

MEF RESPONSE ON REFERRING THE ISSUE OF RIGHT TO STRIKE TO INTERNATIONAL COURT OF JUSTICE BY WORKERS GROUP AND 34 GOVERNMENTS

Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution

1. MEF states that countries including Malaysia have established specific legislative processes and practices to deal with strike. Employers have consistently argued at the various ILCs that a right to strike is not provided for in the text of ILO Conventions 87 and 98 and, according to all applicable methods of interpretation stated in the Vienna Convention on the Law of Treaties, it would be difficult to consider it to be implicit or customary law.
2. The Employers' objections at ILCs on the issue of the right to strike have been accompanied by various requests for clarification. For instance, for the CEACR to explain how it arrived at its interpretations of a right to strike in its 2012 General Survey using the applicable methods of interpretation; and for a review of the circumstances which create such sustained and profound inconsistency between the views of the Experts and the practice of governments and legislatures. Moreover, from the time of the 2012 deadlock, the CEACR has continued to provide national governments with observations based on the view that a right to strike is a fundamental right of workers and their organisations and that it is part of C. 87. This view has been incorporated into ILO training materials and advice to governments on labour law and has had a direct impact on legal thinking across jurisdictions.
3. As a result, confusion has been spread over obligations arising from a ratified Convention vis-à-vis legal developments of Conclusions. The Employers' Group does not question the diverse ways in which different

jurisdictions have protected strike action or recognise a right to strike. The confusion also impacts non-ratifying ILO Member States' obligations to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights at work and has undermined the role of the constituents of the Organization to set international labour standards. In addition to the confusion, national authorities have to face the intrinsic difficulty of how to regulate strikes while reconciling the conflicting interests of the strikers and those of others and the public interest. ILO Member States have to find adequate solutions in line with their respective situations. Whether, and to what extent, there is a need for rules on strike action at international level has not been determined by the ILO's own constituents. In the process of elaborating C. 87 and a number of subsequent ILO Conventions and Recommendations, such a need has however been expressly rejected.

4. In paragraph 92 of its 2014 Report, the CEACR accepts that the diversity of views on strike action requires a more flexible approach when it states: "The committee recognises that these observations on strike action can be questioned by the tripartite constituents or recourse may be made to article 37 of the ILO Constitution.
5. The Employers at ILCs continue to question any observations relating to strike action in the context of Convention No. 87. The Workers' Group has rejected all options for reaching an agreement on a possible solution on strike action at ILO level.
6. With its unique tripartite structure, the ILO would be the appropriate and legitimate arena for solving this issue.
7. MEF reiterates its concern over the differences of opinion between the CAS and the CEACR, which is compromising the authority of the ILO supervisory system as a whole. MEF is of the view that since ILO has established supervisory systems in CAS and CEACR the issue on the right to strike should not be referred to the International Court of Justice for decision.