Committee on the Application of Standards
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Malaysia (ratification: 1961)

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
Convention (no 98) sur le droit d'organisation et de négociation collective, 1949
Convenio sobre el derecho de sindicación y de negociación colectiva, 1949 (núm. 98)

Written information provided by the Government

The Government has provided the following written information as well as statistics on the number of collective agreements given cognizance.

Observations of the Malaysian Trades Union Congress (MTUC)

The Government keeps its measures in protecting the rights of employees in the country.

The Industrial Relations Act (IRA) 1967 [Act 177] provides protection against acts of anti-union discrimination in respect of their employment through section 8 and section 59 of Act 177. Section 8 provides procedures for non-criminal union-busting cases whereas section 59 deals with semi-criminal cases.

Currently, sections 4, 5 and 7 of Act 177 provide protections of the rights of workers to form, to join and to participate in trade union activities.

In addition, the Government is in the midst of amending Trade Unions Act 1959 [Act 262]. Act 262 regulates the operation of trade unions in Malaysia which generally provides for procedures and processes in terms of registration, cancellation and governance of trade unions. The proposed amendment aims to enhance the rights of collective bargaining power of unions in the country by allowing multiplicity of trade unions establishment as well as allow the existence of more than one trade union in one workplace.

The first reading of this bill has been tabled at Parliament on 24 March 2022. The second reading of this act is scheduled to be tabled in the forthcoming Parliament session.

Ongoing legislative reform

The Government has continued to cooperate with the ILO through the Labour Law and Industrial Relation Reform Project in the holistic review process. The development of the labour law amendments are as follows:

(1) The amendment of Employment Act 1955 [Act 265] has been approved by Parliament on 20 March 2022 and has been gazetted on 10 May 2022.

(2) Further, on the development of the amendment of Trade Unions Act 1959 [Act 262], the first reading of this bill has been tabled at Parliament on 24 March 2022. The second reading of this act is scheduled to be tabled in the forthcoming Parliament session.

Article 1 of the Convention. Adequate protection against anti-union discrimination. Effective remedies and sufficiently dissuasive sanctions.

Detailed information on the general remedies imposed in practice for acts of anti-union discrimination dealt with through sections 5, 8 and 20 of Act 177 are as follows:

(i) Remedies for anti-union discrimination under section 8 and section 20 of Act 177 are awarded by Industrial Court based on facts and merits of each case. The Industrial Court will act to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form for all cases that have been referred by the Director-General of Industrial Relations under section 8, Act 177.

(ii) Further, in the spirit of tripartism and as stipulated in Act 177, victims of anti-union discrimination may file complaints to the Director-General of Industrial Relations in order for the department to inquire or conciliate or investigate the complaints.

(iii) 35 cases were reported from January 2021 until April 2022 under section 8 of Act 177. Out of 35 cases, 31 (88.57 per cent) have been resolved by the Industrial Relations Department and the average duration of the proceedings is three to six months.

(iv) As for the Industrial Court, the case which has been referred by the Director-General of Industrial Relations under section 8 of Act 177 shall be disposed within 12 months based on Industrial Court Client's Charter.

Articles 2 and 4. Trade union recognition for purposes of collective bargaining. Criteria and procedure for recognition. Exclusive bargaining agent.

The consultation sessions with stakeholders including the social partners have been done throughout the drafting process of each amendment including the Trade Unions Act 1959. As for the process on the amendment of Trade Union Act 1959, a total of 72 sessions of engagement, consultation and workshop with social partners have been conducted starting from 2018 to date.

The amendment of Trade Unions Act 1959 [Act 262], has undergone the first reading of its bill which has been tabled at Parliament on 24 March 2022. The second reading of this act is scheduled to be tabled in the forthcoming Parliament session.

The Government is of the view that simple majority is a minimum requirement and it shall be maintained in order for a trade union to become an exclusive bargaining agent and social partners agree with this. Where more than one trade union of workers have been accorded recognition, the exclusive bargaining agent will be determined among themselves or ascertained by the Director-General of Industrial Relations by way of a secret ballot (highest number of votes) as stipulated in the new section 12A of IRA 1967. Section 12A has yet to be enforced and subject to the amendment of the Trade Unions Act 1959.

In this regard, the amendment of Trade Unions Act 1959 [Act 262] has undergone the first reading of its bill which has been tabled at Parliament on 24 March 2022. The second reading of this act is scheduled to be tabled in the forthcoming Parliament session.

Duration of recognition proceedings.

The average duration of the recognition process is four to nine months. The decision on recognition by the Director-General of Industrial Relations may be appealed by the concerned union or employers by way of judicial review.

Migrant workers.

Foreign workers are eligible to become members of a trade union and are eligible to hold office upon approval of the Minister if it is in the interest of such union. In addition, Act 177 does not impose restrictions on migrant workers to engage in collective bargaining.

Scope of collective bargaining.

The Government maintains its opinion that section 13(3) of Act 177 shall be retained to maintain industrial harmony and in order to speed up the collective bargaining process. Furthermore, the provisions under section 13(3) of Act 177 is not compulsory provisions, as if both parties agree, they may negotiate the said provisions during the collective bargaining process.

Prior to current amendment of section 13(3) of Act 177, questions of a general character with regards to promotion only may be raised for matters related to promotion, transfer, recruitment, termination of employment due to redundancy, dismissal and reinstatement and assignment or allocation of duties.

Compulsory arbitration.

The amendment on the proviso will be enforced respectively after the amendment of the Trade Unions Act 1959 [Act 262]. In this regard, the amendment of Act 262 has undergone the first reading of its bill which has been tabled at the Parliament on 24 March 2022. The second reading of this act is scheduled to be tabled in the forthcoming Parliament session.

Restrictions on collective bargaining in the public sector.

The Government is committed to ensure the welfare of public servants and recognized collective bargaining as one of the engagement sessions between employers and employees in the public sector. The contents of Service Circular 6/2022 and Service Circular 7/2020 can be accessed through https://docs.jpa.gov.my/docs/pp/2020/pp062020.pdf and https://docs.jpa.gov.my/docs/pp/2020/pp072020.pdf.

Collective bargaining in practice.

Statistical information on the number of collective agreements concluded and in force is provided.

Discussion by the Committee

Government representative – In response to the observations raised by this Committee on Malaysia's compliance with the Convention, please allow me to share some feedback with regard to efforts that have been undertaken by the Government of Malaysia, with the view to progressively fulfil the requirements under the Convention, thus enhancing Malaysia's credibility and integrity at international forums.

In this context, Malaysia wishes to take this opportunity to briefly explain the constructive development of labour laws reform with reference to the requirements of the Convention. In

this respect, Malaysia has successfully amended the Industrial Relations Act 1967 in December 2020. This important development aims to enhance the existing dispute resolution system, as well as to enable any disputes arising to be resolved effectively and expedite the procedures involved. In addition, an amendment to the Employment Act 1955 has been gazetted on 10 May 2022, following which the amendments to the Trade Unions Act 1959 have been tabled in Parliament in March 2022, with the objective to encourage greater participation of workers to join trade unions. In this regard, the Government of Malaysia would like to take this opportunity to record our appreciation for the technical assistance provided by the ILO via the Labour Law Industrial Relations Reform project.

Malaysia has made a progressive move to enhance the relevant laws in order to be in line with the Convention. The Government, through the Ministry of Human Resources, has conducted a series of engagements and dialogue sessions with the social partners and the relevant authority to deal with the issues holistically. Further, the Government's commitment towards labour law reforms shows the continued commitment to deal with all the allegations made particularly with regard to anti-union discrimination and interference in the recognition process. These measures will resolve matters in relation to any cases reported by the Malaysian Trades Union Congress (MTUC). As such, the Government would like to state that observations made by the MTUC previously have been addressed accordingly. Overall, the journey to resolve the cases is not easy. Out of 21 cases reported, 20 cases have been resolved and the outcome of one case is pending at the Industrial Court. Sharing a case in point is the disputes between one of the nation's largest and most diverse conglomerate company and the National Union of Transport Equipment and Allied Industry Workers (NUTEAIW); it has been resolved by the decision of the Industrial Court which was in favour of all the 18 claimants.

In addition, the new amendments provide adequate protection against anti-union discrimination whereby sections 8 and 20 of the Industrial Relations Act 1967 provide general remedies for any case of dismissal such as reinstatement, back wages, and compensation in lieu of reinstatement. In relation to this, if there are cases of anti-union discrimination, in the spirit of tripartism and as stipulated in the Industrial Relations Act 1967, the affected parties may file complaints to the Director-General of Industrial Relations in order for the department to launch inquiries or conciliate or investigate the complaints.

In terms of complaints received by the Department of Industrial Relations, a total of 35 cases were reported between January 2021 and April 2022. Out of 35 cases, 31 cases, which is equal to 88.7 per cent, have been resolved and the average duration of these proceedings is between three to six months. For cases referred to the Industrial Court under section 8 of the Industrial Relations Act 1967, they will be resolved within 12 months based on the Industrial Court Client's Charter.

To safeguard against employers' interference in the recognition process, specific provisions, which are sections 4, 5 and 8 of the Industrial Relations Act, 1967, are applied. In this context, although section 8 of the Act has been amended, the actual impact on the secret balloting process has not been visible due to COVID-19 restrictions. Thus, the Government is of the view that the effectiveness of the amendment should not be a measuring tool at this juncture.

In addition, the Government has also introduced new provisions in advance especially on the sole bargaining rights under section 12A of the Industrial Relations Act 1967, to enable a trade union the rights of sole bargaining in cases where more than one trade union has been recognized by the employer. However, the new provision will only take effect after the amendment of the Trade Unions Act 1959 has been completed. The amendment of the Trade

Unions Act 1959 has undergone the first reading of its Bill and is expected to be tabled for the second reading in the forthcoming Parliament session. To the point raised by the Committee of Experts with regards to the situation where no union is declared as the exclusive bargaining agent, a simple majority is needed as a minimum requirement to ensure the process has been completed.

With regards to the point raised by the Committee of Experts on the average duration of the recognition process, 54 per cent of cases were resolved from 2018 to 2019 within four to nine months. However, there are also cases that can be resolved within a month if it involves voluntary recognition. In relation to the amendment of section 9(6) of the Industrial Relations Act 1967, whereby the provision is deleted, the decision on recognition by the Director General of Industrial Relations could still be applied through a judicial review request.

With regard to the issue of migrant workers, the Government would like to reiterate that they could be members of a trade union and may hold office subject to appropriate processes and approval by the Ministry of Human Resources. As such, there is no specific restriction under the Industrial Relations Act 1967 for them to engage in collective bargaining. Based on the statistics provided by the Trade Unions Department, in 2019, a total of 13 unions with a membership of 2,874 members, migrant worker members, were registered. The number has increased in 2021 whereby a total of 7,325 migrant workers are registered as members of a trade union. Today, a total of 27,964 foreign workers are members in 16 registered trade unions.

With regard to the request of the Committee of Experts to consider lifting the broad legislative restrictions on the scope of collective bargaining, the Government maintains its status quo in order to speed up collective bargaining processes and maintain industrial harmony.

The Government took note of the comments by the Committee of Experts on the amendment of section 26(2) of the Industrial Relations Act 1967.

Further, as for the rights pertaining to collective bargaining by public servants, the Government has always been supportive and has made engagements through various avenues. In this respect, the Public Service Department has provided a platform through the National Joint Council and the Departmental Joint Council in order to ensure that the welfare of public servants is heard and taken care of well.

Last but not least, the Government has always taken important steps to improve and address matters related to labour laws as well as reforms. In this regard, we will continue to be consistent in our support via the existing strategic collaboration between various stakeholders especially the MTUC and the Malaysian Employers Federation (MEF) in ensuring that the ILO's requirements with regard to the Convention are met.

Employer members – This case is about the application in law and practice by Malaysia of the Convention. This is a fundamental Convention which Malaysia ratified in 1961. The case is being discussed in the Committee for the fifth time this year, the last occasion being in 2016. It is a case in which the Committee of Experts made 20 observations since 1989, the last five times being in 2015, 2016, 2017, 2018 and 2021.

The latest consideration of the case follows the complaints launched in 2019 by the MTUC alleging violations of the Convention in practice, including numerous instances of anti-union discrimination, employer interference and violations of the right to collective bargaining in a number of enterprises. The same or similar complaints were previously raised in 2015 by the MTUC and in 2016, 2017 and 2018 by the International Trade Union Federation (ITUC).

The Committee of Experts' observations relate to the following areas of alleged non-compliance by the Government with the Convention. The first one relates to adequate protection against acts of anti-union discrimination. We recall that Article 1 provides that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their of employment".

The Government has indicated that general remedies against acts of anti-union discrimination are dealt with mainly through sections 5, 8 and 20 of the Industrial Relations Act. Cases are referred to the Director-General of Industrial Relations for investigation, inquiry or conciliation, a process which takes an average of three to six months to complete.

Cases referred by the Director-General to the Industrial Court may take up to 12 months to finalize. In addition to the information already submitted by the Government, the Committee of Experts has requested the Government to take measures to ensure that workers who are victims of anti-union discrimination can lodge a complaint directly before the courts in order to access expeditiously adequate compensation and the imposition of sufficiently dissuasive sanctions.

The Committee of Experts also repeated their recommendation for the Government to consider shifting the burden of proof once a worker has made a prima facie case of anti-union discrimination which could be blocking access to appropriate remedies in law.

In this regard, the Employer members invite the Government to continue working with its social partners and, if necessary, with ILO technical assistance to consider measures to improve workers' access to adequate remedies for acts of anti-union discrimination.

The next observation relates to recognition of trade unions for purposes of collective bargaining. In this regard, we recall that Article 2(1) of the Convention provides that workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

Further, Article 4 provides that "measures appropriate to national conditions shall be taken when necessary to encourage and promote the full development and utilisation of machinery for voluntary negotiations between employers and employers' organisations and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements".

The Committee of Experts noted the complaints by the MTUC and the ITUC that the process of challenging an employer's rejection of a voluntary recognition application by a trade union did not provide adequate protection against interference by the employer. The Committee of Experts also repeated their recommendation that, where no single union has emerged as the exclusive bargaining agent, minority unions should be able to negotiate, either individually or jointly, at least on behalf of their members.

We welcome the information by the Government that it has worked with its social partners to make amendments to the legal provisions governing union recognition, including section 12(A) of the Industrial Relations Act which deals with the determination of a bargaining agent by a secret ballot by the Director-General. We note that section 12(A) will only enter into force upon amendment of the Trade Unions Act of 1959. Accordingly, the Employers encourage the Government to continue working with its social partners to finalize the legal mechanisms that provide safeguards against any interference in the process of trade union recognition and to address the situation of minority unions where no exclusive bargaining

agent has emerged. The Government is invited to inform the Committee of Experts of its progress in this regard.

The next observation relates to the duration of recognition proceedings. The Committee of Experts had previously called on the Government to implement administrative and legal measures to expedite the recognition process. According to the Government, changes have been implemented, including amendments to the Industrial Relations Act, to shift powers relating to union recognition from the Minister of Human Resources to the Director-General of Industrial Relations. The Committee of Experts welcomed the changes in law but inquired whether the deletion of section 9(6) of the Industrial Relations Act would render the decision of the Director-General appealable, which might further delay the process. We accordingly invite the Government to consider this matter and provide information to the Committee of Experts by 1 September 2022.

The next observation is in respect of migrant workers, specifically their ability to stand for trade union office. While the Government's information confirms that migrant workers are not prevented from joining trade unions or standing for office, the information maintains the qualification that it must be approved by the Minister if it is in the interest of such a union. The Committee of Experts has indicated that this situation is not consistent with the Convention and has repeated its call on the Government to take measures, legal and otherwise, to ensure that migrant workers enjoy their full collective bargaining rights. In this regard, the Employers invite the Government to work with the most representative employers' and workers' organizations with ILO technical assistance, if required, to align national laws with the Convention.

The next observation is in respect of the scope of collective bargaining, especially as circumscribed by section 13(3) of the Industrial Relations Act. The Committee of Experts had previously expressed their firm hope that this section would be amended in respect of its broad restrictions to collective bargaining, especially with regard to transfer, dismissal and reinstatement which are matters known to be internal management prerogatives. According to the Government, section 13(3) was retained in the last round of amendments except that it has also been amended to now allow trade unions to raise questions of a general character relating to transfers, termination of services due to redundancy, dismissal, reinstatement and assignment or allocation of work.

The Committee of Experts called for information from the Government on the practical implications of the changes, especially the wording about questions of a general character and repeated their recommendation for the Government to lift the broad restrictions on collective bargaining. The Employer members accordingly invite the Government to provide information to the Committee of Experts by no later than 1 September 2022. In addition, we advise the Government to continue working with the most representative employers' and workers' organizations to address any provisions that restrict the scope of collective bargaining.

The next observation relates to collective bargaining in the public sector. The Committee of Experts noted some of the restrictions on collective bargaining in the public sector, specifically, the exclusion in terms of section 52 of the Industrial Relations Act. We also note the Government's information that it is committed to protecting the collective bargaining rights of public servants. We also note Service Circular No. 6 and Service Circular No. 7 of 2020 in this regard. We therefore invite the Government to provide information to the Committee of Experts on the working and practice of collective bargaining in the public sector.

A last observation relates to collective bargaining in practice. In the context of low levels of unionization and coverage by collective agreements, the Committee of Experts encouraged

the Government to continue providing statistical information on the number of active collective agreements, sectors covered and the number of workers concerned, as well as on any additional measure taken to promote the full development and utilization of collective bargaining under the Convention. We accordingly invite the Government to continue submitting the statistical data on collective bargaining to the Committee of Experts.

We note that Malaysia is receiving ongoing technical assistance from the ILO through the Labour Law and Industrial Relations Reform project as well as capacity-building on international labour standards for government officials and social partners. We trust their assistance takes into account the national realities and the evolving nature of the world of work, workers' protection needs and the needs of sustainable enterprises in Malaysia. We also trust that this Committee will be able to see the fruit of these interventions.

Worker members – The Committee is called upon to examine once again the application of the Convention by the Government of Malaysia. During our last review in 2016, the Committee had noted the Government's indication that it was undertaking a holistic review of its key labour legislation: the Employment Act of 1955, the Trade Unions Act of 1959, and the Industrial Relations Act of 1967.

The Industrial Relations Act was amended in 2019, with effect in January 2021, while amendments to the Employment Act were adopted in 2021, and published in the *Official Gazette* a few weeks ago, on 10 May. We take note of these changes; however, we remain concerned that the legislative amendments adopted do not adequately address the long-standing issues raised by the unions, and by the ILO supervisory bodies, and we note with regret that collective bargaining in Malaysia is still subject to statutory restrictions which run counter to the Convention.

Even when workers succeed in establishing and registering a union, which remains a long and arduous process due to the application of the Trade Unions Act – which is still to be amended – they then have to go through the rigid lengthy and costly legal process of recognition as a bargaining agent.

First of all, applications for recognition as the bargaining agent must be submitted to the employer who has complete discretion to reject them. In that case the burden then shifts to the union to report the matter to the Director-General within a prescribed time frame or have its application for recognition considered as having been withdrawn.

The Director-General may demand a secret ballot to ascertain the percentage of workers who show support for the union seeking recognition. This procedure which, by the Government's own admission, still needs to be further reviewed, does not guarantee a fair ballot and does not offer the necessary protections to ensure that employers are unable to gain the results. As a matter of fact it is not the Director-General but rather the employer who decides the time and location of the secret ballot.

For decades trade unions in Malaysia have raised concerns about this recognition process, which fully rests in the hands of the employers and of the Director-General, allowing for undue employers' interference throughout the process and depriving workers of representation for the purposes of collective bargaining.

In practice, recognition of the union as the bargaining agent can drag on needlessly for years. Even when a union wins a secret ballot and should therefore be granted collective bargaining status employers often challenge these results in court, further delaying recognition.

Collective bargaining in Malaysia is further hindered by undue restrictions imposed on the scope of collective bargaining. The current legislation does not allow unions to negotiate general aspects relating to transfers, termination of services due to redundancy, dismissal, reinstatement and assignment or allocation of work, these being the so-called "internal management prerogatives". Amendments introduced to section 13(3) of the Industrial Relations Act, which allow unions to raise questions of a general character, but equally allow the employer to dismiss those questions, fall short of expectations.

To add to this situation, whole categories of workers are denied the right to collective bargaining. In the public sector, unions of public servants are simply consulted and not fully integrated in a process of collective bargaining as mandated by the Convention.

While migrant workers can become trade union members, they can hold trade union office only upon the inappropriate process of approval by the Minister, who will decide on behalf of the union, if it is in the union's interest for them do so. The Committee of Experts has indicated that this condition hinders the right of trade union organizations to freely choose their representatives for collective bargaining purposes.

Finally, protection against anti-union discriminatory measures is virtually non-existent in Malaysia. Complaint mechanisms before the courts are lengthy and can last well over two years, while any remedies applied are inadequate and usually consistent of compensation in lieu of reinstatement. We note in this respect the existing restrictions on the subjects of collective bargaining, especially the aforementioned internal management prerogatives which impede unions from raising these issues. In practice, anti-union dismissals and other discriminatory measures are frequent.

The Worker members recall that collective bargaining is a right, together with the right to freedom of association, it enables the exercise of all other rights at work. Without effective and meaningful protection against anti-union discrimination, collective bargaining becomes meaningless. Determining the scope and meaning of the right to collective bargaining, under the Convention without its human rights' context and the safeguards intended to be afforded to workers when this right is exercised, will lead to a race to the bottom regarding terms and conditions of work.

The existing legal framework for the exercise of collective bargaining in Malaysia is deeply flawed and it is no surprise, that in that context the percentage of workers covered by collective agreements is extremely low, standing between 1 and 2 per cent, while the level of trade union density barely reaches 6 per cent and is declining. The ILO supervisory bodies have repeatedly observed over the years that the Employment Act, the Industrial Relations Act and the Trade Unions Act do not comply with the requirements of the Convention.

In examining the situation they have regularly emphasized to the Government of Malaysia the importance of adopting measures to facilitate the establishment and growth, on a voluntary basis, of free independent and representative workers' organizations and their recognition for the purposes of collective bargaining, and the importance of mutual trust and confidence for the development of harmonious labour relations.

Regrettably these calls have not yet been heeded and the latest amendments introduced fail to address the long-standing issues raised by both the ILO supervisory bodies and the trade unions.

We urge the Government of Malaysia to review and amend the national legislation in consultation with the social partners and in line with the recommendations of the ILO supervisory bodies to bring it into conformity with the Convention.

Worker member, Malaysia – The implementation of the Convention was also examined in this Committee in 2016 and certain concerns raised by the Committee of Experts have not been addressed. We therefore consider the discussion of this case by the Committee as timely and critical.

Several major national labour acts have gone through amendments and are pending implementation. Among them is the Industrial Relations Act 1967, Amendment 2020, which came into force on 1 January 2021 and similarly, the Employment Act 1955, Amendment 2021, which received royal assent on 26 April 2022 and was published in the *Gazette* on 10 May 2022.

Undeniably, the Industrial Relations Act1967 does provide some form of protection to the workers and trade unions in Malaysia. However, executive repression and technical and difficult policies and processes prevent workers and trade unions from benefiting even from the minimum protection.

The amendments to the Industrial Relations Act 1967 move arbitrary ministerial power to the Director-General. The Director-General now decides whether to hold a secret ballot or makes decisions on referring trade disputes to the Industrial Court. Anti-union discrimination and trade union disputes cases are at the discretion of the Director-General. They will not be automatically referred to the Industrial Court, unlike the dismissal cases.

As it is, the Industrial Relations Department must be competent and consistent. In many trade disputes, both parties fail to conciliate. Employers can easily reserve their rights to comply with conciliations or simply refuse to attend the conciliations; even when the employers attend the conciliation, the industrial relations officers merely record statements from both parties which is then referred to the Director-General.

Whenever there is an act of intimidation during a secret ballot exercise or unfair dismissal of trade union leaders, the Industrial Relations Department needs to seriously enforce the Act to protect the workers' right to organize.

Another big challenge of trade unions is to undergo a relatively long and complicated secret ballot process. In section 9 of the Industrial Relations Act 1967, several processes must be followed, and it takes many long years to complete the processes as a suitable date, time and location of the secret ballot are left with the employer. Such a practice is not in conformity with the Convention. Some irresponsible employers refuse recognition and challenge the formation of the union even after a secret ballot victory, right up to the highest court of the land.

We want the entire section 9 – Claims for Recognition – of the Industrial Relations Act 1967, to be reviewed and amended to make it easier for any trade union to form a new union. There is a need for a secret ballot; recognition should be automatic and given immediately without being subjected to lengthy processes.

We are also still facing a situation where a claimant whose case is brought to the Industrial Court has to go through a lengthy process to get a decision. There are cases that exceed the period of 24 months to get a decision, and most of the decisions do not provide for reinstatement in work but only for compensation in lieu of reinstatement, including for trade union leaders, although this remedy is foreseen in the Industrial Relations Act1967.

The processes in the tribunal have also been made technically difficult for workers. In the same token, we also call on the Government to ensure that the President and Chairpersons of the Industrial Court have broad knowledge of trade unionism, social justice and international

labour standards to be appointed to the Industrial Court to adjudicate cases, without which workers and trade union suffer great injustices.

At the same time, a union's locus standi to represent workers can be challenged judicially in court, which may be time-consuming and extremely costly to the trade union, notwithstanding the deliberate violation of the Convention by the employer. Their intention is usually to frustrate the union and they know very well the union has financial constraints.

Section 13 of the Industrial Relations Act1967 prohibits trade unions from including six proposals in a collective agreement that is transfer, promotion, dismissal, and reinstatement of workers, which are purported to be in the company's prerogatives; if they do, the employer has discretionary power to reject the said proposal.

Further, due to the suppressive provisions in the Act, trade unions are not allowed to decide the scope of negotiable issues despite having succeeded in the recognition process. For example, workers repeatedly asked for union security clauses to be included in collective bargaining agreements, but the highest court of Malaysia has decided that such check-off provisions are unenforceable against the employers, as they do not fall under the scope of "trade dispute", as defined in the Industrial Relations Act1967.

The amended Industrial Relations Act 1967 is also denying trade unions from obtaining sole and exclusive bargaining rights. The complexity of the process in the Act will weaken the trade unions' bargaining power, by exhausting the union's funds in legal battles and delay collective agreements for the workers. This amendment read with the Trade Unions Act 1959 will be detrimental to the trade union movement in Malaysia.

There are also cases that are brought up to the Industrial Court to seek clarification and ensure the employers comply with the agreements. Here, we call on the employers as well as the Government to respect every agreement that has been signed between the employer and trade unions, which must be fully complied with.

We see union-busting in Malaysia happening rampantly. This is absolute denial of access to justice and a fundamental breach of the Convention.

Despite recognition under the Employment Act 1955 and the Industrial Relations Act 1967, migrant workers face significant difficulties in exercising their rights to freedom of association and collective bargaining. Migrant workers constantly face threats of dismissal and deportation as they fall under close scrutiny of the police. Unethical employers use dirty tactics and manipulate loopholes in laws and policies to find ways to prevent workers from exercising their rights to vote.

In Malaysia, the public sector is continuously denying the right to collective bargaining. We urge the Government to ensure that public servants can bargain collectively in conformity with the Convention and committed with its Circular No.6/2020 and service Circular No.7/2020.

In conclusion, workers in Malaysia call for drastic reformation in the Employment Act, the Industrial Act, the Industrial Relations Act and the Trade Unions Act to ensure that economic development is aligned with the social development, including social protection for all workers. The Malaysian Government must take anti-union discrimination seriously and must cease all forms of anti-union legislation and practices. Legislative amendments must be in the interest of developing and protecting trade union rights in conformity with the Convention.

To conclude, we strongly believe that effective and transparent social dialogue is the way to move forward. This is currently lagging in Malaysia. Social dialogue has not been conducted for two years but many labour policies and legislative amendments have been implemented

without the social dialogue. Government must hold regular discussions among the tripartite partners within the National Labour Advisory Council (NLAC) for the interest of all, including migrant workers in Malaysia.

Membre gouvernementale, France – J'ai l'honneur de m'exprimer au nom de **l'Union européenne (UE) et de ses États membres**. **L'Albanie** et le **Monténégro**, pays candidats, et la **Norvège**, pays de l''Association européenne de libre-échange (AELE) membres de l'Espace économique européen, s'alignent sur la présente déclaration.

L'UE et ses États membres sont attachés à la promotion, à la protection, au respect et à la réalisation des droits de l'homme, y compris les droits du travail tels que le droit d'organisation et de négociation collective.

Nous encourageons activement la ratification et la mise en œuvre universelles des normes internationales fondamentales du travail, notamment la convention. Nous soutenons l'OIT dans son rôle indispensable d'élaboration, de promotion et de contrôle de l'application des normes internationales du travail ratifiées, et des conventions fondamentales en particulier.

L'UE et la Malaisie entretiennent des relations étroites, notamment grâce à notre coopération dans les domaines commercial et économique à laquelle s'ajoute notre partenariat stratégique avec l'Association des nations de l'Asie du Sud-Est (ANASE).

Tout en tenant compte des informations fournies par le gouvernement, nous notons avec une grande préoccupation la tolérance apparente dont fait preuve le gouvernement à l'égard des allégations de discrimination antisyndicale, d'ingérence d'employeurs et de violations du droit de négociation collective survenues dans plusieurs entreprises. Nous nous faisons l'écho de l'appel lancé par la commission d'experts au gouvernement pour qu'il prenne les mesures nécessaires pour répondre à toutes les allégations susmentionnées, notamment en menant rapidement des enquêtes et en ordonnant des réparations effectives pour les victimes et des sanctions suffisamment dissuasives pour les auteurs. Nous attendons des informations détaillées à cet égard.

Nous saluons l'engagement du gouvernement avec le bureau de l'OIT sur les réformes législatives des principales lois sur le travail, notamment avec la promulgation de la loi portant modification de la loi sur les relations industrielles entrée en vigueur en janvier 2021 et la révision de la loi sur l'emploi et la loi sur les syndicats. Nous considérons cette coopération comme vitale pour parvenir à la pleine conformité de ces lois avec la convention, y compris dans la pratique.

Nous réitérons la demande de la commission d'experts au gouvernement quant au fait de fournir des informations détaillées sur la modification apportée à la loi sur les relations professionnelles et leur mise en œuvre afin de garantir que les travailleurs victimes de discrimination antisyndicale puissent déposer une plainte directement devant les tribunaux afin d'obtenir l'imposition de sanctions suffisamment dissuasives, y compris l'octroi rapide d'une indemnisation appropriée. Il importe également d'assurer une protection efficace sans faire peser sur les victimes une charge de la preuve susceptible d'imposer des obstacles à l'établissement de la responsabilité et à l'octroi d'une réparation adéquate.

De même, en ce qui concerne les dispositions de la loi sur les relations professionnelles relatives aux critères, à la procédure et à la durée des procédures de reconnaissance des syndicats aux fins de la négociation collective, nous demandons au gouvernement de veiller, en consultation avec les partenaires sociaux, à ce que la procédure de reconnaissance dans son ensemble prévoie des garanties propres à prévenir les ingérences de l'employeur. Nous

réitérons également l'appel de la commission d'experts au gouvernement pour garantir l'inclusion pleine et entière des travailleurs migrants dans la négociation collective.

Nous souhaiterions également recevoir des informations plus détaillées sur les implications pratiques des modifications apportées à la loi sur les relations professionnelles concernant le champ d'application de la négociation collective, l'arbitrage obligatoire et les restrictions en matière de négociation collective dans le secteur public, ainsi que sur toute autre mesure supplémentaire prise pour promouvoir pleinement le développement et l'utilisation de la négociation collective comme le prévoit la convention.

L'UE et ses États membres continueront à suivre et à analyser la situation et restent attachés à leur coopération et à leur partenariat étroit avec la Malaisie.

Government member, Indonesia – I have the honour to deliver this statement **on behalf of ASEAN**. ASEAN notes the many efforts and initiatives undertaken by Malaysia towards compliance with the Convention on the right to organize and collective bargaining. In this regard, ASEAN congratulates Malaysia on the recent amendment to the legislation, the Industrial Relations Act, and waits in anticipation for the amendments to the Trade Unions Act to be gazetted and come into effect.

Amendments of legislation are a huge undertaking and will require time to see their effect in implementation. ASEAN is pleased to note that Malaysia has placed much emphasis on its domestic labour law amendment, which is being done in a comprehensive and gradual manner. This is important to ensure its sustainability, particularly in the rapid and dynamic world of work.

ASEAN also encourages Malaysia to continue the engagement and consultation with the tripartite constituents in a meaningful manner. The improvements made to the labour dispute resolution system, including expediting some of the required processes, are most welcome in light of the disruption caused by the COVID-19 pandemic.

In addition, the safeguard elements and provisions of remedies in the gazetted Industrial Relations Act can be seen as adequate to address observations and concerns on anti-union discrimination. However, ASEAN recommends Malaysia to continue reviewing the provisions to ensure that the full effect of its implementation is in compliance with the Convention.

ASEAN is pleased to note Malaysia's close cooperation with the ILO in the amendment process and believes that this will pave the way towards ensuring full compliance with the Convention. ASEAN believes that Malaysia is at its most opportune juncture to continue its good work in protecting and promoting the rights of workers in which ASEAN gives our full support towards the continuous and sustained implementation of the planned activities.

ASEAN would also like to draw attention to the emerging issues and challenges which affect the traditional labour market and industrial harmony and calls upon the ILO to continue working closely with its Member States to ensure the promotion of decent work to all workers.

Worker member, Republic of Korea – In reference to the Convention and concerns raised by the Committee of Experts regarding remedies to anti-union discriminations; trade unions are suffering due to the excessive powers of the Director-General. Under the amended section 8 of the Industrial Relations Act, the Director-General is authorized to forward unresolved complaints to the Industrial Court for remedies.

This is Case No. 3401 referred to in the 397th Report of the Committee on Freedom of Association and relates to the complaint against the Government of Malaysia filed by the National Union of Bank Employees (NUBE).

In 2019, NUBE lodged two complaints against a UK-based multinational bank in Malaysia for intimidating and attempting to injure workers for participating in pickets and campaigns pursuant to trade disputes. The complaint was filed under sections 39(a) and 59(1)(d) of the Industrial Relations Act 1967, long before the dismissal of the workers.

The ILO Director-General also intervened directly in this case, urging the Malaysian Government to take swift action to stop the intended dismissal of the union representatives. But the Malaysian Government did not heed the ILO Director-General's intervention or refer the case to the Industrial Court; only the dismissal case of the workers was referred to the Industrial Court.

However, when the Bank lodged a complaint against NUBE for defamation and to stop NUBE from picketing, campaigning and lodging complaints to the ILO and the OECD, the Director-General very quickly referred the Bank's complaint to the Industrial Court.

He referred the Bank's case even though he is fully aware that the Malaysian Federal Court decided that no court should entertain a case against a trade union pursuant to a trade dispute because trade unions have "immunity" from actions in furtherance to a trade dispute under sections 21 and 22 of the Trade Unions Act 1959.

It is also important to note that the union has written numerous letters urging the Government to take action against the Bank for its anti-union activities but the Government failed to act or respond to NUBE.

The trade union had filed a suit against the Government for "inaction" which has caused 300 workers' complaints against the Bank to be left unattended.

"Injustice anywhere is a threat to justice everywhere." The Malaysian Government is an accomplice in union-busting. We call on the Malaysian Government to stop its anti-union practices and undertake to protect workers and trade unions in conformity with the Convention with immediate effect.

Worker member, Japan – I am speaking on behalf of IndustriALL Global Union and the Japanese Trade Union Confederation (JTUC)–RENGO. Section 9 of the Industrial Relations Act concerning the secret ballot procedure for trade union recognition was a key concern discussed in this Committee in 2016.

We regret that the amendment of section 9 in 2020 has not brought fundamental changes to safeguard workers from undue interferences of the employers in the secret ballot procedure. The Government remains reluctant to invoke penal sanctions against employers' interferences and union-busting practices.

Ten years after the Malaysian Metal Industry Employees' Union (MIEU), in a German multinational company producing copper wire in Pahang applied for union recognition, MEIU is still unable to bargain with the employer. The MIEU submitted a claim for trade union recognition in June 2012; the company immediately disputed the union's right for representation.

The company also disputed the competence of the union which had been ascertained by the Director of Industrial Relations and Director-General of trade unions and moved the case to the High Court. Even though the Court upheld the Director-General's decision in 2014, the company continued to block each and every step of the proceeding to a secret ballot.

The company re-classified almost all 353 production workers, except 16 of them, under the confidential capacity, in a bid to throw them out from being a member of a trade union under section 5 of the Industrial Relations Act. Until the Director-General threatened to file a

police report, the company had been blocking the Director-General from visiting the workplace to assess and interview workers.

When the MIEU succeeded to submit a new claim for recognition in 2019, the company intervened again and supported the registration of an in-house union to undermine the MIEU. The MIEU is still waiting for a secret ballot to take place. This is unacceptable.

Trade union recognition should be simple and automatic after meeting the legal requirements. We urge the Government to continue consultation with the social partners to review section 9 of the Industrial Relations Act 1967to ensure workers in Malaysia can meaningfully exercise their rights under the Convention.

Worker member, Switzerland – Our colleagues from the Indonesian Workers' Delegation align themselves with this intervention. The Committee of Experts has rightly again raised the issue of the foreign migrant workers' ability to becoming members and holding office in a trade union. In its latest response, the Government has simply reiterated that foreign workers are eligible to becoming members of a union and to hold trade union office "upon approval of the Minister if it is in the interest of such union". This condition in our view hinders the right of trade union organizations to freely choose their representatives for collective bargaining purposes and is thus not in line with the Convention.

Though the law allows migrant workers to join trade unions, there are many cases like the example of a multinational tyre manufacturer in Selangor, which excluded migrant workers from Myanmar, India and Nepal from the collective bargaining agreement. One hundred and nine migrants could only recover shift allowances, annual bonuses and pay increases worth 5 million Malaysian ringgit based on a court award.

The rights under the Convention are even more remote for migrant workers unable to acquire the legal residence status under the very restrictive migration legislation.

It is estimated that in the state of Sabah alone, more than 500,000 migrant workers, mostly from Indonesia, are employed in the palm oil sector. Of these approximately 70 per cent are undocumented and thus excluded from the possibility of joining a trade union and participating in collective bargaining.

For a long time, only one trade union in the Sabah palm oil sector has been able to organize in only one plantation. One reason for that is that foreigners are not allowed to hold any executive positions in the unions; thus, only Malaysian citizens may act as union organizers. And even though Indonesia and Malaysia share similar vocabularies, most of the migrants only understand basic Sabah-Malay, since many of them still use their mother language based on their ethnic origin.

Another reason is that, according to the Industrial Relations Act, a union is required to prove a majority of membership in a company. The need to organize in almost all estates of one company in different, often very remote areas at the same time, makes the establishment of a new union extremely difficult.

We recognize the efforts and call upon the Malaysian Government to take all the necessary measures to ensure that all migrant workers can effectively practice their collective bargaining rights, run for trade union office without any restrictions, and to apply the majority requirement at least separately to the different estates of one company in the plantation sector.

Observer, Public Services International (PSI) – Last time we discussed this case, in 2016, this Committee, in its conclusions, requested the Government to: "ensure that public sector

workers not engaged in the administration of the State may enjoy their right to collective bargaining". We will all remember as well that the Government representative said at the time that: "… the Government was currently drafting the amendments and had requested ILO technical assistance so as to facilitate the drafting of the amendments and to ensure that they were in line with the requirements of the Convention …"; however, and in spite of these promises, barriers for public sector workers still remain in law and practice after six years.

While provisions have been made for municipal workers to collectively bargain, to date, for example, no enabling regulations have been adopted to realize this right.

The application of compulsory arbitration in essential services under amended section 26(2) of the Industrial Relations Act, First Schedule, are still broad and deprive public servants not engaged in administration of the state of the right to freely bargain and resort to industrial actions.

Also, we raise concerns over the adoption of Service Circulars Nos 6 and 7. First, these circulars were adopted, paradoxically, without consultation and negotiation with relevant unions in the public service. There is – or there was – an established mechanism to discuss the adoption of new service circulars through the National Joint Council, which did not occur. So, these circulars have eroded even more the role of Workers' groups in the National Joint Council. Furthermore, these circulars seem to impose new barriers to consultation with public service workers. For instance, union leaders must now receive permission from departmental heads to attend the National Joint Council meetings. While in practice, departmental heads have not restricted attendance to date, the new provisions allow for such restriction.

In addition, Service Circular No. 6/2020 seems to restrict the subject of consultations as well, while Service Circular No. 7/2020 seems to restrict who can be elected to represent the workers in the consultations.

We support the Committee of Experts' view that workers who deliver public services should be allowed to bargain collectively and that simple consultations do not amount to effective collective bargaining.

Therefore, we expect to see fully fledged collective bargaining rights for public sector workers in the legislation, in line with the provisions of the Convention.

Government representative – The Government of Malaysia would like to record its appreciation for the views and comments put forward by the Committee and respective social tripartite partners. The views and comments highlighted will help us in further improving and enhancing the application of the Convention in Malaysia. The Government of Malaysia would like to reaffirm that we will continue to take appropriate steps in compliance with the Convention.

In this context, it must be stated that Malaysia has been progressively adhering to the observation made by the Committee of Experts, and we will continue to ensure reforms are done with the support of the employers' associations and workers' unions in amending the relevant labour legislations to be in line with the Convention. Malaysia takes note of comments raised by representatives from both Employers' and Workers' groups. In this regard, Malaysia would like to put in perspective that the Government of Malaysia believes in constructive engagement between trade unions and employers' associations which will ensure the rights are taken care of.

As the process of compliance of standards are subject to many laws in place, Malaysia has always been supportive in amending appropriate laws where needed and we will continue to

do so. Among the impacts observed were the amendments with regard to expanding the power of the Director-General of Industrial Relations, the dispute resolution process has been expedited. Although some of the amendments are in progress, the Government – through consultation, engagement, and townhall sessions – has gathered input from the stakeholders that contribute to the improvement of the process on the amendment of labour laws, in particular, at this point the amendments to the Trade Unions Act, 1959.

As for matters raised by representatives through the complaints and disputes lodged in ILO supervisory mechanisms, we take note on the issues raised and we will revert soonest to the ILO. Thus, we value the opinion and views raised by members.

To address the post-COVID-19 effect on the global economy, the Malaysian economy and the world of work, various initiatives have been implemented using technology platforms. One such initiative with regards to work is the e-mention to address and expedite matters related to Industrial Court cases. To support all the initiatives, the Decent Work Country Programme (DWCP) was signed in 2019.

The DWCP is jointly developed by the ILO, the Ministry of Human Resources, the MEF and the MTUC based on the country's specific priorities. This priority is in line with supporting the Decent Work Agenda through compliance with international labour standards, as well as the country's commitment to the Sustainable Development Goal 2030 which focuses on three areas, namely: rights at work to protect and promote labour rights; future of work to strengthen national capacity in addressing the challenges of future of work; and labour migration to improve the governance of the migration of labour and foreign workers in the country.

In this regard, the Government would like to record its appreciation to the ILO for its continuous support on the labour law reform in Malaysia, especially through the Labour Law and Industrial Relations Reforms project.

Last but not least, we would like to reiterate that the Government of Malaysia has made progressive efforts in order to enhance the procedure and process on the right to strike and collective bargaining. The Government will contribute and engage with the MEF and the MUTC and other stakeholders from time to time in order to uphold industrial harmony in Malaysia.

With those remarks, I wish to conclude my statement by pledging our full and undivided commitment in order to ensure and safeguard the rights and welfare of workers are taken care in line with the obligations under the Convention.

Employer members – We wish to thank the various delegates who took the floor and expressed views that enrich the discussion of this case. We have also noted the information made available by the Government in response to the requests and observations by the Committee of Experts and in this meeting today. We note that the ILO is currently providing ongoing technical assistance and capacity-building to officials of the Malaysian Government and social partners. We trust that this will continue.

We invite the Government to continue working with the most representative employers' and workers' organizations to bring the national laws into full conformity with the Convention, taking into account the national realities in Malaysia, the evolving world of work, including the needs of workers and sustainable enterprises.

On the question of whether there is a legal obligation for employers to negotiate under Article 4 of the Convention, we have noted that the Committee of Experts seems to believe there is, as long as there is no obligation to conclude a collective agreement. The Employers

do not agree with this view, given that Article 4 clearly refers to voluntary negotiation. Similarly, the Employers do not agree with the Committee of Experts that compulsory arbitration at the initiative of a workers' organization is in line with Article 4, even if it is meant to achieve the conclusion of a first collective agreement. Again, this is based on the facts that Article 4 contemplates on the voluntary collective bargaining.

We trust that the Government will keep the Committee of Experts updated on any progress it makes in its efforts to harmonize its laws with the Convention.

Worker members – The Worker members take note of the changes to the Industrial Relations Act and the Employment Act which recently entered into force in 2021 and 2022. However, we deplore that despite the introduction of these amendments; challenges concerning the exercise of collective bargaining rights in Malaysia remain unresolved.

We recall that trade unions in Malaysia have been continuously raising these issues for over 40 years. We recall that collective bargaining is a right which together with the right to freedom of association enables the exercise of all other rights at work.

The current legal framework in Malaysia constitutes a severe obstacle to their full enjoyment and exercise and therefore must be revised in accordance with the requirements of the Convention.

The Worker members call on the Government of Malaysia to review and amend the national legislation, specifically the Employment Act, the Trade Unions Act and the Industrial Relations Act, in consultation with the social partners and in line with the recommendations of the ILO supervisory bodies to bring it into conformity with the Convention. More specifically, the Government of Malaysia must ensure in law and practice that the procedure for trade union recognition is simplified and that effective protections against employer's interference are adopted; that subjects of collective bargaining are not unduly restricted and it is left to the parties to decide on those subjects; that migrant workers can fully participate in collective bargaining including by enabling them to run for trade union office; that collective bargaining machinery is fully recognized and promoted in the public sector; and that public service unions can bargain collectively and protection against anti-union discrimination is improved through effective and expeditious access to courts, adequate compensation and the imposition of sufficiently dissuasive sanctions.

We call on the Government of Malaysia to accept a direct contacts mission and we invite the Government to avail itself of the technical assistance of the ILO.

Conclusions of the Committee

The Committee took note of the written and oral information provided by the Government and the discussion that followed.

The Committee noted with interest the amendments to the Industrial Relations Act and the Employment Act, which entered into force in 2021 and 2022, respectively. The Committee noted concern at the complaints of ongoing challenges concerning the exercise of collective bargaining rights in Malaysia and the instances of anti-union discrimination and undue interference.

Taking into account the discussion, the Committee requests the Government, in consultation with the social partners, to:

- **amend without delay national legislation, specifically the Employment Act, the Trade Unions Act and the Industrial Relations Act, in consultation with the social partners, to bring these laws into conformity with the Convention;**
- **ensure that the procedure for trade union recognition is simplified and that effective protection against undue interference is adopted;**
- **ensure that migrant workers can fully participate in collective bargaining, including by enabling them to run for trade union office;**
- **enable collective bargaining machinery in the public sector to ensure that public sector workers may enjoy their right to collective bargaining;**
- **ensure, in law and practice, adequate protection against anti-union discrimination, including through effective and expeditious access to courts, adequate compensation and the imposition of sufficiently dissuasive sanctions.**

The Committee invites the Government to continue to avail itself of the technical assistance of the ILO.

The Committee requests the Government to submit a report to the Committee of Experts by 1 September 2022 with information on the application of the Convention in law and practice, in consultation with the social partners.