

To : Mr. Hendra Yusran Siry Date : 31 January 2019

Attn. : [hendrasiry@cticff.org](mailto:hendrasiry@cticff.org) Ref. : 06839/5146.001/I/2019/LZ-IRA-RDT

At : Coral Triangle Initiative on Coral Reefs, Fisheries and Food Security (CTI – CFF) From : Raditya Anugerah Titus/  
Irina Anindita/  
Lia Alizia

Re : **Legal Advice on Various Matters**

No. of pages (including this page): 18 Page(s)

---

IMPORTANT THIS E.MAIL AND ANY ATTACHMENTS MAY BE CONFIDENTIAL AND PRIVILEGED, AND MAY ONLY BE USED BY THE AUTHORIZED RECIPIENTS. IF YOU RECEIVE THIS E.MAIL IN ERROR, PLEASE DELETE ALL COPIES AND NOTIFY US ON +62-21-2521272 OR BY E.MAIL. IF THE RECIPIENT OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS E.MAIL OR ANY ATTACHMENTS IS STRICTLY PROHIBITED.

YOU MAY ONLY RELY ON LEGAL ADVICE AND DOCUMENTS RECEIVED BY E.MAIL WHERE THE ADVICE OR DOCUMENTS IS CONFIRMED BY AND CHECKED AGAINST A HARD COPY PROVIDED UNDER A SIGNED MAKARIM & TAIRA S. LETTER. YOU SHOULD CHECK ATTACHMENTS FOR VIRUSES AND DEFECTS BEFORE OPENING OR USING THEM. OUR LIABILITY IS LIMITED TO RESUPPLYING ANY AFFECTED ATTACHMENTS.

---

Dear Pak Hendra,

From our correspondence between 15 January 2019 – 29 January 2019, we understand that you sought our advice and recommendations regarding various matters the list of questions attached to your email of 15 January 2019 address (which are restated below).

Please find below our advice and recommendations interspersed between your questions:

1. *Status of CTI-CFF Regional Secretariat as an International Organization given the following matters:*

- a. *Article 18. Deposition of the Establishment of the CTI-CFF Regional Secretariat Agreement with UN Secretariat General in accordance with Article 102 of the UN Charter (documents will be provided)*

**M&T:**

**I. Article 18 of the Agreement on the Establishment of the Regional Secretariat of the Coral Triangle Initiative on Coral Reefs, Fisheries and Food Security dated 28 October 2011**

We understand that “Article 18” referred to in your question above is Article 18 (Depository) of the Agreement on the Establishment of the Regional Secretariat of the Coral Triangle Initiative on Coral Reefs, Fisheries and Food Security (“**CTI-CFF**”) dated 28 October 2011 (“**Establishment Agreement**”). Under Article 18 of the

Establishment Agreement, the Indonesian government is the depository of the Establishment Agreement, who will register the Establishment Agreement with the Secretary General of the United Nations in accordance with Article 102 of the Charter of the United Nations (“UN”) (“UN Charter”).

Under Article 102 of the UN Charter, every treaty and every international agreement entered into by a member of the UN (like the Establishment Agreement) must be registered with the UN Secretariat and published by it. Failing to comply with the registration requirement may prevent the parties to the treaty or international agreement from invoking the treaty or agreement before any organ of the UN.

From the Statement of Treaties and International Agreements (registered or filed and recorded with the Secretariat during the month of November 2017) No. ST/LEG/SER.A/849, we understand that the Establishment Agreement has been registered and published in accordance with the above provision of the UN Charter.

## **II. Status as an International Organization**

Regarding the status of the CTI-CFF Regional Secretariat as an international organization from the Indonesian law perspective, the following regulations provide a definition of an international organization:

- (i) Presidential Decree No. 64 of 1999 on Indonesia’s Membership of and the Indonesian Government’s Contributions to International Organizations (“**PD 64/1999**”)

PD 64/1999 defines an international organization as an organization/body/institution/association/forum between governments or non-governmental bodies the purpose of which is to increase international cooperation and has been established under a certain rule or agreement.

We believe that the CTI-CFF Regional Secretariat is covered by the above definition, as it can be deemed an organization (a secretariat) established under the Establishment Agreement between the governments of the Republic of Indonesia, Malaysia, the Independent State of Papua New Guinea, the Republic of the Philippines, the Solomon Islands, and the Democratic Republic of Timor-Leste, in relation to international cooperation between these governments to provide greater efficiency in their coordination for the implementation of the CTI-CFF at the regional level.

- (ii) Law No. 24 of 2000 on International Agreements (“**Law 24/2000**”)

Law 24/2000 defines an international organization as an inter-governmental organization which is acknowledged as an international legal subject and has the capacity to enter into international agreements.

Under Article 3 of the Establishment Agreement, the CTI-CFF Regional Secretariat has a legal personality within the scope of its functions and is authorized by the parties to the agreement to perform any or all of the following:

1. enter into agreements;
2. conclude contracts;

3. acquire and dispose of movable and immovable property in the territories of the parties to the agreement in accordance with the laws and regulations of the parties; and
4. institute and be a party to legal proceedings.

Given the above capacity of the CTI-CFF Regional Secretariat, we believe that is defined as an international organization under Law 24/2000.

### **III. The Indonesian Government as a Party to the Establishment Agreement**

In order to be bound to an international agreement (like the Establishment Agreement), under Article 3 of Law 24/2000, the Government of the Republic of Indonesia may bind itself to an international agreement by (i) the signing, (ii) ratification or (iii) exchange of agreements/diplomatic notes; and (iv) by other means agreed to by the parties. This ratification is conducted either by enacting a Law (*Undang-Undang*) or issuing a Presidential Decree, depending on the subject matter of the international agreement. Matters regarding the environment (which we believe include the coral reefs, fisheries and food security covered by the Establishment Agreement) are required to be ratified by enacting a law.

We understand that Indonesia signed the Establishment Agreement and then ratified it on 13 March 2014. However, the Indonesian Government ratified the Establishment Agreement under a Presidential Regulation (not a Law or a Presidential Decree as required under Law 24/2000), i.e. under Presidential Regulation No. 19 of 2014 on the Ratification of the Establishment Agreement. Given this, we believe that the Ministry of Foreign Affairs needs to be consulted on the ratification of the Establishment Agreement in relation to the above ratification requirements under Law 24/2000. However, in order to obtain a conclusive answer, we will have to disclose the title of the Establishment Agreement. Please let us know if you wish us to assist you with this approach.

b. *The CTI-Staff Regulation 2 (para 3):*

*“If any part of these Regulations become contrary to the prevailing laws of the Republic of Indonesia, or where they are silent, the prevailing laws of the Republic of Indonesia will apply”.*

#### **M&T:**

We understand that you would like to confirm whether the CTI-CFF Regional Secretariat, as an international organization operating in Indonesia, is subject to the prevailing Indonesian laws and regulations on manpower in its employment matters.

The references in Law No. 13 of 2003 on Manpower (“**Manpower Law**”) to ‘employers’ and ‘entities’ include (among others) legal entities or other forms of institution which hire employees and pay them a salary or other form of compensation.

Given the above, as an international organization which will hire employees and pay them a salary or other form of compensation, we believe that the CTI-CFF Regional Secretariat can be defined as an ‘employer’ or ‘entity’ under the Manpower Law. In which case, the CTI-CFF Regional Secretariat must comply with the Manpower Law and its implementing regulations.

2. *Compliance with the Vienna Convention vis-à-vis staff matters, for Expatriate and Host country staff;*

**M&T:**

We understand that the Vienna Convention referred to here is the Vienna Convention of 1961 on Diplomatic Relations. If so, as the Vienna Convention 1961 is regarding diplomatic relations between states, we believe that it should not apply to the CTI-CFF Regional Secretariat and its staffing matters. We understand that it only applies to (among other things) the diplomatic staff or agents involved in diplomatic relations between states, not to employees of international organizations (in this case, the CTI-CFF Regional Secretariat).

3. *Obligations, if any, of the CTI-CFF Regional Secretariat to pay tax to the Government of Indonesia regardless of International Organisation status;*

**M&T:**

The Ministry of Finance regularly updates the list of international organizations which are exempted from income tax under Regulation of the Minister of Finance No. 215/PMK.03/2008 ("**Regulation 215**") as lastly amended by Regulation No. 156/PMK.010/2015 ("**Regulation 156**").

Under Regulation 156, an international organization is defined as an intergovernmental or non-government organization/body/agency/association/forum the purpose of which is to increase international cooperation, formed under certain rules or a mutual agreement. An international organization is exempt from income tax if the following criteria are met:

- a. Indonesia is a member of that organization; and
- b. the organization does not engage in other activities to gain income from Indonesia other than loans granted to the Indonesian government, the funds for which are derived from members' contributions.

According to Regulation 156, the international organizations which meet the above requirements will be listed in the attachment to Regulation 156, which includes amendments to Regulation 215 issued from time to time.

Neither Regulation 156 nor Regulation 215 provides any further explanation of the above criteria.

From our review to the Regulation 156, we do not find CTI CFF as an international organization which is exempted from the obligations to pay the income tax. However, as we are not qualified to advise on tax matters, it is advisable that you further consult with a tax consultant or an accounting firm to obtain comprehensive advice on the tax related matters.

4. *Obligation, if any, to provide BPJS Kesehatan, BPJS Ketenagakerjaan, Jaminan Hari Tua, Retirement Fee, and Tunjangan Hari Raya (THR) for the Host Country and Expat staff, health insurance (national/international) according to the Manpower law of Indonesia;*

**M&T:**

**I. BPJS Health and BPJS Manpower**

The Manpower Law entitles every employee and his/her immediate family members to social security benefits under the prevailing Manpower regulations. These social security benefits are administered through the National Social Security System (*Sistem Jaminan Sosial Nasional* – “**SJSN**”) and by the institution managing the SJSN (ie the Social Security Agency (*Badan Penyelenggara Jaminan Sosial* - “**BPJS**”) under Law No. 24 of 2011 on The Social Security Agency (“**BPJS Law**”). Article 13 (1) of Law No. 40 of 2004 on the National Social Security System requires all employers to register themselves and their employees with the Social Security Agency.

BPJS has two main programs: BPJS Health and BPJS Manpower. BPJS Health covers and organizes the health security program. All employees must be enrolled in this program. Meanwhile, BPJS Manpower covers and organizes occupational accident security (*jaminan kecelakaan kerja*), death security (*jaminan kematian*), old age security (*Jaminan Hari Tua*), and pension security (*jaminan pensiun*). As an employer, CTI-CFF must enrol its employees in all of the program and provide correct information.

For failure to do so, under Government Regulation No. 86 of 2013 on The Procedure for Imposing Administrative Sanctions on Employers other than State Administrators and All Individuals other than Employers, Employees and Contribution Beneficiaries (“**GR No.86**”), the employer will be served:

- (i) written warnings; followed by
- (ii) a fine; or
- (iii) the withdrawal of certain public services.

The BPJS programs that are mandatory for foreign employees are the occupational accident security, death security, old age security, pension security, and health security programs. The health security program is mandatory for foreigners who work in Indonesia for more than 6 months.

## **II. Pension Entitlement**

Upon reaching the retirement age, permanent employees are entitled to the following:

- a. Severance package as required under Article 167 of the Manpower Law;
- b. Old age security benefit; and
- c. Pension security benefit.

The old age security benefit and pension security benefit are managed by BPJS Manpower while the severance package will be paid by the employer with the following requirements (Article 167 of the Manpower Law):

- a. if the employer has enrolled the employee in a pension program, the premiums for which have been paid in full by the employer, the employee will have no right to severance pay or a service period recognition payment, but will still be entitled to compensation.
- b. if the pension benefits received under the pension program referred to in a. above amount to less than 2x the severance pay plus 1x the service period recognition payment and compensation (please see Annex I) (severance package) otherwise due, the employer must make up the difference.
- c. if the employer has enrolled the employee in a pension program, the premiums for which are paid by both the employer and the employee, the amount to be paid as part of the severance package is the portion of the pension for which the premiums

have been paid by the employer (ie the total sum of the premiums paid by the employee is not counted).

- d. if the employer has not enrolled the retiring employee in a pension program, the employer must provide the employee the severance package.
- e. the pension benefits referred to in a., b. and c. above do not void the employee's right to old age insurance which is compulsory under the prevailing laws and regulations (SJSN).

### **Old Age Security benefits:**

Old Age Security benefits are paid to employees when they reach 56 or their heirs upon the employees:

- a. reaching pensionable age – this includes employees who leave their employment, because they resign, are terminated or leave Indonesian territory permanently;
- b. suffering a full disability; or
- c. passing away.

The employee is entitled to the full amount of the pension benefit in point a above, comprising the total premiums and interest due (if any) paid during his/her employment. The old age security benefit is paid in a lump sum.

the old age security premium is 5.70% of the monthly salary with 3.70% being paid by the employer and 2% by the employee.

### **Pension Security Benefit:**

The type of pension benefits that will be paid is:

- a. an old age pension, upon reaching pensionable age until the employee passes away;
- b. a disability pension, if the employee has suffered a disability due to an accident or illness until he/she passes away;
- c. a widow or widower's pension, received by the employee's widow or widower until the widow or widower passes away or remarries;
- d. a child's pension, received by the employee's child if (i) his/her parents who were participants both die; or (ii) if the widow or widower of the participant dies or remarries; or
- e. a parents' pension, received by the employee's parents if the employee has no wife, husband, or child until he/she dies.

The pension security premium is 3% of the monthly salary with 2% paid by the employer and 1% paid by the employee. The contribution will be reviewed by BPJS within 3 years of payment of the first contribution and the employer's contribution may be gradually increased to 8%.

The common retirement age of the employee is 55 because the previous social security program recognized 55 as the retirement age for receiving the old age benefits even though, under the pension security benefit (BPJS Manpower), as of 1 January 2019, the pension age is 57 years. This pension age will gradually increase by one more year every three years until the retirement age finally becomes 65. Note that this pension age under the pension security program means the age when the employee is entitled to receive his/her pension benefit from the social security program; not the mandatory age to be applied by employers. In short, the employer can apply its own pension or

retirement age so long as it is clearly provided in the employment agreement, Company Regulations or Collective Labour Agreement.

### **III. Religious Holiday Allowance (Tunjangan Hari Raya or “THR”)**

Under the Indonesian Manpower regulations, on the occasion of one annual religious festival, employees are entitled to a THR amounting to one month’s salary if they have worked for at least 1 year continuously. Employees with at least one month's continuous service but less than one year are entitled to a THR pro rata to their length of service (i.e. one twelfth of a month's wages per month of service).

The Company may have an option to provide the THR during its preferred religious holiday, eg Idul Fitri or Christmas. Idul Fitri is the most common religious holidays before which the THR is paid. By law, only local employees are entitled to the THR. It is not clear whether foreign employees are entitled to THR. However, generally speaking foreign employees are not entitled to THR. We understand that the Ministry of Manpower shares this view.

Unlike permanent employees, neither are fixed term employees whose employment is terminated before the religious holiday, regardless of whether they have worked continuously for one month or more are entitled to THR. The permanent employees will be entitled THR if they are terminated at least 30 days before the religious festival in which THR will be payable.

### **IV. Health Insurance**

The Manpower Law is silent on the requirement to provide employees health insurance. Article 100 (1) of the Manpower Law requires employers to provide their employees a prosperity facility, which includes among others, a health facility. In practice, a health facility could be establishing a small clinic within a company’s location, providing a company’s doctor, a regular medical check-up or enrolling their employees in a private health insurance program selected by employers.

5. *Obligations, if any, to provide Relocation, Repatriation (of live persons and bodies), Annual leave, Annual Home Leave, Monetization of leave, Definition and entitlements of dependents, sick leave, housing allowance, etc*

#### **M&T:**

- a. **Relocation:** The Indonesian Manpower laws and regulations are silent on obligations related the relocation of employees. In practice, this is usually covered by the Company Regulations, Collective Labour Agreement or the employment agreement.
- b. **Repatriation:** The Manpower Law requires employers foreign manpower to pay their repatriation costs upon cease of his/her employment in Indonesia. By law, employers are obliged to repatriate their foreign employees to their home country. In practice, the employer can cover the cost of the foreign employee’s return to the country which was the point of hire and this matter should be clearly regulated in an employment agreement. For example, if he/she was hired in Singapore, the employer only needs to pay the cost of his/her return to Singapore, whatever his/her nationality.

For Indonesian employees, repatriation is applicable only if it is clearly regulated in Company Regulations, Collective Labour Agreement or the employment agreement. By law, if it is internally regulated, repatriation costs for an employee and his/her

dependant(s) to the place where the employee was recruited will be borne by an employer upon termination of employment. Repatriation of bodies is not provided in the Manpower Law.

- c. **Annual Leave:** Under Article 79 of the Manpower Law, employees are entitled to at least 12 (twelve) working days annual leave after every 12 months of continuous service. According to the Manpower Law, further details should be provided in the employment agreement, Company Regulations, or Collective Labour Agreement (if any).
- d. **Monetization of Leave:** Under Article 156 (4), any untaken annual leave not forfeited and housing allowance should be included as one of the components of the compensation that an employee receives upon the termination of his/her employment. In practice, employers do not usually monetize untaken annual leave unless the employee is being terminated.

In common practice, employers usually allow untaken annual leave to be carried forward to the next year with a limit on the number of days leave which can be carried forward under the Company Regulations, Collective Labour Agreement or the employment agreement.

- e. **Entitlements of Dependents:** The Manpower Law does not define dependents or specify their entitlements. However, under Article 160 of the Manpower Law, if an employee is detained because of an allegation of a criminal activity, the employer has no obligation to pay the employee's salary. However, the employer must provide the following assistance to his/her dependents:
  - For one (1) dependent: 25% of the salary (basic salary plus fixed allowances, if any);
  - For two (2) dependents: 35% of the salary (basic salary plus fixed allowances, if any);
  - For three (3) dependents: 45% of the salary (basic salary plus fixed allowances, if any);
  - For four (4) or more dependents: 50% of the Salary (basic salary plus fixed allowances, if any);

The above assistance must be provided for up to six (6) month as of the first day on which the employee is detained.

According to the elucidation of Article 160 of the Manpower Law, the dependents are the spouse of the employee, their children, and other persons who are legally the employee's dependents under the employment agreement, Company Regulations, or Collective Labour Agreement (if any).

- f. **Sick Leave:** Legally speaking, the Manpower Law does not recognize the term Sick Leave. An employee who cannot attend work due to illness is still entitled to his/her salary and entitlements. There is no limitation on the number of days for "sick leave".

Under Article 93 (3) of the Manpower Law, if the employee is unable to perform work continuously, the company must pay the following percentage of the employee's salary:

- for the first four (4) months, 100% of the salary (basic salary plus fixed allowances, if any);



- for the second four (4) months, 75% of the salary (basic salary plus fixed allowances, if any);
- for the third four (4) months, 50% of the salary (basic salary plus fixed allowances, if any);
- for subsequent months, until the termination of the employee's employment by the employer, 25% of the salary (basic salary plus fixed allowances, if any).

g. **Housing Allowance:** There is no requirement to provide a housing allowance. Allowance (*Tunjangan*) is divided into 2 types, namely: (i) fixed allowances and non-fixed allowances. Fixed allowance is payable to employees regularly regardless of their work attendance while non-fixed allowance is payable to employees depending on their work attendance. Housing allowance may be a fixed or non-fixed allowance which should be decided and regulated in the employment agreement, Company Regulations or Collective Labour Agreement.

Further, Article 100 (1) of the Manpower Law requires employers to provide a prosperity facility, which includes among other things, family planning services (*pelayanan keluarga berencana*), a babysitting facility, a housing facility, a religious facility, a sports facility, a canteen, a health facility and a recreational facility. However, Article 100 (2) explains that the above depends on the employees' needs and the capacity of the employer. Usually, a local regulation, ie a Governor or regional regulation will further elaborate type of prosperity facilities which should be satisfied by employers which will depend on the size of their number of employees and/or industry or business.

h. **Others (Maternity Leave):** Pregnant employees are entitled to three months maternity leave, one-and-a half months before and one-and-a half months after the birth.

If an employee suffers a miscarriage, she is entitled to take one-and-a-half months' leave after the miscarriage, or some other period required according to a medical certificate issued by an obstetrician or midwife.

If it is impossible for a pregnant employee to perform her normal work owing to her pregnancy, the employer must change her duties or move her to another position, without any loss of pay or other entitlements. If this is not possible, the employer must grant the employee paid leave until she is entitled to take maternity leave (that is, until one-and-a-half months before the expected date of birth).

Employees who are pregnant may not be employed between 11pm and 7am, if it is medically certified that it would place their health and/or safety, or that of their unborn child at risk.

Employers may not dismiss an employee on the ground that she is pregnant or has given birth, or that she is absent from work because she is pregnant or has had a miscarriage.

i. **Specific Occasions Related Leave:**

- |    |  |        |
|----|--|--------|
| a. | Death of the employee's wife/husband/child/parents/parents-in-laws | 2 days |
| b. | The employee's wife gives birth                                    | 2 days |
| c. | Employee's wedding   | 3 days |
| d. | Marriage of the Employee's children                                | 2 days |
| e. | Circumcising/Baptizing the employee's children                     | 2 days |
| f. | Death of a family member who lives in same house                   | 1 day  |

- g. The employee's wife suffers a miscarriage 2 days

6. *The termination of the staff process and the entitlement for the staff that terminated;*

**M&T:**

In Indonesia, the termination of employees is regulated by the Manpower Law and Law No. 2 of 2004 on the Settlement of Industrial Relations Disputes ("**Law No. 2/2004**"), as explained further below.

**I. Grounds for Termination**

In principle, under the Manpower Law, terminations of employment should be avoided, and in some cases is even prohibited. Any termination of employment requires approval from the Industrial Relations Court ("**IRC**") or Supreme Court if the IRC ruling is appeal and there must be a clear reason(s) for terminating an employee. A final and binding court ruling should be obtained for termination of employment unless there is a mutual termination agreement signed by employer and employee.

The Manpower Law recognizes the following grounds for termination:

**A. Termination by the employer**

The following are acceptable grounds for termination by the employer:

1. serious misconduct (currently known as termination for urgent reasons due to a 2004 ruling of the Constitutional Court);
2. the employee has been placed under arrest by the competent authorities because of being suspected of having committed a crime;
3. a violation of the employment agreement, Company Regulations, and/or Collective Labour Agreement (minor misconduct);
4. financial reasons;
  - a. a change of status or employer, merger or consolidation of the company;
  - b. the closing down of the business due to continues losses for 2 consecutive years according to its financial reports for 2 consecutive years or force majeure;
  - c. bankruptcy;
5. the death of the employee;
6. the employee's reaching retirement age;
7. the employee being absent for 5 working days consecutively and having been properly summonsed twice; or
8. the employee is suffering a long-term illness and has been absent for 12 consecutive months, as certified by a doctor.

The urgent reasons in I. above are listed in Article 1603 o. of the Indonesian Civil Code, and include for example the employee's performance not meeting the employer's expectations, the employee embezzling company funds, etc. However, the require termination procedure must still be followed. In practice, the urgent reasons for a termination of employment can apply if they are covered by the Company Regulations or employment contract or Collective Labour Agreement.

## **B. Termination by the employee**

The following are acceptable grounds for termination by the employee:

1. the employee's resignation;
2. a change of status or employer, merger, consolidation or change of ownership and the employee does not wish to continue the employment relationship because of one of the occurrences;
3. termination due to the following violations by the employer:
  - a. maltreating, harshly confronting or menacing the employee;
  - b. persuading and/or ordering the employee to engage in any activity which violates the prevailing laws and regulations;
  - c. failing to pay the salary on time for 3 (three) or more months consecutively;
  - d. not complying with agreed to obligations to the employee;
  - e. ordering the employee to work outside the agreed to place of work; or
  - f. ordering the employee to perform work which could endanger his/her life, safety, health, or ethics and is not specified in the employment agreement.

## **II. Severance Package**

The severance package depends on the reason for the employee's termination and the circumstances (eg: years of service, grounds for termination, and the employee's salary etc.), certain multiples of the severance pay and service period recognition payment may apply.

Please refer to our memorandum (as attached) on the calculation of severance and other termination packages for information about the severance entitlements according to the reason for termination.

In general, an employee terminated on any of the above grounds is entitled to a severance package, but not in the following circumstances:

1. the employee resigns voluntarily: he/she is only entitled to compensation (please see the further explanation in Annex I);
2. the employee is absent for 5 consecutive days: he/she is only entitled to compensation (please see the further explanation in Annex I);
3. the expiry of the employee's fixed term contract: no severance needs to be paid to the employee.

## **III. Prohibited Grounds for Terminating Employees**

Article 153 of the Manpower Law prohibits employers from terminating employees for any of the following reasons:

- a. the employee being prevented from working because of an illness as proven by a doctor's recommendation for not more than 12 (twelve) consecutive months;
- b. the employee being prevented from performing his/her work because of his/her obligations to the state under the prevailing laws and regulations;
- c. the employee's performing religious rites as required by his/her religion;
- d. the employee getting married;
- e. a female employee getting pregnant, giving birth, suffering a miscarriage, or breast feeding her baby;
- f. the employee being related to another employee by blood or by marriage;

- g. the employee establishing, becoming a member and/or manager of an employee /labour union, the employee engaging in employee /labour union activities outside office hours, or during office hours with the agreement of the employer, or under the employment agreement, Company Regulations, or Collective Labour Agreement;
- h. the employee reporting the employer to the competent authorities for allegedly committing a crime;
- i. because of a difference of religion, ideology, tribe, race, group, gender, physical condition, or marital status;
- j. the employee being permanently disabled or ill due to an industrial accident or occupational illness caused by the employee's working conditions, the healing period for which cannot be predicted according to a doctor's certificate.

Any termination of an employee for the reasons in a. – j. above will be declared void by law and the employer must re-employ the employee.

#### **IV. Termination Procedures**

By law, unilateral termination is not possible; terminations of employment should be prevented and must be agreed to by both parties. The Manpower Law and Law No. 2/2004 require the following procedure and mechanism to be followed for a termination of employment:

##### **a. Bipartite meeting(s)**

The employer and the employee must hold at least one bipartite meeting to negotiate the arrangement. The bipartite negotiations may continue for up to 30 working days and the results of the negotiations should be recorded in minutes of meeting signed by both parties.

During the bipartite negotiations, the employer must explain the reason for the employee's termination to the employee and provide arguments and documents (if any) which support the reason for his/her termination. The employee may raise his concerns or questions about his/her termination.

Please note that foreigners should never be involved in any Human Resources ("HR") or employment matters in any way. Under the Manpower Law, foreign employees may not hold any HR position and in practice and under an unwritten policy of the Ministry of Manpower, this means that they may not sign any employment agreements, warning letters or any other manpower/employment related documents or be involved in any way in terminations of employment.

If the parties reach a consensus in the bipartite negotiations, the terms are drawn up in a Mutual Termination Agreement ("**MTA**"), signed by both parties and registered with the Industrial Relations Court with jurisdiction.

If no consensus is reached, the negotiations are deemed to have failed and therefore the termination dispute is registered with the local Ministry of Manpower ("**MOM**") office to be settled through tripartite meetings (ie conciliation or mediation).

##### **b. Tripartite meeting(s)**

Within 7 working days of mediation being requested, the local MOM office must start the mediated dispute settlement negotiations which must be completed within 30 working days. If mediation fails, the MOM official provides a written recommendation

for settling the dispute to the parties and the MOM office. The disputing parties should respond to the recommendation within 10 working days of receipt of the recommendation letter. If either party does not respond to the recommendation letter, that party will be deemed to have rejected it.

c. IRC

If either party rejects the recommendation, the dispute can be referred to the IRC by filing a petition in the IRC in the District Court with jurisdiction over the employee's workplace. According to Law 2/2004, the IRC should hand down its decision on the dispute within 50 working days of the first hearing.

If either party does not accept the IRC's ruling, it can file an appeal in the Supreme Court. Theoretically, the Supreme Court should issue a ruling within 30 working days.

In practice, the above termination procedures often take longer than they should, but there is no sanction for failure to comply with the time limits.

7. *Tax exemptions for Staff (expats and non-expats) working at the Regional Secretariat;*

**M&T:**

As we are not qualified, to advise on tax, finance, accounting, or other technical matters and in Indonesia, taxation advisory services traditionally fall within the scope of work of the big accounting firms as a close working relationship with the tax authorities is required to keep fully abreast of all written and unwritten practices, policies and procedures of the tax office, you may wish to consult an accounting firm to obtain comprehensive advice on the tax related matters.

8. *The Immunities and Privileges for Staff (Host country staff and Expats) of the Regional Secretariat;*

**M&T:**

Regarding the immunities and privileges of staff of the CTI-CFF Regional Secretariat, Article 16 of Law Number 37 of 1999 on Foreign Relations ("**Law 37/1999**") explains that the granting of immunity, privileges and exemptions from certain obligations to diplomatic and consular representatives, special missions, representatives of the UN, representatives of special agencies of the UN, and other international organizations should comply with both national law and international law and custom. Immunity, privileges and exemptions from certain obligations can be granted to parties determined by international agreements ratified by Indonesia or in accordance with international law and custom.

In CTI-CFF Regional Secretariat's case with respect to its staff, we understand that under Article 12 of the Establishment Agreement, the Host Country (i.e. Indonesia) grants the Executive Director and the Deputy Executive Directors who are not citizens of the Host Country such privileges and immunities as may be necessary for them to perform their official duties and functions. Specific details of the privileges and immunities are provided in the CTI-CFF Host Country Agreement between the CTI-CFF Regional Secretariat and the Host Country (i.e. the Government of the Republic of Indonesia) dated 1 December 2015 ("**HCA**").

Under the HCA, in accordance with the prevailing Indonesian laws and regulations, the Indonesian government grants the Executive Director and the Deputy Executive Directors who are not Indonesian citizens immunity from judicial and administrative proceedings for any deed or word spoken or written in the performance of their official duties related to Article 2 of the HCA (on the juridical personality of the CTI-CFF Regional Secretariat), provided that their immunity does not impede the course of justice.

Referring to Law 37/1999 above, we note that (i) the Establishment Agreement has been ratified by the Indonesian government under Presidential Regulation No. 19 of 2014 and (ii) the HCA has been ratified by the Indonesian government under Presidential Regulation No. 46 of 2016.

Given the above, it can be interpreted that CTI CFF's staff holds immunities and other privileges provided under the Establishment Agreement and HCA and such immunities and privileges are also acknowledged by Indonesian Government by ratifying the Establishment Agreement through Presidential Regulation No. 19 of 2014. However, the existence of the clause mentioned in question 1.b above (quoted as below):

*“If any part of these Regulations become contrary to the prevailing laws of the Republic of Indonesia, or where they are silent, the prevailing laws of the Republic of Indonesia will apply”*

creates ambiguity of applicability of the immunity and privileges given to the Executive Director and Deputy Executive Director because of the two conflicting clauses. Conservatively speaking, for compliance issues, we believe that CTI CFF should still comply with Indonesian law, especially related to manpower matters to minimize any possible risk of being claimed by its local employees. The dispute settlement of industrial disputes in Indonesia is not predictable and some current manpower cases or disputes have showed that the Ministry of Manpower and the IRC seemed to ignore the immunity and privileges of embassies in Indonesia as they required the embassies to comply with their obligations under the Manpower Law, such as paying severance package as per the Manpower Law upon termination of employment, requirement for embassies to enroll their local staff to SJSN.

#### 9. *Dispute resolution mechanisms, and using which laws*

##### **M&T:**

If this refers to the resolution of disputes between employers and employees over matters which may cause a termination of employment, please refer to our response in 6. above.

In other cases (eg over commercial agreements between private contracting parties), as a general rule, Indonesian law recognizes the right of private contracting parties to select the law which governs the interpretation of their contract. However, in relation to the choice of the governing law of an agreement, there must be a connection between the chosen law and the transaction or in your case, the subject of the agreement, which includes:

1. the country of the place of incorporation of the parties entering into the agreement;
2. the location of the goods/services or subject of the agreement; and
3. the place where the legal action is performed.

Given the above, the parties to a contract are free to choose either local law or foreign law as the governing law as long as there is a connection between the chosen jurisdiction and the transaction and/or there are no other laws or specific public policy requiring local law to be the governing law.

Further, in practice, any dispute can be settled in the local courts or through arbitration (local or foreign). However, dispute resolution through the local courts is time consuming. Although the Supreme Court's guidelines (in a Supreme Court Circular Letter) require a dispute in the court of first instance (district court) to be completed within 5 months, in practice, it often takes longer, especially if the losing party in the district court files an appeal in the High Court, followed by an appeal to the Supreme Court which in total can take 2 – 3 years or even longer.

As an alternative, arbitration may be more time efficient and less costly (depending on the amount in dispute). However, arbitration only applies to commercial transaction disputes. Generally, arbitration is preferable for very complex contractual arrangements or contracts which contain a lot of technical detail which would not be appropriate for the local courts, as local judges might not have a sufficient degree of commercial sophistication.

Given the above, it is difficult to generalize and to say that, in all circumstances, conventional litigation is preferable to arbitration, or vice versa.

#### 10. *The number of working hours and overtime per week;*

##### **M&T:**

Under the Manpower Law, employees' normal working hours may not be more than 40 hours a week, while normal daily working hours should not be more than 7 (seven) hours for employees working a six-day week and 8 (eight) hours for employees working a five-day week.

If an employee works overtime on normal working days, he/she may not work more than 3 (three) hours per day and 14 (fourteen) hours per week. Further, all hours worked on employees' weekly rest days or public holidays are considered overtime.

Employees who work overtime are generally entitled to a pay premium. For overtime worked on a normal working day, the employee must be paid 150% of the normal hourly wage (for overtime purposes, the hourly wage is defined as one-173<sup>rd</sup> of the employee's normal monthly pay) for the first daily hour of overtime, and then double the normal hourly wage for the second and subsequent hours. For overtime worked on a weekly rest day or a public holiday:

- a. employees who work a five-day week must be paid double the normal hourly wage for the first eight hours of overtime on the day concerned, rising to three times the normal hourly wage for the ninth hour of overtime, and four times the normal hourly wage for the 10th and 11th hours of overtime; and
- b. employees who work a six-day week must be paid double the normal hourly wage for the first seven hours of overtime on the day concerned, rising to three times the normal hourly wage for the eighth hour of overtime, and four times the normal hourly wage for the 9th and 10th hours of overtime.

However, employees holding "certain" responsible positions as thinkers (*pemikir*), planners (*perencana*), operators (*pelaksana*) and controllers (*pengendali*) of the

operations of the company are not entitled to overtime pay as their work hours are not restricted to those of regular employees (laborers and staff) of the company.

Please note that employers must comply with the following requirements for overtime:

- a. issue written instructions to and obtain approval from the relevant employee;
- b. pay overtime rates, except to the company's management who receive a higher salary;
- c. provide enough rest breaks; and
- d. provide food and drinks of at least 1,400 calories (if the overtime is worked for 3 hours or more).

Further, the above general limits and rules on overtime and overtime pay do not apply to certain specified sectors and types of work, to which specific rules apply. These include the sectors and types of work that are not covered by the statutory normal daily or weekly working hour rules (eg offshore oil and gas installations, fisheries).

11. *The status of the job contracts/letter of agreement for Permanent staff and Non-Permanent Staff, and when signed by ED vs signed by Chair of Committee of Senior Officials or Chair of Council of Ministers from a non-Indonesian member country*

#### **M&T:**

We understand that you require our advice on the difference between employees hired under a fixed term contract (“**FTC**”) and those under a permanent employment contract (“**PEC**”) under the Manpower Law.

Please see below a general explanation of the PEC and FTC regulations:

#### **PEC:**

1. There is no legal requirement to have a PEC drawn up in writing. Therefore, it may be entered into orally. However, the employer must then issue an appointment letter to the employee which contains at least the name and address of the employee, the starting date of his/her employment, the type of work and the salary;
2. A PEC may impose a probation period of up to 3 months and it should be put in writing, during which the employer must at least pay the employee the prevailing minimum wage. The employer can terminate the employee anytime with or without providing any reason during the probation period.

#### **FTC:**

An FTC is an employment contract between an employee and an employer to undertake an employment relationship for a certain term or a certain job.

The following are the characteristics of an FTC:

- a. it must be in writing using the Indonesian language and Roman script;
- b. it cannot have a probation period;
- c. it may only be for specific work, which will finish/be completed within a certain term (not permanent):
  - (i) work which is one-off, or temporary in nature;
  - (ii) work estimated to be completed in a short time, within 3 years;



- (iii) work which is seasonal in nature; or
- (iv) work which is related to a new product, activity, or an additional product which is still in the experimental stage or on trial.
- d. initially for up to 2 years, extendable (once for 1 more year) and/or renewable (once for up to 2 years with a 30-day break); if the employer intends to extend the FTC, the employer must notify the employee in writing no later than 7 days before the FTC expires;
- e. the FTC must be registered with the local office of the MOM within 7 days of signing;
- f. in the event of early termination, the terminating party must pay the other party the employee's salary up to the expiry of the FTC.

Failure to comply with a., c., d., and e. will cause the FTC to automatically become a PEC, while if the FTC does not meet the criteria in point b., the probation period will be null and void.

The signatory of the employment agreement between the CTI-CFF Regional Secretariat and its employees, must be its authorized representative. Under Regulation 4.2.b(i) (on Executive Directors) of the CTI-CFF Staff Regulations, we understand that the Executive Director is responsible for (among other things) representing the CTI-CFF. Therefore, in entering into employment agreements, the CTI-CFF Regional Secretariat should be represented by its Executive Director (not the Chair of the Committee of Senior Officials or the Chair of the Council of Ministers from a non-Indonesian member country).

In any case, please note that under the Indonesian Manpower Law, a foreigner is not allowed to handle HR matters. This is often interpreted to also cover signing an employment agreement. Therefore, an Indonesian should be appointed as the authorized representative of the employer to sign employment agreements.

We hope the above is of assistance. Should you have any questions or require our further assistance, please let us know.

Best regards,  
**Makarim& Taira S.**

## ANNEX I

### Severance Pay, Service Period Recognition Payment, and Compensation

#### 1. Severance Pay

Length of Service (Year(s))	Severance Pay
Less than 1	1 month's Salary
≥ 1 but < 2	2 months' Salary
≥ 2 but < 3	3 months' Salary
≥ 3 but < 4	4 months' Salary
≥ 4 but < 5	5 months' Salary
≥ 5 but < 6	6 months' Salary
≥ 6 but < 7	7 months' Salary
≥ 7 but < 8	8 months' Salary
≥ 8	9 months' Salary

#### 2. Service Period Recognition Payment

Length of Service (Year(s))	Service Period Recognition Payment
≥ 3 but < 6	2 month's Salary
≥ 6 but < 9	3 months' Salary
≥ 9 but < 12	4 months' Salary
≥ 12 but < 15	5 months' Salary
≥ 15 but < 18	6 months' Salary
≥ 18 but < 21	7 months' Salary
≥ 21 but < 24	8 months' Salary
≥ 24	10 months' Salary

#### 3. Compensation

- a. annual leave not yet taken and not yet forfeited. Please find the calculation below.  
$$[\text{number of days untaken leave}] \times \frac{\text{Salary}}{23}$$
- b. fares or expenses for returning home for the employee and his/her family to the location where the employee was recruited.
- c. compensation for housing, medical treatment and medication which must be 15% (fifteen percent) of the severance pay and/or service period recognition payment for those that meet the requirements.
- d. other compensation provided for in the employment agreement, company regulations or collective employment agreement.