



**Business Law Reform and
Alternative Dispute Resolution
Development**

Under the USAID/Madagascar Legal, Regulatory and
Judicial Reform Activity
USAID Contract No. 623-C-00-98-00029-00

Scope of Work No. 12

THE REVISION OF THE MADAGASCAR LABOR CODE

AND

THE AMERICAN LABOR LAW SYSTEM

**(SUPPLEMENT TO: RAPPORT SUR LE SYSTÈME AMÉRICAIN
DU DROIT DU TRAVAIL, June 11, 1999)**

October 19, 1999

ARD, Inc. and Checchi and Company Consulting, Inc.
1899 L Street, N.W., Suite 800
Washington, DC 20006-3804
Washington Telephone: 202-452-9700
Local Telephone: 033-110-3970
e-mail: ardchecchi@dts.mg /treynders@checchiconsulting.com

JURECO Etudes et Conseils S.A.
Boîte Postale 682
Lot IV M 66 rue Dr. Raseta Andraharo
Antananarivo 101, Madagascar
Telephone: 22-202-37
e-mail: mbra@bow.dts.mg



**Business Law Reform and
Alternative Dispute Resolution
Development**

Under the USAID/Madagascar Legal, Regulatory and
Judicial Reform Activity
USAID Contract No. 623-C-00-98-0029-00

Scope of Work No. 12

THE REVISION OF THE MADAGASCAR LABOR CODE

AND

THE AMERICAN LABOR LAW SYSTEM

**(SUPPLEMENT TO: RAPPORT SUR LE SYSTÈME AMÉRICAIN
DU DROIT DU TRAVAIL, June 11, 1999)**

October 19, 1999

Submitted to:

*USAID/Madagascar
Villa Vonisoa III
Avenue Dr. Ravoangy
Anosy, Antananarivo 101
Madagascar*

Presented by:

*Don Zimmerman, Law Development Advisor, for
ARD, Inc. and Checchi and Company Consulting, Inc.
1899 L Street, N.W., Suite 800
Washington, DC 20006-3804
Washington Telephone: 202-452-9700
Local Telephone: 033-110-3970
e-mail: ardchecchi@dts.mg /treynders@checchiconsulting.com*

Introduction

The *Ministère de la Fonction Publique, du Travail et des Lois Sociales* requested that USAID furnish technical assistance for its major project to revise the Code du Travail, which resulted in my assignment on this project. Phase I of this assignment began on April 19, 1999, with my participation in the second national workshop in Antananarivo from 20 to 23 April. This consultation continued to June 11, 1999, when I submitted my *Rapport sur le système Américain du Droit du Travail*. Phase II of my consultation began on September 20, 1999, when I met with officials of the Ministry to confirm the nature and scope of my consultation, and concluded on October 19, 1999, with the submission of this supplemental report. During both Phase I and Phase II, I have been assisted by a national expert, Mboara Andrianarimanana, of JURECO Etudes et Conseils, a consultant of ARD/Checchi.

This supplemental report is intended to provide further explanation of the American labor law system, and how it is applied in practice, in the context of the *Avant-Projet de Code du Travail* prepared by the *Comité de rédaction* in August. The *Avant-Projet* reflects the two reports prepared by the Ministry on the first and second workshops on the Code du Travail. In addition to these and other documents concerning the Code, I also have reviewed the report of the Ministry on the Workshop on the Promotion of Collective Bargaining, which was conducted in July, 1998. Finally, the consultation during Phase II has permitted collaboration with the expert furnished by the ILO, Professor Jean Marc Béraud, and my review of his report – MEMORANDUM TECHNIQUE AU GOUVERNEMENT DE LA RÉPUBLIQUE DE MADAGASCAR CONCERNANT LA RÉVISION DE LA LÉGISLATION DU TRAVAIL, submitted in July. This supplemental report refers to certain aspects of it (as the “Béraud Report”).

This report, like the first, is written in the context of the changing economic and social conditions in Madagascar. The government is implementing a strategy to promote economic growth and reduce the high rate of poverty among its citizens. That economic growth strategy now includes the privatization of major state owned enterprises, and a shift of emphasis generally from the public sector to the private sector. The success of that strategy depends on progress in increasing both consumption and investment, and, in particular, increased reliance on foreign direct investment.

In general, therefore, an important objective for reform of the *Code du Travail* is to make it conducive to increased economic growth in the private sector, and, at the same time, to ensure necessary protections for workers who work, and who seek work, in that sector. The optimum balance is extraordinarily difficult to achieve in Madagascar, just as it is in all countries, including the United States and Europe.

From the standpoint of responsible investors, employers and prospective employers, their objective is to be able to conduct business in a competitive, free market economy in which the regulation of the labor market, by the Code du Travail, provides flexibility, predictability, transparency, clear and understandable rules, and administration and enforcement of the Code that is fair, efficient and free from corruption. On the basis of meetings with employers and visits to several enterprises during Phases I and II, many employers criticize the present system because they view it as weak and ineffective, and not known or understood by them or by

workers or their representatives. Investors complain that the Code does not contain provisions that would help to resolve the many problems involved in the transition of workers to the private sector in the process of privatization.

From the standpoint of workers, and their representatives in the labor unions, the problems of the Code are similar. Workers and responsible employers would agree in the need for a system that is fair, well known and understood by all parties, and enforced effectively so that irresponsible employers are not able to enjoy a competitive advantage by disregarding the law and the needs of workers. The concern of workers is heightened by the prospect of less job security in the private sector operating in a competitive, free market economy. Strikes, which are the last resort for workers who demand that their employers follow the law, or who want to create pressure for better pay or benefits, are likely to be ineffective in an economy that is characterized by an excess supply of workers. When workers decide that their lack of economic power requires union representation, or make economic demands, the present system offers little protection. Effective protection by labor unions is impossible if the system of representation is poorly defined, and collective bargaining rarely exists (which was well explained at the Ministry's workshop on collective bargaining in 1998).

At the time this supplemental report is submitted, the revision of the Code is not yet complete. The principal purpose of this report is to provide further description and explanation of the American labor law system, concentrating on certain aspects that seem most appropriate with respect to private sector labor market flexibility, to labor union representation, collective bargaining and other worker protections, and related matters. The commentary in this report is consistent with the relevant Conventions of the International Labor Organization (ILO). It includes references to the proposed code as completed by the *Comité de rédaction* in August, and to the Béraud Report. Should technical legislative language on any of these subjects be desired, it could be the subject of any subsequent request for further technical assistance.

Labor Force Flexibility

To the extent that the strategy of Madagascar to promote economic growth in the private sector is successful, the relative proportion of workers in the public sector will decline as private sector employment increases. The distinction between these two sectors is somewhat blurred, however, because formal sector enterprises have included both private sector enterprises as well as state owned enterprises that are now in the initial stage of privatization. Privatization alone will account for a substantial shift of workers to the true private sector and, for the first time, to a competitive economic environment. Increased private investment will account for further labor market growth in the private sector.

Because public sector wages are generally higher than private sector wages,¹ the transition of workers to the private sector may cause adverse wage pressures on workers who will have to compete in a labor market with high unemployment. And in the private sector, where employers require greater work force flexibility than in the public sector, workers also are likely to face greater demands and less employment security and stability. The alternative to such private sector investment and growth, however, is less favorable — dependence on the informal sector for employment where wages, and protections for workers, are much lower.

There seems no real choice, therefore, than for the *Code du Travail* to address those aspects of labor market flexibility that are of greatest interest and concern to private sector employers. These subjects include:

Hiring and Termination — The ability to hire and terminate workers with minimum delay and interference. The reasons may include either cyclical changes in economic conditions that affect the level of employment required for efficient operations, or the need to make adjustments in the mix of skills of one or more categories of workers. There also may be a need to replace workers whose work performance does not meet the standards required by the employer. The termination of employees also occurs in case of a sale or transfer of the enterprise, in whole or in part.

Advance Notice. When a large number of employees must be terminated or laid off for economic reasons, the adverse impact may be substantial, both for the workers who suddenly must compete for new jobs, and for the community which may suffer because of the aggregate loss of income. Under the American system, in order to mitigate the adverse impact, the law requires that employers give notice, at least 60 days in advance of the termination, to each employee, the labor union representatives, and the local government where the enterprise is located. The law applies only to large employers (of 100 or more workers), and only when the termination will affect one third or more of the active employees (but at least 50), within a 30

¹ “Emploi et Revenus à Madagascar,” Peter Glick, Etude financée par USAID, pour le Ministère des Finances et de l’économie et l’Institut national de la statistique, août 1999.

day period. Failure to give the notice may result in up to 60 days of compensation of lost wages and benefits for the affected employees.

In the American system, generally there are no other restrictions mandated by law on the termination of workers, except in cases where the employer has agreed voluntarily to further protection for workers, such as for severance pay, or to lay off workers on the basis of their seniority with the same employer. Such an agreement may be between the employer and employees on an individual basis, or on the basis of a collective bargaining agreement applicable to the employees who are terminated. Of course, the law does not permit an employer to terminate employees for economic reasons, or because of poor performance by the employees, if the reason is false, and the actual motive is discrimination against the employees, such as on the basis of race, national origin, color, religion, sex, or handicap.

Sale or Transfer of the Enterprise. American law generally places no requirements for worker protection in the case of a sale or transfer of the enterprise. It is a common practice, however, for employers, on a voluntary basis, to provide severance pay to employees at the time their employment is terminated (and also when there is a termination of employees for economic reasons). The typical formula applied is that the worker will receive one week of regular pay for each year of employment with the same employer. The amount may be subject to a minimum, and maximum amount.

Privatization. Although there are significant differences when state owned enterprises are sold to private investors, the effect on employees, and their labor union representatives, may be quite similar to a sale or transfer of enterprises entirely within the private sector. See the section on Privatization, below.

Collective Bargaining. The American labor code does impose certain requirements in the case of a reduction in force by the employer, or the sale of an enterprise to another employer, when the affected employees are represented by a labor union. In such cases, the employer has no obligation to bargain with the union about the economic decision.

However, if there is a request by the union, the employer must bargain with the union over the effects on employees of the decision to institute a reduction in force. The union can be expected to try to protect the employees with the most seniority, and, therefore, to persuade the employer to conduct a reduction in force in order of seniority. The employer can be expected to resist this approach and, instead, to terminate employees according to their ability, so that the remaining work force consists of employees with the best job performance. Often, the final agreement will contain some combination of both factors, seniority and job performance. The union can also be expected to attempt to persuade the employer to provide additional economic benefits for the employees who are terminated, such as severance pay and additional pension benefits.

In the case of a sale or transfer of the assets of the enterprise to another employer, the new employer has the discretion to terminate, or rehire, the employees of the former employer. The law, however, prohibits discrimination against any of the employees of the former employer on the basis of their union membership. Any existing collective bargaining agreements are, in

effect, nullified at the time of the sale, and the new employer generally is free to establish new rules concerning pay, benefits, and all other terms and conditions of employment. If, however, at the time the new employer commences operations, a majority of the new work force consists of former employees who were represented by a labor union, the new employer must agree to bargain with the same union and make an effort, in good faith, to conclude a new collective bargaining agreement. As is always the case in the American system, the law requires only that both the employer and the union bargain in good faith. The law does not require that either party yield to the other on any subject, or that the bargaining must result in an actual collective bargaining agreement. In other words, the law establishes the procedures to be followed, but not the result.

Employee Performance. In cases where the competence or other performance aspects of a worker, such failure to follow procedures established by the employer, is unsatisfactory, but does not constitute serious misconduct, the employer may decide to terminate the worker. In the American system, there is no law preventing that action by the employer, unless the employer's motive is to discriminate against the employee, as explained above.

On the other hand it is a common practice by employers who wish to be perceived as providing fair procedures for their workers to voluntarily establish a disciplinary system that gives employees an opportunity to correct their mistakes or improve their competence. There is a wide variety of such procedures, such as the issuance of a series of warnings to the employees, counseling by supervisors, and an opportunity to improve, before the employee is terminated.

For employees represented by a labor union, the typical collective bargaining agreement contains a provision that permits the termination or other disciplinary action against employees only if the cause for the employer's action is just. From the time of the employer's proposed action, if the employee wishes to contest it, there is a series of steps involving discussion of the action between supervisors and the employee, with a labor union representative to assist the employee. If the dispute is not resolved at one of these steps, the dispute is decided by a private, neutral arbitrator appointed jointly by the employer and the union. If the decision of the arbitrator is not accepted, it will be enforced by the judicial system.

Government Approval. The role of the government under the American labor law system is limited to the requirements described above concerning advance notice, employment discrimination, and collective bargaining. Otherwise, there generally is no government interference with a decision by a private sector employer to conduct a reduction in force, to utilize temporary employees, to subcontract work, or to sell the assets of an enterprise.

Proposed Code (*Comité de redaction*, August, 1999) There are numerous differences between the proposed code and the American labor law system that are readily apparent from the above description of American law and practice. In several instances the code includes provisions that are not contained in American law, but are consistent with the actual practice of many, but certainly not all, employers. Some of these are noted below. Apart from specific differences, it should also be noted that the Madagascar system of employment regulation, like that of France and other European countries, rests on the concept of a written employment contract between the employer and each individual employee. Except in a few cases, most of

which involve managerial and executive employees, employment contracts do not exist in the American system. None of these contracts is required by law. In addition:

- Article 7 would nullify any contract clause that prohibits post-employment activity by an employee. In the American system, such agreements are permitted, but only if they are limited to a reasonable duration and scope. They are permitted to a limited extent in order to protect the employer from unfair competition by a former employee who has learned trade secrets or other valuable information that is the property of the employer. The protection is intended to prevent unfair competition by employees who establish a new business themselves, or who would take the valuable information with them for employment in another enterprise. At the same time, such agreements are nullified if they prevent the former employee from engaging in any future employment, or if the duration and scope of the agreement exceeds that which is necessary for the former employer's protection.

- Article 9 (former Article 24) requires that in the case of a sale or other transfer of the enterprise, any collective bargaining agreement then in effect continues in force as to the new employer. This is far more intrusive and restricting than in the American system, which, as noted above, under certain circumstances requires only that the new employer must engage in collective bargaining over a new labor contract. The rationale for this latitude is to permit new employers to take into account the changed economic circumstances and managerial changes that they intend to implement. It is sometimes the case that the terms of the previous collective bargaining agreement are a significant cause of economic difficulties experienced by the previous employer.

Moreover, the sale or transfer sometimes involves major changes in the work force, and only a minority of the former employees may continue employment with the new employer. Because, in the American system, union representation is the result of the fundamental right of free association of workers, the employees themselves must be permitted to make that choice. If most of the employees of the new employer are not the employees of the former employer, the mandatory continuation of the previous collective bargaining agreement means that they have been denied the opportunity to make that choice. And if they choose the same, or another union, the bargaining should take into account the needs of the new work force.

- Article 10, paragraph 11, would mandate reinstatement of a worker who has been freed from custody. Some clarification may be necessary if this new requirement is intended to protect workers who were placed in custody because of alleged conduct related to the former employment. If that is the intent, because reinstatement often is not feasible, compensation in the form of the actual wages and benefits lost by the employee might be considered as an added remedy.

- Article 17 would define several causes of termination that are particularly excessive. As to terminations that are in violation of the law or the terms of the collective bargaining agreement, or are based on membership in a labor union, these are consistent with the American system. However, the definitions also include a termination that is not for a valid professional reason. If that provision is to be included in the new labor code, some further explanation may be necessary in order to guide the judge who will decide whether the

termination of the employee is unlawful. As noted, in the American system, the termination of employees generally is permitted if it is not discriminatory, or is not in violation of a collective bargaining agreement. Moreover, compensation for employees normally is limited to the amount of lost wages and benefits, and reinstatement to employment with the former employer. This limitation prevents the unjust enrichment of employees, as well as excessive discretion in making the award of compensation.

- Article 19 would entitle employees subject to termination to a hearing and to assistance by a person of their choice. Although not required by law in the American system, this is consistent with common practice under the terms of collective bargaining agreements. Normally, the assistance would be provided by a representative of the labor union, who has the training and experience appropriate for such assistance. This is considered to be one of the valuable purposes of union representation.

- Article 21 would define the termination of one or more employees for economic reasons as being caused by economic difficulties or technological change. This appears to be an extremely, and unnecessarily, limited definition because legitimate economic motives may involve many more aspects, such as a reorganization of the enterprise, a change in products or services, the sale of part of the enterprise, subcontracting of production, and there are many more. Because a specific and comprehensive definition is so difficult, consideration might be given to a more general definition, such as any substantial change in the economic circumstances of the enterprise.

- Articles 22 - 25 would establish rather detailed procedures, some of which entail government intervention, in the case of terminations for economic reasons. The American system, as noted above, provides considerably more flexibility to the employer, but also provides protection if the actual motive involves discrimination against workers and, in certain cases, a requirement for advance notice. If such procedures are to be established in the labor code, consideration might be given to setting a definitive time limit to accomplish them. Otherwise, in some cases enterprises would be prevented from achieving the economic benefit of the proposed changes.

- Article 26 establishes a minimum and maximum amount of severance pay in the case of workers terminated for economic reasons. This is consistent with American law and practice, and consideration might be given to establishing other specific minimum and maximum amounts for damages in the code for all other cases of termination, whatever the cause.

Béraud Report. It is noted, with respect to several of the points discussed above, that his report proposes a more expansive definition of the termination of employees for economic reasons, does not require the continuation of a collective bargaining agreement in the case of a sale or transfer of an enterprise, does not require prior approval by the government in such cases (but is subject to subsequent review by the courts), and that severance pay is specifically defined with minimum and maximum amounts for damages. These aspects are generally consistent with the American labor law system.

Temporary Employees — The ability to utilize temporary employees on a limited or regular basis. The reasons may include additional work that is beyond the capacity or capability of the permanent work force, difficulty in recruiting employees directly who have the necessary skills, or the expectation that a new work project will have only a short duration.

In recent years, the use of temporary employees by employers in America and other countries has increased very substantially. The practice is largely unregulated by the American government, and no time limit on the employment of temporary employees is imposed on employers. This gives them flexibility to adapt to changing economic circumstances. In contract, the Béraud report would establish specific time limits on the duration of temporary workers (Article 231.5).

Subcontracting — The ability to subcontract work to another enterprise. The reasons may be circumstances that are similar to those that cause the use of temporary employees. There may be a number of additional reasons, such as that the decision to subcontract work is necessary because the cost of the product or service can be reduced significantly by transferring existing work outside the enterprise.

The subcontracting of work by enterprises also has increased in recent years in American practice, and is largely unregulated in the labor code, which is consistent with the proposed Articles 52 - 53. In collective bargaining relationships, however, if the subcontracting of work would cause the termination of union represented employees, and the employer's motive is to reduce labor costs, there may be an obligation for the employer to bargain with the union over the decision to subcontract.

This gives the union an opportunity to make counter proposals concerning ways to reduce the labor costs of keeping the same work within the enterprise, such as by reducing wages, or changing rules of work in order to increase efficiency or productivity. In any event, there normally will be a requirement to bargain concerning effects on employees of the decision to subcontract their work outside of the enterprise, such as severance pay, assignment to different jobs, or the right for laid off employees to be recalled in the event that the business expands and there are new jobs available.

Hours of Work — The ability to adjust the hours of work within the enterprise, with or without the voluntary agreement of employees. The motivation for flexibility in the hours of work usually is because of an increase in demand for the goods or services of the enterprise. The increase in demand that requires an increase in the hours of work of some or many employees may only be temporary, or its duration may be difficult to predict. In that case, it may be significantly less costly for the employer to utilize the existing work force, and provide extra wages for the overtime work, than to employ additional workers. Or, there simply may not be sufficient time available to hire and train new workers.

In order to provide such flexibility, American labor law, since 1938, has required only that work performed in excess of 40 hours per week be compensated at one and one-half times the regular rate of the employee's pay. No limit is placed on the number of overtime hours worked, except in the case of some collective bargaining agreements. Some collective

bargaining agreements contain provisions that restrict the ability of the employer to impose mandatory overtime. After a certain number of overtime hours of work (the number varies among different labor contracts), extra hours of overtime work may be performed only by the voluntary agreement of the employees.

By contrast, Articles 76 - 77 of the proposed labor code include two alternative limitations, which reflect the division of opinion expressed at the workshop. If such limitations are to be included in the final code, but more flexibility is also desired, consideration might be given to permitting more hours of overtime work, above the maximum number of hours that employers are permitted to mandate, but making the additional hours subject to the voluntary agreement of individual employees.

Other means of increasing flexibility are also possible, such as one of the alternative proposals (Proposition No. 3) contained in Article 321.7 of the Béraud report.

Privatization

As noted above, the privatization of state owned enterprises, although almost unknown in America, is similar in many respects to the sale or transfer of a private enterprise as to the affects on employees. This subject is not addressed in the proposed labor code, or in the Béraud report.

Like the American system described above, just as in the case of a managerial decision to sell or transfer the enterprise, the decision to privatize a state owned enterprise may be equally inappropriate for collective bargaining. On the other hand, because the employment effects on employees are similar, consideration might be given to including specific requirements on the purchasers of the enterprises, such as the obligation to bargain with the union for a new collective bargaining agreement if they hire a majority of the state enterprise employees. This would provide more flexibility than the present Article 24 of the labor code. In any event, establishing the rules for worker protection, including collective bargaining obligations and the status of prior labor contracts, would best be clearly established prior to commencing the privatization of an enterprise.

Union Representation and Collective Bargaining

The role of labor unions in America, and in other developed countries, has a long history of growth in the private sector, followed by a prolonged period of decline over the past three decades. By today, the proportion of workers represented by labor unions in the public sector is higher than in the private sector. The observations below are primarily applicable to labor union activity in the private sector.

A central purpose of promoting labor union representation and collective bargaining, in addition to the guarantee of the basic right of freedom of association, is that it will provide a basis for improving wages, hours of work, and other terms and condition of employment that are most appropriate for a particular enterprise or industrial sector. Private sector collective bargaining is considered to be the proper domain of the private sector parties themselves, with

minimum interference by the government, which is considered to lack the capacity to understand the economic and social realities of each enterprise and industrial sector, especially in an economy that is increasingly varied and complex. American law, therefore, primarily involves establishing, and enforcing, the basic procedural rules to which labor unions and employers must comply.

At the same time, the American labor code has expanded in content and scope to provide special protections for all workers, whether or not they enjoy union representation. These protections are considered the minimum working standards. Thus, in the American system, the concept of collective bargaining has come to mean a system of negotiating working conditions that are more favorable than required by the law and regulations, and that are tailored for the unique circumstances of a particular work place. The financial capacity of the employer is a major determining factor.

The proposed labor code generally embraces this two tier concept, but in some respects (as noted below) it appears to be inconsistent and contradictory, and not to have fully taken into account the emerging shift of economic activity from the public sector to the private sector, where government regulation carries the potential risk of interfering with economic progress and retarding employment growth.

The labor codes of many developed countries, including America, are quite different from place to place, and in many respects the Madagascar system is more similar to the system in France. It is not suggested here that Madagascar adopt the American system, which like all labor code systems has many flaws, but only that consideration be given to adapting certain aspects of it that address particularly serious problems.

Union Representation. Freedom of association is merely a theoretical right of workers unless there is a defined procedure to establish union representation, a procedure that is understood by all parties — workers, labor unions, employers, and the government. The government has a particularly important role in defining the procedures and, perhaps, as in the American system, for certifying that a particular union has successfully met the requirements for the representation of workers in an enterprise, or group of enterprises.

Union certification by the National Labor Relations Board resolves doubts about the status of unions, and is the foundation for requiring employers to recognize the union, and to engage in collective bargaining with it. Thus, it protects a union from refusal by the employer to accept that it is legitimate, and refusal by the employer to enter into collective bargaining. It also protects the union, for a certain period of time, from competition by other unions to represent the same workers. Another feature of the American system, which is unusual among other countries, is the concept of “exclusive representation” by labor unions. That is, union representation is decided by a clear majority of workers who belong to a certain category of workers (such as all the workers who work in the production of products in a factory), and the consequence is that only that one union may act as the representative of those workers.

The National Labor Relations Board conducts secret ballot elections for workers at the place of employment when at least 30 percent of the workers express their desire, normally by

signing a simple document, that they wish to have representation by a particular union. If workers desire that other unions be considered for representation, the election will decide which single union has the majority support. The election will also include a choice for no union representation.

In some cases, union representation is established without an election by the National Labor Relations Board. The union, after receiving the signatures of a majority of the employees of an employer, may demand that the employer recognize, and bargain with, the union. If the expression of majority support is clear, the National Labor Relations Board, and the courts, will enforce the obligation of the employer. If, however, the employer has a reasonable doubt about the majority status of the union, he may refuse to recognize the union and require the union to request that the National Labor Relations board conduct an election. Then, the election will be held to decide the union's status, and the results will be certified by the National Labor Relations Board.

The Labor Ministry has expressed concern about the system of union representation of workers in Madagascar, including the problem of determining the actual representational status of the unions. This concern was reflected in the comments of Ministry officials and others at the workshop on collective bargaining conducted in 1998, and is addressed in the following brief commentary on several of the articles that relate to this problem as proposed for the labor code.

- Article 114 incorporates a new definition of a labor union as relating to the interests of workers. The American concept is somewhat more specific, which requires that a labor union must exist for the purpose of negotiating with employers concerning wages, hours and other terms and conditions of employment. The concept is intentionally broad, in order to take into account wide variation in the needs of workers from place to place, and from time to time, but it is also intended to exclude organizations which are only political in nature, or which are determined to exist for the purpose of criminal activity.

- Articles 115, 116 and 117, consistent with the American system, and the applicable ILO Conventions, establishes that the right of association, for both workers and employers, is protected, that there is a right to the free election of representatives, and that the government will not interfere in these rights.

- Article 119, also consistent with the American system, protects workers against discrimination in employment because of their affiliation with a labor union, or participation in union activities. The same Article, however, also seems to prohibit a common practice that is legally protected in the American system. That is what is called, "dues checkoff," which means that (a) if the procedure is included by the request of the union and the consent of the employer in the collective bargaining agreement, and (b) there is individual written authorization by the workers, then the employer will deduct the union dues from the wages of the employees and pay the amount to the union on a regular basis so that the union has the necessary financial resources to carry out its responsibilities to the workers.

- Articles 120 and 123 continue the existing procedure for establishing union representation, in which the representation depends only on the support of seven workers. In large enterprises, this number may represent only a small minority of workers, leaving the actual

representativeness of the union in doubt. The authority established by seven workers then permits the union, under the present code and the proposed code, to name the candidates in the election of employee delegates at an enterprise. This procedure appears to permit the participation of any number of separate unions. The result potentially results in extremely fragmented, and weak, union representation, and no clear measure of the degree of actual worker support for the unions involved in the election.

One possible solution would be to adopt a procedure similar to the American system. Perhaps more consistent with Madagascar history and tradition, however, another possible solution would be to preserve multiple union representation but to establish a minimum election requirement for union recognition as worker delegates.

In order to be recognized as a legitimate union representative of workers at a particular establishment, this election requirement could be established by changing the labor code to require that the candidate (or candidates) nominated by each union must receive at least twenty percent of the vote of the workers. Thus, a potential maximum of five labor organizations would enjoy official status, and the measure of their worker support would be clear to all parties. A higher percentage requirement, of course, such as twenty-five percent, would result in a small number of recognized unions at the establishment. This approach would resolve the problem of ambiguity in determining union representation for the purpose of Articles 162 and 163. It also is consistent with the method proposed in the Béraud report.

- Article 123 also grants certain job benefits to union representatives, including educational and statutory leave. Other aspects of the code provide union representatives certain job protections, as does the American system. American law, however, is limited to certain protections intended to promote continuity in union representation, and does not provide, or permit, extra benefits to individuals who are union representatives based solely on their union status. That is considered discriminatory. Thus, under the American system, a union representative is allowed to have “super seniority” status. That is, in the case of a layoff of some employees at an establishment based on seniority in employment, the union representatives are deemed to have the highest degree of seniority in employment. Thus, they may remain employed at the establishment and are able to continue their duties as union representatives without interruption. Union representatives are also permitted a reasonable amount of time each week to carry out their union responsibilities, which is consistent with the proposed Article 130 of the code.

Collective Bargaining. In the American system, as explained above, collective bargaining is carried out by employers and unions with minimal government regulation. Accomplishing a complete and final collective bargaining agreement, after a union has been certified as the legitimate representative of workers in an establishment, is not mandatory. Sometimes a strike, the ultimate economic weapon of the union, must come first, but even a strike does not guarantee that there will be a collective bargaining agreement. This may be the result when the union is very weak. The following commentary notes some differences between the American labor law system and the collective bargaining provisions in the proposed code.

- Articles 152 and 155 appear to encompass collective bargaining agreements in enterprises that have at least 50 workers. American labor law, in theory, requires only 2 or more employees for union representation and collective bargaining. In practice, it is not unusual to have collective bargaining agreements covering 10 to 20 employees. The bargaining on the side of the employees may be conducted by union officials who are trained and experienced in collective bargaining, and not by the employees themselves.

- Article 153 states that the negotiators in collective bargaining must be allowed to have assistance from any person of their choice. This is consistent with the American system which provides that both the union, and the employer, may not interfere with the choice of bargaining representatives by the other party. This sometimes means that one union may utilize representatives of other unions during collective bargaining.

- Article 154, like the present code, requires that a collective bargaining agreement must include more favorable provisions than those required by the law and regulations. This is contrary to the American system, and a potential source of difficulty in collective bargaining for the workers at a particular enterprise. First, it is not necessary to mandate that the provisions in the labor contract may not contradict the minimum requirements of the labor code. The code requirements are always superior to collective bargaining agreements, although the code itself may specifically permit labor contracts to have variations from a particular provision in the code. Second, and more importantly, in the American experience it is best to leave the parties free to bargain for whatever provisions they consider to be necessary and appropriate for their particular circumstances. For example, they may wish to have an agreement on only one or a few subjects, and not to address, or improve, other requirements of the labor code. This observation is consistent with the commentary included in the Béraud report.

- Article 155, as proposed, would require the government to intervene when collective bargaining is not initiated by the parties themselves. In the American system, the parties are left to decide when, and whether, to initiate bargaining. The law requires that each side agree to meet for bargaining at reasonable times and places. The government intervenes only if the other party refuses a request to engage in collective bargaining, and files a complaint with the government that the other party's refusal is an unfair labor practice.

- Article 156 provides for the mandatory extension of a collective bargaining agreement to enterprises engaged in a similar field of activity even if those enterprises did not participate in the collective bargaining, and did not agree to be bound by the agreement. The mandatory extension can be at the initiative of either a union or the Labor Ministry. The mandatory extension of a collective bargaining agreement to parties who were not represented at the collective bargaining, and who did not voluntarily consent to be bound by it, is entirely contrary to the American system, and to the labor law system in most developed countries. Collective bargaining agreements are considered to be based on the principles of mutual consent and freedom of association. If multiple employers in an industry wish to engage in collective bargaining that results in a single labor contract, they may do so voluntarily with minimum interference by the government.

In the American system, employers sometimes establish an association of employers for collective bargaining. It may be based, for example, on a particular industry. It may be local, regional, or national. It is most common in the construction industry. This is called “multiemployer bargaining.” Generally, there will be one collective bargaining agreement between the association of employers and one union. The association of employers is entirely consensual. That is, it is completely voluntary on the part of the employers, and also must be agreed to by the union. The common practice is that a single agreement including wages, benefits, and other terms and conditions of employment is concluded by the union and the employers represented by the association. Then, in order to take into account the particular circumstances of different employers within the association, subsidiary collective agreements are negotiated for each enterprise.

Before bargaining for a new collective bargaining agreement begins, the employers are free to remain in the group, or to withdraw. The only restriction on this freedom to join or withdraw in the American labor law system is to require that, after bargaining begins, the employers must remain in the association until the next time there is bargaining over a new labor contract. This purpose of this requirement is to provide stability in collective bargaining. Only those employers who participate voluntarily in the association have any obligations under the labor contract between the association and the union. The government has no power to extend the agreement to any other employers, even if they are in the same industry, or in the same geographic area.

It would be considered unfair to apply the terms of a collective bargaining agreement on employers who took no part in the negotiations. In addition to interfering with the freedom of association of employers, an employer outside the association might suffer an unfair competitive advantage by the employers in the association. For example, their larger size could enable them to agree with the union on terms that would be more difficult, or impossible, for smaller employers. Or there could be other economic circumstances, or significant differences in production methods, that would make the association’s agreement inappropriate for employers outside the association.

- Article 157, as proposed, appears to grant authority in the Labor Ministry to regulate working conditions for a particular field of work in the absence of a collective bargaining agreement. The American labor law system is designed to encourage and promote collective bargaining, based on mutual, voluntary consent of the parties, and not to coerce them. The proposed provision appears to be coercive by creating a potential penalty for failing to reach agreement on a collective bargaining agreement. Moreover, as described above, the labor code in America is intended to establish minimum conditions of work for all workers. The provisions are generally applicable to all enterprises, and does not depend on the presence, or absence, of a collective bargaining agreement.

Strikes and Lockouts. In order to be effective, labor-management relations must include the right of workers to withhold their labor — the strike. In the American labor law system there are several distinct categories of strikes, all of which are protected by the law. Typically, strikes are

resolved through negotiations resulting in a formal agreement, and without government intervention.

- An economic strike occurs generally occurs when the union is attempting to create pressure on an employer to yield to demands for improved wages, benefits, hours of work, or other terms and conditions of employment. Normally, this occurs when there is a breakdown in collective bargaining for a new collective bargaining agreement.
- An unfair labor practice strike occurs when the employer has acted in a way that is unlawful under the labor code or regulations, and the union decides to respond quickly without waiting for investigation and enforcement by the government.
- A strike to enforce the terms of an existing collective bargaining agreement occurs when the union decides that it should create pressure on an employer who fails to comply with the agreement it signed. It is almost always the case in America that such disputes do not result in a strike, because the collective bargaining agreement contains provisions which require that the dispute will be resolved by a private, third party arbitrator selected jointly by the union and the employer.
- Collective action by employees, in the absence of a union, or in the absence of union approval, is also protected by the law. Generally, this action is protected because most collective action concerning conditions of work, whether or not under the authority of a union, is recognized as legitimate under the law. In practice, this right is exercised by employees who refuse to work when working conditions become intolerable. An example is when there is a sudden deterioration of health or safety conditions at the enterprise, and to continue to work under those circumstances would subject the employees to an imminent danger to their lives.

In the context of these categories of strikes, the following commentary describes ways in which the proposed code contains significant differences.

- Article 194 defines a strike in terms that are consistent with the definition of an economic strike, but it appears not to include the other types of strikes — the unfair labor practice strike, the strike to enforce an existing collective bargaining agreement, or collective action by employees in the absence of representation or support by a union.
- Article 195 contains general provisions designed to protect employees who participate in a strike. The rights of employees in the American system depend on the nature of the strike. In the case of an economic strike, the law permits the employer to hire replacement employees in order to continue the production or other business of the enterprise. At the end of the economic strike, the right of the employees to return to their jobs that were filled by replacement workers depends on mutual agreement between the employer and the union. As to the other categories of strikes, however, the workers have a right to reinstatement to their jobs, and to damages, which are limited to the amount of the actual lost pay and benefits. In these cases, the employer is considered at fault. In the economic strike, however, the employer is exercising his rights under the law and is not considered to be at fault.

- Article 198 as proposed would prohibit a lockout by employers, except in very limited circumstances. Lockouts in the American system, although rare, are permitted in economic disputes as they are considered the equivalent of the union's right to engage in a strike. An employer may lockout employees even before a strike is initiated by the union, which is called an offensive lockout. Or, as is more often the case, the employer decides to lockout all employees when the union has initiated a strike only by a few groups of employees. This is called a defensive lockout.

- Articles 200 to 220 include various procedures for the resolution of collective disputes, some of which authorize intervention of the government in the actual terms of the settlement. In the American system, the role of the government is much more limited. A specialized agency of the government, the Federal Mediation and Conciliation Service, provides mediators to help to resolve collective disputes, but only when requested by both parties. Arbitration by private arbitrators to resolve economic disputes is rare, and also takes place only when it is mutually agreed upon by the employer and the union.

Finally, the American labor code includes special procedures in circumstances in which a collective dispute threatens to cause severe disruption to the economy, and hardship to many people and organizations who have no direct involvement in the dispute. These procedures permit the President to direct the parties to suspend a strike or lockout for a certain period while mediators attempt to persuade the parties to resolve the dispute through negotiations conducted in good faith. In some cases, persons appointed by the President will recommend, but cannot compel, the terms of settlement of the collective dispute.

Worker Protection

The first report on the American labor law system contains an overview of the basic American worker protection laws, including the minimum wage, health and safety, child labor, the resolution of conflicts in the workplace, and discrimination in employment.

Protection against discrimination in employment is considered to be among the most important protections, because the advancement of both human rights and economic growth depends on all workers having an equal opportunity to participate in the labor market. In recent years, the equal treatment of women has been given a high priority and has been the subject of rapid development in American labor law.

Equal treatment of women generally requires that all labor protection laws and regulations be the same for all workers, men and women alike. In this context, proposed Article 89 in the labor code would continue prohibitions on night work for women. In order to promote equal treatment, such differential treatment of women has largely been eliminated in the American system, and the same approach might be considered for purposes of the Madagascar labor code.

At the same time, it is consistent with the principle of equal treatment for the labor code to take into account consideration of the needs of women who are pregnant, and after they have given birth. Therefore, the proposed Article 98 appropriately prohibits any inquiry of female

applicants for employment by employers as to whether or not they are pregnant. In the American system, discrimination in employment on the basis of pregnancy is specifically prohibited.

In the same context, American labor law prohibits sexual harassment. Article 20 of the proposed labor code would adopt the same principle. One difficulty, however, is how to adopt a definition that is adequate to protect against abusive forms of sexual harassment, but at the same time does not reward workers for making false claims. This has been a serious problem in the American system, because the definition, as in Article 20, defines sexual harassment as any unwelcome behavior. It is primarily meant to prevent supervisors from demanding sexual favors from employees as a condition of continued employment or other benefits of employment.

This, then, raises the question of whether the “unwelcome behavior” means any behavior that is offensive to any particular employee. Instead of leaving the question entirely to the judgment of the employee who makes a complaint, American law has evolved to incorporate the concept that the unwelcome behavior must be behavior that would be offensive, and would interfere with the employment relationship, in the judgment of any reasonable person. Such a limitation promotes equal application of the law against sexual harassment, and enables the government to concentrate enforcement action on the most serious cases.

Code du Travail Information

The lack of information on the provisions of the labor code and the regulations is a widespread problem for employers, as well as for workers and the labor unions. This problem was discussed at the workshops on reform of the labor code, and at the workshop on collective bargaining. It also is a major problem for the government, and its enforcement of the code, because the lack of knowledge itself leads to more violations. The code makes it a responsibility of the inspectors to provide information about the code, but with so many other priorities, their ability to do this is limited. Perhaps the enactment of the new code will provide an opportunity to improve knowledge and understanding of it.

Mandatory Notices for Workers. The American system provides information on the most basic requirements of the labor code by requiring employers to post a large notice at each place of employment. Regulations identify the specific information that must be included, such as the minimum wage, protection against discrimination, and protection of health and safety of workers. In addition, the government publishes and distributes brochures describing the nature and scope of the most important labor laws.

Availability of Collective Bargaining Agreements. For those workers who are covered by collective bargaining agreements, the labor code requires that the agreements be available to workers, which is the same in the American system. Because these collective agreements often are quite long and detailed, and difficult to understand, it is the general practice of labor unions and employers to provide workers with a summary of the more important aspects.

Publication and Translation of the Code. In interviews of employers and labor unions, the lack of availability of the code, together with a complete and accurate compilation of the regulations,

was nearly always mentioned as a serious problem. When the new code is enacted, and the regulations revised, publication and wide distribution of them would address this important need. It also is often suggested, in part because of potential direct foreign investors, that it be published in Malagasy, French and English.

Deference to Voluntary Codes

Economic globalization has spread manufacturing and other industries around the world, including Madagascar. These enterprises can contribute to the economic growth of developing countries, but they also can create unfair working conditions for employees in those countries. Consumers in the developed countries, especially in America, have demanded that these enterprises guarantee at least minimum standards for workers in developing countries.

These enterprises have begun to respond. Some of them have organized into associations for the purpose of reaching common agreement on minimum standards for workers, such as minimum wages, hours of work, worker health and safety, and the right to join labor unions. These are generally referred to as voluntary codes of conduct, which are enforced by inspectors employed by the associations. The number of these voluntary codes is growing, and not all contain the same standards of working conditions for workers.

For many developing countries these codes may provide a significant supplement to the labor laws. In some cases they can provide superior protection because the enforcement is conducted on a regular basis and the local enterprises have a strong incentive to comply because failure to comply with the codes may cause them to lose their export business to others.

This development seems certain to continue to expand, and may offer practical ways to improve working conditions as a supplement to enforcement of the labor code. Although it perhaps is premature at the present time, at some point the Ministry may wish to consider the possibility of adopting regulations to encourage these voluntary codes of conduct as a way of improving the conditions of work for many workers. Of course, a number of important issues would have to be considered. These include how to define acceptable voluntary codes that offer effective protection, how to determine the standards that should be included, and how to ensure that private enforcement by independent monitors will be carried on a regular basis with no advance notice to the employer.