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ITUC/Lex

27 October 2023

Re: ACTION TO BE TAKEN ON THE REQUEST OF THE EMPLOYERS' GROUP TO URGENTLY INCLUDE A STANDARD-SETTING ITEM ON THE RIGHT TO STRIKE ON THE AGENDA OF THE 112TH SESSION OF THE INTERNATIONAL LABOUR CONFERENCE

Dear Director General,

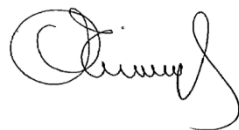
I am writing with reference to your letter of 11 October 2023 informing us of the availability of an Office background report concerning the special Governing Body meeting on action to be taken on the request of the Employers' group to urgently include a standard setting item on the right to strike on the 112th session of the International Labour Conference.

Your letter also indicated that any comments we have on the report should be addressed to NORMES@ilo.org.

Please, find below ITUC comments in this regard.

We expect, in due course, that you will bring this to the attention of Governing Body and further processes in relation to this dispute.

Yours sincerely,



Luc Triangle
Acting General Secretary

COMMENTS BY THE INTERNATIONAL TRADE UNION CONFEDERATION (ITUC) TO THE OFFICE BACKGROUND REPORT ON “ACTION TO BE TAKEN ON THE REQUEST OF THE EMPLOYERS’ GROUP TO URGENTLY INCLUDE A STANDARD-SETTING ITEM ON THE RIGHT TO STRIKE ON THE AGENDA OF THE 112TH SESSION OF THE INTERNATIONAL LABOUR CONFERENCE”

[\(See Office background paper \(GB. 349ter/INS/1\)\)](#)

Introduction and chronology

1. At the 347th Session of the Governing Body meeting of 13-23 March 2023, the Vice Chairperson of the Workers Group gave notice regarding the interpretation dispute on the right to strike, stating that *“It was already clear that any Member of the Organization could raise an issue of interpretation and submit a request to the Director-General to ask him to put the issue before the Governing Body for referral to the ICJ. One specific issue of interpretation had been waiting long enough and her group could not wait much longer for it to be resolved. Indeed, it was considering submitting a request to the Director-General in the coming months to put the issue before the Governing Body at its 349th Session and hoped to receive the support of governments in this respect. There needed to be a debate on that specific issue as soon as possible.¹”*
2. Following this notice, on 12 July 2023, the Workers Vice Chairperson of the Governing Body addressed a letter to the Director-General, formally requesting that the long-standing dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike be referred urgently to the International Court of Justice for decision, in accordance with article 37(1) of the ILO Constitution, and therefore to include the matter for discussion and decision on the agenda of the Governing Body of November 2023. This request was supported with letters to the DG by initially 32 and in the meantime 37 Governments.
3. The Workers’ group request was challenged by the Employers’ group without any legal basis. Following the efforts of the Employers’ group to block the request of the Workers’ group for a discussion at the Governing Body regarding the referral of the long-standing interpretation dispute on the right to strike to the ICJ, on 9 August 2023 the Workers’ group submitted a request to the Chairperson of the Governing Body for a special meeting on the matter, in accordance with the constitution of the ILO and the standing orders of the Governing Body. The Workers’ group has always acted in good faith in its endeavours to have this long-standing dispute settled, in order to provide legal certainty to Member States and constituents and avoid further damage to the ILO’s supervisory system.

¹ See Para 345 here

https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_884393.pdf

4. Regrettably, on this matter, the Employers' group has, in the view of the ITUC, not been constructive nor acted in good faith, trying to prevent any step in the direction of having this interpretation dispute addressed, in disregard of the ILO's institutional framework and rule of law. We say this for a number of reasons. First, in spite of the fact that the Workers' group invoked a request under article 37(1) of the ILO constitution which is akin to an ILO constitutional complaint, the Employers' group blocked its automatic referral to the Governing Body of November for discussion and decision, trying to exercise a veto power over this constitutional request. Second, when the Workers' group realised that the Employers' group would not allow the normal procedures to be followed, and decided to proceed under article 7(8) of the ILO Constitution in conjunction with paragraph 3.2.2 of the Standing Orders of the Governing Body by requesting a special meeting of the Governing Body, the Employers' group continued to challenge both the legality and legitimacy of the process and made every effort to prevent any decision regarding the scheduling of the meeting.
5. In view of the compulsory nature of the request by the Workers' group under article 7(8) of the constitution and paragraph 3.2.2. of the Standing orders of the GB, and after the decision taken by the GB Chair that such a meeting therefore should take place, a screening group meeting was called to determine the modalities for the special meeting requested by the Workers' group.
6. At that meeting, held on 13 September 2023, the Employers group suddenly submitted a request under paragraph 3.2.2 of the Standing Orders of the Governing Body for a special meeting to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference. This, while they were still challenging the legality and legitimacy of the procedure they were now also using themselves. More concretely, the Employers' group proposed that the Conference adopt in June 2024 a Protocol to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) on the right to strike. The Employers' group also insisted that their request should be discussed before the other special meeting, ignoring the constitutional nature of the request tabled by the Workers' Group and a considerable number of governments and the fact that the GB Chair had already decided on the special meeting requested by the Workers' group that this special meeting should take place, whereas their request had just been tabled and clearly required further decision making.
7. The Screening group decided on 13 September 2023 that the special meeting to discuss the ICJ referral would take place on Friday, November 10th. In a next meeting on 28 September, the Screening group decided that the special meeting to discuss the proposal regarding the addition of a standard setting item on the right to strike to the ILC agenda of 2024 would be discussed the day after (Saturday, November 11th).

8. While recognizing that the Standing Orders in 3.2.2. do not require any conditions to be in place in order to be granted a special meeting, it is important to emphasize however the difference between the two requests, one invoking the Constitution, under articles 7(8) and pursuant to settling an interpretation dispute under article 37(1), and the other clearly not. And in this regard, one wonders why the Employers' group put forward their request to add an item to the ILO's standard setting agenda in the form of a special meeting instead relying on the normal Governing Body process for including items on the Conference agenda.
9. In our view, this proposal by the Employers' group for a Protocol to C87, given all the legal, technical and practical infeasibility and unsoundness, must be seen and discussed in light of all the past and present efforts by the Group to prevent any discussions on the dispute in a manner that would bring about legal certainty and stability as well as strengthen the supervisory system while at the same time, continuing to permanently attack the key bodies in the supervisory system, i.e. the CEACR, CAS and CFA, for their guidance which ensures consistency in the scope, meaning and application of C87 with regard to the right to strike and thereby weakening the supervisory system and undermining its important work on freedom of association and right to organize.
10. It is worth recalling that, so far, Governments, the Employers' group and the Workers' group all agree that this dispute on the right to strike regarding C87 is an interpretation dispute. This means that we cannot disregard the clear and authoritative language of article 37(1) which expressly and unambiguously obliges the Governing Body, once it has come to the determination that a dispute is one of an interpretation of a Convention or the Constitution (noting, as a reasonable first step, that dialogue was not able to settle the dispute), to resort to the International Court of Justice (ICJ) for the settlement of the dispute. The constitution does not provide standard setting as the remedy in that circumstance. The authoritative and conclusive nature of the decision of the ICJ in this regard is not in doubt whether looking at it from the perspective of precedent, good governance or the hierarchy of norms and judicial decisions, taking into account the effect of such an ICJ decision on a judicial tribunal (a lower body to the ICJ) of the kind proposed under article 37.2². In view of the respect ILO constituents have for the rule of law, it is our view that the decision of the ICJ will settle this dispute and enable the ILO to find a path forward from it.
11. The ITUC emphasises the need to act in the interest of the institutional objectives of the ILO and its constitutional purpose of protecting workers and of living up to the spirit of good faith and constructive social dialogue. Good faith social dialogue also requires the understanding that when social partners are unable to agree, for reasons of an underlying dispute on the legal aspects of a situation, it is logical to resort to an available dispute settlement mechanism. In the context of the ILO this is the obligatory recourse to the ICJ based on art 37 (1) of the Constitution.

² The hierarchy of any such tribunal vis-à-vis the ICJ must also be seen in light of article 9(2) of the UN-ILO Agreement of 1946.

Rationale for rejecting the Employers' group request to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference

12. The proposal of the Employers' group for a standard setting activity in the form of a Protocol to C87 is in our view legally, technically and politically impossible and an unfeasible idea, which is not suitable for nor capable of achieving the necessary legal certainty and stability, for the following reasons;

A Protocol on the right to strike would not resolve the interpretation dispute

13. Protocols are international treaties attached to existing Conventions. A Protocol can only be ratified by those States which are already bound by the Convention to which the Protocol is attached.
14. The origin of Protocols in the ILO context dates back from the 1979 report of the Ventejol Working Party on the Revision of Standards. Prior to 1982, the only method for both total and partial revision of Conventions had been the drafting of a new Convention based on either a single or double Conference discussion.
15. To date, six Protocols have been adopted by the ILO. Based on past practice, as indicated in the Office background paper (para 41), Protocols adopted so far had the following purpose:
- introducing flexibility and potentially reducing the scope of the Convention with a view to facilitating ratification (Protocol to Convention No. 110);
 - expanding the scope and coverage of the Convention (Protocol to Convention No. 81);
 - allowing for a widening of exemptions to facilitate a transition towards standards that reflect changing circumstances in the world of work (Protocol to Convention No. 89)
 - updating certain regulatory aspects in the Convention they partially revise (Protocol to Convention No. 147)
 - adding regulatory content to the standards in the Convention they partially revise with a view to closing implementation gaps (Protocols to Conventions Nos 29 and 155).
16. None of the six Protocols adopted so far aimed at settling a dispute with respect to the interpretation of provisions of the related Convention (see para 62 of the Office background paper).

17. It should be noted that, as rightly indicated in the Office background paper as well as in the [March 2022 GB Paper](#)³, the adoption of a “*consensus-based modality involving standard-setting cannot and does not generate the legal certainty provided by article 37 of the ILO Constitution as the consensus-based outcome of a Convention or Protocol would be binding only for those Member States which have eventually ratified these. Legal uncertainty would therefore continue to prevail in respect of Member States having ratified the Convention subject to a legal dispute, for as long as they are not in a position to ratify the newly adopted Convention or Protocol*” (para 55). Therefore, a Protocol on the right to strike would generate more legal uncertainty, as it would create “alternative legal regimes” on the right to strike, based on whether Member States have ratified Convention No. 87 and whether they have additionally ratified the proposed Protocol.
18. Such a Protocol would also lead to further uncertainty regarding its impact on the review by the Committee of Experts and other supervisory bodies of the application of Convention No. 87 by those Member States that would eventually decide not to become parties to the said Protocol. While the Committee of Experts would have to take fully into account the provisions of the Protocol vis-à-vis the Member States that have ratified it, it will have to decide, as an independent body, how to proceed vis-à-vis Member States which have not ratified the Protocol and are bound only by the Convention.
19. In this context, and most importantly, it should be added that Protocols create legal obligations for ratifying States without retroactive effect. This means that the guidance of the Committee of Experts will continue to apply to those Member States who have ratified the Convention and not the Protocol. The legal uncertainty will therefore remain in the body of international labour standards linked to Convention 87 and the principle of freedom of association.
20. In the ILO, there is a reality of reliance on freedom of association as including the right to strike which is inherent in the Constitution of the ILO. There is also a reality of reliance on the coherent application of Convention 87 by the supervisory bodies as protecting the right to strike for over 70 years. The proposal of the Employers’ group that such protection for workers can be removed by standard-setting enters uncharted territory and is out-of-place in the context of the institutional objectives and constitutional theory and framework of the ILO. Such an action will turn the *raison d’être* of the ILO and its Conventions on its head⁴.

³ GB paper entitled “Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty and information on other action points in the work plan”, para. 65.

⁴ The preamble of the ILO Constitution is clear as to the institutional purpose of the ILO “Whereas universal and lasting peace can be established only if it is based upon social justice; And *whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; **and an improvement of those conditions is urgently required**; ... **recognition of the principle of freedom of association**...”(emphasis added).*

21. It must be emphasized that C87 plays a pivotal role in the ILO's institutional set up as a fundamental convention, which moreover has been characterized together with C98 as providing for enabling rights that are of key importance to workers around the world to ensure that other labour rights are respected. The current long-standing legal uncertainty with regard to its scope and meaning in such a fundamental area as the right of workers to collective action is very detrimental to all ILO's constituents.

There is no clarity on the questions to be addressed by a Protocol on the right to strike

22. The denial by the Employers' group that Convention 87 protects the right to strike raises the following fundamental question: since Protocols aim at partially revising existing Conventions, which provisions of Convention No. 87 would need to be revised, how would they be identified and what role will the existing guidance of the supervisory system play?
23. As recalled by the Office in the background paper (para. 65), it appears from the review of the six existing Protocols that at least two Protocols – those linked to Conventions Nos 29 and 147 – explicitly built on the Committee of Experts comments and general surveys to update and add regulatory content to the provisions of the Conventions concerned.
24. The comments and observations of the ILO supervisory bodies constitute fundamental guidance for ILO constituents when considering the revision of Conventions through Protocols. Therefore, given that for decades both the Committee of Experts and the Committee on Freedom of Association have progressively developed “a number of principles relating to the right to strike” on the basis of Convention No. 87, the proposed Protocol normally would consolidate the guidance of the ILO supervisory bodies.
25. However, given the Employers' repeated opposition to the comments of the Committee of Experts on the right to strike, the Employers' group expects the content of the proposed Protocol to reverse the Experts comments on the issue, which would not only create even further legal uncertainty but also create in fact a legal ‘monstrum’, as they basically argue in favour of adopting a Protocol to a Convention with the sole objective of undoing the authoritative guidance of the ILO's supervisory system, developed over the last 70 years, on that Convention.

26. Finally, the Employers' rationale⁵ to adopt a Protocol on the right to strike to circumscribe and limit the interpretive authority of the Committee of Experts is also from a technical perspective totally flawed. In line with its mandate to determine the scope, meaning and content of Conventions, the Committee of Experts would have to review the implementation of the Protocol and therefore determine the legal scope, content and meaning of its provisions. Again, the Employers' proposed Protocol defeats the purpose of ensuring definitive legal certainty on the matter.
27. In sum, it is our strong view that a Protocol on the right to strike would not resolve the interpretation dispute, as the discussion on possible standard setting would expose the same fundamental and persistent disagreement on interpretation, thus preventing consensus. In addition, it would lead to even more legal uncertainty and is in essence legally unsound.

The timeframe put forward for the adoption of the proposed standard setting activity for a Protocol to C87 is not feasible

The standard setting process and the applicable timeframe

28. The standard setting procedure is regulated by the Standing Orders of the International Labour Conference (in articles 45 and 46) which provide for statutory time limits for the preparatory stages of a double or single discussion.
29. These preparatory stages include:
- the preparation of a preliminary report on the national law and practice with a questionnaire (to be sent to the governments not less than 18 months before the opening of the Conference at which the discussion will take place)
 - the communication of replies by constituents (to be received by the Office not less than 11 months before the opening of the Conference at which the discussion will take place)
 - and the preparation of a further report of the Office with draft conclusions which in principle serve as a basis for the first Conference discussion (to be communicated not less than 4 months before the opening of the Conference at which the discussion will take place)
30. These arrangements apply in cases in which the question has been included in the agenda of the Conference not less than 26 months before the opening of the session of the Conference at which it is to be discussed in respect of a single discussion, or not less than 18 months before the opening of the session of the Conference in the case of a double discussion. When the standard-setting item is placed on the agenda of the Conference less than 26 months for a single discussion or less than 18 months for a double discussion, a programme of reduced intervals must be approved by the Governing Body.

⁵ As recalled in the Office background paper (para. 59), the Employers' declared objective is "to ensure that the Committee of Experts does not create new obligations beyond those intended by the tripartite constituents at the Conference. The Committee of Experts should refer difficult questions or gaps in a Convention to the constituents for them to resolve; its failure to do so in the case of the right to strike had led to the current dispute."

31. It is clear that the Employers' proposal would not allow for the respect of the requirements set out in the standing orders, as in practical terms it would mean that the time available between the placing of the item of the ILC agenda (Nov 2023) and the first discussion in June 2024 would be only seven (7) months.
32. Even if one would then try to argue in favour of the GB approving a programme of reduced intervals, in our view this would not be feasible, taking into account the need to respect procedural requirements that are there to ensure the full participation and contribution of the tripartite constituents in the preparatory process, as well as past practice and the amount of preparatory work that would be required from the Office (Law and Practice report, Report with draft conclusions and draft text). It would be absolutely impossible to complete all this preparatory work within 7 months.
33. As indicated in the Office background paper (para. 72), all ILO Protocols were placed on the agenda of the Conference between 15 and 19 months before the opening of the session at which they would be discussed, except for the Protocol to Convention No. 147. However, this had been prepared in the context of an earlier technical meeting. A programme of reduced intervals was adopted for the preparation of the two most recent Protocols to Conventions Nos 155 and 29 in line with article 38, paragraph 3 (now article 45, paragraph 4) of the Standing Orders of the Conference.
34. Reduced intervals only work when there is broad consensus on the issue(s) and the preparation for standard setting.
35. In addition, four of the six Protocols adopted by the Conference have been preceded by technical or tripartite meetings of experts which facilitated the preparatory work of the Office, and ensured the involvement of tripartite constituents in the process. This preparatory work, consisting in in-depth technical analyses and tripartite debates, has been demonstrated to be essential in developing sound and well-informed standards.
36. It is clear that no preparatory work on any regulatory approach to the right to strike has been conducted. The existing technical analysis and guidance of the supervisory system, which would normally form a consensus basis for the preparatory work, is rejected by the Employers' group. Taking into account the existing statutory timeframes, past practice, the need to respect tripartite involvement as well as practical considerations, the Employers' proposal to have a Protocol on the right to strike discussed at the 2024 ILC is simply not feasible. This is in addition to the fact that in our view as argued above the proposal is legally unsound.

There is no space in the already approved agendas of the forthcoming sessions of the International Labour Conference (See [GB 349/INS/2](#))

37. The responsibility for setting the agenda of the Conference lies with the Governing Body. Proposals to place an item on the Conference agenda must be considered at two successive sessions of the Governing Body, unless there is unanimous consent to place a proposed item on the agenda of the Conference when it is discussed for the first time by the Governing Body (paragraph 5.1.1 of the Governing Body Standing Orders).
38. The Agenda of the 2024 ILC has already been decided by the GB in previous sessions, and the following items, in addition to the standing items, have been placed on the agenda:
- Occupational safety and health protection against biological hazards – **standard-setting (first discussion)** [*decided in March 2021*]
 - Recurrent discussion on the strategic objective of fundamental principles and rights at work.
 - Decent work and the care economy – general discussion. [*decided in March 2022*]
 - Abrogation of Conventions Nos 45, 62, 63 and 85. [*decided in November 2021*]
39. According to the established practice of having three technical committees plus the General Affairs Committee (GAC - to be convened when necessary), there is therefore no possible slot for an additional standard setting item in the 2024 ILC Agenda.
40. For all the reasons stated above, the Employers' proposal to adopt a Protocol relies on a flawed rationale and defeats its own declared purpose of providing an easier path to consensus and more legal certainty on the right to strike. A Protocol would not resolve the interpretation dispute regarding the right to strike as it is legally, practically and politically impossible.
41. Preserving the unique nature of the ILO as a normative tripartite organization requires that legal certainty is restored to ILO constituents and the supervisory system with regard to this long-standing dispute on the interpretation of C87. Therefore the Governing Body must decide now to resolve this dispute by referring it to the ICJ under article 37(1) of the ILO Constitution and not through the adoption of a Protocol to C87 (see text in box below).

Taking the unique tripartite governance structure of the ILO into account

The Employers' group has argued that their request for standard setting as the preferred way to settle the interpretation dispute is based on the fact that standard setting is the only social dialogue based solution in the ILO or the highest form of social dialogue in the ILO. This is erroneous.

The ILO is according to its Constitutional mandate a tripartite social dialogue based normative organization with a sound system of interrelationships between its governance, legislative and supervisory systems aimed at protecting workers, achieving social justice and realising universal peace.

In view of the dialogue that takes place between tripartite social partners at the national level and the regular supervisory system at the ILO through reporting under article 19, 22 and 23 of the ILO constitution aimed at better implementing ratified Conventions, it is improper to suggest that this supervisory system is not social dialogue based.

Also, given the role that the International Labour Conference and the Governing Body play regarding the work of the supervisory bodies under the Constitution of the ILO; and the role specifically played by the Governing Body (which is also a tripartite structure) regarding the deliberations and decision to refer a question or dispute to the ICJ under article 37(1), it is equally improper to suggest that the process to refer a dispute to the ICJ does not inherently include social dialogue.

The advisory opinion of the ICJ, when delivered, will also not constitute an external imposition on the ILO and its constituents. In order to ensure legal certainty and predictability associated with the rule of law, the ILO will deal with the advisory opinion of the ICJ on the basis of its constitution and precedents, which prescribe the need to bring a dispute of interpretation to the ICJ for decision and therefore consider the outcome to be conclusive and binding on the organisation.

It is worth noting that social dialogue systems in many ILO Member States also include dispute settlement mechanisms, on the basis of the law or agreed in advance by social partners, which provide for resorting to judicial settlement of disputes of a legal nature arising in social dialogue.

The ILO is a normative organization founded on a culture of social dialogue which includes its dispute settlement mechanism, and this makes it unique. It must also be emphasised, that the ILO's uniqueness is equally in the fact that its supervisory system does not impose decisions on Member States. The CEACR as an independent body undertakes an impartial and technical analysis of how ratified Conventions are applied in law and practice by Member States, while cognizant of different national realities and legal systems, and provides non-binding guidance through continuing dialogue with governments taking into account information provided by employers' and workers' organizations. The CFA arrives at conclusions and makes recommendations to Member States on a tripartite basis. These bodies, in continuing dialogue with Member States and constituents, work to guide the actions of national authorities in the application of international labour standards and principles, in law and practice. Member States, in voluntarily becoming members of the ILO by ascribing to its constitution, and in voluntarily ratifying ILO conventions, engage in this dialogue with the supervisory bodies.

It is therefore misleading to caricature the supervisory system as external to and imposing its will on Member States and constituents. It is also misleading to caricature any decision of the ICJ in such a manner as 'an imposition' or 'foreign to the ILO' for the same reasons already stated above.

Finally, arguing that social dialogue would have to be preferred over any dispute settlement mechanism would lead to a situation where a deadlock in social dialogue would persist ad infinitum, giving the party that blocks access to dispute settlement in practice a veto. This would certainly not be in line with basic principles of social dialogue and the tripartite governance structure of the ILO.