International Labour Organization

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Governing Body

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Institutional Section **INS**

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Report of the Director-General

Fifth Supplementary Report: Report of the Committee set up to examine the representations alleging non-observance by Chile of the Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35), and the Invalidity Insurance (Industry, etc.) Convention, 1933 (No. 37)

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▶ I. Introduction

1. In a communication received on 20 June 2019, the National Federation of Municipal Workers of Chile (FENTRAMUCH) made a representation to the International Labour Office under article 24 of the ILO Constitution alleging non-observance by the Government of Chile of the Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35), and the Invalidity Insurance (Industry, etc.) Convention, 1933 (No. 37). Both Conventions were ratified by Chile on 18 October 1935 and remain in force in the country.

2. The following provisions of the ILO Constitution relate to the representation:

> Article 24
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> *Representations of non-observance of Conventions*
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> In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.
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> Article 25
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> *Publication of representation*
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> If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

3. In accordance with article 1 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, the Director-General acknowledged receipt of the representation, informed the Government of Chile thereof, and brought the representation before the Officers of the Governing Body.

4. At its 340th Session (October–November 2020), the Governing Body decided that the representation was receivable and set up a tripartite committee for its examination. The tripartite committee was composed of Mr Luis Eduardo Vela Málaga (Government member, Peru), Mr Fernando Yllanes Martínez (Employer member, Mexico) and Mr Gerardo Martínez (Worker member, Argentina).

5. The Committee was informed that the parties entered into a national voluntary conciliation process with the technical assistance of the Office, beginning with a round table on 13 September 2021. On 27 September 2023 the parties agreed to conclude that process without having reached an agreement on the allegations.

6. On 16 June 2023 the complainant organization made a further representation under article 24 of the ILO Constitution that also alleged non-observance by the Government of Chile of Conventions Nos 35 and 37. At its 349th Session (October–November 2023), the Governing Body decided that the representation was receivable and, considering that it concerned issues similar to those raised in the initial representation, that both would be examined jointly by the tripartite committee already established.

7. The Government of Chile submitted its response to the allegations in both representations on 13 May 2024.

8. The Committee met on 22 August and 2 September 2024 to examine the representations and to adopt its report.

▶ II. Draft decision

9. In the light of the conclusions and recommendations set out in the report of the Committee contained in document GB.352/INS/19/5, the Governing Body:

(a) approved the report of the Committee; and

(b) decided to make the report publicly available and to close the procedures initiated by the two representations.

▶ III. Examination of the representations

A. The complainant's allegations

10. In both representations FENTRAMUCH refers generally to the non-observance by Chile of Articles 7(1) and (3), 9(1) and (4), 10(5), and 11(1) of Convention No. 35, and Articles 7(1) and (3), 10(1) and (4), 11(5), and 12(1) of Convention No. 37.

11. Specifically, in its first representation FENTRAMUCH recounts how in November 1980 a new pension system was introduced in Chile by means of Legislative Decree No. 3.500 of 1980, which replaced the pay-as-you-go system with private pension schemes, [1] and Legislative Decree No. 3.501 of 1980, which established a new system of contributions paid exclusively by workers.

12. FENTRAMUCH states that in order to protect workers' net wages after they had assumed responsibility for paying all contributions under the new pension system, article 2 of Legislative Decree No. 3.501 of 1980 increased taxable pay through the application of a weighting. The protection of net wages, continues the complainant organization, is the fundamental principle underpinning Legislative Decree No. 3.501 of 1980, and any interpretation of that law's meaning and scope must ensure that the requirement for workers to fund their contributions under the new pension system does not bring about any reduction in their wages.

13. FENTRAMUCH alleges that the compensatory increase [2] currently paid to municipal workers is calculated taking into account only their base salaries rather than all taxable allowances, whatever their nature. In the opinion of the complainant organization, that approach is contrary to the provisions of articles 2 and 4 of Legislative Decree No. 3.501 of 1980 and leads

[1] Unlike pay-as-you-go systems (in which active workers fund retirees' pensions), private pension schemes are based on individual savings in personal accounts for each worker.

[2] This term relates to the increase provided for in article 2 of Legislative Decree No. 3.501 of 1980 that is intended to protect the net wages of workers contributing to the new system. The increase is applied to taxable allowances as at 28 February 1981.

to: (i) a reduction in the amount used to set pensions on retirement; (ii) decreased old-age and invalidity insurance contributions; and (iii) municipalities' liability for unpaid contributions.

14. In its allegations, FENTRAMUCH refers to Opinion No. 8.466 of the Office of the Comptroller-General, [3] issued in February 2008, which interprets, for the first time, the correct and legal meaning of the application of the compensatory increase as set out in article 2 of Legislative Decree No. 3.501 of 1980, stating that the increase must be calculated on the basis of "all allowances paid for the performance of public duties, rather than each allowance individually". As a result of that Opinion, 286 municipalities (82.3 per cent of the total) decided that the increase should be calculated taking into account all taxable allowances.

15. On 18 August 2009, continues FENTRAMUCH in its allegation, the Office of the Comptroller-General issued Opinion No. 44.764, establishing that the increase should be applied only to taxable allowances as at 28 February 1981, and not to allowances created after that date. The complainant organization believes that the reference to the "non-application of the increase to allowances created after that date" has no basis in any legal provision, including Legislative Decrees Nos 3.500 and 3.501. It is alleged that, as a result of that Opinion, several judicial decisions have been handed down with the aim of preventing the application of Opinion No. 8.466, giving rise to an illegal situation with regard to municipal wages, which should be standardized throughout the country but which differ depending on whether a municipality pays the compensatory increase in accordance with Opinion No. 8.466.

16. Lastly, FENTRAMUCH alleges that the Government acted aggressively towards municipalities and officials that adopted the calculation method set out in Opinion No. 8.466, promoting the auditing of accounts with the aim of preventing the application of the new method and demanding repayment of the sums paid. At the judicial level, continues the complainant organization, private assets of officials who authorized or received the new rise were frozen.

17. In its second representation, FENTRAMUCH alleges the same non-observance in relation to three other payments that are not taken into account when calculating the compensatory increase: (i) the professional category allowance and the special management and leadership category allowance granted through Act No. 20.922 of 2016 to municipal officials in those categories; and (ii) the lifelong readjustment bonus granted via Act No. 21.526 of 2022 to municipal officials on grades one to five of the municipal pay scale. According to the complainant organization, when establishing new taxable allowances, the State should consider establishing a social security protection mechanism whose non-observance would violate Conventions Nos 35 and 37.

B. The Government's reply

18. In a communication received on 13 May 2024, the Government of Chile communicated its response to the allegations contained in both representations, indicating that, after consulting a range of State bodies involved in the matter and gathering records and technical opinions, it has found no legal or technical arguments proving a violation of the Conventions concerned.

19. More generally, the Government adds that the representations fail to comply with article 1 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, since representations must be sufficiently precise for the Officers of the Governing Body to be able to legitimately substantiate their proposal to

[3] An autonomous audit institution with constitutional rank responsible for monitoring the legality of action taken by the civil service and overseeing fiscal and municipal funds.

the Governing Body. Moreover, the Government points out that the events date back to the 1980s and, as such, principles established by the Committee on Freedom of Association should be applied, according to which "in establishing the matters on which the representation is based, the Committee may consider that, while no formal period of prescription has been fixed for the examination of representations, it may be very difficult – if not impossible – for a Government to reply in detail regarding matters which occurred a long time ago".

20. The Government's response to the allegations contained in the representation may be summarized as follows:

(a) Legislative Decree No. 3.501 of 1980 established a new social security contribution system and provided that, from its entry into force on 1 March 1981, contributions would be calculated on the basis of payments to the dependent officials to which that law refers.

(b) Consequently, workers' net wages would fall given that they would assume sole responsibility for paying contributions following the move from a social security system to a private pension system.

(c) The Act therefore provided for an increase in workers' taxable pay as at 28 February 1981 by means of a compensatory increase calculated using a series of weightings.

(d) According to the jurisprudence of the Office of the Comptroller-General, calculations of the compensatory increase should exclude allowances created or recognized after the date of the entry into force of Legislative Decree No. 3.501, that is, after 28 February 1981, in line with the wording of that Decree.

(e) In Opinion No. 8.466 of 22 February 2008, the Office of the Comptroller-General indicated that "the net wages of dependent workers affiliated to the social security institutions listed in article 1 of Legislative Decree No. 3.501 of 1980 shall be maintained by means of an increase in the taxable portion of their allowances through the application of the weightings set out in that Legislative Decree", omitting the phrase "as at 28 February 1981" after the word "allowances".

(f) Based on Opinion No. 8.466, some of the country's municipalities mistakenly believed that the Office of the Comptroller-General had changed its interpretation of the Legislative Decree and authorized a new method for determining the aforementioned compensatory increase, which they therefore began to calculate based on all taxable allowances, without taking into account the cut-off date of 28 February 1981 imposed by the legislator.

(g) The Office of the Comptroller-General was required to clarify its interpretation and, in Opinion No. 44.764 of 18 August 2009, explained that the increase should be calculated by applying the relevant weighting only to allowances subject to social security contributions as at 28 February 1981 and not to those created or established after that date, to which the benefit established by the legislator up to that date does not apply.

(h) The Office of the Comptroller-General issued Opinion No. 50.142 of 9 September 2009 in which it indicated the action to be taken in cases where the increase was found to have been paid incorrectly. That procedure required local authorities to amend their procedures and adjust their calculations of the increase and ordered the sums paid in error to be returned. Moreover, the municipalities that had not made erroneous calculations were required to refrain from calculating the benefit using the incorrect calculation method. All municipalities were requested to report on the payments that they had made based on whichever interpretation of the calculation method they had applied.

Civil proceedings were also required to be instituted against persons responsible for the harm caused to the municipalities.

21. The Government states that in light of the above, and to ensure legal certainty, it submitted a bill [4] with the following aims:

(a) to waive overpayments made on or before 31 December 2023 where the compensatory increase was calculated by applying the relevant weighting to allowances subject to social security contributions created or established after 28 February 1981;

(b) to declare the overpayments to be correct and ensure that they are waived in line with the previous point from the moment they were made;

(c) to ensure that the return to the respective municipalities of amounts paid in error to current and former municipal officials owing to the overpayment of allowances linked to the compensatory increase do not lead to requests for the return of those sums or grant the right to any form of compensation.

22. The Government indicates that in submitting the bill it has fulfilled a commitment that it made under the protocol agreement that it signed on 5 December 2023 with the Single Central Organization of Chilean Workers and the public sector trade unions as part of negotiations on general public sector reforms. The Government highlights that the bill, once adopted, will apply to all municipal workers, not just those affiliated to a certain organization.

23. Furthermore, in its response, the Government makes reference to the ongoing pension system reforms [5] that aim to recognize individual effort and improve pensions through a mixed public/private system that provides for contributions by employers.

24. In conclusion, the Government believes that there is no normative precedent that requires the payment of the compensatory increase to workers who were not employed or appointed on or before 28 February 1981 or its application to taxable allowances established after that date. The Government therefore requests that the representations presented be rejected in their entirety since the allegations do not constitute a violation of the international labour standards mentioned therein.

IV. The Committee's conclusions

25. The Committee's findings are based on its review of the allegations presented by the complainant organization and the reply provided by the Government of Chile.

26. The Committee notes that FENTRAMUCH alleges non-observance of Conventions Nos 35 and 37 by virtue of the following:

(a) The compensatory increase provided for by article 2 of Legislative Decree No. 3.501 of 1980, introduced with the aim of protecting workers' net wages following the adoption of a new contribution system by means of Legislative Decree No. 3.500 of 1980, should be applied to all forms of remuneration, not only those in existence on 28 February 1981.

(b) The issuance of Opinion No. 44.764 of the Office of the Comptroller-General, which clarified and corrected the interpretation contained in its previous Opinion No. 8.466, led

[4] Submitted on 29 January 2024 to the Chamber of Deputies, Bulletin No. 16620-06.

[5] Undertaken by means of a bill submitted to the Chamber of Deputies on 7 November 2022.

to legal uncertainty at the national level and to legal action to recover amounts received unduly, causing economic harm to municipal officials that must be compensated, setting aside the interpretation contained in Opinion No. 44.764.

A. Calculation of the compensatory increase

27. The Committee notes that, according to FENTRAMUCH, the compensatory increase established in article 2 of Legislative Decree No. 3.501 of 1980 should be applied to all taxable allowances, whatever their nature, with the aim of protecting workers' net wages. Moreover, the complainant organization bases its allegation on article 4 of Legislative Decree No. 3.501 of 1980, which reads as follows: "the increases to the allowances set out in article 2 shall have the sole effect of maintaining the total net amount of allowances and benefits, whether granted under the law, collective agreements or arbitration awards benefiting the workers to which that article refers. Those increases shall therefore make no change to the portion of benefits or allowances not subject to social security contributions or to benefits or allowances that are not subject to such contributions owing to their nature. In any case, the aforementioned increases shall be incorporated into the portion of allowances that is subject to social security contributions and shall serve as a basis for any adjustment required after the entry into force of this law". Lastly, the Committee notes that FENTRAMUCH bases its allegation on the interpretation set out in Opinion No. 8.466 of the Office of the Comptroller-General, which provided that "the aforementioned increase shall not be calculated in relation to each individual allowance, as understood by the claimant, but on the basis of all allowances received as payment for the performance of public duties".

28. The Committee notes that, according to the Government, the compensatory increase provided for in article 2 of Legislative Decree No. 3.501 of 1980 must be calculated only on the basis of taxable components of remuneration as at 28 February 1981, and not those created later. The Government also indicates that the interpretation contained in Opinion No. 8.846 was later rejected and clarified by the Office of the Comptroller-General through Opinion No. 44.764, which states that "Opinion No. 8.466 of 2008 should therefore be clarified in the sense that the increase established in the aforementioned legislation must be calculated by applying the relevant weighting only to allowances subject to social security contributions as at 28 February 1981 and not to those created or established later, to which the benefit established by the legislator is not applicable".

29. The Committee considers that the wording of article 2 of Legislative Decree No. 3.501 of 1980 clearly states that "the net wages of dependent workers affiliated to the social security institutions set out in the previous article shall be maintained. For that sole purpose, and in order to apply the provisions of the previous article, the taxable portion of those workers' allowances as at 28 February 1981 shall be increased". The Committee also considers that article 4 of the same Legislative Decree limits itself to describing the purpose of the compensatory increase (maintaining net wages), providing clarity on the forms of remuneration to which it must be applied (all forms of taxable allowances and benefits) and determining its taxable nature ("the aforementioned increases shall be incorporated into the portion of allowances subject to social security contributions"), without undermining the reference to the cut-off date of 28 February 1981 set out in article 2.

30. The Committee notes that although FENTRAMUCH cites several articles, the specific allegations relate to Article 7 of Conventions Nos 35 and 37, which states, in both Conventions:

Article 7

1. The pension shall, whether or not dependent on the time spent in insurance, be a fixed sum or a percentage of the remuneration taken into account for insurance purposes or vary with the amount of the contributions paid.

2. Where the pension varies with the time spent in insurance and its award is made conditional upon the completion by the insured person of a qualifying period, the pension shall, unless a minimum rate is guaranteed, include a fixed sum or fixed portion not dependent on the time spent in insurance; where the pension is awarded without any condition as to the completion of a qualifying period, provision may be made for a guaranteed minimum rate of pension.

3. Where contributions are graduated according to remuneration, the remuneration taken into account for this purpose shall also be taken into account for the purpose of computing the pension, whether or not the pension varies with the time spent in insurance.

31. In that regard, the Committee recalls that Article 7 of both Conventions does not establish criteria or obligations relating to the method for calculating taxable wages or allowances; rather, it limits itself to determining that the remuneration taken into consideration when calculating contributions, including other taxable allowances determined by law, shall be taken into account for the purpose of calculating the corresponding pension.

32. In this context, the Committee observes that in this case all allowances deemed taxable under the law are taken into account when calculating pensions, including the compensatory increase calculated on the basis of taxable allowances as at 28 February 1981, as indicated in articles 2 and 4 of Legislative Decree No. 3.501 of 1980, and confirmed by the jurisprudence of the Office of the Comptroller-General, particularly in its Opinion No. 44.764 of 18 August 2009. ***In these circumstances, and based on the above considerations, the Committee does not note that the allegations result in a violation of the obligations set out in Article 7 of Conventions Nos 35 and 37.***

B. Interpretation set out in Opinion No. 44.764

33. The Committee notes that FENTRAMUCH alleges that Opinion No. 44.764 of the Office of the Comptroller-General violates the Conventions, specifically Articles 9(1) and (4), 10(5), and 11(1) and (3) of Convention No. 35 and Articles 10(1) and (4), 11(5), and 12(1) and (3) of Convention No. 37. With regard to these general references, the Committee observes that FENTRAMUCH has provided insufficient information to link the obligations set out in those Articles to its allegations relating to the calculation of the compensatory increase and administrative and municipal liability.

34. The Committee observes that, according to the Government, Opinion No. 44.764 of the Office of the Comptroller-General clarified the interpretation contained in its previous Opinion No. 8.846, consolidating the administrative jurisprudence [6] by establishing that the compensatory increase applies only to allowances in force as at 28 February 1981 and not to allowances established after that date.

35. In that regard, the Committee considers that Opinion No. 44.764, which is in effect (and was later endorsed by the issuing body, as illustrated by Opinion No. 50.142 of 9 September 2009),

[6] In that regard, Opinion No. 44.764 indicates that "the above is consistent, moreover, with the repeated jurisprudence of that audit institution, which concluded in Opinions Nos 329 of 2006, 40.282 of 1997 and 27.108 of 1983, among others, that the increase in question was applicable only to those taxable stipends and allowances that existed in the remuneration framework in force on the aforementioned date".

does not imply a violation of the Conventions, since it simply corrects and clarifies the interpretation contained in Opinion No. 8.846, which aligns with the wording of articles 2 and 4 of Legislative Decree No. 3.501 of 1980, as described above. ***Based on the above, the Committee does not note a violation of the Conventions in question and will not pursue its examination of these allegations.***

* * *

36. Lastly, the Committee wishes to set out its considerations with regard to the bill submitted by the Government to the Chamber of Deputies on 29 January 2024 intended to cancel debts accrued following undue payments, and concerning the pension reform process announced by the Government in its response.

37. The Committee welcomes the submission of the bill, which stems from a commitment that the Government made under the protocol agreement that it signed on 5 December 2023 with the Single Central Organization of Chilean Workers and the public sector trade unions as part of negotiations on general public sector reforms. The Committee notes that, according to the Government, those provisions would benefit all municipal officials, regardless of whether they are members of a specific trade union organization, and it trusts that the Government will be able to implement them quickly and expeditiously.

38. With regard to the pension reform process submitted to the Chamber of Deputies on 7 November 2022, the Committee trusts that the most representative employers' and workers' organizations will be consulted within the framework of social dialogue and reminds the Government that it may avail itself of any technical assistance from the Office that it deems necessary, including concerning the decisions adopted by the Governing Body in relation to the recommendations of the Standards Review Mechanism Tripartite Working Group [7] regarding the Conventions linked to this representation.

▶ V. The Committee's recommendations

39. In light of the conclusions set out in paragraphs 25 to 38 of the document in relation to the issues raised in the representations, the Committee recommends that the Governing Body:

(a) approve the present report; and

(b) make the report publicly available and close the procedures initiated by the two representations.

Geneva, 2 September 2024

(signed) Mr Luis Eduardo Vela Málaga
(Government member)

Mr Fernando Yllanes Martínez
(Employer member)

Mr Gerardo Martínez
(Worker member)

[7] See para. 19(1)(a) of document GB.328/LILS/2/1(Rev.).