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Chairperson: Mr Rorix Núñez Morales
Président: Mr Rorix Núñez Morales
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Discussion of individual cases *(cont.)*
Discussion sur les cas individuels *(suite)*
Discusión sobre los casos individuales *(cont.)*

Brazil *(ratification: 1952)*

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
Convention (no 98) sur le droit d'organisation et de négociation collective, 1949
Convenio sobre el derecho de sindicación y de negociación colectiva, 1949 (núm. 98)

The Government provided written information which is reproduced in document D.11.

In addition, before the Committee, **a Government representative (Mr YOMURA, Minister of Labour)** regretted that the case was discussed for political considerations. That could have a negative impact on the quality of the system, and Brazil had always supported the strengthening of the ILO system of supervision.

Brazil was a founding member and had ratified 97 Conventions, 80 of which were in force. It was one of the States most exposed to the supervisory system. Its performance in the context of the ILO supervisory mechanisms was exemplary. Each year, the Government submitted all reports due, demonstrating the full implementation of the instruments ratified. In addition, the Tripartite Commission on International Relations, where ILO standards and their application were widely discussed, in full implementation of the social dialogue promoted by Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), met periodically.

With all those credentials, and with no reason to justify the urgency of such an examination, it was difficult to understand why the Committee of Experts, not fulfilling its mandate to examine the application of ILO instruments in law and in practice, did not wait for the regular reporting cycle to examine Act No. 13.467/17. Concerning some important aspects, that law was prejudged a few days after its entry into force. The analysis was conducted with such excessive speed that the articles of the legislation examined were swapped. Because the country committed to the ILO and its system of standards supervision, the biased, partial and non-technical treatment of the case caused great discomfort. The ILO was captured in a political game that combined partisan motivations and corporatist interests.

Out of the more than two dozen of "Direct Actions of Unconstitutionality" (judicial review proceedings) proposed in the Federal Supreme Court against several points of the reform, none dealt with the points analysed by the Committee of Experts. Two-thirds of them dealt with the end of the union tax, which was a very controversial measure not questioned by the Committee of Experts. That measure brought Brazil closer to the practice of the vast majority of the countries in the world and promoted the autonomy and independence of trade unions, established in the Convention. The reform abolished a provision which was created in the 1940s by a government that wanted to keep trade unions under control.

The Committee of Experts stated that the possibility, by means of collective bargaining, of derogations to the rights and protection afforded to workers by the labour legislation

would discourage collective bargaining and would therefore be contrary to the objectives of the Convention. He regretted that the Committee of Experts seemed to have endorsed the political thesis that the reform would lead to precarious work. However, that could be possible only if trade unions would voluntarily agree to the terms of an agreement less favourable than the existing legal provisions. The Committee of Experts did not consider that trade unions were not obliged to agree to conditions less favourable than those defined by law. Negotiation without the possibility of reciprocal concessions, only conferring advantages to one party, would not offer the other party any incentive to negotiate. It was a basic principle of any negotiation to have concessions from each side.

Brazil had extremely broad and detailed labour legislation. Restricting collective bargaining only to points not covered by legislation or above legal provisions would reduce their range and scope of application in an irrational way. That would be contrary to the Convention as it established that governments had to promote negotiations as comprehensive as possible, as recognized in the ILO Handbook on the subject and reaffirmed repeatedly in recurrent recommendations of the Committee on Freedom of Association.

The Committee of Experts did not refer to a broad set of labour rights that had been granted constitutional protection in the Brazilian legal system and could not be revoked by any reform, not even by a constitutional reform. Those rights were included in Act No. 13.467/2017. Eighty Conventions in force were part of the legal system in Brazil and were not affected by the reform. In the "General Survey" of 2018, the Committee of Experts recognized that constitutional protection guaranteed to those rights in Brazil was an example to emulate. Those rights were not subject to derogation and had been expressly excluded from the possibility of any negotiation. That proved that the aim of the reform was not to revoke any right but, by consolidating them, to guarantee as much space as possible for collective bargaining, thus implementing more effectively the Convention.

The Committee neglected to mention that, in the past, it was common that the judiciary in Brazil would make void labour clauses of collective agreements or entire agreements,

without any objective legal reasoning. That created legal uncertainty and discouraged collective bargaining. Collective bargaining could be effectively fostered, as advocated by the ILO, only by granting force of law to collective bargaining and protecting the autonomy of the parties, through the primacy of the negotiated over the legislated. It was surprising that union leaders questioned that point, since the law incorporated a proposal originally made in 2011 by one of the largest and strongest unions in the country, the ABC metalworkers union of São Paolo.

It was alleged that the primacy of the negotiated over the legislated opened the possibility for unions to negotiate to the disadvantage of the workers. However, that was not the experience of collective bargaining in Brazil. Studies showed that in 2016, the year of a strong economic crisis, in more than half of the collective agreements, unions negotiated salary readjustments above inflation, while the vast majority succeeded in securing job preservation at a time when layoffs were high. Trade unions in Brazil had already integrated the provisions contained in the new legislation into their collective agreements. Collective bargaining had not been discouraged with the new legislation.

In addition to the constitutional guarantees, workers were protected by the system of ratification of collective agreements by the Ministry of Labour, which required proof that the agreement was approved by a representative assembly of the category; by the labour inspection system, composed of professionals able to identify and administratively combat fraud and violations; by the labour prosecutor's office, a unique institution that could bring a lawsuit when it perceived non-compliance to legal precepts, as it had done; and by the labour judicial system, with specialized professionals who, in 2017, before the new law entered into force, received more than 4 million new lawsuits.

The Committee did not mention that in Brazil there were 17,509 registered union entities and many had done very little for their constituency. It was not difficult to understand why there were so many, differently from the rest of the world. Since it benefited from a mandatory tax, in order to exist a union did not have to be representative or defend the

workers' interests. The income guaranteed by the State, which in 2017 reached more than 4 billion Reais (or $1.25 billion), provided a sufficient reason for its existence, in a clear distortion of the values that should guide and justify workers' organizations. For that reason, the same reform that favoured collective bargaining, also promoted union independence, which was at the heart of the Convention. It was clear that there were no technical reasons why the case of Brazil should be examined by the Committee at this time and it was regrettable that the ILO had been politically manipulated. Hasty and technically flawed analyses could be sufficient to expose a country, if political interests so required, and force it to provide clarification to the Committee. The process was described in the Brazilian press, in an election year, regardless of the country's commitment to fulfilling its obligations. Such a system did not meet the demands and challenges of the world of work, nor the expectations placed in the ILO. With the ILO approaching its first centenary, the time had come to reform the system so as to make it more consistent with the world of work and with democratic and inclusive principles, such as the due process of law, which was required of all agencies of the UN system.

For many years, GRULAC had denounced this state of affairs and had been solemnly ignored. The time had come to start listening, because otherwise the system of standards supervision would run the grave risk of losing credibility, and thereby becoming irrelevant. In a tripartite organization, it was astonishing that there was nothing tripartite in the regular system of standards supervision. Unlike other agencies, governments had no role in the selection of the Committee of Experts members or in the definition of working methods. Unlike other agencies, there was no real universal method of supervision. It was always the same group of countries that allegedly failed to respect commitments. That situation privileged selectivity against transparency and universality.

He reiterated the lack of consensus in the current working methods of the Committee. If the level of compliance and support for ILO instruments was to be increased, the perspectives of governments had to be included in selecting the lists of cases, to meet

technical criteria; in the drafting of conclusions, to be effectively implemented; and in working methods in general, to be honoured. The composition of the Committee of Experts had to be revised to reflect the diversity and technical quality expected. The criteria for selecting the lists of cases to examine had to be re-examined in order to ensure that decisions were exclusively of a technical nature. Brazil had a keen interest in continuing the debate with social actors in order to improve its labour legislation and it is prepared to do so. He expressed its continuous commitment to the obligations undertaken with the ILO and reiterated that the modernization of the legislation did not violate any Convention. On the contrary, Act No. 13.467/2017 promoted and strengthened collective bargaining, giving full effect to the Convention. He urged a profound change in the supervisory system before it was too late and expressed the readiness of his Government to participate in good faith in a collective effort to improve the supervisory system for all.

The Worker members noted that it was the first time in 20 years that the Committee was discussing the application of the Convention in Brazil. Noting that the country had been on a steady path towards social progress and a global leader in this regard, they were therefore deeply disappointed by the regressive legislative steps undertaken, which would have the effect of dismantling collective bargaining rights and the strong industrial relations tradition built over the past two decades. In 2016, Brazilian trade unions had already transmitted information to the Committee of Experts to report the severe shortcomings and flaws of the bills which were before Congress at that time. Considering that the introduction of a general possibility of lowering through collective bargaining the protection established for workers in the legislation would have a strong dissuasive effect on the exercise of the right to collective bargaining and could contribute to undermining its legitimacy in the long term, the Committee of Experts had requested the Government to take these comments into account during the examination of the bills. Even if it was eventually not discussed by the Conference Committee in 2017, Brazil had been listed on the preliminary list of cases. Despite these warning signals, the Government had adopted the problematic amendments

on 13 July 2017, without taking into account the comments of the Committee of Experts. Both social partners had provided their views on the legislative reform, which was passed before the 2017 session of the Committee of Experts. The Worker members therefore did not agree that this case, which had a history within the supervisory system, had been dealt with prematurely by the Committee of Experts. They also strongly disagreed with the criticism related to the treatment of the case outside of the regular reporting cycle. Recalling that the criteria for breaking the reporting cycle were reproduced every year in the General Report of the Committee of Experts, they considered that the case of Brazil met the criteria that observations referring to legislative proposals or draft laws may be examined by that Committee even in the absence of a reply from the Government. The development of a mechanism to break the reporting cycle enjoyed tripartite support. It had been introduced as a safeguard when the Governing Body had extended the reporting cycle for certain types of Conventions to ensure that effective supervision of the application of ratified Conventions was maintained. They would never accept that an individual case would be used to attack the well-recognized and supported impartiality and independence of the Committee of Experts.

The Workers members were deeply concerned that the far-reaching legislative amendments, which were introduced hastily and without prior genuine and meaningful consultation, would effectively result in the dismantling of the collective bargaining framework in Brazil and undermine the rights of workers. With reference to the Government's statement that the legislation had been elaborated after a series of debates organized by the Government in December 2016, with the participation of representatives of trade unions and employers, they wished to remind the Government that "debates" cannot substitute genuine and effective consultations and that the most representative trade unions were not part of these debates. Moreover, the draft Bill had only seven articles at that time, whereas the law, as enacted, was very extensive, with more than 100 articles. In addition, the Labour Relations Council, which was the official tripartite body where ILO matters were

discussed, had not been convened after April 2016. When the new National Labour Council was created on 1 June 2017, the Bill had already been approved in the lower house.

They considered that the amendments run counter to the objective and spirit of the Convention. New section 611A of the Consolidation of Labour Laws (CLT), which established as a general principle that collective agreements prevailed over the legislation and that collective agreements, negotiated by workplace delegations at the enterprise level, prevailed over collective agreements, made it possible through collective bargaining not to give effect to the protective provisions of the legislation. While Act No. 13.467/2017 contained a list of subjects in respect of which collective bargaining prevailed over the law, that list included many aspects of the employment relationship, such as working-time arrangements. Since that list was merely illustrative, it could be broadly extended by the parties. The sole limit to these deviations was a closed list of rights referred to in section 611B, which contained 30 rights, enshrined in article 7 of the Federal Constitution of Brazil. Moreover, section 611A specified that the absence of compensatory measures was not a reason for the clauses of collective agreements to be found void, even where they derogated from the rights set out in the law. The Worker members wished to recall that the overall aim of Article 4 of the Convention was the promotion of good faith collective bargaining with a view to reaching an agreement on terms and conditions of employment that were more favourable than those envisaged in law. By allowing for less favourable derogations in collective agreements on virtually all subjects of the employment relationship, the Government deprived workers of their fundamental right to collective bargaining and failed to ensure the effective realization of a minimum set of rights which would apply equally to all workers in Brazil. Moreover, new section 444 of the CLT, which stated that workers who had a higher education diploma and received a wage that was at least two times higher than the ceiling for benefits from the general social security scheme may agree to derogate from the provisions of the legislation and collective agreements in their individual contracts of employment, was not in conformity with Article 4 of the Convention and with

the Collective Agreements Recommendation, 1951 (No. 91), which laid down the principle of the binding effects of collective agreements and their primacy over individual contracts of employment where the latter were less favourable. In addition, by expanding the definition of autonomous workers who did not enjoy the right to organize and bargain collectively to include workers who were engaged exclusively and permanently for an enterprise, new section 442B of the CLT diluted the collective representation of workers through misclassification.

The Worker members were deeply concerned by the profound and broad-reaching changes implemented by the legislative reform which eroded collective bargaining rights previously guaranteed to workers. With reference to the Government's argument that the reform had been necessary due to the overall context of economic recession, they noted that even though the number of collective agreements had decreased by 29 per cent since the adoption of the reform, the economic situation in the country had not improved. Unemployment and the informality rate had even risen. No country had ever achieved sustainable economic progress by depriving workers of their fundamental rights. Reiterating their deep concern with the retrograde practices in a country which used to be championing fundamental rights at work, they called on the Government to urgently take the necessary steps in order to reform the legislation and to bring it into line with the Convention before any further harm was inflicted on the workers of Brazil.

The Employer members expressed concern with the observation adopted by the Committee of Experts on the application of the Convention by Brazil. While recognizing the authority of the Committee of Experts to examine a situation outside of the regular reporting cycle, in particular in the case of legislative reforms, they were concerned with the exercise of this discretion in the present case. While one national trade union had criticized the labour reform, the national employers' organization had sent information to express satisfaction at the modernization of the outdated labour relations system. Moreover, despite the fact that it had not received a response from the Government to the diverging opinions of the social

partners, the Committee of Experts had adopted an observation, only a few days after the labour law reform had come into effect. In addition, 2017 had not been a reporting year on the Convention for Brazil, which was up to date with its reporting obligations. In view of the lack of information on the position of the Government, a direct request might have been the more appropriate first step in the examination of the situation. In view of the sensitivity of the case, they regretted that its discussion by the Conference Committee was based on incomplete information. The Committee was therefore not in a position to examine the case in a proper and balanced manner. Examining the case in the regular cycle would have allowed a comprehensive evaluation of the impact of the reforms on the application of the Convention, both in law and in practice. The Employer members had taken careful note of the Government's statement. Additional information was necessary to fully understand the labour law reform.

The Employer members noted that the labour law reform established as a general principle that collective agreements prevailed over national legislation, except for the constitutional rights referred to in section 611B of the CLT. In that respect, the Committee of Experts had observed that the general objective of the Convention was to promote collective bargaining with a view to agreeing on terms and conditions of employment that were more favourable than those already established by law. The Employer members recalled the requirements of Article 4 of the Convention which provided that member States must take measures to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. In their view, there was no absolute requirement that the outcome of collective bargaining must be on terms and conditions that would be more favourable than those established by law. A mechanism that allowed for the prevailing effect of collective agreements promoted in law the principle of collective bargaining. It might create an incentive for additional voluntary collective bargaining. It was not yet possible to

analyse the effect of the system in practice and therefore not possible to know at this stage whether this mechanism would undermine the principle of collective bargaining. In order to allow a complete examination of the conformity of the reform with the Convention, the Employer members encouraged the Government to provide information in its next report on the operation of sections 611A and 611B of the CLT, in law and in practice. The analysis must take into account the extensive rights of workers enshrined in the Constitution and referred to in section 611B which concerned 30 areas of protection, including the right to unemployment insurance, minimum wage, paid weekly rest and vacation, maternity and paternity leave, occupational safety and health and freedom of association. It was of concern that the full list of protected rights was not included in the observation adopted by the Committee of Experts.

With respect to the issue of the relationship between individual contracts of employment and collective agreements, the Committee of Experts had noted that workers who had a higher education diploma and received a wage that was at least two times higher than the ceiling for benefits from the general social security would be able to derogate from the provisions of the legislation and collective agreements and accords in their individual contracts of employment. In that respect, the Employer members noted that it was not possible to have a full and informed discussion on the impact of such a provision in law and practice and to assess compliance with the Convention without further information from the Government and the social partners. In their view, the issue of the prevalence of individual contracts over the national legislation was not within the scope of application of the Convention.

Finally, regarding the extension of the definition of autonomous workers and its effect on the exclusion of workers from trade union rights, they noted that it was not possible to have a full and informed discussion without appropriate information and requested the Government to send its comments on the observations from the trade unions for examination by the Committee of Experts.

El miembro trabajador del Brasil (Sr. DE LISBOA ANTONIO), en nombre de las centrales sindicales brasileñas, felicitó a la Comisión de Expertos por la calidad de su trabajo que la ha convertido en una referencia inequívoca en las discusiones sobre las relaciones laborales. Sostuvo que los conocimientos técnicos y la imparcialidad de los expertos no deberían ser cuestionados sólo porque sus comentarios sean desfavorables a cierta posición. La función de los expertos es imprescindible para la orientación de los debates y para generar el necesario equilibrio en la Organización y, por lo tanto, quienes atacan a la Comisión de Expertos, atacan a la propia Organización. La gravedad de las violaciones ocasionadas por la ley núm. 13467 queda reflejada en las severas observaciones formuladas por los expertos. La nueva legislación constituye el ataque más grave a los derechos sindicales de los trabajadores en toda la historia del Brasil. El debate ante la Comisión no es nuevo ya que en 2001 el Gobierno había pretendido aprobar una ley que permitía la reducción de derechos previstos en la ley por medio de negociaciones colectivas. En 2002, en respuesta a una consulta formulada por la Central Única de Trabajadores (CUT) del Brasil, el Departamento de Normas Internacionales del Trabajo de la OIT había afirmado ya que la posibilidad de desconocer derechos contenidos en la ley a través de una negociación colectiva era contraria a los Convenios núms. 98 y 154. El proceso que culminó con la aprobación de la reforma laboral en julio de 2017 estuvo marcado por la absoluta falta de consulta tanto de los representantes de los trabajadores como de otros sectores vinculados al mundo del trabajo como la Asociación Nacional de los Jueces del Trabajo, el Ministerio Público del Trabajo y la Asociación de Abogados Laborales. La nueva ley promueve el debilitamiento general de todo el sistema de protección de los trabajadores, atacando la organización sindical y el derecho de los trabajadores a recurrir a la justicia para presentar sus demandas, imponiendo pesadas cargas financieras a aquellos que lo hacen. Al respecto, el orador repudió toda práctica tendiente a perseguir a magistrados del trabajo que, al aplicar la nueva ley, han seguido un enfoque jurídico distinto. Con el argumento de modernizar las relaciones laborales, la nueva ley representa un retorno a parámetros de relaciones jurídicas superados desde hace numerosos años. Tales parámetros se basan en la plena libertad de contratación

y asumen que las partes de la relación laboral tienen el mismo poder de negociación. El retroceso es manifiesto si se tiene en cuenta que la ley permite que la negociación individual deje sin efecto la aplicación de convenios colectivos, en violación a lo dispuesto en el artículo 4 del Convenio. Asimismo, bajo el argumento de combatir el trabajo informal, la nueva ley legaliza diversos tipos de trabajo precario y permite que mujeres embarazadas y lactantes puedan trabajar en lugares insalubres. La reforma no sólo no generó el empleo prometido sino que aumentó los índices de desocupación. Así, mientras que en el momento de entrada en vigor de la ley la tasa de desempleo era del 12,2 por ciento, según datos del Instituto Oficial del Estado brasileño (IBGE), en abril de 2018, dicha tasa era del 13,1 por ciento, lo que equivale a 13,7 millones de desempleados. Si a esta cifra se suman los trabajadores potenciales que desistieron de buscar empleo (7,8 millones) y los subocupados (6,2 millones), resulta que un total de 27,7 millones de brasileños están fuera del mercado de trabajo (24,7 por ciento de la población económicamente activa). La posición del Gobierno según la cual la nueva ley contribuye a promover la negociación colectiva está alejada de la realidad. Un estudio realizado por el Instituto de Investigación Económica de la Universidad de São Paulo a este respecto da cuenta de una caída del 34 por ciento en el número de acuerdos colectivos celebrados en los primeros meses de 2018. De acuerdo con la nueva ley, la negociación colectiva prevalece sobre la legislación incluso cuando ésta establece mejores condiciones; el acuerdo de empresa prevalece sobre la convención colectiva y los acuerdos individuales pueden excluir a trabajadores de la protección conferida por acuerdos y convenciones existentes, en clara violación del Convenio núm. 98. La reforma atacó duramente la organización sindical, en la medida en que extinguió el modelo de financiación existente sin crear un modelo alternativo. Se impide igualmente a los sindicatos aprobar en asamblea tasas o contribuciones para su sustento, violando una vez más el Convenio. Es imposible fortalecer la negociación colectiva debilitando a los sindicatos. Concluyó solicitando la derogación de la nueva ley dado que la misma retira derechos, ataca a los sindicatos, promueve la negociación individual en detrimento de la negociación colectiva y aleja el país de la agenda de trabajo decente.

El miembro empleador del Brasil (Sr. FULAN FALA) sostuvo que no existe fundamento legal alguno que justifique el llamado del Brasil ante la Comisión. La Comisión de Expertos, al no observar el ciclo regular de memorias establecido para examinar el Convenio, ha prejuzgado sobre la aplicación del mismo, basándose en un análisis superficial y abstracto de la nueva ley que no tiene en cuenta los resultados de su aplicación concreta. No se trata de un debate técnico sino de un debate político e ideológico. El Brasil es uno de los países que ha ratificado más convenios de la OIT y en el que los derechos laborales tienen rango constitucional. La reforma laboral no deroga ni modifica tales derechos laborales. La nueva ley sólo permite que los trabajadores y los empleadores puedan, si así lo desean, establecer normas relativas a las rutinas de trabajo, válidas por un tiempo determinado. No puede sostenerse que en virtud de la reforma la negociación colectiva deje sin efecto la legislación aplicable, en particular, dado que cuando no hay acuerdo en la negociación colectiva, debe aplicarse la legislación existente. Es claro que, contrariamente a lo que se ha sostenido, la ley núm. 13467 no menoscaba el Convenio sino que refuerza sus objetivos en el contexto de la legislación laboral brasileña, garantizando que los instrumentos colectivos puedan celebrarse teniendo en cuenta las modalidades actuales de trabajo y producción, sin interferencia del Estado. La Corte Suprema Constitucional del Brasil destacó, en 2015, el papel fundamental de la negociación colectiva como mecanismo de adecuación de las normas laborales a diferentes sectores de la economía y situaciones económicas. A este respecto, la reforma laboral simplemente confirma la premisa principal del Convenio de promover la negociación voluntaria, estableciendo expresamente que los derechos de los trabajadores, previstos en la Constitución Federal, no pueden ser objeto de supresión o reducción por medio de la negociación. Entre tales derechos figuran los enumerados por la portavoz de los empleadores. La nueva ley busca establecer un ambiente propicio para la negociación colectiva brindando seguridad jurídica a los actores sociales para que puedan reanudar el diálogo sobre cuestiones cuya negociación generaba incertidumbre al ser a menudo objeto de anulación por parte de la justicia del trabajo. Los trabajadores no han sido perjudicados por la reforma, contrariamente a lo que afirman ciertos sindicatos que reclaman

la restauración del impuesto sindical obligatorio, sin ofrecer a cambio los servicios debidos a sus representados. Los recursos nacionales existentes no fueron utilizados antes de llegar a la OIT. En efecto, las centrales sindicales sólo recurrieron ante la Corte Constitucional para reclamar el impuesto sindical y no para alegar supuestas violaciones a la Constitución o al Convenio. La reforma laboral era necesaria para dar impulso a la negociación colectiva y modernizar una ley de principios de los cuarenta. La nueva ley, resultado de un proceso democrático en el que hubo numerosas audiencias públicas y aprobada por una amplia mayoría del Congreso Nacional, no menoscaba el Convenio sino que protege la negociación colectiva de interferencias externas; consolida un mecanismo eficaz para hacer frente a dificultades económicas; armoniza la legislación con la de otros países miembros de la OIT y tiende a lograr un equilibrio entre la libertad de negociación y el principio de protección de los trabajadores. Es preocupante que la OIT pueda considerar que la negociación sólo es válida si contiene términos y condiciones de empleo más favorables que los establecidos en la ley, en particular porque tal noción resulta de una interpretación extensiva del Convenio que no debería vincular a ninguno de los 165 países que tienen ratificado dicho instrumento, no debiendo permitirse una modificación de las reglas del juego establecidas por el Convenio. Recordando que su país sólo hace algunos años era considerado como una referencia para la Comisión, confió en que en el examen del caso prevalecerían la imparcialidad y el papel institucional de la OIT basado en el tripartismo y exento de intereses políticos e ideológicos.

La miembro gubernamental del Paraguay (Sra. LÓPEZ BENITEZ) hablando en nombre de una significativa mayoría del Grupo de los Estados de América Latina y el Caribe (GRULAC), reiteró su profunda preocupación con los métodos de trabajo adoptados por la Comisión de la Conferencia, que no cuentan con el consenso tripartito. Además, varios aspectos de los comentarios de la Comisión de Expertos generan interrogantes. En relación con la ruptura del ciclo regular sin memoria del Gobierno, la oradora consideró que la existencia de criterios al respecto sólo ilustra la necesidad de una justificativa de la decisión

de romper el ciclo. Refiriéndose al mandato de la Comisión de Expertos reflejado en su Informe General que indica que las opiniones de la Comisión de Expertos no son vinculantes y que toman en cuenta la aplicación de los convenios «en la legislación y en la práctica, teniendo en cuenta las diferentes realidades y sistemas jurídicos», lamentó que en el caso del Brasil, no se haya concedido el tiempo necesario para evaluar la complejidad de la reforma laboral, que se debe examinar en su conjunto, sus repercusiones prácticas y su interpretación por los tribunales. En ese sentido, tampoco se ha considerado el extenso rol de derechos laborales contenidos en la Constitución Federal del Brasil. En el caso brasileño, se debería considerar, no solamente la Constitución, sino también la justicia laboral especializada, la Fiscalía General del Trabajo, órgano independiente del Gobierno, la naturaleza de carrera de Estado de la inspección del trabajo y la manutención del marco de la Consolidación de las Leyes del Trabajo. Reiteró su compromiso con el fomento a la negociación colectiva y con el principio contenido en el artículo 4 del Convenio. El sentido ordinario del artículo es claro, incluso al referirse a las «condiciones nacionales».

El miembro gubernamental de Panamá (Sr. CARLES RUDY) se refirió al modelo de las mesas tripartitas de diálogo social tripartito establecidas en su país para la armonización del ordenamiento jurídico con los convenios y recomendaciones de la OIT y subrayó el carácter fundamental de la asistencia técnica brindada por el Departamento de Normas Internacionales del Trabajo de la OIT a este respecto. Expresó, sin embargo, preocupación en torno a los métodos regulatorios que determinaron la inclusión del Brasil en la lista de casos a ser examinados por la Comisión, incluyendo la ruptura del ciclo regular por la Comisión de Expertos que se pronunció sin memoria del Gobierno. Reiterando su compromiso con los órganos de control, subrayó la necesidad de adoptar mecanismos de trabajo que sean debidamente consensuados entre los mandantes.

The Worker member of Portugal (Mr PRAÇA) considered that the labour legislation reform adopted by the Brazilian Government followed the matrix of reforms that had occurred in Spain, Portugal and Greece which, since 2009, had led to social regression

for workers in southern Europe to levels of several decades earlier. Under the pretext of making labour relations more flexible, increasing employment, ending labour market fragmentation and enhancing collective bargaining, the "troika", integrating the International Monetary Fund (IMF), the European Commission (EC), the European Central Bank (ECB), and the Governments had imposed labour law reforms on workers, allowing for collective bargaining to be carried out by informal organizations, eliminating the principle of favourability, increasing hours of work and lowering overtime pay. Such changes had had dire consequences for workers, with labour incomes dropping, unemployment rates reaching figures never seen before, rising from under 10 per cent to over 20 per cent in less than two years, forcing hundreds of thousands of workers, mainly young people, to look for work in other countries. He thus considered that these labour legislation reforms' central objective had been to cut workers' and pensioners' incomes.

The reform that was being imposed on the Brazilian workers followed the same matrix, grounds and aims. By mandating that an individual contract of employment could stipulate lower terms and conditions than those set by law or by collective agreements; by permitting that collective bargaining could be engaged in without the participation of trade unions; and by allowing the development of precarious employment relations, the labour reform would lead to an increase in precarious work and to labour market segmentation, instead of combating them. The Brazilian Government's labour reform undermined workers' fundamental rights enshrined in the ILO core Conventions and was in violation of the Convention, since it allowed for collective bargaining without the participation of trade unions and to set aside collective labour agreements by individual contracts. He therefore urged the Brazilian Government to accept ILO assistance to align labour legislation with the international instruments to which they were bound and to respect the indispensable role of the Committee of Experts in ensuring that ILO Conventions were effective.

The Government member of India (Mr PAUL) appreciated the efforts and the positive steps taken by the Government to reform its labour laws with a view to providing

legal certainty and reliability to collective bargaining, in consultation with the social partners and in accordance with the Constitution of the country and its international obligations. Countries should not be included in the preliminary or final list of cases before the end of the reporting cycle and without following due process and for other reasons than the technical merits of a case. A genuine and constructive tripartism was sine qua non for an effective and credible ILO supervisory mechanism. In fulfilling its labour-related obligations, the Committee should fully support the Government.

The worker member of Italy stated that the Government had been implementing a series of reforms in Act No. 13.467/2017 in breach of foundational principles of the ILO. No consultation with the social partners had been held, no public debate had accompanied the discussion and the Act, which took away the set of existing guarantees had been approved in record time. Neoliberal policies enacted in a unilateral way had the effect of job insecurity and precariousness. The so-called "innovation" had only entailed the worsening of working conditions and the denial of trade union rights, undermining collective bargaining mechanisms. Act No. 13.467/2017 allowed for collective agreements to worsen the conditions provided for in the law. For millions of Brazilian workers the reforms meant an increase in inequality in one of the most unequal industrialized countries. The criteria and procedure for breaking the reporting cycle of the examination of cases by the Committee of Experts provided for safeguards to ensure effective supervision of the application of ratified Conventions. That possibility not only strengthened the supervisory system of the ILO, but also ensured that time-sensitive issues, including matters of life and death or fundamental human rights were appropriately addressed. She urged the Government to amend the legislation so as to bring it into line with the Convention.

The Government member of the Russian Federation (Mr KALININ) appreciated the information provided by the Government representative on the merits of the issue, as well as on its procedural aspects. The speaker shared many of the concerns expressed, in particular in relation to the decision to examine this case outside of the regular reporting

cycle. Additional explanations regarding the reasons for that decision were needed. When considering the implementation of ILO Conventions, it was important to take into account both law enforcement practice and the general context conditioned by the peculiarities of the legal system of the country concerned. Since the reform had just been adopted, it was necessary to give the Government time to work before making unambiguous conclusions. The speaker believed that there was room for improvement in the working methods of the Conference Committee. The concrete proposals made in this respect deserved a comprehensive study. Given that the Committee was central to ensuring consistent and strict compliance with international labour standards, it must rely on the full trust of governments, workers and employers.

The Worker member of Pakistan (Mr AWAN) recalled that the mandate of the Committee of Experts was clearly spelled out in its General Report. It was vital for the Conference Committee to recall that the legitimacy and rationality of the Committee of Experts' work was based on its impartiality, experience and expertise. It was on that basis that over the years, exceptional cases had been identified and the reporting cycle broken, when allegations had been sufficiently substantiated and there was an urgent need to address the situation. In addition, observations referring to legislative proposals or draft laws could be examined by the Committee of Experts in the absence of a reply from the Government when it could be of assistance to the country. Therefore, the speaker considered that the Committee of Experts had acted within its mandate and in line with the criteria for breaking the reporting cycle, as the right to organize and to bargain collectively was a fundamental human right that risked being eroded by the enactment of Act No. 13.467/2017.

El miembro empleador de Colombia (Sr. ECHAVARRIA) señaló que la reforma laboral del Brasil es producto de amplias discusiones llevadas a cabo con los interlocutores sociales durante más de veinte años. Se trata de una norma expedida para mejorar las relaciones laborales en el Brasil, al adecuar la legislación a las nuevas realidades, siempre sobre la base de la negociación colectiva. Lo que se pretende con esta reforma laboral es

establecer condiciones más favorables para la competitividad, la productividad y el desarrollo económico social con respeto a los derechos fundamentales del trabajo y al trabajo decente. Consideró que ha sido prematura la evaluación de los efectos generados por la reforma; un período razonable de implementación es necesario para poder llegar a conclusiones precisas y fundamentadas. La reforma laboral brasileña no concede una autorización general para derogar la legislación laboral por negociación colectiva como se ha denunciado. Los cambios realizados se enfocaron en dar seguridad al resultado de lo pactado entre trabajadores y empleadores y al alcance de la negociación colectiva. La nueva normativa laboral no priva a los trabajadores de sus derechos y garantías laborales y tampoco viola los Convenios núms. 98 y 154. La Legislación laboral actual protege las negociaciones colectivas, consolida un mecanismo necesario y eficaz para el enfrentamiento de adversidades económicas y brinda mayores posibilidades de negociación a empleadores y trabajadores, sin vulneración de los derechos laborales constitucionalmente previstos. En relación con la regulación del trabajo autónomo, el orador notó que la nueva legislación establece una definición clara sobre quiénes se consideran profesionales autónomos y los requisitos para identificarlos. Al ser independientes o autónomos, los trabajadores se rigen por normas diferentes a las de los empleados y en ambas se respeta el trabajo decente. No se restringen los derechos sindicales porque los profesionales autónomos no cuentan con un vínculo laboral y, por lo tanto, no están cubiertos por la legislación laboral.

The sitting closed at 1.03 p.m.
La séance est levée à 13 h 03.
Se levantó la sesión a las 13.03 horas.

15th sitting, 5 June 2018, 3.09 p.m.
15e séance, 5 juin 2018, 15 h 09
15.ª sesión, 5 de junio de 2018, 15.09 horas

Chairperson: Mr Rorix Núñez Morales
Président: Mr Rorix Núñez Morales
Presidente: Sr. Rorix Núñez Morales

El miembro trabajador de la Argentina (Sr. MARTÍNEZ GERARDO) señaló que en un estudio reciente presentado ante el Consejo de Derechos Humanos de las Naciones Unidas se afirma que más de 130 países se han embarcado en los últimos años en reformas de políticas y normas laborales pro austeridad y que la desregulación del mercado de trabajo no favorece el crecimiento ni el empleo. Por el contrario, un número creciente de estudios confirma que las normas del trabajo tienen efectos económicos positivos tanto en la productividad como en la innovación. La reforma laboral en el Brasil generaliza la tercerización y la subcontratación. De ese modo, menoscaba salarios, debilita los sindicatos y la negociación colectiva y favorece a las grandes corporaciones multinacionales. El incremento de la informalidad y la precarización conlleva un aumento de la desigualdad. La nueva ley elimina la idea de jornada de trabajo al crear el trabajo intermitente; elimina recursos con los que contaba el trabajador para efectuar reclamos ante la justicia laboral; permite a las mujeres embarazadas trabajar en ambientes insalubres, y elimina el financiamiento de los sindicatos, con graves consecuencias sobre la existencia de los sindicatos y la negociación colectiva. Al imponer la «negociación» entre el empleador y el trabajador, sin presencia del sindicato, facilita la imposición de condiciones por debajo del acuerdo colectivo. La nueva ley constituye, asimismo, un ataque a las normas fundamentales de la OIT y es una medida regresiva que no puede considerarse como una respuesta admisible frente a las crisis económicas y financieras. Es necesario que se generen economías sustentables, con protección social, trabajos seguros y salarios decentes tanto en el Brasil como en todo el continente americano.

El miembro gubernamental de Honduras (Sr. CARRANZA DISCUA) expresó su preocupación en relación con la interrupción del ciclo regular de presentación de memoria.

Confió en que el Gobierno avanzará en el fomento de la negociación colectiva a través de la adopción de medidas adecuadas destinadas al uso de procedimientos de negociación libre y voluntaria y de contratos colectivos que reglamenten las condiciones de empleo.

The Worker member of the United States (Mr FINNEGAN), speaking also on behalf of the Worker member of Canada, stated that stable labour market institutions, social dialogue and collective bargaining were being dismantled in Brazil. In November 2017, the amendments to the CLT had come into force reducing workers' capacity to defend their rights and to negotiate improved wages and conditions. The changes permitted unions and individuals to negotiate agreements that lowered wages and conditions while increasing precarious work. Contrary to the concept of collective bargaining, employers and workers could negotiate agreements that lowered standards below what was provided for in legislation. As indicated in the report of the Committee of Experts, Act No. 13.467/2017 was not based on negotiation, but on the abdication of rights on a wide range of issues. The changes to the CLT had created a new category of exclusive autonomous worker and denied an employment relationship even when a worker had been engaged exclusively and permanently by one firm. Such workers were denied freedom of association and collective bargaining rights, and this had resulted in atomized labour relations. The first three months of the new regime had seen a nearly 3,000 per cent increase in the number of stable employment relationships dissolved, mostly concerning low-wage positions held by workers without the higher education supposed to afford them greater individual bargaining power. The changes opened more workers to precarious work and unions would no longer receive a stable contribution from those they represented. In March 2018, unions had received approximately 20 per cent of what they had in March 2017. In the first quarter of 2018, the total number of collective agreements had fallen by 29 per cent over the same period in 2017. In 2018, there had been 1,000 fewer collective agreements than there had been over the six previous years. Unemployment, informality and precarious work had increased in the same period. Brazil was experiencing extreme polarization exacerbated by the deliberate

dismantling of social dialogue and mature industrial relations. Labour law reform should not mean abandoning ILO standards. A different path could lead to broadly shared income growth and progress.

The Government member of Bangladesh (Mr HOSSAIN) commended the Government of Brazil for holding a series of discussions with the representatives of trade unions and employers in reforming the CLT that had entered into force in November 2017. Inclusive, comprehensive and extensive consultation with social partners was key in reforming any legislation concerning labour rights. One of the main aspects of labour reform in Brazil was the strengthening of collective agreements between unions and employers aimed at the possibility for each to negotiate collectively without affecting the rights of workers. Additional time was needed for understanding the impact of the law on the labour market, as it was still in its initial stage of implementation. He supported the view that the reporting cycle should not be broken and comments issued before a report was due and submitted, and agreed with the Government representative's statement with regard to the reform of the ILO supervisory mechanism. He concluded by underlining the importance of objectivity, transparency, neutrality and impartiality in the work of the Conference Committee through the use of tripartism in all decision-making processes, including for the establishment of the final list of cases and the consideration of conclusions.

The Worker member of the United Kingdom (Ms REED) stated that the labour law reforms adopted in Brazil in July 2017 were in contravention of the Convention. The reform had deregulated more than 120 labour standards, including safeguards protecting pregnant women from working with toxic substances, rules on dismissal and equal pay laws. It had also dismantled the collective bargaining system, including by permitting collective agreements to displace statutory standards. The stated goal of the reforms had been to increase flexibility, reduce unemployment and regularize the informal economy. However, unemployment levels in Brazil had remained high with a growing informal economy and a rise in precarious forms of work. Workers in insecure work were deterred from joining trade

unions for fear of victimization or job loss. The reforms had also permitted educated workers to enter into individualized contracts which opted out of collectively agreed pay and conditions. As the Committee of Experts had noted, that was a clear violation of the Convention. The speaker called on the Government of Brazil to reform its national legislation and to restore trade union rights, in line with the Convention.

El miembro gubernamental de México (Sr. HEREDIA ACOSTA) tomó nota con interés del proceso de consultas amplias que resultó en la adopción de una reforma legislativa que busca proporcionar más flexibilidad, mayor productividad laboral, certidumbre legal y racionalidad tanto al mercado de trabajo como al ordenamiento jurídico. Destacando su preocupación por la ruptura injustificada del ciclo regular de presentación de memorias, consideró que los procesos de reforma requieren ser evaluados de una manera holística, tomando en cuenta el contexto en que se desarrollan, así como otras medidas prácticas que contribuyen a la construcción de un marco jurídico efectivo que se alinee a los principios y derechos fundamentales.

El miembro trabajador de Colombia (Sr. PEDRAZA) declaró que la reforma deslegitima el objetivo de la negociación colectiva, que es mejorar las condiciones de trabajo, permitiendo que acuerdos o convenios colectivos desmejoren los mínimos establecidos en la ley. La restricción al tiempo de duración de acuerdos y convenciones colectivas a máximo dos años, conforme al artículo 614 de la reforma, y la prohibición de la ultractividad de los acuerdos y convenios, limita la voluntad de las partes y es contraria al Convenio. Rechazó de manera enérgica la posibilidad de que los trabajadores individualmente o de forma colectiva, sin la participación de los sindicatos, negocien condiciones de trabajo fuera de la negociación colectiva o pacten la exclusión de la aplicación de los acuerdos o convenciones.

Otro miembro trabajador de Colombia (Sr. GÓMEZ) lamentó profundamente el incumplimiento del Convenio por parte del Gobierno y expresó su solidaridad con las centrales obreras del Brasil.

The Government member of China (Mr JIA) shared the concerns expressed regarding the working methods of the Conference Committee. The Conference Committee was at the heart of the ILO supervisory system and its working methods could be improved. There was a lack of transparency in the selection of individual cases, which should be based on objective, fair and transparent criteria, and not on political considerations, in compliance with the established ILO procedures. Governments that were required to appear before the Conference Committee should be warned of the final list in advance, in order to have ample time to prepare. The recommendations made by the Conference Committee should reflect tripartite consensus. Governments should fully enjoy the right to information and the right to participate in the process of examining individual cases. Further, capacity building and technical assistance should be provided by the ILO to the Government concerned.

El miembro trabajador del Paraguay (Sr. ZAYAZ MARTÍNEZ) señaló que la reforma laboral en Brasil precariza el trabajo, debilita la negociación colectiva y el diálogo social y ataca a la organización sindical. La reforma fue aprobada en uno de los peores momentos de crisis política e institucional en la historia del Brasil, sin diálogo con los sindicatos y los trabajadores. Tendrá como consecuencia que los empresarios podrán hacer despidos colectivos, sin necesidad de discutir con el sindicato. Además de limitar la representación sindical, la reforma priva al movimiento sindical brasileño de sus principales fuentes de financiamiento. Recordando que en los últimos años las centrales sindicales del Brasil han venido denunciando las prácticas antisindicales y las propuestas de reformas que se acaban de concretizar, expresó su apoyo a la discusión de este caso de violación del Convenio.

El miembro trabajador del Uruguay (Sr. GAMBERA) manifestó su solidaridad con las centrales sindicales del Brasil ante los efectos de la nueva ley que ha aumentado el desempleo y la pobreza y ha llevado a un desmejoramiento de las condiciones de vida en el país. Con respecto a la necesidad de esperar el envío de la memoria por parte del Gobierno, sostuvo que más importante que la obligación de enviar memorias era la necesidad de dar

cumplimiento a las disposiciones del Convenio. A nivel del Cono Sur, se cuenta con la Declaración Sociolaboral del MERCOSUR, una herramienta tripartita que protege los derechos laborales, obtenida tras largos debates entre los interlocutores sociales. La reforma laboral en el Brasil busca por el contrario imponer recetas de los años noventa para desregular las relaciones laborales.

Un observador en representación de la Organización Mundial de Trabajadores (Sr. FREITES CHIRINO) indicó que la reforma laboral en el Brasil contraviene al derecho sindical establecido en la Constitución brasileña y a los artículos 3 y 4 del Convenio. La reforma laboral reglamenta de manera individual y privada los contratos de trabajo, entre el trabajador y el empleador, sin participación de las organizaciones sindicales, colocando a los trabajadores en una situación de vulnerabilidad excesivamente peligrosa. Este desconocimiento de las organizaciones sindicales y de la negociación colectiva permite a los empleadores realizar despidos colectivos. En los últimos años, las centrales de trabajadores brasileñas han venido denunciando las prácticas antisindicales. Permitir los ataques contra la libertad sindical y la negociación colectiva, en varios países, puede dar lugar a un retroceso para la institucionalidad sindical en el mundo.

El miembro trabajador de la República Bolivariana de Venezuela (Sr. DÍAZ) consideró que la reforma laboral brasileña que permite la negociación a la baja de los derechos es un retroceso que conduce a la desprotección de los trabajadores y que viola el Convenio. También, permite la disolución del vínculo de afiliación sindical en el caso de trabajadores que perciban un salario por lo menos dos veces superior al límite máximo de beneficios del régimen general de la previsión social. Esto puede debilitar la fuerza y la unidad sindical. Además, la reforma permite la creación de la figura del trabajador autónomo exclusivo, atacando los derechos de libertad sindical y negociación colectiva.

El miembro empleador de México (Sr. YLLANED MARTÍNEZ) enfatizó que la OIT reconoce la contratación colectiva como uno de los principales medios para establecer condiciones laborales y otras regulaciones de manera libre y voluntaria a través de los

representantes designados para tal fin. La contratación colectiva es un instrumento vinculante que obliga a las partes y que asegura seguridad jurídica. Lamentablemente en el Brasil, antes de la reforma laboral, los contratos colectivos estaban sujetos continuamente a la intervención de las autoridades que los anulaban de manera recurrente. La reforma laboral reconoce y privilegia la importancia de la contratación colectiva, en el marco constitucional que establece unos derechos fundamentales que son irrenunciables.

El miembro empleador de Guatemala (Sr. RICCI) consideró que la nueva legislación responde a la necesidad de fortalecer la negociación colectiva, en los términos exigidos por el artículo 4 del Convenio. El hecho de que los derechos de los trabajadores consagrados en la Constitución constituyan el piso de la negociación es una garantía amplia de protección. Antes de la promulgación de la nueva legislación, un fallo de la Corte Constitucional reconoció expresamente el papel importante de la negociación colectiva en tanto que mecanismo de adecuación de las normas de trabajo a los diferentes sectores de la economía y las coyunturas económicas diferenciadas. Subrayó que antes de la reforma, la interferencia gubernamental por la cancelación de cláusulas acordadas entre las partes fue duramente criticada y objeto de quejas por parte de los trabajadores brasileños. En 2011, un importante sindicato en el Brasil propuso la adopción de un convenio colectivo con un fin específico, encaminado a velar por la prevalencia de la negociación colectiva sobre la ley. La reforma permite que los que no quieren negociar colectivamente tengan las garantías del ordenamiento legal; quienes lo harán, tendrán la posibilidad de adecuar la legislación a su mejor conveniencia y según sus circunstancias, sin perjuicio de amplias garantías laborales consagradas a nivel constitucional.

El miembro trabajador de Chile (Sr. ZENTENO) señaló que en muchos aspectos la normativa brasileña referida a la libertad sindical, antes de la adopción de la ley núm. 13467, constituía un ejemplo. Tomó nota con preocupación de esta reciente ley que reforma la CLT y que estaría impactando en el cumplimiento del Convenio. Observó, con mucha preocupación, que en nombre de una supuesta defensa del empleo, de la inversión y del

crecimiento económico, el país haya recurrido a la fórmula clásica de abdicar derechos a los trabajadores, contraviniendo las disposiciones del Convenio. Recordó que la desigualdad es el principal desafío de este siglo y posiblemente de la historia de la humanidad y que la negociación colectiva, con actores sindicales fuertes, puede contribuir a establecer una vía para un crecimiento equitativo e integrado que permita reducirla. Por ello, la Comisión debería instar al Gobierno a cumplir con el Convenio, revisando los aspectos de la ley núm. 13467que no están en concordancia con éste y con el objetivo de promover la negociación colectiva libre y voluntaria y los objetivos de desarrollo sostenible.

El miembro empleador de España (Sr. SCHWEINFURTH ENCISO) señaló que la reforma de la legislación laboral brasileña ha puesto el foco en la prevalencia de la negociación colectiva sobre la legislación ordinaria que, por su rigidez, concedía, antes de la reforma, muy poco espacio de negociación a los trabajadores y empleadores, lo que inducía numerosos conflictos. La modernización de la legislación laboral ha reforzado la negociación colectiva, de conformidad con el Convenio. Las empresas y los trabajadores, representados por los sindicatos, podrán negociar y acordar unas condiciones de trabajo adaptadas a la realidad específica de los sectores, regiones y empresas. Subrayó que la ley no establece la obligatoriedad de la negociación colectiva, que se basa en la autonomía y voluntariedad de las partes.

Una observadora en representación de la Asociación Latinoamericana de Abogados Laboralistas (Sra. GÓMEZ DUQUE) destacó la gravedad del caso y su importancia para la efectiva vigencia del sistema de control de la OIT. Subrayó el papel de la negociación colectiva como un mecanismo de compensación de las desigualdades que existen en la relación entre un empleador y un trabajador. La necesidad de normas mínimas internacionales se basa en esta premisa. Las normas internacionales son también consecuencia de procesos de negociación y prevalecen sobre el derecho interno cuando es menos favorable a los trabajadores. La reforma laboral brasileña que prevé que el acuerdo individual prevalezca sobre el convenio colectivo es una grave e inaceptable regresión en

materia de derechos sociales que tiene un impacto sobre muchos países, incluyendo en la región latinoamericana.

El miembro empleador del Uruguay (Sr. SCREMINI) se refirió a la práctica llamada «industria del juicio laboral» que existe en los países de la región y que contamina la negociación colectiva y la gestión empresarial. Esta práctica es fomentada por un marco jurídico insuficiente. La reforma laboral brasileña ha buscado encontrar soluciones para estas situaciones de abuso, dando seguridad a todos los actores sociales sobre las consecuencias de lo pactado.

The Government member of Egypt (Ms ABDEL TAWAB) noted the information provided by the Government representative on measures taken to comply with the Convention. She welcomed the efforts made to strengthen its labour legislation and bolster collective bargaining. She called on the Government to pursue its efforts to fully respect the Convention, and to avail itself of ILO technical assistance in that respect.

El miembro empleador de Chile (Sr. BOBIC) consideró que la Comisión de Expertos rompió el ciclo de memorias sin ninguna explicación, para hacer una evaluación precipitada de la ley num. 13467. Es evidente que la norma no ha tenido el tiempo mínimo necesario para que de manera seria y responsable se pueda evaluar su impacto. Los comentarios de la Comisión de Expertos dan al Convenio una interpretación que su articulado no contempla cuando consideran que el objetivo general de promoción de la negociación colectiva supone encontrar un acuerdo sobre términos y condiciones de trabajo que sean más favorables que los previstos en la legislación. Además, estos comentarios no destacan la amplitud y el detalle de los derechos laborales que contempla la Constitución brasileña, ni tampoco todos los recursos judiciales de que disponen los trabajadores para salvaguardar sus derechos. El artículo 4 del Convenio no contempla ninguna limitación a la negociación colectiva, en el sentido de que ésta sólo pueda establecer condiciones más favorables que las establecidas por la legislación. Muy por el contrario, contempla de manera expresa la posibilidad de que se adopten medidas que se adapten a las condiciones nacionales. En un mundo cambiante y

frente a las nuevas formas de empleo, es importante que las leyes salvaguarden la libertad de las partes para adaptarse a los cambios y la modernización.

Le membre gouvernemental de l'Angola, soulignant les liens d'amitié entre les deux pays, a soutenu la déclaration du Brésil et considéré que la présentation orale de la délégation du Brésil indiquait que le gouvernement avait rempli ses obligations.

The Employer member of Greece (Mr KYRIAZIS) indicated that there had been a methodological error in the data on unemployment and informality in Brazil which had been referred to during the discussion. This was misleading the Conference Committee. The relevant indicators released in May 2018 by the Brazilian Institute of Geography and Statistics made it clear that when the seasonality of economic activity was accounted for, the unemployment rate in Brazil had been reduced in 2018 as compared to the same period of 2017. Furthermore, it was too early for an assessment of the new legislation as it had still not been fully implemented. The speaker considered that the labour reform had potential for growth in formal and quality jobs.

An observer representing Public Services International (PSI) (Ms PAVANELLI) stated that she was also speaking on behalf of Education International (EI), IndustriALL Global Union and the International Transport Federation (ITF). The possibility, by means of collective bargaining, to derogate from statutory minimum rights breached the fundamental objective of the Convention, as well as Conventions Nos 151 and 154. The speaker rejected the Government's assertion that the Committee of Experts had erred in its interpretation, and expressed support for that Committee's interpretation of Article 4 of the Convention and its technical comments. The new section 611A of the CLT that allowed collective bargaining agreements to reduce the rights and protections afforded by labour legislation could have catastrophic consequences for workers and trade unions. In the aviation and maritime sectors, such derogations could interfere and reduce sector-specific safety standards, including protections derived from technical ILO Conventions. The safeguards contained in section 611B of the CLT were not sufficient. It was also possible that collective bargaining

would derogate from the application of ILO Conventions. A recent decision by the Superior Labour Court had contradicted the claim that the reform was a modernization of the labour legislation aimed at strengthening negotiations and unions. The Court had recently ruled on the illegality of a strike of oil workers and established a substantial daily fine for unions that had failed to suspend the strike. That created a hostile environment that was not conducive to mature social dialogue.

In December 2017, the President had vetoed Law No. 3831, regulating collective bargaining in the public administration, which was an affront to Brazilian civil servants, particularly as Brazil had ratified Convention No. 151. Law No. 3831 had been built by consensus in the bipartite Chamber of Government and Public Servants of the Ministry of Labour and Employment and had been approved unanimously in the Federal Senate and the Chamber of Deputies of Brazil. The labour reform also had direct consequences for the education sector relating to the privatization of secondary education and the minimum salary of teachers. Contrary to what had been indicated by the Employer member of Brazil, Act No. 13.467/2017 had not been preceded by a broad process of discussion. Brazilian trade unions had merely been informed of the proposed amendments. The ILO supervisory bodies had that it was imperative that full and frank consultation take place on any question or proposed legislation affecting trade union and collective bargaining rights. Comprehensive labour law reform, in consultation with all social partners, was therefore necessary to bring the Brazil's legislation into conformity with the Convention.

The Government representative appreciated the leadership, firmness and serenity of the Chairperson in conducting the work of the Conference Committee and expressed his gratitude to the countries and speakers who had expressed their support to Brazil and to the importance of improving the supervisory system for greater predictability, transparency and real tripartism. The Government had come prepared to dialogue and had presented technical arguments to prove the full consistency of the labour reform with ILO standards. The discussion had reinforced the belief that the debate on the reform was premature and he

reaffirmed his concern about the improper use of the mechanism to serve other purposes than the mandate and objectives of the Organization, which should remain technical, impartial and objective in order to keep its effectiveness and legitimacy. He then reacted to some of the points brought forward in the discussion, reiterating that the labour reform was the result of many years of discussions on labour market challenges in Brazil due to the shortcomings of the labour legislation and to the malfunction of the labour courts. Such discussions had become even more urgent, in a context of hard economic crisis in recent years. 2016 had witnessed the highest unemployment rate ever recorded since the beginning of the series, in 1992, and an 82 per cent increase in the unemployment rate since 2012. The crisis had not been generated by the Government, which could not be held responsible for it, but the reform was part of the solution and was already producing results. Between January and April 2018, more than 310,000 formal jobs had been created, the largest volume in the previous five years. Although statistics had been presented to criticize the modernization of labour in Brazil, when comparing the quarter from February to April 2018 with the same period from 2017, the unemployment rate had fallen 0.7 percentage points, repeating the trend recorded in the mobile quarter of January to March 2018, compared to the same quarter of 2017, when the reduction had been of 0.6 percentage points.

He considered that the reform was fighting informality, the worst form of precariousness and allowed for new forms of employment with all the legal guarantees and constitutional rights, namely as it had increased by almost eight times the amount of the fine applied to companies failing to register their workers.

With regard to article 444 of the CLT, the Committee of Experts' observation had no grounds as the Convention did not refer to individual contracts; moreover, Act No. 13.467/2017 only foresaw the application of such provision in exceptional cases, for workers with a higher education degree and with incomes at least two times higher than the ceiling for benefits of social security. The legal provision aimed at stimulating negotiations to best address the particular situation of such workers, usually not foreseen in collective

agreements. While the previous legislation had already allowed the differential treatment for those workers, the labour reform had set objective criteria for ensuring the provision would only apply to those with negotiation capacity, without prejudice to their rights.

The reform had not weakened the unions, as union dues had not been eliminated and could still be deducted with the agreement of the worker or company. To promote the independence of trade unions from state funding, in line with the Convention, the obligation of every worker to contribute to a trade union had been abolished, but Brazilian unions could still rely on other sources of financing permitted by law.

He also rejected that the reform had taken place without consulting workers, as a series of debates had been organized by the previous Minister of Labour, who had met in December 2016 the six main trade unions and representatives of the major employers' confederations, to discuss the proposal prepared by the Ministry of Labour, which had subsequently been forwarded to the National Congress. During the legislative process in 2017, 17 public hearings, seven regional seminars and more than 40 meetings with interested stakeholders had been held in Parliament and in different States, leading to the approval of the Bill by a significant majority in Congress and later in the Senate. The labour reform Bill had received 1,340 amendments, the largest number in the entire history of the Brazilian Parliament. Of the 452 amendments accepted, 62 had been authored by opposition parliamentarians. Amendment number 150, which had been accepted, proposed the possibility to bargain collectively on daily hours of work, within the constitutional limits, the protection against unjustified dismissal in the event of reduction of hours of work and/or salary among other measures related to the strengthening of collective bargaining. The author of the amendment had underlined that it "resulted from the valuable contribution of the combative National Confederation of Commerce Workers (CNTC)", demonstrating the effective participation and acceptance of suggestions from workers.

With regard to representation in the workplace, it had been a historical demand of the Brazilian trade union movement, foreseen for nearly 30 years in article 11 of the Constitution

and regulated by the labour reform, in line with the provisions of ILO Convention No. 135. Workers' representatives in the company not compete with the mandate of the unions. The number of collective agreements had been dropping since 2016, which suggested that it was more related to the effects of the economic crisis than to the labour reform. In addition, the same study quoted by the workers' representative indicated that there had been a qualitative change in the agreements signed, which evidenced the expansion of the scope of bargaining and the concern to improve the representation at the workplace.

Concerning pregnant women, the new rule had been designed to prevent discrimination in hiring women; it had been formulated by health workers' unions and defended by the female Congressional Caucus, and guaranteed the protection of maternal and infant health. Regulatory Standard No. 15 had a broad definition of unhealthy place which included, for example, hospitals and airports, and the rule remained the removal of pregnant women.

A 12-hour working day was only permitted if followed by 36 hours of compulsory rest, which, at the end of the week and month, represented less hours worked with no reduction in wages.

The Committee of Experts had also mistakenly considered that the law excluded the possibility of autonomous workers to form unions and engage in collective bargaining. That was provided for in article 511, which dealt with trade union organization and had not been altered by the new law. The purpose of article 442B was simply greater conceptual clarity and certainty about the elements that characterized the employment relationship, in line with ILO Recommendation No. 198, and as defined by article 3 of the CLT, unchanged by the reform. The Government representative rejected the Committee of Experts' comment that the Convention should apply to autonomous workers, since it did not provide a definition of "worker" for the purposes of application of the Convention, and the new legislation did not change the characterization of employment already present in the CLT.

The Government had worked constructively and in respect for the common interest of all members of the Conference Committee and reiterated the call for all members to engage in an urgent, collective and effectively tripartite effort to reform the standards supervisory system.

The Employer members expressed appreciation for the detailed information provided by the Government representative, including with regard to the consultations that had taken place in connection with the labour law reform, and on the nature of the reform. Certain aspects of the discussion in the Conference Committee had fallen outside the appropriate scope of the discussion on the application of the Convention. The Employer members were not able to conclude that Brazil was in violation of its obligations under the Convention as a result of the labour law reform. Modernizing labour law could be a difficult process leading to change and uncertainty. The discussion of the case had been premature.

Article 4 of the Convention required the Government to encourage and promote voluntary negotiation between employers and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. That obligation should guide the consideration given to the information provided by the Government. With respect to the labour law reform, a mechanism that allowed collective agreements to prevail over provisions of law could be seen as promoting collective bargaining in law, by extending the scope of collective bargaining while also ensuring that the floor of rights in the Constitution remained respected. It could not constitute a violation of the obligation to promote voluntary bargaining in law. There was also no information available to support the assertion that the reform constituted a violation of the Convention in practice. There had been no objective assessment of the impact of the reform on the labour market and on collective bargaining. Evidence was therefore required in order to assess the impact it had had on the social partners' ability to engage in collective bargaining.

The issue of the relationship between individual contracts and collective agreements could be further examined by taking into account the Employer members' view that workers

also had contractual freedom and could not be bound by a collective agreement against their will. The issue of an individual contract prevailing over national legislation was not within the scope of the application of the Convention. Certain other issues that had been raised during the discussion, such as maternity protection, were also not within the appropriate scope of the discussion.

The Employer members encouraged the Government to provide information on the content and application of the labour law reform, in particular with respect to the extent to which the collective bargaining partners had made use of the possibility of negotiating collective agreements prevailing over national legislation and the extent to which workers had made use of the possibility to adopt individual contracts prevailing over collective agreements.

The Employer members noted the Government's indication that the views of the Committee of Experts on autonomous or self-employed workers had been inaccurate. Accordingly, more information on the effect of the extension of the definition of an autonomous worker should be provided by the Government, as well as information on the impact it had had on the ability of those workers to represent their interests. The Employer members concluded by encouraging the Government's continued commitment to international labour standards, in cooperation and consultation with the national workers' and employers' organizations.

The Worker members expressed their deep disappointment at the remarks of the Government representative describing trade unions as political instruments, which would had done little to advance the rights of workers. The right to freedom of association was a prerequisite for the right to organize and bargain collectively. Regarding remarks on the ability of the Committee of Experts to assess Brazilian legislation taking into account the context of the country, they recalled that members of the Committee of Experts were appointed by the ILO Governing Body and that they were eminent legal experts from all regions of the world. They reiterated their deep respect for the work of that Committee. They

also recalled that document D.1 on the working methods of the Conference Committee had been adopted by unanimous tripartite consensus. Governments had ample opportunity to participate in the Conference Committee and to complement the information included in the report of the Committee of Experts.

They stressed that, as recalled in the preparatory work to Convention No. 154, collective bargaining was a process intended to improve the protection of workers provided for by law. As recognized in the ILO Constitution, in the Declaration of Philadelphia, in the 1998 Declaration on Fundamental Principles and Rights at Work and in the 2008 Social Justice Declaration, collective bargaining contributed to the establishment of just and equitable working conditions and other benefits, and thereby to social peace. That could not mean going below statutory minimum protections. That principle was well supported throughout many jurisdictions. For example, the Court of Justice of the European Union had established that collective bargaining agreements fell outside the scope of competition law provided that those agreements seek to adopt measures to improve conditions of work and employment. The European Court had even extended this principle in order to protect the right of workers who were falsely classified as self-employed to bargain collectively.

The Worker members were deeply worried about the extensive and structural reform of the collective bargaining system adopted in 2017 and its grave consequences on the enjoyment and realization of the fundamental right to collective bargaining for workers in the country. In undertaking that reform, the Government had failed to duly take into account prior comments of the Committee of Experts in this regard. The social partners had merely been informed of those permanent and far-reaching changes, which would effectively lead to the breakdown of industrial relations. A comprehensive legislative reform process had to be undertaken in order to reverse the devastating changes made. The Government should ensure that the legislation was in full conformity with Article 4 of the Convention. The legislative provisions with respect to the general possibility, by means of collective bargaining, to reduce the rights and protections afforded by the labour legislation for

workers, had to be revoked. Moreover, the provisions permitting individual derogations from the law and from collective agreements for workers with a higher education diploma and earnings above a certain limit had to be repealed. The definition of an autonomous worker had to be revised to ensure that misclassified workers were not excluded from their right to organize and to bargain collectively.

Given the absence of effective tripartite consultations during the legislative reform process, the Worker members urged the Government to engage the social partners in genuine negotiations within the framework of the national tripartite body. In this regard, they called on the Government to avail itself of ILO technical assistance in order to develop a time-bound roadmap for legislative reform. The Government should also accept a direct contact mission before the next International Labour Conference in order to assess progress made. Finally, they believed that it was crucial that the case be included in a special paragraph of the report.

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