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| 102-103 | LI | 1968 | 2 S |
| 104-106 | LI | 1968 | 4 S |
| 107-108 | LII | 1969 | 1 S |
| 109-110 | LII | 1969 | 2 S |
| 111-112 | LII | 1969 | 4 S |
| 113-116 | LIII | 1970 | 2 S |
| 117-119 | LIII | 1970 | 4 S |
| 120-122 | LIV | 1971 | 2 S |
| 123-125 | LIV | 1971 | 4 S |
| 126-133 | LV | 1972 | S |
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| 146-148 | LVIII | 1975 | Series B, Nos. 1-2 |
| 149-152 | LVIII | 1975 | " No. 3 |
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| 158-159 | LIX | 1976 | " No. 3 |
| 160-163 | LX | 1977 | " No. 1 |
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| 168-171 | LX | 1977 | " No. 3 |
| 172-176 | LXI | 1978 | " No. 1 |
| 177-186 | LXI | 1978 | " No. 2 |
| 187-189 | LXI | 1978 | " No. 3 |
| 190-193 | LXII | 1979 | " No. 1 |
| 194-196 | LXII | 1979 | " No. 2 |
| 197-198 | LXII | 1979 | " No. 3 |
| 199-201 | LXIII | 1980 | " No. 1 |
| 202-203 | LXIII | 1980 | " No. 2 |
| 204-206 | LXIII | 1980 | " No. 3 |
| 207 | LXIV | 1981 | " No. 1 |
| 208-210 | LXIV | 1981 | " No. 2 |
| 211-213 | LXIV | 1981 | " No. 3 |
| 214-216 | LXV | 1982 | " No. 1 |
| 217 | LXV | 1982 | " No. 2 |
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| 222-225 | LXVI | 1983 | " No. 1 |

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| 226-229 | LXVI | 1983 | " No. 2 |
| 230-232 | LXVI | 1983 | " No. 3 |
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| 234-235 | LXVII | 1984 | " No. 2 |
| 236-237 | LXVII | 1984 | " No. 3 |
| 238 | LXVIII | 1985 | " No. 1 |
| 239-240 | LXVIII | 1985 | " No. 2 |
| 241-242 | LXVIII | 1985 | " No. 3 |
| 243 | LXIX | 1986 | " No. 1 |
| 244-245 | LXIX | 1986 | " No. 2 |
| 246-247 | LXIX | 1986 | " No. 3 |
| 248-250 | LXX | 1987 | " No. 1 |
| 251-252 | LXX | 1987 | " No. 2 |
| 253 | LXX | 1987 | " No. 3 |
| 254-255 | LXXI | 1988 | " No. 1 |
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| 259-261 | LXXI | 1988 | " No. 3 |
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| 259-261 | LXXI | 1988 | " No. 3 |
| 262-264 | LXXII | 1989 | " No. 1 |
| 265-267 | LXXII | 1989 | " No. 2 |
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| 270-271 | LXXIII | 1990 | " No. 1 |
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| 289-290 | LXXVI | 1993 | " No. 2 |
| 291 | LXXVI | 1993 | " No. 3 |

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| 292-293 | LXXVII | 1994 | " | No. 1 |
| 294 | LXXVII | 1994 | " | No. 2 |

[1] The letter S, followed as appropriate by a roman numeral, indicates a supplement. [2] For communications relating to the 23rd and 27th Reports, see *Official Bulletin*, Vol. XLIII, 1960, No 3.

INTERNATIONAL LABOUR OFFICE

# OFFICIAL BULLETIN

*Vol. LXXVII* *1994* *Series B, No. 3*

## 295th Report of the Committee on Freedom of Association [1]

### I. Introduction

**1.** The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 3, 4 and 10 November 1994, under the chairmanship of Mr. Jean-Jacques Oechslin, former Chairman of the Governing Body.

**2.** The members of the Committee of Indian and Argentinian nationalities were not present during the examination of the cases relating to India (Case No. 1651) and Argentina (Case No. 1723), respectively.

* * *

**3.** The Committee is currently seized of 105 cases, in which complaints have been submitted to the governments concerned for observations. At its present meeting, it examined 25 cases on the merits, reaching definitive conclusions in 23 cases and interim conclusions in two cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

#### NEW CASES

**4.** The Committee adjourned until its next meeting the cases relating to: Portugal (No.1782), Paraguay (Nos. 1783 and 1790), Romania (No. 1788), the Republic of Korea (No. 1789), Chad (No. 1791), Honduras (No. 1795), Peru (Nos. 1796 and 1804), Venezuela (No. 1797), Spain (No. 1798), Kazakhstan (No. 1799), Canada (Nos. 1800, 1801, 1802 and 1806), Djibouti (No. 1803), Cuba (No. 1805), Ukraine (No. 1807), Costa Rica (No. 1808) and Kenya (Case No. 1809) because it is awaiting information

[1] The 295th and 296th Reports were examined and approved by the Governing Body at its 261st Session (November 1994).

and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee. In Case No. 1782 (Portugal), the Government stated that it would send its observations soon.

### OBSERVATIONS REQUESTED FROM GOVERNMENTS

**5.** The Committee is still awaiting observations or information from the governments concerned in the cases relating to: Spain (No. 1561), Morocco (Nos. 1640, 1646, 1687, 1691 and 1712), Nicaragua (No. 1649), Costa Rica (Nos. 1678, 1695, 1770, 1780 and 1781), Canada (No. 1737), Argentina (No. 1744), El Salvador (No. 1754), Bulgaria (No. 1765), Ecuador (No. 1767), Iceland (No. 1768), Cameroon (No. 1772) and Australia (No. 1774).

### OBSERVATIONS REQUESTED FROM COMPLAINANTS AND/OR GOVERNMENTS

**6.** In Case No. 1598 (Peru), the Committee is awaiting comments and observations from both the complainant and the Government. In Cases Nos. 1736 and 1741 (Argentina) and 1738 (Canada/Newfoundland), the Committee is awaiting comments from the complainants. The Committee requests the complainants and the Government concerned to transmit, without delay, the observations and information requested.

### PARTIAL INFORMATION RECEIVED FROM GOVERNMENTS

**7.** In Cases Nos. 1527 and 1541 (Peru), 1719 (Nicaragua), 1761 and 1787 (Colombia), 1773 (Indonesia) and 1777 (Argentina), the Governments have sent certain information on the allegations made. The Committee requests them to send the remaining information without delay so that it can examine these cases in full knowledge of all the facts.

### OBSERVATIONS RECEIVED FROM GOVERNMENTS

**8.** The Committee intends to examine the substance of Cases Nos. 1676 and 1685 (Venezuela), 1758 and 1779 (Canada), 1766 (Portugal), 1776 (Nicaragua), 1784, 1794 (Peru), at its next meeting.

* * *

**9.** In Cases Nos. 1682, 1711 and 1716 concerning Haiti, the Committee faced a specific procedural problem since the allegations against the military authorities who then exercised control in Haiti could only be transmitted to the Haitian Government recognized by the international community, even though the latter could not be held responsible for the acts which are the subject of the complaints. Now that the Government has returned to the national territory, the Committee requests it to provide

its observations and information on the evolution of the situation with respect to the facts alleged in the complaints.

* * *

**10.** The Committee has received two new communications dated 4 and 29 July 1994 from the complainant in Case No. 1641 (Denmark), examined by the Committee at its June 1994 Session. The Committee has taken due note of the complainant's request that the case be reopened and that its conclusions be reconsidered based on the information previously provided in the complaint. The Committee would first like to recall that this complaint was presented by the Danish Confederation of Professional Associations (AC) in April 1992. Since that time, the Committee has been obliged to adjourn the examination of the case on a number of occasions due to the transmittal by the complainant of additional information just prior to or during the Committee's sessions. According to regular procedure, these communications were transmitted to the Government which was granted a sufficient period of time to reply. The Committee received once again two new communications from the complainant just prior to (27 May 1994) and during (14 June 1994) its June 1994 Session. These communications were brought to the attention of the Committee, but as they did not bring to light any new substantive information, the Committee decided to examine the case on the information which was available to it at that time taking into account both the complainants' allegations and the Government's replies. The Committee would recall that, in paragraph 77 of its 294th Report, it had determined that this case did not call for further examination. Given that the two communications presented by the complainant in July do not contain any new information bearing on the case, the Committee has decided not to reopen the case and reconfirms its previous conclusions.

**11.** As regards Case No. 1785 [representation submitted by the independent Self-Governing Trade Union "Solidarnosc", by virtue of article 24 of the ILO Constitution, concerning the violation by Poland of provisions of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)], the Government sent its observations in a communication dated 23 September 1994. The complainant organization is demanding the restitution of all its assets which were confiscated following the imposition of martial law and the distribution of assets of the Central Council of Trade Unions, dissolved in 1981. In its communication, the Government states in particular that, very soon, a new round of negotiations will be held with the representatives of the complainant organization and with those of the National Alliance of Polish Trade Unions (OPZZ), and that in its view, agreement can still be reached on the distribution of assets of the Central Council of Trade Unions. The Committee takes note of this information and calls on the concerned parties to negotiate in good faith so that an equitable solution can be found. The Committee requests the Government to keep it informed of the outcome of these negotiations. It will examine the case at its next meeting following the transmission by the Government of the outcome of these negotiations.

## REQUEST TO ACCEPT A DIRECT CONTACTS MISSION

**12.** As regards Cases Nos. 1512, 1539, 1595, 1778 and 1786 (Guatemala), concerning a great number of allegations which relate to murders, physical attacks, death

threats and arrests of trade unionists, the Committee expresses its concern over the seriousness of the issues raised and considers that a direct contacts mission would be very useful in order to obtain the necessary information and to examine the allegations in full knowledge of all the facts. The Committee requests the Government to accept such a mission and proposes to examine these cases on the basis of the mission report.

## URGENT APPEALS

**13.** As regards Case No. 1612 (Venezuela), 1693 and 1757 (El Salvador), 1733, 1747, 1748, 1749 and 1750 (Canada), 1740 (Guatemala), 1753 (Burundi) and 1762 (Czech Republic), the Committee observes that, despite the time which has elapsed since the presentation of these complaints or since their last examination, it has not received the Governments' observations. The Committee draws the attention of all these Governments 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, even if the observations or information requested from the Governments have not been received in due time. The Committee accordingly requests the Governments to transmit their observations or information as a matter of urgency.

* * *

**14.** The Committee draws the legislative aspects of Cases Nos. 1756 (Indonesia) and 1771 (Pakistan) to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

## EFFECT GIVEN TO THE RECOMMENDATIONS OF THE COMMITTEE AND THE GOVERNING BODY

**15.** As regards Case No. 1417 (Brazil) concerning the murder of trade union leaders, the Committee had requested the Government at its March 1994 meeting [see 292nd Report, para. 12] to provide information on the sentence handed down by the Court of Appeal in relation to the judicial inquiry into the murder of the trade union leader Mauro Pires as well as to keep it informed on the outcome of the trial concerning the death of Teixeira do Carmo. In communications of 28 April and 30 May 1994, the Government states that: (1) the Court of Appeal has not yet handed down a sentence in the case of the trade union leader Mauro Pires and that it would provide information on this matter at the appropriate time; and (2) that after the trial and in the absence of specific elements concerning the allegations of murder of Teixeira do Carmo, it has not been in a position to determine the existence of the alleged facts. The Committee takes note of these observations and requests the Government to communicate the text of the sentence handed down by the court of Appeal concerning the death of the trade union leader Mauro Pires.

**16.** As regards Case No. 1509 (Brazil) concerning the murder of the trade union leader Valdicio Barbodsa dos Santos, the Committee had requested the Government at its March 1994 meeting [see 292nd Report, para. 14] to keep it informed of the outcome of the judicial investigation under way. In a communication of 3 June 1994, the

Government states that a special delegate has been made responsible for this investigation and that it will communicate to the Committee any information obtained by this delegate. The Committee takes note of this information and requests the Government to keep it informed of the final outcome of this investigation.

**17.** As regards Case No. 1575 (Zambia), last examined by the Committee at its March 1994 meeting [see 292nd Report, para. 17], the Government had been requested to keep the Committee informed of any amendments made to the Industrial Relations Act 1993 with a view to removing the following limitations: minimum membership (100) for the establishment of a trade union (section 9(1) and (2)); ban on multiple office-holding (sections 18(3) and 30(3)); ban on strikes in certain mining operations (section 107(10)(f); police powers in case of strikes in essential services (section 107(6)). In a communication dated 23 August 1994, the Government has indicated that the Committee's observations on the above points have been noted and that they will be taken into account when the Industrial Relations Act is reviewed. The Committee hopes these amendments will be adopted quickly and asks the Government once again to keep it informed of any amendments made to the legislation to give effect to its previous recommendations on these points.

**18.** Regarding Case No. 1622 (Fiji), at its March 1994 meeting [see 292nd Report, para. 20], the Committee had noted with interest the Government's statement that certain legislative amendments were under way to bring its legislation into conformity with freedom of association principles, and had requested it to provide copies of the texts in question once they had been adopted. In a communication of 1 June 1994, the Government sent copies of the legislative texts which repeal the following provisions: (1) section 5(1)(a) of Decree No. 42 of 1991 (amending the Industrial Associations Act) as regards conditions on eligibility for trade union office and, in particular, the ban on multiple office-holding for trade union officials (the Government confirms in this respect that, by virtue of said amendments, the legal proceedings commenced against Mr. Chaudry have been withdrawn); (2) section 10(B)(2) of the Trade Unions Regulations (Amendment) Regulations, 1991, limiting strike ballots to a six-week validity period; (3) section 9 of the Trade Unions Act (Amendment) Decree No. 44, requiring trade unions to hold secret ballots when they seek financial support from outside the country. Moreover, the Government confirms that the Public Service Commission of Fiji (the employer) has restored the check-off to all public service unions without seeking any precondition with the unions involved. The Committee notes with interest the legislative amendments adopted by the Government, giving trade union organizations the necessary autonomy to elect their representatives and organize their administration and activities, and restoring without any precondition the check-off.

**19.** As regards Case No. 1652 (China), at its March 1994 meeting [see 292nd Report, paras. 368-401], the Committee had requested the Government: (1) to take, as soon as possible, measures to amend the Trade Unions Act of April 1992, in order fully to recognize the freedom of association principles which guarantee workers without distinction whatsoever the right to establish organizations of their own choosing, and give trade unions the right to draw up their constitutions, to organize their administration and activities and to formulate their programmes in full freedom, as well as to guarantee the observance of these rights in practice (the Committee had also requested the Government to keep it informed on any progress in this respect); (2) to cancel the expulsion decision issued against Mr. Han Dongfong, so that he could enter his country

and, if he so wished, exercise his trade union activities in full freedom, and to keep it informed of measures taken in this respect; and (3) to initiate the required steps to ensure that the case of eight detained trade union leaders and activists of the Autonomous Workers' Federation (WAF) named in the complaint, be re-examined with a view to releasing them, and to keep it informed of the measures taken in this respect. In a communication of 28 July 1994, the Government informed the Committee of the release of Mr. Liu Xingqi, one of the trade unionists whose detention had been complained of and in respect of whom the Government itself had pointed out that he had been sentenced to five years of imprisonment for theft. The Committee notes with satisfaction the release of this trade unionist. However, it observes that the Government has not provided the other information requested and it requests it to do so rapidly.

**20.** In Case No. 1677 (Poland), at its May 1993 meeting [see 287th Report, paras. 343-369], the Committee had expressed the hope that the amendments to the Act of 25 October 1990 would rapidly come into force so as to give effect to the decisions of the Constitutional Court and the Diet in order to provide the trade union organizations with a complete and definitive legal framework within which the restitution of trade union property could be effected with the full participation of the organizations concerned. It had requested the Government to keep it informed of any progress made in the situation. Moreover, the Committee had requested the Government, the complainant organization and other interested trade union organizations to continue to make every effort to settle the restitution of trade union property by means of agreements and to keep it informed of any progress made in this situation. In a communication of 4 July 1994, the Government reiterates the statement that it had made in its previous reply and adds that due to the change of members of Parliament in June 1993, the amendments to Act No. 25 have not yet been made. The Committee takes note of the Government's observations. It reiterates its recommendations of May 1994 and refers to what it stated in Case No. 1785 (Poland). The Committee requests the Government to keep it informed in this respect.

**21.** In Case No. 1704 (Lebanon), which deals with the incompatibility between the draft Bill on trade union structure and the Committee's principles of freedom of association, the Committee had, at its May 1994 meeting [see 294th Report, paras. 135-161], drawn the Government's attention to the fact that many provisions of the draft Bill were not in conformity with the principles of freedom of association. It had requested the Government to prepare a new draft Bill taking into account the comments formulated by the Committee in its conclusions. In a communication of 12 August 1994, the Government states that it is currently amending the legislation and that, to this end, it has set up a Commission of senior civil servants and experts. It adds that those amendments will be made taking into account international Conventions that have been ratified, the jurisprudence of national courts and the realities of Lebanese society. The Commission has prepared a draft text which has been distributed to trade union and professional organizations as well as to experts so as to enable them to submit their comments on the matter. Finally, the Government states that in drafting the final version of the Bill, the Commission will take into consideration the observations and viewpoints of all parties in accordance with the legislation in force. The Committee takes note of the Government's observations, and as pointed out in its previous recommendations, it expresses the hope that the new Bill, unlike the previous one, will confine itself to defining a general framework within which trade union organizations can choose the

trade union structures they wish to establish. Similarly, the Committee expresses the hope that the new legislation will be in full conformity with the principles of freedom of association and reminds the Government that the technical assistance of the International Labour Office remains at its disposal.

**22.** As regards Case No. 1724 (Morocco), at its June 1994 meeting [see 294th Report, paras. 347-371], the Committee had urged the Government to take measures to release immediately all persons arrested for normal trade union activities and to reinstate them in their jobs (six strikers employed in Sidi-Kacem in the El Baraka agricultural enterprise, including Mr. Mohammed Zarzour, secretary-general of the UMT trade union in the enterprise; the person arrested on 14 July 1993 during a trade union demonstration by staff of the Ministry of National Education) and to keep it informed of developments in the situation of these persons and to transmit the texts of the sentences made against them. The Committee had also requested the Government to transmit the verdict in the case of the 12 striking deep-sea fishermen arrested on 17 July 1993 and the texts of the rulings handed down on appeal concerning the 12 workers in the SOCAFIR enterprise. Moreover, as regards the allegations concerning the violent intervention of the police to disperse striking workers (in particular during strikes in the SOCAFIR, SICOPAR, El Baraka and PLASTIMA enterprises as well as during a demonstration by staff of the Ministry of National Education), the Committee had requested the Government to carry out an independent, impartial and in-depth inquiry to determine the nature of the action alleged by the complainant organization and to keep it informed of the outcome of this inquiry. In a communication of 20 July 1994, the Government states that the common factor in the complaints presented by certain Moroccan trade unions is that they are linked to collective labour disputes concerning working conditions, and the main reason for the wide scale of these disputes is due to the ignorance of the borderline between the right to strike and the right to work. More specifically, the Government states in respect of the allegations of the anti-union attitudes of the SOCAFIR, SICOBAR, El Baraka, PLASTIMA and MARPHOCEA enterprises that in certain cases the workers had initiated judicial proceedings to reclaim their rights and that agreements on the reinstatement in their posts or compensation of the dismissed workers had been made. In other cases, these allegations were not well founded. The Committee takes note of this information and reiterates its previous recommendation that legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination and acts of interference by employers against workers and workers' organizations to ensure the practical application of Articles 1 and 2 of Convention No. 98. Consequently, the Committee once again urges the Government to adopt as soon as possible legislative or other measures to ensure the application of the Convention and to keep it informed of any progress made in this respect. Finally, regretting that the Government has not provided any of the information requested on the arrests, the judicial proceedings under way and the acts of violence by the police against striking workers and demonstrators, the Committee requests the Government once again to transmit this information as soon as possible.

**23.** As regards Case No. 1726 (Pakistan), at its June 1994 meeting [see 294th Report, paras. 372-419], the Committee had requested the Government: (a) to amend its legislation in order to ensure the right to organize and bargain collectively for workers in accordance with Conventions Nos. 87 and 98; (b) to ensure that registration is granted to the Awami Labour Union-Daewoo Motorway Construction Project; (c) to establish

an independent and impartial inquiry into the reported arbitrary detention and torture of Daewoo workers; (d) to keep it informed of the situation of the Daewoo workers reportedly arrested and charged with illegal assembly; (e) to ensure the reinstatement of the approximately 395 union members dismissed from Daewoo for exercising their trade union rights; and (f) to investigate the allegations of anti-union tactics on the part of the Daewoo Corporation. In its communication of 8 September 1994, the Government addresses three points: the situation of workers in export processing zones; the question of the registration of the Daewoo union; and the Pakistan Essential Services (Maintenance) Act, 1952. First, the Government indicates that workers in the Karachi Export Processing Zone (KEPZ) are guaranteed better facilities and benefits due to the sophisticated management style introduced in that organization and adds that workers there have been happy with their working life and there is no bar on their right to association which is otherwise constitutionally guaranteed. As concerns the registration of the Awami union, the Government states that the question is still pending before the Labour Appellate Tribunal upon the appeal made by the Registrar of Trade Unions. It states that the Ministry of Labour, above and beyond this litigation, has requested the provincial Government to see to it that the applicant union is registered in accordance with the provision of the law, but adds that it cannot issue directions to the provincial Government in contravention of the latter's legislative rights. Finally, the Government recalls that the provisions of the Pakistan Essential Services (Maintenance) Act are limited in time and applied only in case of essential and public utility services. Nevertheless, the Government declares its intention to further limit its scope of application by reducing the frequency of its application. While noting this information, the Committee must, however, express its regret that the Government has not provided any information concerning the investigations into the reported arrests, detention and torture of workers at the Daewoo Motorway Construction Project, nor with respect to the measures taken to reinstate the workers dismissed for having legitimately exercised their trade union rights. The Committee once again urges the Government to take the necessary steps to ensure an independent and impartial investigation on these points and to keep it informed of the findings and the measures taken to redress the situation. The Government is also requested to continue to keep it informed of the steps taken to ensure the registration of the Awami union and to amend the above-mentioned legislation so as to ensure the right of workers to organize and bargain collectively.

**24.** Finally, as regards Cases Nos. 1556 (Iraq), 1557 (United States), 1568 (Honduras), 1581 (Thailand), 1590 (Lesotho), 1623 (Bulgaria), 1628 (Cuba), 1630 (Malta), 1656 (Paraguay), 1675 (Senegal), 1688 (Sudan), 1697 (Turkey), 1705 (Paraguay), 1706 (Peru), 1713 (Kenya), 1714 (Morocco), 1722 and 1735 (Canada/Ontario), 1742 (Hungary), 1746 (Ecuador), 1759 (Peru) and 1760 (Sweden), the Committee requests the governments concerned to keep it informed of developments in the various matters. The Committee hopes that these governments will communicate the information requested shortly. In Cases Nos. 1434/1477, 1686, 1702 and 1721 (Colombia), 1569 (Panama), 1618 (the United Kingdom) and 1710 (Chile), the Committee received information from the governments concerned just prior to or during its meeting. It will examine these cases at its next meeting.

# II. Cases in which the Committee has reached definitive conclusions

## Case No. 1729

*Complaints against the Government of Ecuador*
*presented by*
*— the Latin American Central of Workers (CLAT) and*
*— the Postal, Telegraph and Telephone International (PTTI)*

**25.** The Committee examined this case at its March 1994 meeting [see 292nd Report, paras. 742-760, approved by the Governing Body at its 259th Session (March 1994)], when it formulated interim conclusions. The Government sent new observations in communications of 10 March and 11 May 1994.

**26.** Ecuador has ratified the Freedom of Association and the Protection of the Right to Organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

### A. PREVIOUS EXAMINATION OF THE CASE

**27.** In the Committee's previous examination of the case certain allegations remained pending for which the Government had not communicated observations. Specifically, these concerned the dismissal as a result of protests and strikes of the General Secretaries of the Federation of Telecommunications Workers (FEDETEL) and the Trade Union of the State Telecommunications Enterprise (SINDO-IETEL) (Messrs. César Jara Pullas and Fernando García); the dismissal of eight trade union leaders of the State Telecommunications Enterprise (EMETEL), including the General Secretary of the National Federation of Telecommunications Workers of Ecuador (FENETEL) (Mr. Leonardo Torres Sarmiento); and the detention for 24 hours of the trade union leader, Mr. Abdón Logroño Losada.

**28.** In these circumstances, the Committee formulated the following recommendations [see 292nd Report, para. 760]:

The Committee requests the Government to communicate its observations on the alleged dismissals of the General Secretaries of FEDETEL and SINDO-IETEL, Messrs. César Jara Pullas and Fernando García, as a result of protests and strikes.

The Committee regrets that the Government has not explained the reasons for the 24-hour detention of Mr. Logroño and requests it to communicate detailed information on this allegation.

Observing that the new allegations presented by the CLAT regarding the dismissal of eight trade union leaders from the EMETEL enterprise, including the General Secretary of the National Federation of Telecommunications Workers of Ecuador (FENETEL), Mr. Leonardo Torres Sarmiento, were transmitted recently, the Committee requests the Government to furnish its observations on these allegations as quickly as possible.

B. THE GOVERNMENT'S REPLY

**29.** In its communication of 10 March 1994, the Government states that, as regards the alleged dismissal of eight trade union leaders from the EMETEL enterprise (including the General Secretary (Mr. Leonardo Torres Sarmiento) of the National Federation of Telecommunications Workers of Ecuador (FENETEL)), these dismissals were the result of a de facto decision taken by the enterprise, which was not sanctioned by law, and that under the labour legislation, unjust dismissal is penalized by the payment of compensation calculated according to the worker's length of service. Furthermore, an employer who dismisses a worker without justification must pay a special bonus along with the compensation provided under the respective collective agreement. The Government explains that these dismissals took place without the labour authorities being aware of them and that in August 1993, the Ministry of Labour had already denied authorizations of dismissal *(vistos buenos)* requested by the enterprise, because of a lack of legal grounds to terminate the employment relationship. The Government states that the Ministry of Labour could intervene to arrange for the EMETEL enterprise to comply by paying this compensation, and that the dismissed workers could also bring legal action to request payment, as one of the prejudiced workers had already done. Finally, the Government reports that the legislation does not establish the right of a dismissed worker to return to his post, and that the labour authorities thus cannot intervene by ordering reinstatement.

**30.** In its communication of 11 May 1994, the Government states that, as regards the alleged dismissal of the General Secretaries of the FEDETEL and the SINDO-IETEL (Messrs. César Jara Pullas and Fernando García), the EMETEL enterprise requested a *visto bueno* authorization to dismiss Mr. Fernando García, but that he was not dismissed, as the labour authority denied the dismissal request, and he is thus still working at the enterprise. As regards Mr. César Jara Pullas, the Government states that the EMETEL enterprise requested from the labour authorities a *visto bueno* authorization to terminate the employment relationship, basing the dismissal on the worker's lack of integrity and serious insults made by him against the employer. The Government reports that after an investigation was conducted by the labour authorities to determine whether the authorization should be given, it was ascertained that Mr. Jara Pullas had conducted a written campaign of insults, abuse and threats not only against the enterprise's authorities, but also against other trade union leaders. Furthermore, the Government points out that after studying the case, the enterprise's joint worker-management committee adopted a resolution authorizing the EMETEL to proceed with the dismissal authorization procedure. As it was ascertained that the grounds invoked by the enterprise did indeed exist, the labour authority granted the authorization for the termination of the employment relationship with the trade union leader. The Government denies that protests and strikes were the cause of this termination which took place with the Government's authorization, and further specifies that during the negotiation and signing of the collective agreement at the EMETEL enterprise there were no strikes or protests.

**31.** Finally, the Government states that as regards the alleged detention for 24 hours of the trade union leader Mr. Abdón Logroño Losada, a complaint was filed by Ms. Greta Hoyos in accordance with the procedures established by national law and that the complaint was handled by the judicial authorities. The Government reports that the judge may, when he considers it necessary, order the temporary detention of the accused

for up to 48 hours while beginning the investigation. The Government points out that it was not a party to the complaint.

## THE COMMITTEE'S CONCLUSIONS

**32.** The Committee observes that the allegations which remained pending after its examination of this case in March 1994 referred to dismissals and requests made to the labour authorities for authorizations of dismissals of trade union leaders at the EMETEL enterprise, as well as the detention of a trade union leader.

**33.** As regards the alleged dismissals of the General Secretaries of the FEDETEL and SINDO-IETEL (Messrs. César Jara Pullas and Fernando García), the Committee notes that the Government states that Mr. Fernando García was not dismissed and is still employed at the enterprise.

**34.** As regards the case of Mr. Jara Pullas, the Committee notes the Government's observations according to which the enterprise requested the authorization to terminate the employment relationship with this trade union leader, that following an investigation conducted by the labour authorities it was ascertained that a written campaign of insults, abuse and threats had been conducted against the enterprise's authorities and against other trade union leaders, and that the authorization was therefore granted. Furthermore, the Committee notes that the enterprise's joint worker-management committee approved the proceedings aimed at obtaining the *visto bueno* (authorization for dismissal). The Committee recalls that although "the right to express opinions through the press or otherwise is an essential aspect of trade union rights" [see *Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition, 1985, para. 172], "in expressing their opinions trade union organizations [and their leaders] should respect the limits of propriety and refrain from the use of insulting language". [See 254th Report of the Committee, Case No. 1411, para. 198, approved by the Governing Body at its 239th Session (February-March 1988).]

**35.** As regards the alleged dismissal of eight trade union leaders from the EMETEL enterprise, including the General Secretary (Mr. Leonardo Torres Sarmiento) of the National Federation of Telecommunications Workers of Ecuador (FENETEL), the Committee notes that the Government states that:

(1) such dismissals took place based on a de facto decision taken by the enterprise, which was not sanctioned by law, and without the labour authorities being aware of them;

(2) under the labour legislation, unjust dismissal is penalized by the payment of compensation calculated according to the worker's length of service;

(3) an employer who dismisses a worker without justification must pay a special bonus along with the compensation provided under the respective collective agreement;

(4) the dismissed workers may bring legal action to request payment (as one of the prejudiced workers has done).

Furthermore, the Committee notes that the Government states that the Ministry of Labour could intervene to arrange for the EMETEL enterprise to comply by paying this compensation, but that it could not request the reinstatement of these trade union leaders, as the national legislation does not establish a right to reinstatement.

**36.** Consequently, since the Government recognizes that the trade union leaders were dismissed illegally, the Committee should like to point out the principle according to which "it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is accorded by legislation which enables employers in practice — on condition that they pay the compensation prescribed by law for cases of unjustified dismissal — to dismiss any worker, if the true reason is his trade union membership or activities". [See 292nd Report, Case No. 1625 (Colombia), para. 70 and *Digest*, op. cit., para. 547.] In these circumstances, the Committee requests the Government to facilitate an agreement between the State Telecommunications Enterprise and the trade unions so that the dismissed workers can be reinstated in their posts.

**37.** As regards the detention for 24 hours of the trade union leader Mr. Abdón Logroño Losada, the Committee notes that the Government reports that a complaint was filed by another trade union leader, Ms. Greta Hoyos, in accordance with the procedures established by national law and that the complaint was handled by the judicial authorities. Furthermore, the Committee observes that the complainants pointed out in their complaint that Ms. Greta Hoyos, after filing the complaint, did not confirm the accusations. [See 292nd Report, para. 747.] In these circumstances, as the detention resulted from a private dispute and was not the result of action taken by the enterprise or the authorities, the Committee will not proceed with the examination of this allegation.

THE COMMITTEE'S RECOMMENDATION

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

— The Committee requests the Government to facilitate an agreement between the State Telecommunications Enterprise and the trade unions so that the eight dismissed trade union leaders (including the General Secretary of the National Federation of Telecommunications Workers of Ecuador, Mr. Leonardo Torres Sarmiento) can be reinstated in their posts.

**Case No. 1743**

*Complaint against the Government of Canada (Quebec) presented by the Confederation of National Trade Unions (CNTU)*

**39.** The Confederation of National Trade Unions (CNTU) presented a complaint of violation of trade union rights against the Government of Canada (Quebec) in communications dated 6 December 1993 and 22 June 1994.

**40.** The Government of Canada, in a communication dated 9 August 1994, transmitted the observations of the Government of Quebec, dated 2 August 1994.

**41.** Canada has ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); however, it has not ratified the Right to Organize

and Collective Bargaining Convention, 1949 (No. 98), or the Collective Bargaining Convention, 1981 (No. 154).

## A. THE COMPLAINANT'S ALLEGATIONS

**42.** In its communication dated 6 December 1993, the CNTU maintains that the Act to amend the Labour Code, which entered into force on 19 May 1994 (hereinafter referred to as "the Act"), runs counter to the principles of freedom of association guaranteed by Conventions Nos. 87, 98 and 154, and by the Constitution of the ILO.

**43.** The CNTU, founded in 1921, groups together 2,200 trade unions and over 240,000 workers, mainly in the province of Quebec. These trade unions are affiliated to nine federations, according to branch of activity, in the private sector and the public services. Most of the trade unions affiliated to the CNTU would be affected by this Bill, both in the private sector and in the public services, such as municipal corporations, for example. However, the public and parapublic sectors (hospitals, school boards and public servants) are not covered by the legislative measures contested in the complaint.

**44.** The earlier version of the Labour Code provided that the term of a collective agreement was not less than one year and not more than three years (section 65). The Code also provided that certification could be applied for from the 90th to the 60th day prior to the date of expiration of a collective agreement, thus allowing assessment of the representative character of the certified association at least every three years, should another trade union claim to be representative. Under the new provisions, the issue of certification to the most representative trade union in a given unit, recognizing it as an exclusive agent for purposes of bargaining and representation of all the workers in the unit, cannot be challenged for a period of up to six-and-a-half years.

**45.** Under the new provisions, for collective agreements with a term of over three years, assessment of a union's representative character can take place between the 180th and the 150th day prior to the date of expiration of the collective agreement. For example, if an employer and a certified association conclude a collective agreement for a seven-year term, no other organization can apply for certification for the same group until six-and-a-half years have elapsed after the signature of the collective agreement. This is an infringement of the workers' right to choose their representative organization within a reasonable period (all of the other labour jurisdictions in Canada recognize the right to change certified association at least every three years).

**46.** The CNTU maintains that the new time periods imposed by the Labour Code of Quebec are clearly unreasonable in the light of the principles laid down by the Committee itself, in particular in Cases Nos. 533 (India), 559 (Trinidad and Tobago) and 1385 (New Zealand).

**47.** Moreover, under section 15 of the Act, read together with section 2, a member of a certified association could be prohibited from becoming a member of another association or affiliating to it for a period of up to six-and-half years, depending on the term of the collective agreement concluded between the certified association and the employer. Under the earlier legislation this ban could not last more than three years, because of the prohibition on collective agreements with a term of over three years. This section therefore infringes the workers' right to join organizations of their own choosing and runs counter, in particular, to Articles 2, 5, 8 and 11 of Convention No. 87.

**48.** In addition, the fact that a certified association and an employer may conclude collective agreements for a long term, while another association cannot apply for certification before a long period has elapsed (of up to six-and-a-half years), does not ensure adequate protection against acts of interference, in so far as this possibility in itself encourages employers wishing to set up a dominated trade union organization to do so and thus secure six-and-a-half years of "peace" without any genuine bargaining. Workers wishing to set up a trade union which is not dominated by the employer would in practice be compelled to wait until the six-and-a-half-year period has elapsed before they can claim representativity and negotiate. This infringes the right to adequate protection against any acts of interference, in violation of Article 2 of Convention No. 98.

**49.** Lastly, since the new Act allows the parties to negotiate collective agreements for longer terms (five, ten, 20 years, etc.) without their being subject to denunciation by one of the parties, after some years of application this may become a restrictive framework from which one of the parties cannot free itself by negotiating working conditions adapted to the real situation, until it is able to choose another representative association, once five-and-a-half to six-and-a-half years have elapsed since the application of the collective agreement. These provisions therefore infringe the right to bargain.

**50.** In its communication dated 22 June 1994, the CNTU states that the amendment made between the time the Bill was tabled and its adoption introduces an exception for the *first* collective agreement, whose term cannot exceed three years. This amendment means that, for every first collective agreement, the period during which workers may change their trade union allegiance when another association has the required representative character is between one and three years, depending on the term of the agreement (section 22(d) of the Labour Code, section 2 of the Act). In the case of a collective agreement that has been renewed, however, the parties may agree to postpone the period in which another association may apply for a certification to between five-and-a-half and six-and-a-half years from the date of the renewal of the agreement (section 22(e) of the Labour Code). This amendment only ensures respect of the principles of freedom of association in the case of a *first* agreement, while the grounds for the initial complaint remain as regards other agreements.

## B. THE GOVERNMENT'S REPLY

**51.** In its communication dated 2 August 1994, the Government of Quebec maintains that the provisions criticized by the complainant organization are in compliance with the principles of freedom of association of the ILO and, before going on to reply specifically to the allegations, outlines the main features of the labour relations system.

**52.** The rules respecting certification allow an association claiming to represent the absolute majority of employees in a certain group of employees of the same employer (the bargaining unit) to request recognition as the exclusive agent of all of the employees of the unit for purposes of negotiation and application of a collective agreement (sections 21 and 67). This certification is carried out by a specialized and independent body, whose decision is based on objective and pre-established criteria. It can only be challenged at certain specified times which are linked to the term of the collective

agreement. Before the amendments introduced by Bill No. 116, this could be done after one to three years, depending on the agreed term of the collective agreement, i.e. the lower and upper limits imposed by the law.

**53.** The fact that certification cannot be challenged outside these periods does not, however, mean that it is impossible to remove a trade union which does not genuinely represent the workers' interests. On the one hand, the Code provides that certification shall not be granted to a trade union which is dominated (sections 12, 29 and 31) and, on the other, it stipulates that a complaint of an association being dominated can be brought at any time, and its dissolution can be obtained (sections 12, 143, 145 and 149). Since the decree to dissolve the association proceeds from the court's having established that it was dominated, it follows that the dissolved association is stripped of its certification. Since this is an essential attribute for the conclusion of a collective agreement by an association of employees, such agreement therefore loses its legal basis. Moreover, although this subject is not dealt with in the Code and this has no impact on certification, under the by-laws governing the functioning of the association, a group of employees has the possibility of replacing the trade union officers, even during the term of the collective agreement.

**54.** Once certification has been granted, the certified association and the employer are bound to begin and carry on negotiations diligently and in good faith, with a view to concluding a collective agreement (sections 53, 141 and 144). In order to assist them, the law provides them with means of resolving their dispute: conciliation (sections 54 and 55) or arbitration (Chapter IV, sections 1 and 1.1 of the Code and section 15 of the Act respecting the Ministry of Labour, LRQ, c. M-32.1). The law does not dictate the content of the collective agreement but leaves free rein for negotiation, as long as it relates to conditions of work in the broad sense of the term and that it is not contrary to public order or prohibited by law (section 62). There can be only one collective agreement with respect to the group contemplated by the certification (section 67), the signing of which is conditional upon its being accepted by vote of the members of the trade union, by secret ballot (section 20.3).

**55.** The Code provides that any disagreement regarding the interpretation or application of a collective agreement shall be submitted to the procedure of arbitration of grievance (sections 100 and ff.). Strikes and lockouts are therefore forbidden during the period of the agreement, except where negotiations are reopened under a clause to that effect in the agreement (section 107). These heavy means of pressure can only be used, with advanced notice, between two collective agreements or during negotiation for a first collective agreement — a less frequent occurrence since arbitration for a first collective agreement may take place at the request of only one of the parties (sections 58 and 93.1 and ff.). Under what are known as the "anti-strike-breaker" provisions of the Code, for the duration of a strike or a lockout the employer is prohibited from replacing striking or locked-out employees, whether by other employees not affected by the dispute, any person hired after the negotiations stage, by a contractor or by a person employed by another employer. The law also prohibits the use of the services of dissident employees. Moreover, in an establishment where a strike has been declared, an employer cannot utilize employees from another of his establishments, unless the employees of such an establishment are members of the bargaining unit on strike or locked out. An employer wishing to maintain his activities despite the dispute therefore has no other option than to utilize his own employees, subject to the reservation

mentioned above, or to contract out his production to a contractor outside the establishment on strike or locked out. The Code also provides that an employee on strike shall not lose his employment because of the strike and enjoys priority in recovering his employment at the end of the dispute (sections 110 and 110.1).

**56.** Individual employees are protected against anti-union acts on the part of the employer (sections 13, 143 and 14 and ff.) and provision is made for remedies for contesting failure of a trade union (whether or not he is member thereof) to discharge its duty of representation with respect to all of the employees of the bargaining unit (sections 47.2, 144 and 47.3 and ff.). Lastly, the Code provides that changes affecting the enterprise (alienation, operation by another in whole or in part, division, amalgamation or changed legal structure) shall not invalidate the certification of the trade union or the collective agreement; the new employer remains bound thereby (section 45).

**57.** As regards the amendments introduced by the Act, only the provisions concerning the term of collective agreements are not unanimously accepted, and are the subject of the complaint; these are sections 2, 13, 15 and 35. Section 13, from which the other three follow, amends section 65 of the Labour Code, as it now stands, by removing the three-year upper limit on the term of collective agreements. Henceforth, the parties may, if they wish, agree on an agreement suited to their needs, the only limit being a specified term of not less than one year. The amendments introduced by sections 2 and 15 of the Bill are intended to ensure consistency with the provision concerning the term of agreements: they specify the periods during which union allegiance may be changed (raiding periods)[1] and affiliation may be changed, in the case of a collective agreement concluded for a long term.

**58.** The expiration date of a collective agreement has always served as a point of reference for determining the period during which employees may express their wish to change their collective representative. If freedom of association were not to be jeopardized, this rule could not be left as it stood in the case of a long-term agreement concluded for more than seven years. It is hardly conceivable that in the case of a collective agreement with a ten-year term the representative character of the certified union cannot be contested until the tenth year. It also seemed desirable for this period (known as the change of allegiance period) to occur before the beginning of negotiations to renew the collective agreement, it being possible to begin such negotiations 90 days before the expiration of the agreement.

**59.** Thus, section 22(e) of the Code, inserted by section 2 of the Bill, provides that, for a collective agreement with a term of more than three years, the period during which allegiance may be changed shall be brought forward to between the 180th and the 150th day preceding the expiration of the agreement. The Code also provides, in the case of an agreement with a term of more than seven years, for a raiding interval running from the 180th to the 150th day preceding the sixth anniversary of the collective agreement and, where appropriate, every other anniversary thereafter. The following table illustrates the application of this new legislation, based on the agreed term of the collective agreement.

[1] Practice whereby a trade union recruits, as members, workers who are members of another existing union.

**Raiding periods, based on term of agreement**

| Term | Beginning of raiding period(s) | Applicable rule |
|---|---|---|
| 3½ years | 2 years, 9 months | (End) 180th-150th day |
| 4 years | 3 years, 6 months | (End) 180th-150th day |
| 6 years | 5 years, 6 months | (End) 180th-150th day |
| 6½ years | 6 years | (End) 180th-150th day |
| 7 years | 6 years, 6 months | (End) 180th-150th day |
| 7 years, 1 month | 5 years, 6 months<br>+ 6 years, 7 months | (6-year interval)<br>(End) 180th-150th day |
| 7 years, 2 months | 5 years, 6 months<br>6 years, 8 months | (6-year interval)<br>(End) 180th-150th day |
| 8 years | 5 years, 6 months<br>7 years, 6 months | (6-year interval)<br>(End) 180th-150th day |
| 9 years, 1 month | 5 years, 6 months<br>7 years, 6 months<br>8 years, 7 months | (6-year interval)<br>(8-year interval)<br>(End) 180th-150th day |
| 10 years | 5 years, 6 months<br>7 years, 6 months<br>9 years, 6 months | (6-year interval)<br>(8-year interval)<br>(End) 180th-150th day |

**60.** As regards the periods during which it is permitted to change trade union affiliation (section 73 of the Code, amended by section 15 of the Bill), all the Act does is maintain the previous rule, while adapting it to the context of agreements concluded for a long term. Thus, for a collective agreement whose term is three years or less, the amendment still allows a change of affiliation within 90 days preceding the expiration of the agreement and, in the case of an agreement for a longer term, within the 180 days counting from the beginning of any raiding period.

**61.** According to the Government, the complainant organization is concerned not so much about the removal of the upper limit on the term of collective agreements as about its necessary corollaries: the modification of the periods in which change of allegiance and trade union affiliation is allowed, upon which the periodicity of negotiation depends in turn. The CNTU considers the proposed periods to be excessively long in the light of the principles laid down on this subject by the Committee on Freedom of Association. In this respect, the Government maintains that these principles cannot be applied literally to Bill No. 116 without first considering the social, economic and legal context in which this amending Act is being adopted, as well as the spirit and context of the decisions handed down by the ILO supervisory bodies.

**62.** As regards the social-economic context, the Government emphasizes that in the last five years, with the signing of the Canada-United States Free Trade Agreement (FTA) and, more recently, of the North American Free Trade Agreement with the United States and Mexico (NAFTA), Canada has moved from being a relatively closed economy to one which is open to the world. The restructuring of markets resulting from

the signature of these agreements, as well as the economic realities at the beginning of this decade, have led the Quebec partners in enterprise — employers, unions and employees — now that they have reached this stage of maturity, to experiment with new labour relations based on partnership rather than confrontation. Thus, without any control from the State, a labour relations model known as the "social contract" developed, as a distinctive feature of Quebec in the entire North American region. To assist the process, the Government of Quebec supported the negotiation and conclusion of such agreements, which go beyond the traditional collective bargaining framework, either in terms of the subjects covered (investment guarantees), or as regards the term of the agreement, which generally takes account of the time needed to implement the terms of the agreement. By and large these agreements could have been included in the collective agreement if it had not been for the upper limit on the term laid down in section 65 of the Labour Code.

**63.** The partners to bargaining thus developed a number of tools to compensate for a legal prohibition which had become obsolete: parallel agreements; signature of two collective agreements in advance, to be applied successively, with the second agreement being kept for filing on the date at which it is to enter in force; or simply the conclusion of an agreement with a four-, five- or six-year term or more, despite the legal prohibition. To date 40 such agreements have been concluded, 20 of which are said to have been negotiated by trade unions affiliated to the CNTU. As can be seen from the apparently contradictory decisions handed down by the Superior Court (attached to the Government's observations), a problem arises as to the legal status of such agreements. If one took the first judgement alone, one could even say that these agreements are, at most, amicable agreements whose legal status, once three years — i.e. the upper limit laid down by law — have elapsed, lies entirely in the good faith of the parties. With respect to third parties, or one of the parties wishing to obtain enforcement of the agreement, as far as the application of the Code is concerned it is as if the agreement did not exist. Raiding would therefore be possible and if certification were accorded to the raiding union, the latter could refuse to apply the long-term agreement signed by its predecessor and ask for new negotiations, in accordance with the rules laid down in section 61 of the Code. The enterprise would lose all of the advantages it hoped to gain from the stability of working conditions laid down in a long-term agreement, for which it may have made a number of concessions, which would then be considered as acquired rights. The same is true of the concessions and advantages the previous trade union hoped to gain, although to a lesser extent, since the replacement of the association results from the employees' decision. However, the situation could be just as problematical for the union and the members it represents if a new employer takes over the enterprise. In this case, the rules relating to the transfer of the enterprise (sections 45 and 46) cannot result in the new employer being bound by the terms of an agreement concluded more than three years earlier. The application, and especially the interpretation, of the agreement could also raise a problem in so far as one of the parties could successfully claim that a grievance cannot legitimately be referred to an arbitrator in the fourth year of the collective agreement.

**64.** Uncertainties of this kind arising out of the rules laid down in the Labour Code and case-law are likely to incur distrust on the part of the parties, however eager they may be to embark on the negotiation and conclusion of a collective agreement for a longer term. It would therefore become impossible for them to ensure that their relations

are stable and up to date as dictated by today's economic environment. In this context, state intervention would therefore appear to be justified in so far as a balance needs to be maintained between stability of the employer and trade union partners and the right of employees to periodically choose the trade union representing them. The amendments introduced maintain this balance.

**65.** As regards the legal context, the Government maintains that the Labour Code continues to ensure the promotion and exercise of the rights of association and collective bargaining. In fact, the sole purpose of the provisions that are the subject of the complaint is to create a secure legal framework for the partners, both employers and trade unions (including those affiliated to the complainant organization, the CNTU), when they sign agreements for a long term, an increasingly frequent occurrence to which legislation had not yet adapted. This mutual security of the partners could have been jeopardized had the amendment merely removed the three-year upper limit on the term of collective agreements (section 65 of the Labour Code). This would have meant that the possibility of replacing the trade union once the agreement had expired would have been shifted to much longer intervals (depending on the term of the agreement) than that envisaged by the amendments introduced. This is the reason justifying the introduction of an amendment to section 22 of the Code allowing an interval for a change of trade union allegiance in the case of an agreement concluded for more than seven years (section 2 of the Bill, introducing a new paragraph (e) in section 22 of the Code). Whereas under the combined effect of sections 22(d), 61 and 45 of the Code, employers and employees were formerly bound by the terms of the collective agreement until it expired, the amendment will favour employees, as they are the only party which can denounce a long-term agreement before it expires, by replacing their association. By setting this first change of allegiance period at a time six-and-a-half years after the beginning of the agreement, *at the latest*, the Government feels it has achieved a fair balance between the need for security of the partners to negotiation and respect for employees' right of association.

**66.** By comparison, most of the other legislatures in Canada (at provincial or federal level), while they do not place an upper limit on the term of collective agreements, also allow a change of union allegiance at a specified period or specified periods, during the term of a long-term collective agreement. In one case (Ontario), the current agreement automatically ceases to apply as a result of certification of a new employees' association, while in others the union replacing the original signatory may denounce the agreement in force (federal, Alberta and British Columbia, for example). This change of union partner may take place for the first time between the 18th and the 35th month of the agreement's application, depending on the jurisdiction. It would have been easy to adopt a similar formula but for the fact that, according to the Government, allowing a date (any date) for a first raid could result in practice in the indirect imposition of a new upper limit on the term of collective agreements. There would then be a risk that few employers and unions would be inclined to make the concessions required by a long-term agreement if the possibility always existed for a new union partner to replace the signatory union in the short term and disregard this long-term agreement in future. In purely statistical terms, the experience of Canada bears out this concern, since the great majority of collective agreements are negotiated for a term which corresponds to the first allowed raiding period.

**67.** The Government states that the complainant does not offer any factual evidence giving reason to believe that the new periods envisaged for change of union allegiance are unreasonable, or excessively long to the point of entailing systematic violation of employees' rights to choose their representative association. The complainant does not adduce any fact establishing that the new periods, ranging from two years and nine months to six years and six months (see table above), are particularly inadequate in the light of past experience or practice in Quebec as regards the frequency of changes of union allegiance. There is no obligation to choose three rather than two, four or six years as the time-limit for challenging the representative character of a certified trade union. The legislator had to draw a line of demarcation and arbitrate between the divergent demands of different groups of the community as regards the ideal period within which it should be possible to challenge the representativity of a trade union. In this respect, the Government considers that it has not been unreasonable in exercising a certain amount of leeway when addressing social policy issues and attempting to reconcile conflicting interests. It considers that in adopting these new provisions on the period for changing allegiance it has achieved a fair balance between the need for security of the bargaining partners and respect of employees' rights. These provisions adequately meet the need to update the Labour Code in the light of the new realities on the labour market, while securing industrial peace during the term of the collective agreement that has been negotiated and affording employees the choice of their representative association by allowing them the possibility of changing union allegiance at sufficiently frequent intervals.

**68.** Moreover, the term of a collective agreement remains, as it has always been, one of the elements of negotiation. In other words, just like other conditions of work, the term of the agreement is negotiable and the conclusion of a collective agreement, irrespective of its term, is still a voluntary act. Moreover, the signature of the contract is still subject to the employees who are members of the association expressing their wish to do so (section 20.3 of the Code).

**69.** The complaint also implies that it will be easier for a dominated trade union to establish itself and maintain its position in the enterprise because of the time period which must elapse before it can be removed. Concerned to avoid this situation and aware of the problem, the legislator amended the Bill to prohibit partners negotiating their first collective agreement from concluding an agreement for a term of more than three years, since this is the time at which the employees' association is most vulnerable: the situation therefore remains as it stands for such agreements. In this case as in the other cases, the Code also continues to provide, *at any time,* for the possibility of filing a complaint alleging that the association is dominated by the employer (sections 12 and 143 of the Code). The complaint is heard by an independent court of law, whose decision can lead to the imposition of a fine, with the possible addition of a request to decree the dissolution of the dominated association (section 149). If such dissolution is decreed by the court, the employees may then found a new association, apply for certification and negotiate a new collective agreement replacing that which was cancelled as a result of the dissolution of the signatory association.

**70.** Neither does the Bill deny employees, as regards their individual rights, the remedies and machinery afforded them by the Labour Code as protection against arbitrary acts of the trade union. In addition to the right to express their agreement, by secret ballot, to the signature of a collective agreement, the members of an association

have the right of access to the financial statements of their association and may, whether they are members or not, contest failure of the union to discharge its duty of representation with respect to them (sections 20.3, 47.1, 47.2 and 144). If the union negligence occurs in a context of a dismissal or disciplinary sanction, the employee concerned has a special remedy which allows him first of all to submit a complaint of such negligence (for example, refusal by the union to arbitrate his grievance of dismissal) and then to have the case referred to arbitration (sections 47.2 to 47.6). The process successively involves an investigator of the Ministry of Employment, should the employees so request, then the labour court and, finally, an arbitrator of grievances.

**71.** The Government points out that this machinery only makes sense if there is a high degree of unionization. Quebec has one of the highest rates of unionization in North America, taking all branches together, and representation is highly diversified. The vast majority of employees covered by collective agreements are represented by a trade union affiliated to one of the four major confederations of Quebec, over which the State has no control. A large proportion of the other employees are grouped together in independent trade union federations. Trade union dynamism is thus by no means impaired by labour legislation in Quebec, on the contrary, and there is nothing in Bill No. 116 to jeopardize this situation. As it has for several decades now, the Labour Code continues to recognize the right of association (section 3), to ensure its protection by prohibitions and appropriate machinery for contestation before independent bodies (sections 12 and ff.); to allow any representative association to be certified following assessment of its representative character by an independent body, and according to specific, objective, previously established criteria (sections 21 to 44); to promote the negotiation and conclusion of a collective agreement (sections 52 to 73); to encourage, by appropriate and independent machinery (arbitration of disputes and arbitration of grievances) the settlement of disagreements concerning the negotiation or interpretation of a collective agreement (sections 74 to 102); to authorize a strike in support of negotiation of a collective agreement, coupled with protection machinery unequalled in scope throughout North America, in the form of prohibitions on the employer to utilize replacement labour ("anti-strike-breaker" measures, sections 109.1 and ff.); and, lastly, it provides that violation of one of its provisions can incur a complaint and sentencing to a fine by an independent court of law, the labour court (section 118, second paragraph, and 141 and ff.).

**72.** The Government considers that the provisions which are the subject of the complaint are in conformity with the principles of freedom of association. As amended, the Labour Code does not affect the right of an employee to refrain from joining, or his right to participate in forming, carrying out the activities of or being a member of another association at any time. The amendment does not impose a compulsory duration for trade union membership. Rather, this would be derived from the term of the collective agreement freely negotiated by the parties (unions and employers). In a way it acts as a guarantee of stability of the union side *allowed* by law for a longer period, which does not result in a system of trade union monopoly contrary to the principles of freedom of association. [ILO, *Freedom of association,* 3rd edition, 1985, para. 248; 259th Report, Case No. 1385 (New Zealand), para. 551; ILO: *General Survey on Freedom of Association and Collective Bargaining,* Report III (Part IV(B)), ILC, 69th Session, 1983, paras. 144 and 145.] In other words, the amendment at issue relating to change of union allegiance merely governs the periodicity of such changes.

**73.** The Government requests the Committee to examine *Bill No. 116* in the light of the decision of the ILO supervisory bodies to leave "it to the practice and regulations of each State to decide whether it is appropriate to guarantee the right of workers not to join an occupational organization, or on the other hand, to authorize and, where necessary, to regulate the use of union security clauses and practices". [*General Survey*, op. cit., para. 142.]

**74.** Lastly, the Government of Quebec considers that the precedents referred to by the CNTU do not apply to the case in question. As regards Case No. 533 (India), the two trade unions that had concluded a five-year agreement with the company had acted without the consent or knowledge of most of the workers. In this case, the unions were not representative of all the workers and could not represent them for purposes of collective bargaining and the conclusion of the five-year agreement. Moreover, in this case it was up to the employer to recognize the trade union, whereas here this is done by decision of an independent body. Lastly, contrary to what is implied by the CNTU, there is no passage in this decision where the Committee states that the five-year period before the trade union partner can be replaced is unreasonable. As regards Case No. 559 (Trinidad and Tobago), a legislative provision required that a collective agreement have a term fixed by agreement between the parties, not to be less than three years. In addition, the law ensured that the union which was representative of the majority of workers would represent them for the specified term of the collective agreement. In this case, the law protected the union party to the agreement for a minimum period of three years. If one is to understand the Committee's decision correctly, in particular paragraph 132, it is the absence of a raiding interval which was the determining factor in handing down its decision, whereas this is not the case under the terms of the amendment introduced by Bill No. 116.

**75.** The Government adds that under the terms of an amendment to the Bill it undertook to submit to a Committee within the National Assembly, the Standing Committee on the Economy and Labour, an evaluation report on the new measures (term of agreements and new raiding periods) by the year 2000 at the latest. All of the citizens of Quebec, as well as trade union associations, will then have the opportunity of expressing their views on the subject and suggesting adjustments if necessary.

## THE COMMITTEE'S CONCLUSIONS

**76.** The Committee notes that the present complaint concerns some of the legislative amendments introduced in the Labour Code of Quebec by Bill No. 116, in particular section 13 thereof which repeals the upper limit on the term of collective agreements and from which the other provisions at issue follow. According to the CNTU, these amendments entail infringements of the principles of freedom of association because they may incur unreasonable waiting periods, in particular for assessing the representative character of unions, the possibility of affiliating to another organization, the creation of unions dominated by the employer and collective bargaining. According to the Government, it was necessary to remove this upper limit in order to provide a secure legal framework for collective agreements concluded for a long term, a form of contract which has emerged recently in response to a new socio-economic context.

**77.** The former text of section 65 of the Labour Code read as follows: "A collective agreement shall have a specified term of not less than one year and not more than three years." It was replaced by the following text: "A collective agreement shall have a specified term of not less than one year. In the case of a first collective agreement for a group of employees contemplated by the certification, the term shall not be more than three years."

**78.** The new provisions of the Labour Code, as explained both by the Government and the complainant organization, have the effect of extending the time periods within which it is permitted to change union allegiance and union affiliation and, hence, the periodicity of collective bargaining. The CNTU considers that these periods are unreasonable and that they entail a risk that unions may be set up which are dominated by the employer.

**79.** In the view of the Committee, the difficulties referred to by the complainant organization derive from the particular features of the labour relations system in Quebec, in particular the right of exclusive representation of the employees of the bargaining unit (whether or not they are members of the trade union) conferred on the most representative union for a specified period *based on the term of the collective agreement.*

**80.** The Committee has already pointed out in this respect that it is not necessarily incompatible with Convention No. 87 for the most representative union to be recognized as the exclusive bargaining agent, provided that a number of safeguards are ensured, including in particular:

(a) certification to be made by an independent body;

(b) the representative organization to be chosen by a majority vote of the employees in the unit concerned;

(c) the right of an organization which fails to secure a sufficiently large number of votes to ask for a new election after a stipulated period;

(d) the right of an organization other than the certificated organizations to demand a new election after a fixed period, often 12 months, has elapsed since the previous election.

[See *Digest of decisions and principles of the Freedom of Association Committee,* 3rd edition, 1985, para. 237.]

**81.** The first two conditions referred to above are not at issue here. As for the other two criteria, which are in fact two facets of the same right, several aspects should be emphasized in view of the particular legislative context of the present complaint. Firstly, and this is perhaps the most important aspect, the term of collective agreements (which, it should be recalled, determines the time periods and frequency of change of union allegiance and affiliation) is still one of the elements of voluntary negotiation; thus, a union negotiation committee could be willing to conclude an agreement for a longer term than the maximum formerly laid down by the Code, in exchange for financial or other advantages. Indeed, it appears from the information provided to the Committee that some 40 such agreements have been concluded, including about 20 by unions affiliated to the CNTU. Moreover, the parties remain free to negotiate clauses providing for a renewal of negotiation of certain terms of the agreement, if certain conditions arise, or at the end of a certain period. In addition, the signature of the agreement *remains subject to ratification* by secret ballot by the members of the certified association, which confers on the latter a right to veto a draft agreement they might consider to be unacceptable, by which act they challenge the negotiating team and hence the union involved. It was

therefore understandable, in such a context of voluntary collective bargaining, that the Government would seek to reflect in the legislation a practice which had started to develop, to secure the legal status of agreements concluded for a term of more than three years, and thus to avoid their being challenged by a party seeking to evade its obligations on the grounds that it had committed itself for a period exceeding the maximum laid down in the Code.

**82.** As regards first collective agreements, where unions are both more vulnerable to attempted interference and domination and in a weaker bargaining position, the three-year upper limit has been maintained in the law and the situation remains unchanged in this respect.

**83.** Concerning the complainant organization's allegations on the risk of employer domination and interference, the Committee observes that the remedies provided for by the Labour Code, in particular recourse to an independent judicial body, continue to apply, both at the time of the initial application for certification and subsequently. While it is true that the risks of inadequate representation of the employees concerned increase with the lengthening of the periodicity for the renewal of collective agreements, the comments made above concerning the voluntary nature of negotiation still apply: the law does not impose the conclusion of collection agreements for a long term, it allows it; in cases where the parties accept it by means of negotiation, the law introduces time periods which are admittedly longer than those laid down by the earlier provisions, but which do allow changes of union allegiance and affiliation.

**84.** For all of the reasons stated above, the Committee considers that the amendments removing the upper limit on the term of collective agreements, and its effect on the time periods for assessing representativity, collective bargaining, change of union allegiance and affiliation, do not constitute a violation of the principles of freedom of association. However, the Committee is aware that, at least potentially, the possibility of concluding collective agreements for a very long term entails a risk that a union with borderline representativity may be tempted to consolidate its position by accepting an agreement for a longer term to the detriment of the workers' genuine interests.

**85.** The Committee notes in this respect that the Government states that it has undertaken to submit to a Committee of the National Assembly, "by the year 2000 at the latest", an evaluation report on the new measures and that all of the citizens, including trade union organizations, will then have the opportunity of expressing their views as to whether the objectives of the Act have been achieved and suggesting adjustments if necessary. The Committee considers that should problems of the practical application of the new provisions manifest themselves, *in the form and to the extent* cited by the complainant organization, this period would appear to be too long. It therefore recommends that the Government submit a report to the Committee in question within a shorter time, for example within three years of the Act's entry into force, so that all of the social partners may, in a tripartite framework, evaluate the application in practice of these new provisions and propose any changes they may consider appropriate.

## THE COMMITTEE'S RECOMMENDATIONS

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

(a) The Committee considers that the legislative amendments concerning the removal of the upper limit on the term of collective agreements and its effects on the periods for assessment of representativity, change of union allegiance and affiliation and collective bargaining do not constitute a violation of the principles of freedom of association.

(b) However, being aware that the time period for evaluating the new measures is very long, the Committee recommends that the Government submit a report to the Standing Committee on the Economy and Labour within a shorter period than that envisaged, for example within three years of the Act's entry into force, so that the social partners may, in a tripartite framework, evaluate the application in practice of the new provisions and propose any changes they may consider appropriate.

## Case No. 1752

*Complaint against the Government of Myanmar presented by the International Transport Workers' Federation (ITF)*

**87.** In a communication of 17 December 1993, the International Transport Workers' Federation (ITF) submitted a complaint of infringements of trade union rights against the Government of Myanmar. It sent additional information relating to its complaint in a communication of 21 March 1994.

**88.** The Government supplied its observations on the case in a communication dated 6 June 1994.

**89.** Myanmar has ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); it has not ratified the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

### A. THE COMPLAINANT'S ALLEGATIONS

**90.** In its complaint of 17 December 1993, the ITF alleges that the Government has committed flagrant violations of human and trade union rights through its oppression of Myanmar seafarers serving on foreign flagships. The intimidation and abuse of these seafarers is the direct result of their having accepted assistance from the ITF to improve their wages and working conditions.

**91.** The ITF explains that its complaint is based on information which has been collated from sources which include the ITF affiliated Seafarers' Union of Burma (SUB), which operates in exile in Thailand and is in regular contact with the ITF, and ITF inspectors worldwide who over the past few years have intervened on behalf of Myanmar seafarers on numerous occasions. The ITF points out that many Myanmars are forced by poverty to take jobs at sea and around 30,000 are currently registered with the Seamen Employment Control Division (SECD) which operates under the auspices of the Department of Marine Administration. This agency in turn comes under the responsibility of the Ministry of Transport and Communications. The Government therefore has, through the SECD, total control over the placement of all Myanmar

seafarers. Myanmar seafarers have to work with whatever pay and conditions the flag-of-convenience ships offer and before boarding a ship they are required to sign a contract saying that they will not contact the ITF. The complainant attaches an example of such a contract (see Annex 1). In the event that Myanmar crew members do receive an ITF settlement, they are required to pay the money back to the SECD (even if the ITF's intervention was requested by non-Myanmar members of the crew). If they refuse, their registration is revoked, passports confiscated and they face the threat of imprisonment. In at least one case of ITF intervention, the Myanmar crew of a flag-of-convenience ship were told that their families would be hurt if the action was not called off.

**92.** The ITF then goes on to describe in detail certain case histories as evidence to support its allegations. The *MV Albatross* incident, which occurred in March 1987, involved the 22 Myanmar crew of the Maltese-flag *Albatross*. The Myanmar crew members sailing on the *Albatross* were being paid in line with the agreement the SECD had signed with the manning agent (i.e. US$200 per month for the Able Seamen (AB) as opposed to the ILO recommended minimum, at that time, of $286). Their December salary was paid three months late and minus overtime. Thereafter they only received cash advances representing a fraction of their true entitlement. Living conditions on board were appalling — they were rationed to only 15 minutes of fresh water for washing and bathing every five days, and were provided with the barest minimum of food to survive. Only 2.5 kg of meat were spread between the 22 Myanmar crew. The rice was not full grain but of the type usually used to feed livestock rather than humans. the men also had serious worries about the overall safety of the ship. There was only one nine-year-old radio receiver working and the medical chest was almost empty in breach of international standards.

**93.** The Myanmars were also maltreated by the master and were physically assaulted and threatened to the extent that many of the crew genuinely believed their lives were in danger. These horrendous conditions eventually drove the crew to seek help in March 1987 when their ship docked near New Orleans in the US. They contacted ITF Inspector John Sansone (from the International Longshoremen's Association — ILA), and told him that they had activated the grievance procedure outlined in their contract and were waiting for a response. On 18 March 1987, when a response to their complaints had not been forthcoming, they went on strike. The men made their own ITF banners, which they hung on the side of the ship. The owners' representative, from Seaworld Management and Trading Inc. in Greece, appeared on the scene and promptly tried to bribe the ITF inspector. He told Sansone that he would pay for a trip for him to go away while the ship slipped quietly out of port. When this approach failed, the owners' representative tried to take the ship out to sea while the strike was still on. The US pilots refused to board the ship on the grounds that the ship was not safe to sail. The owners then contacted the Myanmar Ambassador to Washington and within hours the crew lifted the eight-day-long strike and the ship sailed. The captain of the ship was replaced, but the real reason for the crew ending their action was a series of telephone calls they received from the Myanmar Ambassador. The crew maintained that the Ambassador threatened each of them with immediate imprisonment upon return to Myanmar unless the strike ended. Faced with government and employer pressure like this, and knowing that no real trade unions exist in their home country to protect them, the men were forced to give way.

**94.** In the *MS Cape Hope* incident which also occurred in 1987, the ITF explains that it won US$44,239.40 plus interest for a Myanmar seafarer on the Cyprus-flag *Cape Hope* in a case brought in Germany. The judgement was handed down in a Bremen Labour Court against the owners of the ship, the Kingfisher Shipping Company of Nicosia. The seafarer in question had been employed on the *Cape Hope* (a ship with an ITF collective agreement) for over two years. The fact that the ship was covered by an ITF agreement, and the owner had contracted to pay ITF rates, meant that the ITF had a legitimate right to intervene to assist the crew in obtaining justice. In rejecting the seafarer's claim, the owner claimed falsely that he had an agreement with the ITF under which 70 per cent of crew pay was to be sent back to the SECD. In fact, the crew members on the *Cape Hope* were the victims of "double bookkeeping", a common phenomenon on flag-of-convenience ships. Each pay-day they were given two lists to sign, an official ITF salary list, and the SECD "ITF" salary list which was considerably lower.

**95.** As a result of being cheated of their wages in this way, the crew asked ship inspector Hans Kreitlow of the German Transport Workers' Union (OTV) to help them when the ship arrived at the German port of Bremen in May 1987. The crew gave Kreitlow leave to have the ship arrested for payment of the debt. A representative of the Myanmar Embassy in Bonn learned of the situation and visited the ship. By this time only one seafarer was prepared to continue the action against the shipowner but the Myanmar Embassy representative "persuaded" the seafarer to go with him to a local notary where he signed papers saying he was prepared to drop the case. Despite this the case came before the courts and further evidence of subversion by the Myanmar authorities came to light. Kingfisher, with the obvious collaboration of the Myanmar authorities, produced a statement which they claimed that the seafarer had signed in June 1987 (i.e. about a month after the events described took place) before a notary in Myanmar. In this document the seafarer stated that he wished to drop the case against Kingfisher as he had received all the money due to him for the two years he had been on the ship.

**96.** However, the court was able to prove from entries in the seafarer's passport that he was not even in Myanmar at the time the company claimed he had signed the statement, but in Thailand. Not surprisingly, the court later declared the signature a forgery (it was quite different from those in his passport and on the ship's documents). Not deterred, the company also produced a second statement to back up the first in which the seafarer was said to have signed receipts before the Director of the Myanmar Department of Marine Administration for the money he had supposedly received. The court, after examining the evidence before it, said it fully accepted the seafarer's argument that he had not been in Myanmar since lodging his complaint in Germany. Nor could he possibly have signed this second statement as he was by that time in Germany. It therefore dismissed both of the statements Kingfisher had placed before the court. The court then ruled that both parties agreed that he should have been paid in line with ITF wage rates and that Kingfisher had lamentably failed to prove it had done this. The court therefore ruled that the SECD "agreement" had no validity and even had it been in force the SECD could not deduct 70 per cent of a seafarer's pay without his express authority. In the light of the evidence, the court decided to award the seafarer his claim in full. He was subsequently awarded backpay of US$44,239.40 plus 4 per cent interest from 10 August 1987. Costs were also awarded against Kingfisher.

**97.** As regards the *MV Trans Dignity* case, the ITF states that on 29 September 1988 in Sundsvall, Sweden, 14 Myanmar seafarers working on board the Liberian-flag *Trans Dignity* contacted the ITF-affiliated Swedish Seamen's Union (SSU) requesting their help in improving their working and living conditions on board ship. A local official of the SSU, Peter Rundqvist, went on board to listen to the crew's complaints. The *Trans Dignity* was technically covered by an ITF agreement (the owner had in fact signed the agreement with an ITF affiliate just days before arriving in Sweden), but the crew were not being paid in accordance with it. Rundqvist found evidence of the usual system of evasion — the crew were signing on two sets of ships' articles and dual wage accounts were in operation. The Swedish unions decided to seek the termination of the existing agreement and to request the signature of a new ITF Standard Agreement. When the owners refused to agree to this demand, the unions boycotted the vessel for a period of six days until the owner's representative, flying in from Hong Kong, eventually agreed to sign the new agreement and to pay the crew their backpay entitlement under it. As part of the agreement, the owners gave an undertaking that they would not subsequently victimize the seamen by withdrawing their seamen's books or registration or attempting to claim back the payments obtained for them by the Swedish unions' action.

**98.** The new agreement, which was signed on 1 December 1988, awarded a total of US$176,845 in backpay to the Myanmar crew. The crew decided that they would accept the backpay settlement and sign off the vessel and return to Asia. When the claims had all been settled, the crew, who at their own insistence had already received part of their backpay in cash, prepared to leave Sweden on a flight to Bangkok on 6 December 1988. Knowing the fate which might await them in Myanmar, they had no intention of going on any further than Bangkok. Prior to departure, the local manning agent in Sweden attempted to intimidate the crew by informing them that he was aware of their flight details and "promised" they would be met on arrival. The message "you can't escape from us" was also conveyed to the men's families back home in Myanmar. As planned, the crew arrived in Bangkok on 8 December 1988. Their money and passports were confiscated on arrival by the Myanmar authorities, prompting the Thai authorities to declare them illegal immigrants and to request that they be returned to Myanmar as soon as practicable. Their passports were subsequently returned but only after ITF lawyers had intervened on their behalf. A campaign was then launched designed to make an example of the crew so as to ensure that no other Myanmars would ever accept assistance from the ITF or any of its affiliates. They circulated a scurrilous document headed "ITF problem crew on *MV Trans Dignity*", accompanied by pictures of each crew member and their identity documents numbers, saying that they were troublemakers. (The ITF attaches a copy of this document to its complaint.) This tactic was successful in ensuring that they did not work at sea again. In the end, financial hardship forced all but three of the former crew of the *Trans Dignity* to return home to Myanmar where their passports and seamen's books were confiscated by the Myanmar authorities as punishment for accepting the help of the ITF and refusing to hand over their backpay settlements.

**99.** In the *MV Chemical Harmony* case, in March 1991 one of the ITF's inspectors in Rotterdam, Mr. Gert-Jan Harmsen from the ITF-affiliated Federatie van Werknemersorgansaties in de Zeevaart (FWZ), visited the Japanese-owned Panamanian-flag chemical tanker *Chemical Harmony* and discovered that nine Myanmar crew

members were not signed on the ship's articles. The names of Koreans who were not on the ship had been entered in their place. The vessel was covered by an ITF-approved Korean collective agreement, but the Myanmars were being paid much less than the other 14 Korean crew members. Disturbed by this, Harmsen investigated further and uncovered a double bookkeeping system. Despite being reminded of the risks involved, the crew of the *Chemical Harmony* were determined to press for the full wages due to them, and after threatening the Master with arrest for false documentation Harmsen persuaded the ship's Korean managers, Nam Ung Marine of Pusan, to guarantee the payment of US$46,583 owed to the men. The next problem was to get the Myanmar crew members home safely. The first four Myanmar flew to Bangkok on 27 March 1991, having promised to telex the ITF when they arrived. The ship was delayed in Rotterdam by repair work and it was not until 5 April 1991 that the remaining five Myanmars could be flown to Bangkok. Four days later, the ITF heard from its lawyers in Bangkok that all except two of the nine were in safety. The first group had been threatened by the manning agents, and one of them had disappeared having presumably been taken back to Myanmar by the Myanmar authorities. One member of the second group then decided for personal reasons to take the risk and return to Myanmar too and he promised to try to contact the missing man and report back. No such information was ever received.

**100.** In the *MV Angelic Faith* incident, the ITF describes that on 3 June 1993 11 Myanmar former crew members of the Greek-flag *Angelic Faith* were kidnapped by Myanmar government officials whilst in transit through Singapore airport bound for Bangkok. These seafarers had received assistance from the ITF when their vessel docked in Dalrymple Bay, Queensland, Australia. Industrial action by the ITF-affiliated Maritime Union of Australia (MUA) resulted in a backpay settlement of nearly US$100,000. The crew were threatened by the Myanmar authorities with forcible repatriation to Myanmar. Instead, the MUA arranged repatriation from Australia to Thailand via Singapore. The crew arrived in Singapore on Qantas flight QF051 on 3 June. What happened then has rightly become an international diplomatic incident, with the Government of Singapore publicly accusing Qantas airline and the Myanmar Government of infringing its sovereignty. It is clear that the crew members were effectively kidnapped and returned forcibly to Myanmar. It has been reported on Myanmar television that they are currently under house arrest.

**101.** On 31 August 1993, Mr. Lau Ping Sum, a member of the Singaporean Parliament, asked the Minister for Home Affairs to inform the House if the Government was investigating the circumstances under which 11 airline passengers were intercepted at the airport and sent to Myanmar. The Home Affairs Minister, S. Jayakumar, told Parliament that the Myanmar Embassy had persuaded Qantas airways staff in Singapore and private airport security guards to help seize and hold the 11 seafarers on 3 June. The Government said that the seafarers were kept at the airport until 7 June when they were put on a flight to Yangon (Rangoon). The Minister told the Singaporean Parliament that the day before the flight arrived, the First Secretary of the Myanmar Embassy in Singapore had received a request from the Chairman of the Star Corporation Shipping Company, representing the seafarers' employers, asking him to help in repatriating the seafarers to Myanmar. The First Secretary subsequently received instructions from the Myanmar Foreign Ministry to assist in repatriating the seafarers, the Minister told Parliament. He stated that when the seafarers arrived, the First Secretary got the Qantas

airport duty manager to assist him to seize the passports of the 11 seafarers and to hold the men until their departure to Yangon (Rangoon). The Minister stated that the actions of the airport security officers, who he stated acted solely on the request of Qantas and the Myanmar Embassy, were unsatisfactory and that they would be reviewing their future procedures. He further stated that the Singaporean Government took a very serious view of this incident.

**102.** The ITF finally indicates that the Deputy Minister of Transport, U Than Wai, stated at a press conference held on 8 October 1993 (which was broadcast by Rangoon Radio) that there were approximately 28,000 registered Myanmar seafarers and about 11,000 of these were currently being employed by over 120 "international shipping companies". According to the Director-General of the SECD, Dr. U Tin Hlaing, it was the SECD which, in the absence of a trade union in Myanmar, looks after the welfare and interests of Myanmar seafarers. At the press conference mentioned above, the Director-General of the Department of Marine Administration, U Hla Min, stated that the SECD entered into general agreements with foreign shipping companies for the employment of Myanmar seafarers and that the SECD was solely responsible for ensuring that the seafarers got their contractual wages and decent working conditions. In addition, the Director of the SECD, U Tun Aung Myint, said that Myanmar seafarers did not face the threat of detention or torture nor are they prevented from bringing money into the country. However, the Deputy Transport Minister did confirm that Myanmar seafarers had to sign an agreement before they can leave the country to join a ship with the SECD stating that they will not "let down the State's dignity". He also confirmed that there were some disciplinary measures in place, such as the confiscation of the seamen's discharge book, if this agreement was breached by the seafarer. The ITF concludes by stating that those seafarers who have contacted the ITF in the past regarding the non-compliance with collective agreements by foreign shipping companies and their working conditions generally have been subject to retaliation by the Government of Myanmar. This retaliation has included the confiscation of passports, seamen's record books and qualifications and some have even been sentenced to jail for obtaining "illegal income" in accordance with the Foreign Currency Act. This is, according to the radio broadcast of the press conference held on 8 October 1993, legitimate persecution in order to ensure that Myanmar seafarers do not compromise the "State's dignity".

**103.** To its communication of 21 March 1993, the ITF attaches a letter (see Annex 2) which, according to it, illustrate the nature of the pressure being exerted by manning agents in Myanmar on Myanmar seafarers. The ITF asserts that the letter clearly indicates that Myanmar seafarers are required to sign for wages they do not actually receive. The letter also states that the manning agent "has excellent contacts with the departments concerned here and ensure not to occur any problem especially in connection with ITF matters". In the ITF's view, this is a clear reference to the Government's practice of intimidating Myanmar seafarers who contact the ITF, or its affiliates, for assistance in securing their legitimate rights.

B. THE GOVERNMENT'S REPLY

**104.** In its communication of 6 June 1994, the Government contends that the complaint filed by the ITF is groundless. The allegation that there is oppression of Myanmar seafarers serving on foreign-flag ships by the Myanmar Government is utterly baseless and has no foundation whatsoever. It is not the policy of the Myanmar Government to oppress the Myanmar seafarers or Myanmar citizens for that matter. The allegations emanate from certain quarters, mainly from outside sources, who are politically motivated and who are bent on tarnishing the image of Myanmar authorities.

**105.** The Government then refers to the five vessels mentioned by the ITF. The Government points out that the allegations made by the ITF were found to be untenable. For example, in the case of *MV Trans Dignity*, the ITF has in its letter of complaint appended as Annex 2, the names of 14 crew members said to have served on *MV Trans Dignity*. Names and photographs said to be belonging to 14 crew members were given. The names of four seamen, namely Maung Htwe, Thaung Tun Shane, Maung Aung and Zaw Myint were given. Their passport numbers and their CDC numbers were also given. However, upon scrutiny by the Myanmar authorities concerned it was found that the said four seamen never registered themselves with the authorities concerned. The passports as well as the CDCs were all fakes. In other words the four so-called seamen had never registered themselves officially and were carrying fake passports and fake CDCs.

**106.** The Government points out that since the advent of the State Law and Order Restoration Council which took over the state power in September 1988, it is the policy of the Government to look after the interests and welfare of Myanmar workers including Myanmar seamen. The incidents said to have occurred regarding *MV Albatross* and *MS Cape Hope* took place in 1987. With regard to the case concerning *MV Chemical Harmony*, the Myanmar authorities feel that the responsibility of the unfortunate incident lay with the owners of the vessels or with the manning agents. With regard to the incident concerning *MV Angelic Faith*, the Government submits that the allegations against the Myanmar authorities are unfounded. Neither coercion nor threat was resorted to by the Myanmar authorities against the 11 seamen, as alleged. They were repatriated to Myanmar by the shipowners in accordance with the contracts. On their return to Myanmar no harm was done by the Myanmar authorities except that their CDCs were revoked.

**107.** As regards family remittance, the Government states that for the welfare and benefit of the families of the seamen, Myanmar seamen are required to remit a portion of their salaries to their families back home. Prior to 1989 the allotment for family remittances was fixed at 50 per cent of the seamen's salaries. Beginning from 1989-90 Myanmar fiscal year, this allotment was reduced to 25 per cent. The seamen can use freely the remaining 75 per cent of their earnings. They can either spend the whole amount abroad or they can open a foreign exchange account in Myanmar. They can operate this foreign exchange account in Myanmar freely.

**108.** The Government then turns to the issue of employment contracts and pledges. According to it, the hiring of Myanmar seamen by foreign shipping companies/agencies is done in accordance with the agreement signed between the foreign shipping companies/agents and the Myanmar seamen. The terms and conditions of the contract are scrutinized by the Seamen Employment Control Division (SECD) under the

Department of Marine Administration, Ministry of Transport. Before leaving the country, the seamen have to pledge that they will conduct themselves as good citizens of the Union of Myanmar and also to abide by the rules and regulations for Myanmar seamen. The allegation that the Myanmar Government has long made Myanmar seamen enjoy reduced salaries and rights is totally untrue. No government would adopt and practice a policy detrimental to its own citizens or nationals. Myanmar seamen enjoy rights under the terms and conditions of the contract signed with the respective shipping companies. The terms and conditions will depend on the type and volume of work. The SECD oversees the contract. There is no oppression by the Myanmar authorities on the Myanmar seamen serving on foreign ships.

**109.** With respect to the Seamen Union of Burma (SUB), the Government claims that the SUB does not represent the seamen of Myanmar. Those who belong to this self-styled SUB are a handful of seamen who have violated the laws, rules and regulations of the country. This small group of seamen left the country for various reasons and chose to stay abroad. They are involved in illegal and clandestine business. The SUB is not recognized by the Government of the Union of Myanmar.

**110.** The Government then refers to U Nay Win Aung's letter which was sent to various shipping companies and which had been appended to the ITF's complaint (Annex 2). The Government explains that in his letter of 2 February 1994, U Nay Win Aung, President of Vasconia Myanmar Limited, Yangon, Myanmar, had solicited the business of various shipping companies abroad. In his zeal to act as manning agent in Myanmar, U Nay Win Aung had deceived his prospective business companies by stating that there existed a double bookkeeping arrangement by Myanmar authorities with foreign shipowners to avoid any involvement or problem with the International Transport Workers' Federation. The Government asserts that no such arrangement of double bookkeeping exists between the Myanmar authorities and foreign shipowners. The Government adds that U Nay Win Aung is engaged in general trading export-import business and is a business representative of Vasconia SARL (France). It considers that it is regrettable that ITF has used U Nay Win Aung's letter as a complaint against Myanmar.

**111.** In the Government's view, it is apparent from the foregoing that the allegations made against the Myanmar authorities concerning the Myanmar seamen are without foundation. The Myanmar Government's policy is to look after the interests and welfare of Myanmar seamen serving on board foreign vessels. The role played by the SECD is of a regulatory nature to protect the interests of Myanmar seamen. The allegations made against the Myanmar authorities are regrettable. With a view to rebutting these allegations, the authorities of the Government of the Union of Myanmar held a news conference on 8 October 1993 in which senior officials explained everything that really happened in order to dispel any misunderstanding and misconception.

## THE COMMITTEE'S CONCLUSIONS

**112.** The Committee notes that the allegations in this case concern violations of human and trade union rights through the oppression by the Government of Myanmar of seafarers serving on foreign flag ships. The complainant contends more specifically that the intimidation and abuse of these seafarers is due to the fact that they accepted

assistance from the complainant to improve their wages and working conditions. In this respect, the complainant provides detailed information and case histories to back up its allegations.

**113.** At the outset, the Committee observes that the Government does not dispute the allegation that the terms and conditions of the contract signed between foreign shipping companies/agents and Myanmar seafarers are overseen by the Seamen Employment Control Division (SECD) which operates under the Department of Marine Administration in the Ministry of Transport. However, the Government maintains that the role played by the SECD is of a regulatory nature to protect the interests of Myanmar seamen and not to oppress them. The Committee notes however that the Government does not reply to the complainant's allegation that Myanmar seafarers are required to sign an affidavit saying that they will not contact the complainant before boarding a ship nor does it provide its observations on the copy of such an affidavit provided by the complainant (Annex 1). All it states is that before leaving the country the seamen have to pledge that they will conduct themselves as good citizens of Myanmar and abide by the rules and regulations for Myanmar seamen. However, it would appear to the Committee from the detailed information and case histories provided by the complainant that Myanmar seafarers are in fact required to sign a contract restricting their rights to accept any assistance from the complainant or affiliated parties.

**114.** In this connection, the Committee would emphasize the importance that it attaches to the fact that no obstacle should be placed in the way of the affiliation of workers' organizations, in full freedom, with any international organization of workers of their own choosing. [See *Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition, 1985, para. 520.] In the present case, it is the Myanmar seafarers themselves and not an organization of workers as such who are prevented from contracting or accepting assistance from the complainant. However, the Committee believes that this situation is due to the fact that the ITF-affiliated Seafarers' Union of Burma (SUB) which intervenes on behalf of Myanmar seafarers operates in exile in Thailand since by the Government's own admission, the SUB is not recognized by the Government of Myanmar. In this respect, the Committee would remind the Government that, under the terms of Article 2 of Convention No. 87 which the Government of Myanmar has ratified, workers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing in full freedom to protect their interests. The Committee considers that it is not for the Government to decide which organization would best represent the workers' interests, as would appear to be the case of the SECD which exercises total control over the placement of all Myanmar seafarers and which is a government agency.

**115.** In view of the above-mentioned arguments, the Committee would first of all urge the Government to withdraw the SECD requirement that Myanmar seafarers must sign an affidavit restricting their right to affiliate with or contact the complainant for assistance, which requirement violates freedom of association principles. Moreover, as regards the non-recognition of the SUB by the Government, the Committee would remind the Government that workers should be able to form and join organizations of their own choosing in full freedom; it therefore urges the Government to guarantee and respect the rights of seafarers to form an independent trade union in Myanmar for the defence of their basic rights and interests if they so wish.

**116.** The Committee recalls in this respect the special paragraph adopted by the 1993 Conference Committee on the Application of Standards concerning the denial of the right to organize by the Government of Myanmar. The Committee notes that the evidence before it in this case is yet another example of the way in which the Government denies the right to freedom of association to its citizens. The Committee deplores that this case illustrates that the Government similarly denies the same fundamental rights to Myanmar seafarers.

**117.** The Committee further deplores the requirement in the affidavit by which Myanmar seafarers are obliged to sign a double payroll. This is a reprehensible way of evading the terms of collective agreements, a practice which the Committee strongly condemns.

**118.** Finally, the Committee takes note with serious concern of the various incidents described by the complainant and of the victimization of Myanmar seafarers — such as revocation of their registration, confiscation of their passports and even the threat of imprisonment — in the event that they accept and receive an ITF settlement and they refuse to hand their back-pay settlements to the SECD. The Committee deeply regrets that in response to the incidents of the five vessels described in detail by the complainant, the Government merely states that in certain incidents the seamen never registered themselves and were carrying fake passports or that in certain other incidents, the responsibility lay with the owners of the vessels or with the manning agents. It is amply clear to the Committee that in most of these incidents the Myanmar authorities, either directly or indirectly, had exerted various types of pressures on Myanmar seafarers once an ITF settlement concerning them was reached. The Committee draws the Government's attention to the principle that no person should be prejudiced in his employment by reason of trade union membership or legitimate trade union activities. [See *Digest*, op. cit., para. 538.] It therefore calls on the Government to refrain in future from having recourse to acts of anti-union discrimination against Myanmar seafarers who pursue their legitimate grievances through the complainant and/or its affiliated trade unions.

## THE COMMITTEE'S RECOMMENDATIONS

**119.** 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 withdraw the requirement by the Seamen Employment Control Division (SECD) that Myanmar seafarers must sign an affidavit before leaving the country restricting their right to affiliate with or contact the complainant for assistance to protect their occupational interests.

(b) Recalling the importance that it attaches to Article 2 of Convention No. 87 which the Government of Myanmar has ratified, the Committee urges the Government to guarantee and respect the rights of seafarers to form an independent trade union in Myanmar for the defence of their basic rights and interests if they so wish.

(c) The Committee calls on the Government to refrain from having recourse to acts of anti-union discrimination against Myanmar seafarers who pursue their legitimate grievances through the complainant and/or its affiliated trade unions.

# Annex 1

Literal translation into English from the Myanmar original

AFFIDAVIT

confirm that I am fully aware of the dangers of the International Transportation Workers' Federation (I.T.F.) or other parties involvement. I solemnly promise by signing my name that I will abide with and honour my official agreement of employment for the complete duration of the agreement and/or additional Voluntary extension hereof.

Should the Master and/or Owners and/or Managers and/or Agents of above vessel be forced to effect any backpay to us as extorted by I.T.F. through intimidation or blackmail or whatever form, so the undersigned seamen commit myself being signing this AFFIDAVIT, that I shall return this backpay money promptly and in full to the Master or the Owners of above vessel upon departure from said port.

I likewise promise and agree to sign every month a "Double payroll" if required by the Master.

I, the undersigned, fully understand that I will be legally liable for prosecution in case I break this personal commitment.

Furthermore, I hereby state that the following are true and correct.

My bank account is: .....
Assets under my
ownership are:
(include any houses
or cars) .....

Finally, I, the undersigned seamen, confirm that I have signed this document out of my free will and without force or intimidation in any kind of force.

IN WITNESS whereof I place my signature on this Affidavit on this day of 199 , and I confirm that the text was read and translated to me.

# Annex 2

VASCONIA MYANMAR LIMITED

Dated: 2-2-94

TO:

*FRANCE*

*For the attention of the Operation Manager*

Through the Honourable Commercial Attache of the Embassy of France in Myanmar, we came to learn your esteemed company and aware that your line of business is mainly involving with shipping. Taking the liberty we are pleased to introduce ourselves that we are one of the leading exporters/importers and also a business representative of Vasconia S.A.R.L (France) in Myanmar. Our line of business is general trading and involved with man-power and seamen recruiting. We have been doing seamen recruiting and man-power business since last 10 years ago. Therefore we assure you that our experiences and knowledge can fulfil all your requirements regarding with seamen recruitment and man-power.

Also note that we have excellent contacts with the departments concerned here and ensure not to occur any problem especially in connection with ITF matters. Even in the case of ITF people make routine check up at certain ports and found the pay different, our seamen understood very well to solve this problem. In such case they firstly receive the salaries as recommended by ITF in order to fall in line with regulations. But, as soon as the vessel departed the port and came into the area of international water zone they surrender their surplus money to the master of the vessel and master remit all surplus amount to the principal Co. All our seamen understood this ITF matter and they know the way to solve the problem. Therefore we guarantee not to happen any problem regarding with ITF. Also note that our Myanmar seamen are hard working, obedient, experienced, well trained and hold relevant certificates of competency as recognized by the standard of International Maritime Organization (IMO). To be competent as above, Marine Administration Dept: Has closely supervised, trained and made necessary examinations to issue the certificates. So most of the foreign shipping companies are much interested Myanmar seamen for their vessel. For the above facts that we are much interested to establish business relationship with you for long mutual benefits and to promote seamen recruiting business. We do expect that our offer will meet you interest and if you need further information, please do not hesitate to contact us. We ever welcome your enquiries and assure you to feed back your requirements immediately with our best attention.

| | |
|---|---|
| Our fax no. | 095-01-89960 ATTN: (864) |
| | 095-01-87806 ATTN: NAY WIN AUNG |
| Tlx no. | BM 21201 ATTN: (1861) |
| Banker name: | MFTB, YANGON, MYANMAR. |

We much look forward to hearing good news from you soon.

Yours faithfully,

Nay Win Aung
President

## III. Cases in which the Committee requests to be kept informed of developments

### Case No. 1552

*Complaint against the Government of Malaysia presented by the International Metalworkers' Federation (IMF)*

**120.** The Committee has already examined the substance of this case on three previous occasions during which it presented interim conclusions to the Governing Body [see 277th Report, paras. 406-419, 281st Report, paras. 311-325 and 283rd Report, paras. 282-295, approved by the Governing Body at its sessions in February-March 1991, March 1992 and May-June 1992 respectively].

**121.** The Government supplied certain further information on this case in a communication dated 23 July 1994.

**122.** Malaysia has not ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); it has ratified the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

A. PREVIOUS EXAMINATION OF THE CASE

**123.** The International Metalworkers' Federation (IMF) alleged that electronics workers who had formed a union in the Harris Solid State Sdn. Bhd. (HSS), a wholly owned subsidiary of the multinational Harris Corporation, were facing intimidation aimed at eliminating the only in-house union in the industry. Although the union had been registered in January 1990, the parent company decided to wind up HSS and absorb it into Harris Advanced Technology Sdn. Bhd. (HAT); 23 union activists at the HSS plant were dismissed without being given the option to transfer to HAT.

**124.** The Government initially replied that workers in the electronics industry were not denied the right to associate and that, in the Malaysian system, in-house unions were truly independent bodies able to pursue claims against their employers and free to affiliate to national and international workers' bodies. It subsequently added that after the parent company decided to consolidate its subsidiaries, HAT offered 2,700 HSS employees jobs, all of whom accepted except 22 (one of whom later resigned), who were mainly union officers; the figure of 23 workers mentioned in the complaint comprised these 21 plus two workers who had been at that time seconded from HAT but subsequently returned there. Following the dismissal of the 21 HSS employees when HSS ceased operations on 21 September 1990, three wrongful dismissal cases were lodged on behalf of these employees before the Industrial Court. According to two Industrial Court awards supplied by the Government, initial procedural questions concerning the three Industrial Court cases had been ruled upon and hearings for the applications for reinstatement had been set for 27 and 28 July 1992. Moreover, as a result of the preliminary rulings, the Harris Solid State Employees' Union had been made a party to the claims for wrongful dismissal under the Industrial Relations Act, 1967.

**125.** At its May-June 1992 Session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendation:

— The Committee trusts that the hearings scheduled for July 1992 (some 22 months after the dismissals of the 21 HSS employees) will proceed in a timely fashion and requests the Government to inform it of the outcome of these unfair labour practice proceedings before the Industrial Court immediately upon the handing down of the decisions concerning the applications for reinstatement.

B. THE GOVERNMENT'S OBSERVATIONS

**126.** In its communication of 23 July 1994, the Government states that the three cases that were lodged on behalf of the 21 dismissed HSS employees took a longer time than expected for completion due to the legal tussles of both the disputing parties who had made various applications and objections in the process. In order to rule on the applications/objections, the Industrial Court had to make three separate awards/decisions. The company was aggrieved by one of the decisions made (Award No. 293 of 1992) and applied to the High Court to quash the award. The company also obtained an order prohibiting the Industrial Court from proceeding with the hearing of the cases pending the High Court's decision.

**127.** The High Court dismissed the company's application in September 1993 and the Industrial Court proceeded to hear the three cases together in a period of six days. The hearing was completed on 16 April 1994 and a decision — Award No. 213 of 1994 — was handed down on 30 May 1994. The Industrial Court dismissed the claims of the 21 workers that they were dismissed without just cause. However, the Court received a notice from the claimants on 7 July 1994 that they would apply to the High Court for a judicial review. The High Court's decision on the application would only be known after the relevant papers were filed by the claimants.

## THE COMMITTEE'S CONCLUSIONS

**128.** The Committee notes from the Government's further reply that the three Industrial Court cases filed by the 21 dismissed HSS employees were ruled upon only in May 1994, nearly four years after the dismissals took place. According to the Government, this delay was due to the various applications and objections made by both disputing parties which resulted in a protracted process of litigation before the Industrial Court could hear the substantive claims of dismissal.

**129.** The Committee recalls that the existence of basic legislative provisions prohibiting acts of anti-union discrimination is not sufficient if these provisions are not accompanied by effective procedures ensuring their application in practice. Thus, for example, it may often be difficult, if not impossible, for a worker to furnish proof of an act of anti-union discrimination of which he has been the victim. This shows the full importance of Article 3 of Convention No. 98 which provides that machinery appropriate to national conditions shall be established, where necessary, to ensure respect for the right to organize [see *Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition, 1985, para. 567].

**130.** The Committee further notes that although the Government states that the Industrial Court dismissed the claims of the 21 workers, it does not indicate the reasons for which the Court handed down this decision. The Committee requests the Government to keep it informed of the outcome of the High Court's decision on the application for judicial review by the 21 HSS employees, by transmitting the text of the judgement handed down by the Court.

## THE COMMITTEE'S RECOMMENDATION

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

— The Committee requests the Government to keep it informed of the outcome of the High Court's decision on the application for judicial review by the 21 employees of the Harris Solid State Sdn. Bhd. (HSS), by transmitting the text of the judgement handed down by the Court.

## Case No. 1698

*Complaint against the Government of New Zealand presented by the New Zealand Council of Trade Unions (NZCTU)*

**132.** The Committee has already examined this case on the merits at its March 1994 Session, on the basis of information received up to November 1993, and issued interim conclusions. [See 292nd Report, approved by the Governing Body at its 259th Session, March 1994, paras. 675-741.]

**133.** In its recommendations, noting the enormous complexity of the case and the need to obtain additional information, the Committee considered that it would be very useful for a representative of the Director-General to undertake a direct contacts mission to the country with a view to obtaining this information from the parties. The Government has indicated before the Governing Body and by a letter of April 1994 its willingness to accept the mission.

**134.** The Committee notes that the mission, which took place from 19 to 27 September 1994, was received by the authorities, the complainant organization and the New Zealand Employers' Federation (annexed to this paper are the mission report and the full list of persons and organizations with whom meetings were held).

**135.** New Zealand has not ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), or the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

### A. PREVIOUS EXAMINATION OF THE CASE

**136.** In its complaint of 8 February 1993, the NZCTU alleged that the Employment Contracts Act, 1991, contravened Conventions Nos. 87 and 98 through various violations of the right to organize and to bargain collectively.

**137.** At its March 1994 Session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:

(a) The Committee underlines that the principle of consultation and cooperation between public authorities and employers' and workers' organizations at the industrial and national levels is one to which importance should be attached.

(b) Noting that the Act contains no express provisions on the recognition of representative workers' organizations for purposes of collective bargaining, the Committee recalls the importance which it attaches to the right of representative organizations to negotiate, whether these organizations are registered or not, and reminds the Government that employers, including governmental authorities in the capacity of employers, should recognize for collective bargaining purposes the organizations representative of the workers employed by them.

(c) The Committee notes that in cases where the employer successfully bypassed the authorized union representative, the Employment Court has not found the employer's actions to be at variance with the Act. The Committee requests the Government to provide further information on decisions of the courts and their consequences.

(d) The Committee draws the Government's attention to the role of workers' organizations in collective bargaining and to the principle that negotiation between employers or their organizations and organizations of workers should be encouraged and promoted.

(e) Considering that, taken as a whole, the Employment Contracts Act does not encourage and promote collective bargaining, the Committee requests the Government to take appropriate steps to ensure that legislation encourages and promotes the development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements.

(f) The Committee notes that case law has established that attempts by the employer to persuade workers to withdraw their authorization to the union as their bargaining agent are perfectly valid since the Act does not require the employer to remain strictly neutral when its vital interests are affected, and it asks the Government to provide further information on whether this remains the situation. The Committee considers that employer attempts to negotiate collective contracts by seeking to persuade employees to withdraw authorizations given to a union could unduly influence the choice of workers and undermine the position of the union, thus making it more difficult to bargain collectively, which is contrary to the principle that collective bargaining should be promoted.

(g) Noting that the Act does not grant sufficient protection to workers against acts of interference and discrimination by employers in case of authorization of a union and that the absence of such protection means that protection against interference and discrimination on the basis of trade union membership or activities is ineffective in practice, the Committee asks the Government to take the necessary steps so that legislation lays down explicitly remedies and penalties against acts of interference and discrimination on the basis of authorization of a union.

(h) Recalling the importance of the independence of the parties in collective bargaining, the Committee asks the Government to take the necessary measures to ensure that legislation specifically prohibits negotiations being conducted on behalf of employees or their organizations by bargaining representatives appointed by or under the domination of employers or their organizations.

(i) The Committee is of the view that the requirement established by the Act that a union establish its authority for all the workers it claims to represent in negotiations for a collective employment contract is excessive and in contradiction with freedom of association principles as it may be applied so as to constitute an impediment to the right of a workers' organization to represent its members. The Committee requests the Government to take the necessary steps to ensure that this possibility is removed.

(j) The Committee believes that the right of access to workplaces is sufficiently guaranteed by the Act and reinforced by case-law. It considers that problems related to union security clauses should be resolved at the national level, in conformity with national practice and the industrial relations system in each country. It further considers that the right to have names of members supplied to unions and the right to time off for union meetings are matters that are negotiable by the parties.

(k) The Committee considers that the prohibition in the Act on strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer is contrary to the principles of freedom of association on the right to strike and that workers and their organizations should be able to call for industrial action in support of multi-employer contracts.

(l) The Committee does not consider the restriction in the Act on the right to strike in an essential industry to be incompatible with freedom of association.

(m) The Committee draws the Government's attention to the principle that trade union organizations ought to have the possibility of recourse to protest strikes in particular where aimed at criticizing a government's economic and social policy. However, strikes that are purely political in character do not fall within the scope of the principles of freedom of association. Accordingly, 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.

(n) The Committee moreover requests the complainant and the Government to provide any other information which they consider to be relevant to the practical implementation of the Act.

(o) Finally, the Committee notes the enormous complexity of the present case and the need to obtain additional detailed information in order to proceed to a definitive examination of the matter in full knowledge of all the facts. Therefore, it considers that it would be very useful for a representative of the Director-General to undertake a direct contacts mission to the country with a view to obtaining this information from the concerned parties. Consequently, the Committee requests the Government to accept such a mission.

**138.** The interim report of the Committee summarized the complainant's allegations and the Government's reply. As the Committee had decided at its 1993 meeting to postpone the examination of the case until its March 1994 session, where it took into account only the information received up to November 1993, the information and arguments received in the meantime and the information collected by the direct contacts mission which is directly germane to the complaint are summarized below. It is of course impossible to reproduce in minute detail the considerable mass of documents produced to the mission, and even to summarize it. However, the Committee will, from time to time, refer to that other information contained in the mission report, where it is necessary for a better understanding of factual situations, or where it provides additional elements of evidence which were not available to the Committee previously.

### B. THE COMPLAINANT'S FURTHER OBSERVATIONS

**139.** As regards the issue of consultation, the NZCTU states that the main policy principles that underlie industrial law in New Zealand were developed outside of a process of consultation involving the social partners, and they directly terminated many existing avenues for tripartite consultation. Companion measures have reduced facilities

for and resourcing of consultative processes at industry and national level. Impediments to the formation and functioning of representative worker organizations limit their ability to engage in consultative processes were these processes to be revived.

**140.** With respect to the issue of recognition of representative workers' organizations for purposes of collective bargaining, the complainant reiterates that there is still no formal process for the recognition of workers' organizations. Because the Act is based on any worker or group of workers appointing an agent to represent their individual interest, it promotes fragmentation and instability in representation and frustrates the development of representative worker organizations for the purpose of collective bargaining. Unrepresentative worker organizations or agents have equal status with representative organizations when it comes to negotiations with employers. The group contracting done by appointed agents is not true collective bargaining with a representative worker organization. That process no longer exists in New Zealand. Bargaining is done on behalf of individuals, not the area of work covered in the negotiations, so that those employed after the contract has been agreed are not covered by it unless the employer agrees to extend coverage either during or after the negotiation. This restricts even further the coverage of contracts negotiated by worker organizations.

**141.** As regards the bypassing of authorized representatives, the NZCTU agrees that this is an area where court rulings have changed since the original complaint was lodged, but both law and practice still allow substantial bypassing of authorized representatives. The court rulings have explicitly acknowledged that employers have the right to contact workers directly, and have only noted that there is a point at which such influence becomes "undue". There is no clarity about where that point lies. Court rulings have not generated agreement around central principles, and there have been inconsistencies between the rulings in different cases. Where court orders have been made restraining employers from bypassing authorized agents, they have acknowledged the substantive rights of employers to interfere with representation, and have only constrained extreme behaviour, such as when the employer has also been engaged in conduct that is in breach of other laws. Seeking court orders to force employers to recognize the worker representative is a slow and costly process, and employers continue to bypass authorized representatives in practice. An undermining of the authorized representative is achieved by other means such as offering a contract only if the workers have not authorized a union to represent them, or setting up rival organizations with support from the employer and with better access to workers for purposes of recruitment and obtaining authority to represent.

**142.** On the issue of encouragement and promotion of collective bargaining, the complainant states that the combination of law and practice has had the effect of contracting the coverage of collective worker agreements by between 40 and 50 per cent, and the membership of worker organizations for purposes of collective bargaining by over 30 per cent. The data on collective contracts include employer-created collective contracts and therefore overstate the extent of collective contracting by worker authorized agents. Clearly, collective bargaining is limited and constrained and not encouraged and promoted under the New Zealand industrial relations regime. This overall result is a result of the interaction of a number of provisions of the law, including:

— the ability of employers to limit the scope of bargaining to the single enterprise;
— the right of employers to break down their operations into separate enterprises to isolate parts of the operation where worker organization is strong;
— the ability of employers to form employer-dominated negotiating bodies and/or to appoint and pay bargaining agents as worker representatives;
— the capacity to limit the application of an agreement to the individuals who were working at the time it was signed, and to use staff turnover to expand the coverage of individual contracts;
— the remaining capacity to bypass authorized representatives;
— the ability to offer special advantages to those who have not authorized a union to represent them;
— the capacity to restrict access of unions to worksites for recruitment and authorization purposes, and to be pedantic about authorization formalities.

**143.** As regards the issue of employer pressure on workers to withdraw the authorization from a union, the complainant states that this is still legal up to the (as yet undefined) point where interference is undue, and despite any restrictions, it can be achieved by devices such as offers of individual contracts to those who have not authorized a union as the representative, and the sponsorship of rival, employer-dominated worker organizations. At some point the courts might rule that certain forms of pressure are unacceptable, but the limits on what may be done by the employer to persuade workers to withdraw authorities have not been established and it is an expensive and time-consuming process to constrain all employer behaviour via litigation.

**144.** As regards the questions of interference and discrimination against members of unions, the complainant reiterates that protection against interference and discrimination against members of worker organizations is inadequate. Workers are free to join unions and to hold union office, but there is no effective protection against interference in their authorization of the union to represent them, or against discrimination if they have authorized the union to bargain for them:
— draft legislation amending the Human Rights Act had contained a provision making it illegal to discriminate against individuals on the ground that they were members of a trade union, but despite protests from the NZCTU the Government withdrew those provisions from the final legislation;
— there is no recognition or definition of the role of unions under the law, and hence there is no effective protection for unions acting industrially in the course of collective bargaining. Membership of the union is meaningless as far as protection for action during the course of collective bargaining is concerned;
— it is symptomatic of the weakness of protection that despite many reports of discrimination and victimization, the NZCTU is not aware that any worker has even been able to pursue, let alone win, a personal grievance for interference and discrimination on the basis of having authorized a union to represent them in negotiating the contract.

**145.** As regards the issue of bargaining by workers' organizations that are under the influence or control of the employer, the NZCTU recalls that it is still perfectly legal for employers to set up and fund worker organizations, to draw up their constitutions,

to retain veto rights over their communications and even to appoint and employ their advocates. Because any individual can be an authorized agent of workers, and exercise any or all of the powers of a worker organization, employer-dominated or influenced representation can be and is encouraged. In at least one case, the employer has controlled the bargaining function through one organization, and left employees to seek to pursue rights and grievances through a conventional, independent union.

**146.** With respect to the authorization of representatives, the complainant states that nothing has changed since the original complaint was lodged, and the requirements to obtain authorization remain significant organizational and financial impediments to the development of representative worker organizations for the purposes of collective bargaining. An extension of requirements for authorization means that any notices of strike action in essential industries have to indicate the intention of each individual to take that action, and this does complicate and limit the right to strike.

**147.** As regards the previous recommendation on rights of access, the NZCTU notes that the ILO believes that there are sufficient access rights for purposes of representation and bargaining, but argues that there are no rights for worker organizations to access a workplace for purposes of recruitment or to obtain authorities to represent. The absence of rights to access workplaces for purposes of obtaining an authority to represent does restrict free association of workers and the development of representative organizations of workers when taken in conjunction with the scope of the employer to interfere in the process of authorization of the union. The restriction on access rights for seeking authorities to represent makes it much easier for employer-dominated organizations to be formed, and makes the requirement to have individual authorization more onerous.

**148.** On the issue of prohibition on strikes to secure multi-employer contracts, the complainant states that it is still explicitly illegal to strike to secure a contract covering more than one employer, and this has had a major impact on shrinking the coverage of collective contracts. Employers can and do break organizations up into distinct legal enterprises in order to shrink the coverage of collective contracts and frustrate the purpose of collective worker association.

**149.** On the right to strike in essential industries, the NZCTU notes that the ILO does not consider restrictions on the right to strike in essential industries as incompatible with freedom of association. It points out, however, that: the definition of "essential industry" is particularly wide in New Zealand law; the requirements for individual notification of intention to strike make it very difficult for worker organizations to comply with the notice requirements for taking strike action in an essential industry; (with the exception of the police) there are no other forms of dispute resolution available to workers who are restricted by the limitations on striking in essential services.

**150.** As regards strikes related to economic and social policy, the NZCTU states that strikes of this nature are still not legal. The importance of wider social and economic policies like the level of the minimum wage, however, has increased with the collapse of collective bargaining, and with the continuation of changes to health, education, training and other policies without electoral mandate.

**151.** In reply to the Government's and employers' arguments that the dictates of economic policy validate the industrial legislation that has been introduced, the NZCTU considers that these arguments are: irrelevant to a consideration of provisions governing

freedom of association and the promotion of collective bargaining; inconsistent with ILO views on the conditions needed for sustained economic growth and social progress; unsubstantiated in that the performance of the New Zealand economy has been determined by factors other than the Employment Contracts Act.

**152.** From a more general perspective, the NZCTU believes that the interaction of provisions in the law has had such a dramatic impact on reducing the level of membership in unions and the coverage of collective bargaining that it is as important to look for evidence in areas where unions no longer operate and where collective bargaining no longer takes place as it is to assess the effects of the law in areas where unions bargain in spite of all the obstacles to free worker association and to effective collective bargaining.

**153.** A factor that is particularly relevant to provisions on access, on authorization of representation of unions and on prohibitions on strikes to secure multi-employer bargaining or for better social and economic protection is the small scale of the New Zealand workplace. There are 174,700 separate enterprises in New Zealand employing 1,170,000 full-time equivalent workers — an average of less than seven workers per enterprise. There are only 1,123 enterprises employing more than 100 workers, and they employ 491,000 of the FTE workforce. Under these conditions of production, an enterprise-based model of contracting via individually authorized agents is not consistent with effective representation or the promotion of collective bargaining as the main way that the conditions of employment are determined for the vast bulk of the labour force.

**154.** On each of the issues mentioned above, the complainant presented testimonies by representatives of its affiliates and numerous documents in support thereto, a summary of which is reproduced below:

(a) The *NZ Harbour Workers' Union* and the *NZ Waterfront Workers' Union* submitted for instance that in the *Ports of Auckland* a worker who did not accept an individual employment contract (IEC) was made redundant (pp. 3-9 of submission). The employer had a policy of only offering individual contracts and denying access to collective employment contracts (CECs) (pp. 9-11 of submission). In the *Port of Nelson*, the employer had a policy of only offering individual contracts (pp. 13-21 of submission, documented with transcript in Employment Tribunal). In the *Port of Otago*, the employer used a new company structure and developed a non-negotiable contract backed by redundancy threats to seek to undermine an existing CEC. The restrictions on *multi-employer bargaining* prevent waterfront workers from striking to obtain an industry bargaining framework, due to section S63(E) of the ECA (pp. 25-27 of the submission). The *fall-off in consultation* also affected health and safety processes within enterprises (pp. 28-31 of submission).

(b) The *Public Service Association (PSA)* submitted that *contract coverage* fell from 97.5 per cent in 1991 to 70 per cent in March 1994 (p. 5 of submission); a Cabinet directive ordered that third-tier managers should have IEC (p. 7 of submission). In the *Department of Social Welfare*, the union was bypassed and IECs were offered to workers; de-authorization was encouraged and direct pressure was exerted on individuals (pp. 8-9 of submission). In the *Department of Internal Affairs*, there was a proliferation of CECs for small groups and pressure exerted on workers to accept IECs (p. 10 of submission). In the *Transport section of Internal Affairs*, IECs were used to undermine collective bargaining for chauffeurs (p. 11 of submission). In the

*Film and video classification branch (Internal Affairs)* workers had to accept IECs to get employment (p. 12 of submission, Appendix 4). At *Housing New Zealand*, offers in bargaining were made direct to staff, bypassing the union (p. 13 of submission). The State Services Commission has issued a directive stating that non-recognition of employee representatives is seen as part of the "enhanced opportunities" under the ECA (p. 4, Appendix 2). In the *Electricity Corporation of New Zealand (ECNZ)* there was a de-unionization process involving individual contracts and a move to multiple bargaining units. In the *Designpower case* a court ruling that the worker did not have a choice of IEC or CEC; the unionization level fell from 88 per cent to 31 per cent in four-and-a-half years (pp. 21-23 of submission). The *Tower Life Corporation* decided to move to IECs (p. 25 ff.). In the *Accident Rehabilitation and Compensation Corporation (ACC)* the employer established and financed an in-house union, including management control of the election system (pp. 26 ff.). At *Mercury Energy* the employer promoted a staff association despite high levels of current union authorization.

(c) *The National Distribution Union* submitted that there has been a move from 55 negotiations to 700 in the transport, energy, storage, retail, textile and food sectors; a loss of multi-employer bargaining; and moves from CECs to IECs (p. 1 of submission). At *Deka* (a variety goods retail chain), the employer refused to negotiate for "new employees", and determined the structure of negotiation; this involved 13 weekly discussion groups around the country over eight weeks, at a great disadvantage for the union (pp. 3-4 of submission). At *Katies*, a retail chain, the employer was offering contracts to workers independently of the union whilst negotiations were taking place (p. 5 of submission). Individual contracts are promoted (p. 6 of submission). A major retailer, *The Warehouse*, has refused to involve the union in any process of collective bargaining (p. 7). At the *New World Supermarkets*, the company arranged de-authorization whilst the union awaited negotiation dates. There was a 40 per cent drop in membership since passage of the legislation (p. 9). Some employers require proof of authorization at each meeting (p. 9).

(d) *Finance sector* (FINSEC). In the *insurance industry* there has been a collapse in collective bargaining (139 employers covered in 1991, 21 collective contracts now) (p. 2.2). In the *stock and station* industry, which services the rural community, the original coverage was at least 20 employers, now two collective contracts remain (p. 2.3). At the *Westland Bank*, the company did not recognize the union and negotiated individual contracts. All staff left the union and are on individual contracts (p. 3.1). At the *TSB Bank Ltd.*, the staff was locked out by employers to achieve IECs. The company stated in a letter its refusal to negotiate CECs (p. 3.2). The *Rural Bank* refused to negotiate a collective contract (p. 3.3). At *Wrightsons* the employer refused to negotiate CECs and imposed IECs.

(e) The *NZ Engineers' Union* submitted that at *Ajax Spurway Fasteners Ltd.* the employer bypassed the bargaining agent; promoted IECs; encouraged de-authorization and withheld information on union authorization. At *James Hardie Building Services* the employer directly approached workers for individual contracts. At *Ogden Aviation* a "collective contract" was developed by the company, which workers were required to join to get a job. In *Aluminium Smelter (Tiwai*

*Point/Comalco)*, although the workers had voted at least two to one for collective contracts management directly approached all individuals for IEC.

(f) *NZ Education Institute (NZEI)*. At *Barnardo's* (a voluntary organization) a contract was developed by a group selected and controlled by management, which determined the structure of the contract and refused to bargain with the union. As regards *kindergarten teachers*, the employer insisted on unreasonable authorization requirement (photocopying 1,500 forms) or required authorization for workers who were already members of the union. The ECA in general prevented strikes for multi-employer contracts. At the *Auckland Girls Grammar*, the employer refused to recognize the union. Concerning the *principals in primary education*, it was confirmed that the employer will at some stage offer individual contracts directly to staff; the employer paid the bargaining agent; the agent was contracted by both employer and Principals' Federation (employer sponsors).

(g) The *Association of Staff in Tertiary Education (ASTE)* submitted voluminous correspondence which allegedly demonstrates the effects of ECA.

*Part 1* — Effect of restriction of strike action for multi-employer contracts; employer choice of nature of contracts; government promotion of individual or enterprise and highlighting that new employees are not automatically able to join; government pressure to stop multi-employer; example of government pressure on CEO to bargain at enterprise level.

*Part 2 — Colleges of education*: Use of ability to develop "a new collective contract" for future staff (without bargaining); employer seeking to bypass the union centrally and determine local participation only in negotiations; employer approaches to staff to negotiate without union; pressure and threat of appointing new staff on different contract.

*Part 3 — Aeraki Polytechnic Institute*: employer seeking to sight authorities before recognizing; employer offering IECs although at that stage the union had spent six months seeking to commence negotiations on a collective; example of the precondition of accepting individual contracts; employer seeking to exclude centre managers from negotiations; non-recognition of right to bargain; proposal for alternate contract development process; direct approaches to staff outside of bargaining.

*Part 4 — Bay of Plenty Polytechnic Institute*: variety of processes to frustrate bargaining; timetable.

*Part 5 — Tai Poutine Polytechnic Institute*: use of ability of employer to "write new collective contracts" for new staff; bypassing of union by negotiating directly to staff.

(h) The *Service Workers' Union* submitted that at the *South Pacific Hotels* it was unable to achieve multi-employer bargaining; the company developed a CEC and refused to negotiate with the union authorized; the legal process is ineffective. The employer at *Romano's Pizza* refused to negotiate collective contracts and attempted to dismiss workers seeking a CEC; the workers could not strike for multi-employer contract; and there were bureaucratic impediments to contracts.

(i) The *New Zealand Nurses' Organization* submitted several letters to and from *Southern Cross* evidencing the employers' refusal to negotiate CECs; there also was bypassing of the union.