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Poland's 1991 Labor Statutes: A Refinement of Earlier Legislation Rather Than a Liberalization of Union Rights and Powers

I. INTRODUCTION

After a series of strikes in the early 1980s, the independent trade union, Solidarity,¹ forced the Polish government to begin liberalizing the economy.² Once it became clear that the Soviet Union would not intervene militarily,³ Poland not only began "moving from a centrally planned economy to a market-driven one, but also from socialism to democratic capitalism."⁴ In June of 1989, free elections were held, Communist rule was rejected, and Poland became "the first non-Communist government in Eastern Europe since 1948."⁵ On December 9,

¹ An independent, self-governed trade union which initially was "an all-pervasive demand for greater personal liberty, independence and nationalism." Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 961 (1982). Solidarity's activities were suspended when Poland instituted martial law on December 13, 1981, and the union was, as were all other unions, dissolved when the 1982 Act on Trade Unions was implemented. David Storey, *Poland Night Lead Solidarity*, Reuters North European Service, Oct. 8, 1982, available in LEXIS, Nexis Library, Reuters North European File. Many former Solidarity members and adherents pursued their activities through underground illegal organizations. Wacław Szubert, *New Trends in Polish Labour Relations*, 12 COMP. LAB. L. J. 62, 65 (1990). It was not until 1989, when the restrictive rules regarding the registration of trade unions were abolished, that Solidarity was allowed to legally resume its activities. *Id.* Today, Solidarity still enjoys great popularity while it continues to take on the role of a political party. *Doing Business in Poland*, §§ 1.2.1-1.2.2, Dec. 20, 1991, available in, WESTLAW, Eurupdate File. In March of 1991, the conservative members of Solidarity progressed to form a democratic party called the Centre Alliance, the largest single political party to spring from the break-up of Solidarity as a political movement, and which now has the backing of Lech Walesa. *Id.*

² *Doing Business in Poland*, *supra* note 1.

³ *Trade Relations EC — Central and Eastern Europe*, § 1.6, Dec. 20, 1991, available in, WESTLAW, Eurupdate File.

⁴ *Doing Business in Poland*, *supra* note 1, § 1.21.

Contrary to the free market economy concept, the socialist economy is of planned character. Not only is all production and distribution of raw materials according to the economic plan, but the exchange of goods between units of the socialised economy is subordinate to the plan. State-owned industry is directly influenced by the planning system, and in the so-called private sector the indirect results of central planning are present.

J. Okolski, *Current Development in Polish Economic Law*, in *ANGLO-POLISH LEGAL ESSAYS* 117, 124 (W.E. Butler ed., 1982).

⁵ *Doing Business in Poland*, *supra* note 1, § 1.1.

1990, Lech Walesa⁶ became the first democratically elected president of Poland and he has continued a stringent economic austerity program designed to insure Poland's economic prosperity.⁷

Free labor unions are an essential part of stable democracies and collective bargaining⁸ is one of the most fundamental principles of a market economy.⁹ "[A]ny successful economic policy must comport with the natural ambition for material gain reasonably equivalent to an

⁶ Lech Walesa is now President of the Solidarity-led Polish national government, and won the Nobel Peace Prize for his efforts in forming and leading Solidarity, the first independent trade union established in a Communist country. *The MacNeil/Lehrer News Hour: Walesa's Nobel Peace Prize* (PBS television broadcast, Oct. 5, 1983). Walesa was awarded the Nobel Peace Prize for his efforts to secure the workers' right to establish their own organization without resorting to violence, since freedom of association is recognized as a fundamental human right by the United Nations. *Id.* Walesa was credited as having a personal, charismatic style of leadership with a brilliant common touch and political instincts that allowed him to think several steps ahead of everyone else. Tom Matthews, et al., *Decade of Democracy*, NEWSWEEK, Dec. 30, 1991, at 32.

⁷ Realizing that a market economy based upon private ownership has proven world-wide to be the only solution for the development of nations, Poland instituted a policy of radical economic reforms to de-monopolize, dismantle and privatize Communist structures. *Economic Reforms — Problems and Concerns*, SOLIDARNOSC NEWS (Coordinating Office Abroad of the NSZZ Solidarnosc, Brussels, Belg.), Nov. 1990, at 1. To put an effective muzzle on inflation, the reform program involves a restrictive tax on wage increases, along with a major price de-control. *Id.* Although the economic reform program keeps inflation relatively in check, it has lowered living standards by thirty percent and drastically limited internal consumption. *Id.* On January 29, 1991, shortly after Lech Walesa was elected President, the government indicated "that the gross domestic product had fallen twelve percent from the previous year and industrial productivity had declined twenty-three percent. More than eight percent of the population were unemployed." Gisbert H. Flanz, *Chronology*, in XIV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1, 4 (Albert P. Blaustein & Gisbert H. Flanz eds., 1991).

⁸ The general nature of the process of collective bargaining has been succinctly summarized: Collective bargaining is galvanized by the dual forces of economic power and rationality. Typically, rational discussion initiates, directs, and consummates this process of bilaterally determining wages, hours, terms and conditions of employment; but it is accented by non-discursive features such as party posturing, personality conflicts, and unreasonable constituency demands. Ultimately, it is the threat and actual use of economic weapons that impels the parties — union and management — toward contractual settlement. Since the exercise of economic force can impose substantial costs on both parties to a collective bargaining dispute, they are motivated to achieve settlement. Calvin William Sharpe & Linda E. Tawill, *Fact-Finding in Ohio: Advancing the Role of Rationality in Public Sector Collective Bargaining*, 18 U. TOL. L. REV. 283, 283 (1987). See also Paul F. Gerhart & John E. Drotning, *The Effectiveness of Public Sector Impasse Procedures: The Six State Studies*, in ADVANCES IN INDUSTRIAL AND LABOR RELATIONS, 146-47 (David B. Lipsky ed., 1985); RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 400 (1965).

⁹ J. Brian Atwood, *The Bush Agenda in Eastern Europe*, CHRISTIAN SCI. MONITOR, July 6, 1989, at 18.

individual's exertions and ingenuity in satisfying the private demands of others."¹⁰ To continue the difficult transformation into a free market economic system, Poland must give substance to its workers' rights to freely associate, bargain collectively, and strike.¹¹

In 1991, Poland passed new labor laws as the result of its continuing economic and political transformation. These laws will play an important part in determining whether Poland will become a member of the European Community, whether Poland satisfies the United Nation's International Labour Organization Conventions, and whether domestic unions have been granted any new or expanded rights or powers. It is the purpose of this Note to analyze whether or not Poland's 1991 labor legislation is sufficient to meet these concerns. Part II will review the history of labor relations in Poland and the main demands initially made by Polish workers regarding the powers and role of labor unions. Part III will highlight the important features of Poland's 1982 Act on Trade Unions and subsequent criticisms. Part IV will compare and contrast Poland's 1991 labor statutes with the 1982 Act. Parts V and VI will respectively appraise whether the new labor code complies with EC and ILO guidelines regarding worker rights.

II. HISTORY OF POLISH LABOR RELATIONS AND SOLIDARITY'S DEMANDS REGARDING UNION RIGHTS

As a socialist government, Poland's labor laws were historically based on the premise that labor relations should be regulated almost exclusively by the state and based upon the notion of cooperation.¹² The government's "prevailing interest in settling economic labor disputes [was] to maintain social peace at any expense."¹³

The Communist party and unions in eastern European countries were inextricably linked under Communist regimes. David Buchan notes that, "[t]he classic eastern block union [was] controlled by the [Communist] party."¹⁴ Its president was usually a member of the "central committee and sometimes of the party politburo."¹⁵ Although eastern block unions did not bargain collectively¹⁶ on their pay rates, their leaders

¹⁰ Bruce Fein, *Marshall Plan SEED*, WASH. TIMES, Dec. 12, 1989, at F1, F4.

¹¹ See *U.S. Labor Technical Assistance for Poland*, Daily Lab. Rep. (BNA) No. 177, at E-1 (Sept. 14, 1989).

¹² Andrzej Swiatkowski, *Current Developments in Labor Law and Labor Relations in Poland*, 12 COMP. LAB. L.J. 35, 37-38 (1990).

¹³ *Id.* at 41.

¹⁴ David Buchan, *The Real Essence of Solidarity*, FIN. TIMES, Oct. 13, 1982, at 17, 18.

¹⁵ *Id.*

¹⁶ "Collective bargaining, with its unpredictable results, would be an anathema . . . to the theoretical orderliness of central planning." *Id.*

had some input regarding wages.¹⁷

Generally, however, Communist-controlled unions were "denied the ultimate weapon of withdrawing their labour" because they could not strike.¹⁸ "The structure of the trade union movement was imposed from above" and was highly centralized; all unions "were subordinate to the directives and control of the respective party agencies."¹⁹ Ultimately, such centralization of power in state agencies and the Communist party stifled the growth of independent labor organizations since they had no opportunity to independently defend workers' interests.²⁰ Nevertheless, labor unions were subject to the directives and control of party agencies,²¹ and due to the government's highly interventionist role in labor relations, these agencies also took part in "collective negotiations"²² over limited aspects of working conditions.²³

Frequently conflicts, such as spontaneous strikes, between the workers and the central state authorities were responsible for shaping the terms and conditions contained in collective bargaining agreements.²⁴ Therefore "every serious labor dispute and conflict necessarily involved the government and assumed a political character."²⁵

The organizational structure of the trade unions . . . was based on . . . democratic centralism . . . [and resulted in trade unions that], as the independence of the lower levels of the trade union organization was limited, . . . acquired features of bureaucratic centralism. The bureaucratic fossilization of the trade unions, . . . [and] the fact that they gave priority to functioning as co-organizers of the production process

¹⁷ *Id.*

¹⁸ *Id.* "Strikes by workers against the workers' state are seen as, at best, illogical." *Id.*

¹⁹ Szubert, *supra* note 1, at 62-63.

²⁰ *Id.* at 62.

²¹ *Id.* at 63.

²² Collective negotiations involved negotiations between trade unions and economic administrative organs, resulting in "collective agreements" covering wages, benefits, working conditions, health and safety, social, welfare, and cultural conditions, and each party's obligations under the agreement involving the rules and means of its implementation. INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS, ch. XIII, § 1 (1988) [hereinafter INTERNATIONAL ENCYCLOPEDIA]. Collective agreements had to conform to Polish laws and its social and economic policies. *Id.* "Branch collective agreements" could be negotiated and concluded by national union federations and national employer federations for certain occupations or industries and would be the minimum required to be included in plant or "work place" collective agreements. *Id.* These agreements had to be registered with the Minister of Labor and Social Policy before becoming effective, and were declined registration if they did not conform to the Polish law and/or social and economic policies. *Id.*

²³ Swiatkowski, *supra* note 12, at 37.

²⁴ *Id.* at 63-64.

²⁵ *Id.*

over their function as defenders of workers' rights and interests, were the main . . . criticism[s] raised against the trade unions in Poland in 1980.²⁶

In August of 1980, the working class engaged in mass protests "against the policies of the government and the methods of running the national economy," sparking a turning point in the development of Polish labor relations.²⁷ The Poles valiantly struggled for the fundamental human rights of forming self-governing trade unions and the right to strike.²⁸ As a result, a Social Agreement was negotiated in that same month which provided for the establishment of independent and self-governing trade unions.²⁹

The new unions "attracted the vast majority of work[ing] people"³⁰ and sought to become their authentic representatives by defending employees' rights and interests and seeking full freedom of the foundation and activities of the trade unions.³¹ An independent trade union movement emerged and manifested a militant attitude by backing its demands with economic pressure.³² Without violence and with a disciplined flexing of muscle, workers engaged in massive strikes to protest government mismanagement.³³ The strikes transformed themselves into a genuine insurgent workers' movement when the workers realized that

²⁶ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 1. The role of the unions included responsibility for "promoting the development of production through constructive cooperation with management." *Id.* See also Szubert, *supra* note 1, at 63.

²⁷ Szubert, *supra* note 1, at 64.

²⁸ *The Spirit of Poland*, CHRISTIAN SCI. MONITOR, Sept. 2, 1980, at 24. Former U.S. President Ronald Reagan has written that free men have the right "to refuse to work for just grievances: the strike is an unalienable weapon of any citizen." RONALD REAGAN & R. HUBLER, *WHERE'S THE REST OF ME?* 138 (1965).

²⁹ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 1. In response to the "Baltic coast strike that rocked Poland's economy," the government agreed to enter into this agreement with the trade unions. John Darnton, *Can Poland Live With Its Bargain?*, N.Y. TIMES, Aug. 31, 1980, § 4, at 1. The agreement "recognised the workers' right to establish new trade unions as an 'authentic representation of the working class'" and acknowledged a union's right to strike. L. Garlicki, *Polish Constitutional Development in 1980*, in *ANGLO-POLISH LEGAL ESSAYS*, *supra* note 4, at 155, 162. The new unions were prohibited from acting as political parties; "their activities [had] to be oriented toward a representation of social and financial rights of the workers." *Id.* Under this agreement, new unions had to apply for registration in the Warsaw District Court; fifty unions were registered in that court between September and December of 1980. *Id.* at 162-63 n.18.

³⁰ Szubert, *supra* note 1, at 64.

³¹ Sylwester Zawadzki, *Inaugural Meeting of Trade Union Bill Drafting Team* (BBC radio broadcast, Oct. 25, 1982).

³² *Id.*

³³ Darnton, *supra* note 29, § 4, at 1.

they had a commonality of interest and wielded political power.³⁴

The rise of these unions, recognized in Autumn, 1980, and registered with the Warsaw District Court as a national federation called Solidarity, caused a complete breakdown of the previously imposed trade union structure.³⁵ The Solidarity movement was not limited to industrial employees or farmers, but included intellectuals, professors, "lawyers and judges, the Catholic Church, the Polish Writers' Union, Administration of Justice employees, environmentalists, and certain leaders of the Communist party."³⁶

Solidarity, led by Lech Walesa, was "an all-pervasive demand for greater personal liberty, independence and nationalism" rather than a movement to "overthrow the Communist Party."³⁷ Solidarity, employing articles 82 and 83 of the Constitution of the Polish People's Republic,³⁸

³⁴ *Id.*

³⁵ *Id.* National federations are national trade union bodies for a given branch of activity or occupation. INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 3. As a result of the Social Agreement the following types of independent and self-governing trade unions were established by the end of 1980:

1. the social-occupational movement Solidarity, consisting of, according to its own figures, about nine million members.
2. autonomous trade unions, consisting of about one million members.
3. the old branch trade unions, continuing their activity in a new guise, consisting of, according to their own estimates, about five million members.

Id. ch. XII, § 1.

³⁶ Aldisert, *supra* note 1, at 961.

³⁷ *Id.*

³⁸ POL. CONST. OF 1952 (amended 1978), ch. 8, arts. 82-83. Article 82 states:

1. The Polish People's Republic shall guarantee freedom of conscience and religion to its citizens. The Church and other religious societies and organizations shall freely exercise their religious functions. Citizens shall not be prevented from taking part in religious activities and rites. No one may be compelled to participate in religious activities or rites.
2. The Church shall be separated from the State. The principles of the relationship between Church and State, and the legal and patrimonial position of religious communities shall be defined by law.

Id. art. 82. Article 83 continues:

1. The Polish People's Republic shall guarantee its citizens freedom of speech, of the press, of meetings and assemblies, of processions and demonstrations.
2. To put these freedoms into effect, the working people and their organizations shall be given the use of printing shops, stocks of paper, public buildings and halls, means of communication, the radio, and other necessary material means.

Id. art. 83. At the present time, parliamentary and senate committees are drafting a new constitution "to codify legal and institutional changes and symbolize Poland's peaceful revolution from a one-party state to a democracy." COMM. ON FOREIGN RELATIONS, HOUSE OF REPRESENTATIVES, 102ND CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, 1233

which insures freedom of conscience and speech, fashioned a broad class-based political program to confront totalitarianism and initiate social reforms.³⁹

Solidarity was a movement that found expression in varied forms — from the demands of the ship builders in Gdansk, to the cries at a national bar meeting at Poznan for a more vigorous representation by lawyers to ferret out abuses by public prosecutors and prison wardens, to a successful protest by environmentalists in Krakow to close down a government operated forge that was polluting the skies over the city with deadly fumes.⁴⁰

When refused a genuine dialogue, the unions' tactics included strikes, demonstrations, slow-downs, sit-ins, and the forcing of hasty concessions.⁴¹

"[T]he anomalies of independent trade unions existing in a Communist country" soon became painfully apparent for Poland.⁴² In a Communist state, where "the government is the employer of all[,] . . . union[s] become the defender[s] of all."⁴³ Unions became "automatically national in scope, in membership and in spirit . . . [therefore] a localized dispute [could] turn into a national crisis, with the union leadership threatening . . . strikes to exert leverage."⁴⁴ From the workers' point of view, "[t]he limits on [their] demands [were] not what [was] economically feasible but what [was] politically obtainable."⁴⁵

"While the unions [could] threaten strikes, the Government's arsenal [was] limited."⁴⁶ To get production back on the rails, the government initially offered the unions joint responsibility in managing enterprises, which the unions summarily rejected; they only wanted "to represent workers' interests and not become a part of the system."⁴⁷ As the gov-

(Comm. Print 1991) [hereinafter COUNTRY REPORTS].

³⁹ Aldisert, *supra* note 1, at 961.

⁴⁰ *Id.*

⁴¹ *Program Resolution of the IInd Congress of the Independent Self-Governing Trade Union Solidarnosc*, SOLIDARNOSC NEWS (Coord. Office Abroad of NSZZ Solidarnosc, Brussels, Belg.) April 1990, at 1, 2 [hereinafter *Program Resolution*].

⁴² John Darnton, *Polish Puzzle: (Free) Unions*, N.Y. TIMES, Nov. 27, 1980, at A12.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* In the West, the demands of the unions are tempered by law, by accepted procedures for collective bargaining, and by the economic realities of free enterprise. Workers cannot demand too much or the employer will go bankrupt In a Communist state, where the government is the employer, these constraints do not apply [and] [t]he result is chaos

Id.

⁴⁶ *Id.*

⁴⁷ *Id.*

ernment learned from the demands presented by Lech Walesa, Polish workers acting exclusively through labor unions of their own choosing, primarily wanted to be the guardians and protectors of their legal, economic, social, and professional rights and interests.⁴⁸ In the early 1980s, the Polish workers' and Solidarity's main demands regarding unionism included:

1. The right to form independent trade unions — to set up self-governing trade unions independent from administrative bodies to freely allow them to determine the objectives and goals of their constituents,⁴⁹ to express the workers' opinions, and protect and defend their social and material interests.
2. The right to collectively bargain — to engage in productivity-based collective bargaining through direct labor management negotiations.⁵⁰
3. The right to strike — to use the ultimate union economic weapon to achieve collective bargaining demands.⁵¹
4. Revision of the censorship laws — provision of real opportunities for the new trade unions to publicly state goals and objectives, views on key issues, and comments on the government's key decisions, including securing radio and television time, as well as the right to issue publications.⁵²
5. The democratic election of union authorities.⁵³
6. The right to have a voice in the decision-making process.⁵⁴
7. The right of farmers to form an independent union having a right to strike.⁵⁵
8. The right of unions to own property.⁵⁶

Solidarity suffered an initial setback in February 1981, when the Polish Supreme Court rejected an appeal by private farmers to join an indepen-

⁴⁸ Swiatkowski, *supra* note 12, at 42-43.

⁴⁹ *Gdansk Negotiations on 30th August* (BBC radio broadcast, Sept. 1, 1980). See also *The Road from Gdansk*, *ECONOMIST*, Sept. 6, 1980, at 15; *The New Trade Union Law: Applications for Registration* (BBC radio broadcast, Aug. 25, 1982).

⁵⁰ Eric Bourne, *Poland Tries Way to Have its Meat and Eat It, Too*, *CHRISTIAN SCI. MONITOR*, July 14, 1980, at 7.

⁵¹ *The Road From Gdansk*, *supra* note 49.

⁵² *Id.* See also Rob Strybel, *International News, Warsaw-Labor*, 1981 Reuters Ltd., March 5, 1981, available in LEXIS, Nexis Library, International News File.

⁵³ Zawadzki, *supra* note 31.

⁵⁴ *Id.*

⁵⁵ Thomas A. Sancton, *A General Takes Charge; The New Premier May be Kania's Last Chance to Restore Order Peaceably*, *TIME*, Feb. 23, 1981, at 24, 25.

⁵⁶ John Darnton, *Polish Court Denies Appeal by Farmers for a Trade Union*, *N.Y. TIMES*, Feb. 11, 1981, at A1.

dent trade union.⁵⁷ Although the court recognized that the "farmers had rights under international law to unionize, [it held that they had] no such right under Polish law because they were self-employed, [therefore] not employees."⁵⁸ Instead, the court said that the farmers' organization could register as an "association" without collective bargaining rights.⁵⁹

In the same month, Poland's new Premier, General Wojciech Jaruzelski, imposed a moratorium on strikes and sit-ins, along with a plea for three months of uninterrupted work to allow the government to sit down with Solidarity to examine labor reforms.⁶⁰ The Polish Premier wanted to minimize destructive activities which could lead to conflict, and to appease the Soviet government which had recently charged the "counter-revolutionary forces" in Poland with launching a "frontal attack" on the Communist party.⁶¹

Successive crises in Poland ensued, and Poland's labor movement took on international significance as the economic and geopolitical consequences were felt.⁶² The Solidarity movement was "marked by great social tensions and . . . growing instability in the country."⁶³ The growing political and economic crises in Poland caused the Polish government to declare a state of emergency and impose martial law on December 13, 1981 to suspend the activities of all trade unions.⁶⁴ In 1982, Solidarity and all other existing union organizations were dissolved by Poland's 1982 Act,⁶⁵ which also established strict conditions for the formation of new labor organizations.⁶⁶

The primary role of unions at that time was transmitting these directives to their members and handling workers' grievances.⁶⁷ Following the 1982 Act, trade unions were defined as autonomous and inde-

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Sancton, *supra* note 55, at 24.

⁶¹ *Id.*

⁶² Jerzy Milewski, et al., *Poland: Four Years After*, 64 FOREIGN AFF. 337, 337-38 (1986).

⁶³ Szubert, *supra* note 1, at 65.

⁶⁴ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 1. Despite the imposition of martial law, Solidarity members campaigned to keep the union alive. However, more than 800 union activists, including the Solidarity chief Lech Walesa, were interned without trial as a result. Storey, *supra* note 1.

⁶⁵ Zmieniając Ustawę O Wykonywaniu i Organizacji, Rzemiosła [1982 Act on Trade Unions, as amended], ch. V (Pol.) (1982) [hereinafter 1982 Act]. Article 59 stated that "[t]he registrations of trade union[s] performed prior to the enactment of this Law lose their legal validity." *Id.*

⁶⁶ *Id.* ch. II. See also David Storey, *Warsaw, Poland*, 1982 Reuters Ltd., Oct. 8, 1982, available in LEXIS, Nexis Library, International News File.

⁶⁷ 1982 Act, *supra* note 65, ch. II.

pendent of the state and enterprises where their members work.⁶⁸ Unions were given authority to represent and protect employees' rights and interests regarding working conditions, wages, and social and cultural facilities.⁶⁹ Trade unions were authorized to independently determine their objectives and programs⁷⁰ as long as they were within the union's self-determined internal rules and regulations, which had to be compatible with Poland's constitution and other laws.⁷¹ Former Solidarity members violently contested the legitimacy of the process which allowed the creation of these new unions under the 1982 Act.⁷² Rather than disband as required under the 1982 Act, the Solidarity movement went underground to pursue their activities through illegal organizations.⁷³ Its members, as well as thousands of others, protested and boycotted the official institutions.⁷⁴ Solidarity remained faithful to its fundamental values; it maintained a willingness to engage in discussions for the good of the country and never engaged in violence.⁷⁵ Solidarity "survived due to its deep social roots, the support offered by western societies, trade unions and governments, and . . . the Church."⁷⁶

In November 1984, the Communist regime set up OPZZ⁷⁷ (the All-Poland Alliance of Trade Unions) to counter the influence of Solidarity. After it was established, it became Poland's largest national federation, a status which it has not given up today.⁷⁸ The OPZZ was the only legal alternative to Solidarity, and was affiliated with the Communist-controlled World Federation of Trade Unions.⁷⁹ The OPZZ serves the interests of its members in their industrial and social affairs, but with a low political profile and low credibility when compared to Solidarity.⁸⁰

⁶⁸ *Id.* art. 2.

⁶⁹ *Id.* art. 6.

⁷⁰ *Id.* art. 1.

⁷¹ *Id.* arts. 1 & 3.

⁷² Szubert, *supra* note 1, at 65.

⁷³ *Id.*

⁷⁴ *Program Resolution*, *supra* note 41, at 1.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ A national inter-union representative, which inherited the property of all trade unions dissolved in 1982, whose purpose was to defend the workers' rights and interests against administrative authorities. INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, §§ 1, 3.

⁷⁸ *Id.* See also *Doing Business in Poland*, *supra* note 1, § 1.2.2.

⁷⁹ COUNTRY REPORTS, *supra* note 38, at 1240.

⁸⁰ *Doing Business in Poland*, *supra* note 1, § 1.2.2.

III. POLAND'S 1982 ACT ON TRADE UNIONS

A. Significant Features of the Act

Poland's 1982 Act on Trade Unions (hereinafter 1982 Act)⁸¹ specified that: "trade unions are self-managing;"⁸² "membership in trade unions is voluntary;"⁸³ and "[t]rade unions represent and protect the interests and rights of employees as regards working conditions, wages, social and cultural facilities"⁸⁴ "in dealings with the management, state and economic administration bodies, [and] social organizations"⁸⁵ It stated that, "[t]rade unions are independent of state administration and economic administration bodies" and "are not subject to supervisions or control by the state administration bodies."⁸⁶

Under this legislation, employees literally had the right to create and associate in unions according to their needs and wishes. However, to form a new labor organization, strict conditions had to be satisfied.⁸⁷ Persons desiring to form a trade union had to elect a founding committee and adopt internal rules and regulations relating to the union's activities, the organizational structure, and election of the union executive boards, and then register the union in court.⁸⁸ A union needed a minimum of ten members, or if another union was already operating within the same enterprise, thirty members, and acquired legal status on the date of registration.⁸⁹ The 1982 Act allowed the creation of independent, self-governing trade unions by guaranteeing the right of independent determination of aims and programs of activity, internal by-laws, organizational structures, and the principles regarding the selection of boards and other leading bodies.⁹⁰ The trade unions' independence from administrative bodies was to be accomplished by fully excluding them from state inspection and control, and by obliging state agencies to refrain from any action aimed at restricting a trade union's independence.⁹¹

Although the 1982 Act expressly stipulated a union's independence

⁸¹ 1982 Act, *supra* note 65.

⁸² *Id.* art. 1.2.

⁸³ *Id.* art. 4.1.

⁸⁴ *Id.* art. 6.

⁸⁵ *Id.* art. 5.

⁸⁶ *Id.* art. 2.2.

⁸⁷ Storey, *supra* note 66.

⁸⁸ 1982 Act, *supra* note 65, arts. 1, 18.

⁸⁹ *Id.* arts. 18, 20.

⁹⁰ *Id.* arts. 18, 19, 21. See also *The New Trade Union Law: Applications for Registration*, *supra* note 49.

⁹¹ *The New Trade Union Law: Applications for Registration*, *supra* note 49.

from state administration, the way was open for the new unions to be dominated by the Communist party.⁹² In addition, the independence of the trade union movement was further impeded since the 1982 Act restricted the freedom of association by allowing only one trade union at each enterprise.⁹³ Beginning in January 1985, these unions were allowed to form national structures and inter-union organizations.⁹⁴ It was not until the 1982 Act on Trade Unions was amended on April 7, 1989⁹⁵ that employees were actually given the right to create and associate in truly autonomous, independent trade unions.⁹⁶

The 1982 Act indicated that the trade union "acquires legal personality and the right to pursue its activities on the date of its registration."⁹⁷ Under the 1982 Act, collective bargaining was limited only to certain aspects regarding "wages, types of work performed, and working conditions."⁹⁸ Thus, collective bargaining agreements, which were subject to central state authority approval, "were not the result of 'real bargaining.'"⁹⁹ Under this statute, unions had "the right to express their opinion on the guidelines or drafts of legislative acts and decisions involving the rights and interests of working people and their families, to include the living conditions of retired people, both those old and disabled."¹⁰⁰ Under the 1982 Act, trade unions had "the right to conclude collective agreements of nationwide range . . . [for] . . . all employees in a given trade, regardless of their trade union membership."¹⁰¹ In addition, under the 1982 Act, "[w]ages and working conditions in trades not covered by collective agreements [were] established in agreement with the trade unions."¹⁰²

⁹² Storey, *supra* note 66.

⁹³ Szubert, *supra* note 1, at 65.

⁹⁴ *Id.*

⁹⁵ O Zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej [Amendment to the 1982 Act on Trade Unions] (Pol.) (1987) [hereinafter 1982 Amendment].

⁹⁶ Swiatkowski, *supra* note 12, at 36.

⁹⁷ 1982 Act, *supra* note 65, art. 20.

⁹⁸ Swiatkowski, *supra* note 12, at 37.

⁹⁹ "Real bargaining" cannot occur in a Communist state where the means of production have been nationalized, depriving the employer of a self-sufficient position; employers are influenced by the central state authorities and bargaining which occurs is subject to their approval. Szubert, *supra* note 1, at 63. Therefore, the employer's position is merely "a link in the apparatus of the states' economic administration." *Id.* at 64. "Real collective bargaining" requires the existence of two self-sufficient parties: an autonomous trade union and an autonomous employer. *Id.* at 69. Such bargaining cannot occur until state enterprises are privatized and employers regain their own identities, which were lost under the "former totalitarian model of labour relations." *Id.*

¹⁰⁰ 1982 Act, *supra* note 65, art. 22.1.

¹⁰¹ *Id.* art. 24.

¹⁰² *Id.*

Article 35 of the 1982 Act specified that:

The activities of trade union organisations at plants comprise, specifically:¹⁰³

1. Taking a position on all individual problems of employees, in accordance with provisions of the Labour Code.

2. Assuming a standpoint to the plant's management and workers' self-management bodies on issues involving the rights and welfare of the workers, in particular on the formulation of the workplace wages system, internal work rules, bonus and award schemes, work schedules, holiday schedules and questions involving the social, welfare, and cultural needs of the working staff.

3. Co-operation with the plant's management in improving the qualifications of the workforce, introducing rationalisation [sic] initiatives and innovations and improving human relations in the plant.

4. Control the observance of provisions of the Labour Code, particularly with respect to occupational safety and hygiene; directing the activities of the social Labor Inspectorate, and the co-operation with the State Labor Inspectorate in this field.

5. Performance of social control over the allocation of apartments available to the work place for distribution.

6. Representing the welfare, social and cultural needs of retired employees (on old-age and disability pensions).

Under the 1982 Act, the collective bargaining subjects included the utilization and distribution of the social and housing fund, and remuneration including the award of prizes and bonuses, working regulations, worktime distribution, and vacation plans.¹⁰⁴

The 1982 Act stated that "[s]hould a collective dispute develop, the relevant trade union bodies and administration bodies shall immediately begin negotiations with a view to settling the dispute."¹⁰⁵ Under the 1982 Act, the subject of a "collective dispute" was not defined, and therefore it was arguable that political issues affecting the employer-em-

¹⁰³ *Id.* art. 35.

¹⁰⁴ *Id.* art. 36.

¹⁰⁵ *Id.* art. 40. See also *id.* arts. 41, 44; *Poland Night Lead Solidarity*, *supra* note 1. If negotiations failed to resolve a dispute, either party could demand that conciliatory proceedings be instituted. 1982 Act, *supra* note 65, art. 41. If conciliation failed to resolve the dispute, the parties submitted the dispute to public arbitration under art. 42, and only if the union stated prior to arbitration that it would not be bound by the arbitration settlement could the union strike. *Id.* arts. 42-44.

ployee relationship were proper subjects of a collective dispute, which the local union could pursue.¹⁰⁶

If negotiations failed to resolve the dispute, "either party [could] demand that conciliatory proceedings be instituted . . ." and "... conducted by a committee consisting of six members appointed in equal proportions by both parties."¹⁰⁷ These conciliation proceedings were optional and could be omitted; however, omission of this stage prevented the union from ultimately striking because the legal mechanisms for settling the dispute were not considered to have been exhausted.¹⁰⁸ If an agreement was reached through the conciliatory proceedings, it was binding for both parties.¹⁰⁹

If conciliation failed within the prescribed time limits, the conciliation committee would prepare reports on the positions of the parties and their differences, and the dispute would lead to compulsory social arbitration, a further pre-condition to strike.¹¹⁰ In addition, to preserve its right to strike, the union had to state, prior to arbitration, that it would not be bound by the arbitration settlement.¹¹¹ Without such a declaration, the arbitration settlement was binding for both parties and strike action was precluded.¹¹² Furthermore, a strike ballot, the approval of a superior union agency, and a seven-day notice to the employer were required before a strike could commence.¹¹³ "In the case of a dispute regarding the content of a collective bargaining agreement, a strike could not be proclaimed before the agreement's proper termination (which [was], as a rule, subject to three months notice."¹¹⁴)

¹⁰⁶ 1982 Act, *supra* note 65, art. 40.

¹⁰⁷ *Id.* art. 41. Article 41 states:

1. Should negotiations fail to resolve a dispute, either party may demand that conciliatory proceedings be instituted. Conciliatory proceedings are conducted by a committee consisting of six members appointed in equal proportions by both parties.

2. An agreement should be reached through conciliatory proceedings within seven days in the case of a dispute involving a single plant (i.e. factory dispute), and within ten days when the dispute extends beyond a single plant (i.e. a multi-factory dispute).

3. The settlement is reached in the form of an agreement binding for both parties. Should the parties fail to reach an agreement, the committee will draw up a protocol of discrepancy, indicating the position taken by both parties.

Id.

¹⁰⁸ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XIV, § 2.

¹⁰⁹ 1982 Act, *supra* note 65, ch. V, art. 41.

¹¹⁰ *Id.*

¹¹¹ *Id.* art. 42.

¹¹² *Id.*

¹¹³ *Id.* art. 45.

¹¹⁴ *Id.* art. 45.5. See also Szubert, *supra* note 1, at 66. In addition to restrictions discussed in

The 1982 Act defined a "strike" as "a voluntary, collective stopping of work by employees undertaken in order to defend the economic and social interests of the given group of employees."¹¹⁵ Under the 1982 Act, a strike was a last resort and could only be proclaimed after exhausting the negotiation, conciliation, and arbitration proceedings.¹¹⁶ Thus, for a union to strike, it was necessary to undertake preliminary measures as early as six months before the proposed strike¹¹⁷ and it was procedurally difficult to reach the point when it could be legally employed.¹¹⁸ Therefore, the most effective means of insuring a partnership position for trade unions — the possibility of calling a strike or using other means of protest in the case of a dispute — was highly restricted and wildcat strikes were banned.¹¹⁹ The 1982 Act on Trade Unions states in relevant part:

Article 45

1. A strike is proclaimed by the plant's trade union body, following an approval in a majority of vote by employees in a secret ballot, and the endorsement of such a decision by a superior trade union level. Participation in the ballot is voluntary.

3. Participation in a strike is voluntary. No one may be forced to join a strike or to refuse to participate in one. No attempts may be made to obstruct the desire to undertake work if conditions permit to continue it by persons who have not joined the strike, or who decided to return to work.

the text, "there were also restrictions on the right to strike depending on the functions exercised by the workers and the nature of services rendered by them." *Id.* The right to strike was not vested in civil servants; bank employees; employees of courts and prosecutors' offices; military units; establishments subject to ministers of defense and home affairs; workers of enterprises producing, storing, or supplying food, water, electricity, and gas; health service employees; employees in the arms industry; and to some extent, employees in transportation and mass media. 1982 Act, *supra* note 65, arts. 13-15. Cf. INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 3. In addition, the law banned strikes in enterprises located in regions which were proclaimed "disaster areas." 1982 Act, *supra* note 65, art. 50. Article 50 banned strikes in plants located in regions which have been proclaimed disaster areas — "from the moment of such proclamation." *Id.* Furthermore, political strikes were specifically forbidden. *Id.* art. 44.5. "Political strikes are inadmissible." *Id.*

¹¹⁵ 1982 Act, *supra* note 65, art. 44.1.

¹¹⁶ *Id.* art. 44.2.

¹¹⁷ COUNTRY REPORTS, *supra* note 38, at 1240.

¹¹⁸ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XXIV, § 1.

¹¹⁹ 1982 Act, *supra* note 65, arts. 40-52. See also Zawadzki, *supra* note 31; Poland May Offer Union Legality, Deal Would Require Solidarity Support for Party Reforms, CHI. TRIB., Jan. 14, 1989, at C8.

Article 51

Participation in a strike organised in accordance with the above provisions does not constitute a violation of employees' duties and responsibilities, and cannot involve adverse consequences for the participants. This provision also applies to other forms of protest, referred to in Article 36, Sect.2.

Article 54

Anyone who directs a strike organised contrary to the provisions of this Law, is liable to the punishment of prison up to one year, to limitation of freedom, or to pay a fine up to 50,000 zlotys.

Articles 51 and 52 of the 1982 Act state that "participation in a strike organised in accordance with the above provisions does not constitute a violation of the employees' duties and responsibilities, and cannot involve adverse consequences for the participants."¹²⁰ During a legal strike, "employees preserve the right to social security allowances and other benefits due under the contract of employment, except the right to pay."¹²¹

B. Criticisms of the 1982 Act

Poland's 1982 Act was criticized by scholars and commentators because it restricted the scope and content of collective agreements. For example, collective agreements covered only wages, the type of work performed, and working conditions.¹²² Under the 1982 Act, wages were set in tripartite negotiations at the enterprise level between unions, management, and workers' councils.¹²³

Collective bargaining was further restricted by Poland's two-tiered bargaining system in which bargaining occurred at both industry and plant levels.¹²⁴ "Polish labor law does not recognize the exclusivity¹²⁵ and majority¹²⁶ principles developed by American labor law."¹²⁷

¹²⁰ 1982 Act, *supra* note 65, arts. 51, 52.

¹²¹ *Id.* art. 52.

¹²² Swiatkowski, *supra* note 12, at 43.

¹²³ COUNTRY REPORTS, *supra* note 38, at 1241.

¹²⁴ Swiatkowski, *supra* note 12, at 37.

¹²⁵ Under section 9(a) of the National Labor Relations Act, "[w]hen a union is designated by the NLRB as the representative of a group of employees, or when an employer privately accords the union such recognition, the union enjoys the exclusive right to represent those employees." DOUGLAS L. LESLIE, LABOR LAW 17 (West Nutshell Series 1986).

¹²⁶ When a union wins a valid representation election, it is presumed to have the majority of

Under Poland's two-tiered bargaining system, any agreement reached at the plant level had to conform to the terms and conditions agreed upon at the industry level.¹²⁸ "Collective agreements" negotiated at the national or industry level covered all employees in a given trade and had to be registered at a provincial court, but registration was refused if the contract diverged from the social and economic policies of the state.¹²⁹ In addition, unions had to develop a common position for all mandatory subjects of bargaining within thirty days.¹³⁰ If the trade unions were unable to reach a common position, the employer (government) intervened and regulated wages and conditions of work on a uniform basis in enterprises all over the country.¹³¹ Because little flexibility existed, little collective bargaining was possible or actually occurred.¹³²

For collective bargaining to be a meaningful process, it was urged that the state relinquish its active role in regulating wages and working

the employees' support for the following 12 months under section 9(c)(3) of the National Labor Relations Act. *Id.* at 25.

¹²⁷ Swiatkowski, *supra* note 12, at 38.

¹²⁸ *Id.* at 37. National trade union federations were authorized to reach "branch collective agreements" with employers' organizations for a given branch of activity or occupation. INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 1. If such an agreement had been negotiated, a "workplace collective agreement" at an individual plant covered under the branch collective agreement could apply higher wages and benefit rates than the minimum laid down in the branch collective agreement if the individual plant enterprise had sufficient financial resources. *Id.* Particularly, the "workplace collective agreement" specifies:

1. the tasks connected with the implementation of plans of the enterprise or establishment regarding the creation of conditions favouring increased labour productivity and improvement of operational efficiency and strengthening of labour discipline.

2. the workplace remuneration system elaborating detailed conditions regarding wages and other benefits connected with work.

3. on the basis of and within the framework of the branch collective agreement, detailed rules regarding working conditions and other matters connected with the implementation of the agreement.

Id.

¹²⁹ 1982 Act, *supra* note 65, art. 26.6.

6. The Court will refuse to register a trade union should its statutes indicate that the organisation in question is not a trade union as defined by this Law, or if the provisions of the statutes are incompatible with the Law's regulations.

Id.

¹³⁰ Trade Union Act of April 7, 1989, art. 18, § 8.

¹³¹ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 1. "Ideological differences" between politically motivated national and local level labor organizations may impede the reaching of a common interest, which might ultimately affect the bargaining process. *Id.*

¹³² Swiatkowski, *supra* note 12, at 37. Due to the current legal system and economic situations of many enterprises, plant level unions were forced to accept the framework negotiated by the industry-wide unions. *Id.*

conditions, and simply define mandatory subjects of collective bargaining.¹³³ Admittedly, the decentralization of the regulation of wages could result in the more influential workers receiving benefits at the expense of others and contribute to the growing inflation rate and thus increasing the cost of living and the inflation rate.¹³⁴

Nevertheless, the government was urged to withdraw as an active participant in labor relations and to recognize the relationship between organized labor and employers, and instead, to merely facilitate a procedure by which the parties could resolve their differences.¹³⁵ It was also suggested that employers should attain an autonomous position from the government to improve collective bargaining.¹³⁶ However, the vast majority of employers are currently state-owned enterprises controlled by the government and have not yet attained an autonomous position under Poland's privatization program.¹³⁷

Under this view, privatization of industrial employers is necessary before genuinely free collective bargaining can produce a labor contract reflecting the economic positions of the parties in the new market economy. Finally, the notion that different labor unions existing at an employer's plant should reach a common agreement before negotiating with an employer frustrates the achievement of free collective bargaining, and merely strengthens the state's role as the sole power in labor relations.¹³⁸

Under the 1982 Act, the statutory settlement procedures of negotiation-mediation-arbitration, which had to be exhausted before a strike could be called, were an attempt to persuade the parties to move to reasonable solutions.¹³⁹ However, unlike strikes, that process did not impose the unacceptable costs that the parties wished to avoid, and had little persuasive effect over an employer who was unwilling to concede during settlement negotiations.¹⁴⁰

As heirs to the traditional Communist-sponsored unions,¹⁴¹

¹³³ *Id.* at 43.

¹³⁴ Szubert, *supra* note 1, at 69.

¹³⁵ Swiatkowski, *supra* note 12, at 44.

¹³⁶ Szubert, *supra* note 1, at 69.

¹³⁷ As of August 31, 1991, less than 10 percent of Poland's 8,443 state enterprises had been transformed into privately-owned corporations. Ada Kostorz-Kostecka, *Minister Lewandowski's View of the First Year of Privatization: Economics Overshadowed by Politics*, POLISH NEWS BULL., Oct. 8, 1991.

¹³⁸ Swiatkowski, *supra* note 12, at 44.

¹³⁹ *Id.*

¹⁴⁰ See WALTON & MCKERSIE, *supra* note 8, at 30-33. The Polish system was similar to some U.S. public sector collective bargaining statutory impasse procedures. Sharpe & Tawill, *supra* note 8, at 285-86.

¹⁴¹ Traditionally, Communist-sponsored unions limited the workers' rights of association and

Poland's new unions needed a virtually unrestricted right to strike to secure the necessary strength in negotiating and administering collective bargaining agreements. Without a genuine right to strike, the nature of the union-management relationship is different from that typically enjoyed in the United States private sector.¹⁴² Unionized employees in the U.S. private sector, for example, have the right to strike to exert economic pressure on the employer to yield to their demands.¹⁴³ Only with such a power can unions begin to fully address workers' concerns regarding wages, benefits, and working conditions since the cost of a strike can force management to negotiate with workers.

"In labor-management negotiations, the parties are usually held together by a considerable area of joint dependency."¹⁴⁴ Typically, both parties derive benefits from being in the relationship and experience important sacrifices during a strike.¹⁴⁵ The parties can be motivated to bargain to divide any "joint gains" by market-like forces or from legislation.¹⁴⁶ The possibility of a costly strike encourages a negotiator to proceed with caution.¹⁴⁷ As the strike costs increase, the parties have a greater incentive to reach a mutually agreeable settlement.¹⁴⁸ If a union is not able to impose strike costs upon a company, the latter has no incentive to meet the union's demands but attempts to maximize its total utility by increasing its size of the joint gains.¹⁴⁹ To avoid such a mo-

the independence of the lower levels of the trade union, and union activities were supervised by state administrative authorities. INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 1. In 1980, a Social Agreement provided for self-governing trade unions which were independent from state administration. *Id.* However, as a result of the imposition of martial law in December of 1981, the activities of all trade unions formed under the Social Agreement were suspended and the unions were dissolved after the 1982 Act on Trade Unions was implemented. *Id.* Although the 1982 Act literally allowed independent and self-governing unions, it was not until 1989, when the restrictive rules regarding the registration of trade unions were abolished, that multi-unionism became a reality. *Id.* See also Szubert, *supra* note 1, at 65. Under the 1991 Law, "a trade union is a voluntary and self-governing organization . . ." O Związkach Zawodowych [Law on Trade Unions], art. 1.1 (Pol.) [hereinafter 1991 Law].

¹⁴² See Sharpe & Tawill, *supra* note 8, at 285-86.

¹⁴³ JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS — THE BASIC PROCESSES, LAW AND PRACTICE 138 (1988). However, there are some limitations on the right to strike during a contract. See *infra* note 245.

¹⁴⁴ WALTER & MCKERSIE, *supra* note 8, at 400.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 399-400.

¹⁴⁷ *Id.* at 31. Strike costs for a union include: (1) lost wages; (2) loss of institutional security; (3) loss of good will of management; and (4) loss of public image. *Id.* Typical strike costs incurred by management include: (1) loss of operating profits and/or market share; (2) loss of negotiator status with higher management or stockholders; (3) loss of good will with labor; and (4) loss of public image. *Id.*

¹⁴⁸ *Id.* at 31-35.

¹⁴⁹ *Id.* at 13, 29, 31.

nopolistic employer position, the employees' unions must be given an effective right to strike.

However, until Polish employers gain an autonomous position from the government through private ownership of enterprises, a union's powers may not be exploited fully since collective agreements require the existence of two self-sufficient parties.¹⁵⁰ In a Communist state, where the government runs the state enterprises, the terms of collective bargaining agreements are ultimately subject to state authority approval, and are subject to politics rather than economic feasibility.¹⁵¹ As of August 31, 1991, only 8.8 percent of 8,443 state enterprises were transformed into corporations owned by the state treasury as a single shareholder or privatized by liquidation.¹⁵² The Polish government therefore continues to run the vast majority of businesses as state enterprises. This may explain why Poland's 1991 labor law revisions continue to closely parallel the Federal Labor Relations Act (hereinafter FLRA),¹⁵³ the U.S. statute covering labor relations between the federal government and unions, rather than the National Labor Relations Act,¹⁵⁴ the U.S. statute that governs private sector labor relations.

Since the government essentially runs Poland's industries, services, and government offices, it plays a large role in determining the wages and working conditions for employees in all industries. Such a situation does not allow free interplay of the labor market economic forces, and thus is counter to a market-driven economy. The unions basically represent the workers in front of government negotiators, becoming protectors of all citizens' rights, similar to an elected government official, and may continue to take on the role of a political party and misuse strikes as a weapon to improve overall living standards.¹⁵⁵ The question then be-

¹⁵⁰ Szubert, *supra* note 1, at 69.

¹⁵¹ See *supra* notes 29-45 and accompanying text.

¹⁵² Kostrz-Kostecka, *supra* note 137. "Privatization" involves transforming state enterprises into independent, self-governing, and self-financing economic entities with their own legal status, such as joint-stock or limited-liability companies which will be owned by private sector investors.

Doing Business in Poland, *supra* note 1, § 2.1.1. Prior to the privatization program, [a]ll natural resources [were] state-owned in Poland, as [was] 44 percent of the total land area, 80 percent of the means of production (industrial plants) and 55 percent of non-productive property (residential buildings, schools, hospitals, etc.). About 2 percent of the land, 6 percent of the means of production, and 10 percent of non-productive property (cooperative apartments) [were] the property of cooperatives. Thus, the socialised economy [had] at its disposal all natural resources, about 50 percent of the land (i.e. about 12 million hectares, including more than 65 percent of woodland), 86 percent of the means of production, and 65 percent of non-productive property.

INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. I, § 4.

¹⁵³ See generally, 5 U.S.C. § 7101 et seq. (1988).

¹⁵⁴ See generally, 29 U.S.C. § 151 et seq. (1988).

¹⁵⁵ *Doing Business in Poland*, *supra* note 1, § 1.2.2. See also *id.* § 4.4.7.1. Solidarity was

comes whether the government's response will be to continue its policy of settling economic labor disputes to maintain social peace at any cost.¹⁵⁶

The 1991 labor regulations were hoped to guarantee and further extend a union's freedom to bargain over more than just wages and working conditions, and to promote the notions of industrial justice, basic fairness, and legality.¹⁵⁷ Andrzej Swiatkowski stated that "justice and fairness in labor relations can be served only by maintaining the proper balance of rights and duties between the parties"¹⁵⁸ The new labor code was suggested to be extended to cover all employees and regulate the minimum rights and maximum duties of employees and employers.¹⁵⁹

formed in the summer and fall of 1980 on a wave of illegal worker strikes which produced the initial social accords, and subsequently "became the bulwark of democratic opposition." *Program Resolution*, *supra* note 41, at 1. "Its strength derived from a rebellion against exploitation and abuse of human labour, against disrespect for human rights, social oppression and contempt for national traditions." *Id.*

The situation in Poland is distinguishable from the American public sector unions which do not have a right to strike. The American labor market "imposes substantial limits on the ability of public employers to take advantage of their employees." HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* 168 (The Brookings Inst. 1971). American public employers must compete for workers with private employers, and therefore cannot permit their wages and conditions of employment to be relatively poorer than those offered in the private sectors and still get the needed workers. *Id.* By contrast, in Poland, the government has a predominant role in determining the wages in the public and private sector, and therefore, the public employers have no private sector employers free from government domination which provide a relative benchmark for wages and benefits. Furthermore, in America, public employee unions serve as lobbying agents wielding political power "quite disproportionate to the size of their membership." *Id.* at 169. With such power, the American public sector unions are able to engage in effective collective bargaining despite the absence of a right to strike. As evidenced by the Polish labor movement's strategy from its inception, it wields political power against the government, similar to the American public sector unions, since they have felt that they have not yet been granted an effective right to strike.

¹⁵⁶ Traditionally, Poland's prevailing interest was to settle economic labor disputes and "maintain social peace at any expense." Swiatkowski, *supra* note 12, at 41. For example, in response to Solidarity's illegal strikes in 1980, the government reached a Social Agreement rather than punishing the strikers. See discussion *supra* note 141. As a further example, in response to the workers' strikes in the spring and summer of 1988, the Polish government was again forced to accept and legally recognize Solidarity as a representative force in Polish society. *Program Resolution*, *supra* note 41, at 1. See also discussion *supra* notes 83-84 and accompanying text.

¹⁵⁷ Swiatkowski, *supra* note 12, at 46.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 45.

C. Worker Dissatisfaction With the 1982 Act

The declaration of martial law, followed by the passage of the 1982 Act, temporarily ended Poland's economic liberalization.¹⁶⁰ It was not until 1988 that reforms once again began to be developed.¹⁶¹ The government offered no solutions to the Polish problems and internal and domestic isolation resulted, so Solidarity continued to gain moral and political authority.¹⁶² The crisis and political transformations occurring in the Soviet Union opened a way out of the impasse. In October of 1987, "[Solidarity] resume[d] overt activity. Worker strikes in spring and summer of 1988 marked the turning point. The authorities were forced to accept Solidarnosc as the representative force of the Polish society, and this . . . [led to] the relegalization of the union"¹⁶³

In the late 1980s, however, industrial conflicts and work stoppages became more and more frequent. In addition, all were initiated beyond the official unions' control. Workers disregarded the procedures provided by legal provisions, deeming them too cumbersome to be observed, especially in the case of serious conflicts. Wildcat strikes also continued after the recognition of the Solidarity unions in 1988; despite their legal character, sanctions were not inflicted on the strikers because the general political climate of the country did not permit the rigid application of the law.¹⁶⁴

During some of the 1988 strikes, trade unions voiced their displeasure with the legal procedures regarding the right to strike, claiming that the process was too long and complicated and workers may be inclined to disregard it and engage in illegal strikes.¹⁶⁵ The U.S. Department of State concluded that because of those restrictions, it was virtually impossible to conduct a legal strike in Poland.¹⁶⁶ Indeed, in the late 1980s, workers disregarded those procedures and engaged in wildcat strikes without any sanctions being imposed against them for their illegal actions.¹⁶⁷

The current Solidarity Chairman, Marian Krzaklewski, once stated that, "the most important thing is to have a law that will not protract disputes, in terms of time and procedural aspects alike."¹⁶⁸ In late

¹⁶⁰ *Doing Business in Poland*, *supra* note 1, § 1.1.

¹⁶¹ *Id.*

¹⁶² *Program Resolution*, *supra* note 41, at 1.

¹⁶³ *Id.*

¹⁶⁴ Swiatkowski, *supra* note 12, at 67-68.

¹⁶⁵ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 3.

¹⁶⁶ COUNTRY REPORTS, *supra* note 38, at 1240.

¹⁶⁷ Szubert, *supra* note 1, at 68.

¹⁶⁸ Jagienka Wilczak, *Time to Address Everyday Tasks: Interview With Solidarity Marian*

1989, Leslaw Newacki, Director General of the Polish Ministry of Labor and Social Affairs, stated that, "unions are exploiting the negotiation and conciliation procedure by striking right away."¹⁶⁹ Therefore, Wacław Szubert recommended that the new labor code re-define "lawful industrial actions and simplify obligatory procedures."¹⁷⁰

Furthermore, since "Poland is a member of the international labor community," a Polish scholar recommended that Poland voluntarily accept and comply with ILO standards and requirements.¹⁷¹ If Poland would do this, then "those standards would be more important than other labor laws because they would represent the law of Poland and the law of the international labor community."¹⁷²

Thus, the substantive provisions of the 1982 Act, as well as various commentators' recommendations to improve Poland's laws regulating labor-management relations, provide a good backdrop for comparison of Poland's 1991 Law on Trade Unions and Law on Resolving Collective Bargaining Disputes with the 1982 Act. This comparison demonstrates that not enough progress has been achieved. The 1991 legislation mainly refines and clarifies the 1982 Act, continuing to track the FLRA rather than the NLRA, however, making some minor improvements in the 1982 Act's substantive provisions.¹⁷³ The net effect seems to be an elimination of one step in the legal procedure regarding the right to strike¹⁷⁴ and allowing collective bargaining agreements to diverge from state, social, and economic parties.¹⁷⁵

Krzaklewski, POLISH NEWS BULL., April 12, 1991.

¹⁶⁹ Poland's Plans to Convert to Market Economy Include Jobless Aid, Training, Minimum Wage Change, Daily Lab. Rep. (BNA) No. 208, at C-1 (Oct. 30, 1989).

¹⁷⁰ Szubert, *supra* note 1, at 68.

¹⁷¹ Swiatkowski, *supra* note 12, at 47.

¹⁷² *Id.*

¹⁷³ For example, the new legislation contains an anti-discrimination provision which states that "[n]o one may suffer negative consequences for belonging or not belonging to a trade union or for holding a trade union office. In particular, membership or non-membership may not be a requirement for hiring, retaining or promoting an employee." 1991 Law, *supra* note 141, art. 3. This anti-discrimination provision ensures that union membership is voluntary and closely tracks the 1982 Act, which provided that:

No person shall suffer negative consequences either because of his/her membership in a trade union and performing within it functions of an elected official; or because of his/her non-membership; specifically, this cannot be a condition for obtaining or keeping employment, or of professional promotion, apart from cases where the provisions of this law ban trade union membership in a specific work place or specific job.

1982 Act, *supra* note 65, art. 4. Other examples of re-codification include: 1991 Law, arts. 4, 10 and 1982 Act, arts. 1.2, 6.

¹⁷⁴ See *infra* notes 229-32 and related text.

¹⁷⁵ See *infra* notes 304-5 and accompanying text.

IV. POLAND'S 1991 LABOR LAWS COMPARED WITH THE 1982 ACT

A. *Introduction*

"In the present social and political situation in Poland, the role of the trade unions is very important."¹⁷⁶ Presently, "the major causes of strike action are the threat of group dismissals and pressure to increase salaries associated with the current financial situation."¹⁷⁷ Poland's economic reform program resulted in an inflation rate of 900 percent in 1989.¹⁷⁸

In an effort to eliminate the dramatic inflation which occurred in 1989, the government imposed a "de facto wage ceiling" which penalizes enterprises that raise wages above government-determined levels.¹⁷⁹ In addition, the government implemented a price liberalization program, and together these two programs reduced inflation to between four and five percent a month in 1990.¹⁸⁰ However, the real standard of living fell by approximately thirty percent.¹⁸¹ At the end of 1990, "[forty-four percent] of working households and [fifty-one percent] of pensionable households were living below the official poverty level" according to official statistics.¹⁸²

By May of 1991, unemployment had grown from a negligible number to approximately 1.5 million people.¹⁸³ The Poles' situation is further exacerbated by the fact that "consumer prices rose by an estimated 70 [percent] during the first three quarters of 1991."¹⁸⁴ Consequently, employers can easily find and employ qualified workers to replace dissidents as there is a high number of unemployed, resulting in increased competition for job openings.¹⁸⁵ Not only does the government-imposed wage ceiling restrict a union's ability to negotiate wages, it also limits the development of efficient enterprises by prohibiting them from attracting superior workers by means of higher wages.¹⁸⁶ Due to the declining living conditions, as well as their inability to effectively negotiate wages, unions were eager to see a new labor law that would allow un-

¹⁷⁶ *Doing Business in Poland*, *supra* note 1, § 4.4.7.1.

¹⁷⁷ *Id.* § 4.4.7.2.

¹⁷⁸ COUNTRY REPORTS, *supra* note 38, at 1234.

¹⁷⁹ *Id.* at 1241. Such enterprises must pay a penalty tax equal to five times the value of the wage increase above the government-determined level. *Id.*

¹⁸⁰ *Doing Business in Poland*, *supra* note 1, § 1.2.2.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* § 4.4.7.2.

¹⁸⁶ COUNTRY REPORTS, *supra* note 38, at 1241.

ions the genuine ability to represent their members' interests regarding wages.¹⁸⁷

B. The 1991 Law on Trade Unions Compared to the 1982 Act

The 1991 Law on Trade Unions¹⁸⁸ (hereinafter 1991 Law) defines a trade union as "a voluntary and self-governing organization of laboring people established with the object of representing and protecting their rights and occupational and social interests."¹⁸⁹ This article incorporates various sections of the 1982 Act and clarifies exactly what a union is and what purpose it serves by specifically defining a trade union.¹⁹⁰

The 1991 Law states that "[t]he trade union's statutory activities are independent of employers, central and local government, and other organizations."¹⁹¹ It better defines which employees can join trade unions, while the previous statute merely stated that, "[e]mployees shall have the right to set up and associate in factory, national and other trade unions at their discretion."¹⁹² Under the 1982 Act, soldiers in active service, members of the police force, members of prison services, employees of military units, and other units controlled by the Ministry of the Interior, workers in the state administration and judiciary, and farmers¹⁹³ were excluded from the right to associate in trade unions.¹⁹⁴ Under the 1991 Law, professional military personnel, soldiers in active military service, and draftees who perform their basic military service in civil defense may not establish or join trade unions.¹⁹⁵ Therefore, under the new statute, members of the police force, members of prison services, and government employees can now establish or join trade unions.

The 1991 Law specifies that, "the right to establish and join trade unions belongs to all employees, . . . [including] . . . members of agricultural producer cooperatives; . . . [and contractors] if they are not employers."¹⁹⁶ However, it remains unclear whether "members of agriculture producer cooperatives" include farmers. Therefore, whether farmers will be allowed to establish and join trade unions or whether they will continue to be prevented from unionizing because they are self-

¹⁸⁷ *Id.*

¹⁸⁸ 1991 Law, *supra* note 141.

¹⁸⁹ *Id.* art. 1.1. A trade union was not specifically defined in the 1982 Act. 1982 Act, *supra* note 65, arts. 1, 2.

¹⁹⁰ 1982 Act, *supra* note 65, arts. 1.2, 4.1, 5, 6.

¹⁹¹ 1991 Law, *supra* note 141, art. 1.2.

¹⁹² 1982 Act, *supra* note 65, art. 1.

¹⁹³ *Id.* arts. 13, 14. See also INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 1.

¹⁹⁴ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 1.

¹⁹⁵ 1991 Law, *supra* note 141, arts. 40, 41.

¹⁹⁶ *Id.* art. 2.

employed is still an unresolved issue.¹⁹⁷ The new law also allows persons performing "commissioned work," retirees, and unemployed individuals to join trade unions.¹⁹⁸

An employee who does not belong to a union may nevertheless nominate a trade union to represent him in a grievance or disciplinary hearing if that union has given him permission to do so, under both the former and current laws.¹⁹⁹ But before a union can represent a non-union employee regarding an individual grievance or disciplinary matter, he must request, and the union must consent to, such representation.²⁰⁰ However, neither law distinguishes between a union and a non-union employee, and thus the union has a general duty to represent all employees' interests "in dealing with the management."²⁰¹ The 1991 Law basically clarifies the union's duty by refining the language of the 1982 Act.

The current law ensures unions of self-government by providing that "[t]rade union by-laws and resolutions freely define the organizational structures of trade unions" and that "property obligations may be undertaken solely by the statutory bodies of the trade union structures having legal entity status."²⁰² That new provision clarified a similar article under the earlier statute, which allowed trade unions "to determine independently and lawfully; . . . their statutes and other internal rules and regulations pertaining to trade union activities"²⁰³

Although the 1991 Law has not fully addressed the scholars' criticisms, it is apparent that the provisions of the 1991 Law, as well as the 1982 Act, as amended in 1989, satisfy the Polish workers' and Solidarity's demands regarding the right to form truly independent, self-governing trade unions to determine and express their constituents' goals and to literally, but not actually, protect and defend the workers' social and material interests.²⁰⁴ In addition, the 1991 Law allows union authorities to be democratically elected if the trade union by-laws and regulations so provide.²⁰⁵ Furthermore, article IX, chapter 1 of the 1991 Law specifically allows unions to own property, a right not ex-

¹⁹⁷ See *supra* notes 71-73 and corresponding text.

¹⁹⁸ 1991 Law, *supra* note 141, arts. 2.2-2.4.

¹⁹⁹ *Id.* art. 7.2. See also *Doing Business in Poland*, *supra* note 1, § 4.4.7.1. A similar provision appeared in the prior legislation. 1982 Act, *supra* note 65, arts. 5, 6, 29.

²⁰⁰ 1991 Law, *supra* note 141, art. 7.2. See also 1982 Act, *supra* note 65, arts. 5, 6, 29 for a similar clause.

²⁰¹ 1982 Act, *supra* note 65, art. 7.

²⁰² 1991 Law, *supra* note 141, art. 9.

²⁰³ 1982 Act, *supra* note 65, art. 1.2.

²⁰⁴ See *supra* notes 97-98 and accompanying text.

²⁰⁵ 1991 Law, *supra* note 141, art. 13(9).

pressly granted under the previous statute, but which was allowed.²⁰⁶ This satisfies another demand made by the workers in the early 1980s.

Under both statutes, no prior state authorization is required to form a trade union²⁰⁷ and the requirements to form a trade union are equivalent.²⁰⁸ "A trade union is formed by virtue of a resolution passed by at least ten persons having the right to establish trade unions, or if another trade union is already operating in the same enterprise, thirty such persons."²⁰⁹

To apply for registration under the new law, a union must meet the membership requirements above,²¹⁰ and the ten persons who resolve to form the union must pass its by-laws and elect a founding committee numbering three to seven members.²¹¹ The founding committee must then establish statutes (by-laws). Unions are registered in court on the basis of their statutes.²¹² The founding committee must register the union with the local *voivodship* (district) court within thirty days of its formation.²¹³ This provision of the 1991 Law recodified a parallel statement in the 1982 Act that indicated that the trade union acquires "[t]he status of a legal entity on the day of the union's registration."²¹⁴

The new legislation is more restrictive than its predecessor in that it only allows "[n]ational trade union confederations and the national trade union federation representative of the employees at a majority of the work places the right to be consulted on the assumptions and drafts of the legislation and implementing regulations relating to the purposes of trade unions."²¹⁵

Thus, the 1991 Law restricts the right granted in 1982 by allowing only national trade union confederations or the national trade union federation representing the majority of the employees in the country the

²⁰⁶ OPZZ owned property consisting of membership dues, donations, legacies, and grants, income from economic and other statutory activities, and the property of all trade unions dissolved in 1982. INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 3.

²⁰⁷ 1982 Act, *supra* note 65, art. 1.1; 1991 Law, *supra* note 141, art. 2.1.

²⁰⁸ *Id.*

²⁰⁹ 1991 Law, *supra* note 141, art. 12.1.

²¹⁰ See *supra* notes 174-75 and related text.

²¹¹ 1991 Law, *supra* note 141, art. 12.2. See also *Doing Business in Poland*, *supra* note 1, § 4.4.7.1.

²¹² 1991 Law, *supra* note 141, art. 14.1. See also *Doing Business in Poland*, *supra* note 1, § 4.4.7.1.

²¹³ 1991 Law, *supra* note 141, art. 14.

²¹⁴ 1982 Act, *supra* note 65, art. 20.

²¹⁵ 1991 Law, *supra* note 141, art. 19.1. A "federation" is a nationwide organization established by a number of trade unions on either occupational or industrial grounds or in one branch of the economy. INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XII, § 1. A "confederation" is a national inter-trade union organization consisting of national trade unions and/or their federations. 1991 Law, *supra* note 141, art. 11.2.

right to be consulted on legislative drafts. Furthermore, this right only extends to legislation relating to the purposes of trade unions, rather than to legislative acts and decisions involving the rights and interests of the working people and their families, retirees, and the disabled.

By not allowing the small local or plant trade union²¹⁶ a real opportunity to publicly state its views on key issues regarding legislation affecting workers and retirees, and by only allowing large union conglomerates or a federation representing the majority of the employees in the country an option to state its view on legislation regarding the "purposes of trade unions," the 1991 Law appears to stifle the number of voices heard in the decision-making process, and further frustrate achievement of a demand²¹⁷ sought by the Polish workers and Solidarity in the early 1980s.

The current law further provides that if the national trade union confederation or the national trade union federation representing the majority of the employees responds with a counter-proposal to the legislative draft which is entirely or partially rejected, the confederation or federation may voice its position at a government session involving the legislative draft.²¹⁸ According to the 1991 Law, "[t]rade unions have the right to express publicly their opinion on the assumptions or draft legislation" relating to the purposes of trade unions "through the mass media, including radio and television."²¹⁹ Therefore, the new law does allow small local unions to utilize mass media and have a voice in the decision-making process. But again, the local unions can only comment on legislation relating to the purposes of trade unions.

National trade union confederations and the national trade union federation representing the majority of the employees can "offer proposals for the passage or amendment of laws or other legal acts concerning matters of concern to trade unions."²²⁰ Therefore, it appears that confederations and the union federation representing the majority of the employees will not be consulted regarding legislative drafts concerning labor and social security laws, but are only allowed to offer proposed amendments to the existing laws, as well as new legislation. Consequently, the 1991 Law significantly limits a union's opportunity to publicly state its views on key government issues and decisions.

The new changes may be an effort to curb the small local union's or plant trade union's political role since their main function is "to en-

²¹⁶ A plant trade union's main function is "to engage in collective bargaining and conclude the related agreements." 1991 Law, *supra* note 141, art. 21.

²¹⁷ See *supra* note 66 and related text.

²¹⁸ 1991 Law, *supra* note 141, art. 19.3.

²¹⁹ *Id.* art. 19.4.

²²⁰ *Id.* art. 20.1.

gage in collective bargaining and conclude the related agreements . . . ,” and “[i]n the labor sectors not covered by collective bargaining agreements, consulting the trade unions is a prerequisite for regulating working conditions and wages.”²²¹ Therefore, unions have a legal right to engage in collective bargaining, and employers were required to consult with unions regarding wages and working conditions even if they were not a party to a collective bargaining agreement.

Under the 1991 Law, the scope of the plant trade union activities include:²²²

1. Taking a position on individual employee affairs to the extent regulated in the provisions of the Labor Law.
2. Taking a position vis-a-vis the employer and the workers' self-government body at the work place on matters concerning the collective rights and interests of employees.
3. Monitoring the adherence to labor law provisions at the work place, and in particular the adherence to the provisions and principles of hygiene and safety of labor.
4. Directing the activities of the social inspectorate of labor and cooperating with the state inspectorate of labor.
5. Attending to the living conditions of pensioners and annuitants.

This new provision simply recodifies the 1982 Act.²²³

Like the 1982 Act, the 1991 Law continues to restrict the scope and content of collective agreements by defining the subjects of collective bargaining as: remuneration; the rules for granting awards and bonuses; the determination of work rules; work timetable and vacation timetable; the determination of the guidelines for the use of welfare and housing funds; and the distribution of those benefits.²²⁴ Under the 1982 Act, the collective bargaining subjects included the utilization and distribution of the social and housing funds, remuneration including the award of prizes and bonuses, working regulations, work time distribution, and vacation plans.²²⁵

Both the 1991 Law and the 1982 Act indicate that the rights of trade unions relating to the formation of plant remuneration systems are defined by separate regulations.²²⁶ Therefore, the national government still plays an active role in regulating wages and implicitly maintains a

²²¹ *Id.* art. 21.

²²² *Id.* art. 26.

²²³ 1982 Act, *supra* note 65, art. 35.

²²⁴ 1991 Law, *supra* note 141, art. 27.

²²⁵ 1982 Act, *supra* note 65, art. 36.

²²⁶ *Id.* ch. IV, art. 36.3; 1991 Law, *supra* note 141, art. 27.3.

role in regulating working conditions, since most Polish employers are still state-controlled. Consequently, genuine collective bargaining is difficult to imagine and free interplay of economic forces in the labor market remains stifled.²²⁷

C. *The 1991 Law on Collective Disputes Compared to the 1982 Act*

The 1991 Law requires that disputes between unions and employers must be resolved under the 1991 Law on Resolving Collective Bargaining Disputes (hereinafter, 1991 Law on Disputes).²²⁸ This requirement parallels the 1982 Act regarding resolution of a collective dispute.²²⁹

Poland's 1991 Law on Disputes works in conjunction with, and supplements, the 1991 Law on Trade Unions.²³⁰ Poland's 1991 Law on Disputes limits the subject of "collective disputes" to wages, working conditions, social benefits, union rights and freedoms of employees.²³¹ Furthermore, collective disputes can only arise between employer(s) and employees who are entitled to organize or join a trade union as defined in article 2, chapter 1 of the 1991 Law.²³² The government cannot become a party to a collective dispute; only employers can.²³³ This appears anomalous since the government is the owner of most employer entities.

Under the new legislation, local union branches are not allowed to enter into collective disputes with the government, but must request national union authorities to act as their agent in such negotiations.²³⁴ Under the 1982 Act, the subject of a collective dispute was not defined, and therefore it was arguable that political issues affecting the employer-employee relationship were proper subjects of a collective dispute, which the local union could pursue.²³⁵

Poland's 1991 Law on Disputes indicates that "[i]n a place of

²²⁷ As of August 31, 1991, only 8.8% of the 8,443 state enterprises had been transformed into limited liability companies or liquidated. *Doing Business in Poland*, *supra* note 1, § 3.2.1.

²²⁸ 1991 Law, *supra* note 141, art. 37. "Disputes between trade unions and employers and their organizations regarding worker interest are resolved under the guidelines defined by a separate law." *Id.* See O Rozwiązywaniu Sporów Zbiorowych [Law on Resolving Collective Bargaining Disputes], 91EP0609A ch. 1, art. 1 (Pol.) [hereinafter 1991 Law on Disputes].

²²⁹ See 1982 Act, *supra* note 65, art. 40.

²³⁰ 1991 Law, *supra* note 141, art. 37.

²³¹ See 1991 Law on Disputes, *supra* note 228, art. 1 (stating that "[e]mployees' collective disputes with an employer or employers can concern working conditions, wages, or social benefits and union rights and freedoms of employees or other groups, who are entitled to the right to organize themselves into trade unions).

²³² *Id.*

²³³ *Gazeta Wyborcza, Government versus Miners*, POLISH NEWS BULL., Nov. 13, 1991, at 1.

²³⁴ *Id.*

²³⁵ 1982 Act, *supra* note 65, art. 40.

work, in which more than one union organization is active, any of them can represent the employees' interests, which are the subject of the . . . collective dispute . . . " or the unions can decide to provide a joint representation of the employee(s) in the collective dispute.²³⁶ Also, "in a place of work, in which no trade union is active, a union organization that the employees ask to represent their collective interests can conduct a collective dispute in the name of the employees."²³⁷ There were no parallel provisions in the 1982 Act regarding multiple unions at one plant or employer, nor did provisions exist addressing employees in a non-union facility.²³⁸ Only one union was allowed to exist at an employer until 1985.²³⁹

The assertion of a collective dispute is prohibited if "settlement is possible through proceedings before a body for settling disputes involving employees' claims."²⁴⁰ Therefore, the resolution of the dispute is relegated to a negotiation-conciliation-arbitration procedure substantially similar to the procedures developed in the 1982 Act.²⁴¹ Additionally, like the 1982 Act, a union's most potent economic weapon, the strike, is an option only after complying with the statutory dispute resolution provisions.²⁴²

Moreover, the "initiation of a dispute to change the contract or agreement can occur no sooner than the date of termination, which is usually subject to three months notice."²⁴³ Therefore, when a contract is in force, disputes which arise during contract negotiations cannot qualify as a "collective dispute," and therefore are not subject to the provisions contained in the 1991 Law on Disputes.²⁴⁴ Again, there were no provisions addressing these issues in the 1982 Act, and this indicates at best a clarification of the prior law, or at worst, a new restriction imposed on the unions' right to strike resulting from the limiting definition of a "collective dispute."²⁴⁵

²³⁶ 1991 Law on Disputes, *supra* note 228, art. 3.1-3.2. See also *supra* notes 162-63 and related text.

²³⁷ 1991 Law on Disputes, *supra* note 228, art. 3.4.

²³⁸ See generally 1982 Act, *supra* note 65, ch. V.

²³⁹ See *supra* note 45 and related text.

²⁴⁰ 1991 Law on Disputes, *supra* note 228, art. 4.

²⁴¹ *Id.* chs. 2-4. See also 1982 Act, *supra* note 65, ch. V.

²⁴² See generally 1991 Law on Disputes, *supra* note 228.

²⁴³ *Id.* art. 4.2.

²⁴⁴ *Id.* This is similar to many American collective bargaining agreements which prevent a union from striking during the term of the agreement through a no-strike clause. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW — UNIONIZATION AND COLLECTIVE BARGAINING 604-5 (1976). If a union strikes and the contract has a no-strike clause, the employer can go to court and obtain an injunction to enjoin the strike activity. *Id.* at 607-08.

²⁴⁵ 1982 Act, *supra* note 65, ch. V. In the United States, under section 7 of the National

Under the 1991 Law on Disputes a "collective dispute exists on the date it is announced by the unit representing the employees' interests to the employer with demands regarding . . . [wages, working conditions, social benefits, union rights and/or freedoms of employees]²⁴⁶ . . . if the employer does not meet all of the demands by the deadline set out in the announcement, no less than three days."²⁴⁷ The 1991 Law on Disputes further states that, "[i]n the announcement of the dispute, the subject of the demands included in the dispute is to be defined. The unit announcing the dispute can warn that if the demands raised are not met, a strike will be announced. The day of the announced strike cannot come before the passage of 14 days from the date of the announcement of the dispute."²⁴⁸

Thus, the collective conflict begins on the day when a trade union organization notifies the employer about its demands.²⁴⁹ The latter has three days to satisfy all postulates, while at the same time the trade union may put the employer on notice that a strike action will follow the failure to heed the demands.²⁵⁰ The strike action itself is technically allowed to commence within fourteen days from the announcement of a

Labor Relations Act ("NLRA"), employees have the right to engage in concerted activity, including the right to strike to exert economic pressure, on the employer to yield to their demands. GETMAN & POGREBIN, *supra* note 143, at 138. Under section 8 of the NLRA, the employer cannot discipline employees for using economic pressure. *Id.* However, the employer is not required to yield to his employees' demands and may defend his own economic interests. *Id.* at 138-39. The employer does not have to pay employees when they are striking, and can lock out employees and/or unilaterally subcontract their work. *Id.* at 139. In addition, the employer can hire permanent replacements for economic strikers, but not unfair labor-practice-strikers, in an effort to continue his business, but not to punish the striking employees. *Id.* Regardless, the employer has a continuing duty to bargain during a strike, and thus is obliged to respond to union demands. *Id.* at 142. However, if a collective bargaining agreement exists between the union and employer, section 8(d) of the NLRA requires the party seeking to terminate or modify the agreement to give the other party 60 days notice prior to the contract's expiration date. GORMAN, *supra* note 244, at 424. Under section 8(d), the union is required to "meet and confer" with the employer, and a strike is prohibited for the 60 days following the termination or modification notice, or until the contract expires, whichever occurs later. *Id.* "The purpose of this prohibition . . . is to give the parties a period . . . to reach a settlement through peaceful negotiations and not by economic force." *Id.* If no settlement is reached within 30 days after the initial notification, the Federal Mediation and Conciliation Service should be notified and given an opportunity to aid in a peaceful solution. *Id.* at 425. If workers engage in a premature strike during this period, they can be summarily discharged and/or the union may lose its status as the exclusive bargaining representative of the unit. *Id.* at 426.

²⁴⁶ 1991 Law on Disputes, *supra* note 228, art. 1.

²⁴⁷ *Id.* art. 7.1.

²⁴⁸ *Id.* art. 7.2.

²⁴⁹ *The Right to Strike in the New Trade Union Law*, SOLIDARNOSC NEWS, Sept. 1991, at 1 (Coordinating Office Abroad of NSZZ Solidarnosc, Brussels, Belg.).

²⁵⁰ *Id.*

"collective dispute"; however, it is unlikely that the parties would be able to move through the negotiation and mediation procedures, which are pre-conditions to a legal strike set out later in the legislation, within fourteen days.²⁵¹

Procedurally, after the union announces a collective dispute, the employer is obligated to commence negotiations without delay²⁵² "for the purpose of settling the dispute through agreement and simultaneously reports the occurrence of the dispute to the appropriate district labor inspector."²⁵³ Negotiations should be crowned with a signed agreement, and in case of a stalemate, with a statement . . . [describing] the positions of the parties."²⁵⁴ Chapter 2 of the 1991 Law on Disputes expanded upon a provision in the earlier legislation by more specifically delineating the requirements and parameters of the negotiation phase of resolving a collective dispute.²⁵⁵

Under the 1982 Act, when a collective dispute arose, "the relevant trade union bodies and the administration bodies" were required to "immediately begin negotiations with a view to settling the dispute."²⁵⁶ Under the current law, if the negotiations fail to resolve the dispute and the union continues to press for its demands, "the dispute is conducted with the participation of a . . . mediator."²⁵⁷ Both sides jointly select the mediator, who can be picked from a list suggested by the Minister of Labour and Social Policy (hereinafter Minister).²⁵⁸ The selection process must be made within a five-day period, but if it fails, the mediator will be a person suggested by one of the sides and accepted by the Minister.²⁵⁹ Negotiations conducted in the presence of the mediator may be prolonged if additional procedures turn out to be necessary (i.e. specifying further conditions related to the conflict, or preparing an assessment of the financial status of the enterprise).²⁶⁰ The allocation of the costs of employing an expert-consultant for such procedures is decided by both sides or, if there is no agreement, they are borne by the

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ 1991 Law on Disputes, *supra* note 228, art. 8.

²⁵⁴ *Id.* art. 9.

²⁵⁵ *Id.* ch. 2.

²⁵⁶ 1982 Act, *supra* note 65, ch. V, art. 40.

²⁵⁷ 1991 Law on Disputes, *supra* note 228, art. 10.

²⁵⁸ *Id.* art. 11.1. The Minister of Labour and Social Policy is responsible for employment policy, the efficient use of human resources, work organization and conditions, pay rate and benefits, social security and social security benefits. *Doing Business in Poland*, *supra* note 1, § 2.4.

²⁵⁹ 1991 Law on Disputes, *supra* note 228, art. 11.2.

²⁶⁰ *The Right to Strike in the New Trade Union Law*, *supra* note 249, at 1.

employer.²⁶¹ When negotiations prove successful, an agreement is signed; otherwise a statement of the differences is to be drafted.²⁶²

Under the 1991 Law on Disputes, which is similar to the 1982 Act,²⁶³ if mediation "will not lead to the resolution of the dispute" within 14 days from the announcement of the dispute, which may be extended upon the union's consent where the mediator requires additional information or analyses, the union "can organize a single warning strike of no more than two hours."²⁶⁴ Moreover, "[t]he failure to reach an agreement resolving the collective dispute in mediation proceedings confers the right to initiate a strike."²⁶⁵

According to the 1991 Law on Disputes, a "strike" is "a collective stoppage by the employees in the performance of their work for the purposes of resolving a dispute . . ."²⁶⁶ The 1982 Act defined a "strike" as "a voluntary, collective stopping of work by employees undertaken in order to defend the economic and social interests of the given group of employees."²⁶⁷ The current law declares that, "[a] strike is a final means and cannot be announced without previously exhausting the possibilities for resolving a dispute . . ." through negotiations or mediation unless "illegal action of the employer prevents the conduct of talks or mediation . . ." or "[i]f the employer dissolves the employment relation with the union activists conducting the dispute."²⁶⁸

Like the 1982 Act, the 1991 Law on Disputes requires exhaustion of the legally-imposed dispute resolution mechanisms before a union can initiate a strike.²⁶⁹ However, the new code creates an exception by allowing a strike without adhering to the procedural steps where the employer resorts to illegally hindering negotiations or mediation (e.g. by refusing to participate in negotiations as prescribed by law²⁷⁰ or by firing a trade union member who is active in the conflict).²⁷¹ This provision discourages employers from engaging in bad-faith dilatory tactics and discriminating against employees for exercising rights granted

²⁶¹ 1991 Law on Disputes, *supra* note 228, art. 18.

²⁶² *Id.* art. 14.

²⁶³ 1982 Act, *supra* note 65, art. 49. Article 49 states: "A strike may be preceded by a warning strike. The duration of a warning strike should be limited to the indispensable minimum and may not exceed two hours." *Id.* These short warning strikes and declarations of strike readiness eliminated the need for complete work stoppages. Szubert, *supra* note 1, at 67.

²⁶⁴ 1991 Law on Disputes, *supra* note 228, art. 12.

²⁶⁵ *Id.* art. 15.

²⁶⁶ *Id.* art. 17.1.

²⁶⁷ 1982 Act, *supra* note 65, art. 44.1.

²⁶⁸ 1991 Law on Disputes, *supra* note 228, art. 17.2.

²⁶⁹ *The Right to Strike in the New Trade Union Law*, *supra* note 249, at 2.

²⁷⁰ *Id.* See also 1991 Law on Disputes, *supra* note 228, art. 17.2.

²⁷¹ 1991 Law on Disputes, *supra* note 228, art. 17.2.

under the national labor laws.

Under the current legislation, before a union can declare a strike, it must obtain an "agreement of a majority of the employees voting if at least 50% of the employees . . . participate in the voting."²⁷² If the strike involves several enterprises, the same requirement applies to each enterprise.²⁷³ The new law requires the union to "take into consideration the relation of the demands to the losses associated with the strike" when making a decision to announce a strike.²⁷⁴

If a majority of the union members vote to strike, an employee can then voluntarily choose whether or not to participate in a strike.²⁷⁵ The law makes clear that participation in a strike action is entirely voluntary, and neither a trade union organization nor any individual has the right to force workers to participate or to harass those refusing to take part.²⁷⁶ These provisions simply refined and recodified similar provisions of the 1982 Act.²⁷⁷ In addition, under the new statute, "[t]he announcement of a strike [by a statutory trade union] should occur at least five days before it begins."²⁷⁸ This evidences a minor change since under the previous law it was recommended that seven days notice be given before commencing a strike.²⁷⁹

The 1991 Law on Disputes includes several provisions which attempt to insure that Polish citizens are safe and secure. For example, "stopping work as part of a strike is not permitted at tasks, equipment, and installations where stopping work threatens human life and health or state security."²⁸⁰

²⁷² *Id.* art. 20.2.

²⁷³ *The Right to Strike in the New Trade Union Law*, *supra* note 249, at 2.

²⁷⁴ 1991 Law on Disputes, *supra* note 228, art. 17.3. *See also* 1982 Act, *supra* note 65, art. 44.3.

²⁷⁵ 1991 Law on Disputes, *supra* note 228, art. 23.

²⁷⁶ *The Right to Strike in the New Trade Union Law*, *supra* note 249, at 2.

²⁷⁷ *See* 1982 Act, *supra* note 65, arts. 45.1, 45.3, 44.3.

²⁷⁸ 1991 Law on Disputes, *supra* note 228, art. 20.3.

²⁷⁹ 1982 Act, *supra* note 65, art. 45.4.

²⁸⁰ 1991 Law on Disputes, *supra* note 228, art. 19.1. "The organization of strikes is not permitted at the Office of State Protection, in units of police, or the armed forces of the Republic of Poland, in prison services, in the border guard, and in organizational units of the fire protection service." *Id.* art. 19.2. Furthermore, "[t]he right to strike is not available to employees in bodies of the state authorities, of the government administration and the self-governments, of the courts, or in the prosecutorial offices." *Id.* art. 19.3. These limitations prohibiting employees in certain jobs from engaging in a strike are not as broad as the restrictions under the 1982 Act. *See* 1982 Act, *supra* note 65, art. 47 (prohibiting employees in the following industries from striking: the arms industry; state administration; banks; military units; the supply of water, electricity, gas and food; health services; employees of courts and prosecutors' offices; employees subject to the Ministers of Defense and Home Affairs; employees in plants located in regions which were proclaimed disaster areas; and to some extent, employees in transportation and mass

However, for employees who do not have the right to strike, the 1991 Law on Disputes allows a union in another enterprise to "organize a Solidarity strike no longer than half the working day" on a voluntary basis, while maintaining all the rights of the trade union's members.²⁸¹ Furthermore, the current code provides that, "[t]he participation of an employee in a strike organized in accord with the provisions of the law does not constitute a violation of the employee duties."²⁸² During a legal strike,²⁸³

[a]n employee retains the right to benefits from social insurance and the rights deriving from his relation of work with the exception to the right to wages. The period of stoppage and the performance of the work is included in the period of employment at the place of work [for seniority purposes].

These provisions again basically recodify almost identical provisions of the 1982 Act.²⁸⁴

Thus, under the current law, unions are required to engage in negotiations and mediation, and attempt to resolve the dispute, to perfect the legal right to strike. Ultimately, the union has the right to strike within 14 days of the announcement of a dispute if: (1) there is no collective bargaining agreement in force so that a "collective dispute" can be legally recognized; (2) the union does not consent to extend this time period should the mediator require additional studies or analyses to aid him/her in mediating the dispute; (3) the negotiation and mediation procedures are legally concluded without resolving the dispute; and (4) a majority of the employees vote to strike.

If the union does not exercise its right to strike, it can "make an attempt to resolve the dispute by submitting it for resolution to a coun-

media). Moreover, "[s]trike action does not reduce the management's rights pertaining to workers not taking part, as well as to ensuring security within the enterprise. The director retains full power to supervise those premises and installations whose continuous operation is essential for the normal functioning of the enterprise after the strike, or whose operation may constitute a danger to health or life. For the above purposes, strike organizers are obligated to cooperate with the management." *The Right to Strike in the New Trade Union Law*, *supra* note 249, at 2. See also 1991 Law on Disputes, *supra* note 228, art. 21.

²⁸¹ 1991 Law on Disputes, *supra* note 228, art. 22.

²⁸² *Id.* art. 23.1.

²⁸³ *Id.* art. 23.2

²⁸⁴ See 1982 Act, *supra* note 65, arts. 51, 52 (stating that "participation in a strike organised in accordance with the above provisions does not constitute a violation of the employees' duties and responsibilities, and cannot involve adverse consequences for the participants"). During a legal strike, "employees preserve the right to social security allowances and other benefits due under the contract of employment, except the right to pay." *Id.*

cil for public arbitration."²⁸⁵ The council for public arbitration under the regional voivodship court settles disputes involving individual enterprises, while the council for public arbitration settles disputes between trade unions and more than one individual company or plant.²⁸⁶ The council for public arbitration consists of the chairman "and six members, of which each party to the dispute names three."²⁸⁷ "The decision of the council is made by a majority vote . . . " and ". . . is binding upon the parties," unless either party, prior to the submission of the dispute to the council, decides otherwise.²⁸⁸

The 1991 Law on Disputes retains most of its predecessor's restrictions regarding the right to strike, except that under the earlier law, undergoing public arbitration was a necessary pre-condition to strike.²⁸⁹ A further pre-condition to strike under the prior law was a statement by the union, prior to arbitration, that it would not be bound by the arbitration settlement. Without such a reservation, the arbitration settlement was binding for both parties and a strike was precluded.²⁹⁰

However, this reservation is not needed for a union to procure the right to strike under the 1991 Law on Disputes; arbitration is an alternative rather than a pre-condition to declaring a strike should the negotiation and/or mediation procedures fail to resolve the collective dispute. However, the possibility exists that the union would forego its right to strike and submit to public arbitration and state that it would not be bound by the arbitration settlement. If the union is not satisfied with the arbitration settlement in this situation, it is unclear what will occur next. In this event, a collective dispute could possibly remain unresolved because the union has foregone its right to strike and is not bound by the arbitration settlement.

There are alternatives to arbitration or striking. For example, after the union exhausts the negotiation proceedings and fails to reach an agreement resolving the collective dispute, it may engage in other forms of legal "protest action" to protect workers' rights and interests.²⁹¹ Significantly, the right to protest is also enjoyed by workers who do not have the right to strike.²⁹² It is also a newly-granted right since there is no similar provision under the 1982 Act allowing the employees to

²⁸⁵ 1991 Law on Disputes, *supra* note 228, art. 16.1.

²⁸⁶ *Id.* art. 16.2.

²⁸⁷ *Id.* arts. 16.2-16.3.

²⁸⁸ *Id.* art. 16.6.

²⁸⁹ 1982 Act, *supra* note 65, art. 42. See also INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XIV, § 2.

²⁹⁰ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, ch. XIV, § 2.

²⁹¹ 1991 Law on Disputes, *supra* note 228, art. 25.1.

²⁹² *The Right to Strike in the New Trade Union Law*, *supra* note 249, at 2.

engage in social or other forms of protest besides a strike before completely exhausting the negotiation, conciliation, and arbitration procedures.²⁹³

According to the 1991 Law on Disputes, anyone who "[h]ampers the initiation or the conduct of a collective dispute in accord with the law," or "[d]oes not perform his duties as defined in this law, is subject to being punished by a fine."²⁹⁴ Furthermore, "[w]hoever directs a strike or other protest action organized in violation of the provisions of this law is subject to. . ." a fine.²⁹⁵ Finally, "[t]he organizer bears the responsibility for damages caused by a strike or protest or action organized in violation of the provisions of. . ." this law.²⁹⁶ These provisions recodified analogous provisions in the 1982 Act.²⁹⁷ However, the 1991 Law on Disputes discards a 1982 Act provision imposing penal sanctions upon a violator.²⁹⁸

The 1991 Polish labor legislation better defines a union, its purpose, and who can become members. Nevertheless, it remains unclear whether farmers fall within the term "members of agriculture producer cooperatives," and thus whether they can become union members. The 1991 Law expressly allows unions to own property, but restricts a right previously granted to plant trade unions regarding consultation on legislation, thereby limiting a local union's opportunity to voice its concerns. Under the 1991 Law on Disputes, political issues affecting the employer-employee relationship are not deemed proper subjects for a collective dispute. Moreover, the 1991 Law on Disputes clarified the requirements of the union during the negotiation phase; however, the union was given the option to strike without having to first submit to public arbitration. In addition, unions are allowed to strike where the employer illegally hinders the collective dispute resolution process or terminates a union member for being active in the conflict. Finally, the 1991 Law on Disputes provides workers which do not have a right to strike, a right to protest.

After comparing and contrasting the 1982 Act with the 1991 legislation, against the backdrop of the workers' and unions' demands and the commentators' and scholars' criticisms, the current legislation should be analyzed to determine whether it complies with international labor standards and regulations, since "Poland is a member of the

²⁹³ See generally 1982 Act, *supra* note 65.

²⁹⁴ 1991 Law on Disputes, *supra* note 228, art. 26.1.

²⁹⁵ *Id.* art. 26.2.

²⁹⁶ *Id.* art. 26.3.

²⁹⁷ 1982 Act, *supra* note 65, arts. 53-54.

²⁹⁸ 1991 Law on Disputes, *supra* note 228, art. 26.2.

international labor community."²⁹⁹

V. DOES POLAND'S 1991 LAW SATISFY THE UNITED NATIONS INTERNATIONAL LABOUR ORGANIZATION CONVENTIONS REGARDING LABOR RELATIONS?

The United Nations International Labour Organization (hereinafter ILO) was established in 1919 to promote social justice.³⁰⁰ The International Labour Conference adopts conventions and recommendations by a majority of two-thirds of the delegates.³⁰¹ Conventions are meant to create international obligations for the states which ratify them, while recommendations do not give rise to obligations, but provide guidelines for government actions.³⁰² Conventions are binding only upon member states that have registered their ratifications with the Director General of the International Labour Office.³⁰³ The ILO sets minimum standards in such fields as wages, social security, hours of work, and conditions of employment.³⁰⁴ ILO conventions and recommendations have the force of international law, and are binding upon the countries which ratify them.³⁰⁵

Although the ILO has no enforcement power, its condemnations carry a sting most nations seek to avoid.³⁰⁶ In 1984, the ILO found that the Polish government had infringed upon workers' rights by suppressing Solidarity under martial law in December of 1981.³⁰⁷ The ILO report indicated that Poland had breached two labor conventions regarding the freedom of association (Convention 87) and the right of workers to organize and conduct collective bargaining (Convention 98).³⁰⁸ Po-

²⁹⁹ Swiatkowski, *supra* note 12, at 47.

³⁰⁰ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, Codex.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *ILO Notes Report on Poland in Face of Warsaw Threat to Quit*, Reuters North European Service, Nov. 16, 1984, available in LEXIS, Nexis Library, Omni File [hereinafter *ILO Notes Report*].

³⁰⁵ *Id.*

³⁰⁶ Harry Bernstein, *ILO Agreement Will End 34 Years of American Inaction*, L.A. TIMES, Nov. 17, 1987, at 3.

³⁰⁷ Tony Barber, *Warsaw, Poland — International News*, Reuters North European Service, Nov. 19, 1984, available in LEXIS, Nexis Library, Omni File.

³⁰⁸ INTERNATIONAL ENCYCLOPEDIA, *supra* note 22, Codex. Convention 87 provides, in pertinent part:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to orga-

land, a founding member of the seventy year-old ILO, was condemned for its brutal suppression of Solidarity.³⁰⁹ A three-man ILO commission concluded that the 1982 Act in Poland and the officially-approved trade unions set up in place of Solidarity were an "invention of the government."³¹⁰ The commission found that the new unions did not represent the views of the Polish workers, and confirmed that there had been no freedom of choice or association in Poland.³¹¹

The pre-Solidarity government of Poland had ratified the key ILO conventions on freedom of association and collective bargaining.³¹² In fact, Solidarity invoked the principles contained in these conventions to secure its initial recognition.³¹³ Despite the fact that some of the ILO's comments were addressed by the 1982 Act, fundamental provisions of that law did not conform to the principles of freedom of association and collective bargaining.³¹⁴ Therefore, trade unions were not authentic representatives to defend the working people's rights and interests because they were not guaranteed the full freedom relating to their foundation and activities.³¹⁵ Because of the U.N. agency's criticism regarding the ban of the Solidarity trade union, Poland formally withdrew

nize their administration and activities, and to formulate their programs. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Convention 98 provides, in pertinent part, that:

Workers shall enjoy adequate protection against acts of anti-union discrimination in respect to their employment. Governments shall not 'make the employment of a worker subject to the condition that he shall not join a union or relinquish trade union membership;' or 'cause the dismissal of or otherwise prejudice a worker by reason of union membership Workers' and employers' organizations shall enjoy adequate protection against any acts of interference . . . in their establishment, functioning or administration Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers and employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements This convention does not deal with the position of public servants engaged in the administration of the state, nor shall it be construed as prejudicing their rights or status in any way.

Id.

³⁰⁹ *ILO Notes Report*, *supra* note 304.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Stephen S. Rosenfeld, *A Window in Poland*, WASH. POST, Mar. 18, 1983, at A19.

³¹³ *Id.*

³¹⁴ *Labour Body Considers Complaints, Plans '84 Conference*, U.N. CHRON., Jan. 1983, at

117.

³¹⁵ Kawadzki, *supra* note 31.

from the ILO on November 19, 1984.³¹⁶

Poland's new labor laws apparently address these criticisms by stating that "[a] trade union is a voluntary and self-governing organization of laboring people," and gives "[t]he right to establish and join trade unions" to all employees.³¹⁷ In addition, the new labor legislation penalizes anyone who "(1) hinders the lawful establishment of a trade union organization, (2) complicates the exercise of trade union activities conducted pursuant to the present law," or "(3) discriminates against any employees by reason of their belonging or not belonging to a trade union, or by reason of their performance of trade union duties."³¹⁸ Thus, the requirements of Convention 87 regarding the freedom of unions and the protection of their rights appear to be amply satisfied by the 1991 legislation.

The new statutes expressly give all employees the right to establish and join trade unions, and specifically state that "[n]o one may suffer negative consequences for belonging or not belonging to a trade union or for holding a trade union office."³¹⁹ "[T]rade unions have the right to engage in collective bargaining and conclude the related agreements."³²⁰ Thus, these provisions appear to fulfill the requirements of Convention 98 regarding the principles of freedom of association and collective bargaining.

However, the ILO concluded in 1990 that the refusal to register collective agreements negotiated at the national or industry level if they diverged from the state social and economic policies was "incompatible with ILO Convention 98 on the right to organize and collective bargaining."³²¹ But the 1991 Law addresses this condemnation by only requiring unions, federations, and confederations to register, which is refused only if its by-laws are inconsistent with the provisions of the present law.³²² Under the new labor code, unions are granted "the right to engage in collective bargaining and conclude the related agreements" without being required to register those agreements, nor are the agreements required to comport with the state's social and economic policies.³²³ Thus, these new provisions apparently address the ILO's recent criticisms and are compatible with ILO Convention 98 regarding the right to organize and engage in collective bargaining. Therefore, the

³¹⁶ Barber, *supra* note 307.

³¹⁷ 1991 Law, *supra* note 141, arts. 1.1, 2.1.

³¹⁸ 1991 Law, *supra* note 141, art. 35.1.

³¹⁹ *Id.* arts. 2.1, 3.

³²⁰ 1991 Law, *supra* note 141, art. 21.1.

³²¹ COUNTRY REPORTS, *supra* note 38, at 1241.

³²² 1991 Law, *supra* note 141, art. 14.2

³²³ *Id.* art. 21.1.

1991 Law on Trade Unions appears to fully comply with the ILO's conventions.

In addition to being a member of the ILO, Poland is also seeking to become a member of the European Community, another international organization. The EC has entered into an agreement with the ILO for "the exchange of information and for technical assistance."³²⁴ Therefore, Poland's 1991 labor code should be analyzed to determine if it satisfies the EC's guidelines.

VI. DOES THE 1991 POLISH LABOR LEGISLATION COMPLY WITH THE EUROPEAN COMMUNITY'S SOCIAL CHARTER REQUIREMENTS?

On December 16, 1991, Poland signed an association agreement with the European Community (hereinafter EC) and formally received associate member status which took effect on March 1, 1992.³²⁵ The EC is an international organization

. . . of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real power stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the Member States to the Community have limited their sovereign rights, albeit within limited fields and have thus created a body of law which binds both their nationals and themselves.³²⁶

The EC "is designed to bring about the general integration of the Member States' economies . . ."³²⁷ Individual Member States transfer some national sovereignty and decision making to the EC, thereby allowing the EC to promulgate an "organized and structured system of legal rules, with its own sources, and its own institutions and procedures

³²⁴ DOMINIK LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 37 (1973).

³²⁵ *EC Association Agreement Signed*, WARSAW VOICE, Dec. 22, 1991, at 5. An associate membership is a preliminary stage intended to lead to full membership within the community. LASOK & BRIDGE, *supra* note 324, at 36. "The purpose of an association agreement is to create a customs union as between community members and the associated state with, in some instances, the provision of financial loans to the associated state and in others the extension of community benefits . . ." *Id.*

³²⁶ JEAN-VICTOR LOUIS, THE COMMUNITY LEGAL ORDER 9 (1990). The EC is actually three communities, each established by a separate treaty. *Id.* at 7. These three communities share the same member states: Belgium, Denmark, France, Germany, Great Britain, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal and Spain. *Id.* The EC was formed on July 1, 1967 when the executive organs of the European Coal and Steel Community ("ECSC"), the European Economic Community ("EEC"), and the European Atomic Energy Community ("EURATOM") were merged into a single council under a treaty signed in Brussels on April 8, 1965. *Id.*

³²⁷ *Id.* at 7.

for making, interpreting and enforcing those rules."³²⁸ Consequently, the EC's legal system becomes an integral part of the Member States' legal systems which their courts are bound to apply.³²⁹

Prior to 1988, eastern European countries were subjected to "the least favorable trade policy among third countries;" however, since 1989 the EC has provided Poland with aid and loans to assist with its economy's restructuring.³³⁰ Moreover, since Poland has become an associate member, it has gained, and will continue to gain, even more privileged access to EC markets.³³¹ Such concessions demonstrate the depth of the EC's desire to integrate Poland into the EC's trading system.³³²

Like many eastern European countries that are now considering full membership of the EC as a long-term goal, Poland seeks to enter into a full association agreement to enjoy the full benefits of the EC through binding international treaties.³³³ While Poland seeks to negotiate for a full EC membership,³³⁴ it should contemplate the probability of eventually attaining full EC membership, and since Poland has to replace the statutes of the socialist legal tradition with laws facilitating the reconstruction of the market system,³³⁵ it should be mindful of the EC directives and guidelines as it determines the contours of its present and future laws.

For example, the EC's Community Charter of the Fundamental Social Rights of Workers (hereinafter Social Charter)³³⁶ was adopted

³²⁸ *Id.* at 11 (internal citation omitted).

³²⁹ *Id.*

³³⁰ The EC realized that the eastern European countries could not restructure their political and economic systems without the EC's backing. *THE EUROPEAN COMMUNITY, THE SOVIET UNION AND EASTERN EUROPE, Introduction 1* (Kenneth R. Simmonds ed., 1991). Therefore, the EC has begun to develop "trade, commercial and economic relationships." *Id.* It has also begun to negotiate association agreements to create free trade with the formerly Socialist countries of eastern Europe. Richard D. English, *Company Law on the European Single Market*, 1990 B.Y.U. L. REV. 1413, 1539-40 (1990). Poland, Hungary, Czechoslovakia, Romania, Bulgaria, and Yugoslavia are making strides to transform from socialist to free-market economies. *Id.* The future of such relationships "depends on the progress of these countries toward market economies, multi-party systems, free and fair elections, respect for human rights, and the rule of law." *Id.* at 1540.

³³¹ *EC Initials Accords With Czechoslovakia, Hungary, Poland*, Inter Press Service, Nov. 22, 1991, available in LEXIS, Nexis Library, Omni File.

³³² The Preamble to the accord "clearly states that the 'ultimate objective'" of the agreement is full EC membership. *Id.*

³³³ *Trade Relations EC — Central and Eastern Europe*, *supra* note 3, § 3.5.1.4.

³³⁴ *Id.*

³³⁵ *Id.* §§ 1.6, 3.2.2.

³³⁶ Commission of the European Communities, Charter of the Fundamental Social Rights of Workers (1990) reprinted in ANGELA BYRE, *EC SOCIAL POLICY AND 1992*, at 9-12 (1992) [here-

on December 9, 1989, and was influenced by the ILO Conventions and the Council of Europe's Social Charter.³³⁷ It is designed to guarantee basic rights for all workers in the EC and is aimed at improving workers' living and working conditions by cushioning the negative impact of a single labor market without internal borders.³³⁸ Social progress or social rights, as the EC signatories have declared, must go hand-in-hand with the corresponding economic progress.³³⁹ Although the Social Charter is not legally binding, it imposes an obligation on the signatories to guarantee fundamental social rights contained in the Charter.³⁴⁰

The Social Charter includes, *inter alia*, a provision for the right to belong to a trade union, to negotiate and conclude collective agreements, and to strike.³⁴¹ Its basic aim is to create a social framework of minimum requirements, leaving the Member States to fill in the details as they see fit.³⁴² The responsibility to implement the social rights lies exclusively with the Member States within the limits of their powers, as constituent parts of the community.³⁴³ Thus, EC Member States need to insure the degree of industrial peace needed for the smooth operation of their country's economy.³⁴⁴

On its surface, Poland's 1991 Law and 1991 Law on Disputes appear to satisfy the Social Charter's requirements regarding freedom of association and collective bargaining. All Polish employees have a statutory right to establish and join trade unions.³⁴⁵ "Trade unions have the right to engage in collective bargaining and conclude the related agreements"³⁴⁶ Furthermore, employees are given the right to strike after first engaging in negotiation and mediation to resolve a collective dispute.³⁴⁷ Although Poles literally have a legal right to strike, it may not be a meaningful or practical right to strike as previously discussed. While Poland's 1991 labor laws may comply with the letter of the So-

inafter, Social Charter].

³³⁷ BYRE, *supra* note 336, at 5.

³³⁸ Social Charter, *supra* note 336, Preamble.

³³⁹ Coopers & Lybrand, *Euroscope Excise Duties and Other Indirect Taxes, Social Affairs* (Aug. 29, 1991 through Sept. 5, 1991) available in LEXIS, Intlaw Library, Euroscope File.

³⁴⁰ *Id.*

³⁴¹ Social Charter, *supra* note 336, paras. 11-13.

³⁴² *Id.* Preamble. See also GEORGE A. BERMANN, ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 1152 (1992).

³⁴³ Social Charter, *supra* note 336, paras. 27-30.

³⁴⁴ Morris Weisz, *A View of Labor Ministries in Other Nations*, 3 BUREAU OF LABOR STATISTICS — MONTHLY LABOR REVIEW 19, 19 (July 1988).

³⁴⁵ 1991 Law, *supra* note 141, art. 2.1.

³⁴⁶ *Id.* art. 21.1.

³⁴⁷ 1991 Law on Disputes, *supra* note 228, chs. 2-3.

cial Charter, in practice, they may not comply with its spirit.

VII. CONCLUSION

Poland's new labor laws recodify and clarify their predecessor and grant unions slight liberalizations in some aspects, while restricting unions' powers in others. Although Poland's new laws literally comply with the ILO Conventions and the EC Social Charter requirements, in practice the right to strike remains highly restricted. The new legislation continues to encourage effective problem-solving through negotiation and mediation between unions and employers, while allowing unions to engage in "other forms of protest action."³⁴⁸ The 1991 Law gives all employees the right to strike, except those in the armed services,³⁴⁹ but prohibits a collective dispute from being proclaimed until a collective agreement is properly terminated, which is usually subject to three months notice.³⁵⁰ Such a limited definition of a "collective dispute" is more intrusive on a union's power than a no-strike clause in an American labor contract because it is government, rather than party, imposed.³⁵¹

Plant trade unions are limited in their ability to negotiate with employers; plant contract terms may have to comport with collective agreements negotiated at the national or industry level, and if more than one plant trade union exists at an employer's location, they are required to reach a common position on "matters requiring the conclusion of an agreement or the coordination of the position taken" before negotiating with the employer.³⁵² Again, the government imposes a legal obligation upon the unions to reach a common position, which is distinguishable from an American union's voluntary action to pursue a common demand and engage in multi-employer bargaining.

Like American labor law, the 1991 Law limits collective bargaining to the mandatory subjects of wages, work rules, work and vacation schedules, and welfare and housing fund benefits.³⁵³ However, since most Polish employers are still state-owned and controlled, the national government still plays an active role in both negotiating and regulating wages and working conditions.³⁵⁴

³⁴⁸ *Id.* art. 25.1. *See supra* note 291 and accompanying text.

³⁴⁹ 1991 Law on Disputes, *supra* note 228, art. 19.1. *See supra* note 181 and related text.

³⁵⁰ 1991 Law on Disputes, *supra* note 228, art. 4.2. *See supra* note 242 and accompanying text.

³⁵¹ However, in America, section 8(d)(3) of the NLRA contains restrictions on a union's right to strike. *See supra* note 245.

³⁵² 1991 Law, *supra* note 141, art. 30.3.

³⁵³ *Id.* art. 27.

³⁵⁴ *See supra* note 191 and accompanying text.

As the Polish economy makes its transformation toward a market system, and as the privatization of enterprises continues, the stage will be set to allow the free interplay of economic forces to promote authentic collective bargaining between autonomous employers and unions. Thus, the state's need to intervene in collective bargaining as an agent of the employer will lessen and the Polish law should again be amended to move away from the FLRA framework and more closely approximate the NLRA. This will facilitate the government's movement to a level of minimal involvement in labor relations and to further promote the free interplay of market forces, which is a touchstone to authentic negotiations and agreements.

Poland's economic and political transformation has resulted in an enormous decrease in real salaries and living standards for most Poles and their patience seems to be running out.³⁵⁵ Since the summer of 1990, a series of strikes has broken out as the workers attempt to use strikes as a weapon to improve living standards.³⁵⁶ In addition, there have been several instances in late 1991 and early 1992 where unions have threatened to strike to improve their living conditions,³⁵⁷ and there are no reports yet of the government enforcing the new law regarding strikes and punishing the violators.³⁵⁸

These actions provide tangible evidence that Polish workers and/or

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Lodz's Textile Mills Continue Strike*, POLISH NEWS BULL., Dec. 6, 1991 at 2. Workers at two textile mills remained on strike to force the government to renegotiate a July agreement. *Id.* Under the agreement, employees of endangered factories could request loans from welfare funds, but the government ordered the loans stopped in October. *Id.* See also Linnett Myers, *Solidarity to Strike Against Price Hikes*, CHI. TRIB., Jan. 12, 1992 at C23. Solidarity called a "nationwide one-hour work stoppage Monday [January 14] to protest an order by the Solidarity-led government to double the price of heating fuel, and to increase prices of natural gas 70 percent and electricity 20 percent." *Id.*; *Strikes Continue as Trade Unions Wait for Negotiations With Government* (BBC radio broadcast, Jan. 16, 1992). On January 14, "Poland was hit by another wave of strikes with about 50,000 workers in 14 aircraft factories staging a one-day stoppage demanding government support for the industry." *Id.*; Anna Dubrawska, *Education Crisis: Teachers Up in Arms*, WARSAW VOICE, Jan. 19, 1992 at 5. The teachers' union demands more money for wages because their earnings dropped by 17 percent in 1991. *Id.* In October, 1991, the union organized a silent march and held a one-hour nationwide strike on January 13, 1992. *Id.*; *No End to the Striking Spree*, POLISH NEWS BULL., Jan. 22, 1992.

With the prices in the stores going through the roof and the national belt-tightening measures reaching new heights, workers across the country are either already on strike or plan to mount protests in the near future. Many are desperately memoing [sic] authorities about their respective predicaments. The beginning of the week marked still another period of a toughened union stand in industry, transport, the health service, and education.

Id.

³⁵⁸ *No End to Striking Spree*, *supra* note 357.

unions continue to view the new strike procedures as too cumbersome, and as restrictive as under the 1982 Act. Unless there is some evidence of economic growth and an increase in living standards in the near future, there may be further unrest in Poland and misuse of strikes.³⁵⁹ Moreover, the government's nonfeasance in the enforcement of this law may result in a lack of respect for the law, as well as the further use of strikes as political weapons.

The current restrictions regarding strikes deprive Polish laborers of an effective strike weapon, and together with the current wage ceiling, may stimulate illegal actions, thereby hampering Poland's ability to complete its political and economic transformation, as well as undermining its social and legal order.

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³⁵⁹ See *supra* note 344 and related text.

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