

INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN MALAYSIA

REPORT FOR THE WTO GENERAL COUNCIL REVIEW OF THE TRADE POLICIES OF MALAYSIA (Geneva, 18 and 20 January, 2010)

EXECUTIVE SUMMARY

Malaysia has ratified five of the eight core ILO labour Conventions. In view of the restrictions on trade union rights in Malaysia, determined measures are needed to comply with the commitments Malaysia accepted at Singapore, Geneva and Doha in the WTO Ministerial Declarations over 1996-2001, and in the ILO Declaration on Fundamental Principles and Rights at Work in 1998 and its Social Justice Declaration in 2008.

Malaysia has not ratified Convention No. 87 on Freedom of Association and Protection of the Right to Organise, but has ratified Convention No. 98 on the Right to Organise and Collective Bargaining. The law grants workers limited rights to organise and to bargain collectively. Large groups of workers such as migrants and those in certain classifications in the public sector face particular restrictions on the right to organise and to bargain collectively. The right to strike is not adequately recognised and many legal restrictions exist, both in terms of workers who are denied the right to strike and in terms of procedures.

Malaysia has ratified Convention No. 100 on Equal Remuneration but not ratified Convention No. 111 on Discrimination. Discrimination in employment is prohibited but women are largely underpaid and are underrepresented in managerial positions. There are reports that many domestic workers, especially migrant women, are subject to severe exploitation and even physical abuse.

Malaysia has ratified the core ILO Conventions on child labour, No. 138 and No. 182. The minimum age for child labour is 14, although light work in family undertakings is allowed for children under 14 and hazardous work is allowed for children older than 16, in both cases in breach of the ILO Convention on Minimum Age. Children work predominantly in restaurants, markets, small industries and in plantations with their parents.

Malaysia has ratified Convention No. 29 but not Convention No. 105 on the Abolition of Forced Labour. However human trafficking for sexual exploitation and forced labour is extensive. Thousands of young Indonesian women work as domestic labourers under potentially abusive circumstances.

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Introduction

This report on the respect of internationally recognised core labour standards in Malaysia is one of the series the ITUC is producing in accordance with the Ministerial Declaration adopted at the first Ministerial Conference of the World Trade Organisation (WTO) (Singapore, 9-13 December 1996) in which Ministers stated: "We renew our commitment to the observance of internationally recognised core labour standards." The fourth Ministerial Conference (Doha, 9-14 November 2001) reaffirmed this commitment. These standards were further upheld in the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work adopted by the 174 member countries of the ILO at the International Labour Conference in 1998 and in the Declaration on Social Justice for a Fair Globalisation adopted unanimously by the ILO in 2008.

The only trade union centre in Malaysia is the ITUC-affiliated Malaysian Trade Union Congress (MTUC) which has a membership of 547,000 persons covering all areas of the workforce. The percentage of unionised workers is rather low, at 7.8 per cent, due in large part to the violations of trade union rights cited below.

Malaysia is a member of the Asia-Pacific Economic Cooperation (APEC), Association of Southeast Asian Nations (ASEAN) and the World Trade Organisation (WTO), and has signed bilateral free trade agreements with Japan, New Zealand and Pakistan.

I. Freedom of Association and the Right to Collective Bargaining

Malaysia has not ratified Convention No. 87 on Freedom of Association and Protection of the Right to Organise, but ratified Convention No. 98 on the Right to Organise and Collective Bargaining in 1961.

The law allows workers to engage in trade union activity, with the exception of public sector "confidential, managerial, and executive" employees, as well as defence and police officials. The 2008 IRA amendment added "security" employees to these classifications of employees who are barred from organising, without providing a definition of who is a "security" employee. Hence it allows the systematic abuse of this ambiguity in order to extend the term to as many employees as possible. The IRA grants the Director General absolute authority to determine employees' classification as "executive", "security", "managerial" or "confidential".

Another broad category of workers barred from organising into independent industrial unions are employees in the electronics industry - the country's largest with a

view to sustaining investment incentives and competitiveness. According to the MTUC, 150,000 electronics workers are thereby restricted to company based in-house unions.

Furthermore there are approximately 2.6 million migrant workers in Malaysia, constituting 25 per cent of the total workforce. Although it is legally permitted, in practical terms migrant workers cannot join a union either because the Ministry of Home Affairs (MHA) has set an absolute prohibition on migrant workers from joining any sort of association. There have been many reports that employers abuse this provision and directly threaten migrant workers with deportation. Moreover, employers use intimidation and threats towards migrant workers in unionised companies to ensure they do not join the rest of their colleagues or even that they vote against the union. By law foreign workers cannot hold trade union offices.

The Trade Unions Act (TUA) prohibits interfering with, or restraining a worker from exercising, the right to form a union or to participate in lawful trade union action; however, as the MTUC has repeatedly stated, the Trade Unions Act in fact impedes the creation and promotion of trade unions. The 1967 Industrial Relations Act (IRA) also places extensive restrictions on freedom of association. The ILO Committee on Freedom of Association (CFA) and Committee of Experts on the Application of Conventions and Recommendations (CEACR) have found that many provisions of the TUA and IRA are incompatible with Convention No. 98, and that the recent amendments of the two Acts in 2008 took place "without consideration" of the ILO's recommendations and without meaningful consultation with the labour movement.

Forming a union is not easy in Malaysia. The Director General of Trade Unions, who is a government appointed official, has the power to supervise and inspect trade unions, can refuse to register a trade union without being obliged to provide a reason and can withdraw registration of unions. A reason for withdrawing the registration of a union could be that two or more registered trade unions exist in a "particular establishment, trade, occupation or industry". The DGTU has the authority to suspend a branch of a trade union only with the information that there are contraventions of any part of the Act or the rules of the union. The Minister of Human Resources has the authority to suspend a trade union for up to six months for national or public security reasons. Moreover, the CEACR reports that sometimes employers ignore decisions to reinstate unlawfully dismissed workers without being punished.

After the authorities grant recognition of a trade union, under the IRA an employer has to respond to a union's request for recognition within 21 days. In cases where the employer does not respond – a practice that is common - then the union must submit a written appeal to the Director General of Industrial Relations (DGIR), the DGTU and then the Minister of Human Resources, who has the final say. The DGIR must receive the appeal within 14 days or the union is automatically denied status. Such procedures can then take up to five years to conclude, during which time the unions cannot take industrial action or protest about denial of recognition.

As of December 2008, there were 18 such cases in Malaysia. One such case concerned the Japanese multinational “Canon Opto” which refused to recognise their employees’ union despite the certification of the Ministry of Human Resources that the union represented more than 60 per cent of the in-house workforce. Canon challenged the application in the High Court making it a 5 year process; in the meantime, as the employer was not obliged to bargain with the union, by the end of 2008 most union members had stopped paying their union fees.

Trade unions cannot form general/national confederations of trade unions; therefore the MTUC, which covers both private and public unions and has 547,000 members, is not recognised as a trade union confederation but as an association established under the Societies Act. Consequently the MTUC cannot conclude collective agreements nor call for industrial action. The formation of general unions is prohibited and trade union membership is limited to workers in similar trades. Moreover, the TUA requires that unions obtain prior permission from the Director General of Trade Unions (DGTU) before affiliating with any foreign organisation. The conditions according to which the DGTU considers such an application are not described in the Act and are left to the Director to decide.

Malaysian law allows workers to bargain collectively only on certain issues. The IRA excludes hiring, firing, reinstatements, transfers and promotions from the scope of the collective bargaining process as “internal management prerogatives”. The 2008 amendment limited the scope even more by stating that only three topics can be the subject of collective bargaining: training to enhance skills, an annual review of the wage system and a performance-based remuneration system. In this regard, the CEACR has asked the government to re-amend the IRA because it massively restricts the scope of negotiable matters. The MTUC expressed serious concerns over the new amendments which threatens the sanctity of the collective agreement. In the public sector the government has refused to bargain collectively and uses joint councils instead, in which the unions have only an advisory role. Furthermore the IRA allows compulsory arbitration by the Minister of Labour of his own initiative, which is generally contrary to the principle of the voluntary negotiation of collective agreements established in the Convention.

Malaysian law prohibits employers from taking retaliatory action against a worker for participating in the lawful activities of a trade union. Unionists who have been discriminated against can file a complaint to the Ministry of Human Resources or the industrial court; however, both agencies have been criticised by the unions for their inefficiency.

The right to strike is not specifically recognised, and legislative restrictions make it virtually impossible for workers to go on a legal strike. The MTUC reports that there were eight lunchtime pickets or one-day work slowdowns but no strikes during 2008. Issues like trade union registration or illegal sackings are not matters on which unions can base a call for a strike, and general or solidarity strikes are not allowed either. The penalties for leaders of unions that engage in an illegal strike vary from fines to a year in

prison. Members of unions that partake in illegal strikes lose their membership and are face difficulties in joining any union again. Furthermore, for disputes in the essential services, which are broadly defined and include education and transportation and other sectors that do not fall under the strict definition of essential services provided by the Convention, the compulsory arbitration process is followed.

For a strike to be declared the TUA requires that two thirds of the members of a trade union must vote in favour of a strike in a secret ballot. The results are then sent to the DGTU for verification and a “cooling-off” week starts and the Ministry of Human Resources is notified that a dispute exists. During the cooling-off week the Ministry might choose to engage in mediate and, if the efforts fail, the dispute can be referred to the industrial court. During all this period picketing, strikes and lockouts are prohibited. Furthermore, the Malaysian Penal Code requires police permission for public gatherings of more than five people, which is an additional requirement the unions have to fulfil before any action that involves workers’ public meetings.

There are Export Processing Zones in Malaysia, where the labour provisions apply as in the rest of the country.

Conclusions:

Workers have the right to organise and the right to collective bargaining; however, these rights are severely restricted in scope and coverage, both in law and in practice. Large groups of workers including immigrants and certain classifications of employees in the public sector face particular restrictions on the right to organise. The right to strike is not specifically recognised and many legal restrictions to strikes exist, both in terms of workers who are excluded as well as in terms of procedures. The dispute settlement machinery remains inefficient.

II. Discrimination and Equal Remuneration

Malaysia ratified Convention No. 100 on Equal Remuneration in 1997 but has not ratified Convention No. 111 on Discrimination (Employment and Occupation).

Further to an amendment in 2001, the Constitution prohibits discrimination on the grounds of gender; however, there is no legislative reference to equal remuneration for work of equal value. In its correspondence with the CEACR the government has answered that it has instructed its labour inspectors to address the issue of equal pay for work of equal value, but according to the CEACR, “it remains unclear how the Department of Labour ensures the application of the principle of equal remuneration in practice, particularly in the absence of any explicit legal provision”.

The issue of sexual harassment in the workplace is covered only by a voluntary code of conduct, which has been criticised as insufficient by women’s groups but as a government interference in the management of labour relations by the employers’

federation. Reports have indicated an alarming degree of abuse and harassment against women domestic workers, especially Indonesians.

According to the WEF Global Gender Gap Report of 2009, the pay gap in Malaysia is 73%. Women and men are almost equally affected by unemployment. Women's literacy rate is not significantly lower than that of men (89 per cent for women, 94 per cent for men) and the educational gap is falling since the female school enrolment rate has been increasing. However, women occupy only 23 per cent of managerial level positions in the public sector and 41 per cent in the private sector, and are significantly underrepresented in political institutions.

The law does not prohibit discrimination on the grounds of disabilities, but the government has passed a public sector regulation that reserves one per cent of all public sector jobs for disabled persons. The government has issued guidelines for the integration of disabled persons in the private sector. The Human Rights Commission of Malaysia has initiated a dialogue on the issues of persons with disabilities and has recommended legislation for better access for persons with disabilities and against discrimination.

According to the law discrimination on the grounds of descent and origin are illegal. However the indigenous Orang Asli population is the poorest group in the country, with 77 per cent of its population living below the poverty line. There are no clear indigenous people's ownerships rights and hence their lands are open to exploitation.

The government has allocated funds to support development in indigenous communities and lands, including education and infrastructure, and has taken measures against labour trafficking involving teenagers from indigenous communities.

Conclusions:

Discrimination in employment is prohibited, but there is no legislation on equal remuneration and women are underrepresented in decision making positions. There are reports that many domestic workers, especially migrant women, are subject to severe exploitation and physical abuses. On the other hand, the educational gap between men and women is declining.

III. Child Labour

Malaysia ratified Convention No. 138 on the Minimum Age in 1997, and Convention No. 182 on the Worst Forms of Child Labour in 2000.

The minimum age for admission to employment is 14, with some exceptions for persons under 14 years of age to perform light work in a family enterprise, work in public entertainment, or work as an approved apprentice. No minimum age is specified for light work and no clear definition of light work is given. Persons above 16 are treated by the Malaysian labour law as adults, and they are allowed – in contradiction to the Convention on Minimum Age - to perform hazardous work. The types of hazardous work are not determined by national laws or by the competent authority, the age intervals are not in line with those provided by the Convention and special provisions on work hours per day and work days per week are not established.

Education is free up to the age of 15. The government has made progress in education, since school enrolment and attendance rates have risen but according to some estimates 200,000 children of primary-school age are not attending school. Furthermore the drop-out rates of certain provinces appear to be particularly high and notably higher for boys.

Malaysian child labour can be found primarily in rural areas in agriculture, where children often work along with their parents without receiving a salary. In urban areas children work in restaurants, shops and small manufacturing units usually owned by family members. The government states that it has made progress in limiting child labour to family enterprises and that foreign workers have largely replaced children in many sectors of the economy. However the UN Committee on the Rights of the Child has expressed concern that the enforcement of Convention No. 138 remains weak. The picture is further blurred by the fact that the Malaysian government does not collect statistic data about child labour.

The CEACR has asked the government to urgently enact specific legislation against Internet-related sexual offences, including child pornography, and including provisions which explicitly prohibit the use, procuring or offering of a child for the production and trafficking of drugs. At the moment such offences are treated by the application of other laws. These laws do establish sufficiently dissuasive penalties of imprisonment and fines for breach of their provisions, but the government has not provided information on whether those laws have been applied in practice.

Conclusions:

The minimum age for child labour is 14, although light work in family undertakings is allowed for children under 14 and hazardous work is allowed for children older than 16. Child work exists primarily in restaurants, markets, small industries and in plantations with their parents.

IV. Forced Labour

Malaysia ratified Convention No. 29, the Forced Labour Convention, in 1957. It has not ratified Convention No. 105 on the Abolition of Forced Labour.

The Constitution provides that no person shall be held in slavery and prohibits forced labour. The Penal Code prohibits the importing, exporting, removing, buying, selling or disposing of any person as a slave. In 2007 the government passed an anti-trafficking law and in December 2008, the first trafficking offender was convicted under this law.

The MTUC estimates that 15 to 20 per cent of the registered foreign workers in the country are being mistreated, and it notes that it receives hundreds of cases every month of migrant workers whose rights have been abused by employers and government authorities. Migrant workers in Malaysia do not have the right to join or form unions, as noted above. It is a common practice for employers, especially employers of migrant domestic workers, to withhold the payment and the travel documents of migrant employees (who are mostly women) until the last day of their contract. For that reason the migrant workers do not seek police assistance, even when facing severe abuses, rape or harassment, because they fear that they will not be able to receive the money the employer withholds and that they will be deported after being unable to present the police with valid documents. In many cases where abuses are reported to the authorities, the migrants have been arrested and sent to a detention camp for overstaying in the country or for not being in possession of a valid travel document. Despite this situation, the confiscation of payment and documents of Indonesian domestic servants by Malaysian employers is allowed by the Memorandum of Understanding signed between Malaysia and Indonesia in 2006.

According to Human Rights Watch there are 300,000 Indonesian girls and women who work as domestic workers in Malaysia. Reports indicate that there is extensive use of violence against them, seizure of documents by their employers, payment in the last day of the contract and sexual abuse.

Furthermore, there have been several NGO and media reports of groups of migrants subjected to similar conditions in manufacturing. An investigative news report in August 2008 revealed that the employers of a Malaysian factory producing apparel for a US company had withheld the documents and the wages of 1,000 migrant workers. The US company, after its own investigation, confirmed that there were serious violations of labour rights in the factory but the government officials responded that there was no breach of any Malaysian law. In February 2009 it was revealed that 140 Bangladeshi workers had paid recruiters \$5,000 to \$13,000 to find them jobs in Malaysia. They were recruited by an employment agency which confiscated their passports and work permits and was withholding their wages for more than a year.

In addition to this many migrant workers have been harassed by the People's Volunteer Corps (RELA) that operates under Malaysia's Home Affairs Ministry. Its members are volunteers and they have the power to carry firearms, arrest individuals, and enter premises without permits. For their recruitment there are no educational or physical requirements, and there are no background or criminal checks on those who join. They serve as auxiliaries to the authorities and they receive rewards for each undocumented migrant worker they apprehend. Currently, there are 480,023 members of RELA which has been involved in many cases of rights abuses and crimes including robbery, rape and murders against migrants. The MTUC and many other civil society organisations have called for RELA to be abolished so that law enforcement is undertaken only by professionally trained police.

Labour trafficking takes place involving Burmese, Indonesian, Laotian, Vietnamese, Cambodian, Thai, Indian, Pakistani, Nepalese and indigenous Malaysian victims. Malaysia is mainly a destination country for men, women, and children trafficked for forced labour or forced prostitution. Many girls and women have been brought illegally into Malaysia after having been promised work, usually as domestic workers. Many individual employers, who act as fronts for human trafficking, sell the victims into brothels, karaoke bars, or pass them to sex traffickers.

There appears to be little progress against human trafficking and forced labour and it is widely reported that the Malaysian border police, immigration offices and other authorities are directly involved in trafficking and that they collaborate with traffickers. There are reports that immigrants arrested by the Malaysian immigration authorities have been sold to traffickers for \$200 per person, and may then be sold for labour or commercial sexual exploitation. In July 2008, the Director-General of Immigration and the Deputy Director-General were arrested for graft and corruption involving the acceptance of bribes for issuance of visas and facilitation of trafficking in persons. Moreover the government arrested six alleged traffickers, the trials of whom are pending; on the other hand there have been no criminal prosecutions of employers who abuse workers or labour recruiters who deceive workers.

After granting victim status in cases such as women or girls forced into prostitution the government, sometimes in cooperation with the victim's embassy, provides shelter for some days until their repatriation. However, the victims of forced labour are often not recognised as such and the authorities refer to them as labour disputes cases.

Conclusions:

An international Memorandum of Understanding between Malaysia and Indonesia authorises employers to withhold payments and documents, thus facilitating the abuse of many women and girls who undertake domestic work and men who work in factories. In addition RELA, a civilian armed group, has been accused of many violations of rights of migrant workers. Some corrupt law enforcement officers have been reported to be collaborating with the traffickers.

Recommendations

1. The Malaysian government must ratify and apply ILO Conventions No. 87 on Freedom of Association and Protection of the Right to Organise, Convention No. 111 on Discrimination and Convention No. 105 on the Abolition of Forced Labour.
2. The government of Malaysia should amend its legislation and allow trade unions to form general or national confederations of trade unions.
3. In line with ILO CEACR recommendations, the government must establish comprehensive and simple rules for the formation and registration of trade unions and to oblige bodies that handle applications of trade unions to decide according to these rules and to provide reasons for their decisions.
4. The government needs to do more to reduce the time and the number of procedures for the formation and registration of new trade unions.
5. The government should apply sanctions to employers that refuse to recognise unions that have been approved by the Director General of Trade Unions or that refuse to implement court decisions.
6. The government should establish a comprehensive, simple and independent mechanism for workers, including migrant workers, to file complaints for sexual harassment, anti-union discrimination, breach of collective agreements and other offences. Moreover, the processing of such cases should be fast.
7. The Ministry of Home Affairs of Malaysia must urgently lift the absolute prohibition on migrant workers from joining any sort of association in order to get or renew their residence and work permits. The classification of public workers as confidential, managerial, executive and security employees should be made according to clear criteria and definitions.
8. In the public sector, the government should allow unions full rights to bargain collectively.
9. Malaysian law should be amended in order to allow workers to bargain collectively on all issues.
10. The state should lift the various legislative restrictions that make it virtually impossible for workers to undertake a legal strike.
11. The essential services should be redefined in order to include only services the interruption of which would endanger the life, personal safety or health of the whole or part of the population, as defined by the ILO.

12. The government should promulgate legislative provisions regarding equal remuneration for work of equal value.
13. Sexual harassment in the workplace should be treated by laws that foresee stringent penalties for offenders and not by a voluntary code of conduct.
14. The government should take measures to increase women's representation in managerial and high-level political positions and to reduce the gender pay gap.
15. Further measures to ensure there is no discrimination, including against indigenous people, are required.
16. The minimum age to work should be lifted from 14 years of age to at least 15 years of age. A minimum age for performing light work should be established, accompanied by a clear definition of light work. Persons younger than 18 years should not be allowed to perform hazardous work, and again law must provide a clear definition of types of hazardous work.
17. The government must start collecting high quality statistical data on child labour so that the volume and nature of the problem is clear.
18. In line with the urgent requests of the CEACR, the government must enact specific legislation against Internet-related sexual offences, including child pornography and provisions that explicitly prohibit the use, procuring or offering of a child for the production and trafficking of drugs.
19. The Memorandum of Understanding that the government of Malaysia has signed with Indonesia that allows Malaysian employers to confiscate wages and travel documents of Indonesian migrant labour must be replaced by a new Memorandum in order to protect the rights of migrant workers.
20. The armed civilian force RELA must be abolished urgently and its competences transferred to duly established bodies that can be properly and effectively subject to constitutional accountability.
21. Stringent penalties are required in order to eliminate any collusion by border police, immigration officers and other authorities with labour traffickers.
22. The state should enact comprehensive legislation for the recognition of victims of forced labour and trafficking and establish a welfare service to provide physical, psychological, legal and other assistance to victims, and use any information they could provide to trace and prosecute traffickers.
23. In line with the undertakings by Malaysia at the WTO ministerial conferences in Singapore and Doha, and its obligations as a member of the ILO, the Malaysian government must provide regular reports to the WTO and the ILO on

amendments to its legislation and on its programmes for implementation of all the core labour standards.

24. The WTO should draw the attention of the Malaysian authorities to the commitments they made on respecting the core labour standards at the WTO ministerial conferences in Singapore, Geneva and Doha. The WTO should ask the ILO to intensify its work with the Malaysian government in these areas and to provide a report for the WTO General Council at the forthcoming review of trade policies.

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