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With Indonesia's 1998 ratification of the ILO Convention on Freedom of Association, and subsequent enactment of initial implementing legislation, previously outlawed labor unions, and quickly formed new ones, began to freely organize workers and form new labor federations. The necessary further legislative reforms in industrial relations regulation have languished, however, in the face of tremendous controversy among the Manpower Ministry, employer associations and labor organizations. Legislation long pending in the DPR, despite many revisions, has failed to achieve a consensus on other major labor relations issues, including collective bargaining, strikes and lockouts, dispute settlement mechanisms, and labor law administration and enforcement. This paper examines the present and proposed labor relations system in the context of Indonesia's historical background, the relevant ILO conventions, and the labor codes of several other countries. The analysis details serious flaws in the proposed reforms. The enacted and proposed legislation (The Labor Union Act, No. 21 of 2000; the pending draft Act concerning the Settlement of Disputes in Industrial Relations; and the proposed draft Act Concerning Manpower Development and Protection) fails to conform either to international standards or to basic principles of modern labor codes. The challenge is to create a new system that will protect basic worker rights and, at the same time, promote a dynamic labor market that can underpin sustained economic growth in a global, competitive market economy. The paper suggests a framework for future reforms and recommends the enactment of specific labor relations reform proposals.

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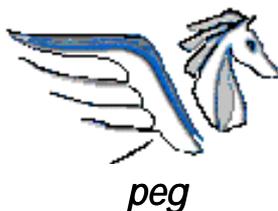
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Legal Challenges to Industrial Relations Reform in Indonesia: An International Perspective

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LEGAL CHALLENGES TO INDUSTRIAL RELATIONS

REFORM IN INDONESIA:

AN INTERNATIONAL PERSPECTIVE

Don A. Zimmerman*

Introduction

The purpose of this paper is to consider the sweeping changes underway in Indonesia's industrial relations regulatory system in the international context. That includes international labor standards as well as labor relations systems utilized by several other nations. Indonesia has now accepted, at least in principle, international standards for the right of workers to join unions and to engage in collective bargaining with employers. Moving from principle to practice, however, continues to face many obstacles. Only a small part of the legal changes intended to implement international standards has yet been enacted. And when measured against international standards for protecting worker and union rights, key aspects of Indonesia's enacted and pending labor legislation fails to conform. Equally serious questions abound concerning the effect of Indonesia's system on future productivity, efficiency, domestic and foreign investment, and economic growth.

Human rights, job security and industrial democracy on the one hand. Economic stability and development on the other. These commonly are seen as a zero sum game. Throughout nearly all of Indonesia's history, the government has deemed these values to be antithetical. The inevitability of conflict appears to be the prevailing mindset of the government, employers and labor organizations in Indonesia, despite continual governmental insistence that Pancasila principles of cooperation and conciliation are the enduring fundamental principles underlying labor relations. The result has been systematic intervention and control, to a degree that is no longer appropriate as the nation's attempts to embrace democratic principles and freedom of association. Accommodating and resolving conflict is a goal of any rational industrial relations system. Rules administered within an administrative and enforcement framework are inevitable. The central question is how Indonesia will balance the role of employers and labor organizations left to themselves to develop and maintain their relationship and resolve disputes, as against the role of government as the final arbiter of the rules and how they are to be applied.

Perhaps the halting progress in enacting a new Indonesian legal framework should be expected in a nation where industrial relations practice was for so long oppressively regulated, by both legal and extra-legal means. One example is that from the early 1970s until 1998 monopoly unionism was the prevailing rule for worker representation in the

* The views expressed in this report are those of the author, a former Member of the U.S. National Labor Relations Board, and not necessarily those of USAID, the U.S. Government, or the Government of Indonesia.

private sector. And this was a monopoly that was controlled and largely funded by the state, and widely perceived to stifle the right of workers to make effective demands on employers for improved wages, benefits and working conditions.

Repressive state regulation of industrial relations in order to ensure that union activity posed no threat to national development did, in fact, for many years go hand in hand with thriving economic growth. The commonly assumed direct correlation, however, is at least open to serious question when Indonesia's experience is compared to that of developing countries elsewhere, including Southeast Asia, that saw comparable economic progress with far freer labor relations practices.

It is also the case that suppressing independent unions did not dispel all labor unrest. Unauthorized wildcat strikes, typically in reaction to low wages, including the failure of employers to meet mandatory minimum wage standards, led to sometimes violent strikes, particularly in the early 1990s. These strikes, and the working conditions that spawned them, sparked international pressure on Indonesia from donor governments, international financial institutions, the ILO, and myriad NGO's to improve conditions and adhere to international labor standards.

From an international perspective, the questions to be considered, and the choices available to Indonesia for an industrial relations regulatory system are the same as for other countries. The focus here is on the basics for any regulatory system – how workers are permitted to form unions; how those unions represent those workers for collective bargaining; what means of economic power may unions and employers use against each other; how industrial disputes, whether over economic issues or worker rights, are to be resolved; and how shall the labor relations system be administered and enforced.

International labor standards as contained in the ILO conventions are generally expressed more as principles than as explicit prescriptions, and there is a wide range of alternatives found among the labor regulatory systems of other countries. Within each of these basic issues, each choice made among various alternatives involves consequences that affect other choices. The multiple effect is that labor relations regulations seem inevitably to involve considerable complexity. Further, the industrial relations rules in any country require sufficient flexibility so that they may adapt to changing economic, social and political circumstances, and as employers and labor organizations find new ways of promoting their economic and other workplace interests. Because of the resulting complexity, the administration and enforcement of the industrial relations regulatory system typically is assigned to specialized governmental bodies and quasi-judicial tribunals with expertise in workplace issues.

The variety and complexity of industrial relations systems is evident in the labor codes and experience of other countries, as indicated by the description of several national examples in this paper. The great majority of national labor codes are influenced by membership in the ILO and having ratified several, or many, of its labor conventions. This includes the Government of Indonesia. These conventions, together with the ILO's specialized bodies for investigating complaints of their violation, are concerned primarily about fundamental worker and union rights. As long as a nation's labor code general adheres to the framework of protections called for in the ILO conventions, the extent to which the code is crafted to promote productivity, efficiency and other national economic objectives is essentially left for member countries to decide for themselves.

This report, then, initially considers the basic international labor standards as promulgated through Conventions of the ILO and how they relate to Indonesia. It then considers and describes relevant aspects of the labor relations regulatory systems adopted by several countries. These are intended to highlight and explicate some of the variations and choices adopted by other countries in varying stages of development – the United States, New Zealand, Argentina, Chile, Korea, and Taiwan. Only highlights of these systems are included in the main body of this report, with further details set forth in the appendices.

An additional appendix describes international experience with the particular labor relations issues that typically arise in connection with the privatization of state owned enterprises. Privatization has emerged as a matter of increasing importance to workers in Indonesia, which has yet to adopt a coherent policy for addressing and resolving the concerns of affected employees and their union representatives. Such a policy may benefit by taking into account the experience of other countries.

The final section of this paper presents an analysis and evaluation of Indonesia's industrial relations regulatory system from the perspective of international standards and experience, and of Indonesia's own history. It takes as its base both the enacted and pending legislation that, taken together,¹ is proposed as the system to reform and replace the New Order framework of the past.

¹ As of August, 2002.

International Labor Organization Conventions

This seems the logical starting place because the applicable ILO conventions form an international framework for industrial relations systems, and Indonesia, the first in the Asia-Pacific region, has ratified all eight of what are commonly referred to as the “Core” Conventions of the ILO.² These fall into four categories:

- Abolition of Forced Labor (Conventions 29 and 105)
- Freedom of Association and the Right to Organize (Conventions 87 and 98)
- Prohibition of Discrimination (Conventions 100 and 111)
- Elimination of Child Labor (Conventions 138 and 182)

The two Conventions on Freedom of Association and the Right to Organize are of principle concern here as they impinge directly on the industrial relations regulatory system.

ILO conventions require translation of their statement of principles into civil code language. As is the case in Indonesia, particularly since the ratification of the Freedom of Association Convention in 1998, the ILO provides expert advisors to assist and comment on the drafting of implementing legislation. Because the ILO has no “master labor code,” and understands that a nation’s preexisting system will shape its legislative process, its experts often face the dilemma of whether to recommend specific elements of a modern labor code, or to confine its involvement to determining whether proposed legislative provisions are in basic compliance with the relevant Conventions, whether or not a rational system results. Moreover, some imbalance is inherent simply because the ILO Conventions provide little basis for considerations related to economic development issues.

The Freedom of Association Convention, No. 87, is concerned with protecting the right of workers and employers to establish and to join organizations of their choosing in order to collectively pursue or defend their interests and welfare. It applies to all workers and enterprises, both privately owned or state owned. Its chief provisions are that:

Workers and employers are to have the right to establish and join organizations as they choose, to draw up rules and constitutions, to freely elect representatives, and decide on the functions of the organizations. These rights are to be exercised without restrictive intervention by public authorities, yet are subject to government regulation so long as the regulation does not impair the Convention’s guarantees. Public authorities also may not dissolve or suspend workers and employers organizations.

The Right to Organize and Collective Bargaining Convention, No. 98, is concerned with protecting workers against acts of anti-union discrimination, protecting labor and employer organizations against acts of interference from each other, and encouraging and

² The Conventions and their dates of ratification by Indonesia are: Forced Labor Convention, No. 29 (1950); Abolition of Forced Labor Convention, No. 105 (1999); Freedom of Association and Protection of the Right to Organize Convention, No. 87 (1998); Right to Organize and Collective Bargaining Convention, No. 98 (1957); Equal Remuneration Convention, No. 100 (1958); Discrimination (Employment and Occupation) Convention, No. 111 (1999); Minimum Age Convention, No. 138 (1999); and Worst Forms of Child Labor Convention, No. 182 (2000).

promoting collective bargaining. It applies to all workers and employers and to all enterprises, private and state-owned. Its chief provisions are that:

Employers are prohibited from acts of anti-union discrimination, such as by making employment subject to the condition that the worker will not join or agree to quit a union, or by dismissing or otherwise disciplining a worker by reason of union membership or participation in union activities. Employers and employer organizations are further prohibited from facilitating the establishment of unions, or supporting unions by financial or other means, for the purpose of controlling them. Measures are to be taken to encourage and promote voluntary negotiation between employers and unions to reach collective labor agreements.

Although several of the ILO conventions are designed to influence the design of a nation's industrial relations system, these two conventions are at the core. Implementing them presents considerable difficulty. Being rather new, employers, unions and workers do not yet fully understand them. Unions have proliferated in Indonesia since 1998 and, also being new, have not developed the capacity for effective representation. Voluntary negotiation of collective labor agreements is often ineffective, resulting in frequent disputes and strikes. The lawful establishment of more than one union in an enterprise is contrary to the previous 25 years of industrial experience in Indonesia and has led to business disruptions and to competitive and sometimes violent inter-union conflicts. A rational system of representation for collective bargaining has yet to be worked out.

The multiplicity of unions and resulting disputes, among themselves and with employers, are frequently cited as one of the greatest problems to be resolved in reforming the industrial relations system. The assumption seems to be that it will mean perpetual chaos in bargaining relationships, and that these ILO Conventions are at fault because their protection of the right of workers to form unions necessarily means that multiple unions at one establishment cannot be controlled. This perception fails to make a critical distinction between union membership rights on the one hand, and representation for collective bargaining on the other. These can be made to be relatively separate issues in any industrial relations system.

As can be seen by the way these issues are regulated in other countries, bargaining chaos need not be imbedded in a rational industrial relations system. In brief, even if more than one union is permitted to represent workers at a single establishment or enterprise, representation for collective bargaining rights is another matter. There are various means that can be adopted, not inconsistent with ILO Conventions, to channel bargaining representation into a single labor union, or into a coalition that acts and bargains as a team for a single collective bargaining agreement, so as to promote stable labor relations in the enterprise.

The other most frequently cited issue concerns the relatively high level of strike activity, both lawful and unlawful, and the need to incorporate a stable industrial relations dispute mechanism to minimize work stoppages. Again, the fundamental protection of the right to strike embedded in ILO Conventions is at issue. Contrary to ILO Conventions, and, moreover, contrary to the prevailing industrial relations systems in both developed and developing countries, Indonesia has an equally embedded tradition of sharply curtailing the right to strike, whether by legal, or extra-legal means. Legally, it has long established mechanisms by which state agencies can and do intervene in industrial disputes, and, once the

intervention commences, the result is a drawn out, multiple step governmental process leading to what is essentially mandatory third party arbitration of the dispute. The government is the third party.

Quite apart from serious public administration issues, this interventionist system contravenes the pertinent ILO Conventions because, during this process, the right to strike can be nullified and, rather than being voluntary, it can be initiated by only one party to a labor dispute. The proposed “reforms,” in the form of the labor union bill enacted two years ago, and the bulk of it remaining in two bills pending in the DPR, do not eliminate this issue. The state intervention continues, modified only in form, with a newly formulated process intended to be more efficient with a transfer of key authority from the executive to the judiciary. Entirely new Industrial Relations Dispute Courts, at the district level and at the Supreme Court, would largely replace the existing mechanism for industrial dispute settlement.

The administration and enforcement of the industrial relations rules governing union-employer relationships is further complicated by Indonesia’s adoption of a broad devolution of authority from the central government largely to the local level.³ Unions tend to organize on a national, or at least multi-province level, whether or not a correlative bargaining practice takes place, or is legally permitted. Since 1998, more than 60 labor union federations have formed. Some employers operate in multiple locations.

Many government functions are generally thought to be best administered at local levels of government. Education, health clinics, roads, police, and utilities are a few common examples. It is the policy of other countries, and particularly the United States, however, to regulate their industrial relations systems so as to promote consistent interpretation and application of the rules, and to delegate regulatory authority in expert, specialized agencies because of the inevitable complexity of labor relations regulation. These may take a variety of forms, such as administrative industrial tribunals, labor courts, and other institutions.

The parties, both unions and employers, cannot reasonably be expected to comprehend, and comply with, inconsistent or contradictory rules depending on the particular location of a representation or labor dispute issue. Having a centrally adopted, uniform set of rules, as appears to be intended in Indonesia, may still lead to chaotic results if the local autonomy exercised by local governments does not entail an administrative and enforcement system that integrates centralized direction on key issues as they mature and develop over time. Otherwise, conflicting rulings and interpretations of the law and decrees will frustrate the objectives of national legislation.

As mentioned, the system in Indonesia is in some key respects inconsistent with the practice of other countries. Which is not to say, however, that Indonesia stands alone in maintaining a system of sweeping state control. These points may be illuminated by considering the union representation, collective bargaining, dispute settlement, and governmental authority aspects of industrial relations systems of a few other countries, starting with the United States, followed by examples from Asia and Latin America.

³ Law No. 22/1999 on Regional Government; Law No. 25/1999 on the Fiscal Balance between the Central Government and the Regions.

International Codes and Experience

A. United States

The U.S. labor law system is markedly different from that of many other countries. Individual employment contracts are the exception rather than the general rule. Employers are remarkably free to institute temporary or permanent job reductions by terminating employees without incurring responsibility for obtaining advance governmental permission, or for legally mandated payments to the displaced workers. The employer's motivation or purpose in reducing the number of employees is legally irrelevant, as long as the action does not violate specific employee protective laws such as prohibitions against discrimination on the basis of union activity, or on the basis of such factors as race, religion, nationality, sex, age or disability.

The basic labor relations law, the National Labor Relations Act (NLRA), enforced by the independent National Labor Relations Board (NLRB), primarily consists of rules governing the *conduct* of unions and employers in their workplace relationship, rather than the substantive outcome, which at least partially explains the relatively greater flexibility accorded to employers in the U.S. system. One industrial relations consequence of this is the inducement to membership that labor unions can offer by promising to demand protections against employer actions that are *not* restricted by law such as permitting job termination only for "just cause;" requiring layoffs to be conducted primarily or exclusively on the basis of each employee's employment seniority; adopting measures to mitigate the effects of layoffs, or even to halt them altogether; and placing limitations on subcontracting of work performed by bargaining unit employees. Protected and prohibited conduct under the NLRA centers on union representation and protection of employees from discrimination based on union activity, requiring employers and unions to bargain in good faith over wages, hours and other terms and conditions of employment, and, subject to certain restrictions, permitting them to engage in economic strikes and lockouts to reinforce their bargaining positions.

Employees have the right to organize and join into labor unions. They cannot be required to become full members of a union, but they can be required by the terms of a collective bargaining agreement to pay toward the basic expenses of union representation. In order to become a collective bargaining representative, a union must be chosen by a majority of employees in an appropriate bargaining unit. The unit ordinarily consists of those employees considered to have a common "community of interest" in the terms and conditions of employment, such the production and maintenance workers at a manufacturing establishment.

Majority support is most often determined by a secret ballot election conducted by the NLRB, although voluntary recognition by the employer is also permitted. If the union wins the election, the NLRB issues a certification of the union's status, and the employer then must recognize, and bargain with, the union. Only *one* union may represent a bargaining unit of employees, and when a collective bargaining agreement is reached, its terms of employment apply to the entire bargaining unit, including employees who did not support the union. The process is referred to as a system of "exclusive representation."

Although the most common collective bargaining structure is at the establishment level, there also is multi-employer bargaining, industry-wide bargaining, and coalition

bargaining. The law imposes a duty to bargain in good faith over wages, hours, and other terms and conditions of employment, but does not compel either party to reach a final agreement. Nor is there any established procedure by which the government may mandate the terms of a labor contract.

The right to strike, either over rights disputes or interest disputes, is a basic right in the law. Certain types of strikes, such as secondary boycotts where a union attempts to enmesh a neutral employer in the dispute with the primary employer, are prohibited, as are slowdowns and sit-down strikes. Defensive and offensive employer lockouts, are permitted. The hiring of striker replacements in interest disputes is also permitted under certain circumstances, and the “no work, no pay” rule applies to strikers. In the case of strikes to protest employer unfair labor practices, the striking workers, by order of the NLRB, are general entitled to reinstatement and lost wages.

Strikes over rights disputes that involve breaches of any terms of collective bargaining agreements are lawful, but hardly ever occur. Such disputes are almost universally settled by a “grievance-arbitration” multi-step procedure voluntarily agreed to by the parties in their collective bargaining agreements. Final and binding arbitration of the dispute is performed by private arbitrators selected by methods agreed upon by the parties.

Because of the importance and complexity of industrial relations regulation, and the need for a uniform national system, the law grants exclusive jurisdiction for administration and enforcement to the NLRB. Public employers are excluded from coverage. When workers, unions or employers file unfair labor practice charges, the charge is investigated and may be prosecuted in a trial before an administrative law judge. Appeals may be made to the NLRB, which either affirms, reverses, or modifies the judge’s decision. Remedies can include cease and desist orders, job reinstatement, and back payment of wages. Appeals may be taken to the courts of appeals, and to the U.S. Supreme Court.

B. New Zealand

Before 1987, New Zealand’s industrial relations system was tightly controlled in what has been called its "Arbitration Era." Private sector unions were supported and protected by law, which gave them monopoly bargaining rights. For much of this period union membership was compulsory. Strikes and lockouts were outlawed. Both rights and interest disputes that could not be settled by negotiation were supposed to be referred to the Court of Arbitration (or its replacements) for settlement by compulsory arbitration. In practice, however, strikes occurred quite frequently. With the Labour Relations Act of 1987, changes were made to bring about a somewhat more voluntary system. Then, only four years later, in the face of rising unemployment and declining union strength, came the Employment Contracts Act of 1991, which was widely viewed as favoring employers at the expense of unions.

A new balance ensued from the 1999 election of the new Labour Alliance Coalition – The Employment Relations Act 2000 (“ERA”), which brought New Zealand’s system much closer to mainstream modern industrial relations codes. Rejecting compulsory arbitration and compulsory union membership, the ERA’s central purpose is to promote collective bargaining in good faith, intended to be the principal means of redressing the inherent power

imbalances between workers and employers, and to promote observance of the ILO conventions on Freedom of Association (No. 87) and on the Right to Organize and Bargain Collectively (No. 98).

Under the ERA employment relationships are based on both individual and collective contracts. Whether to choose union representation is entirely voluntary on the part of employees, and employers are required to recognize a representative authorized by an employee or employees. A novel aspect is to provide that where there is a new employee in a workplace with an applicable collective bargaining agreement, for the first 30 days the employee automatically will be covered by the agreement and receive the same terms and conditions of employment. If the employee subsequently decides not to join the union concerned, the individual is then free to negotiate an individual employment agreement. Discrimination against employees on the basis of union membership, or non-membership, is prohibited. Subject to individual employee consent, employers are required to deduct union dues.

A union must have more than 15 members, and provide a statutory declaration that it complies with the requirements of the Act, that its rules are democratic, and that its purpose is to promote members' collective employment interests. The Act requires the statutory declaration to stipulate that the union is independent of, and is constituted and operates at arm's length from, any employer.

Good faith relationships are meant to underpin the employment relations regime in New Zealand, for both collective and individual arrangements. The union and the employer must meet each other for the purposes of bargaining, and must consider and respond to proposals made by each other. They also must recognize the role and authority of any person chosen by the other, and not do anything to undermine it. Further, the union and employer must provide to each other, on request, information that is reasonably necessary to support or substantiate claims made in bargaining. The Act does not require that a collective bargaining agreement be concluded. Collective agreements apply only to union members and to all members of the union whose work falls within the agreement's coverage clause. Multiple unions are permitted in a single establishment, and provisions in the Act contemplate that such multiple unions will engage in coordinated bargaining at the request of the employer.

Strikes and lockouts in furtherance of bargaining objectives are permitted only if either the collective bargaining agreement has expired, or the parties are bargaining for the first time and more than 40 days have elapsed since the onset of negotiations. Strikes are not permitted during the life of a collective bargaining agreement that is in force. Instead, disputes over issues arising under existing labor contracts are to be resolved through the dispute resolution procedures of the Act. Strikes in support of personal employee grievances also are prohibited, as are sympathy strikes, secondary strikes and boycotts, and strikes over social, economic or political causes. In order to continue business operations, employers have a limited right to use their other employees to perform the work of strikers, but only for the duration of the strike, and to hire new employees as necessary for reasons of safety or health.

The thrust of the Employment Relations Act is to emphasize that the parties themselves are primarily responsible for the conduct of industrial relations activities; that the principal role of government is in setting basic rules for that conduct; that governmental enforcement actions are to be carried out through informal, speedy administrative

proceedings by an expert and independent forum; and that legal proceedings are to be quite limited. The emphasis is on the mediation of industrial disputes, which may be required under the law, by which the government intends to minimize the need for judicial intervention.

Administrative enforcement is vested primarily in a new Employment Relations Authority, with exclusive jurisdiction over the interpretation, application, operation or breach of employment agreements, complaints of unfair bargaining and other breaches of the Act's "good faith" obligations, personal grievances, recovery of wages, strike and lockout matters, and compliance with union rules and the rules for union registration. As in the United States, the law prevents the Authority from varying, or canceling, any term of a collective bargaining agreement, or otherwise fixing terms and conditions of employment. Only by mutual agreement of the parties can arbitration by a third party fix wages, hours, or other terms and conditions of employment.

The law is designed to emphasize informal procedures by the Authority and to minimize legalisms and resort to the judiciary. When judicial action is necessary the Act created an Employment Relations Authority as an independent, expert forum, as well as a new specialized Employment Court. Its principal functions are to decide questions of law, to issue compliance orders, and to determine applications for injunctions directing parties to take, or to refrain from, actions that are required, or prohibited, by the Act. It has limited jurisdiction to review decisions and orders of the Employment relations authority. Like the Authority, the ERA directs the Employment Court first to ensure that mediation efforts have been made by the parties to a labor dispute.

C. Chile

During the 17-year period that Chile was governed by a military regime, it implemented substantial changes in the country's employment laws intended to weaken union influence, give employers greater flexibility, and encourage economic growth. Since 1990 and the restoration of democratic government, there have been a number of further changes, some designed to restore union protections. The latest of these took effect in December 2001.

In Chile, unions represent only those employees who are members. Thus, more than one union is permitted in the same workplace. When a sufficient number of employees become members of a union at a particular company, a union is formed in that workplace and may negotiate with the employer for a collective labor contract covering its members. Enterprise unions in companies with fewer than 250 workers are formed on a proportional basis. With 50 or fewer employees, they must have the greater of eight workers or at least 50 percent. With more than 50, is the greater of 25 workers or ten percent. For a multi-establishment enterprise the union must have the greater of 25 workers or 40 percent of the employees at each location.

A representative of the Labor Ministry conducts a poll of the workers to verify that the required degree of support for the union exists, and, if so, certifies the union. Chilean law establishes a right on the part of each employee to join, refrain from joining, or withdraw membership from any union or labor organization, and membership in a union cannot be required as a condition of employment. If union members adopt a resolution approving the

amount of union dues, the employer must deduct the amount from the members' wages upon the request of the union or the employee. Managerial employees, employees authorized to hire or fire employees, and upper-level employees with decision-making authority as to policies or processes of production or commercialization, are excluded from union representation. A union may not engage in a strike or other economic pressure against an employer while organizing the employer's employees.

Although Chilean law generally restricts the scope of collective bargaining to a single employer and its unions, collective bargaining may take place on a multi-employer or multi-union level as agreed to by the parties. Collective bargaining negotiations between an employer and all of the unions or bargaining groups representing its employees take place at one time, unless the parties agree to separate negotiations. When multiple unions represent various groups of employees at an employer's establishment, the unions may choose to present a common proposal for a collective bargaining agreement to the employer, or they may present multiple proposals, each covering one or more of the unions or bargaining groups.

The Labor Code establishes a 45-day period for collective bargaining. If the parties do not continue negotiations beyond the 45 day period, the union must vote to decide whether to accept the employer's last offer or go on strike. The timely submission of a final offer that, at a minimum, grants employees their existing benefits and existing wages plus the increase in the cost of living according to the consumer price index, gives the employer the right to hire strike replacements when the strike begins if the employees reject the final offer. If the employer does not submit a timely final offer, it must wait for 15 days after the strike begins before it may hire strike replacements.

A strike suspends the individual employment contracts of strikers and suspends both the striker's duty to work and the employer's duty to pay the strikers. Although strikes are permitted, other actions such as picketing, work slowdowns, or secondary boycott activity, are illegal. A strike may not be called during the term of a collective contract. Even when no collective labor agreement is in effect, a strike is legal only when it is called in support of lawful regulated collective bargaining demands. Strikes in protest of unfair labor practices are unlawful at all times. A strike may be called only upon a majority vote of the union members or bargaining group.

A Labor Directorate is primarily responsible for ensuring that employers comply with the labor laws. It conducts compliance inspections, and has the authority to issue fines against violators. It is also authorized to interpret the labor laws and has developed a large body of administrative law on this subject. Disputes may also be taken before the Labor Courts and then to the civil Court of Appeals.

D. Argentina

Labor unions have played a significant role in Argentina's political system, going at least as far back as the regime of Juan Peron, who served as the chief of labor relations for the government before he became President in 1946. More recently, during and since the Menem administration, labor regulations were changed that weakened union influence. One example was the elimination of industry-wide collective bargaining. The labor movement has become

more fragmented, with some elements supportive of economic reforms undertaken to promote export industries.

Another legislative change enacted two years ago to introduce more flexibility in hiring and dismissing workers was the result of IMF loan guarantee conditions, despite strong labor opposition. These and other changes were intended to spur economic growth and reduce Argentina's high rate of unemployment. Despite such changes, Argentina's labor relations regulatory system stands in rather sharp contrast to that of Chile. Through central and local bureaus, the state plays a strong interventionist role in the industrial relations system.

Workers may freely choose whether to become union members or not. All employees, except high-level employees and managers, are subject to union jurisdiction and may be covered by collective bargaining agreements. To become recognized, unions must submit a copy of their bylaws, which state the unions' worker representation jurisdictional claim, to the Labor Ministry for approval. The Labor Ministry's authority to grant jurisdiction over workers controls the union's membership, as most union bylaws contain broad jurisdictional and representative claims that overlap with other unions.

Only unions or union confederations that are registered with and approved by the Labor Ministry can be parties to collective bargaining agreements. The Labor Ministry coordinates the negotiation and implementation of collective bargaining agreements, regardless of the jurisdiction where they will apply. This process begins when a company or union notifies the Labor Ministry of its intention to negotiate a collective bargaining agreement. The Labor Ministry then sets a time period during which the parties must meet to negotiate, and Labor Ministry officials attend the negotiations. The Ministry's approval is necessary for a collective bargaining agreement to become enforceable. Once approved, collective bargaining agreements are binding, not only on members of the unions and employers that are parties to the agreement, but on all workers and employers in the particular activity or industry involved.

The Constitution guarantees the right of workers and employees to strike. However, the right to strike cannot be exercised if the Labor Ministry intervenes in a labor dispute. The Labor Ministry may order a mandatory hearing to discuss a settlement or may order binding arbitration. During the arbitration process and for one year following the final arbitration ruling, workers are not permitted to strike based on disputes decided in the arbitration proceeding.

The federal government of Argentina, through the Labor Ministry, has primary responsibility for enacting and enforcing labor laws. The Constitution grants power to the federal government to enact a uniform labor code applicable to all provinces. Using this authority, the central government has enacted comprehensive and controlling regulation of industrial relations. Each province enforces the national employment laws within its territory.

E. Republic of Korea

Until the economic downturn in 1998, Korea experienced a remarkable period of economic development, marked by real wage growth that was among the highest in Asia, low rates of unemployment, and extensive human resources investment to develop vocational and technical skills. Labor laws and regulations provided comprehensive protections for individual workers, such as strict limitations on dismissals and layoffs.

Throughout most of this period, however, the government sought to promote rapid economic growth by repressive labor relations policies, putting strict limitations on union activities to suppress the development of an independent labor movement. Strikes were prohibited until 1980. As in Indonesia, the government recognized only a single trade union federation (the FKTU) as the only legal labor organization. FKTU received financial support from the government and generally supported national economic policies.

By the late 1980s, with urbanization, a larger and better educated workforce, and calls for democratization, there was a surge in labor disputes by workers demanding both improved working conditions and the right to form their own unions. The turning point came in 1987 with a new labor laws to grant workers basic collective rights to organize, engage in collective bargaining, and to go on strike. Subsequent labor law development brought about other significant changes, including recognition of a large alternative labor organization (the KTUC) that had organized and operated independently for several years before the law change.

These developments were also a response to considerable international pressure to adopt reforms to bring South Korea in line with basic standards. For example, South Korea joined the ILO in 1991 and has adopted several ILO conventions. In 1996 the government formed a Presidential Commission on industrial relations reform on a tripartite basis with representatives of unions, employers and the public. Its recommendations led to a number of law changes to strengthen rights to organize and engage in collective bargaining, along with labor market flexibility measures including easing restrictions on layoffs.

South Korea's labor laws emphasize the voluntary nature of establishing and maintaining collective bargaining relationships and the settlement of industrial disputes. With the exception of certain defense and essential service industries, the labor laws now provide for relatively un-intrusive governmental involvement and control. The law changes of the 1990's have led to effective collective bargaining between employers and unions at the enterprise level that has become the basis for determining wages, hours and working conditions in unionized firms.

The industrial relations system consists of three tiers:

- Laws protecting individual workers, including labor contracts which must contain certain protective provisions;
- A collective industrial relations system, which provides a framework for labor unions to seek improved working conditions through union recognition and bargaining with employers; and

- Labor Management Councils, established independently from trade unions, designed to promote cooperative, rather than adversarial, relations between labor and employers.

This system is based the comprehensive Trade Union and Labor Relations Adjustment Act.

F. Taiwan

Taiwan's impressive economic transformation and growth has roughly paralleled a change over the past 50 years from a quite repressive political and labor relations system to one of greater freedom and democracy encouraging the emergence of unions. Nevertheless, Taiwan's system remains quite controlling and less designed to enable unions and employers to develop their relationships and resolve disputes on a voluntary basis than is generally found in modern labor codes.

As the economy developed and became less dependent on labor intensive, low-wage industries, the government recognized that some improvement in labor regulation was necessary. By 1987, when martial law was lifted, the government created the Council of Labor Affairs (CLA) to enforce the Fair Labor Standards Law, Taiwan's first comprehensive employment law. Independent unions formed outside the ruling party influenced Chinese Federation of Labor, and became able to elect their own leaders.

Unions are formed at the enterprise level, the basic industrial unit, by obtaining the signatures of 30 or more workers. Multiple unions at a plant are officially banned, but, with the emergence of independent unions, dual representation exists on a *de facto* basis. Approximately 30 percent of the workforce belongs to unions. The law mandates that businesses, with or without union representation, convene monthly labor-management conferences to coordinate and promote the harmonization of labor relations and labor-management cooperation, working conditions, welfare planning, and increasing labor productivity.

Strikes are not permitted unless conciliation procedures have failed and the strike is approved by a majority of the entire union membership by secret ballot at a union assembly meeting. Slowdowns are often utilized because of the limitations on strikes. Rights disputes, whether arising under statutory law or collective labor agreements, are subject to non-binding conciliation and, failing resolution, resort to a court action. Interest disputes are subject to non-binding conciliation, or arbitration. Mediation can be requested by the parties, or the government may initiate it and appoint a tripartite mediation board. When there is a bargaining impasse, both parties may request an arbitration committee to decide the issue. The government may also order arbitration if it considers it warranted, and must notify the parties of the decision.

Since its creation in 1987, the Council of Labor Affairs has responsibility for central administration of Taiwan's labor laws. It has the power to delegate inspection and enforcement duties to local authorities.

Labor Relations Regulation in Indonesia

In 1998, following the fall of the New Order regime, the Indonesian government signaled the beginning of a new era of labor relations regulation with recognition of the right of workers to form independent labor unions. That signal was the ratification of the ILO Convention on Freedom of Association and Protection of the Right to Organize (No. 87), and the enactment two years later of implementing legislation. That its potential value still remains to be realized is apparent when set in the context of companion legislation still pending in Parliament, and the historical background.

Starting with the period of Dutch colonial domination, the treatment of labor unions throughout most of Indonesia's history has ranged from the worst forms of brutal suppression to, at best, strict paternalistic control. The one, relatively brief period of an active and influential labor union movement in 1960s ended with the fall of the Soekarno government and the violent repression of the PKI, with which the principal labor organization was affiliated. The unions were effectively banned, with leaders and members executed or jailed. The concept of Pancasila industrial relations, emphasizing cooperation over conflict (including strikes), was instituted to promote national development goals. By the mid-1970's, the New Order government permitted unions to function, but only under tightly managed control, which was facilitated by merging all unions into a single, government dependent federation, the FBSI.

A decade later Indonesia's economic strategy of promoting export manufacturing industries to make up for sharply declining oil revenues by was accompanied by some changes in labor regulation. But labor unions were still considered a potential threat to economic development, political stability and national security, and the effect was to suppress them and maintain effective control. FBSI became SPSI, no longer a federation of separate unions, but a unitary body organized into nine industrial departments.

Formation of new unions was effectively blocked by making government recognition and registration dependent on having branches in at least 20 provinces, 100 districts, and 1000 companies. Collective bargaining was ostensibly promoted at the enterprise, but only a small percentage of private companies had collective bargaining agreements, and employers were widely seen as effectively dictating the terms. When labor unrest occurred, typically over low wages, employers were able to enlist military and police intervention to put an end to it. Detention, arrests and harsh physical maltreatment were common.

By the 1990s, the economy was booming, foreign investment had mushroomed, strike activity, some quite violent, increased substantially, and Indonesia became subject to greater international scrutiny and criticism for abusive labor practices and suppression of independent unions by extralegal means. The ILO, donor governments, NGOs and other organizations regularly issued reports and pressured the Indonesian government to institute labor reforms.

The government attempted to deflect that criticism by increasing the minimum wage and other individual worker protections, but with few changes for collective worker rights. Although the numerical and other requirements for union recognition changed so that some unions outside the SPSI structure were able to organize and bargain at the establishment level, and a decree enabling military intervention in labor disputes was repealed, labor union

control and the dispute settlement regulatory system was little changed. SPSI was renamed FSPSI to denote its federation status, but remained ineffective in representing workers, or protecting them from losing their jobs for expressing support for independent unions.

The regulatory framework for union organizing, bargaining, strikes and dispute settlement based on Pancasila principles was, and largely remains, a system designed to control the outcome. If collective bargaining fails to reach an agreement, the workers are supposed to have the right to strike. In reality, however, the dispute is subject to a multi-step process, beginning with either or both parties submitting it to the Ministry of Manpower for mediation and arbitration, and most “lawful” strikes are brief.

Failing a mediated settlement, the dispute is referred to the Regional Committee for the Settlement of Labor Disputes (P4D), which is empowered to issue a binding decision. Appeals are available to the Central Committee for the Settlement of Labor Disputes (P4P), which are subject to cancellation by the Minister for Manpower, and to judicial appeal to the Administrative and higher courts. The system has been discredited by lack of public confidence based on systemic problems, including long delays, lack of competence, unwarranted Ministry of Manpower interference, cumbersome and excessive control, bias against one or another party, an unwieldy appellate process, and corruption.

The legislation designed to implement ILO Convention 87 is the Workers/Labor Union Act (Act No. 21 of 2000) concerning the process of union representation. Legislation to create a new framework for regulating strikes and lockouts, collective bargaining, and dispute settlement remains to be enacted. Two bills for that purpose, submitted to Parliament by the Ministry of Manpower and Transmigration (MOMT), remain a contentious matter among unions, employers, and the government.

It is this three part legislative package that forms the central subject matter of the analysis that follows. It is set in the context of international experience, both the applicable ILO Conventions, together with the modern labor codes of other countries and the basic principles that can be derived from them.

International experience with industrial relations rules and procedures has a long and disparate history. National labor relations regulatory systems have evolved, sometime dramatically, as national economic, social and political circumstances have changed over time. Some countries have taken a relatively “hands off” and neutral stance, while others have been highly interventionist. The interventionist systems themselves are highly diverse. Some have been designed to be highly protective of organized labor. Examples are mandating union membership and compelling third party arbitration of labor disputes. Others have been designed to restrict and control union representation and collective action in the name of fostering economic development. These restrictive systems, like that of Indonesia during the New Order era, reflect the longstanding “conventional wisdom” that investment, particularly direct foreign investment, will be greater where labor unions are weak.⁴ Neither extreme is a satisfactory prescription for long term success.

⁴ This particular conventional wisdom may be correct only to the extent that weak union representation correlates to relatively low labor costs, which are known to influence FDI flows. This, however, fails to take into account the important potential gains of having union representation and collective bargaining effectively protected in a rational regulatory system – such as greater productivity, human capital investment, and social and political stability, factors that may well be more determinative of investment decisions than relative labor costs alone.

A premise of this paper is that international experience demonstrates the desirability and feasibility of an industrial relations regulatory system that accommodates credible and effective observance of international labor standards for protecting worker rights along with the general public need to promote robust economic growth. While no universal blueprint exists that can properly take into account the particular economic, social and political circumstances of any one country, certain general principles, or hallmarks, can be identified.

- Worker Rights. Because of inherently unequal bargaining power, labor relations regulation should not only permit, but effectively protect, the right of workers to form and join unions for the purpose of workplace representation, free from discrimination or retaliation by either employers or unions. It also should not only permit, but require good faith collective bargaining over wages, hours and other terms and conditions of employment. And, consistent with fundamental international standards, it should permit the reasonable exercise of economic action as a last resort by unions and employers.
- Dispute Settlement. In a market economy, the labor relations system should promote and encourage primary reliance on the voluntary, private resolution of labor disputes by the parties themselves, with minimal governmental interference and control. This is especially the case where the parties' trust in government is undermined by their perception of endemic corruption. Labor disputes, particularly those over economic issues that are resolved by the parties alone are more likely to foster a dynamic labor market than settlements compelled by governmental administrators or judges.
- Administration and Enforcement. An optimal industrial relations system is characterized by governmental rules and procedures that (i) establish clear parameters within which unions and employers can develop a productive relationship suited to the particular circumstances of each enterprise; and (ii) constrain unprincipled employers and unions from taking unfair advantage against each other, or against workers. The manner in which the rules are devised, administered and enforced needs to be perceived by the stakeholders as characterized by fairness, independence, transparency, clarity, consistency, speed, finality, and accountability. This is especially the case in Indonesia, where neither employers nor unions have experience in operating under a rational, modern labor relations code and, with reason, are distrustful of government agencies and the courts.
- Mutuality. While labor-employer cooperation in promoting improved working conditions and productivity is the goal of a rational labor relations regulatory system, the potential for conflict is ever present. Thus, both sides have an equal need for clear rules of conduct, and a mutual commitment to follow them. That, in turn, depends largely on whether the system is one that unions and employers perceive to be in their long-term, mutual benefit. Their sense of having an important stake in the system will significantly affect its prospects for success or failure. Greater attention is usually paid to the gains for unions, especially in having effective protections for worker representation, collective bargaining and the right to strike. But the potential benefits for employers are no less important, particularly in competitive, labor-intensive enterprises. These include workforce stability, the ability to predict labor costs, and a "level playing field" where law-breaking employers are denied a competitive advantage.

This paper's analysis and evaluation of Indonesia's labor relations regulatory system is based primarily on the legal framework consisting of (i) the Workers/Labor Union Act (Act No. 21 of 2000) concerning the process of union representation; (ii) the draft Act Concerning the Settlement of Disputes in Industrial Relations, version dated June 26, 2002, pending in Parliament (referenced herein as the "Disputes bill"); and (iii) the draft Act Concerning Manpower Development and Protection, version dated June 26, 2002, also pending in Parliament, significant provisions of which concern collective bargaining (referenced herein as the "Manpower bill").⁵ Note also that this review is based on English translations provided by the Jakarta office of the International Labor Organization.

The labor relations provisions of both draft bills are highly interrelated, and, as a matter of proper drafting for clarity and consistency, would better be combined and added to the provisions of Act No. 21. It would be preferable for Indonesia to replace the myriad existing labor relations laws with a unitary legal framework.

It remains to be seen whether the devolution of authority under the existing decentralization laws and regulations will result in substantial regional variations. There is a powerful case for consistent, centralized labor relations policy in that both labor organizations and employers, under freedom of association principles, will operate, and bargain, across political subdivisions. For either side to be required to comply with multiple and potentially conflicting sets of rules and regulations, which inevitably become complex and evolve over time, would add a chaotic element to an already difficult environment at Indonesia's current stage of economic and political development.

As a general observation, many aspects of the labor legislation are poorly drafted in that Act No. 21 and the pending bills fail to present a clear and coherent set of regulatory provisions. Important labor relations regulatory matters are too often omitted entirely, rendered opaque by obscure language, or are consigned to the drafter's crutch of leaving them to the vagaries of future Ministerial Decrees. And too often the reader is required to speculate as to the actual legislative intent. As the bills have undergone numerous changes since their original introduction, and may well be subject to further change, no attempt is made here to detail the technical corrections required. Instead, the focus of this analysis is on particular shortcomings with respect to certain critical issues. Thus, following a summary description, the analysis concentrates on particular issues from the standpoint of international labor standards and modern labor codes in the context of Indonesia. Some of the issues addressed will be of principal concern to unions, and others of principal concern to employers.

A. Union Representation and Collective Bargaining

Act No. 21, which took effect August 4, 2000, provides for the right of workers to form and join labor unions; defines the purposes of unions and their right to engage in collective bargaining; establishes procedures for official union registration and for forming

⁵ Although beyond the scope of this paper on labor relations regulation, the pending bills also address other major labor protective legislative subjects, including minimum wage, severance pay, and limitations on employment termination, all of which carry a significant potential impact on union representation and collective bargaining. Mandated protections tend to impose labor costs unrelated to negotiated collective bargaining agreements and, at the same time, set a "floor" for collective bargaining.

union federations and confederations; prohibits discrimination against workers based on union membership and activity; provides for the dissolution of unions under certain circumstances; and sets penalties for violations of the Act.

1. Union Membership and Formation

Act No. 21 (Art. 5) provides that a labor union may be formed with a minimum membership of ten workers. Although this is an acceptable minimum requirement for purposes of governmental registration, a prerequisite to the right of worker representation, the Act fails to specifically relate this minimum to employer recognition of the union as a representative of workers at a particular establishment. It implies that workplace union representation is subject to the same minimum of ten members, but this matter should be specified and not be left as a matter of inference about the law's intent. The Manpower bill also contains, *inter alia*, provisions relating to aspects of union representational rights and obligations that must be read in conjunction with related provisions contained in Act No. 21

2. Recognition

Similarly, the Act contains no specific provision establishing that a union representing ten or more workers at a particular establishment must be recognized by the employer as the lawful representative of those workers. It should be clarified so that both unions and employers are aware of their rights and responsibilities when a union has met the minimum membership and registration requirements.

The Act, taken in conjunction with the collective bargaining provisions of the Manpower bill, clearly authorizes a system of multiple unions in a single enterprise. Employers have expressed great concern about the considerable proliferation of unions since 1998 when the official FSPSI near monopoly was brought to an end and other unions became free to form and engage in organizing workers.

Contrary to the U.S. majority rule system of exclusive representation, which generally results in a single union representing most workers at a single establishment, most national labor codes, and international standards, contemplate some form of multiple union representation and, in some cases, for the potential of multiple collective bargaining agreements within the same enterprise. Others require, or strongly encourage, single collective labor agreements through coalition bargaining among the multiple union representatives.

Whether multiple unions constitute a serious problem for employers depends on the permitted activities and purposes of those unions. Typically, employers' greatest concerns are (i) determining the actual union affiliation of their employees; (ii) avoiding multiple and conflicting bargaining demands from more than one union; and (iii) avoiding inconsistent terms of employment for similarly situated categories of employees, which may give rise to worker complaints and festering disputes that will adversely affect workplace morale and productivity. Moreover, the employer interest in achieving bargaining stability is frustrated if there are multiple contracts with disparate termination dates, resulting in the potential for nearly constant bargaining demands and obligations.

It is important, therefore, to distinguish between union representation for purposes of collective bargaining, and representation for other purposes, such as representing individual employees in vindicating their rights under individual employment contracts or statutory

labor protective laws.⁶ In the case of a union representing a member for such other purposes (for example, a claim that a particular wage payment failed to include overtime pay) the employer is not likely faced with the prospect of conflicting wages, hours or other terms of employment among employees. It is in representation for collective bargaining that multiple union representation presents the greater potential risk to employers. The Act (Art. 25) should be modified to make clear the distinction.

3. Bargaining Relationships

Representation for collective bargaining is more fully addressed in the separate Manpower bill (Part Seven, Art. 113 - 118), which appears intended to assuage employer objections to multiple union bargaining by permitting only a single collective bargaining agreement at an enterprise, and requiring its terms to apply to all the employees regardless of their membership in another union, or non-membership in any union.⁷ (Art. 115).

Where only a single union is present, Art. 116 provides that the union has no collective bargaining rights unless it either (i) represents more than fifty percent of the workers, or (ii) wins the support of more than fifty percent of the workers in a vote held for this purpose.

Rather inexplicably, however, the same Article further provides that in the event that the single union fails to garner majority support, it “may once again put forward its request to negotiate a collective work agreement . . . after a period of 6 (six) months . . .” It nowhere explains whether the union’s claim depends upon its winning a second election, nor does it explicate the meaning of “put forward its request to negotiate.” If, under basic rules of statutory construction, legislation should not be presumed to call for a futile act, the bill would be deemed to grant collective bargaining rights to a single union without necessarily having the support of more than the minimum number of ten members. On the other hand, affording bargaining rights to a union possibly having only negligible worker support would entirely contravene the mandate of absolute majority support contained in the same Article. It is essential that the draft bill be amended so that readers are able to discern clearly the legislative intent of this Article.

Where multiple unions are present (Art. 117), the bill is even less coherent. First, if more than fifty percent of the workers are members of one of the unions, that union then has exclusive bargaining rights for the entire workforce, including all members of the other union or unions. Second, in the absence of a single union having majority membership, the bill permits (but appears not to require) two or more unions having majority membership to form a bargaining coalition. Again, the operation of Art. 115 appears to mean that any resulting collective labor agreement applies to the entire workforce. Third, in the absence of majority membership either by a single union, or by a union coalition, Art. 117 states only that a negotiating team is required to be established, without clarifying whether the employer in

⁶ Act No. 21 is deficient in failing to specify these union functions, which are particularly important to individual employees who often need assistance in disciplinary matters and in securing benefits mandated by protective labor statutes on such matters as minimum wage, hours of work, termination and severance pay, or benefits provided by the terms of collective labor agreements. It should be amended accordingly.

⁷ Act No. 21, consistent with international labor standards, protects the right of individual employees to join, or refrain from joining, a labor union. The Act, however, neglects to cover procedures for resignation from union membership or for changing union membership within the same enterprise.

such circumstances is required to bargain upon the “team” request, or specifying any particular degree of membership among the enterprise’s employees as a prerequisite to bargaining rights. Thus, like Art. 116, the bill may have the result, intended or not, of granting bargaining rights without regard to having membership beyond the Act No. 21 minimum requirement of ten members. Again, this would effectively undermine the majority requirement of the rest of this Article, and, as such, requires an amendment to clarify the actual legislative intent.

This abysmal lack of clarity on a key legislative point is a serious shortcoming. If, however, the actual legislative intent is essentially to make majority support a prerequisite for bargaining rights at the expense of minority unions, that requirement *should be reconsidered* in light of the likely effect of inhibiting reform efforts within the union movement and restricting fair competition among unions for workers’ allegiance.

Indonesia’s New Order government long fostered a single union monopoly in FSPSI, and the nation’s experiment with a freer system of competing unions is now barely underway. Only a small and incomplete part of the intended reform of the labor relations regulatory system has been enacted. FSPSI, although fractionated, is widely regarded as retaining considerable influence as the dominant union in many enterprises, as having the benefit of employer favoritism based on bargaining agreements that in many instances fail to provide workers any benefit beyond restating various normative rights, and as retaining unfair advantage in the government’s collection and distribution of union dues payments.

As such, imposing majority union representation requirements through the new legislation would unfairly constrain the organizing and representational efforts of emerging unions. Recognizing that this issue may be at odds with employers’ desire for certainty and stability, some compromise should be found for the final legislative package in an attempt to accommodate both interests.

The recommendation here is to permit multiple union representation for collective bargaining, but only on a coalition bargaining basis upon employer request. In order to minimize impossibly fractionated collective bargaining, coalition bargaining would be permitted among unions enjoying a minimum percentage, such as twenty percent, of employee membership at a particular enterprise. Thus, for example, a union with minority worker support of twenty percent or more would form part of the bargaining coalition even where another union may enjoy absolute majority support. The provision requiring a single collective bargaining agreement would remain in place.

4. Union Independence

Neither Act No. 21 (see Art. 1, 3 and 9) nor the proposed bills adequately require strict union independence from employer influence or control. Unions covertly formed by employers, dominated by them, or financially dependent on them are unlikely to provide adequate worker representation and are contrary to international labor standards. The Act should be amended so that a condition of registration, and a cause of union dissolution for failure to comply, should be that a union must be independent of and operates with no financial support from any employer.

5. Good Faith Bargaining

Neither Act No. 21 nor the proposed bills affirmatively require that both employers and unions operate in good faith toward each other. (See Manpower bill, Art. 133, and Article 113, and the explanatory statement thereto). This is a central feature of other national labor codes, such as the U.S. and New Zealand, and is especially important with respect to promoting a collective bargaining process that will be successful without intrusive governmental control. The concept put forward in the legislation that the settlement of most kinds of labor disputes is to be first through bipartite negotiations (Dispute bill, Art. 3) is novel in the sense that throughout Indonesia's history meaningful union-employer negotiations have been the exception rather than the general rule. It needs better definition, and a means of enforcement.

Although defining what conduct constitutes good faith bargaining is necessarily a somewhat subjective matter, it is important that unions and employers understand its basic elements. These include a requirement to meet together from time to time and consider and respond to proposals made by each other. They also must recognize and not interfere with the role and authority of any person chosen by the other. That is, the choice of bargaining representative must be the sole prerogative of each side.

Further, the union and employer must provide to each other, on request, information that is reasonably necessary to support or substantiate claims, or responses to claims, made for the purpose of bargaining. And, most importantly, it must be understood that once a collective bargaining agreement has been reached, neither party may make any unilateral change concerning any subject governed by the agreement. Although "good faith" is briefly referenced in the explanatory note to Art. 113, such a central matter should be incorporated in the legislation itself, together with basic defining elements. Moreover, the bill fails to provide inducement for meaningful, good faith bargaining. At a minimum, the bill should be amended to empower the Industrial Relations Dispute Courts to issue compliance orders, backed up by a system of civil fines for noncompliance.

When the regulatory system places primary reliance on the parties voluntary efforts to reach agreement, consistent with modern labor codes, the system must allow for both success and failure. Collective bargaining, even when conducted in utmost good faith, will not always produce a collective agreement, whether because of unyielding demands, unequal bargaining power, or the inexperience of one or both parties. The proposed legislation is silent on this point, and should be modified to make clear that while good faith collective bargaining is required, reaching and executing a final agreement is not.

6. Scope of Bargaining

The proposed legislation (Manpower bill, Art. 121) merely requires that collective labor agreements state the rights and obligations of the employer, union and workers, and not contradict statutory laws. At least a general definition of the subjects over which bargaining is mandatory is important to promote successful bargaining, and to protect each side's reasonable expectation of what is, and what is not, required at the bargaining table. For unions, the definition of mandatory bargaining can only be broadly defined, along the lines of "wages, hours, and other terms and conditions of employment," as the list of potential subjects of legitimate concern to workers is virtually inexhaustible. The central point, however, is that the scope of bargaining cannot be considered to be infinite. Rather it incorporates only subjects that vitally affect the employment conditions of active employees.

Moreover, from the standpoint of employers operating in a market economy, the scope of bargaining should exclude *decisions* that are inherently a matter of entrepreneurial prerogative, such as those involving the deployment of capital. Whether to open, or close, an enterprise, and whether to change product mix or production methods, are typical examples. This should not, however, exclude bargaining over the *effects* of such decisions on the workers. To the extent that workers are adversely affected by such managerial decisions, their union representative should be permitted to demand bargaining over benefits and other measures to mitigate those effects.

To promote bargaining stability and harmonious union-employer relationships, the legislation should be modified to address the scope of bargaining.⁸

7. Successorship

Related to the issue of bargaining scope is the question of the rights and obligations of the parties when there is a new (successor) employer as a result of a change in ownership of an enterprise. The proposed legislation (Manpower bill, Art. 128) would require that in such circumstances any applicable collective labor agreement be transferred intact until its expiration as an obligation of the new employer. Such a blanket requirement may be appropriate if the only essential change is in ownership of the employing enterprise, and the composition of the workforce and the nature of the job requirements remain essentially unchanged.

It is often the case, however, that under new ownership the enterprise will expand or contract, will require a different number and skill mix of employees, will change production and distribution methods, and make any number other business changes, for which the old labor agreement may no longer be compatible. No provision in the bill takes such potential changes into account. Nor does it account for the real possibility that the union that negotiated the collective agreement may no longer represent a majority of the workers. Indeed, Art. 158 of the same bill provides that upon a sale or merger of the enterprise, the new employer is permitted to employ *none* of employees of the predecessor's employees, subject to severance pay obligations. The former union representative would then be left with no members, or collective labor agreement, at the enterprise.⁹

Consideration should be given to amending the bill to provide more flexibility in the case of significantly changed circumstances, while still affording protection to the workers' prior exercise of their right to join a union, or unions, and to negotiate their wages, hours and other terms and conditions of employment. Thus, as long as there remains a reasonable basis for the union's claim of representation, the new employer should be required to recognize the union's legitimacy as bargaining representative. Instead of automatic application of the previous labor agreement, however, the employer should have the alternative option of requesting negotiations over changes in the agreement in order to accommodate material business changes that directly affect the workforce.

⁸ In contrast to the absence of provisions concerning bargaining scope, the legislation (Art. 120) imposes a rigid requirement that the duration of all collective bargaining agreements be restricted to two years, which in some circumstances could be less than desirable from the standpoint of promoting bargaining stability. This Article should be deleted and the matter left for the parties to decide.

⁹ There is a need to reconcile Art. 128 with Art. 126(2), which provides for replacing a collective labor agreement with enterprise rules and regulations when union representation no longer exists.

8. Union Registration and Dissolution

Law No. 21 incorporates a system of union formation and governmental registration, as a prerequisite to lawful worker representation with employers. It does not, however, adequately address the problem known in other countries, and the subject of anecdotal reports in Indonesia, of “sham” unions, including groups that prey on workers by taking an inordinate share of benefits extracted from employers, or that are, in essence, political parties masquerading as labor unions.¹⁰

The legislation (Law No. 21, Art. 4(1) and 25; Manpower bill Art. 2(17)) provides a general description of legitimate union purposes. It would be preferable, however, to amend the Act to make it clear that as a condition of registration the labor union must have as its *primary* purpose the representation of workers in order to protect and improve their welfare and benefits. Any interested party, including workers, other unions, and employers, should have the right to challenge the registration of a union based upon objective evidence that it fails to meet the statutory requirement for registration, and if already registered, to petition for its dissolution.

9. Union Workplace Access

The Act No. 21 and the pending bills are silent on the often controversial issue of union access to workers within an establishment for organizing purposes. Typically this is an important matter for unions because of the difficulty of reaching workers elsewhere for the purpose of explaining the benefits of membership to them. At a minimum, the legislation should be modified to clarify union access rights, or prohibitions, in this regard.

One solution, intended to balance the union’s need for an effective means of exercising their lawful rights to organize workers with the employer’s need to avoid disruptions in the workplace, would be to specify that union representatives have access rights for organizing purposes, and that employers have the right to post reasonable limitations on such access, such as confining contacts between the union and workers away from production areas and only during break or meal periods. (Note that the legislation, Law No. 21, Art. 29) addresses union access, but provides procedures only for unions already representing workers within the enterprise).

10. Discrimination Based on Union Activity

One of the most important, and difficult, subjects for any labor relations regulatory system concerns the protection of workers from employer discrimination based on their union membership or union activities. International labor standards and modern labor codes call for protection against such discrimination because, if ineffectively regulated, it can gravely undermine workers’ basic rights. In order to deter employers from anti-union discrimination (and, equally, deter unions from discriminatory treatment of workers for exercising their right to refrain from membership), the law should make clear that (i) any form of such discrimination that adversely affects a worker’s wages, hours or other terms and conditions of employment, and (ii) any form of a *threat* to take such action, is prohibited. The legislation is inadequate in both respects and should be revised accordingly to protect against

¹⁰ This in no way is intended to suggest that legitimate labor unions should be barred from political activity or protest, a right long recognized by international labor standards.

discrimination based on union membership or activity (Law No. 21, Art. 28, Manpower bill, Art. 149(g) and 158(2)) .

The same Article (28(d)) also prohibits “[e]verybody” from “[c]ampaigning against the establishment of trade union/labor unions.” If, as seems likely, the intent is to prohibit employers from undertaking concerted efforts to persuade the workers at a particular enterprise to reject union membership, the legislation should be amended to add clarifying language. Otherwise, the mere expression of an opinion by a manager to a single worker, unaccompanied by any discriminatory actions or threats, or even an official of one union attempting to persuade workers not to join a competing union, could be subject to this provision.

11. Union Dues Collection

The legislation contains no provision concerning the ability of unions to collect dues from their members at the workplace. The suggestion here, consistent with international practice, is that the legislation explicitly permit unions to negotiate, for inclusion in collective bargaining agreements, dues collection procedures by which the employer periodically withholds agreed upon amounts from the wages of members who have executed specific written authorization, and remit the deducted dues amount to the union. Thus, such dues collection is subject to agreement by the employer and by each worker who chooses union membership.

B. Representation by Other Entities

The legislation (Manpower bill, Art. 103) requires that every enterprise employing fifty or more workers establish a Bipartite Cooperation Institute, to be a “forum for communication, consultation and deliberation aimed at solving manpower problems at an enterprise.” The Article further states that an institute is to be composed of employer representatives and “laborer’s representatives who are appointed by workers/laborers . . .,” and that other membership procedures are subject to a Ministerial decree. There is no further explication.

These institutes appear intended to function along the lines of similar organizations established by the labor laws of many other countries. Works Councils are common in Europe. Korea has Labor Management Councils. Taiwan requires regular labor-management conferences. In Chile, if no union is present, workers elect a staff delegate to communicate with the employer.

Such workplace organizations can make a significant contribution to harmonious workplace relationships. By being focused at the enterprise level, they can keep workers informed of significant developments affecting the enterprise, can provide an effective means of expressing worker concerns to the employer, can focus on particular issues that require day-to-day attention, such as workplace health and safety, and can enhance productivity. The institutes can deal with issues that are not suitable or feasible for inclusion in collective labor agreements.

Care should be taken, however, to distinguish between the subject matter and activities that are appropriate for these institutes and those that are properly within the province of union representation and collective bargaining, such as wage setting. For

example, it should be made clear that institute worker representatives may not call a strike. Nor may they engage in actual negotiations with the employer representatives. If a union represents a substantial proportion of the workers, an official of the union should be one of the worker representatives to the institute.

These matters should be incorporated into the legislation, as well as a general reference to the subjects intended to be within the *consultation*, as opposed to bargaining, functions of the institute. Examples include recommendations on working conditions and the organization of work with a view to increasing productivity; improving health and safety practices; the type of information that employers are expected to share with the worker representatives; and the formulation of enterprise regulations which are the responsibility of all employers with ten or more workers (Manpower bill, Art. 105-112).

C. Economic Action and Dispute Settlement

Economic action, meaning union strikes and employer lockouts, are generally regarded as the weapons of last resort when either party is unable to find lesser means of persuading the other to accept its terms for resolving a labor dispute. Strikes and lockouts are covered primarily in the Manpower bill, Art. 134 - 144. The dispute settlement system is covered by the Labor Disputes bill, in its entirety. These two matters are quite interrelated and can best be understood by considering them together. It is unfortunate these most important subjects are the least clearly drafted and, in some respects, appear to be contradictory, as discussed below.

Contrary to the trend in modern labor relations statutes, both the present and proposed Indonesian regulatory system is characterized by heavy intervention and control by the government in all aspects of the dispute process. The pending bills would perpetuate the long held governmental view that permitting strike activity is impermissible at any stage of the dispute resolution process, and that private negotiations may be easily bypassed in favor of imposed terms of settlement. That perspective is no longer appropriate, and whether such extensive control accords with the ILO conventions on freedom of association, the right to organize, and collective bargaining (No. 87 and 98) is in serious doubt. And, conventions aside, its framework seems inadequate for channeling worker discontent through a rational dispute resolution system that will be deemed acceptable and effective by either employers or unions, or perceived as providing an effective “voice” for the concerns of workers.

At the most basic level, in order to be consistent with international labor standards, labor relations codes must protect the right to strike, generally defined as economic pressure applied through a collective stoppage of work for the purpose of securing compliance with economic or other demands concerning wages, benefits or other conditions of work that have been refused by the employer. Although not specifically addressed in international labor standards, most labor codes also protect employer lockouts, considered to be the counterpart of the union strike weapon, and generally defined as economic pressure applied by temporarily denying work through the cessation of all or part of business operations.

Along with protections, modern labor codes, in considerably varying degrees, also regulate and restrict the ability of unions to carry out strikes. The regulation of strike protections and limitations are generally expressed in relation to the purpose of the strike, the effect of a strike, or the manner in which it is carried out. Prohibiting strikes that could have

the effect of paralyzing essential public services is a common feature of labor relations laws and regulations.

When the union's strike objective is to secure new rights or benefits from the employer, or to change existing ones, it is considered to be in furtherance of an "interest" dispute, which the Disputes bill (Art. 1(2)) refers to as involving disagreement "concerning the formulation of, and or the interpretation of, and or the interpretation of, and or changes to employment requirements that have been determined in work agreements or enterprise rules and regulations and or collective work agreements." Disputes over termination of employment are treated similarly in the bill, and are defined as disagreements "concerning the termination of an employment relationship performed by either side in the relationship."¹¹ (Art. 1(4)). To the extent that union strikes¹² are permitted to occur under the terms of the proposed legislation, they are allowed only where the union's purpose is to strengthen its position in interest disputes or employment termination disputes.

"Rights" disputes, which involve disagreement over rights and benefits that already exist by virtue of workplace agreements or labor statutes, fall into another major category. The Disputes bill defines these as disputes that arise "because the rights that have been specified and established in work agreements, enterprise rules and regulations, collective deals or statutory laws and regulations are not fulfilled." In the case of a rights dispute, the legislation would entirely rule out use of the union strike weapon, and the employer lockout counterpart, in favor of direct resort to the governmental settlement system. (implicit in Disputes bill, Art. 4).

1. Strike Regulation

Denying the strike (or lockout) option in the case of rights disputes is not considered to contravene international labor standards, although it is a more sweeping limitation than is found in many other national labor relations codes. There are additional strike regulation provisions in the proposed legislation.

a. Essential Services. As is common in national labor codes, and, if narrowly defined, consistent with international labor standards, strikes in essential public services may be prohibited. The Manpower bill (Art. 135) proposes to prohibit strikes "at enterprises that serve the public interest and or enterprises where strike endangers human lives," and enumerates several classifications: water supply, telecommunications control, electricity supply, hospitals, oil and gas processing, officers regulating air traffic and sea traffic, firefighters, railway gatekeepers, and sluice gatekeepers. This list is subject to expansion through a subsequent, open-ended clause authorizing future government regulations to extend the strike prohibition to other "kinds of enterprises that operate on behalf of the public interest."

National labor codes contain quite disparate definitions of essential services to be protected against work stoppages. International labor standards, however, call for

¹¹ Limitations on dismissals, and severance pay requirements, are contained chiefly in the Manpower bill, Chapter XI, Art. 145 - 166.

¹² A labor dispute involving a collective refusal to work by a group of workers in the absence of a union is not protected under the proposed legislation, unlike some other national labor relations systems, including the U.S.

confining strike prohibitions to a narrow definition of essential services, meaning those public services in which interruption would endanger the life, personal safety or health of the whole or part of the population. It is not clear that some of the enumerated services and enterprises, such as oil and gas processing, entirely conform to that definition. The recommendation here is that (i) the enumerated enterprises be reviewed for consistency with international standards, and (ii) that the open ended clause be modified to incorporate a limitation comparable to international labor standards to govern future regulations on this subject.

b. Strike Notice. Under the Manpower bill (Art. 136), a seven-day advance written notice of a strike must be given by the union to the employer and to the government manpower agency. The notice must include the time and date of the strike, and the reason for the strike. The notice also must include the number of striking workers, which “must be proved with statements of workers/laborers’ support of the strike,” and which, according to the Art. 136 explanatory note, must be supported by “approvals from union members by means of voting.”

Advance strike notice is contained in other national labor codes, and, in principle, does not contravene international labor standards. Mandating open affirmation of worker support, however, presents two problems.

First, in light of international labor standards and some national labor relations systems (including the U.S.), mandating worker support statements and voting as a prerequisite to a lawful strike seems an unwarranted and unnecessary intrusion into the internal affairs of a union, and could expose workers to retaliatory discrimination as a means of thwarting the strike before it occurs. Absent worker complaints, it would seem sufficient to rely on a union’s democratic processes (required by Act No. 21, Art. 3), and require, instead, only a statement by a union official attesting to worker support.

Second, the intended requirements should be more specific, and included in the statutory language itself, such as defining the minimum proportion of workers who must turn out for the vote (quorum requirements), and defining majority vote requirements, and how the vote is to be conducted.¹³ Moreover, in order to protect the integrity of the ballot procedure, consideration should be given to stipulating that the vote be conducted by the local manpower agency, or by a third party as agreed upon by the unions and the employer.

c. Striker Wages. Contrary to the long held and nearly universal rule of “no work, no pay” in strike situations, the proposed legislation requires that workers on strike are nonetheless entitled to continue to receive wages.¹⁴ Such wages are not required by

¹³ Majority strike vote requirements, which are contained in some national labor codes, are sometimes advocated by employers in the (often mistaken) belief that mandating a worker vote will deter strikes. Further, because of the proposed bill’s lack of clarity on majority representation for collective bargaining, clarification of that matter will require consistent correlation to the provisions concerning the degree of worker support required as a prerequisite to a lawful strike.

¹⁴ Although the Manpower bill’s general wage section states that “[w]ages are not paid if the worker/laborer does not perform his or her job,” (Art. 91(1)), the section on strikes provides that wages of strikers may be denied only when a dispute has been submitted to mediation, conciliation, arbitration, or to a Dispute Court (Art. 140). Thus, by clear implication, strikers’ wages must be paid at any other stage of a strike. Among other problems, this provision would potentially have the rather perverse effect of creating an incentive for employers to cut short promising bipartite negotiations and rush to the governmental dispute settlement system in order to

international labor standards, and are strongly opposed by employers on the grounds that wage continuation would undermine good faith bargaining, create a strike incentive, and prolong strikes after they occur. International practice supports the employer view, and the recommendation here is to delete it from the bill's requirements in favor of the "no work, no pay" principle.¹⁵

d. Striker Replacements. An always contentious issue is whether, in the face of a strike, the employer is permitted to prevent or mitigate a cessation of business operations by hiring replacement workers, on either a temporary or permanent basis, and, if so, whether the strikers have a right to return to their previous positions at the end of the dispute. International labor standards generally oppose permitting the hiring of striker replacements, except in limited circumstances, and especially if replaced strikers are denied reinstatement when the dispute is settled. The legislation contains a blanket prohibition against replacing workers on strike. (Manpower bill, Art. 134(3)).

Some national labor systems, such as in the U.S., permit hiring striker replacements under certain circumstances with reinstatement rights after the end of the dispute only to the extent that future vacancies occur. Others do so on a more limited basis, as is the case in New Zealand, which expressly permits employers to transfer other, non-striking employees to perform the work of strikers, and to hire new employees only as necessary for reasons of safety or health.

e. Place, Purpose and Manner Limitations. The legislation states that "[s]trikes shall be staged peacefully and orderly," (Manpower bill, Art. 134(2)) which means, according to the explanatory note, "that the strike must not disrupt security and public order and or threaten the life and safety of the entrepreneur, other people or other members of the general public and the property belonging to the enterprise, the entrepreneur or other people or other members of the general public."

Because of the potentially serious consequences of strikes – including the employer's loss of business, and the workers' loss of wages – it is important not only that labor relations law effectively protect the right to strike, but that what does and does not constitute lawful strike activity be clearly defined and understood by the parties and the governmental institutions charged with administering and enforcing the law. For this reason, consideration should be given to amending the legislation to clarify what strike activity is permitted, or proscribed, in relation to its manner (partially addressed by Art. 134(2), above), its purpose or objective (as in the case of prohibiting strikes over rights disputes, or in essential services, as described above), and its place or location.

As to the place and manner of strike activity, the mandate that strikes be conducted "peacefully and orderly" could be modified so as to clarify that it encompasses situations where strikers remain on the employer's premises during the strike, taking possession of the property and excluding others from entry. The reference to "others" would

cut off wage payments to strikers.

¹⁵ An exception somewhat similar to U.S. practice could be considered to provide that when an employer unlawfully retaliates against workers engaged in a lawful strike, the affected workers, in addition to reinstatement to their jobs, would be entitled to wages, or a multiple thereof, from the inception of the employer's unlawful actions.

include non-striking employees, managers, suppliers and customers. Similarly, as to place and manner, it would be desirable to clarify the status of what is sometimes referred to as a partial strike – where employees remain at work while exerting economic pressure through such measures as refusing to work overtime, or to perform certain tasks while accepting others, or other actions intended to produce a slowdown of production or services.

As to the purpose or objective of a strike, the legislation fails to address whether a union, having attained the requisite number of members in an enterprise, may lawfully strike to pressure an employer who refuses to recognize it as the legitimate representative of those workers or to enter into collective bargaining. Such recognitional strikes are normally permitted, except to the extent that the objective is to force recognition when another union already represents the same employees.

Sympathy strikes also are not addressed in the legislation. Consistent with international labor standards, labor laws generally protect the right of union members on strike against their employer to request that other union members (of a different union, or of the same union, and employed elsewhere) refuse, for example, to make deliveries to or to perform work at the site of the primary employer. And, of course, those other union members are protected as well. In this connection, it also would be desirable to make clear that sympathy strikes, and limitations on them, may be addressed by the parties in collective labor agreements.

Nor does the legislation address union pressure directed against employers other than the employer with which it has its primary dispute in what are often described as secondary strikes or boycotts. These are actions taken by a union to induce the employees of a neutral, secondary employer to withhold their labor in order to force their employer to cease dealing with the primary employer. These are generally considered a matter for protection under international labor standards, but are limited to some extent by some national labor codes, including the U.S., and may also be limited by the terms of collective labor agreements.

2. Dispute Settlement

Although the legislation may appear to comport with modern labor codes in emphasizing the role of voluntary negotiations in the settlement of disputes (i.e., they “must be settled through a bipartite negotiation,” (Disputes bill, Art. 3), in reality private negotiations are subverted to the overriding role of the governmental settlement system to the extent that the right to strike is, in effect, defeated and mandatory arbitration is, in effect, accorded highest priority. Although nowhere stated, it is as if the legislation has been crafted on the basis of two fallacious assumptions – that private collective bargaining and the right to strike are inherently incompatible, and that settlements devised and imposed by government are superior to free market private resolutions. Mandatory mediation, in itself quite acceptable,¹⁶ is but the first link in this chain. The fault lies in coupling this feature with improper provisions enabling, and inducing, a single party to submit a labor dispute to a settlement process that culminates in compulsory arbitration. In a rational labor relations system the incentives should run in the opposite direction, to promote voluntary bargaining

¹⁶ It is compatible with international labor standards, and found in some modern labor codes. See, e.g., the description of the recently enacted New Zealand labor relations code in the relevant Appendix to this report.

and collective settlements with minimal state involvement in either the process, or in the terms, of settlement.

a. Mediation. As noted, some national labor codes require, as permitted by international labor standards, that a labor dispute first be submitted to mediation before a strike may lawfully take place. Superficially, the pending bills appear to contain contradictory provisions.

On the one hand, the Disputes bill provides that, “if both sides in the [interest or employment termination] dispute agree, they can choose to have their dispute settled through mediation, conciliation, or arbitration.” (Art. 5) On the other hand, the Manpower bill (Art. 137(4)) provides that, following receipt of the required seven day advance strike notice, “the government agency responsible for manpower affairs shall immediately make efforts to reach an agreement to settle the dispute . . .” The term “efforts,” is defined in the explanatory notes:

“The settlement efforts as referred to under this subsection shall be made by mediators and this is a mechanism that must be carried out so that settlements through mediation under this subsection is an exemption of procedures for the settlement of industrial relations disputes that are regulated under the Act on the Industrial Relations Dispute Settlement.”

As a matter of statutory construction, in light of the explanatory note, the appearance of voluntary mediation in the Disputes bill is negated by the Manpower bill, to the effect that mandatory mediation would be the rule in every case. This “effort” in mediation is then directly coupled in the Manpower bill (Art. 137(5)) with a strike restriction:

“In case no agreement is reached . . . , the government agency responsible for manpower affairs . . . must already submit a written recommendation to both parties in the dispute *before a strike actually takes place* so that the parties [may] bring their case . . . to the Industrial Relations Dispute Court.” (emphasis added)

The provision, with perhaps some logic, might have required that an existing strike be stopped during a period of collective bargaining assisted by a mediator. But that is not the case here. Despite clumsy and incomplete drafting, the most plausible construction of the phrase, “before a strike actually takes place,” is that the intent of the legislation is that *no* strike will be permitted – before, during, or after collective bargaining. One must return to the Disputes bill (Art. 5(3)) to understand that the mutual consent of the union and employer is not required for bring the dispute to be brought to the court for a final and binding settlement. It may be brought to the court at the request of only one party to the dispute:

“. . . [I]f both sides in the dispute do not agree to settle their dispute through mediation, conciliation, or arbitration, then, upon the agreement of both of them *or upon the request of one of them*, the settlement of the dispute shall be made by an Industrial Relations District Court.” (emphasis added)

As noted above, the cumulative effect of these provisions is to undermine both the right to strike and bipartite collective bargaining.¹⁷ Although prohibiting strikes for a defined period consisting of advance strike notice, private, bipartite collective bargaining, and the completion of mediation or conciliation does not contravene international labor standards, provisions permitting only one party to a labor dispute over interests or employment termination to force settlement through mandatory arbitration is not consistent with those standards. Nor is it compatible with modern labor codes. Although requiring mediation assistance may be desirable, any procedures leading to mandatory arbitration should be subject to the mutual consent of the parties. The legislation should be modified accordingly.

b. Mediation/Conciliation Procedures. The Disputes bill (Art. 9 - 28) provides for the assistance in the settlement of interest disputes and employment termination disputes through either mediation or conciliation¹⁸ performed by persons selected by the parties who have been qualified by the local manpower agency on the basis of proficiency and other criteria enumerated in the bill. Unlike arbitration, this process is meant to facilitate a negotiated settlement of the dispute by the parties. A mediator is to investigate the issues in dispute and convene a mediation conference, and, if no settlement is reached, the mediator is to recommend settlement terms to the parties.

One improvement over the present system is providing for a choice to be made by the parties, instead of being required to accept the choice of the manpower agency. The bill, however, should incorporate a procedure for avoiding a deadlock in mediator selection. And, consistent with the problems discussed above, the provisions in the bill (Art. 15, 22) requiring failed mediation cases to be submitted for settlement to the Dispute Court should be modified to permit submission only upon mutual request. Further, the criteria for qualifying mediators should be modified to include the concept of neutrality and impartiality based on the person's background and experience.

c. Arbitration. In the case of arbitration, the legislation is properly based on voluntary mutual agreement of the parties, which includes the selection of the arbitrator registered with the governmental manpower agencies, for the final and binding resolution of interest and employment termination disputes. (Disputes bill, Art. 32) It also properly contains a liberal judicial review procedure for the purpose of efficient enforcement of arbitration decisions and minimizing judicial interference with the arbitrator's judgment as to appropriate terms of settlement. (Art. 49(4))

There is an anomalous exception, however, in a provision compelling referral of the dispute to an Industrial Relations Dispute Court if the parties are unable to agree on the appointment of an arbitrator. (Art. 33(5)). The labor relations system should encourage

¹⁷ Arguably confirming the actual intent of the legislation is the fact that precisely the same effect has been contained in multiple previous drafts of the legislation (at least since the version produced in August, 2000 – see Art. 77 therein), albeit in more explicit language. For example, Art. 77 stated that the strike termination “must be performed since the date on which the bipartite negotiation starts . . .” The criminal penalty for failing to stop the strike contained in previous drafts, however, does not appear in the current draft. The current draft also leaves to inference the provision found in earlier drafts that strikes could be prohibited by judicial order while the dispute is pending at an Industrial Dispute Court for binding settlement.

¹⁸ The bill makes no substantive distinction between mediation and conciliation, and in common practice are considered to have little, if any difference, with mediation sometimes thought of as more assertively making recommendations for settlement terms that the parties may voluntarily accept.

privately reached agreement to take disputes to arbitration as an alternative to the Industrial Relations Dispute Courts. This anomaly, therefore, should be deleted as inconsistent with the otherwise voluntary nature of the arbitration process, and further modified to ensure the parties' wide discretion to agree on the terms of authority of the arbitrator and the arbitration process.

The legislation would further benefit by specifically encouraging the use in arbitration cases of what is sometimes referred to as "final offer" selection. Under this method, the arbitrator's authority is confined to selecting between the final offers for resolving a dispute made by each side at the culmination of negotiations. Arbitrators, under this system, have no authority to make an arbitration decision based on their own formulation of settlement terms. Instead, the parties understand that at the end of the collective bargaining process they each must make a final offer containing the best terms on which they are willing to settle the dispute. Both final offers are submitted to the arbitrator, and after hearing both parties and reviewing the nature of the dispute decides which final offer to select.

Final offer arbitration has proved effective in labor and other dispute resolution systems, including in the U.S. Its chief advantage lies in its potentially positive effect on the bargaining process itself. Knowing in advance that failure to negotiate a final settlement will result in a process by which a third party will choose one or the other the final offer creates a powerful incentive for the parties to moderate extreme demands and put forward more realistic proposals to accommodate the needs of both the workers and the employer.

d. Industrial Relations Dispute Courts. The structure and function of Dispute Courts is contained in the following section concerning administration and enforcement.

D. Government Administration and Enforcement

1. Criminal and Administrative Penalties

The penalty provisions of the proposed legislation (Manpower bill, Art. 176 - 207) are excessive and likely to be counterproductive. By emphasizing criminal penalties carrying minimum sentences of imprisonment for even first and relatively minor offenses, the legislation fails to follow the general principle that the penalty should be proportionate to the wrongdoing. Otherwise, government authorities may be deterred from pursuing labor law violations, or may pursue selective enforcement against disfavored parties. Moreover, attempts to prosecute parties who violate the law are likely to lead to protracted legal proceedings because those parties have an incentive to take every possible step to avoid the harsh penalties they face. In general, the better course is to establish penalties on an incrementally stepped basis, beginning with orders to cease and desist from engaging in the prohibited activity coupled with civil fines, then increasing fines for second or third time violations by the same party, followed by criminal prosecution only in cases of egregious violations.

One example concerns unlawful discrimination based on union activity (including the prohibition against campaigning against union formation), as described above. This carries a criminal penalty with a jail sentence of between one and five years, together with an enormous fine. (Act No. 21, Art. 43) While interfering with protected union activity is a serious matter, the bill should be amended according to the principles of proportionality and incremental penalties described above.

Another example of a disproportionate penalty is that a registered union (or an entire federation or confederation) may be entirely dissolved on the basis that its “administrators and or members” are found guilty of committing a crime in the name of the union that “harms the security of the State.” (Act No. 21, Art 38) This leaves open the possibility that a single union member, acting entirely without the authority, or knowledge, of any union officials, could bring down an entire union for acts that the legislation fails to specifically define.

Similarly, the legislation authorizes cancellation of a union’s registration, and freezing or even eliminating an enterprise’s permission to operate, for failure to establish a Bipartite Cooperation Institute (a forum for employer/worker communication, consultation and deliberation for solving manpower problems, as described above), or to follow unspecified Ministerial decrees concerning the institutes. (Manpower bill, Art. 207, referencing Art. 103). This punishment is excessive. It should be deleted entirely and replaced with a civil fine provision.

Finally, there are excessive penalties against workers concerning strike activity. Workers who interfere with co-workers’ right to strike, or their right to refrain from striking, are subject to criminal prosecution and imprisonment for between one and four years and a fine of between one hundred million and four hundred million rupiah. (Manpower bill, Art. 204). In the absence of serious violence creating harm to individuals, or serious property damage, there would seem to be no proper place for such harsh penalties.¹⁹ In other countries, including the U.S., engaging in a strike unlawfully (such as in violation of a no-strike clause contained in a collective bargaining agreement) entails no criminal penalties, but leaves striking workers without legal protection. Thus, they are subject to dismissal at the discretion of the employer. A less harsh penalty would be to permit the employer to hire temporary replacement workers for the duration of an unlawful strike.

2. Industrial Relations Dispute Courts

The Disputes bill (Art. 53 - 101) proposes a major and unprecedented transfer of the existing labor relations dispute settlement system from the central and district manpower agencies to the judiciary. Whether this transformation will yield a more independent, transparent, expert, efficient, and equitable system of labor relations administration and enforcement than the present system²⁰ is open to question.

Industrial Relations Dispute Courts consisting of judges and ad hoc judges are to be “immediately” established, by presidential decree, at each district court in each provincial

¹⁹ Previous versions of the Industrial Disputes bill (e.g., the August, 2000 draft, Art. 78) also provided criminal penalties for engaging in strike activity while a dispute is subject to bipartite negotiations, mediation, or to settlement by a judicial industrial tribunal. This provision is omitted in the current draft bills, and, in the absence of an explanatory statement, it is not entirely clear whether the omission is intentional, or a drafting oversight.

²⁰ The current system, in brief: If the parties fail to reach a negotiated settlement, and decline arbitration, either one or both parties may advise the local manpower agency and mediation commences. Failing a mediated settlement, the dispute is referred to the Regional Committee for the Settlement of Labor Disputes (P4D), which is empowered to issue a binding decision. Appeals are available to the Central Committee for the Settlement of Labor Disputes (P4P), which are subject to cancellation by the Minister for Manpower, and to judicial appeal to the Administrative and higher courts. The system has been discredited by lack of public confidence based on systemic problems, including long delays, lack of competence, unwarranted MOMT interference, cumbersome and excessive control, bias against one or another party, an unwieldy appellate process, and corruption.

capital city and at the Supreme Court, with jurisdiction over virtually all types of labor disputes – initial jurisdiction of interest and employment termination disputes, subject to judicial appeal; and final jurisdiction, not subject to appeal, over rights and inter-union disputes. (Art. 53 - 55, 78).

At the District Court level, the Dispute Court is to hear and decide dispute cases by a three-member panel consisting of a judge and two ad hoc judges, under the Law of Civil Procedure (Art. 79, 80). Stated (but apparently unenforceable) time limits are provided for each stage of the Dispute Court process. The authority to appoint, and to dismiss, the Dispute Court judges in the District Courts is made independently by the Chief Justice of the Supreme Court. (Art. 56). Ad hoc judge appointment (and dismissal) authority, on the other hand, is more dispersed. Under the bill, their appointment is to be by “Presidential Decision based on the proposal of the Chief Justice of the Supreme Court through Minister.” And in order to be proposed by the Chief Justice, candidates must first be “nominated by entrepreneur’ and workers/laborers’ organizations with approval of Minister.” (Art. 58). They are to have a five year term of office, subject to one renewal. Similarly, appeals in interest and employment termination dispute cases are to be heard and decided by panels consisting of a Supreme Court Justice and two ad hoc justices, established and supervised by the Chief Justice (Art. 99).

Enacting a sweeping transfer of labor relations regulatory authority away from the present system is an understandable and appealing concept. Engrafting it on to the existing judicial system as proposed in the Disputes bill, however, raises a number of troubling issues.

First, is the question of expertise. Modern labor relations systems have learned that the issues and rules they must deal with inevitably become quite complex, and that specialized expertise on the part of regulatory officials is essential to deal with them effectively and flexibly in response to developments in workplace practices and the needs of workers, unions, and employers over time. While the bill calls for expertise and experience in labor relations on the part of ad hoc judges, no such requirement is proposed for the judges themselves, reflecting that the proposed new Disputes Courts are merely incorporated into the existing judicial institutions rather than established as separate “Labor Courts” as exist elsewhere.

Second, is the question of legalistic procedures. Specialized labor tribunals in other countries best function in the interest of the parties and the public with more flexible dispute resolution methods, and with more flexible and informal rules and procedures, than typically attend court proceedings. The application of standard judicial procedures and rules are likely to take too long to meet the need to promptly resolve labor disputes before they deteriorate to the point of creating serious problems for workers’ morale and business productivity. Moreover, a needlessly legalistic system may work to the disadvantage of workers and labor unions, generally less able than employers to bear the expense of employing lawyers and other costs of litigation.

Third, is the related question of the Dispute Courts’ potentially overwhelming caseload. As noted above, all rights and inter-union disputes are first taken to court without intervening mediation, conciliation or arbitration. And in light of the enormous range and detailed provisions of the myriad labor protective provisions contained in the Manpower bill, there is a potential risk of serious backlogs in the courts. And employment termination disputes, which have constituted an extraordinarily high proportion of cases under the present

P4D Committees, may compound that risk. Interest disputes, any one of which can involve large numbers of workers, may fail to receive the priority attention they require. The need to redirect legislative emphasis and incentives toward privately negotiated dispute settlement with minimal governmental involvement and interference, discussed above, is especially pertinent here.

Moreover, it also seems unnecessarily burdensome on government administration and enforcement, as well as being needlessly intrusive, to require that employers secure advance approval from the Disputes Courts in every employment termination case that is not resolved through collective or individual negotiations. Even where, as in the Manpower bill, employment termination decisions must be based upon valid reasons, advance approval is not required by international labor standards and is contrary to most modern labor codes.²¹ If advance approval is to be retained in the bill, the suggestion here is to confine it to especially vulnerable categories of employees, such as employees acting in their capacity as union leaders. Or approval might be required (or at least a requirement for advance notice to union representatives and government officials) in the case of mass layoffs. Enforcement of the requirements and limitations on individual dismissals would then be based on complaints filed by individual employees or their union representatives.

Fourth, is the question of independence, integrity and public confidence in the system. Labor relations regulation is an important and pervasive aspect of civil society, with a substantial potential contribution to the development of democratic institutions generally, to social and political stability, and to economic growth. Instilling public confidence is jeopardized to the extent that the proposed new Dispute Court system is not structured to be fully independent from the existing labor relations system, perceived by many as inept, slow, biased, and too often subject to corruption. That the same perception exists with respect to the existing judicial system further threatens public confidence.

The lack of full independence is exemplified by the degree of Ministerial influence over the appointment of ad hoc judges as contained in the Dispute bill (Art. 58). There are five actors in the appointment process – employers, unions, the President, the Chief Justice of the Supreme Court, and the Manpower Minister. Nominations are to be made by the employers and unions,²² and the actual appointment is made by the President based on candidates proposed by the Chief Justice. Standing in the middle of this process is the Manpower Minister. The Chief Justice may propose only those candidates approved by the Minister, and the bill contains no criteria for the Minister to follow. Such unlimited veto power could be exercised in an all-controlling manner.

²¹ There are other examples of arguably excessive or unnecessary employment termination and severance pay provisions in the Manpower bill that are not required by international labor standards and are generally not so restricted in modern labor codes, including (i) requiring continued employment for workers prosecuted by law enforcement authorities for commission of a crime (Art. 154(3)); (ii) requiring severance pay for workers dismissed for serious misconduct (implicit in Art. 151); (iii) not permitting the termination of individual work agreements in cases of (a) unjustified refusal or failure to perform assigned work, or (b) employment redundancy caused by economic downturns or other structural reasons (both implicit in Art. 61); (iv) prohibiting probationary periods in fixed term work agreements (Art. 58); and (v) mandating severance pay for voluntary resignations (Art. 157).

²² The Disputes bill lacks any provision to resolve conflicts over nominations among employers or unions, which should be addressed in light of complaints of domination of the existing P4D/P4P system by FSPSI.

Although there are potential statutory changes that could provide partial solutions to the serious problems associated with engrafting a labor dispute court system on to the existing judicial system, consideration should be given to solving these problems by placing labor relations regulatory administration and enforcement in an entirely new independent agency, as described below.

3. Independent Labor Commission

An alternative institution for administration and enforcement, for consideration by unions, employers, and the labor legislative framers, is the kind adopted in modern labor codes, and, in recent years, by the government of Indonesia for governing *other* important and specialized matters – an independent regulatory commission. An independent *Labor Commission* could be established by legislation along the lines of the Competition Commission²³ and the Consumer Protection Commission²⁴ as examples.

While the structure and functions of an independent regulatory commission for labor relations would necessarily be designed to suit the particular requirements in the field of labor, the policy rationale would be virtually identical. That is, to break away from the limitations and deficiencies of existing ministerial and judicial bodies by vesting jurisdiction of a highly specialized subject in an institution designed to exemplify independence, transparency, consistency, speed and accountability. The general characteristics of such a Labor Commission would include:

- Independence. This means to ensure against bias, or the perception of bias, and refers to independence in two respects. First, independence from the unions and employers that come within its jurisdiction for regulation. And second, independence from political influence by Ministries or other parts of government.
- Independent Appointment Process. Appointments of Commissioners would be made by the President, subject to approval by the Peoples Legislative Assembly, for a fixed term, such as five years, with the terms staggered to promote consistency in the administration and enforcement of the law. Expertise based on education, training and experience would be the principal criterion for appointment. Dismissals would be based on limited grounds, such as permanent illness, and exclude any grounds based on subjective judgment of a Commissioner's performance in office. The number of Commissioners would be stated in the law, such as three, or five.
- Expertise. The Commission would be authorized to employ staff necessary to carry out its investigative and adjudicatory duties, including technical experts and specialists in labor matters.

²³ Established by Law No. 5, 1999, Concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which was enacted to promote freer competition, consumer protection, and anti-corruption efforts.

²⁴ Established by Law No. 8, 1999, Concerning Consumer Protection, which was enacted to protect the interests of consumers and business entities in a fair economy.

- Rule Making Authority. The Commission would be authorized to issue, and revise, implementing regulations from time to time for the purpose of explaining, interpreting, and filling gaps in the law, in order to promote consistency and a clear understanding of the rights and responsibilities of workers, unions and employers under the applicable law.
- Investigative Authority. The Commission would have the power to investigate complaints and reports of violations of the law through staff employed for that purpose, to conduct investigative meetings with the affected parties (avoiding formal, adversarial hearings), and to call and question witnesses, and obtain documents, to determine the pertinent facts in each case. It could be authorized to direct the parties to return to bargaining, to utilize mediation, and other steps to promote settlement, but would not be authorized to mandate the terms of a collective labor agreement.
- Adjudicatory Authority. The Commission, following the investigation, and a determination that one or more parties has acted in violation of the law, would issue a decision on its findings, conclusions, and remedies to be imposed. This authority would be exclusive, and not subject to approval by other parts of government. Its remedial power would include the issuance of orders directing specific actions for compliance with the law, and subsequent reports from the responsible party as to its compliance with the order, and administrative fines within amounts specified in the law. Its decisions and orders would be subject to judicial review upon appeal by a losing party, but that review would be restricted to the question of whether the Commission had acted within the law, and would not include a review based on the merits of the Commission's exercise of its authority.
- Accountability. The commission would be responsible to the President and the Peoples Legislative Assembly, and, through publication of periodic reports on its operations, the parties and general public.
- Research and Surveys. The Commission would undertake, and make recommendations for other public and private institutions to undertake, studies and surveys on labor relations practices and compliance with the applicable laws and regulations. This would address the need for better information on actual labor relations practices, including union formation, strike and lockout activity, collective bargaining and collective bargaining agreements, dispute resolution through mediation, conciliation and arbitration, and the effectiveness of the Commissions operations and rulings.
- Tripartite Consultation. The Commission, the parties, and the government would mutually benefit from periodic and open consultations meetings to discuss matters of administration of the laws and regulations (but not, of course, actual disputes that are, or may be, before the Commission for investigation and adjudication). Thus, the Commission would hold such meetings with participation by employer organizations, unions, including their federations and confederations, and the Manpower and other interested Ministries.

E. Conclusion

In light of the fact that labor unions, employers and government officials in Indonesia have had essentially no direct experience with a labor relations regulatory system that is consistent with modern labor codes and international standards, and with concepts like good faith collective bargaining that place more emphasis on the actions of the parties themselves than on governmental direction and control, it is hardly surprising that crafting a comprehensive new labor relations code has proved to be a great challenge. The history of legislating labor relations regulation in most countries is replete with comparable experience.

The observations and suggestions in this paper are intended to provide assistance as the legislative process moves forward, knowing that in the contentious field of labor relations meeting the desires of all interested parties is unattainable. Achieving consensus on core principles, however, should be the goal. Indonesia seems far from such consensus. The hallmarks of a modern system described at the outset of the preceding analysis are intended as a guide in that direction.

International experience may well provide useful lessons as Indonesia struggles to reform its regulatory framework for labor relations consistent with international labor standards and its current stage of political, social and economic development. The labor codes of other countries contain some pertinent examples of rules on union formation, collective bargaining, strikes and lockouts, dispute settlement, and governmental administration and enforcement that help to promote and maximize the voluntary conduct of labor relations, as opposed to Indonesia's long history of governmental control.

The challenge is not so much to satisfy all parties as it is to create a framework for labor relations that convincingly replaces the repressive system of the past with one that at once respects worker rights and promotes a dynamic labor market that can underpin sustained economic growth in a global, competitive market economy. Any suggestion that Indonesia should perpetuate its interventionist labor relations system is untenable.

Permitting the rise of independent unions which Indonesia recognized and enacted two years ago as a fundamental right is, and should be, irreversible. The question is how to take the next step of translating that right into effective workplace representation and a rational framework for collective bargaining and dispute settlement. That the pending legislation provides virtually no protection or guidance specifically concerning the union role in representing workers in rights disputes is but one illustration of the need for the legislative framers to make a sharper break from the nation's past and apply more lessons from modern labor codes. Otherwise, the potential for enhancing both productivity and the dignity of workers at the enterprise level will be squandered.

The experience of other nations in developing modern labor codes also carries lessons about the limitations facing the best-intentioned reform efforts. One of them is that achieving consensus on comprehensive labor reforms is a considerably more difficult undertaking in the face of a weak economy and labor market. When job opportunities are expanding, capital investment is rising along with profits, consumer demand and exports are on the increase, and real wages are rising, labor reforms have a far better chance of being accepted by the stakeholders.

In the absence of a present consensus, and in the face of economic weakness, perhaps a more attainable option would be to take reform in stages, taking up only the most essential union representation and labor dispute issues as the first order of business, and leaving others for subsequent stages. Another lesson from international experience is that the industrial relations stakeholders in Indonesia must have confidence in the system by which they must conduct their relationships on a day to day basis, and that system must take into account Indonesia's unique political, social and economic circumstances. Other national labor codes can serve only as a guide.

The suggestion here, borrowing an example from South Korea in the late 1980s, is to address industrial relations reform by means of a reconstituted tripartite body.³² In order to acknowledge the important contribution of industrial relations reform to civil society and democratic institution building, the reform issues might best be addressed by a new independent and expert Employment Policy Commission. It would be made an independent body by having members appointed by the President. Its members would be representative of labor, employers, and the public, to include distinguished experts from universities and research organizations. It would be given sufficient support to employ a small staff. It also would formally engage government participation, to include, in addition to the Ministry of Manpower and Transmigration, the other ministries and institutions responsible for economic policy.

Indonesia's experience since the enactment of Act No. 21 of 2000 liberalizing the rules on union organizing and legitimizing independent labor unions, coupled with international industrial relations experience, may suggest a framework for setting priorities and a possible agenda for the initial stage of legislative reforms. It seems appropriate to concentrate on issues concerning the proliferation of labor unions, the need for collective bargaining stability, the absence of clear rules on strikes, and excessive dispute settlement interventions. Thus, for example, the subjects for priority consideration might include:

- Union Representation.
 - Permit the registration of unions whose purpose is worker representation and collective bargaining, and require union independence from employers, in order to exclude sham unions.
 - Require plurality (but not majority) representation for multi-union collective bargaining on a coalition basis, such as a 20 percent requirement, so as to minimize conflicting bargaining demands and promote bargaining stability without unfairly inhibiting emerging independent unions.
 - Permit union workplace access for organizing purposes, limited to reasonable times and places so as not to disrupt business operations.

- Collective Bargaining.
 - Encourage bargaining and cooperative relationships at the enterprise level, but with higher level bargaining permitted on a consensual basis.

³² The Tripartite Cooperation Institutes provision contained in the pending legislation (Manpower bill, Art. 104) has a long line of antecedents. *See*, for example, the Minister of Manpower decision on the Indonesian Tripartite Cooperation Body (No. KEP-258/MEN/1983).

- Prohibit employers and unions from interfering with the selection of the other's bargaining representative.
 - Define the scope of bargaining subjects as related to wages, hours, working conditions and other terms of employment, excluding managerial decisions.
 - Clarify and make explicit that employers and unions have an obligation to bargain in good faith, subject to administrative penalties, and, at the same time, that reaching agreement is not mandatory.
- Strikes.
 - Encourage collective labor agreements to require exhaustion of dispute settlement procedures, such as mediation for a minimum period, at which point strikes are permitted.
 - Resolve the ambiguity in the pending legislation so as to confirm the "no work, no pay" principle, consistent with international labor standards and virtually all national labor codes.
 - Permit strikes and picketing in support of collective bargaining demands (interest disputes), but exclude sit down strikes and slowdowns that impede business operations or safety.
- Dispute Settlement.
 - Convert the mandatory governmental arbitration of disputes without the mutual consent of the parties to a voluntary process based on mutual consent, in order to eliminate the imposition settlement terms by the actions of a single party to a labor dispute.
 - Require exhaustion of bargaining, and mediation efforts, for a certain period, but all further governmental dispute settlement procedures, including final and binding arbitration, would be only with mutual consent of the parties.
 - Initially retain existing central and district MOMT administration, but change procedures of the P4D and P4P committees to increase independence from the Ministry, including elimination of MOMT veto prerogatives, and reform the appointment process to fairly represent the recommendations of employers and independent unions.
 - Permit employers unions to choose from among qualified mediators.

Resolving these issues and creating a set of clear and consistent regulations for them that are acceptable to the stakeholders would constitute great progress. Other matters are more appropriate for longer-term consideration. One example suggested by international experience would be to replace industrial relations administration and enforcement by MOMT (or by the judiciary as proposed by the pending legislation) with a specialized, tripartite, independent commission, structured on a Central and District government basis consistent with the laws and regulations concerning decentralization. Many more can be gleaned from the legislative analysis in the preceding pages, and others would no doubt be highlighted following the experience of adopting the initial set of reforms.

APPENDIX A: United States

As a preliminary matter, it should be noted that the basic employer-employee relationship in the U.S. labor law system, and particularly in its regulation of industrial relations, is considerably different from and less regulated than that of most of other countries. It stands in sharp contrast to the labor laws of countries comprising the European Union, and, for that matter, Indonesia.

Individual employment contracts in the U.S. are the exception rather than the general rule. Employers are remarkably free to institute temporary or permanent job reductions by terminating employees without incurring responsibility for obtaining advance governmental permission, or for legally mandated payments to the displaced workers.²⁵ Layoffs can occur for such reasons as an economic decline in business or the need to change the mix of skill requirements of employees. In such cases, employers generally either terminate the employees, or induce their voluntary resignation or retirement by voluntarily offering severance pay and a wide array of other types of financial incentives.²⁶ The employer's motivation or purpose in reducing the number of employees is legally irrelevant, as long as the action does not violate specific employee protective laws such as prohibitions against discrimination on the basis of union activity, or on the basis of such factors as race, religion, nationality, sex, age or disability.

The basic labor relations law, the National Labor Relations Act (NLRA), enforced by the independent National Labor Relations Board (NLRB), primarily consists of rules governing the *conduct* of unions and employers in their workplace relationship, rather than the substantive outcome, which at least partially explains the relatively greater flexibility accorded to employers in the U.S. system.

One industrial relations consequence of this is the inducement to membership that labor unions can offer by promising to demand protections against employer actions that are *not* restricted by law. That helps to explain why the basic features of privately negotiated collective bargaining agreements typically consist of such worker protections. Examples are permitting job termination only for "just cause;" requiring layoffs to be conducted primarily or exclusively on the basis of each employee's employment seniority; adopting measures to mitigate the effects of layoffs, or even to halt them altogether; and placing limitations on subcontracting of work performed by bargaining unit employees. Protected and prohibited

²⁵ Indeed, even the terminology is different. Although the terms "worker" and "employee" have somewhat different connotations in the U.S., they are used interchangeably in this paper. In most countries the term "labor law" refers to all laws governing the employment relationship, while in the U.S. that term generally applies to the regulatory system of laws, regulations and judicial decisions covering unions, unionized workers, and collective bargaining; the term "employment law" refers generally to all other protective laws such as prohibitions on discrimination, workplace health and safety, the minimum wage, and the like. In addition, U.S. usage includes relations between labor and "management" and refers to "labor-management" relations because the distinction is drawn at the supervisory level; elsewhere the distinction is commonly drawn at the ownership level so that the division is seen as being between labor and "capital," or, simply, "employer."

²⁶ In cases of large layoffs of employees, ordinarily done for economic reasons, federal law requires only that sixty days advance notice be given to the employees, to the labor union representative, and to local government.

conduct under the NLRA centers on union representation, requiring employers and unions to bargain in good faith over wages, hours and other terms and conditions of employment, and, subject to certain restrictions, permitting them to engage in economic strikes and lockouts to reinforce their bargaining positions.

1. Union Representation

Under the National Labor Relations Act, employees have the right to organize into labor unions, to join existing labor unions, to bargain collectively through their choice of representatives, and to engage in strikes, picketing and other concerted activities. Employees cannot be required to become full members of a union, but they can be required by the terms of a collective bargaining agreement to pay toward the basic expenses of union representation.

In order to become a collective bargaining representative, a union must be chosen by a majority of employees in an appropriate bargaining unit. The unit ordinarily consists of those employees considered to have a common “community of interest” in the terms and conditions of employment. Common examples are the production and maintenance workers at a manufacturing establishment. Employee support for a labor union is expressed through signed cards authorizing the union to be the employees’ collective bargaining representative.

A union may request voluntary recognition by an employer if the union has received the support of a majority of the bargaining unit employees. If the employer refuses based on doubts about the union’s majority support, the issue is settled by a secret ballot election conducted by the National Labor Relations Board.²⁷ If the union wins the election, the NLRB issues a certification of the union’s status, and the employer then must recognize, and bargain with, the union.

The election ballot may contain a choice among two or more unions if they are competing for representation rights. If necessary, a subsequent “run off” election will be held to determine majority status, because there can be only one union selected to represent a bargaining unit of employees. And once selected and certified as having majority support, the union becomes the lawful representative of *all* employees in the unit. When a collective bargaining agreement is reached, its terms of employment apply to the entire bargaining unit, including employees who did not support the union. The process is referred to as a system of “exclusive representation.”

2. Representation By Other Entities

The United States does not have a statutorily based system of works councils or similar labor-management bodies. Moreover, the law restricts employer discretion in establishing employee participation programs in the workplace, as a consequence of the law’s prohibition against employer domination or support of an employee organization, which is very broadly defined in the NLRA. This prohibition, enacted as a major part of the original 1935 law, outlawed and effectively eliminated sham company unions.

²⁷ A union also may go directly to an NLRB conducted election, based upon authorization cards signed by at least thirty percent of the bargaining unit employees.

3. Collective Bargaining

The most common collective bargaining structure is at the establishment level, with one-on-one negotiating between a single employer and a single union. Other forms are permitted, however, including multi-employer bargaining, industry-wide bargaining, and coalition bargaining. The law imposes a duty to bargain in good faith over wages, hours, and other terms and conditions of employment, but does not compel either party to reach a final agreement. Nor is there any established procedure by which the government may mandate the terms of a labor contract.

Mandatory subjects of bargaining have been established over time through numerous cases brought to the NLRB and the federal courts. Distinctions are made, for example, between management rights to make business decisions, and other decisions, such as subcontracting work performed by the bargaining unit employees, that under some circumstances are subject to bargaining agreement.²⁸ The parties are free to determine the duration of a collective bargaining agreement. The typical contract duration is three years, which normally is also the period before a competing union can challenge an incumbent union for representation rights. Advance notice of the expiration of a labor contract is required to be given to the Federal Mediation and Conciliation Service (FMCS), a separate agency to assist unions and employers in resolving collective bargaining disputes. Its services are provided only upon mutual consent of the parties, and it has no authority to order a cessation of a strike or lockout.

4. Economic Actions and Dispute Settlement

The right to strike, either over rights disputes or interest disputes, is a basic right in the law. Final and binding arbitration of disputes is sometimes utilized, but only by voluntary consent of the parties. Certain types of strikes, such as secondary boycotts where a union attempts to enmesh a neutral employer in the dispute with the primary employer, are prohibited, as are slowdowns and sit-down strikes. Defensive lockouts, and, in some circumstances, offensive lockouts, are permitted. The hiring of striker replacements in interest disputes is also permitted under certain circumstances, and the “no work, no pay” rule applies to strikers. In the case of strikes to protest employer unfair labor practices, the striking workers, by order of the NLRB, are general entitled to reinstatement and lost wages.

Absent unlawful activity by either party during, or immediately prior to a strike, the only governmental intervention may be in the form of an offer of mediation services by the FMCS, which is subject to the mutual agreement. A rare exception is in the event of a work stoppage seriously affecting the national economic welfare, when the government may take steps to suspend the stoppage and impose a temporary “cooling off” period for further negotiations, usually with the assistance of a government mediator.

Strikes over rights disputes that involve breaches of any terms of a collective bargaining agreement are lawful. However, they almost never occur. Such disputes are almost universally settled by a “grievance-arbitration” multi-step procedure voluntarily

²⁸ Common examples of mandatory bargaining subjects, in addition to wages and hours of work, include overtime work, employee dismissals, seniority rights, vacations, union dues deductions, profit sharing plans, retirement and pension benefits, health insurance, health and safety rules, and no-strike agreements for the duration of the bargaining agreement.

agreed to by the parties in their collective bargaining agreements. Arbitration of the dispute is performed by private arbitrators selected by methods agreed upon by the parties. The arbitration award is final and binding on the parties and is enforceable by the courts.

The NLRA defines and enforces certain “unfair labor practices” that are applicable to employers and unions.

It is unlawful for an *employer* or a *union* to interfere in the right of employees:

- To form, join, or assist a union;
- To bargain through their choice of representatives;
- To engage in concerted activity for their mutual aid and protection; and
- To refrain from union or other concerted activity.²⁹
- To discriminate (or, in the case of a union, to cause an employer to discriminate) in hiring or other employment conditions to encourage or discourage union membership.

It is also unlawful for an *employer*:

- To dominate or interfere with the formation or administration of a labor union, or to contribute financial support to it.
- To discriminate against an employee because he or she has filed charges under the NLRA.
- To refuse to bargain collectively in good faith with the bargaining representatives chose by the employees.

It is also unlawful for a *union*:

- To interfere with an employer’s selection of its collective bargaining representatives.
- To cause an employer to discriminate against an employee for nonmembership in the union.
- To refuse to bargain in good faith with the employer.

5. Government Administration and Enforcement

The National Labor Relations Board generally has jurisdiction over labor relations regulation in the private sector as it relates to conducting elections to determine whether there is majority support for union representation, and to enforcing the prohibitions against unfair labor practices. In the U.S. federal-state system of government, exclusive jurisdiction, even as to protective labor laws, is quite unusual. Substantial and overlapping legal authority typically is exercised by state governments. Because of the importance and complexity of industrial relations regulation, and the need for a uniform national system, the law grants exclusive jurisdiction to the NLRB. Public employers are excluded from coverage.

When workers, unions or employers file unfair labor practice charges with the NLRB, the office of the General Counsel investigates, and if there is merit to the charge, it then prosecutes the charged party in a trial before an administrative law judge employed by the

²⁹ Employee protections under the NLRA extend beyond union sponsored activity to other collective actions taken by employees that relate to working conditions, such as a refusal to work because of hazardous conditions at the workplace.

NLRB, whose decisions are not final. Appeals from the administrative judge's decision may be made to the five Member National Labor Relations Board, which either affirms, reverses, or modifies the judge's decision. Remedies can include cease and desist orders, job reinstatement, and back payment of wages. Appeals may be taken to one of the 12 federal circuit courts of appeals, and (though rare in practice) to the U.S. Supreme Court.

APPENDIX B: New Zealand

The design of an industrial relations regulatory system necessarily entails, or at least implies, policy choices concerning the desired outcomes on key issues – among these are the extent of union representation of workers, the role of collective bargaining, methods of labor contract enforcement, and how disputes are to be resolved. These issues, in turn, involve decisions concerning the balance to be struck between governmental intervention and control versus reliance on the parties themselves. The extremes of these choices are illustrated by New Zealand's experience over the past 20 years.

Before 1987, New Zealand's industrial relations system was tightly controlled in what has been called its "Arbitration Era." Private sector unions were supported and protected by law, which gave them monopoly bargaining rights. For much of this period union membership was compulsory, as a condition of employment. First it was compulsory by law, and later as a matter of union-employer agreement, although the accepted practice was that the employers always agreed. Strikes and lockouts were outlawed. Disputes that could not be settled by negotiation were supposed to be referred to the Court of Arbitration (or its replacements) for settlement by compulsory arbitration. This included interest disputes as well as rights disputes. In practice, however, strikes occurred quite frequently.

Then, with a change of government, and major economic liberalization policy changes, came the Labour Relations Act of 1987. Unions still received protection, having monopoly bargaining rights, but had to have a minimum size of 1000 members (compared to the original seven) to remain registered, which led to a sharp decline in the number of unions. Union membership remained compulsory by agreement ("union shop" rather than "closed shop," in that workers had to join after commencing work). Interest arbitration was no longer provided by the government, and, with certain restrictions, strikes and lockouts were legalized. Collective bargaining, free from an overarching arbitral body, was encouraged.

Only four years later, in the face of rising unemployment and declining union strength, this law gave way to the Employment Contracts Act of 1991. It was widely viewed as favoring employers at the expense of unions. It brought an end to compulsory union membership, outlawing both union shops and closed shops. Worker protection against "unjustifiable" job termination, formerly applicable only to union members, was extended to non-union workers as well, thereby eliminating one of the advantages that unions had to offer. Lawful strikes were confined to the negotiation of a collective bargaining agreement, and were prohibited in the case of disputes involving union membership, personal employee grievances, the interpretation of labor agreements, or attempting to obtain multi-employer bargaining. Employers could suspend pay for strikers, as well as for non-striking employees whose work was not available because of a strike, and no wages were payable during a lawful employer lockout.

Still another major change in industrial relations regulation ensued from the 1999 election of the new Labour Alliance Coalition – The Employment Relations Act 2000 ("ERA"), which came into effect on October 2, 2000. The new law repealed the Employment Contracts Act and brought New Zealand's system much closer to mainstream modern industrial relations codes. There was no return to the earlier system of compulsory arbitration and compulsory union membership. Instead the Act is centered on promoting

collective bargaining in good faith, intended to be the principal means of redressing the inherent power imbalances between workers and employers. It also has the stated purpose of promoting observance of the ILO conventions on Freedom of Association (No. 87) and on the Right to Organize and Bargain Collectively (No. 98). The remainder of this Appendix addresses key features of the new Employment Relations Act.

1. Union Representation

Under the ERA employment relationships are based on both individual and collective contracts, which may coexist (previous law excluded employees with individual employment contracts). Individual employees and employers may choose to conduct negotiations for employment contracts on their own behalf, or they may authorize any other person or organization to do so on their behalf. Whether to choose union representation is entirely voluntary on the part of employees, and employers are required to recognize a representative authorized by an employee or employees.

Where individuals choose not to be represented by unions, the legislation addresses the issue of inherent inequality by requiring employers to provide them with relevant information before being hired and give them the opportunity to seek independent advice before concluding an individual agreement. One of the ERA's novel aspects is to provide that where there is a new employee in a workplace in which an applicable collective bargaining agreement is in force covering the new employee's work, for the first 30 days the employee automatically will be covered by the agreement and receive the same terms and conditions of employment. If the employee subsequently decides not to join the union concerned, the individual is then free to negotiate an individual employment agreement. Discrimination against employees on the basis of union membership, or non-membership, is prohibited. Subject to individual employee consent, employers are required to deduct union dues.

The ERA establishes a union registration system and grants registered unions bargaining rights together with rights of access to workplaces. To register, a union must have more than 15 members, and provide a statutory declaration that it complies with the requirements of the Act, that its rules are democratic, and that its purpose is to promote members' collective employment interests. The Act requires the statutory declaration to stipulate that the union is independent of, and is constituted and operates at arm's length from, any employer.

2. Representation By Other Entities

There appears to be no provision for works councils or comparable labor-management institutions.

3. Collective Bargaining

In contrast to the previous Employment Contracts Act, the philosophy of the new ERA is that the employment relationship, as an on-going transaction, is one that is characterized by "good faith" conduct, and that unions play an important role, and should play an important role, in the employment relationship. The requirement of good faith conduct by unions and employers permeates the ERA, particularly the provisions governing collective bargaining. In this regard, it is similar to the duty to bargain in good faith found in

the United States system, where the concept is similarly difficult to define because the circumstances underlying collective bargaining are unique in each instance.

The establishment and maintenance of good faith relationships are meant to underpin the employment relations regime in New Zealand, for both collective and individual arrangements. At the most basic level, "good faith" means that unions and employers are not allowed to mislead or deceive each other or employees, and that discrimination against employees on the basis of their union membership, or non-membership, is not permitted.

Included in the Act's criteria and requirements are that the union and the employer must endeavor to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner. The union and the employer must meet each other, from time to time, for the purposes of the bargaining, and must consider and respond to proposals made by each other. They also must recognize the role and authority of any person chosen by the other, and not do anything to undermine the bargaining or the authority of the other in the bargaining. Further, the union and employer must provide to each other, on request, information that is reasonably necessary to support or substantiate claims, or responses to claims, made for the purpose of bargaining. In cases where there is a need to keep such information confidential, the Act encourages the parties to agree on an independent reviewer to protect the information.

The ERA recognizes that, despite the best good faith efforts by both sides, and even with the assistance of expert mediation, a bargaining impasse may occur. In such cases the Act does not require that a collective bargaining agreement be concluded.

Only registered unions may negotiate collective bargaining agreements, and the agreements apply only to union members and to all members of the union whose work falls within the agreement's coverage clause. Multiple unions are permitted in a single establishment, and provisions in the Act contemplate that such multiple unions will engage in coordinated bargaining at the request of the employer. The duration of collective bargaining agreements is specified as the earlier of their expiration date, or three years. However, upon a union's initiation of bargaining before the expiration date, an agreement automatically continues in force until the earlier of its replacement through successful bargaining, or the passage of 12 months.

4. Economic Actions and Dispute Settlement

The ERA carries over some of the previous limitations on union strike and employer lockout activity.

Strikes and lockouts in furtherance of bargaining objectives are permitted only if either the collective bargaining agreement has expired, or the parties are bargaining for the first time and more than 40 days have elapsed since the onset of negotiations. It is noteworthy that strikes are not permitted during the life of a collective bargaining agreement that is in force. Instead, disputes over issues arising under existing labor contracts are to be resolved through the dispute resolution procedures of the Act. Moreover, under limited circumstances, the new Employment Court (See Section E below) may suspend otherwise lawful strike and lockout rights in the interest of peaceful dispute resolution.

Strikes in support of personal employee grievances continue to be prohibited. However, the Act eliminates the prior prohibition against strikes in pursuit of multi-employer contracts across an entire economic sector.

On the divisive issues of sympathy strikes, secondary strikes and boycotts, and strikes over social, economic or political causes, New Zealand has come down against them in the ERA. None is permitted. Sympathy strikes are those where employees of one employer refuse to work in support of employees of a different employer who are engaged in a labor dispute. An example is refusing to cross the picket line set up by another union.

A secondary strike or other industrial action is intended to force a second, neutral employer to refrain from doing business with the employer with which the union has a primary dispute. The secondary employer, for example, may be the manufacturer of products for which the supplier of critical parts is the primary employer in an ongoing labor dispute. The union's purpose in picketing the secondary employer is to cause that employer to put pressure on the primary employer to settle the dispute favorably to the union.

Although the Act similarly bars strikes over social or political causes, this prohibition presumably extends only to union industrial action directed against the employer, but not to the right of workers or their union representatives otherwise to participate in support of or opposition to social or political causes. Notwithstanding contrary views of the International Labor Organization views on the meaning of Conventions 87 and 98, New Zealand appears to have adopted a policy of insulating employers from union economic actions where the targeted employer has no direct control over the issues in dispute.

Strikes and lockouts in "essential services" affecting the public welfare are subject to certain restrictions, including a 28-day advance notice requirement, but only members of the military and the police are specifically barred from all strike activity. Instead, their labor disputes are subject to arbitration.

In order to continue business operations, employers have a limited right to use their other employees to perform the work of strikers, but only for the duration of the strike. The law expressly permits employers to transfer other, non-striking employees to perform the work of strikers, and to hire new employees as necessary for reasons of safety or health.

5. Government Administration and Enforcement

The thrust of the Employment Relations Act is to emphasize that the parties themselves are primarily responsible for the conduct of industrial relations activities; that the principal role of government is in setting basic rules for that conduct; that governmental enforcement actions are to be carried out through informal, speedy administrative proceedings by an expert and independent forum; and that legal proceedings are to be quite limited.

As the "good faith" requirement is central to the Act, its counterpart is the law's emphasis on the mediation of industrial disputes, by which the government intends to minimize the need for judicial intervention. Mediation is strongly encouraged and requires that for most disputes mediation will first be undertaken by the parties. Upon agreement of the parties, a mediator may issue a final, binding and enforceable decision resolving a labor dispute. The Department of Labour contracts out specialist mediation services.

Administrative enforcement is vested primarily in a new Employment Relations Authority. Its jurisdiction is quite wide, encompassing industrial relations issues, personal grievances, and violations of wage and other employee protective laws. Its exclusive jurisdiction encompasses disputes over the interpretation, application, operation or breach of employment agreements, complaints of unfair bargaining and other breaches of the Act's "good faith" obligations, personal grievances, recovery of wages, strike and lockout matters, and compliance with union rules and the rules for union registration. As in the United States, the law prevents the Authority from varying, or canceling, any term of a collective bargaining agreement, or otherwise fixing terms and conditions of employment. Only by mutual agreement of the parties can arbitration by a third party fix wages, hours, or other terms and conditions of employment.

The law is designed to emphasize informal procedures by the Authority and to minimize legalisms and resort to the judiciary. The Authority carries out "investigative meetings" rather than adversarial "hearings," and the Act provides that it should operate free of any strict procedural requirements, and free of most forms of judicial supervision. The Authority is required, prior to investigating any dispute that comes before it, to consider whether the parties have attempted mediation, and, if not, to direct the parties to mediation.

In addition to creating the Employment Relations Authority as an independent, expert forum, the ERA similarly establishes a new specialized Employment Court. Its principal functions are to decide questions of law, to issue compliance orders, and to determine applications for injunctions directing parties to take, or to refrain from, actions that are required, or prohibited, by the Act. It has limited jurisdiction to review decisions and orders of the Employment relations authority. Like the Authority, the ERA directs the Employment Court first to ensure that mediation efforts have been made by the parties to a labor dispute.

Also like the Authority, the ERA precludes the Employment Court from canceling or varying a labor agreement. It may, however, in order to induce the parties to settle a dispute over the interpretation or application of a labor agreement, (i) suspend some aspect of an agreement, (ii) direct the parties to reopen bargaining as to that suspended part, (iii) direct the parties to mediation; and (iv) determine whether the parties in dispute have the right to strike or lockout weapons while the resumed bargaining takes place.

Finally, a party dissatisfied with a decision of the Employment Court has a right of review of that decision before the Court of Appeal. That review, however, in deference to the expertise of the specialized Employment Relations Authority and the Employment Court, is limited solely to questions of law.

Appendix C: Chile

During the 17-year period that Chile was governed by a military regime, it implemented substantial changes in the country's employment laws intended to weaken union influence, give employers greater flexibility, and encourage economic growth. Since 1990 and the restoration of democratic government, there have been a number of further changes, some designed to restore union protections. The latest of these took effect in December 2001.

Chile's labor law, including its industrial relations system, in many respects represents a quite modern code in that it incorporates many provisions detailing rules and procedures that are missing, or far less adequately drafted, in the labor codes of many other countries. This is not a judgment on whether it is more favorable to one side or another. Indeed, Chile's employee protective provisions are more favorable to workers than those of many other countries, including the U.S. Rather, Chile's labor laws are commendable for promoting legal clarity and certainty. That reduces the burden on governmental administration and enforcement, and has the advantage to both employers and unions of greater cost predictability.

Chile's most recent labor law changes include restrictions on the number of unions a single employee may join at a single employer, new prohibitions against terminating employees for union membership, facilitating the formation of unions and promoting collective bargaining by freeing unions from government regulation of their internal organization, and permitting unions to be structured along geographic as well as functional lines.

1. Union Representation

The unionization of employees in Chile is quite different from the process of unionization in the United States. Unlike unions in the United States, where a union is certified to represent all employees in a defined bargaining unit regardless of whether they are members of the union, in Chile, unions represent only those employees who are members. Thus, more than one union is permitted in the same workplace.

When a sufficient number of employees become members of a union at a particular company, a union is formed in that workplace and may negotiate with the employer for a collective labor contract covering its members. Enterprise unions may be formed on the following basis.

- In companies with 50 or fewer employees, a union may be formed with a minimum of eight employees, provided that at least 50 percent of employees are represented.
- In companies with more than 50 workers, a union may be formed with at least 25 workers, provided that they represent at least 10 percent of the employer's employees.
- If an employer has several places of business, a union may be formed with at least 25 workers at each site, provided that they represent at least 40 percent of the employees at each location.
- In companies with 250 or more employees, a union may be formed regardless of the percentage of employees represented.

The required number of employees must assemble before a representative of the Labor Ministry, who polls the assembled employees to verify that the required degree of support for the union exists, and the employees vote their approval of the union's by-laws and board members. The Minister then certifies the results, and the union must inform management of these proceedings within one working day. The Labor Inspectorate enters the documents in the official union register, thereby certifying the union. Unions may form federations and confederations.

The formation of a union is a matter left entirely to the discretion of employees. An employer may neither interfere with its employees' right to form and join a union nor require employees to form or join a particular union. Chilean law establishes a right on the part of each employee to join, refrain from joining, or withdraw membership from any union or labor organization, and membership in a union cannot be required as a condition of employment. If union members adopt a resolution approving the amount of union dues, the employer must deduct the amount from the members' wages upon the request of the union or the employee. A union may not engage in a strike or other economic pressure against an employer while organizing the employer's employees.

2. Representation By Other Entities

Employees who do not wish to form a union may nonetheless elect a representative, known as a "staff delegate." The employees who wish to be represented by a staff delegate must fulfill the representational requirements applied to enterprise unions as to the number of employees required, and must not be affiliated with any union. Like union directors, staff delegates serve two-year terms and are the means of communication and negotiation between the represented employees and the employer. Staff delegates may also represent their workers before government labor authorities.

3. Collective Bargaining

Generally, an employer has a duty to bargain with any union of its employees that has met the legal requirements for establishing a union. However, employers who have been in operation for less than one year and employers with fewer than 16 employees are exempted from collective bargaining. In addition, certain classes of employees are not entitled by law to engage in collective bargaining, although they may form or join a union, including apprentices, employees hired for a particular task, and temporary employees.

An employment contract may also exempt other classes of employees from bargaining, although they, too, may join or establish a union. These include managerial employees, employees authorized to hire or fire employees, and upper-level employees with decision-making authority as to policies or processes of production or commercialization.

The parties may not negotiate limits on management's right to administer and organize the company, including the use of machinery and various forms of production, nor may the parties negotiate any matters that are unrelated to the company. Union security clauses, such as provisions requiring union membership as a condition of employment or requiring employees to join the union within a certain time period after being hired, are not permitted.

Although Chilean law generally restricts the scope of collective bargaining to a single employer and its unions, collective bargaining may take place on a multi-employer or multi-

union level as agreed to by the parties. Collective bargaining negotiations between an employer and all of the unions or bargaining groups representing its employees take place at one time, unless the parties agree to separate negotiations. When multiple unions represent various groups of employees at an employer's establishment, the unions may choose to present a common proposal for a collective bargaining agreement to the employer, or they may present multiple proposals, each covering one or more of the unions or bargaining groups.

The Labor Code establishes a 45-day period for collective bargaining, and during this period the employer is expected to respond to the initial proposal. If the employer does not respond at all within 20 days, it is deemed to have accepted the proposal. Any agreement that the parties reach becomes the exclusive contract between the parties and must remain in effect for at least two years.

If the parties do not continue negotiations beyond the 45 day period, the union must vote to decide whether to accept the employer's last offer or go on strike. The timely submission of a final offer that, at a minimum, grants employees their existing benefits and existing wages plus the increase in the cost of living according to the consumer price index, gives the employer the right to hire strike replacements when the strike begins if the employees reject the final offer. If the employer does not submit a timely final offer, it must wait for 15 days after the strike begins before it may hire strike replacements. A strike suspends the individual employment contracts of strikers and suspends both the striker's duty to work and the employer's duty to pay the strikers.

4. Economic Actions and Dispute Settlement

Any time during negotiations, the parties may agree to appoint a mediator of their own choosing to assist the negotiation process. Unless the parties agree otherwise, the mediator has 10 days in which to try to bring the parties to agreement. If no agreement is reached during that period, the mediator convenes the parties for a meeting at which they will formalize their final proposals for a collective bargaining agreement. The mediator then submits to the parties a proposed solution to their differences, and the parties must respond to the proposal within three days.

Arbitration is also available as a means by which parties to collective bargaining negotiations can resolve their differences and reach an agreement. The parties may mutually agree to submit their negotiations to arbitration at any time, regardless of whether the 45-day negotiation period has ended or whether a strike or lockout is in progress. If the parties cannot agree on arbitration procedures, the arbitrator follows procedures established by law. Arbitration is compulsory in certain industries, such as public utilities, where strikes are prohibited. In these arbitration cases, the arbitrator's authority is limited to awarding only the full terms for settlement proposed by one or the other party. This procedure, sometimes referred to as "final offer arbitration," is intended to encourage the parties to compulsory arbitration of economic (interest) disputes, to put forward realistic proposals, realizing that failure to do so is likely to cause the arbitrator to choose the other party's proposal.

When the parties are unable to reach an agreement, the only economic weapon available to the employees is the strike. Any other activities the employees may undertake to pressure the employer into accepting their proposal, such as picketing, work slowdowns, or secondary boycott activity, would be illegal.

A strike may not be called during the term of a collective contract. Even when no collective labor agreement is in effect, a strike is legal only when it is called in support of lawful regulated collective bargaining demands. Strikes in protest of unfair labor practices are unlawful at all times. A strike may be called only upon a majority vote of the union members or bargaining group, as the case may be.

5. Government Administration and Enforcement

Certain prohibited unfair labor practices are defined in the labor law. Charges of unfair labor practices are heard by the Labor Courts, which have the power to punish violators by imposing a fine. The Labor Directorate maintains a register of unfair labor practice violators and periodically publishes a list of repeat offenders.

Examples of employer unfair practices include offering special payments or benefits to employees or exerting other pressure to prevent their joining a union; discriminating among workers for the purpose of discouraging union membership or requiring an employee to join a union as a condition of employment; refusing to bargain with a certified union; and refusing to provide information to a union that is necessary for bargaining.

Examples of union and employee unfair labor practices include conspiring with an employer to help the employer commit an unfair practice; conspiring with the employer to terminate or discriminate against an employee for nonpayment of union dues or fines; using coercion to induce an employee to join or resign from a labor union, or interfering with free speech among union members; disclosing an employer's confidential information to third parties; or interfering with an employer's right to choose its representatives for collective bargaining.

It is an unfair labor practice for a union to fine a union member for not obeying an unlawful union decision or for bringing charges against or testifying against the union. A union officer who ignores a member's complaint or claim also commits an unfair labor practice.

A Labor Directorate is primarily responsible for ensuring that employers comply with labor laws. It conducts compliance inspections, and has the authority to issue fines against violators. It is also authorized to interpret the labor laws and has developed a large body of administrative law on this subject. The Labor Directorate maintains a registry of unions and oversees union activities, including compliance with the collective bargaining laws.

An employee or union having a labor dispute with an employer may file a claim in the Labor Inspectorate, which has the authority to act in connection with labor disputes that involve an apparent violation of the labor laws and, in exercising that authority, has the power to impose fines. Alternatively, appeals may be taken before the Labor Courts and then to the civil Court of Appeals, and an employee who initiates a claim before a Labor Court has no further recourse before the Labor Inspectorate. If an employee asserts a claim initially before the Labor Inspectorate, that agency normally provides some basic legal assistance to the employee and conducts a hearing with the parties in an attempt to conciliate the dispute. If conciliation fails, the Labor Inspectorate generally directs the employee to the appropriate Labor Court to file a legal action.

APPENDIX D: Argentina

Labor unions have played a significant role in Argentina's political system, going at least as far back as the regime of Juan Peron, who served as the chief of labor relations for the government before he became President in 1946. More recently, during and since the Menem administration, labor regulations were changed that weakened union influence. One example was the elimination of industry-wide collective bargaining. The labor movement has become more fragmented, with some elements supportive of economic reforms undertaken to promote export industries.

Another legislative change enacted two years ago to introduce more flexibility in hiring and dismissing workers was the result of IMF loan guarantee conditions, despite strong labor opposition. These and other changes were intended to spur economic growth and reduce Argentina's high rate of unemployment. Despite such changes, Argentina's labor relations regulatory system stands in rather sharp contrast to that of Chile. Through central and local bureaus, the state plays a strong interventionist role in the industrial relations system.

1. Union Representation

There is a constitutional guarantee for workers to have the right to organize themselves under worker associations. Workers may freely choose whether to become members or not. All employees, except high-level employees and managers, are subject to union jurisdiction and may be covered by collective bargaining agreements.

To become recognized, unions must submit a copy of their bylaws to the Labor Ministry for approval. The bylaws must state the union's jurisdiction and claimed worker representation. Unions may request representation and jurisdiction on different levels such as industry-wide, specific crafts, specific companies, or a combination, such as workers in a specific craft at only one company. If the union's bylaws are approved, the union has the right to enroll members within the scope of its bylaws.

A union may not, however, represent workers before the national or provincial authorities until the Labor Ministry grants the union jurisdiction over the workers. The Labor Ministry's authority to grant jurisdiction over workers controls the union's membership, as most union bylaws contain broad jurisdictional and representative claims that overlap with other unions. Very few new unions are recognized because most workers fall under the jurisdiction of an existing union. In order to ensure union independence, employers are prohibited from creating or supporting "company unions," and any unions created by employer support or encouragement are not recognized by the Labor Ministry.

2. Representation By Other Entities

Under Argentina's labor law, only unions have the right to represent workers, and it does not recognize works councils or similar worker-employer consultative organizations.

3. Collective Bargaining

Only unions or union confederations that are registered with and approved by the Labor Ministry can be parties to collective bargaining agreements. The Labor Ministry

coordinates the negotiation and implementation of collective bargaining agreements, regardless of the jurisdiction where they will apply. This process begins when a company or union notifies the Labor Ministry of its intention to negotiate a collective bargaining agreement. The Labor Ministry then sets a time period during which the parties must meet to negotiate, and Labor Ministry officials attend the negotiations.

Once an agreement is reached, generally for a term of one to two years, the parties must submit the agreement to the Labor Ministry for approval. Approval is necessary for a collective bargaining agreement to become enforceable. Once approved, collective bargaining agreements are binding, not only on members of the unions and employers that are parties to the agreement, but on all workers and employers in the particular activity or industry involved. Upon expiration of labor agreement, its terms remain in effect until a new agreement is negotiated and approved. Within Argentina's federal system of government, individual disputes arising from rights contained in collective bargaining agreements are resolved at the province level, while collective disputes are resolved at the national level.

4. Economic Actions and Dispute Settlement

The Constitution guarantees the right of workers and employees to strike. However, the right to strike cannot be exercised if the Labor Ministry intervenes in a labor dispute. The Labor Ministry may order a mandatory hearing to discuss a settlement or may order binding arbitration. During the arbitration process and for one year following the final arbitration ruling, workers are not permitted to strike based on disputes decided in the arbitration proceeding.

Arbitration of labor disputes may be agreed to by the parties or may be ordered by the Labor Ministry. In either event, the arbitrator's decision is binding and legally enforceable, although the decision can be appealed to the National Appellate Judicial Court. Mediation of disputes or settlement conferences may be agreed to by the parties. However, the process is not binding. Any agreement that reduces the rights granted to employees under law or under a collective bargaining agreement is void. Employees cannot waive or release employers from payment of any amount owed. However, a settlement agreement can be executed before a labor or judicial authority if the authority issues an order approving the agreement on the basis that it contains a fair settlement.

With respect to inter-union disputes, the unions may submit the dispute to the Labor Ministry. The decision of the Labor Ministry is legally binding, but may be appealed to the National Labor Appellate Judicial Court. The decisions of this court are final, with limited right of appeal to the National Supreme Court of Justice.

5. Government Administration and Enforcement

The federal government of Argentina, through the Labor Ministry, has primary responsibility for enacting and enforcing labor laws. The Constitution grants power to the federal government to enact a uniform labor code applicable to all provinces. Using this authority, the central government has enacted comprehensive and controlling regulation of industrial relations. Each province enforces the national employment laws within its territory.

APPENDIX E: Republic of Korea

Until the economic downturn in 1998, Korea experienced a remarkable period of economic development, marked by real wage growth that was among the highest in Asia, low rates of unemployment, and extensive human resources investment to develop vocational and technical skills. Labor laws and regulations provided comprehensive protections for individual workers, such as strict limitations on dismissals and layoffs.

Throughout most of this period, however, the government sought to promote rapid economic growth by repressive labor relations policies, putting strict limitations on union activities to suppress the development of an independent labor movement. Strikes were prohibited until 1980. As in Indonesia, the government recognized only a single trade union federation (the FKTU) as the only legal labor organization. FKTU received financial support from the government and generally supported national economic policies.

By the late 1980s, with urbanization, a larger and better-educated workforce, and calls for democratization, there was a surge in labor disputes by workers demanding both improved working conditions and the right to form their own unions. The turning point came in 1987 with a new labor laws to grant workers basic collective rights to organize, engage in collective bargaining, and to go on strike. Subsequent labor law development brought about other significant changes, including recognition of a large alternative labor organization (the KTUC) that had organized and operated independently for several years before the law change.

These developments were also a response to considerable international pressure to adopt reforms to bring South Korea in line with basic standards. For example, South Korea joined the ILO in 1991 and has adopted several ILO conventions. In 1996 the government formed a Presidential Commission on industrial relations reform on a tripartite basis with representatives of unions, employers and the public. Its recommendations led to a number of law changes to strengthen rights to organize and engage in collective bargaining, along with labor market flexibility measures including easing restrictions on layoffs.

South Korea's labor laws emphasize the voluntary nature of establishing and maintaining collective bargaining relationships and the settlement of industrial disputes. With the exception of certain defense and essential service industries, the labor laws now provide for relatively un-intrusive governmental involvement and control. The law changes of the 1990's have led to effective collective bargaining between employers and unions at the enterprise level that has become the basis for determining wages, hours and working conditions in unionized firms.

The industrial relations system consists of three tiers:

- Laws protecting individual workers, including labor contracts which must contain certain protective provisions;
- A collective industrial relations system, which provides a framework for labor unions to seek improved working conditions through union recognition and bargaining with employers; and

- Labor Management Councils, established independently from trade unions, designed to promote cooperative, rather than adversarial, relations between labor and employers.

This system is based the comprehensive Trade Union and Labor Relations Adjustment Act. It defines and provides for the establishment and operation of trade unions, which are the main body of employee representatives for collective labor relations purposes. The law also addresses collective bargaining and collective action, and establishes reconciliation procedures that come into play when collective agreements are not achieved peacefully. Finally, the law defines unfair labor practices so as to provide for the protection of basic labor rights.

1. Union Representation

Wage and salary employees are eligible for union membership. Management employees are excluded. Only two employees are needed to organize a union. Only one union was permitted at each workplace until passage of the 1997 labor law, which changed the law to authorize the formation of competing unions. This change, however, has been suspended until 2007.

The 1997 law also, for the first time, modified the prohibition against unions and employers agreeing to require union membership as a condition of employment. Under current law, if a union represents at least a two-thirds majority of eligible employees, the union and employer, by collective bargaining agreement, may require new employees to join the union within a certain period from the date of employment.. Although this union shop procedure is permitted, the open shop system is the primary system, by which membership, or withdrawal from a union, is totally a matter of individual employee free choice.

2. Representation By Other Entities

South Korea has established Labor Management Councils as a mechanism to maintain labor peace and cooperation, and to resolve actual or potential labor disputes in a non-adversarial setting. These Councils, consisting of an equal number of representatives of employers and workers, are now mandatory in all workplaces employing 30 or more employees. They must be consulted by the employer on various labor matters, such as productivity and profit-sharing, working hours, work rules, and pay scales, and have decision making power over such issues as education and training plans, grievances, and welfare facilities.

If the company has no labor union representing a majority of the employees, the employee members must be elected by a direct secret ballot of the employees. If there is a labor union representing a majority of the employees, the chairman of the union automatically will be an employee member, and the union will select the other employee members. Employer members are appointed by the employer representative.

3. Collective Bargaining

Under the 1997 law, the parties to a collective agreement must report it to the Ministry of Labor or local government agency within 15 days from the date of execution. Collective agreements typically have two parts: (a) the normative part, which establishes

workplace standards, and thus, directly affects the individual employment relationship; and (b) the obligatory part, which deals with rights and duties between the contracting parties. The normative part includes items such as wages, bonus (if any), annual and monthly leaves, working hours, and any other working conditions, while the obligatory part includes union rights such as union office, union activities allowed during working hours, full-time union officers, etc. The maximum period for any collective bargaining agreement may not exceed two years.

The law also provides that all individual employment contracts or rules of employment that are less favorable to employees than the workplace standards established by a collective agreement are null and void. Thus, any less favorable rules of employment or individual contract terms automatically are replaced by the standards set in the collective bargaining agreement.

Unions have the right to institute collective bargaining, and bargaining in good faith must be observed by all parties. The union has the right to bargain collectively with the company on behalf of its members. In such bargaining, the union represents only its members. In general, this means that the collective agreement covers only union members who are employed by an employer who has signed the collective agreement.

Under certain conditions, however, the law states that a collective agreement has a legally binding effect on non-union employees, or on those whose employers have not signed the collective agreement, or who do not belong to the employers' association that has signed the agreement. One such example is the extension of a company-level collective agreement to non-union members when the union represents half or more of the employees of a similar occupation in a workplace. This can occur even if the minority group of employees are members of a different union within the company.

Another example is extension of a collective agreement on a regional basis. When the coverage of a collective agreement between a regional union and an employer, or a regional federation of employers, applies to more than two-thirds of the total employees in a similar occupation in the same region, the administrative authority may determine that the collective agreement be extended to non-parties with the consent of the Labor Relations Council. Any party to the collective agreement may request such an extension, or the administrative authority can decide to implement such an extension on its own initiative.

4. Economic Actions and Dispute Settlement

The union right to strike is provided by law, but with certain limitations. The strike may commence only after mediation. Moreover, the union is not permitted to take strike action unless there is a majority vote, by secret ballot, of union members in favor of the strike.

Once a collective labor action commences, certain basic rules must be honored. First, acts of violence or subversion are not considered acceptable tools in a labor dispute, and are not allowed. The law also bans threatening behavior or violence during picketing, and prohibits attempts to persuade unrelated workers to participate in the strike. Union activities conducted within the company's premises that interfere with normal business operations during a collective action are illegal.

Strikes are not permitted by workers in certain defense industries, and certain critical public service businesses, such as medical or communications. Instead, unions must take disputes to arbitration.

In strike situations the principle is “no work, no pay,” and companies have no obligation to pay striking employees. Furthermore, employees may not strike for the purpose of securing wages lost during previous strikes.

As for employers, the law permits the right of lockout, but only if it is a defensive action in response to a union’s strike. The replacement of strikers is also allowed, but only with employees transferred from within the same enterprise. Further, no new subcontracting of work is permitted.

The law contemplates voluntary dispute settlement, and, as such, permits unions and employers to adopt their own system of mediation and arbitration by mutual agreement. If an impasse in bargaining is reached, however, a request for mediation must be filed with the Labor Relations Commission. This starts a 10 day period when no strike or lockout is permitted. The period is 15 days for certain public interest businesses.

If the parties mutually agree, the Labor Relations Committee will designate a three member arbitration committee, upon which no strike or lockout is permitted for 15 days. Compulsory arbitration may be instituted by the Committee in industries providing essential services, including water, electricity, gas, telecommunications, railroads, hospitals, inner-city bus services, and banking services.

5. Government Administration and Enforcement

The Ministry of Labor is in charge of government labor policy, and deals with such matters as the status of employment, employment insurance, vocational training, working conditions and workers' welfare, industrial safety and health, and industrial accidents. It also is responsible for general administration of industrial relations matters.

There also is a somewhat autonomous, tripartite Labor Relations Commission, which was created as a body to handle industrial disputes more expertly and speedily than the courts. Its principle functions are the adjudication of unfair labor practice and wrongful termination cases, as well as the settlement of labor disputes by mediation or arbitration.

APPENDIX F: Taiwan

Taiwan's impressive economic transformation and growth has roughly paralleled a change over the past 50 years from a quite repressive political and labor relations system to one of greater freedom and democracy encouraging the emergence of unions. Nevertheless, Taiwan's system remains quite controlling and less designed to enable unions and employers to develop their relationships and resolve disputes on a voluntary basis than is generally found in modern labor codes.

Until the mid-1980s, Taiwan's suppression of free union activity was related to its overriding goal of pushing economic development, coupled with fear of mainland infiltration of labor organizations for the purpose of undermining the government. Union activity was curtailed by martial law, which prohibited work stoppages. The ruling party controlled nominations for union officer positions.

As the economy developed and became less dependent on labor intensive, low-wage industries, the government recognized that some improvement in labor regulation was necessary. The lifting of martial law in 1987 made greater democratic participation possible, including mass demonstrations, additional political parties, and more independent unions. It brought an increase in union activity, particularly in public enterprises.

In the same year the government created the Council of Labor Affairs (CLA) to enforce the Fair Labor Standards Law, Taiwan's first comprehensive employment law. It had been enacted three years earlier, but had been essentially unenforced until the CLA was established. Independent unions formed outside the ruling party influenced Chinese Federation of Labor, and became able to elect their own leaders. As a result, compared to nonunion firms, unionized firms typically have greater employee benefits than required by law, including retirement programs, maternity leave, work councils, and profit-sharing programs.

1. Union Representation

Unions at the plant level are the basic industrial unit. Employees may petition the government to form a union based on obtaining the signatures of 30 or more workers qualified for union membership. When granted, the union is the sole representative of the employees in a particular plant because multiple unions at a plant are officially banned. However, the emergence of more independent unions in recent years has resulted in dual union representation in some enterprises with no action taken against them by the government.

There is an essentially unenforced legal requirement for there to be a craft or industrial union formed when there are 30 or more workers at an establishment. Approximately 30 percent of the workforce belongs to unions. Unions exist at the national, regional, provincial, and local level. Only one national federation may be organized for each specific industry or craft.

Workers over age 16 are eligible to form unions, except for government employees, employees of educational institutions, employees of munitions industries, and managers and assistant managers, who may not belong to the same union that represents their employees.

2. Representation By Other Entities

The law mandates that businesses convene monthly labor-management conferences to coordinate and promote cooperation as well as to increase work efficiency. The conference is to have equal numbers of employer and employee representatives. If a business is unionized, the union members are responsible for electing the employee representatives to the conference. If there is none, the representatives are selected by the employees through a direct election.

The conferences are to discuss matters relating to the harmonization of labor relations and labor-management cooperation; working conditions; welfare planning; and increasing labor productivity.

3. Collective Bargaining

Bargaining may take place at the local, regional, or national level. Establishment level unions negotiate with the management. The law does not specify mandatory or unlawful subject of bargaining, but includes wages, hours, benefits, vacations, and the establishment and utilization of mediation and arbitration procedures. In practice, many labor contracts are brief and consist of little or no more than statutory requirements. The number of collective agreements has been declining, to some extent attributed to the decline in the number of public enterprises through privatization and in the number of large scale factories as the economy has shifted away from manufacturing toward services.

4. Economic Actions and Dispute Settlement

Strikes are not permitted unless conciliation procedures have failed and the strike is approved by a majority of the entire union membership by secret ballot at a union assembly meeting. Slowdowns are often utilized because of the limitations on strikes. Although unlawful, the government has not taken punitive action against them. Lockouts are not legally regulated, but they appear generally not to be utilized by employers.

Rights disputes, whether arising under statutory law or collective labor agreements, are subject to non-binding conciliation and, failing resolution, resort to a court action. Interest disputes are subject to non-binding conciliation, or arbitration. Mediation can be requested by the parties, or the government may initiate it and appoint a tripartite mediation board. When there is a bargaining impasse, both parties may request an arbitration committee to decide the issue. The government may also order arbitration if it considers it warranted, and must notify the parties of the decision. There is judicial review and enforcement of collective bargaining rights and of arbitration awards. In recent years, a growing number of firms have established formal internal grievance procedures to resolve workplace disputes.

5. Government Administration and Enforcement

Since its creation in 1987, the Council of Labor Affairs has responsibility for central administration of Taiwan's labor laws. It has the power to delegate inspection and enforcement duties to local authorities.

Labor Protection Issues

Following the Asian financial crisis and the change of government in 1998, privatization became a core element of the government's efforts to restore higher economic growth rates and generate revenues to shore up its budget in the face of substantial shortfalls. A variety of factors has delayed the privatization program. These are beyond the scope of this paper, save one: The opposition of employees and their union representatives, often manifested by large public demonstrations, based on the perceived threat to job security, wages and other benefits as a consequence of transferring State Owned Enterprises (SOEs) to the private sector. Worker opposition has centered on a number of the SOE's subject to the privatization process administered by the Ministry of State Owned Enterprises (MSOE) as well as the failed banks subject to sale or liquidation by IBRA.

Worker and labor union job security fears, at least in some cases, may be based on incomplete or inaccurate information and, therefore, be exaggerated or misplaced entirely. Privatization is likely to yield quite disparate results as to its effect on employment, skill mix, wages and other terms and conditions of employment. A few enterprises may be subject to liquidation, and some to substantial retrenchment, resulting in significant job losses. Others, however, even within the same sector, may achieve greater economic success as the result of changed management, eliminating corruption and fraud, operational restructuring, shedding the burden of unprofitable public service functions by shifting them to the appropriate Ministries, and other enhancements to increased efficiency and profitability. In those cases, the result is likely to be increased employment opportunities.

What appears to be missing is an effective and comprehensive MSOE plan to address the important worker issues by:

- Surveying the workforce, its skill mix, wage and benefit levels, other relevant terms conditions of employment including collective bargaining agreements, and employment prospects;
- Identifying the issues that concern SOE employees and their unions, generally, and on a case by case basis;
- Providing full disclosure of relevant information to workers and unions;
- Engaging them in a cooperative dialog at the privatization planning stage;
- Identifying and evaluating the range of potential measures available to cushion anticipated job losses in particular enterprises;
- Soliciting worker input through their bargaining representatives; and
- Incorporating workforce planning into the bidding process by specifying it as a requirement and according it significant weight in evaluating bids.

From the standpoint of the employees, the potential impact of privatizing SOE's, in many respects, is comparable to the potential effect of private sector restructuring brought about by asset sales and M&A activity. As such, the labor relations practices of other countries attendant to asset transfers, and to retrenchments leading to job terminations generally, may be instructive when Indonesia moves forward with its privatization plans and commitments. The GOI at the same time is struggling with general reform of its outmoded labor relations system to bring about the efficient and fair labor market it needs for sustained economic progress. It could well find that formulating a balanced and progressive labor relations scheme tailored for privatization of SOEs will lead to greater understanding and acceptance of the essential elements of a modern labor relations regulatory system for much broader application of the lessons learned from privatization.³⁰ A few brief examples of the rules adopted by other countries may illustrate the point.

International Experience

United States.

Compared to many countries, there are few legally imposed limitations on the right of U.S. enterprises to terminate employees permanently or temporarily when a retrenchment is required for such reasons as reduced demand, automation, plant closure, or subcontracting.³¹

Nonetheless, many employers adopt formal policies for such circumstances, and often enter into voluntary collective bargaining agreements containing provisions to mitigate the effects of retrenchment. Such labor agreements may enable union representatives to bargain over management's retrenchment decision itself, such as by offering concessions to prevent subcontracting, plant closing, or plant consolidation. They also may call for bargaining over means of mitigating the effects of such decisions on workers, such as early retirement, extended severance pay, job retraining, relocation assistance, the exercise of seniority rights as layoffs occur, and recall rights in the event of subsequent business expansion.

The legal requirement for good faith collective bargaining applies in these situations. Therefore, the employer must notify the labor union representatives sufficiently in advance so that meaningful bargaining will be possible. Unilateral changes made by the employer without engaging in collective bargaining constitute a violation of the duty to bargain in good faith, and, therefore, are not permitted.

In the event of transfers in the case of a stock sale, the employees normally become the employees of the acquiring business and are not terminated, and the existing union representation, and applicable collective bargaining agreements, are continued. In contrast,

³⁰ In this respect, SOEs operate in major sectors of the economy; the book value of their assets is estimated at more than 40 percent of the total assets of Indonesia's producing sector; and they contribute 12% to GDP. SOEs employ approximately 700,000 full time employees, and an equal number are employed as contract and subcontract employees. This constitutes 18 percent of the medium and large enterprise workforce (ADB estimates), representing a considerable opportunity for focusing modern labor relations practices.

³¹ Federal and state laws prohibit discrimination in employment on the basis of age, gender, race, religion, physical or mental disability and other factors.

in the event of an asset sale, the purchaser is not required to retain the employees unless it is made a condition of the sale, or the collective labor agreement requires the seller to incorporate job protection, union recognition, and continuation of the collective bargaining agreement in the terms of the sale. By law, however, the successor employer must recognize the legitimacy of the existing union or unions if a majority of the employees after the transfer were formerly employees of the seller. In that case, the new employer must bargain in good faith with the union representatives over a new collective bargaining agreement, but is permitted to establish unilaterally the initial terms and conditions of employment.

The policy underlying such employment flexibility for the acquiring entity recognizes that the previous terms of employment may have been a contributing factor to the seller's operating inefficiencies and unprofitability. As such, the successor employer should have the opportunity to bargain for terms of employment that will improve operations, profitability, and long-term employment prospects.

Generally, however, if the successor employer has agreed in advance to employ all of the seller's employees, the new employer cannot lawfully change the existing wages, hours and other terms and conditions of employment without first bargaining with the union representatives. In this circumstance, any changes during the remaining term of the labor agreement must be by mutual consent.

The federal Worker Adjustment and Retraining Notification Act generally requires that employers give affected employees, their labor unions, and local government officials at least 60 days advance written notice in the event of a plant closing, meaning either the permanent or temporary shutdown of a single site of employment, or of a large layoff of employees in other circumstances. Failure to comply entitles workers to recover pay and benefits for the period for which advance notice was not given. In the event of a sale of the business, the seller is responsible for the notice requirements up to the effective date of the sale, and the purchaser is responsible thereafter.

The Federal-State unemployment insurance system provides partial income replacement for laid off workers, generally for up to 26 weeks, and for longer periods during economic recessions. In addition, as a matter of policy, most employers provide some layoff benefits in the form of severance pay. Larger employers may provide more extensive benefits. These may include (i) cash benefits in a lump sum or salary continuation, with the amount based on the worker's length of service with the employer; (ii) extended health insurance coverage; (iii) extended disability and life insurance coverage; (iv) tuition reimbursement for job retraining or general educational advancement; (v) outplacement benefits such as job search training and assistance and counseling; and (vi) shares of the company stock. Incentives to induce voluntary job termination also are commonly offered to address overstaffing, such as special early retirement benefits and special severance bonuses.

South Korea.

In the case of retrenchments and overstaffing, employees may be either be involuntarily laid off (dismissals other than for reasons of poor performance or misconduct), or to incentive programs offering special benefits to encourage voluntary resignations of employment.

The Labor Standards Act enacted in 1998 was intended to remedy the lack of clarity in the law governing when layoffs were permissible by establishing a set of governing layoff criteria and standards.

Like the U.S., 60 days advance notice is required to be given to the union representatives. If there are none, the employee representative is to be elected by the employees. Then, there must be good faith consultation with the representatives about measures to avoid dismissals and about the selection criteria for dismissals. The Ministry of Labor must receive at least 30 days prior notice when layoffs are of ten percent or more of the company's employees are expected.

If there is a subsequent business expansion resulting in new hiring within two years of a layoff, the employer must make efforts to rehire previously dismissed employees, and to make an effort to return the employees to their previous positions, but are not required to rehire employees in order of seniority. In U.S. terminology, this is the granting of preferential recall rights.

In addition, various incentive programs to encourage voluntary resignation as a remedy for overstaffing have been adopted, including one by the foreign banking community known as the Early Retirement Program. It involves additional severance payments, above those legally required, to all employees seeking early retirement. The amount paid varies depending on such factors as the size of the enterprise, the extent of layoffs, and years of service. Such incentives generally must be applicable to a group of employees who meet specified eligibility criteria, and not to specified individual employees.

Mergers, acquisitions and other transactions involving a change in ownership also must be in accord with certain criteria. The acquiring company is required to accept the transfer of all employees who wish to have continued employment. The terms of employment are continued at the acquiring company without change, unless changes are agreed to by the employees. Residual employment obligations and claims, including severance payments, become the responsibility of the new employer, except to the extent there is a contrary agreement with the transferor.

Taiwan.

There is rather limited legal coverage for employment protections attendant to transfers of ownership or liquidations. The general law on severance payments applies, and, in the event of business dissolution or bankruptcy, employees may seek redress for unpaid wages from a Wage Arrears Fund, funded by a portion of monthly labor insurance payments generally required of companies in Taiwan.

The law does require, in the event of a transfer of business ownership, that the transferor give advance notice to the employees whose individual employment contracts will be terminated. It also contemplates that there will be negotiations between the transferor and the transferee concerning the retention of employees following the change in ownership.

Following the transfer, the new employer is required to continue the terms of any collective bargaining agreements in effect at the time of the transfer, as well as the terms of individual employment contracts for employees who are retained. The new employer also is required to recognize the seniority of the retained workers.

Hong Kong.

The Hong Kong Special Administrative Region retains authority to enact labor laws. A special Labour Tribunal adjudicates various types of employment disputes, although employers and unions that have entered into collective labor agreements often resolve their disputes through voluntary arbitration.

There appears to be no special labor protective provision for transfers of business ownership. Generally, dismissed employees with at least 24 months of employment are entitled to severance pay in an amount based on years of service with the employer and the worker's prior rate of pay. Dismissed employees with more than five years of employment are entitled to additional amounts based on the same criteria.

Singapore.

Under the Employment Act, a transfer or change in ownership must be explained to affected employees in advance, giving them information on the reasons for the action, the date of transfer, information about the new employer, and the impact on their future employment.

Upon the change of ownership, the existing terms and conditions of employment are retained, and the worker's seniority continues instead of being considered a break in service. The sale of all or a part of a company as a going concern entitles the employees to be transferred to the new employer.

Upon transfer of employees, an existing union will continue to be recognized as the lawful bargaining representative if it has a majority of employees in the new company, and existing collective bargaining agreements will continue to apply. If the union does not have a majority, it may represent only transferred employees in labor disputes.

Japan.

In 2000, the Diet adopted substantial revisions to the Commercial Code concerning corporate reorganization and the spin-off of corporate divisions, which include requirements that a business consult with employees or, if represented, their unions prior to any changes affecting terms of employment. Under prior law consent of the employees was required prior to a transfer of ownership.

In addition, it also enacted the Labor Contract Succession Law. In the case of any shareholder meeting called to consider a business reorganization, the company is required to give advance notice to affected employees and unions, advising them that they will be subject to transfer and that employment contracts will be protected. The law also requires the continuation of existing collective bargaining agreements.

Employers facing overstaffing issues generally implement a voluntary resignation incentive plan before instigating dismissals. They will hold consultations with union representatives, or, if there are none, with the affected employees. Voluntary resignation is solicited through special benefits. Although there is no established standard, such benefits often range from several months to two years of wages.

Indonesia

Under Master Plan 2000, State Owned Enterprise Reform, May 2000, the MSOE has incorporated a brief “Social Safety Net” section. After observing that “SOEs typically employ more staff than the business strictly requires . . .,” it sets forth the GOI’s intention to address the “risk of unemployment” by four specified actions: (i) prohibiting involuntary dismissals for two years following privatization; (ii) offering unspecified early retirement benefits; (iii) offering other employees unspecified severance pay based on length of service; and (iv) offering unspecified support for retraining, relocation, or new business creation. The benefits are presumably intended to be over and above those mandated by current law and decrees.

The high stakes for Indonesia in maximizing the gains from privatizing its SOEs would seem to call for a considerably more comprehensive action plan for dealing with the inevitable labor issues that have already been made a matter of public protest, and that threaten to continue in the absence of assurances of full disclosure, fair treatment and the inclusion of labor interests in all relevant aspects of the privatization process. The Master Plan no doubt reflects that fact that the MSOE has virtually no practical or policy experience in dealing with the labor aspects of privatization. It no doubt will need to coordinate with other Ministries and draw on the expertise of others.

It is beyond the scope of this paper on the broader aspects of general labor relations reform to incorporate the kind of detailed labor protective privatization plan intimated here by the description of seven basic principles cited above, and the relevant experience of a few other countries. They are intended, however, to suggest the elements, and the kinds of options available, for consideration in such a plan.

Important aspects of the plan will necessarily be prospective. Until the change of ownership takes place and new management is in place, and operations take place in a competitive private business context, the consequences for workers in many cases cannot be fully known. Important aspects may be illuminated earlier, however, by making manpower planning a key part of the bidding process as mentioned above. Other measures, such as financial inducements for resignation and retraining, could be undertaken early on for workers deemed in excess of current needs at particular SOE’s.

Because the industries involved are so disparate, from ports to plantations (where half the potentially affected workers are employed), it is obvious that specific attention will need to be paid to the particular circumstances of each one. Perhaps, for example, the comprehensive plan could entail dealing with layoffs of certain categories of workers at one SOE to be liquidated, or substantially downsized, by according preferential hiring rights for a fixed period at SOEs within the same industry that are expected to succeed and increase employment opportunities.

In the final analysis, the process of achieving an effective plan is likely to be as important as the substantive results. The recommendation here is that the process be subsumed under the employment policy role of the new inter-ministerial Council of Employment, proposed elsewhere in this paper, comprising those ministries responsible for economic and labor policies, as well as the MSOE in this case.

The next step would be to structure a central process for involving the stakeholders in the planning stage, which will necessarily entail defining the bargaining rights and responsibilities of the labor union representatives of affected workers, and a means of engaging and involving employees who are not represented by a union. At the present stage, it would seem that ad hoc consultations or negotiations with unions at the SOE level, which have been reported, may be counterproductive. This does highlight the need, however, for undertaking a deliberate and comprehensive planning effort at the earliest opportunity.

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