a strike should not result in the obstruction of the ingress to and egress from the enterprise and, when this recognized statutory limitation is violated by the strikers, it may be necessary to call on, or seek the assistance of, the law enforcement officers. In the context of the Hacienda Luisita strike, the excesses committed by the strikers in obstructing the ingress to and egress from the workplace dictated the intervention of the law enforcement officers who are expected to maintain peace and order at all times. Indeed, an otherwise absolute right ends when the rights of others begin.
- 1413.** If indeed law enforcers exceed the limits of their authority to beyond what is required or dictated by the situation, there are built-in remedies in law to address this situation; the incident need not call for the conclusion of a violation of trade union rights by a party to the Conventions. What happened in Hacienda Luisita is isolated and was affected by abnormal circumstances; it was a deviation from the normal course of things. It is not at all indicative of a governmental design or a premeditated attempt directed at suppressing trade union rights.
- 1414.** With regard to the allegations concerning killings and other actions against activists, the Government responds that the KMU complaint has not pointed to any direct evidence in the cited cases showing that the police and the military were indeed the perpetrators of the killings and other actions against KMU leaders and members. *Nor does the complaint categorically state in what manner the cited ILO Conventions have been violated.* At best, the link to the police and to the military appears to be merely circumstantial – a conclusion that the Melo Commission itself arrived at in its initial report. To state the obvious, implicating the police and the military in the killings without any cited evidence amounts to pure conjecture or speculation. Unfortunately, this is how the KMU generally made its allegations in linking the military and the police to the acts complained about. In some instances, it was only an alleged and unsubstantiated police or military surveillance immediately before the killing that brought on a linkage to the police or the military. It should of course take more than this type of allegation before the Committee on Freedom of Association should give due course to a complaint for violation.
- 1415.** With regard to the allegations concerning the disappearance of Perseus Geagoni, the Government emphasizes the absence of evidence pointing to the responsibility of the military. The basis for alleging military participation is merely *the hearsay evidence that a military man disclosed that a group of 30 intelligence operatives were responsible for Geagoni's disappearance.* This allegation is very weak to substantiate the alleged involvement of the military. The same holds true with the case of Ronald Intal.

- 1416.** In the case of Nenita Labordio, Dante Teotino, Noel Daray and Ronald Andrade, the KMU complaint and its attachment show that they were in fact killed by private persons; thus, there clearly was no military and/or police participation in these cases.
- 1417.** In the cases of Antonio Pantonial, Victoria Samonte, Federico de Leon, Crisanto Teodoro, Tirso Cruz, Leodogario Punzal, Rolando Mariano and Albert Terradeno, the complainant, KMU, did not allege even a single circumstance that would indicate the police's and the military's participation in the killings. What was clearly established solely in these cases was that the victims were either KMU leaders and members or employees active in trade union activities, no more no less. There was even no allegation that they were killed for specific trade union activities.
- 1418.** With regard to Father William Tadena, a priest, and Abelardo Ladera, a local councilman, who were allegedly victims of trade union repression, and known supporters of Hacienda Luisita workers, the complainant, KMU, significantly did not even allege, much less cite evidence, of military or police participation in their killings.
- 1419.** In the cases of Ramon Namuro and Nilo Bayas, the complainant, KMU, alleged, beside their KMU membership or affiliation, the additional *claim* that they were killed by members of a paramilitary group and the military, respectively. Other than this bare and self-serving claim the complainant does not provide particular or details of how the military might have been involved in these cases.
- 1420.** Samuel Bandilla, Anakpawis member, was allegedly killed by motorcyclists. Other than the conjectural link of motorcyclists with the military, the complainant failed to specifically allege military or police involvement in the killing.
- 1421.** With regard to the killings that allegedly involve the military: (1) Felipe Lapa, union president of the Milagrosa Farm Workers' Union (NAFLU-KMU); (2) Angelito Mabansag, a member of an urban poor organization affiliate of KMU; (3) Edwin Bargamento, regional executive committee member of the National Federation of Sugar Workers (NFSW-KMU); (4) Mario Fernandez, NFSW organizer; (5) Manuel Bartolina, NFSW present and organizer in several haciendas in Manapla, Negros Occidental; (6) Diosdado Fortuna, president of the union of Filipro Employees at Nestlé Philippines; (7) Ricardo Ramos, Central Azucarera de Tarlac Labour Union (CATLU); (8) Roberto dela Cruz, board member of the Workers' Union of Tritran and Anakpawis member, as well as some 35 additional cases listed by the complainant with regard to alleged killings by the police or military elements without an indication of the motives, the Government notes that a common thread in the allegations about these cases is that the supporting documents are mostly narrations from the KARAPATAN or the International Labor Solidarity Mission Philippines, or other organizations allied to the KMU activist community. They likewise contain narrations that do not constitute sufficient evidence that would stand up in formal or judicial investigations relating to military or police involvement in the killings or of trade union rights violations. To illustrate, KMU's allegations of military linkages, pressures or threats preceding the killings must be established by supporting conclusive evidence, which is not in any way satisfied by the self-serving attachments to the KMU's complaints. In other words, there must be at least some proof of the pertinent allegations. Additionally, these organizations that provided the fact sheets to the KMU's allegations are the same entities that failed to participate in the Melo Commission despite open invitations extended to them. The Government submits that allegations of violations of trade union rights under the Conventions should not be entertained under these circumstances.
- 1422.** With regard to the alleged kidnappings and forced disappearances, the Government indicates that, by the KMU's own allegations, victims like Armando Leabres, Francis Noel

Desacula, Rogelio Concepcion and Leopoldo Ancheta were abducted by *suspected* military men. Again, military participation in these cases is nothing but conjectural and cannot be considered abductions committed by the military to suppress trade unionism. The Government should not carry the burden of evidence on the basis of these conjectural allegations.

- 1423.** The other cases of abduction or kidnappings allegedly perpetrated by the military similarly rest on *surmises*, conjecture and speculation. Some KMU claims on the other hand are not fully supported by evidence that would stand the test of general acceptance. The cases for instance of Robin Solano and Ricardo Valmocina, who were allegedly abducted by military elements who had earlier massacred the workers in CV Tamayo Farm shows lack of substantiation of the essential allegations that contain no less than charges of massacre.
- 1424.** In some cases, the military appears to have valid reasons to pursue the “alleged victims”. Four members of the PISTON group for instance were subsequently charged with illegal possession of explosives – a crime punishable under Philippine law. The pursuit in this case is not therefore directed against trade union activities but for commission of crimes against public order.
- 1425.** With regard to the allegations of militarization of workplaces, the Government denies putting up military detachments or deploying military forces in strike-bound workplaces or in workplaces where there are militant unions *because of* the trade union situation in these places. Police and military presence is dictated by public need. Where what are involved are peace and order concerns, then the police are generally in attendance, but the military may be involved where matters of insurgency and terrorism are involved. To be sure, these responsibilities cannot be held back or withheld from the public simply because there is a strike in the vicinity or there are workers in the process of organizing themselves. At the very least, charges of this nature should be supported by evidence, not by mere second-hand narratives. These narratives are necessarily suspect, too, if they do not appear to have been brought to the attention of the Department of Labor and Employment, by complaint or otherwise.
- 1426.** The allegations that workers are required to render assistance to the military appears irrelevant to the cited Conventions in the absence of any relationship to trade union activities. In other words, assistance may have been requested as members or as citizens of a local community – a request that does not go at all into the Conventions under consideration. Thus, these allegations need not be addressed here at all. The Government adds that it does not allow itself, or any of its agents, to be used by private firms and companies for the purpose of denying workers their right to organization, collective action and collective bargaining as the complainant, KMU, wants to impress on this body. The KMU’s complaint in this regard should not be considered for lack of evidentiary basis.
- 1427.** With regard to the allegations of army surveillance, the Government indicates that surveillance is a legitimate law enforcement tool that, by itself, cannot be alleged to be a violation of trade union rights. For it to be so, there must be more to the surveillance, showing the intention to affect, subvert or undermine the exercise of trade union activity. Surveillance of a member of the KMU does not per se indicate such a violation, given the thin red line that divides the KMU and some of its members from the illegal activities of the CPP/NPA discussed earlier. Where a KMU member has crossed that dividing line, then there should be no question about the legitimacy of the surveillance. At the same time, it should take more than a plain claim of surveillance to merit a consideration of a violation of trade union rights before the Committee on Freedom of Association.
- 1428.** In conclusion, the Government emphasizes that the present complaint raised purely political issues whose ultimate underlying facts cannot be proved in a forum such as the

Committee on Freedom of Association. Necessarily, these facts must be settled at the local forum; only thereafter and with these as bases can the issue of violation of trade union rights be ripe for the Committee's consideration.

C. The Committee's conclusions

1429. *The Committee notes that the present case concerns allegations of killings, grave threats, continuous harassment and intimidation and other forms of violence inflicted on leaders, members, organizers, union supporters/labour advocates of trade unions and informal workers' organizations who actively pursue their legitimate demands at the local and national levels.*
1430. *The Committee notes that the Government raises some preliminary objections to this case stating the following: (i) the complaint is prima facie unsubstantiated; (ii) the complainant is shopping for a forum with greatest publicity whereas a local forum, i.e. the Philippine internal investigative process, is available and should take priority; (iii) the Philippines has been facing an insurgency for the past 60 years which has been compounded by terrorism in the past 20 years; (iv) the complainant, KMU, is an arm of an insurgent movement, the Communist Party of the Philippines/New People's Army (CPP/NPA) and distinctions should be made between legitimate trade union activities fully entitled to ILO protection and subversive activities which violate Philippine laws and lie outside the parameters of ILO Conventions on freedom of association.*
1431. *The Committee notes the following in this respect: (i) it is within the mandate of the Committee to examine whether, and to what extent, satisfactory evidence is presented to support allegations; this appreciation goes to the merits of the case and cannot support a finding of irreceivability [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 9]; (ii) although the use of internal legal procedures, whatever the outcome, is undoubtedly a factor to be taken into consideration, the Committee has always considered that, in view of its responsibilities, its competence to examine allegations is not subject to the exhaustion of national procedures [Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, para. 30]; and (iii) where the government concerned considers that the questions raised are purely political in character, the Committee has decided that, even though allegations may be political in origin or present certain political aspects, they should be examined in substance if they raise questions directly concerning the exercise of trade union rights [Procedures, op. cit., para. 25]; moreover, within the terms of its mandate, the Committee is empowered to examine to what extent the exercise of trade union rights may be affected in cases of allegations of the infringement of civil liberties [**Digest**, op. cit., para. 7].*
1432. *The Committee wishes to emphasize that the object of the special procedure on freedom of association is not to blame or punish anyone, but rather to engage in a constructive tripartite dialogue to promote respect for trade union rights in law and in practice [**Digest**, op. cit., para. 4]. It is in this spirit that the Committee will pursue with an examination of this case.*
1433. *The Committee notes that the complainant refers to the following types of violations: (i) summary killings of trade union leaders, members, organizers and union supporters and informal workers from 2001 to 2006 as the height of the Government's scheme to prevent the workers and informal workers from exercising their freedom of association and their right to organize and collectively bargain; in conformity with its mandate, which empowers it to examine to what extent the exercise of trade union rights may be affected in cases of allegations of the infringement of civil liberties [**Digest**, op. cit., para. 7], the Committee has in this respect retained a list of 44 murders of trade union leaders or*

members found in Appendix I; (ii) abduction and enforced disappearances of trade union leaders, members, organizers and union-supporters and informal workers committed by elements of the military and police from January 2001 to June 2006, not only to intimidate and/or terrorize the workers and informal workers from continuing their economic and political activities, but to ultimately paralyze and render the union or organization useless; the Committee has retained a list of incidents concerning trade union leaders or members found in Appendix II; (iii) harassment, intimidation and grave threats by the military and police forces against trade union leaders, members, organizers and union supporters and informal workers; (iv) militarization of workplaces in strike-bound companies or where a labour dispute exists and where existing unions or unions being organized are considered progressive or militant, by means of establishing military detachments and/or deployment of police and military elements under the pretext of counter-insurgency operations; and (v) arrest and detention of and subsequent filing of criminal charges against trade union leaders, members, organizers and union supporters and informal workers due to their involvement and active participation in legitimate economic and political activities of trade unions and informal workers' associations.

- 1434.** *The Committee notes the Government's indications according to which the President of the Philippines established an Independent Commission to Address Media and Activist Killings (the Melo Commission) which submitted its report on 30 January 2007. In the report, which was released on 22 February 2007, "the Commission comes to the conclusion that there is no direct evidence, but only circumstantial evidence, linking some elements of the military to the killings ... However, there is certainly evidence pointing the finger of suspicion at some elements and personalities in the armed forces ... as responsible for the undetermined number of killings, by allowing, tolerating and even encouraging the killings". In addition to this, "further in-depth investigation into the numerous killings, including extensive evidence gathering, is necessary for the successful prosecution of those directly responsible. In this, the testimony of witnesses and the presentation of evidence from the victims and their families and colleagues would be indispensable".*
- 1435.** *The Committee also observes that the recommendations of the Melo Commission emphasized the need for: (i) strong political condemnation of the killings by the Government and the President in particular; (ii) an investigation conducted by a body or agency independent from the armed forces; (iii) the creation of a special team of competent and well-trained prosecutors to handle the trials and special courts to hear and try these cases; (iv) reinforcement of the Witness Protection Program; (v) legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority; and (vi) orientation and training of the armed forces.*
- 1436.** *The Committee observes that, as a result, the President of the Philippines gave the following instructions: (i) that the Melo Commission continue its work and periodically submit supplemental reports; (ii) that a formal proposal be submitted to the European Union, Spain, Finland and Sweden to send investigators to assist the Melo Commission; (iii) the constitution of a joint fact-finding body by the Departments of Justice, National Defence and the Commission of Human Rights to delve deeper into the matter of involvement of military personnel in unexplained killings, file the corresponding charges against and prosecute the culpable parties; (iv) to broaden the Witness Protection Program so as to cover all witnesses to unexplained killings of an ideological/political nature; and (v) the creation of special courts for the trial of charges involving unexplained killings of an ideological/political nature. The Supreme Court responded to the latter request by designating 99 regional trial courts as special tribunals which shall expeditiously resolve or decide the cases of extrajudicial killings. Trials will be terminated*

within 60 days and a judgement will be rendered within 30 days, priority will be given to cases of activists and media personnel and any dilatory pleadings or motions will be prohibited.

- 1437.** *The Committee notes with interest the steps taken by the Government in recognition of the gravity of the problem of killings. The Committee also recalls, however, that this is the third complaint filed before it with regard to very serious allegations of murders, abductions, disappearances, attacks on picket lines and illegal arrests [Case No. 1572, 292nd Report, paras 297–312 and Case No. 1444, 279th Report, paras 544–562]. The Committee deplores the gravity of the allegations made in this case and the fact that more than a decade after the filing of the last complaint on this issue, inadequate progress has been made by the Government with regard to putting an end to killings, abductions, disappearances and other serious human rights violations which can only reinforce a climate of violence and insecurity and have an extremely damaging effect on the exercise of trade union rights – on the contrary, the number of alleged murders has dramatically increased as can be seen by the list in Appendix I. The Committee emphasizes that freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed [Digest, op. cit. para. 43]. The rights of workers’ organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [Digest, op. cit., para. 44]. A climate of violence, such as that surrounding the murder or disappearance of trade union leaders, or one in which the premises and property of workers and employers are attacked, constitutes a serious obstacle to the exercise of trade union rights; such acts require severe measures to be taken by the authorities [Digest, op. cit. para. 46].*
- 1438.** *The Committee must also observe with deep concern that although the Melo Commission recommended that the investigation of the killings be carried out by a body independent of the army, the joint fact-finding body actually set up includes among the bodies responsible for its establishment the Department of National Defence. The Committee recalls in this regard that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [Digest, op. cit., para. 48].*
- 1439.** *The Committee also observes that while the killings alleged in this case date as far back as 2001 – although the main bulk dates from 2005 – the Government does not mention one single case in which a suspect was summoned for interrogation or any concrete step was taken to investigate the murders. The Committee recalls that justice delayed is justice denied and that the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [Digest, op. cit., paras 105 and 52]. The Committee therefore requests the Government to keep it informed of the progress of the investigation to be carried out by the special joint fact-finding body concerning the killings of trade union leaders and members and, in particular, the steps taken to investigate the murders alleged by the complainant which are listed in Appendix I. The Committee firmly expects that the investigation and trials will proceed without delay and in full independence, so that all responsible parties may be identified and punished before the competent courts as soon as possible and a climate of impunity be avoided. The Committee requests to be kept informed of developments in this respect.*

1440. Furthermore, the Committee notes with regret that the Government rejects the allegations concerning police or army involvement in the killings on the basis of lack of sufficient evidence. The Committee considers that, regardless of the question of any involvement of members of the armed forces or the police in the killings, numerous murders have actually taken place as the Melo Commission and the Government itself have acknowledged. In this respect, the Committee considers that facts imputable to individuals bring into play the State's responsibility owing to the State's obligation to prevent violations of human rights. Consequently, governments should endeavour to meet their obligations regarding the respect of individual rights and freedoms, as well as their obligation to guarantee the right to life of trade unionists [*Digest*, op. cit., para. 47]. Thus, the Government is under a responsibility to take all necessary measures to have the guilty parties identified and punished – in particular by ensuring that witnesses, who are crucial for the successful identification and prosecution of suspects, are effectively protected – and to successfully prevent the repetition of human rights violations.
1441. In this respect, the Committee notes with concern that the Government has not provided any information on measures taken to implement the recommendations of the Melo Commission concerning: (i) the reinforcement of the Witness Protection Program (the information provided by the Government is confined to the expansion of this programme to include witnesses of killings); (ii) the adoption of legislation to ensure strict chain-of-command responsibility in the police and armed forces with respect to the killings; and (iii) the carrying out of orientation and training of the armed forces. The Committee therefore requests the Government to take all necessary measures without delay to ensure full implementation of these important recommendations of the Melo Commission.
1442. The Committee must also observe with concern that the mandate of the Melo Commission is limited to extrajudicial killings, so that allegations of abductions and disappearances remain unexplored. Furthermore, the Committee notes with concern that the Government does not mention any steps taken to investigate the alleged abductions or disappearances or summon the alleged perpetrators for questioning; on the contrary, the Government tends to reject outright the allegations on the basis of lack of sufficient evidence. The Committee recalls that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [*Digest*, op. cit., para. 48]. It also emphasizes that the absence of judgements against the guilty parties creates in practice a situation of impunity which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [*Digest*, op. cit., para. 52]. The Committee therefore requests the Government to establish an independent judicial inquiry and proceedings before the competent courts as soon as possible with regard to the allegations of abductions and disappearances of trade union leaders and members which are listed in Appendix II with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. The Committee requests to be kept informed of progress made in this respect.
1443. The Committee notes further allegations made by the complainant on a number of obstacles to the establishment and activities of trade unions including: (i) serious obstacles in the process of union recognition; (ii) an unwritten policy of no-union and no-strike in the export processing zones and industrial enclaves where foreign investors are concentrated; (iii) a trend of flexibilization which prevents the workers from organizing or collectively bargaining for fear of dismissal; (iv) dismissals of union leaders and active members and company-instigated petitions to cancel union registrations which virtually paralyze unions in their formative stages; (v) the power of the DOLE Secretary to impose

compulsory arbitration ending strikes through the issuance of the AJO under article 263(g) of the Labour Code; and (vi) police and military dispersal of strikes where the union defies the AJO, like in the Hacienda Luisita case in Tarlac where enforcement of an AJO order claimed the lives of at least seven strikers and seriously injured 70 workers and supporters.

- 1444.** *The Committee notes that, in reply to these allegations, the Government makes reference to its labour relations record (ratification of Conventions Nos 87 and 98, recognition of freedom of association in the Constitution, etc.). With regard to the right to strike in particular, the Government refers to statistics showing that the rate of strikes has fallen dramatically since the 1980s so that, in the first two months of 2007, only one strike actually took place out of 61 notices of strikes; some were settled through conciliation, the Department of Labour assumed jurisdiction over one case and certified another to the National Labor Relations Commission for compulsory arbitration. The Government states that this record is a source of pride and one that investors have taken notice of.*
- 1445.** *The Committee notes that most of the issues raised by the complainant have been examined on several occasions by the Committee in previous cases [most recently Case No. 2252, 343rd Report, paras 182–190, and Case No. 2488, 346th Report, paras 1271–1360.]. The Committee will pursue in the framework of these other cases its examination of the matters related to the lack of a fair, independent and speedy certification process providing adequate protection against acts of employer interference, the power of the DOLE Secretary under section 286(g) of the Labour Code to put an end to strikes in sectors which do not qualify as essential in the strict sense of the term or concern public servants exercising authority in the name of the State, dismissals of trade union leaders and members in that context, and the lack of effective protection before the courts against anti-union discrimination.*
- 1446.** *The Committee takes this opportunity to emphasize, with regard to the Government’s reply to the allegations, that trade union rights, like other basic human rights, should be respected no matter what the level of development of the country concerned [Digest, op. cit., para. 19] and recalls the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the ILO in November 1977, which states that (paragraph 46 of the Declaration, as amended in November 2000): “where governments or host countries offer special incentives to attract foreign investment, these incentives should not include any limitation of the workers’ freedom of association or the right to organize and bargain collectively” [Digest, op. cit., paras 19 and 20]. The Committee also emphasizes that workers in export processing zones – despite the economic arguments often put forward – like other workers, without distinction whatsoever, should enjoy the trade union rights provided for by the freedom of association Conventions [Digest, op. cit., para. 264]. Finally, the Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests [Digest, op. cit., para. 521].*
- 1447.** *With regard to the Hacienda Luisita incident, which concerns police and army intervention in a strike which claimed the lives of at least seven trade union leaders and members and led to the injury of 70 others, the Committee notes that according to the Government, the records show that there were clear indications of provocation on the part of the strikers who refused to comply with the AJO of the DOLE Secretary to end their strike and emphasizes that the exercise of the right to strike carries with it obligations to observe legal limitations, especially with regard to the prohibition of obstructing the ingress to and egress from enterprises. The excesses committed by the strikers dictated the intervention of the law enforcement officers.*

- 1448.** *The Committee observes, from the numerous documents provided by the complainant, that three of the six gates of the Hacienda Luisita were open while the workers were holding their picket at gate 1; this is how the army and police managed to enter the hacienda and strike at the workers. The Committee further observes that the House of Representatives Committees on Human Rights and Labor and Employment reached the following conclusions on this incident: (i) “there was no evidence whatsoever of criminal acts being committed and/or civil disturbance being perpetrated by the striking workers which could have justified police intervention”; (ii) “on November 6 to 7, 2004 when the members of the police already allegedly harassed the workers, the DOLE had not yet issued any order seeking assistance from law enforcement agencies ... There was no basis therefore for the PNP [Philippines National Police] to deploy CDM police force at the striking area”; (iii) “There was, undoubtedly, excessive use of force against the workers”; (iv) “On November 16, 2004, the Armed Forces of the Philippines [AFP] joined the PNP in harassing, hurting and in shooting the striking workers, which caused the death of a number of workers. The AFP’s participation was upon the request or order of the DOLE Secretary.” The Committees concluded: “After careful deliberation and review of the testimonies of the witnesses and all the parties invited by the Committees and examination of all documents submitted in the course of the congressional inquiry, the Committees have arrived at the conclusion that human rights violations were committed against the striking workers of Hacienda Luisita by the elements of the Philippine National Police and the Armed Forces of the Philippines, including the officers and the staff of the Department of Labor and Employment. Hence, it is imperative that the officers concerned be held responsible directly or by reason of command responsibility for the said acts after proper investigation has been concluded.”*
- 1449.** *The Committee recalls that the authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order. The intervention of the police should be in proportion to the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order. In cases in which the dispersal of public meetings by the police has involved loss of life or serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities [Digest, op. cit., paras 140 and 49].*
- 1450.** *The Committee deeply regrets the involvement of the army and police in the dispersal of the picket line and further observes with deep regret that the Government does not refer to any investigation carried out, or suspects identified pursuant to the recommendations of the Congressional report. The Committee requests the Government to take all necessary measures so as to have an independent investigation carried out in the Hacienda Luisita incident with a view to identifying and punishing those responsible without further delay. It also requests the Government to give adequate instructions to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations. The Committee requests to be kept informed in this respect.*
- 1451.** *The Committee notes that, with regard to the serious allegations of militarization of workplaces, the Government indicates that military detachments are not deployed in strike-bound workplaces or in workplaces where there are militant unions because of the trade union situation in these places, but because of matters of insurgency and terrorism. Furthermore, with regard to allegations that workers are required to render assistance to the military, the Government indicates that assistance may have been requested not because of trade union activities but as part of civic duties and the Government does not*

allow itself to be used by private firms and companies for the purpose of denying the workers their right to organization, collective action and collective bargaining.

- 1452.** *The Committee notes with deep regret that the Government essentially confirms the complainant's allegation that the Regional Special Action Forces, the Philippine National Police Mobile Group and Special Weapons Action (SWAT) in full battle gear are a common sight in companies in Southern Tagalog and Central Luzon, two of the industrial areas where most of the foreign investors are concentrated. The Committee further notes with regret that the Government does not provide specific answers to the following allegations of the complainant: (i) military presence and operation in the Nestlé Cabuyao factory since 2002; (ii) in Console Farm the military forced the workers to become members of a paramilitary unit and to render at least two hours of military duty every day on a rotating basis; workers are moreover coerced by the army to withdraw trade union affiliation, union books are audited, workers' movements are closely monitored, union organizers and leaders who join legitimate protest rallies are branded as terrorists, communists and NPA sympathizers; (iii) in Robina Farms the military set up a detachment and harassed the union members asking them to disaffiliate from the KMU; (iv) in the Fresh Banana Agricultural Corporation, Compostela Valley, members of the 28th Infantry Battalion held meetings inside packing plants 90, 92 and 95 in August 2005 to prevent workers from establishing trade unions; the military allegedly told the workers that establishing a union would cause the plant to close down and their families would not be able to find jobs, that the KMU members were satanists and rebels and that it is fine to form a union but not under the KMU; and (v) in the Sun Ever Lights in Sta. Rosa, Laguna, elements of the Special Weapons Action Group were deployed to man the production line and keep watch on union leaders of the newly formed union.*
- 1453.** *The Committee expresses concern at the allegations of a prolonged presence of the army inside workplaces, which, if correct, is liable to have an intimidating effect on the workers wishing to engage in trade union activities, and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations. The Committee recalls that the Committee of Experts on the Application of Conventions and Recommendations has emphasized that the freedom of association Conventions do not contain any provision permitting derogation from the obligations arising under the Convention, or any suspension of their application, based on a plea that an emergency exists [Digest, op. cit., para. 193]. All appropriate measures should therefore be taken to guarantee that, irrespective of trade union affiliation, trade union rights can be exercised in normal conditions with respect for basic human rights and in a climate free of violence, pressure, fear and threats of any kind [Digest, op. cit., para. 35]. The International Labour Conference has also pointed out that the right of assembly, freedom of opinion and expression and, in particular, freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers constitute civil liberties which are essential for the normal exercise of trade union rights (resolution concerning trade union rights and their relation to civil liberties, adopted at the 54th Session, 1970) [Digest, op. cit., para. 38]. Finally, workers should have the right, without distinction whatsoever, in particular without discrimination on the basis of political opinion, to join the organization of their own choosing. They should have the right to establish the organizations that they consider necessary in a climate of complete security irrespective of whether or not they support the social and economic model of the Government, including the political model of the country [Digest, op. cit., paras 212 and 213].*
- 1454.** *The Committee therefore requests the Government to take measures, including the issuance of appropriate instructions, to bring to an end prolonged military presence inside workplaces. The Committee also requests the Government to give appropriate instructions so as to ensure that any emergency measures aimed at national security do not prevent in*

any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security. The Committee requests to be kept informed in this respect.

- 1455.** Furthermore, the Committee notes that with regard to allegations of surveillance of trade union leaders, the Government indicates that this legitimate law enforcement tool cannot by itself be alleged to be a violation of trade union rights and that surveillance does not per se indicate an intention to undermine trade union activity given the thin red line that divides the complainant KMU and some of its members from the illegal activities of the CPP/NPA.
- 1456.** The Committee expresses regret at the brevity of the Government information given in reply to the allegations of the complainant which include: (i) the alleged admittance on 4 April 2001 during a press conference by Philippine National Police Region IV director Domingo Reyes, that 94 factories with militant unions were under surveillance; (ii) surveillance of Angelina Ladera, chairperson of the Workers' Alliance of Region 3 (WAR-3) and former president of the International Wiring Services Corp. Workers' Union from which she had to quit because of fear for her life, especially after learning that she had been included in a list of "enemies of the state" in a CD-ROM distributed by the Northern Luzon Command to local and international media in January 2005; (iii) harassment and surveillance of a number of union leaders and members of Nestlé Workers Union in Cabuyao; and (iv) the tailing of NAMAOS leaders in Compostela town following the conclusion of a collective agreement.
- 1457.** The Committee recalls that the rights of workers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [*Digest*, op. cit., para. 44]. The Committee therefore requests the Government to give specific instructions without delay so as to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the rights of workers' organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations. The Committee requests to be kept informed in this respect.
- 1458.** The Committee also notes with regret that the Government does not provide a reply to the remaining allegations of harassment and intimidation, in particular: (i) 81 cases of grave threats recorded by the CTUHR, including threats against the life of Romeo Legaspi, president of the United Workers' Strength in Honda; (ii) interrogation of a number of union leaders and members of the NAMAOS by the members of the Special Operating Team of the 36th Infantry Battalion; (iii) interrogation of Vicente Barrios, president of the United Workers at Suyapa Farms by the military on several occasions in September 2005; and (iv) the incident of 14 November 2004, during which soldiers roamed around the NAMAOS office putting up posters warning workers not to "be used by Communist".
- 1459.** Recalling that measures depriving trade unionists of their freedom on grounds related to their trade union activity, even where they are merely summoned or questioned for a short period, constitute an obstacle to the exercise of trade union rights and that the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights and, furthermore, that a climate of violence, coercion and threats of any type aimed at trade union leaders and their families does not encourage the free exercise and full enjoyment of the rights and freedoms set out in Conventions Nos 87 and 98 [*Digest*, op. cit., paras 63, 178 and 58], the Committee requests the Government to provide its comments in respect of the allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU.

- 1460.** *With regard to the allegations concerning the arrest of Crispin Beltran, long-time KMU leader and current congressman with the Anakpawis Partylist to which the KMU is closely linked, as well as five members of the NFSW on 30 September 2005 under the accusation of being high-ranking officers of the CPP/NPA, the Committee notes that according to the Government: (i) Crispin Beltran was arrested on the basis of a warrant under the charge of rebellion which is unrelated to trade union activities; the Government later implicated him in the failed attempts to overthrow the Government and he is currently under hospital detention because of failing health; (ii) there was no linkage between the arrest of the NFSW members/leaders and trade union activities, given that they were accused of being high ranking officers of the Communist Party of the Philippines and CPP/NPA.*
- 1461.** *The Committee is not in a position to determine, on the basis of the information brought before it, whether these cases concern trade union activities. The Committee recalls that in cases where the complainants alleged that trade union leaders or workers had been arrested for trade union activities, and the Governments' replies amounted to general denials of the allegation or were simply to the effect that the arrests were made for subversive activities, for reasons of internal security or for common law crimes, the Committee has always followed the rule that the governments concerned should be requested to submit further and as precise information as possible concerning the arrests, particularly in connection with the legal or judicial proceedings instituted as a result thereof and the result of such proceedings, in order to be able to make a proper examination of the allegations. In many cases, the Committee has asked the governments concerned to communicate the texts of any judgements that have been delivered together with the grounds adduced therefore [Digest, op. cit., paras 111–112].*
- 1462.** *The Committee requests the Government to communicate the texts of any judgements handed down in the cases of Crispin Beltran, long-time KMU leader, as well as five members of the NNFSW who were arrested, and to ensure that all relevant information is gathered in an independent manner so as to shed full light on their situation and the circumstances surrounding their arrest. Should it be determined by the court that they were arrested in relation to their trade union activities, the Committee requests the Government to take the necessary measures to ensure that they are immediately released.*

The Committee's recommendations

- 1463.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee deplores the gravity of the allegations made in this case and the fact that more than a decade after the filing of the last complaint on similar allegations, inadequate progress has been made by the Government with regard to putting an end to killings, abductions, disappearances and other serious human rights violations which can only reinforce a climate of violence and insecurity and have an extremely damaging effect on the exercise of trade union rights.*
- (b) *The Committee requests the Government to:*
- (i) *keep it informed of the progress of the investigation to be carried out by the special joint fact-finding body concerning the killings of trade union leaders and members and, in particular, steps taken to investigate the murders alleged by the complainant which are listed in Appendix I. The Committee firmly trusts that the investigation and trials will proceed without delay and in full independence, so that all responsible parties*

may be identified and punished before the competent courts as soon as possible and a climate of impunity be avoided;

- (ii) establish an independent judicial inquiry and proceedings before the competent courts as soon as possible with regard to the allegations of abductions and disappearances of trade union leaders and members which are listed in Appendix II with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events;*
- (iii) keep it informed of progress made in this respect.*
- (c) Noting that the Government is under a responsibility to take all necessary measures to have the guilty parties identified and punished – in particular by ensuring that witnesses, who are crucial for the successful identification and prosecution of suspects, are effectively protected – and to successfully prevent the repetition of human rights violations, the Committee requests the Government to take all necessary measures without delay to ensure full implementation of the recommendations of the Melo Commission with regard to: (i) the reinforcement of the Witness Protection Program; (ii) legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority; and (iii) orientation and training of the armed forces.*
- (d) Deeply regretting the involvement of the army and police in ending the strike in the Hacienda Luisita incident which claimed the lives of at least seven trade union leaders and members and led to the injury of 70 others, the Committee requests the Government to take all necessary measures so as to have an independent investigation carried out into this incident, with a view to identifying and punishing those responsible without further delay. It also requests the Government to give adequate instructions to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations. The Committee requests to be kept informed in this respect.*
- (e) Expressing concern at the prolonged presence of the army inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations, the Committee requests the Government to take measures, including the issuance of appropriate instructions, to bring to an end prolonged military presence inside workplaces.*
- (f) The Committee requests the Government to give appropriate instructions so as to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security. The Committee requests to be kept informed in this respect.*

- (g) *The Committee requests the Government to give specific instructions without delay so as to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the rights of workers' organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations. The Committee requests to be kept informed in this respect.*
- (h) *The Committee requests the Government to provide its comments in respect of the allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU.*
- (i) *The Committee requests the Government to communicate the texts of any judgements handed down in the cases of Crispin Beltran, long-time KMU leader, as well as five members of the NNFSW who were arrested, and to ensure that all relevant information is gathered in an independent manner so as to shed full light on their situation and the circumstances surrounding their arrest. Should it be determined by the court that they were arrested in relation to their trade union activities, the Committee requests the Government to take the necessary measures to ensure that they are immediately released.*

Appendix I

Alleged murders

Name	Date killed	Organization and position
1. Felipe Lapa	25 October 2001	Leader, Milagros Farm Workers' Union
2. Nenita Labordio	27 October 2002	Worker, Footjoy Company
3. Angelito Mabansag	28 September 2003	Community organizer, KADAMAY, Manila
4. Melita Carvajal	27 August 2004	KADAMAY, Laguna
5. Samuel Bandilla	15 October 2004	TU organizer, Leyte Metropolitan Waterworks District Employees' Association
6. Jhaivie Basilio	16 November 2004	Hacienda Luisita, Inc.
7. Adriano Caballero	16 November 2004	Hacienda Luisita, Inc.
8. Jun David	16 November 2004	Hacienda Luisita, Inc.
9. Jesus Laza	16 November 2004	Hacienda Luisita, Inc.
10. Jaime Pastidio	16 November 2004	Hacienda Luisita, Inc.
11. Juancho Sanchez	16 November 2004	Hacienda Luisita, Inc.
12. Jessie Valdez	16 November 2004	Hacienda Luisita, Inc.
13. Ronnie Almoete	5 February 2005	Member, Bayan Muna/Urban Poor sector
14. Abelardo Ladera	3 March 2005	Councilor – Tarlac City; Member, Bayan Muna/Convenor, Kapitbisig support campaign for the families and victims of Hacienda Luisita Massacre
15. Samuel Dote	11 April 2005	Member, Municipal Association of Catbalogan Employees affiliated with the Confederation for Unity, Recognition and Advancement of

Name	Date killed	Organization and position
		Government Employees – Western Samar (COURAGE-WS)
16. Manuel "Edwin" Bargamento	13 April 2005	Organizer – Negros Federation of Sugar Workers
17. Mario Fernandez	10 June 2005	NFSW-FGT organizer
18. Manuel Batolina	13 June 2005	NFSW-FGT organizer and local federation president of NFSW in Haciendas Navidad, Candelaria and Begonia
19. Antonio Pantonial	6 July 2005	Member of the NFSW
20. Nilo Bayas	17 July 2005	Vice-Chairperson, Samahan ng Mag-uuling sa Sapang Bulak, Dona Remedios Trinidad, Bulacan, Provincial Health Office employee in Malolos, Bulacan under Malaria Control Program
21. Ryan Cabrigas	1 September 2005	Employee, Samar Electric Cooperative II
22. Benedicto Gabon	1 September 2005	Employee, Samar Electric Cooperative II
23. Engr. Dalmacio Cepeda	1 September 2005	Employee, Samar Electric Cooperative II
24. Dante Teotino	13 September 2005	Worker/union member
25. Diosdado Fortuna	22 September 2005	President of the Nestlé Employees' Union
26. Ronald Andrada	24 September 2005	Member, KADAMAY
27. Victoria P. Samonte	30 September 2005	Regional Vice-Chairperson, KMU CARAGA President, Andres Soriano College Employees' Union
28. Jimmy Legaspi	1 October 2005	Union President, BOD Sierra Madre Bus Line Co.
29. Rolando Mariano	7 October 2005	Former president, TARELCO 1 Employees' Union
30. Florante Collantes	15 October 2005	Secretary-General, Bayan Muna-Tarlac
31. Ramon Namuro	15 October 2005	Staff, AJODOM-PISTON
32. Ricardo Ramos	25 October 2005	President, CATLU
33. Federico de Leon	26 October 2005	President, PISTON – Bulacan and Provincial Coordinator, Anakpawis
34. Errol Sending	19 November 2005	KADAMAY, Pampanga
35. Rommel Arcilla	21 November 2005	Member, Bagong Alyansang Makabayan Community Relations Officer, Pampanga Electric Cooperative II
36. Albert Terredaña	29 November 2005	President, Department of Agrarian Reform Employees' Association (DAREA); Convenor of the Provincial Organizing Committee of COURAGE-ABRA
37. Junico Halem	6 December 2005	Bayan Muna Municipal Coordinator
38. Jess Alcantara	16 December 2005	Former Municipal Coordinator and former Secretary of the TODA
39. Noel Daray	25 December 2005	Member, Association of Workers in WL Food Inc.

Appendix II

Alleged abductions and disappearances

Date/time	Place	Perpetrator	Account of incident	Victims' profile	Status
8/1/2006; 10 a.m.	Ormoc, Leyte	8th Infantry Division under Major General Bonifacio Ramos	Abducted by eight men wearing bonnets, detained and interrogated for almost five hours on his alleged connections to the New People's Army (NPA), the military threatened to harm him and his family if he did not cooperate	Rafael Tarroza – Regional Chairman of National Federation of Labor Unions (NAFLU–KMU)	Returned to his family after six hours after he told the military agents that he will cooperate
10/1/2006; 7.20 a.m.	Penaranda, Nueva Ecija	Suspected military elements	Abducted by armed men while on his way to work, found dead the following day	Armando Leabres	Found dead
29/1/2006	Lemery, Batangas	30 elements of the Armed Forces of the Philippines (AFP)		Francis Noel Desacula	Missing
1/2/2006; 8 p.m.	San Idefonso, Bulacan	24th Infantry Battalion	Abducted by the 24th Infantry Battalion of the Philippine Army (IBPA) after the massacre of CV Tamayo Farms	(1) Robin Solano, worker of the farm; (2) Ricardo Valmocina, caretaker of the Tamayo Farm	Missing
6/3/2006; 10 p.m.	San Idefonso, Bulacan	Suspected military elements	Abducted by suspected military men from the 24th IB in the field near Solid Development Corp.	Rogelio Concepcion, acting union president of Solid Development Corp. Workers' Association (SDCWA). His predecessor also went into hiding after the military from 24th IB of 7th ID of the Philippine Army camped inside the company in December 2006.	Missing, his wife refused to meet anybody in person or execute an affidavit for fear
3/4/2006; 11 a.m.	Tarlac City, Tarlac	Unidentified military elements	According to witnesses, was abducted by military men and brought to Aqua Farms	Ronald Intal, charcoal maker inside the Hacienda Luisita, suspected as NPA sympathizer	Missing
17/04/2006; 9.30 a.m.	Dona Remedios Trinidad, Bulacan	56th Infantry Battalion under Lt Ferdinand Basas, members of the RHB	Members of the RHB assaulted and tortured the victims, then abducted Mendiola, Leuterio, Virgilio and Teresita Calilap. Afterwards, 26 members of the 703rd Brigade of the AFP came and forced 15 other residents to ride	(1) Virgilio Calilap – organizer (2) Teresita Calilap – wife of Virgilio (3) Bernabe Mendiola – the company's operations manager (4) Oscar Leuerio –	

Date/time	Place	Perpetrator	Account of incident	Victims' profile	Status
			a truck and were brought to a chapel, where they were given lectures on anti-insurgency and anti-communist propaganda. They were released thereafter. Those who remain missing were accused by the military as NPA rebels	mine worker	
24/06/2006	Guiginto, Bulacan	Unidentified men	Abducted by unidentified men on board a van, suspected as military agents	Leopoldo Ancheta	Missing
3/07/2006; 11 a.m.	Angeles City, Pampanga	Philippine National Police – CIDG – Angeles City 69th and 56th Infantry Battalions	Abducted by the combined forces of the PNP and AFP when they were supposed to meet and discuss important issues in the transportation industry. They were tortured before being surrendered to the PNP Angeles headquarters. All were released except Lipio, who is still under the custody of the military	(1) Emerito Gonzales Lipio, member of PISTON Nacional Council and PISTON leader in Bulacan (2) William Agilar, PISTON Central Luzon and KMU organizer	Emerito Gonzales Lipio is still under AFP custody. The rest of the victims were released from detention

CASE NO. 2473

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

**Complaint against the Government of United Kingdom
concerning Jersey
presented by
the Transport and General Workers' Union (TGWU)**

Allegations: The complainant organization, the Transport and General Workers' Union (TGWU) alleges that a new statute, the Employment Relations (Jersey) Law 2007 (ERL), violates principles of freedom of association, more particularly as regards the registration of trade unions, the settlement of collective disputes and the right to strike

1464. The complaint is contained in a communication dated 16 December 2005 from the Transport and General Workers' Union (TGWU). The TGWU submitted additional information in a communication dated 15 February 2007.

1465. The Government submitted its observations in a communication dated 26 February 2007.
1466. 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 complainant's allegations

1467. In a communication dated 16 December 2005, the TGWU, representing the majority of the unionized workforce of the Island, alleges that a new statute not yet in force, the Employment Relations (Jersey) Law (ERL), violates principles of freedom of association, more particularly as regards the registration of trade unions, the settlement of collective disputes and the right to strike. The TGWU also alleges the lack of provisions prohibiting employers' financial inducement to encourage workers to give up trade union representation.
1468. The ERL was approved on 17 May 2005 and was at the time of the complaint waiting for the approval of the Privy Council and the Employment and Social Security Committee (ESSC) was consulting on its proposed codes of practice. During the course of debate over the passing of the ERL, the TGWU made several representations and although some changes were made, the TGWU remains deeply concerned, and an emergency motion criticizing the law was carried on 12 July 2005 by the TGWU delegate conference. In its communication dated 15 February 2007, the TGWU indicates that the UK Government has endorsed this legislation through its Privy Council and it is due to be enacted in Jersey as law in the middle part of 2007. The codes are yet to be produced for consultation.
1469. The complainant states that the ERL provides a system of legal identification and registration of trade unions and employers' associations, clarifies the legal status of these bodies and creates a legal dispute resolution process. The codes of practice for their part cover four aspects: recognition of trade unions, resolving collective disputes, balloting for industrial action and limitations on industrial action.
1470. The complainant argues that there are several respects in which the ERL is not compatible with ILO Conventions namely, registration, the settlement of collective disputes and the right to strike. The complainant then considers further points raised during the consultation process on the codes of practice.

Registration

1471. According to the complainant registration under the ERL functions as a gateway to key statutory rights. Under article 7, a trade union or an officer or member of a trade union "shall not do any act in furtherance of any purpose for which the union ... is formed unless it is registered in accordance with this Law". A trade union which is not registered is incapable of suing in its own name (article 16(4)), nor does it have any immunities from tort law in relation to trade disputes (article 20(1)), and the limitation of damages in tort proceedings is only available to registered trade unions (article 21(1)).
1472. The decision as to whether to register a trade union and whether to cancel the registration is made by a Registrar appointed by the Employment and Social Security Committee (ESSC) (article 8(1)) and the complainant argues that no provision is made to ensure the independence, impartiality or expertise of the Registrar.
1473. Under article 10(1), the Registrar is under a duty to refuse to grant an application for the registration of a trade union if "any of the purposes of the union ... is unlawful". No further

criteria are laid down as to what would constitute an unlawful purpose of a union, except that restraint of trade is expressly stated not to render the purpose unlawful (article 17(1)).

- 1474.** The complainant adds that the Registrar also has powers to cancel the registration, either of his or her own motion or on the application of any person with sufficient *locus standi*. Registration must be cancelled if any of the purposes of the trade union are unlawful, and it may be cancelled if the registration has been obtained by fraud or mistake, if the union has failed to inform the Registrar of any changes in the constitution, if it has ceased to exist, or if it has failed to comply with a prescribed requirement despite having had at least 21 days' notice from the Registrar (article 14).
- 1475.** The complainant states that there is no indication of whether the Registrar makes this decision only on the basis of the express purposes of the union as stated in its constitution, or by considering the constitution as a whole, or by considering whether any purposes may be implied from the conduct of the union. Thus, according to the complainant, a union with a history of unlawful conduct perhaps fortified by policy decisions of its annual or (in the case of the TGWU) its biennial delegate conference might find registration refused or cancelled. In the case of cancellation, given that the registration was originally granted, there is also a danger that activities subsequent to registration of the union will be taken into account.
- 1476.** The complainant argues that the only procedural safeguard is in the form of an appeal to the Royal Court (article 15), which may confirm or reverse the decision. The nature of such an appeal is undefined thus opening the possibility that the Royal Court may consider that it may only review rather than rehear the case. If the former view is taken then the Registrar's decision may only be overturned if it is the product of an error of law or if it is so unreasonable that the court holds that no Registrar properly directing himself on the law and the facts could have reached the decision appealed against.
- 1477.** In the view of the complainant, the registration provisions are highly problematic because of the extent of discretion left in the hands of the Registrar, aggravated by the absence of procedural safeguards or guarantees of independence or objectivity. This is particularly so in determining whether the purposes of a trade union are unlawful. Most importantly, according to the complainant, it is well known from the experience of the law in the United Kingdom that a system which bases the lawfulness of strike action on immunities from tort gives rise to a large number of uncertainties. The ERL does not confer any positive right to strike. Instead it gives specific immunity to an act which would otherwise be tortious by reason of an inducement of breach of contract, or a threat to induce a breach of contract if done by a registered union in contemplation or furtherance of an employment dispute (article 19). A union may not appreciate that industrial action organized by it is unlawful until the matter has been determined by a court (by way of example, the complainant refers to several court judgements). The nature of the protection conferred by the proposed immunity is thus, according to the complainant, very weak indeed.
- 1478.** Furthermore, the complainant argues that the circumstances in which the protection is conferred is yet weaker. It only applies to acts done "in contemplation or furtherance of an employment dispute". An employment dispute is either an individual employment dispute as defined in article 1(1) of the Employment (Jersey) Law 2003, or a collective employment dispute.
- 1479.** An individual employment dispute is defined by article 1(1) of the Employment (Jersey) Law 2003, as "a dispute between an employer or employers and an employee or employees in the employment of that employer or employers which is connected with the terms of employment or with the conditions of labour of any of those employees or with the rights and duties of an employer or an employee under this Law but does not include a dispute as

to the entering into, or the failure to enter into, a contract of employment with a person”. That Law covers various matters including unfair dismissal but it remains unclear according to the complainant as to whether a dispute over the dismissal of an employee would constitute an individual employment dispute where issues of unfair dismissal have not arisen and where the real dispute might be better described as concerning the right of the employer to dismiss at all – a right which derives from contract and not statutory unfair dismissal. Furthermore an individual employment dispute plainly excludes the hiring of new workers.

- 1480.** According to the complainant, a dispute is only collective under the ERL if, inter alia, a collective agreement exists between the employer or employers and the trade union (article 5). The complainant notes that curiously, a collective agreement is defined (article 1) as one between an employer or employers representative of a substantial proportion of employers in the trade or industry and “employees who are representative of a substantial proportion of the employees engaged in the trade or industry concerned”. Thus an agreement between an employer and a trade union would appear not to be a “collective agreement” under the proposed law. More significantly, if the employees did not represent a substantial proportion of those in the trade or industry, an agreement would not count as a collective agreement. Again therefore, it will be seen that the dispute with Gate Gourmet with whom there was a collective agreement but the employees represented only a tiny proportion of those involved in aircraft catering might well not qualify. Furthermore, the proposed law requires that the collective agreement “exists”. An employer could easily deny a union the immunity for industrial action by terminating (in accordance with its terms or otherwise) all collective agreements with the union. It appears that if there is no collective agreement as defined, any industrial action would be unlawful unless it came within the definition of an individual employment dispute.
- 1481.** The complainant argues that a trade union might therefore run the risk of refusal or cancellation of registration if the Registrar considers that its purposes include the taking of industrial action which is unlawful under these provisions. A union which, for example, avowed a policy that it would take industrial action even where it had not achieved a collective agreement or one had been terminated might find its registration refused or cancelled on the basis that it had an unlawful purpose. This is only one example of the extent of the Registrar’s discretion, according to the complainant.

Resolution of collective employment disputes

- 1482.** The complainant states that the ERL provides for collective employment disputes to be brought before the Jersey Employment Tribunal (JET) either with the consent of both parties, or by one party if all other available procedures have been applied unsuccessfully and a party to the dispute is acting unreasonably in the way in which that party is or is not complying with an available procedure. Available procedures include procedures in a collective agreement, a relevant contract of employment or a relevant handbook for employees, or an approved code of practice or a procedure which is established with the relevant trade or industry (article 22). The TGWU states that it has already made submissions to the Government that the inclusion in this list of an employer’s handbook permits unilateral imposition of a procedure.
- 1483.** According to the complainant, the JET may make a binding award with the consent of both parties, or a declaration that a party is not observing relevant terms and conditions, or as to the interpretation of any disputed terms and conditions of a collective agreement (article 23). Generally, a declaration simply states the law. In this case, however, it is expressly stated that the declaration will have the effect of incorporating into individual contracts of employment the terms and conditions specified in the declaration, and these will remain until varied by agreement between the parties, by subsequent declaration, or

until different terms and conditions of employment are settled through the machinery for the settlement of terms and conditions in the relevant trade, industry or undertaking (article 24).

1484. The inclusion of the declaration as a remedy is an express response to earlier objections to the effect that the collective dispute provisions amounted to unilateral binding arbitration. It was stated then that the use of the declaration removed this risk. The complainant states that it cannot agree. The JET can make a declaration which incorporates the JET's interpretation of the disputed terms and conditions into the individual contracts of employment. This is still tantamount to binding arbitration. This is particularly problematic where a union has taken industrial action after agreement could not be reached under one of the named procedures. In this circumstance, the employer has the power to refer the dispute to the JET on the grounds that the union is acting unreasonably as defined; and JET has the power to incorporate its interpretation of the terms and conditions into individual employees' contracts. This is clearly a case of unilateral binding arbitration according to the complainant.

The right to strike

1485. The complainant argues that as has been already stated, the ERL has not given workers a positive right to strike, but instead followed the British model of providing immunities from tortious action for acts in contemplation and furtherance of a trade dispute (article 19). Moreover, a collective employment dispute is defined more narrowly than in the United Kingdom in that it requires, among other things, that a collective agreement must exist between the employer or employers and the trade union (article 5), leaving a gap in cases where no collective agreement yet exists or where one has been terminated. In addition, unlike the British legislation, there is no express provision for the lawfulness of picketing and no protection for workers dismissed while on strike.

1486. The complainant is of the opinion that the ERL does provide, in article 18, that an employee is not liable in damages to his or her employer for a breach of contract consisting of a cessation of work, a refusal to work, or a refusal to work in a manner lawfully required by his or her employer where this is in contemplation or furtherance of an employment dispute. However, article 18(2) specifies that this does not affect any other right or remedy of the employer or any other liability of the employee arising out of a breach of a contract of employment. One such implication is that the employee could be held to have committed a fundamental breach of contract, justifying dismissal at common law. Moreover, the Employment (Jersey) Law 2003, contains no specific protection against unfair dismissal during the course of lawful industrial action, apart from the general protection for unfair dismissal. In the absence of such protection whilst the bringing of an unfair dismissal claim by a striker is not debarred, it is also overwhelmingly likely to fail because the employer will assert that the dismissal was justified by the striker's conduct in wilfully refusing to carry out his obligations under the contract and/or in seeking to disrupt the employer's business (*Ticehurst v. British Telecommunications pic* [1992] ICR 383 CA), thus amounting to a fundamental and repudiatory breach of contract or, at the least, gross misconduct.

1487. The complainant also believes that ILO Conventions also require that workers dismissed for taking part in a lawful strike should be entitled to reinstatement if the dismissal is unfair. Although the Employment Law (Jersey) Law 2003, does not expressly preclude an application for unfair dismissal by employees dismissed due to industrial action, article 76 only provides a remedy of compensation and not reinstatement.

The financial inducement

1488. Moreover, concerning employer inducement, the complainant states that despite the finding by the European Court of Human Rights in *Wilson and Palmer v. United Kingdom* [2002] IRLR 128, that law permitting an employer to make financial inducements to encourage employees to give up trade union representation was a breach of Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), there is no provision prohibiting such inducements in Jersey legislation.

The codes

1489. The complainant first describes the status of the codes, and then describes each of the four codes, drawing on a comprehensive response prepared to the consultation papers on the codes.

1490. According to the complainant, as a result of representations made by the TGWU, the ERL was amended to give codes of practice the status of an Order in Council, or subordinate legislation, which means that they cannot come into force sooner than 28 days after the Order is before the States, which may annul it. Moreover, a code cannot be approved that contravenes an international obligation that is binding on Jersey. Before approving a code, the ESSC must publish a notice inviting interested persons to inspect the proposals and to make representations, which must be considered by the Committee when deciding whether or not to approve the code.

1491. The complainant considers these as welcome amendments. However, as well as giving the codes a more robust legal basis, the amendments have reinforced their function as integral to the operation of the legislation. Although failure to observe an approved code of practice does not in itself make a person liable to proceedings, immunities from liability are withdrawn if a code of practice provides for a holding of a ballot of members and the action is not taken in accordance with such a ballot. A trade union is also not protected from liability in tort for action that is defined in an approved code of practice as conduct that is not reasonable when taken in respect of an employment dispute. However, this reinforced function does not apply to recognition, which still cannot be enforced in a court of law. Although disputes can be referred to the Jersey advisory and conciliation service, it only has power to make recommendations. And because a collective employment dispute requires a collective agreement to be in place, a dispute over recognition would not in itself be a collective dispute giving unions immunity against tortious action in respect of any industrial action taken to achieve recognition. This asymmetry within the legislation is of concern.

1492. Concerning code 1 and recognition of trade unions. As regards representativeness, the complainant states that a union should be entitled to be recognized if it can demonstrate that 50 per cent plus one of the employees in the bargaining unit are members of the union, or if it can show in a ballot that 50 per cent plus one of the employees are in favour of recognition. The Employment Forum (a tripartite consultative body) in its report of 1 February 2005 partially accepts these figures, proposing, however, that if the employer does not accept the union's estimate of its membership, or if membership is below 50 per cent plus one, then a ballot is necessary, and a ballot can only be held if at least 35 per cent of the bargaining unit are in membership of the applicant union or would be willing to take up membership if recognition were granted. This is significantly higher than the figure in Britain, where a union is entitled to call for a ballot where 10 per cent of the bargaining unit are in membership and there is other evidence indicating a majority would be likely to support recognition in a ballot.

- 1493.** According to the complainant, a number of concerns exist about the process of achieving recognition, and in particular the supervision of the process, the ballot and the resolution of disputes. All of these remain to be addressed, as does the proposed exemption for small businesses, employing ten or fewer employees, which would have the effect of excluding 80 per cent of the island's employers. According to the complainant, in order to comply with ILO obligations, Jersey is required to "encourage and promote the full development" of collective bargaining. To exclude such a large proportion from the procedures would cast doubt on that policy. Moreover, according to the complainant, the ILO considered that all unions should have the right to make representations on behalf of their members and represent them in individual grievances. This entails that, at the very least, there should be a right to be represented even in workplaces with ten or fewer employees.
- 1494. Concerning code 2 and the procedure for resolving disputes.** The complainant states that the issue of binding arbitration has been dealt with above. The further major difficulty is the definition of reasonableness for the purposes of the code, particularly since a union may lose its registration and hence its immunities for actions in tort if it is acting unreasonably in its use of procedure and the Registrar considers that acting in that way was one of the union's purposes. The code would need to provide very clear guidance as to what is reasonable and unreasonable in this respect.
- 1495. Concerning code 3 and balloting on industrial action.** The Employment Forum suggests that the code should not be overly prescriptive so as to avoid conflicting with provisions in unions' own rule books. According to the complainant, this is a welcome recognition of the importance of union autonomy. However, the major point of contention remains that of notice before industrial action. The code provides that employers should be given such notice as necessary to warn customers, ensure the health and safety of employees or the public or to safeguard equipment which might otherwise suffer damage from being shut down or left without supervision. It gives, as an example, the number, category or workplace of the employees concerned. While the Employment Forum suggests that it would be reasonable to expect an employer to be provided with enough information to work out how the business will be affected, it is doubtful whether precise information as to the numbers, categories and workplaces of employees concerned is necessary to achieve that objective. Experience in England and Wales has shown in the last few years that allegations of inaccuracy in ballot notices is the principle ground on which injunctions are sought to restrain unions from industrial action. Thus earlier this year in an unreported decision (*University of North London v. NATFHE*) an injunction was granted because though the union had specified the grade of every lecturer to be called out on a one day strike and identified the exact number and specified in relation to each which department or subdepartment he or she worked in so that by consulting the timetable the university could ascertain every lecture which would not be given and the room in which it should have been delivered, the failure to identify at which site each lecturer had his or her desk was a breach of the requirement to specify workplaces.
- 1496.** According to the complainant, particularly serious is the link between the requirements for balloting and the retention of trade union immunity. article 20(2) of ERL provides that immunity is lost if an approved code of practice provides for the holding of a ballot and the ballot has not been held in accordance with the approved code, or a majority of those balloted do not support the industrial action. This means that even if a majority of those balloted support the action, a union could lose its immunity and a strike could become unlawful if even a small detail of the approved code has not been complied with. In particular, if a union does not give sufficient information to the employer to enable it to make plans to mitigate the effect of the strike, then even an overwhelming majority in favour of the action will not save it from unlawfulness. The experience in the United Kingdom bears ample testimony to the ability of employers to find breaches in the

balloting provisions in British legislation and on the basis of this to gain an injunction or other remedy to prevent the strike.

- 1497. Concerning code 4 and limits on industrial action.** This code deals with three proposed limits: essential services, secondary action and picketing. The complainant deals particularly with the last two.
- 1498. Secondary action.** The code of practice states that it would be unreasonable to take industrial action in furtherance of a collective dispute in the following circumstances: (i) where action is taken in support of a third party; (ii) where employees are not directly involved; (iii) where the dispute is not with the same employer; (iv) where the employees are not at the same place of work as those directly affected. The Forum suggested that all four could be summed up in a single definition of secondary action, namely “where the employees are not a party to the dispute”. Article 20(3) provides that an immunity is lost if the conduct of a trade union does not conform to the definition in a code of practice of reasonable conduct when done in contemplation or furtherance of an employment dispute. Thus secondary action as here defined would render a strike unlawful and expose the union to liability in tort.
- 1499.** According to the complainant, the ILO has reiterated on numerous occasions that workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute, and that they should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful. A ban on secondary action is also in breach of the European Social Charter. It is clear that the effective ban on secondary action, through the fact that it is classed as unreasonable behaviour and therefore has the effect of removing union immunities, is in breach of Jersey’s international obligations. Thus a union which had as a policy of upholding Jersey’s international obligations by supporting secondary action where the protection of the interests of its members required might well find its registration denied or removed. This would appear to be inappropriate, to say the least.
- 1500. Picketing.** The code of practice provides that picketing is considered reasonable only when it is for one of the following two purposes: to peacefully obtain and communicate information; or to peacefully persuade a person to work or not to work. The code goes on to state that picketing in these two circumstances would be protected by immunities if all of those union members who are likely to be called to take part in the action have been balloted (in accordance with the code) and the majority of those are in favour of taking (or continuing) industrial action.
- 1501.** However, since, as mentioned above, there is no express provision in the ERL for picketing, the immunities mentioned are only for the torts specified in article 19, namely inducement or threat of inducement or breach of contract. This means that even if all the conditions are satisfied, namely the picket is supported by a ballot and its aim is to peacefully persuade or communicate information, it could still entail the commission of a civil wrong. Indeed the code states expressly that picketing is not protected from civil suits such as “obstruction of a path, road, entrance or exit to premises; interference (e.g. because of noise or crowds) in the rights of neighbouring properties (i.e. private nuisance) and trespassing on private property”. It might be very difficult to hold a picket without some obstruction of a path, road, entrance or exit to premises and if these are unlawful under Jersey law, the union could not picket lawfully. It is our view that to give no immunity from such liability runs the risk of breaching the right to freedom of expression in Article 10 and/or freedom of assembly in Article 11 of the ECHR.
- 1502.** Suggestions that the right be further restricted to the employees’ own place of work and to a maximum of six pickets received some support, but the TGWU’s submission that it

would be preferable to use a criterion of peacefulness is noted by the Employment Forum. It is not clear, however, which approach is to be used.

B. The Government's reply

- 1503.** In its communication dated 26 February 2007, the Government seeks to provide a summary of Jersey's constitutional position and a chronology of events, and identify key issues arising from the complaint.
- 1504.** Regarding Jersey's constitutional position, the Government indicates that Jersey is a dependency of the British Crown. It is politically and legally separate from the United Kingdom. By adoption in the States of Jersey, its parliament, it passes its own laws, which require Royal Assent from Her Majesty the Queen before coming into force. Assent to the Employment Relations (Jersey) Law 2007 (the ERL) was given by Her Majesty in Council on 14 December 2006. Although Jersey people have no representation in the Westminster Parliament, the United Kingdom, as the sovereign state, has ultimate formal responsibility for the Island's international relations.
- 1505.** The Government provides the Committee with a detailed chronology of events, starting in November 1997, when the (then) ESSC was given responsibility for industrial relations matters and was charged by the States of Jersey (the States) to introduce an industrial relations strategy for the Island to overcome the shortcoming of existing employment legislation. In November 1998, it lodged a report on minimum wage legislation based on research that had been carried out during the previous year. The same month, following substantial research into employment law and industrial relations practices worldwide, the ESSC issued a detailed consultation document which was circulated Island-wide; a number of meetings were held to seek the views of the community, including trade unions, employer associations and other relevant groups and individuals.
- 1506.** In May 1999, the drafting brief for the Minimum Wage Law was considered by the Island's Law Draftsman who indicated that this law could not be effectively implemented until such time as basic employment legislation supporting it (and also a system to deal with its enforcement) was in place. In December 2000, responses to the first consultation document were collated and presented to the States; it proposed to introduce legislation to facilitate the introduction of the minimum wage, establish acceptable contractual standards and revise the Industrial Disputes (Jersey) Law 1956. The proposition was subsequently debated and approved by the States Assembly.
- 1507.** In July 2001, the ESSC issued a second consultation document which examined trade union legislation and legal dispute resolution procedures in more detail, using expert advice drawn from both inside and outside the Island and including a comparative study of legislation and systems in other jurisdictions (particularly smaller states). It also highlighted the general approaches worldwide and analysed the status of trade unions, trade union regulation and governance, the regulation of employer-employee relationships, the definition and regulation of legitimate industrial action and the institutional frameworks.
- 1508.** In July 2002, a report was presented to the States which confirmed that responses to the second consultation document showed reasonable consensus on the general approach to new legislation in that it should be (i) non-adversarial, with (ii) minimal legislation, and have (iii) clear definitions/a simple registration process. The law drafting brief for the new ERL drew heavily on the report which the States had received.
- 1509.** In November 2002, the Regional Secretary of the TGWU (South and West), was contacted soon after his appointment to this role by the Controller (the Chief Executive Officer) of

the Employment and Social Security Department to inform him of progress in the employment legislation and of the proposals for employment relations legislation. He was encouraged to meet further with the Employment and Social Security Department officials to give his views. In July 2003, the Employment (Jersey) Law 2003 was debated and adopted by the States.

- 1510.** In September 2004, a draft of the ERL was prepared and the ESSC circulated it widely for consultation. The first draft was later revised in the light of consultation responses. Concurrently, the Employment Forum began consultation on the codes of practice required to support the ERL. The Forum has a balance of representatives (three employer, three employee and three independent). The outcome of the Forum's consultation was presented to the ESSC in a report on the proposed content of the codes, which was appended to the ERL when it was first presented to the States. On the basis of that report, draft codes of practice have since been prepared and consulted upon and a current working draft of the codes of practice is available.
- 1511.** On 22 March 2005, the ERL was due to be debated by the States, as was an amendment to the draft law proposed by Deputy G.P. Southern (a member of the States Assembly who acknowledged his proposed amendments were being brought on behalf of the TGWU). The States approved a request by Deputy G.P. Southern to refer the ERL back to the ESSC for further consultation. During that extended period of consultation, although discussions focused on the TGWU, all of those who had previously been consulted received a copy of the revised ERL and draft codes of practice and were encouraged to submit any further comments. The ESSC gave priority to the discussions that took place with the TGWU over the period of further consultation with the genuine hope that some clarification and measure of agreement could be achieved. Although agreement could not be reached on every point, the ESSC moved its position on one aspect of the proposed amendment (namely mandatory and prohibitory injunctions) and found an acceptable solution with the TGWU on another aspect (namely employees' handbooks). That consultation period ended in full understanding between the TGWU and the ESSC of where compromises could and could not be found. The ESSC tried as far as possible to put forward legislation which reflected the general views of the community, based on consultation outcomes. Remaining issues that could not be agreed were proposed to the States by Deputy G.P. Southern. As a result, the main points of difference were to be decided by the States by the democratic process.
- 1512.** On 17 May 2005, the ERL was debated and adopted by the States. Deputy G.P. Southern's remaining amendments were not debated as he withdrew them. On 1 July 2005, the Employment (Jersey) Law 2003, came into force. This law amended and consolidated enactments relating to employers' obligations to specify terms of employment, the payment of wages, and the notice required to terminate contracts of employment; provided for compulsory minimum periods of leave and rest time for employees; provided employees with rights not to be unfairly dismissed and to be paid a minimum wage; and repealed and replaced enactments for the establishment and jurisdiction of Tribunals to hear and determine employment disputes.
- 1513.** On 4 October 2005, Deputy G.P. Southern lodged a report and proposition asking the ESSC to review the ERL, the Employment (Jersey) Law 2003, and the draft codes of practice in order "to identify if there were any provisions which denied employees the fundamental rights to recognition and representation, or that might breach Conventions Nos 87 and 98, and, if any such provisions were identified, to take the necessary steps to remedy the situation". That report and proposition appended the Hendy/Fredman Opinion (the Opinion), which has now been submitted to the ILO by the TGWU as its complaint.

- 1514.** On 21 March 2006, the Minister for Social Security (the Minister) (previously the ESSC) presented the States with a response to that Opinion, stating that a thorough review had been undertaken, expert and legal advice had been taken, and that it was the Minister's belief that the primary legislation and the draft codes of practice achieved the right balance. The report and proposition was withdrawn by Deputy G.P. Southern on 23 May 2006, and was not debated.
- 1515.** On 16 May 2006, Deputy G.P. Southern withdrew a proposed amendment to the draft ERL relating to the recognition of unions in favour of an amendment presented by the Minister. Deputy G.P. Southern also proposed an amendment to the Employment (Jersey) Law 2003, relating to employees' "rights to representation" in a grievance or disciplinary matter. This was rejected by the States (by 24 votes to 23).
- 1516.** On 4 July 2006, the Minister's proposed amendment to the ERL relating to the recognition of unions was approved by the States. Broadly, this amendment provides that the JET can make an enforceable declaration on recognition and collective bargaining in relation to pay, hours and holiday. It also limits the extent of these new provisions to employers with 21 or more employees.
- 1517.** Regarding the key issues, the Government states that the ERL should be viewed as part of a structured programme of legislative reform: (1) Jersey has generally had a very good industrial relations record for decades and it is considered that the ERL clarifies the legal situation and improves on its forerunner, the Industrial Disputes (Jersey) Law 1956. (2) The debate on the priority to be given to employment and employment relations legislation took place in the States Assembly in December 2000. The draft legislation was prepared following extensive consultation with social partners, with a view to conferring rights within a balanced legislative framework. It is the product of a sound democratic process and draws on aspects of the United Kingdom and the Isle of Man legislation, and also on codes of practice and advisory guides provided in the United Kingdom, Isle of Man and Northern Ireland. (3) Jersey Advisory and Conciliation Service is available to advise, assist and train employers, employees and unions with guidance on the law, model employment relations procedures and any assistance required with balloting, negotiations, and dispute resolution generally. (4) The legislation is intended to encourage discussion and resolution of disputes as quickly as possible, with a minimalist legal framework that is appropriate to the Island's small community. Confrontation between unions and employers is usually more avoidable in a small community because there is better awareness of the other party's position and of the views of the community at large. The legislation accordingly provides a simple and straightforward system of legal identification and registration of trade unions and employer associations, to give those bodies legal characteristics, rights and obligations that they do not have in customary law. (5) One of the major tasks in preparing this legislation was to reconcile the freedoms of individuals and employers with the freedoms of unions. The TGWU view which emerged during the discussions was that the legislation should provide mandatory recognition of trade unions for collective bargaining purposes and that all other aspects should be voluntary. One major concern appeared to relate to balloting procedures as the TGWU rule book allows a show of hands as acceptable balloting. However, the consultation outcomes endorse the procedure set out in the draft code of practice, i.e. where industrial action is contemplated, it should be decided in a secret ballot by the union members as a whole. (6) Each jurisdiction sets a legal framework which is geared to the needs of its own industrial relations traditions and practices, e.g. some outlaw strikes for the duration of a collective agreement. The ERL reflects Jersey's experiences and needs (for example, the unique needs of a small island to maintain supplies and services to the population of less than 90,000, few opportunities to borrow resources from other jurisdictions at times of crisis, a large percentage of small businesses (75 per cent with five or less employees and 93 per cent with 20 or less) and only one union with a full-time officer in the Island). (7) The ERL

contains provisions in its Schedule (see Sch 2 (6)) which make dismissal for official industrial action automatically unfair. (8) The Minister recognizes that the ERL forms part of an ongoing process of reform, and that the community may want to see it amended from time to time. Engagement with all the social partners is viewed as a vital part of that process. The Minister is aware that there is still much work to do in developing other appropriate employment legislation for Jersey, and work is well under way to introduce necessary provisions relating to business transfer, redundancy, maternity and paternity rights. Consultation on business transfers legislation closed in August 2006 and formal consultation on a draft Discrimination Law, and Race Discrimination Regulations began in July 2006.

- 1518.** The Island hopes to provide comfort on some of the points raised. In doing so, it is to be emphasized that the opinion submitted by the complainant has been very carefully considered. Their views have not been entirely accepted but even where this is so, the Island authorities have noted their undoubted experience in the matters under review.
- 1519.** On the subject of registration, the compulsory registration system borrows from the practice of other jurisdictions which have received favourable response from the ILO (e.g. 1992, Isle of Man – “the Committee considers that the compulsory registration system established by the 1991 Act does not run counter to the requirements of Convention No. 87”) and addresses these conclusions in relation to the cancellation of registration (see article 14 of the ERL). Attention is drawn to various safeguards in relation to registration: (1) the Registrar is an official who is independent of the Minister; (2) a decision reached by the Registrar is subject to a right of appeal which is compliant with Article 6 of the ECHR; (3) whilst concerns have been raised regarding the possibility of deregistration in the case of a trade union on “unlawful purpose” grounds, it is submitted that this is a very narrow head. It can be easily distinguished from a trade union which was set up for lawful purposes but acts unlawfully. It is understood that it would not be possible for the Registrar to lawfully deregister such a trade union in such circumstances; (4) the Minister is keen to emphasize that all trade unions existing at the time of the ERL coming into force would be registered as a matter of course.
- 1520.** Concerning the declarations, the Government states that, whilst noting carefully the cogent arguments expressed to the contrary, the Minister is not persuaded that the role of collective bargaining is usurped by the ability of the JET to make a declaration. It is noted that: (1) a unilateral reference may only be made where one party is held to be acting unreasonably by the JET; (2) the JET is a judicial (rather than an administrative) authority. This is considered relevant when anticipating the nature of any such declaration and in distinguishing the position from adverse comments in the *Digest of decisions and principles of the Freedom of Association Committee*, 1996; (3) the power of the JET does not extend to fixing the amount of wages or the content of other terms which have not been agreed by collective bargaining; (4) the terms of any declaration shall apply until the parties agree alternative terms.
- 1521.** Regarding reinstatement, the Government indicates that one particular issue discussed in the complaint is an employee’s right to reinstatement when a dismissal is found to have been unfair, in this case, on the basis of having taken industrial action. The ESSC took advice on this matter in the early days of preparing the Employment (Jersey) Law 2003. In its December 2001 report, the Employment Forum recommended that this provision should not be included in Jersey’s legislation; “Research has shown that in other jurisdictions there is provision for Tribunals to order that the dismissed employee should be reinstated to their previous employment after a decision of unfair dismissal has been determined. Having carefully considered this issue the Forum is of the opinion that there is nothing to be gained by having such a provision present in Jersey legislation. Of course, should both parties wish to enter into a new contract of employment there would be nothing to prevent

this.” The ESSC accepted the recommendation and the 2003 Law was drafted accordingly. Whilst statistics published by the UK Employment Tribunals Service indicate that in 2000–01 only 15 out of 5,294 unfair dismissal cases upheld by the Tribunal resulted in re-employment, the Minister has requested that the Employment Forum reconsiders the matter of re-employment (including both reinstatement and reengagement).

- 1522.** Regarding employer inducement, the Government takes note of the complainant’s point that there is no provision in Jersey legislation to prohibit financial inducements to encourage employees to give up trade union representation and its claims that this is in breach of Article 11 of the ECHR. The Minister accepted this point and the TGWU is aware that work is under way to draft an amendment to make relevant provision.
- 1523.** Concerning recognition, the Government indicates that significant amounts of consultation have been carried out and the Minister has accepted, and personally proposed, a number of changes to improve the ERL. In particular, progress has been made on the union’s rights to recognition for collective bargaining purposes and the procedure required for the making of codes of practice. A further amendment to the ERL in respect of recognition rights has been approved by Jersey (the Employment Relations (Amendment) (Jersey) Law 2003). It is believed to address the situation where a trade union is not recognized by an employer and/or where a collective agreement has not been finalized.
- 1524.** The Government indicates that it was the intention of Jersey in introducing the ERL to remove uncertainty as to the rights of employees and set mutual obligations in the context of modern practice, providing unions with separate legal personality. The legislation is not intended to be “anti-trade union”. It gives unions (and associations) rights in law that they did not have before. Jersey has sought to engender a non-adversarial approach to negotiation and conciliation with a view to creating more harmonious relationships at work. This is essential in a small community where there is a greater need perhaps for all the community to work together. The ERL is intended to be modern and proportionate whilst, as a constituent part of a legislative reform programme, remaining faithful to ILO Convention–ECHR requirements.

C. The Committee’s conclusions

- 1525.** *The Committee notes that the present case concerns allegations that the Employment Relations (Jersey) Law (ERL), approved on 17 May 2005, violates freedom of association principles, more particularly as regards the registration of trade unions, the settlement of collective disputes and the right to strike.*
- 1526.** *The Committee takes note that the draft ERL has received assent by the Privy Council and that it will be enacted as law in the middle part of 2007 but that the codes of practice are yet to be produced for consultation.*
- 1527.** *The Committee further notes that the draft ERL was amended in July 2006 (Employment Relations (Amendment No. 2) (Jersey) Law 2003). This amendment regards the definition of a collective employment dispute, which has been extended to include recognition dispute, and the referral of such a dispute to the JET. The amendment, however, states that a recognition dispute between an employer who employs fewer than 21 employees and a trade union is not a collective dispute.*
- 1528.** *The Committee takes note of the comprehensive complaint submitted by TGWU which deals with four issues of concern: registration, the right to strike, the definition of a collective agreement, and the resolution of collective disputes. Several issues regarding the codes of practice are also of concern.*

1529. *The Committee notes that in its reply, the Government provides a lengthy and detailed account of the chronology of events which gave rise to the ERL. The Committee notes that these events started in November 1997. Furthermore, the Committee notes that this chronology of events highlights the dialogue that has been taking place between the social partners and the fact that the TGWU's allegations were taken up by a Deputy and presented to the Parliament of Jersey. Moreover, amendments were made to the draft in the light of the consultation process. The Committee further notes that the Government indicates that it believes to have had generally a very good industrial relations record and that the ERL clarifies the legal situation. Furthermore, the ERL is adapted to the size of the Island, the fact that it has a population of less than 90,000, few opportunities to borrow resources from other jurisdictions in time of crisis, a high percentage of small businesses, and only one union on the island. The Committee notes that the Government raises the fact that the legislation intends to encourage discussion and resolutions of dispute as quickly as possible, taking into account the small size of the community which permits a better awareness of the parties' positions. The Committee, however, observes that the Government's reply does not directly respond to all the specific issues raised by the complainant such as the right to strike, the definition of an employment dispute, and the content of the codes of practice.*

Registration

1530. *As regards the registration of a trade union, the Committee notes that a union needs to be registered under Jersey law in order to function properly (article 7). The Committee notes that the Registrar may refuse registration, or cancel it, if any of the purposes of the union are unlawful (articles 10(1) and 14). The Committee takes note of the complainant's position that there is no indication as to whether the Registrar makes this decision only on the basis of the express purposes of the union as stated in its constitution, or by considering the constitution as a whole, or by considering whether any purposes may be implied from the conduct of the union. In the case of cancellation, there is also a danger that activities subsequent to registration of the union will be taken into account. The Committee notes that the Government indicates that while concerns have been raised regarding the possibility of deregistration in the case of a trade union on "unlawful purpose" grounds, this is a very narrow head and that it can be easily distinguished from a trade union which was set up for lawful purposes but acts unlawfully. According to the Government, it is understood that it would not be possible for the Registrar to lawfully deregister such a trade union. The Committee expects, as the Government contends, that this article will not be used by the Registrar to cancel a union's registration in the case of, for example, the exercise of industrial action which the Registrar considers unlawful and that this article only concerns the purposes of a union which may go beyond the legitimate objectives of the defence of its members' interests and prove the intention to disrupt the constitutional order. The Committee considers that the ERL must be more precise, to avoid any confusion and specify, as the Government indicates, that the Registrar may only consider the express purposes of the union as set forth in its constitution or clear criminal acts that are not covered by the principles of freedom of association in order to exercise its authority under articles 10(1) and 14.*

1531. *As regards the possibility to appeal this administrative decision, the Committee notes under article 15 of the ERL, that appeal to the Royal Court may confirm or reverse a decision to cancel registration and a decision to refuse to grant registration. In case of cancellation of registration, the Committee recalls that any possibility should be eliminated from the legislation of suspension or dissolution by administrative authority, or at the least it should provide that the administrative decision does not take effect until a reasonable time has been allowed for appeal and, in the case of appeal, until the judicial authority has ruled on the appeal made by the trade union organizations concerned [see *Digest of decisions and principles of the Freedom of Association Committee*,*

fifth edition, 2006, para. 704]. The Committee requests the Government to take measures to ensure that a union remains registered until a final decision has been taken by a judicial authority. Furthermore, the Committee notes that according to the complainant, the nature of such an appeal is undefined thus opening the possibility that the Royal Court may consider that it may only review rather than rehear the case. If the former view is taken then the Registrar's decision may only be overturned if it is the product of an error of law or if it is so unreasonable that the court holds that no Registrar properly directing himself on the law and the facts could have reached the decision appealed against. The Committee would recall in this regard that judges should be able to deal with the substance of a case to enable them to decide whether or not the provisions pursuant to which the administrative measures in question were taken constitute a violation of the rights accorded to occupational organizations by Convention No. 87. In effect, if the administrative authority has a discretionary right to register or cancel the registration of a trade union, the existence of a procedure of appeal to the courts does not appear to be a sufficient guarantee; the judges hearing such an appeal could only ensure that the legislation had been correctly applied. The same problem may arise in the event of the suspension or dissolution of an occupational organization [*Digest*, op. cit., 2006, para. 705]. The Committee requests that the Government will ensure that the Royal Court may fully review the substance of cases on appeal.

Right to strike under the ERL

1532. The Committee notes that the ERL does not confer any positive right to strike and instead, gives specific immunity to an act which would otherwise be tortious by reason of an inducement of breach of contract, or a threat to induce a breach of contract if done by a registered union in contemplation or furtherance of an employment dispute (article 19). The Committee takes note of the complainant's allegations concerning the uncertainties that this situation raises, for example, a union may not appreciate that industrial action organized by it is unlawful until the matter has been determined by a court. Moreover, the Committee takes note of the complainant's submissions regarding the lack of provisions concerning reinstatement in cases of dismissal for participating in a legal strike, as the Employment (Jersey) Law 2003, only provides for compensation in cases of unfair dismissal (article 77). The Committee recalls that the right to strike is one of the essential means through which workers and their organizations may promote their economic and social interests and is an intrinsic corollary to the right to organize protected by Convention No. 87 [*Digest*, op. cit., 2006, paras 522 and 523]. Moreover, the Committee recalls in this regard that no one should be penalized for carrying out or attempting to carry out a legitimate strike [*Digest*, op. cit., 2006, para. 660]. Noting that the Government indicates that the Minister has requested the Employment Forum to reconsider the matter of re-employment (including both reinstatement and reengagement), the Committee expects that the Government will ensure respect for these principles and guarantee that workers are not sanctioned for carrying out legitimate trade union activity and ensure effective protection against any retaliatory acts aimed at penalizing workers for exercising trade union activity.

Definition of an employment dispute

1533. The Committee notes that the above protection concerning immunity conferred by the Law only applies to acts done "in contemplation or furtherance of an employment dispute". An employment dispute is either an individual employment dispute as defined in article 1(1) of the Employment (Jersey) Law 2003, or a collective employment dispute. The Committee notes that a dispute is only collective under the ERL if: (1) a collective agreement exists between the employer and the trade union, or (2) if the dispute is a recognition dispute and

is between an employer who employs more than 21 employees and a trade union (article 5, as amended).

- 1534.** *The Committee notes with concern in this regard that a collective agreement is defined as one between an employer, or an organization of employers that is representative of a substantial proportion of employers in the trade or industry and “employees who are representative of a substantial proportion of the employees engaged in the trade or industry concerned” (article 1). The term “substantial proportion” is undefined, and the fact that it is referring to the number of employees of the trade or industry concerned would appear not to leave the determination of the bargaining level to the discretion of the parties. The Committee recalls in this respect that according to the principle of free and voluntary collective bargaining embodied in Article 4 of the Convention, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and that, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority [Digest, op. cit., 2006, para. 988]. The Committee further notes that it would appear that an agreement between an employer and a trade union that does not represent a “substantial proportion of the employees engaged in the trade or industry concerned” would not qualify as a “collective agreement” within the law, whereas such agreement should be possible where no union has met the representativeness requirement. In such cases, the complainant argues that it would not have any available recourse to the JET.*
- 1535.** *The Committee recalls that for a trade union at the branch level to be able to negotiate a collective agreement at the enterprise level, it should be sufficient for the trade union to establish that it is sufficiently representative at the enterprise level [Digest, op. cit., 2006, para. 957]. As in systems requiring majority representation, the Committee considers that decisions concerning whether a union represents a substantial proportion of employees should be based on objective and pre-established criteria so as to avoid any opportunities for partiality or abuse. Moreover, the Committee recalls that where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining should be granted to all unions in this unit, at least on behalf of their own members [Digest, op. cit., 2006, para. 976].*
- 1536.** *The Committee further notes the complainant’s argument that the proposed law requires that the collective agreement “exist” and an employer could easily deny a union the immunity for industrial action by terminating (in accordance with its terms or otherwise) all collective agreements with the union. It appears to the complainant that if there is no collective agreement as defined, any industrial action would be unlawful unless it comes within the definition of an individual employment dispute. The Committee considers that the definition of protected industrial action should not be such as to render strike action virtually impossible and requests the Government to take measures to ensure that industrial action is protected even in the absence of a pre-existing collective agreement.*
- 1537.** *As regards recognition disputes, the Committee recalls that the fact that a strike is called for recognition of a union is a legitimate interest which may be defended by workers and their organizations [Digest, op. cit., 2006, para. 535], the Committee considers that the requirement that the employer employs at least 21 employees for a recognition dispute to qualify as a collective dispute, and therefore permit a strike, should also be removed as it is clearly in violation of the principles of freedom of association.*

Resolution of collective disputes

- 1538.** *The Committee notes that the ERL provides for collective employment disputes to be brought before the JET either with the consent of both parties, or by one party if all other available procedures have been applied unsuccessfully and a party to the dispute is acting*

unreasonably in the way in which that party is or is not complying with an available procedure. Available procedures include procedures in a collective agreement, a relevant contract of employment or a relevant handbook for employees, or an approved code of practice or a procedure which is established with the relevant trade or industry (article 22).

- 1539.** *The JET may make (1) a binding award with the consent of both parties, or (2) a declaration the content of which will be integrated in individual contracts of employment until varied by agreement between the parties, by subsequent declaration, or until different terms and conditions of employment are settled through the machinery for the settlement of terms and conditions in the relevant trade, industry or undertaking (article 24). This declaration may relate to: (a) the opinion of the JET as to whether any party to the dispute is not observing any relevant terms and conditions; (b) the interpretation of any terms and conditions of a collective agreement that are relevant to the dispute; (c) the incorporation into the individual contracts of employment of any terms and conditions relating to (a) or (b); (d) in case of a recognition dispute, the opinion of the JET regarding this issue (article 23(2)). This would mean, according to the complainant, that the JET can make a declaration which incorporates terms and conditions specified therein into individual contracts of employment and is tantamount to binding arbitration. The Committee recalls that provisions which establish that, failing agreement between the parties, the point at issue in collective bargaining must be settled by the arbitration of the authority are not in conformity with the principle of voluntary negotiation contained in Article 4 of Convention No. 98 [Digest, op. cit., 2006, para. 993]. While noting that in the absence of the parties' consent to the terms of a binding award, the JET can only issue a declaration, the Committee considers that the declaration's de facto and de jure integration in individual contracts of employment is tantamount to compulsory binding arbitration contrary to the principle of voluntary negotiation. It requests the Government to ensure that such declarations are only possible in the case of essential services in the strict sense of the term, public servants exercising authority in the name of the State or where both parties agree to binding arbitration.*

The codes of practice

- 1540.** *Regarding the codes of practice, the Committee notes from a government web site that these are not legally enforceable but if a case reaches the final stage in the dispute resolution process, the JET could, in reaching a decision, take into account the extent to which the parties involved observed the appropriate codes: a party whose conduct contravenes the codes could be held to have acted outside the spirit of the legislation. In addition, the ERL specifically provides for the withdrawal of immunity if a code of practice provides for the holding of a ballot and action has not been taken in conformity with this ballot.*
- 1541.** *The Committee understands from the Government that consultations and modifications of the code of practice will be taking place and that it only has a draft copy. This notwithstanding, the Committee observes the allegations concerning an exemption for small businesses employing ten or fewer employees from the right to form trade unions and stresses that, if envisaged, this would clearly be in contravention of Article 2 of the Convention which states that all workers without distinction whatsoever have the right to establish or join an organization of their own choosing.*
- 1542.** *The Committee further notes that, according to the complainant's allegations, the draft codes of practice raise several other difficulties in respect to Conventions Nos 87 and 98. article 20 of the ERL limits the immunity of a trade union from liability in tort if the trade union has not respected the ballot provided for in the code of practice or if a code of practice defines conduct that is or is not reasonable conduct when done in contemplation*

or furtherance of an employment dispute. Regarding balloting and industrial action, the Committee notes that code 3 provides that employers should be given notice before industrial action takes place. Such notice shall contain information in the union's possession to help the employer make plans to enable him to advise his customers of the possibility of disruption so that they can make alternative arrangements or to take steps to ensure the health and safety of his employees, or the public, or to safeguard equipment which might otherwise suffer damage from being shut down or left without supervision. Such information could be the number, category or workplace of the employees concerned (not necessarily by individual name). The complainant gives an example of an English case where an injunction was granted against the decision to take industrial action because insufficient information was provided to the employer: the union had not identified at which site each lecturer on strike had his or her desk which was a breach of the requirement to specify workplaces. The Committee recalls that the obligation to give prior notice to the employer before calling a strike may be considered acceptable [*Digest, op. cit.*, 2006, para. 552], but considers that the information asked for in the notice should be reasonable, or interpreted in a reasonable manner, and such injunctions should not be used in such a manner as to render legitimate trade union activity nearly impossible.

- 1543.** Furthermore, a reading of article 20(3) of the ERL and code 4 regarding secondary action would render such a strike unlawful and expose the union to liability in tort. Indeed, article 20(3) provides that immunity is lost if the conduct of a trade union does not conform to the definition in a code of practice of reasonable conduct when done in contemplation or furtherance of a dispute, and code 4 provides that industrial action would be considered unreasonable if taken in support of a third party, when employees are not directly involved, where a dispute is not with the same employer, where employees are not at the same place of work as those directly affected. The Committee recalls that a ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association. Furthermore, a general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful. More generally, the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests [*Digest, op. cit.*, 2006, paras 538, 534 and 531]. The Committee requests the Government to take the necessary measures to ensure that sympathy strikes and social and economic protest action are protected under the law.
- 1544.** Regarding picketing and code 4, the Committee notes the fact that picketing is not protected from civil suits such as "obstruction of a path, road, entrance or exit to premises; interference (e.g. because of noise or crowds) in the rights of neighbouring properties (i.e. private nuisance) and trespassing on private property". The Committee stresses that it considers legitimate a legal provision that prohibits pickets from disturbing public order and threatening workers who continue work [*Digest, op. cit.*, 2006, para. 650]. The Committee does, however, consider that the action of pickets organized in accordance with the law should not be subject to interference by the public authorities [*Digest, op. cit.*, 2006, para. 648].
- 1545.** The Committee requests the Government to pursue its review of the ERL and its accompanying codes in full and frank consultations with the employers' and workers' organizations concerned and expects that the necessary measures will be taken to ensure full respect for the principles set out above. The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.

1546. *The Committee reminds the Government that it may avail itself of technical assistance from the Office in respect of the matters raised in this case.*

The Committee's recommendations

1547. *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 pursue its review of the ERL and its accompanying codes in full and frank consultations with the employers' and workers' organizations concerned and expects that the necessary measures will be taken to ensure full respect for the principles set out above, and in particular so as to:*

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

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

(c) The Committee reminds the Government that it may avail itself of technical assistance from the Office in respect of the matters raised in the present case.

Annex

Extracts

EMPLOYMENT RELATIONS (JERSEY) LAW 2007

PART 1

INTRODUCTION

1 Interpretation

In this Law, unless the context otherwise requires –

“collective agreement” means an agreement that has been settled by machinery of negotiation, mediation, conciliation or arbitration to which the parties are –

- (a) an employer, or an organization of employers that is representative of a substantial proportion of the employers engaged in the trade or industry concerned; and
- (b) employees who are representatives of a substantial proportion of the employees engaged in the trade or industry concerned;

“employment dispute” means –

- (a) a collective employment dispute; or
- (b) an individual employment dispute as defined in Article 1(1) of the Employment (Jersey) Law 2003;

5 “Collective employment dispute”

(1) In this Law, “collective employment dispute” means a dispute between one or more employers and one or more employees, where –

- (a) the employee or employees concerned are represented by a trade union;
- (b) a collective agreement exists between the employer or employers and the trade union; and
- (c) the dispute relates wholly or mainly to one or more of the matters described in paragraph (2).

(2) The matters to which this paragraph refers are:

- (a) the terms of employment of one or more employees;
- (b) the conditions in which one or more employees are required to work;
- (c) the engagement or non-engagement of one or more persons as employees, or the termination or suspension of employment of one or more employees;
- (d) the termination or suspension of the duties of employment of one or more employees;
- (e) the allocation of work or the duties of employment as between employees or as between groups of employees;
- (f) matters of discipline or grievance;
- (g) the membership or non-membership of a trade union on the part of one or more employees;

- (h) facilities for officials of trade unions; and
 - (i) an issue as to whether or not an approved code of practice is being observed by one or more employers or by one or more employees.
- (3) A dispute between a Committee of the States and any one or more employees shall, notwithstanding that the Committee is not the employer or those employees, be treated for the purposes of this Law as a dispute between an employer and those employees if the dispute relates –
- (a) to matters that have been referred for consideration by a joint body on which, by virtue of any provision made by or under any enactment, that Committee is represented; or
 - (b) to matters that cannot be settled without that Committee exercising a power conferred on it by or under any enactment.
- (4) It is immaterial that a dispute relates to matters occurring outside Jersey if a person or persons whose actions in Jersey are said to be in contemplation or in furtherance of the dispute is or are likely to be affected in respect of any matter specified in paragraph (2) by the outcome of the dispute.
- (5) A dispute to which a trade union is a party shall be treated for the purposes of this Law as a dispute to which employees are parties.
- (6) A dispute to which an employers' association is a party shall be treated for the purposes of this Law as a dispute to which employers are parties.

PART 2

REGISTRATION OF TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS

10 Determination of application

- (1) The registrar shall refuse to grant an application for the registration of a trade union or employers' association if, but only if –
- (a) any of the purposes of the union or association is unlawful;
 - (b) the application is not made in accordance with this Law; or
 - (c) the name of the union or association is the same as the name by which any other union or association is registered, or so nearly resembles such a name as to be likely to mislead any person.
- (2) If the registrar refuses to grant an application for the registration of a trade union or employers' association, the registrar shall give each applicant notice in writing of that decision and of the reasons for the decision.
- (3) Unless the registrar is required by paragraph (1) to refuse to grant an application for the registration of a trade union or employers' association, he or she shall –
- (a) grant the application;
 - (b) register the union or association in the appropriate register; and
 - (c) issue to the applicant or applicants a certificate of registration in the prescribed form.

14 Cancellation of registration on other grounds

- (1) The registrar shall cancel the registration of a trade union or employers' association if any of its purposes are unlawful.
- (2) The registrar may cancel the registration of a trade union or employers' association on any of the following grounds –

- (a) if its registration has been obtained by fraud or mistake;
 - (b) if it has contravened Article 11(1);
 - (c) if, after the registrar has given it not less than 21 days notice in writing, to comply with a prescribed requirement, the union or association has failed to comply with that requirement; or
 - (d) if it has ceased to exist.
- (3) The registrar may under paragraph (2) cancel the registration of a trade union or employers' association of his or her own motion or on the application of any person having sufficient *locus standi*.
- (4) However, before cancelling the registration of a trade union or employers' association under paragraph (1), or under paragraph (2) on a ground specified in any of sub-paragraphs (a) (b) and (c) of that paragraph, the registrar shall –
- (a) give the union or association notice in writing or his or her proposal to do so; and
 - (b) afford it a reasonable opportunity to be heard on the matter.
- (5) If (having complied with paragraph (4)) the registrar decides under paragraph (1) to cancel the registration of a trade union or employers' association or decides under any of sub-paragraphs (a), (b) and (c) of paragraph (2) –
- (a) to cancel the registration of a union or association; or
 - (b) to refuse to grant an application to cancel its registration.
- the registrar shall give the union or association notice in writing of that decision and of the reasons for the decision.
- (6) If the registrar decides under any of sub-paragraphs (a), (b) and (c) of paragraph (2) to grant or refuse to grant an application to cancel the registration of a trade union or employers' association, the registrar shall also give the applicant notice in writing of that decision and of the reasons for the decision.
- (7) A cancellation of the registration of a trade union or employers' association –
- (a) under paragraph (1); or
 - (b) under any of sub-paragraphs (a), (b) and (c) of paragraph (2),
- shall not have effect until the expiry of the period of 21 days following the day on which the registrar gives the union or association notice in writing of the decision to cancel its registration.
- (8) If a notice of an appeal against the cancellation of the registration of the trade union or employers' association is given within that period of 21 days, the cancellation shall not in any event have effect until the appeal is disposed of.

15 Appeals

- (1) The following persons and bodies shall have a right of appeal under this Law to the Royal Court –
- (a) any applicant for the registration of a trade union or employers' association, against a refusal by the registrar under Article 10(1) to grant the application;
 - (b) a union or association, against a refusal by the registrar under Article 12(1) to grant an application for the amendment of the register in respect of the union or association;
 - (c) a union or association, against a refusal by the registrar under Article 13(1) to grant an application under that paragraph to cancel the registration of the union or association;
 - (d) a union or association, against a decision by the registrar under either of paragraphs (1) and (2) of Article 14 to cancel its registration; and
 - (e) an applicant under Article 14(3) for the cancellation of the registration of a union or association, against a refusal by the registrar under Article 14(2) to grant the application.

- (2) An appeal under this Article shall be brought within 21 days after the person or body who has the right of appeal is given notice in writing by the registrar of the decision to which the appeal relates.
- (3) On hearing the appeal, the Royal Court may confirm or reverse the decision of the registrar and may make such order as it thinks fit as to the costs of the appeal.

PART 3

STATUS OF TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS

19 Immunities from liability in tort for industrial action

- (1) An act done by a person in contemplation or furtherance of an employment dispute is not actionable in tort by reason only –
 - (a) that it induces another person to break a contract or interferes or induces any other person to interfere with its performance;
 - (b) that it consists in the first person's threatening that a contract will be broken (whether or not it is one to which he or she is a party);
 - (c) that it consists in the first person's threatening that there will be interference with a contract (whether or not it is one to which he or she is a party); or
 - (d) that it consists in the first person's threatening that the or she will induce another person to break a contract or to interfere with its performance.
- (2) An agreement or combination by 2 or more persons to do or procure the doing of any act in contemplation or furtherance of an employment dispute is not actionable in tort if the act is one that, if done without any such agreement or combination, would not be actionable in tort.
- (3) An agreement or combination by 2 or more persons to do or procure the doing of any act in contemplation or furtherance of an employment dispute is not a criminal offence if such an act committed by one person would not be a criminal offence.

20 Limitations on immunities from liabilities in tort

- (1) Article 19 does not prevent an act done –
 - (a) by a trade union or employers' association; or
 - (b) by an official of a union or association,from being actionable in tort if at the time of the act the union or association is not registered.
- (2) Article 19 does not prevent an act done by a trade union from being actionable in tort if –
 - (a) an approved code of practice provides for the holding of a ballot of members of the union before it does such an act; and
 - (b) a ballot in respect of the doing of the act has not been held in accordance with an approved code of practice, or a majority of those balloted do not support the doing of the act.
- (3) Article 19 does not prevent an act described in paragraph (1) of that Article from being actionable in tort if –
 - (a) an approved code of practice defines conduct that is or is not reasonable conduct when done in contemplation or furtherance of an employment dispute; and
 - (b) one of the facts relied on for the purpose of establishing liability is that the act of the trade union constitutes conduct that, as so defined, is not reasonable conduct.

PART 4**RESOLUTION OF COLLECTIVE EMPLOYMENT DISPUTES****22 Jurisdiction in respect of collective employment disputes**

- (1) Proceedings may be brought before the Jersey Employment Tribunal in respect of a collective employment dispute –
 - (a) with the consent of each party to the dispute; or
 - (b) at the request of any party to the dispute, in the circumstances described in paragraph (2).
- (2) The circumstances to which this paragraph refers are –
 - (a) that the body or person making the request considers that as far as is practicable all other available procedures have been applied unsuccessfully to seek to resolve the dispute; and
 - (b) that a party to the dispute is acting unreasonable in the way in which that party is or is not complying with an available procedure.
- (3) For the purposes of paragraph (2), a procedure is an available procedure if –
 - (a) it is a procedure for the resolution of the dispute that is contained in a collective agreement, a relevant contract of employment or a relevant handbook for employees;
 - (b) it is a procedure for the resolution of the dispute in accordance with an approved code of practice; or
 - (c) it is a procedure for the resolution of the dispute that is otherwise established within the trade or industry concerned by this Law or any other Law.
- (4) In deciding whether or not a party to the dispute is acting unreasonably in the way in which that party is or is not complying with an available procedure in a relevant handbook for employees, regard shall be had to whether or not the handbook has been agreed by or on behalf of the parties to the dispute, but this paragraph does not limit the generality of paragraph (2)(b).

23 Orders and declarations in collective employment disputes

- (1) On hearing proceedings in respect of a collective employment dispute that are brought before the Tribunal, it may make –
 - (a) with the consent of each party to the dispute, an order that is binding on the parties; or
 - (b) a declaration.
- (2) A declaration under paragraph (1) may relate to any of the following things –
 - (a) the opinion of the Tribunal as to whether any party to the dispute is not observing any relevant terms and conditions;
 - (b) the interpretation of any terms and conditions of a collective agreement that are relevant to the dispute;
 - (c) the incorporation into the individual contracts of employment of the employees to whom the dispute relates of any terms and conditions to which either of sub-paragraphs (a) and (b) refers;
- (3) In paragraph (2)(a), “any relevant terms and conditions” means –
 - (a) any terms and conditions of employment that are, in the opinion of the Tribunal, applicable to the case; or
 - (b) any terms and conditions of employment that are, in the opinion of the Tribunal, not less favourable to the employee or employees concerned than the terms and conditions to which sub-paragraph (a) refers.

26 Failure to comply with an approved code of practice

- (1) A failure on the part of any person, trade union or employers' association to observe any provision of an approved code of practice issued under this Law does not of itself render that person, union or association, or any member of the union or association, liable to any proceedings.
- (2) However, paragraph (1) is subject to Article 20(2).
- (3) In any proceedings before a court or before the Tribunal, an approved code of practice is admissible in evidence.
- (4) If it appears to the court or the Tribunal that any provision in an approved code of practice is relevant to any question arising in the proceedings, the court or the Jersey Employment Tribunal shall take that provision into account in determining the question.

**EMPLOYMENT RELATIONS (AMENDMENT No. 2)
(JERSEY) LAW**

A LAW to amend further the Employment Relations (Jersey) Law, approved by the States of Jersey, awaiting Privy Council sanction.

3 Article 5 amended

Article 5 of the principal Law shall be amended by inserting after paragraph (2) the following paragraphs –

“(2A) In this Law, ‘collective employment dispute’ also means a dispute between one or more employers and one or more employees, where –

- (a) the employee or employees concerned are represented by a trade union;
- (b) the trade union is one that fulfils criteria for its recognition that are set out in an approved code of practice; and
- (c) the dispute is a recognition dispute.

(2B) However, a recognition dispute between –

- (a) an employer who employs on average fewer than 21 employees in the period of 13 weeks immediately preceding the day on which the dispute arises; and
 - (b) the trade union,
- is not a collective employment dispute.”.

4 Article 23 amended

(1) Article 23(2) of the principal Law shall be amended –

- (a) in sub-paragraph (c), by substituting for the full stop the word “; or “;
- (b) by adding after sub-paragraph (c) the following sub-paragraph –

“(d) in the case of a recognition dispute, the opinion of the Tribunal as to whether the trade union is recognized as being entitled to conduct, on behalf of any employee or employees, collective bargaining with the employer or employers in respect of any matter relating to pay, hours of work or holidays.”

(2) After Article 23(2) of the principal Law there shall be inserted the following paragraph –

“(2A) A declaration to which paragraph (2)(d) refers may specify a method by which collective bargaining shall be carried out, and a method so specified shall have effect as if it were contained in a legally enforceable contract made between the employer or employers and the trade union.”

5 New Article 24A inserted

After Article 24 of the principal Law (but before Part 5 of the Law) there shall be inserted the following Article –

“24A Enforcement of declaration in recognition dispute

A declaration to which Article 23(2)(d) refers –

- (a) shall have effect as if it were a legally enforceable contract made between the parties to the collective employment dispute to which the declaration relates; and
- (b) shall be enforceable in the Royal Court by but only by an order for specific performance.”

Geneva, 1 June 2007.

(Signed) Professor Paul van der Heijden,
Chairperson.

Points for decision: Paragraph 208; Paragraph 963;
Paragraph 246; Paragraph 995;
Paragraph 263; Paragraph 1036;
Paragraph 336; Paragraph 1080;
Paragraph 355; Paragraph 1097;
Paragraph 395; Paragraph 1129;
Paragraph 424; Paragraph 1191;
Paragraph 441; Paragraph 1218;
Paragraph 467; Paragraph 1243;
Paragraph 487; Paragraph 1259;
Paragraph 806; Paragraph 1270;
Paragraph 878; Paragraph 1360;
Paragraph 902; Paragraph 1463;
Paragraph 913; Paragraph 1547.
Paragraph 930;