INTERNATIONAL LABOUR OFFICE

Governing Body

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Institutional Section

INS

ELEVENTH ITEM ON THE AGENDA

Report of the Director-General

Fifth Supplementary Report: Report of the Committee set up to examine the representation 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), made by the College of Teachers of Chile AG, under article 24 of the ILO Constitution

1. In a communication dated 9 November 2009, the College of Teachers of Chile AG (CPC AG), an affiliate of the Amalgamated Workers' Union of Chile (CUT), invoking article 24 of the Constitution of the International Labour Organization (ILO), submitted a representation to the International Labour Office 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).

Issues relating to procedure

2. The representation in question relates to two Conventions to which Chile is a party and which are in force in that country. [1]

3. The relevant provisions of the ILO Constitution concerning the submission of representations are as follows:

Article 24

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

[1] Conventions Nos 35 and 37, ratified on 18 October 1935.

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.

Article 25

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.

4. The procedure to follow in the case of representations is governed by the Standing Orders concerning the procedure for the examination of representations adopted by the Governing Body at its 57th Session (8 April 1932), and modified at its 82nd Session (5 February 1938), 212th Session (7 March 1980) and 291st Session (18 November 2004). In accordance with articles 1 and 2(1) of the Standing Orders, the Director-General acknowledged receipt of the representation, informed the Government of Chile and brought it before the Officers of the Governing Body.

5. At its 308th Session (June 2010), on the recommendation of its Officers, the Governing Body declared the representation receivable and decided, in conformity with article 3(3) of the Standing Orders, concerning the procedure for the examination of representations, [2] to "postpone the appointment of the committee to examine the representation pending the examination of the case by the Committee of Experts at its next session, in November–December 2010", given the similarity of the 2009 representation to two previous representations made by the CPC AG and examined in 1999 and 2006. [3]

6. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) considered this matter at its November–December 2010 session and found that although the 2009 representation does make similar allegations, it nonetheless raises new questions, which are governed by provisions of national law. The CEACR therefore considered that the legal facts at the basis of the representation differed from those for previous representations. [4]

7. At its 310th and 311th Sessions (March and June 2011), the Governing Body took note of the decision of the CEACR and decided to proceed with the appointment of the committee to examine the representation, composed of: Mr Carlos Flores (Government member, Bolivarian Republic of Venezuela); President, Mr Jorge de Regil (Employer member, Mexico); and Mr Gerardo Martínez (Worker member, Argentina). [5]

8. In accordance with article 4(1) of the Standing Orders, by letter dated 4 August 2011, the Government was invited to submit its observations on the representation. The Government

[2] Under this provision: "… if a representation which the Governing Body decides is receivable relates to facts and allegations similar to those which have been the subject of an earlier representation, the appointment of the committee charged with examining the new representation may be postponed pending the examination by the Committee of Experts on the Application of Conventions and Recommendations at its next session of the follow-up given to the recommendations previously adopted by the Governing Body."

[3] GB.308/PV, para. 104.

[4] ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 100th Session, 2011.

[5] GB.310/PV, para. 270.

submitted its observations on the representation in a communication received on 19 January 2012.

9. The CPC AG presented additional information in letters dated 21 November 2011, 29 March 2012, 19 April 2012, 24 April 2013, 3 June 2014 and 23 September 2014.

10. In March 2012, the Committee decided to request the Government to furnish additional information regarding certain elements directly related to the representation. The Government's response was communicated in a letter dated 12 July 2012.

11. The Committee met in Geneva in March and October 2013, in October 2014, and in March 2015, to discuss and adopt its report.

12. The Committee notes that in January 2014 there was a change of government in Chile following presidential elections. Taking note of this change of government, the Committee decided in November 2014 to request the new Government to provide any information it considered relevant with respect to the representation. The Government's responses were received on 4 and 26 February 2015.

13. Considering the circumstances referred to in the representation extend over a long period, and given the technical complexity of the evidence and arguments put forward by the parties, the Committee has decided to mark certain essential elements of its examination of the representation in bold, for ease of understanding and reference..

A. Allegations

14. In its communication, the CPC AG contended that, by ceasing to pay some 80,000 teachers transferred under the jurisdiction of the municipal authorities a wage supplement established by Decree-Law No. 3.551 of 1981, Chile had not complied with its obligations under Conventions Nos 35 and 37, taking into account the effect of this non-payment on the rights of teachers to old-age and invalidity pensions, which are guaranteed by these two instruments. The Government adopted Decree-Law No. 3.551, on the remuneration system and public sector employees, on 26 December 1980, and it was promulgated in the *Official Gazette* on 2 January 1981. Article 40 of this text provides for the establishment of a non-taxable special allowance to be paid from 1 January 1981 to teachers under the jurisdiction of the Ministry of Education. The special allowance is 90 per cent of the basic remuneration provided by Decree-Law No. 2411 of 1978 for regular teachers, and 50 per cent thereof for temporary teachers. The CPC AG noted that, in the Chilean system of pensions funded through individual capitalization, pension contributions are a percentage levied on gross remuneration, which the employer must pay to the respective social security bodies, in accordance with the principle of "better remuneration, better pension". The fact that the teachers had not received the special allowance established by article 40 of Decree-Law No. 3.551 had had the effect of reducing the amount of the contributions to old-age and invalidity insurance made on their behalf, part of which would have been levied on that component of their remuneration.

15. According to the complainant organization, the implementation of Decree-Law No. 3.551 occurred simultaneously with that of Decree-Law No. 3.063, promulgated in the *Official Gazette* on 29 June 1979, and providing for the gradual transfer of the administration of the public education system from the central Government to the municipal level. This transfer was completed in 1986, when all educational institutions and their staff were placed under the jurisdiction of municipalities. As the transfer of teachers to the municipal authorities became effective, the municipalities stopped paying teachers the special allowance even though this allowance continued to be paid to other categories of public servants identified

by Decree-Law No. 3.551. According to the CPC AG, the clear and categorical text of article 40 of Decree-Law No. 3.551 is the source of the continuing right of teachers to request and receive the special allowance which teachers consider to be an integral part of their patrimony.

16. The complainant organization also points out that the transfer of educational institutions and their staff from the Ministry of Education to the municipal authorities was organized by the military regime then in power and took place under duress. Teachers refusing to submit to it were publicly and repeatedly threatened with dismissal from their posts. Teachers seeking to obtain payment of the special allocation by the municipal authorities only began to lodge judicial appeals a number of years after the transfer, because the political situation in the country in the early 1980s did not, according to the allegations, ensure impartial justice. According to the CPC AG, to date there are some 120 appeals requesting payment of the special allowance. The rulings handed down by the first and second instance courts did not all consistently address the issue. Certain rulings refused to accede to the teachers' demands, while others granted their requests. Although in some 40 cases the appeals were decided in favour of teachers, the actual payment, in arrears, of the total amounts owed, including the associated social security contributions, as well as the right to continue to receive the special allowance could only be obtained in seven cases. [6] The complainant organization also indicates that, in the majority of the decisions favourable to teachers, the payments could not be made due to the fact that legislation declares municipal property to be immune from seizure, making it impossible to enforce the decisions concerned.

17. According to the complainant, the mobilization of teachers to demand payment of the special allowance has received consistent support from both chambers of the national Congress – the Chamber of Deputies and the Senate – which have requested the Government, in several parliamentary documents entitled "draft agreements", to find a solution regarding the payment, in arrears, of the special allowance and the associated social security contributions. Between 2006 and 2014, more than ten such documents were adopted by both houses of Parliament. In 2008, seeking to find a solution to the problem of the "historical debt" [7] owed to teachers, the Congress refused to approve the education section of the budget. This led to a joint agreement between the Government, the office of the President and the Chamber of Deputies to establish a special committee of the Chamber of Deputies, which submitted its report in August 2009. Moreover, the office of the President of the Republic has explicitly recognized the existence of a state debt to teachers in statements by its Secretary-General. The special committee unanimously concluded that the State did have a historical debt to teachers, but that its enormity made it impossible to repay it in full. The special committee, therefore, made a proposal to the Government for an interim solution in the form of financial compensation which included a readjustment of teachers' pensions. The complainant organization contends, however, that the Government has not fulfilled its commitment to follow up the conclusions of the special committee's report, and that it has continually rejected the teachers' demands, arguing that their allegations have no legal basis and are political in nature.

18. The complainant states that in 2010 and 2011, faced with the Government's inaction, the national Congress made the vote on the 2011 and 2012 budgets contingent upon settlement

[6] Teachers whose right to receive the subsidy has been recognized by the courts receive a monthly salary about US$450 higher than that of other teachers.

[7] The complainant organization indicates that the teachers' demands related to payment of the special allowance are an integral part of what is referred to in the country as the "historical debt" of Chile. This "historical debt" comprises the claims made by different groups of citizens against the State and has been the subject of continuous negotiations since 1990.

of the issue of the "historical debt" or, failing that, initiation of the process of negotiation and dialogue between the State and the teachers. With no action on the part of the Government, the national Congress adopted the budget for the year 2012, giving the Government an ultimatum for finding a solution. In November 2011, the CPC AG officially requested the Government to open discussions in a committee composed of the Government and the trade unions, to develop a solution to the debt problem in the context of the report of the parliamentary special committee. However, the Government ignored the ultimatum of 31 March 2012 set by the Congress in relation to the budget vote and did not respond to the proposal for dialogue made by the CPC AG. According to the complainant, any solution to the problem was thus blocked, inasmuch as, according to the Constitution, only the Government can initiate legislation to resolve this issue.

19. According to information provided by the CPC AG, on 20 March 2013, the Inter-American Commission on Human Rights declared that the representation submitted from 2005 onwards by 852 teachers was receivable – a representation with which the CPC AG requested to be aligned, declaring that, by not implementing the court decisions in favour of the appeals filed by the teachers related to the negative effect of non-payment of the special allowance, Chile had violated its obligations under the American Convention on Human Rights. This body, in its preliminary examination of the case, observed: that the court rulings had been handed down between 1993 and 1997; that, while they were final, they had not yet been carried out; and that the examination of the substance of this case should continue, with reference to the provisions of the Convention relating to legal guarantees, the right to private property, and legal protection.

B. The Government's observations

20. In its communication received on 19 January 2012, the Government stated that the issues that are the subject of the representation are strictly legal in substance, and that, in the context of its successive reports on the application of Conventions Nos 35 and 37, submitted pursuant to article 22 of the ILO Constitution, and the review of the application of Convention No. 35 by the Committee on the Application of Standards of the International Labour Conference in 2010, it is unaware of any new information that would change the position maintained since 2009.

21. According to the information previously submitted by the Government, Decree-Law No. 3.551 of 1980, which established the special allowance, provides that such additional remuneration is non-taxable, and therefore is not part of the basis for the calculation of the amount of old-age and invalidity insurance contributions. In 1981, teachers began to be transferred to the municipal authorities, but could initially choose to be subject to civil service law or to private law. Beginning in 1983, [8] all teachers already transferred were made subject to private sector labour law. Under the terms of this new legislation, current or future legislative texts relating to the public sector wage scale, including Decree-Law No. 3.551 of 1980, would not be applicable to the private sector. Therefore, teachers transferred to the municipal authorities were automatically subject to private sector labour law and lost the right to benefit from the special allowance provided by the public service wage scale. Law No. 18.602 of 23 February 1987 concerning special standards related to teachers provided that municipalized teachers were subject to the labour code which applies only to the private sector. In addition, Law No. 19.070 of 26 November 1991 concerning the status of education professionals has, since its implementation, governed the status of teachers employed by municipal authorities. According to the Government,

[8] Pursuant to article 15(2) of Law No. 18.196 of 29 December 1982, concerning supplementary provisions related to financial administration and staff, and having budgetary implications (amendment to article 4 of Decree-Law No. 1.3063(I) of 1980).

various allowances which teachers previously enjoyed, including the special allocation, are incompatible with this new status as recognized by the courts.

22. While recognizing teachers' loss of the special allowance following the adoption of the aforementioned legislative texts, the Government made reference to the compensation measures that had been taken. In 1985, Law No. 18.461 of 12 November provided for an increase in the subsidies devoted by municipalities to the financing of the education sector, in order to replace the special allowance that teachers would have received if they had remained in the public sector. Between 1990 and 2009, the real wages of teachers have grown by 200 per cent, while during the same period those of the rest of the population have grown by only 70 per cent. A bonus equivalent to US$100 (post-work bonus) in favour of municipal teachers aims to supplement their pension when its replacement rate is low. The Government stated that it ensured decent conditions for retired teachers through bonuses for pensioners whose pension replacement rates were low. Overall, according to the Government, teachers have more favourable retirement conditions than their counterparts whose income level during their working lives was similar.

23. Regarding the court appeals made by teachers, the Government states in its reports, communicated in accordance with article 22 of the ILO Constitution, that the ordinary courts, the Supreme Court (1994, 1997 and 2001 rulings) and the Court of Audit *(Contraloría General de la República)* have unanimously found that municipalized teachers are not entitled to benefit from the special allowance established by Decree-Law No. 3.551 of 1980, mainly because following the adoption of new legislation, they lost the status of public servants, on which payment of the special allocation depended. The Government refers to several documents issued by the executive authority in response to draft agreements submitted by Parliament, which attest to this. In 2001, the Supreme Court declared that the conclusion of agreements between certain municipalities and the teachers placed under their authority did not mean that these remuneration supplements had the legal standing of special subsidies, in view of the fact that this would contravene the provisions of the aforementioned Law No. 18.196, as well as those of the Civil Code, under which such status must be invalidated. Furthermore, with reference to the Supreme Court (1997) and the Court of Audit rulings, the Government maintains that any right to appeal on this matter is proscribed by national law.

24. The Government's response regarding its follow-up to the report of the special committee of the Chamber of Deputies on historical debts was published on 15 October 2009. In this, the Government referred to the decisions of higher courts and the Court of Audit, which had consistently dismissed teachers' claims. It therefore considered the teachers' representations to be of a political nature and without legal basis. The fact that Congress had challenged the Government did not compel it to accede to the teachers' request. The Government affirmed, in the context of the right of reply, that it had the power to determine priorities as it deemed fit, and was not obliged to follow the guidance of the members of Congress. In that context, the Government noted that the report of the special committee recognized the lack of legal basis for the teachers' demand, and referred to a moral rather than an actual debt. As the administrative and judicial bodies agreed to refute the existence of teachers' right to receive the special allocation, the Government considered that the CPC AG was not entitled to invoke a social security debt, as the payment of the special allocation would have formed the basis for the calculation of such a debt. The Government stated that this position was in line with its constitutional mandate – to act in accordance with its powers and in compliance with the laws, for the common good of society.

25. In a letter dated 12 July 2012, the Government replied to the Committee's request for additional information. In its reply, the Government indicates that it is reiterating information submitted previously. Since the matters at hand are of a strictly legal nature,

that information should suffice for a full understanding of the case. The Government also indicated that:

– the matters at hand have already been examined and resolved in Chile and it is not legally possible to reconsider them;

– the rights in question date back to the 1980s and are prescribed (foreclosed) under national legislation;

– in November 2010, the CEACR itself considered that this case was similar to other cases it had resolved previously, while also recognizing that the legal basis for this representation is different;

– the Ministry of Labour is unclear about which provision of Convention No. 35 (shelved) has not been observed, how the case in question differs in legal terms from the previous cases, and what is the basis of the representation (that is, how, legally, teachers who were transferred to the municipal authorities and placed under the remuneration system of the private sector could have received a benefit available only to public sector employees);

– lastly, the ILO should ensure that it does not provide a forum for hearing appeals on issues which have already been resolved, as that could jeopardize the proper functioning of the complaints mechanisms.

26. In the communication received on 4 February 2015 (see paragraph 12), the Government provided a Declaration signed on 20 November 2014 by the Minister of Education and the CPC AG, point 5 of which provides that the Ministry of Education will establish a Technical Board for considering proposals with a view to finding a solution to the question of pensions of teachers who were transferred from the Ministry of Education to the municipalities between 1981 and 1991. The Government has also communicated a letter on the subject of "historic debt in respect of teachers" dated 14 January 2015 of the Chief of Cabinet of the Ministry of Education to the Chief of Cabinet of the Ministry of Labour and Social Forecast, which confirms the will of the Ministry of Education to develop the teachers' wage and welfare conditions and to ensure that the Technical Board, which has started its work and meets periodically, submit concrete proposals on this subject in 2015. According to the Government's latest communication of 26 February 2015, the Technical Board has had three meetings and is expected to submit its final report at the end of the first semester of 2015.

C. Examination of the representation by the Committee

Preliminary considerations

27. The Committee notes that, in its reply, the Government opposes the consideration of the representation by the ILO for the following reasons:

(i) the allegations are based on events which happened in the 1980s, and the relevant period of negative prescription established by national legislation has expired;

(ii) the issues raised in the representation have already been examined by the highest judicial authorities in the country – the Supreme Court and the Court of Audit of the Republic – and the ILO should avoid reopening cases;

(iii) the allegations are without any legal basis and are of a political nature.

28. The Government further states that the representation does not make clear which provisions of the Conventions have not been observed, nor in what respect this case differs from previous representations made by the same complainant and which the ILO supervisory bodies have already resolved.

29. With reference to the Government's opposition to the ILO's consideration of the representation, on the grounds that the claims lack a legal basis, the Committee would like to recall that the legal basis for a representation under article 24 of the ILO Constitution is the international legal obligations assumed by the State under the ILO Constitution and under the corresponding provisions of the ratified Convention in question. The provisions of Conventions Nos 35 and 37 relating to the allegations made in the representation, and the resulting legal obligations of the State of Chile, are set out by the Committee in paragraphs 37–41 below.

30. With regard to the Government's concern about the political nature of the representation, the Committee observes that its mandate is to examine the allegations made concerning non-observance by Chile of its international obligations under article 24 of the ILO Constitution. The Committee wishes to explain, in this respect, that the special procedure for representations established by article 24 of the ILO Constitution entails not only the examination of alleged inconsistencies between the provisions of the Convention and national law and practice – this being the primary task of the Committee of Experts on the Application of the Conventions and Recommendations (CEACR) – but the engagement, if appropriate, of the national parties to the representation in an international, higher level tripartite dialogue, with a view to finding a comprehensive and sustainable solution to the problem raised in a representation with respect to the implementation of the Convention in question.

31. With regard to the argument that the rule of negative prescription invalidates the teachers' claims to the special allowance, the period of prescription having expired in the 1980s, the Committee observes that while clauses of negative prescription may be found in the national legislation of countries, they cannot be invoked to justify the non-fulfilment by a State of the obligations it has assumed under ratified international treaties. In this regard, Article 27 of the Vienna Convention on the Law of Treaties expressly provides that "a party may not invoke the provisions of its internal law as justification for failure to perform a treaty". The same applies to the decisions of its judicial authorities. While an ILO Convention does not apply to any event or situation which took place before its entry into force for the State in question, the application of its provisions after this date are not subject to any period of prescription, unless otherwise established by the Convention itself. Conventions Nos 35 and 37 entered into force for Chile on 18 October 1936 and their provisions have been effective for Chile throughout the whole period covered by the representation.

The complex character of the issues raised in the representation

32. The Committee observes that the circumstances referred to in the representation extend over the period of the last 30 years in the context of radical changes in the pension, educational and political systems of the country, all of which have contributed to the creation of the complex regulatory environment in which the Conventions have had to be applied. In order to facilitate the understanding of the events described in the representation, it would be useful to put them in some historical order as well as to highlight the salient features of the case. With regard to the latter, the present analysis will have to take into account in particular:

(i) The rich legal history of the case both in terms of the density of the legislation adopted on the municipalization of teachers and in terms of the intensity of the subsequent litigations it caused. There were more than 120 appeals lodged in 345 municipalities of the country, some of them still ongoing. At the same time, as underscored by the Government, the legal facts on which the representation is based date back 30 years, have been barred under labour or civil law, decided on by the supreme judicial authorities of the country, and foreclosed, so that no related claims can be reopened in the internal legal system of Chile.

(ii) The controversial political history of the case dates back to the military regime (1973–90). From this point of view, the teachers' pension rights allegedly acquired under the military rule were subsequently refused to be honoured under the democratic regime, where the Government has been continuously opposing the Parliament on these issues.

(iii) The exceptionally rich international history of the case where the application of Conventions Nos 35 and 37 in Chile has given rise to five representations under article 24 of the ILO Constitution, numerous CEACR observations and deliberations by the Conference Committee on the Application of Standards.

33. The case spans three major periods – 1981 to 1991; 1991 to 2001 and 2002 to the present time. The first period (1981–91) covers the decade of the transfer of teachers to municipalities and extends from the establishment of the special allocation by the Decree-Law No. 3.551 in January 1981 to the adoption on 26 November 1991 of the Law No. 19.070 on the status of municipal teachers. It might be called the legislative period, as all the laws and decrees referred to in the representation were adopted during this period, establishing the conditions of remuneration and pension contributions of the teachers before and after their transfer from the Ministry of Education to local municipal authorities.

34. The second period (1991–2001) could be called the litigation period as it extends from the fall of the military regime in 1991, when the first complaints and appeals were filed by the teachers to local courts, until ten years later when, after a decade of decisions, in 2001, the Supreme Court ruled against the teachers' claims, foreclosing the legal options.

35. The subsequent events (2002–present), when the teachers took their case to the national Parliament and lodged complaints with the international bodies, including with the Inter-American Commission on Human Rights and with the ILO, belong to the third period extending over the 2000s up to the present time.

36. In examining these various facets of the representation, the Committee was confronted with the task of undoing a particularly complex bundle of legal, judicial and political histories where it has been difficult, if not impossible, to separate pension issues from the wider context of policies affecting the employment and professional status and the system of remuneration of the teachers concerned, which fall outside the scope of Conventions Nos 35 and 37. The Committee wishes to point out in this respect that the application of ILO social security Conventions is very context dependent, meaning that the performance of social security systems largely depends on the context of the current economic, financial and labour market policies and various other external factors outside of their reach. Pension systems, where pensions are calculated in relation to wages, depend on the stable and predictable wage policy; where they are calculated in relation to the years spent in employment – on the stable and active employment policy and full insurance coverage. The right of appeal could be effectively exercised only where there are fair and impartial tribunals and where their decisions are fully enforced. Generally, the application of the social security Conventions depends on the internal regime of the country being based on

the principles of the rule of law, democracy, social dialogue and good governance. With this understanding in mind, the Committee has proceeded to link the allegations put forward by the representation to the specific provisions of Conventions Nos 35 and 37 and the consequent obligations of the State of Chile.

Relation of the representation to the relevant provisions of the Conventions

37. The Committee notes that the complainant organization considers the protections guaranteed by Conventions Nos 35 and 37 to be violated by the fact that the old-age and invalidity pensions of the teachers concerned are calculated without taking into consideration the social insurance contributions based on the part of their remuneration constituted by the special allowance established by Decree-Law No. 3.551, which should have been paid into the pension system. In technical terms, the representation alleges that the non-payment of the special allowance has substantially reduced teachers' pension contributions, which are calculated on the basis of total received wages, and has resulted in a corresponding reduction in their pensions, which are paid to them through a defined-contribution pension scheme, where the final pension amount represents a return on the investment of contributions accumulated in an individual account over the employee's full period in insurance. The Committee points out that Conventions Nos 35 and 37 are fully applicable to defined-contribution pension plans under which pensions are calculated on the basis of contributions graduated according to remuneration and made over the time spent in insurance. Indeed, Article 6(1) of these instruments expressly refers to insurance schemes that entitle an insured person to a "benefit representing a return for the contributions credited to his account". With respect to such schemes, Article 7 of both instruments provides, inter alia, that the pension shall vary with the amount of the contributions paid and that the remuneration taken into account for this purpose shall also be taken into account for the purpose of computing the pension. Non-payment of the special allowance would therefore directly affect the application of the following provisions of Conventions Nos 35 and 37:

> Article 7(1) of both Conventions, according to which "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"; and
>
> Article 7(3) of both Conventions: "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."

38. The representation questions whether the municipalities, as teachers' employers, are responsible for the non-payment of pension contributions that should have been paid on teachers' behalf, based on the part of their remuneration constituted by the special allowance. The representation also alleges that the municipalities, as public authorities, and the central Government, are responsible for the proper financial and administrative management of the pension system and the due provision of benefits to insured persons. According to the complainant, neither the municipalities nor the central Government, represented by the Ministry of Education, had shown the will to act to safeguard and maintain teachers' conditions of remuneration and levels of pension contributions after their transfer. With regard to financial management, the representation points to the fact that the compulsory transfer of teachers to municipalities was not accompanied by the transfer from the central to municipal budgets of the financial resources necessary to maintain their conditions of remuneration and levels of pension contributions. With regard to administrative management, the representation recalls that the public authorities in Chile at all levels have completely withdrawn from the administration of the pension funds

placed under private management. The Committee observes, therefore, that the representation also concerns the application of the following provisions of Conventions Nos 35 and 37:

> Article 9, paragraph 1, of Convention No. 35 and Article 10, paragraph 1, of Convention No. 37: "The insured persons and their employers shall contribute to the financial resources of the insurance scheme";
>
> Article 9, paragraph 4, of Convention No. 35 and Article 10, paragraph 4, of Convention No. 37: "The public authorities shall contribute to the financial resources or to the benefits of insurance schemes covering employed persons in general or manual workers";
>
> Article 10, paragraph 5, of Convention No. 35 and Article 11, paragraph 5, of Convention No. 37: "Self-governing insurance institutions shall be under the administrative and financial supervision of the public authorities".

39. The representation further alleges, with regard to claims related to the special allowance: that the procedures of complaint and appeal existing in the national legal system have been ineffective, because the military regime in Chile in the early 1980s did not ensure courts' impartiality; that numerous appeals filed by teachers in the later period have resulted in various courts handing down contradictory judgments; and that, in the few cases where appeals have been decided in favour of teachers, the State has been largely unable to execute the courts' decisions. The Committee observes that these allegations concern the application of Article 11 of Convention No. 35 and Article 12 of Convention No. 37, which read as follows:

> Article 11, paragraph 1, of Convention No. 35 and Article 12, paragraph 1, of Convention No. 37: "The insured person or his legal representatives shall have a right of appeal in any dispute concerning benefits";
>
> Article 11, paragraph 3, of Convention No. 35 and Article 12, paragraph 3, of Convention No. 37: "In any dispute concerning liability to insurance or the rate of contribution, the employed person and, in the case of schemes providing for an employer's contribution, his employer shall have a right of appeal".

40. Finally, invoking the multiple pieces of legislation governing teachers' change of status and remuneration conditions during the lengthy transition period from state to municipal employment and from public to private employment, the contradictory character of court decisions on similar cases brought by teachers and the continuing controversies between the Parliament and the Government – the legislative and executive powers of the State – on the issue of pension debts, the representation questions whether the State of Chile has ensured the coherent and consistent action of its constituent powers necessary for compliance with its international obligations under Conventions Nos 35 and 37. In this respect, the representation concerns the application of Article 1 of both instruments, under which:

> Each Member of the International Labour Organisation which ratifies this Convention undertakes to set up or maintain a scheme of compulsory old-age insurance which shall be based on provisions at least equivalent to those contained in this Convention.

41. Prior to examining the above questions, the Committee considers it necessary to recall the previous representations related to the application of Conventions Nos 35 and 37 by Chile that are linked to the legal questions raised by the present representation.

Relationships to the representations under article 24 examined previously

42. The Committee notes that the municipalization of the educational system and the transfer of teachers to the private sector coincided with the institution in Chile of the privately-managed pension scheme established by Decree-Law No. 3.500 of 1980. The military regime, in power from 1973 to 1990, initiated and implemented both reforms in the 1980s, and four representations under article 24 of the ILO Constitution concerning the application of Conventions Nos 35 and 37 by Chile were filed. Two of the representations were initiated by the National Trade Union Coordinating Council (CNS) [9] and a group of national unions of employees of pension funds, [10] in 1986 and 2000 respectively, and concerned the incompatibility of the private pension system with the aforementioned Conventions. The other two cases, in 1999 and 2006, were submitted by the CPC AG and relate to prejudice caused to teachers' social security as a result of their transfer to the municipalities, [11] as does the present representation.

(a) Chile's private pension system in the light of Conventions Nos 35 and 37

43. The Committee recalls that the representations of 1986 and 2000 concerned non-observance by Chile of the same provisions of the Conventions which are the subject of the present representation, namely Articles 9 and 10 of Convention No. 35 and Articles 10 and 11 of Convention No. 37. These Articles set out basic principles of the organization and financing of the pension insurance schemes covered by the Conventions: such schemes shall be managed by non-profit-making institutions (Article 10(1) of Convention No. 35); the representatives of the insured shall be able to participate in their administration (Article 10(4) of Convention No. 35); employers shall contribute to the financing of such schemes (Article 9 of Convention No. 35); and the State shall assume responsibility for the proper administrative and financial management of such schemes (Article 10(5) of Convention No. 35). The examination of the abovementioned representations established that the Chilean pension insurance scheme does not comply with these provisions of the Convention. The Committee wishes to stress that non-respect for these principles undermines the entire legal architecture of the Conventions. Individual provisions only function properly when all basic systemic principles are observed. In this respect, the Committee notes that it is confronted with an unusual situation, where the specific allegations of violation of the Conventions with respect to teachers' pension rights are formulated with regard to the pension insurance scheme, the very design of which is already at odds with the Conventions.

44. The Committee recalls that the examination of the representations of 1986 and 2000, as well as those of 1999 and 2006, revealed a clear link between continual non-respect for the general principles for proper financial and administrative management of pension systems laid down by the Conventions, and the specific problem of persistent arrears in collection of social security contributions, and pension debts resulting from unpaid contributions. Despite various corrective measures taken by the Government, the successive Governing Body reports on the representations of 1986, 1999, 2000 and 2006 attest to the limitations of the state supervisory, inspection and enforcement mechanisms in controlling alone the privately managed pension insurance in such a regulatory environment where the basic principles established by the Conventions are not observed. As the Committee which

[9] GB.230/19/25.

[10] GB.273/15/4.

[11] GB.271/18/1 and GB.274/16/4.

examined the 1999 representation noted, "despite the existence of a legal framework which, according to the Government, enables workers' social security rights to be guaranteed, a number of municipalities have accumulated arrears owed to the welfare institutions, both private and public, to the direct detriment of workers' social security rights, a situation which the Government itself considers to be the cause for concern". [12] Thus, the absence of any obligation on the part of municipalities, as public authorities and teachers' employers, to contribute to teachers' pension schemes, coupled with the absence of any right of teachers, as the insured persons, to be represented in the administration of the schemes and supervise the due payment of contributions by the municipalities, has no doubt contributed to the formation of pension debts over the decades, and to the ongoing uncertainty, described in the present representation, with regard to the volume of teachers' pension rights.

(b) Effects of non-payment by the municipalities of part of the social security contributions under Conventions Nos 35 and 37

45. The Government argues that the present case does not substantially differ from the previous representations made by the same complainant organization in 1999 and 2006 and already resolved by the ILO supervisory bodies. The Committee agrees that the decisions taken by the Governing Body on previous representations largely concern the same issues, and, therefore, that they remain relevant to the present case. In this respect, the Committee recalls that in relation to the 1999 representation, the Government was called upon to guarantee the payment by municipal authorities of the arrears in social security contributions for teachers, so that they could lay claim to the full amount of their old-age and invalidity pensions. In the case of the 2006 representation, the Governing Body concluded that it was the responsibility of the State to guarantee the payment of the social security debt resulting from municipal authorities' non-payment to teachers of an education subsidy which formed part of their remuneration.

46. With respect to these conclusions, it is to be emphasized that the State's responsibility for the proper functioning of the social security system extends to all relevant public authorities at all levels of state administration, including municipalities. A social security system is a public good and, in this sense, the primary responsibility for it will always remain with the public authorities, central as well as local. A central government may not decentralize its responsibility to the country's 345 autonomous municipalities, making them the only public authorities responsible for the social security of the teachers in their employ. Further, it may not relinquish its responsibility by transferring teachers from the public to the private sector and by placing them under a privately managed pension scheme based on their individual savings. In this connection, the committee charged with examining the 1999 representation stressed in its report that, pursuant to Article 10(5) of Convention No. 35 and Article 11(5), of Convention No. 37, "when entrusting the administration of insurance to autonomous authorities, a State cannot remain separate from the results of this administration and must retain the right to exercise supervision. The principle of autonomous management has as its corollary the principle of financial and administrative supervision of the administration of social insurance by the public authorities. The organization of supervision is thus an essential feature of the general social insurance mechanism, without which the application of national and international law could not be guaranteed. Pursuant to the abovementioned provisions of Conventions Nos 35 and 37, the Government is therefore responsible for the full application, in conformity with the law, of the provisions governing the social insurance system,

[12] GB.274/16/4, para. 28.

including those concerning the payment of contributions, the principle of which is laid down in Article 9 of Convention No. 35 and Article 10 of Convention No. 37." [13]

47. The Governing Body noted with concern the serious consequences that the non-payment of social security contributions necessarily had for the rights of workers, particularly as regards pensions, and, in the long term, for the credibility of the whole social security system. It called upon the Government to ensure the rapid and full repayment of social security contributions as yet unpaid by municipal authorities by increasing inspections, imposing appropriate sanctions and taking financial control of reimbursements made by municipalities. The Committee on the Application of Standards of the International Labour Conference has examined the follow-up given to the recommendations made by the Governing Body on several occasions – most recently at its 98th Session in 2009 – and has noted that some of these issues go back several years without, it seems, the Government having provided a lasting solution. The Committee notes, in the light of the above information, that disputes over the alleged damage suffered by teachers regarding their remuneration and their rights to social security have continued to exist for many years without managing to find a satisfactory solution ensuring the full application of the requirements of the Conventions being examined. The present representation refers to the same deficiencies of the private pension system in Chile, albeit in a slightly different context.

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48. In view of the allegations and the counter arguments given by the Government, in order to determine whether the State of Chile has duly fulfilled its obligations to ensure that teachers' rights to a pension have been acquired and maintained with all the legal certainty and predictability called for by the provisions of Conventions Nos 35 and 37, the Committee proposes to examine the following questions moving from the establishment of concrete legal facts to general observations concerning the application of the whole of the Conventions:

1. Was the special allowance part of the gross remuneration on the basis of which the pension and invalidity contributions were deducted?

2. When did the teachers' right to the special allowance expire?

3. Can teachers claim continuity in their conditions of remuneration and social security despite a change to their status and employment regime?

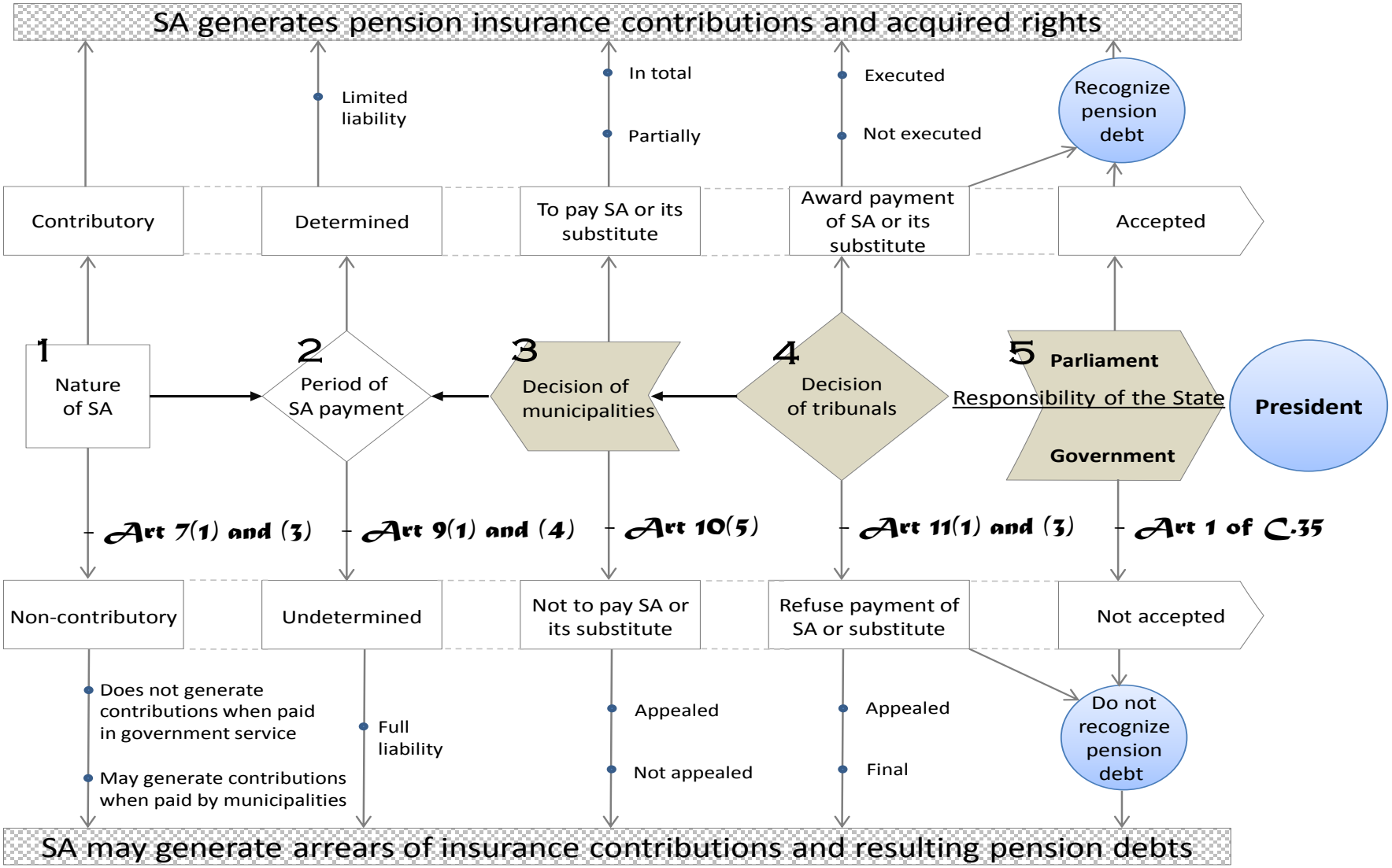
4. Did teachers' judicial appeals re-establish legal certainty concerning the extent of their right to a pension after they were placed under municipal authority?

5. To what extent did the State of Chile fulfil its duty to safeguard pension rights of the teachers?

The logical sequencing of these questions and possible outcomes depending on the answers obtained are reflected in figure 1 below:

[13] GB.274/16/4, para. 26.

Figure 1.


SA generates pension insurance contributions and acquired rights
Limited liability
In total
Partially
Executed
Not executed
Recognize pension debt
Contributory
Determined
To pay SA or its substitute
Award payment of SA or its substitute
Accepted
1
Nature of SA
2
Period of SA payment
3
Decision of municipalities
4
Decision of tribunals
5
Parliament
Responsibility of the State
Government
President
Art 7(1) and (3)
Art 9(1) and (4)
Art 10(5)
Art 11(1) and (3)
Art 1 of C.35
Non-contributory
Undetermined
Not to pay SA or its substitute
Refuse payment of SA or substitute
Not accepted
Does not generate contributions when paid in government service
May generate contributions when paid by municipalities
Full liability
Appealed
Not appealed
Appealed
Final
Do not recognize pension debt
SA may generate arrears of insurance contributions and resulting pension debts

1. Contributory nature of the special allowance

49. Concerning the list of five questions relevant to the examination of the current representation, which the Committee sets out in paragraph 48, the first concerns the nature – contributory or non-contributory – of the special allowance. Here the main consideration is whether, in accordance with national law and practice, the portion of non-taxable remuneration known as the "special allowance" was subject to the payment of old-age and invalidity contributions. **It is only in case where national laws provide, as the CPC AG contends, that the special allowance should be included in the base used for the calculation of social security contributions, that teachers would be entitled to invoke the loss of rights to social security guaranteed by Conventions Nos 35 and 37.** A positive answer to this question, meaning that the special allowance had the purpose of increasing both the remuneration and the pension rights of the teachers, would lead the Committee to proceed with examining to what extent all the responsible parties involved fulfilled their respective obligations under Conventions Nos 35 and 37 for the proper calculation and payment of insurance contributions on behalf of the teachers concerned according to their pensionable remuneration throughout the entire insurance career.

50. The Committee notes that article 40 of Decree-Law No. 3.551 of 1980 establishes the non-taxable nature of the special allowance but does not specify whether this has consequences regarding the determination of the basis for calculating social security contributions. In this respect, according to the CPC AG, the special allowance is an integral part of teachers' gross remuneration and its non-payment substantially reduces their rights as regards pensions. The Government contends instead that the non-taxable nature of the special allowance implies that it cannot enter into the basis of calculation for the determination of old-age and invalidity contributions without any reference to a regulatory provision to this effect. In order to clarify this difference of opinions, the Committee submitted a list of questions to the Government on 30 May 2012, specifically requesting it to indicate: (i) whether teachers who had initially opted to remain under public law had made contributions to old-age and invalidity insurance on the basis of the special allowance; (ii) whether other categories of public servants who continued to be eligible to receive the special allowance made social security contributions on that basis; and (iii) whether the teachers receiving from the municipalities remuneration supplements equivalent to the special allowance on the basis of agreements to that effect were contributing to old-age and invalidity insurance on the basis of their total remuneration. The Committee notes with regret that the Government did not reply to its questions.

51. In the light of the available information, the Committee concludes that the complainant organization and the Government agree on the fact that social security contributions are calculated on the basis of gross remuneration of which the special allowance is an integral part. The Committee is not aware of any provision of national law which a priori conflicts with the special allowance being considered an integral part of the basis for the calculation of old-age and invalidity insurance contributions. On the contrary, the Committee is aware of many declarations from Parliament members and other authorities recognizing the debts owed to teachers in terms of pensions due, inter alia, to non-payment of the special allowance. In this situation, the Committee decided to examine the representation further.

52. The Government and the complainant organization also agree that the legislator and the Government at the time intended to maintain the conditions of remuneration for teachers by planning to transfer to the municipalities the corresponding funds required to retain their salary level. On the basis of this logic, the loss of the non-taxable special allowance should have been compensated by other wage elements paid out by the municipalities on a contractual basis. In terms of private law contracts, all elements of the remuneration should have been considered subject to a contribution for pension insurance. **In the presumption of the non-taxable non-contributory special allowance being "traded in" for a taxable**

and contributory salary supplement, the question of the contributory or non-contributory nature of this allowance is devoid of substance and must be replaced with the question of the readiness of the municipalities to pay out a wage supplement compensating the loss of the special allowance through the application of legislation that provides for maintaining teachers' conditions of remuneration following transfer to municipal authorities. Owing to the contractual nature of this part of the remuneration, the municipal authorities must have had to make contributions to the pension system based on full remuneration, including the supplement which replaced the special allowance. Therefore, the Committee decided to examine the question of conditions of remuneration and social security of municipal teachers. However, prior to doing this, the Committee wished to understand when the teachers' right to the special allowance expired and when the responsibility of municipalities to compensate this allowance and the related social contributions could have started – this being the second question on its list.

2. The question of the expiry of the teachers' right to the special allowance

53. The Committee notes that the special allowance established by Decree-Law No. 3.551 was limited in time. According to the information provided by the Government, payment of the special allowance to persons entitled to it definitely ceased in 1998. **The Committee observes, therefore, that the teachers' claims to pension debts resulting from non-payment of the special allowance are limited to the period of time the special allowance itself was payable, that is 1981 to 1998. The Committee notes that the Government and the complainant agree that the teachers, while still employed by the Government, had been given the right to the special allowance and should have been receiving it as part of their remuneration until this right expired.** Where the complainant and the Government disagree is the time when the teachers' right to the special allowance was extinguished: the complainant believes that this right was firmly and formally included in the teachers' patrimony and therefore expired only with the special allowance itself, while the Government has so far maintained that this right was lost much earlier when the teachers changed their employment status from government employees to municipal employees. The common denominator between these two positions is that the teachers should have been receiving the special allowance at least for the period of time from 2 January 1981, as established by section 40 of Legislative Decree-Law No. 3.551, until such date when their right to the special allowance was annulled by the subsequent legislation with the necessary legal certainty. In this respect, the complainant organization points out that the subsequent laws have not expressly mentioned the special allowance, while the Government maintains that the subsequent laws prohibited the application to private sector employees of all the tariffs and conditions of remuneration established in the public sector. Setting aside the question of the legal certainty of the date of the expiration of the right to the special allowance for different categories of teachers, which in principle is for the national courts to determine, **the Committee considers it important to underline that, to the extent that the special allowance formed part of the teachers' pensionable remuneration, the Government and the municipalities as their sequential employers should have paid on behalf of the teachers employed by them contributions into the compulsory pension and invalidity insurance calculated on the basis of their full pensionable remuneration, including the amount of the special allowance, for the whole period mentioned above. Non-payment of the contributions in the full amount during this period resulting in reduced pensions on retirement would have constituted a violation of Article 7(1) and (3), and Article 9(1) and (4), of Conventions Nos 35 and 37.**

54. The above conclusions would have resolved the main issue raised in the representation making unnecessary any further examination, if the Committee would have been able to put an end date for the expiry of the teachers' right to the special allowance in the period

1981–98 mentioned above. With regard to the controversial question of the presumed date of expiry of the teachers' right to the special allowance, the Government refers to various laws adopted over the period of 1982–91, which extends far beyond the termination of the teachers' transfer period in 1986, as well as to the decisions of the Supreme Court and the Court of Audit adopted over a subsequent period of 1994–2001 in the context of individual cases, which invoked different arguments for the denial of the teachers' right to the special allowance and point to different moments in time when this denial should have taken place. Thus, according to the Government, teachers have lost their right to the special allowance either by virtue of their municipalization losing the status of government employees, in which case teachers who were transferred to the municipalities in 1986 should have been receiving the special allowance already for five years while being still in the service of the central Government; or because of obtaining the status of municipalized teachers defined by Law No 19.070 in 1991; or else simply because of the expiry of the period of negative prescription to claim the special allowance; or due to various negative decisions of the tribunals at all levels up to the Supreme Court. **The Committee observes that each of the abovementioned legal grounds pointed to a different end date for the presumed expiry of the teachers' right to the special allowance. The previous Government in its observations has not singled out any one of such end dates, but relied in its opposition to the representation on the combined power of these legal facts to negate the existence of any legal basis for teachers' claims.**

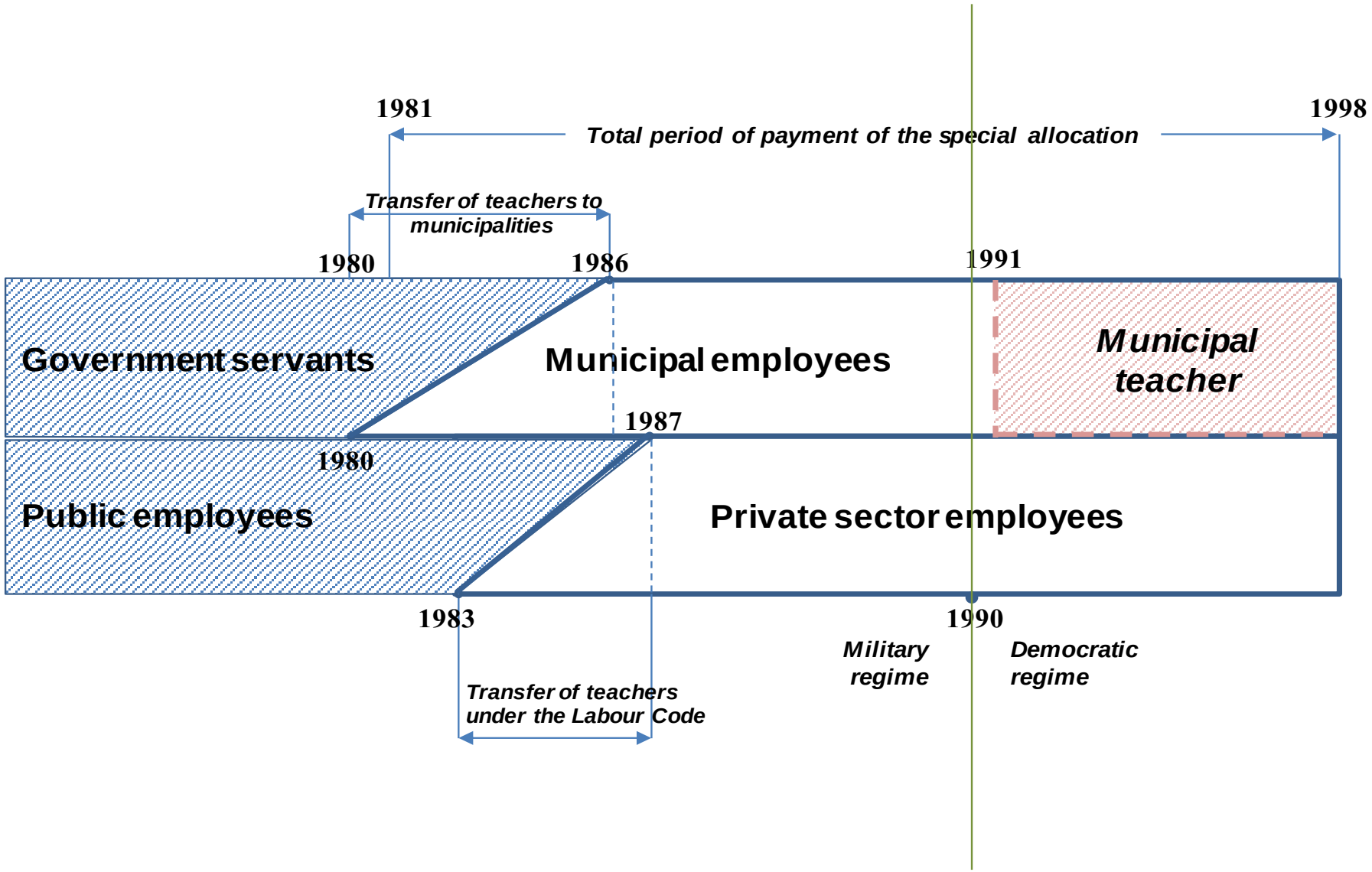
55. Summarizing the situation, the Chief of Cabinet of the Ministry of Education indicates in a letter dated 14 January 2015 (see paragraph 26) that "the Chilean State has repeatedly maintained the argument that, in accordance with the legal standards and the decisions of the Court of Audit, the right to the special allowance established by section 40 of Decree-Law No. 3551 of 1980 of the Ministry of Finance, only existed until 1982, the year in which Act No. 18.196 was adopted. Furthermore, the special allowance is incompatible with the teachers current wage nomenclature established by Act No. 19.070, Legislative Decree No. 1 of 1996 of the Ministry of Education. Finally, the tribunals have considered that the possibility to judicially require the payment of the special allocation was barred".

56. The Committee notes that, until December 1982, national law allowed teachers to choose between remaining subject to the public service remuneration scheme or being transferred to the private law scheme. This right to choose was eliminated by Law No. 18.196 of 1982, which stipulated that, following their transfer to the municipal authorities, teachers could not benefit from any current or future right applicable to public employees. In 1985, the explanatory report concerning the Law No. 18.461 of 12 December, amending Decree-Law No. 3.551, stated that the special allowance provided by article 40 of the latter Decree-Law could be paid only to staff of the state civil administration. At the same time, this law also provided for an increase of 17.32 per cent in municipal educational subsidies for increasing the wages of teachers under the municipalities. In 1986, all teachers were finally transferred under the responsibility of municipalities and Law No. 18.602 of 1987 establishing a new administrative status provided that municipalized teachers were subject to the provisions of the Labour Code. Lastly, in 1991, the adoption of a new Statute of municipalized teachers also established that municipalized teachers would be subject to private law.

57. The Committee notes that it is impossible, in the framework of the international examination procedure for the examination of the representation, to carry out the necessary analysis and interpretation of the multitude of legislative texts adopted in order to govern the transfer of teachers to the municipal authorities and their employment conditions. Some of these texts, such as Law No. 18.196 of 1982, were aimed at denying teachers the rights granted to state employees under national law, while others, such as Law No. 18.461 of 12 December 1985, were intended to maintain the employment conditions of teachers following their transfer under the responsibility of municipalities. However, while national

law had provided, since 1983, that the wage nomenclature of state officials would cease to apply to municipalized teachers, it was not until 1991, and the adoption of the new Statute of municipalized teachers, that a new wage nomenclature for teachers was established by national legislation. The letter of the Ministry of Education of 15 January 2015 refers in this respect to "the teachers transferred from educational establishments between the years 1981 and 1991 from the Ministry of Education to the municipalities and municipal entities". **The Committee observes that the numerous overlapping laws adopted throughout the 1980s – the decade of the transfer of the teachers under municipalities – and subsequent contradictory jurisprudence on these issues have not permitted the establishment with sufficient legal certainty of either the date on which the teachers' right to the special allowance should have expired, or the moment when the municipalities should, in principle, have taken over the responsibility for maintaining the conditions of remuneration and social security of the teachers employed by them**. This is the third question for the Committee to examine, which is illustrated by figure 2.

Figure 2. Evolution of the employment status and conditions of remuneration of teachers in Chile



3. Maintaining continuity of conditions of remuneration and social security of municipalized teachers

58. The Committee notes that the transfer of teachers to the municipalities was provided for by Decree-Law No. 3.063 of 1979 related to the services transferred, the terms under which the labour relations of transferred staff had to be respected and the rights and conditions in force prior to their transfer. The Ministry of Education had committed to guaranteeing that all the teachers' financial rights and obligations in force at the time of the transfer would be carried over. In fact, Decree-Law No. 1-3063 of 13 June 1980, establishing the arrangements for the transfer, provided for the conclusion of conventions between the Ministry and the different municipalities which to protect the acquired rights of municipal staff. In practice, the transfer was gradual, beginning in 1980 and ending in 1986 or in 1991, depending on different sources of information. It seems, however, that teachers who were municipalized between 1981 and 1982 have received prior to their transfer, a special allowance of only 9 per cent and 22.5 per cent of their base salary, in contrast with the 90 per cent established by article 40 of Decree-Law No. 3.551. In 1985, Law No. 18461 of 12 November introduced a time schedule for the progressive payment of the special allowance – from 65 per cent in November 1985 to 100 per cent in January 1988. Therefore the teachers transferred in 1986 received a special allowance equal to 67.5 per cent of their base salary. Consequently, the payment of the entire special allowance to those teachers who were entitled to it prior to their transfer was never made.

59. The Committee notes that by providing for the maintenance of employment conditions of municipalized teachers and, since the early 1990s, an increase in the credits allocated to municipalities for the remuneration of teachers, national legislation has implemented measures in order to make up for the wage loss suffered by teachers after their transfer to private law. The Committee observes that, based on the legislative texts providing for the maintenance of employment conditions of municipalized teachers and the subsidies intended to offset the loss of wages suffered by teachers because of non-payment of the special allowance, a number of municipalities have decided to continue paying teachers who are under their responsibility additional remuneration equal to the special allowance. Therefore it is not surprising that these teachers considered the special allowance an acquired right that was part of their patrimony. The Committee notes that particular efforts had been made by the State and certain municipalities in order to avoid loss of wages and maintain the teachers' level of pay. However, it seems that all the funds needed to ensure that the teachers' employment conditions stayed the same were not allocated to the municipalities, with the situation varying from one municipality to another. In reply to earlier representations concerning non-payment to teachers by the municipal authorities of other components of their remuneration, the Government indicated that "the education system was prone to disputes relating to the problem of payment of certain components of wages, and particularly special subsidies, in view of the complexity of the structure of remuneration, which complicates the determination of arrears and that these issues are the responsibility of the Court of Accounts and the Directorate of Labour which have had to resolve these disputes in an appropriate manner". **The Committee would like to emphasize in this respect that, in terms of the obligations arising out of Article 10(5) of Convention No. 35 and Article 11(5) of Convention No. 37, the greater the complexity of the teachers' remuneration system from the standpoint of the diversity of allowances, subsidies and the sources of funds, the more strict should be the administrative and financial supervision of the State over the proper calculation and payment of the insurance contributions into the social security system.**

60. Given the complexity of the situation in law and in practice during the 1980s prior to the adoption of a new wage nomenclature for teachers in 1991, and the absence of additional explanations requested from the Government, the Committee took due note of the report of

the special committee of the Chamber of Deputies responsible for examining the issue of the different state "historical debts" passed down from the military period, according to which "a large number of municipalities granted agreements with the teachers incorporating the special allowance in their remuneration, thereby explicitly recognizing that it was part of their rights. It is therefore possible to contend that, in practice, despite there being a change in the legal status by going from a legal right to a contractual right, it is also possible to prove that the nature of the teachers' functions did not change, i.e. the teachers continued to exercise the same functions as they did prior to being transferred and that the only change was in the administrative body responsible for meeting the educational needs of the population, without the link between the teachers and the body changing." [14] The Committee observes that, under these conditions, the transfer of teachers to the municipal authorities should not lead to a substantial deterioration in their salary conditions and social security rights. The very large amount of this portion of remuneration (90 or 50 per cent of basic remuneration, depending on the case) is not, according to the Committee, such as to suggest that the special allowance could be eliminated without being noticed when transferring teachers to the municipal authorities. **The fact that in many cases this happened without any compensatory arrangements being put in place demonstrates that, in the 1980s, the State had been unable to ensure that the pension rights under the new privatized pension system of the teachers concerned had been acquired and maintained in conditions of legal certainty, stability and predictability of their wages and social security contributions related to their employment after transfer. This conclusion raises the question of the responsibility of the Government and the municipalities, as public authorities and employers of the teachers, for the proper financial and administrative management of the pension insurance system where pensions are calculated in relation to the amount of previous wages and contributions.** However, before assessing how the State of Chile has coped with this responsibility in terms of Articles 9 and 10 of Convention No. 35 and Articles 10 and 11 of Convention No. 37, the Committee is logically faced with the question of whether the legal action undertaken by the teachers helped clarify the extent of their rights related not only to the amount of their remuneration but also to social security rights derived from it – the fourth question which the Committee raises (see paragraph 48).

4. Appeals brought by teachers before the courts

61. According to information supplied by the CPC AG, including the report of the special committee of the Chamber of Deputies, which summarizes and consolidates all the available elements on this matter, the decisions of the courts of first and second instance did not all resolve this issue in a consistent manner; some decisions went against the teachers while others acceded to their requests. Beginning in 1994, the Supreme Court heard repeated applications for judicial review relating to the issue of the teachers' right to receive the special allowance. Although initially its decisions upheld the judgments acceding to the teachers' requests, the Supreme Court subsequently appears to have consistently considered that municipalized teachers did not have a right to continue to receive the special allowance. According to the explanations that the Government provided on 29 October 2009, in its report on the application of Convention No. 35, the Court justified its refusal primarily on the following grounds: (i) the right of teachers to appeal to the courts on this issue was barred at the time the proceedings were instituted; (ii) Law No. 18.196 of 29 December 1982 (amending article 4 of Decree-Law No. 1-3063 of 1980) provided that municipalized teachers would be governed by private law and that no current

[14] Report of the Special Committee on Historical Debts, Chamber of Deputies of Chile, 12 August 2009.

or future laws governing the public sector wage scale would be applicable to them; [15] (iii) Law No. 18.461 of 12 December 1985, amending Decree-Law No. 3.551 of 1981, provided that the special allowance would benefit only the staff of the state civil administration; this law also provided an increase in subsidies for municipalities to raise the wages of municipalized teachers; (iv) the entry into force in 1991 of Law No. 19.070 on the status of teachers in the educational system confirmed that municipalized teachers were subject to private sector labour law; (v) the fact that agreements had, in some cases, been concluded to provide for the continuation of the previous remuneration system could not be considered valid for employment contracts entered into after the adoption of Law No. 18.196, which prohibits such agreements; (vi) the non-existence of a right for teachers to retain the benefit of the special allowance in their patrimony while remaining subject to private law; and (vii) the courts were unable to restore, by their decision, the payment of a non-taxable special allowance of which teachers had been deprived by law.

62. With regard to administrative appeals, the Government stated that the Court of Audit had, in general, ruled that teachers were entitled to demand payment of the special allowance from municipalities only until 29 December 1982, when the right to choose the public sector wage scale was abolished and Law No. 18.196, providing that officials transferred to the municipal authorities would henceforth be governed by private law, was promulgated. According to this body, even when teachers' contracts provide for the payment of the special allowance, the right to demand payment of it in the country's courts is barred, given the relevant provisions of the Labour Code. Lastly, the Court of Audit also found that, since 1 July 1991, the entry into force of Law No. 19.070 has permitted only the payment of the allowances provided for therein (article 42), and the special allowance established by article 40 of Decree-Law No. 3.551 of 1980 is not among them; the fact that some teachers transferred to the municipal authorities have continued to receive a wage supplement, similar to the special allowance established by Decree-Law No. 3.551, is the result of an agreement between teachers and the municipalities that employed them, and should not be interpreted as establishing the existence of a right in this regard. The right to sue to demand payment of the special allowance is barred.

63. The Committee recalls that the transfer of teachers under the municipal authorities was carried out in the 1980s via decree-laws within a historical, political and institutional context that did not truly allow for the effective exercise of the right to appeal. It was only after the return of democracy in 1991 that many teachers lodged appeals before the administrative and other courts in order to draw attention to the existence of a loss of wages resulting from the transfer to municipalities. The rulings cite multiple motives based on different successive legislative documents which addressed the issue of teachers' remuneration and whether it was subject to private law. Since the Supreme Court rulings did not have an effect *erga omnes*, instead only on the disputing parties, judicial appeals continued to be lodged.

64. Out of the 40 or so cases where the court's final ruling, between 1993 and 1997, acceded to the teachers' requests, only seven have been carried out so far. In those cases, the parties concerned were able to, and continue to, receive their special allowance as part of their remuneration. No further action has been taken on the other rulings that were in favour of teachers due to the municipal property being immune from seizure. The Supreme Court

[15] Article 4 of Decree-Law No. 1-3063 as amended by Law No. 18.196: "The staff of the public sector agency or entity that has been or is being transferred to the municipal government, and the staff subsequently contracted for that service by the municipality, shall not be considered part of the fixed staffing of the municipality concerned. Such staff shall be governed wholly by the labour, remuneration and social security standards applicable to the private sector. The rules of current or future legislation governing public sector remuneration shall not apply to the staff referred to in the preceding paragraph."

dismissed several rare appeals against the public treasury lodged by certain municipalities in order to cover the amounts that the Court of Appeals had determined were owed to the teachers. Decisions in favour of the teachers ordering repayment of arrears in their pension contributions were pronounced in the municipalities of Cauquenes, Chanco, Pelluhue, Parral, Vallenar and Chanaral, while in the latter two, certain payments were actually made to the teachers concerned in 2008. The Committee also notes that the Inter-American Commission on Human Rights is now considering the complaint against Chile regarding non-execution of one of those court decisions made in 1994, and confirmed in 2005, concerning the municipality of Chanaral. Certain other municipalities have continued to transfer, on a contractual basis, a salary supplement equal to the special allowance, either by debiting from its own funds or from additional funds received for this purpose.

65. The numerous overlapping laws opened the way to their different understanding by different municipalities depending, inter alia, on their financial capacity of paying their teachers increased wages, and to the numerous contestations of their decisions by the teachers concerned in different national courts in the subsequent period. Court decisions, being often inconsistent and even diametrically opposed, only amplified the differences between municipal policies regarding remuneration and pension contributions of their teachers. The special committee of the Chamber of Deputies noted that "the courts failed, in the first instance, to reach a consensus; some of them invoked the constitutional guarantee of the right of ownership of the allowance as being an integral part of the remuneration for acceding to the demands of the teachers". In this context, the Committee regrets that the Government did not wish to provide the details that it had requested in May 2012 on what legal obstacles had prevented the aforementioned court rulings from being carried out as well as concerning the ongoing proceedings before the Inter-American Commission on Human Rights.

66. With regard to the overall situation regarding the court appeals, the Committee observes that, despite their widespread use, the complaint and appeal mechanisms have not permitted to change the situation of legal uncertainty concerning conditions of remuneration and social security contributions that prevailed throughout the entire period following the transfer of the teachers. Furthermore, the rulings in question largely contributed to the growing disparity of teachers' employment conditions in different municipalities and the strong feeling of inequality and discriminatory treatment by the State of these teachers, depending on their place of employment. The Committee considers that the situation, in which certain municipalities pay a wage supplement equal to the special allowance to their teachers while others refuse to pay such a supplement, represents a situation of inequality in their conditions of employment and social security which is incompatible with the objectives of Conventions Nos 35 and 37. The Committee understands that from the teachers' perspective, the unmanageable complexity of their remuneration system, exacerbated by the courts' conflicting rulings, have led to distrust in the capacity of the administrative and judicial system of the country to adequately respond to their claims. Consequently, since the beginning of the 2000s, the teachers were compelled to take their grievances to their representatives in the national Parliament and to the international bodies, including the ILO. This leads the Committee to the last question in the list it has drawn in paragraph 48 above and illustrated in figure 1.

5. Responsibility of the State of Chile to safeguard pension rights in respect of Conventions Nos 35 and 37

67. In accordance with Article 26 of the 1969 Vienna Convention on the Law of Treaties ratified by Chile in 1981, by ratifying international treaties, States consent to be bound by them and to implement them in good faith in law and in practice, and not to deprive them

of their substance and purpose. In relation to the ILO Conventions, this implies a commitment on the part of the State legislature to legislate in accordance with the instruments ratified, a commitment on the part of the executive branch to bring national practice into conformity with the law, and a commitment on the part of the judiciary to ensure, in particular, that national law and practice and the international obligations assumed by the State are not in any way in conflict. A State which ratifies an international Convention undertakes to ensure that its three constituent powers will work in concert to implement the Convention in conditions respecting the rule of law and the need for stable and predictable legislation, and not allowing any situation of legal uncertainty to persist. Ratified Conventions are in force for the State as a whole and shall be observed at all levels of government, establishing and maintaining such an internal regulatory framework under which rights are acquired in accordance with the provisions of the ratified Convention, and are preserved for as long as the Convention requires.

68. The Committee wishes to observe that the long history of dialogue on these issues between the Government of Chile and the ILO supervisory bodies attests to the insufficiency of the measures taken by the Government to give effect to the recommendations of the CEACR, the Governing Body and the Conference Committee on the Application of Standards – which has discussed the application, in Chile, of Conventions Nos 35 and 37 in 1987, 1993, 1995, 2001 and 2009. In 2009, in view of the lack of response from the Government on the issues raised, the CEACR expressed "**concern** at the Government's determination to ignore, since 2000, the recommendations made to it by the international community and the numerous calls for dialogue by the Committee", and urged the Government to reconsider its position (observation of 2009). In the subsequent observations formulated in 2010, 2011 and 2012, the CEACR noted that the Government was unable to indicate any amendments made to the private pension scheme which were likely to give effect to the recommendations of the Governing Body (observation of 2012).

69. With respect to the obligation to ensure the proper application of Conventions Nos 35 and 37 at all levels of government, the Committee considers that the Government's entrusting to municipal authorities of civil servants for whom it was previously responsible cannot allow it to neglect the arrangements for such a transfer and its consequences on their rights to social security and to fail to discharge all its responsibilities under those Conventions. Moreover, it is the responsibility of the central government to ensure that the provisions of ratified Conventions are applied by local authorities in a uniform manner to all protected persons in the country, without creating any unjust discrimination. The Committee observes however that neither the laws, nor the courts, nor the central Government have sent a clear message to the municipalities as to the effective right of their teachers to the maintenance of their conditions of remuneration and pension contributions upon transfer into municipal employment, which has led many municipalities to refuse payment of the special allowance or to reduce or suspend unilaterally the payment of a corresponding supplement to the teachers' wages whenever they encountered financial constraints. **The Committee expresses its concern that overlapping pieces of legislation governing the change of status and remuneration conditions of the teachers during the lengthy transition period from the state to municipal employment and from public to private law, the contradictory character of court decisions on similar cases brought up by the teachers, and the continuing controversies between the Parliament and the Government, the Legislative and the Executive Powers of the State, on the issue of pension debts, have not enabled the State to establish a stable, reliable and predictable regulatory framework with respect to conditions of remuneration and social security rights of the teachers, which is necessary for the proper application of Conventions Nos 35 and 37.**

70. With respect to the concerted obligation of the constituent powers of the State to ensure the proper observance of ratified Conventions, the Committee is bound to note that in Chile the dispute over teachers' salary and pension rights has remained on the parliamentary, judicial and political agenda for more than 20 years without an agreement on the subject. In this connection the Committee notes that, since the 1990s and the first rulings by the higher courts, the Chamber of Deputies and the Senate have on numerous occasions examined all the legal and factual elements concerning the municipalized teachers' allegations and have unanimously approved a series of parliamentary documents entitled "draft agreements". In 2009, a special committee of the Chamber of Deputies established to examine the question of the various "historical debts" of the State from the time of the military regime unanimously concluded that the State did have a debt to the teachers, and that this was confirmed by the tacit or explicit acknowledgement of a moral debt both by the various branches of the Government and by the municipalities themselves. [16] The Committee notes that the special committee of the Chamber of Deputies called on the Government to actively seek an out-of-court solution, by requesting the President to take the steps required by the circumstances to meet the teachers' concerns, and made a proposal to the Government for an interim solution, including a readjustment of the teachers' pensions. The Committee regrets that it has no information about the follow-up given to the proposals made by the special committee of the Chamber of Deputies or the agreements reached with the national Congress in the context of the votes on the 2011 and 2012 budgets. The Committee notes however that, according to information communicated by the CPC AG, the Chamber of Deputies again in June 2014 adopted a draft agreement calling on the Office of the President of the Republic to intervene in order to settle the problem of the State's debt to the teachers.

71. In view of these efforts, the Committee can only but encourage the Government to find an appropriate formula for achieving the national consensus necessary for applying Conventions Nos 35 and 37 in good faith. Conventions Nos 35 and 37 provide in this respect that each Member undertakes to maintain a scheme of compulsory old-age insurance where the representatives of the insured persons shall participate in the administration under the supervision of the public authorities (Article 10 of Convention No. 35 and Article 11 of Convention No. 37). **The Committee considers that the Government should make full use of these provisions to ensure the protection of acquired pension rights of the teachers in municipal employment in conditions of legal certainty, uniform implementation and enforcement necessary for the proper functioning of the pension scheme based on capital accumulation accounts. In order to come out of the judicial impasse and the legislative blockage that have been created under previous governments, and in view of the obligations undertaken by Chile as a member State of the ILO and party to Conventions Nos 35 and 37, the Committee considers that the appropriate approach to be followed in seeking solutions to this type of dispute is that of social dialogue and political agreement at the highest level. In this context, the Committee welcomes the recent initiative of the Ministry of Education to establish, together with the College of Teachers of Chile, a Technical Board with a view to consider claims related to pension rights of municipalized teachers. The Committee hopes that the requirements of Conventions Nos 35 and 37 will be duly taken into account in the deliberations of this Board.**

[16] Report of the Special Committee on Historical Debts, Chamber of Deputies of Chile, 12 August 2009.

Conclusions of the Committee

72. The Committee refers to the five questions raised at the outset of its examination (see paragraph 48 above) in order to determine whether the State of Chile has duly fulfilled all its obligations to ensure that teachers' rights to a pension have been acquired and maintained in compliance with the provisions of Conventions Nos 35 and 37. The Committee recalls in this connection that the application of social security Conventions largely depends on the context of other government policies, particularly in the areas of taxation, the labour market, wages and social dialogue, and requires a minimum degree of consistency among the authorities responsible for those policies. Considering the functioning of the pension system vis-à-vis teachers over the period stretching back more than 30 years, the Committee observes that the State has not managed to create a system for regulating the employment, remuneration and social security of municipalized teachers in which it has been possible to acquire and maintain pension rights during the whole period of insurance under the conditions of stability, predictability and legal certainty required for a funded pension system.

73. Furthermore, the Committee considers that non-observance by the Chilean pension insurance system since its inception in 1980 of the basic principles of the organization and financing of the pension insurance established by these Conventions has contributed to the creation of a deficient regulatory environment where the Government has relinquished, and the municipalities have not assumed, the responsibility for the proper functioning of the teachers' pension insurance scheme during their transfer from the government service into the municipal employment. This has resulted in the non-payment of social security contributions by the employers and municipalities and the consequent accumulation of pension debts. In particular, it has proved itself inadequate to safeguard and maintain the remuneration and pension contributions of the teachers after transfer, causing substantial reduction of their pension rights.

74. The Committee recalls that, in terms of Articles 9 and 10 of Convention No. 35 and Articles 10 and 11 of Convention No. 37, the Government and the municipalities, as public authorities and employers of the teachers, shall bear the general responsibility for the proper financial and administrative management of the pension insurance system where pensions are calculated in relation to the amount of previous wages and contributions. To the extent that the special allowance or any salary increment replacing it formed part of the teachers' pensionable remuneration, non-payment of the contributions in the full amount resulting in reduced pensions on retirement constitutes a violation of Article 7, paragraphs 1 and 3, and Article 9, paragraphs 1 and 4, of Conventions Nos 35 and 37.

75. The Committee also concludes that the State of Chile has failed to guarantee uniform application of the legislation concerned to all teachers without distinction and effective enforcement of their pension rights. In order to come out of the judicial impasse and the legislative blockage that have been created under previous governments, and in view of the obligations undertaken by Chile as a member State of the ILO and party to Conventions Nos 35 and 37, the Committee considers that the appropriate approach to be followed in seeking solutions to this type of dispute is that of social dialogue and political agreement at the highest level. The Committee hopes that the work of the Technical Board established by the Ministry of Education together with the CPC AG will be able to effectively contribute to the resolution of the claims related to pension rights of teachers in full respect of the requirements of the Conventions taking into account the conclusions and recommendations of this Committee.

The Committee's recommendations

76. ***With reference to the recommendations of the Governing Body made in 1986, 1999, 2000 and 2006 within the framework of the previous representations concerning non-observance by Chile of Conventions Nos 35 and 37, the Committee recommends that the Governing Body:***

(a) approve this report, and specifically the conclusions set out in paragraphs 72–75 concerning the application by Chile of Conventions Nos 35 and 37;

(b) note the will of the Ministry of Education to develop the teachers' wage and welfare conditions through social dialogue and to find a durable solution to the pension issues raised in the representation by establishing, together with the College of Teachers of Chile, a Technical Board, which is expected to submit concrete proposals to that end and to deliver its final report at the end of the first semester of 2015;

(c) encourage all parties concerned to reach a viable agreement in the very near future and request the Office to provide the parties to the representation with any technical, consultative or conciliatory services and good offices, which they may request;

(d) request the Government of Chile to take the measures necessary for acquiring and preserving pension rights of the municipal teachers in conditions of legal certainty, uniform implementation and enforcement required for the proper functioning of the pension scheme based on capital accumulation accounts, in particular:

(i) to accept the responsibility, in compliance with Article 10(5) of Convention No. 35 and Article 11(5) of Convention No. 37, for the administrative and financial supervision of the collection and payment of pension insurance contributions by the municipalities and municipal bodies employing the teachers, and, where necessary, provide appropriate contributions by the public authorities to the financial resources of the municipalities or to the pension benefits of the teachers, in compliance with Article 9(4) of Convention No. 35 and Article 10(4) of Convention No. 37;

(ii) to ensure participation of the representatives of the teachers and other categories of insured persons in the management of their pension schemes, including collection of insurance contributions and supervision of their effective payment into respective schemes by the municipalities and other employers in respect of their employees, in compliance with Article 10(4) of Convention No. 35 and Article 11(4) of Convention No. 37, and to engage the process of dialogue with the representatives of the teachers for this purpose;

(iii) to improve the effectiveness of dispute resolution and appeal mechanisms in pension matters concerning municipal employees, ensure prompt rendition of justice in these cases and execution of court decisions engaging the liability of the municipalities for unpaid

contributions, in line with Article 11 of Convention No. 35 and Article 12 of Convention No. 37;

(e) invite the Government to send reports under article 22 of the ILO Constitution on the application of Conventions Nos 35 and 37 by 1 September 2015 containing detailed information on the measures taken to give effect to the conclusions and recommendations made in points (a), (b) and (c) above, as well as on the solutions advanced through social dialogue within the work of the Technical Board established by the Ministry of Education and the College of Teachers of Chile, to be examined by the Committee of Experts on the Application of Conventions and Recommendations in relation with the follow-up on the recommendations adopted by the Governing Body in 1999 and 2006 on the previous representations submitted by the College of Teachers of Chile on similar issues; and

(f) make this report publicly available and close the procedure initiated before the Governing Body as a result of the representation made by the CPC AG concerning the application by Chile of the Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35), and the Invalidity Insurance (Industry, etc.) Convention, 1933 (No. 37).

Geneva, 20 March 2015

Point for decision: paragraph 76

(Signed) C. Flores
Chairperson

J. de Regil

G. Martínez