PUBLIC COMMUNICATION TO
THE U.S. Office of Trade Agreement Implementation (OTLA)

Public Communication to the U.S. Office of Trade and Labor Affairs (OTLA) under the *North American Agreement on Labor Cooperation* (NAALC) concerning the violation of basic labor rights and principles by the government of Mexico, including Freedom of Association and Protection of the Right to Organize, the Right to Bargain Collectively, The Right to Strike and the Prevention of Occupational Injuries and Illnesses, in violation of the NAALC, Conventions of the International Labor Organization (ILO) and Principles of International Law.

Submitted to the U.S. OTLA on November 14, 2011

on behalf of

The Sindicato Mexicano de Electricistas (Mexican Union of Electrical Workers)

and on behalf of

AFL-CIO
Alianza de Tranviarios de México
Alianza Nacional de Trabajadores
American Federation of Government Employees (AFGE)
American Federation of Teachers (AFT)
Asociación Latinoamericana de Abogados Laboralistas (ALAL)
Asociación Nacional de Abogados Democráticos (ANAD)
Bakery, Confectionary, Tobacco Workers and and Grain Millers International Union (BCTGM)
Black Workers for Justice (BWFJ)
Canadian Association of Labour Lawyers/Association Canadienne de Avocats du Mouvement Syndical
Canadian Autoworkers (CAW)
Communication Workers of America (CWA)
Canadian Union of Postal Workers (CUPW)
Canadian Union of Public Employees (CUPE)
Centrale des syndicats du Québec (CSQ)
Centro de Investigación Laboral y Asesoría Sindical (CILAS, AC)
Communications, Energy and Paper Workers (CEP)
Confédération des syndicats nationaux (CSN)
Conseil central du Montreal metropolitain - CSN
Coordinación Nacional Plan de Ayala Movimiento Nacional
Cosmoger A.C. Avon
Cross Border Network for Justice and Solidarity
Farm Labor Organizing Committee (FLOC)
Federación Nacional de Agrupaciones Sindicales
Federación Nacional de Jubilados Ferrocarrileros A.C.
Federación Sindical Mundial en México
Federación Sindical Revolucionaria

Fédération des travailleurs de Québec (FTQ)
Frente Autentico Del Trabajo (FAT)
Frente Nacional de Trabajadores (Alianza)
Frente Sindical Mexicano
Global Economy Project, Institute for Policy Studies
Global Workers Justice Alliance
Grassroots Global Justice (GGJ)
H. Sindicato Heroico del Cuerpo de Bomberos del Distrito Federal
International Association of Democratic Lawyers (IADL)
International Brotherhood of Electrical Workers (IBEW)
International Brotherhood of Teamsters (IBT)
International Commission for Labor Rights (ICLR)
International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM)
International Labor Rights Forum (ILRF)
International Longshore and Warehouse Union (ILWU)
International Metalworkers Federation (IMF)
International Trade Union Confederation (ITUC)
International Transport Workers' Federation (ITF)
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
Jobs with Justice (JwJ)
Kairos: Canadian Ecumenical Justice Initiatives
Labor Council on Latin American Advancement (LCLAA), New York Chapter
Labor-Religion Coalition of New York State
Maquila Solidarity Network (MSN)
National Lawyers Guild (NLG)
National Union of Public and General Employees (NUPGE)
Organización Movimiento Obrero Revolucionario Independiente
Public Service Alliance of Canada (PSAC)
Sección 188 CYCSA-STRM
SEIU, 32BJ
Service Employees International Union (SEIU)
Sindicato de la Unión de Trabajadores del Instituto de Educación Media Superior del Distrito Federal (SUTIEMS)
Sindicato de los Trabajadores de la Universidad Nacional Autónoma de México (STUNAM)
Sindicato de Telefonistas de la República Mexicana (STRM)
Sindicato de Trabajadores Académicos de la U de G (STAUdeG)
Sindicato de Trabajadores de la Industria Metálica Acero, Hierro, Conexos y Similares (STIMAHCS)
Sindicato de Trabajadores de la Universidad Nacional Autónoma de México (STUNAM)
Sindicato Democrático Independiente de Trabajadores del Sistema de Transporte Colectivo, Metro
Sindicato Independiente de Trabajadores de la Jornada (SITRAJOR)
Sindicato Independiente Nacional de Trabajadores de la Salud
Sindicato Independiente Nacional de Trabajadores de la Secretaría de Seguridad Pública Federal
Sindicato Industrial de Trabajadores Textiles y Similares “Belisario Domínguez”
Sindicato Internacional de Constructores de Elevadores México (SICEM)

Sindicato Nacional de Trabajadores de la Educación Secretaría
Sindicato Nacional de Trabajadores de la Industria de la Costura, Confección, Vestido, Similares y Conexos “Diecinueve de Septiembre”
Sindicato Nacional de Trabajadores de la Industria del Hierro, Acero, Productos Derivados, Similares y Conexos de la República Mexicana
Sindicato Nacional de Trabajadores de la Sedesol Sec. 33
Sindicato Nacional de Trabajadores del Transporte en General, Similares y Conexos de la República Mexicana
Sindicato Nacional Trabajadores Educación Física D H E F 1 (SNTE)
Sindicato Único de Trabajadores de la Industria Nuclear (SUTIN)
The Canadian Labour Congress (CLC)
The Sindicato Mexicano de Electricistas (Mexican Union of Electrical Workers) (SME)
The United Steel, Paper and Forestry, Rubber, manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers)
Trade Union Confederation of the Americas (TUCA)
Transport Workers Union of America
U.S. Labor Education in the Americas Project (USLEAP)
UE Local 150
UFCW
United Mineworkers of America (UMW)
UNI Americas
UNI Global Union
Unión Nacional de Técnicos y Profesionales Petroleros (UNTyPP)
Unión Nacional de Trabajadores (UNT)
Unión Nacional Donceles #28
Unión Nacional Donceles 28 CROC
United Electrical, Radio and Machine Workers of America (UE)
UNITE-HERE
Universidad Obrera de México “Vicente Lombardo Toledo”
Utility Workers Union of America, AFL-CIO

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INTRODUCTION

The Mexican Union of Electrical Workers (Sindicato Mexicano de Electricistas, "SME" or "Union") files this Public Communication to challenge the Mexican government's concerted attack on the Union's very existence and to defend fundamental labor rights in that country. The petition is jointly submitted with the list of signatories appearing on the cover page. Starting in October 2009, the Mexican government forcibly removed SME members from their workplaces, unilaterally terminated the employment of 44,000 unionized workers through a presidential decree, exploited the absence of an effective judicial remedy for the Union, displaced their positions to a non-unionized company, and failed to rehire the terminated union workers in the new positions.

Through a series of public statements, the federal government has demonstrated that its main purpose in taking these steps was to rid itself of the Union and its collective bargaining agreement. The Mexican government's destruction of the collective bargaining structure was in violation of its own labor laws, which was in turn a clear violation of its commitments under Part Two of the North American Agreement on Labor Cooperation. The government's actions were also contrary to conventions of the International Labor Organization and principles of international law.

The Mexican government's unlawful attack on SME began on October 10, 2009 with the deployment of 27,000 police and military officials to forcibly remove union members from their workplaces in the dead of night. Subsequently, the Mexican government extinguished the state-owned electrical power company, known as Central Light and Power (Luz y Fuerza del Centro, "LyFC"), which employed all SME members, and consequently terminated the employment of SME's entire membership through a single presidential decree. The government transferred assets and facilities that had previously belonged to LyFC to another state-owned electrical company, the Federal Electricity Commission (Comisión Federal de Electricidad, "CFE"). As a result, the work that was previously performed in LyFC through union workers was given to non-unionized workers and subcontractors in the CFE. These workers suffered from significantly worse working conditions and lacked adequate health and safety protections, resulting in the death of a number of subcontracted workers.

Moreover, the federal government unlawfully circumvented the Union's opposition to this liquidation of its members' rights. The virtual elimination of the Union was done without prior bargaining, consultation or notice to SME, in contravention of Mexican labor law. Moreover, the government refused to grant legal recognition to the Union leadership as required under regulations

promulgated by the Secretariat of Labor and Social Welfare (Secretaría del Trabajo y Previsión Social, "STPS"). It then cut off union dues and froze the union's bank accounts. Finally, although the actions of the federal government are clearly illegal under Mexican and international labor law, no tribunal or court has demonstrated sufficient independence from the federal executive to uphold Mexican labor law and declare the actions of the government to be illegal. The continuing judicial delays served as the final stamp of approval that permitted the federal government to eradicate the SME membership's labor rights.

The facts set forth below demonstrate that the Mexican government has consistently disregarded its obligation to enforce, at a bare mínimum, its own labor laws under the NAALC. Permitting the Mexican government to act in this manner will undermine the NAALC's aim of ensuring that increased economic integration does not lead to a corresponding decrease in labor standards. As such, the Petitioners request that the U.S. Office of Trade and Labor Affairs Implementation ("OTLA"), following its investigation, recommend ministerial consultations regarding the Mexican government's failure to respect its own labor and health and safety laws as provided for under Article 22 of the NAALC. If these steps cannot be obtained as a result of ministerial consultations, the Petitioners request that the United States request the establishment of an arbitral panel in accordance with Article 29 of the NAALC.

LIST OF NAALC LABOR PRINCIPLES AND NAALC VIOLATIONS RAISED IN THE COMMUNICATION

This Communication addresses the following labor principles, contained in Annex 1 to the NAALC:

- Freedom of association and protection of the right to organize;
- The right to bargain collectively;
- The right to strike; and
- Prevention of occupational injuries and illnesses.

This Communication asserts that the government of Mexico has failed to meet its obligations under the NAALC, and in particular:

- The obligation to promote, to the maximum extent possible, the labor principles set out in Annex 1 (Article 1 of the NAALC);

- The obligation to ensure that its labor laws and regulations provide for high labor standards (Article 2 of the NAALC);
- The obligation to continue to strive to improve those labor standards (Article 2 of the NAALC);
- The obligation to promote compliance with and effectively enforce its labor law through appropriate government action (Article 3.1 of the NAALC);
- The obligation to ensure that persons may have recourse to, as appropriate, procedures by which rights arising under its labor law, and collective agreements, can be enforced (Article 4.2 of the NAALC);
- The obligation to ensure that administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, further, that such proceedings: (a) comply with due process of law, and (b) are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays (Article 5.1 of the NAALC);
- The obligation to provide final decisions on the merits of the case in such proceedings that are: (a) in writing and preferably state the reasons on which the decisions are based; (b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and (c) based on information or evidence in respect of which the parties were offered the opportunity to be heard (Article 5.2 of the NAALC);
- The obligation to ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter (Article 5.4 of the NAALC); and
- The obligation to publish, in advance, laws, regulations, procedures and administrative rulings of general application respecting any matter covered by the NAALC that the government proposes to adopt, and to provide interested persons a reasonable opportunity to comment on such proposed measures (Article 6 of the NAALC).

STATEMENT OF JURISDICTION AND AUTHORITY FOR COOPERATIVE CONSULTATIONS

1. The U.S. OTLA has jurisdiction to review this submission under Article 16(3) of the NAALC, which authorizes each OTLA to review Public Communications on labor law matters arising in the territory of another Party, in accordance with domestic procedures.

2. As a party to NAALC and a Member State of the International Labor Organization ("ILO"), Mexico has an obligation to promote high labor standards and to enforce labor standards within its borders. The government of Mexico has failed to adequately protect

workers' rights as required by its participation in the NAALC and its membership in the ILO.

3. The U.S. OTLA is empowered under Article 21 of the NAALC to request consultations with the Mexican NAO concerning labor law, its administration, or labor market conditions in Mexico.

4. Under Article 22 of the NAALC, the U.S. Secretary of Labor may request consultations with the Mexican Labor Secretary regarding any matter within the scope of the NAALC. The matters raised in this submission are within the scope of the Agreement.

PART I: FACTS

A. **Overview**

5. Prior to the events giving rise to this Public Communication, only two electrical power companies existed in Mexico. Both were state-owned, had the legal status of decentralized public bodies and were ultimately controlled by the President of Mexico. Central Light and Power (Luz y Fuerza del Centro, "LyFC") provided electrical power to about 25,000,000 users in the Federal District (Mexico City) and in six adjacent states (Guerrero, Hidalgo, Mexico, Michoacán, Morelos and Puebla); the Federal Electricity Commission (Comisión Federal de Electricidad, "CFE"), provided electrical power to the rest of the country. The CFE now provides electrical power to the entire country.

6. The workers of LyFC were represented by the Mexican Union of Electrical Workers (Sindicato Mexicano de Electricistas, "SME"), an independent union with an active membership and a strong collective agreement. The collective bargaining agreement governed all work that LyFC may carry out, by itself or through its agents. The most recent collective agreement, negotiated and renewed in accordance with a memorandum executed on March 16, 2008, expired on March 15, 2010 ("Collective Agreement").[1]

[1] A copy of the 2008-2010 Collective Bargaining Agreement Between LyFC and the SME is attached as **Exhibit 004**.

7. The workers of the CFE are represented by the Sole Union of Electricity Workers of the Mexican Republic (Sindicato Único de Trabajadores Electricistas de la República Mexicana, "SUTERM").

8. At the time of LyFC's dissolution on October 11, 2009, SME comprised 44,362 LyFC workers in addition to approximately 22,000 retirees. SME does not represent workers in any other company.

9. Since 1917, SME has consistently represented the unionized workers of LyFC and its predecessor companies, and has had over 90 years of stable bargaining relations with these companies. SME has a proud democratic tradition as Mexico's oldest trade union, founded in December 14, 1914. SME is legally incorporated and registered as an Industrial Workers' Union of federal jurisdiction with the former Labor Department, now the federal Secretariat of Labor and Social Welfare (Secretaría del Trabajo y Previsión Social, "STPS").

B. The Mexican Government's Forced Dissolution of LyFC and Transfer of its Operations to the Federal Electricity Commission (CFE)

i. The Military's Removal of SME Workers from LyFC Workplaces

10. At 10:00 p.m. on Saturday, October 10, 2009, more than 27,000 members of the Federal Police, the Army, the Navy and police from Mexico City and the States of Mexico, Hidalgo, Puebla and Morelos forcibly removed SME members from their workplaces. These authorities occupied the headquarters of LyFC located at 171 Melchor Ocampo St. in Colonia Tlaxpana, Miguel Hidalgo Delegation, Mexico City, as well as the 230 kv Substation at Cerro Gordo, the Jorge Lucke hydroelectric plant in Necaxa, and 486 other workplaces. Through these actions, which constituted a *de facto* dismissal of all LyFC workers, Mexico's security forces enforced a presidential decree to dissolve LyFC before the Decree had even come into force.

11. Unbeknownst to SME and to the public at large, earlier that day, President Felipe Calderón had signed, but not yet published), a presidential decree ("the Extinction

Decree" or "the Presidential Decree") dissolving LyFC and providing for the liquidation of its assets through a federal government agency, the Assets Administration and Transfer Service (Servicio de Administración y Enajenación de Bienes, "SAE"). The Decree provided for the payment of severance to LyFC's workers "in the shortest possible time,"[2] ultimately leading to the termination of LyFC's 44,362 unionized workers – SME's entire working membership. The Extinction Decree was also signed by several senior secretaries of President Calderón's cabinet, including the Secretaries of Revenue and Public Credit, Social Development, Energy, Agriculture, and Labor, among others.

12. At 12:25 a.m on Sunday, October 11, 2009, approximately two and a half hours after military and police forces had ejected SME members from their workplaces, the SAE and the CFE entered into an agreement purportedly meant to guarantee the continuity of electrical power services and to enable the CFE to immediately take over the provision of the services previously provided by LyFC as administrator of the LyFC enterprise.[3]

13. At approximately 1:00 a.m. on Sunday, October 11, 2009, three hours after the police and the military stormed the LyFC facilities, the federal government published the Extinction Decree in the government's Official Gazette of the Federation.[4] Upon publication, the Extinction Decree came into legal force. Accompanied by the Federal Police, the chief executive officer of the CFE took immediate possession of the LyFC

[2] Article 4 of the Extinction Decree reads as follows:

> The labor rights of Central Light and Power's workers shall be respected, and the corresponding severance payments shall be made in accordance with the provisions of the Collective Bargaining Agreement, the Federal Labor Law and other applicable legislation.
>
> The secretariats of Revenue and Public Credit, Energy and Labor and Social Welfare shall act, within the ambit of their respective jurisdictions, in coordination with the Assets Administration and Transfer Service, so that the severance payments referred to in the previous paragraph be paid in the shortest possible time, in accordance with the applicable provisions.

See Decreto por el que se Extingue el Organismo Decentralizado Luz y Fuerza del Centro [Decree To Extinguish the Decentralized Body of Central Light and Power], Diario Oficial de la Federación [DO], 5 de octubre, *available at* http://dof.gob.mx/nota_detalle.php?codigo=5114004&fecha=11/10/2009 [**Exhibit 006**]. An unofficial English translation of the Extinction Decree is attached as [**Exhibit 006-1]**.

[3] Agreement Entered Into Between the SAE and the CFE (Oct. 11, 2009) [**Exhibit 007**].

[4] Decreto por el que se Extingue el Organismo Decentralizado Luz y Fuerza del Centro [Decree To Extinguish the Decentralized Body of Central Light and Power], Diario Oficial de la Federación [DO], 5 de octubre, *available at* http://dof.gob.mx/nota_detalle.php?codigo=5114004&fecha=11/10/2009 [**Exhibit 006**].

premises and and used LyFC's facilities and resources to take charge of providing electrical power services in the geographic areas previously serviced by LyFC.

14. The Mexican government transferred the assets of LyFC and the work previously performed by the SME-represented employees of LyFC to the CFE. The provision of electricity to LyFC's former customers continues and is now the responsibility of the CFE. LyFC's electrical infrastructure also remains in place: LyFC's generating plants, power substations and the low-, medium- and high-voltage transmission and distribution lines continue to operate, now under the CFE's management. LyFC's former operations are now being run union-free through the use of non-unionized subcontractors and confidential personnel. SME, its members and its collective agreement have been excluded from the new operation.

ii. SME's Challenge of the Extinction Decree

15. On October 28, 2009, SME filed an *amparo*[5] application challenging, *inter alia*, the constitutionality of the Presidential Decree dissolving LyFC.[6] The *amparo* proceedings eventually reached the Supreme Court of Justice of the Nation ("Supreme Court of Mexico"), which ultimately denied the Union's application on July 5, 2010.[7] In so doing, the Supreme Court of Mexico dealt exclusively with constitutional and division of powers issues. The Court abstained from making a final determination of the labor rights issues arising from the case, particularly the substitute or successor employer issue, which it left to the Federal Board of Conciliation and Arbitration (Junta Federal de

[5] *Amparo* is an application for constitutional protection whose rules and procedures are governed by the Mexican Constitution. *See* Constitución Politica de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de febrero de 1917, art. 103, 107, *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf [**Exhibit 008**]; *see also* Ley de Amparo [LA] [Legal Protection Law], Diario Oficial de la Federación [DO], 24 de Diciembre de 1992 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/20.pdf) [**Exhibit 009**]. An *amparo* application can be filed to allege acts of authority violate civil liberties. These acts including resolutions of the conciliation and arbitration boards when those resolutions are alleged to have breached the due process guarantees contained in the Constitution (*the amparo* being, in effect, an additional means of appeal). Jurisdiction over *amparo* applications lies with the federal court system.

[6] SME's Amparo Application v. Extinction Decree (Oct. 28, 2009) [**Exhibit 010]**.

[7] Amparo en Revisión 346/2010 relativo al Constitutionalidad del Decreto que Extingue el Organismo Decentralizado Luz y Fuerza del Centro, resena del amparo en revisión, Tribunal Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Julio de 2010, Página 120 [**Exhibit 011**].

Conciliación y Arbitraje, "JFCA") to decide.[8] The Supreme Court did, however, make the finding that the Extinction Decree had not terminated the individual and collective labor relationships at LyFC since a legal proceeding seeking approval for their termination, initiated by the SAE before the JFCA, was yet to be decided.[9]

16. After the Extinction Decree was issued, the JFCA denied authorization to SME to bargain for the renewal of the 2008-2010 collective agreement with both the SAE as liquidator of LyFC, and the CFE as LyFC's successor. The JFCA also denied SME the right to strike the SAE and CFE.

C. **The Elimination of the Union and its Collective Bargaining Agreement**

17. In justifying its decision to dissolve LyFC, the Mexican government has claimed that the SME collective agreement and the benefits it provides to SME's active and retired members were the primary causes of LyFC's alleged inefficiencies and dismal financial situation.

18. In the Extinction Decree, the federal government asserted that LyFC's labor costs, particularly the retirees' pensions, were unbearably high. The government also asserted that the liquidation of LyFC was an economic necessity due to high operating costs and a large deficit. According to the Decree, LyFC's results "are notably inferior to those of companies or bodies providing the same service internationally," and LyFC's "proven operational and financial inefficiencies" demonstrate that its ongoing existence "is no longer convenient from the standpoint of the national economy and the public interest."[10]

19. In the days following the issuance of the Extinction Decree, the President of Mexico and central members of his cabinet issued communiqués and made public statements that

[8] *See* Versión Taquigráfica de la Sesión Pública Ordinaria del Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Celebrada el Lunes 5 de Julio de 2010, Amparo en Revisión 346/2010 at 113-116, *available at* http://www.scjn.gob.mx/2010/pleno/Documents/2010/jul2.pdf [**Exhibit 012**]; *id.* at 198, 333-334 (**[Exhibit 011]**.

[9] *See Amparo en Revisión* 346/2010 relativo al Constitutionalidad del Decreto que Extingue el Organismo Decentralizado Luz y Fuerza del Centro, resena del amparo en revisión, Tribunal Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Julio de 2010, Pagina 147-48 [**Exhibit 011**].

[10] *See* Decreto por el que se Extingue el Organismo Decentralizado Luz y Fuerza del Centro [Decree To Extinguish the Decentralized Body Central Light and Power], Diario Oficial de la Federación [DO], 5 de octubre, *available at* http://dof.gob.mx/nota_detalle.php?codigo=5114004&fecha=11/10/2009 [**Exhibit 006**].

evidenced that LyFC was dissolved in part to eliminate SME and its collective agreement for a union-free operation.

1) **President Felipe Calderón (October 11, 2009)**:

> Unfortunately, most of the revenue received by [LyFC] could not be devoted to improving the quality of the service, **but rather went fundamentally to pay for onerous privileges and benefits of a labor character**, and this situation worsened year after year
>
> […]
>
> For example, the number of workers continued to grow disproportionally, not because the electrical service required it, **but rather because the Collective Bargaining Agreement demanded it**. And these conditions not only made [LyFC] unviable, they also very gravely affected the quality and coverage of the electricity service that had to be provided.[11]

2) **Secretariat of the Interior (October 11, 2009)**:

> **The conditions established in the labor contract prevented the effective operation of the company, through a co-management arrangement with the union that deteriorated the operation of the body**. Practically all the decisions of Central Light and Power had to be made in function of the union's demands and not the interests of the users, whom it must have served. This severely decreased its productivity . . .
>
> […]
>
> On the other hand, the pension provisions in the collective agreement—which allow many workers to retire before the age of 50—establish that unionized pensioners are to receive an average of 3.3 times the average salary of active workers … As a result, Central Light and Power had unsustainable labor costs and lacked a financial reserve to back the pensions.[12]

3) **Interior Secretary Fernando Gómez Mont:**

> **October 12, 2009**

[11] President Felipe Calderón, *Mensaje a la Nación del Presidente Felipe Calderón*, PRESIDENCIA DE LA REPÚBLICA (Oct. 11, 2009), http://www.presidencia.gob.mx/2009/10/mensaje-a-la-nacion-del-presidente-felipe-calderon (emphasis added). [**Exhibit 013**]

[12] Secretaría de Gobernación [Government Secretary], *El Ejecutivo Federal Publicó el Decreto por el que se Extingue al Organismo Descentralizado de Luz y Fuerza del Centro* (Oct. 11, 2009), http://www.presidencia.gob.mx/2009/10/el-ejecutivo-federal-publico-el-decreto-por-el-que-se-extingue-al-organismo-descentralizado-luz-y-fuerza-del-centro (emphasis added).[**Exhibit 014**]

The union itself was co-responsible for the management; **part … of the problem that has been mentioned, is that the union itself interfered in a very important manner with the administration**, that the capacity to modernize Central Light and Power was prevented and impeded by … the union's lack of productivity with respect to modernization works . . .[13]

October 13, 2009

Secretary Gómez Mont: "**The fact is that the company was congested by the union in practically all of its decisions**, the decisions on modernization, [and] the decisions on how to implement investments for infrastructure . . ."

[…]

Leonardo Curzio (Journalist): "…but the management of the company, given the information you mention, was, let me tell it like it is, a disaster!"

Secretary Gómez Mont: "Part of this arises from the limited space of autonomy that management of Central Light and Power had; **everything had to be discussed and negotiated with the union**, the decisions were ultimately made in function of the interests and the decisions of the union and not the interests of the users, we reached a situation in which the direction of the company was limited by the union situation **and that had to be brought to an end**.**"**[14]

4) **Labor Secretary Javier Lozano Alarcón:**

[O]f course, the union had as its only collective agreement the one with Central Light and Power, and when Light and Power was extinguished, it was left without that contract.[15]

20. Further, on October 14, 2009, the Secretary of Labor gave a press conference in which he stated that the electrical power service previously provided by LyFC would have to be provided by the CFE under the collective agreement between the CFE and the

[13] Press Conference with Secretary Fernando Gómez Mont, *Precisó el Titular de SEGOB que la Extinción de Luz y Fuerza del Centro es una Medida Estrictamente Apegada a Derecho*, PRESIDENCIA DE LA REPÚBLICA (Oct. 12, 2009), http://www.presidencia.gob.mx/2009/10/preciso-el-titular-de-segob-que-la-extincion-de-luz-y-fuerza-del-centro-es-una-medida-estrictamente-apegada-a-derecho (emphasis added) [**Exhibit 015]**.

[14] Interview by Leonardo Cuzio with Fernando Gomez Mónt, *Hemos Venido Planteando la Necesidad de Asumir ya en los Próximos Meses una Reforma Política que Mejores la Calidad de la Representación en México: Gómez Mont,* PRESIDENCIA DE LA REPÚBLICA (Oct. 13, 2009), http://www.presidencia.gob.mx/2009/10/hemos-venido-planteando-la-necesidad-de-asumir-ya-en-los-proximos-meses-una-reforma-politica-que-mejores-la-calidad-de-la-representacion-en-mexico-gomez-mont (emphasis added) [**Exhibit 016].**

[15] Interview by Monica Garza with Javier Lozano Alarcón, *Ni es una Política Anti Obrera o Contra los Sindicatos o la Autonomía Sindical*, PRESIDENCIA DE LA REPÚBLICA, (Oct. 12, 2009), http://www.presidencia.gob.mx/2009/10/ni-es-una-politica-anti-obrera-o-contra-los-sindicatos-o-la-autonomia-sindical [**Exhibit 017**].

SUTERM.[16] Despite the Secretary of Labor's statement (that dismissed the workers' right to join the union of their choice), the work previously performed by SME's members has not been transferred to SUTERM members. Rather, the work formerly performed by members of SME is being performed by the non-unionized employees of the CFE and its subcontractors, as detailed below.

21. Several months later, on May 12, 2010, the Director of Financed Investment Projects of the CFE, Eugenio Laris Alanís, stated that the CFE did not want the same union as the defunct LyFC. [17] He then proceeded to praise the CFE's union, the SUTERM.[18]

22. In the years leading up to the dissolution of LyFC, the federal government had made budget cuts at LyFC that undermined the company's ability to modernize equipment. At the same time, the government drained LyFC resources by forcing it to buy electricity from the CFE, whose prices had increased by 298%, whereas LyFC's rates had only increased by 176%.[19] Further, according to House Representative Claudia Edith Anaya Mota, the CFE's budget for the year 2011 was increased by almost the same amount of money that it previously cost to run LyFC, thus casting doubt on the government's rationale that LyFC was extinguished to reduce costs.[20]

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[16] [I]t is a matter of the Federal Electricity Commission adapting to and adopting, for the Central Zone of the country, the same standards and levels of electricity that it has for the rest of the country…It has to be exactly the opposite [of the previous situation,] on the basis of the Collective Bargaining Agreement of the Federal Electricity Commission under the protection of the Union which holds that Collective Bargaining Agreement [i.e., the SUTERM] and under the norms [and] procedures that the Federal Electricity Commission has.

Question Session by Juan Carlos Santoyo with Javier Lozano Alcarón, *Sesión de Preguntas y Respuestas en la Conferencia de Prensa que Ofreció el Secretario del Trabajo y Previsión Social, Javier Lozano Alarcón*, PRESIDENCIA DE LA REPÚBLICA (Oct. 14, 2009), http://www.presidencia.gob.mx/2009/10/sesion-de-preguntas-y-respuestas-en-la-conferencia-de-prensa-que-ofrecio-el-secretario-del-trabajo-y-prevision-social-javier-lozano-alarcon [**Exhibit 018**].

[17] Angélica Enciso L., *Es Inconveniente para la CFE Tener al SME, Asegura Funcionario*, LA JORNADA, at 39 (May 13, 2010), http://www.jornada.unam.mx/2010/05/13/sociedad/039n2soc [**Exhibit 019**].

[18] *Id.*

[19] *See* Israel Rodríguez J., *Mejoró LFC Finanzas Antes de Su Extinción*, LA JORNADA, at 20 (Feb. 7, 2010), http://www.jornada.unam.mx/2010/02/07/economia/020n1eco [**Exhibit 022**].

[20] House Representative Claudia Edith Anaya Mota, Request for Information from the CFE Regarding its Subcontracting Arrangements, 3-4 (May 24, 2011), *available at* http://www.senado.gob.mx/sgsp/gaceta/61/2/2011-05-25-1/assets/documentos/PA_CFE.pdf [**Exhibit 023**].

23. By dissolving the LyFC and dismissing its entire workforce, the government eliminated the existing bargaining structure and rendered the SME collective agreement inoperative. It also left SME without any working members and without any further union dues. Labor Secretary Javier Lozano Alarcón made the following statement during an interview on October 13, 2009:

> If [SME Secretary-General] Mr. Martín Esparza had had the *toma de nota* [legal acknowledgment] in this moment, the economic situation of Central Light and Power would not change at all, nor would the considerations about its financial or operational viability; this is, **we would be talking about the same, <u>the extinction</u>** of a body [i.e., LyFC], **<u>of a union</u>** [i.e., SME] . . .[21]

D. **SME's Repeated Requests for Information**

24. Since the dissolution of LyFC, SME has repeatedly requested, in public and in the course of legal proceedings, the reports and other documents that the Mexican government alleges set forth the basis for the Executive's sudden decision to extinguish and liquidate LyFC. Despite the government's claims, the government has produced no evidence of LyFC's alleged inefficiencies or the Union's alleged role in perpetuating them, not even before the JFCA or the federal courts.

25. The Union has made out-of-court requests in accordance with the statutory mechanisms laid out in Mexico's Federal Transparency and Access to government Public Information Law ("LFTAIPG").[22] Meanwhile the government has refused disclosure, citing national security concerns (i.e., that disclosure of the information requested could lead to "violent demonstrations," "road blockades," and "acts of sabotage" to critical infrastructure).[23]

26. In refusing disclosure, the government has also argued that disclosure of the information requested "would seriously prejudice" the government's "litigation strategies" in the

[21] Interview by Carmen Aristegul with Javier Lozano Alcarón, *Si hubiera tenido la Toma de Nota en este momento el señor Martín Esparza en nada cambiaría la situación económica de Luz y Fuerza del Centro: Javier Lozano*, PRESIDENCIA DE LA REPÚBLICA (Oct. 13, 2009), http://www.presidencia.gob.mx/2009/10/si-hubiera-tenido-la-toma-de-nota-en-este-momento-el-senor-martin-esparza-en-nada-cambiaria-la-situacion-economica-de-luz-y-fuerza-del-centro-javier-lozano [**Exhibit 020**].

[22] Ley Federal de Transparencia y Acceso a La Información Pública Gubernamental [LFTAIPG] [Federal Transparency and Access to Public Information Law], art. 40, *as amended*, Diario Oficial de le Federación, 12 de junio de 2003.

[23] *See* SHCP Response to SME's Access to Information Request No. 000060033510 (Apr. 12, 2010) [**Exhibit 021**].

numerous legal proceedings currently underway, given that "the majority of the documents contained in … [the file requested] have not been provided in [these] legal proceedings, nor are they within the knowledge of the plaintiffs in the said proceedings …"[24] The legal proceedings to which the government refers are the various proceedings launched by SME against the government's actions.

E. Lack of Meaningful Bargaining or Consultation with SME, and Denial of Its Bargaining Rights

27. Prior to the dissolution of LyFC, the government failed to meaningfully discuss its concerns regarding the alleged issue of labor costs and work rules with SME, either through consultation or collective bargaining. Since the nationalization of LyFC in 1960,[25] the company and the federal Executive had involved SME in every major reorganization of LyFC. The lack of any notice to the Union ahead of the sudden Saturday night deployment and the Sunday presidential decree precluded any opportunity to collectively bargain.

28. The collective agreement in place at the time of the LyFC dissolution in October 2009 was due for renewal in March 2010. However, the future of LyFC was not bargained before or after LyFC's dissolution in October 2009.

F. History of LyFC and the Consistent Recognition of SME's Legitimacy and Bargaining Rights

29. From 1917 until the government's dissolution of LyFC in 2009, SME's well-established collective bargaining rights endured, despite sweeping changes to the national administration of electrical power and numerous transformations of the power company now known as LyFC.

30. From the establishment of LyFC's first predecessor company in 1902 to the dissolution of LyFC in 2009, LyFC and its predecessor companies underwent a number of

[24] *Id*.
[25] See *infra* para. 34.

reorganizations and name changes both before and after the company's nationalization by the federal government in 1960. Throughout these transformations, prior to 2009, the federal government and every private predecessor company consistently recognized SME's bargaining rights without controversy, pursuant to the substitute employer provisions in Mexico's labor legislation.[26]

31. Originally called the Mexican Light and Power Company, S.A., the company was was renamed as the Mexican Light and Motor Power Company and Subsidiaries, S.A. (*Compañía Mexicana de Luz y Fuerza Motriz y Subsidiarias, S.A.*) to reflect its ownership and operation of the following four subsidiaries: Compañía de Luz y Fuerza de Pachuca, S.A. (September 27, 1910); Compañía de Luz y Fuerza Eléctrica de Toluca, S.A. (July 1928); Compañía Meridional de Fuerza, S.A. (April 5, 1924) and Compañía de Fuerza del Suroeste de México, S.A. (October 26, 1922). By the beginning of the 1920s, LyFC's second predecessor company provided electrical power to an area that included the Mexican Federal District as well as parts of the States of Puebla, Hidalgo, México, Morelos, Tlaxcala, Querétaro, Guanajuato, Guerrero, Michoacán and Veracruz.

32. In 1926, President Plutarco Elías Calles proclaimed the National Electric Power Code, which provided the federal government with the authority to govern electrical power generation, distribution and transmission. In 1934, Article 73(X) of the Federal Constitution was passed in order to empower the Federal Congress to pass laws on electrical power matters.

33. Mexico's other electrical power generation company, the CFE, was established by the Congress in 1937 under President Lázaro Cárdenas del Río. President Cárdenas also promulgated the Electric Industry Law on December 31, 1938.

[26] The Social Security Law of Mexico states that any "transmission, between the substituted employer and the substitute employer, by any legal title, of the essential assets [of the operation] with the intention of continuing it" constitutes a substitution. The law goes on to state that any substitute employer is under the same collective bargaining obligations as the previous employer. Ley de Seguro Social [LSS] (Social Security Law), *as amended*, Art. 290, Diario Oficial de la Federación [DO], 27 de Mayo de 2011 [**Exhibit 073**].

34. Two decades later, on September 27, 1960, the Mexican government acquired 90% of the stock held by Mexican Light and Motor Power Company and Subsidiaries, S.A., which was thereupon renamed Central Light and Power Company, S.A. and Subsidiaries (Compañía de Luz y Fuerza del Centro, S. A. y Subsidiarias). On December 29, 1960, Congress gave constitutional status to this expropriation by amending the Mexican Constitution to read as follows:

> Article 27.- …
> […]
> The Federation shall be entitled exclusively to generate, conduct, transform, distribute and furnish any electric power intended to provide a public service. No concessions shall be granted to any private persons whatsoever and the Federation shall exploit all natural resources and property required for such purpose.[27]

This expropriation did not alter the bargaining rights of SME, which remained the exclusive bargaining agent of the company's unionized workers.

35. Fourteen years later, on December 16, 1974, President Luis Echeverría Álvarez commenced a process aimed at liquidating LyFC's third predecessor company. The liquidation of Central Light and Power Company, S.A. and Subsidiaries would take close to twenty years. Notably, the Federal Executive was careful to respect SME's bargaining rights throughout this process.

36. In the midst of that process, on March 14, 1989, the Secretary of Energy, Mines and Decentralized Industry, the federal Secretary of Labor, representatives of Central Light and Power Company, S.A. and Subsidiaries (in liquidation), and representatives of SME, executed an Agreement whereby, *inter alia*, the Secretariat of Energy, Mines and Decentralized Industry agreed to prepare a bill, to be tabled by the Federal Executive, to

[27] Constitución Politica de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de febrero de 1917, art. 27, para. 6, *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf [**Exhibit 008**].

amend the Law of the Public Service of Electrical Power (Ley del Servicio Público de Energía Eléctrica, "LSPEE").[28]

37. Pursuant to this agreement, the bill to be tabled "would represent the efforts of the federal government to guarantee the preservation of the workplace and the [Union's] right to administer the Collective Bargaining Agreement, in response to the demands put forth by the Mexican Union of Electrical Workers and the commitments it assumes."[29]

38. President Carlos Salinas de Gortari tabled the bill and on December 27, 1989. Congress enacted an amendment to Transitional Article Four of the LSPEE, providing that upon completion of the liquidation process of Central Light and Power Company, S.A. and Subsidiaries, the Federal Executive would arrange for the establishment of a decentralized public body, which would eventually be known as LyFC.

39. The December 27, 1989 Decree publishing the amendment to Transitional Article Four of the LSPEE provided that the March 14, 1989 Agreement would be applied, and that the workers' rights, as established in the law, the collective bargaining agreement and other labor agreements held by SME, would be respected. President Salinas de Gortari made a commitment to SME "that the determination of the future of Central Light and Power Company, S.A. and Subsidiaries would . . . imply neither 'dismissals, nor attacks on [SME's] legitimate rights or on the existence of the Mexican Union of Electrical Workers.'"[30] According to the legislative record, one of the stated objectives of the amendment to Transitional Article Four of the LSPEE was the following:

> In regard to the second objective, a period of uncertainty for the workers of Central Light and Power Company, S.A. and Subsidiaries In Liquidation, [who are] members of the Mexican Union of Electrical Workers [SME], comes to an end. With this step, **the permanence of this organization is ensured**, safeguarding the rights of both its members and the Union itself.[31]

[28] Agreement of March 14, 1989 Between Central Light and Power Company, S.A. and Subsidiaries and the Mexican Union of Electrical Workers, cl. 3. [**Exhibit 002**]. A copy of the Law of the Public Service of Electrical Power is attached as **Exhibit 074**.
[29] *Id*.
[30] Diario de los Debates de la Cámara de Senadores del Congreso de los Estados Unidos Mexicanos, LIV Legislatura, Año II, Primer Periodo ordinario, Sesión del 20 de Diciembre de 1989 (Dec. 20, 1989).
[31] *Id*. (emphasis added).

40. Four years later, on February 9, 1994, President Salinas de Gortari issued a Decree creating LyFC[32] under Article 4 of the LSPEE. Upon its creation, this new body became the "substitute" or successor employer of Central Light and Power Company, S.A. and subsidiaries. The Decree included the following provisions:

1) LyFC had legal personhood and assets of its own (Article 1);
2) The purpose of LyFC was to provide the public service of electrical power previously provided by Central Light and Power Company, S.A. and Subsidiaries (Article 2);
3) LyFC was to be governed by a Management Board, chaired by the Secretary of Energy, Mines and Decentralized Industry and comprised of representatives of the Secretariats of Revenue and Public Credit, Social Development, Trade and Industrial Promotion, and Agriculture and Hydraulic Resources, in addition to the Director General of the CFE and three representatives of the union holding the Collective Bargaining Agreement governing the body's labor relations, i.e., SME (Article 4);
4) LyFC's labor relations were to be governed by Paragraph "A" of Article 123 of the Mexican Constitution (Article 9); and
5) The Agreements of March 14, 1989 and February 1, 1994, entered into between the liquidated companies and SME, shall be applied (Transitional Article Third).[33]

41. From the creation of LyFC in 1994, SME and LyFC maintained a productive relationship that allowed SME's members to maintain a reasonable standard of living while LyFC remained a productive economic enterprise. Over the years, LyFC and SME had entered into a number of productivity agreements. As recently as March 16, 2008, LyFC and the Union executed a productivity and technological modernization agreement[34] that the Company's officers acknowledged provided the Company with the flexibility to improve productivity.

G. **Overview of Domestic Legal Issues and Litigation**

[32] Decree To Create the Decentralized Body of Central Light and Power], Diario Oficial de la Federación [DO], 9 de Febrero de 1994 [**Exhibit 003**].
[33] *Id.*
[34] Modernization Agreement Entered Into Between LyFC and the SME (Mar. 16, 2008) [**Exhibit 005**].

i. Termination of the 44,362 SME-represented workers of LyFC

42. In contrast with discretionary employer termination practices in the United States, in Mexico an employer may dismiss employees without liability only under appropriate causes for dismissal. Mexico's Federal Labor Law (Ley Federal de Trabajo, "LFT") sets out the appropriate bases for "labor termination" [35] (LFT Articles 53, 433 and 434) as well as the appropriate procedures to be followed depending on the cause of termination (LFT Article 435).[36]

43. Labor termination may result from "[*f*]*orce majeure* or acts of God for which the employer may not be deemed responsible" under Article 434. In such case, "a notice shall be filed with the Conciliation and Arbitration Board for its approval or disapproval pursuant to the procedure set out in Article 782 and in subsequent articles" under Article 435(I).[37]

44. After dissolving LyFC, the government took steps to terminate LyFC's workforce on the grounds that the President's Extinction Decree constituted *force majeure* within the meaning of Article 434(I). As Secretary of Labor Javier Lozano declared on October 11, 2009, the day the Extinction Decree came into force:

> **[I]n an event of this nature, where the labor relationships end precisely because of the existence of *force majeure*, in a manner alien to the body's management, the workers and their union, such as a Decree of the Executive,** the Federal Labor Law provides expressly that such *force majeure* is a cause for the termination of both individual and collective labor relationships.[38]

[35] Ley Federal de Trabajo [LFT] [Federal Labor Law], art. 53, 433, 434, *as amended*, Diario Oficial de le Federación, 1 de Abril de 1970.
[36] Article 435 sets out appropriate procedures to be followed in the specific case of labor termination as a consequence of the closing of companies or establishments or the final reduction of work. *Id.*, art. 435, *as amended*, Diario Oficial de le Federación, 1 de Abril de 1970.
[37] Ley Federal de Trabajo [LFT] [Federal Labor Law], art. 782, 435, *as amended*, Diario Oficial de le Federación, 1 de Abril de 1970.
[38] Secretary Fernando Gómez Mont, Conferencia de prensa que ofrecieron los Secretarios de Gobernación, Energía, del Trabajo y Previsión Social y el Director de la CFE, PRESIDENCIA DE LA REPÚBLICA (Oct. 11, 2009) (emphasis added), http://www.presidencia.gob.mx/2009/10/conferencia-de-prensa-que-ofrecieron-los-secretarios-de-gobernacion-energia-del-trabajo-y-prevision-social-y-el-director-de-la-cfe [**Exhibit 024**].

45. Article 47 of the LFT requires written notice of termination.[39] The government of Mexico did not provide written notice of termination to the 44,362 SME-represented workers of LyFC who were forcibly removed from the workplace on the evening of October 10, 2009, or who were subsequently prevented from entering the occupied worksites to provide their services.

46. The government proceeded to terminate the individual and collective labor relationships of LyFC in the absence of any of the termination causes set out in Articles 53 or 434 and without first following the procedure set out in Article 435.

ii. The JFCA's Approval of the SME Workers' Termination

47. Two days after the dissolution of LyFC, on October 13, 2009, the SAE, in its capacity as LyFC liquidator, brought a special proceeding before the JFCA under Articles 434(I) and 435(I) of the LFT,[40] requesting the approval of a notice to terminate the collective labor relationship between LyFC and SME, and consequently the SME collective agreement, as well as the individual labor relationships between LyFC and all of its unionized workers, due to an alleged *force majeure* (Case File No. IV-239/2009).[41] As the Secretary of Labor had anticipated two days prior, the SAE argued that the Presidential Decree dissolving LyFC amounted to *force majeure* not attributable to the employer, LyFC, whose necessary, immediate and direct consequence was the termination of the work.[42]

48. Through a ruling dated October 13, 2009, the JFCA formally received the SAE's application and ordered that SME be notified "on its own behalf and on behalf of the

[39] Ley Federal de Trabajo [LFT] [Federal Labor Law], art. 47, *as amended*, Diario Oficial de le Federación, 1 de abril de 1970.
[40] Article 435 stipulates that "a notice shall be filed with the Conciliation and Arbitration Board for its approval or disapproval pursuant to the procedure set out in Article 782 and in subsequent articles" in the case of either force majeure or legally declared bankruptcy under Article 434. Ley Federal de Trabajo [LFT] [Federal Labor Law], art. 434-35, *as amended*, Diario Oficial de le Federación, 1 de Abril de 1970 [**Exhibit 001**].
[41] *See* JFCA Decision Terminating the Individual and Collective Labor Relationships and the SME Collective Agreement, 1 (Aug. 30, 2010) [**Exhibit 025**].
[42] *Id*. at 1-2.

unionized workers" of LyFC.[43] The JFCA failed to notify the workers directly and individually, at their home addresses. The workers lacked notice to appear or intervene directly before the JFCA.

49. In a Statement of Defense dated October 31, 2009, SME argued, *inter alia*, that the Extinction Decree did not constitute *force majeure* within the meaning of Article 434(I) of the LFT. SME argued instead that the substitute employer provisions in Article 41 of the LFT applied to preserve the individual and collective labor relationships, as well as SME's bargaining rights and collective agreement.[44]

50. SME also requested, under Article 707 of the LFT,[45] that the President of the JFCA recuse himself because he was appointed by, and serves at the behest of, the President of Mexico,[46] who issued the Extinction Decree allegedly constituting the *force majeure* at issue in this case.[47] Further, the General Director of the SAE, who initiated these proceedings, was appointed, following a resolution by the President of Mexico,[48] by the Secretary of Revenue and Public Credit, who was in turn appointed by, and serves at the behest of, the President of Mexico.[49] Nevertheless, the President of the JFCA did not recuse himself.

51. The only evidence introduced by the SAE was the Extinction Decree and SME Collective Agreement.[50] The SAE did not marshal any evidence to show that the Extinction Decree constituted *force majeure*, or that the necessary, immediate and direct consequence of the Extinction Decree was the termination of the work. On the other

[43] *Id*. at 4.
[44] The SME's Statement of Defense is summarized in JFCA Decision Terminating the Individual and Collective Labor Relationships and the SME Collective Agreement, 4-9 (Aug. 30, 2010) [**Exhibit 025**].
[45] Article 707 addresses conflict of interest. Ley Federal de Trabajo [LFT] [Federal Labor Law], art. 707, *as amended*, Diario Oficial de le Federación, 1 de Abril de 1970 [**Exhibit 001]**
[46] Ley Federal de Trabajo [LFT] [Federal Labor Law], art. 612, *as amended*, Diario Oficial de le Federación, 1 de abril de 1970 [**Exhibit 001**]; Constitución Politica de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917, art. 89(II), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf [**Exhibit 008**].
[47] *See* SME's *Amparo* Application vs. JFCA Decision of August 30, 2010 (Sept. 23, 2010) at 12-14 [**Exhibit 026**].
[48] Federal Law for the Administration and Transfer of Public Sector Assets, art. 86, Diario Oficial de la Federación, art. 86, 19 de diciembre de 2002, *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/251.pdf [**Exhibit 077**].
[49] Constitución Politica de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917, art. 89(II), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf [**Exhibit 008**].
[50] *See* JFCA Decision Terminating the Individual and Collective Labor Relationships and the SME Collective Agreement, 3 (Aug. 30, 2010) [**Exhibit 025**].

hand, SME proposed to tender evidence which included, *inter alia*, an examination of the SAE representatives and expert witness testimony, and requested that the JFCA order the Secretariats of Energy and Revenue and Public Credit, among other authorities identified in the Preamble to the Extinction Decree, to provide it with reports on the reasons behind their recommendations to dissolve LyFC.[51] Without regard to the relevance of the evidence to the *force majeure* issue, the JFCA declined to admit them in a hearing held on October 31, 2009.

52. Ten months after this hearing, on August 30, 2010, and in the absence of any evidence, the JFCA issued a decision approving the termination of the collective labor relationship between SME and LyFC, the SME collective agreement, and the individual labor relationships between SME's members and LyFC, effective October 11, 2009,[52] and ordering that the SAE pay the workers severance.[53]

53. With regard to SME's employer substitution defense, the JFCA found that the dissolution of LyFC did not result in employer substitution because the requirements under Article 41 of the LFT had not been met.[54] The JFCA relied in part on an August 16, 2010 decision issued by the Sixth District Court for Labor Matters of the Federal District.[55] The JFCA stated, *inter alia*, that no entity had acquired the property in the assets of LyFC,[56] even though a transfer of title is not required to trigger Article 41.

54. On September 23, 2010 SME challenged, *inter alia*, the JFCA's actions during the October 31, 2009 hearing, the JFCA's August 30, 2010 decision and the JFCA President's failure to recuse himself, through the filing of an *amparo* application before the Second Collegiate Court for Labor Matters of the First Circuit (Case File No. D.T.

[51] *Ibid.* at 9; and SME's *Amparo* Application v. JFCA Decision of August 30, 2010, 30-34 (Sept. 23, 2010) [**Exhibit 026**].
[52] JFCA Decision Terminating the Individual and Collective Labor Relationships and the SME Collective Agreement, 51-52 (Aug. 30, 2010) [**Exhibit 025**].
[53] *Ibid*. at 45, 52.
[54] Article 41 states that in the case of an employer replaced by a new employer, both are jointly liable for employment obligations for the six-month period following the time the union receives notice of the substitution. Ley Federal de Trabajo [LFT] [Federal Labor Law], art. 41, *as amended*, Diario Oficial de le Federación, 1 de Abril de 1970 [**Exhibit 001]**
[55] *Ibid*. at 35-43.
[56] *Ibid*. at 40.

1337/2010).[57] On or about February 2011, the Federal Attorney General requested that the Supreme Court of Mexico assert its jurisdiction over the case. On April 1, 2011, the Supreme Court of Mexico referred the Attorney General's request to its Second Chamber for resolution (Case File No. 00030/2011-00). In its May 4, 2011 session, the Supreme Court's Second Chamber decided not to assert its jurisdiction over the case.[58] This ruling resulted in the case being returned to the Second Collegiate Court for resolution. A final decision remains outstanding.

55. While the JFCA's decision awaits final judicial determination, the SME collective agreement is not being applied by the government as employer. SME has filed other legal challenges seeking to enforce the provisions of its collective agreement.[59]

iii. SME's "unjustified dismissal" case against LyFC, SAE and CFE

56. On November 6, 2009, SME filed an unjustified dismissal case on behalf of its 44,362 members terminated by their forcible removal from LyFC worksites on October 10, 2009 and the Extinction Decree of October 11, 2009. SME brought the action against LyFC, the SAE and the CFE, at Special Board No. 5 of the JFCA (Case File No. 1267/2009).[60]

57. SME sought, *inter alia*, 1) the reinstatement of all dismissed workers and 2) for CFE, or in the alternative the SAE, to assume all of LyFC's labor obligations as substitute (or successor) employer to LyFC pursuant to Article 41 of the LFT. In addition, the Union

[57] SME's *Amparo* Application v. JFCA Decision of August 30, 2010 (Sept. 23, 2010) [**Exhibit 026**].
[58] Acta de la Sesión Celebrada por la Segunda Sala de la Suprema Corte de Justicia de la Nación el Día Miércoles 4 de Mayo de Dos Mil Once, 6 (May 4, 2011), http://www.scjn.gob.mx/2010/segundasala/Documents/ActasSesionPublica/2011/Mayo/ActaSesPub2sala20110504v2.pdf [**Exhibit 027**].
[59] On December 3, 2009, the Union filed an *amparo* application before the First Assistant District Court (Case File No. 3696/2009) alleging that the workers who had accepted their severance payments should be entitled to continue receiving health benefits as of Dec. 7, 2009. The Union also filed a criminal complaint (Case File No. 065/2010) based on the fact that, without legal authority, the SAE had withheld payment of the year-end bonuses and savings funds to which all SME members are entitled.
[60] SME's Unjustified Dismissal and Substitute Employer Statement of Claim (Nov. 6, 2009) [**Exhibit 028**].

sought payment of earned but unpaid wages, recognition of the workers' seniority and protection of their pensions.

58. Subsequently, on November 25, 2009 and September 23, 2010, SME filed documents with the JFCA amending, clarifying and adding to its November 6, 2009 Statement of Claim.[61] In particular, SME requested that, in dealing with the substitute employer issue, the JFCA apply Clauses 15 and 115 of SME collective agreement.[62] Clause 15 groups LyFC's unionized workers into several geographic zones and provides that the work of LyFC shall be performed by SME members:

> ZONES.- …
> […]
> The works subject to this Agreement, which may be carried out in those Zones, shall be done with the unionized personnel affiliated with the Mexican Union of Electrical Workers, in accordance with the applicable legal and regulatory provisions and the norms and internal manuals of LyFC].

Further, Clause 115 reads as follows:

> RIGHT TO ADMINISTER THIS AGREEMENT.- **Should LyF[C], by any reason, transfer, sell or alienate its property,** or be transformed into a public decentralized enterprise, **or become part of the Federal Electricity Commission** or other institutions, whatever their name may be in the future under any legal or administrative structure which they may adopt, **it shall be obligated to enter into an agreement with any such institution, binding it to comply, in its character as substitute employer, with all of the stipulations contained in this Collective Bargaining Agreement and the legal provisions that govern the labor relationships between LyF[C] and the Union, as well as the recognition of the Mexican Union of Electrical Workers as representative of … its workers, as well as the representation of its retirees and the right to administer this Collective Bargaining Agreement**.[63]

Clause 115 of the SME collective agreement was the result of a jurisdictional agreement entered into between SME and the SUTERM on May 15, 1985, and

[61] Amendments, Clarifications and Additions to the SME's November 6, 2009 Statement of Claim (Sept. 23, 2010) [**Exhibit 029]**.
[62] *Id*. at 2.
[63] *Id*. (emphasis added).

witnessed by the President of Mexico.[64] SME also submitted that these clauses must be complied with not only because of their legally binding character, but also because Article 4 of the Extinction Decree itself provides in part that "[t]he labor rights of the workers of Central Light and Power shall be respected…"[65]

59. In Statements of Defense dated September 24[66] and October 6, 2010,[67] the SAE denied each and every one of the allegations made by SME in its Statement of Claim and the subsequent amendment. In arguing that none of the relief sought by SME and its members could be awarded, particularly their request for reinstatement and payment of back wages, the SAE relied on the following decisions:

1) The JFCA's August 30, 2010 decision,[68] which approved the termination of the individual and collective labor relationships of LyFC as well as the SME collective agreement;[69] and
2) An August 16, 2010 decision issued by the Sixth District Court for Labor Matters of the Federal District.[70] In confirming a JFCA decision denying SME the right to strike against the SAE and the CFE as substitute employers in connection with the 2010 round of bargaining, the Court purported to find that there was no employer substitution on the facts as the test in Article 41 of the LFT had not been made out.[71]

60. In defending itself against SME's unjustified dismissal and employer substitution case, the SAE and/or the CFE have resorted to procedural maneuvers, which have had the effect of delaying the main proceedings, as follows:

[64] *Id*. at 21-24. *See* Jurisdictional Agreement Between the SME and the SUTERM (May 15, 1985) [**Exhibit 030**].
[65] Amendments, Clarifications and Additions to the SME's November 6, 2009 Statement of Claim, at 2-3 (Sept. 23, 2010) [**Exhibit 029**].
[66] SAE's Legal Representative Humberto Cavazos Chena, Statement of Defense Responding to the SME's Statement of Claim and Amendments, Clarifications and Additions Thereto 15-17 (Sept. 24, 2010) [**Exhibit 031**].
[67] SAE's Statement of Defense in Unlawful Dismissal and Employer Substitution Case (Oct. 6, 2010) [**Exhibit 080**].
[68] Case File No. IV-239/2009.
[69] *See, e.g.*, SAE's Legal Representative Humberto Cavazos Chena, Statement of Defense Responding to the SME's Statement of Claim and Amendments, Clarifications and Additions Thereto 15-17 (Sept. 24, 2010) [**Exhibit 031**].
[70] Case File No. 710/2010.
[71] *See id.* at 28-30; Sixth District Court Decision Confirming Denial of Right to Strike and Finding Substitute Employer Provisions Do Not Apply (Mar. 12, 2010) [**Exhibit 032**]; Press Bulletin, Secretariat of Labor and Social Welfare, *Determina Juez de Distrito en Materia Laboral, que Comisión Federal de Electricidad (CFE) No Es Patrón Sustituto de los Ex Trabajadores de Luz y Fuerza del Centro* 132 (Aug. 20, 2010), http://www.stps.gob.mx/bp/secciones/sala_prensa/boletines/2010/agosto/bol_132.html [**Exhibit 033**].

- The defendants filed a motion to join approximately 40,000 cases, which was heard over four separate hearings held on September 25, 2010; October 9, 2010; November 6, 2010; and December 4, 2010.
- On September 24, 2010, the SAE made a motion seeking a declaration that SME's Labor Secretary and its lawyers had no legal standing to bring the November 6, 2009 suit on behalf of SME and its members.[72]

  Despite the fact that the SAE withdrew this motion on February 22, 2011, the JFCA decided that it would nevertheless deal with the issue. In a ruling dated March 8, 2011, the JFCA denied Mr. Bobadilla Zarza (SME's Labor Secretary) legal standing to represent SME or its members, allowing him to appear in his personal capacity only.

  SME has challenged the JFCA's ruling on legal standing by filing an *amparo* application on March 28, 2011, but a decision by the First District Court of the First Region's Auxiliary Center, based in the Federal District, is still outstanding (Case File No. 109/2011).[73]

- In the SAE's September 24, 2010 Statement of Defense and elsewhere, the SAE and the CFE have relied on an August 11, 2010 "loan agreement" of their own making to argue that the CFE cannot be a substitute employer because it has possession of LyFC's assets as a temporary loan only.[74] This "loan agreement" was entered into between the SAE and the CFE with respect to LyFC's physical assets.[75] Executed almost a year *after* the filing by the SME of the employer substitution claim, this agreement fits into a pattern of governmental actions deliberately aimed at circumventing the substitute employer provisions of the LFT.

61. In light of the issues shared by SME's unjustified dismissal and employer substitution case and the SAE's termination case, SME moved to have these two files joined under Article 766 of the LFT in its Statement of Claim of November 6, 2009.[76] On March 12, 2011, the JFCA denied SME's request.[77]

62. The JFCA finally held a hearing to receive the parties' evidence in SME's unjustified dismissal and employer substitution case on April 9, 2011, after a previous hearing scheduled for March 26, 2011 was cancelled. The JFCA has not yet ruled on the

[72] SAE Legal Representative Humberto Cavazos Chena, Statement of Defense Responding to the SME's Statement of Claim and Amendments, Clarifications and Additions Thereto 1-6, (Sept. 24, 2010) **[Exhibit 031]**.
[73] SME's *Amparo* Application vs. JFCA's Mar. 8, 2011 Ruling on Legal Standing (Mar. 28, 2011) [**Exhibit 034**].
[74] SAE Legal Representative Humberto Cavazos Chena, Statement of Defense Responding to the SME's Statement of Claim and Amendments, Clarifications and Additions Thereto 36-41 (Sept. 24, 2010) **[Exhibit 031]**.
[75] *See Loan Agreement Entered into Between the SAE and the CFE* (Aug. 11, 2010) **[Exhibit 035]**.
[76] SME's Unjustified Dismissal and Substitute Employer Statement of Claim, at 16 (Nov. 6, 2009) [**Exhibit 028**].
[77] This ruling is transcribed in pages 8-12 of the Submissions Presented by the SAE's Legal Representative, Humberto Cavazos Chena (Oct. 8, 2010) [**Exhibit 036**].

admissibility of that evidence. Despite the fact that SME filed its claim almost 21 months ago, the JFCA is yet to issue a final decision.

iv. The rehiring of a fraction of SME-represented workers of LyFC on a temporary basis via unlawful severance payments

63. The CFE maintained that the Extinction Decree was a legitimate cause for the termination of the 44,362 SME-represented workers of LyFC, and proceeded to rehire a small fraction of them only on a temporary basis.

64. The President and members of his cabinet made a number of statements in the week following LyFC's shutdown suggesting that SME members would be rehired by the CFE. The President of Mexico indicated that he had given instructions to the CFE to rehire as many SME members as possible. Further, CFE Director Alfredo Elías Ayub stated in media interviews that 8,000 workers would be hired to operate the former LyFC operation in Mexico City alone,[78] before clarifying that by the end of October 2009, the figure would actually be about 8,500.[79] Secretary of Labor Javier Lozano Alarcón stated that the figure of 8,500 provided by the CFE Director was a floor rather than a ceiling,[80] and speculated that the figure would be much higher than 10,000.[81] He also stated that any workers hired would be CFE employees covered by the SUTERM collective

[78] Interview by Oscar Mario Beteta with Alfredo Elias Ayub, *Para que un Sindicato Pueda Subsistir o Pueda Tener Buenas Condiciones Requiere que la Empresa Esté Bien*, PRESIDENCIA DE LA REPÚBLICA (Oct. 12, 2009), http://www.presidencia.gob.mx/2009/10/para-que-un-sindicato-pueda-subsistir-o-pueda-tener-buenas-condiciones-requiere-que-la-empresa-este-bien [**Exhibit 037**].

[79] Interview by Carlos Loret de Mola with Alfredo Elias Ayub, *Nuestros ingenieros están operando las instalaciones con mucha eficacia, llevamos una operación normal y el servicio eléctrico se va a proporcionar con toda y absoluta normalidad*, PRESIDENCIA DE LA REPÚBLICA (Oct. 12, 2009), http://www.presidencia.gob.mx/2009/10/nuestros-ingenieros-estan-operando-las-instalaciones-con-mucha-eficacia-llevamos-una-operacion-normal-y-el-servicio-electrico-se-va-a-proporcionar-con-toda-y-absoluta-normalidad/ [**Exhibit 038**].

[80] Interview by Marco Antonio Mares with Javier Lozano Alarcon, *Lo que buscamos es que los, digamos los 44 mil trabajadores de Luz y Fuerza del Centro que estaban en activo, tengan una ocupación productiva además de la liquidación: Javier Lozano*, PRESIDENCIA DE LA REPÚBLICA (Oct. 13, 2009), http://www.presidencia.gob.mx/2009/10/lo-que-buscamos-es-que-los-digamos-los-44-mil-trabajadores-de-luz-y-fuerza-del-centro-que-estaban-en-activo-tengan-una-ocupacion-productiva-ademas-de-la-liquidacion-javier-lozano [**Exhibit 039**].

[81] Interview by Carmen Aristegul with Javier Lozano Alcaron, *Si hubiera tenido la Toma de Nota en este momento el señor Martín Esparza en nada cambiaría la situación económica de Luz y Fuerza del Centro: Javier Lozano*, PRESIDENCIA DE LA REPÚBLICA, Oct. 13, 2009, http://www.presidencia.gob.mx/2009/10/si-hubiera-tenido-la-toma-de-nota-en-este-momento-el-senor-martin-esparza-en-nada-cambiaria-la-situacion-economica-de-luz-y-fuerza-del-centro-javier-lozano [**Exhibit 020**].

agreement.[82] The Secretary of Labor also indicated that credits would be made available to LyFC employees to start companies that could become providers of goods and services to the CFE.[83] Revenue Secretary Agustín Carstens noted that the actual status of any SME members rehired by the CFE would have to be determined, but that it was possible that a subsidiary of the CFE would be created to hire these workers with a contract "completely different" from that of the SUTERM.[84]

65. Moreover, the Secretary of Labor stated that SME members would only get preference in rehiring if they accepted the severance payments being offered by the government prior to the deadline of November 14, 2009.[85] As it turned out from a later communiqué, no SME member would be rehired at all unless and until he or she had taken a severance payment.[86] While approximately 27,280 SME members have been forced by economic or other pressures to accept these severance payments, it appears that only a negligible fraction has been rehired on a temporary basis.[87] Further, CFE personnel have fraudulently offered temporary employment to terminated SME members in exchange for money,[88] while SME members have been blacklisted by the CFE's subcontractors.[89]

66. In the days following the issuance of the Extinction Decree, the SAE initiated a proceeding before the JFCA to facilitate the payment of severance and offered "enhanced" severance payments to those workers who claimed their severance between

[82] *See* Interview by Marco Antonio Mares, *supra* note 77. [**Exhibit 039**].
[83] *Id*.
[84] Interview by Monica Garza with Agustin Carstens, *CFE va estar haciendo una evaluación del perfil del trabajador que va a necesitar para reincorporar a las labores: Secretario de Hacienda*, PRESIDENCIA DE LA REPÚBLICA, Oct. 14, 2009, http://www.presidencia.gob.mx/2009/10/cfe-va-estar-haciendo-una-evaluacion-del-perfil-del-trabajador-que-va-a-necesitar-para-reincorporar-a-las-labores-secretario-de-hacienda [**Exhibit 040**].
[85] Interview by Carmen Aristegul, *supra* note 78.
[86] Interior Secretariat, *Comuniqué 50/11: Responde SEGOB a Propuesta del SME*, Feb. 15, 2011, http://www.presidencia.gob.mx/2011/02/responde-segob-a-propuesta-del-sme/ [**Exhibit 041**].
[87] Whether any SME members have been rehired by the CFE, and if so, how many, is information within the CFE's exclusive possession and control.
[88] Fabiola Martínez, *Denuncian Electricistas Subterfugios para Evitar que los Contrate CFE*, LA JORNADA, Feb. 28, 2010, http://www.jornada.unam.mx/2010/02/28/politica/013n2pol [**Exhibit 042**]. *See also* Statement of Marco Guzman, *Discriminado por Ser Electricista* (Aug. 18, 2011), http://www.youtube.com/watch?v=DoMrJDyi2Zw.
[89] *See*, *e.g.*, Statement of Marco Guzman, *supra* note 85.

October 14 and November 14, 2009.[90] The SAE established a number of centers where LyFC's former workers could voluntarily go to receive their severance payments.

67. From the government's perspective, by accepting these payments SME members would be giving up their right to be reinstated under the LFT.[91] As of June 2011, 16,720 SME members have declined severance and have struggled to survive for almost two years by relying on their retired parents for support, by joining the ranks of Mexico's informal economy or by migrating in search for work.

68. SME has challenged the illegal severance payments made by the federal government by requesting in its unjustified dismissal and employer substitution claim (para. 58 above), that the individual severance agreements entered into between the SAE and those SME members who were forced to accept severance, be declared null and void.[92] Under Article 5(XIII) of the LFT, these agreements constitute a surrender of rights that may not be waived by contract.[93] A decision in this matter is still outstanding.

H. The Government's Improper Involvement in SME's Internal Affairs

i. Denial of the *Toma de Nota* to the Union's Duly Elected Leadership

69. The federal government has involved itself improperly in SME's internal affairs by denying the legal acknowledgment, or *toma de nota,* to the Union's duly elected leadership. The denial of this legal acknowledgment has not only impaired the Union's ability to defend itself and its members before the JFCA, but also unduly delayed the resolution of various legal proceedings.

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[90] *See* SAE's Legal Representative Humberto Cavazos Chena, SAE's Oct. 13, 2009 Application to the JFCA for the Appointment of Notaries Public to Certify the Payment of Severance, transcribed in Statement of Defense Responding to the SME's Statement of Claim and Amendments, Clarifications and Additions Thereto (Sept. 24, 2010), para 9 [**Exhibit 031**].

[91] Pursuant to Article 48 of the LFT, a worker suing for unjustified dismissal may choose one of the two following remedies: (1) reinstatement or (2) compensation equivalent to three months' salary. [**Exhibit 001**].

[92] SME's Unjustified Dismissal and Substitute Employer Statement of Claim (Nov. 6, 2009), at 4, 16 [**Exhibit 028**].

[93] Article 5 of the LFT provides that "[t]he provisions of this Law are public order provisions," and that a stipulation, whether written or verbal, which establishes "[s]urrender on the part of the worker of any of the rights or prerogatives provided for in the labor norms," shall not have any legal effect, nor will it prevent the enjoyment and exercise of rights. In any case where labor rights are surrendered, the LFT shall fill in the void created by a declaration that the contractual clause is null and void. [**Exhibit 001**].

70. In July 2009, SME held internal elections, electing half of SME's 26-member Central Committee, including incumbent Secretary-General Martin Esparza Flores.[94] Although Mr. Esparza's slate was successful, on October 2, 2009, just nine days before the dissolution of LyFC by Presidential Decree, the General Directorate of Registry of Associations (Dirección General de Registro de Asociaciones, "DGRA"), an office of the STPS, refused to grant a legal acknowledgment, known as a *toma de nota*, to the 13 SME officers elected during SME's July 2009 elections.[95] The one-page decision denying the *toma de nota* contained no rationale and stated only that in reaching its decision, the DGRA had "evaluated… the formal aspects of the electoral process of the Mexican Electrical Workers' Union."[96] Prior to denying the *toma de nota*, on September 3, 2009 and September 10, 2009, the DGRA had requested that SME provide additional information and numerous documents regarding the Union's internal affairs and the July 2009 electoral process, for the purposes of scrutinizing the election and ostensibly to verify compliance with the provisions of the Union's Constitution. SME provided the documents and the requested information prior to the denial notwithstanding that the DGRA had no legal authority under the LFT to request some of these internal union documents.

71. The *toma de nota* was finally granted 14 months later, on December 15, 2010. At that time, the DGRA again refused to grant the *toma de nota* to the other half of the Central Committee members elected in the elections of July 2010. The state interference in the internal operation of SME has continued most recently with the delayed refusal to grant the *toma de nota* to the 26 SME Central Committee members elected in June 2011 elections.

[94] The central committee of the Mexican Union of Electrical Workers has 26 elected positions, each with a two-year mandate. Elections occur in July. Half of the executive committee is elected in even years and half is elected in odd years.
[95] *See* DGRA Denial of Legal Acknowledgment (*Toma de Nota*) to the SME, File 10/5096-25, Oct. 2, 2009 [**Exhibit 043**].
[96] *Id.*

72. By denying the *toma de nota*, the federal government has deprived the Union's duly-elected leadership of the legal personhood to function as well as the unrestrained ability to bring legal claims and pursue other redress on behalf of SME and its members.

73. After a 90-day hunger strike by SME members, the government entered into talks with SME. While the government has not implemented all the agreed upon terms, it finally granted the *toma de nota* to the Esparza slate of Union officials on December 15, 2010.[97] However, the DGRA has refused to grant the *toma de nota* to the other half of the Central Committee members elected in July 2010.

74. In order to reset the internal election cycles after the government refused to recognize half of SME's Central Committee members, from June 16, 2011 to June 27, 2011, SME held an election for all 26 positions of the Central Committee and Autonomous Commissions. The 37,420 retirees and terminated workers of LyFC who had not taken severance from the government were eligible to vote, and 25,421 of them (68% of the membership eligible to vote) exercised their right. Secretary-General Martín Esparza Flores was re-elected to a third term with 98% of the votes. Every other member of the Central Committee obtained between 94 and 98% of the votes.[98] A team of national and international[99] independent observers representing 20 organizations validated these results[100] and found SME elections to be free, fair and transparent.[101]

75. On or about July 15, 2011, SME's duly-elected leadership submitted the election results to the DGRA of the STPS. However, the DGRA only granted the *toma de nota* to SME leaders in September 2011.

ii. Additional Government Involvement in the SME's Internal Affairs

[97] DGRA Legal Acknowledgement (*Toma de Nota*) Issued to the SME, Dec. 15, 2010 [**Exhibit 046**].
[98] Lorraine Clewer (Mexico Country Program Director, Solidarity Center, AFL-CIO), *Members Vote Therefore The Union Exists: An Embattled Mexican Union Demonstrates its Strength at the Ballot Box*, June 2011 (**Exhibit 047**).
[99] The international observers included representatives of the AFL-CIO's Solidarity Center, the United Autoworkers' Union (UAW), the San Francisco Labor Council (SFLC) and the Canadian Association of Labour Lawyers (CALL).
[100] Report of the National and International Committee of Independent Observers on the Electoral Process of the Mexican Union of Electrical Workers, June 16, 2011-July 1, 2011 (**Exhibit 048**).
[101] Jodi Martin (Member, Canadian Association of Labour Lawyers), *The 2011 Mexican Electrical Workers (SME) Elections: Dispatch from the Observation*, July 2011 (**Exhibit 049**).

76. In addition to denying the *toma de nota* on several occasions, the government has engaged in other actions aimed at quashing the SME, including interfering with SME's internal meetings and assemblies as well as the detention of Executive Committee members. For instance, on October 28, 2010, the Under-Secretary of Divisions of SME's Central Committee, Miguel Angel Marquez Ríos, was detained under arrest warrants issued by the Fifth and Ninth Courts of Puebla District and remains in prison to this day. Further, twelve other SME members remain in detention on a variety of charges (including resisting arrest), which most rights observers consider meritless.[102]

77. Following the denial of the *toma de nota* in 2009 but before the dissolution of LyFC, the Mexican government terminated the collection of union dues from SME members and froze the Union's bank accounts.[103] SME had three bank accounts at Scotiabank Inverlat.[104] [105] On February 9, 2010 the Directorate of Civil Payments into Court of the Federal District[106] surrendered the Deposit Bills to SME's Labor Secretary, Eduardo Bobadilla Zarza, as he had produced his own *toma de nota* and had been authorized by SME's Secretary-General to receive the monies. However, the National Savings and Financial Services Bank (Banco del Ahorro Nacional y Servicios Financieros, "BANSEFI"), issuer of the Deposit Bills, has refused payment of these bills to Bobadilla Zarza on the basis that, notwithstanding his *toma de nota*, he allegedly lacks the legal powers to receive the bills under the LFT and the Union Constitution.[107] Ever since then,

[102] Lorraine Clewer (Mexico Country Program Director, Solidarity Center, AFL-CIO), Members Vote Therefore The Union Exists: An Embattled Mexican Union Demonstrates its Strength at the Ballot Box, June 2011 [**Exhibit 047**].
[103] *See, e.g.*, Julian Sanchez, *SME Pasa la 'Charola' por Falta de Ingresos*, EL UNIVERSAL, Oct. 10, 2009, *available at* http://www.eluniversal.com.mx/nacion/171810.html [**Exhibit 044**]. On October 9, 2009, LyFC deposited the following amounts in the SME's bank account: Deposit Bill No. S.456475, for the sum of $888,959.75 MX; Deposit Bill No. S. 456476 for the sum of $7,586,896.33 MX; Deposit Bill No. S.456477 for the sum of $7,519,056.29 MX; and Deposit Bill No. S.456478 for the sum of $7,403,017.14 MX. The Federal Government has made false accusations against the Union and taken control of this money. The SME has a bank account with Scotiabank Inverlat, account number 00103926516, with a balance of over $80,000,000.00 MX, which was frozen by the Federal Government at the same time that it occupied the LyFC facilities on October 10, 2009. This sum has not yet been paid to the SME.
[104] These were checking accounts 00103926516 and 00109587896 as well as the account assigned to investment contract 79069629.
[105] The monies that Scotiabank Inverlat deposited into court totalled $21,055,289.23 MX and were represented by Deposit Bills V027149, V027150 and V027151, issued to Scotiabank Inverlat by the National Savings and Financial Services Bank (Banco del Ahorro Nacional y Servicios Financieros, "BANSEFI").
[106] Dirección de la Oficina Central de Consignaciones Civiles del Distrito Federal.
[107] This argument was included in a letter from the STPS dated February 17, 2010.

and despite the Directorate of Civil Payments' prior decision to release the funds to Bobadilla Zarza, the BANSEFI has refused payment to him and SME lawyer Amalia Vargas Ríos on the basis that, *inter alia*, they are not authorized to receive the funds on behalf of SME and the monies have been seized by the federal Attorney General's Office (Procuraduría General de la República)[108] in connection with the criminal charges being pursued against them.

78. SME's duly elected leadership is now facing criminal charges for trying to get access to funds that belong to the Union. In a recent development, on June 21, 2011, the Sixth Court for Criminal Matters of the First Circuit indicted, and issued arrest warrants against, SME Secretary-General Martín Esparza, SME Secretary of Labor Eduardo Bobadilla Zarza, and SME staff lawyer Amalia Vargas Ríos, for the alleged offense of attempted fraud. They were charged for attempting to receive payment of the Deposit Bills that the Directorate of Civil Payments into Court of the Federal District had previously determined were to be paid to Bobadilla Zarza as SME's representative.[109]

I. JFCA's Extreme Delays in Administering Justice

79. The federal judiciary and the JFCA have delayed deciding the applications and claims filed by SME, in violation of the right to a speedy administration of justice enshrined in Article 17 of the Mexican Constitution. Although the administration of justice has been notoriously slow at all tribunal and court levels, the delays created by the JFCA are extreme.

80. While the JFCA took just over 10 months to decide the SAE's application requesting approval of its notice to terminate the individual and collective labor relationships of LyFC, it has not yet decided SME's unjustified dismissal and employer substitution claim, filed almost 21 months ago. It is unclear how many more months it will take for SME's claim to be adjudicated, given that the JFCA has not even ruled on the admissibility of the evidence tendered in a hearing held on April 9, 2011.

[108] BANSEFI Letter from Alarcón Urueta to Bobadilla Zarza, Mar. 9, 2010 [**Exhibit 045**].
[109] Excerpt of the Sixth Court's Decision Containing the Arrest Warrants Against the SME Leadership, June 21, 2011, [**Exhibit 050**].

81. Finally, the JFCA decided to address the issue of SME Secretary-General Martín Esparza's standing to bring the November 6, 2009 suit on behalf of SME. This was despite the fact that the SAE had already withdrawn its September 24, 2010 motion challenging Esparza's standing on February 22, 2011. The JFCA refused to recognize Martín Esparza as Secretary-General of the SME.[110] The JFCA then reversed itself on this point six days later, on March 14, 2011, and recognized Mr. Esparza as representative of the SME.[111] JFCA's handling of SAE's motion resulted in unwarranted delays.

82. Given its lack of independence and biased track record, the JFCA is likely to rule against SME, in which case an *amparo* application will follow and greater, unquantifiable delays will occur at the federal courts level, further compounding what petitioners submit constitutes an already egregious violation of Article 17 of the Mexican Constitution.

J. The Precarious Working Conditions of Non-Union Workers Now Performing the Former Work of SME Members

i. Transfer of the LyFC Enterprise to the CFE

83. After dissolving the LyFC, the government turned over the entire LyFC enterprise, including all of its assets and physical facilities, to Mexico's other state-owned power company, the CFE, which immediately began providing the same power services previously provided by LyFC. The CFE also assumed the federal budget that previously had been allocated to LyFC, and registered itself with the Mexican Institute of Social Security (Instituto Mexicano del Seguro Social) as an employer with respect to the geographic areas in which LyFC had previously provided electrical power services.[112]

[110] *See* JFCA Ruling Refusing to Recognize Standing of SME Official and Lawyers (Mar. 8, 2011) at 4-7, 277 **[Exhibit 078]**.
[111] JFCA Ruling Reversing In Part Its March 8, 2011 Ruling (Mar. 14, 2011) [**Exhibit 079**].
[112] Computer Snapshots of the IMSS Employer Registration Database (July 19, 2010) [**Exhibit 051**]. *See also* Amendments, Clarifications and Additions to the SME's Nov. 6, 2009 Statement of Claim (Sept. 23, 2010), at 19-20 [**Exhibit 029**].

Also, since LyFC's dissolution, the CFE has been issuing payment receipts to users who had electrical power contracts with LyFC.[113]

84. In the days following LyFC's dissolution, the military and approximately 3,500 managerial (or confidential) CFE personnel carried out the functions previously performed by SME-represented workers[114] in order to effect the transfer of SME members' jobs to non-union subcontractors.

85. CFE documents show that in operating the LyFC enterprise, the CFE has been using hundreds of private subcontractors since October 11, 2009. This information is set out in the table below.[115] Some of these private subcontractors are companies set up by former SME-represented LyFC workers with credits facilitated by the government. None of these private subcontractors employs unionized workers.

Time Period	**Type of Contract by Price**	**Number of Private Subcontractors**	**Cumulative Price of All Contracts**
2009			
Oct. 11 to Dec. 31, 2009	Under $1 million MX	102	$50,067,432.42 MX
	Over $1 million MX	87	$213,877,370.10 MX
Total……			$263,944,802.52 MX
2010			
Jan. 1st to Oct. 31, 2010	Under $1 million MX	177	$86,832,971.49 MX
Jan. 1st to Mar. 31, 2010	Over $1 million MX	158	$401,282,201.58 MX
April 1st to Oct. 31, 2010		330	$1,868,443,698.23 MX
Total ……			$2,269,725,899.81 MX

[113] See, for example, LyFC bill (Jan. 12, 2004) and CFE bill (Sept. 22, 2010) issued to Martín Cruz Hernández with respect to the same Mexico City address [**Exhibit 052**]. *See also* Amendments, Clarifications and Additions to the SME's November 6, 2009 Statement of Claim (Sept. 23, 2010), at 21 [**Exhibit 029**].

[114] Figure provided by CFE Director Alfredo Elías Ayub. *See* Interview by Carlos Loret de Mola with Alfredo Ilias Ayub, *Nuestros ingenieros están operando las instalaciones con mucha eficacia, llevamos una operación normal y el servicio eléctrico se va a proporcionar con toda y absoluta normalidad*, PRESIDENCIA DE LA REPÚBLICA (Oct. 12, 2009), http://www.presidencia.gob.mx/2009/10/nuestros-ingenieros-estan-operando-las-instalaciones-con-mucha-eficacia-llevamos-una-operacion-normal-y-el-servicio-electrico-se-va-a-proporcionar-con-toda-y-absoluta-normalidad [**Exhibit 038**].

[115] CFE, Sub-Directorate of Distribution, *Contratista Participante en el Programa Operativo de Emergencia* [Subcontractor Participating in the Emergency Operational Program], for the periods October 11 to December 31, 2009; January 1 to October 31, 2010, and April 1 to October 31, 2010 [**Exhibits 053, 054, 055, 056 and 057**].

86. Today, the work previously performed by SME members is still being performed by non-unionized employees of the CFE and private subcontractors. According to figures that the Interior Secretariat provided to SME on February 15, 2011, approximately 8,600 workers are now performing the work previously performed by SME members. None of these workers is unionized or covered by a collective agreement, not even the SUTERM collective agreement.

87. The 8,600 non-unionized workers provided by the Interior Secretariat do not include the large numbers of workers who are being kept "off the books." The number only includes:

(a) the approximately 150 CFE managerial personnel and former LyFC managerial staff temporarily engaged by the CFE;

(b) the approximately 500 SME members rehired by the CFE[116] either as managerial staff or on 3- or 6-month contracts to train the subcontractors' employees; and

(c) the thousands of workers employed by the legion of private subcontractors engaged by the CFE.[117]

88. Despite its initial representations on the rehiring of SME-represented workers, the federal government has used the CFE to create a new structure by which the work previously performed by SME members is now performed by non-unionized workers.

ii. Death and Serious Injuries Sustained by the Workers Now Performing the Former Work of SME Members

89. Since the CFE started subcontracting work related to the LyFC enterprise, a number of workers employed by the CFE or its subcontractors have died on the job. Only a few of these fatalities have been reported in the media. For example, on January 19, 2010, Luis Galixia Benítez, a 31-year old worker for CFE subcontractor *Comercializadora y Ejecutora de Proyectos*, died from electrocution while working on a high-tension line in

[116] Fabiola Martínez, *El SUTERM No Obstaculiza Contratos de ex Trabajadores de LFC: Fuentes*, LA JORNADA, Aug. 6, 2010, *available at* http://www.jornada.unam.mx/2010/08/06/politica/014n2pol [**Exhibit 058**].

[117] These figures are an estimate. Information as to the number of workers currently operating the LyFC enterprise, the identity of their employer and whether or not they are unionized, is within the CFE's exclusive possession and control.

Irolo, State of Hidalgo.[118] On September 9, 2010, CFE employees Jorge Díaz Estrada (a manager) and Fernando Macías Quintero died instantaneously as a result of a short circuit which appears to have caused two explosions during repairs at the Coyoacán Substation at the intersection of Universidad and Martin Mendalde, Colonia Acacias, Benito Juárez Delegation, Mexico City.[119] A month later, on or about October 14, 2010, José Estrada, a 40-year old worker for CFE subcontractor *Grupo Felsa*, died shortly after his body caught flames while he was replacing an electricity pole at the corner of Rio Papaloapan and Independencia, in Santa Cruz Azcapotzaltongo, Toluca, State of Mexico.[120] On August 11, 2011, 27-year old CFE employee Santiago Vega Cintora died from electrocution while carrying out the connection of a high-tension tower in Ciudad Sahagún, State of Hidalgo.[121]

90. Moreover, an unknown number of workers employed by the CFE or its subcontractors have suffered serious workplace injuries. For instance, on January 5, 2010, an explosion injured three workers at the Kilómetro Cero Substation in Nonoalco, Mexico City.[122] Also, in the summer of 2010, Agustín Salinas Pérez, a 21-year old indigenous man from Puebla State, suffered serious injuries by electrocution while trimming tree branches that interfered with electrical lines. As a result of these injuries, one of his feet was partially amputated. The CFE subcontractor who recruited him kept him "off the books" and had provided him with neither training nor protective equipment.[123] On September 9, 2010,

[118] *Accidentalmente Tocó los Cables de Alta Tensión con su Cuerpo*, EL SOL DE HIDALGO, Jan. 22, 2010, *available at* http://www.oem.com.mx/elsoldetoluca/notas/n1487204.htm [**Exhibit 061**].
[119] *See* Metro Staff, *Registra Subestación de CFE en Coyoacán 2 Estallidos: Sufren Descarga Mortal*, METRO, Sept. 10, 2010, 12 [**Exhibit 062**]; Mirna Servín, Josefina Quintero & Laura Gómez, *Mueren Dos Empleados de la CFE Cuando Reparaban un Cortocircuito*, LA JORNADA, Sept. 10, 2010, at 37, *available at* http://www.jornada.unam.mx/2010/09/10/capital/037n1cap [**Exhibit 063**].
[120] Alfonso García, *Arde Trabajador Electrocutado. Muere al Recibir Descarga Cuando iba a Cambiar un Poste de Luz*, METRO, Oct. 15, 2010, at 20 [**Exhibit 064**].
[121] Juan Sabino Cruz, *Trágico Fin de Electricista*, EL SOL DE HIDALGO, Aug. 13, 2011, *available at* http://www.oem.com.mx/elsoldehidalgo/notas/n2184446.htm [**Exhibit 065**].
[122] Alma E. Muñoz, Víctor Cardoso & Claudia Álvarez L., *Explosión en Subestación de Nonoalco; Fue por Impericia de CFE, Acusa el SME*, LA JORNADA, Jan. 6, 2010, *available at* http://www.jornada.unam.mx/2010/01/06/politica/007n1pol [**Exhibit 066**].
[123] Mr. Salinas Pérez was recruited by a subcontractor of the CFE who paid him cash, offered him no benefits and failed to register him with the IMSS. *See* Fabiola Martínez, *Agustín podaba árboles para la CFE; ahora está mutilado y desprotegido*, LA JORNADA Oct. 10, 2010, at 4 [**Exhibit 059**].

the same explosions at the Coyoacán Substation that killed two CFE employees seriously burned two other employees.[124]

91. To SME's knowledge, the STPS's Labor Inspection has neither investigated nor attended the scene of these workplace deaths and injuries.

92. The subcontractors' employees lack adequate training and experience. In addition, they lack special shoes and uniforms, and they work "with the minimum necessary equipment, scarce safety in the event of a[n electrical] discharge and without blueprints to guide them on where the underground electricity lines lie."[125] They work under these health and safety conditions without any collective agreement protections, as House Representative Claudia Edith Anaya Mota noted with concern.[126] As reported by Mexican daily newspaper *La Jornada*, the workers employed by CFE subcontractors work exhausting shifts which begin at 9:00 am and end as early as the next morning. They are also scheduled to work 21 consecutive days followed by three days of rest. An unknown number of these employees work "off the books" because the CFE subcontractors have deliberately avoided registering their employment with the IMSS in order to evade payment of social security premiums.[127]

K. International Challenges to the Mexican Government's Actions

93. The actions of the Mexican government in SME's case have been investigated and adjudicated by the following civil society entities:

1) On July 1, 2010 the International Commission for Labor Rights ("ICLR") issued a Report on, *inter alia*, SME's case, finding that the government's performance does

[124] Mirna Servín, Josefina Quintero & Laura Gómez, *Mueren Dos Empleados de la CFE Cuando Reparaban un Cortocircuito*, LA JORNADA, Sept. 10, 2010, at 37, *available at* http://www.jornada.unam.mx/2010/09/10/capital/037n1cap [**Exhibit 062**].
[125] Rocío González & Israel Rodríguez, *Sin Seguridad, Equipo y Planos Laboran Trabajadores Contratados por la CFE*, LA JORNADA, Jan. 20, 2010, at 33, *available at* http://www.jornada.unam.mx/2010/01/20/capital/033n1cap [**Exhibit 060**].
[126] *See* Request for Information Made by House Representative Claudia Edith Anaya Mota to the CFE Regarding its Subcontracting Arrangements, May 24, 2011, 3, *available at* http://www.senado.gob.mx/sgsp/gaceta/61/2/2011-05-25-1/assets/documentos/PA_CFE.pdf [**Exhibit 023**].
[127] *See, e.g.*, text accompanying note 117, *supra.*

not match its stated commitments.[128] The ICLR is a non-profit, non-governmental organization based in New York City that responds to urgent appeals for independent reporting on alleged labor rights violations and coordinates the pro bono work of a global network of lawyers and jurists.

This report was the result of the ICLR delegation's high-profile fact-finding mission to Mexico in May 2010. [129] The finding took into account Mexico's official commitment to international law, which includes ratification of several international and regional treaties and conventions as well the Mexican Supreme Court's recognition of international instruments as binding law superior to obligations of federal and local law. According to the information provided to the ICLR delegation, the Mexican government engaged in a campaign to remove SME's leadership. ICLR's information remained unverified by the government, since the government declined the Delegation's invitation to meet. However, these alleged actions raised concerns about the government's violation of its obligations under international labor law, especially ILO Convention No. 87 on Freedom of Association, and a number of international human rights conventions ratified by Mexico.

2) The International Tribunal for Trade Union Freedom of Association (Tribunal Internacional de Libertad Sindical, "TILS"), issued resolutions on May 1, 2010[130] and May 1, 2011,[131] finding that the Mexican government had violated SME's right to trade union freedom of association as enshrined in Mexican law and international human and labor rights conventions, particularly ILO Conventions 87 and 98. Established in September 2009, the TILS is a tribunal of conscience composed of prominent labor and human rights experts from the Americas and Spain.The Tribunal heard testimony and received documentary evidence from SME in three public

[128] *See* Report of the International Commission for Labor Rights (ICLR) Delegation to Mexico from May 18 to 24, 2010 (July 2, 2010), at 3-5, 20-27 [**Exhibit 067**].
[129] The ICLR Delegation was composed of Justice Yogesh Sabharwal, retired Chief Justice of India; Judge Juan Guzmán Tapia, retired Judge of the Appellate Court in Santiago, Chile; Justice Gustin Reichbach, Justice of the New York Supreme Court; labor attorney Jeffrey Sack, from Toronto Canada; labor attorney Teodoro Sánchez de Bustamante, from Buenos Aires, Argentina; Professor Sarah Paoletti from the Faculty of Law at the University of Pennsylvania; and labor attorney Jeanne Mirer from New York City, President of the Board of ICLR.
[130] *See* International Tribunal for Trade Union Freedom of Association, Resolution Issued in Mexico City on May 1, 2010 at 5-8, 29-30, 35-36, 39 [**Exhibit 068**].
[131] *See* International Tribunal for Trade Union Freedom of Association, Resolution Issued in Mexico City on May 1, 2011 at 2-4, 17, 24-26, 32 [**Exhibit 069**].

sessions over the course of eighteen months. The Mexican government declined the TILS's invitation to participate in the proceedings and respond to the SME's allegations.

PART II: SUBMISSIONS ON THE VIOLATIONS OF THE NAALC

In light of the above facts, the Petitioners assert that the Mexican government has violated several different Articles of the NAALC. Furthermore, it has violated the principles of freedom of association, the duty to prevent occupational injuries and illnesses, the right to organize, the right to bargain collectively, and the right to strike.

A. The Government of Mexico Has Violated its Obligations Under Article 2 of the NAALC

Article 2 of the NAALC provides:

> **A**ffirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.

While Mexico's labor legislation generally provides for relatively high labor standards, as a formal matter, in practice the government's repeated failure to apply and enforce its labor laws has resulted in low labor standards and precarious working conditions for LyFC's former workers. Through the issuance of the decree extinguishing LyFC, the President of Mexico ultimately left more than 44,000 SME members unemployed and without a structure to contest their economic deprivation. The mass termination of these workers, undertaken to eliminate SME's collective agreement and bargaining rights was done without consultation with the workers or their lawful union as required by Mexican law. Such an action contravenes the most fundamental Labor Principles set out in Annex 1 of the NAALC: Freedom of Association and the Right to Bargain Collectively. The cavalier manner in which the government violated these principles highlights its lack of commitment to ensuring that its laws and regulations provide for "high labor standards" as required by the NAALC.

The Canadian National Administrative Office ("NAO") is the only government agency responsible for receiving complaints under the NAALC that has issued a report interpreting Article

2. In *Echlin*[132], a case challenging the failure to conduct elections by secret ballot, the NAO held that Mexican tribunals should interpret their own laws in light of Article 2. The NAO noted that if alternatives to secret ballots were used, "the onus is on the JFCA to show that they are equally effective in protecting the accuracy and integrity of the recuento and that they meet the obligations stemming from Article 2 of the NAALC. The objective here is to ensure the true wishes of the workers are ascertained as required by the principle of freedom of association."

The U.S. OTLA should follow the logic of the *Echlin* case and demand that the government of Mexico interpret its laws in accordance with the high labor standards required by Article 2 and "continually strive to improve standards which are not in accordance with the NAALC principles." While the introductory paragraph of Annex 1 and Article 2 of the NAALC reflect the decision of the parties not to establish continental standards, the NAALC imposes upon the signatory states a substantive baseline obligation in the establishment and enforcement of its domestic standards in Article 2. At a minimum, the concept of "high labor standards" must include the most basic rights to be represented by a democratically chosen union, to bargain collectively, and to enforce these rights through Mexico's labor boards and courts.

B. The Government of Mexico Has Violated its Obligations Under Article 3 of the NAALC by Acting Contrary to, and Failing to Apply and Enforce, the International Labor and Human Rights Conventions to Which it is a Party

Under Article 3 of the NAALC, parties are required to "promote compliance with and effectively enforce [their] labor laws...." Since Mexican law incorporates international labor law standards, a violation of international labor standards also constitutes a violation of Mexican law and of Article 3 of the NAALC.[133] International law is incorporated into Mexican labor law through Articles 1 and 133 of the Mexican Constitution. International treaties are specifically incorporated into the labor law of Mexico by Article 6 of the LFT, which states that "the laws and treaties

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[132] Canadian National Administrative Office, Public Report of Review, NAO Submission # 9801 (International Labour Affairs, Canadian Ministry of Labour, 1998).

[133] *See* Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Article 1, Diario Oficial de La Federación [DO], 13 de Octubre de 2011 (Mex.) ("In the United Mexican States, all persons shall enjoy the human rights recognized in this Constitution and in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection, whose exercise shall not be restricted or suspended, except in the cases and under such conditions as this Constitution may establish."); Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Article 133, Diario Oficial de La Federación [DO], 13 de Octubre de 2011 (Mex.). ("The Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union."

entered into and approved in the terms of Article 133 of the Constitution, shall be applicable to the employment relations in all respects that are beneficial to workers from the effective date of such law or treaty." Moreover, pursuant to a June 2011 amendment to Article 1 of the Mexican Constitution, international human rights conventions were granted constitutional status. Mexico has ratified numerous international human rights conventions that pertain to freedom of association, the right to organize, and other principles affecting labor law. The ratified treaties relevant to the present application include: ILO Convention 87 on Freedom of Association and Protection of the Right to Organize; the International Covenant on Civil and Political Rights; the Universal Declaration of Human Rights; the American Convention on Human Rights; and the International Covenant on Economic, Social and Cultural Rights. All of these human rights conventions, along with the NAALC itself, have been incorporated into Mexican law and have constitutional status following the recent amendment to the Mexican Constitution.

i. The Mexican Government's October 10, 2009 Decree Violates ILO Convention 87

The Mexican government's actions violate the provisions of ILO Convention 87,[134] which was ratified by Mexico in 1950, and has thus been incorporated into domestic law in accordance with Articles 1 and 133 of the Constitution. ILO Convention 87 provides robust protections for organizing rights. These include the right to establish organizations,[135] freedom from administrative interference in organizations,[136] the guarantee that domestic law "shall not interfere" with union rights,[137] and the recognition that states have all of the "necessary and proper" authority to enforce

[134] International Labor Organization Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 UNTS 17 [**Exhibit 070**].

[135] International Labor Organization Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, Art. 2, July 9, 1948, 68 UNTS 17 ("Workers and employers, without distinction whatsoever, shall have the right to establish and . . . to join organizations of their own choosing without previous authorization."); International Labor Organization Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, Art. 3, July 9, 1948, 68 UNTS 17 ("Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs.")

[136] International Labor Organization Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, Art. 3, July 9, 1948, 68 UNTS 17 ("The public authorities shall refrain from any interference which would restrict the right [of organizing] or impede the lawful exercise thereof.").

[137] International Labor Organization Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, Art. 8, July 9, 1948, 68 UNTS 17 ("The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.")

union rights.[138] By operation of Articles 1 and 133 of the Mexican Constitution, the Extinction Decree of 2009 should be subject to ILO Convention 87.

Because a central objective of the federal government's dissolution of LyFC was to extinguish SME and its collective agreement, and to eliminate the collective bargaining rights of LyFC's unionized employees, the Mexican government contravened each of these guarantees contained in ILO Convention 87. While the government attempted to justify the decree on the grounds of the allegedly "unbearable financial situation" of the LyFC, statements made by the President of Mexico reveal that the government's true agenda was the ultimate elimination of SME. For example, in his "Message to the Nation" given on October 11, 2009, President Calderón directly challenged SME and its members stating that "most of the [LyFC] assets paid off labor privileges and labor benefits."[139] President Calderón blamed the collective bargaining agreement for this situation, noting that "almost all decisions had to be taken after asking permission from the union leaders" and that such decisions only satisfied "the needs and interests of the union." Furthermore, the statements made by a number of high-ranking public officials outlined in paragraphs 18 to 21 of the Statement of Facts above, all confirm the government's agenda to attack the basic trade union freedoms enshrined in ILO Convention 87.

That the Extinction Decree was a pretext for eliminating SME's Collective Bargaining Agreement is evident from the government's failure to utilize the provisions of Mexico's labor law to modify collective agreements. The collective bargaining agreement represents the rights of unionized workers, freely negotiated on their behalf by their democratically chosen trade union. If the conditions set out in a collective bargaining agreement adversely affect the company's economic situation, Mexico's labor laws provide for a process to solve collective disputes of an economic nature. This process is regulated by Articles 900 through Article 919 of the LFT, which grant the Conciliation and Arbitration Board the power to "increase or decrease personnel, work shifts, working week, wages and, in general, modify a company's or establishment's working conditions without reducing in any case the minimum rights enshrined in the laws.[140] Rather than appealing to the Board, however, the federal government attacked the union's very existence. The ultimate intention of the Extinction Decree was to impair the right to freedom of association and the right to

[138] International Labor Organization Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, Art. 11, July 9, 1948, 68 UNTS 17.
[139] *See* para. 30.
[140] Ley Federal de Trabajo [LFT] (Federal Labor Law), *as amended*, Art. 919, Diario Oficial de La Federación [DO] 17 de Enero de 2006 (Mex.). [**Exhibit 001**].

collectively bargain of LyFC's workers, thereby infringing Articles 2, 3, 4, 8 and 11 of ILO Convention 87.

ii. The Government's Interference with the Autonomy of SME Violates ILO Convention 87

Just before the President of Mexico extinguished LyFC, the federal government interfered with SME's internal autonomy. Specifically, in October 2009, the DGRA announced that it would not recognize the duly elected leadership of SME, denying it the *toma de nota*, which is integral in establishing union leadership legitimacy. Following the denial of the *toma de nota*, but before the extinction of LyFC, the government also interrupted the distribution of union funds to SME. On December 2, 2009, the JFCA nullified the recent SME elections. Without the *toma de nota*, the union's duly-elected leadership could not function and could not bring legal claims and pursue other redress on behalf of SME and its members. Although the government finally granted the *toma de nota* to the duly-elected slate of union officials on December 15, 2010,[141] the DGRA has refused to grant the *toma de nota* to the other half of the Central Committee members elected in July 2010. In addition, the DGRA only issued the *toma de nota* in September to the 26 Central Committee members elected in June 2011. Given the timing of events, it is clear that the government sought to impair the union's ability to respond and defend itself in the wake of the Extinction Decree.

This unwarranted interference with SME's autonomy clearly violates ILO Convention 87, which guarantees that workers must be allowed to join the trade union of their choice without interference from government authorities. The ILO's Committee on Freedom of Association ("CFA" or "Committee") has made numerous findings and statements regarding state interference in the internal operations of trade unions.[142] With respect to the refusal to recognize the results of the SME election and grant legal certification to SME, the Committee has stated that "as a general principle, governments should not interfere in union elections"[143] and "labor authorities shall not act in a discretionary manner to interfere in union elections."[144] The CFA has also observed that "[t]he

[141] DGRA Legal Acknowledgment (*Toma de Nota*) Issued to the SME (15 December 2010) [**Exhibit 046**].
[142] International Labor Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) edition, *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf (2006) [**Exhibit 072**].
[143] *Id*., at paras. 388-453.
[144] *Id*., at paras. 388-396

registration of the leadership of unions shall be automatic upon filing of the union's notice and should only be challengeable upon request of the members of the union at issue."[145] In the event that there is a dispute regarding the results of an internal union election, such dispute must be adjudicated by the judiciary. The government should not take a position on such issues. On this point, the Committee has stated:

> In connection with an internal conflict within the union between two rival managements, the Committee remembered that in order to assure impartiality and objectivity in the process, it proves convenient that union elections shall be controlled by the competent judiciary authorities.[146]
>
> In order to avoid impairing significantly the workers' right to choose their representatives freely, all complaints challenging the elections' results filed with the Labor courts through an administrative agency shall not derive in the suspension of the validity of such elections as long as the final resolution adopted by the relevant court is known.[147]

With respect to a government's actions in seeking to control or restrict access to Union funds, the Committee has declared that "[r]estricting access to a union's accounts may constitute a serious interference of the authorities in union activities."[148] In the instant case, the STPS's active interference before the BANSEFI constitutes another attack on the Union's autonomy and an extension of the undue use of the *toma de nota* to control independent trade unions.

In connection with the dissolution of a trade union and the refusal to recognize a union, the Committee has stated as follows:

> Suspension or dissolution measures adopted by the administrative authority represent material violations of union principles of freedom.[149]
>
> Union dissolution through administrative methods represents a clear violation of Article 4 of Convention No. 87.[150]

[145] *Id*., at para. 403.
[146] *Id*. para. 431.
[147] *Id*. para. 44; *see also* paras. 431, 439-443.
[148] *Id*. para. 486.
[149] *Id*. para. 683.
[150] *Id*. para. 684; *see* paras. 677-78.

In cases in which administrative authorities intend to dissolve a union, the Committee has made it clear that such actions shall not be allowed unless all judicial processes have been completed:

> Even if certain circumstances justify the cancellation of union personality and blockage of union funds, in order to avoid all discretionary risks such measures shall be adopted through judicial but not administrative methods.[151]
>
> For the appropriate application of the principles stating that a professional organization shall not be subject to suspension or dissolution through administrative methods, it is not enough that the law grants an appeal against such administrative decisions, but its effects shall not begin before the lapsing of the term to file an appeal or upon confirmation of such decisions by a judicial authority.[152]
>
> Law shall eliminate all possibilities of suspension or dissolution through an administrative resolution or at least provide that such resolution shall not become effective until a reasonable term to file an appeal has lapsed or, if any, until the judicial authority decides on the remedies filed by the affected union organizations.[153]

In the instant case, the Mexican government refused to recognize the SME election results, refused to acknowledge the Union's duly-elected leadership, and froze the Union's funds. The government never sought prior authorization for these actions from the judicial authorities. As such, the Mexican government clearly and materially infringed the provisions of ILO Convention 87 and of the applicable Mexican labor legislation.

iii. The Abolition of the Union's Bargaining Rights and Collective Agreement Violates ILO Convention 98

ILO Convention 98 protects workers from acts of discrimination or retribution that are connected in any way to their membership in a union. Further, ILO Convention 98 promotes collective bargaining as a means to regulate terms and conditions of employment. The essence of ILO Convention 98 is to provide protection for those employees who choose to join a union and to

[151] *Id*. para. 702.
[152] *Id*., para. 703.
[153] *Id*., para. 704.

encourage and promote collective bargaining. The actions of the Mexican government in this case represent the most fundamental attack on the basic principles enshrined in ILO Convention 98.

First, by terminating more than 44,000 employees of LyFC because of the fact that they were members of SME, the Mexican government imposed on those union members the ultimate punishment for exercising the right to unionize. Moreover, the government also violated ILO Convention 98 by terminating SME's collective agreement and by refusing to negotiate with the Union. The government acted unilaterally to terminate SME's bargaining rights and to ensure that the lawful collective agreement would not apply to those enterprises that have taken over the business formerly operated by LyFC.

Indeed, the ILO Committee on Freedom of Association's interpretation of ILO Convention 98 demonstrates that the Mexican government violated its tenets. The Committee considered ILO Convention 98 in conjunction with a complaint discussing whether the Swedish Parliament's legislation declaring already-concluded collective agreements null and void due to the "difficult employment situation."[154] The ILO Committee noted:

> [T]he new legislation, insofar as it overrides previously negotiated collective agreements, constitutes an act of interference which restricts the right of trade unions and employees to bargain freely with employers, thereby violating the principle of the autonomy of the parties to the collective bargaining process. The Committee requests the Government to refrain in future from having recourse to such measures of legislative intervention…[155]

The ILO Committee requested that the Swedish government ensure that the challenged legislation be amended "so that collective agreements concluded prior to its entry into force are not overridden…"[156] The parallels between the Swedish legislation and the Mexican President's Extinction Decree as well as their respective effects on collective bargaining are clear. Against this jurisprudential backdrop, there can be no doubt that the actions of the Mexican government in this case also violate ILO Convention 98.

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[154] Complaint against the Government of Sweden presented by the Swedish Trade Union Confederation (LO), the Swedish Confederation of Professional Employees (TCO) and the International Confederation of Free Trade Unions (ICFTU), Report No. 294, Case(s) No(s). 1760 (Vol. LXXVII, 1994, Series B, No. 2) at para. 549 [**Exhibit 071**].
[155] *Id.* at para. 570.
[156] *Id.* at para. 571(a).

C. **The Government of Mexico Has Violated its Obligations Under Article 3 of the NAALC by Acting Contrary to, and Failing to Apply and Enforce, Mexican Labor Law**

Article 3 of the NAALC states, in part:

> **Article 3: Government Enforcement Action**
>
> 1. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:
>
> ….(g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor laws.
>
> 2. Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.

The actions of the federal government in issuing the Extinction Decree, terminating over 44,000 unionized employees and their collective agreement, and effectively terminating the bargaining rights of SME, constitute a clear violation of Mexican labor law. The Mexican courts' and the JFCA's refusal to rescind the actions of the government amounts to a failure by Mexico to adequately enforce its labor laws in violation of the NAALC.

i. Termination of the LyFC Employees was Illegal under Mexican Law

The LFT specifically sets out the following bases for "labor termination:"

> **Article 53**. The following are considered causes for labor termination:
>
> I. The parties' mutual consent;
> II. The worker's death;
> III. The completion of a given work or labor term expiration or cancellation of capital investment pursuant to Articles 35, 37 and 38;
> IV. The worker's physical or mental handicap or incapacity preventing him/her from working; and
> V. The cases set out in Article 434.
>
> **Article 433.** Labor termination as a consequence of the closing of companies or establishments or the final reduction of work shall be subject to the subsequent articles.

Article 434. The following are deemed causes for labor termination:

I. *Force majeure* or acts of God for which the employer may not be deemed responsible; the employer's physical or mental handicap or the employer's death deriving necessarily, immediately and directly in the termination of work;
II. The operation proves clearly unaffordable;
III. The resource exhaustion in a drilling industry;
IV. The cases set out in Article 38; and
V. The legally-declared bankruptcy if the competent authority or the creditors decide on the final closing of the company or on the final reduction of its activities.

Article 435. In the aforementioned case, the following regulations shall be complied with:

I. In the case of paragraphs I and V, a notice shall be filed with the Conciliation and Arbitration Board for its approval or disapproval pursuant to the procedure set out in Article 782 and in subsequent articles;
II. In the case of paragraph III, the employer, prior to the termination, shall apply to the Conciliation and Arbitration Board for an authorization, as provided in Article 782 and in subsequent articles; and
III. In the case of paragraph II, the employer, prior to the termination, shall apply to the Conciliation and Arbitration Board for an authorization, according to the regulations governing collective disputes in economic matters.

In this case, since LyFC was being shut down, the government was compelled to follow the procedure in Article 433-435, which required it to appear before the JFCA, apply for authorization and submit evidence proving its legitimate cause before terminating the workers. However, the government failed to do so.

Following the extinction of LyFC, the federal government adopted the position that the Extinction Decree constituted *force majeure* within the meaning of Article 434(I) of the LFT. In such cases, it is for the party claiming the *force majeure*–here, the LyFC– to have appeared before the JFCA to give notice of the collective termination of labor relationships by initiating a special proceeding under Articles 892-899 of the LFT. In this proceeding, LyFC would have had to submit evidence proving not only the existence of the alleged *force majeure*, but also that the necessary, immediate and direct consequence of such *force majeure* was the termination of the work. Then, LyFC would have had to wait for the JFCA to approve or disapprove its collective termination request before terminating the workers. However, none of this occurred. Rather, the federal

government carried out *de facto* terminations of SME members who were forcibly removed from the workplace on the evening of October 10, 2009, or were subsequently prevented from entering the occupied worksites to provide their services, without providing them with notice of termination under Article 47 of the LFT. In short, the federal government terminated these individual and collective labor relationships in the absence of any of the termination causes set out in Articles 53 or 434 and without first following the procedure set out in Article 435.

Three days *after* the abrupt dismissal of SME workers, on October 13, 2009, the SAE, in its capacity as LyFC liquidator, brought a special proceeding before the JFCA under Articles 434(I) and 435(I) of the LFT, requesting the approval of a notice to terminate the collective labor relationship between LyFC and SME, and consequently the SME collective agreement, as well as the individual labor relationships between LyFC and all of its unionized workers, due to an alleged *force majeure* (Case File No. IV-239/2009).[157] However, the SAE failed to marshal any evidence whatsoever to show that the Extinction Decree constituted *force majeure*, or that the necessary, immediate and direct consequence of the Extinction Decree was the termination of the work. In fact, the only evidence introduced by the SAE was the Extinction Decree itself and the SME collective agreement.[158] In contrast, SME proposed to tender evidence that included, *inter alia*, an examination of the SAE representatives and expert witness testimony, and requested that the JFCA order the Secretariats of Energy and Revenue and Public Credit, among other authorities identified in the Preamble to the Extinction Decree, to provide it with reports on the reasons behind their recommendations to extinguish LyFC.[159] While these means of evidence were arguably relevant to the *force majeure* issue, the JFCA refused to admit them in a hearing held on October 31, 2009.[160] Ten months after this hearing, on August 30, 2010, the JFCA issued a decision approving the termination of the collective labor relationship between SME and LyFC, the SME collective agreement, and the individual labor relationships between SME's members and LyFC, effective October 11, 2009,[161] and ordering that the SAE pay the workers severance.[162]

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[157] *See* JFCA Decision Terminating the Individual and Collective Labor Relationships and the SME Collective Agreement (Aug. 30, 2010) at 1 [**Exhibit 025**].
[158] *Id.* at 3 [**Exhibit 025**]
[159] *Id*. at 9; *see also* SME's *Amparo* Application vs. JFCA Decision of August 30, 2010 (23 September 2010) at 30-34 [**Exhibit 026**].
[160] *See* SME's *Amparo* Application vs. JFCA Decision of August 30, 2010 (23 September 2010) at 30-31[**Exhibit 026**].
[161] JFCA Decision Terminating the Individual and Collective Labor Relationships and the SME Collective Agreement (30 August 2010) at 51-52 [**Exhibit 025**].
[162] *Id*. at 45 and 52.

The JFCA's flawed decision does not accord with the labor statute or the basic principles of Mexican labor law. Article 434(I) of the LFT requires that the following two elements be proven: (i) the existence of "*[f]orce majeure* or an act of God not attributable to the employer, or his or her physical or mental incapacity or death;" and (ii) that "the necessary, immediate and direct consequence of such event [be] the termination of the work." In its August 30, 2010 decision, the JFCA found that both elements had been proven despite the absence of any compelling evidence. The JFCA's reasons were overly formalistic and completely disregarded SME's arguments and evidence, as well as the reality on the ground. The JFCA's decision was incorrect for the following reasons:

1. In regard to the first branch of the test in Article 434(I) of the LFT, there was no evidence of the existence of *force majeure*. According to a decision of the Supreme Court of Mexico, there is *force majeure* where the events at hand: (i) are alien to the person liable, (ii) are not "imputable, directly or indirectly" to that person, and (iii) are such that their occurrence cannot be prevented or resisted.[163]

   The first two elements of this definition were not met on the facts given the inextricable relationship between the LyFC as a public employer and the Federal Executive as the issuer of the Extinction Decree alleged to amount to *force majeure*. Therefore, the Decree was not alien to LyFC and could be imputed to it.

   With respect to the third element of the definition, the alleged causes of the Extinction Decree can ultimately be traced back to LyFC and as such, could have been prevented by LyFC. According to the Extinction Decree itself, since its creation, LyFC had not stopped receiving large state subsidies. Further, LyFC allegedly had costs that were almost twice as high as its revenue, large labor costs, and results "notably inferior to those of enterprises and bodies providing the same service internationally…"[164] Presumably the extinction of LyFC, caused by these allegedly longstanding issues, could have been prevented by LyFC through a variety of fiscal measures.

2. In regard to the second branch of the test, and even assuming *arguendo* that the Extinction Decree did amount to *force majeure*, such *force majeure* did not have the necessary, immediate and direct consequence of ending the work as required by Article 434(I) of the LFT. On this point, after misstating the second branch of the test,[165] the

[163] "Caso Fortuito o Fuerza Mayor. Elementos." Suprema Corte de Justicia de la Nación [Supreme Court of Justice of the Nation]. No. Registro: 245,709. Tesis Aislada. Materia(s): Laboral. Séptima Época. Instancia: Sala Auxiliar. Fuente: Semanario Judicial de la Federación. 121-126 Séptima Parte. Página: 81. Genealogía: Informe 1979, Segunda Parte, Sala Auxiliar, tesis 11, página 36.

[164] *See* Decreto por el que se Extingue el Organismo Decentralizado Luz y Fuerza del Centro [Decree Which Extinguishes the Decentralized Body Central Light and Power], pmbl., Diario Oficial de la Federacion, [DO], 11 de octubre de 2009, *available at* http://dof.gob.mx/nota_detalle.php?codigo=5114004&fecha=11/10/2009 [**Exhibit 006**].

[165] The JFCA misstated the test by stating that in order for *force majeure* to exist, the Extinction Decree must have had, as its immediate and direct consequence, "the termination *of the labor relationships*" (emphasis added), rather than the

> JFCA made a finding, based exclusively on the text of Article 1 of the Extinction Decree,[166] that the extinction of LyFC proved "the evident and manifest impossibility of continuing… the provision of the service which such decentralized body carried out at the time it ceased to exist…"[167] However, since the Extinction Decree came into force, and particularly during the ten months prior to the JFCA's August 30, 2010 decision, the Government's actions have amply demonstrated that the work did not end and that the CFE immediately took over the provision of the same electrical power services previously provided by LyFC, in the same geographic areas and to the same users serviced by LyFC. The CFE continues to provide these services to this day.[168]

Furthermore, the government failed to allow the workers and the Union to exercise their fundamental right to be heard, as provided in Article 14 of the Mexican Constitution. Article 14 provides that no one may be deprived of his or her rights except through a judicial proceeding that complies with the rights of due process of law.[169] None of the workers terminated by the federal government were granted any right to be heard prior to their termination. Similarly, SME was not heard or consulted prior to the extinction of LyFC. Moreover, the JFCA failed to notify the workers, directly and individually, of the SAE's application to terminate the individual labor relationships, thus depriving them of the opportunity to exercise their right to directly appear or intervene before the JFCA.

In short, the Mexican government's acts violated the LFT because there was simply no evidence to substantiate the *force majeure* claimed by the government. Furthermore, the hearing before the JFCA did not uphold the substance of the LFT or meet the basic procedural requirements guaranteed by Mexican law. Rather, it merely served to rubber stamp the government's calculated attack on the affected workers and their union, SME.

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termination *of the work*. *See* JFCA Decision Terminating the Individual and Collective Labor Relationships and the SME Collective Agreement (Aug. 30, 2010) at 27 [**Exhibit 025**].

[166] Article 1 of the Extinction Decree reads as follows: "The decentralized body Central Light and Power shall be extinguished, but it shall maintain its legal personhood exclusively for the purposes of the liquidation process" [**Exhibit 006**].

[167] *See* JFCA Decision Terminating the Individual and Collective Labor Relationships and the SME Collective Agreement (Aug. 30, 2010) at 32 [**Exhibit 025**].

[168] For a summary of the SME's evidence on this point, *see* SME's *Amparo* Application vs JFCA Decision of August 30, 2010 (Sept. 23, 2010) at 47-48 [**Exhibit 026**].

[169] *See* Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Art. 14, Diario Oficial de La Federación [DO], 13 de octubre de 2011 (Mex.) ("Nobody shall be deprived of his libety, property, possessions or rights, except through a trial pursued through previously established tribunals in which the essential formalties of the proceeding are met and which is in conformity with laws implemented before the act in question").

ii. The Mexican Government's Denial of SME's Bargaining Rights with the Successor Employer Violates Mexican Law

As noted at paragraphs 17-22 of the Statement of Facts, SME's bargaining rights and its collective agreement were both terminated as the ultimate outcome of the extinction of LyFC and creation of the successor CFE. This violated Article 41 of the LFT, which mandates that all substitute or successor employers uphold established union rights. Article 41 provides that the "substitution of an employer shall not affect the labor relations of the enterprise . . . . [and] [t]he substituted employer shall be jointly and severally responsible . . . for the obligations derived from the labor relations and the Act."[170] While the LFT does not define the term "substitution of an employer," Article 290 of the Social Security Law, which was applicable to the LyFC, does.[171] Pursuant to that provision, any "transmission, between the substituted employer and the substitute employer, by any legal title, of the essential assets [of the operation] with the intention of continuing it" constitutes a substitution. This definition is consistent with a decision of the Fourth Chamber of the Supreme Court of Mexico, which found that the employer substitution provisions apply not only to the transfer of the totality of an enterprise, but also to the transmission of part of the enterprise's assets, where such part can be used to continue to perform part of the work carried out by the original employer.[172] In addition, the same article of the Social Security Law provides that there is *presumption* that the purpose of the operation continues following a transfer or substitution.[173] Pursuant to a decision of a federal collegiate appeals court, the transfer of assets can also be presumed where the new employer fails to show that the business it carries is different from that of the substituted enterprise.[174] The reach of Article 41 of the LFT is so broad that according to decisions issued by Mexico's federal judiciary, the employer substitution provisions apply

[170] Ley Federal de Trabajo [LFT] (Federal Labor Law), *as amended*, Art. 41, Diario Oficial de la Federación [DO], 17 de enero de 2006 **[Exhibit 001].**
[171] Ley de Seguro Social [LSS] (Social Security Law), *as amended*, Art. 290, Diario Oficial de la Federación [DO], 27 de mayo de 2011 [**Exhibit 073**].
[172] Sustitución patronal en caso de transmisión parcial de la empresa," Tesis Aislada de la Cuarta Sala de la SCJN, Séptima Época, Semanario Judicial de la Federación, Vol. 163-168, Quinta Parte, p. 41, reg. 242851.
[173] *Id.*
[174] "Seguro Social Sustitución patronal. Puede presumirse el elemento objetivo," Tesis Aislada del Primer Tribunal Colegiado en Materia Administrativa del Primer Circuito, Octava Época, Semanario Judicial de la Federación, T. II, Segunda Parte-2, julio a diciembre de 1988, p. 530, reg. 230577.

following the death of the original employer,[175] or even when the workers were not at work at the time of the substitution, for example, because of a labor conflict.[176]

Thus, Article 41 of the LFT applies where the assets of one employer (the *substituted* or predecessor employer) are transferred to a new employer (the *substitute* or successor employer), with the intention of continuing the work of the original employer. The successor is required to observe the terms of the individual employment contracts or the collective agreement in place at the time of the substitution. The successor is further required not to alter the terms and conditions of employment of the predecessor's employees for a period of six months.

In this case, LyFC became extinct upon publication of the Extinction Decree, but the services it provided continued without interruption. As Article 2 of the Extinction Decree demonstrates, the executive branch fully intended to continue to provide the electrical power services which LyFC had, until then, provided, by transferring the assets of LyFC to the CFE:

> The Assets Administration and Transfer Service shall immediately take the necessary measures to ensure that those assets of the body being extinguished . . . as well as any other assets which may be necessary for such service, [will] be used to that end in accordance with the Law of the Public Service of Electrical Power. [177]

The Law of the Public Service of Electrical Power (Ley del Servicio Público de Energía Eléctrica, "LSPEE") states, in Article 7, that the provision of the public service of electrical power shall be the responsibility of the CFE.[178]

Whether or not a new employer assumes the role of substitute employer is not a matter of choice under Article 41 of the LFT; rather, it is an automatic consequence of the transfer of an enterprise such as LyFC. Because the CFE was substituted for the LyFC, Article 41 required that

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[175] "Relación laboral. No se extingue con la muerte del patrón, sino que se da la figura de la sustitución patronal," Novena Época, Registro: 184790, Instancia: Tribunales Colegiados de Circuito, Tesis Aislada, Fuente: Semanario Judicial de la Federación y su Gaceta, XVII, Febrero de 2003, Materia: Laboral, Tesis: II.T.243 L, Pág. 1136.

[176] "Sustitución Patronal, para su existencia es innecesario que el trabajador se encuentre laborando," Novena Época, Registro: 201285, Instancia: Tribunales Colegiados de Circuito, Tesis Aislada, Fuente: Semanario Judicial de la Federación y su Gaceta, IV, Octubre de 1996, Materia: Laboral, Tesis: IV.3º42 L, Pág. 626.

[177] Decreto por el que se Extingue el Organismo Decentralizado Luz y Fuerza del Centro [Decree Which Extinguishes the Decentralized Body Central Light and Power], pmbl., Diario Oficial de la Federacion, [DO], 11 de octubre de 2009, *available at* http://dof.gob.mx/nota_detalle.php?codigo=5114004&fecha=11/10/2009 [**Exhibit 006**].

[178] LyFC had been the only exception to the CFE's exclusive responsibility to provide electrical power nationwide. Such an exception, contained in Transitional Article Fourth of the *Law of the Public Service of Electrical Power*, was also implemented through executive decree. Decree Which Creates the Decentralized Body Central Light and Power, Diario Oficial de la Federacion [DO], 9 de febrero de 1994. This decree was abrogated by the second transitional article of the Extinction Decree, *supra* note 178. A copy of the *Law of the Public Service of Electrical Power* is attached as **Exhibit 074**.

labor relations continue with the CFE, and that the rights of the SME-represented workers be maintained under the Collective Bargaining Agreement. Consequently, SME's dismissed members should have been given jobs in the CFE and ought to have been covered by the SME Collective Agreement for a period of at least six months, pursuant to Article 41 of the LFT.

Yet, at present, the CFE has not recognized LyFC's workers as CFE workers and has categorically denied its obligation to comply with the SME Collective Bargaining Agreement or to negotiate with SME. As mentioned in the statement of facts, SME filed a wrongful dismissal case against the CFE, the SAE and the LyFC in November of 2009, arguing that the CFE failed to follow its Article 41 obligation as substitute employer; the JFCA failed to hear evidence in this case until nearly two years later, in April of 2011, and a decision has yet to be issued. The 17-month delay in hearing the matter and the even longer delay in issuing a decision has caused enormous prejudice and irreparable harm to the terminated employees and SME.

Moreover, the government failed to give notice of employer substitution under Article 41 of the LFT, took steps to illegally terminate LyFC's unionized workforce, and assigned the work previously performed by SME members to non-unionized employees of CFE and its subcontractors. This was a deliberate decision designed to consolidate the government's efforts to rid itself of SME and its collective agreement, as evidenced by the following statement made by CFE Director Alfredo Elías Ayub during a press conference held on October 12, 2009. When asked why the CFE does not assume the role of substitute employer of LyFC's former employees (under Article 41 of the LFT), Mr. Elías Ayub stated:

> [W]hat is not viable is to assume the role of substitute employer, **because that would precisely bring into effect the collective agreement of [Central] Light and Power**, which is what made things reach this point of non-viability [emphasis added].[179]

In sum, the Mexican government, which controlled both LyFC and the CFE at all relevant times, simply transferred the assets of LyFC and the work previously performed by LyFC's employees to the CFE. The provision of electricity to LyFC's former customers continues and is now the responsibility of the CFE. The electrical infrastructure of LyFC also remains in place. Nothing has changed, except that the Union, its members and its collective agreement have been

[179] Press Conference with Alfredo Elias Ayub, *Afirma el Director de la CFE que las Tarifas no se Aumentarán*, PRESIDENCIA DE LA REPÚBLICA, *available at* http://www.presidencia.gob.mx/2009/10/afirma-el-director-de-la-cfe-que-las-tarifas-no-se-aumentaran (Oct. 12, 2009) [**Exhibit 075**].

deliberately excluded from the new operation in breach of Article 41 of the LFT. By failing to apply and enforce the clear provisions of Article 41 of the LFT, the Mexican government has acted in complete disregard of its own labor laws, and in violation of Article 3 of the NAALC.

iii. The Mexican Government Failed to Follow the Principle of Preference in Rehiring under Articles 438 and 154 of the LFT

Without prejudice to their position that there was no *force majeure* that could justify such mass termination, and that the substitute employer provisions of the LFT should have been applied, the Petitioners assert that in hiring workers to operate the former LyFC enterprise, the CFE has failed to follow the principle of preferential rehiring contained in Articles 438 and 154 of the LFT. Pursuant to Article 438 of the LFT, where a company closure takes place, thus giving cause for the termination of the labor relationships, and the employer resumes activities or creates a new company to carry them on, such employer shall have certain obligations regarding hiring as set out in Article 154 of the LFT, including the obligation to "prefer, in equal circumstances . . . [workers] who have previously served [the employer] satisfactorily for a longer time period . . . and unionized workers over those who are not."[180]

In the weeks that followed the issuance of the Extinction Decree, government officials and CFE executives made a number of public statements that the CFE would in fact hire between eight and ten thousand former LyFC employees. However, it soon became clear that no SME member would be hired unless and until the employee accepted a severance payment with respect to their LyFC employment. Moreover, the SAE made every effort to facilitate employee claims for severance in a clear attempt to rid the employer of as many SME members as possible. In addition, once accepted, the government took the position that these employees had no further right to be reinstated under the LFT. The conditions under which the severance payments were made constituted a violation of Articles 154 and 438 of the LFT. While SME has challenged the illegal severance payments in its wrongful dismissal and successor employer claim, a decision on this issue has not yet been issued by the JFCA.

The terminated employees and their union have been deprived of the protections of Articles 154 and 438 of the LFT, as the Government of Mexico has utterly failed to enforce its own labor laws, in further violation of Article 3 of the NAALC.

[180] Ley Federal de Trabajo [LFT] [Federal Labor Law], *as amended*, Art. 154, DiarioOficial de la Federación [DO], 17 de enero de 2006, *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf.

iv. The Actions of the Mexican Government Violated Associational Rights Guaranteed under Mexican Law

The dissolution of LyFC, the termination of its unionized employees and the elimination of SME's bargaining rights all violate the right to freedom of association enshrined in Mexican labor law. Under Article 9 of the Mexican Constitution, protection is given to "the right to peacefully associate" or to "assemble for any legal purpose."[181] Under Article 123, the Congress of the Union is obliged to enact labor laws which, among other things, entitle workers in the private and broader public sectors (including workers of LyFC) to organize themselves for the defence of their interests.[182]

Similarly, the LFT acknowledges workers' freedom of association in a number of provisions. Workers' freedom to "coalesce" temporarily in defense of their common interests is guaranteed by the LFT.[183] Workers' right to constitute unions "without the need for previous authorization," is guaranteed by Article 357 of the LFT. Pursuant to Article 358, "nobody may be obligated to be part of a union or to not be part of it," and any stipulation which in some way undermines this provision shall be void. [184] Further, Article 387 of the LFT establishes the right to collectively bargain in Mexican labor law: whenever an employer hires any union members, such employer is compelled to "execute with the union, upon the union's request, a collective bargaining agreement." Should the employer refuse to sign the collective agreement, the workers may exercise their right to strike.[185] Article 386 states that the purpose of a collective bargaining agreement is to "establish the conditions according to which the work shall be performed in one or more companies or establishments."

The actions of the Mexican government and its state-controlled entities, the CFE and the SAE, violated multiple provisions related to associational rights in the LFT. First, by eliminating the

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[181] Constiutución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Art. 9, Diario Oficial de la Federación [DO], 13 de octubre de 2011.
[182] *Id.* art. 123. [**Exhibit 008**].
[183] Ley Federal de Trabajo [LFT] [Federal Labor Law], *as amended*, Diario Oficial de la Federación [DO], 17 de enero de 2006http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdfhttp://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf. [**Exhibit 001**].
[184] Ley Federal de Trabajo [LFT] [Federal Labor Law], *as amended*, Art. 357, Diario Oficial de la Federación [DO], 17 de enero de 2006. [**Exhibit 001**].
[185] Ley Federal de Trabajo [LFT] [Federal Labor Law], *as amended*, Art. 386, Diario Oficial de la Federación [DO], 17 de enero de 2006. [**Exhibit 001**].

collective agreement and bargaining rights without consultation, the government clearly violated the basic principles of freedom of association enshrined in the LFT. Further, the government refused, through the CFE as substitute employer, to bargain with the SME. Moreover, the government, through the JFCA, has denied SME the right to strike the CFE. Lastly, the government has interfered in the SME's internal affairs, thus violating its associational rights, by denying its leadership the *toma de nota*, freezing the Union's bank accounts and persecuting its leadership and members through the machinery of the criminal justice system. Not only has SME had its rights blatantly violated time and again, it has been unable to obtain any remedy for these violations in the 25 months following the issuance of the Extinction Decree. This is clear proof that Mexico is not enforcing its labor laws, in violation of Article 3 of the NAALC.

v. The Mexican Government Has Created Dangerous Working Conditions While Failing to Enforce its Health and Safety Legislation

Pursuant to Article 541 of the LFT, Labor Inspectors have an obligation to oversee compliance with labor norms, particularly those pertaining to the prevention, detection, and correction of occupational health and safety hazards.[186] They are also required to carry out extraordinary inspections on the request of their superiors or where a complaint that labor norms have been violated is received.[187] Historically, Mexico's track record of not enforcing workplace safety standards has been recognized as a violation of the NAALC.[188]

The present case demonstrates another instance of Mexico's failure to meet its occupational health and safety obligations. These health and safety norms are contained primarily in the LFT and

[186] Ley Federal de Trabajo [LFT] [Federal Labor Law], *as amended*, Art. 541, Diario Oficial de la Federación [DO], 17 de enero de 2006. [**Exhibit 001**].http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdfhttp://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf. [**Exhibit 001**].

[187] Ley Federal de Trabajo [LFT] [Federal Labor Law], *as amended*, Art. 542, Diario Oficial de la Federación [DO], 17 de enero de 2006. [**Exhibit 001**].[**Exhibit 001**].

[188] For example, in response to a NAALC submission filed in 2000, the United States highlighted the Mexican government's "failure to provide information and training, pressure on workers to meet excessively high production quotas, poorly designed workstations" and "inadequate personal protective equipment." The NAO, which was the functional equivalent of the OTLA at the time, noted that these allegations constituted a violation of Mexican labor law and recommended ministerial consultations. *See* Public Report of Review of NAO Submission No. 2000-01. U.S. NAT'L ADMINISTRATIVE OFFICE. Apr. 6, 2001, *available at* http://www.dol.gov/ilab/media/reports/nao/pubrep2000-1.htm#1.

in the Federal Regulation of Work Safety, Hygiene and Work Environment.[189] Since the dissolution of LyFC, the employees of the CFE and the CFE subcontractors who are now doing the work previously performed by SME members are working under extremely precarious health and safety conditions. The subcontractors' employees lack adequate training and experience and work exhausting shifts which begin at 9:00 am and end early the next morning. They are also scheduled to work 21 consecutive days before receiving a three-day break. In addition, they lack special shoes and uniforms and work "with the minimum necessary equipment, scarce safety in the event of an electrical discharge and without blueprints to guide them on where the underground electricity lines lie."[190] Given these unsafe working conditions, since the CFE started subcontracting work related to the LyFC enterprise, many workers employed by the CFE or its subcontractors have died, and many others have suffered serious workplace injuries.

To SME's knowledge, the STPS's Labor Inspection has neither investigated nor attended at the scene of the abovementioned workplace deaths and injuries. By creating conditions that breed serious and frequent workplace accidents, some of which have been fatal, and by failing to enforce health and safety standards, the Mexican government has breached Article 3 of the NAALC.

D. The Government of Mexico Has Violated its Obligations under Article 4 of the NAALC

Article 4 of the NAALC requires the government to provide access to tribunals obligated to enforce domestic labor law; it also obliges the government to provide appropriate recourse for violations of labor law as well as collective agreements.[191]

By issuing the Extinction Decree, refusing to recognize the lawful successor rights of SME, and terminating its collective agreement with LyFC, the Mexican government extinguished SME's bargaining rights, making enforcement of these rights impossible. While SME had formal access to judicial and administrative procedures to attempt to enforce its rights and the rights of its members under their collective agreement and Mexican labor law, these mechanisms have proven to be

[189] *Federal Regulation of Work Safety, Hygiene and Work Environment*, Published in the Official Gazette of the Federation (January 21, 1997), *available at* http://www.stps.gob.mx/bp/secciones/conoce/marco_juridico/archivos/r_seguridad.pdf [**Exhibit 076]**.
[190] Rocío González & Israel Rodríguez, *Sin Seguridad, Equipo y Planos Laboran Trabajadores Contratados por la CFE*, LA JORNADA, Jan. 20, 2010, at 33, *available at* http://www.jornada.unam.mx/2010/01/20/capital/033n1cap [**Exhibit 060**].
[191] North American Agreement on Labor Cooperation, Art. 4, Sept. 14, 1993, 32 I.L.M. 1499.

illusory and meaningless. As shown in the statement of facts above[192], the JFCA and the federal courts have utterly failed to enforce Mexican labor law.

Therefore, although under Mexican law a union would normally have access to mechanisms to enforce a collective agreement, the effect of the Extinction Decree and the government's actions in this case has been to completely eliminate the ability of SME and its more than 44,000 members to enforce their collective agreement. Because the JFCA decided that the terminations were legal and that the SME collective agreement had been terminated, and because it has delayed the resolution of the substitute employer claim by nearly two years, it has effectively removed all domestic mechanisms for redress of the SME workers' rights. Meanwhile, SME has been improperly denied the right to enforce its collective agreement against the SAE and the CFE.

As such, the actions of Mexico's federal government clearly violated Article 4 of the NAALC.

E. The Government of Mexico Has Violated its Obligations under Article 5 of the NAALC

Article 5 of the NAALC provides for a variety of procedural guarantees in adjudication of labor claims, nearly all of which were violated by the JFCA hearings of the SME workers' claims. The circumstances of these tribunals demonstrate the Mexican government's failure to provide fair, equitable and transparent proceedings before impartial and independent tribunals. Furthermore, the proceedings themselves have been fraught with such unwarranted delays that the workers have very little real chance of having their claims successfully redressed. Each of the JFCA adjudications and the procedural violations accompanying them are outlined below.

i. Procedural Violations in the JFCA Case Upholding the Termination of the LyFC Workers (Case File No. IV-239/2009)

As set out in the Statement of Facts above, on October 13, 2009, the SAE, in its capacity as LyFC liquidator, brought a special proceeding before the JFCA requesting approval of its termination of SME's collective bargaining agreement as well as individual LyFC workers.[193] The SAE based this request on the theory that the presidential decree extinguishing LyFC was akin to a *force majeure*—one of the only legal grounds for such a termination. Despite the seriousness of this

[192] *See supra* paras. 81-84.
[193] Part D, *supra*, at para. 67.

claim and the high stakes it presented, the JFCA committed several grave procedural violations in adjudicating it:

(a) **Improper filing and illegal processing.** First, the SAE's application itself was improperly filed and illegally processed by the JFCA.[194] Accordingly, the proceedings have failed to comply with due process of law, contrary to Article 5.1(a) of the NAALC. In order to legally collectively terminate its employees, an employer is obligated under Mexican law to initiate a special proceeding before the JFCA in which it gives *notice* of the collective termination.[195] In this proceeding, LyFC would have had to submit evidence proving not only the existence of the alleged *force majeure* but also the allegation that the necessary, immediate and direct consequence of such *force majeure* was the termination of the work.For the termination to be legal, LyFC would have had to wait for the JFCA to approve or disapprove its collective termination request *before* terminating the workers.

Rather than observing such provisions, the federal government carried out de facto terminations of SME members who were forcibly removed from the workplace on the evening of October 10, 2009.[196] Notwithstanding the illegality of this procedureless termination, the JFCA chose to accept the application of the SAE (which by now had substituted for the LyFC) through a ruling dated October 13, 2009, and *only then* ordered that SME be notified on its own behalf and on behalf of the unionized workers of LyFC.[197] By this point, the workers had already been effectively terminated and the JFCA's ability to order a remedy was already severely compromised.

(b) **Conflict of interest.** SME requested that the president of the JFCA recuse himself on the basis of a conflict of interest, given that he was appointed by, and serves at the pleasure of, the President of Mexico,[198] who issued the Extinction Decree allegedly constituting the *force majeure* at issue in this case.[199] However, the JFCA president did not recuse himself,[200] thereby severely undermining the independence and neutrality of the JFCA. This violated Article 5.4 of the NAALC, which provides that "[e]ach Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter."[201]

(c) **Inadequate opportunity to be heard.** SME sought to introduce evidence, including government reports dealing with the extinguishing of LyFC, which was arguably

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[194] *Id.*
[195] Articúlo 891-899, Ley Federal de Trabajo [LFT] [Labor Law], *as amended*, Diario Oficial de la Federación [DO], 17 de enero de 2006, *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf.
[196] Part B, *supra*, at para. 10.
[197] Part D, *supra*, at para. 49.
[198] Article 612 of the LFT [**Exhibit 001**] and Article 89(II) of the *Mexican Constitution* [**Exhibit 008**].
[199] See SME's *Amparo* Application vs. JFCA Decision of August 30, 2010 (23 September 2010) at 12-14 [**Exhibit 026**].
[200] Part D, *supra*, at para. 52.
[201] North American Agreement on Labor Cooperation art. 5, Sept. 14, 1993, 32 I.L.M. 1499.

relevant to the *force majeure* issue; however, the JFCA refused to hear any of it.[202] By depriving SME of the opportunity to tender evidence to challenge the claim made by the government and the SAE, the government of Mexico, through the JFCA, denied SME a fair process, thus contravening Article 5.2(c) of NAALC, which requires that final decisions of labor tribunals be "based on information or evidence in respect of which the parties were offered the opportunity to be heard."

Because the JFCA refused to admit SME's evidence, what resulted was a sham of a proceeding in which the only evidence before the tribunal was introduced by the SAE.[203] Unsurprisingly, the JFCA granted the SAE's request, terminating individual LyFC employees as well as SME's collective bargaining agreement.

ii. Procedural Violations in the Wrongful Dismissal and Successor Employer Case (JFCA Case File No. 1267/2009)

On November 6, 2009, SME filed a wrongful dismissal and substitute employer case with the JFCA (Case File No. 1267/2009).[204] SME sought the reinstatement of all dismissed workers and especially the assumption by the CFE of all of LyFC's labor obligations as successor employer to LyFC pursuant to Article 41 of the LFT. In addition, it sought payment of earned but unpaid wages, recognition of the workers' seniority, and protection of their pensions.

Article 5 of NAALC requires that tribunal proceedings are "fair, equitable and transparent" and free of unwarranted delays. This case, by contrast, was fraught with procedural irregularities and unwarranted delays.

The JFCA consistently elected to hear the SAE's motions, however meritless. This effectively denied SME its right to have its claims adjudicated in a timely manner.

a. ***Motion to join.*** Following SME's initial filing of its claim before the JFCA, the SAE filed a motion to join approximately 40,000 cases. While it was clearly without merit, the JFCA considered this motion not once, but in *four* separate hearings. This delayed SME's ability to raise its claims for months.

b. ***Motion to dismiss.*** At the same time, SAE made a motion seeking a declaration that SME's Labor Secretary and its lawyers had no legal standing to bring the November 6, 2009 suit on behalf of SME and its members, which it withdrew a

[202] Part D, *supra*, at para. 53.
[203] *See* JFCA Decision Terminating the Individual and Collective Labor Relationships and the SME Collective Agreement, August 30, 2010, at 3 [**Exhibit 025**].
[204] SME's Unjustified Dismissal and Substitute Employer Statement of Claim, November 6, 2009 [**Exhibit 028**]; Section G.iii, *supra*.

> few months afterward.[205] Despite this fact, the JFCA decided it would nevertheless hear the issue. Not only did the JFCA's decision to pursue the motion despite the moving party's withdrawal of it cause unwarranted delays; it also further confirmed that the JFCA was neither impartial nor independent.

Given these specious motions by defendants and the ensuing delays, a hearing to receive the parties' evidence in SME's unjustified dismissal and employer substitution case did not occur until April 9, 2011. Despite the fact that SME filed its claim twenty-four months ago, the JFCA is yet to issue a final decision.

These cases illustrate that the JFCA is not capable of rendering impartial and expeditious justice; both cases have taken far too long to adjudicate. Further, any objective assessment of the proceedings reveals a clear bias against SME. Both cases have been fraught with procedural irregularities making SME's ability to get a fair hearing a virtual impossibility.

Previous United States NAO and OTLA reports reveal that the JFCA's bias and foul play in this case is nothing new; the labor tribunal has exhibited a history of partiality and opacity.[206] Especially when juxtaposed against this precedent, the unfairness of SME adjudications serves as just another example of the systemic failure of the Mexican labor justice system to comply with the demands of the NAALC.

F. The Government of Mexico Has Violated its Obligations under Article 6 of the NAALC

Article 6 of the NAALC requires the government to "publish in advance" any measure pertaining to labor law in order that "interested persons" may have a "reasonable opportunity to comment on such proposed measures."[207] Here, exactly the reverse happened. The president issued the Decree on October 10, 2009 and deployed government offiicals to forcibly expel SME workers from the premises of the LyFC on that same date; the decree was not officially published until the next day. By issuing the Extinction Decree on October 11, 2009 without any prior consultation with

[205] Statement of Defence Responding to the SME's Statement of Claim and Amendments, Clarifications and Additions Thereto, Presented by the SAE's Legal Representative, Humberto Cavazos Chena , September 24, 2010, at 1-6 **[Exhibit 031]**.

[206] See, for example, *Han Young*, NAO Public Report 2003-01, noting that "several submissions [against Mexico] explicitly raised the issue of Mexico's obligations under NAALC Article 5 on procedural guarantees"; see also *Hidalgo*, NAO Public Report 2005-03, which noted "concerns about the application of procedural guarantees under Mexican labor law."

[207] North American Agreement on Labour Cooperation art. 6, Sept. 14, 1993, 32 I.L.M. 1499.

the tens of thousands of workers who would be affected, and by enforcing the Decree before its publication, the government clearly violated this provision of NAALC.

G. Conclusion: The Government of Mexico has Violated Fundamental Labor Rights and Failed to Enforce its Labor Law

Through secrecy and physical force, the Mexican government unilaterally terminated over forty thousand union workers, disregarding their collective bargaining agreement as well as their panoply of rights enshrined in domestic law. The terminated workers' recourse to labor tribunal and court proceedings was subsequently frustrated by the government's failure to ensure independent and timely administration of justice.

The facts of this case highlight fundamental problems with the Mexican labor law regime. These problems include:

(a) Unchecked government authority and control over labor relations;

(b) The longstanding and well-documented lack of any protection for autonomous, democratic trade unions;

(c) The lack of any impartial, independent and effective labor law enforcement mechanisms; and

(d) The failure to enforce health and safety law and regulations.

The facts of this case further demonstrate that Mexico has failed to adhere to even the most basic concept of "high labor standards" as mandated by Article 2 of the NAALC. It has failed to promote compliance and enforce its own labor law, violating Article 3 and has failed at every level to provide SME and its affected membership with any fair, equitable, or effective legal proceeding through which to advance their claims and protect their basic labor rights, thus violating Article 5.

This case is of particular importance because the Mexican Government has led this attack on trade union and worker rights by violating its own labor laws. At its core, the NAALC requires the signatory states to enforce their own labor laws. The effective and neutral enforcement of labor laws is most important when it is the government itself that is attacking the rights of workers. In this case, the Mexican system has completely failed to meet the standards required by the NAALC and it is no accident that this failure has occurred in the face of a government assault on workers' rights.

Petitioners are aware that the OTLA prefers to wait for domestic litigation to be concluded before accepting a Public Communication under the NAALC. However, in the instant case, the domestic litigation has suffered unwarranted delay and bias in violation of Article 5 of NAALC. If the NAALC is to have any meaning or substance, OTLA must be willing to investigate Public Communications in a timely manner. Only through prompt investigation of these allegations the Mexican government's violations of the NAALC can be revealed and the union workers' rights redressed.

After a careful and detailed review of the facts set out in this Public Communication, the OTLA must accept this Communication and investigate the issues raised by the unconscionable attack on tens of thousands of Mexican workers. If these facts do not give rise to the conclusion that Mexico is in violation of the NAALC, then the NAALC is truly of no value whatsoever to the workers of North America.

PART III: DOCUMENTARY EVIDENCE

The Petitioners attach hereto all the constitutional, legal, judicial and administrative documents as well as any other evidentiary documents related to the instant Public Communication. The documents are contained in the enclosed discs.

PART IV: RELIEF REQUESTED

The Petitioners respectfully request the following relief from the OTLA:

A. The Petitioners request that the OTLA immediately accept this Public Communication and that it initiate a review, pursuant to Article 16(3) of the NAALC.

B. Once accepted for review, the Petitioners request that the OTLA organize a full Public Hearing in the United States so that the OTLA may hear further facts and submissions from the affected leaders and members of SME, from Mexican labor lawyers and experts, and from other petitioners.

C. The Petitioners request that the OTLA issue a full report on this matter that makes the following findings and recommendations:

1. A finding that the government of Mexico has failed to meet its obligations under Articles 1, 2, 3, 4, 5, and 6 of the NAALC as set forth in this Public Communication.

2. A recommendation that the U.S. Secretary of Labor request immediate ministerial consultations with the Mexican government on all NAALC violations set out herein, and specifically:

    a. The Government's failure to follow Mexican Laws by issuing the Decree Extinguishing LyFC;

    b. The Government's failure to expeditiously enforce if own labor law through impartial and independent adjudicative bodies;

    c. The Government's ongoing interference in the operation of the SME by, *inter alia*, failing to respect the outcome of the Union's internal elections and granting legal certification (*toma de nota)* and freezing the Union's bank accounts; and;

    d. The Government's failure to take measures to prevent further workplace deaths and accidents.

D. The Petitioners request that they be fully involved and apprised of the progress and outcome of the Ministerial Consultations.

E. If, following Ministerial Consultations, the Government of Mexico has not remedied the issues set out in paragraph (C) above, the OTLA should recommend that the Minister request that an Evaluation Committee of Experts be established under Article 23 and that arbitration and sanctions be pursued under Article 27 of the NAALC.