INTERNATIONAL COURT OF JUSTICE

RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

WRITTEN COMMENTS OF AUSTRALIA

16 SEPTEMBER 2024

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I. INTRODUCTION AND PRELIMINARY OBSERVATIONS

A. INTRODUCTION

1. Australia wishes to avail itself of the opportunity afforded by the International Court of Justice ('**ICJ**' or '**the Court**') to submit written comments on the written statements filed by States and organisations (the '**participants**') in the first round of these proceedings. The following observations are submitted in accordance with the Order of the Court of 16 November 2023.[1]

2. As emphasised in its Written Statement of 16 May 2024 ('**Written Statement of Australia**'), Australia reiterates its longstanding commitment to the International Labour Organization ('**ILO**'), in particular its critical role in setting international labour standards. Australia also reiterates the importance of achieving legal certainty through the resolution of the ongoing disagreement within the ILO as to whether the right to strike of workers and their organisations is protected under *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise* ('**Convention 87**').[2]

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[1] Although Australia has considered all of the written statements filed in the first round of these proceedings, those statements are not exhaustively addressed in these written comments. The fact that Australia has not addressed a statement, or particular comments made within a statement, should not be taken as an indication that Australia agrees or disagrees with the content of that statement or those particular comments.

[2] *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise*, adopted 9 July 1948, 68 UNTS 17 (entered into force generally 4 July 1950 and for Australia 28 February 1974) (ILO Dossier Document No. 120).

3. Like many of the participants in these proceedings,[3] Australia considers that, taking account of the applicable principles of treaty interpretation, [4] Convention 87 protects the right to strike.[5] Australia also shares the view expressed by a number of participants that the domestic law of State Parties may impose restrictions on the right to strike under Convention 87.[6] These matters are addressed in more detail below in Chapter II.

B. SUMMARY AND STRUCTURE OF AUSTRALIA'S COMMENTS

4. Australia's written comments on the statements filed by other participants proceed as follows:

Chapter I addresses the Court's jurisdiction to render an advisory opinion (**Section C**), the legal effect of the Court's Advisory Opinion (**Section D**) and the scope of the question posed to the Court (**Section E**).

Chapter II addresses the applicable principles of treaty interpretation (**Section A**), the interpretation of the text of Convention 87 in accordance with the rule reflected in Article 31 of the Vienna Convention on the Law of Treaties ('**Vienna Convention**') (**Section B**) and the supplementary means of interpretation referred to in Article 32 of the Vienna Convention (**Section C**).

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[3] See, eg, Written Statement of the Federative Republic of Brazil, paras. 22-27; Written Statement of the Republic of Colombia, paras. 1.2, 3.46; Written Statement of the French Republic, paras. 38-39; Written Statement of Germany, para. 45; Written Statement of the International Cooperative Alliance ('ICA'), para. 3; Written Statement of the International Trade Union Confederation ('ITUC'), paras. 4.5, 4.9; Written Statement of Mexico, paras. 41, 58; Written Statement of the Kingdom of the Netherlands, paras. 2.1, 2.10, 2.24, 2.28, 2.32; Written Statement of the Kingdom of Norway, paras. 12-13; Written Statement of the Organisation of African, Caribbean and Pacific States ('OACPS'), para. 35; Written Statement of the Republic of South Africa, paras. 45-46, 65; Written Statement of the Republic of Tunisia, p. 1; Written Statement of the United States of America, para. 2.3; Written Statement of the Republic of Vanuatu, para. 19.

[4] The applicable principles of treaty interpretation, which reflect customary international law, are set out in the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[5] Written Statement of Australia, paras. 25-94.

[6] See, eg, Written Statement of Australia, para. 47; Written Statement of the French Republic, para. 25; Written Statement of Germany, para. 36; Written Statement of the Kingdom of Norway, para. 23; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 78; Written Statement of the Republic of Tunisia, p. 3; Written Statement of the Republic of South Africa, paras. 51(d), 53(c), 65; Written Statement of the Kingdom of the Netherlands, paras. 4.2-4.10.

C. JURISDICTION AND DISCRETION

5. The written statements before the Court indicate strong agreement with Australia that the Court has jurisdiction to render an advisory opinion in these proceedings.[7] No participant suggests that the requirements for the exercise of the Court's advisory jurisdiction are not met in these proceedings.

6. As submitted by Australia,[8] there is also broad agreement between participants that the Court should, in the exercise of its discretion, render an advisory opinion, and that there is no compelling reason for the Court to decline to do so in this case.[9]

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[7] The following written statements submit that the requirements for the Court's advisory jurisdiction are met: Written Statement of Australia, para. 12; Written Statement of the International Labour Organization ('ILO'), para. 98; Written Statement of the French Republic, para. 24; Written Statement of the Republic of Vanuatu, para. 13; Written Statement of the OACPS, para. 13; Written Statement of the ITUC, para. 2.1; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 8; Written Statement of the Republic of Colombia, para. 1.29; Written Statement of the Swiss Confederation, para. 10; Written Statement of the Kingdom of Norway, para. 3; Written Statement of Mexico, para. 6; Written Statement of the Federative Republic of Brazil, para. 8; Written Statement of the Kingdom of Spain, pp. 9-10.

The following written statements are silent on, but do not contest, the Court's jurisdiction: Written Statement of the ICA; Written Statement of Italy; Written Statement of the World Federation of Trade Unions ('WFTU'); Written Statement of the People's Republic of Bangladesh; Written Statement of Germany; Written Statement of the Republic of Poland; Written Statement of Business Africa; Written Statement of the International Organisation of Employers ('IOE'); Written Statement of the Republic of South Africa; Written Statement of Canada; Written Statement of the Republic of Tunisia; Written Statement of the United States of America; Written Statement of Japan; Written Statement of Costa Rica; Written Statement of the Somali Federal Republic; Written Statement of Belize; Written Statement of the Kingdom of the Netherlands (which leaves it to the Court to satisfy itself of jurisdiction), para. 1.4.

[8] Written Statement of Australia, para. 17.

[9] The following written statements positively submit that the Court should, in the exercise of its discretion, render an advisory opinion: Written Statement of Australia, para. 17; Written Statement of the Republic of Colombia, para. 1.29; Written Statement of the OACPS, para. 18; Written Statement of the Republic of Vanuatu, para. 13; Written Statement of the ILO, para. 124; Written Statement of the ITUC, para. 2.9; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 8; Written Statement of the Federative Republic of Brazil, para. 9; Written Statement of Mexico, paras. 15-19.

The following written statements are silent in respect of the Court's discretion: Written Statement of the Kingdom of Spain; Written Statement of the ICA; Written Statement of the Kingdom of the Netherlands; Written Statement of the Kingdom of Norway; Written Statement of the Republic of South Africa; Written Statement of Japan; Written Statement of the People's Republic of Bangladesh; Written Statement of Costa Rica; Written Statement of Business Africa; Written Statement of the Republic of Tunisia; Written Statement of the French Republic; Written Statement of the United States of America; Written Statement of the WFTU; Written Statement of the Republic of Poland; Written Statement of Italy; Written Statement of Canada; Written Statement of Belize; Written

D. STATUS OF THE COURT'S ADVISORY OPINION

7. A small number of participants argue that the Court's Advisory Opinion will be binding on the ILO and its constituent members (i.e. States, workers' and employers' representatives).[10] One participant specifically requests that the Court confirm that the Opinion is binding.[11]

8. Whilst Australia recognises that the Court's Opinion will contribute much needed clarity and certainty to the interpretation of Convention 87, it will not have binding effect.[12] The Court itself has observed that, when asked for an advisory opinion, its 'reply is only of an advisory character: as such, it has no binding force'.[13] Any suggestion otherwise overlooks and undermines the very *raison d'être* of the Court's advisory jurisdiction as a means for authorised international organisations to seek *advice* from the Court. A finding that the advisory opinion requested of the Court in these proceedings is binding would inevitably stifle further requests for such opinions. Given these broader ramifications, Australia offers the following brief comments in response to the suggestion that has been made to the effect that the Opinion will be binding on parties to Convention 87.

Statement of the Somali Federal Republic; Written Statement of Germany; Written Statement of the IOE.

The Republic of Indonesia submits that the Court should exercise its discretion to decline to respond to the question posed. It does so on the basis that rendering an opinion would be tantamount to resolving an ongoing bilateral dispute between employers and workers and would also be contrary to the tripartite dispute resolution framework (Written Statement of the Republic of Indonesia, para. 22). Australia does not agree with these arguments.

[10] Written Statement of the Republic of Indonesia, para. 10; Written Statement of the Kingdom of Spain, p. 10, Written Statement of the Kingdom of Norway, para. 4; Written Statement of the ILO, para. 127; Written Statement of the ITUC, para. 4.223.

[11] Written Statement of the ITUC, para. 4.223(c). Note that the Written Statement of the ITUC does not outline the basis upon which it considers the Court's Opinion will be binding.

[12] Written Statement of Australia, paras. 9, 17.

[13] *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, pp. 65, 71; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, pp. 177, 189.

9. The relevant statements[14] seek to rely, in particular, on Article 37 of the ILO Constitution which provides that:

> 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.
>
> 2. Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.[15]

10. Certain participants contend that the use of the word 'decision' in Article 37(1) signifies that the Court's Opinion will be binding on the ILO and its constituents.[16] However, Australia submits that the use of this term is, in and of itself, insufficient to indicate an intention that any advisory opinion rendered by the Court relating to the ILO Constitution or any ILO convention will be binding. The term 'decision' was originally included in Article 423 of the Treaty of Versailles.[17] Yet, the Permanent Court of International Justice ('**PCIJ**') did not

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[14] See Written Statement of the Republic of Indonesia, para. 10; Written Statement of the Kingdom of Spain, p. 10, Written Statement of the Kingdom of Norway, para. 4; Written Statement of the ILO, para. 127.

One participant also relies on Article 31 of the ILO Constitution to argue that the Court's advisory opinions are binding (Written Statement of the ITUC, para. 4.223). However, Article 31 provides that a decision of the Court 'in regard to a complaint or matter which has been referred to it in pursuance of article 29 shall be final'. This clearly concerns referral of complaints from Commissions of Inquiry to the Court. Neither Article 29, nor Article 31, are concerned with referral of questions to the Court for an advisory opinion, and as such they are not relevant to the question whether the Court's advisory opinions are binding on the ILO, its constituents or parties to Convention 87.

[15] *Constitution of the ILO*, opened for signature 9 October 1946, 15 UNTS 35 (as amended; entered into force 20 April 1948) (ILO Dossier Document No. 1).

[16] Written Statement of the Kingdom of Norway, para. 4; Written Statement of the ILO, para. 129; Written Statement of the Kingdom of Spain, p. 10.

[17] *Treaty of Peace between the Allied and Associated Powers and Germany, and Protocol,* signed 28 June 1919, [1920] ATS 1 (treaty entered into force 10 January 1920, protocol entered into force 28 June 1919) *('Treaty of Versailles').*

suggest that its inclusion in either Article 423 of the Treaty of Versailles or Article 37(1) of the ILO Constitution resulted in its six advisory opinions concerning the ILO being binding on the organisation or its constituent members.[18]

11. One participant also points to Article 37(2), along with its drafting history, to argue that the Court's Opinion must be binding because it places the Court 'at the apex of the jurisdictional set-up for the resolution of interpretation disputes' so its decisions 'should *a fortiori* also be final and binding on all Member States'.[19] Australia disagrees. The effect of Article 37(2) is that the Court's advisory opinions, where relevant, will be binding on any tribunal constituted under Article 37(2). The provision simply provides the applicable law for tribunals constituted under Article 37; it does not provide that the Court's advisory opinions are in any other respect binding. Rather, the implication to be drawn from the inclusion of Article 37(2) is that advisory opinions rendered at the request of the ILO are not otherwise binding.

12. Therefore, Australia submits Article 37 of the ILO Constitution does not provide a basis upon which the Court's Opinion in these proceedings will be binding. Instead, Article 37 can be contrasted with provisions in other treaties which provide that the Court's advisory opinions will be treated as binding on States in those specific contexts.[20]

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[18] *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, Advisory Opinion, 1926, P.C.I.J. (ser B) No. 1*; *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion, 1922, P.C.I.J. (ser B) No. 2*; *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production, Advisory Opinion, 1922, P.C.I.J. (ser B) No. 3*; *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer, Advisory Opinion, 1926 P.C.I.J. (ser B) No. 13; Free City of Danzig and ILO, Advisory Opinion, 1930, P.C.I.J. (ser B) No. 18; Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J. (ser A/B) No. 50.*

[19] Written Statement of the ILO, para. 134.

[20] See, eg, *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946) Article 30; *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for signature 21 November 1947, 33 UNTS 261 (entered into force 2 December 1948) Article 32; *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, opened for signature 21 March 1986, UN Doc A/CONF.129/15 (not yet in force) Article 66. See also

E. SCOPE OF THE QUESTION

13. Australia recognises and shares the view expressed by some participants that the question referred for an advisory opinion is by its very terms limited to requesting the Court's consideration of whether the right to strike is protected under Convention 87.[21] As noted by a number of participants, the Court has not been asked to express its view on the scope of any such right or permissible limitations upon it.[22] Similarly, the Court has not been asked to consider whether any such right is protected under customary international law.[23] Some participants also have observed that the competence (or otherwise) of ILO committees to interpret the ILO Conventions has not been referred to the Court.[24] Australia agrees that these issues are beyond the scope of the question, as the plain text of the question and the history of its negotiation within the ILO Governing Body demonstrate.

14. Some participants have contended that the Court should reformulate the question put and/or adopt an expansive interpretation of its scope. In particular, one participant has invited the Court to express its view on whether the right to strike as conceptualised in detail by the Committee of Experts on the Application of Conventions and Recommendations ('**CEACR**') is protected by

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Robert Kolb, *The International Court of Justice* (Hart, 2013), p. 1100; Shabtai Rosenne, *The Law and Practice of the International Court of Justice* (Martinus Nijhoff 2006), p. 953.

[21] See, eg, Written Statement of the French Republic, para. 25; Written Statement of the ILO, para. 118; Written Statement of Mexico, para. 9; Written Statement of the Kingdom of Norway, para. 25; Written Statement of the ITUC, para. 1.7.

[22] See, eg, Written Statement of the French Republic, para. 25; Written Statement of the ITUC, para. 1.7; Written Statement of the Kingdom of Norway, para. 25; Written Statement of the Kingdom of Spain, p. 28.

To the extent the Court wishes to express a view on the scope of the right to strike under Convention 87 or permissible limitations upon it, the Court may wish to record that in State practice the right to strike is not absolute, and that the range of restrictions identified by participants in their written statements is diverse.

[23] Customary international law is addressed in, eg, the Written Statement of the ICA, para. 3; Written Statement of the OACPS, paras. 24-34; Written Statement of the Republic of Colombia, paras. 3.48-3.68; Written Statement of the Republic of South Africa, para. 62; Written Statement of the ITUC, para. 4.180-4.188; Written Statement of the ILO, para. 416; Written Statement of the IOE, paras. 262-270; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 78.

[24] See, eg, Written Statement of the French Republic, para. 25; Written Statement of the ILO, para. 118; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 11.

Convention 87.[25] Another participant has suggested that the question put should be interpreted as relating not only to the existence of the right to strike in Convention 87, but also to the question of who is competent to establish the content, modalities of exercise and limits of the right.[26]

15. The Court has indicated that it will reformulate questions referred to it for an advisory opinion only in exceptional circumstances and only to ensure that it gives a reply based on law.[27] There can be no suggestion that the question put to the Court in the present proceedings – which, at its core, is a question of treaty interpretation – is other than a legal question, susceptible to a reply based on law.[28]

16. The Court has modified the question put to it in advisory proceedings either when the Court has considered the question to have been poorly formulated, with regard to the requesting organ's intentions and/or the applicable law, or when the question was not clear.[29] The question put in the present proceedings does not fall into either of these categories:

    (a) As to the first category, Australia submits that the question transmitted to the Court is well-formulated. It is unambiguous in seeking the Court's guidance on the legal question that has generated ongoing disagreement within the ILO (the protection of the right to strike by Convention 87). It also reflects the intentions of the Governing Body in seising the Court, as evidenced by the negotiating history of the ILO Resolution requesting

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[25] Written Statement of the IOE, paras. 30-31.

[26] Written Statement of the Swiss Confederation, para. 42.

[27] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, para. 135.

[28] Written Statement of Australia, para. 14. As the Court has itself observed, treaty interpretation is an essentially judicial task. See *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, I.C.J. Reports 1948*, p. 57, p. 61.

[29] Kolb (n 20) p. 1078. See, eg, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, para. 35; *Application for Review of Judgment No. 273 of the United Nations Administering Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325, paras. 46-47; *Legal Consequences for the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 38; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, para. 50.

an advisory opinion from the Court. In particular, when considering the Resolution requesting an advisory opinion, the ILO Governing Body omitted a question initially proposed by the Workers' Group relating to the competence of the CEACR.[30]

(b) As to the second category, Australia shares the view expressed in some other statements that the question put to the Court is in clear terms.[31] It is narrow and specific: it asks only whether the right to strike of workers and their organisations is protected under Convention 87.[32]

17. Contrary to the submission that a reply to the question put would be ineffectual,[33] Australia reaffirms its view that an advisory opinion by the Court responding to the question put to it will contribute much needed clarity and certainty to the interpretation of Convention 87.[34]

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[30] In discussions within the ILO Governing Body regarding the referral of the request to the Court, the Workers' Group initially recommended that two questions be put: see *Letter of the Worker Vice-Chairperson of the ILO Governing Body to the ILO Director-General*, dated 12 July 2023, p. 2 (ILO Dossier Document No. 5). The first question was in the same terms as the question now before the Court. The second question related to the competence of the CEACR. At the 394th bis (Special) Session of the ILO Governing Body, 44 States proposed an amended draft resolution which omitted the second question. The ILO Governing Body adopted this amended resolution: see International Labour Organization, Governing Body, 349th bis (Special) Session, *Minutes of the 349th bis (Special) Session of the Governing Body of the International Labour Office* (Minutes, 31 January 2024), paras. 3, 146 (draft minutes at ILO Dossier Document No. 31). This negotiating history supports the conclusion that it was the plain intention of the Governing Body to confine its request for an advisory opinion to the question of the protection of a right to strike under Convention 87.

[31] See, eg, Written Statement of the French Republic, para. 25; Written Statement of the ILO, para. 124.

[32] One participant has submitted that the question is vague as to whether the right to strike means a right to strike in abstract or a right to strike as defined by the CEACR: see Written Statement of the IOE, para. 5. The latter interpretation is untenable in light of the history of the referral Resolution set out above.

[33] Written Statement of the IOE, paras. 30-31; Written Statement of the Swiss Confederation, paras. 36-38.

[34] Written Statement of Australia, para. 17.

II. PROTECTION OF THE RIGHT TO STRIKE UNDER CONVENTION 87

A. THE APPLICABLE PRINCIPLES OF TREATY INTERPRETATION

18. Many participants in these proceedings share Australia's view[35] that, applying the customary international law principles of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention, the right to strike is protected by Convention 87.[36] While those participants may not characterise all relevant material in precisely the same manner under Articles 31 and 32, on the whole, it is clear they all agree that, applying the applicable rules of treaty interpretation, the right to strike is protected by Convention 87.

B. INTERPRETATION OF THE TEXT OF CONVENTION 87 UNDER THE PRIMARY RULE REFLECTED IN ARTICLE 31 OF THE VIENNA CONVENTION

19. Moving first to Article 31 of the Vienna Convention, Australia considers that, applying the general rule of interpretation reflected in Article 31, the right to strike falls within the scope of the activities protected by Convention 87. This conclusion follows from the ordinary meaning of the terms of Convention 87 interpreted in their context, and in light of the Convention's object and purpose. Resolutions and recommendations of the ILO, which may be taken into consideration as either subsequent agreements or subsequent practice, confirm this interpretation.

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[35] Ibid paras. 21, 25.

[36] See, eg, Written Statement of the Federative Republic of Brazil, paras. 22-27; Written Statement of the Republic of Colombia, paras. 1.2, 3.46; Written Statement of the French Republic, paras. 38-39; Written Statement of Germany, para. 45; Written Statement of the ICA, para. 3; Written Statement of the ITUC, paras. 4.5, 4.9; Written Statement of Mexico, paras. 41, 58; Written Statement of the Kingdom of the Netherlands, paras. 2.1, 2.10, 2.24, 2.28, 2.32; Written Statement of the Kingdom of Norway, paras. 12-13; Written Statement of the OACPS, para. 35; Written Statement of the Republic of South Africa, paras. 45-46, 65; Written Statement of the Republic of Tunisia, p. 1; Written Statement of the United States of America, para. 2.3; Written Statement of the Republic of Vanuatu, para. 19.

1. The right to strike falls within the ordinary meaning of Article 3(1), in context and in light of Convention 87's object and purpose

20. Like Australia, the majority of participants conclude on the basis of a good faith interpretation of the ordinary meaning to be given to the terms of Article 3(1) of Convention 87, read in their context and in light of the Convention's object and purpose, that the right to strike is protected under the Convention.[37] In particular, most of those participants agree that the terms 'activities' and 'programmes' in Article 3 are broad terms and, when read in the context of Articles 10 and 11, protect strike action which furthers or defends the interests of workers and their organisations.[38]

21. This interpretation is supported by, and consistent with, the object and purpose of Convention 87 – to protect workers' and employers' freedom of association (*'liberté syndicale'*) at work.[39] A number of participants observe that without a right to exert pressure through industrial action, Convention 87's protection of the freedom of association and the right to organise would be significantly

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[37] Written Statement of Australia, paras. 26-41; See, eg, Written Statement of the Federative Republic of Brazil, paras. 22-27; Written Statement of the Republic of Colombia, paras. 1.2, 3.46; Written Statement of the French Republic, paras. 38-39; Written Statement of Germany, para. 45; Written Statement of the ICA, para. 3; Written Statement of the ITUC, paras. 4.5, 4.9; Written Statement of Mexico, paras. 41, 58; Written Statement of the Kingdom of the Netherlands, paras. 2.1, 2.10, 2.24, 2.28, 2.32; Written Statement of the Kingdom of Norway, paras. 12-13; Written Statement of the OACPS, para. 35; Written Statement of the Republic of South Africa, paras. 45-46, 65; Written Statement of the Republic of Tunisia, p. 1; Written Statement of the United States of America, para. 2.3; Written Statement of the Republic of Vanuatu, para. 19.

The following Statements are silent on the interpretation of the text of Convention 87 in accordance with Article 31 of the Vienna Convention: the Republic of Indonesia; Italy; Canada; Belize; The Somali Federal Republic; Poland.

[38] Written Statement of Australia, paras. 26-31; Written Statement of the OACPS, paras. 38-43; Written Statement of the Republic of Colombia, para. 3.4; Written Statement of the Kingdom of the Netherlands, paras. 2.5, 2.7; Written Statement of the Kingdom of Norway, para. 15; Written Statement of Germany, para. 16; Written Statement of the Republic of South Africa, paras. 36-37, 51-52; Written Statement of the ITUC, paras. 4.13, 4.17-4.19; Written Statement of the Federative Republic of Brazil, para. 22; Written Statement of Tunisia, p. 1; Written Statement of the French Republic, para. 39; Written Statement of the United States of America, para. 2.8; Written Statement of Mexico, paras. 44-45; Written Statement of the WFTU, para. 14; Written Statement of the Republic of Vanuatu, para. 23.

[39] Written Statement of Australia, paras. 32-34; Written Statement of the OACPS, paras. 44-49; Written Statement of the Kingdom of the Netherlands, paras. 2.8-2.10; Written Statement of the Republic of Vanuatu, paras. 26-31; Written Statement of the ITUC, para. 4.51; Written Statement of Mexico, para. 46; Written Statement of the United States of America, para. 2.10; Written Statement of the Republic of South Africa, para. 53.

diminished.[40] Some participants also emphasise that strike action is one of the most fundamental activities to advance the interests of workers, especially in the context of collective bargaining on pay and conditions.[41] Australia agrees with these observations.

22. Australia also recognises and agrees with those participants who observe that the equally authoritative French text strengthens the conclusion that Convention 87 protects the right to strike.[42] As submitted by the French Republic, the use of the word '*syndicale*' rather than '*association*' in Article 11 – along with the title of the Convention, the Preamble and the title of Part I (which contains Article 3) – confirms that Convention 87 is concerned not only with freedom of association at work in general, but with the rights and freedoms of trade unions ('*syndicats*') in particular.[43] The use of '*programme d'action*' in the French text of Article 3 confirms that planned collective action is protected.[44]

23. Finally, similar to Australia, a number of participants have submitted that Article 3 must be read in context with Article 8, which requires that the exercise of rights under Convention 87 'shall respect the law of the land'.[45] Therefore,

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[40] See, eg, Written Statement of Germany, para. 22; Written Statement of the French Republic, paras. 50, 52; Written Statement of the United States of America, para. 2.17; Written Statement of the Federative Republic of Brazil, para. 25; Written Statement of the ITUC, para. 4.59; Written Statement of the Kingdom of Spain, p. 46.

[41] See, eg, Written Statement of the Federative Republic of Brazil, para. 23; Written Statement of the United States of America, para. 2.15; Written Statement of Germany, para. 22; Written Statement of the OACPS, paras. 39, 49; Written Statement of the Kingdom of the Netherlands, para. 2.7; Written Statement of Mexico, paras. 28, 59; Written Statement of the Kingdom of Norway, para. 18; Written Statement of the Republic of Colombia, para. 3.69; Written Statement of the ITUC, paras. 4.24-4.25, 4.57; Written Statement of the Republic of Vanuatu, para. 31; Written Statement of the WFTU, para. 14.

[42] Article 21 of Convention 87 provides that the English and French versions of the text are equally authoritative. Consistent with Article 33(4) of the Vienna Convention, the meaning which best reconciles the French and English texts, having regard to the object and purpose of the treaty, shall be adopted.

[43] Written Statement of the French Republic, paras. 76-81; see also Written Statement of the ITUC, paras. 4.47-4.50.

[44] Written Statement of the ITUC, para. 4.20.

[45] See also Written Statement of Tunisia, p. 2; Written Statement of the Kingdom of Norway, paras. 16 and 23; Written Statement of the Republic of South Africa, para. 53; Written Statement of the OAPCS, para. 42; Written Statement of Germany, para. 73.

although the Court has not been asked to express its view on the scope of the right to strike or permissible limitations upon it,[46] it is clear from the text of Convention 87 that the right is not absolute. Rather, it is a right which must be exercised consistently with national laws, provided those laws do not substantially impair the ability of workers to pursue their interests through collective bargaining.[47] As outlined below in Section C, the written statements before the Court illustrate the diverse approach of participants to regulating the right to strike through domestic law.[48]

a. The absence of the words 'right to strike' does not mean strike action is not protected

24. A small number of participants submit that the absence of an express reference to the 'right to strike' or 'strike' in Convention 87 means that the Convention does not cover that right.[49]

25. This argument is overly simplistic, and should not be accepted. The proper analytical exercise is to determine whether the terms of Convention 87, when interpreted in light of Articles 31 and 32 of the Vienna Convention, operate to protect a right to strike. The absence of an express reference to the right to strike is not determinative, and does not negate the need to undertake that analysis.

26. The Court is frequently required to consider whether particular conduct or activities fall within the scope of general terms used in the relevant treaty (such as 'commerce').[50] In *Navigational and Related Rights*, the Court recognised that

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[46] See above at para. 13.

[47] Written Statement of Australia, para. 41.

[48] See below at paras. 40-41.

[49] That submission is advanced in 7 of the 31 Statements filed before the Court. See Written Statement of Japan, para. 9; Written Statement of Costa Rica, p. 7, para. 7 of Conclusion; Written Statement of the IOE, paras. 11, 150-151; Written Statement of the Swiss Confederation, paras. 49-54; Written Statement of the People's Republic of Bangladesh, para. 3.1; Written Statement of Business Africa, para. 33; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 20.

[50] See, eg, *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 803, 818 at para. 45; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, p. 34, para. 78; *Certain Iranian Assets (Islamic Republic of Iran v United States of America) Judgment, I.C.J. Reports 2023,* para. 212.

'even if no provision expressly guaranteeing a right of non-commercial navigation ... could be found in the treaty, the question must be asked whether such a right does not flow from other provisions ...'.[51] The PCIJ also rejected arguments that the mere absence of express terms meant particular activities were outside the scope of the ILO conventions being considered.[52]

27. One participant submits that the ordinary meaning of the terms of the Convention, including 'activities', 'organise', 'guarantees' and 'interests' in Articles 3, 8 and 10 do 'not, in usual parlance' include the right to strike.[53] This submission detaches these terms from their context, contrary to the customary rule of treaty interpretation reflected in Article 31 of the Vienna Convention. When interpreted in the context of a Convention concerned with the protection of workers' and employers' freedom of association (*liberté syndicale)* at work, each of the relevant terms is apt to protect the right to strike.

28. Further, the contention that Article 3 must expressly refer to strikes does not account for how other 'activities' and 'programmes', which are also not expressly included in the provision, would find protection. It would be at odds with the broad framing of Article 3 if every single activity or programme in which a workers' organisation were allowed to engage, including strike action, were only entitled to protection if specifically mentioned in Article 3(1).[54]

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[51] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, p. 246, para. 77; see also *Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952: I.C.J. Reports 1952*, p. 93, p. 104 in which the Court held that: 'But the Court cannot base itself on a purely grammatical interpretation of the text. It must seek an interpretation which is in harmony with a natural and reasonable way of reading the text...'; see also Written Statement of the French Republic, para. 36.

[52] *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion, 1922 P.C.I.J (ser B) No. 2*, pp. 39-41; *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932 P.C.I.J (ser A/B) No. 50*, pp. 375-376. See also Written Statement of the ITUC, para. 4.152.

[53] Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 20.

[54] See Written Statement of the ITUC, para. 4.38; Written Statement of the Republic of Vanuatu, para. 23; Written Statement of the WFTU, para. 15; Written Statement of the French Republic, paras. 37-38, 49; Written Statement of the OACPS, paras. 37, 41; Written Statement of Germany, paras. 12-17; Written Statement of the Kingdom of Norway, para. 15; Written Statement of the United States of America, para. 2.9; Written Statement of Mexico, para. 45.

29. The participants who emphasise the absence of an express reference to the word 'strike' effectively seek to read in an exclusion of strike action from the 'activities' and 'programmes' which workers' organisations are entitled to 'organise' and 'formulate'. However, in line with past observations of the PCIJ, any exclusions should not, in the absence of express reservations, be read into the text.[55] Such an interpretation would also run counter to 'the well-established principle' of effectiveness in treaty interpretation, which the Court has consistently recognised.[56]

30. One participant cautions that the ordinary meaning of the terms cannot be so broad that *any* rights or obligations can be read into Convention 87.[57] That is, of course, correct. But it is not Australia's submission that all 'activities' and 'programmes' in the ordinary sense of those terms are protected under Convention 87; rather, the meaning of those words is to be determined in the context and in light of the Convention's object and purpose. For example, Article 10 of Convention 87 defines 'organisation' as an organisation which furthers and defends the interests of workers or of employers. The clear object of the Convention is to protect workers' and employers' freedom of association. Taken together, that definition and object provide support for the view that the terms 'activities' and 'programmes' in Article 3(1) capture, at a minimum, those activities and programmes necessary for individuals to freely associate through organisations in pursuance of shared interests or objectives at work.[58]

31. One statement contends that because the Preamble of Convention 87 expressly refers to the 'freedom of association' and the 'right to organise', but does not expressly refer to 'the right to strike', the right to strike is, on an *a contrario*

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[55] *Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (ser B) No. 11,* p. 37; Written Statement of the ITUC, para. 4.25.

[56] See, eg, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 125, para. 133; *Corfu Channel case, Judgment, I.C.J. Reports 1949,* p. 4, p. 24. See also Written Statement of the French Republic, para. 51.

[57] Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 20.

[58] Written Statement of Australia, paras. 27-30.

basis, not covered by the Convention.[59] However, the Court has previously determined that an *a contrario* interpretation is warranted only 'when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty'.[60] Further, Judge Yusuf has written that an *a contrario* interpretation is 'never in and of itself determinative of a particular interpretation'.[61] For the reasons already addressed, Australia submits that the ordinary meaning of the provisions of Convention 87, read in their context and in light of the object and purpose of the Convention, do not warrant the adoption of an *a contrario* interpretation. Rather, they clearly lead to the conclusion that Convention 87 protects the right to strike.[62]

32. Finally, certain participants submit that Article 3 must be interpreted as only enshrining rights that can be attributed to both workers' and employers' organisations.[63] However, in light of the distinct and unique interests of workers' and employers' organisations, it would be unworkable to interpret Convention 87 as only containing identical protections for both. Further, the use of the term 'their' throughout the Convention (and, in particular, in Articles 2 and 3) confirms that the broad protections of Convention 87 manifest in different ways for these distinct groups.[64]

2. Subsequent agreements and practice under Articles 31(3)(a) and (b)

33. Australia reiterates its submission that three instruments adopted previously by the International Labour Conference without opposition constitute subsequent agreements or subsequent practice under Articles 31(3)(a) or (b) of the Vienna

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[59] Written Statement of Japan, paras. 10-11.

[60] See, eg, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 3, 19, para. 37; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, para. 64.

[61] Abdulqawi A. Yusuf and Daniel Peat, '*A Contrario* Interpretation in the Jurisprudence of the International Court of Justice' (2017) 3(1) *Canadian Journal of Comparative and Contemporary Law* 1–19.

[62] Written Statement of Australia, Chapter II, Section B.

[63] Written Statement of Japan, paras. 13, 21, 24; Written Statement of the IOE, para. 144.

[64] Written Statement of the ITUC, para. 4.21.

Convention, confirming the protection of the right to strike in the context of Convention 87.[65] The relevant instruments are the 1951 Recommendation concerning Voluntary Conciliation and Arbitration;[66] the 1970 Resolution concerning Trade Union Rights and Their Relation to Civil Liberties;[67] and the 1972 Resolution concerning Policy pursued by a Member State in Africa.[68]

34. A number of participants have referred expressly to the 1951 Recommendation and the 1970 and 1972 Resolutions as confirming a right to strike under Convention 87.[69] Many more participants note Articles 31(3)(a) or (b) of the Vienna Convention are capable of capturing recommendations and resolutions of the International Labour Conference.[70]

35. Some participants have proffered peripheral arguments to the effect that the ILO Recommendation and Resolutions are not subsequent agreements or practice supporting the conclusion that Convention 87 protects the right to strike. These arguments are not persuasive:

    (a) It has been suggested that references to the right to strike in the 1951 Recommendation were references to the right to strike under the domestic law of Member States.[71] This is not apparent from the text of the Recommendation.

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[65] Written Statement of Australia, paras. 42-45.

[66] International Labour Conference, 34th Session, 1951, Record of Proceedings, pp. 451, 666.

[67] International Labour Conference, 54th Session, 1970, Resolution concerning Trade Union Rights and Their Relation to Civil Liberties (ILO Dossier Document No. 136).

[68] International Labour Conference, 57th Session, 1972, Resolution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights Pursued by Portugal in Angola, Mozambique and Guinea (Bissau) (ILO Dossier Document No. 137) ('1972 Resolution concerning Policy pursued by a Member State in Africa').

[69] For the 1951 Recommendation: Written Statement of the Republic of Colombia, para. 5.9; for the 1970 Resolution: Written Statement of the Republic of Vanuatu, para. 38; for the 1972 Resolution: Written Statement of the OACPS, para. 55.

[70] Written Statement of the OACPS, para. 55; Written Statement of the Republic of Colombia, para. 3.43; Written Statement of the Republic of Vanuatu, para. 38; Written Statement of the Republic of South Africa, para. 55; Written Statement of the ITUC, paras. 4.76, 4.85; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 56.

[71] Written Statement of Japan, para. 31.

(b) It has been argued that the express reference to 'strikes' in the 1951 Recommendation presupposes that, if the right to strike came within the scope of Convention 87, it would have been explicitly mentioned.[72] This is an inference lacking in justification, including for the reasons explained in paragraph 28 above.

(c) It has been contended that the inclusion in the 1970 Resolution of the right to strike in a list of rights to be the subject of comprehensive studies with a view to fully protecting those rights is incompatible with the right to strike then being recognised internationally.[73] However, that argument fails to account for the fact that the 1970 Resolution states that the rights in that list 'fall within the competence of the ILO'.[74]

36. For the reasons more fully explained in paragraphs 42 – 45 of the Written Statement of Australia, the 1951 Recommendation concerning Voluntary Conciliation and Arbitration; the 1970 Resolution concerning Trade Union Rights and Their Relation to Civil Liberties; and the 1972 Resolution concerning Policy pursued by a Member State in Africa are subsequent agreements or subsequent practice under Articles 31(3)(a) or (b) of the Vienna Convention, and they support the conclusion that the right to strike is protected by Convention 87.

3. Conclusions on the ordinary meaning of Convention 87

37. When interpreted in accordance with the applicable principles of treaty interpretation reflected in Article 31 of the Vienna Convention, Convention 87 protects the right to strike. Although Convention 87 does not expressly mention the right to strike, the conclusion that Convention 87 protects that right follows from the ordinary meaning of Article 3(1), interpreted in good faith, in its context and in the light of the Convention's object and purpose. It is also

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[72] Written Statement of the IOE, para. 293.

[73] Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 56.

[74] International Labour Conference, 54th Session, 1970, Resolution concerning Trade Union Rights and Their Relation to Civil Liberties, para. 15 (ILO Dossier Document No. 136).

confirmed by resolutions and recommendations adopted by the International Labour Conference. The majority of participants in these proceedings agree with this conclusion.

C. SUPPLEMENTARY MEANS OF INTERPRETATION

38. Applying the customary rule reflected in Article 32 of the Vienna Convention, supplementary means of interpretation confirm the conclusion that the right to strike is protected under Convention 87. In this regard, and consistent with the Written Statement of Australia,[75] many of the participants in these proceedings have referred to:

(a) State practice incorporating the right to strike in domestic law;

(b) public statements of States and their organs confirming that the right to strike is protected under Convention 87;

(c) other relevant treaties which either expressly protect the right to strike, or have been interpreted as protecting the right to strike as a necessary corollary of protection of the right to freedom of association;

(d) the findings and views expressed by ILO supervisory bodies and Commissions of Inquiry indicating that Convention 87 protects the right to strike; and

(e) the negotiating history of Convention 87 and the circumstances of its conclusion.

1. State practice incorporating the right to strike in domestic law

39. The written statements now before the Court confirm that State Parties to Convention 87 have incorporated the right to strike in their domestic law. Indeed, some State Parties have identified the obligations created by

[75] Written Statement of Australia, paras. 48-94.

Convention 87 with respect to the right to strike as forming the basis for their domestic law provisions protecting and regulating the right.[76]

40. In explaining their own domestic regimes, and by collating the practice of other States, the written statements demonstrate that there is substantial variation in the ways in which State Parties protect and regulate the right to strike, both in form and in substance. With regard to form, the written statements indicate that State Parties protect and regulate the right to strike in their constitutions (either explicitly[77] or through recognition by their domestic courts[78]); through legislation;[79] and/or by judicial decisions.[80] With regard to substance, the written statements evidence the wide and diverse approaches to protecting and regulating the right to strike in domestic law.[81] They also demonstrate that State

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[76] For example, Belize notes that to comply with ILO conventions, including Convention 87, Belize passed the Trade Unions and Employers Organisations (Registration, Recognition and Status) Act in 2000: Written Statement of Belize, p. 2. Colombia notes that Colombia's legal framework regarding the right to strike has been amended to ensure compliance with ILO Conventions, including Convention 87, and pronouncements of the CEACR and the CFA regarding freedom of associations: see Written Statement of the Republic of Colombia, paras. 4.5-4.7. The Written Statement of the Somali Federal Republic provides that following ratification of Convention 87, and in order to ensure compatibility with ILO labour standards, a revised Labour Code was proposed which explicitly provides that '[t]he right to strike is a fundamental right...': see Written Statement of the Somali Federal Republic, pp. 1-2.

[77] See, eg, Written Statement of the Federative Republic of Brazil, para. 10; Written Statement of Colombia, para. 4.2; Written Statement of Costa Rica, p. 3; Written Statement of Italy, para. 7; Written Statement of Mexico, para. 23; Written Statement of the Republic of Poland, para. 2.2; Written Statement of the Somali Federal Republic, p. 1; Written Statement of the Republic of South Africa, para. 19; Written Statement of the Kingdom of Spain, p. 42; Written Statement of the Swiss Confederation, para. 85; Written Statement of the Republic of Tunisia, p. 4; Written Statement of Business Africa, para. 47.

[78] See, eg, Written Statement of Belize, p. 3; Written Statement of Germany, para. 33.

[79] See, eg, Written Statement or Australia, para. 55; Written Statement of Indonesia, para. 3; Written Statement of the United States of America, para. 1.5; Written Statement of Business Africa, paras. 45-46; Written Statement of the Republic of Colombia, para. 4.6.

[80] See, eg, Written Statement of the Kingdom of the Netherlands, para. 5.2; Written Statement of the Republic of Colombia, para. 4.2.

[81] In particular, this is demonstrated in the Written Statement of the United Kingdom of Great Britain and Northern Ireland, which surveys the practice of 39 States: see Written Statement of the United Kingdom of Great Britain and Northern Ireland, paras. 82, 88-125. Australia notes that the main Australian federal workplace relations statute is the *Fair Work Act 2009* (Cth) and not the *Industrial Relations Act 1988* or the *Workplace Relations Amendment (Work Choices) Act 2005* (which are referred to at p. 55 of the Written Statement of the United Kingdom of Great Britain and Northern Ireland).

practice, including concerning conditions on the lawful exercise of the right to strike and limitations upon it, is far from homogenous, even at a regional level.[82]

41. The diversity of State practice in protecting and regulating the right to strike is not surprising, given the need to balance 'sensitive social and political issues'.[83] The State practice reflected in the written statements demonstrate the varied ways in which States balance protection of the right to strike with countervailing interests including protection of the rights and freedoms of others; [84] preservation of life, health and safety;[85] vital societal interests and the provision of essential services.[86]

42. Given the volume and diversity of State practice set out by participants, and to the extent the Court may wish to express its view on the scope of the right to strike under Convention 87 and permissible limitations upon that right,[87] Australia submits that the right to strike is not absolute, and that restrictions on that right in State practice are diverse.

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[82] See, eg, Written Statement of Business Africa, paras. 41, 55; Written Statement of the Swiss Confederation, paras. 92-93; Written Statement of the Republic of Colombia, para, 3.70.

[83] Written Statement of Australia, para. 64; *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10, p. 33, para. 86 (ILO Dossier Document No. 319).

[84] See, eg, Written Statement of Business Africa, para. 43; Written Statement of Germany, para. 45; Written Statement of the Kingdom of the Netherlands, paras. 5.18, 5.20; Written Statement of the Republic of Tunisia, pp. 3-4; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 80.

[85] See, eg, Written Statement of the Kingdom of Norway, paras. 23-24; Written Statement of the Kingdom of the Netherlands, paras. 5.21-5.22; Written Statement of the Republic of Poland, para. 2.9; Written Statement of Italy, para. 10.

[86] See, eg, Written Statement of Italy, para. 14; Written Statement of the Republic of Colombia, para. 4.12; Written Statement of Business Africa, para. 45; Written Statement of the Federative Republic of Brazil, para. 10; Written Statement of the Kingdom of Spain, p. 42; Written Statement of the United Kingdom of Great Britain and Northern Ireland, paras. 82(c), 96-100; Written Statement of the Kingdom of Norway, para. 23.

[87] See above at para. 13.

2. Statements of States and their organs confirming that the right to strike is protected under Convention 87

43. Consistent with the Written Statement of Australia,[88] many participants refer to public statements of ILO members which support the conclusion that Convention 87 protects the right to strike. Examples (beyond those mentioned in the Written Statement of Australia) include:

(a) In a discussion on the right to strike at the 81st International Labour Conference, several State members, including Finland, Germany and Venezuela, expressed general agreement with the Committee of Expert's position on strikes as an indispensable corollary of freedom of association.[89]

(b) In a country case dealt with by the Committee on the Application of Standards at the 64th International Labour Conference, the United Kingdom noted that 'the right to strike, which, although not expressly laid down in Convention No. 87, was implied by the provision there for the right freely to organise activities'.[90]

(c) At the ILO's 2015 Tripartite Meeting on Convention 87, several group and State representatives made statements recognising that the right to strike is protected under Convention 87.[91] For example:

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[88] Written Statement of Australia, paras. 56, 58-59.

[89] Written Statement of Germany, para. 50; International Labour Conference, 81st Session, 1994, Record of proceedings, Report of the Committee on the Application of Standards, p. 25/40, para. 144.

[90] Written Statement of the ITUC, para. 4.121; International Labour Conference, 64th Session, 1978, Report of the Committee on the Application of Standards, pp. 29/28-29/29 (Ethiopia) (ILO Dossier No. 241).

[91] See, eg, Written Statement of Mexico, paras. 50-52; Written Statement of the Republic of Colombia, para. 3.68; Written Statement of Germany, para. 53; Written Statement of the ITUC, paras. 4.127-4.129.

i. The European Union and its Member States expressed the view that '[t]he right to strike was thus a corollary of freedom of association, even though it was not mentioned explicitly in Convention No. 87';[92]

ii. The Nordic States (Denmark, Finland, Iceland, Norway and Sweden) supported the European Union's statement, agreeing that 'the right to strike could be derived from Convention No. 87.'[93]

iii. The United States of America 'concurred that the right to strike was protected under Convention No. 87, even though the right was not explicitly mentioned in the Convention.'[94]

(d) In voting in favour of referring the question to the Court for an advisory opinion, the United States of America's delegation expressed the view 'that the right to strike is an intrinsic corollary to the right to organize activities protected by Convention 87.'[95]

44. Several participants also refer to decisions of domestic courts which support the conclusion that Convention 87 protects the right to strike.[96] These public

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[92] International Labour Office, Governing Body, GB.323/INS/5/Appendix II, The Standards Initiative - Appendix II, Final Report of the Tripartite Meeting on 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 (Geneva, 23-25 February 2015), 13 March 2015, p. 4, para. 13 (ILO Dossier Document No. 107).

[93] Ibid, pp. 4-5, para. 15.

[94] Ibid, p. 5, para. 16.

[95] Written Statement of the United States of America, para. 3.2, Annex 4. Further, the United States Supreme Court has on many occasions upheld the right to strike as fundamental to the ability to organise: see, eg, *N.L.R.B v Erie Registor Corp.*, 373 U.S. 221, p. 234 (1963).

[96] Beyond those mentioned in the Written Statement of Australia at paras. 58-59, see, eg, the decision of the Constitutional Court of Peru in *Juan José Gorriti and more than 5,000 citizens v. Congress of the Republic*, Case No. 008-2005-PI/TC (2005) (ILO Dossier Document No. 329), referred to in the Written Statement of the ITUC, para. 4.146; the decision of the the Bobo-Dioulasso Appeal Court (Burkina Faso) in *Messrs Karama and Bakouan v Societe Industrielle du Faso (SIFA)*, No. 035 (2006) (ILO Dossier Document No. 330), referred to in the Written Statement of the ITUC, para. 4.136; the decision of the Supreme Court of Justice of Colombia in *CBI Colombiana S.A v. Petroleum Industry Workers' Trade Union (USO), Case No. 59420* (2013) (ILO Dossier Document No. 336), referred to in the Written Statement of the ITUC, para. 4.141; the decision of the High Court of Botswana in *Botswana Public Employees' Union and others v Minister of Labour and Home Affairs and others*, MAHLB-000674-11 (2012) (ILO Dossier Document No. 333), referred to in the Written Statement of Mexico, para. 54, the Written Statement of the ILO, para. 410 and the Written Statement of the ITUC, para. 4.134; the decision of the Industrial Court of Nigeria in *Aero Contractors Co. of Nigeria*

statements of State Parties to Convention 87 (made by their authorised representatives or their organs), dating from 1952 to the present day, alongside the statements of many participants in these proceedings, indicate that many State Parties to Convention 87 consider that the right to strike is protected under Convention 87.

45. Some participants refer to statements of State Parties to Convention 87 expressing the view that Convention 87 does not include the right to strike.[97] Australia notes that in some instances the statements cited were made by States that now take the view in these proceedings that Convention 87 does protect a right to strike.[98] In view of the subsequent positions expressed by those States in these proceedings, their prior statements should be given no weight.

46. One participant contends that a statement[99] made by the Government Group of the Governing Body[100] at the ILO's 2015 Tripartite Meeting on Convention 87 reflects a common understanding that the right to strike is not yet regulated in

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Limited v. the National Association of Aircrafts Pilots and Engineers, the Air Transport Senior Staff Association of Nigeria and the National Union of Air Transport Employees, Case No. NICN/LA/120/2013 (2014) (ILO Dossier Document No. 340), referred to in the Written Statement of the ILO, para. 410 and the Written Statement of the ITUC, para. 4.145; the decision of the Labour Court of South Africa in *Chamber of Mines of South Africa v. Association of Mineworkers of South Africa, National Union of Mineworkers, United Association of South Africa*, Case No. J99/14 (2014) (ILO Dossier Document No. 341), referred to in the Written Statement of the ILO, para. 411, the Written Statement of the ITUC, para. 4.149, and the Written Statement of Mexico, para. 55; the decision of the Supreme Court of Argentina in *Orellano v el Correo Oficial de la República Argentina SA*, CSJ 93/2013 (49-0)/CS1, referred to in the Written Statement of the ITUC, para. 4.133.

[97] See, eg, Written Statement of Japan, para. 72; Written Statement of the IOE, paras. 14, 191-216, 246-249.

[98] See, eg, Written Statement of Japan, para. 72, which refers to a statement made by Germany at the 72nd session of the International Labour Conference; Written Statement of the IOE, paras. 194, 203 and 216, which refer to statements made by Tunisia, the Republic of Colombia and Germany respectively. The Written Statement of the IOE, para. 217 acknowledges that some States may have changed their views over time on whether or not the right to strike is included in Convention 87. The Written Statement of the ITUC, para. 4.125, also recognises that the positions of some States regarding Convention 87 and the right to strike have evolved over time.

[99] International Labour Office, Governing Body, GB.323/INS/5/Appendix I, The Standards Initiative – Appendix I, Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and modalities and practices of strike action at national level (Geneva, 12-27 March 2015), 13 March 2015, Annex II, p. 4 (ILO Dossier Document No. 106) ('*Outcome of the 2015 ILO Tripartite Meeting*').

[100] The Governing Body of the ILO is composed of representatives of the three constituent groups, namely governments, employers and workers: see Articles 2 and 7 of the ILO Constitution (ILO Dossier Document No. 1).

any ILO Convention, but is regulated by domestic law.[101] This argument mischaracterises the Government Group's Statement. The Statement merely notes that '[t]he scope and conditions of this right are regulated at the national level' and highlights the 'multifaceted regulations that States have adopted to frame the right the strike.'[102] The Group's indication of its readiness to 'consider discussing' the exercise of the right[103] reflects the fact that the right is regulated in varied and diverse ways, but does not suggest that the right to strike lacks protection under any existing ILO Convention.[104]

3. Other relevant treaties

47. Consistent with the Written Statement of Australia,[105] many participants in these proceedings have referred to other relevant treaties to confirm their conclusion that Convention 87 protects the right to strike.

48. Many participants have referred to the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**')[106] and the International Covenant on Civil and Political Rights ('**ICCPR**'),[107] both of which protect the right to strike.[108] These treaties were concluded after Convention 87, have been ratified

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[101] Written Statement of the IOE, paras. 14, 214-215.

[102] *Outcome of the 2015 ILO Tripartite Meeting* (n 99) p. 4, para. 5.

[103] Ibid p. 4, para. 6.

[104] Written Statement of the IOE, para. 215.

[105] Written Statement of Australia, paras. 60-67.

[106] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ILO Dossier Document No. 284).

[107] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 for all provisions except those of Article 41; 28 March 1979 for the provisions of Article 41 (Human Rights Committee)) (ILO Dossier Document No. 285).

[108] See, eg, Written Statement of the OACPS, paras. 25-26, 50, 56; Written Statement of the Republic of Vanuatu, paras. 39, 45-49; Written Statement of Mexico, para. 34; Written Statement of the Republic of South Africa, para. 60; Written Statement of the Kingdom of the Netherlands, paras. 2.25-2.28, 3.1-3.7; Written Statement of the Republic of Colombia, paras. 3.53, 3.74-3.76, 3.80; Written Statement of the ICA, para. 5; Written Statement of the ITUC, paras. 4.158-4.163.

by the vast majority of State Parties to Convention 87, and explicitly refer to Convention 87 in their text and preparatory works.[109]

49. A number of participants have also contended that certain regional treaties are relevant to the interpretation of Convention 87.[110] As between States party to both Convention 87 and any one of these regional treaties, that treaty would be a 'relevant rule applicable in the relations between' those States by virtue of the rule reflected in Article 31(3)(c) of the Vienna Convention. More generally, Australia submits that these agreements form part of the supplementary means of interpretation to be taken into account under the customary rule reflected in Article 32 of the Vienna Convention.

50. Many of these regional instruments explicitly protect the right to strike. Furthermore, in applying the regional instruments within their competence, the European Court of Human Rights, the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights have all considered that protection of the right to strike is necessary to protect the right to freedom of association.[111] This lends support to the conclusion that

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[109] Written Statement of Australia, paras. 60-67. See also Written Statement of the Kingdom of the Netherlands, paras. 2.26-2.28.

[110] Regional treaties referred to by participants include the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights* (commonly known as the 'Protocol of San Salvador') (ILO Dossier Document No. 290); the *African Charter on Human and Peoples' Rights* (ILO Dossier Document No. 291); the *American Convention on Human Rights*; the *Arab Charter on Human Rights* (ILO Dossier Document No. 293); the *Charter of Fundamental Rights of the European Union* (ILO Dossier Document No. 288); the *Charter of Fundamental Social Rights in the Southern African Development Community* (ILO Dossier Document No. 294); the *Charter of the Organisation of American States*; the *European Convention on Human Rights* (ILO Dossier Document No. 286); the *European Social Charter* (ILO Dossier Document No. 287); the *Inter-American Charter of Social Guarantees*; the *Southern African Development Community Protocol on Employment and Labour* (ILO Dossier Document No. 299); and certain free trade agreements, including the *United States-Mexico-Canada Agreement* (ILO Dossier Document No. 300). See, eg, Written Statement of Canada, paras. 6, 10; Written Statement of Germany, paras. 23; Written Statement of the OACPS, paras. 24-34, 50; Written Statement of the Republic of Vanuatu, para. 39; Written Statement of the ILO, paras. 386-408; Written Statement of Italy, paras. 15-17; Written Statement of the Republic of Colombia, paras. 3.53, 3.84-3.112; Written Statement of Mexico, paras. 34-37; Written Statement of the Kingdom of the Netherlands, paras. 2.25-2.28, 3.1-3.23; Written Statement of the Republic of South Africa, para. 60; Written Statement of the United States of America, para. 2.12; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 61; Written Statement of the ITUC, paras. 4.164-4.179.

[111] Article 11 of the *European Convention on Human Rights* (ILO Dossier Document No. 286) protects the 'freedom of association', and this protection has been interpreted by the European Court of

Convention 87 protects the right to strike, as a necessary corollary of protection of the right to freedom of association.[112]

4. The findings and views expressed by ILO supervisory bodies and Commissions of Inquiry

51. Many participants agree with the position expressed by Australia[113] that the views of the ILO supervisory bodies, the CEACR and the CFA, and of the Commissions of Inquiry established under Article 26 of the ILO Constitution, support the conclusion that the right to strike is protected under Convention 87.[114] Participants differ to some degree on the basis upon which these views may be relied upon.[115] However, without prejudice to their precise legal

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Human Rights ('ECtHR') as incorporating a 'right to strike': see, eg, *Affaire Enerji Yapi-Yol Sen v Turquie* (European Court of Human Rights, Chamber, Application No 28959/01, 21 April 2009) para. 24 (ILO Dossier Document No. 318). While the ECtHR has so far declined to determine whether the taking of industrial action should be accorded the status of an 'essential element' of the Article 11 guarantee (although protected), the essential elements include the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. In this respect, it has been held that the right to strike constitutes an important means by which a trade union can make its voice heard: see, eg, *Humpert v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 59433/18, 59477/18. 59481/18 an<759494/18, 14 December 2023) paras. 100-105. The African Commission on Human and Peoples' Rights has interpreted the right contained in Article 15 of the *African Charter on Human and Peoples' Rights* (ILO Dossier Document No. 291), to include the 'right to strike,' being an aspect of the freedom of association, see: African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, para. 59 (ILO Dossier Document No. 292). The Inter-American Court of Human Rights has held that freedom of association, collective bargaining, and the right to strike are rights incorporated into the *American Convention on Human Rights* (ILO Dossier Document No. 289). The Court has also held that the right to collective bargaining and the right to strike are essential tools for the freedom of association and freedom to organise: see *Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and their Relation to Other Rights, with a Gender Perspective (Advisory Opinion)* (Inter-American Court of Human Rights, OC-27/21, 5 May 2021) (ILO Dossier Document No. 323) paras. 106, 124, 131 - 132

[112] Written Statement of Australia, paras. 32-38.

[113] Ibid paras. 68-83.

[114] Written Statement of the OACPS, para. 54; Written Statement of the Republic of Colombia, para. 3.42; Written Statement of the Kingdom of the Netherlands, para. 2.20; Written Statement of the Republic of Vanuatu, para. 32; Written Statement of the Republic of South Africa, para. 55; Written Statement of the ILO, para. 266; Written Statement of the ITUC, paras. 4.75-4.76; Written Statement of the Federative Republic of Brazil, para. 27; Written Statement of the Kingdom of Norway, para. 22; Written Statement of Japan, paras. 58-59; Written Statement of the French Republic, para. 93; Written Statement of the United States of America, para. 2.14; Written Statement of Italy, para. 5.

[115] Australia has relied upon the approach taken by the Court in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) Merits, Judgment, I.C.J. Reports 2010*, pp. 663-664, para. 66. Furthermore, Australia notes that the views of the ILO bodies might also be categorised as

categorisation, the views expressed by the CEACR, the CFA and the Commissions of Inquiry confirm the interpretation of Convention 87 that results from the application of the rule reflected in Article 31(1) of the Vienna Convention. Specifically, they confirm that Convention 87 protects the right to strike and that the right may be subject to a wide range of restrictions under domestic law.

5. The negotiating history of Convention 87 and the circumstances of its conclusion

52. Like Australia, a number of participants refer to the *travaux préparatoires* of Convention 87 as a supplementary means of interpretation in order to confirm the interpretation arrived at through the application of the primary rule in Article 31 of the Vienna Convention.[116]

53. As explained in the Written Statement of Australia, the International Labour Conference's 1948 questionnaire and the International Labour Office's conclusions confirm that Convention 87 protects the right to strike.[117] The fact that the vast majority of States in their responses to the questionnaire confirmed that it was important to *exclude* public officials' right to strike from the proposed

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supplementary means of interpretation for the purposes of Article 32 of the Vienna Convention (Written Statement of Australia, para. 68). A number of participants suggested that the views of the ILO supervisory bodies constitute either subsequent agreements or subsequent practice under Articles 31(3)(a) or (b) of the Vienna Convention (Written Statement of the OAPCS, para. 54; Written Statement of Colombia, para. 3.42; Written Statement of the Kingdom of the Netherlands, para. 2.20; Written Statement of the Republic of Vanuatu, para. 32; Written Statement of the Republic of South Africa, para. 55; Written Statement of the ITUC, para. 4.75; Written Statement of the ILO, para. 266; Written Statement of the Federative Republic of Brazil, para. 27.). Australia does not rely on that view.

[116] Written Statement of the French Republic, para. 69; Written Statement of the Kingdom of the Netherlands, para. 2.32; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 64; Written Statement of the ITUC, para. 4.191; Written Statement of the Republic of Vanuatu, para. 40; Written Statement of the OACPS, para. 57; Written Statement of Germany, para. 42.

A small number of participants submit that, in accordance with Article 5 of the Vienna Convention, *travaux préparatoires*, should be given 'special importance' or 'prominence' as a *lex specialis* rule of interpretation applicable to ILO Conventions. Notwithstanding the ILO's unique tripartite structure, Australia disagrees there is any *lex specialis* set of interpretive rules requiring preparatory works to be given greater weight than that envisaged in Article 32 of the Vienna Convention (see written statements of: ILO para. 250; IOE para. 129; Business Africa para. 31).

[117] Written Statement of Australia, paras. 85-90.

freedom of association protections indicates that States likely considered those protections otherwise covered the right to strike for all other workers. If the right to strike was not so covered, the proposed carve out would not have been necessary. A number of written statements interpret the 1948 questionnaire and the International Labour Office's conclusions consistently with Australia's approach.[118]

54. In contrast, a small number of participants submit that the *travaux préparatoires* indicate an 'express', 'deliberate' or 'unambiguous' decision not to include the right to strike within Convention 87.[119] However, these submissions are based on a small minority of responses to the 1948 questionnaire, which must be read in the context of the narrow question posed.[120] When read as a whole and in its full context, the *travaux préparatoires* do not indicate that the negotiators of Convention 87 made an express decision to exclude the right to strike.

55. Some participants argue that the fact Convention 87 was intended to be a concise statement of fundamental principles indicates an intention to exclude the right to strike.[121] Australia agrees that Convention 87 was intended to be a concise statement of fundamental principles, rather than a detailed compilation of the rights comprising freedom of association. However, such an intention does not lead to the conclusion that Convention 87 does not protect the right to strike.[122] Instead, it confirms that the Convention was intended to create broad fundamental protections, concisely stated, encompassing a range of rights, including the right to strike. [123]

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[118] Written Statement of Australia, paras. 85-87; Written Statement of the ITUC, paras. 4.210-4.213; Written Statement of Germany, paras. 42-44.

[119] Written Statement of Japan, para. 45; Written Statement of the IOE, para. 282; Written Statement of Business Africa, para. 38; Written Statement of the People's Republic of Bangladesh, para. 7.0; Written Statement of the Swiss Confederation, para. 82; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 73.

[120] Written Statement of Australia, para. 87. See also Written Statement of the ITUC, para. 4.213.

[121] Written Statement of the ITUC, para. 4.214.

[122] Cf Written Statement of the People's Republic of Bangladesh, para. 7.0.

[123] Written Statement of the ITUC, para. 4.215.

56. Indeed, several participants observe that the *travaux préparatoires* indicate that, in light of the recognised connection between the right to strike and the freedom of association, States felt it unnecessary to delineate the exact contours of the right to strike.[124] A number of participants, including Australia, have submitted that the International Labour Conference elected to set down a series of general principles relating to freedom of association, rather than to regulate the minutiae of trade union activities.[125] These broader circumstances of the conclusion of Convention 87 and the development of the protection of the freedom of association indicate that a reasonable view had been taken by negotiating States that the right to strike was captured within freedom of association.[126]

57. Insofar as the *travaux préparatoires* are otherwise silent on the question of whether the right to strike is protected by the Convention, for all the reasons already addressed above the Court should not infer an intention to exclude the right to strike from such silence.[127]

III. CONCLUSION

58. Although the Convention does not expressly mention the right to strike, when interpreted in accordance with the applicable principles of treaty interpretation, Convention 87, and in particular Article 3(1), protects that right, subject to regulation and restriction under domestic law. As submitted by Australia and the majority of participants, the Court should answer the question before it in

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[124] Written Statement of the Republic of Vanuatu, para. 41; Written Statement of the OACPS, para. 58; Written Statement of the Kingdom of the Netherlands, para. 2.31. See Memorandum and Draft Resolution submitted by the American Federation of Labor to the Economic and Social Council on the Guarantees for the Exercise and Development of Trade Union Rights, 1947 (ILO Dossier No. 142). See also Janice R. Bellace, 'The ILO and the Right to Strike', *International Labour Review*, Vol. 153 (2014), No. 1, p. 42; Jeffrey Vogt et al, *The right to strike in international law* (Hart Publishing, 2020), p. 42.

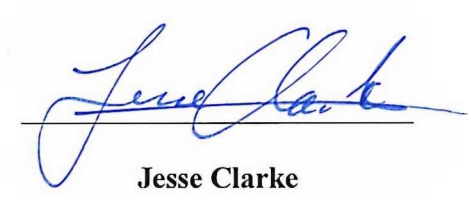
[125] Written Statement of Australia, para. 94; Written Statement of the ITUC, para. 4.216; Written Statement of the ILO, para. 306.

[126] Written Statement of Australia, paras. 91-94; Written Statement of the ITUC, paras. 4.216, 4.218; Written Statement of the Republic of Vanuatu, para. 41; Written Statement of the Kingdom of the Netherlands, para. 2.32.

[127] Written Statement of the French Republic, para. 71.

the affirmative – that is, the right to strike of workers and their organisations is protected under Convention 87.

Respectfully submitted on behalf of Australia,



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16 September 2024