4. ENCOURAGEMENT AND PROMOTION (AND EXTENT) OF COLLECTIVE BARGAINING

(a) General remarks

93. Obviously whether or not an industrial relations system, as reflected in the terms, interpretation and application of the relevant legislation, encourages and promotes collective bargaining is, at the end of the day, a judgement which must take account of many factors. Can it be measured on an absolute scale; on the basis of what system was in force before and what system is in force now; on sheer relative numbers of collective agreements or the coverage of such agreements? Is the move from a strongly collectively based system of labour-management relationships to one oriented more or less towards greater possibilities of the individualization of that relationship a conclusive element in probing the question of encouragement and promotion of collective bargaining? How many particular violations of specific standards need there be to conclude that the system does not "encourage and promote"?

94. It is not for me to address these questions. I would suppose nevertheless that the Committee at a minimum would base its consideration on an examination or analysis of the import of the information in the previous sections of this report and its impact on the possibilities for engaging in meaningful collective bargaining.

95. What I could review in this section are the comments which appear to be relevant to this question as expressed by certain of those who were in contact with the mission or from public documents and, for what they are worth, statistical material coming from various sources.

(b) Views and comments

96. In the *Eketone* case, Justice Cooke refers to a description of the ECA itself as "union-neutral" (and says that employers are not bound to be "union-neutral", but are free to express views against unionism subject to sections 8 and 12 of the Act). The question may perhaps be posed, if the above characterization of the Act is accepted, does "union-neutral" equate with "collective bargaining neutral" (or neutral as between collective and individual bargaining). Mr. Max Bradford, chairman of the Parliamentary Labour Committee told the mission that the ECA was not intended to weigh individual employment contracts over collective contracts but rather was completely neutral as between the two. The further question can then be posed: Can legislation which is so neutral be said necessarily not to encourage or promote collective bargaining?

97. Many of the trade union people, including leaders of the National Distribution Union (referring to the retail sector) in claiming that the ECA discourages collective bargaining insist that many collective employment contracts have not been concluded in a collective process, but are non-negotiable documents for individuals to sign. And spokespersons from the state sector union, PSA, have testified that the pattern in their sector reflected a move from collective to individual contracts.

98. Some company executives also expressed the idea to the mission that the policy of their enterprise was to move from collective to individual employment contracts wherever possible. The ECA was instrumental in permitting the implementation of such policy according to the human resources manager of Telecom Corporation of New Zealand. He also believed that individual contracts better provided a basis for labour flexibility and fostered a more committed workforce; it was no longer a question of "them" and "us" with the union considered as a third party. The mission heard similar views from the principal industrial relations advisor of NZ Aluminium Smelters who, in addition, particularly stressed that with individual contracts one could more easily eliminate demarcation restrictions. The chief executive of Shell NZ also saw the union as a third party contributing to a "them" and "us" relationship; Shell, with 500 to 600 employees, had only seven employees covered by collective employment contracts.

99. There was a different pattern in other companies and industries. The mission was advised for example that at New Zealand Rail, 87 per cent of the employees are union members and parties to a collective employment contract. And employers' spokespersons from the bars and brewery industry as well as the pulp and paper industry informed the mission that responsible trade unions and constructive collective bargaining were prevalent therein.

(c) Some statistics

100. There is no common acceptance among those the mission met of a single statistical model to measure collective agreement coverage and related matters. With the caveats mentioned in paragraphs 34-38 of this report, I shall merely set out the various sets of statistics and, in certain cases, comments on these statistics.

101. The NZCTU cites Harbridge and Hince of the Industrial Relations Centre, Victoria University, North Wellington, *A sourcebook of New Zealand trade unions and employee organizations,* which it characterizes as being the most reliable publication on union membership. I would use more up-to-date information taken from Harbridge, *Labour market regulations and employment: Trends in New Zealand* (unpublished manuscript, 1994). Harbridge reports that union membership has dropped steadily from 45 per cent in September 1989 to 27 per cent in December 1993; the steepest drop being between May 1991 and December 1992 (from 41 per cent to 29 per cent).

102. On collective bargaining coverage, Harbridge reports that collective bargaining coverage has fallen from 49 per cent of the total employed workforce in 1990 (before the ECA) to 29 per cent in 1993.

103. The Government, stating that collective bargaining remains significant under the ECA, cites different surveys to illustrate this. The Quarterly Employment Survey (QES), conducted by Statistics New Zealand, shows that in February 1993, 43.2 per cent of employees in the survey were covered by current collective employment contracts and 3.4 per cent by expired collective contracts, a total figure of 46.6 per cent (plus 0.2 per cent on old awards). In addition, nearly half of the 559,500 individual employment contracts were based on expired collective contracts or awards and hence were originally negotiated collectively. This would raise the collectively negotiated coverage to over 60 per cent according to the Government. In February 1992 the total figure was 54 per cent encompassing 39.7 per cent of old awards and 14.5 per cent on collective employment contracts. (No breakdown of individual employment contract is available for 1992.)

104. The Government also cites the Heylen survey and a second QES survey, both covering only the private sector, which show respectively 49 per cent and 40 per cent collective coverage. The Government states that to these figures should be added up to a further 27.1 per cent who are covered by expired contracts or awards or agreements.

105. The Government contests the collective contract information of the Harbridge survey, both as regards the data bases used and the inclusion of working proprietors.

106. On figures which have relevance under this heading, as well as, perhaps, in regard to the question of employer-domination, the Government offers another Heylen survey which indicates that in 1993, 72 per cent of employees covered by collective employment contracts were represented by established unions in their negotiations (90 per cent in the public sector and 67 per cent in the private sector).

5. STRIKES FOR A MULTI-EMPLOYER BARGAINING UNIT

107. Section 63 of the ECA makes unlawful strikes concerned with the issue of whether a collective employment contract will bind more than one employer. There is not any new factual matter in terms of case-law, legislative or policy measures that has been brought to the attention of the mission that would alter the situation from that at the time of the Committee's initial consideration of the complaint.

108. The complainant maintains that the ban has had a major impact on shrinking the coverage of collective contracts. They note in this regard the small scale of New Zealand workplaces, with an average of less than seven workers per enterprise. The NZCTU further contends, with examples cited, that employers take advantage of this provision and break organizations down into distinct legal entities in order to further shrink the coverage of collective contracts and frustrate the purpose of collective worker association.

109. The Government reasserts that the ECA provisions on strikes seek to balance the right to strike with the employers' right not to face economic loss owing to the actions of other employees over whom they have no control; and with the employers' right not to be bound into

arrangements with other businesses — especially competitors — which do not allow for their reasonable business requirements. Concern over the effects on the community generally has also driven the ban on this type of strike. The Government recalls that the right to strike in support of the content of multi-employer contracts is not affected by the relevant provision. Finally it points out that 19.7 per cent of employees in the Labour Department database are covered by multi-employer contracts and that multi-employer bargaining is clearly a viable option under the New Zealand system.

110. The NZEF addressed this question and considered that if the law were to permit such strikes, the right of choice would be undermined or negated. This would call into question the ECA's underpinning philosophy by coercing "free association" (a contradiction in terms).

6. Strikes on social and economic issues

111. The Government notes that strikes on social and economic issues are not at all mentioned in the ECA as lawful or unlawful. However, they agree that, not being specified as a lawful strike, they would not be protected against tort, injunction or breach of contract actions. The Government does not believe that employers should suffer economic loss due to factors over which they have no individual control.

112. It would seem from the testimony heard by the mission that while there had been in the past two strikes — or demonstrations — of this sort, no court action resulted and the strikers (or demonstrators) were not subjected to any disciplinary measures. I would add that, without doing extensive research, I do not believe that it is usual in many countries for legislation to deal explicitly with the question of strikes on social and economic issues.

113. The NZEF stressed, inter alia, that there were ample other means for workers to protest general economic and social policies without resorting to strike action.

114. The NZCTU, on the other hand, expressed to the mission their belief that the possibility of workers to resort to such strikes or protests was necessary. This was particularly the case since, with what they contend to be the "collapse of collective bargaining", workers were more dependent on government social and economic policies. Subjects such as minimum wages and changes to health, accident compensation, education and training programmes, and other issues directly affecting the occupational interests of workers have now become more important. In these circumstances, workers should be allowed, with protection from legal proceedings, to take some form of strike action to protest the Government's economic and social policies.

IV. A concluding remark

115. The mission was met with such goodwill and warmth in New Zealand, and this on the part of the Government, employer and trade union personalities as well as many others concerned with labour questions, that I am tempted to express a personal hope. Along with the goodwill on all sides, there seemed to me to be a window of opportunity. I detected a willingness, even a readiness (although a bit of gentle pushing may be helpful), of all three parties to meet and engage in constructive discussions. I believe, perhaps naively but certainly sincerely, that if this goodwill is translated into a modicum of compromise on a limited number of issues which could be reflected in a degree of legislative change, a workable solution might be found to the issues to which this case has given rise.

Appendix A

LIST OF PERSONS AND ORGANIZATIONS MET BY THE MISSION

Monday, 19 September 1994

John Chetwin, Secretary of Labour, Department of Labour

Ralph Stockdill, General Manager, Industrial Relations, Department of Labour

Joanne Silberstein, Manager, Industrial Relations Policy, Department of Labour

Janet Hector, Advisor, Industrial Relations, Department of Labour

Paula Rebstock, General Manager, Labour Market Policy, Labour Market Analysis Unit, Department of Labour

Richard Whatman, Industrial Relations Analyst, Labour Market Analysis Unit, Department of Labour

Margaret Richards, International Liaison Officer, Department of Labour

Doug Andrew, Director, Enterprise and Innovation and International Economics, The Treasury

Bill Moore, Senior Legal Advisor, Department of Justice

Alf Kirk, Branch Manager, Government Operations Branch, State Services Commission

Alan Nixon, Manager, Strategic Policy Major Projects, Department of Social Welfare

Alastair Bisley, Deputy Secretary, Ministry of Foreign Affairs and Trade

Sir Kenneth Keith, President, New Zealand Law Commission

Tuesday, 20 September

Morning

Hon. Doug Kidd, Minister of Labour

Hon. Bill Birch, Minister of Finance

Mr. Max Bradford, MP, Chairman, Labour Committee

The mission also met informally Mr. Ralph Gardiner, Chief, Employment Tribunal.

Afternoon

(1) *Practitioners in the labour market:*
Rob Campbell, Director, Wheeler Campbell Securities
Francis Wevers, Director, Wevers and Company
Patrick Green, Partner, Teesdale Meuli and Company
Peter Kiely, Partner, Heskith Henry, Barristers and Solicitors
Rod Lingard, Director, Lingard Labour Markets Limited

(2) Nigel Fyfe, Deputy Director, Legal Division, Ministry of Foreign Affairs and Trade
Alaistair Bisley, Deputy Secretary, Ministry of Foreign Affairs and Trade
Andrew Sweet, Analyst, External Integration Strategy, The Treasury

Wednesday, 21 September

(1) *New Zealand Employers' Federation:*
Steve Marshall, Chief Executive Officer

Anne Knowles, Deputy Chief Executive
Richard Tweedie, President

(2) *New Zealand Business Roundtable:*
Roger Kerr, Executive Director, New Zealand Business Roundtable
Alan Jones, Human Resource Development Manager, Fletcher Challenge Ltd.
Bob Matthew, Chairman, Brierley Investments Ltd. and Chairman, Air New Zealand Ltd.
Dr. Colin Howard, Barrister, Australia

(3) *Industrial practitioners:*
Ken Bania, Group General Manager, Human Resources, DB Group Ltd. (Dominion Breweries)
Mike Brooks, Executive Officer, Human Resources, NZ Meat Industry Association
Paddy Boyle, Human Resources Manager, Carter Holt Harvey
David Patten, General Manager, Legal, Human Resources and Technology, Independent Newspapers Ltd. (INL)
Terence Currie, Executive Director, NZ Pulp and Paper Employers' Association
Tom Sheey, Chief Executive, Hotel Association of New Zealand
Adrienne d'Ath
Vaughan Sampson
Colin McInnes

(4) *The mission also met informally the following persons:*
John Foster, Chief Executive, Richmond Ltd.
Kerry McDonald, Managing Director, Comalco New Zealand Ltd.
Jim McRea, Managing Director, Air New Zealand Ltd.
Jim Law, Chief Executive, Mobil Oil New Zealand Ltd.
Rosanne Meo, Principal, Langley Meo and Associates

Thursday, 22 September

(1) *New Zealand Council of Trade Unions*
Ken Douglas, President
Ross Wilson, Vice-President
Angela Foulkes, Secretary
Peter Harris, Economist
David Martin, Legal Officer

(2) Jim Turner, Deputy Secretary, Public Service Association
Colin Davies, Industrial Officer, Public Service Association
Peter Conway, Industrial Officer, National Distribution Union
Paul Goulter, General Secretary, FinSec
Helen Gilbert, Industrial Officer, FinSec
Ross Wilson, Secretary, Harbour Workers
Trevor Hanson, Secretary, Watersiders

Eddie Dixon, Industrial Officer, Harbour Workers
Gavin McNaughton, Industrial Officer, Watersiders

(3) Raymond Harbridge, Associate Professor, Centre for Industrial Relations, Victoria University
Marianne Street, Director, Industrial Relations Centre, Auckland University
Margaret Wilson, Professor of Law, Waikato University
Margaret Mulgan, Dean of Law, Waikato University
Paul Harris, Director, Centre for Labour and Trade Union Studies, Waikato University
Chris Eichbaum, Director, Centre for Labour Studies, Massey University

Friday, 23 September

Suze Wilson, Industrial Officer, NZ Engineers' Union
Rex Jones, National Secretary, NZ Engineers' Union
Roz Noonan, National Secretary, NZ Educational Institute
Linda Mitchell, Senior Research Officer, NZ Educational Institute
Lorraine Webber, National Secretary, Association of Staff in Tertiary Education
Maryanne Baxter, National President, Association of Staff in Tertiary Education
Mark Gosche, National Secretary, Service Workers' Union
Peter Cranney, Industrial Officer, Service Workers' Union
Laura Cronin, Legal/Industrial Officer, NZ Nurses' Organization
Mary Slater, Central Regional Manager, NZ Nurses' Organization
Ian Powell, National Secretary, Association of Senior Medical Specialists
Tony Wilton, National Secretary, Journalists and Graphic Processors Organization
Jim Turner, Deputy General Secretary, Public Service Association
Colin Davies, Industrial Officer, Public Service Association

Saturday, 24 September

(1) Jim Anderton, MP, Head of Alliance Party
David Steele, Research Officer
Vernon Tile, Post Primary Teachers' Association

(2) *Trade Union Federation:*
Dave Morgan, President, NZTUF/NZ Seafarers' Union
Maxine Gay, Secretary, NZTUF
Robert Reid, NZ Footwear Workers' Union
Con Devitt, NZTUF
Robyn Haultin, Barrister

(3) Theo Simeonidic, Federated Farmers
David Lonsdale, Retail and Wholesale Merchants
Doug McLaren, Retail and Wholesale Merchants
Philip Fleming, NZ Manufacturers' Federation
Simon Arnold, NZ Manufacturers' Federation

(4) *Labour party*
Hon. Helen Clark, Leader of the Opposition
Heather Simpson, Research Assistant

Monday, 26 September

(1) Steve Marshall, Chief Executive Officer, NZ Employers' Federation
Anne Knowles, Deputy Chief Executive, NZ Employers' Federation

(2) *Legal practitioners*
Hugh Fulton, Barrister, Auckland
John Timmins, Barrister, Auckland
Rob Towner, Barrister and Solicitor, Russel McVeagh, Auckland

(3) *Company representatives:*
Keith Handley, Group Manager, Personnel, Ports of Auckland Ltd.
Trevor Arnond, Operations Manager, Richmond Ltd.
Bruce Munro, General Manager, Personnel, Alliance Textiles Ltd.
George Mark, Principal Industrial Relations Advisor, NZ Aluminium Smelters
Richard White, Executive Manager, Personnel, New Zealand Rail Ltd.
David Bedford, Manager, Human Resources, Telecom Corporation of NZ Ltd.
Bill Smith, Chief Executive, Otago-Southland Employers' Association

Tuesday, 27 September

(1) Hon. Doug Kidd, Minister of Labour
(2) Department of Labour officials

Appendix B

SELECTED PROVISIONS OF THE EMPLOYMENT CONTRACTS ACT, 1991

An Act to promote an efficient labour market and, in particular:

(a) to provide for freedom of association;

(b) to allow employees to determine who should represent their interests in relation to employment issues;

(c) to enable each employee to choose either —
  (i) to negotiate an individual employment contract with his or her employer; or
  (ii) to be bound by a collective employment contract to which his or her employer is a party;

(d) to enable each employer to choose —
  (i) to negotiate an individual employment contract with any employee;
  (ii) to negotiate or to elect to be bound by a collective employment contract that binds two or more employees;

(e) to establish that the question of whether employment contracts are individual or collective or both is itself a matter for negotiation by the parties themselves;

...

2. *Interpretation.* In this Act, unless the context otherwise requires, —

"Applicable collective employment contract" means the collective employment contract that is binding on the relevant employee, employees, employer, or employers (as the case may require) at the relevant point in time;

...

"Collective employment contract" means an employment contract that is binding on one or more employers and two or more employees;

...

"Dispute" means a dispute about the interpretation, application, or operation of an employment contract;

"Employee" —

(a) means any person of any age employed by an employer to do any work for hire or reward; and

(b) includes —

...

(ii) a person intending to work;

"Employees' organization" means any group, society, association, or other collection of employees, however described and whether incorporated or not, which exists in whole or in part to further the employment interests of the employees belonging to it;

...

"Employment contract" means a contract of service;

...

"Individual employment contract" means an employment contract that is binding on only one employer and one employee;

...

"Personal grievance" or "grievance" has the meaning given to it by section 27 of this Act;

...

Part I

Freedom of association

5. *Object.* The object of this Part of this Act is to establish that —

(a) employees have the freedom to choose whether or not to associate with other employees for the purpose of advancing the employees' collective employment interests;

(b) no person may, in relation to employment issues, apply any undue influence, directly or indirectly, on any other person by reason of that other person's association, or lack of association, with employees.

6. *Voluntary membership.* Nothing in any contract or in any other arrangement between persons shall require any person —

(a) to become or remain a member of any employees' organization; or

(b) to cease to be a member of any employees' organization; or

(c) not to become a member of any employees' organization.

7. *Prohibition on preference.* Nothing in any contract or in any other arrangement between persons shall confer on any person, by reason of that person's membership or non-membership of an employees' organization —

(a) any preference in obtaining or retaining employment; or

(b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.

8. *Undue influence.* (1) No person shall exert undue influence, directly or indirectly, on any other person with intent to induce that other person —

(a) to become or remain a member of an employees' organization or a particular employees' organization; or

(b) to cease to be a member of an employees' organization or a particular employees' organization; or

(c) not to become a member of an employees' organization or a particular employees' organization; or

(d) in the case of an individual who is authorized to act on behalf of employees, not to act on their behalf or to cease to act on their behalf; or

(e) on account of the fact that the other person is, or, as the case may be, is not a member of an employees' organization or of a particular employees' organization, to resign from or leave any employment;

(2) Every person who contravenes subsection (1) of this section shall be liable to a penalty under this Act.

Part II

Bargaining

9. *Object.* The object of this Part of this Act is to establish that —

(a) any employee or employer, in negotiating for an employment contract, may conduct the negotiations on his or her own behalf or may choose to be represented by another person, group, or organization;

(b) appropriate arrangements to govern the employment relationship may be provided by an individual employment contract or a collective employment contract, with the type of contract and the contents of the contract being, in each case, a matter for negotiation.

10. *Choice of representation.* (1) Each person may, in negotiating for an employment contract, —

(a) determine whether that person wishes to be represented by another person, group, or organization; and

(b) if the person wishes to be represented by another person, group, or organization, determine, subject to any objection under section 11 of this Act, the person, group, or organization by which the person will be represented.

(2) A person, group, or organization may represent a person both under this Part of this Act and under section 59 of this Act.

...

12. *Authority to represent.* (1) Any person, group, or organization who or which purports, in negotiations for an employment contract, to represent any employee or employer shall establish the authority of that person, group, or organization to represent that employee or employer in those negotiations.

(2) Where any employee or employer has authorized a person, group, or organization to represent the employee or employer in negotiations for an employment contract, the employee or employer with whom the negotiations are being undertaken shall, subject to section 11 of this Act, recognize the authority of that person, group, or organization to represent the employee or employer in those negotiations.

13. *Right of access for the purpose of obtaining authority to act as representative.* Where a person, group, or organization is seeking to represent any employee or employees in

negotiations, that person or a representative of that group or organization, as the case may be, may, with the agreement of the employer, be given access to the workplace or workplaces concerned for the purpose of obtaining authority to represent employees.

14. *Right of access by representative.* (1) Where any employee has authorized a person, group, or organization to represent the employee in negotiations for an employment contract and the employee is employed on premises that are under the control of the employee's employer, that person or a member of the group or a person acting on behalf of the group or organization may, for the purpose of those negotiations, enter those premises at any reasonable time when employees are employed to work on the premises, to discuss matters with that employee relating to those negotiations.

...

(5) Every person is liable to a penalty under this Act who —

(a) refuses to allow any person, group, or organization to exercise the powers conferred on that person, group, or organization by this section; or

(b) obstructs any person in the exercise or attempted exercise of that person's powers under this section; or

(c) wilfully fails to comply with the provisions of this section.

...

16. *Ratification of settlement.* Where a person, group, or organization is authorized to represent any employer or employee in negotiations for an employment contract, that person, group, or organization and the employer or employee being represented, as the case may be, shall, before entering into the negotiations, agree, within the three months preceding the commencement of negotiations, on a procedure in relation to the ratification of any settlement negotiated later by that person, group, or organization and any such agreed procedure shall for the purpose of concluding the negotiations, be binding on the employer or employee being represented, from the time a proposed settlement is first reached on their behalf by that person, group, or organization.

...

18. *Freedom to negotiate.* (1) Negotiations for an employment contract may, subject to this Act, include negotiations on any matter, including all or any of the following matters:

(a) the question of whether employment contracts are to be individual or collective;

(b) the number and mix of employment contracts to be entered into by any employer.

(2) Nothing in this Act requires any employer to become involved in any negotiations for a collective employment contract to which it is proposed that any other employer be a party.

19. *Individual employment contracts.* (1) Where there is no applicable collective employment contract, each employee and the employer may enter into such individual employment contract as they think fit.

(2) Where there is an applicable collective employment contract, each employee and the employer may negotiate terms and conditions on an individual basis that are not inconsistent with any terms and conditions of the applicable collective employment contract.

(3) Where an employee negotiates terms and conditions under subsection (2) of this section, that employee is still bound by the applicable collective employment contract.

(4) Where an applicable collective employment contract expires, each employee who continues in the employ of the employer shall, unless the employee and the employer agree to a new contract, be bound by an individual employment contract based on the expired collective employment contract.

(5) Every individual employment contract shall, if the employee so requests at the time when it is entered into, be in writing and the party that prepares the employment contract shall supply a copy of that employment contract to the other party as soon as practicable.

(6) Every employee who is bound by an individual employment contract, including an employee who has negotiated terms and conditions on an individual basis under subsection (2) of this section, may request his or her employer to record in writing all or any of the contents of that

contract, and, on any such request, the employer shall, as soon as practicable, provide a written record of those contents to the employee.

20. *Collective employment contracts.* (1) An employer may enter into a collective employment contract with any or all of the employees employed by the employer.

(2) Two or more employers may enter into a collective employment contract with any or all of the employees employed by them.

(3) Any employer may, in negotiating for a collective employment contract, negotiate with —

(a) the employees themselves; or

(b) if the employees so wish, any authorized representative of the employees.

(4) Every collective employment contract shall be in writing.

(5) Every employer who is bound by a collective employment contract shall, on being requested to do so by an employee who is bound by that contract, give to that employee, as soon as practicable, a copy of that contract.

21. *New employees.* If a collective employment contract contains a term allowing the extension of its coverage to other employees employed by any employer bound by it, any such other employee may, in addition to the employees who are parties to it, become a party to, and be covered by, that collective employment contract if that employer and any such other employee so agree.

...

Part III

Personal grievances

26. *Object.* The object of this Part of this Act is to establish that —

(a) all employment contracts must contain an effective procedure for the settlement of personal grievances;

(b) personal grievances are distinguishable from disputes by their subject-matter and not by the number of employees involved;

(c) the application of a personal grievance procedure is not able to be frustrated by deliberate lack of cooperation on the part of any person;

(d) the remedy for a proven grievance is determined in each case by the circumstances of the case;

(e) the personal grievance procedure is an alternative to, and is not in addition to, any right to make a complaint under the Human Rights Commission Act 1977 or the Race Relations Act 1971.

Definitions

27. *Personal grievance.* (1) For the purposes of this Act, "personal grievance" means any grievance that an employee may have against the employee's employer or former employer because of a claim —

(a) that the employee has been unjustifiably dismissed; or

(b) that the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer (not being an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment contract); or

(c) that the employee has been discriminated against in the employee's employment; or

...

(e) that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of an employees' organization.

...

28. *Discrimination.* (1) For the purposes of section 27(1)(c) of this Act, an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer —

(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment —

by reason of the colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief of that employee or by reason of that employees' involvement in the activities of an employees' organization.

(2) For the purposes of subsection (1) of this section, an employee is deemed to be involved in the activities of an employees' organization if, at any time within 12 months before the action complained of, that employee —

(a) was an officer of any employees' organization or branch thereof, or was a member of the committee of management of any employees' organization or branch, or was otherwise an official or representative of any employees' organization or branch; or

(b) had acted as a negotiator in collective bargaining; or

(c) had represented an employees' organization or branch thereof in any negotiations between employers and employees; or

(d) was involved in the formation or the proposed formation of an employees' organization; or

(e) had made or caused to be made a claim for some benefit of a collective or individual employment contract either for that employee or any other employee, or had supported any such claim, whether by giving evidence or otherwise; or

(f) had submitted another personal grievance to that employee's employer.

...

30. *Duress.* For the purposes of section 27(1)(e) of this Act, an employee is subject to duress in that employee's employment in relation to membership or non-membership of an employees' organization if that employee's employer or a representative of that employer —

(a) makes membership of an employees' organization or of a particular employees' organization a condition to be fulfilled if that employee wishes to retain that employee's employment; or

(b) makes non-membership of an employees' organization or of a particular employees' organization a condition to be fulfilled if that employee wishes to retain that employee's employment; or

(c) exerts undue influence on that employee, or offers, or threatens to withhold, or does withhold, any monetary incentive or advantage to or from that employee, or threatens to or does impose any monetary disadvantage on that employee, with intent to induce that employee —

  (i) to become or remain a member of an employees' organization or a particular employees' organization; or

  (ii) to cease to be a member of an employees' organization or a particular employees' organization; or

  (iii) not to become a member of an employees' organization or a particular employees' organization; or

  (iv) in the case of an employee who is authorized to act on behalf of employees, not to act on their behalf or to cease to act on their behalf; or

(v) on account of the fact that the employee is, or, as the case may be, is not, a member of an employees' organization or of a particular employees' organization, to resign from or leave any employment; or

(vi) to participate in the formation of an employees' organization; or

(vii) not to participate in the formation of an employees' organization.

...

Part IV

Enforcement of employment contracts

43. *Object.* The object of this Part of this Act is to establish that —

(a) employment contracts create enforceable rights and obligations;

(b) all employment contracts must contain an effective procedure for the settlement of disputes about their interpretation, application, or operation;

(c) provisions in employment contracts that provide for further negotiation on certain matters are not enforceable under this Act;

(d) it is the responsibility of the parties to employment contracts, and of individuals bound by them, to enforce their rights under them;

(e) the primary remedy under this Act for a breach of any employment contract or of any provision of this Act is an order for compliance.

Disputes

44. *Procedures for settling disputes.* (1) Every employment contract shall contain a procedure for settling any dispute about the interpretation, application, or operation of the employment contract.

(2) The procedure required by subsection (1) of this section shall be —

(a) an agreed procedure that is not inconsistent with the requirements of this Part of this Act (which requirements do not include the requirements of the Second Schedule to this Act); or

(b) if there is no such agreed procedure, the procedure set out in the Second Schedule to this Act.

...

52. *Penalties for breach of employment contract.* (1) Every party to an employment contract who breaches that contract is liable to a penalty under this Act.

(2) Every person who incites, instigates, aids, or abets any breach of an employment contract shall be liable to a penalty under this Act.

...

55. *Power of tribunal to order compliance.* (1) Where any person has hot observed or complied with —

(a) Any provision of —

(i) any employment contract; or

(ii) Part II or Part III or Part IV of this Act;

...

(b) Any order, determination, direction, or requirement made or given under this Act by the tribunal or a member or officer of the tribunal, —

the tribunal may, in addition to any other power it may exercise, by order require, in or in conjunction with any proceedings before the tribunal under this Act to which that person is a party, that person to do any specified thing, or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement, and shall specify a time within which that order is to be obeyed.

...

57. *Harsh and oppressive contracts.* (1) Where any party to an employment contract alleges —

(a) that the employment contract, or any part of it, was procured by harsh and oppressive behaviour or by undue influence or by duress; or

(b) that the employment contract, or any part of it, was harsh and oppressive when it was entered into, —

that party may apply to the court for an order under this section.

...

(4) Where the court is satisfied, on the application of a party to an employment contract, that an allegation of the type referred to in subsection (1) of this section is true, the court may make one or more of the following orders:

(a) an order setting aside the contract (either wholly or in part);

(b) an order directing any party to the employment contract to pay to any other party such sum by way of compensation as the court thinks fit;

(5) In making any order under this section the Court shall take into account all the circumstances surrounding the creation of the contract or the relevant part thereof.

...

Part V

Strikes and lockouts

60. *Object.* The object of this Part of this Act is to establish that —

(a) the right of employees to strike and the right of an employer to lock out are recognized, subject to constraints;

(b) constraints on the right of employees to strike and on the right of employers to lock out include a constraint based on the principle that an employee covered by a collective employment contract should neither strike nor be locked out by his or her employer;

(c) constraints on the right of employees to strike and employers to lock out include a constraint based on the principle that no employee should strike and no employer should lock out —

(i) where the strike or lockout relates to freedom of association or to a personal grievance or a dispute;

(ii) where the strike or lockout is in an essential industry and notice required by this Act has not been given;

(iii) where the strike or lockout is concerned with the issue of whether a collective employment contract will bind more than one employer;

(d) a strike or lockout is lawful if it —

(i) does not offend against the principle described in paragraph (b) of this section or the principle described in paragraph (c) of this section; and

(ii) relates to the negotiation of a collective employment contract;

...

63. *Unlawful strikes or lockouts.* Subject to section 71 of this Act, participation in a strike or lockout shall be unlawful if —

...

(e) it is concerned with the issue of whether a collective employment contract will bind more than one employer; ...

64. *Lawful strikes and lockouts.* (1) Participation in a strike or lockout shall be lawful if —

(a) it is not unlawful under section 63 of this Act; and

(b) it relates to the negotiation of a collective employment contract for the employees concerned.

...

Appendix C

LIST OF CASES (IN CHRONOLOGICAL ORDER WITH IDENTIFYING NAME ITALICIZED)

In the Court of Appeal

Eketone and Docherty v. Alliance Textiles and others (CA388/91; judgement given 5 November 1993).

In the Employment Court

Davis and others, and the Harbour Workers Union v. *Ports of Auckland* (AEC38/91; A310/91; A311/91; judgement given 15 November 1991).

Adams v. Alliance Textiles (NZ) (IERN2982; judgement given in 1992).

Service Workers Union v. *Southern Pacific Hotel* Corporation and others (WEC27/93; W21/93; judgement given 1 October 1993).

Mineworkers Union v. *Dunollie* Coal Mines and others (CEC8/94; C4/94; judgement given 18 February 1994).

National Distribution Union v. *Foodstuffs (Auckland)* Ltd. (AEC33/94; A26/93; A33/93; judgement given 17 June 1994).

Witehira and others v. *Presbyterian Support Services* (Northern) (AEC31/94; A129/93; judgement given 17 June 1994).

New Zealand Medical Laboratory Workers Union and others v. *Capital Coast Health* Limited (WEC45/94; W48/94; judgement given 12 August 1994).

Case No. 1699

Complaint against the Government of Cameroon presented by the National Union of Teachers in Higher Education (SYNES)

263. The Committee already examined the substance of this case at its November 1993 meeting when it presented interim conclusions to the Governing Body [see 291st Report, paras. 516-551, approved by the Governing Body at its November 1993 Session].

264. The SYNES presented additional allegations in communications dated 2 March and 18 April 1994, to which the Government has not replied.

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

A. PREVIOUS EXAMINATION OF THE CASE

266. In its initial complaint the National Union of Teachers in Higher Education (SYNES) brought several allegations against the Government; refusal to recognize the SYNES; the banning of all trade union activities; creation of administrative difficulties and harassment of union members; failure to conduct an official investigation into the attempted assassination of the president of the SYNES.

267. At its November 1993 Session, the Governing Body approved the following recommendations in the light of the Committee's interim conclusions:

(a) Noting with regret that the National Union of Teachers in Higher Education has still not been recognized as a legal entity, though it registered its request for recognition in June 1991, over two years ago, the Committee urgently requests the Government to recognize the right to teachers in higher education, be they public servants or contract employees, to form a union of their own choosing, without prior authorization, for the defence of their occupational interests and to modify the legislation and practice accordingly. It further requests the Government to ensure that the teachers in higher education are provided with premises for their union activities, and to keep it informed of any developments in this respect.

(b) The Committee requests the Government to repeal Act No. 68/LF/19 of 18 November 1968 which makes the legal existence of a trade union of public servants contingent upon the prior approval of the Minister of Territorial Administration and to repeal section 6(2) of Act No. 92/007 of 14 August 1992 promulgating the Labour Code, which stipulates that persons forming a trade union that has not yet been registered and who act as if the said union has been registered shall be liable to prosecution, and which is at variance with the provisions of Conventions Nos. 87 and 98. It requests the Government to communicate information on measures taken to this effect.

(c) The Committee requests the Government to send its observations on the allegations of the complainant union concerning the attempted killing of the president of its national executive committee in front of his residence, as well as concerning attacks, intimidation and pressure against the union's members.

(d) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case regarding Conventions Nos. 87 and 98.

B. ADDITIONAL ALLEGATIONS

268. In its communication of 2 March 1994, the SYNES indicates that its president, Mr. Jongwane Dipoko, has been arbitrarily suspended for two years. The grounds given in decision No. 68 of 23 December 1993 are the failure to carry out his professional duties during the 1991-92 examinations and incitement to revolt and insubordination vis-à-vis his university colleagues. What happened in fact is that Mr. Dipoko, as a union member, took part in the academic strike that was called to demand the payment of salaries owed to the teaching staff. As to the accusations of revolt and insubordination,

this is a veiled allusion to his union activities as president and founder member of the SYNES, a movement that the authorities have been trying to put a stop to for three years.

269. Regarding the form of the decision to suspend Mr. Dipoko, the SYNES points out that, considering that the Disciplinary Board met on 21 December 1993, it should by law (section 26 of the Teaching Staff Regulations, Decree No. 93/036 of 29 January 1993) have made any decision public within 16 calendar days, whereas the university authorities published the decision only on 28 February 1994, though antedated 23 December 1993. In a communication of 10 March 1994, the Confederation of Workers' Trade Unions of Cameroon endorsed the request submitted by the SYNES and its president that the suspension be revoked.

270. In its communication of 18 April 1994, the SYNES states that the authorities have intensified their efforts to repress the Cameroon trade union movement. Many officials of the SYNES and of the Autonomous National Union for Secondary Education (SNAES) and several hundred union members are the victims of measures ranging from non-payment of salary to dismissal from the public service; these measures are in response to a general movement of protest following a drastic 40-60 per cent cut in salaries at the end of 1993. This wave of repression followed a preliminary agreement reached at a 10 March 1994 meeting at which the trade unions suspended their call for a general strike and the Government undertook to lift all previous sanctions without exception. The discussions were scheduled to continue from 21 March in committees that were set up for the purpose, but have still not resumed.

271. Since the publication of the Committee's resolutions and recommendations concerning the SYNES' complaint, the authorities have allegedly shown no intention of amending the law on trade unions or putting a stop to anti-union repression. The very existence of SYNES is repeatedly challenged as it has not been granted any legal status.

THE COMMITTEE'S CONCLUSIONS

272. At its June 1994 meeting, the Committee had urged the Government once again to send the observations that had been requested earlier and had drawn its attention 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 could present a report on the substance of the complaint, even if the Government's observations had not been received in due time. [See 294th Report, para. 12, approved by the Governing Body at its 260th Session.]

273. The Committee deeply regrets that, in spite of the time that has elapsed since the substance of the complaint was examined and although it has been asked several times to send its comments and observations, and has even been sent an urgent appeal to that effect, the Government has not communicated to the Committee the observations that it requested in its interim decision and has not commented on the new allegations.

274. In these circumstances, and in accordance with the relevant procedural rule [see para. 17 of the 127th Report of the Committee, approved by the Governing Body at its 184th Session], the Committee finds itself obliged, in the absence of the information that it hoped to receive from the Government, to submit a report on the substance of the matter.

275. The Committee first of all reminds the Government that the purpose of the whole procedure instituted in the ILO to examine allegations concerning infringements of freedom of association is to promote respect for trade union rights in law and in fact. If this procedure protects governments against unreasonable accusations, governments on their side must recognize the importance for their credibility of formulating for its objective examination detailed replies to the charges put forward against them. [See First Report of the Committee, para. 31.]

276. As regards the recognition of the National Union of Teachers in Higher Education, the Committee notes with regret that the SYNES has still not been recognized despite the fact that it submitted its by-laws over three years ago, on 11 June 1991. In this respect, the Committee refers to its previous conclusions [291st Report, paras. 537-551] and recalls that the very first trade union right, without which all other guarantees under Conventions Nos. 87 and 98 are meaningless, is the right of workers, without distinction whatsoever, to form organizations of their own choosing, without prior authorization from the public authorities. The Committee has consistently emphasized the importance it attaches to the fact that workers and employers should in practice be able to form and join organizations of their own choosing in full freedom. [See, for example, *Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition, 1985, para. 222.] More recently, it recalled this fundamental principle in connection with a complaint presented by university professors. [See Case No. 1547, Canada/British Columbia, 277th Report, paras. 99-114.]

277. Since in this case the conditions for ensuring that the basic guarantees of freedom of association are respected, as required by Convention No. 87 ratified by Cameroon, exist neither *de jure* nor de facto, the Committee once again urges the Government to take the necessary steps as soon as possible to enable teachers in higher education to establish and to join the organization of their choice. It further invites the Government to guarantee them the use of premises to conduct their activities. The Committee requests the Government to keep it informed of any steps taken in this respect.

278. As regards the system of prior authorization for unions to acquire legal status and the provisions whereby legal proceedings can in certain cases be taken against the sponsors of a non-registered trade union, the Committee refers to its previous conclusions and again calls upon the Government to repeal Act No. 68/LFK/19 of 18 November 1968 as soon as possible, together with section 6(2) of Act No. 92/007 of 14 August 1992 promulgating the Labour Code. It requests the Government to inform it of any measures taken to this effect.

279. The Committee notes once again with regret that the Government has still not responded to the allegations concerning the attempted assassination of the president of the executive committee of the SYNES, as well as the attacks, acts of intimidation and pressure against the union's members. Recalling that freedom of association can exist only in a climate devoid of violence and fear and that an independent judicial inquiry is particularly well suited to establishing the facts, determining responsibilities, punishing the guilty and preventing a repetition of such events, the Committee again requests the Government to inform it of any steps taken in this respect.

280. As to the new allegations, the Committee once again regrets that it has not received any observations or comments from the Government so as to be able to conduct

an objective examination of the new developments in the case since its previous decision. This silence on the part of the Government is especially regrettable because the allegations are particularly serious, i.e. a two-year ban on any teaching or research activities for what, on available evidence, are legitimate trade union activities. The nature of the acts of which Mr. Jongwane Dipoko is accused, the fact that they coincide with his suspension and the doubts as to the validity of the decision to suspend him led the Committee to conclude that there is indeed anti-union discrimination.

281. As the Committee has often emphasized, important though it is that workers should be protected against such acts, it is even more desirable in the case of trade union officials who must be assured that they will not suffer on account of the mandate they hold from their trade union, so that they can perform their duties in full independence. [See *Digest*, op. cit., paras. 556-566.] In the light of all these circumstances, the Committee urges the Government to take the necessary steps to have the decision to suspend Mr. Dipoko rapidly reversed and to reinstate him in his functions with compensation for the prejudice suffered. It requests the Government to keep it informed of any steps taken in this respect.

282. Regarding the other additional allegations, the Committee notes that they confirm that the authorities have still not implemented the recommendations regarding the recognition of the SYNES and that the harassment and pressure against the union is continuing. The Committee reiterates its earlier conclusions and recommendations in this respect and urges the Government to take concrete steps to ensure that the SYNES' legal status is rapidly recognized and that it can carry out its activities freely.

THE COMMITTEE'S RECOMMENDATIONS

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

(a) The Committee once again urgently requests the Government to take the necessary steps as soon as possible to allow teachers in higher education in Cameroon to establish and to join the organization of their choice. It further urges the Government to guarantee them the use of premises to conduct their activities fully and freely. It requests the Government to keep it informed of any measures taken in this respect.

(b) The Committee once again requests the Government to repeal Act No. 68/LF/19 of 18 November 1968 as soon as possible, together with section 6(2) of Act No. 92/007 of 14 August 1992 promulgating the Labour Code. It requests the Government to inform it of any steps taken to this effect.

(c) The Committee requests the Government to keep it informed of any steps taken with a view towards establishing investigations concerning the alleged attempted assassination of the president of the executive committee of the SYNES, as well as concerning attacks, acts of intimidation and pressure against the union's members.

(d) The Committee urges the Government to reverse the decision to suspend Mr. Jongwane Dipoko, president of the SYNES, as soon as possible and to reinstate him in his functions with compensation for the prejudice suffered. It requests the Government to keep it informed of any steps taken in this respect.

(e) The Committee urges the Government to take concrete measures to ensure that the SYNES' legal status is rapidly recognized and that it can carry out its activities freely.

Case No. 1718

Complaint against the Government of the Philippines presented by the Drug, Food and Allied Workers' Federation (DFA)

284. The complaint in this case appears in a communication from the Drug, Food and Allied Workers' Federation (DFA) dated 31 May 1993. The Government sent its observations in a communication dated 20 May 1994.

285. The Philippines has ratified both the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

A. THE COMPLAINANT'S ALLEGATIONS

286. In its communication of 31 May 1993 the Drug, Food and Allied Workers' Federation (DFA) states that the Union of Filipro Employees (UFE) is the exclusive bargaining representative of all the employees in Nestlé Filipinas Inc., and that its struggle to obtain a number of claims began in November 1985 when it called a strike on the grounds that the enterprise had violated the workers' rights. The complainant organization states that in December 1985, upon a petition filed by Nestlé, the Labour Minister issued an order assuming jurisdiction over the labour dispute and that as a result of this decision the strike was prohibited. The UFE filed a motion for reconsideration of the order but this motion was denied. Meanwhile, the complainant states that Nestlé refused to bargain and in January 1986 the trade union organization called a strike. The Labour Minister subsequently issued a return to work order and the enterprise filed separate petitions to declare the strike illegal before the Labour Arbitration Branches of the National Capital Region, and in Cagayàn de Oro. The complainant organization points out that it filed motions to dismiss petitions to declare the strike illegal, but that all these were either denied or ignored.

287. The complainant organization states that on 13 March 1986 the new Government ordered that all striking workers should return to work and that the management should accept them under the same terms and conditions prevailing previous to the work stoppage. It adds that in spite of the fact that two days later the striking workers returned to work, the enterprise refused to readmit several of them. More specifically, the complainant organization alleges that: in the Cagayàn de Oro branch the 72 members of the UFE were not allowed to go back to work and were not paid their wages and benefits due; in the Alabana branch, drivers were reassigned to different jobs; and in the Makati office a worker was transferred to another job.

288. The complainant organization states that the UFE tried to settle the labour dispute amicably and that in June 1986 it sent a letter to the Secretary of Labour to try and obtain preventive mediation and a compromise agreement. The letter was referred

to the National Conciliation and Mediation Board (NNCMB) and after the enterprise had failed to respond to the Board's summons to attend conciliation hearings a strike was called for 4 December 1986 on the grounds of violation of the collective agreement, the dismissal of trade union officers and members, anti-trade union discrimination and the hiring of scabs. The complainant organization points out that it tried once again to reach an agreement by calling off the strike on 16 December although the issues involved had not been resolved but that the labour arbiters declared the strike illegal and ruled that the trade union officers and members had lost their employment status.

289. The complainant organization states that in June 1987 negotiations began with the enterprise on a collective agreement and that two months later the enterprise submitted its proposals. The complainant organization alleges that after numerous bargaining sessions a deadlock was declared on 11 September 1987. It adds that the UFE called a strike and that subsequently, on 14 September, the enterprise served notices of termination of employment on 69 trade union officials and 35 trade union members. The complainant organization also alleges that negotiations on the collective agreement were called off and that the enterprise entered into individual negotiations with employees from the Cebu-Davao sales office and the Cagayàn de Oro factory.

290. The complainant organization also alleges that in September 1987 the enterprise stopped remitting union funds on the grounds that the dismissed union officers could no longer represent the trade union organization. The complainant organization adds that it filed a petition to the National Labour Relations Commission (NLRC) on this matter and after a protracted litigation, the NLRC issued a resolution ordering the enterprise to remit the union funds. In spite of this, the enterprise refused to comply with the resolution and appealed to the Supreme Court, which prevented the NLRC's resolution from being implemented. The Supreme Court dismissed the enterprise's petition in October 1989 as well as a later motion for reconsideration filed in November of the same year. Finally and after having deprived the trade union of its funds for one year; the enterprise defied the decisions of the NLRC and the Supreme Court and distributed the funds directly among the individual trade union members.

B. THE GOVERNMENT'S REPLY

291. In its communication dated 20 May 1994, the Government states that the complaint centres on the application of articles 263 and 264 of the Labour Code of the Philippines and their use in connection with the labour dispute at the enterprise Nestlé Filipinas Inc. More specifically, the Government states that the complainant organization had violated these legal provisions by having called and carried out a strike in spite of the fact that the Labour Minister had issued an order assuming jurisdiction over the labour dispute in the enterprise — under the above-mentioned article 263 which states that it may assume jurisdiction over a dispute likely to cause a strike in an industry indispensable to the national interest — and ordered the return to work of the strikers. The Government states that the legal provisions in question — and in particular the law on assumption of jurisdiction — are not repressive of the workers' right to strike and that in this case, the purpose of the return-to-work order was to maintain the status quo pending determination of the legality or illegality of the strike. The Government also

encloses the Supreme Court's ruling upholding the NLRC's decisions that the strikes were illegal and the dismissals justified.

292. As regards the allegation concerning the withholding of trade union dues, the Government states that the NLRC's decision to refuse to issue a writ of execution ordering Nestlé to remit the union's funds is justified and does not undermine the complainant's right to form an association, given that the workers in the enterprise may exercise the right to join the union within the enterprise. The Government also points out that the above-mentioned decision of the NLRC cannot be implemented given that the enterprise has referred the matter to the Supreme Court and that until the latter has upheld or reversed the NLRC's resolution, execution cannot proceed.

THE COMMITTEE'S CONCLUSIONS

293. First of all, the Committee notes that the labour dispute which promoted the various allegations of violations of trade union rights in this case began nine years ago (1985), and understands that it might be difficult for a government to reply in a detailed way on events which occurred so far in the past. Similarly, the Committee notes that during the period in which the disputes in question occurred, there was a change of government in the Philippines, and the Committee feels bound to recall, as it has on various occasions, that a new government should take all the necessary measures to remedy the repercussions that facts alleged in a complaint might have had since it came to power, even if the events occurred under the previous regime.

294. The Committee notes that the allegations in this case refer to deficiencies in the labour legislation, to the dismissal or transfer to other jobs of a number of trade union officials, trade union members and workers who had taken part in two strikes in the Nestlé enterprise, to the withholding of trade union dues by the enterprise and to the enterprise's refusal to negotiate a collective agreement.

295. As regards the allegation concerning the dismissals and transfer to other jobs of trade union officials, trade union members and workers in the Nestlé enterprise on the grounds that they had participated in two strikes in January 1986 and September 1987, the Committee notes the Government's statement to the effect that the complainant organization violated sections 263 and 264 of the Labour Code by calling these two strikes although the Minister of Labour had issued an order assuming jurisdiction over the labour dispute and ordered the workers to return to work. The Committee notes that the above-mentioned sections allow, amongst other things, that if there is a labour dispute likely to cause a strike or lockout in an industry which the Government considers indispensable to the national interest, the Secretary of Labour and Employment may assume jurisdiction over the dispute or submit it to compulsory arbitration. Furthermore, the Committee notes that the Supreme Court ruling, which the Government communicates with its observations, upholds the NLRC's decisions that the strikes were illegal and the dismissals justified.

296. The Committee notes that the labour authority assumed jurisdiction over the dispute and submitted it to compulsory arbitration to the National Labour Relations Commission (NLRC) at the request of the Nestlé enterprise, in spite of the fact that the complainant organization was opposed to these measures. Similarly, the Committee notes that after the NLRC had declared these strikes illegal the enterprise failed to abide by

the resolution of the labour authority that it should reinstate all the strikers when they returned to work after the strike in January 1986 (72 workers were dismissed) and that later it dismissed a number of trade union officials and trade unionists (104) after the strike in September 1987. The Committee draws the Government's attention to the fact that a provision which permits "either party unilaterally to request the intervention of the labour authority may effectively undermine the right of workers to call a strike ... and does not promote voluntary collective bargaining". [See 265th Report, Cases Nos. 1478 and 1484 (Peru), para. 547.] The Committee also deplores that drivers were reassigned to different jobs in the Alabana and Makati offices.

297. The Committee recalls that compulsory arbitration to end a collective labour dispute is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population. [See 256th Report of the Committee, Case No. 1430 (Canada/British Columbia), para. 181.] The Committee urges the Government, in accordance with the requests the Committee of Experts on the Application of Conventions and Recommendations has been making for several years in its observations, to amend the provisions in the Labour Code concerning: the enforcement of compulsory arbitration when, in the opinion of the Secretary of Labour and Employment, a planned or current strike affects an industry indispensable to the national interest (section 263(g) and (i)); and the dismissal of trade union officers as a penalty for participating in strikes declared illegal (section 264(a)), with a view to limiting the restrictions on the right to strike, in accordance with the principles laid down in Convention No. 87.

298. The Committee notes that compulsory arbitration had been requested by the Nestlé enterprise in conformity with the law on the grounds that the dispute affected an industry indispensable to the national interest (section 263 of the Labour Code). However, according to the Committee, given that the activities carried out by this enterprise may in no way be classified as essential services in the strict sense of the term, the Committee regrets the restrictions on the right to strike and the many dismissals ensuing from the exercise of this right. The Committee requests the Government to encourage negotiations between the enterprise and the trade union in order to evaluate the possibility of reinstating the parties concerned to their posts. The Committee requests the Government to keep it informed on the matter.

299. As regards the allegation concerning the withholding of trade union dues by the Nestlé enterprise since 1987, the Committee notes that the Government feels that the NLRC's resolution that the enterprise should remit the trade union dues should not be executed since the Nestlé enterprise has lodged an appeal on this resolution to the Supreme Court. The Committee draws the Government's attention to the fact that a considerable delay in the administration of justice — seven years in the case of this allegation — is tantamount in practice to a denial of justice. The Committee also notes that, according to the complainants, the trade union dues were reimbursed individually to the workers. The Committee nevertheless draws the Government's attention to the fact that "the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious relations and should therefore be avoided". [See *Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition, 1985, para. 325.] The Committee

requests the Government to take measures, in future, so that similar practices do not reoccur.

300. As regards the allegation concerning the Nestlé enterprise's refusal to negotiate a new collective agreement with the trade union organization, as well as the fact that the enterprise gave priority to bargaining of an individual nature, the Committee notes that the Government did not submit any observations in this respect. The Committee points out that generally speaking "both employers and trade unions should bargain in good faith to come to an agreement, and that genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties". [See 284th Report, Case No. 1619 (United Kingdom), para. 360.] The Committee also recalls that "direct negotiation between the undertaking and its employees, bypassing representative organizations where these exist, might be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted". [See *Digest*, op. cit., para. 208.]

THE COMMITTEE'S RECOMMENDATIONS

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

(a) The Committee urges the Government, in accordance with a request made for many years by the Committee of Experts on the application of Conventions and Recommendations in its observations, to amend the provisions concerning (1) the enforcement of compulsory arbitration when, in the opinion of the Secretary of Labour and Employment, a planned or current strike affects an industry indispensable to the national interest (section 263(g) and (i)) and (2) the dismissal of trade union officials as a penalty for participating in strikes declared illegal (section 264(a)), with a view to limiting the restrictions on the right to strike, in accordance with the principles contained in Convention No. 87.

(b) Regretting the many dismissals which took place after the legislation in question had been applied and after strikes had been declared illegal in the Nestlé enterprise — which does not carry out an essential service — the Committee requests the Government to promote negotiations between the enterprise and the trade union in order to evaluate the possibility of reinstating the persons concerned in their jobs. The Committee requests the Government to keep it informed on this matter.

(c) The Committee requests the Government in future to take the appropriate measures so that practices concerning the withholding of trade union dues, mentioned in relation to the Nestlé enterprise, do not reoccur.

Case No. 1723

Complaint against the Government of Argentina presented by the Banking Association (Association of Bank Employees) (AB)

302. The complaint is contained in a communication from the Banking Association (Association of Bank Employees) of 19 May 1993. The Government responded with a communication of 31 May 1994.

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

A. THE COMPLAINANT'S ALLEGATIONS

304. In its communication of 19 May 1993 the Banking Association (Association of Bank Employees) alleges that the provisions of Act No. 23523 of 28 September 1988 — which grants a preferential right of access to their previously held jobs to bank workers who were suspended from their posts and/or made redundant for political reasons or for participation in trade unions between 1 January 1959 and 12 December 1983 — have not been observed by the private banking industry (mainly foreign banks) and have been only partially observed by the state banking industry, both of which have deliberately recruited new staff.

305. The complainant points out that this refusal to reinstate employees is not based on economic reasons, as their number is not significant for each financial institution. The reasons must be political or based on their trade union participation, since dismissal has always been used widely to pressure trade unionists and political activists in general.

306. Finally, the complainant sends a list of 34 trade unionists who are former employees of 16 banking institutions and who made use of this preferential right under the aforementioned law, and includes numerous annexes. Of the 34 dismissed workers, 19 lost their jobs during the major banking strike of 1959 which lasted 69 days; the rest were dismissed between 24 March 1976 and 10 December 1983 and were victims of the arbitrary repression of the military dictatorship. This list covers banks which are in operation.

B. THE GOVERNMENT'S REPLY

307. In its communication of 31 May 1994, the Government, referring to the alleged lack of observance of the provisions of Act No. 23523, states that the alleged violation of freedom of association in no way refers to an act of the national Government, but rather is the result of activities by banking institutions which are able to acquire rights and undertake obligations, and that the Ministry of Labour cannot compel them to observe such obligations by any means other than those which fall within its own legal competence and which are referred to below. The Act in question stipulated that certain former banking employees were to benefit from a preferential right to reinstatement in their jobs. It covered employees who were suspended from their posts,

made redundant, dismissed or transferred to administrative bodies where the conditions of work were different from that in banks in the period from 1 January 1959 to 10 December 1983 inclusive. These former employees were to benefit from the law if they lost their jobs at state banks, whether they are national, provincial or municipal; at private or mixed banks; at banks of the former General Directorate of Personnel and State Guaranteed Loans or at banks of the Institute of Social Banking Services for political reasons or owing to their participation in trade unions or in strikes or other industrial action. Section 2 of this Act established a period of 60 working days from the date of publication of the Act in the *Official Bulletin*, in which workers could exercise this preferential right by sending a telegram or an official letter expressing their desire to be reinstated. The provisions of section 3 obliged the various employers to draw up a list of personal data of workers who complied with this law, and to submit a copy thereof to the Ministry of Labour and Social Security and to the Banking Association. The employers were obliged, when a vacancy occurred in one of the institutions mentioned in the Act to, fill it with preference with one of these workers by inviting him in good faith to take the post, and to communicate this reinstatement to the administrative labour authority and to the trade union association.

308. The Government adds that one may conclude from the above that, in any case, Act No. 23523, apart from not establishing the Ministry of Labour's responsibility for the application of its standards, merely assigned to the Ministry the obligation to provide means for the application, and not responsibility for the final results. Indeed, the function of the administration in this case is to supervise compliance with the legal standard in question, as is the case with any labour standard. This is a function fulfilled by the National Directorate of Labour Inspection; in the event of concrete complaints of cases where the standards are not observed, the task of mediating between the parties to find a conciliatory solution is fulfilled by the National Directorate of Labour Relations.

309. In this regard, the Government emphasizes that in the present case, and as noted in the complainant's own statements, the first of these functions was completely and satisfactorily fulfilled by the Ministry through numerous inspections conducted by the National Directorate of Labour Inspection, which not only instructed the offending banks to observe the legal provisions in force, but also applied the appropriate sanctions to them for obstruction of administrative procedures (section 5 of Act No. 18694). As regards the second of the functions described above, it should be emphasized that the National Directorate of Labour Relations was consulted regarding the procedures initiated based on complaints of specific violations of the provisions of Act No. 23523, and that it reported that only three cases had been registered, for the Boston, Sudameris and Avellaneda banks. Of these cases, reinstatement was only obtained for one former employee of the Avellaneda Bank, but not for the rest of the workers.

310. Unfortunately, under the mandate given to it by the legislation in force, once the Ministry of Labour has instructed the offending institution to comply and has exhausted its mediation and conciliation efforts without reaching an agreement between the parties, its administrative role is completed. The administrative authority is not competent to deal with individual disputes. The way is then clear for the worker to bring any complaints he deems appropriate before the courts, as for example a complaint relating to the payment by his employer of compensation provided under section 245 of the Contracts of Employment Act. Indeed, under section 8 of the legal standard in question, the only sanction provided in the event its provisions are not observed is the

payment to the affected worker of compensation equivalent to that which would be due to the worker for dismissal without just cause under the current legislation.

311. The Government concludes by stating that the administration has consistently expressed its desire to resolve this problem and to reconcile the parties by acting within the mandate given to it by law; if this procedure has failed then it is up to the parties to make their claims before the judicial authority as explained in the preceding paragraph. There has thus been no violation of the freedom of association, and this case should therefore be dismissed by the Committee.

THE COMMITTEE'S CONCLUSIONS

312. The Committee observes that in this case the complainant organization alleges that, in violation of Act No. 23523 of 28 September 1988, 34 former employees of 16 banking institutions who were dismissed for political reasons or for participation in trade unions between 1 January 1959 and 12 December 1983 were denied reinstatement in their posts. The Committee notes that the Government states that the Ministry of Labour fulfilled the task assigned to it under this law, mediating between the parties to find a conciliatory solution, instructing the offending banks to comply with the law and applying the appropriate sanctions for obstruction of administrative procedures. The Committee also notes that, according to the Government, when the parties do not reach an agreement, the affected workers may bring the case before the courts and may thus be awarded compensation equivalent to that which under the legislation in force would be due to the worker for dismissal without just cause.

313. The Committee should like to emphasize that Act No. 23523 defends bank employees who were dismissed for political reasons and/or for participation in trade unions. Because of the Committee's mandate, the following conclusions apply only to those workers dismissed because of their participation in trade unions in the period covered by Act No. 23523. The Committee notes that the allegations and the Government's statements differ as regards the number of dismissed workers who were not reinstated with a preferential right to reinstatement: according to the complainant organization, there were 34 former employees of 16 banking institutions, while according to the Government, complaints of violations of Act No. 23523 refer only to the Boston, Sudameris and Avellaneda banks (in the last bank, one of the former employees was, however, reinstated).

314. In these circumstances, the Committee emphasizes the importance it attaches to the effective and quick observance of Act No. 23523 of 1988. Therefore, in light of the differing information given by the complainant and the Government as regards the number of former bank employees dismissed for trade union activities (and the number of banks concerned), the Committee requests the Government to hold discussions with the Banking Association, and with the relevant employers' and employees' organizations, with the aim of determining the exact names and number of former employees who have not been reinstated despite their preferential right to reinstatement. Independently of the available judicial and administrative remedies, the Committee requests the Government to promote new conciliatory measures and arrangements which may be concluded between the parties with the aim of reaching an agreed settlement. Where reinstatement is impossible, because of the age of the former bank employees who were dismissed

decades ago, or because of other valid reasons, the Committee considers that the injured parties should receive the compensation provided by law as soon as possible.

THE COMMITTEE'S RECOMMENDATIONS

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

(a) The Committee emphasizes the importance it attaches to the effective and timely application of Act No. 23523 of 1988.

(b) In light of the differing information given by the complainant and the Government, as regards the number of bank employees dismissed for trade union activities (and the number of banks concerned), the Committee requests the Government to hold discussions with the Banking Association and with the relevant employers and employers' organizations, with the aim of determining the exact names and number of former employees who have not been reinstated despite their preferential right to reinstatement.

(c) Independently of the available administrative and judicial remedies, the Committee requests the Government to promote new conciliatory measures and arrangements which may be concluded between the parties with the aim of reaching an agreed settlement.

(d) Where reinstatement is impossible, because of the age of the former bank employees, or because of other valid reasons, the Committee considers that the injured parties should receive the compensation provided by law as soon as possible.

(e) The Committee requests the Government to keep it informed of developments in this case.

Case No. 1727

Complaint against the Government of Turkey presented by the Public Workers' Union, Educational Branch (EGITIM-IS)

316. In a communication dated 20 July 1993, the Public Workers' Union, Educational Branch (EGITIM-IS) presented a complaint against the Government of Turkey for violations of freedom of association. The complainant organization sent further information in a communication of 2 August 1993.

317. The Government presented its observations in communications dated 20 December 1993 and 28 June 1994.

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

A. THE COMPLAINANT'S ALLEGATIONS

319. The Public Workers' Union, Educational Branch (EGITIM-IS) alleges in its communication of 20 July 1993 the following violations of trade union rights:

— the president of the EGITIM-IS office in Denizli (Mr. Hüseyin Mercan) was penalized with suspension of promotion for a period of three years because of his trade union activities and his criticism of certain decisions made by the director of the board of education in the town; for the same reasons he was transferred from Denizli to a sub-prefecture;

— the local offices of EGITIM-IS in Denizli and Corum were denied authorization to publish official magazines;

— the president of the EGITIM-IS office in Diyarbakir was subjected to an administrative interrogation for having made a statement to a local newspaper;

— at the prefecture's request, the State Prosecutor of the Republic in Elazig appealed to a tribunal to suspend the activities of the trade union section in Elazig and to have it closed down;

— the local office of the EGITIM-IS in Kütahya was not authorized to publish a bulletin, and the prefecture informed the office that if it published the bulletin a complaint would be lodged with the State Prosecutor of the Republic against the President of the office ;

— the Erzurum prefecture did not authorize the local office to organize a public discussion on "education and the problems of education workers";

— the sub-prefecture of Kesan (Edirne) did not authorize the local office to organize a meal to commemorate the third anniversary of EGITIM-IS, and warned that a complaint would be lodged against the President of the office with the State Prosecutor of the Republic if the meal was organized; the prefecture of Edirne held an administrative interrogation of the members of the Executive Committee of the union;

— administrative or police authorities denied permission to open trade union branches in Burhaniye/Balikesir (14 January 1993), Elazig (29 January 1993), Cayama/Zonguldak (9 February 1993), Fatih/Istanbul (18 February 1993), Tekirdag (28 February 1992), Hayrabolu/Tekirdag (7 April 1993), Kusadasi (9 April 1993), Balcova (13 April 1993) and Edremit/Balikesir (5 May 1993);

— the Prefect of Elazig sent a communication of 12 April 1993 stating that it would not be possible to convert the existing representation into a local union branch or to conduct trade union activities;

— on the eve of the second regular congress of EGITIM-IS, prefects and sub-prefects denied authorization for general congresses to approximately 80 local offices, stating that public servants and teaching staff did not have the right to form trade unions; the complainant organization documents the cases of the following local offices: Emirdag, Sultandag, Gumushaciköy, Kusura, Hayrabolu, Bayramic, Buca, Ceyhan, Mus, Kaycuma, Diyarbakir, Kesan, Ankara (Yeni Mahalle), Istanbul, Ankara (Cankaya), Hatay, Aksehir, Samsun, Diyarbakir, Erzurum and Afyon.

320. The complainant organization adds that despite a certain improvement which has taken place, especially since the coalition Government came to power, it has

continued to encounter administrative obstacles, as have all trade unions of public servants. Although the provisional Prime Minister made it known in June 1993 through a circular that the public authorities were being asked not to hinder the activities of trade unions of public servants, the latter cannot enjoy the rights guaranteed under ILO Conventions Nos. 87, 98 and 151. This hostile attitude on the part of the authorities will continue as long as no law on public servants' trade unions has been adopted.

321. In its communication of 2 August 1993, the complainant organization alleges that on 27 July 1993 the authorities closed the EGITIM-IS local office in Van and that it was not possible to appeal against this decision to a tribunal. Furthermore, the former Minister of Education initiated legal proceedings to penalize Dr. Altunya, the President of EGITIM-IS, and to obtain compensation on the pretext that he had insulted him in a letter which referred to the Financial Department of Primary School Teachers. Dr. Altunya never insulted the Minister; he merely wished to bring to light irregularities committed by members of the administrative body of this Department — irregularities which had been proven by official inspectors — and the Minister protected those members instead of dismissing them.

B. THE GOVERNMENT'S REPLY

322. In its communication of 20 December 1993, the Government states that in February 1993 it had begun legislative work to guarantee freedom of association for public employees. The Bill is now nearly finished and is open for discussion by the social partners. While the legislative work is currently in this phase, public employees have already begun to enjoy freedom of association in the country. The Prime Minister's circular of 16 June 1993 (No. 1993/15) eliminated the doubts that certain administrative authorities had in this respect. This circular clearly sets out that:

— no hindrances shall be made to requests and initiatives of public employees to form and join trade unions or to participate in their activities;

— trade unions shall not be prohibited from holding general meetings, producing publications on their activities, holding meetings of various types or organizing cultural and artistic activities;

— no disciplinary penalties shall be imposed on trade union leaders and members because of their union activities;

— the establishment of trade unions and their activities shall not be subject to interference by the police.

323. The Government stipulates that the allegations of EGITIM-IS refer to the period prior to the issuance of this circular.

324. In its communication of 28 June 1994, the Government provides the following information:

— the Regional Administrative Court on 6 October 1993 overturned the decision of the Governor of Eskisehir, which denied authorization for the Eskisehir branch of EGITIM-IS to conduct trade union activities;

- the legal proceedings undertaken against the Kutahya branch for violating the Act on Public Meetings and Processions have been withdrawn; the court of second instance prohibited the publication of the branch's bulletin on 11 December 1992;
- the Burhaniye branch and the Edremit liaison office have been functioning without any hindrance;
- the Regional Administrative Court of the province of Zonguldak overturned the District Governors' decision to close the Caycuma liaison office;
- the decision of the Governor of Van to close the EGITIM-IS branch in the province of Van was overturned by the Regional Administrative Court on 11 February 1994, but the Governor appealed against this decision;
- the Public Prosecutor of the Province of Elazig initiated legal proceedings for the closure of the trade union branch in that province;
- the request of the Public Prosecutor to close the Fatih branch was denied;
- the charges brought against Messrs. Ismail Erten and Bedri Arik, the trade union leaders of the Balikesir branch, have been dropped;
- as regards the case of Sefer Celik, Ahmet Ozkan, Mazaffer Savas Erdem, Dilaver Omer, Samet Ekinci, Haluk Cemal Atli and Atilla Ozdemir, the founding members of the Tekirdag branch, for violating Act No. 2911, the defendants have been acquitted and the charges against the branch have been dropped;
- the Public Prosecutor of the province of Corum decided on 7 July 1993 not to prosecute Mr. Bilal Nartok;
- the Public Prosecutor of the province of Izmir decided on 17 June 1992 not to prosecute Messrs. Mustafa Gunaydin, Zuhal Acarkan, Fikret Dogan, Behcet Kemal Bal and Fevsi Yilmaz for having established the Izmir branch; on 3 March 1992 he decided not to press charges against trade union leaders for trade union activities conducted between 19 January and 23 February 1992;
- on 5 April 1993 it was decided not to press charges against Vahdet Kadioglu, Osman Dumanoglu, Sükrü Aslan, Nur Sahin, Tekin Karsli, Fevzi Yilmaz and Cengiz Keles, trade unionists of the Balcova branch, for violating Act No. 2821;
- on 12 May 1993 it was decided not to initiate legal action against Fikret Dogan, Ibrahim Gamgar, Cengiz Ozdomir, Muazzez Hizal and Ilhan Atak, trade unionists of the Konak branch, for acts committed in violation of Act No. 2821;
- Hüseyin Mercan, a middle-school teacher in the province of Denizli, was disciplined for making statements to the press without authorization and was transferred to a teaching post in the Gülagac district (province of Aksaray);
- although legal proceedings have been initiated to close the Elazig branch established by Dr. Niyazi Altunya, the branch has been functioning without any hindrance.

THE COMMITTEE'S CONCLUSIONS

325. The Committee would like to recall that on previous occasions, it has examined other cases concerning restrictions on trade union rights in law and in practice in Turkey.

326. The Committee observes that the complainant organization in this case alleges various limitations on the exercise of the trade union rights of teachers which, in its opinion, will continue as long as no labour legislation guaranteeing the trade union rights of public servants has been adopted. The acts to which the complainant organization refers include the denial of authorization to establish trade union branches, the closure of such branches, denial of authorization of trade union congresses, administrative interrogations of trade unionists, the prohibition of various branches from engaging in certain activities and producing union publications, and different acts of anti-trade union discrimination (the initiation or threat of legal proceedings for the exercise of trade union activities and suspension of promotion and transfer of a trade unionist). The Committee takes note of the Government's statements, and specifically of those to the effect that the allegations refer to acts which took place prior to the Prime Minister's circular of 16 June 1993, which sets out that there shall be no hindrance to the establishment of trade unions and to their activities and that no penalties shall be imposed for carrying out trade union activities. The Committee emphasizes, however, that certain allegations concern facts that have occurred after the issuance of the circular. The Committee further notes that, according to the Government, a bill is now being considered to ensure the trade union rights of public employees and is currently the subject of discussion by the social partners.

327. The Committee urges the Government to eliminate ambiguities existing in practice as soon as possible, in particular by adopting the bill to ensure the trade union rights of public employees, taking fully into consideration the opinions of the social partners and the requirements of ILO Conventions Nos. 87, 98 and 151, which have been ratified by Turkey. The Committee reminds the Government that the Office is at its disposal to provide any technical assistance which may be required.

328. The Committee notes with interest that the Government has reported a series of improvements as regards the exercise by the complainant organization of its trade union rights (although these do not always refer to the questions mentioned in the allegations) and that a number of questions mentioned in the allegations have already been resolved: the authorization of the Eskisehir branch to conduct activities; the withdrawal of the legal proceedings undertaken against the Kutahya branch; the elimination of obstacles to the functioning of the Burhaniye branch and the Edremit liaison office; the end of the closure of the Caycuma liaison office, the Van branch (although this is the subject of an appeal by the Governor) and the Fatih branch; the dropping or non-filing of charges against the leaders of the Balikesir branch, against the founding members of the Tekirdag branch and against the branch itself; the decision not to prosecute a trade union leader (in the province of Corum) and the founders of the Izmir branch and the non-filing of charges against trade union leaders of this branch for union activities conducted between 19 January and 23 February 1992; the non-filing of charges against the trade unionists of the Balcoba branch; and the decision to not initiate legal proceedings against trade unionists of the Konak branch.

329. However, the Committee observes that the legal proceedings to close the Elaziq branch remain pending, although the latter has been functioning without hindrance. Furthermore, the Government confirms that the teacher, Mr. Hüseyin Mercan, was transferred for having made statements to the press without authorization, and also confirms that legal proceedings have been undertaken against Dr. Altunya — according to the complainant — for criticizing the work of the Minister of Education.

330. Moreover, the Government has not sent observations concerning the denial of authorization to publish magazines at the Denizli, Corum and Kütahya offices; the administrative interrogation of the President of the Diyarbakir office and the members of the Executive Committee of the Kesan office; the denial of authorization of a public discussion on education organized by the Erzurum office; the denial of authorization to hold a meal to commemorate the third anniversary of EGITIM-IS by the Kesan office; the refusal to open certain trade union branches; and the denial of authorization for general congresses in nearly 80 local offices.

331. In these circumstances, taking into consideration the circular of the Prime Minister of 16 June 1993, the legislative work which is being carried out to adopt a law guaranteeing the trade union rights of public employees, the ratification by Turkey of ILO Conventions Nos. 87, 98 and 151 and the seriousness of the questions pending, the Committee requests the Government to take the necessary measures in the near future to ensure that: (1) all the branches and local offices of EGITIM-IS may be formed and function without hindrance; (2) the legal or administrative proceedings taken against trade unionists, including Dr. Altunya, for having exercised their trade union rights are withdrawn; (3) trade union congresses of the branches can take place without hindrance; (4) the trade union publications and activities of the branches are not prohibited; (5) interrogation is not used as a means to intimidate trade unionists; and (6) the acts of discrimination to which the trade unionist, Mr. Mercan, was subjected are annulled (transfer and suspension of promotion).

THE COMMITTEE'S RECOMMENDATIONS

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

(a) Noting with interest the circular of the Prime Minister of 16 June 1993, and the fact that a bill is being considered to guarantee the trade union rights of public employees, as well as the various measures which ended certain limitations alleged by the complainant, the Committee urges the Government to eliminate ambiguities existing in practice by adopting this bill as soon as possible. The Committee urges the Government to ensure that this bill will take fully into consideration the opinions of the social partners and the requirements of ILO Conventions Nos. 87, 98 and 151. The Committee reminds the Government that the International Labour Office is at its disposal to provide any technical assistance which may be required.

(b) The Committee requests the Government to take the necessary measures in the near future to ensure that: (1) all the branches and local offices of EGITIM-IS may be formed and function without hindrance; (2) the legal or administrative proceedings undertaken against trade unionists, including Dr. Altunya, for exercising their trade union rights are withdrawn; (3) trade union congresses of the branches can take place without hindrance; (4) the trade union publications and activities of the branches are not prohibited; (5) interrogation is not used as a means to intimidate trade unionists; and (6) the acts of discrimination to which the trade unionist, Mr. Mercan, was subjected are annulled (transfer and suspension of promotion).

(c) The Committee requests the Government to keep it informed of the development of these matters.

Case No. 1755

Complaint against the Government of Turkey presented by the International Federation of Air Line Pilots Associations (IFALPA)

333. The complaint in this case was submitted in a communication dated 14 December 1993 from the International Federation of Air Line Pilots Associations (IFALPA). The Government sent its observations in a communication of 6 July 1994.

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

A. THE COMPLAINANT'S ALLEGATIONS

335. In its communication dated 14 December 1993 the International Federation of Air Line Pilots Associations (IFALPA) states that after protracted and inconclusive negotiations between the Turkish Airlines company and the Turkish Aviation Workers Union (Hava-Is) the union was not very receptive to the company's proposal to reduce working time in order to compensate for the insufficient salary increase offered which was below the inflation rate in Turkey. Hava-Is therefore decided to conduct a membership ballot in order to determine whether a strike had sufficient support and in order to press for its claims. The complainant federation states that the ballot resulted in a narrow defeat of the strike call. It adds that in accordance with the rules in force, the vote count was conducted in the presence of a number of representatives of the pilots and cabin attendants, board members and senior administrators of Turkish Airlines, and government inspectors, all of whom acted as observers of the voting procedure.

336. The complainant federation alleges that shortly after the vote count, some pilots and cabin attendants present during the ballot count were dismissed (two pilots who are leaders in the Turkish Air Line Pilots Association (TALPA), five cabin attendants who are members of the Cabin Attendants Association, including the president of the association, another cabin attendant, and two dispatchers) or grounded (four pilots and three cabin attendants, all of whom are trade union leaders of Hava-Is). The trade union federation explains that since the dismissed pilots who were members of the Turkish Air Lines Pilots Association (TALPA) did not hold any position within the Hava-Is trade union — notwithstanding the fact that they were spokesmen for the TALPA association — they were dismissed in accordance with Turkish legislation which permits dismissal if there is payment of prescribed compensation. In the case of the other four pilots who are trade union leaders of Hava-Is, dismissal was more difficult for the company. They have therefore been denied promotions and the company has ordered its flight scheduling department to remove their names from the roster, without advising the pilots of this decision and without explaining the reason for it. The complainant

federation adds that in none of the six cases of pilots prejudiced in this way has a formal letter been sent informing them of the decisions taken and the reasons why they have been made.

337. Finally, the complainant federation states that a member of the company's management indicated that he had lost confidence in the six pilots in question, as a result of which it was impossible for them to continue in any operational capacity, and that the pilot who is president of the TALPA was dismissed for addressing excessive and disrespectful language to the president of the company. Indeed, this member of the management referred specifically to a public challenge by the TALPA to the company's management to engage in an open debate on what the association considers to be operational malpractices in justifying his lack of confidence. The complainant organization thus considers that the six members of the TALPA have been prejudiced for having the courage to speak out against various operational and employment practices of the company.

B. THE GOVERNMENT'S REPLY

338. In its communication of 6 July 1994 the Government explains that the Turkish Airlines company is an autonomous public establishment and that the Government is not competent to interfere directly in its administrative procedures concerning the employment of its personnel. The Government states that according to the information it requested from the company: (1) there was no pressure exerted by management against the personnel carrying out trade union activities and these activities were conducted freely and within the established legal framework; (2) the disciplinary proceedings mentioned by the complainant federation and conducted by the company cannot be considered as pressure tactics against the personnel carrying out trade union activities but rather as the legal exercise of the rights of the company; (3) the contracts of the pilots, cabin attendants and former president of the Turkish Air Lines Pilots Association (TALPA) were terminated because of the insults made against and their improper behaviour towards the company's Board and its members.

339. The Government states that two of the pilots whose employment contracts were terminated received compensation in accordance with the law, and that furthermore the employment contracts of five cabin attendants were terminated with proper notice. These five workers appealed against their dismissal in the courts, and the cases are still pending. The Government further reports that four other pilots who held posts as representatives of the trade union lost the confidence of the company because they did not intervene when the insults were being made against the company's Board members and its president. The Government specifies that these pilots have not been dismissed, but that the Board of Directors decided to prohibit them from flying, as was its right in the light of this loss of confidence. None the less, they are still being paid compensation for seniority and flight compensation and have thus not been subjected to any major material losses. Finally, the Government states that Turkish legislation contains the necessary legal protection against anti-union discrimination and that the pilots and cabin attendants who have been prejudiced may bring their cases before a court to defend their rights, as some have already done.

THE COMMITTEE'S CONCLUSIONS

340. The Committee observes that the allegations in this case refer to certain measures which were taken by the Turkish Airlines company and which are prejudicial to trade union leaders and activists as well as workers, following the conducting of a membership ballot of the Turkish Aviation Workers Union (Hava-Is) to decide whether to hold a strike. Specifically, the complainant federation alleges that seven trade union leaders (two pilots and five cabin attendants) and three workers (one cabin attendant and two dispatchers) were dismissed and that four pilots and three cabin attendants who are trade union leaders were grounded.

341. The Committee notes the Government's observations according to which: (1) there was no pressure exerted by the company's management against the personnel carrying out trade union activities freely and within the framework of the law; (2) the disciplinary proceedings mentioned by the complainant federation and conducted by the company cannot be considered as pressure tactics against the personnel carrying out trade union activities but rather as the legal exercise of the rights of the company; (3) the contracts of the pilots, cabin attendants and former president of the Turkish Air Lines Pilots Association (TALPA) were terminated because of the insults these workers made against and their improper behaviour towards the company's Board and its members; (4) the two pilots whose employment contracts were terminated received compensation in accordance with the law; (5) the employment contracts of five cabin attendants were terminated with proper notice. These workers later filed complaints in court, and the cases are still pending; and (6) the company's Board decided to ground four pilots who were trade union leaders because it lost confidence in them, but they are still receiving compensation for seniority and flight compensation.

342. The Committee observes that the dismissals in this case took place as part of a dispute between the Turkish Aviation Workers Union (Hava-Is) and the Turkish Airlines company, and more specifically after a membership ballot was conducted to decide whether to hold a strike. Furthermore, the Committee observes that the Government states that the pilots and cabin attendants were dismissed because of the insults they made against and their improper behaviour towards the company's Board and its members. The Committee is not in a position, based on the general elements supplied by the Government, to judge the gravity of the terms used by the trade union leaders and trade unionists who were dismissed or of their behaviour during the collective dispute. The Committee would like to recall that "with regard to the reasons for dismissal, the activities of trade union officials should be considered in the context of particular situations which may be especially strained and difficult in cases of labour disputes and strike action". [See *Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition, 1985, para. 561.]

343. In these circumstances, as there are clear indications of the anti-union nature of the dismissals since they took place following a membership ballot to call a strike and the dismissed workers were present during the vote count, the Committee draws the Government's attention to the fact that no one should be penalized for carrying out or attempting to carry out a legitimate strike. The Committee requests the Government to take the measures necessary to encourage the parties to come to an agreement so that all the trade union leaders and activists as well as the workers who were dismissed in this case can be reinstated in their posts. Furthermore, the Committee trusts that the judicial

authorities will take into account the principle mentioned in the above paragraph when considering the appeals made by some of the dismissed workers, and requests the Government to keep it informed of the outcome of these proceedings.

344. Furthermore, as regards the company's decision to ground four pilots and three cabin attendants (all of whom are trade union leaders of Hava-Is) due to its loss of confidence in these workers and that it was therefore impossible for them to continue working in any operational capacity, the Committee can only consider that this decision — like the decision to dismiss the other trade union leaders and trade unionists — appears to have been taken as a consequence of the trade union activities of the workers in question, and more specifically of the conducting of a membership ballot to hold a strike. In these circumstances, the Committee once again recalls to the Government that "no person should be dismissed or prejudiced in his employment by reason of his trade union membership or legitimate trade union activities, and ... [it is important to forbid and penalize] in practice all acts of anti-union discrimination in respect of employment. [See 270th Report, Case No. 1640 (Uruguay), para. 63 and 272nd Report, Case No. 1506 (El Salvador), para. 132.] The Committee requests the Government to make efforts to bring the parties to the dispute together and to ensure that these workers can once again carry out flights if they so desire.

345. Finally, the Committee observes that the Government does not refer in its observations to the alleged dismissals of three workers (one cabin attendant and two dispatchers) nor to the grounding of the three cabin attendants (trade unionists and members of the Hava-Is) who participated in the vote count. Noting that these workers have been prejudiced in the same circumstances as the above-mentioned workers, the Committee considers that its conclusions apply fully to these other cases and requests the Government to keep it informed in this respect.

THE COMMITTEE'S RECOMMENDATIONS

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

(a) The Committee requests the Government to take the measures necessary to encourage the parties to come to an agreement so that all of the trade union leaders and activists, as well as the workers who were dismissed following the conducting of a membership ballot to decide whether to hold a strike at Turkish Airlines, are reinstated in their posts.

(b) The Committee trusts that the judicial authorities will take into account the principle mentioned in the conclusions when considering the appeals made by some of the dismissed workers, and requests the Government to keep it informed of the outcome of these proceedings.

(c) As regards the company's decision to ground four trade unionist pilots, the Committee recalls that no person should be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities and requests the Government to make efforts to bring the parties to the dispute together and to ensure that these workers can once again carry out flights if they so desire. The Committee requests the Government to keep it informed in this respect.

(d) The Committee requests the Government to keep it informed of the situation of the three dismissed workers (one cabin attendant and two dispatchers) and the three cabin attendants who have been grounded and whose cases have not been referred to by the Government in its observations.

Case No. 1732

Complaint against the Government of the Dominican Republic presented by the International Confederation of Free Trade Unions (ICFTU)

347. This complaint was lodged in a communication of the International Confederation of Free Trade Unions (ICFTU) dated 22 September 1993. The Government sent its observations in a communication dated 4 May 1994.

348. The Dominican Republic has ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

A. THE COMPLAINANT'S ALLEGATIONS

349. In its communication of 22 September 1993 the ICFTU states that, with the upsurge in trade union activity in the industrial free-zone areas, a National Federation of Free-Zone Workers was established in September 1992, to which 98 trade unions throughout the country are currently affiliated. The complainant organization alleges that this trade union movement has encountered stiff opposition from employers, who have drawn up blacklists of dismissed trade union leaders so that they will not be recruited by other enterprises. The complainant organization states further that none of the 98 trade unions has been able to conclude a collective agreement since the members of their executive boards have been dismissed, along with any worker who expresses his or her desire to join a union.

350. Specifically, the complainant organization alleges instances of anti-trade-union action in the following enterprises:

— Woo-Chang and Bonaham Apparel (Bonao city): dismissed all the members of the executive boards were dismissed;

— Big Bond Apparel (Bonao city): all the members of the executive board were dismissed in June 1992; the enterprise has been ordered by court to pay a fine and to compensate the union leaders;

— Westinghouse (Itabo industrial estate): all the members of the executive board were dismissed;

— Hotel Hamaca Beach Resort: 31 workers who joined a union were dismissed on 22 August 1993;

— Empresa Attwoods Dominicana S.A.: 26 members of the union were dismissed, including the entire executive board; on a false accusation, the secretary-general was arrested by the police secret service for seven days and beaten during his detention.

B. THE GOVERNMENT'S REPLY

351. Regarding the alleged violations of freedom of association the free trade zone enterprises, the Government states that the administrative authorities have investigated all enterprises where such acts have occurred and brought criminal charges against the managers. In the specific enterprises cited by the complainant organization, the Government states: (1) that Big Bond Apparel has been ordered by court to pay the dismissed trade union leaders compensation, but that the enterprise has appealed against the sentence; meanwhile the Secretary of State for Labour has ordered that the enterprise's export licence be suspended until it agrees to respect trade union rights; (2) that in the case of Westinghouse only some of the members of the executive board were dismissed with the authorization of the labour court of San Cristobal, on the grounds that they organized an illegal strike at which acts of violence were perpetrated against the enterprise's assets (documents attached by the Government indicate that 12 workers were dismissed for "dereliction of duty"); (3) that in the case of Woo-Chang Dominicana and Bonaham Apparel the sentences have been appealed and the cases are awaiting a ruling; (4) that Hamaca Beach Report and Attwoods Dominicana S.A. are not in the free trade zones, but that the Secretary of State for Labour has initiated legal proceedings against the former that have not yet come to court and has investigated the latter and brought penal charges against it (the dismissed workers have submitted their case to the labour court).

352. Finally, the Government states that, in order to promote harmonious working relations between employers and workers in the free trade zones, a tripartite agreement has been reached between the Government, the Dominican Association of Free Trade Zones and five of the six trade union federations in the country, whereby the parties agree to submit collective labour disputes to the mediation of the Secretariat of State for Labour and, in the event that its mediation is unsuccessful, to take the matter before the National Council of Free Trade Zones, which is empowered to suspend or cancel the export licences of enterprises in those zones that do not comply with labour legislation.

THE COMMITTEE'S CONCLUSIONS

353. The Committee observes that the allegations refer to a series of dismissals of trade union leaders and members, to the introduction of blacklists in free trade zone enterprises, to the arrest of a union leader and to other instances of anti-union discrimination. The Committee notes the Government's observations and the various legal and administrative steps taken in connection with the alleged facts, as well as the tripartite agreement that has been reached in the free trade zones. Nevertheless, considering the many instances of anti-union discrimination, the Committee wishes in the first place to emphasize the importance it attaches to the principle that no-one should be dismissed or subjected to anti-union discrimination by reason of his or her legitimate trade union activities. [See *Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition, 1985, para. 538.]

354. With respect to the alleged dismissal of union members in a number of enterprises (Woo-Chang and Bonaham Apparel: dismissal of members of the executive boards; Hotel Hamaca Beach Resort: dismissal of 31 members of the union; Attwoods

Dominicana S.A.: dismissal of 26 members of the union, including the entire executive board; and Big Bond Apparel: dismissal of members of the union's executive board), the Committee notes the Government's statement that these cases have been brought before the labour authorities and that, in the case of Big Bond Apparel, the Secretary of State for Labour has had the enterprise's export licence suspended until it undertakes to respect trade union rights. In these circumstances, the Committee invites the Government to keep it informed of the outcome of the legal action taken. In addition, in view of the fact that the labour authorities have recognized the anti-union character of the dismissals by taking the cases to court, the Committee urges the Government immediately to take the necessary steps to ensure the reinstatement in their jobs of all the union leaders and members who have been dismissed by reason of their membership of a trade union or their union activities. The Committee would like to draw the Government's attention to 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 get rid of any worker, even if the true reason is his trade union membership or activities. [See *Digest*, op. cit., para. 547.]

355. Regarding the alleged dismissal of members of the executive board of the Westinghouse Union, the Committee observes the Government's statement that only some members were dismissed and that this was with the authorization of the San Cristobal labour court, on the grounds that they engaged in an illegal strike and committed acts of violence against the enterprise's assets. However, noting that according to documents submitted by the judicial authority (enclosed by the Government), 12 workers were dismissed for "dereliction of duty" and that in the report of the labour inspectorate (also enclosed by the Government) the parties concerned denied having engaged in sabotage, the Committee urges the Government to re-examine the situation of the dismissed union leaders and to keep it informed of developments.

356. As regards the allegation that the secretary-general of the Attwoods Dominica S.A. union was falsely accused, arrested by the police secret service for seven days and beaten during his detention, the Committee regrets that the Government has not sent any observations on the subject. The Committee deplores the union leader's arrest and the ill-treatment he is said to have suffered. The Committee draws the Government's attention to the fact that the arrest and detention of trade unionists without any charges being laid or court warrants being issued constitutes a serious violation of trade union rights. [See 284th Report, Case No. 1642 (Peru), para. 986.] As in similar cases, the Committee recalls that "governments should give precise instructions and apply effective sanctions where cases of ill-treatment are found, so as to ensure that no detainee is subjected do such treatment," and emphasizes "the importance that should be attached to the principle laid down in the International Covenant on Civil and Political Rights according to which all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person". [See 278th Report, Case No. 1527 (Peru), para. 238.]

357. Concerning the drawing up of blacklists to ensure that dismissed trade union leaders are not subsequently recruited by any enterprise in the sector, the Committee regrets that the Government has not sent any specific observations on the subject and that it cannot therefore determine whether blacklisting is included among the points that the

judicial authority will be called upon to examine in the context of the cases brought against various enterprises. The Committee draws the Government's attention to the fact that "all practices involving the 'blacklisting' of trade union officials constitute a serious threat to the free exercise of trade union rights" and "that governments should take stringent measures to combat such practices". [See 177th Report, Case No. 844 (El Salvador), para. 276.] In these circumstances the Committee invites the Government to investigate the matter and, should the existence of such lists be confirmed, to take the necessary steps to punish those responsible and prevent the repetition of such practices.

358. The Committee notes with interest the tripartite agreement that has been reached on labour relations in the free trade zones. It trusts that the agreement, together with the laws and regulations in force, will provide the necessary framework to put a stop to acts of anti-union discrimination in the free trade zones and to develop healthy labour relations through collective bargaining. The Committee urges the Government to take the necessary steps to ensure that this agreement is fully applied.

THE COMMITTEE'S RECOMMENDATIONS

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

(a) The Committee requests the Government to keep it informed of the outcome of the legal action taken in connection with the dismissed union leaders and members of Woo-Chang and Bonaham Apparel, Hotel Hamaca Beach Resort, Attwoods Dominicana S.A. and Big Bond Apparel. In addition, in view of the fact that the labour authorities have recognized the anti-union character of the dismissals, the Committee urges the Government immediately to take the necessary steps to ensure the reinstatement in their jobs of all the union leaders and members who have been dismissed by reason of their membership of a trade union or their union activities.

(b) Noting that blacklists are a serious threat to the free exercise of trade union rights, the Committee requests the Government to conduct an investigation into the enterprises cited in the allegations and, should the existence of such lists be confirmed, to take the necessary steps to punish those responsible and prevent the repetition of such practices.

(c) The Committee urges the Government to re-examine the situation of the trade union leaders dismissed by Westinghouse and to keep it informed of developments.

(d) The Committee notes with interest the tripartite agreement that has been reached on labour relations in the free trade zones. It trusts that the agreement, together with the laws and regulations in force, will provide the necessary framework to put a stop to acts of anti-union discrimination in the free trade zones and to develop healthy labour relations through collective bargaining. The Committee urges the Government to take the necessary steps to ensure that this agreement is fully applied.

Case No. 1751

Complaint against the Government of the Dominican Republic presented by the National Federation of Sugar, Agricultural and Allied Workers (FENAZUCAR)

360. The complaint in this case is contained in a communication of the National Federation of Sugar, Agricultural and Allied Workers (FENAZUCAR) of 22 November 1993. Later, in a communication dated 14 February 1994, FENAZUCAR submitted additional information. The Government sent its observations in communications dated 4 and 31 May 1994.

361. The Dominican Republic has ratified both the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

A. THE COMPLAINANT'S ALLEGATIONS

362. In its communication of 22 November 1993, FENAZUCAR states that in April 1993 the workers of the Cristóbal Colón Sugar Plantation established the United Agricultural and Industrial Trade Union and elected an executive committee, and that immediately afterward the enterprise dismissed the general secretary and all the members of the executive of the trade union. As soon as the union was created, the sugar plantation's management challenged its establishment. Notwithstanding this, the Department of Labour legally recognized the union on 10 May 1993. The complainant organization further alleges that the enterprise is conducting a campaign to pressure workers to withdraw from membership in the union by threatening them with dismissal and expulsion from their homes.

363. In its communication dated 14 February 1994, the complainant organization adds that the sugar plantation has a security team which blocks trade union meetings, and that in December 1993 the general secretary and claims secretary were prohibited from circulating in the "bateyes" (the places where residences and warehouses are located in a plantation); these trade union leaders were later detained for four hours at the police station.

B. THE GOVERNMENT'S REPLY

364. In its communications of 4 and 31 May 1994, the Government states that since 1961 there has been a trade union at the Cristóbal Colón Sugar Plantation, called the Trade Union of Workers of the Sugar Industry (Wage and Salary Earners) of the Cristóbal Colón Sugar Plantation and that in April 1993 a group of workers of this plantation informed the Secretary of State for Labour of the establishment of another trade union, called the United Agricultural and Industrial Trade Union of the Cristóbal Colón Sugar Plantation. The Government further states that the members of the previously established trade union first opposed the registration of the second trade union, alleging that its general secretary held a post in the management of the enterprise,

but that despite their request the labour authorities authorized the registration of the union. The Government reports that when the registration was contested in court, the judicial authorities ordered the revocation of the resolution issued by the Secretary of State for Labour registering the trade union, as the union was not established in accordance with the provisions of the law. Specifically, the union did not comply with the provision of the labour code which prohibits workers holding managerial, security, monitoring or supervisory posts from being members of a trade union.

365. Finally, as regards the dismissal of the leaders of the new trade union, the Government reports that the Secretary of Labour attempted without success to mediate, as the parties did not attend the meetings convened by the mediator.

THE COMMITTEE'S CONCLUSIONS

366. The Committee observes that the allegations refer to the dismissal of the general secretary and all the members of the executive committee of the United Agricultural and Industrial Trade Union of the Cristóbal Colón Sugar Plantation following the establishment of the union, to a campaign of pressure from the enterprise to force workers to withdraw from membership in the union, to the blocking of the free movement of trade union leaders in the enterprise's premises, to the impossibility of holding trade union meetings and to the temporary detention by the police of the general secretary and the claims secretary of the union.

367. As regards the dismissal of the general secretary and all the members of the executive committee of the new trade union following the establishment of the union, the Committee notes that the Government recognizes that these dismissals took place and that it states that it attempted without success to mediate, as the parties did not attend the meetings which were convened. The Committee deeply deplores these anti-union dismissals. It furthermore emphasizes that they are a very serious violation of freedom of association which affects all of the leadership of the trade union. It draws the Government's attention to the fact that "no person should be dismissed or prejudiced in his employment by reason of his trade union membership or legitimate trade union activities". [See 272nd Report, Case No. 1506 (El Salvador), para. 132.] In these circumstances, the Committee urges the Government to take the measures necessary so that the dismissed trade union leaders are immediately reinstated in their posts.

368. As regards the alleged campaign of pressure and threats of dismissal conducted by the enterprise so that the workers would withdraw from membership in the trade union, the Committee observes that the Government has not communicated its observations. However, given that the Government acknowledges that the entire executive committee of the trade union was dismissed for anti-trade union reasons, the Committee cannot but conclude that in this anti-trade union context there was anti-trade union persecution within the enterprise of the union's members. In these circumstances, the Committee requests the Government to ensure that the union's members can freely exercise their trade union activities and, if necessary, that the competent authorities apply the penalties provided by legislation.

369. As regards the allegation concerning the blocking of the free movement of trade union leaders on the premises of the sugar plantation, the Committee observes that the Government has not communicated its observations. The Committee draws the

attention of the Government to the principle according to which Governments must "guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionization". [See 284th Report, Case No. 1523 (United States), para. 195.] The Committee requests the Government to take the measures necessary to ensure that trade union representatives are given free access to workplaces and are able to move about within them.

370. As regards the alleged impossibility to hold trade union meetings at the sugar plantation because a security team prevents them, the Committee observes that the Government has not communicated its observations. In these circumstances, the Committee refers to the conclusions it has formulated in the past as regards trade union activities at plantations, in which it stated that although it "recognized that plantations are private property", the Committee recalled that "employers should remove existing hindrances, if any, in the way of the organization of free, independent and democratically controlled trade unions by plantation workers and they should provide such unions with facilities for the conduct of their normal activities, including ... freedom to hold meetings". [See *Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition, 1985, para. 220.] The Committee thus requests the Government to conduct an investigation into the allegations, and to ensure that the trade union in question may immediately hold freely the trade union meetings it considers necessary at the sugar plantation.

371. As regards the detention for four hours of the general secretary and the claims secretary at the police station, the Committee deeply regrets that the Government has not communicated its observations in this respect as well, and given the anti-trade union context of this case must deplore the detention which reportedly occurred and draw the Government's attention to the principle according to which the arrest — even if only briefly — of trade union leaders and trade unionists who are exercising legitimate trade union activities constitutes a violation of the principles of freedom of association. [See *Digest*, op. cit., para. 88.] The Committee insists that such reprehensible acts should not reoccur in future.

372. Finally, as regards the judicial challenge of the registration of the United Agricultural and Industrial Trade Union of the Cristóbal Colón Sugar Plantation by another trade union which already existed at the enterprise, the Committee notes the Government's statement that it was the judicial authorities that requested revocation (despite the fact that the United Agricultural and Industrial Trade Union had been registered by the administrative authorities). As regards the grounds for the challenge of the registration, the Government points out that the trade union previously established at the sugar plantation challenged new trade union's registration, referring to the fact that the general secretary of the new union was a member of the enterprise's management. For its part, the court judgement refers to the fact that some members of the new trade union held "administrative, security, monitoring or supervisory posts" as grounds for the revocation of the registration.

373. In this respect, as regards the accusation that the general secretary of the new trade union reportedly held a management post at the sugar plantation, or in other words that the trade union leader was not independent, the Committee observes that this accusation appears to be refuted by the fact that the general secretary in question was dismissed for his trade union activities, as was the entire executive committee.

Furthermore, the Committee observes that in this case the judicial authority revoked the registration based on the Labour Code (section 328) which makes it possible to exclude workers who carry out "administrative, inspection, security, monitoring or supervisory functions ..." from the right of association. On this point, given that the text of the judgement does not give an accurate description of the tasks carried out by the members of the trade union in question, the Committee emphasizes that an excessively broad interpretation of the concept of "worker of confidence", which denies such workers of their right of association, may seriously limit trade union rights and even, in small enterprises, prevent the establishment of trade unions, which is contrary to the principle of freedom of association. In these circumstances, the Committee also emphasizes the principle under which the right of workers to constitute organizations of their choosing implies, in particular, the effective possibility to create — if the workers so choose — more than one workers' organization per enterprise. In the light of these principle, the Committee considers that all the workers of the Cristóbal Colón Sugar Plantation should be allowed to establish and join trade unions of their choosing and that, consequently, the United Agricultural and Industrial Trade Union of the Cristóbal Colón Sugar Plantation should be allowed to function and develop its activities. The Committee requests the Government to take measures to guarantee that this is the case, including by initiating judicial proceedings if necessary, and to keep it informed in this respect.

THE COMMITTEE'S RECOMMENDATIONS

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

(a) Recalling that no person should be dismissed or prejudiced in his employment by reason of his trade union membership or legitimate trade union activities, the Committee urges the Government to take the measures necessary so that the trade union leaders of the United Agricultural and Industrial Trade Union of the Cristóbal Colón Sugar Plantation who were dismissed are immediately reinstated in their posts.

(b) The Committee requests the Government to conduct an investigation to determine whether the allegations concerning the campaign by the enterprise to pressure workers to withdraw from membership in the union are true and, if so, to take the necessary measures so that the union's members can freely exercise their trade union activities, and to apply the penalties provided by legislation.

(c) The Committee requests the Government to take the necessary measures to ensure that trade union representatives are given free access to workplaces and are able to move about within them.

(d) The Committee requests the Government to conduct an investigation into the alleged impossibility to hold trade union meetings because of a security team which prevents them and to guarantee that the trade union in question may immediately hold freely the trade union meetings that it considers necessary.

(e) Considering that all the workers of the Cristóbal Colón Sugar Plantation should be able to establish and join the trade union of their choosing and that, consequently, the United Agricultural and Industrial Trade Union of the Cristóbal Colón Sugar Plantation should be able to function and develop its activities, the Committee

requests the Government to take measures to guarantee that this is the case, including by initiating judicial proceedings if necessary, and to keep it informed in this respect.

Case No. 1734

Complaint against the Government of Guatemala presented by the International Confederation of Free Trade Unions (ICFTU)

375. The complaint in this case is contained in a communication from the International Confederation of Free Trade Unions (ICFTU) dated 4 October 1993. The Government sent its observations in a communication of 7 September 1994.

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

A. THE COMPLAINANT'S ALLEGATIONS

377. In its communication of 4 October 1993, the ICFTU alleges that the "Atlantida" SA food and beverage enterprise, located in the Department of Puerto Barrios Izabel, has systematically maintained an anti-trade union policy. Specifically, out of 200 workers engaged there on 8 December 1992, 30 decided to establish a trade union, and submitted to the appropriate labour tribunals the necessary documentation. The enterprise responded by first dismissing the eight leaders of the union and later the rest of the workers who established the trade union. Various procedures have been undertaken to have these workers reinstated, without effect. On the one hand, the Ministry of Labour has contended that it has no coercive power to oblige the enterprise to comply and, on the other, the courts in the judiciary have simply stated that the legal procedures must be followed. The real problem is that there is already a solidarist association at this enterprise, and this is the third time that a union has been dissolved. This situation has been the subject of a complaint to the General Labour Inspectorate, to the courts and to Human Rights Prosecutor's Office.

378. The complainant also denounces the fact that for over two years the "Camisas Modernas" SA in-bond enterprise has been carrying out a campaign of harassment and exclusion against the founding members of the Trade Union of Workers of the Camisas Modernas SA in-bond enterprise (SINTRACAMOSA) and its leaders, most of whom are women. The complainant adds that in 1992 a solidarist association was established with the aim of thwarting the activities of the trade unionists, that the enterprise announced that it might close with a view to resuming operations in another country without trade union problems, and that this caused a great deal of concern among the workers.

B. THE GOVERNMENT'S REPLY

379. Regarding the dismissals in the "Atlantida" SA food and beverage enterprise, the Government states in its communication of 7 September 1994 that the workers indicated by the complainants had indeed been dismissed, but that the dismissals were not of an anti-trade union nature but were authorized by the Labour and Social Welfare Courts after they had found evidence of serious misconduct.

380. As to the campaign of harassment and exclusion of the founding members of the Trade Union of Workers of the Camisas Modernas SA in-bond enterprise (SINTRACAMOSA) and its leaders, the Government states that legal proceedings have been initiated against the enterprise at the Sixth Court of Labour and Social Welfare and that it will keep the Committee informed of the outcome.

THE COMMITTEE'S CONCLUSIONS

381. The Committee observes that the allegations made in this case refer to the dismissal of trade union leaders and various workers for establishing a trade union in a food and beverage enterprise and to acts of anti-union discrimination and the establishment of a solidarist association with the aim of thwarting trade union activities at a shirt enterprise.

382. Concerning the dismissals at the "Atlantida" SA food and beverage enterprise, the Committee, while noting the Government's observation that the dismissals were not of an anti-trade union nature but were authorized by the Labour and Social Welfare Courts after they had found evidence of serious misconduct, regrets that the Government replies only in general terms, simply referring to serious misconduct. The Committee therefore requests the Government to provide it with the text of the decisions handed down by the courts in each of these cases.

383. The Committee must draw the attention of the Government on the one hand to the importance that it attaches to the principle according to which workers and employers should in practice be able to form and join organizations of their own choosing in full freedom and, on the other, to the principle that no person should be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities. [See *Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition, 1985, paras. 222 and 538, respectively.]

384. As regards the allegations concerning the activities of solidarist associations aimed at thwarting trade union activities, the Committee has already examined allegations of this type in a case concerning Guatemala [see 259th Report, Case No. 1459, para. 305], in which: "the Committee draws the Government's attention to Article 2 of the Right to Organize and Collective Bargaining Convention (No. 98), ... which provides that workers' organizations must enjoy adequate protection against any acts of interference by employers or employers' organizations and that measures designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations or to support workers' organizations by financial and other means, with the object of placing such organizations under the control of employers or employers' organizations, are specifically assimilated to such acts of interference".

385. As regards the campaign of harassment and exclusion of the founding members of the Trade Union of Workers of the Camisas Modernas SA in-bond enterprise (SINTRACAMOSA) and its leaders, the Committee notes the Government's observation that legal proceedings have been initiated against the enterprise at the Sixth Court of Labour and Social Welfare and that it will keep the Committee informed of the outcome.

386. On this point, the Committee recalls that the Committee of Experts, in its comments in 1994, noted with satisfaction that Decree No. 64-92 of 2 December 1992 provides in section 24 (a) for an increase to between one thousand five hundred (1,500) and five thousand (5,000) quetzales of the fine for infringements of the Labour Code, including the fine imposed on employers who oblige or try to oblige workers to relinquish membership of their union or to join a union (section 62(c)).

387. The Committee expresses the hope that with the increase in these fines the protection against acts of anti-union discrimination will, in practice, be greater. The Committee requests the Government to keep it informed of the outcome of the legal proceedings initiated against the enterprise Camisas Modernas SA.

THE COMMITTEE'S RECOMMENDATIONS

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

(a) Regarding the dismissals at the "Atlantida" SA food and beverage enterprise, the Committee requests the Government to send it the text of the relevant decisions handed down by the courts in each of these cases.

(b) As regards the allegations concerning the activities of solidarist associations aimed at thwarting trade union activities, the Committee draws the Government's attention to Article 2 of the Right to Organize and Collective Bargaining Convention (No. 98), which provides that workers' organizations must enjoy adequate protection against any acts of interference by employers or employers' organizations and that measures designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations or to support workers' organizations by financial and other means, with the object of placing such organizations under the control of employers or employers' organizations, are specifically assimilated to such acts of interference.

(c) As regards the campaign of harassment and exclusion against the founding members of the Trade Union of Workers of the Camisas Modernas SA in-bond enterprise (SINTRACAMOSA) and its leaders, the Committee requests the Government to keep it informed of the outcome of the legal proceedings initiated against the enterprise.

Case No. 1739

Complaint against the Government of Venezuela presented by the Latin American Central of Workers (CLAT)

389. The complaint in this case is contained in a communication from the Latin American Central of Workers (CLAT) dated 6 September 1993. The Government sent its observations in communications dated 31 May and 30 September 1994.

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

A. THE COMPLAINANT'S ALLEGATIONS

391. In its communication of 6 September 1993, the Latin American Central of Workers (CLAT) alleges that Mr. Felipe Muñoz Key, a worker of the Vargas Hospital and member of the Hospitals and Clinics Trade Union of the Federal District and State of Miranda, of the National Federation of Health Workers (FETRASALUD) and of the United Federation of Workers of the Federal District and the State of Miranda (FUT), was murdered on 25 August 1993. The complainant organization adds that Mr. Muñoz Key's son was injured and a policeman died on the same occasion.

392. The complainant organization states that Mr. Muñoz Key received threats in the days prior to his murder and had even been abducted for 24 hours. Finally, the complainant organization points out that Mr. Muñoz Key had reported irregularities which took place at the Vargas Hospital and that on the day of his murder his name appeared on a list of candidates which obtained the highest number of votes in trade union elections.

B. THE GOVERNMENT'S REPLIES

393. In its communication of 31 May 1994 the Government states that a judicial investigation is under way to ascertain the reasons behind the murder of Mr. Felipe Muñoz Key and to determine who is responsible, but that since this case is now in the indictment phase it is not possible to provide any specific information concerning the investigation. Furthermore, the Government reports that after requesting information from the National Federation of Health Workers (FETRASALUD) and the United Federation of Workers of the Federal District and State of Miranda (FUT), it was possible to determine that Mr. Muñoz Key was a kitchen worker at the Vargas Hospital of Caracas, that he was not an enterprise trade union delegate and that the list in which he was presented for the trade union elections did not obtain the highest number of votes in trade union elections (it adds that Mr. Muñoz Key was the second candidate on the list). Furthermore, the trade union organizations reported that they were not aware of threats made against Mr. Muñoz Key or of his subsequent abduction.

394. In its communication of 30 September 1994, the Government states that the person suspected of murdering Mr. Muñoz Key has been arrested. The judicial

investigation is continuing in the indictment phase. According to the Government, the murder was carried out by the mob and not as described by the complainant organization.

THE COMMITTEE'S CONCLUSIONS

395. The Committee profoundly regrets the murder of Mr. Muñoz Key, a trade unionist and member of the Hospitals and Clinics Trade Union of the Federal District and State of Miranda, and the death of a policeman, as well as the injuries sustained by the son of Mr. Muñoz Key. The Committee notes that according to the Government a judicial investigation is under way to determine the reasons for the murder of Mr. Muñoz Key and that the person suspected of this murder has been arrested. Moreover, the Committee notes that Mr. Muñoz Key was not a trade union delegate, although he was a candidate in trade union elections which he did not win. The Committee trusts that the investigation will be concluded without delay so as to establish the facts, determine who is responsible and severely punish the guilty parties. The Committee urges the Government to take the necessary measures in this regard and to keep it informed of the outcome of the judicial investigation under way and to ensure that the investigation also covers the injuries sustained by Mr. Muñoz Key's son.

396. The Committee draws the attention of the Government to the fact that a climate of violence aimed at trade union leaders and their families does not encourage the free exercise of the trade union rights set out in Conventions Nos. 87 and 98, and that all States have the duty to guarantee their respect. The Committee urges the Government to take all measures in its power to ensure respect for this principle.

THE COMMITTEE'S RECOMMENDATIONS

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

(a) The Committee profoundly regrets the murder of the trade unionist Mr. Muñoz Key and of a policeman, as well as the injuries sustained by the son of the above-mentioned trade union leader. The Committee trusts that the judicial investigation under way will be concluded without delay and that it will be possible to establish the facts, determine who is responsible and severely punish the guilty parties. The Committee urges the Government to take the necessary measures in this regard and to keep it informed of the outcome of the investigation and to ensure that it also covers the injuries sustained by the son of Mr. Muñoz Key.

(b) Drawing the attention of the Government to the fact that a climate of violence aimed at trade union leaders and their families does not encourage the free exercise of the trade union rights set out in Conventions Nos. 87 and 98, and that all States have the duty to guarantee their respect, the Committee urges the Government to take all measures in its power to ensure respect for this principle.