

INTERNATIONAL COURT OF JUSTICE

International Labour Organization Convention No. 87 and the right to strike

(Request for an Advisory Opinion)

WRITTEN STATEMENT OF THE KINGDOM OF SPAIN

14 May 2024

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A) INTRODUCTION

At its 349th bis Special Session, the Governing Body of the International Labour Organization (ILO) discussed the action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (Convention No. 87) in relation to the right to strike to the International Court of Justice (ICJ).

The interpretation dispute concerns whether the right to strike of workers and their organizations is protected under Convention No. 87. The dispute has persisted for several years and in 2012 gave rise to a major institutional crisis, with the Conference Committee on the Application of Standards (CAS) being prevented for the first time from exercising its supervisory functions.

The Governing Body adopted the following decision:

Conscious that there is serious and persistent disagreement within the tripartite constituency of the International Labour Organization (ILO) on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), with respect to the right to strike,

Recalling that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning whether the right to strike is protected under Convention No. 87

Noting that ILO supervisory bodies have consistently observed that the right to strike is a corollary to the fundamental right to freedom of association,

Seriously concerned about the implications that this dispute has on the functioning of the ILO and the credibility of its system of standards,

Affirming the necessity of resolving the dispute consistent with the Constitution of the ILO,

Recalling that under article 37, paragraph 1, of the ILO Constitution, “[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice”,

Recalling the consensual decision of the 320th Governing Body in March 2014, welcoming “the clear statement by the Committee of Experts of its mandate as expressed in the Committee’s 2014 report”:

"The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee’s work based on its impartiality, experience and expertise. The Committee’s technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods

built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions."

Noting that, despite protracted attempts, no consensus has been reached through tripartite dialogue,

Emphasizing that Article 37(1) of the ILO Constitution establishes that any referral to the International Court of Justice is for decision on the question or dispute referred,

Expressing the hope that, in view of the ILO's unique tripartite structure, not only the governments of ILO Member States but also the international employers' and workers' organizations enjoying general consultative status in the ILO would be invited to participate directly and on an equal footing in the written proceedings and any oral proceedings before the Court,

Decides, in accordance with article 37, paragraph 1, of the Constitution of the International Labour Organization,

- 1. To request the International Court of Justice to render urgently an advisory opinion under Article 65, paragraph 1, of the Statute of the Court, and under Article 103 of the Rules of Court, on the following question:*

Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?

- 2. Instructs the Director-General to:*
 - a) transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw*

light upon the question, in accordance with article 65, paragraph 2, of the Statute of the Court;

- b) respectfully request that the International Court of Justice allow for the participation in the advisory proceedings of the employers' and workers' organizations that enjoy general consultative status with the ILO;*
- c) respectfully request that the International Court of Justice consider possible steps to accelerate the procedure, in accordance with Article 103 of the Rules of Court, so as to render an urgent answer to this request;*
- d) inform the United Nations Economic and Social Council of this request, as required under Article IX, paragraph 4, of the Agreement between the United Nations and the International Labour Organization, 1946.*

(GB.349bis/INS/1/1, paragraph 27, as amended by the Governing Body)

Following referral of the dispute by ILO (see The International Labour Organization (ILO) requests an advisory opinion from the Court on the interpretation of ILO Convention No. 87 with respect to the right to strike [ICJ, 14 November 2023]), the Court issued an Order on 16 November 2023 setting out its decision that ILO and the States parties to Convention No. 87 are considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion and referring to the possibility of their presenting written statements on this question to the Court.

In this same Order, ICJ fixes the time-limits within which written statements on this question and written comments on other written statements may be presented to the Court by the constituents of ILO on the question submitted to the Court for an advisory opinion.

The Order sets out the following time-limits for ILO and the States parties to Convention No. 87, fixing:

- 16 May 2024 as the time-limit within which written statements on this question may be presented to the Court, in accordance with Article 66, paragraph 2, of the ICJ Statute
- 16 September 2024 as the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the ICJ Statute

Moreover, the Court invites six employers' and workers' organizations (the International Organisation of Employers, the International Trade Union Confederation, the World Federation of Trade Unions, the International Cooperative Alliance, the Organization of African Trade Union Unity and Business Africa) to make written contributions to the Court within the above time-limits.

The Secretariat of ICJ has published the collection of documents ("dossier") and the Introductory Note, prepared by the International Labour Office for the purposes of the Request for Advisory Opinion, available at: <https://www.icj-cij.org/case/191/request-advisory-opinion>.

Spain ratified Convention No. 87 on 20 April 1977 and the Spanish Government therefore considers that Spain meets the requirements to state its position on the dispute regarding whether or not the right to strike is a corollary of Convention No. 87.

B) CONSTITUTION AND FUNCTIONING OF THE ILO SUPERVISORY SYSTEM

ARTICLE 37(1) OF THE ILO CONSTITUTION

Article 37(1) of the ILO Constitution refers in the following manner to the competence of ICJ to interpret the provisions of the Constitution and the Conventions:

Article 37

Interpretation of Constitution and Conventions

1. Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

Article 37(1) of the ILO Constitution stipulates that “any question or dispute” relating to the interpretation of the Constitution or of any international labour convention concluded by the Member States in pursuance of the provisions of the Constitution shall be “referred for decision to the International Court of Justice”. The terms “question” and “dispute” were taken directly from Article 14 of the Covenant of the League of Nations (Treaty of Versailles, 1919), which made provision for the future establishment of a Permanent Court of International Justice which would be competent, inter alia, to “give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly” [of the League of Nations]. Said terms were included by the Commission on International Labour Legislation [of the Paris Peace Conference of 1919] in the text of what would later become Article 37 of the ILO Constitution.

It would appear that the inclusion of both these terms in the Covenant was intended to prevent limitations from being placed on the scope of the advisory function of the Permanent Court of International Justice. The term "question" is sufficiently broad so as to enable any request for interpretation to be referred to ICJ.

The terms "any" and "shall be" leave no room for doubt as regards the obligation to refer unresolved disputes to the Court, while the expression "for decision" implies that the Court's opinion shall be deemed as final.

In addition, from the perspective of constitutional theory and practice, Spain considers that Article 37(1) of the ILO Constitution confers a binding and decisive effect upon any advisory opinion obtained. Said effect was recognized in the case of the six preceding advisory opinions requested of the Permanent International Court of Justice (on the basis of the provision included in the ILO Constitution of 1919 that is almost identical to the current Article 37(1)), which, without exception, were promptly accepted and applied.

As regards the details of the dispute regarding the interpretation of Convention No. 87 with respect to the right to strike, this report refers to the provisions set forth in the Annex to the Office background report (GB.349bis/INS/1/1), prepared for the purposes of the special meeting of the Governing Body convened under Article 7(8) of the ILO Constitution following the request of the Workers' group and of 36 governments to refer urgently the dispute over the interpretation of Convention No. 87 in relation to the right to strike to ICJ for decision in accordance with Article 37(1) of the Constitution.

LEGAL CERTAINTY AND RESPECT FOR THE ILO BODY OF INTERNATIONAL LABOUR STANDARDS

Legal certainty may be defined as the “clarity, unambiguity, and stability in a system of law allowing those within the system to regulate their conduct according to the law’s dictates”.

Legal certainty is a core element of the principle of the rule of law and fulfils a triple function by promoting clarity (*certitudo*), security (*securitas*) and good faith (*fides*) in creating, interpreting or applying the law.

When it comes to the interpretation of international labour Conventions, legal certainty implies the ability to obtain unambiguous and decisive pronouncements on the scope and meaning of provisions of Conventions so that States parties, or States considering ratification, can fully appreciate the nature and extent of obligations arising from ratification, and can adapt national law and practice accordingly.

In that sense, recourse to the advisory function of ICJ and/or the establishment of an in-house tribunal would enhance stability and predictability in the understanding of the meaning of Conventions, which in turn may have a positive impact on the ratification and implementation of Conventions, and more broadly, on the credibility of ILO and the effectiveness and transparency of the system of supervision of standards.

Interpretation of the Conventions

The rules of interpretation of treaties set forth in the Vienna Convention on the Law of Treaties constitute international customary law and, therefore, apply to Convention No. 87. This supports the case for the “dynamic” interpretation of treaty texts provided for in Article 31 of the Vienna

Convention, insofar as it requires treaty provisions to be interpreted in their context and in the light of the object and purpose of the treaty.

Accordingly, the terms of Convention No. 87 guaranteeing the right to organize must be understood in the context of the relevant provisions of the Preamble to the ILO Constitution and of the Declaration of Philadelphia and taking into account any subsequent practice that establishes general agreement regarding their interpretation, such as the consistent case law of the bodies responsible for overseeing the application of the Convention.

In addition, as the Workers' group argued, no recourse to the preparatory work is needed, as the conditions of the Vienna Convention are not met; that is to say, the interpretation suggested in accordance with Article 31 does not leave the meaning ambiguous or obscure nor does it lead to a result that is manifestly absurd or unreasonable.

Under the applicable rules, a legal question arising within the scope of ILO activities, such as the interpretation of an international labour Convention, may be referred to ICJ for an advisory opinion either by the International Labour Conference (ILC) or by the Governing Body, if specifically authorized by the Conference to make such a referral.

The unresolved dispute concerning the right to strike has, in practice, created a legal vacuum with respect to the interpretation of the right to strike, as the dispute is preventing the proper functioning of the supervisory system.

This means that workers, employers and governments have for over a decade now been unable to benefit from authoritative guidance on and interpretation of the legal boundaries of the right to strike. This increasingly creates legal uncertainty for all parties involved.

THE FUNCTIONING OF THE ILO SUPERVISORY SYSTEM

To achieve its objectives, ILO adopts international labour standards and supervises their application. To supervise the standards, ILO has adopted supervisory mechanisms that can roughly be grouped into two categories. The regular system of supervision is based on the periodic reports submitted by the Member States to ILO pursuant to Articles 22 and 23 of the ILO Constitution. The special procedures are based on the submission of representations or complaints to the Governing Body, pursuant to Articles 24 and 26 of the Constitution, and in particular on complaints submitted to the Committee on Freedom of Association (CFA).

In this report, we will refer exclusively to the regular system of supervision.

The regular system of supervision is based on the examination of reports on the application in law and practice sent by Member States and on observations in this regard sent by workers' organizations and employers' organizations. Said examination is carried out by the following two ILO bodies:

- The Committee of Experts on the Application of Conventions and Recommendations
- The International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations

The Committee of Experts on the Application of Conventions and Recommendations

In 1926, ILC approved a resolution establishing an annual Conference committee—the Conference Committee on the Application of Standards (CAS)—and asked the Governing Body to appoint a technical committee—the Committee of Experts on the Application of Conventions and

Recommendations (CEACR)— which would submit reports to the Conference. This resolution was adopted to ensure the effectiveness and efficiency of the annual ILC in meeting its mandate; that is to say, the examination of the periodic reports submitted by the Member States in compliance with their reporting obligations, as well as other ILC responsibilities, such as the drafting of standards.

The periodic reports are examined by CEACR, the independent technical committee that assesses whether the domestic laws of ILO Member States are in compliance with the obligations incumbent upon them as a result of their ratification of an ILO Convention. CEACR itself produces an annual report.

The Committee also prepares the General Surveys, which review the national law and practice of Member States on certain Conventions or Recommendations, irrespective of their ratification, and determine the extent to which the provisions of a specific Convention have been given effect — or to which measures have been taken to achieve this goal— and, in particular, the difficulties preventing or delaying the ratification of a given Convention.

The reports of CEACR, including both the General Surveys and the information and reports on the application of Conventions and Recommendations, are discussed by CAS.

Spain respects the CEACR mandate described in its annual reports:

The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with

examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions.

Spain considers it important for the Member States to maintain an ongoing dialogue with CEACR for the purpose of receiving its guidance on the application, both in law and in practice, of the conventions ratified, as provided in the five General Surveys on Convention No. 87.

In general, Spain takes a positive view of the fact that governments have acted on comments made by CEACR on specific matters, whether by adopting new legislative texts, by amending existing laws, or by making significant changes to national policies or practices, thereby improving compliance with their obligations under the conventions they have ratified.

C) FINDINGS OF CFA AND CEACR ON THE MATTER

Committee on Freedom of Association

Freedom of association and the right to collective bargaining are among the foundational principles of ILO, as reflected by the inclusion of the principle of freedom of association in the Preamble to the ILO Constitution, the Declaration of Philadelphia, Convention No. 87, and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

The Committee on Freedom of Association (CFA) is a tripartite body set up in 1951 by the ILO Governing Body. CFA examines alleged infringements of the principles of freedom of association and the effective recognition of the right to collective bargaining enshrined in the Constitution of the International Labour Organization (Preamble), in the Declaration of Philadelphia and as expressed by the 1970 ILC Resolution.

The Committee is composed of members and deputies from the Government, Workers' and Employers' groups of the Governing Body and has an independent Chairperson. It meets three times a year and carries out an examination of the complaints lodged against governments, irrespective of whether they have ratified the ILO Conventions relating to freedom of association.

The conclusions issued by CFA in specific cases are intended to guide governments and national authorities for discussion and the action to be taken to follow-up on its recommendations in the field of freedom of association and the effective recognition of the right to collective bargaining. The object of the CFA complaint procedure is not to blame or punish anyone,

but rather to engage in a constructive tripartite dialogue to promote respect for freedom of association in law and practice. When doing so, CFA is cognizant of different national realities and legal systems.

In issuing its conclusions and recommendations, CFA is guided by the principles of freedom of association and the effective recognition of the right to collective bargaining, as well as by the long-standing experience and expertise of its members in the field of industrial relations.

Paragraph 51 of the Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association – Annex I, included under “Rules for relations with the governments concerned”, provides that “By membership of the International Labour Organization, each member State is bound to respect a certain number of principles, including the principles of freedom of association which have become customary rules above the Conventions.”

Moreover, pursuant to paragraph 12 of the aforementioned Annex:

By virtue of its Constitution, the ILO was established in particular to improve working conditions and to promote freedom of association in the various countries. Consequently, the matters dealt with by the Organization in this connection no longer fall within the exclusive sphere of States and the action taken by the Organization for the purpose cannot be considered to be interference in internal affairs, since it falls within the terms of reference that the ILO has received from its Members with a view to attaining the aims assigned to it.

As recorded in the compilation of decisions of CFA cases, CFA has already referred to the principle of freedom of association with respect to the right to strike, specifically in Case No. 461, Spain, Dispute of October 1965 at the Sociedad Española de Construcción Naval (Sestao), (Report No 95, 1967, paragraphs 245 and 246):

245 The Committee has always applied the principle that allegations respecting the right to strike are not outside its competence in so far as they affect the exercise of trade union rights. It has frequently pointed out that the right of workers and their organisations to strike as a legitimate means of defending their occupational interests is generally recognised.

246 The Committee has also emphasised the importance it attaches, when strikes are prohibited or subject to restriction, to ensuring adequate guarantees to safeguard to the full the interests of the workers thus deprived of an essential means of defending their occupational interests, and observed that such restriction should be accompanied by adequate, impartial and speedy conciliation and arbitration procedures in which the parties concerned can take part at every stage.

In other cases (see case No 490 (Colombia)), CFA has reiterated that the awards given should in all cases be binding on both parties. The Committee explained in this connection that these principles do not apply to the absolute restriction of the right to strike but to the restriction of that right in the essential services or in the civil service, in which case adequate guarantees should be provided to safeguard the interests of the workers.

Where legislative provisions prohibit strikes absolutely, in either a direct or an indirect manner, CFA endorses the view taken by CEACR, namely that such a prohibition may sometimes constitute a considerable restriction of the potential activities of trade unions and hence run counter to the generally accepted principles of freedom of association.

In many cases in the past, CFA has observed that the right to strike of workers and their organizations as a legitimate means of defending their occupational interests is generally recognized. In this connection CFA has

also emphasized that, in exercising the right to strike, workers and their organizations must have due regard to temporary restrictions placed thereon, e.g. cessation of strikes during conciliation and arbitration proceedings in which the parties can take part at every stage. In doing so, however, CFA has stressed that when restrictions of this kind are placed on the exercise of the right to strike, the ensuing conciliation and arbitration proceedings should be “adequate, impartial and speedy.”

At the same time, in other cases the Committee has declined to examine allegations concerning strikes not considered to be work-related or that sought to force the government’s hand on a political or policy matter and were not the result of a labour dispute.

As regards the use of international law as a guide for interpreting the law, following the claim that the Republic of Türkiye had violated Articles 11 and 14 of the European Convention on Human Rights, in the Decision of the European Court of Human Rights, Third Section, *Enerji Yapi-Yol Sen v. Turkey*, 21 April 2009, Application No. 68959/01, the Court supported its decision by taking into account elements of international law drawn from sources other than the European Convention on Human Rights. Having affirmed that the strike, which enabled the trade union to make its voice heard, was an important factor in enabling the trade-union members to protect their interests, the Court referred to Convention No. 87. It noted that the right to strike is recognized by the supervisory bodies of the International Labour Organization as an indissociable corollary to the right of freedom of association protected by Convention No. 87.

The CEACR interpretation of the right to strike in Convention No. 87

The core subject matter of this dispute is how to interpret Convention No. 87 and whether or not the right to strike is protected thereunder.

The dispute stems from the CEACR interpretation that the right to strike can be inferred from Article 3 of Convention No. 87:

*1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to **organise their administration and activities** and to formulate their programmes. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

Moreover, Article 10 stipulates that “[i]n this Convention the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.”

For 70 years, CEACR, a committee composed of independent experts responsible for monitoring compliance with the conventions ratified by ILO Member States, has held the position that the right to strike is a corollary of the right to freedom of association and, as such, is recognized and protected by Convention No. 87.

In paragraph 122 of its 2012 General Survey, CEACR stated that:

Each year, the Committee examines many individual cases relating to national provisions regulating strikes, most frequently without being challenged by the governments concerned, which generally adopt measures to give effect to the comments of the Committee of Experts. Over the years, the supervisory bodies have specified a series of elements concerning the peaceful exercise of the right to strike, its objectives and the conditions for its legitimate exercise, which may be summarized as follows:

(i) the right to strike is a right which must be enjoyed by workers' organizations (trade unions, federations and confederations);

(ii) as an essential means of defending the interests of workers through their organizations, only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise;

(iii) the objectives of strikes must be to further and defend the economic and social interests of workers and;

(iv) the legitimate exercise of the right to strike may not result in sanctions of any sort, which would be tantamount to acts of anti-union discrimination.

*Accordingly, subject to the restrictions authorized, a **general prohibition of strikes is incompatible with the Convention**, although the supervisory bodies accept the prohibition of wildcat strikes. Furthermore, strikes are often called by federations and confederations which, in the view of the Committee, should be recognized as having the right to strike. Consequently, legislation which denies them this right is incompatible with the Convention.*

In other words, CEACR does not understand the right to strike to be an absolute right, but it does recognize that the ILO supervisory bodies have specified a series of elements for its legitimate exercise, which authorize certain limitations based on strict requirements.

However, in 2012, the year of publication of the *General Survey on the fundamental Conventions concerning rights at work*—which included Convention No. 87 among the eight fundamental Conventions selected—for the first time since its creation in 1926, CAS was unable to discuss a single individual case, triggering a crisis in the ILO supervisory system.

The problem stemmed from the failure of the Employers' group and the Workers' group to reach an agreement regarding the list of cases of non-

compliance to be discussed.

The Employers' group challenged the affirmation by CEACR in the General Survey of 2012 in reiteration of the Committee's long-standing position that the scope of application of Convention No. 87 included the right to strike.

The Employers' group stated (see paragraph 154 of the *Provisional Record of the Report of the Committee on the Application of Standards of 2012*) that:

The ILO was now facing a multifaceted crisis concerning the interpretation of the right to strike in connection with Convention No. 87. It was not acceptable for anyone to be confused or misled as to the true status of any ILO text simply because it bore its logo or was silent as to its proper status. This was now more than just an issue involving the General Survey as it affected the Convention No. 87 cases to be supervised in the Conference Committee. The absence of an express right to strike in Convention No. 87 meant that the Committee of Experts was effectively making policy, which was outside of their mandate. Policy-making was the exclusive domain of the Governments, Employers and Workers. The Committee of Experts could advise on application, not determine application on behalf of the ILO and certainly not determine new rights and obligations regarding a right to strike within Convention No. 87. It was important that all Governments, Employers and Workers alerted their constituents and relevant authorities as to the true status of the Committee of Experts' interpretation of the right to strike.

Spain reiterates its respect for the independence of CEACR and for its mandate and role within the ILO supervisory system. Moreover, Spain defends the CEACR position on the scope and meaning of Convention No. 87 as regards the understanding that it includes the right to strike.

Measures implemented to resolve the dispute relating to interpretation

Since 1993, wide-ranging discussions and consultations have taken place on the conditions and forms of possible recourse to the provisions of Article 37 of the ILO Constitution, to resolve any question or dispute relating to the interpretation of any convention.

However, no agreement was reached during the 2013 discussions, or in subsequent consultations. The Governing Body took note of this and in session 319 “underlined the pressing need for substantive progress to be made on matters which are of fundamental importance to the functioning of the ILO supervisory system” in advance of the 2014 Session of ILC.

It was apparent from the Governing Body discussions in November 2018 and March 2019 that there was general agreement on the need to ensure legal certainty in matters relating to the standards and particularly with regard to resolution of disputes over interpretation of international labour standards.

Because of the disagreement during the 2013 Session of ILC, the Governing Body undertook informal tripartite consultations prior to its 316th Session (November 2012), during which two matters were discussed: the list of cases for CAS and the mandate of CEACR.

In November 2014, the International Labour Office submitted to the Governing Body an exhaustive document on the modalities, scope and costs of action under Article 37 of the ILO Constitution, including a draft Governing Body resolution on referral to ICJ and draft statutes for a tribunal. During its Session in November 2014, the Governing Body decided to “convene a three-day tripartite meeting in February 2015 [...] regarding [...] the question of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike, and the modalities and practices of strike action at national level” and to “place on the agenda of its 323rd Session, the outcome and report from this meeting

on the basis of which the Governing Body will take a decision on the necessity or not for a request to the International Court of Justice to render an urgent advisory opinion concerning the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike.”

The planned tripartite meeting was held from 23 to 25 February 2015. An informal social dialogue between the Workers’ group and the Employers’ group to prepare for this meeting gave rise to the Joint Statement of the Workers’ and Employers’ Groups of 23 February on how the supervisory procedures and Standards Initiative operated, which was presented to the tripartite meeting. In response, the Government group adopted a statement in which it acknowledged the joint statement and welcomed the efforts made by the social partners. On that basis, a tripartite agreement was reached on the path forward, leading, among other outcomes, to CAS resuming its work during the 2015 Session of ILC, and to the establishment of the Standards Review Mechanism Tripartite Working Group (SRM TWG), which then began its work.

In March 2017, the Governing Body adopted a revised work plan on strengthening of the supervisory system, measure 2.3 of which—on ensuring legal certainty—provided for a tripartite exchange of views on Article 37.

In January 2020, the Office facilitated the tripartite exchange of views on further steps to ensure legal certainty based on a paper that provided clarifications on the meaning of legal certainty, and its implications as regards the interpretation of Conventions. The tripartite exchange of views permitted reinforcement of the shared understanding that: (i) Article 37 provides the only constitution-based mechanism guaranteeing legal certainty in matters of interpretation of Conventions; and (ii) the current constitutional order of the Organization establishes an obligation for its tripartite

constituents to refer any question or dispute relating to the interpretation of Conventions to ICJ, or possibly to an in-house tribunal.

During the Governing Body discussions of the March 2022 Session, there was a general understanding that Article 37(1) was intended for serious, complex, persistent disputes regarding interpretation, while Article 37(2) was intended to apply to less complex matters that could be dealt with swiftly. This decision was adopted by consensus.

In document GB.344/INS/5, of March 2022, the Governing Body “considering that settling disputes relating to the interpretation of international labour Conventions in accordance with article 37 of the ILO Constitution is fundamental for the effective supervision of international labour standards” requested the Office “to facilitate tripartite consultations with a view to preparing: (a) proposals on a procedural framework for the referral of questions or disputes regarding the interpretation of international labour Conventions to the International Court of Justice for decision in accordance with article 37(1); and (b) additional proposals for the implementation of article 37(2), taking into account the guidance of the Governing Body and the opinions expressed in the tripartite exchange of views”.

Despite all of these precedents of seeking consensus-based solutions through social dialogue, no agreement was reached during the March 2024 Session of the Governing Body on the procedure for referral to ICJ. As a result, the question of how to ensure legal certainty in a situation of persistent dispute regarding interpretation of a convention remains unanswered; such is the case of the continued challenge from the Employers’ group to the scope and meaning of Convention No. 87 regarding the right to strike and non-acceptance of the authoritative CEACR guidance on the matter.

Therefore, despite numerous attempts to resolve the issue at the tripartite level, severe disagreements remain among the ILO tripartite constituents with respect to interpretation of the right to strike in Convention No. 87, resulting in continued legal uncertainty on the issue. The standpoints of the tripartite constituents are unshakeable and there are no prospects of them converging.

It is clear that questioning how CEACR has interpreted Convention No. 87 and challenging the authority of CEACR to interpret conventions has triggered a dire institutional crisis.

There is a general feeling that persistent disagreement over such important elements of the ILO legislative mandate is undermining the credibility of the supervisory system and the reputation of ILO as a legislative body.

PROPRIETY OF THE REQUEST FOR AN ADVISORY OPINION FROM THE INTERNATIONAL COURT OF JUSTICE

The ILO supervisory bodies have customarily played an important role with respect to “interpretation” of international labour standards as part of their remit. For a long time, their opinions were generally considered sufficient to ensure legal certainty.

However, when the comments or conclusions of the supervisory bodies are not considered sufficient to ensure legal certainty, recourse must be had to Article 37, to prevent disagreements regarding interpretation from giving rise to levels of legal disputes and uncertainty that jeopardize harmonious ILO legislative activity.

On this point, it is important to specify that disputes regarding interpretation such as those concerning Article 37 are very different from the requests for

clarification or explanation that are often submitted to the Office through informal consultations or to obtain its opinion.

The Government of Spain considers that, in the matter of the ongoing dispute regarding the right to strike, despite countless attempts to find a consensus-based solution over the past 20 years, the tripartite consultations have not succeeded in settling uncertainties over the interpretations offered by the ILO supervisory bodies. An external impartial tribunal must therefore be involved, as provided for in Article 37 of the ILO Constitution.

With respect to the appropriate tribunal, the Government of Spain considers that, unlike the special procedure set out in Article 37(1) of the ILO Constitution to resolve complex legal issues relating to interpretation of the Constitution or conventions, establishment of an internal tribunal pursuant to Article 37(2) would be a practical means of swiftly resolving more technical disputes regarding interpretation, with fewer implications at the institutional level, that *prima facie* are not of sufficient importance to merit referral to ICJ.

Disputes regarding interpretation should only be considered under Article 37(1) in exceptional circumstances, because of the complexity of the issues involved and because of the damage that could be done to the image of ILO by a decision that does not satisfy all parties.

In view of the above, and given the exceptional nature of the dispute addressed herein, the Government of Spain considered that in this case an advisory opinion was needed from ICJ, in accordance with Article 37(1), which would make the resolution of the dispute as effective and legitimate as possible. Moreover, the fact that any decision by an internal tribunal could be appealed at the ICJ level would further delay the resolution of the dispute relating to interpretation.

It was the opinion of the Government of Spain that under Article 37(1) the question should be general in nature and refer to the scope or exact meaning of a provision, and not relate to application of a convention or questions arising from national legislation or practice.

The question ultimately posed to ICJ was: “Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?”

The same question had already been asked in 2014, when a decision was reached to continue with tripartite negotiations to reach a consensus-based solution (see Appendix I to The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards (GB.322/INS/5))

The question is both direct and general, containing no queries concerning the scope of the right to strike, its modalities, or limits in law or in practice.

D) PROCEDURE FOR REFERRING THE DISPUTE TO THE INTERNATIONAL COURT OF JUSTICE

SPECIAL SESSIONS OF THE GOVERNING BODY (see GB349bis/INS/1; GB349ter/INS/1)

Pursuant to the ILO Constitution and the Standing Orders of the Governing Body, a special session of the Governing Body may be convened when a minimum of regular members of the Governing Body so request in writing, or when the person acting as Chair deems it necessary. More specifically, this is set forth in Article 7(8) of the Constitution and Article 3.2.2 of the

Standing Orders of the Governing Body. See the following documentation prepared by the Office: Office note: Special GB sessions – Past practice and Office note: Special sessions of Governing Body – Origin and evolution of applicable rules.

Requests for special sessions of the Governing Body

In a letter dated 12 July 2023, addressed to the Director-General, the Chairperson of the Workers' group and Vice-Chairperson of the Governing Body formally requested that the long-standing dispute over the interpretation of Convention No. 87, regarding the right to strike, be referred urgently to ICJ for decision, pursuant to Article 37(1) of the ILO Constitution. The Vice-Chairperson also requested, to this end, that the Office take all necessary steps to place an item on the agenda of the 349th Session of the Governing Body (October-November 2023), for discussion and decision, regarding the request to ICJ for an advisory opinion, including the questions that ILO must put to ICJ. She also asked that the Office prepare a comprehensive report to facilitate an informed decision by the Governing Body in that session.

On 14 July 2023, the institutions and Member States of the EU, along with Iceland and Norway, submitted a letter to the Director-General of ILO. The text of the letter was as follows:

Dear Director-General,

The EU and its Member States, and the EFTA countries Iceland and Norway, members of the European Economic Area, are following up on the discussions at the 347th Governing Body and the decision point adopted on the 'Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty (GB.347/INS/5)'. We

would like to request that, as a matter of utmost importance, an item concerning the referral to the International Court of Justice (ICJ) of the dispute relating to the interpretation of ILO Convention (No. 87) on Freedom of Association and Protection of the Right to Organise as regards the right to strike be placed on the agenda of the 349th Session of the Governing Body as a point for decision.

We note that several attempts have been made by the tripartite constituents to overcome the long-standing dispute, including through social dialogue. Despite these efforts, a consensual outcome has not been achieved. Where disputes on legal interpretation continue, legal dispute settlement should be sought, as provided for in Article 37(1) of the ILO Constitution, which will offer a straightforward solution and a guarantee of integrity and independence. Without legal certainty this dispute will continue to have a detrimental impact on the supervisory system, the credibility of the ILO as a standard setting agency in the UN system and beyond, as well as on the effective implementation of the international labour standards. After more than a decade of failed attempts to find a solution, having legal clarity has become a matter of urgency.

In view of the above, and in line with our long-standing position reiterated during the 347th Governing Body, we request that this item be placed on the agenda of the 349th Governing Body. To inform the decision of the Governing Body, we ask the Office to prepare a comprehensive report containing all necessary elements, including the question(s) of interpretation to be considered for referral to the Court.

Due to the utmost institutional importance of this persistent interpretation dispute, we also ask the Office to circulate this letter as soon as possible to all constituents of the International Labour Organization ahead of the Governing Body discussions.

The letter was signed by Lotte Knudsen, Permanent Representative of the European Union to the United Nations in Geneva and Aurora Díaz-Rato Revuelta, Permanent Representative of Spain to the United Nations in Geneva.

On the same day, separate letters on the subject were submitted by the Government of the Federative Republic of Brazil, the Government of the Republic of South Africa and the Government of the Argentine Republic, asking that the matter of interpretation of Convention No. 87 regarding the right to strike be referred to ICJ, with a view to a decision being reached.

In September and October of the same year, similar letters were submitted by Barbados, Colombia, Angola, Ecuador and Somalia, bringing the total number of governments to 36, 9 of which are regular members of the Governing Body: Barbados, Brazil, Colombia, Czechia, France, Germany, Italy, Romania and Sweden.

Importantly, only regular members have voting rights, meaning that support from a majority of regular members was crucial to deciding to submit the request for an advisory opinion to ICJ.

Because 9 regular members from the Government group and 14 regular members from the Workers' group backed the request, the ILO Legal Adviser determined that the conditions of Article 7(8) of the ILO Constitution had been met, whereby a "special meeting shall be held if a written request to that effect is made by at least sixteen of the representatives on the Governing Body".

Therefore, it was decided that a special session would be held on the request for referral from the Workers' group and 36 governments through separate letters, following the 349th Session of the Governing Body.

For procedural reasons, the EU and its Member States sent a second letter to clarify that their request should extend to a special session of the Governing Body, as the letter dated July asked that the matter be included on the agenda for the 349th Session of the Governing Body in November, which the Employers' group opposed, as the agenda for the meeting had already been agreed and was therefore final.

On 2 August 2023, the Office received a letter signed by the Chairperson of the Employers' Group and Vice-Chair of the Governing Body, expressing the opinion that a meeting of the Officers of the Governing Body to update the provisional agenda could only be scheduled once the Officers had had adequate time and opportunity to properly consult with the other members of the tripartite screening group, as stipulated in Article 3.1.3 of the Standing Orders of the Governing Body. The Chairperson of the Employers' Group and Vice-Chair of the Governing Body also stressed the need to find a solution to the dispute over interpretation within the framework of social dialogue, as she considered that the issue of the right to strike could not simply be given out of hand and left to an external institution to decide, and that future deliberations by the Governing Body on the matter should therefore primarily incorporate ILO-internal options.

Lastly, on 13 September 2023, the 14 regular members of the Employers' group, and subsequently the Republic of Türkiye, submitted a request under paragraph 3.2.2 of the Standing Orders of the Governing Body to convene a special session of the Governing Body to urgently place a standard-setting item on the right to strike on the agenda of the 112th Session of ILC in June 2024.

The special sessions were held on 10 November for the request from the Workers' group and 36 governments; and on 11 November for the request

from the Employers' group and the Government of the Republic of Türkiye (see the Correspondence relating to the referral request).

In both sessions, the Director-General invited Member States, and through them national employers' and workers' organizations, to convey the observations they wished on the matter. The purpose of this was to enable inclusive discussions on an issue that is of particular institutional importance, thereby offering the opportunity for Members that are not currently represented on the Governing Body to express their opinions.

Discussions during the special sessions of the Governing Body

The first portion of the special sessions were held in plenary, to allow all members of ILO to participate, followed by discussions and decisions within the Governing Body.

The International Labour Office made a great effort to document all of the key questions posed, preparing specific documents on the legal basis for referral to ICJ, the background, the binding or non-binding nature of the advisory opinion of ICJ and the nature of protocols linked to conventions (see Office note: The binding legal effect of ICJ advisory opinions; Office note: Legal basis for requesting an advisory opinion; and Office note: ICJ advisory proceedings – Relevant jurisprudence).

The general feeling during the discussions was that a decision to refer a dispute regarding interpretation to ICJ should not be made unless it was backed by a broad consensus of ILO tripartite constituents, while recognizing that such a consensus was not identical to unanimity. Because of the direction the discussions took, a vote proved necessary in both sessions. In both cases, the votes of the EU Member States, together with those of other governments and the Workers' group resulted in adoption of

amendments to the decision, while the Employers' group expressed disappointment with the outcome.

Notably, during the exchanges, frequent reference was made to the lack of internal democracy at ILO. Although there had already been discussion of this aspect of ILO functioning, it became apparent that the question was more significant than suggested by the specific dispute over the right to strike; several governments stated during the discussions that they did not recognize the legitimacy of the Governing Body as an institution, owing to its lack of representativeness. Moreover, those governments questioned the power of the Governing Body to refer the issue of interpretation to ICJ, since it was based on a mandate from a delegating resolution from the 32nd Session of ILC in 1949, which they considered obsolete, as it had been adopted at a time when ILO did not have its current structure. Consequently, they demanded that the decisions be made by ILC, in which all countries vote with equal rights.

This, together with the severe criticism of the Director-General of ILO by the Employers' group, reflected how the dispute over the right to strike has eroded the institutions of ILO.

Analysis of the proposal to request an advisory opinion on the right to strike from the International Court of Justice

Prior to the discussion at the 349th bis Special Session, held on 10 November 2023, the Summary of the comments received from constituents relating to the Office background report was published as part of the meeting documents.

Spain considers that the process followed during consultations guaranteed rights, and that the Office played an impartial and transparent role. Spain

gives no credence to claims that the role played by the Office as part of its duties was not impartial.

As for events after July 2023, this report concurs with the Office background report (GB.349bis/INS/1/1, paragraphs 6 to 21), drawn up for the purposes of the Special Session of the Governing Body, convened pursuant to Article 7(8) of the ILO Constitution at the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to ICJ for decision in accordance with Article 37(1) of the ILO Constitution.

Accordingly, this report shall not go into the details of the procedure, as they are already available to ICJ.

Spain expresses its conformity with the Office's legal assessment that, as the request of the Worker's group and of the 36 governments related to the implementation of a constitutional procedure, it should be directly and immediately transmitted to the Governing Body for its consideration and that the Officers and the other members of the screening group had no authority to block or delay the transmission of the request to the Governing Body.

During discussions strong doubts were expressed as to whether the decision on the referral to ICJ could be adopted during the first stage, i.e. at the 349th bis Special Session of the Governing Body, and the wording of the questions was left for a later session. Nevertheless, many countries were against separating the two issues: referral to ICJ and the wording of the questions.

Moreover, there was also doubt regarding the questions in the Workers' group letter. It was thought that the second question could reopen the debate regarding the CEACR mandate, which dates back to 2014, which no group wished to endanger. The Employers' group and some governments did however express concern that CEACR had consistently overreached its

mandate, which is to issue non-binding opinions and recommendations resulting from an impartial and technical analysis.

The discussions focused on the two questions raised: (1) the substantive issue as to whether Convention No. 87 can be interpreted as protecting the right to strike; and (2) whether the mandate of CEACR gives it the authority to make such interpretations and, if so, whether such interpretations can go beyond general principles by specifying certain details regarding the application of the principle.

There was widespread agreement among EU Member States on the referral of the first question (whether the right to strike can be considered to stem from Convention No. 87 as an internationally recognized workers' right despite not being explicitly stated in the Convention) to ICJ.

Regarding the second question (as to whether CEACR had acted within its mandate in stating that the right to strike is inherent to freedom of association), EU Member States remained unconvinced as they believed the consultation would weaken the supervisory system, therefore the second question was removed to avoid damaging the status quo on the mandate of CEACR.

Moreover, some governments expressed concerns of a different kind. These included the concern that the ICJ advisory opinion could create new obligations stemming from a strengthened mandate for CEACR.

The mandate of CEACR originates in a 2014 decision by the Governing Body, and has not been formally contested since. It has, however, been contested in practice, as the Employers' group has questioned the validity of the interpretations of CEACR regarding the right to strike and considers that CEACR has overreached its authority by interpreting the content of a convention, which is why they want to close the door to future interpretations of regulatory instruments.

Lastly, and in order to settle the current dispute and create the legal certainty necessary for the supervisory system to fully function again, EU Member States, alongside other governments and the Workers' group, supported a resolution whose operative part included the recognition of the mandate of CEACR to interpret an ILO regulatory instrument.

As regards the competence of CEACR to interpret conventions, the position of the Employers' group was that, although it considered that CEACR had attempted to de facto widen its mandate, the Committee's tasks should remain purely technical and not judicial. Therefore, the group has consistently objected to what it considers a "dogmatic" acceptance by CEACR of a universal, explicit and detailed right to strike and to attempts by CEACR to produce new "jurisprudence" despite lacking law-making power or the authority to issue binding rulings on the application of national laws and regulations.

Moreover, the Employers' group contends that CEACR findings cannot be regarded as binding pronouncements since, under Article 37 of the ILO Constitution, only ICJ may give a binding interpretation of international labour standards.

Nevertheless, the Employers' group was against any kind of ICJ consultation. It stated that this body, in fact, can only provide limited legal certainty regarding interpretation dispute, since its opinions are not inherently binding from a legal standpoint.

Although ILC adopted a decision in 1949 to delegate the authority to request an advisory opinion from ICJ to the Governing Body, consideration was given to the possibility of allowing ILC to take the final decision regarding the referral.

However, after long discussions regarding the different alternatives put forward by ILO constituents, there was a strong vote in favour of deciding

jointly on the wording of the question and the referral to ICJ, as well as a strong vote against other options, such as proposing the adoption of a Protocol for Convention No. 87.

The urgent nature of the request for an advisory opinion is due to the lack of tripartite consensus, which damages ILO as an institution, its supervisory system and the legal certainty of its body of law (see **Request for Advisory Opinion to ICJ/Interpretation of Convention No. 87 with respect to the right to strike**).

Analysis of the proposal for a new regulatory instrument on the right to strike

On 12 September 2023, the 14 regular members of the Employers' group and the Republic of Türkiye submitted a request under Article 3.2.2 of the Standing Orders of the Governing Body to convene a special session of the Governing Body on the urgent inclusion of a standard-setting item on the right to strike on the agenda of the 112th Session of ILC in June 2024.

The request proposed that ILC adopt a Protocol for Convention No. 87 on the right to strike or more broadly, on industrial action, in order to determine authoritatively the scope of and limitations on the right to strike in the context of Convention No. 87 and thus settle the ongoing interpretation dispute.

In preparation for the meeting, the Office collected and published Comments received from constituents on the referral request (In the language of submission) on the submitted request. The matter was considered at the 349th ter Special Session of the Governing Body.

Spain does not support the allegations made by the Employers' group that the Workers' group and 36 governments received beneficial treatment. Spain

endorses the Office's response that differences are due to time constraints, which made it difficult to summarize the comments on the proposal submitted by the Employers' group and the Republic of Türkiye.

As regards the content of said request, the main issue for EU Member States and other governments resulted from the fact that this solution would implicitly recognize that the right to strike cannot be understood as a corollary to Convention No. 87.

The Spanish government does not believe that there is a legal vacuum in the international protection and regulation of the right to strike. The right to strike is protected by Convention No. 87 and is inextricably bound to the right to collective bargaining and freedom of association, as stated by ILO supervisory bodies during the last 70 years.

Therefore, it does not seem possible to make progress in the proposed direction until the current dispute has been settled through an authoritative and binding ICJ decision.

As regards form, ILO protocols were introduced to allow a more flexible method of revision for certain provisions of existing conventions. Therefore, if, as the Employers' group states, the right to strike does not stem from Convention No. 87—to which the proposed protocol would be linked—it would not be logical or coherent with ILO constitutional theory and practice to link said protocol to Convention No. 87.

Therefore, the drafting of the proposed regulation would result in the existing rights enjoyed by all workers being reversed or eliminated, which runs against the constitutional aim, mandate and purpose of ILO.

The only viable method for settling the dispute on the right to strike and provide legal certainty is to refer it to ICJ so that it may adopt an authoritative and binding decision.

Moreover, the proposed solution would seriously challenge the authority of CEACR and CFA, and would also compromise the principle of legal certainty of the system of international labour standards as a whole.

Lastly, the possible protocol would only be binding for those countries that ratified it, creating a legal vacuum in the international regulation of the right to strike.

Hence, the proposed solution was unacceptable to Spain, as it was to the Workers' group and numerous governments, since the right to strike would not be “codified” for States which did not go on to ratify the new protocol. In other words, from that moment onwards countries that ratified Convention No. 87 would not consider that they were obliged to guarantee the right to strike despite more than 70 years of guidance to the contrary.

E) POSITION OF THE SPANISH GOVERNMENT ON THE MATTER REFERRED TO THE INTERNATIONAL COURT OF JUSTICE

Following referral of 14 November 2023 (see Resolution adopted by ILO Governing Body at its 349th bis (special) session), the Court issued an Order on 16 November 2023 setting out its decision that ILO and the States parties to Convention No. 87 are considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion and referring to the possibility of their presenting written statements on this question to the Court.

Spain ratified Convention No. 87 on 20 April 1977 and the Spanish Government therefore considers that Spain meets the requirements to state its position on the dispute regarding whether or not the right to strike is a corollary of Convention No. 87.

ILO is the only tripartite body in the United Nations system. This means the decisions it takes are adopted with the participation of workers, employers and governments.

ILO Member States undertake to comply with its mandate not only in law, but also in practice. Although ILO supervisory bodies are not jurisdictional bodies, their recommendations offer highly valuable guidance to all parties, which are morally obliged to comply therewith.

When an international convention is ratified, a State must guarantee that national legislation is compliant therewith. In many cases, owing to the recommendations made by supervisory bodies, States adjust their legislation to comply with a convention.

The Spanish Government, which held the presidency of the Council of the EU during the second half of 2023, led the request for a special session of the Governing Body from within the EU through a separate letter to the ILO Director-General, not referring to the Workers' group request as it contained specific questions.

EU Member States formally requested that the long-standing dispute on the interpretation of Convention No. 87 be urgently referred to ICJ to be settled, pursuant to Article 37(1) of the ILO Constitution.

The Spanish Government understands the right to strike to be an essential component of the freedom of association and inseparable from it. This stems from the institutional structure set out in the 1978 Spanish Constitution.

As stated in Article 7 of the Spanish Constitution:

Trade unions and employers' associations contribute to the defence and promotion of the economic and social interests which they represent. Their creation and the exercise of their activities shall be unrestricted in so far as they respect the Constitution and the law.

The position of this provision within the Preliminary Part of the Constitution demonstrates the basic constitutional importance of trade unions (and employers' associations) to the institutions as a whole, and their status as essential social actors upholding democracy.

This statement is complemented by and developed through the recognition of two fundamental rights (which enjoy the maximum protection afforded by Spanish law): freedom of association and the right to strike, both included in Article 28 of the Spanish Constitution.

Article 28 of the Spanish Constitution provides that:

*1. **Everyone has the right to freely join a trade union.** The law may limit the exercise of this right or make an exception to it in the case of the Armed Forces or Institutes or other bodies subject to military discipline, and shall regulate the special conditions of its exercise by civil servants. Trade union freedom includes the right to set up trade unions and to join the union of one's choice, as well as the right of the trade unions to form confederations and to found international trade union organisations, or to become members thereof. No one may be compelled to join a trade union.*

*2. **The right of workers to strike in defence of their interests is recognised.** The law regulating the exercise of this right shall establish the guarantees necessary to ensure the maintenance of essential community services.*

Despite formal separation of the rights into two separate paragraphs (exclusively related to historical circumstances: the right to strike was recognized before the enactment of the Spanish Constitution and therefore before freedom of association was recognized), said rights appear in the Spanish Constitution as necessarily complementary instruments. There would be no true right to strike without the possibility of exercising freedom of association, and no true freedom of association could exist if it did not include the right to strike. Therefore, as stated in Article 7 of the Spanish Constitution, all of this is essential in order to defend the interests unions represent.

This relationship, reflected in the 1978 Spanish Constitution, was emphasized by the Spanish Constitutional Court in Ruling 11/1981, which analysed whether the regulation of the right to strike included in Royal Decree-Law 17/1977 on labour relations (passed before the Constitution itself) was constitutional.

Regarding the matter at hand, the Constitutional Court established early on:

*Not only is the right to strike a personal right, it is also a constitutional right, consistent with the idea of a social and democratic State subject to the rule of law established by Article 1.1 of the Constitution, the meanings of which include that of legitimizing the means to defend the interests of socially dependent groups and strata of the population. This includes granting constitutional recognition to an instrument to exert pressure and which has been shown for centuries to be necessary to affirm the interests of workers in socio-economic disputes. These disputes may not be ignored by a social State, which can and must provide appropriate institutional channels for them. **The right to strike is also consistent with the recognized right to form unions contained in Article 7 of the Constitution, since a union lacking the***

right to strike would, in a democratic society, be devoid of substance. The right to strike is also consistent with promoting conditions which ensure that the freedom and equality of individuals and social groups are real and effective (Article 9.2 of the Constitution).

The inclusion of the right to strike within the scope of freedom of association has been a permanent feature in the Constitutional Court's doctrine. It includes the right to strike among the appropriate means of action available to a union to fulfil its constitutional obligations to promote and defend the interests it represents (Constitutional Court Ruling 198/2004, of 15 November, legal basis 5).

As the Constitutional Court states, freedom of association means the free exercise of union activity, using the means of action considered appropriate to defend and promote the interests it represents, which not only includes collective bargaining but also, fundamentally, the right to strike (Constitutional Court Ruling 123/2018 of 12 November, legal basis 4).

This understanding has been fully incorporated into the legal regulation of freedom of association, which is included in *Organic Law 11/1985 of 2 August, on freedom of association.*

In fact, as stated in its introduction, Article 2 establishes the substance of freedom of association on two levels: the substance of workers' freedom to join or not to join any union they choose, and the substance of unions' freedoms. **The introduction also claims that Article 2 includes the most progressive international doctrine on union substance, independence and freedom to act.**

Specifically, paragraph 2 of Article 2 states:

2. Unions, in the exercise of freedom of association, have the right to:

- a) write their own by-laws and regulations, organize their internal administration and activities and decide on their action programme;*
- b) set up, join and withdraw from federations, confederations and international organizations;*
- c) not be suspended or dismantled unless ordered by a final court ruling founded on serious breaches of the law;*
- d) Exercise freedom of association inside and outside the company, including in all cases the right to collective bargaining, the right to strike, to bring up individual and collective disputes and to put forward candidates for ballots to Works councils and as Workers' representatives, and equivalent bodies in public administrations, pursuant to relevant regulations.***

It follows that the Constitution and the law, taking into account international standards, establishes that "**in all cases**" the right to strike is part of freedom of association. The Spanish Constitutional Court has identified the exercise of the right to strike as part of the **essential content or minimum obligatory core of freedom of association**. This allows unions to fulfil the duties assigned to them by Article 7 of the Spanish Constitution (Constitutional Court Rulings 9/1988, 51/1988, 173/1992, among others).

In conclusion, Spanish law, within the framework of international law (which must guide the interpretation of regulations concerning the fundamental rights and freedoms recognized by the Spanish Constitution, pursuant to Article 10.2 thereof) recognizes the right to strike as an essential component of recognized union powers to fulfil their constitutional duty and views it as an inseparable element of freedom of association.

Therefore, the core substance of freedom of association is a series of powers which "in all cases" includes the right to strike. Without said power, freedom of association would be unrecognizable and devoid of substance; it would be impossible for unions to fulfil their constitutional duty to defend and promote workers' interests and rights (Constitutional Court Ruling 130/2021).

The Spanish Constitution and Spanish Organic Laws, as well as all the doctrine and case law—including that of the Constitutional Court—which interprets these laws, consistently agree that the right to strike is an essential component of freedom of association to the extent that this freedom would be unrecognizable if it did not include the right to strike.

In short, the core substance of freedom of association in Spanish law, but also, we believe, in ILO international labour standards, cannot be understood if it does not include the right to strike as an instrument unions can make use of. Otherwise, freedom of association would be left devoid of substance, and its true and effective recognition as a fundamental right would be prevented (Constitutional Court Ruling 94/1995).

The Spanish Government expects the ICJ advisory opinion to confirm the position—held for more than 70 years—that the regulation of the right to strike effectively stems from Convention No. 87.

Such an opinion would provide legal certainty, guarantee the credibility and functioning of the ILO system of international labour standards and strengthen the coherence of the ILO supervisory system. This outcome would be consistent with Spanish interpretation and practice regarding the scope of application of Convention No. 87 with respect to the right to strike.

We must emphasize the importance of the right to strike in the context of the social justice mandate of ILO and its constitutional principle of freedom of association.

Implications of the advisory opinion of the International Court of Justice

Spain has noted that ILO, under the supervision and ultimate responsibility of its Director-General, has attached a full dossier to the request. This dossier contains all the relevant available information, as well as a preliminary analysis of the interpretation dispute and an objective explanation of the procedure which led to the referral of the question to ICJ and the scope of said question. This confirms that the request for an advisory opinion from ICJ has been as complete and informed as possible.

It is now imperative that ICJ issue a clear advisory opinion giving immediate practical guidance to ILO bodies regarding the question referred in the request.

Spain wishes to emphasize that, if the ICJ advisory opinion confirms the position held for more than 70 years by ILO supervisory bodies regarding the right to strike as a corollary to Convention No. 87, this would in no way change the regulations and practice stemming from its application. In other words, the ILO supervisory system would maintain its current course, and CEACR guidance to Member States and social partners at national level on the interpretation and implementation of Convention No. 87 in this regard would be strengthened.

Only if ICJ rejected the interpretation held for the last 70 years by ILO supervisory bodies regarding the right to strike as a corollary to Convention No. 87 would there be national and international repercussions regarding the implementation of Convention No. 87 with respect to the right to strike. This would likely lead to a new period of additional discussions among ILO constituents to assess the need to undertake regulatory action of some kind at ILO level.

As for the binding nature of the ICJ advisory opinion, the Spanish Government believes the rule of law demands that States systematically comply with the rulings of international courts. It is difficult to imagine why the principle of the rule of law should apply any differently to ILO when it requests an advisory opinion on the basis of the Article concerning the settlement of interpretation disputes set forth in the ILO Constitution.

The Kingdom of Spain has appointed the undersigned as Agent for the purposes of the present Declaration.

Embassy of Spain to the Kingdom of the Netherlands.

Lange Voorhout, 50, 2514 EG, the Hague

Respectfully,

A handwritten signature in blue ink, appearing to be 'CFG' or similar initials, written in a cursive style.

Consuelo Femenía Guardiola,

Ambassador of Spain in the Netherlands