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Report of the Director-General

Second Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Spain of the Labour Inspection Convention, 1947 (No. 81), made under article 24 of the ILO Constitution by the trade union “National Federation of Associations of Employment and Social Security Sub-inspectors (FESESS)”

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List of abbreviations

AEPD	Spanish Data Protection Agency
CEACR	Committee of Experts on the Application of Conventions and Recommendations
FESESS	National Federation of Associations of Employment and Social Security Sub-inspectors
ITSS	Labour and Social Security Inspectors
LOITSS	Framework Act No. 42/1997 of 14 November 1997 on Labour and Social Security Inspection
LOPCDH	Framework Act No. 1/1982 of 5 May 1982 on civil protection of the right to honour, personal and family privacy, and personal reputation
OSH	occupational safety and health
RISOS	Royal Decree No. 928/1998 of 14 May 1998 adopting the General Regulations on procedures for the imposition of penalties for labour-related offences and for settlements relating to social security contributions
ROFIT	Royal Decree No. 138/2000 of 4 February 2000 adopting the Regulations on the organization and operation of the Labour and Social Security Inspectorate
SESS	Employment and Social Security Sub-inspectors
TGSS	Social Security Fund

I. Introduction

1. In communications dated 16 June 2011 and 7 October 2011, the National Federation of Associations of Employment and Social Security Sub-inspectors (FESESS) addressed a representation to the International Labour Office, in accordance with article 24 of the ILO Constitution, alleging non-observance by Spain of the Labour Inspection Convention, 1947 (No. 81).
2. The Labour Inspection Convention, 1947 (No. 81), was ratified by Spain on 14 January 1960 and is in force in the country.
3. The following provisions of the Constitution of the International Labour Organization relate to representations:

Article 24

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite the government to make such statement on the subjects as it may think fit.

Article 25

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

4. The representation procedure is governed by the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, as revised by the Governing Body at its 291st Session (November 2004).
5. In accordance with articles 1 and 2, paragraph 1, of the above Standing Orders, the Director-General acknowledged receipt of the representation, informed the Government of Spain and brought it before the Officers of the Governing Body.
6. At its 312th Session (November 2011), the Governing Body decided that the representation was receivable and appointed a committee to examine the matter. The Committee members were Mr Claude-Emmanuel Triomphe (Government member, France), Ms Lidija Horvatić (Employer member, Croatia) and Ms Cinzia Del Rio (Worker member, Italy).
7. The Government of Spain submitted its observations concerning the representation in a communication dated 28 February 2012.
8. At its first meeting in November 2012, in accordance with article 4 of the Standing Orders concerning the procedure for the examination of representations, the Committee decided to request the FESESS to provide further information, and to subsequently ask the Government to provide any statement that it may wish to make in relation to this information.
9. The FESESS transmitted the requested additional information in a communication dated 12 December 2012. The Government of Spain submitted its observations concerning this additional information in a communication dated 22 February 2013.

10. The Committee met on 25 March 2014 to examine the case. It adopted its report on 10 June 2014.

II. Examination of the representation

A. The complainant's allegations

11. In its communication dated 16 June 2011, the complainant organization alleges that a proposed amendment – in the form of a Bill of 28 April 2011 – to Act No. 42/1997 of 14 November 1997 (Framework Act No. 42/1997 of 14 November 1997 on Labour and Social Security Inspection (LOITSS)), contained wording incompatible with the provisions of Convention No. 81.
12. In its communication dated 7 October 2011, the complainant organization indicates that the Bill of 28 April 2011 was approved by the Bureau of the Congress of Deputies on 21 June 2011, and was published in the Official Gazette of the *Cortes Generales* on 24 June 2011. However, the parliamentary procedure continued only until 27 September 2011, and the Bill lapsed as a result of the entry into force of Royal Decree No. 13290/2011 of 26 September 2011 concerning the dissolution of the Congress of Deputies and the Senate and the announcement of elections. In this communication, the complainant organization provided additional arguments relating to its representation, alleging that, even though the amendments to the LOITSS contained in the Bill had lapsed, the LOITSS itself, which is intended to transpose Convention No. 81 into national law, is in violation of the Convention.
13. The complainant explains that the functions of the Spanish Labour and Social Security Inspectorate are performed by two corps, Labour and Social Security Inspectors (ITSS) and Employment and Social Security Sub-inspectors (SESS) and alleges that the LOITSS arbitrarily, without any justification and in a discriminatory manner, fails to provide SESS with the guarantees and certain of the powers of inspectors for the performance of their duties set out in Convention No. 81, which are granted to ITSS.
14. The complainant observes in this regard that sections 2(1) and 6(1) of the LOITSS are only applicable to ITSS and not to SESS. Section 6(1) of the LOITSS provides that “Labour and Social Security Inspectors [ITSS] shall have the authority to exercise all of the powers entrusted to the Labour and Social Security Inspectorate in section 3 of this Act, and their conditions of service shall be such that they have complete technical and operational autonomy and are independent of improper external influences, in accordance with Article 6 of ILO Convention No. 81 and Article 8 of ILO Convention No. 129.¹” Section 2(1) of the LOITSS refers to “Labour and Social Security Inspectors [ITSS], whose legal status and conditions of service guarantee the technical independence, objectivity and impartiality prescribed by ILO Conventions Nos 81 and 129”.
15. The complainant indicates that this lack of recognition in law of the full technical and operational autonomy to SESS is unjustified, since they perform genuine inspection functions in practice, regardless of the hierarchy of administrative units to which they are assigned, within their area of competence, under the same conditions as ITSS, that is, they enter workplaces to conduct any investigations, examinations or tests that they deem necessary, check the personal identity of persons, interview employers and workers and initiate penalty and contribution settlement proceedings with the same technical

¹ The Labour Inspection (Agriculture) Convention, 1969 (No. 129).

thoroughness as ITSS. In support of this allegation, the complainant refers to a number of provisions in various guidelines on inspection procedures.

16. While the trade union does not question the operational guidance role of the head of the group or team to which SESS are attached, it deplores that non-compliance and contribution settlement reports drawn up by SESS are, where applicable, subject to the validation and approval of ITSS, on whom SESS are technically dependent. According to the FESESS, the approval procedure only introduces unnecessary and unjustified delays in the relevant procedures, as well as strains and operational inconsistencies owing to differences in technical assessments.
17. The complainant also submits that the fact that SESS are, under section 8(4) of the LOITSS, considered to be agents of the public authority in the execution of the instructions that they receive for the discharge of their functions, rather than members of the public service, may detract from the authority needed in their relations with employers and workers for the effective discharge of their principal duties. SESS discharge their duties like ITSS acting on behalf of the authorities without it being possible to say, in the strict sense, that they are acting under the instructions of their superiors. The complainant also expresses the view that, because section 6(3) of the LOITSS does not recognize SESS under the same terms as ITSS as competent for the purposes of section 8(1) of Framework Act No. 1/1982 of 5 May 1982 on civil protection of the right to honour, personal and family privacy, and personal reputation (LOPCDH), SESS incur the risk of committing acts of “interference” by revealing, in the course of their duties, confidential data concerning the entities inspected (for example, when recording details of wage payments, employment contracts, and on that basis establishing administrative violations in their reports).
18. The complainant alleges that in accordance with section 8(3) of the LOITSS, in conjunction with section 5 of the same Act, SESS are not granted certain of the powers granted to ITSS for the performance of their duties, including those in sections 5(2) and 5(3.4) of the LOITSS, that is, to be accompanied during inspection visits by the workers, workers’ representatives, company experts and technical staff; to collect samples of substances and materials used or handled in a workplace; to take measurements and photographs; and to make videos and record images, draw diagrams and maps. The complainant organization asserts that the fact that SESS are not granted the power to obtain copies and extracts of the documents referred to in section 5(3.3) of the LOITSS is in violation of Article 12(1)(c)(ii) of the Convention.
19. Furthermore, the complainant observes that section 8(4) of the LOITSS, in conjunction with section 7 of the same Act, does not empower SESS to take the following measures in the discharge of the duties assigned to them under the LOITSS: “Promote procedures for the inclusion of enterprises and workers in the relevant area of the social security system ...” (section 7(6) of the LOITSS), although in practice, SESS make proposals along these lines to the social security administration.
20. The complainant requests that the Government be invited to amend the wording of the LOITSS to ensure that the consolidated wording of the LOITSS is wholly consistent with the provisions of Convention No. 81.

B. The Government’s observations

21. The Government, in its communication of 28 February 2012, explains that in Spain inspection duties are performed by two corps of civil servants, namely ITSS and SESS. ITSS belong to civil service category A1, whereas SESS belong to civil service

category A2. For entry into the corps of ITSS, candidates must have a higher university degree, whereas candidates for the post of SESS must have intermediate-level qualifications. SESS perform support, administrative and collaboration duties relating to the exercise of inspection activities under the guidance and technical supervision of the labour and social security inspector in charge of the team to which SESS are attached, in accordance with section 8(1) of the LOITSS.

22. The Government adds that the duties assigned to ITSS by section 3 of the LOITSS, and to SESS by section 8(2) of the same Act, show that the respective areas of activity of the two corps do not coincide entirely. SESS only perform certain of the duties for which the Spanish labour and social security inspection system exercises responsibility.

23. Section 3(1) of the LOITSS provides that:

Inspection functions, which are assumed by ITSS in their entirety, and by SESS within the terms established under section 8, encompass the following tasks:

Tasks involving the supervision and enforcement of legal and regulatory provisions and the provisions-related content of collective agreements, in the following fields, including:

- Organization of work and relations with trade unions:
 - Provisions relating to individual and collective labour relations.
 - Provisions relating to the protection, rights and guarantees of workers' representatives in enterprises.
- Prevention of occupational hazards:
 - Provisions relating to the prevention of occupational hazards, including legal and technical provisions that affect conditions of work.
- The social security system:
 - Provisions relating to various aspects of the social security system, such as coverage, registration, affiliation, registration/deregistration of workers, contributions and their collection.
 - Provisions regarding entitlement to social security benefits and benefits from other systems supplementing the protection deriving from the social security system, in addition to any arrangements under voluntary supplementary systems established by collective agreement.
 - Provisions relating to participation in the administration of social security, and inspection of the administration and functioning of entities and enterprises which collaborate therein or in the administration of other social protection benefits or assistance schemes.
- ...
- Employment and migration:
 - Provisions relating to job placement, employment and protection against unemployment.
 - Emigration, migration and the employment of foreigners.
- ...

24. Section 8(2) of the LOITSS specifies the duties to be performed by SESS, including:

- Enforcement of provisions relating to employment, access to employment, promotion of employment, bonuses and allowances, entitlement to and receipt of unemployment allowances.
- Enforcement of provisions relating to various aspects of the social security system, such as coverage, registration, affiliation, contributions, registration/deregistration of workers,

and the collection of contributions, as well as the mandatory collaboration of enterprises in the administration of the social security scheme, and entitlement to and receipt of social security benefits.

- Enforcement of provisions relating to the employment of foreign nationals.

...

- 25.** Consequently, the Government considers that SESS do not have competence in matters of inspection relating to employment contracts and compliance with the obligations arising out of them, or in matters concerning the prevention of occupational risks, which in its view, are the only matters which fall within the scope of the Convention.
- 26.** With regard to the allegation of lack of recognition of autonomy of SESS made by the trade union, the Government submits that Article 6 of the Convention does not require the granting of full technical and functional autonomy to SESS, but establishes that inspection staff must be composed of public officials whose status and conditions of service are such that they are assured of stability of employment and are independent of changes of government and of improper external influences. The Government states that these requirements of the Convention are met by section 20 of the LOITSS (read together with the requirements laid down in the Spanish Constitution), as both ITSS and SESS are granted the status of civil servants after successful competitive examination, and that they can only be removed from their posts in the event that serious misconduct has been legally established. In the Government's view, the independence of SESS is not affected by the fact that they are subject to an administrative hierarchy within the structure of the inspection system, as members of teams under the management and direction of an ITSS who assigns instructions to SESS.
- 27.** Concerning the recognition of the public authority of SESS, the Government submits that the authority of SESS is not affected by the fact that they are granted the status of agents of the public authorities. This status is granted to SESS precisely to ensure that they receive appropriate consideration from the public authorities themselves, as well as from the general public, employers and workers. The fact that SESS are considered to exercise authority is expressed in generic terms through the conferral of their status as agents of the public authorities, and does not in any way suppose that a higher category of authority is reserved for higher ranking bodies or officials. This is without practical consequences, as the facts established in non-compliance and contribution payment reports drawn up by SESS enjoy the same probative value as all decisions taken by officials of the Labour and Social Security Inspectorate, under the terms of the fourth additional provision of the LOITSS ("presumption of certainty"), on condition that the legal requirements have been observed. With regard to the lack of recognition of SESS as a competent authority for the purposes of the LOPCDH, the Government submits that the reference to this Act is unjustified as it refers to the area of personal privacy, and is therefore outside the scope of the Convention.
- 28.** Concerning the allegation that SESS are being denied certain powers for the performance of their duties, such as to take or remove samples of substances or materials, take measurements and photographs, make videos and record images, draw diagrams and maps, the Government submits that these powers are essentially intended for the exercise of labour inspection activities (enforcement of the legislation governing employment contracts and occupational safety and health (OSH)), which are outside the area of activity of SESS. With regard to the allegation that SESS are denied certain other powers, such as registering enterprises and workers with the relevant social security schemes, the Government indicates that this is a matter that does not fall within the scope of the labour inspection Conventions.

29. Finally, the Government indicates that, in view of all of the above, it must be concluded that Spain fully and satisfactorily meets its obligations under Conventions Nos 81 and 129, that the labour inspection functions covered by the Conventions are discharged fully by officials of the ITSS and that SESS assist, support and collaborate in the implementation of inspection functions.

C. The complainant's reply to the request for additional information

30. The FESESS, in its response of 12 December 2012 to the request by the Committee for concrete or practical examples concerning non-compliance with the Convention, including elements highlighting the manner in which SESS are assimilated to ITSS in practice, maintains that the tasks performed by ITSS and SESS are essentially the same, both from a procedural and substantive point of view. It also provides numerous documents (inspection guidelines, assignments of inspection orders by the provincial inspectorates and the Social Security Fund (TGSS), including examples of the instructions issued, and non-compliance and contribution payment reports drawn up by SESS in relation to social security and employment of foreign nationals), intended to highlight how, in practice, SESS are assimilated to ITSS and to prove the similarity in the work of these two categories of inspectors.
31. The complainant refers to different legal provisions on the procedure applicable to SESS, and deplors that they provide for limited functions and powers of SESS in relation to those of ITSS. Although the LOITSS entrusts inspection functions and the related scope of action to the inspection system as a whole, under section 8(2) of the LOITSS, SESS are not authorized to conduct certain control activities, including for instance, with regard to provisions on individual and collective labour relations and the prevention of occupational hazards.
32. The complainant adds that the LOITSS also undermines the authority and impartiality that SESS require in their relations with employers and workers in view of the provisions of the final paragraph of section 8(4), which read as follows: "The non-compliance reports issued by SESS shall be signed by the ITSS to whom they are technically accountable if they exceed the level or amounts indicated by the Ministry of Employment and Social Security. With regard to contribution payment reports, regardless of the resulting amount, the inspector's signature shall only be required in cases involving failure to register or when there are discrepancies in social security payments." As a result, SESS do not enjoy full technical and functional independence and are not guaranteed independence of any improper external influence within the meaning of Article 6 of the Convention. This provision of the LOITSS is also contrary to Article 3(2) of the Convention because it undermines the authority and impartiality necessary to SESS in their relations with employers and workers, since it makes the adoption of one of the principal measures SESS that can take, that is, proposing the opening of penalty proceedings in the relevant non-compliance report, conditional on verification by the ITSS to whom they are technically accountable.
33. However, in the various procedural inspection guidelines governing the action of the inspection services, SESS are given full inspection powers in their area of material competence, in the same way as ITSS, exceeding in practice the restrictions and limits on the technical capacities of SESS provided for in law. The trade union indicates that there is no reference in the various practical examples provided to the role of inspectors responsible for the direction and coordination of the SESS within the team, except for the signature by which the ITSS certify that they have verified the activities of the SESS, but without intervening in any way in the investigation process carried out by them.

34. In this context, the complainant indicates that the inspection guidelines and the examples provided in the annexes to its submission demonstrate that, contrary to the relevant provisions in Royal Decree No. 138/2000 of 4 February 2000, adopting the Regulations on the organization and operation of the Labour and Social Security Inspectorate (ROFIT) and Royal Decree No. 928/1998 of 14 May 1998, adopting the General Regulations on procedures for the imposition of penalties for labour-related offences and for settlements relating to social security contributions (RISOS): (i) instructions are assigned directly by the provincial inspectorates or specialized head offices (TGSS, etc.) to officials, irrespective of whether they are ITSS or SESS, and not to team leaders for subsequent assignment to the investigating SESS; (ii) both ITSS and SESS have to follow the same procedure for inspections on their own initiative (with the only exception that SESS require a prior generic assignment); (iii) SESS just like ITSS, without any distinction whatsoever, are free to determine the methods of investigation they use when carrying out their verification activities; (iv) SESS, just like ITSS, conduct independent activities with technical autonomy (including the establishment of non-compliance and contribution settlement reports, automatic registration/deregistration, etc.) and not “supporting, collaborative and administrative” functions.
35. The trade union also refers to Operational Technical Criterion No. 47/2006 and report No. 92/2009 of the Legal Office of the Spanish Data Protection Agency (AEPD), which stipulate, contrary to the restrictions provided for in section 8(3), read together with section 5(2) and 5(3.4), of the LOITSS, that SESS are authorized to request the presence of the worker concerned or a representative during visits to workplaces, and to take pictures or videos of the workers and physical persons without their consent.
36. With regard to the substantive competence of SESS, according to the FESESS, in their daily reality of activities in the area of the control of social security fraud, SESS carry out activities that are directly related to the control of employment contracts, a matter which, under the terms of section 8(2) of the LOITSS, is theoretically outside the scope of their competencies. This is the case when a report is requested, for example, on the existence of collusion in the payment of social security benefits, including unemployment benefits; the simulation of an employment relationship or the undue increase of the contribution base for fraudulent access to benefits; and the failure to register with and contribute to the general social security scheme for workers who are fictitiously self-employed.
37. The trade union provides examples which show, in its view, that SESS control many components of employment contracts in order to determine the existence of fraud, with consequences for social security benefits and the social security scheme in terms of registration and contributions. It indicates that, for instance, SESS verify the working time and occupational category of workers to determine the existence of an enforceable *inter partes* employment relationship or the mere formal provision of services by a self-employed worker and, on this basis, determine the lawfulness of the receipt of partial retirement benefits of workers. In order to determine the existence of collusion to obtain fraudulent access to benefits or the establishment of joint responsibility for the payment of arrears in social security contributions in cases of the unlawful transfer of workers, SESS are required to assess circumstantial evidence in different areas of individual labour relations (such as legal defects in contracts, the non-compliance of part-time and fixed-term contracts with legal requirements, dismissals, etc.) to determine whether contractual arrangements are in conformity with the law. All these fields relate to individual relations for which only ITSS have legal competence under the law.
38. In addition, the FESESS maintains that, while according to section 8(3) and (4), in conjunction with section 7(6) of the LOITSS, SESS are not allowed to initiate procedures for the categorization of enterprises and workers in the relevant social security scheme, and are only authorized to initiate these procedures internally, the examples submitted show

that, in practice, SESS carry out investigations in full independence, communicate directly with the TGSS, and initiate the incorporation of the physical persons concerned in the general social security scheme or the social security scheme for self-employed workers with external effects vis-à-vis third parties, and not only by taking internal initiatives, thereby going beyond the legislative framework.

39. The complainant also indicates that under the new structure of university degrees, a bachelor's degree is required to participate in the selection procedures for the positions of both SESS and ITSS, and that the qualifications required therefore no longer constitute a factor differentiating access to the two corps.
40. With regard to the number of inspection staff and the recognition of SESS as labour inspectors, the complainant organization argues that if SESS were not recognized as labour inspectors, there would be a violation of the Convention, since the number of ITSS is not sufficient to secure the effective discharge of the duties of the Labour and Social Security Inspectorate. In this context, the complainant refers to a recommendation of the ILO Governing Body of 2006, which indicates that countries which have ratified Conventions Nos 81 and 129 should maintain "a sufficient number of inspectors" for the discharge of their functions (Article 10 of the Convention). According to this recommendation, in industrialized countries with market economies – which is clearly the case of Spain – there should be one inspector for 10,000 workers. The complainant indicates that in 2011, the number of officials with competence for employment and social security was 1,827 and SESS represented 48.63 per cent of inspection staff. If SESS were not recognized as labour inspectors, there would be a ratio of 16,946,237 workers registered with the social security for 958 ITSS, or 17,689 workers for every labour inspector.
41. The FESESS finally refers to an opinion provided by the International Labour Office (the Office) to a request made by the *Syndicat Sud Travail 02*, in which it was considered that the French *contrôleurs du travail* (labour controllers) are labour inspection agents within the meaning of the Convention, in accordance with the criteria outlined by the ILO supervisory bodies. According to the trade union, there is an obvious similarity with the Spanish system, since French inspectors are higher-grade officials, whereas the controllers have, theoretically, a mid-level grade.

D. Observations of the Government in reply to the additional information provided by the complainant

42. The Government indicates in its observations of 22 February 2013 in reply to the additional information of the FESESS, that while the complainant intended to provide examples of how SESS are identical in practice to ITSS, it actually emphasizes the differences between these two categories.
43. With regard to the issues raised concerning the various inspection procedures, the Government indicates that it does not consider it necessary to refute each of the issues, on the understanding that they lack relevance. It emphasizes however that the trade union is mistaken in equating generic assignments with the power of initiative, which corresponds to ITSS exclusively. Furthermore, it considers the statement that there is no reference to the role of the ITSS responsible for the direction and coordination, does not reflect reality. SESS act in the framework of the technical direction and supervision of ITSS to whom they are hierarchically assigned.
44. The Government adds that the requirement of approval by ITSS of the non-compliance and contribution payment reports of SESS is part of a system which requires guarantees of the

quality of administrative acts in the inspection services, based on the higher technical qualification of ITSS with regard to SESS.

45. Concerning the application of Article 12 of the Convention, the Government states that section 8(3), in conjunction with section 5(3), 5(3.1), 5(3.2) and 5(3.3) of the LOITSS, does not exclude the right of SESS to be accompanied, which is clarified by Operational Technical Criterion No. 47/2006. Furthermore, the Government acknowledges that, in conformity with report No. 92/2009 of the AEPD, SESS are empowered to take photos of workers in the framework of campaigns against the grey economy, but objects to the trade union's assertion that this report grants SESS any other prerogatives. However, the Government stresses that the LOITSS amplifies the powers which are granted to labour inspectors under the Convention. In this context, the Government cites Article 12(1)(c)(ii) of the Convention, which, in its view, does not provide inspectors with the possibility to take photos, make videos or draw diagrams and maps. Therefore, it can hardly be said that the Convention is violated by not granting these rights to SESS.
46. The Government indicates that the only powers that are not granted to SESS are those in Article 12(1)(c)(iv) of the Convention, that is, "to take or remove for the purposes of analysis samples of materials and substances used or handled ...", reflected in section 5(3.4) of the LOITSS, for the simple reason that SESS do not discharge functions in the area of OSH.
47. With regard to the qualifications required to be eligible for the posts of SESS and ITSS, the Government indicates that, while it is true that since 2008 a general bachelor's degree has been introduced, which allows participation in the competition for the two corps of inspectors, the competitive examinations for the positions of ITSS and SESS are totally different (in terms of the subjects covered, the number of exams and the duration of training).
48. The Government indicates that SESS only assume competencies in areas specifically concerning section 8(2) of the LOITSS, which are in general all related to compliance with social security obligations relating to registration with the compulsory public social security system, social security contributions and benefits, and the work of foreign nationals. The examples provided show that SESS exercise functions (control of the unlawful receipt by workers of social security benefits, control of non-compliance by employers with social security obligations, registration with the social security schemes) that are specifically entrusted to them by the LOITSS. The examination of certain facts relating to employment contracts is necessary as they give rise to social security obligations. For example, the existence of an employment relationship is a deciding factor for the determination of compliance with the requirement to be insured under the compulsory social security system; the control of the consistency between the actual wages received and the social security contributions paid is a deciding factor in establishing under-declaration of wages; and the control of working time and the occupational category of workers receiving partial retirement benefits is necessary to determine the existence of fraud. While there is no doubt that there are multiple connexions and associations between the different legal provisions under the supervision and control of ITSS (in their entirety) and SESS (in part), and that some tasks of SESS involve a certain technical complexity and knowledge of various legal concepts, this does not mean that SESS go beyond the competences entrusted to them.
49. The Government considers that registration with social security schemes is a matter that is unrelated to issues pertaining strictly to labour and the prevention of occupational hazards which, in the Government's view, are the only matters which fall within the scope of the labour inspection Conventions. The example provided by the FESESS concerning the decision on the correct categorization for social security purposes by SESS does not

contradict the fact that SESS are only authorized to take internal initiatives and not to initiate directly the registration of workers, since this question is directly related to the functions attributed to SESS and has to be carried out under the direction and technical supervision of ITSS heading the team.

50. The fact that SESS are taken into account in the number of labour inspectors is due to the fact that they strengthen and complete the activity of ITSS, even if this does not mean that they have the same competencies and powers that the LOITSS gives to ITSS.
51. The Government finally expresses the view that the case of France is different in the sense that the functions and powers of investigation of ITSS and SESS are different. In particular, the French Labour Code does not specifically enumerate and limit the functions of labour controllers as the LOITSS does, but entrusts them with the supervisory functions relating to the entire body of legal provisions relating to conditions of work and the protection of workers.

III. The Committee's conclusions

52. The Committee has based its conclusions on its review of the complainant's allegations, the observations transmitted by the Government, the additional information provided by the complainant and the observations of the Government in reply thereto. Account has also been taken of the information previously communicated by the Government in the framework of its reports on the application of ratified Conventions, under article 22 of the ILO Constitution (article 22 reports), and the comments of the Committee of Experts on the Application of Conventions and Recommendations (CEACR).

A. Preliminary remarks

53. The Committee notes that the issues raised in the representation relate mainly to the application of Articles 3(1) of the Convention (labour inspection functions), 10 of the Convention (number of labour inspectors) and 12(1)(c) of the Convention (powers and prerogatives of labour inspection).
54. The Committee is primarily called upon to determine whether, as the complainant organization claims, the LOITSS is in violation of Convention No. 81 because it fails to provide SESS with the guarantees and certain of the prerogatives and inspection powers for the exercise of their duties under the Convention, which are granted to ITSS.
55. The Committee notes that the complainant refers to an informal opinion of the Office, in which it was considered that the French labour controllers are labour inspection agents within the meaning of the Convention, in accordance with the criteria outlined by the ILO supervisory bodies. According to the trade union, there is an obvious similarity with the Spanish system, since French inspectors are higher-grade officials, whereas the controllers have, theoretically, a mid-level grade. The Government replied that the case of France is different in the sense that the functions and powers of investigation of ITSS and SESS are different. In particular, the French Labour Code does not specifically enumerate and limit the functions of labour controllers as the LOITSS does, but entrusts them with the supervisory functions relating to the entire body of legal provisions relating to conditions of work and the protection of workers.
56. The Office based its opinion on criteria set out by the ILO supervisory bodies, according to which labour inspectors are agents that exercise functions as defined in Article 3(1) of the Convention; have the status of public servants (Article 6 of the Convention); are recruited

on the basis of appropriate qualifications and competences (Article 7 of the Convention); have powers and prerogatives of injunction, control and investigation (Articles 12, 13 and 17 of the Convention); and report on their activities to a hierarchy (Article 19 of the Convention), while being bound by their professional duties and obligations (Article 15 of the Convention). The Office concluded that the French labour controllers were labour inspection agents within the meaning of the Convention, taking into account that they met all the criteria, just as the higher corps of French labour inspectors.

57. The Committee notes that in the present case, as the complainant indicates itself, SESS do not meet at least one of these criteria, as they do not benefit from all the prerogatives and inspection powers provided by the Convention, and indeed claim that the LOITSS should be amended to grant SESS the guarantees, prerogatives and inspection powers for the exercise of their duties under the Convention, which are granted to ITSS. The Committee considers therefore that this informal opinion is not relevant for this case.
58. The Committee is of the view that the guarantees, prerogatives and inspection powers under the Convention are essentially intended for the exercise of the functions of the system of labour inspection as set out in the Convention. It recalls that, in accordance with Article 3(1) of the Convention, the primary functions of labour inspection shall be:
- (a) to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors;
 - ...
59. Accordingly, the Committee will primarily examine whether the functions exercised by SESS are functions within the scope of Article 3(1) of the Convention, and to what extent SESS should be granted certain guarantees and prerogatives for the performance of their duties where they are covered by the Convention.
60. The Committee will also examine whether there are any violations of the Convention in relation to the other allegations of the complainant. These allegations concern the alleged insufficiency of the number of labour inspectors exercising functions within the meaning of the Convention (Article 10 of the Convention) and the ineffectiveness of the inspection procedure in view of certain limitations placed on SESS in relation to their technical functions. The Committee considers that the analysis of the functions should also take into account the specific characteristics of the Spanish inspection system.

B. Functions of the Spanish labour and social security inspection system

1. *Functions of the Spanish inspection system as a whole*

61. The Committee understands that, in the Spanish labour and social security inspection system, inspection duties are performed by two corps of civil servants, namely ITSS and the SESS, and that inspection teams are composed of an ITSS responsible for the team, and SESS attached to these teams. ITSS are higher-grade officials and SESS have a mid-level grade.

62. The Committee notes that, in accordance with section 3 of the LOITSS, the functions of the Spanish labour and social security inspection system encompass a wide range of tasks, namely:

Tasks involving the supervision and enforcement of legal and regulatory provisions and the provisions-related content of collective agreements, in the following fields, including:

- Organization of work and relations with trade unions:
 - Provisions relating to individual and collective labour relations.
 - Provisions relating to the protection, rights and guarantees of workers' representatives in enterprises.
- Prevention of occupational hazards:
 - Provisions relating to the prevention of occupational hazards, including legal and technical provisions that affect conditions of work.
- The social security system:
 - Provisions relating to various aspects of the social security system, such as coverage, registration, affiliation, registration/deregistration of workers, contributions and their collection.
 - Provisions relating to entitlement to social security benefits and benefits from other systems supplementing the protection deriving from the social security system, in addition to any arrangements under voluntary supplementary systems established by collective agreement.
 - Provisions relating to participation in the administration of social security, and inspection of the administration and functioning of entities and enterprises which collaborate therein or in the administration of other social protection benefits or assistance schemes.
- ...
- Employment and migration:
 - Provisions relating to job placement, employment and protection against unemployment.
 - Emigration, migration and the employment of foreign nationals.
- ...

63. It also notes that in accordance with the same provision of the LOITSS, inspection functions are assumed by ITSS in their entirety, and by SESS within the terms established under section 8 of the LOITSS. In addition, section 2(1) and section 6(1) of the LOITSS refer to the application of Conventions Nos 81 and 129 to ITSS, but do not mention SESS.

2. *Functions assumed by SESS in law*

64. The Committee further notes that the functions entrusted to SESS by section 8(1) and (2) of the LOITSS do not encompass all the functions enumerated in section 3 of the LOITSS, but that they are limited, in particular, to the following functions:

- enforcement of provisions relating to employment, access to employment, promotion of employment, bonuses and allowances, entitlement to and receipt of unemployment allowances;
- enforcement of provisions relating to various aspects of the social security system, such as coverage, registration, affiliation, contributions, registration/deregistration of workers, and the collection of contributions, as well as the mandatory collaboration of enterprises in the administration of the social security scheme, and entitlement to and receipt of social security benefits;

- enforcement of provisions relating to the employment of foreigners;
- ...

65. In this respect, the Committee notes the complainant's indications that SESS are not authorized under the law to conduct certain control activities, including for instance with regard to provisions relating to individual and collective labour relations and to the prevention of occupational hazards.

3. Functions assumed by SESS in practice

66. While the Committee notes that section 8(2) of the LOITSS delineates and limits the functions of SESS in comparison with the functions entrusted to ITSS, it also notes that the actual scope of the duties performed by SESS in practice is disputed by the parties.

67. The Committee notes the complainant's assertion that the activities entrusted to SESS in the area of the control of social security fraud are directly related to the control of employment contracts, a matter which, under the terms of section 8(2) of the LOITSS, is theoretically outside the scope of their competencies. This is the case when a report is requested, for example, on the existence of collusion in the payment of social security benefits, including unemployment benefits; the simulation of a labour relation or the undue increase of the contribution base for fraudulent access to benefits, failure to register workers who are fictitiously self-employed with the general social security scheme and failure to pay contributions. The trade union considers that the examples it provides demonstrate that SESS control many components of employment contracts in order to determine the existence of fraud with consequences for social security benefits and the social security scheme in terms of registration and contributions. It indicates that for this purpose, SESS verify, for instance, the existence of an employment relationship, the daily working time and occupational category of workers and compliance with the legal requirements concerning part-time work and fixed-term contracts.

68. The Committee notes, on the other hand, the Government's indications that SESS only assume competencies in areas specifically concerning section 8(2) of the LOITSS, which are in general all related to compliance with social security obligations regarding registration in the compulsory public social security system, social security contributions and benefits and the employment of foreign nationals. The Government considers that the examples provided by the complainant show that SESS exercise functions (control of the unlawful receipt by workers of social security benefits, control of non-compliance by employers with social security obligations and registration with the social security schemes, etc.) that are specifically entrusted to them by the LOITSS. The Committee also notes that, according to the Government, the examination of certain facts relating to employment contracts is necessary as they give rise to social security obligations. For example, the existence of an employment relationship is a deciding factor for compliance in relation to the obligation to be insured under the social security system; the control of the consistency between the actual wages received and the social security contributions paid is a deciding factor in establishing under-declaration; and the control of daily working time and the occupational category of workers receiving partial retirement benefits is necessary to detect fraud. The Committee finally notes that, according to the Government, while there is no doubt that there are multiple connections and associations between the different legal provisions under the supervision and control of ITSS (in their entirety) and SESS (in part), and that some tasks of SESS involve a certain technical complexity and knowledge of various legal concepts, this does not mean that SESS go beyond the competences entrusted to them.

69. The Committee observes that, while section 8(2) of the LOITSS only describes the functions of SESS in general terms, the various examples provided by the complainant are all related to the control of social security fraud, except for one case which is related to the control of provisions concerning the employment of foreign nationals. It considers that even if the control of several facts concerning employment contracts are necessary to determine the existence of social security fraud, this does not mean that SESS exercise functions other than those specifically entrusted to them by section 8(2) of the LOITSS. It understands in addition that the functions of SESS concerning the enforcement of provisions relating to employment are also aimed at the determination of the existence of fraud (such as the undue receipt of unemployment and other benefits depending on the existence of an employment relationship).
70. **The Committee therefore finds that SESS are inspectors specialized in the control of compliance with social security obligations (relating to registration in the compulsory public social security system, social security contributions and benefits) and in the control of the employment of foreign nationals.**

C. Labour inspection functions covered by Convention No. 81

71. The Committee notes that the terms of Article 3(1) of the Convention do not explicitly mention social security or the employment of foreign nationals, and that the examples provided in this Article are limited to hours, wages, safety, health and welfare and the employment of children and young persons.
72. The Committee notes however that some general indications on the extent and nature of the labour inspection functions covered by Convention No. 81 can be found in the preparatory work for this Convention. In particular, the conclusions of the report submitted to the 30th Session of the International Labour Conference (ILC) in 1947 indicate that the language used in Article 3(1) of the Convention “is intended to make it clear that the subject headings introduced by it are illustrative only and are neither binding nor limited”.²
73. Since Convention No. 81 also has to be understood in the context of the subsequent labour inspection instruments, the Committee notes that point 7(a) of the proposed Office text for the first discussion of the Labour Inspection (Agriculture) Convention, 1969 (No. 129), included, in the list of the legal provisions to be enforced by labour inspectors, those relating to certain conditions of life, such as weekly rest and holidays, housing, the employment of women, social security, the right to organize and bargain collectively at the level of the undertaking, recruitment and transport of workers and termination of employment. However, the wording was subsequently amended and the matter of social security was not included in the final draft of Convention No. 129.
74. In this context, the Committee also notes the indications made by the CEACR in its 1985 General Survey on labour inspection, according to which “... the list of matters considered as pertaining to conditions of work and the protection of workers is given merely by way of example. The fact that the list is not restrictive means that relatively new aspects of labour protection can be taken into account, even if they are not explicitly referred to in the aforementioned provisions of Conventions Nos 81 and 129 By stipulating that the function of the system of labour inspection is to secure the enforcement of the legal

² ILO: Report IV, Organisation of Labour Inspection in Industrial and Commercial Undertakings, ILC, 30th Session, Geneva, 1947, p. 158.

provisions relating to conditions of work and the protection of workers ‘in so far as such provisions are enforceable by labour inspectors’, the two Conventions leave it to the discretion of individual States to determine the range of legal provisions coming within the purview of the labour inspectorate”.³

75. The CEACR, in its 2006 General Survey on labour inspection, also observed that: “While referring in distinct terms both to conditions of work and the protection of workers while engaged in their work, the instruments foresee the labour inspectorate covering rights recognized in national labour legislation. In a number of countries, the labour inspection is competent to cover freedom of association, equality of treatment, dismissal procedures, and social security”.⁴
76. With regard to the functions of SESS in the area of the employment of foreign nationals, the Committee recalls the detailed indications made by the CEACR in its 2006 General Survey on labour inspection, where it emphasized that the primary duty of labour inspectors is to protect workers and not to enforce immigration law, and that efforts to control the use of migrant workers in an irregular situation require the mobilization of considerable staff, time and material resources, which inspectorates can only provide to the detriment of their primary duties. The CEACR has also emphasized in its 2006 General Survey that “verifying the legality of employment should have as its corollary the reinstatement of the rights of all the workers if it is to be compatible with the objective of labour inspection. This objective can only be met if the workers covered are convinced that the primary task of the inspectorate is to enforce the legal provisions relating to conditions of work and protection of workers”.⁵
- 77. Taking into account the text of the Convention, the preparatory work of this instrument, the text and preparatory work of the subsequent labour inspection instruments, as well as the indications of the CEACR in the 1985 and 2006 General Surveys on labour inspection, the Committee is of the view that any decision as to whether inspection functions that are not explicitly foreseen by the instrument are covered by the Convention must lie with the Government and depends on the legislation in force. Such functions should nevertheless be in conformity with the objective of the Convention, which is the enforcement of provisions relating to conditions of work and the protection of workers.**

D. Conformity of the functions of SESS with the objective of the Convention

1. Control of compliance with social security obligations

78. As regards the specific activities of SESS in the area of social security, the Committee notes, from the explanations given by the parties in paragraphs 67 and 68 above, that SESS

³ ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B), International Labour Conference, 71st Session, Geneva, 1985, para. 60, et seq. (hereinafter the “1985 General Survey on labour inspection”).

⁴ ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), International Labour Conference, 95th Session, Geneva, 2006, para. 57 (hereinafter the “2006 General Survey on labour inspection”).

⁵ *ibid.*, para. 78.

control the existence of an employment relationship to assess compliance with the obligation of being insured under the social security system. It further notes that in accordance with section 7(5) of the LOITSS – this provision has not been referred to or discussed by the parties – SESS are authorized to initiate the procedure for the affiliation of workers in the compulsory social security scheme without any restrictions, that is, that the law authorizes SESS (just like ITSS) to initiate the procedure for the affiliation of workers in the compulsory social security scheme at their own initiative. The Committee understands that, even if the activities of SESS seem to be primarily aimed at the detection and sanctioning of fraud or the recovery of social security contributions, the official recognition of an employment relationship in inspection reports and the initiation of the procedure for the registration of workers are activities which may result in the regularization of workers and consequently, the granting by the social security authorities to workers of their due social security rights resulting from their employment relationship. The Committee accordingly finds that there are aspects of the activities of SESS in the area of social security fraud that are directly related to the enforcement of legal provisions relating to conditions of work and the protection of workers.

79. The Committee considers that the activities of SESS relating to the control of compliance with social security obligations are primarily aimed at securing the effective functioning of the social security system as a whole and the funding of this system as well as, in the long term, the creation of a level playing field for employers and the provision of social protection for all workers. Moreover, as shown above, the Committee is of the view that the activities of SESS may also be aimed at the enforcement of provisions relating to conditions of work and the protection of individual workers. This assumption is not affected by the fact that the nature of controls in the area of social security fraud is somewhat different in the sense that it also encompasses the prosecution of offences by workers (the unlawful receipt of unemployment benefits, etc.), whereas the traditional subjects of labour inspection are normally exclusively aimed at the enforcement of workers' rights. In this context, the Committee understands from the various non-compliance reports given as an example of the activities of the SESS and Royal Decree No. 5/2000 of 4 August 2000, adopting the consolidated text of the law on infractions and sanctions of the social order that the primary responsibility for non-compliance with the social security obligations lies with employers in breach of the social security obligations.

80. In conclusion, the Committee considers that the functions of SESS in relation to the control of compliance with social security obligations are in conformity with the objective of the Convention.

2. *Enforcement of the provisions relating to the employment of foreign nationals*

81. With regard to the compatibility of the functions relating to the enforcement of provisions concerning the employment of foreign nationals with the objective of the Convention, the Committee notes the indications made by the CEACR in its 2006 General Survey on labour inspection that, with the exception of a few countries, only the employer is held accountable for illegal employment as such, with the workers involved in principle being seen as victims. The CEACR further indicated however that, where the workers concerned are foreign nationals residing illegally in the country, they are doubly penalized in that, in addition to losing their job they face the threat of expulsion, if not actual expulsion. It nonetheless emphasized that the fact that labour inspection in general has the power to enter establishments without prior authorization allows it more easily than other institutions to put an end to the abusive working conditions of which workers in an

irregular situation are often the victims, and to ensure that workers benefit from recognized rights.⁶

- 82.** The Committee also notes the considerations made by the CEACR in the same General Survey that the primary duty of labour inspectors is to protect workers and not to enforce immigration law; that verifying the legality of employment should have as its corollary the reinstatement of the rights of all the workers if it is to be compatible with the objective of labour inspection; and that this objective can only be met if the workers covered are convinced that the primary task of the inspectorate is to enforce the legal provisions relating to conditions of work and the protection of workers.⁷
- 83.** The Committee observes that the only practical example provided by the complainant in relation to the activities of SESS in the area of the employment of foreign nationals concerns a non-compliance report establishing a violation of section 55(1)(c) of the Basic Act No. 4 of 2000 on the rights and liberties of foreign nationals in Spain and their social integration (Act No. 4 of 2000). In the example provided, a fine of €10,001 is imposed for employing a foreign national without the required work and residence permit. While this example does not provide any information with regard to the measures taken in relation to the foreign national concerned, section 53(1)(b) of Act No. 4 of 2000 provides that taking up work without the required work and residence permit constitutes a serious violation under the Act, for which a sanction of €501 to €10,000 may be imposed on foreign workers (section 55(1)(b) of the Act). In conformity with section 57(1) of Act No. 4 of 2000, instead of being fined, foreign nationals may also be expelled from the Spanish territory. The Committee finds that, as it appears from Act No. 4 of 2000, one of the objectives of the activities of SESS in the area of the employment of foreign nationals is the enforcement of immigration law.
- 84.** The Committee also notes that the CEACR, in its latest observation on the application of the Convention in Spain, has asked the Government to specify how the Labour and Social Security Inspectorate ensures compliance with employers' obligations (such as the payment of wages and other benefits for work actually done) in relation to foreign workers in an irregular situation, including in cases where such workers are subject to deportation or expulsion under immigration law.
- 85. The Committee concludes that the available information does not allow it to consider that the activities of SESS in this regard could also be aimed at the protection of foreign workers, that is, that they have a role in granting foreign nationals the rights resulting from their past employment relationship.**

E. Characteristics of the Spanish labour and social security inspection system

- 86.** As indicated above, the Committee considers that the analysis of the functions of SESS should also take into account the specific characteristics of the Spanish inspection system. While there is a single inspection system for labour and social security encompassing two corps of inspectors, ITSS and SESS, the respective functions of the two corps are clearly defined. ITSS have all the functions, rights and prerogatives of labour inspectors under the Convention, whereas SESS do not exercise other functions than those relating to

⁶ *ibid.*, para. 75, et seq.

⁷ *ibid.*, para. 78.

social security and the employment of foreign nationals, and benefit from certain rights and prerogatives provided by the Convention.

- 87.** For instance, the Committee notes that in conformity with section 20 of the LOITSS, both ITSS and SESS are granted the status of civil servants after successful competitive examination and they can only be removed from their posts in the event that serious misconduct has been legally established (Article 6 of the Convention). It also notes that, according to the corresponding statements of the parties, both ITSS and SESS are recruited with sole regard to their qualification and receive appropriate training for the exercise of their respective functions (Article 7 of the Convention). Moreover, in accordance with sections 8(3) and 5(1), 5(3.1) and 5(3.3) of the LOITSS, both ITSS and SESS are authorized to enter freely and without any previous notice at any time any workplaces liable to inspection; to interrogate, alone or in the presence of witnesses, the employer or the staff of the undertaking on any matters concerning the application of the legal provisions; and to examine any books, registers or documents in the workplace in order to control the compliance with the legal provisions relating to the social order (Article 12(1)(a), (b),(c)(i) and first part of Article 12(1)(c)(ii) of the Convention).
- 88.** The Committee observes that the Spanish inspection system is an integrated system and that the functions of labour inspection and social security inspection are complementary. For the system to function effectively, it is important that the two corps can exercise their duties fully and effectively. The Committee understands that it is for this purpose that the Government has considered it necessary to entrust SESS with the abovementioned rights and prerogatives. It further understands that certain other prerogatives could be needed for the exercise of their functions in the area of social security. In this context, the Committee wishes to emphasize that any powers and prerogatives under the Convention are granted for the effective exercise of the labour inspection functions, and therefore must not be understood as individual rights of inspectors.

F. Powers and prerogatives needed by SESS for the performance of their duties

- 89.** The Committee notes that Article 12(1)(c) of the Convention provides that:

Labour inspectors provided with proper credentials shall be empowered:

...

- (c) to carry out any examination, test or enquiry which they may consider necessary in order to satisfy themselves that the legal provisions are being strictly observed, and in particular –
- (i) to interrogate, alone or in the presence of witnesses, the employer or the staff of the undertaking on any matters concerning the application of the legal provisions;
 - (ii) to require the production of any books, registers or other documents the keeping of which is prescribed by national laws or regulations relating to conditions of work, in order to see that they are in conformity with the legal provisions, and to copy such documents or make extracts from them;
 - (iii) to enforce the posting of notices required by the legal provisions;
 - (iv) to take or remove for purposes of analysis samples of materials and substances used or handled, subject to the employer or his representative being notified of any samples or substances taken or removed for such purpose.
- 90.** The Committee notes that SESS are granted certain of the powers and prerogatives under the Convention referred to in paragraph 87 above. At the same time, the complainant alleges that in accordance with section 8(3) of the LOITSS, in conjunction with section 5

of the same Act, SESS are not granted certain of the powers given to ITSS for the performance of their duties, including those in sections 5(2) and 5(3.4) of the LOITSS, that is, to be accompanied during inspection visits by the workers, workers' representatives, company experts and technical staff; to collect samples of substances and materials used or handled in a workplace; to take measurements and photographs; and to make videos and record images, draw diagrams and maps. The complainant organization asserts, in particular, that the fact that SESS are not granted the power to obtain copies and extracts of documents is in violation of Article 12(1)(c)(ii) of the Convention. The Committee notes, on the other hand, the Government's indications that the only powers – in relation to the application of the Convention – that are not granted to SESS are those in Article 12(1)(c)(iv) of the Convention, for the reason that SESS do not discharge functions in the area of OSH.

91. The Committee will therefore proceed to examine the different powers and prerogatives requested by the complainant.
92. *Power to obtain copies and extracts of documents (Article 12(1)(c)(ii) of the Convention (in fine)).* The Committee notes that section 8(3) of the LOITSS does not refer to section 5(3.4) of the LOITSS and therefore does not grant SESS the power to obtain copies of documents that they are entrusted to control, in accordance with sections 8(3) and 5(3.3) of the LOITSS. The Committee considers that the prerogative to obtain copies of documents is needed as evidence to prove non-compliance with the social security obligations.
93. *Power to take or remove for purposes of analysis samples of materials and substances used or handled (Article 12(1)(c)(iv) of the Convention).* With regard to the power to take or remove for purposes of analysis samples of materials and substances used or handled (Article 12(1)(c)(iv) of the Convention), the Committee notes that the CEACR indicated, in paragraph 278 of the 2006 General Survey on Labour Inspection that “(t)hese provisions are intended to ensure protection of the health and safety of workers ... in the use and handling of certain materials and substances”. The Committee is of the view that the power to take or remove for purposes of analysis samples of materials and substances used or handled is not needed for the control of compliance with social security obligations.
94. *Power to be accompanied during inspection visits by the workers, workers' representatives, company experts and technical staff.* The Committee notes that the power to be accompanied during inspection visits, by workers, their representatives or by company experts or technical staff and granted to ITSS by section 5(2) of the LOITSS, are not powers that are explicitly provided for by the Convention, even though it is without doubt that such powers can be very useful for the control of compliance with social security obligations.
95. As regards the power to be accompanied during inspection visits by the workers or workers' representatives, the Committee notes that while Article 5(b) of the Convention provides that the competent authority shall make appropriate arrangements to promote collaboration between officials of the labour inspectorate and employers and workers or their organizations, this article does not determine the form this collaboration should take. The Committee also notes that Part II of the Labour Inspection Recommendation, 1947 (No. 81), only provides guidance concerning possible forms of collaboration with the social partners in regard to OSH (collaboration of workers' representatives in the investigation of industrial accidents and occupational diseases, setting up of safety committees at the enterprise level, discussion of questions relating to OSH during conferences and joint committees, dissemination of information in the area of OSH, etc.).

96. With regard to the association of experts and specialists with the work of labour inspectors, the Committee notes that the explicit purpose of Article 9 of the Convention⁸ is to secure the enforcement of the legal provisions relating to the protection of the health and safety of workers while engaged in their work and that the Convention only requires the association of experts and specialists in the area of OSH (such as specialists in medicine, engineering, electricity and chemistry) and not experts in other areas.
97. *Power to take measurements and photographs; and to make videos and record images, draw diagrams and maps. Power to initiate procedures for the categorization of enterprises and workers under the relevant social security scheme.* As for the power to take measurements and photographs; and to make videos and record images, draw diagrams and maps, the Committee notes that these powers are not explicitly mentioned and go beyond the powers explicitly granted by the Convention. Similarly, the power to initiate procedures for the categorization of enterprises and workers under the relevant social security scheme, set out in section 7(6) of the LOITSS, is a measure specifically related to functions in the area of social security and not a prerogative referred to in the Convention.
98. **In conclusion, the Committee considers that the power to obtain copies and extract of documents is needed for the exercise of the duties of SESS. However, it does not find merit in the arguments brought forward by the complainant in relation to the other powers mentioned in paragraphs 93 to 97 above, since these powers are either: (i) intended for controls in the area of OSH and not needed for the control of social security obligations; or (ii) go beyond the powers explicitly granted by the Convention.**

G. Conclusions: Inspection powers and prerogatives

99. Against this background, **the Committee concludes that, taking into account the characteristics of the Spanish inspection system, and while acknowledging the discretion that the Government has in this matter (see paragraph 77 above), the Government should envisage the possibility to grant SESS powers and prerogatives under the Convention, where they are needed or useful for the performance of their functions that are in conformity with the objective of the Convention, which is the case in relation to their functions in the area of social security.**
100. However, the Committee also notes that many powers under the Convention primarily relate to functions in the area of OSH and that only a limited number of guarantees, powers and prerogatives under Convention No. 81 appear to be directly applicable to functions in the area of social security. This view is corroborated by the indications made by the CEACR in its 2011 General Survey concerning social security instruments,⁹ that there was

⁸ Article 9 of the Convention provides that each Member shall take the necessary measures to ensure that duly qualified technical experts and specialists, including specialists in medicine, engineering, electricity and chemistry, are associated in the work of inspection, in such manner as may be deemed most appropriate under national conditions, for the purpose of securing the enforcement of the legal provisions relating to the protection of the health and safety of workers while engaged in their work and of investigating the effects of processes, materials and methods of work on the health and safety of workers.

⁹ ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), International Labour Conference, 100th Session, Geneva, 2011, para. 619.

a pressing need for more thorough controls in the area of social security obligations and that experience accumulated by the ILO in applying the Labour Inspection Convention, 1947 (No. 81) (and the Protection of Wages Convention, 1949 (No. 95)), could provide guidance for considering new standards on protection of social security funds and inspection services in social security.

- 101.** Consequently, the only prerogative provided by the Convention and which has not been granted to SESS by the LOITSS, but nevertheless appears to be needed for their functions in the area of social security is the power to obtain copies and extracts of documents under Article 12(1)(c)(ii) of the Convention (in fine). **The Committee concludes that the Government should consider the possibility of granting SESS – in the same way as ITSS – the power provided by Article 12(1)(c)(ii) of the Convention (in fine), both in law and in practice.**

H. Other questions

1. *The number of labour inspectors exercising functions within the meaning of the Convention*

- 102.** The Committee notes that Article 10 of the Convention provides that:

The number of labour inspectors shall be sufficient to secure the effective discharge of the duties of the inspectorate and shall be determined with due regard for:

- (a) the importance of the duties which inspectors have to perform, in particular –
 - (i) the number, nature, size and situation of the workplaces liable to inspection;
 - (ii) the number and classes of workers employed in such workplaces; and
 - (iii) the number and complexity of the legal provisions to be enforced;
- (b) the material means placed at the disposal of the inspectors; and
- (c) the practical conditions under which visits of inspection must be carried out in order to be effective.

- 103.** The Committee notes that the complainant refers to a recommendation of the Governing Body of November 2006 indicating that countries should maintain a “sufficient number of inspectors” for the discharge of their functions and the obligations under the Convention. According to this recommendation, in industrialized countries with market economies the ratio should be one inspector for 10,000 workers. The trade union holds that, if SESS (which in 2011 represented 48.63 per cent of inspection staff) were not recognized as labour inspectors, the ratio (as at 2011) would be 16,946,237 workers affiliated to social security for 958 ITSS, or 17,689 workers for every ITSS, and the Government would fail to comply with this recommendation, and accordingly with its obligations under the Convention.

- 104.** On the other hand, the Committee notes the Government’s indications that labour inspection functions under the Conventions are satisfactorily discharged by officials of the ITSS. The Government adds that SESS assist, support and collaborate in the implementation of the inspection function, strengthen and complete the activity of the ITSS, even if they do not dispose of the same competencies and powers that the LOITSS grants ITSS.

- 105.** The Committee is of the view that the Government cannot deny that SESS are exercising labour inspection functions within the meaning of the Convention, and at the same time, take them into full consideration when reviewing the number of labour inspectors under

Article 10 of the Convention. However, it notes that a specific number of labour inspectors is not required by the Convention, that the ratio of one inspector per 10,000 workers is merely indicated as guidance and that the number of labour inspectors shall be determined with due regard for the criteria listed in Article 10 of the Convention.

- 106.** The Committee considers that there are insufficient elements to appreciate the application of Article 10 of the Convention and that some additional information would be needed to enable the Committee to evaluate the efficiency of the Spanish labour inspection system (such as the number of inspection visits carried out, the number of infractions detected, the number of industrial accidents and cases of occupational diseases occurred, etc.). Since the complainant has based its allegations on the ineffectiveness of the Spanish labour inspection system exclusively on the number of labour inspectors, the Committee concludes, in the absence of more detailed information on the effectiveness of the labour inspection system, that it is not in a position to make an informed assessment in this regard. The Committee notes however that the CEACR, in its latest comments on the application of Convention No. 81 by Spain, observed that the activities of ITSS in the area of undeclared work are on the increase in Spain. It is of the view that the Government should make necessary arrangements, in view of the increased activities in this regard, that sufficient resources are provided for the exercise of the traditional functions, for instance the enforcement of legal provisions relating to OSH. **The Committee requests the Government to provide the CEACR with relevant information for follow-up on this question.**

2. Effectiveness of inspections

- 107.** The complainant alleges that the LOITSS denies SESS full technical and operational autonomy for the performance of their duties, although SESS perform genuine inspection functions in practice, regardless of the hierarchy of the administrative units to which they are assigned under the same conditions as ITSS. **The Committee considers that the Convention does not impose a particular model for the inspection system, but allows for flexibility with regard to the organization or the mode of operation of the labour inspectorate, on the condition that the national labour inspection system functions effectively in practice. It is therefore at the discretion of the Government if it wishes to create an additional corps of inspectors at a subordinate level with limited functions and powers, provided that the functions of the labour inspection system are performed effectively.**
- 108.** The Committee also notes that the complainant refers to certain limitations placed on SESS in relation to their technical functions. In particular, it notes the complainant's indications that: (i) the fact that non-compliance and contribution payment reports of SESS are subject to approval introduces strains and operational inconsistencies, as well as delays owing to differences in technical assessments in the inspection procedure; (ii) the fact that SESS are, under section 8(3) of the LOITSS, considered to be agents of the public authority in the execution of the instructions that they receive for the discharge of their functions, rather than members of the public service, may detract from the authority needed in their relations with employers and workers for the effective discharge of their principal duties; and (iii) the fact that SESS are not recognized by section 6(3) of the LOITSS as competent for the purposes of the LOPCDH, raises the risk of SESS committing acts of "interference" by revealing, in the course of their duties, confidential data (for example, records of wage

payments and employment contracts in reports and other documents) concerning the entities inspected.¹⁰

- 109.** On the other hand, it notes the Government's indications that these allegations are without relevance for the effectiveness of the inspection procedure, and in particular that: (i) the requirement of approval by ITSS of non-compliance and contribution payment reports of SESS is part of a system which requires guarantees for administrative acts in the inspection services, based on the higher technical qualification of ITSS with regard to SESS; (ii) the fact that SESS are considered to exercise authority is expressed in generic terms through the conferral of their status as agents of the state authorities and does not suppose in any way that a higher category of authority is reserved for higher ranking bodies or officials and does not in any way impact on the presumption of certainty of the non-compliance and contribution payment reports drawn up by SESS; and that (iii) the reference to the LOPCDH is unjustified as it refers to the area of personal privacy.
- 110. The Committee finds that the questions relating to (i) and (ii) above relate to the internal organization of the Spanish labour and social security inspection system, and there are no indications that they affect the effective functioning of the system.**
- 111.** In particular, the complainant does not provide any examples on how the status of agents of the public authorities of SESS may detract from the authority they need in their relations with employers and workers for the effective discharge of their duties. As indicated by the complainant, SESS enter workplaces to conduct any investigations, examinations or tests that they deem necessary, check the personal identity of persons, interview employers and workers and draw up non-compliance and contribution settlement reports. Furthermore, in accordance with the fourth additional provision of the LOITSS, the facts established by SESS in non-compliance and contribution settlement reports have the same probative value as if they were established by ITSS.¹¹ The Committee understands that only the decisions taken by SESS (and not the facts established in these reports) are subject to the validation and approval of ITSS, on whom SESS are technically dependent, under the conditions provided for in section 8(4) of the LOITSS. The Committee is of the view that this control does not affect the authority needed by SESS for the effective discharge of their duties.
- 112.** Concerning the risk of SESS committing offences under the LOPCDH in the course of the duties entrusted to them because of their failure to be recognized as competent for the purposes of the LOPCDH, **the Committee considers that, if the Government decided to extend the prerogatives of SESS provided by Convention No. 81, in particular in relation to the power to copy documents (Article 12(1)(c)(ii)), it might also wish to examine whether there is a need to review the related legal matters under the LOITSS in conjunction with the LOPCDH.**

¹⁰ Section 6(3) of the LOITSS provides that "Labour and Social Security Inspectors [ITSS] shall have the character of a **competent authority** for the purposes of Organic Act No.1/82 of 5 May on the civil protection of the right to honour, the personal intimacy and the own image" (*emphasis added*). Section 8(1) of the LOPCDH stipulates that in "in general, lawful actions authorized or agreed upon by the **competent authority**, even where a relevant historical, scientific or cultural interest predominates, **shall not be considered unlawful interference**" (*emphasis added*).

¹¹ Para. 2 of the fourth additional provision of the LOITSS provides that the facts established by the officials of the Labour and Social Security Inspectorate in non-compliance and financial settlement reports enjoy presumption of certainty, on the condition that the legal requirements are complied with.

IV. The Committee's recommendations

113. *In light of the conclusions set out in paragraphs 70, 77, 80, 85, 98, 99, 101, 106, 107, 110 and 112 above concerning the issues raised in the representation, the Committee recommends that the Governing Body:*

- (a) approve the present report;*
- (b) invite the Government to consider the possibility of granting SESS, in law and in practice, the powers and prerogatives under the Convention where they are needed or useful for the performance of their duties that are in conformity with the objective of the Convention, as indicated in paragraph 101;*
- (c) entrust the Committee of Experts on the Application of Conventions and Recommendations with following up on effect given to the conclusions of this report with respect to the application of Article 10 of this Convention (paragraph 106), as well as Article 12(1)(c)(ii) (paragraph 101); and*
- (d) make this report publicly available and close the procedure initiated by the representation of the complainant organization alleging the non-observance by Spain of Convention No. 81.*

Geneva, 10 June 2014

(Signed) C.-E. Triomphe
Chairperson

L. Horvatić

C. Del Rio

Point for decision: Paragraph 113