

**Submission to the Second Universal Periodic Review of Malaysia**  
**17<sup>th</sup> Session of the Universal Periodic Review Working Group, 21 Oct - 1 Nov 2013**

**I. Background and framework**

Malaysia is scheduled for its second Universal Periodic Review (UPR) in the 17<sup>th</sup> session of the Human Rights Council UPR Working Group (21 Oct - 1 Nov 2013). The focus of the second review is on the implementation of the recommendations accepted by Malaysia during its first UPR in 2009 and the developments of the human rights situation in Malaysia during the four year period under review. Many of the accepted recommendations<sup>1</sup> relate to rights guaranteed in ILO Conventions ratified by Malaysia.

Malaysia has ratified 16 ILO conventions, out of which 15 are in force. These include six out of eight fundamental conventions, two out of four governance (priority) conventions, as well as eight technical conventions. (See Table 1 below.) In addition, Peninsular Malaysia has ratified five technical conventions, Sabah has ratified five technical conventions, and Sarawak has ratified nine technical conventions.<sup>2</sup> The submission of the ILO ROAP summarizes recent comments of the ILO supervisory bodies – the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association – on application of these conventions in Malaysia. Information is provided in response to recommendations accepted by Malaysia during its first UPR in 2009 relating to **gender equality and women’s advancement**, **child labour**, and **protection of the rights of foreign workers**. In addition, observations are made in relation to **freedom of association and trade union rights** in Malaysia.

Table 1. ILO fundamental and governance (priority) conventions ratified by Malaysia

<b>Fundamental conventions</b>	Date	Status
Forced Labour Convention, 1930 (No. 29)	11 Nov 1957	In Force
Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	05 Jun 1961	In Force
Equal Remuneration Convention, 1951 (No. 100)	09 Sep 1997	In Force
Abolition of Forced Labour Convention, 1957 (No. 105)	13 Oct 1958	Denunciation 10 Jan 1990
Minimum Age Convention, 1973 (No. 138)	09 Sep 1997	In Force
Worst Forms of Child Labour Convention, 1999 (No. 182)	10 Nov 2000	In Force
<b>Governance conventions</b>		
Labour Inspection Convention, 1947 (No. 81)	01 Jul 1963	In Force
Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)	14 Jun 2002	In Force

**II. Implementation of international labour standards**

<sup>1</sup> *Report of the Working Group on the Universal Periodic Review – Malaysia*, 5 Oct 2009, A/HRC/11/30, para. 104.

<sup>2</sup> NORMLEX database. Available at: <http://www.ilo.org/normlex> [13Feb 2013].

## Gender equality and women's advancement

The CEACR has noted that women's participation in the labour market is very low in Malaysia (35.7 per cent). Women also continue to be concentrated in particular fields, such as clerks, services and manufacturing, while their number in higher paying occupations, such as legislators, senior officials and managers is relatively low. In its comments on application of the **Equal Remuneration Convention, 1951 (No.100)** in Malaysia, the CEACR has recalled the importance of the concept of equal pay for work of equal value in eradicating gender-based pay discrimination and addressing occupational segregation, in particular when they are based on patriarchal attitudes and stereotypes regarding the roles and responsibilities of women and men in the labour market and in society.<sup>3</sup> The ILO recommends ratification of the **Discrimination (Employment and Occupation) Convention, 1958 (No. 111)**, which envisages the adoption of a national policy to promote, inter alia, gender equality in all aspects of employment.

As regards national legislation in Malaysia, the CEACR has noted that the *Constitution*, the *Employment Act* and the *Wages Council Act* do not reflect fully the principle of equal remuneration for men and women for work of equal value. It has therefore asked the Government of Malaysia to review the relevant legislation in consultation with the social partners.<sup>4</sup>

The Committee on Freedom of Association has since April 2008 been following a case concerning the Malaysian Government's refusal to allow migrant domestic workers, vast majority of whom are women, to establish organizations to defend their interests (Case No. 2637). In November 2012 the Committee on Freedom of Association deeply regretted that no policy for domestic workers to form and join associations has been adopted. It urged the Government to take the necessary measures, including legislative, to ensure that domestic workers may all effectively enjoy right to establish and join organizations of their own choosing. It also invited the Government of Malaysia to consider ratifying the **Domestic Workers Convention, 2011 (No. 189)**.<sup>5</sup>

## Child labour

The CEACR has repeatedly requested the Government to bring its national legislation in full conformity with the **Worst Forms of Child Labour Convention, 1999 (No. 182)**. It has requested the Government to take immediate and effective measures as a matter of urgency to ensure that, in the framework of the amendments to the *Child Act*, legislation is adopted to prohibit the use, procuring or offering of a child under 18 years of age for the production of pornography or for pornographic performances. The CEACR has also noted that it needs further information to assess whether section 32 of the *Child Act* can be applied effectively to prohibit the use, procuring or offering of a child for the production and trafficking of drugs, and has requested the Government to

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<sup>3</sup> Malaysia - CEACR, direct request concerning Convention No. 100, 2012. Available at: <http://www.ilo.org/normlex> [13Feb 2013].

<sup>4</sup> Malaysia – CEACR, observation concerning Convention No. 100, 2012, in *Report of the CEACR on the Application of Conventions and Recommendations*, Report III (Part 1A), International Labour Conference, 101<sup>st</sup> Session (2012, Geneva).

<sup>5</sup> Committee on Freedom of Association, Case No. 2637, Report No. 353, 2009 and Report No. 365, 2012.

provide information on the effect given to this provision in practice.<sup>6</sup> As regards prohibition of hazardous work, the CEACR has noted the section 2(6) of the *CYP Act* (as amended), which states that for the purposes of section 2, “hazardous work” means any work that has been classified as hazardous based on the risk assessment conducted by a competent authority on safety and health as determined by the Minister. The CEACR has requested the Government to provide information on the measures taken to determine the types of work which constitute hazardous work prohibited to persons under the age of 18.<sup>7</sup>

As regards application of the Convention 182 and the **Minimum Age Convention, 1973 (No. 138)** in Malaysia, the CEACR has noted the concern expressed by the CRC that the enforcement of these Conventions remains weak.<sup>8</sup> The CEACR further noted that the Workers member of Indonesia noted at the Conference Committee on the Application of Standards that, according to the Indonesian National Commission for Child Protection (INCCP), cases of forced labour of migrant workers and their children on palm oil plantations in Sabah involve an estimated 72,000 children. The INCCP reported after a 2008 fact-finding mission to the plantations in Sabah that children worked in the plantations all day long without regulated employment hours. Other sectors where migrant workers’ children were often found were family food businesses, night markets, small-scale industries, fishing, agriculture and catering. The CEACR has therefore strongly urged the Government to take the necessary measures to ensure that the provisions giving effect to Conventions Nos. 138 and 182 are effectively enforced. It has requested the Government of Malaysia to continue its efforts to strengthen the capacity and expand the reach of labour inspectorate to better monitor children carrying out economic activities in the palm oil plantations, in the agricultural sector, and in the urban economy. It has also requested the Government to provide information on the number of infringements reported, investigations, prosecutions, convictions and penal sanctions applied with regard to children engaged in the worst forms of child labour. It has also reminded the Government that migrant children, street children and child domestic workers are particularly exposed to the worst forms of child labour and requested the Government to take effective time-bound measures to ensure that these children are protected.<sup>9</sup>

The CEACR has noted the adoption of the *Anti-Trafficking in Persons Act* in 2007<sup>10</sup> and drafting of a National Plan of Action to combat trafficking in persons in 2008. The CEACR has requested the Government to continue providing information on the implementation of the National Plan of Action and the number of children who have been withdrawn from trafficking and rehabilitated. The CEACR has also urged the Government to take measures to cooperate with the neighboring countries, particularly Indonesia and Thailand, to bring an end to child trafficking for labour or commercial sexual exploitation and to the engagement of child migrants in the worst forms of child labour.<sup>11</sup>

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<sup>6</sup> *Malaysia* – CEACR, observation concerning Convention No. 182, 2012, 2010.

<sup>7</sup> *Malaysia* – CEACR, observation concerning Convention No. 138, 2012.

<sup>8</sup> CRC/C/MYS/CO/1, paragraph 90.

<sup>9</sup> *Malaysia* – CEACR, observation concerning Convention No. 138, 2012; *Malaysia* – CEACR, observation concerning Convention No. 182, 2012, 2010.

<sup>10</sup> *Malaysia* – CEACR, direct request concerning Convention No. 29, 2010.

<sup>11</sup> *Malaysia* – CEACR, observation concerning Convention No. 182, 2012, 2010.

## Protection of the rights of foreign workers

The CEACR has noted the need to ensure equal treatment of foreign workers in its comments on application of the **Migration for Employment Convention (Revised), 1949 (No. 97)** in Sabah and the **Equal Treatment (Accident Compensation) Convention, 1925 (No. 19)** in Peninsular Malaysia and Sarawak.<sup>12</sup> The CEACR recalls that since 1 April 1993, the Malaysian social security system has contained inequalities of treatment that run counter to the provisions of the Conventions Nos. 19 and 97. This inequality is due to national legislation that transferred foreign workers who have been employed in Malaysia for up to five years from the Employees' Social Security Scheme (EES) to the Workmen's Compensation Scheme (WCS). The EES provides for periodical payments to victims of industrial accidents, whereas the WCS only guarantees a lump sum payment of a significantly lower amount. The CEACR has repeatedly urged the Government to take immediate steps to bring national law and practice into conformity with the Conventions. In August 2011 the Government replied that it is considering bringing its national law and practice into conformity with the Convention, and in October 2011 an ILO mission visiting the country was briefed on action being taken to rectify the situation. In an observation published in June 2012, the CEACR hoped that the Government will accomplish this task in very near future so as to be able to report success by 1 September 2012.<sup>13</sup>

In its comments on application of the Convention No. 97 in Sabah, the CEACR has recalled that under the Convention migrant workers shall not be treated less favorably than nationals with respect to remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeships and training, women's work and work of young persons.<sup>14</sup> It has asked the Government to provide information on the measures taken to ensure that the legislation protecting migrant workers from discrimination with respect to their conditions of work is effectively applied and enforced, and that effective mechanisms exist for migrant workers to submit complaints without fear of reprisals.<sup>15</sup> The CEACR has also noted that paragraphs 1 and 2(a) and (f) of the Schedule to the *Labour Ordinance (Sabah Cap. 67)* excludes from its application manual workers, domestic workers and workers who have entered into a contract of service with an employer and whose wages do not exceed RM2,500 a month. The CEACR has asked the Government to indicate specific measures taken to ensure that these workers are not treated less favorably than nationals with respect to their conditions of work.<sup>16</sup> The CEACR has also noted the annual levy which is being imposed on employers of foreign workers in Malaysia, and has warned against the possible negative impacts of such a levy system on wages and general working conditions and rights of migrant workers.<sup>17</sup>

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<sup>12</sup> *Malaysia* – CEACR, direct request concerning Convention No. 97, 2011.

<sup>13</sup> *Malaysia (Peninsular)* – CEACR, observation concerning Convention No. 19, 2012; *Malaysia (Sarawak)* – CEACR, observation concerning Convention No. 19, 2012; *Malaysia (Sabah)* – CEACR, observation concerning Convention No. 97, 2011.

<sup>14</sup> *Malaysia (Sabah)* – CEACR, direct request concerning Convention No. 97, 2009.

<sup>15</sup> *Malaysia (Sabah)* – CEACR, direct request concerning Convention No. 97, 2011.

<sup>16</sup> *Malaysia (Sabah)* – CEACR, direct request concerning Convention No. 97, 2011.

<sup>17</sup> *Malaysia (Sabah)* – CEACR, direct request concerning Convention No. 97, 2011, 2009.

In 2009, the CEACR noted that the UN Committee on the Elimination of Discrimination against Women (CEDAW) had expressed its concern about the lack of legislative and other measures to prevent and eliminate trafficking in women and to protect victims in Malaysia. Moreover, women and girls who have been trafficked may be punished for violation of immigration laws.<sup>18</sup> The CEACR draws the attention of the Government to the fact that measures to address misleading propaganda are an important step in preventing clandestine and irregular migration, including trafficking of human beings, as well as abuse and discrimination of migrant workers.<sup>19</sup> It asks the Government to take specific measures to ensure that migrant workers coming to Sabah are not subjected to erroneous information, either by employer or intermediaries, regarding their living and working conditions.<sup>20</sup> In its comments on the application of the **Labour Inspection Convention, 1947 (No.81)** the CEACR also recalled that the primary duty of labour inspectors is to protect workers and not to enforce immigration law, and requested the Government to explain how this primary duty is fulfilled in the context of actions with respect to irregular workers.<sup>21</sup>

As regards freedom of association of migrant workers, the CEACR has noted that the requirement for foreign workers to obtain the permission from the Ministry of Human Resources in order to be elected as trade union representatives hinders the right of the trade union organizations to freely choose their representatives for collective bargaining purposes.<sup>22</sup>

### **Freedom of association and trade union rights**

The Committee on Freedom of Association has noted that that the *Trade Union Act* and the *Industrial Relations Act* and their application, for many years, have resulted in serious violations of the right to organize and bargain collectively, and has urged the Government to amend these laws. In Case No. 2301 the Committee on Freedom of Association noted the following violations of the **Right to Organise and Collective Bargaining Convention, 1949 (No.98)**: discretionary and excessive powers granted to authorities as regards trade union registration and scope of membership; denial of workers' rights to establish and join organizations of their own choosing, including federations and confederations; refusal to recognize independent trade unions; interference of authorities in internal union activities, including free election of trade unions representatives; establishment of employer-dominated unions; and arbitrary denial of collective bargaining.<sup>23</sup> The CEACR has also noted these violations and has, among others, requested the Government to modify the legislation in order to reduce the length of proceedings for the recognition of trade unions and to remove restrictions on collective bargaining matters.<sup>24</sup>

The CEACR has also noted comments made by the International Trade Union Confederation (ITUC) that the Government has failed to apply any sanctions against employers who oppose the directives

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<sup>18</sup> CEDAW/C/MYS/CO/2, 31 May 2006; see also *Malaysia – CEACR*, observation concerning Convention No.182, 2012.

<sup>19</sup> *Malaysia (Sabah) – CEACR*, direct request concerning Convention No. 97, 2009.

<sup>20</sup> *Malaysia (Sabah) – CEACR*, direct request concerning Convention No. 97, 2011.

<sup>21</sup> *Malaysia – CEACR*, direct request concerning Convention No. 81, 2011.

<sup>22</sup> *Malaysia – CEACR*, observation concerning Convention No. 98, 2011.

<sup>23</sup> Committee on Freedom of Association, Case No. 2301, Reports No. 333, 2004 and No. 363, 2012, paragraph 171.

<sup>24</sup> *Malaysia – CEACR*, observation concerning Convention No. 98, 2011.

of the authorities granting trade union recognition or who have refused to comply with Industrial Court orders to reinstate unlawfully dismissed workers. The CEACR has requested the Government to provide information and statistics on any sanctions against employers who opposed the directives of the authorities.<sup>25</sup>

In 2011, the CEACR once again urged the Government to take the necessary measures to ensure for public servants not engaged in administration of the State the right to bargain collectively. It has also urged the Government to take measures to ensure that the legislation only authorizes compulsory arbitration in essential services, in the strict sense of the term, for public servants engaged in the administration of the State or in cases of acute national crisis.<sup>26</sup> Other groups of workers whose freedom of association has been limited in Malaysia include migrant workers. As noted above, the Government has refused to allow migrant domestic workers to establish organizations to defend their interests<sup>27</sup> and required foreign workers to obtain a permission from the Ministry of Human Resources in order to be elected as trade union representatives.<sup>28</sup>

### **III. Achievements and best practices**

In its 2012 comments on application of the **Minimum Age Convention, 1973 (No. 138)** in Malaysia, the CEACR noted with satisfaction that the *Children and Young Persons (Employment) (Amendment) Act* of 2010 (*CYP Amendment Act*) defines a “child” as a person under 15 years of age, thereby raising the minimum age for admission to employment or work from 14 years to 15 years of age. It further noted with satisfaction that pursuant to *CYP Amendment Act*, the term “young person” is defined as a person between 15 and 18 years of age, and that no child or young person shall be required or permitted to engage in any hazardous employment. The CEACR has also noted with interest that, as previously requested by the CEACR and the Committee on the Rights of the Child (CRC)<sup>29</sup>, the term “light work” is defined in section 1A of the *CYP Amendment Act*. However, no minimum age for admission to light work has been specified. The CEACR therefore requested the Government to take measures to establish a minimum age of 13 years of age for admission to light work, in conformity with the Convention No. 138.<sup>30</sup>

### **IV. Recommendations**

Gender equality and women’s advancement

- Ratify the Discrimination (Employment and Occupation) Convention, 1958 (No.111) and adopt a national policy to promote equality of opportunity and treatment at work.
- Bring national legislation to fully reflect the principle of equal remuneration for men and women for work of equal value.

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<sup>25</sup> *Malaysia* – CEACR, observation concerning Convention No. 98, 2011.

<sup>26</sup> *Malaysia* – CEACR, observation concerning Convention No. 98, 2011.

<sup>27</sup> Committee on Freedom of Association, Case No. 2637, Reports Nos. 353, 365.

<sup>28</sup> *Malaysia* – CEACR, observation concerning Convention No. 98, 2011.

<sup>29</sup> CRC/C/MYS/CO/1, paragraph 90.

<sup>30</sup> *Malaysia* – CEACR, observation concerning Convention No. 138, 2012.

- Address occupational segregation and gender-based pay discrimination, and repeal patriarchal attitudes and stereotypes regarding the roles and responsibilities of women and men in the labour market and in society.
- Guarantee migrant domestic workers' freedom of association and right to establish organizations to defend their interests.
- Ratify the Domestic Workers Convention, 2011 (No.189).

#### Child labour

- Establish a minimum age of 13 years of age for admission to light work.
- Effectively prohibit the use, procuring or offering of a child under 18 years of age for the production of pornography or for pornographic performances and for the use, procuring or offering of a child for the production and trafficking of drugs.
- Determine the types of work which constitute hazardous work prohibited to persons under the age of 18.
- Strengthen the capacity of labour inspectorate to better monitor children carrying out economic activities in the palm oil plantations, in the agricultural sector, and in the urban economy.
- Effectively report, investigate and prosecute worst forms of child labour.
- Take effective time-bound measures to protect migrant children, street children and child domestic workers against the worst forms of child labour.
- Cooperate with the neighboring countries to bring an end to child trafficking for labour or commercial sexual exploitation and to the engagement of child migrants in the worst forms of child labour.

#### Protection of foreign workers

- Revise the social security system to ensure equal treatment nationals and foreign workers in terms of industrial accident compensation.
- Ensure that foreign workers are not treated less favorably than nationals with respect to their conditions of work, including remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeships and training, women's work and work of young persons.
- Extend labour law protection to cover domestic workers, manual workers and workers whose wages do not exceed RM2,500 a month.
- Ensure that the foreign workers' levy does not have negative impacts on wages and working conditions and rights of migrant workers.
- Address misleading propaganda to prevent clandestine and irregular migration, including trafficking of human beings, as well as abuse and discrimination of migrant workers.
- Ensure that labour inspectors fulfill their primary duty to protect workers and that no victims of trafficking in persons are punished for violation of immigration laws.
- Remove any restrictions to migrant workers' freedom of association and right to be elected as trade union representatives.

#### Freedom of association and trade union rights

- Amend the *Trade Union Act* and the *Industrial Relations Act* to remove excessive powers granted to authorities as regards trade union registration and scope of membership, to guarantee workers' rights to establish and join organizations of their own choosing, and to recognize independent trade unions. Prohibit interference of authorities in internal union activities, including free election of trade unions representatives.
- Ensure that sanctions against employers who oppose the directives of the authorities and court decisions granting trade union recognition or ordering reinstatement of unlawfully dismissed workers are effectively enforced.
- Ensure that public servants not engaged in administration of the State have the right to bargain collectively over wages and other employment conditions.
- Amend the legislation to only authorize compulsory arbitration in essential services.
- Remove any restrictions to migrant workers' and domestic workers' freedom of association.