

## Meeting of the ILO Committee of Experts Geneva, 1 December 2012

### Statement of Mr. Christopher Syder, CAS<sup>1</sup> Spokesperson on behalf of the Employers' Group

#### **(Highlights)**<sup>2</sup>

The Employers very much appreciate this opportunity for direct dialogue with the members of the Committee of Experts (CEACR); it is more crucial now for the proper functioning of the ILO standards supervisory system and the work of the CEACR and the CAS, than at any time in the last 20 years, given today's agenda on the involvement and role of the CEACR and its interaction with the tripartite constituents of the ILO.

This meeting is also key, coming as it does after the election of our new ILO Director-General and the presentation of new priorities for the organization that focus on the better functioning of the supervisory system.

The Employers firmly believe that the difficult issues that have emerged will be resolved with continuous close dialogue, cooperation and coordination between the bodies of the ILO regular supervisory system, and in a spirit of mutual respect, cooperation, and responsibility.

The following remarks are underpinned by the Employers' commitment to preserving and strengthening the cooperation and coordination between the CAS and the CEACR. Two issues are of major importance to the Employers, namely:

1. the disputed right to strike concerning Convention 87
2. the mandate of the Experts with reference to the ILO Constitution

#### **The "right to strike" and Convention 87**

The Experts consider the "right to strike" to be part of the obligations politically negotiated and agreed by the ILO Constituents under Convention 87.

The Employers have regularly objected to this for many years, arguing that a "right to strike" is not regulated in Convention 87 and that the ILO constituents did not agree to the inclusion of the right to strike at the adoption of Convention 87 in 1948. This is also clearly stated in the preparatory work for the adoption. The Employers have also put forward detailed arguments showing that, in considering all applicable rules of interpretation, a "right to strike" cannot be "read into" Convention 87.

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<sup>1</sup> Committee on the Application of Standards of the International Labour Conference

<sup>2</sup> For the full verbatim of Mr Syder's intervention, please contact [assenza@ioe-emp.org](mailto:assenza@ioe-emp.org).

In this year's General Survey on the eight fundamental ILO Conventions, the Experts included nearly 20 pages on their view that Convention 87 contains an inherent right to strike.

The Experts observed that, *"in the absence of a specific provision...it was mainly on the basis of Article 3...which sets out the right of workers to organise their activities and to formulate their programmes, and Article 10, under which the objective of these organisations is to further and defend the interests of workers, that a number of principles relating to the right to strike were progressively developed... by the Committee on Freedom of Association...(as of 1952), and by the Committee of Experts (as of 1959, and essentially taking into consideration the principles established by the Committee on Freedom of Association). This position of the supervisory bodies [emphasis added] in favour of the recognition and protection of the right to strike has, however, been subject to a number of criticisms from the Employer's group in the Committee on the Application of Standards of the International Labour Conference.*

Several important issues arise from this opening paragraph concerning the role and mandate of the various groups, namely, the Committee on Freedom of Association (CFA), the Committee of Experts (CEACR) and the Committee on the Application of Standards (CAS). The role of the Experts was first mandated at the 8<sup>th</sup> International Labour Conference (ILC) in 1926. The CAS in its conclusions that year explained the necessity of a technical committee of experts as follows: *"The functions of the committee would be entirely technical and in no sense judicial"* (paragraph 400) and *"It was agreed however that the Committee of Experts would have no judicial capacity nor would it be competent to give interpretations of the provisions of the Convention nor to decide in favour of one interpretation rather than of another."* (paragraph 405). Further explanation was provided at the 1947 ILC: that the Experts would *"carry out an examination of the annual reports submitted by governments...in preparation for the examination of these reports from a wider angle by the Conference"* and that this served as an *"indispensible preliminary to the overall survey of application conducted by the Conference through its Committee on the Application of Conventions"* (paragraph 36 of the minutes of the Committee on Application of Conventions). On considering the Minutes of the Governing Body in 1947, when the terms of reference of the Committee of Experts were confirmed, paragraph 8 provides: *"In pursuance of a decision of the Conference at its Eights (1926) Session, special machinery was set up in 1927 to ensure the fullest possible use being made of the Governments' annual reports. The machinery in question consists of a Committee of Experts appointed by the GB for the purpose of carrying out a preliminary examination of the annual reports, and of a special committee of delegates [emphasis added] which the Conference sets up to review the application of Conventions from a wider angle, with the assistance of the three Groups"*.

Nothing has changed since then: these paragraphs remain the guiding principles on the role and mandate of the Experts. Further, alluding to the Employers' opposition to the views of the "supervisory bodies" indicates an apparent lack of understanding of the role of Employers in the CAS. The fact that the Employer members of the CAS have consistently opposed the Experts' views on the right to strike cannot be construed as the

view of *external* opposition, rather it is evidence that there is no agreement inside the International Labour Organization on the right to strike.

In the 2012 General Survey, the Experts seek to justify importing the right to strike into a Convention silent on the matter by stating that *“while preparatory work is an important supplementary interpretative source ....it may yield to the other interpretative factors, in particular, in this specific case to the subsequent practice over a period of 52 years (see articles 31 and 32 of the Vienna Convention on the Law of Treaties).* The Experts state, *“the right to strike was indeed first asserted as a basic principle of freedom of association by the tripartite Committee on Freedom of Association in 1952...”* In fact, despite being “asserted”, the right to strike was deliberately not recognised in Convention 87 (or 98). The issue was left “at large”, to the great relief of the Employers’ and Workers’ groups.

Subsequently, the Experts *“highlight that the right to strike is broadly referred to in the legislation of the great majority of countries and by a significant number of constitutions, as well as by several international and regional instruments, which justifies the Committee’s interventions on the issue [emphasis added].”* This last point is disputed by the Employers. The fact that many, if not most, countries have enshrined a right to strike, together with restrictions, is not determinative of the proposition that Convention 87 is the source of that right. Rather, it is far more supportive of a view that countries have found it necessary to regulate this important issue themselves in the face of a lack of clear and explicit guidance from an agreed source, e.g. the CAS. Citing national practice as a basis for interpreting an unstated right into an international document does not advance the Experts’ argument that Convention 87 is the source of the right to strike.

The Experts then state, *“the affirmation of the right to strike by the supervisory bodies lies within the broader framework of the recognition of this right at the international level.”* In the Employers’ view, this conflicts with the opening statement that it was *“mainly on the basis of Article 3 of the Convention.... and Article 10..., that a number of principles relating to the right to strike were progressively developed.”* For the Employers, the Experts’ views are contradictory in giving equal primacy to Convention 87 and international practice. The Experts rely on custom and practice as the real source of their authority to interpret Convention 87. They refer to a *“broader framework of the recognition of this right at the international level,* mentioning in particular the International Covenant on Economic, Social and Cultural Rights of the United Nations. However, Article 8 of the International Covenant on Economic, Social and Cultural Rights of the United Nations, provides that *“1. The States Parties to the present Covenant undertake to ensure.(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country [emphasis added].”* It is clear that the Covenant does not confer a general right to strike. Despite referring *“particularly [to] the International Covenant on Economic, Social and Cultural Rights of the United Nations”* the Employers disagree that the Experts can rely on it as a source of their authority to interpret a general right to strike into Convention 87.

The Experts also reference a number of regional instruments on the right to strike. None reference an international overarching right to strike. All restrict the exercise of the right

to strike within the laws of the individual states. They cannot therefore be regarded as determinative of an international right to strike, nor do they support an interpretation of that right into Convention 87. To connect their views on Convention 87 with this “broader framework”, the Experts cite Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Article 31 of the Vienna Convention is couched in terms familiar to most common and Roman law jurisdictions; basically that proper interpretation is based in the first instance on the plain and ordinary meaning of the words in the Treaty. Article 32 states that, only if the meaning is unclear, is it permitted to look beyond the document to ascertain a complete interpretation. This permits changes over time, for instance through custom and practice becoming more of a reality than the words of the treaty.

The Experts highlight that the CAS discussion of the 1959 General Survey covered the issue of the right to strike “*without any objection from any of the constituents.*” The Experts appear to rely on this point to imply that the 52 years following are a sound basis for establishing a custom and practice interpretation supported by Article 31 of the Vienna Convention. However, in making this point, the Experts fail to mention that the Employers (an ILO constituent and part of the CAS, the apex of the regular supervisory system of the ILO) have consistently, before 1959 and since, objected to the view that Convention 87 contains a right to strike. This first occurred in 1973 when the next General Survey on the Freedom of Association Conventions was discussed by the CAS, which is nearly forty years ago.

It is a step too far to imply that, simply because one view is long held, it has primacy over the originally documented agreement, which, in the case of Convention 87, did not include a right to strike. As Article 31 provides, a departure from the plain meaning of the words of the treaty is possible, inter alia, because of, “*any subsequent practice in the application of the treaty which establishes the agreement [emphasis added] of the parties regarding its interpretation.*” There is strong evidence that the prerequisite agreement for a custom and practice interpretation of Convention 87 is absent and always has been.

The greatest weakness of the Experts’ view, that a general right to strike is derivable from Convention 87, is to be found in the subsequent discussion on permitted restrictions and compensatory guarantees within the 2012 General Survey. The Experts state that, “*the right to strike is not absolute and may be restricted in exceptional circumstances.*” There is a considerable “leap of faith” here. Having derived the right to strike from Convention 87 in the most general terms, the Experts set about outlining highly specific circumstances in which the right to strike may be constrained. For instance, in relation to public service, the Experts state, “*the Committee of Experts and the Committee on Freedom of Association consider that States may restrict or prohibit the right to strike of public servants ‘exercising authority in the name of the state.’*” Leaving aside the “leap of faith”, this statement goes straight back to the issue of the mandates of the Experts and the CFA. These two bodies are not policy organs of the ILO. Thus, their views are not determinative of the content of the Conventions.

With regard to Convention 87, the Experts have assumed a role more akin to that of the CAS than the advisory role assigned to them in 1926. They have developed and maintained views on the right to strike that should have been the subject of tripartite policy debates, and regrettably the Experts and the ILO Standards Department have encouraged the adoption of those views as authoritative. Second, the principles of interpretation, identified by the Experts as justifying their importation of the right to strike into a convention that is silent on the matter, are arguably imperfectly applied. Inconsistencies exist in the cited sources of authority, and the application of international standards of interpretation appears to be flawed. Furthermore, explicit references to a right to strike in later international instruments support the argument that the absence of that right in Convention 87 is deliberate. Third, there are considerable inconsistencies between the assertion of a general right to strike and the pronouncements of the Experts on the scope and parameters of strikes and restrictions placed upon them. The widely-varied reality of practice in ILO member states, and the general disapproval of much of that practice, suggests that many, if not most, governments may quietly hold views similar to those espoused by the Employers. The fact that there is no determinative international instrument espousing a general right to strike, notwithstanding the Experts' attempts with Convention 87, suggest that individual nations recognise that they need to manage their own affairs, having been reminded by conditional mentions in a number of other international documents that they need to regulate this issue.

Reality suggests that the concept of the right to strike should be defined in practice by individual nations based on national circumstances. Any definition will recognise that the world has changed since Convention 87 was adopted. Concepts of workers exercising in the workplace the citizens' general right to protest are not helpful. This is not the time to be espousing a general right to damage the economy, it is the time rather to strengthen the ability of economies to prosper and grow. This means concentrating on the workplace, creating jobs, protecting worker rights, and encouraging general prosperity for all. The right to strike, as developed by the Experts, also allows strikes over which employers have no control, such as solidarity or wildcat strikes - employers cannot "settle" a dispute with those who are not their employees. The consequences of such an interpretation are that the general populace, as well as the economy in general, suffers from the protest actions of a comparative few. Strikes therefore should be confined to the workplace in which the dispute motivating the strike occurs.

To contribute to a settlement of this dispute, in the November 2012 Governing Body the Employers proposed a proper tripartite discussion on the "right to strike" at the International Labour Conference. Such a discussion would determine if and to what extent there is common ground amongst ILO constituents for global standard-setting on "the right to strike". The Employers have expressed their willingness to contribute to a balanced solution, which to the extent possible respects the needs of all parties. The Experts will appreciate that it is the exclusive constitutional competence of the ILO tripartite constituents convened in the ILC to decide (or not) on the adoption of ILO standards. Should the ILO constituents decide to adopt a Convention on "the right to strike" the Experts would then assess the application in law and practice at the national level of this Convention, not other rules on "the right to strike". Should the ILO

constituents, however, decide not to have a Convention on “the right to strike”, the Experts should respect this decision.

**Against this background, the Employers request the Committee of Experts at its present session to reconsider its position on “the right to strike” and to immediately suspend any references to “the right to strike” in future reports until a tripartite discussion has taken place at the ILC.**

### **The Mandate of the Committee of Experts**

The mandate of the Experts, more specifically the legal status of its views and observations, is not precisely set out in the Committee’s reports. Outside of the ILO, there have been – and there are likely to be further – misunderstandings that the views and observations of the Experts have been approved by the ILO’s tripartite constituents, or that they are legally binding.

Since the June 2012 ILC, the Employers remain frustrated that the arguments put forward concerning the Experts’ mandate continue to meet with a reaction that has nothing to do with the Employer position and frequently clearly misrepresents it. This frustration is best demonstrated by reference to the informal consultations on 19 September. The Employers formally requested that the following question be answered: *“Whether the Governing Body has ever decided to amend the stated terms of reference of the Committee of Experts to expressly include the interpretation of international labour standards and, if it had not, whether the Governing Body intended to change those terms of reference.”*

The answer received from the ILO’s Deputy Legal Adviser is, *“without prejudice to the scope and timing of the further office paper needed, the Governing Body was a constitutional organ that operated within the constitutional order, including in respect of relevant decisions of the Conference and of article 37 of the Constitution referenced in the discussion and in the papers available in the meeting. Any decision of the Governing Body or the Conference concerning the Committee of Experts mandate would be understood consistently with that constitutional order.”*

This answer is unclear.

The Employers understand that the answer to:

*Whether the Governing Body has ever decided to amend the stated terms of reference of the Committee of Experts to expressly include the interpretation of international labour standards is “no”.*

*Whether the Governing Body intended to change those terms of reference is also “no”, because the Constitution provides that the authority to interpret ILO Conventions is vested with the International Court of Justice so the Constitution would need to be amended first.*

The Employers' understanding is that the mandate of the Experts was defined by an ILO Resolution adopted during the 1926 ILC, and was further confirmed by the Governing Body in 1947. Since 1947, there have been no adjustments made to the mandate of the Experts, which the Office confirmed in its information paper in advance of the informal consultations in September. Even if a GB or ILC decision had amended the Experts' mandate to interpret Conventions, this would be in open violation of Article 37 of the ILO Constitution, which gives the exclusive authority to deal with any question or dispute relating to the interpretation of the ILO Constitution or ILO Conventions to the International Court of Justice (ICJ).

Hence, a constitutional amendment involving a two-thirds majority decision by the International Labour Conference and ratification by two-thirds of all ILO member States (including 5 of the 10 countries of major industrial importance) would be required to give the Experts the "legal capacity" to interpret ILO Conventions.

What needs to be stated in the Experts' publications is that the views and observations of the Experts have not been approved by the ILO constituents and they may not necessarily agree with them. Secondly, the views of the Experts are not legally authoritative interpretations and therefore not legally binding. The latter follows from Article 37 of the ILO Constitution, according to which the ICJ (or a tribunal, should the ILO decide to set one up) has the exclusive legal capacity to make interpretations of ILO Conventions.

The Employers have made proposals for fair, clear and constructive language to this effect in the reports of the Committee of Experts.

**The Employers respectfully request the Experts to consider this issue with a view to clarifying the CEACR's mandate and the legal status of its views in a clear and concise manner in all future reports. This wording should be inserted at a visible place in the reports, preferably on the first pages, to ensure that parties consulting the Experts' reports do not overlook it.**

We respectfully propose the following objective text for discussion:

***"This General Survey/Report has been prepared by the Committee of Experts on Application of Conventions and Recommendations (CEACR) and is meant to provide a basis for the supervisory work of the Committee on the Application of Standards (CAS) of the International Labour Conference (ILC).***

***The General Survey/Report does not necessarily reflect the views of the Employers, Workers and Governments represented in the ILO. It has not been approved, nor is it intended to be approved, by tripartite ILO bodies.***

***While the CEACR, within its mandate, can provide technical explanation of the meaning of ILO Conventions and Recommendations, the ILO Constitution does not permit the CEACR to give authoritative***

***interpretations of these instruments. The only body that has this authority is the International Court of Justice (ICJ)***".

There may be different views on what this clarification text could look like and where it should be inserted; this should be discussed, but it undoubtedly needs to be done.

### **More direct and frequent interaction with the Committee of Experts**

Finally, turning to an issue that has been discussed on a number of occasions and that the Experts have also mentioned in their reports, that is the interaction between the two supervisory committees. I quote from the Committee of Experts' 2011 report: "*The Committee considers that it would be in the interests of both Committees to further strengthen this relationship, by creating opportunities for an additional and more in-depth exchange of views on matters of common interest. It invites the Office to examine the possibilities for that purpose*". Unfortunately, not much progress has been made.

This more in-depth exchange of views would, as the Experts put it "*enable a fuller understanding*" of the role and the impact of the Committee of Experts, which the Experts consider "*is not always fully understood*". However, it could also help the Committee of Experts better understand the situation and needs of ILO constituents. This would help the Experts in making realistic and meaningful assessments in its evaluation task. Assessing the application of ILO standards in law and practice is not a purely theoretical matter; it has a very practical purpose, which is to assist ILO tripartite constituents in their efforts to implement ratified ILO Conventions at national level.

With this in mind, dialogue involving the two committees should also be extended in terms of participants and time. Rather than the Committee of Experts having a short and limited exchange with the two spokespersons of the CAS only, the Office should organize one-day consultations between the Committee of Experts and a number of CAS employer and worker members nominated by the two Groups and assisted, as is usual practice in all ILO meetings by ACT/EMP and the IOE, as well as ACTRAV and the ITUC respectively. Such consultations should take place in connection with - but outside - the Committee of Experts' meeting. There may be further and alternative formats, but it is clear to the Employers that this important work and interaction requires more resources, more discussion and more cooperation.

**The Employers therefore request both the Committee of Experts and the Office at this session to make concrete proposals for such an additional broader and more in-depth dialogue e between the two Committees so that this can start as of 2013.**

Last year the Employers called for an improvement in the ILO Standard Supervision by increasing the transparency and the interaction between the CEACR, the CAS, the Governing Body and the Office. Employers remain deeply concerned about this issue, and deeply regret not to have been able to have an ACTEMP/IOE member supporting the Employer spokesperson at the meeting this year as an observer. We respect that as this is your meeting, it is your prerogative who you invite; however there is disappointment that the requested attendance of ACTEMP/IOE led to assertions of

conditions being imposed, when ACTEMP/IOE have attended in the past. The system appears to become more and more closed, instead of becoming more open and transparent.

The discussions and outcomes of this dialogue should be recorded in more depth as is currently the case, and made public. Here, too, the Employers would be interested in hearing the Experts' views and suggestions so instructions can be given to the Office. As a first step, the Employers respectfully request that this intervention be faithfully reproduced in the forthcoming report with equal importance as the Experts' President's submission is reproduced in the CAS report every year.

### **Conclusion**

On behalf of the Employers, we once more express our appreciation to this Committee for its valuable work. The Employers have high expectations of the Experts but also wish to reassure the Committee and the social partners of their full commitment to contribute to an effectively functioning ILO standards supervisory system.