International Labour Organization

▶ GB.340/INS/15(Rev.1)

Governing Body

340th Session, Geneva, October–November 2020

Institutional Section **INS**

Date: 2 November 2020
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Fifteenth item on the agenda

Complaint concerning non-observance by Chile of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Maternity Protection Convention (Revised), 1952 (No. 103), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151)

Purpose of the document

The Office communicates to the Governing Body the information provided by the Government of the Republic of Chile, as contained in the appendices to this document. It will be for the Governing Body to adopt the necessary decisions as to the procedure to be followed in respect of this complaint. See the draft decision in paragraph 6.

Relevant strategic objective: Promote and realize standards and principles and fundamental rights at work.

Main relevant outcome: Outcome 2: International labour standards and authoritative and effective supervision.

Policy implications: None.

Legal implications: None.

Financial implications: Depending on the decision of the Governing Body.

Follow-up action required: Depending on the decision of the Governing Body.

Author unit: International Labour Standards Department (NORMES).

Related documents: GB.337/INS/13/2; GB.337/INS/PV.

1. At its 337th Session (October–November 2019), the Governing Body had before it a report by its Officers regarding a complaint concerning non-observance by the Republic of Chile of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Maternity Protection Convention (Revised), 1952 (No. 103), the Workers' Representatives Convention, 1971 (No. 135), Labour Relations (Public Service) Convention, 1978 (No. 151), made under article 26 of the ILO Constitution by a delegate to the 108th session (2019) of the International Labour Conference. [1]

2. Having considered that the complaint was receivable in so far as it met the conditions established in article 26 of the ILO Constitution, the Governing Body requested the Director-General to transmit the complaint to the Government of the Republic of Chile, inviting it to communicate its observations on the complaint no later than 30 January 2020, and placed this item on the agenda of the 338th Session (March 2020) of the Governing Body.

3. The 338th Session (which was originally scheduled to take place from 12 to 26 March 2020) was not held in view of the meeting and travel restrictions that have been in place since early March as a result of the COVID-19 pandemic. Consideration of this agenda item was deferred to a future session of the Governing Body. With the subsequent reinforcement of travel and meeting restrictions in most countries, and having due regard to the need to protect the health and well-being of all, the Governing Body decided, through a vote by correspondence, to cancel the 338th *bis* and 339th Sessions of the Governing Body, scheduled for 25 May and 6 June 2020, respectively.

4. In communications dated 30 January and 5 October 2020, the Government transmitted its observations on the complaint. A copy of these observations is appended to the present document. (The texts of the annexes mentioned therein are available to constituents).

5. In accordance with article 26 of the Constitution, it is for the Governing Body to take the necessary decisions concerning future action on this complaint.

▶ Draft decision

6. **The Governing Body, on the recommendation of its Officers:**

(a) **decided not to refer the matter to a Commission of Inquiry and to close the procedure under article 26; and**

(b) **invited the Government to continue reporting to the ILO regular supervisory system on measures taken to apply in law and practice the Conventions concerned.**

[1] GB.337/INS/13/2.

▶ Appendix I

Observations of the Government of Chile concerning the complaint made under article 26 by a Worker's delegate to the 108th Session (June 2019) of the International Labour Conference

I am writing to you as requested in report No. INS/13/2, adopted at the 337th Session of the Governing Body, in order to transmit the observations of the Government of Chile on the complaint made under article 26 of the Constitution of the ILO by a Worker delegate, Mr Wills Asunción Rangel Delgado (Bolivarian Republic of Venezuela), and supported by the World Federation of Trade Unions (WFTU), represented by its Vice-President, Mr Valentín Pacho (Worker, Peru) and Mr José Ortíz Arcos, WFTU Coordinator for Chile and President of the General Confederation of Public and Private Sector Workers (CGTP). The complaint was presented during the 108th Session (2019) of the International Labour Conference (hereinafter "the Conference").

The complainant's communication (hereinafter "the complaint") is based on the Government's alleged non-compliance with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Maternity Protection Convention (Revised), 1952 (No. 103), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151), all of which have been ratified by Chile. As these observations will show, the allegations in question are baseless and should be rejected in their entirety.

I. Previous issues

1. Concerning the complaint presented to the Conference in 2016, which concerns the same issues as the present complaint

At the outset, we would like to state that the present complaint is quite similar to the complaint against Chile that was presented at the 105th Session (2016) of the Conference by a Peruvian delegate, Mr Nazario Arellano Choque, also with the support of the WFTU.

Both of these complaints concern, in essence, virtually identical allegations. Even their wording is extremely similar. Both complaints maintain that Chile's legislation is not consistent with ILO Conventions Nos 87, 98, 151, 135 and 103 and request the appointment of a Commission of Inquiry. Lastly, although both complaints invoke these five Conventions, their arguments refer only to Conventions Nos 87 and 98; there is no mention of any violation of Conventions Nos 103, 135 and 151.

One issue that is examined in depth in the 2016 complaint is the labour reform that was before Congress at the time. It should be noted that this reform ultimately led to the adoption of Act No. 20.940, which has been in force since 1 April 2017 and on which the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has commented positively, stating that it had noted ***with satisfaction*** the significant advances in Chilean law made during the labour reform. This is consistent with previous comments made by this ILO supervisory body. The regulation of strikes, prohibition of the replacement of striking workers, removal of a number of restrictions on strike

declarations, authorization of bargaining by inter-enterprise unions, simplification of the procedure for collective bargaining, repeal of legislation that denied apprentices and casual or temporary workers the right to bargain collectively, regulation of trade unions' right to information, and definition and punishment of anti-trade-union practices are among the areas of substantive progress which the CEACR has noted ***with satisfaction***; this is important since the 2019 complaint repeatedly stresses that Act No. 20.940 is contrary to the provisions of the Convention that are alleged to have been violated.

At its March 2017 session, based on the observations provided by Chile in its defence and on the final text of Act No. 20.940, the Governing Body ultimately decided that the complaint would not be referred to a Commission of Inquiry and that the procedure initiated under article 26 of the ILO Constitution would therefore be closed. [1] The Governing Body also invited the CEACR to continue its examination of any pending issues concerning the application of certain Conventions (GB.329/INS/12(Rev.)).

In light of the foregoing, the Government of Chile considers that the 2019 complaint does not withstand legal scrutiny. It is based on the same allegations that were considered, addressed and rejected by the ILO supervisory bodies in 2017 and its presentation is therefore totally irreceivable and improper. It constitutes *res judicata*, one of the general legal principles mentioned in Article 38(1)(c) of the 1945 Statute of the International Court of Justice. Similarly, the ILO supervisory bodies have consistently stated on various occasions that it is inappropriate for them to *"re-examine allegations on which [they have] already given an opinion: for example, when a complaint refers to a law that [they have] already examined and, as such, does not contain new elements"*. [2] This is precisely the situation in the present case.

Against this backdrop, we would like to recall that the established procedures for monitoring compliance with the international labour standards must only be invoked where strictly necessary. The purpose of complaints such as the one that we have before us is to place States in an uncomfortable position at key ILO events such as the Conference. In particular, this complaint was presented during the 108th Session of the Conference during the year in which the ILO's Centenary was celebrated.

Thus, the use of this expedient – the only one available – undermines the ILO's standards protection system, abusing it and, ultimately, lessening its credibility.

We therefore take this opportunity to reiterate that it is important for the Organization to continue to focus on analysing, in the context of the Standards Review Mechanism, the receivability standards to be met by article 26 complaints, which are often used for political and communication purposes that seriously damage the reputation of governments.

For these reasons, without prejudice to the substantive comments set out below, the Government of Chile requests that the article 26 complaint presented by Mr Rangel Delgado and supported by the WFTU be rejected in its entirety on the grounds that it concerns matters that have already been discussed and decided by the ILO supervisory bodies in the context of the 2016 complaint.

[1] https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_546483.pdf.

[2] See the 297th Report of the Committee on Freedom of Association, para. 13.

2. Manifest lack of merit

As this Organization will have noted, the claims made in the complaint are presented in an extremely confused and unsystematic manner. The acts alleged to constitute violations are not clearly described and there is no mention of the legal basis or of specific legal provisions the alleged breach of which might constitute a violation of the international labour standards by the Government of Chile.

Similarly, although the summary of the complaint alleges violations of several Conventions, the substantive portion thereof mentions only Conventions Nos 87 and 98.

All of these factors unquestionably hinder the exercise of the Government's right to mount a viable defence. They also complicate the task of the review body that will ultimately be required to take a decision on the merits.

The requirement that complaints brought before international bodies be judicial or quasi-judicial – that they be duly substantiated – is a basic rule of receivability that is grounded in good faith. As the ILO knows, good faith is both a general legal principle and a basic principle of international law.

While the duty to meet this requirement is not expressly stated in article 26 of the ILO Constitution, there is no doubt that it constitutes an obligation under international customary law or, at least, general international law; it is also unquestionably a general legal principle as seen from the fact that this minimum standard for receivability is established in the vast majority of comparative legislation and is recognized in the principal international human rights treaties, including Article 47(c) of the American Convention on Human Rights and Article 35(3)(a) of the European Convention on Human Rights; it is also established in Article 38(2) of the Rules of the International Court of Justice.

For these reasons, the Government of Chile considers that the article 26 complaint against it should be rejected as manifestly unfounded.

II. Matters of substance

Without prejudice to the statements made in section I, the following arguments will clearly show that the article 26 complaint should also be rejected on the grounds that its allegations are untrue.

As noted above, in the initial paragraphs of the complaint the complainant alleges violations of Conventions Nos 98, 103, 135 and 151. However, as we have said, the body of the text does not even mention Conventions Nos 103, 135 and 151, let alone describe the alleged violations thereof.

This means, quite simply, that we do not know how the alleged rights violation occurred and, since this is unknown, it cannot be addressed. Under the circumstances, these observations will concern only allegations that are reasoned or substantiated.

It is clear from the body of the complaint that the allegations are limited to the following: (1) matters relating to minimum services; (2) matters relating to an alleged usurpation of powers by Chile's Labour Directorate; (3) matters relating to the alleged use of a strike-breaking system; (4) matters relating to inter-enterprise bargaining; (5) matters relating to an alleged inconsistency between Act No. 20.940 on modernization of the labour relations system and Conventions Nos 87 and 98. All of these allegations will be addressed below in order to demonstrate that they are unfounded.

1. Matters relating to minimum services

a. Allegations

The complainant alleges that the labour reform implemented through Act No. 20.940 introduced a new way of handling minimum services and emergency teams and that the Government is using these institutions to obstruct collective bargaining with many resulting problems [for workers] in various sectors, including, among others, public transport workers, food handlers, service providers and bank employees.

Specifically, the complainant maintains that the Labour Directorate's decisions on minimum services violate domestic law and that procedures with a legal deadline of 180 days for completion are currently taking 14 or 15 months.

The complainant bases his allegations on a case involving the food handlers employed by the Merken SpA consortium (hereinafter "Merken"). It maintains that *"the Labour Directorate has suspended three collective bargaining actions [and] has even suspended strike ballots", ... "alleging that they could not continue because the enterprises had invoked minimum services"*. He makes similar arguments with regard to public transport workers in the city of Santiago.

In that connection, he claims that *"the Labour Director abuses and violates national labour legislation and ILO Conventions"* and that previous violations include delays in the issuance of decisions on minimum services.

Lastly, the complainant states that while domestic law envisages mechanisms for limiting the right to strike, they violate Conventions Nos 87 and 98; that the Labour Directorate has agreed to process requests for minimum services that also violate domestic law; and that the courts are slow to consider complaints of violations of fundamental rights and ignore ratified Conventions when taking their decisions.

b. The Government's observations

b.1. Prior legislation on minimum services and the Labour Directorate's decisions thereon

The procedure for taking decisions on minimum services and forming emergency teams [3] has been implemented on the basis of sections 359 and 360 of the Labour Code, which have been incorporated into Act No. 20.940 (2016) on modernization of the labour relations system:

> *Section 359*
>
> *Minimum services and emergency teams*
>
> *Without affecting the right to strike as such, a union's bargaining committee must provide, for the duration of the strike, workers to provide such minimum services as are strictly required in order to protect the enterprise's assets and facilities, prevent accidents and ensure that public utility services are delivered, that the basic needs of the population – including those related to life, safety and public health – are met and that the environment and sanitation are not harmed. In making this determination, factors relating to the scope and characteristics of the enterprise, establishment or work shall be taken into account.*

[3] Although there is no legal definition of the term "minimum services", its meaning and scope are established in Directive No. 5.346/92. See https://www.dt.gob.cl/legislacion/1624/w3-article-110449.html.

The workers whom the union assigns to provide minimum services shall be chosen from among those involved in the bargaining process and shall be called "emergency teams". Their members shall be paid for the hours worked.

Minimum services shall be provided for as long as necessary and for the purposes ordered.

In the event that the union fails to form an emergency team, the enterprise may take the necessary steps to provide minimum services, including by contracting for them. In such cases, it shall immediately inform the labour inspectorate of this violation. The measures taken by the employer shall not involve a number of workers greater than the number of emergency team members that the union failed to provide unless the labour inspectorate authorizes a different number for valid reasons.

Section 360

Ordering minimum services and emergency teams

Decisions concerning minimum services and emergency teams shall be taken before collective bargaining commences.

These decisions shall identify the enterprise's minimum services and the number and professional or technical skills of the workers who shall comprise the emergency teams.

The employer shall give all of the enterprise's unions at least 180 days' written notice of the expiration of the current collective agreement, propose minimum services and emergency teams for the enterprise and send a copy of this proposal to the labour inspectorate.

Where the enterprise currently has more than one collective agreement, the aforementioned 180 days shall apply to the agreement with the closest expiration date. Where the enterprise has no union, the employer shall make its proposal within 15 days of receipt of notification of the formation of a union in accordance with section 225 of this Code, during which time collective bargaining may not commence. Once the employer has submitted its application, collective bargaining shall not commence until a decision on minimum services and emergency teams has been taken.

Once the employer's proposal has been received, the unions shall have 15 days in which to respond jointly or separately.

The parties shall have 30 days as from the date on which the proposal is made in which to reach an agreement.

Where an agreement is reached, a document stating the agreed minimum services and emergency teams shall be drawn up and signed by the employer and by all of the unions that have accepted the agreement. A copy of this document shall be deposited with the labour inspectorate within five days of the date on which it is signed.

Where the parties do not reach an agreement, or where the agreement does not include all of the unions, any of the parties shall have five days in which to request the intervention of the Regional Labour Directorate.

Where the enterprise has establishments or workplaces in two or more regions of the country, the application shall be sent to the Regional Labour Directorate of the applicant's place of residence. Where the intervention of two or more Regional Directorates has been requested, the National Labour Directorate shall decide which of them shall handle all of the applications.

Once an application has been received, the Regional Labour Directorate shall hold a hearing of the parties and request the relevant regulatory or inspection body to prepare a technical report. Any of the parties may also submit technical reports prepared by public or private bodies. The Regional Labour Directorate may conduct inspection visits at the request of a party or of its own volition.

The Regional Labour Directorate's decision regarding minimum services and emergency teams for the enterprise shall be substantiated and issued within 45 days of

receipt of the application. The parties shall be notified of the decision within five days of its issuance. The decision may only be appealed before the National Labour Director.

The Labour Directorate shall publish the general technical standards used in taking decisions on minimum services and emergency teams in April of each year.

In the event of a change in the conditions that prompted these decisions, they may be reviewed as needed following the procedure set out in the preceding paragraphs. Applications for review shall be substantiated by the applicant.

As seen from these legal provisions, minimum services should not affect the right to strike as such. Decisions concerning them should primarily and preferably be arrived at by agreement between the employer and the union or unions before collective bargaining commences. It should be noted that this process must begin at least 180 days prior to the expiration of the current collective agreement, thereby ensuring a reasonable time period prior to collective bargaining in order not to delay its commencement or hinder its progress.

Where no agreement can be reached, any of the parties may request the Regional Labour Directorate to decide whether minimum services are required, whereupon the Directorate shall issue an administrative decision that may be appealed before the National Labour Directorate.

Where the Labour Directorate is requested to intervene in order to take a decision on minimum services, the relevant administrative procedure will be followed in order to gather as much technical information as possible so that the impact of a production shutdown and/or the areas, responsibilities and functions concerned can be predicted and, in light of that information, it can be determined whether such a situation would fall within the scope of section 359 of the Labour Code.

Thus, the process of taking decisions on minimum services is largely technical in nature and has an impact on vital legal assets. For this reason, collecting background information and preparing a case study requires rigorous, detailed research with a view to appropriate application of the relevant legislation and criteria and, ultimately, to a duly substantiated argument. For this reason, the Labour Directorate's decisions may, in some cases, take more time than is desired although, as seen from the statistics provided in the following section, the time required has been gradually diminishing. [4]

b.2. Statistics on minimum services as at 31 December 2019

In order to demonstrate the inaccuracy of the complainant's allegations, the following statistical tables have been provided by the Labour Directorate pursuant to Directive No. 203 of 10 January 2020. The tables reflect the total number of applications for decisions on minimum services that were submitted to the Labour Directorate between 2017 and 2019 (including the month of December) and their current status.

[4] In addition to the arguments made in this section, it should be noted that according to the ILO supervisory bodies, the institution of minimum services does not violate international labour standards. See Case No. 2696 (Bulgaria), complaint presented to the Committee on Freedom of Association on 15 February 2009 (Report No. 356), available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:2897803.

Year 2017		Total
Applications submitted to the Labour Directorate (by applicant)	**Applications received**	**295**
	From an enterprise	285
	From a trade union	4
	From both parties	6
Applications (by current status)	**Applications processed**	**295**
	Processing by the Regional Labour Directorate completed	137
	Pocessing by the National Labour Directorate completed	158
	Applications being processed	**0**
	By the Regional Labour Directorate	0
	By the National Labour Directorate	0

Year 2018		Total
Applications submitted to the Labour Directorate (by applicant)	**Applications received**	**156**
	From an enterprise	152
	From a trade union	1
	From both parties	3
Applications (by current status)	**Applications processed**	**150**
	Processing by the Regional Labour Directorate completed	79
	Pocessing by the National Labour Directorate completed	71
	Applications being processed	**6**
	By the Regional Labour Directorate	0
	By the National Labour Directorate	6

Year 2019		Total
Applications submitted to the Labour Directorate (by applicant)	**Applications received**	**111**
	From an enterprise	110
	From a trade union	0
	From both parties	1

Year 2019		Total
Applications (by current status)	**Applications processed**	**58**
	Processing by the Regional Labour Directorate completed	40
	Pocessing by the National Labour Directorate completed	18
	Applications being processed	**53**
	By the Regional Labour Directorate	32
	By the National Labour Directorate	21

To summarize, of the 562 applications received between 2017 and 2019, 503 (89 per cent) have been processed.

b.3. Decisions concerning minimum services for enterprises in the Metropolitan Transport Network (RED) (formerly Transantiago)

The following table shows the status of decisions on minimum services in the specific case of enterprises in the RED:

Enterprise	Status of decision
Subus Chile SA	Taken through the National Labour Director's Decision No. 1531 of 15 July 2018
Express de Santiago Uno SA	Taken through the National Labour Director's Decision No. 291 of 22 November 2019
Buses Vule SA	Taken through the National Labour Director's Decision No. 295 of 13 December 2019
Inversiones Alsacia SA	Decision pending

As at 31 December 2019, the only RED enterprise for which a decision on minimum services is pending is the Inversiones Alsacia SA. As stated by the Labour Directorate in the aforementioned Directive No. 203, these services are still being rigorously analysed and it is hoped that a final decision can be issued as soon as possible.

c. Conclusion

In conclusion, the complainant fails to justify, substantiate or prove why or how the Labour Directorate's decisions concerning minimum services under the relevant procedures violate domestic law or international labour standards.

With regard to their assessment, as stated and substantiated above, the minimum service decisions taken have been fully consistent with domestic law. In some cases, they have been taken before an administrative body by agreement between workers and employers, respecting the right of both parties to be heard and the right to appeal the decisions of an administrative authority (in this case, the labour inspectorate). Moreover, the relevant legislation recognizes the right to alter decisions on minimum services after the fact in the event of a change in circumstances, thus ensuring that the mechanism constantly reflects the actual situation of each enterprise.

Furthermore, as stated in the preceding paragraphs, decisions concerning minimum services cannot be taken across the board; on the contrary, their legality in a given situation must be assessed on the basis of prior in-depth examination of the case in question, including highly technical studies that the Labour Directorate considers in an extremely responsible manner.

The complainant's allegation that decisions concerning minimum services are taking as long as 14 or 15 months is also inaccurate. As seen from the statistics included in this submission, the vast majority of applications for minimum services have already been processed and the remainder date from 2019.

Similarly, with regard specifically to the public transport sector, it is also clear from the aforementioned statistics that the complainant's allegations do not reflect the facts since decisions on minimum services have been taken in good time and in an appropriate manner.

Thus, it is clear that the complainant's allegations are completely unfounded; there has been no violation of the Conventions mentioned and the allegations should therefore be rejected in their entirety.

2. Matters relating to an alleged usurpation of powers by Chile's Labour Directorate

a. Allegations

The complainant further alleges that the Labour Director has usurped judicial and legislative powers through *"unlawful decisions, which no one prevents"* and that, *"[h]aving previously annulled ongoing collective bargaining negotiations, the Labour Director is now suspending strike ballots at the same time as refusing to designate a certifying officer for strike ballots and trade union elections"*.

As proof of this allegation, the complainant mentions a specific case involving Merken and five trade unions.

He maintains that the Labour Directorate has refused to *respect* and does not intend to comply with the judgment of the Second Labour Court of Santiago on this matter (Internal Case (RIT) No. 1-522-2018) and that, on the contrary, the Directorate has *"issued decisions to amend it, which is unlawful and constitutes an offence"*. The complainant goes on to state that the Ministry of Labour has done nothing to *"reinstate the rule of law"*. Lastly, he makes the baseless allegation that in the same case, the Labour Directorate has *"refused to designate certifying officers for strike ballots and elections for trade union leaders and delegates, increased the restrictions on the organization of workers, and issued a decision amending the standing orders of trade unions with respect to the election of trade union leaders, in violation of Convention No. 87. All this has been achieved through unlawful administrative decisions that violate the Conventions ratified by Chile."*

b. The Government's observations

b.1. Responsibilities of the Labour Directorate

At the outset, it should be borne in mind that the Labour Directorate is a technical service that operates under the Ministry of Labour and Social Security through the Labour

Secretariat. [5] It is governed primarily by its Organization Act (Legislative Decree No. 2 of 30 May 1967). [6]

The Labour Directorate is legally empowered to issue rulings establishing and interpreting the meaning and scope of the current labour laws, including the rules governing collective bargaining. This power is recognized in several provisions of the aforementioned Organization Act, section 1(2)(a) and (b) of which states that the Labour Directorate:

> *Without prejudice to the duties assigned to it by general or special legislation, shall be specifically responsible for:*
>
> *(a) monitoring the implementation of labour legislation;*
>
> *(b) establishing the meaning and scope of labour laws by issuing rulings of its own volition or at the request of a party;*
>
> *…*

Section 5(b) and (c) adds:

> *In particular, the Director shall be responsible for:*
>
> *…*
>
> *(b) heading and supervising the Labour Directorate throughout the country and representing the Government in the application and monitoring of labour laws;*
>
> *(c) without prejudice to the powers granted to other services and monitoring bodies in specific areas, establishing interpretations of labour laws and regulations except where the Director is aware that the case has been brought before the courts;*
>
> *…*

Section 505(1) of the Labour Code is clear on this point:

> *Section 505. Without prejudice to the powers granted to other administrative services under the laws that govern them, the Labour Directorate shall be responsible for monitoring compliance with the labour laws and for interpreting them.*
>
> *Public servants shall notify the relevant labour inspectorate of any violations of the labour legislation of which they become aware in the course of their work.*

In that connection, it should be noted that these powers of interpretation are not unusual under Chile's domestic law; they have been granted to several administrative bodies. For example, the Internal Revenue Service is empowered to interpret the tax laws pursuant to section 6(A)(1) of the Tax Code. [7]

Also of relevance is the Labour Directorate's power to resolve disputes and complaints brought by employers and workers during negotiations on a draft collective agreement for the reasons set out in section 339 of the Labour Code, of which section 340 states:

> *Section 340. Rules of procedure. The disputes and complaints mentioned in the previous section shall be brought before the relevant labour inspectorate in accordance with the following rules:*
>
> *…*
>
> *(e) The labour inspector shall issue a decision within five days of the end of the hearing. Where a dispute or complaint involves more than 1,000 workers, it shall be resolved by the Labour Director.*

[5] Legislative Decree No. 2 of 30 May 1967, para. 1(1).

[6] https://www.leychile.cl/Navegar?idNorma=3485.

[7] https://www.leychile.cl/Navegar?idNorma=6374.

> *(f) Objections to such decisions may only be lodged through an appeal for reversal, which shall be brought within three days. Decisions on these appeals shall be issued within three days and may be appealed before the courts within five days through the procedure described in section 504 of this Code.*

Thus, the Labour Directorate's actions have been fully consistent with its legal powers at the time when the opinions and decisions that the complainants mention in their communication were issued. In other words, the claim that it has *"usurped"* the powers of another of Chile's State administrative bodies is totally false.

b.2. Situation of the Merken SpA consortium

According to the Labour Directorate, on 6 September 2018, five trade unions – the Victor Jara National Inter-Enterprise Union of School and Kindergarten Feeding Programmes (PAE/PAP) Food Handlers (Single Trade Union Registration (RSU) No. 07030189), the Gladis Marín National Inter-Enterprise Union of PAE/PAP Food Handlers (RSU No. 04010357), the SIMADA National Inter-Enterprise Union of Food Handlers (RSU No. 09010730), the Inter-Enterprise Union of Food Handlers (RSU No. 13111436) and the Javiera Carrera Union of Food Handlers (RSU No. 04.03.0183) – jointly submitted a draft collective agreement to the Merken consortium (Single Tax No. (RUT) No. 76.425.376 0).

On 14 September 2018, Merken sent the trade union's bargaining committee its reply, in which, on the basis of sections 339 et seq. of the Labour Code, it challenged the legality of the draft collective agreement and the names of several workers on the list of those involved in the collective bargaining process.

On 20 September 2018, the union's bargaining committee replied to these challenges. The discussion between the two parties focused essentially on the issue of whether the inter-enterprise unions had met the quorum and the requirement that a trade union's members be employed by enterprises in the same category or economic sector, as required by section 364(2) of the Labour Code:

> *In order to bargain collectively, inter-enterprise unions must comprise workers employed by enterprises in the same category or economic sector. In order to bargain collectively in an enterprise, an inter-enterprise union must also have a number of members not less than the quorum, established in section 227, for workers in that enterprise. Inter-enterprise unions may bargain as provided in section 314 (on non-regulated bargaining).*

On 1 October 2018, the Eastern Santiago Communal Labour Inspectorate (hereinafter "Eastern Santiago ICT") adopted Decision No. 776, rejecting the allegations of the union's bargaining committee and concluding that the four inter-enterprise unions had not met the requirements established in the labour legislation for bargaining by this type of organization, i.e. meeting the quorum for bargaining and comprising workers employed by enterprises in the same category or economic sector. In light of the foregoing, only one enterprise union, the Javiera Carrera Union of Food Handlers, was authorized to engage in regulated collective bargaining. This was confirmed by Eastern Santiago ICT Decision No. 813 of 16 October 2018. The Union ultimately signed a collective agreement on 18 October 2018.

On 19 October 2018, pursuant to section 340(f) of the Labour Code, all of the unions lodged an appeal against Decision No. 813 with the Santiago Labour Court, which granted the appeal in a judgment issued on 21 January 2019. This judgment was later upheld by the Santiago Court of Appeal in a judgment of 8 May 2019, in which the court stated that the inter-enterprise union complainants, which had submitted the collective

bargaining proposal, met the legal conditions for bargaining collectively with Merken; it ordered that the collective bargaining process continue without further delay.

While the judicial proceedings described in the previous paragraph were under way, communication between the unions and Merken continued. The enterprise signed a collective agreement with the Gladis Marín National Inter-Enterprise Union of PAE/PAP Food Handlers on 9 November 2018 and a similar instrument with the SIMADA National Inter-Enterprise Union of Food Handlers on 30 November 2018.

In light of the foregoing, in compliance with the judgment of the Santiago Court of Appeal on the resumption of regulated collective bargaining, the Eastern Santiago ICT issued Directive No. 1220 of 6 June 2019, concluding that the resumption would apply only to the two unions that had not yet signed a collective agreement with Merken, i.e. the Victor Jara National Inter-Enterprise Union of School and Kindergarten Feeding Programmes (PAE/PAP) Food Handlers and the Inter-Enterprise Union of Food Handlers, since the other trade unions that had been parties to the collective bargaining had already signed collective agreements with the enterprise.

On 7 June 2019, the union's bargaining committee appealed this Directive on the grounds that it violated the judgment of the Santiago Court of Appeal. On 14 June 2019, the Eastern Santiago ICT granted the appeal and ordered that the collective bargaining process be resumed for all of the unions in question for a period of ten days, during which Merken could present a final offer and the union's bargaining committee could request the Labour Directorate, on behalf of all of the unions, to designate a certifying officer for the strike ballot.

Ten days passed without Merken having presented a final offer. Therefore, in accordance with section 346(2) of the Labour Code, the enterprise's most recent formal proposal of 6 September 2018, responding to the draft collective agreement, was deemed to constitute its final offer. For its part, the union's bargaining committee neither held a strike ballot nor requested the Labour Directorate to designate a certifying officer within the required ten day period. In fact, on 12 September 2019, well past the ten days stipulated in Eastern Santiago ICT Decision No. 436, the bargaining committee submitted a request for a strike ballot certifying officer. This request was denied through Directive No. 2015 of 16 September 2019 on the grounds that it was clearly time-barred.

On 19 June 2019, a few days after the adoption of Decision No. 436, the union's bargaining committee requested the Second Labour Court of Santiago to enforce the judgment of 8 May 2019. The court referred the case to the Labour Directorate, which accepted the referral on 4 July 2019. Against this background, the court held a special hearing on 19 July 2019, at which the Labour Directorate confirmed that, as stated in the aforementioned Decision No. 436, it had fully complied with the provisions of the judgment. The Court therefore referred the case to the Santiago Labour and Benefits Collection Court, which sent it back to the Santiago Labour Court as RIT No. C-3815-2019 because it had no financial implications. The Santiago Appeals Court, resolving a jurisdictional dispute, ultimately ordered that the proceedings continue before the Santiago Labour and Benefits Collection Court. Subsequently, in RIT No. C-5205-2019, the Labour and Benefits Collection Court ordered the Labour Directorate to comply with the judgment. The Labour Directorate applied for a waiver of costs; this application was declared receivable by the Court and is under consideration at this stage of the proceedings.

Clearly, then, as seen from the detailed account provided, all of the Labour Directorate's actions in connection with the collective bargaining between Merken and the

aforementioned individual trade unions were consistent with the labour legislation. It is also clear that the claim that the inter-enterprise trade unions were unable to bargain collectively is completely false. Lastly, judicial and administrative appeals were available to the unions at all times, the legal proceedings followed their proper course and, contrary to the complainant's allegations, once the judgments were final and enforceable, they were implemented scrupulously by the Labour Directorate.

c. Conclusion

Thus, it is perfectly clear that the alleged usurpation of powers by the Labour Directorate is baseless and totally untrue. It has been confirmed that the Directorate's actions were fully consistent with the powers granted to it by its own [Organization] Act, which, in turn, is fully consistent with Chile's Constitution.

The information provided above also shows that the allegation that the inter-enterprise unions were unable to bargain collectively is inaccurate.

Furthermore, the Government has clearly ensured that judicial and administrative appeals were available to the unions at all times, and the legal proceedings were conducted properly.

It is also untrue that the Labour Directorate has *"refused to respect or comply with the judgment"* of the Second Labour Court of Santiago and/or with the Court of Appeal's confirmation of that judgment. On the contrary, as this Government has demonstrated that judgment – which was in the trade unions' favour – was fully implemented by the Labour Directorate.

It is also untrue that the Labour Directorate has refused to designate certifying officers for strike ballots and trade union elections. As stated in Eastern Santiago ICT Decision No. 436, the union's bargaining committee had ten days in which to request the Labour Directorate to make such a designation and, as noted above, it failed to do so. Without prejudice to the foregoing, it is also important to note that Chile's domestic law makes other certification officials available to trade unions; under section 313 of the Labour Code, elections during collective bargaining may be held in the presence of civil registry officials, notaries public and other public administration officials with certification powers.

In conclusion, the complainant's allegations are utterly baseless, since there has been no violation of the Conventions in question, and should therefore be rejected in their entirety.

3. Matters relating to the alleged strike-breaking system

a. Allegations

The complainant alleges that the Government, and particularly the Ministry of Transport and Telecommunications, the Labour Directorate, the courts and even domestic law have permitted the use of a strike-breaking system in order to hinder collective bargaining by the unions, thereby violating Conventions Nos 87 and 98.

In support of these allegations, the complainant mentions two situations involving, respectively, the trade unions in the city of Santiago's public transport system (the Metropolitan Transport Network (RED)) and a strike by the workers of the Pavicret Corporation.

With regard to the RED, the complainant maintains that whenever the workers in one of its member enterprises exercise their right to strike, the Ministry of Transport and Telecommunications implements contingency plans which amount to the implementation of a strike-breaking system. These plans entail sending buses and drivers from other companies to cover the services affected by the strike. The complainant also states that the Ministry deploys police officers at bus terminals to intimidate workers and, on many occasions, has detained strikers.

As stated above, the complainant considers that domestic law itself violates Conventions Nos 87 and 98 and that it *"explicitly violates all the jurisprudence of the Standards Committee and the Committee on Freedom of Association"*. In particular, the complainant criticizes section 359 of the Labour Code, on restrictions on the right to strike, which, without affecting the right to strike as such, regulates the potential provision of minimum services and emergency teams.

The complainant considers that this legal provision, together with various administrative decisions of the Labour Directorate, demonstrate that the right to strike in Chile amounts to nothing more than an empty declaration and that in practice, its exercise is prohibited. He claims that section 359 is *"an incentive for the enterprise to hire staff during the bargaining period and then use them as strike-breakers during the strike, an action which is explicitly considered to be an anti-union practice"*. Furthermore, the courts have stated in their latest rulings that *"no replacements can be made by workers who are not union members at the time of the strike"*.

Lastly, as stated above, the complainant mentions the strike by the workers of the Pavicret Corporation. In this case, collective bargaining with the National Union of Workers (SME), initiated on 20 July 2017, was unsuccessful and led to a strike action as from 20 September 2017. The complainant maintains that the enterprise hired strike-breakers and placed them in the positions of the striking workers. That same day, the trade union submitted its grievances to the Municipal Labour Inspectorate of Santiago South. The complainant states that the Inspectorate conducted an inspection five days after the strike, and only in places where and at times when there were no strike-breakers. Lastly, the complainant maintains that when a strike-breaker was identified, the Inspectorate stopped inspecting. In a confused manner, the complainant adds that "[t]he Municipal Labour Inspectorate submitted a complaint concerning the anti-union practices to the courts on 17 October 2017, which was registered with the serial No. S-10-2017 of the San Miguel Labour Court"; that the complaint contained a series of factual errors; and that the court ultimately dismissed the complaint. The complainant considers that this, too, constitutes a clear violation of Convention No. 87 by the judge in the case.

b. The Government's observations

b.1. The public transport system in the province of Santiago and the municipalities of San Bernardo and Puente Alto: Description of its regulatory framework and the role of the Ministry of Transport and Telecommunications

Public transport in Chile is a dynamic, constantly-changing activity and uses national rather than private assets. Under these circumstances, the administrative authority requires a flexible regulatory framework in order to address changing situations. To that end, the law has granted the Ministry of Transport and Telecommunications broad powers to regulate public transport services, including:

- the power to set requirements and issue regulations for the work of the public passenger transport services;
- the power to issue operating rules in accordance with certain general legal parameters;
- the power to order that the roads be used by specific types of vehicles and/or services in order to improve the operation of the passenger transport system, and to regulate all other matters relating to support for or in connection with transport and its administration and management.

Similarly, section 1(1) of Act No. 18.059 states that the Ministry of Transport and Telecommunications is the primary national transit authority and establishes its powers: [8]

> *The Ministry of Transport and Telecommunications shall be the national regulatory authority responsible for setting policies for transit via streets, roads and other public ways or ways open for public use and for coordinating, assessing and monitoring compliance therewith.*

On the basis of these premises and of the other powers granted to it by law, [9] the Ministry, in its capacity as the national transit authority, has issued "specific operating conditions" authorizing seven companies, known as "business units", to use specific streets in the city of Santiago. [10] The public transport services also require transport worker management services, known as "supplementary services". [11] In order to ensure their availability, the Ministry has signed contracts with four additional enterprises. [12] It should be noted that the Metro Passenger Transport Corporation, in particular, provides

[8] https://www.leychile.cl/Navegar?idNorma=29486.

[9] See Act No. 18.059, amending Supreme Decree No. 170 (2016) of the Transport Department of the Ministry of Transport and Telecommunications; Act No. 18.696, amending section 6 of Act No. 18.502 (authorizing the import of certain vehicles and establishing regulations on passenger transport); Act No. 18.290, amending, coordinating and organizing the Transit Act; Act No. 19.040, regulating the acquisition of certain vehicles by the tax authorities and other matters relating to collective passenger transport; Ministry of Finance Legislative Decree No. 343 (1953), establishing the organization and powers of the Transport Department; and Ministry of Finance Legislative Decree No. 279 (1960), regulating the powers of the Ministry of the Economy with regard to transport and to the restructuring of the Transport Department.

[10] Business Unit 1: Inversiones Alsacia SA.; Business Unit 2: Su-Bus Chile SA.; Business Unit 3: Buses Vule SA.; Business Unit 4: Express de Santiago Uno SA.; Business Unit 5: Buses Metropolitana SA.; Business Unit 6: Redbus Urbano SA.; Business Unit 7: Servicio de Transporte de Personas SA. Business Unit 1 went out of business on 28 February 2019.

[11] Paragraph 1(8) of the contracts authorizing use of the roads states that the city of Santiago's public transport system requires that companies provide the following supplementary services:

- production and sale of tickets;
- a ticketing network;
- sale, provision and installation of the equipment needed for ticket validation and recording at every stage of the journey;
- administration of the financial resources needed in order to provide transport and supplementary services and assign them to the various parts of the system;
- collection, processing and distribution of the validation and positioning data generated by the transport services and required for operational management of the system;
- other supplementary services contracted or ordered by the Ministry in accordance with domestic law.

[12] Pursuant to Act No. 18.696, amending section 6 of Act No. 18.502 (authorizing the import of certain vehicles and establishing regulations on passenger transport), the Ministry of Transport and Telecommunications has signed contracts with the Financial Officer of Transantiago Corporation (AFT contract), SONDA Corporation (SONDA contract), the Metro Passenger Transport Company (Metro contract) and the Indra Sistemas Chile Corp (Indra contract).

supplementary services and is one of the largest transport companies. [13] Since late 2016, the train service has been incorporated into the Alameda-Nos network, operated by the Trenes Metropoltanos Corporation. [14]

All of these bodies make up the so-called *"public transport system"* or *"Transantiago system"* (hereinafter "the system"). This system constitutes a single entity which the Ministry of Transport and Telecommunications, in its Directive No. 30-802 of 28 January 2020, defines as *"companies which have been authorized to use the roads in order to provide paid urban public passenger transport services using city of Santiago buses or to provide supplementary services; their legal successors in these operations; and any other ticket-selling public transport service provider"*.

Clearly, then, the system's structure is based on an integrated physical, technological and financial operational model for its transport and supplementary services using an integrated fare system.

b.2. Management of the public transport services during service interruptions

The complainant alleges that the Ministry of Transport and Telecommunications has interfered with collective bargaining and with the right to strike of public passenger transport workers.

At the outset, it should be noted that several provisions of Act No. 18.696, regulating the operation of the public transport services, [15] establish *"the guiding principle of the continuity of service"*. The Ministry is required to ensure that these provisions are implemented and, ultimately, that the users' transport needs are met, particularly in situations that might interrupt this service, such as the bankruptcy of a transport concessionaire or company or an enterprise's operational or financial contingencies that might have an impact on the proper, timely provision of its services.

The principle of uninterrupted public transport service is expressly established in section 3(l) of Act No. 18.696:

> *Continuity of service. The Ministry of Transport and Telecommunications shall take the necessary steps to ensure continuity in the provision of public services and to safeguard the rights of the users of these services and of the respective concessionaires' workers. Through the Ministry of the Interior, it may request the assistance of the police in order to ensure compliance with its orders, instructions and decisions. None of this shall affect the right to strike when exercised in accordance with the law.*
>
> *The foregoing is without prejudice to the Ministry of Transport and Telecommunications' power to order the application of the general regime set out in section 3(1).*
>
> *Furthermore, irrespective of the existing regulations, the Ministry of Transport and Telecommunications may request Metro Corporation or its subsidiaries and affiliates to provide public passenger transport services in order to support the existing transport systems should this become necessary in order to maintain the continuity of these services,*

[13] Pursuant to the Agreement on the Provision of Transport Services to the Santiago Public Transport System, signed by the Ministry of Transport and Telecommunications and Metro Corporation on 26 June 2014 and adopted through the Ministry's Special Decision No. 1860 (2013).

[14] Pursuant to the Agreement on the Provision of Transport Services to the Santiago Public Transport System, signed by the Ministry of Transport and Telecommunications and Trenes Metropolitanos Corporation on 22 December 2016 and adopted through the Ministry's Special Decision No. 3526 (2016).

[15] https://www.leychile.cl/Navegar?idNorma=30078.

to ensure their efficient and proper provision or for other reasons of public interest that will ensure the provision of public transport services to the users thereof.

It will be noted that the first paragraph of this provision instructs the Ministry to take the necessary steps to ensure the continuity of the public transport service, which it defines as a *"public service"*, and even authorizes it to call upon the police without prejudice to the right to strike of transport workers.

The third paragraph empowers the Ministry to directly request Metro Corporation to provide public transport services in support of any transport system where necessary in order to ensure the continuity of public service and safeguard users' rights.

Similarly, the Comptroller-General of the Republic has repeatedly stated (including in, among others, Opinions Nos 54.108/2009, 34.100/2010, 52.859/2011 and 55.242/2011) that the Ministry must ensure the proper operation of the system and the continuity of public transport services. With regard to workers' exercise of the right to strike and the continuity of service, its Opinion No. 34.100/2010 states: *"With respect to the competence of this monitoring body on the matter in question, we conclude that the right that workers may have to stop work in accordance with the laws that govern their relations with their employers is without prejudice to the duty of the Ministry of Transport and Telecommunications, as the authority responsible for authorizing use of the roads in question, to ensure proper compliance with the relevant contracts and the resulting provision of passenger transport services. For this reason, the measures taken in that regard may not be challenged as interference with labour relations between the concessionaires and their workers."*

Therefore, in accordance with domestic law and with the administrative jurisprudence of the Office of the Comptroller-General of the Republic, the Ministry's role cannot be interpreted in the manner of the complaint. On such issues, the powers granted to it by law are designed to provide it with the tools that it needs in order to meet its legal obligation to maintain the regularity and continuity of public passenger transport services. Under no circumstances are these powers intended or used to pursue a different objective, i.e. to hinder or threaten the exercise of labour rights by the workers employed by companies in the system.

In view of the inherently changeable nature of public transport, and of the obligation to ensure respect for the principle of continuity in the provision of public service and to safeguard the rights of users and of the respective companies' workers, Appendix 3 to the current contracts granting use of the roads and establishing specific operating conditions provide mechanisms to be used in striking a balance between these objectives. These contracts include sections entitled *"Schedules"* and *"Contingency protocols"*.

"Operational schedules" are the instruments that establish and regulate the characteristics of the transport services that companies must provide pursuant to their contracts and against which their degree of operational compliance is measured. Their preparation, approval and modification and the evaluation procedures and criteria to be used in reviewing their parameters are set out in the aforementioned Appendix 3. It should also be noted that these procedures normally include mechanisms for the involvement of, among other things, municipalities and neighbourhood associations.

"Contingency protocols" are tools that reflect the characteristics of public passenger transport that have been described above. They allow for the possibility of unforeseen events and incidents and the need for coordination between the various elements of the system in ensuring the continuity of service. Appendix 3 to the contracts and operating

conditions define *"contingency protocol"* as *"a living document which will be modified throughout the period covered by the contract on use of the roads* (or, where applicable, on specific operating conditions) *in light of the needs of the company* (or, where applicable, the service provider) *and/or the Ministry with a view to improving the mechanisms for communication and joint action"*.

Following this definition, the purpose of these instruments is to establish an action protocol that is binding on companies, service providers and the Ministry and will facilitate appropriate action in response to temporary changes in the supply of and/or demand for public transport in Santiago. To that end, models for the flow of information and communication between companies or service providers and the Bus Monitoring Centre are established. [16] The goal is to set appropriate standards for solving problems; establish the duties and rights of the parties during execution of the protocol; and coordinate the work of the various bodies responsible for performing the actions required under the protocol.

It is important to note that these protocols come into play not only in the event of a strike by the system's workers, but in a variety of contingencies: accidents, events, diversions (planned and unplanned), bus breakdowns, bus injections, problems with the trains, emergencies and vandalism.

For each contingency, the protocol specifies mechanisms for coordination between the various elements of the system in order to restore operational capacity as quickly as possible. Strikes by workers fall into the category of "emergencies".

The term "emergencies" refers not specifically to their cause, but rather to their effect on the system, including temporary changes in the availability of one or more companies owing to a total or partial interruption in its services. The goal is to implement a contingency plan in a situation defined as an emergency. This plan prioritizes coverage of the interrupted services in light of their relative weight, based on the respective company's transport capacity and the specific conditions for its coverage (i.e. whether there is supplementary coverage).

Once the feasibility of executing the plan has been confirmed, it is communicated to the companies, users and other concerned bodies. Its execution is then assessed by verifying the quantity and quality of the emergency services promised. Lastly, the relevant records are compiled and used to prepare a report on the progress and conclusion of the emergency. In such cases, support services are provided for ten days where required in order to address an emergency with a direct impact on users. If support services are needed for a longer period of time, they are agreed between the Office of the Executive Secretary of the Metropolitan Public Transport Directorate and the company or companies in question.

We would like to stress that under the current "contingency protocol", once it has been confirmed that a business unit has totally or partially interrupted its service, its services are reviewed and the basic services that must not be interrupted owing to the size of its transport capacity or the lack of other services to supplement it are identified.

[16] The Centre is part of the Operation and Maintenance Department of the Office of the Executive Secretary of the Metropolitan Public Transport Directorate. The Department is responsible for monitoring and supervising the daily bus service and the proper execution of bus maintenance plans. It also ensures ongoing supervision of metropolitan public transport services, including coordination, management and analysis, in order to ensure the proper functioning of the system.

This is done because the protocol itself recognizes that, generally speaking, it is not feasible to replace the normal operations of a business unit. For this reason, the critical demand to be met under emergency conditions is determined. In such cases, a critical demand of at least 60 per cent of the anticipated transport capacity of each interrupted service is assumed and used to calculate the auxiliary fleet required in order to cope with the emergency. This auxiliary fleet is limited to the size of the reserve fleet of the business unit or of the system, depending on whether the unit can resolve the interruption.

Thus, the contingency protocols for emergencies such as a potential strike are specifically designed to create the necessary conditions for meeting critical demand in the affected transport sectors as described above. It follows that this is not a plan of which the purpose or outcome is to replace an enterprise's operations, but merely to ensure the continuity of the services in question, and only where the extent of the emergency makes it impossible to take other measures.

It is important to note that in preparing these contingency plans, the enterprise in question is required to take all practicable steps to maintain the services that it can provide with the available resources and to follow all applicable labour regulations unless provisions of its contract relieve it temporarily of its obligations in that regard for the duration of the emergency.

Lastly, we take this opportunity to point out that the ILO supervisory bodies, and particularly the Committee on Freedom of Association, have stated that the maintenance of a minimum service in the event of a strike by workers in the public passenger transport sector is quite permissible and consistent with the applicable ILO Conventions because it is an essential public service. [17]

b.3. Protection of workers under the new transport system, particularly with regard to contingency plans in the event of a strike with a resulting interruption of service

The new public tendering contracts for use of the roads, the legality of which has yet to be reviewed by the Office of the Comptroller-General of the Republic, include several provisions on the protection of transport workers.

Specifically, each of the contracts signed at the end of such public tendering constitutes an administrative concession that is subject not only to the standards, principles and procedures set out therein, but also to those established in domestic law [18] and in the implementing regulations for the relevant legislation. Concessionaires are subject to

[17] *Digest of decisions and principles of the Freedom of Association Committee*, 1996, para. 556; 316th Report of the Committee on Freedom of Association, Case No. 1985, para. 324; 320th Report of the Committee, Case No. 2057, para. 780; 329th Report of the Committee, Case No. 2174, para. 795; 333rd Report of the Committee, Case No. 2251, para. 990; 336th report of the Committee, Case No. 2300, para. 383; 337th Report of the Committee, Case No. 2355, para. 630; and 338th Report of the Committee, Case No. 2364, para. 975.

[18] See, in particular, Act No. 18.059, amending Supreme Decree No. 170 (2016) of the Transport Department of the Ministry of Transport and Telecommunications; Act No. 18.696, authorizing the import of certain vehicles and establishing regulations on passenger transport; Act No. 18.290, amending, coordinating and organizing the wording of the Transit Act; Act No. 19.040, regulating the acquisition of certain vehicles by the tax authorities and other matters relating to collective passenger transport; Act No. 19.880, establishing the basis for the administrative procedures governing the records of State administrative bodies; Act No. 20.378, establishing a national subsidy for paid public passenger transport; Ministry of Finance Legislative Decree No. 343 (1953), establishing the organization and powers of the Transport Department; and Ministry of Finance Legislative Decree No. 279 (1960), regulating the powers of the Ministry of the Economy with regard to transport and to the restructuring of the Transport Department.

current and future legislation and regulations on the operating conditions for paid passenger transport services and use of the roads; and to those relating to technical standards and pollutant emission, which are considered an integral part of contracts for use of the roads.

Both current and future contracts for use of the roads establish that companies are responsible for complying with domestic law and that the Ministry of Labour is responsible for monitoring such compliance.

The most important elements of the new contracts are as follows:

(a) **Content of invitations to tender for use of the roads**: Pursuant to Act No. 18.696, which regulates passenger transport, the aforementioned invitations to tender set criteria designed to give special consideration to bidders who demonstrate or offer better working conditions and higher wages as seen, for example, from their *"average personnel expense per employee"*, which establishes a minimum annual wage for operations personnel. For these purposes, it is understood that the "personnel expense per employee" includes gross wage, incentives and training.

(b) **Obligations**: The new contracts specifically require companies to:

- pay their workers' wages, termination benefits, social security and health insurance contributions and any emoluments to which they are entitled under the law, the company's contract or their own employment contracts;
- cover the average personnel expense per employee established in the technical specifications;
- develop and implement an occupational safety and health policy;
- set aside, for the duration of the contract for use of the roads, sufficient funds to pay any termination benefits owed at the end of the contract;
- fully comply with the provisions of section 183(a) et seq. of the Labour Code, which regulates subcontracting;
- meet the quota for the percentage of women on their staff; the quota for certified staff shall be set in accordance with the ChileValora registry of the National Labour Skills Certification System, a public service established pursuant to Act No. 20.267 (2008);
- obtain and maintain certification under Chilean standard (NCh) No. 3262-2012 on gender equality management systems and the balance between work, family and private life, issued by the National Standards Institute;
- authorize and facilitate appropriate training for their staff, whether provided by the company or by the respective bus suppliers.

(c) **Termination Benefits Fund**: This is a bank account, administrated by the company, into which it must make monthly deposits in order to pay any future termination benefits (net rather than book value). This account shall not be discretionary; only the Ministry of Transport and Telecommunications may authorize withdrawals for the stated purpose.

(d) **Gender quota**: The new contracts establish the obligation to meet a minimum quota for women on the company's staff. "Operations personnel" include drivers, maintenance staff, staff engaged in pollutant control activities and other staff

involved in operations, regardless of whether they were contracted or subcontracted by the company, but not managers, executives and administrative or cleaning staff.

(e) **Occupational skills certification**: This is not required under the current contracts; however, the new contracts establish the obligation to certify staff members in the following categories: driver/metropolitan public passenger transport official; fleet operations hub operator; dispatcher; warehouse supervisor; and route inspector.

This obligation must be met on a set schedule, which specifies the number of staff members to be certified each year.

(f) **Other types of certification**: The new contracts establish the obligation to acquire the certifications required under NCh No. 3262-2012 on gender equality and the balance between work, family and private life and International Organization for Standardization (ISO) Standard No. 39001:2012 on road traffic safety (RTS) management systems within the time period established in these instruments, with fines for non-compliance.

(g) **Training**: Both types of contracts establish the obligation to provide staff with a certain number of hours of training.

The new contracts require that such training be provided by a technical institute certified pursuant to NCh No. 2728-2015. It also establishes the obligation to submit annual training plans to the Ministry of Transport and Telecommunications for advance review.

Lastly, drivers with no prior experience must undergo a minimum number of hours of training.

(h) **Insurance**: Companies must comply with the provisions of Act No. 16.744 on industrial accidents and occupational diseases and must purchase and maintain, for the entire period of the contract, supplementary personal accident insurance for drivers and field support staff.

(i) **Equipment of staff**: Both current and future contracts establish the obligation to provide workers with summer and winter uniforms; the new contracts also require that credentials be issued to field support staff.

(j) **Terminals**: The new contracts require that facilities to be used by drivers include, at a minimum, a rest and eating area for staff, sanitary facilities and separate dressing rooms for men and women. These rules are also applicable to inspection posts.

b.4. Number of strikes in the sector over the past few years, existing (recently formed) trade unions, collective bargaining sessions conducted, instruments signed, collective bargaining coverage and union membership

The following strikes have been called in recent years:

- June 2015: Express de Santiago Uno SA.
- January 2017: Buses Vule SA.
- September 2018: Subus Chile SA.

The following table provides statistics on collective bargaining:

Business unit (No.)	Most recent collective bargaining session	Next collective bargaining session	No. of unions	No. of union members
2	September 2018 October 2018	July 2020 August 2020	10	5 848
3	December 2016 December 2016 July 2018 December 2019	December 2020 December 2020 July 2021 December 2022	45	4 800
4	June 2018 August 2018 September 2018 October 2018	October 2020	198	8 888
5	September 2017	August 2020	7	3 586
6	March 2017 May 2017 July 2017	January 2020 May 2020	8	2 916
7	April 2018 July 2019	July 2022	7	2 101

In that connection, the existence of both enterprise and inter-enterprise unions, the possibility of membership in more than one union and the fact that current contracts with passenger transport companies do not require reporting of the coverage of bargaining sessions must be taken into account.

c. Conclusion

As has been explained in detail, Chile's public transport system is based on an integrated physical, technological and financial operations model for transport and supplementary services. Therefore, the actions of the Ministry of Transport and Telecommunications have always been taken in accordance with the law and with a view to ensuring the provision of service.

It has been demonstrated that the Ministry has always acted within its legal framework and has sought to ensure respect for labour rights not only in its institutional acts, but also in the content of invitations to tender for public passenger transport.

As seen from the foregoing, the Ministry has constantly endeavoured to improve the level of protection of public transport workers' labour rights, and this protection is fully consistent with the regulatory framework established in the international labour standards.

In short, it is untrue that strikes are prohibited in the transport sector or in any other, that strike-breaking systems have been implemented or that it is, in practice, impossible to strike. This is clearly seen from the statistics provided. Furthermore, collective bargaining has been carried out in a perfectly normal manner and, in many cases, has resulted in collective agreements as shown by the official figures presented.

4. Matters relating to inter-enterprise bargaining

a. Allegations

The claimant maintains that *"[t]he Government persists in its legislation in discriminating against branch or inter-enterprise unions …"*. As an example, he mentions section 229 of the Labour Code, which states that although workers can form this type of union, in order to have representation in the enterprise they require far more members than *"other types of unions, such as enterprise and workplace unions"*. Another alleged type of discrimination in the formation of inter-enterprise unions is the fact that in accordance with section 221 of the Code, unlike other types of unions, *"inter-enterprise unions must have a certifying officer appointed exclusively by the labour inspectorates"*. Furthermore, decisions on such matters are left to the discretion of the labour inspectors, who are not adequately paid and therefore, the complainant assumes are *"prey to bribes and other inducements by employers"*.

In order to substantiate these allegations, the complainant mentions the aforementioned situation between the food handlers' unions and Merken.

The complainant adds that that right to bargain collectively has been violated because at times and in some cases, the law *"simply does not allow [workers] to bargain as that right remains at the discretion of the employers and the incumbent Government"*. In that regard, he mentions section 364(4) of the Labour Code, which states: *"In small and micro-enterprises …, bargaining with an inter-enterprise union shall be voluntary or optional"*. Thus, "*[s]ince the employer can decline to engage in collective bargaining, the workers are totally deprived of any defence"*. The complainant states that this must be understood in light of the fact that *"dismissal without just cause, which is based solely on the will of the employer, exists in Chile. This undermines the trade unions"*.

In the complainant's view, *"[t]hese legal provisions are therefore contradictory, since … the union … may exist, yet is unable to engage in collective bargaining in practice and, furthermore, membership can cause [workers] to lose their jobs"*.

The complainant also maintains that these violations affect *"[c]asual, seasonal and temporary workers and construction workers [since they] can only negotiate if their employment lasts for more than a year"* and because they *"also have no right to strike"*. Workers with contracts of less than a year are in an even worse situation as they can only bargain collectively if the employer agrees. In that connection, the complainant mentions Labour Directorate Directive No. 1489 of 26 March 2010.

In support of these allegations, the complainant draws attention to the situation of the National Inter-Enterprise Union of Workers in the Metallurgy, Communications, Energy and Allied Industries (RSU No. 13.01.2411) and the unions of the Escapes Mendoza Corporation; the ECM Ingenería Corporation; the Maestranza Americo Vespucio Corporation; the Industrias Ceresita Corporation and the Construcciones y Servicios Siglo Verde Corporation.

Lastly, the complainant states that all of these situations have been brought before the Labour Directorate and the courts, which, *"using various ploys[, avoided] recognizing the validity of the Conventions on freedom of association in their rulings"*. Despite the seriousness of these accusations, there is no information on the individual cases in question.

b. The Government's observations

The situation with regard to the Merken consortium has already been discussed in these observations and, for reasons of economy, our remarks will not be reiterated here. However, it will be recalled that this case was brought first before the Second Labour Court of Santiago and then before the Santiago Court of Appeal, which ruled in favour of the trade unions, and that the latter judgment has been fully implemented by the Labour Directorate.

At the outset, we totally reject the complaints' allegations since they are based on an incorrect interpretation of the ILO Conventions that are said to have been violated.

The purpose of Act No. 20.940 was to harmonize regulated collective bargaining by enterprise and inter-enterprise trade unions. For this reason, the aforementioned section 364 [of the Labour Code] establishes two requirements for the initiation of this process by inter-enterprise unions, bringing into line with the regulations applicable to enterprise unions. Thus, for purposes of collective bargaining, an inter-enterprise union's members must be employed by enterprises in the same category or economic sector and the number of its members in the enterprise in which it is bargaining must meet the quota set for enterprise unions (section 227 of the Labour Code).

On this point, attention is drawn to the statement by the ILO Committee on Freedom of Association that *"[w]hile a minimum membership requirement is not in itself incompatible with Convention No. 87, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered. What constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed"* (*Digest of decisions and principles of the Freedom of the Association Committee of the Governing Body of the ILO*, fifth (revised) edition, 2006, para. 287. See also the 336th Report of that Committee, Case No. 2332, para. 703). This is perfectly consistent with Chilean law.

In medium-sized and large enterprises, collective bargaining with an inter-enterprise union on matters affecting its members is compulsory. In micro- and small enterprises, bargaining is voluntary or optional for the employer. If the employer refuses to bargain, the union's members may present a draft collective agreement and initiate regulated collective bargaining directly with the employer on the understanding that they constitute an enterprise union for the purposes of such bargaining.

An inter-enterprise union's bargaining committee is composed of the union's leaders and representatives who work in the enterprise in which it is bargaining.

Confederations and federations may present draft collective agreements and initiate bargaining regulated by sections 408–411 of the Labour Code; section 408 states that such presentations must be made with the prior agreement of one or more employers or employers' associations.

This is consistent with the views expressed by the Committee on Freedom of Association on various occasions: *"The determination of the bargaining level is … to be left to the discretion of the parties. Thus, the Committee does not consider the refusal by employers to bargain at a particular level as an infringement of freedom of association"*. (See the 1996 *Digest*, para. 852, and the 321st Report of the Committee, Case No. 1975, para. 117.)

It follows that in Chile, priority is given to the principle of free and voluntary collective bargaining, embodied in Article 4 of Convention No. 98, which establishes that determination of the bargaining level is essentially a matter to be left to the discretion

of the parties and, consequently, that the level of negotiation should not be imposed by law. [19]

In light of the foregoing and in strict application of these rules in practice, the Labour Directorate has issued the following legal rulings:

- Directive No. 1078/28 of 8 March 2017 [20] on the meaning and scope of Act No. 20.940, in so far as it concerns collective bargaining by members of inter-enterprise unions and casual, seasonal and temporary workers, and on the presentation of draft collective agreements by federations and confederations. With respect to the special provisions on collective bargaining by members of inter-enterprise unions, the Directive states: *"… the lawmakers have given inter-enterprise unions two ways in which to initiate collective bargaining with an enterprise on behalf of its members employed by that enterprise: the non-regulated procedure established in section 314 of the Labour Code; and the regulated procedure, with some modifications as regards the size of the enterprise with which the bargaining is conducted. The primary modification concerns the binding nature that the legislators have assigned to regulated collective bargaining at the enterprise level in medium-sized and large enterprises, provided that the legal requirements are met. It must, however, be borne in mind that in the case of regulated collective bargaining, it is for the enterprise to determine the level of bargaining with an inter-enterprise union. This means that the union is not bargaining on behalf of all of the workers that it represents in various enterprises, but only those that it represents in the enterprise in question"*.

- Directive No. 5835/131 of 1 December 2017, [21] which addresses several issues relating to the bargaining requirements that Act No. 20.940 establishes for inter-enterprise unions pursuant to chapter IV of the Labour Code. With respect to the special provisions on collective bargaining by members of inter-enterprise unions, the Directive states: *"… in accordance with the jurisprudence of this Directorate concerning collective bargaining by inter-enterprise unions, contained in Directive No. 1078/28 of 8 March 2017, one of the objectives of Act No. 20.940 is to increase the collective bargaining capacity of members of these organizations by establishing special rules at the enterprise level …. Thus, under the legislation in question, inter-enterprise unions do not bargain on behalf of all of their members in various enterprises, but only those employed by a specific enterprise"*.

- Directive No. 607/11 of 31 January 2018, [22] supplementing Directive No. 1078/28 of 8 March 2017, on inter-enterprise bargaining in micro- and small enterprises. This Directive states that in such enterprises *"… if the employer does not agree or refuses to bargain with an inter-enterprise union within the established time period, it shall be understood that it has agreed to bargain collectively"*.

[19] *Digest of decisions and principles of the Freedom of Association Committee*, 1996 para. 851; 302nd Report of the Committee on Freedom of Association, Case No. 1845, para. 514; 306th Report of the Committee, Case No. 1906, para. 553; 308th Report of the Committee, Case No. 1926, para. 629; 321st Report of the Committee, Case No. 1975, para. 117; 325th Report of the Committee, Case No. 2099, para. 193; and 338th Report of the Committee, Case No. 2326, para. 448; Case No. 2403, para. 600 and Case No. 2375, para. 1226.

[20] https://www.dt.gob.cl/legislacion/1624/w3-article-111278.html.

[21] https://www.dt.gob.cl/legislacion/1624/w3-article-113968.html.

[22] https://www.dt.gob.cl/legislacion/1624/w3-article-114448.html.

- Directive No. 1250 of 7 March 2018, [23] which states that although, by virtue of its legal nature, an inter-enterprise union represents workers employed by a number of enterprises, in order for it to bargain in each of these enterprises the workers must also be employed by enterprises in the same category or economic sector.

The following statistics reflect collective bargaining by inter-enterprise unions between 2017 and June 2019:

Year	Inter-enterprise unions that signed collective agreements	Collective instruments signed	Workers involved			Instruments not finalized
			Men	Women	Total	
2017	359	332	39 776	26 309	66 085	9
2018	484	439	43 592	32 116	75 708	26
January–June 2019	224	218	22 492	9 676	32 168	8

Source: Administrative records of the Labour Directorate.
Compiled by: Labour Directorate Research Department.

c. Conclusion

It will thus be seen from the foregoing that in Chile, not only does collective bargaining above the enterprise level exist, but these models are applied in practice and are fully consistent with the relevant ILO Conventions and with the rulings of the Committee on Freedom of Association.

5. Matters relating to an alleged conflict between Act No. 20.940 on modernization of the labour relations system and Conventions Nos 87 and 98

a. Allegations

The complainant states that the new Act No. 20.940 on modernization of the labour relations system violates a number of collective bargaining rights, and particularly Article 4 of Convention No. 98.

With respect to the adoption of this Act, the complainant adds that the criteria used by the Constitutional Court, which had been involved in that process in fulfilment of its responsibility for prior constitutional review, were not consistent with the rulings of the ILO supervisory bodies and that there is therefore *"a conflict between, on the one hand, the Constitutional Court and the Government of Chile and, on the other, the international community and the obligations of ILO member States and those deriving from the Vienna Convention to observe the terms of ratified instruments"*.

[23] https://www.dt.gob.cl/legislacion/1624/w3-article-114660.html.

b. The Government's observations

b.1. The adoption of Act No. 20.940

At the outset, it should be borne in mind that Act No. 20.940 was brought before Congress on 29 December 2014 and that, as stated in Presidential Message No. 1055-362, [24] the legal reform initiative was presented in fulfilment of the Government's commitments and in order to modernize the country's labour relations system, and thus to ensure a proper balance between the parties with full respect for freedom of association as established in the relevant Conventions that Chile has ratified.

The draft legislation incorporated several proposals arising from social dialogue forums, including the following:

(i) Final report of the Presidential Advisory Council on Labour and Equity ("Meller Committee"), entitled *Towards a More Just Chile: Labour, Wages, Competition and Social Equity* (2008); [25]

(ii) Agreement of Intent between the United Workers' Federation (CUT) and the Confederation of Industry and Trade (CPC) (2012);

(iii) Report on the status and operation of Chile's labour market, entitled *Review of the Labour Market and Social Policies: Chile* (2009);

(iv) In particular, the most recent observations of the CEACR concerning Conventions Nos 87 and 98.

Furthermore, every stage of the draft legislation's adoption by Congress was accompanied by public hearings at which the following institutions and individuals had an opportunity to comment on its content: the CPC; the National Union of Workers (UNT); the National Confederation of Trade Unions of Micro-, Small and Medium-sized Enterprises; Self-employed Workers and Freelancers (UNAPYME); the National Coordinating Body of Inter-enterprise Trade Unions (CSI); FORUS Ltd.; the Coordinating Body of Inter-enterprise Trade Unions; Francisco Tapia Guerrero, Professor of Labour Law; Marcelo Soto Ulloa, labour lawyer; the Amalgamated Workers' Union of Chile (CUT); the Chilean Federation of Industry (SOFOFA); the National Confederation of Micro, Small and Medium-sized Enterprises of Chile (CONAPYME); the National Chamber of Commerce (CNC); the National Confederation of Trade Unions and Federations of Workers in Trade and Services (CONSFECOVE); Evelyn Matthei and Ricardo Solari Saavedra, former Ministers of Labour and Social Welfare; José Luis Ugarte Cataldo, academic and researcher in the field of labour law; Andrea Repetto Lisboa, economist; Giorgio Boccardo Bosoni, Director of the Nodo Foundation Research Centre XXI and Professor at the University of Chile; the Freedom and Development think tank; the Sol Foundation; the Union of ASMAR Workers in Talcahuano; the Chilean Construction Chamber (CChC); the Association of Chilean Exporters (ASOEX); the Executive Secretary of the Standing Committee for Dialogue on Social and Labour Issues in the Fruit-growing Sector; Claudio Palavecino Caceres, Professor of Labour Law, University of Chile; the National Confederation of Workers in the Salmon Industry (CONATRASAL); the Chilean Chamber of Maritime Transport and Ports; the Salmon Chile trade association; Bernardo Fontaine Talavera, economist; the National Agricultural Society (SNA); the National

[24] https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/5389/.

[25] http://www.consejoconsultivoemt.cl/wp-content/uploads/2014/09/Informe-Final-del-Consejo-Asesor-Presidencial-Trabajo-y-Equidad.pdf.

Federation of Fruit-growers (FEDEFRUTA); the Union of Chilean Port Workers; the Association of Exporters of Manufactured Goods (ASEXMA); the Santiago Chamber of Commerce (CCS); Eduardo Caamano Rojo, Professor of Labour Law; María Ester Feres Nazarala, former Labour Director; Emilio Morgado Valenzuela, lawyer and academic; Fabio Bertranou, Director of the ILO Country Office for the South Cone of Latin America; Kirsten Maria Schapira, specialist in international labour standards and labour relations; Andrés Marinakis, specialist in labour market policies and labour institutions; the Confederation of Trade Unions in the Banking Sector; Felipe Larrain, economist and researcher at the Latin American Centre for Economic and Social Policy, University of Chile (CLAPES UC); the Federation of Copper Workers (FTC); the Confederation of Chilean Port Workers (COTRAPORCHI); and the Autonomous Workers' Confederation (CAT).

It is clear from the foregoing that there were opportunities for tripartite social dialogue during the drafting and adoption of the Act to which the complainant objects so strongly and that the aspects of the labour relations model the modification of which had been specifically requested by the ILO supervisory bodies were taken into account.

b.2. Constitutional review

During its consideration, the draft legislation that was ultimately adopted as Act No. 20.940 underwent prior constitutional review by Chile's Constitutional Court [26] at the request of the senators and deputies. This review focused primarily on the recognition of trade unions, the granting of benefits, the right to information, and bargaining by inter-enterprise unions.

The Court's decision in the joined cases, Rol 3016–2016 [27] and Rol 3017–2016, [28] issued on 9 May 2016, upheld a portion of the complaint; it removed from the draft legislation only the rules concerning the recognition of trade unions on the grounds of unconstitutionality. [29] The new Act No. 20.940 was ultimately promulgated and published in the *Official Gazette* of 8 September 2016.

The ILO should, however, bear in mind that, prior to its promulgation, draft legislation naturally has no legal effects under Chile's domestic law. Therefore, it cannot be

[26] Chile's Constitutional Court comprises ten members, known as "Ministers", and fulfils the majority of its functions, particularly those relating to constitutional review, in plenary session. Its mandate includes, among other things:

a. constitutional review, i.e. prior and subsequent review of legislation (including legislative decrees); in the latter case, this may be done in response to unenforceability or unconstitutionality appeals. Prior monitoring may be optional (at the request of the President of the Republic, the Houses of Congress or current members of the Court) or compulsory (for acts that interpret the Constitution, constitutional organization acts and international treaties that include legal provisions). The Court also carries out optional prior review of draft constitutional reforms and international treaties presented to Congress for adoption, as well as prior and subsequent review of the regulatory authority's own instruments (decrees and decisions). Lastly, it addresses constitutionality issues arising from the judgments of the highest courts (the Supreme Court and the courts of appeal) and the Electoral Commission;

b. resolution of jurisdictional disputes: the court resolves disputes between the political and administrative authorities and the courts that do not fall within the mandate of the Senate;

c. rulings on lack of jurisdiction, incompatibility and abdication or resignation of public-office-holders such as the President of the Republic, Cabinet ministers and members of Congress;

d. rulings on violations of the Constitution: the Court declares unconstitutional organizations, movements and political parties (such as that of the President or President-elect of the Republic) that have committed the violations of the Constitution set out in section 19(15)(6) et seq. thereof

[27] https://www.tribunalconstitucional.cl/ingresa-requerimiento-de-parlamentarios-respecto-de-proyecto-de-ley-sobre-reforma-laboral-rol-n-3016-16-cpt.

[28] https://www.tribunalconstitucional.cl/expediente.

[29] https://www.tribunalconstitucional.cl/expediente.

considered that, as the complainant alleges, the acts or deliberations of the bodies involved at the various stages of its adoption constitute a violation by the Government of Chile of its international obligations, let alone its international responsibility.

b.3. Statements by ILO supervisory bodies

Following the publication of Act No. 20.940, the ILO welcomed the procedure followed during its drafting; many of the social partners had spoken before working groups in the Chamber of Deputies and the Senate. In its 2017 report, with regard to Conventions Nos 87 and 98, the CEACR stated:

1. *Articles 1–6 of the Convention. Labour reform. … With regard to requests made to the Government in previous comments to amend or repeal specific provisions of the Labour Code, which were not in conformity with the Convention,* ***the Committee notes with satisfaction*** *that Act No. 20.940: [repeals several rules and] eliminates the general exclusions from collective bargaining.*
2. ***The Committee also notes with satisfaction*** *the additional measures for the promotion of voluntary collective bargaining introduced through Act No. 20.940, such as the broadening of the right to information (there is a specific section on this in the amended Labour Code which includes, for example, a requirement for employers to provide specific and necessary information on the enterprise for the negotiation), the simplification of the collective bargaining procedure and the broadening of the issues which may be covered by negotiation.*
3. *Articles 2 and 3 the Convention. Legislative matters. In relation to its requests in previous comments to amend or repeal the following provisions of the Labour Code which are not inconformity with the Convention,* ***the Committee notes with satisfaction*** *the following measures: … .*
4. ***While noting with interest*** *the attribution to the judicial authorities of decisions concerning the resumption of work, the Committee requests the Government to provide information on the application of this provision in practice, as well as on the compensatory guarantees envisaged for workers who may be affected.*

Also with regard to this Act, but in connection with the content of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), the Committee has stated:

> *In this respect, the Committee notes with interest the adoption on 29 August 2016 of Act No. 20.940, section 4, which establishes a High Labour Council; a tripartite advisory body mandated to participate in the development of public policy proposals and recommendations aimed at strengthening and promoting social dialogue and a culture of fair, modern and collaborative industrial relations.*

As part of its legal mandate, the High Labour Council is required to issue a follow-up and evaluation report on the implementation and application of Act No. 20.940 annually for the first three years following its entry into force. This has been done and has been included in Chile's reports to the ILO. [30]

c. Conclusion

As noted above, there were opportunities for tripartite social dialogue during the drafting and adoption of the Act and, throughout that process, there was a continual effort to meet the requirements of the ILO supervisory bodies.

[30] See section 9 of the temporary provisions of Act No. 20.940.

With regard to the complainant's criticism of the Constitutional Court's involvement in the adoption of this Act by carrying out a prior review of its constitutionality, we shall only say that this is an issue that should not be addressed in the present complaint since it has nothing to do with the alleged violations mentioned by the complainant. The Act did not produce effects until it had been promulgated and had entered into force, prior to which it could not give rise to international responsibility on the Government's part. Therefore, there cannot, as the complainant maintains, be a "conflict" between the Constitutional Court and the international community, Articles 26, 27 and others of the Vienna Convention on the Law of Treaties, 1969, or the ILO.

Lastly, as we have recalled, the CEACR has viewed Act No. 20.940 as a positive step in the protection of collective labour rights. And, ultimately, the preceding arguments confirm that the Act does not violate the international labour standards. Consequently, this allegation should also be rejected in its entirety.

III. Situation of Chilean food handlers

Since the complainant repeatedly mentions the food handlers' situation, we shall take the opportunity to describe this situation in the context of this country.

Chile has a school meals programme, the purpose of which is to provide food services (breakfast, lunch, morning and afternoon snacks and dinner, as appropriate) on a daily basis to 60 per cent of the most vulnerable students in the schools during curricular and extracurricular activities throughout the school year and during the winter and spring holidays.

The food service is provided by concessionaires, one of which is the aforementioned Merken consortium. These companies are granted their respective concessions through a tendering process carried out annually by the National School Assistance and Scholarship Programme (JUNAEB). The concessions granted for each period provide services to one third of the country's schools and the contracts cover periods of three to five years.

During the tendering process, the food service requirements and the labour requirements for food handlers to be met by the companies to which concessions are granted are established. In every case, it is emphasized that these workers are in a direct employment relationship not with the JUNAEB, but with the concessionaire.

There has been significant improvement in the food handlers' working conditions over time as a result of effective dialogue with the organizations that represent them. Examples include:

- **Act No. 20.238,** [31] **promulgated on 14 January 2008**, which amended Act No. 19.886 by ensuring the protection of workers and unfettered competition in the State administration's provision of goods and services. The Act:
  - excludes from public tendering enterprises that have been convicted of anti-union practices or violations of workers' rights during the past two years;
  - provides that where a concessionaire has a history of unpaid wages or social security contributions, the first payments made to it shall be used to meet those obligations;

[31] https://www.leychile.cl/Navegar?idNorma=268636.

- orders that priority in the granting of concessions be given to the enterprises that offer the highest wages and the best working conditions.

- **Act No. 20.787,** [32] **promulgated on 23 October 2014**, sets out the standards establishing the rights of food handlers in the schools. The Act:
  - orders that priority in the granting of concessions be given to the enterprises that offer food handlers the highest wages and the best working conditions, such as bonuses and open-ended contracts;
  - orders that food handlers' service contracts provide for the payment of wages during the months of December, January and February on the same terms as during the other months of the year.

- **JUNAEB National Directorate Special Decision No. 2128 of 13 October 2015**, establishing Food Handlers' Day. The Decision:
  - establishes the last working Friday of October as the annual Food Handlers' Day and orders that both invitations to tender and the respective food service providers' contracts require concessionaires to take the necessary steps to ensure that food handlers can celebrate this day on the date in question.

- **Act No. 21.032,** [33] **promulgated on 6 September 2017**, establishing National Public–School Food Handlers' Day. Through a special decision adopted in 2015, the JUNAEB had established the last working Friday of October as Food Handlers' Day, which was given a new status by this Act.

IV. Concerning the request to appoint a Commission of Inquiry

The complaint procedure is governed by articles 26 to 34 of the ILO Constitution, under which a complaint concerning non-compliance with a ratified Convention may be filed against a member State by another member State which has ratified the same Convention, a delegate to the International Labour Conference or the Governing Body of its own motion. Upon receipt of a complaint, the Governing Body may establish a Commission of Inquiry consisting of three independent members, which is responsible for carrying out a full investigation of the complaint, ascertaining all the facts of the case and making recommendations on measures to be taken to address the problems raised.

While these are the so-called "receivability requirements" for an article 26 complaint, the ultimate goal of this type of procedure is to set up a Commission of Inquiry, which is the ILO's highest-level investigative procedure.

It is generally set up when a member State is accused of committing persistent and serious violations and has repeatedly refused to address them. Its limited application is seen from the fact that only 14 Commissions of Inquiry have been established in the 100-year history of the ILO. [34]

When a country refuses to fulfil the recommendations of a Commission of Inquiry, the Governing Body can take action under article 33 of the ILO Constitution. This provision establishes that *"[i]n the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the*

[32] https://www.leychile.cl/Navegar?idNorma=1068865.

[33] https://www.leychile.cl/Navegar?idNorma=1107616.

[34] https://www.ilo.org/dyn/normlex/en/f?p=1000:50011:::NO:50011:P50011_ARTICLE_NO:26.

decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith".

Article 33 was invoked for the first time in the ILO's history in 2000, when the Governing Body asked the International Labour Conference to take measures to lead Myanmar to end the use of forced labour.

Clearly, Chile's labour relations model, which has been repeatedly challenged in this complaint, is very different from the serious cases that have been declared receivable and for which a Commission of Inquiry has been appointed.

In no way would granting the claimants' request facilitate the adjustments and improvements that any of the world's labour relations models undergoes, particularly in view of the dynamic nature of the labour market, which is changing ever more rapidly owing to, among other things, the influx of technology. Therefore, recourse to the highest level of monitoring of international labour standards must be proportionate and rational and must take into account the efforts of governments and the social partners in the world of work.

For these reasons, we request that the option of appointing a Commission of Inquiry for this case be rejected.

V. Conclusions

In these observations, the Government of Chile has addressed all of the complainant's allegations. It has substantiated its statements and provided technical, legal and administrative background information, all of which was prepared in cooperation and consultation with all of the public institutions relevant to the case. Thus, there can be no doubt whatsoever that the article 26 complaint presented in June 2019 is totally baseless and should be rejected in its entirety.

At the outset, the complaint raises issues that have been discussed and resolved by the ILO supervisory bodies, specifically in their ruling on a 2016 complaint against Chile. Moreover, its allegations are baseless and illogical, a fact which demonstrates that there are no real or plausible grounds for presenting it and which makes it difficult for the Government to exercise its right to a defence. In that connection, we would like to emphasize that it is important for the ILO to ensure proper use of the standards monitoring system in order to prevent it from being abused and used for purposes other than those envisaged in the 1919 Constitution.

With respect to the substance of the complainant's arguments, i.e. with regard to minimum services, the alleged usurpation of powers by the Labour Directorate, the use of strike-breaking systems, inter-enterprise bargaining and the alleged conflict between Act No. 20.940 and the international labour standards, these and the other related allegations have been disproved through arguments, prior history and other background information provided by the Government of Chile.

In particular, it has been demonstrated that the Labour Directorate's decisions on minimum services are based entirely on domestic law. Furthermore, there has been no usurpation of powers; on the contrary, the Directorate's actions are perfectly consistent with its mandate under Chilean law. It is also untrue that it has refused to comply with legal decisions; on the contrary, it has implemented them in full. The Directorate has not refused to designate certifying officers for strike ballots and trade union elections and, in that connection, the claim that inter-enterprise bargaining does not exist in Chile is

false. The claim that the Government, the courts, domestic law and the Ministry of Transport and Telecommunications have built a strike-breaking system is inaccurate. In particular, as we have shown, the Ministry has always acted within its legal mandate and, moreover, has always sought to ensure respect for labour rights both in its institutional actions and in the public passenger transport contracts that it signs with companies. Lastly, as this Organization knows, it is not true that Act No. 20.940 violates the ILO standards to which Chile is subject, as evidenced by the fact that the CEACR itself has viewed this legislation as a positive step in the protection of collective labour rights. Clearly, then, the complainant's allegations are completely baseless and there has been no violation of the Conventions in question.

The Government of Chile therefore requests that the article 26 complaint presented by Mr Rangel Delgado and supported by the WFTU be rejected in its entirety and that a Commission of Inquiry not be appointed since the allegations do not constitute a violation of the international labour standards mentioned therein, and since the appointment of a Commission of Inquiry is an extremely rare option to which this Organization does not resort unless it has no alternative and which is in no way applicable to the present case.

▶ Annexes

1. Department of Labour Directive No. 1489 of 26 March 2010
2. Eastern Santiago Communal Labour Inspectorate Directive No. 1220 of 6 June 2019
3. Department of Labour Directive No. 2015 of 16 September 2019
4. Eastern Santiago Communal Labour Inspectorate Decision No. 436 of 14 June 2019
5. Eastern Santiago Communal Labour Inspectorate Decision No. 813 of 16 October 2018
6. Eastern Santiago Communal Labour Inspectorate Decision No. 776 of 1 October 2018

PPSS/COP/CFE/MAPS/MGL

▶ Appendix II

Letter from the Government of Chile (September 2020)

Letter No. 721 – 3

Further to:

– Your email of 28 September 2020.

– Your letter of 21 August 2020.

Subject: Article 26 complaint.

From: **Fernando Arab Verdugo**
Undersecretary for Labour

To: **Corinne Vargha**
Director, International Labour Standards Department
International Labour Orgainization
Geneva
Switzerland

I am writing to you with reference to your letter of 21 August 2020 requesting an update on the Government of Chile's observations on the complaint under article 26 of the ILO Constitution presented at the 108th Session of the International Labour Conference, held in Geneva in 2019.

In this regard, after consultations with our Labour Directorate, and in addition to the information provided in Letter No. 101-3 of 30 January 2020, the Government of Chile submits the following observations:

1. Matters relating to minimum services

The statistics set out in the observations of 30 January 2020 reflected the decisions on minimum services handed down by the Labour Directorate as at 31 December 2019.

As at 30 September this year, 44 applications for decisions on minimum services were pending, of which only one concerns the Metropolitan Transport Network (RED), which is the application relating to Inversiones Alsacia SA.

2. Matters relating to an alleged usurpation of powers by Chile's Labour Directorate

Concerning the situation that arose in respect of the Merken SpA consortium, the Government reported in its reply that, in Internal Case No. C-5205-2019, which was heard by the Santiago Labour and Benefits Collection Court, the Labour Directorate had applied for a waiver of costs, which was declared receivable by the court.

On 23 March 2020, the court confirmed the end of the evidence phase, which had begun in December 2019, and on 5 August summoned the parties to court for the judgment. On 27 August 2020, the court issued a judgment rejecting the waiver of costs, as follows:

> *"SEVENTH: That the facts set forth in the fourth paragraph above, which are not contested as being false or unreliable, in no sense justify it being placed on record that the entity subject to enforcement actually has had all the means and resources available to it under the law for that purpose, with the effect that the trade union negotiating committee seeking the enforcement shall continue the collective bargaining process with the employer, the Merken SpA consortium, in accordance with the draft collective agreement that was submitted, in order to comply with the judgment on which the enforcement order is based.*
>
> *It should be noted, from the statements made by the parties in their respective briefs, documents attached by both parties and witness statements submitted by the party seeking enforcement, that, in accordance with the stage that had been reached in the collective bargaining process, at the time when the claim was lodged with the declaratory court, it was incumbent on the defendant, the Municipal Labour Inspectorate, to appoint and make available to the negotiating committee a certifying official to conduct the vote on the employer's last offer, something which, in the case under dispute, has not taken place, thus confirming the conclusions set out in the previous paragraph.*
>
> *EIGHTH: That, in view of the reasons set out in the previous paragraph, it is prudent and appropriate to reject the waiver sought by the party subject to enforcement."*

Lastly, on 24 September 2020, a request was made for a certificate of enforceability of the judgment, in other words, that it shall be final and enforceable, which was issued by the court on 29 September 2020.

It is therefore clear that the proceedings before the courts have continued independently and in accordance with established procedures.

Yours sincerely,

(Signed) **Fernando Arab Verdugo**
Undersecretary for Labour

(Signed) **GRS/PPSS/MGL**

c.c.:

- Correspondence Office of the Ministry of Labour and Social Security
- Permanent Mission of Chile to the United Nations Office and other international organizations in Geneva
- Division of Multilateral Policy (DIMULTI)/Ministry of Foreign Affairs (MINREL)
- International relations file