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American Labor Policy and the International Economy: Clarifying Policies and Interest

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AMERICAN LABOR POLICY AND THE INTERNATIONAL ECONOMY: CLARIFYING POLICIES AND INTERESTS†

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I. INTRODUCTION

American labor policy[1] was developed at a time when the American economy was largely self-contained and independent.[2] The primary goal of labor legislation was to respond to the crisis affecting the masses of workers who had little expectation beyond obtaining employment at bare subsistence wages.[3] These workers were historically unable to improve their situation because employers dealt harshly with any attempts to organize and act collectively.

The labor legislation initially enacted served the purpose of protecting American workers by law while they organized and bargained collectively.[4] Minimum wage and hour laws, along with safety and health laws, set a floor for the level of working conditions.[5]

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I would also like to thank Jennifer Kanamura, John Short, and Leslie Stearns for their excellent research assistance, and Richard Skolnick and Steve Gold for their helpful comments.

[1] For purposes of this Article, "American labor policy" refers to legislation enacted to govern the relationship between employers and employees. For a discussion of the more important aspects of labor policy, see *infra* notes 22–82 and accompanying text.

[2] The internationalization of the economy is a recent phenomenon stemming from gains in communication, transportation, and various government programs designed to encourage investment in developing countries. See *infra* note 8 for further discussion of the global economy.

[3] See *infra* notes 25–34 and accompanying text for a discussion of the plight of American workers prior to labor legislation.

[4] See *infra* notes 48–50 and accompanying text for a discussion of early labor legislation's efforts at protecting workers' rights to organize and bargain collectively.

[5] See *infra* notes 54–66 and accompanying text for a discussion of legislation designed to improve working conditions.

Later, labor policy was further enhanced by various statutes designed to protect certain human rights, primarily the right to employment free of discrimination.[6]

As long as the American economy remained independent or relatively unchallenged in world markets, American labor policy was an effective step in the direction of assuring that workers were treated with basic fairness. Further, American business was able to remain competitive because domestic producers incurred basically the same labor costs.[7] The world economy has become increasingly interdependent,[8] however, and multinational companies ("MNCs")[9] are now able to transfer freely production from the United States to developing countries to take advantage of significantly lower labor costs made possible by the virtual absence of regulations protecting workers.[10] This transfer of production is permitted, if not encouraged, by policies of the United States government developed with an express purpose of fueling business expansion, assisting developing countries, and promoting exports of American products.

The development of an extensive international economy has greatly reduced the effectiveness of current labor legislation and raises basic questions about the direction of American policy. If American MNCs can freely seek out cheaper labor in developing countries and abandon high-priced American workers, then the hard fought gains of the American labor movement were a Pyrrhic

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[6] See *infra* notes 67–70 and accompanying text for a discussion of Title VII of the Civil Rights Act of 1964.

[7] *See, e.g.*, Columbus & Georgia Ry. Co. v. Adm'r. of Wage and Hour Div., 126 F.2d 136, 140 (5th Cir. 1942) (minimum wage and hour law sets uniform standards to equalize wages and remove advantage from low wages).

[8] *See, e.g.*, Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1001(a)(1), 102 Stat. 1120 (1988) ("in the last 10 years there has arisen a new global economy in which trade, technological development, investment, and services form an integrated system; and in this system these activities affect each other and the health of the United States economy"); Jedel & Stamm, *The Battle Over Jobs: An Appraisal of Recent Publications on the Employment Effects of U.S. Multinational Corporations*, in AMERICAN LABOR AND THE MULTINATIONAL CORPORATION 144, 150–51 (D. Kujawa ed. 1973).

[9] The term "multinational company" ("MNC") is used in its commonly understood form to denote a firm that is operating in more than one country, whether it is producing in more than one country or gathering components from various locations to assemble. One major work on the analysis of the global power of MNCs has objected to the term because it implies worldwide participation, when in fact nationals from the MNC's home country almost always control the management and own the stock of the company. *See* R. BARNNET & R. MÜLLER, GLOBAL REACH, THE POWER OF THE MULTINATIONAL CORPORATIONS 17–18 (1974).

[10] For a discussion of examples of working conditions in developing countries, see *infra* notes 164–224 and accompanying text.

victory. If those gains meant something rooted in principle, and represented deliberate movement in the evolution of worker rights and industrial democracy,[11] then the circumvention of those rights reflects a major weakness in current policy. This is particularly true when the foreign workers are exploited due to the virtual absence of effective labor regulation in developing countries.[12]

An issue related to American MNCs' eagerness to shift their production to developing countries is why American policy so freely allows this practice without regard for the impact on American interests. A fundamental assumption of all policies that promote business is that if business does well, then the rest of the country will benefit. Perhaps the most memorable expression of this policy is the famous statement by Charles Wilson, a former president of General Motors, that "what was good for our country was good for General Motors and vice versa."[13] The assumption is that a growing business, acting consistently with American interests, will hire additional workers, pay them well, and allow the workers to increase consumption and keep business growing — the classic justification for the "trickle down theory," recently revived as "supply side" economics.[14]

While the overall merit of a trickle down development policy can certainly be debated,[15] its primary claim to legitimacy is that government policies should promote business expansion so that those dependent on business may also benefit. Not even the boldest conservative policy maker would openly declare that government should give special benefits to business *regardless* of whether there are any resulting gains to the masses of workers that constitute the vast majority of Americans. The trickle down system works as well as it can when government trade and tariff policies encourage business expansion internationally. It then assists American business in expanding to foreign markets and increasing domestic employment

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[11] Senator Wagner, the sponsor of the National Labor Relations Act, stated that he viewed his labor legislation as a step in the evolution of worker rights. See *infra* text accompanying note 53 for the direct quotation from Senator Wagner.

[12] See *infra* notes 231–325 and accompanying text for a discussion of the absence of effective labor regulation in developing countries.

[13] The statement is widely quoted. *E.g.*, Reich, *Corporation and Nation*, ATLANTIC MONTHLY, May 1988, at 76. Prior to this, under President Hoover, "the business of government was business." B. BLUESTONE & B. HARRISON, THE DEINDUSTRIALIZATION OF AMERICA 194 (1982).

[14] *See id.* at 197.

[15] *See id.* at 196–204.

to meet the new demand. This is consistent with the goals of labor policy.

The justification for the system breaks down, however, when MNCs eliminate American workers from the equation by manufacturing products with cheap labor from developing countries and then export those products to the United States. Americans lose jobs,[16] plant closings devastate communities,[17] and such moves further undermine American interests by contributing substantially to the trade deficit.[18] Further, American technology, often subsidized by the government, is exported to other countries.[19] This also undermines American defense interests.[20] These developments certainly are inconsistent with any broad vision of "American interests."

Any basic economic analysis recognizes that the primary goal of capitalistic enterprises, to increase profits, makes such moves inevitable. Marxist theory accurately predicted that producers will avail themselves of cheaper labor whenever possible.[21] This development is inevitable, however, only as long as business remains unregulated.If the expansion of American business into developing countries actually hurts American labor, then allowing this type of expansion to continue without regulation can no longer be justified on the basis that it improves employment at home.

The internationalization of the economy raises many important labor-related issues. It would be impossible to do complete justice to them all in a single article. The more modest goal of this article is to demonstrate a relationship between trade policy and labor policy, and to raise very fundamental questions as to whether it

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[16] See *infra* notes 127–33 and accompanying text for a discussion of American job loss resulting from the exploitation of cheap labor in developing countries.

[17] *See, e.g.*, B. BLUESTONE & B. HARRISON, *supra* note 13, at 63–78 (discussing a variety of ripple effects of plant closings, including the mental health of the unemployed, the impact on the local economy, and the need for increased public spending).

[18] *See, e.g.*, Jedel & Stamm, *supra* note 8, at 151.

[19] Goldfinger, *An American Trade Union View of Trade and Investment*, in AMERICAN LABOR AND THE MULTINATIONAL CORPORATION 40–41 (D. Kujawa ed. 1973); *Oversight of U.S. Trade Policy: Joint Hearings before the Subcomm. on International Trade of the Senate Comm. on Finance and the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 29 (1981); Reich, *Put a Brake on High-Tech Alliances*, L.A. Times, Mar. 20, 1989, at 5.

[20] P. KENNEDY, THE RISE AND FALL OF GREAT POWERS 685–86 (1987).

[21] *See, e.g.*, MARX, WAGE-LABOUR AND CAPITAL 39 (1933) (profits can only grow rapidly when the price of labor — the relative wages — decreases just as rapidly). Even a more conservative observer, Oliver Wendell Holmes, recognized that "one of the eternal conflicts out of which life is made up . . . is that society, disguised under the name of capital, [attempts to get man's] services for the least possible return." Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896).

furthers broader American interests to promote trade and business expansion at the expense of labor policy. The article will hopefully begin a dialogue that will focus on the issues and facilitate resolution of the problem.

The first section demonstrates that the principles underlying American labor policy are being seriously undermined due to the internationalization of the economy. Specific components of labor legislation are discussed to illustrate that the conflict between labor and management as interest groups has already been resolved by the adoption of a policy that attempts to strike a balance between the competing interests. That policy is no longer negotiable, as it requires that certain protections be given to workers in exchange for providing companies with the opportunity to have a stable environment in the most lucrative market in the world.

The article then discusses how this balance is undermined when American companies displace American workers by transferring production to developing countries for the purpose of exporting goods back to the United States. Two primary dimensions to labor policy are impacted. First, these relocations cause American workers to lose their jobs because of their protected status. Second, to allow American companies to exploit workers in developing countries by utilizing labor practices that would be considered illegal under American law and inhumane in any civilized society conflicts with the underlying values of American labor policy. If MNCs can return to the days of exploited labor and still have access to the American market, this violates the balance struck to enact American labor legislation long ago.

The article then discusses trade and tariff policies that allow, if not encourage, American MNCs to transfer their operations to developing countries. Trade and tariff laws that allow American business to succeed at the expense of American workers (or regardless of American workers) fundamentally conflicts with labor policy.

Finally, the article analyzes congressional efforts to protect the values of labor policy by regulating the exploitation of workers in developing countries. Several recent statutes attempt to impose minimum standards for worker rights in developing countries in exchange for trade benefits. These statutes alone are not sufficient to prevent the erosion of labor policy because of the lack of any restrictions on displacement of American workers when MNCs relocate abroad. The Article concludes with an explanation of the current void in policy based on outdated assumptions that MNCs will act consistently with American interests and a proposal to pro-

tect more effectively American workers and preserve the goals of labor policy in an international economy.

II. American Labor Policy

A. *Specific Components of American Labor Policy*

In order to assess accurately the extent to which American labor policy is endangered by the recent trend to transfer production to developing countries, the specific components of labor policy must first be discussed. Americans have very short historical memories. The current enthusiasm to deregulate the economy and allow the "free market" to control[22] ignores the fact that working conditions were regulated in the first place to curb the deplorable conditions that resulted from business unrestrained.

In order to emphasize the importance of continued observance of the values underlying labor policy, this section will discuss the major steps of its development. This approach allows parallels to be drawn between American labor history and the current labor situation in developing countries.[23] This is not meant to be an exhaustive history of the development of labor legislation in the United States.[24]

1. Working Conditions Prior to Labor Legislation

The deplorable working conditions and the brutal resistance to worker organization that existed prior to modern labor regulation are well documented. Landmark works of fiction describe the details of the life of workers during the early stages of the labor movement,[25] but the historical record paints an equally bleak picture.

Up until the late 1930s, a laborer was doomed to a life of hand to mouth subsistence. In 1929, at least half of the working families lived at or below the subsistence level.[26] The prosperity of the industrial revolution eluded the workers, and it was clear that, for

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[22] This was certainly one of the cornerstones of "Reaganomics." For a specific expression of Reagan's free market philosophy, see *infra* notes 367–71 and accompanying text. For a populist expression of this philosophy, see G. Gilder, Wealth and Poverty (1981).

[23] See *infra* notes 146–230 and accompanying text for a discussion of the exploitation of workers in developing countries.

[24] For more extensive historical treatment, *see, e.g.*, S. Perlman & P. Taft, History of Labor in the United States (1935); R. Ziegler, American Workers, American Unions, 1920–1985 (1986).

[25] *See, e.g.*, U. Sinclair, The Jungle (1922); J. Steinbeck, The Grapes of Wrath (1939).

[26] *E.g.*, R. Ziegler, *supra* note 24, at 7–8.

the most part, the business community was not voluntarily going to share its gains.[27] The growth of large corporations in this period exacerbated the problem. The personal relationship between workers and employers disappeared, and the individual worker had virtually no bargaining power.[28] The fact that many of the industrial jobs were unskilled reduced workers to fungible parts of the industrial machine.

Other factors contributed to the poor conditions under which workers were forced to accept employment, but the primary problem was the lack of bargaining power.[29] The only apparent solution was some form of collective action, like unionization, but this idea met with fierce resistance from employers. The only weapon the workers had was the strike. When they exercised this right, the strikes were often brutally suppressed by management, utilizing private security forces[30] or public officers.[31] Further, the courts assisted in denying the right to strike by holding that these collective actions were criminal conspiracies[32] or that they were illegal conspiracies in restraint of trade in violation of the antitrust laws.[33]

Workers made few gains during the period when government and management combined to prevent unionization. During this period, labor was viewed as an exploitable commodity that was necessary for industrial development. Employers viewed any exertion of control by the workers as a usurpation of the fundamental liberty right to employ non-union workers under any conditions they accepted.[34]

2. Federal Intervention on Behalf of Workers — The Passage of National Labor Legislation

Beginning with the Norris-LaGuardia Act of 1932,[35] the policy of the federal government began to shift. Its initial view was that

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[27] Not all businesses were cruelly exploiting workers during this time, so any reference to a generalized "business community" is not meant to convey universal application.

[28] A. Cox, D. Bok & R. Gorman, Labor Law, Cases and Materials 5 (10th ed. 1986).

[29] *See id.*

[30] *E.g.*, R. Ziegler, *supra* note 24, at 66 (Ford Motor Company had a paramilitary force of 3000 men during the 1930's).

[31] *E.g.*, *id.* at 24, 56.

[32] *E.g.*, R. Gorman, Basic Text on Labor Law 1 (1976).

[33] *Id.*

[34] *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 250–51 (1917).

[35] 29 U.S.C. §§ 101–15 (1982). Although there were earlier examples of labor legislation, such as the Railway Labor Act of 1926, 45 U.S.C. §§ 151–88 (1982), this was the first broadly applicable legislation. It marked the start of a federal role in regulating labor relations.

government must act to uphold the "free market" system and not interfere with employment relationships,[36] which in effect meant that the government actively suppressed labor. It later changed to acceptance of the view that the business community was not likely to improve working conditions gratuitously, and that it was in the national interest to legislate for the protection of workers. The Norris-LaGuardia Act was the first of a series of statutes designed to curb the worst aspects of government participation in the suppression of labor. The basic thrust of this legislation was to remove the power of federal courts to issue injunctions to stop labor disputes,[37] except under very limited circumstances.[38]

There are at least three major reasons for this initial shift in the government's labor policy, and they are important for understanding the continuing validity of the social compact struck by labor legislation. First, once the basic infrastructure for the industrial revolution was in place, public opinion began to question the need to have such a blatantly lopsided system for distributing the gains. The public had questioned the basic fairness and reality of the trickle down theory in the context of government policies to reduce tax burdens on business. The government argued that this would stimulate the economy and help the struggling workers. One rather colorful expression of contempt for this approach to economic regulation comes from this period:

> The theory of those in power seems to be that if Congress will only help the railroads, the Wall Street bankers, the big manufacturing monopolies, and the immensely rich, enough will ooze through for the laboring man . . . . The contention of the powers that be is that the way to feed a starving dumb brute is to give some thoughtless, selfish man all he desires to eat and perhaps he will have enough bones for the poor dog to gnaw . . . .[39]

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[36] *See, e.g., Hitchman Coal*, 245 U.S. at 239–40.

[37] 29 U.S.C. § 104 (1982).

[38] *Id.* § 107.

[39] 65 CONG. REC. 2570 (1924) (statement of Rep. Lankford). A more contemporary statement from Rep. Don Pease (D-Ohio) is "[t]he rationale for free trade is that a rising tide lifts all boats . . . [If America is to embrace free trade] we have every right to insist that the workers who make [the] products benefit from that process, and that it is not just multinational corporations and government officials who benefit from plants manufacturing overseas." *International Workers' Rights: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. 182 (1987) [hereinafter *Hearings on Worker Rights*].

The public became increasingly sympathetic to the plight of working people whose economic fate depended entirely on the unilateral generosity of the business community.

Along this same line, as a response to the extreme economic polarity existing during the decades preceding the early labor legislation, radical groups began to gain influence, and sought fundamental changes in the economic structure of the country.[40] In 1934, in particular, systematic strikes threatened the stability of the economy.[41] People were ready to see the government begin to support interests broader than those of the business community. The increase in radicalism influenced the agenda of issues and encouraged Congress to strike a preemptive blow. Although it is impossible to say what might have happened, it is clear that the radical movement did lose much of its momentum when the government finally responded with legislation to protect workers.

Finally, it was the opinion of many members of the Roosevelt administration and Congress that the key to economic recovery from the Great Depression was to increase the purchasing power of America's workers[42] and to assist the business climate by reducing labor disputes.[43] Indeed, some evidence indicates that recovery, not reform, was the primary motivation of the Roosevelt administration.[44] It viewed a strong domestic economy as essential to long term economic health.

The first major legislation to attempt to protect the specific rights of workers generally to organize, and to regulate systematically wages and hours, was section 7(a) of the National Industrial Recovery Act of 1933.[45] The Supreme Court ultimately held this legislation to be unconstitutional,[46] and it was also considered to be inadequate due to its ineffective enforcement mechanisms.[47]

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[40] *See, e.g.*, R. ZIEGLER, *supra* note 24, at 17–21; 4 S. PERLMAN & T. TAFT, *supra* note 24, at 386–402 (1935).

[41] I. BERNSTEIN, THE TURBULENT YEARS 217 (1970).

[42] *See, e.g.*, ZIEGLER, *supra* note 24, at 38. Section 1 of the National Labor Relations Act of 1935 expressly provides that certain efforts to prevent collective action by workers "tend[] to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners . . . ." 29 U.S.C. § 151 (1982).

[43] *See* B. BLUESTONE & B. HARRISON, *supra* note 13, at 202.

[44] I. BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 26, 131 (1950).

[45] *To Create a National Labor Board: Hearings On § 2926 Before the Senate Comm. on Education and Labor*, 73rd Cong., 2nd Sess. 16 (1934) (statement of Senator Wagner), *reprinted in* LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 at 46 [hereinafter LEGISLATIVE HISTORY].

[46] Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

[47] LEGISLATIVE HISTORY, *supra* note 45, at 15, 114–36. The primary problem was that

To remedy the specific problems with the NIRA, Senator Wagner proposed the Wagner Act of 1935, the first manifestation of the National Labor Relations Act.[48] Its main thrust was to protect the rights to organize and bargain collectively.[49] The hearings prior to passage of the Wagner Act reflect a genuine awareness of the need to check the power of large corporations and to empower workers so that they could bargain equally with management and improve the abhorrent conditions under which they worked.[50] Congress recognized that without government intervention to protect workers, management would continue to set wages and conditions at the lowest level possible.

Passage of the NLRA meant a firm rejection of the concept that the free market should exclusively control wages and working conditions. The underlying values were both humanitarian and economic. That is, the Act's primary purpose was to stop the exploitation of workers, but it was also believed that the domestic economy would improve by increased consumer spending.[51] Once the Supreme Court affirmed the NLRA,[52] the vindicated policy represented a clear shift in the basic philosophy of the federal government as it relates to the protection of workers. As Senator Wagner expressed the goal he was aiming for:

> The only way that the worker will be accorded the freedom of contract to which, under our theory of government, he is entitled, is by the intrusion of the government to give him that right, by protecting collective bargaining. When 10,000 come together and collectively bargain with the employer, then there is equality of bargaining power. That is all this legislation attempts to preserve, and *I think it is a matter of evolution*.[53]

Although there is no elaboration on this theme in the hearings, it seems that by introducing the concept of *evolution*, Senator Wagner was expressing his view of the inevitable development in an industrial society towards equality and away from exploitation.

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the courts had construed section 7(a)(2) to permit the formation of company dominated unions, which became the chief impediment to any independent union environment. *Id.*

[48] 29 U.S.C. §§ 151–69 (1982) ("NLRA").

[49] Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 265 (1964).

[50] *See, e.g.*, LEGISLATIVE HISTORY, *supra* note 45, at 37, 47, 515–16.

[51] See *supra* notes 42–43 and accompanying text for a discussion of the idea that an increase in purchasing power will lead to economic recovery.

[52] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).

[53] LEGISLATIVE HISTORY, *supra* note 45, at 47 (emphasis added).

These values form a cornerstone of American labor policy. Senator Wagner recognized that this evolution was unlikely to occur without positive government intervention, and that government policies should not be directed exclusively to assisting the business community.[54]

This spirit of intervention in the market to protect workers carried over to the passage of the Fair Labor Standards Act of 1938.[55] Basically, the FLSA sets minimum wages[56] and maximum hours[57] for all covered employees[58] working for an employer[59] in a covered enterprise.[60] The humanitarian purpose of the FLSA was expressly stated in the legislation: "The Congress finds that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . burdens commerce and . . . constitutes an unfair method of competition in commerce . . . ."[61]

Emphasizing the humanitarian purpose, the Supreme Court stated of the FLSA's provisions protecting workers, "[w]e are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others."[62] The Supreme Court also recognized that the FLSA bans from interstate commerce products produced "under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being."[63] Thus, the purpose of the FLSA is clear — it is the policy of the United States to prohibit employers from sinking below established minimums in setting working conditions. The Act resolves the issue of whether it is legitimate for

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[54] The NLRA imposes on the government a statutory obligation to intervene and protect workers, which reverses the past practice of intervening to protect business from workers' attempts to organize. See *supra* notes 31–33 and accompanying text for a discussion of the government's assistance in suppressing early labor strikes.

[55] 29 U.S.C. §§ 201–19 (1978) ("FLSA").

[56] *Id.* § 206(a).

[57] *Id.* § 207(a).

[58] *Id.* § 203(e).

[59] *Id.* § 202(d).

[60] *Id.* § 203(r).

[61] *Id.* § 202(a).

[62] Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

[63] United States v. Darby, 312 U.S. 100, 109 (1941). *See also* 81 CONG. REC. 4983 (1937) (statement of President Roosevelt endorsing the FLSA and its promise to give employees "[a] fair day's pay for a fair day's work" and its commitment to protect employees from "the evil of 'overwork' as well as 'underpay'").

employers to try to increase profits and remain competitive at the expense of humane treatment of workers.

Other than amendments to the NLRA[64] and the FLSA,[65] labor policy remained fairly fixed for several decades and involved implementation of the goals of both acts. Gains were made in worker safety and health by the passage of the Occupational Safety and Health Act,[66] another example of legislation designed to use the power of government to force employers to comply with specific minimums to improve general working conditions.

One other significant development in labor policy that was implemented only after the basic economic issues were institutionalized was the introduction of prohibitions against discrimination. Title VII of the Civil Rights Act of 1964,[67] which prohibits discrimination based on race, color, religion, sex or national origin,[68] and the Age Discrimination in Employment Act of 1967,[69] which prohibits discrimination based on age,[70] added an additional human rights element to labor policy. The opportunities for employment and the benefits flowing from employment could no longer be legally denied to persons based on arbitrary discriminations against those in the protected categories.

Passage of legislation prohibiting discrimination was again a strong statement of policy by Congress that the business community must be regulated in order to achieve something besides bottom line concerns. The principles of equality simply could not be left to the good faith of the business community and to society at large.[71]

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[64] *E.g.*, The Taft-Hartley Amendments of 1947 and The Landrum-Griffin Amendments of 1959. 29 U.S.C. §§ 151–69 (1982). Congress designed many of the specific provisions of the amendments to curb abuses by some unions that had grown too powerful, and to confront charges of corruption by union leaders.

[65] *E.g.*, Fair Labor Standards Amendments of 1985 and Fair Labor Standards Amendments of 1955. 29 U.S.C. §§ 201–19 (1978).

[66] 29 U.S.C. §§ 651–678 (1982).

[67] 42 U.S.C. §§ 2000e–2000e–17 (1982).

[68] *Id.* § 2000e–2(a)(1).

[69] 29 U.S.C. §§ 621–634 (1982).

[70] *Id.* § 623(a)(1).

[71] That equal employment opportunities must be enforced by legislation and cannot be left to reliance on the good faith of the business community is illustrated by the employment practices of some American-based companies operating in Asia and violating the principles of equal employment opportunity as soon as they are no longer technically bound by law to follow them. See *infra* notes 221–23 and accompanying text for a more complete discussion of this point.

B. *The Implicit Balancing of Interests Underlying Labor Policy*

Although the labor movement began as a bitter struggle between the opposing interest groups — workers and management — Congress finally intervened and implemented a policy that resolved many of the issues in dispute. The range of debatable issues between workers and management was substantially narrowed. Specific labor legislation expressly resolved whether workers have a right to organize and bargain collectively,[72] whether employees may be discharged for union organizing activities,[73] whether management may exploit workers by paying them as little as the market will allow and working them as long as they can function,[74] and whether employers may exploit some groups of workers more than others because of societal discrimination.[75] These rights are now the firm base of labor policy. When employers attempt to circumvent these specific prohibitions, they are no longer simply engaging in the age old antagonism against labor, but also are acting against express legislation that forms American labor policy.

The resolution of the initial conflict was not entirely one-sided. Congress did recognize that in order for workers to have the opportunity to improve their lives, employers had to be able to remain in business. The *quid pro quo* for employers was that labor legislation would reduce labor disputes,[76] remove any unfair competitive advantage gained by excessive exploitation by ensuring uniform minimum standards,[77] and strengthen the domestic economy by improving the purchasing power of workers.[78] There was a tacit understanding that if labor cooperated, it would share some of the gains from the worldwide demand for American products.[79]

Senator Wagner's goal was to achieve these positive effects for business and to improve the conditions for workers:

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[72] *See* 29 U.S.C. § 158(a) (1982).

[73] *See id.* § 158(a)(3).

[74] See *supra* notes 54–62 and accompanying text for a discussion of the government's attempts at protecting workers.

[75] See *supra* notes 67–70 and accompanying text for a discussion of worker protection against employment discrimination.

[76] *See, e.g.*, 29 U.S.C. § 151 (1982) (statement of purpose in the National Labor Relations Act that the legislation would reduce labor disputes and improve the stability of the economy).

[77] See, e.g., *supra* note 7 and accompanying text for a discussion of the importance of uniform standards for labor.

[78] *See, e.g.*, LEGISLATIVE HISTORY, *supra* note 45, at 2284.

[79] *See, e.g.*, Nissen, *U.S. Workers and the U.S. Labor Movement*, 33 MONTHLY REV. 25 (May 1981).

> The upswing of business cannot be maintained indefinitely unless there is a tremendous reduction in unemployment, a sustained rise in purchasing power, and a *removal of the present industrial discontent based so largely upon a denial of legal as well as ethical rights* . . . .
>
> The passage of the [NLRA] will help . . . every industry that believes that contented and decently treated workers are the richest materials any country can possess . . . .
>
> *And in helping industry let us not forget that we shall help the worker also.* Forty thousand American workers have borne the depression with heroic patience and fortitude. Those who did not actually lose their jobs were tormented, nevertheless, by the constant fear of insecurity and by the added burden of helpless relatives and friends. Even those at work have seen their children denied the elementary needs of food, clothing, and schooling. They have gone through the valley of despair for the future of their families. In trials of peace as in trials of war, the American workers have never broken faith with this country or its Government. They have been the backbone and the strength of the Nation. The time has come when our Government must recognize the deep extent of their devotion. We must not now repudiate the pledge that has been given them of emancipation from economic slavery and of an opportunity to walk the streets free men in fact as well as in name.[80]

Thus, employers were forced to comply with labor legislation in exchange for the privilege of access to American workers and to the most lucrative market in the world. As a result of this exchange, radical groups demanding collective ownership of business lost much of their momentum once the major components of labor legislation were passed.[81] This dynamic preserved the capitalistic system of ownership at a time when it was endangered, and it also explains the motivation for the support given to labor legislation by capitalists.[82] Further, this compact fused the interests of business and labor. If labor could count on a share of the bounty, then it was in labor's interest to see business prosper. This interdependence provided the justification for policies to provide government benefits that encouraged business expansion.

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[80] LEGISLATIVE HISTORY, *supra* note 45, at 2284 (emphasis added).

[81] See *supra* note 40 and accompanying text for further discussion of these radical groups.

[82] J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 42–43 (1983).

The fact that American businesses experienced unprecedented prosperity fueled by consumer spending and international expansion indicates that it was not an unfair exchange for business. When formulating new policies to deal with problems of the international economy, lawmakers must remember the assumptions of this exchange.

III. The Impact on American Labor Policy of Shifting Production to Developing Countries

The purpose of this section is to specifically identify how American labor policy is impacted when American MNCs transfer production to developing countries.[83] If the impact is significant, then the conflict between current business practices and well established labor policy must be addressed. Also, one might question whether trade policies which, as the next section demonstrates,[84] encourage these moves, are justified.

The impact on labor policy has two dimensions. First, while no clear prohibitions on a company's freedom to relocate to a developing country exist,[85] such moves, if done to escape the costs of American labor laws, cause job loss through a new manifestation of "runaway shops."[86] This phenomenon is much more serious than the more traditional intra-American runaway shop.[87] The principles that form the basis of the labor laws are meaningless if companies are free to relocate to developing countries that provide no protections for workers, and if the companies are leaving because labor protections have made American labor more costly than in these developing countries. Further, the fact that a company has the

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[83] See *infra* notes 127–33 and accompanying text for a discussion of the extent of this movement.

[84] See *infra* notes 231–325 and accompanying text for a complete discussion of these trade policies.

[85] See *infra* notes 90–106 and accompanying text for a discussion of the attempts of American businesses to relocate.

[86] The term "runaway shop" developed to describe a company's closing of a unionized facility, or its closing of a facility in response to the threat of unionization, accompanied by the movement of operations to another part of the country where it was less likely that a union could successfully organize. *See, e.g.*, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 272–73 (1965). The modern runaway shop can take many forms besides that of a simple exchange where one facility is closed and a replacement is opened. See *infra* note 407 for a discussion of the impact of runaway shops.

[87] The primary distinction is that the old runaway shop neither caused jobs to leave the United States nor impacted the overall employment picture.

potential to flee to a developing country results in a tremendous chilling effect on the rights that American workers may assert.[88]

Second, and equally important, while American labor laws technically are not violated when an American company operating in the third world employs workers under conditions that would be illegal in the United States, the company commits a moral violation that conflicts with the humanitarian objectives of American labor policy.[89] The laws prohibiting suppression of unions, inhumane working conditions, employment at less than subsistence wages, and discrimination should not be simply burdensome requirements that can be ignored as soon as the law is technically inapplicable.

A. *Impact on Labor Policy of Loss of Jobs Due to Shifting of Production to Developing Countries*

1. The Runaway Shop in an International Economy

American labor policy has allowed American workers to enjoy the highest standard of living in the world, and also has made them among the most costly.[90] These costs generally have not hindered the success of American business, particularly because until recently, most had no choice but to pay American wages. Further, the high American wages have supported the most lucrative domestic market in the world, which certainly has been a major factor in the success of American business.[91]

One early tactic to attempt to avoid high labor costs associated with unionized workers was to close a union facility and reopen a nonunion facility, normally in some other part of the country.[92] Recognizing that this practice would have a chilling effect on the rights of workers to unionize, the United States Supreme Court, in the 1965 case of *Textile Workers v. Darlington Mfg. Co.*,[93] suggested

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[88] See *infra* notes 138–45 and accompanying text for a discussion of the chilling effect that such threats may have on workers.

[89] See text accompanying notes 146–230, *infra*, for a discussion of the moral issues involved in exploiting workers in developing countries.

[90] The standard of living enjoyed by American workers is difficult to quantify due to factors besides wages that contribute to that standard of living. Suffice it to say that, on all dimensions, American workers are among the highest paid in the world.

[91] See *supra* notes 78–82 and accompanying text for a discussion of the economic impact of improving working conditions and raising wages.

[92] *See, e.g.*, Local 1330 v. U.S. Steel Corp., 631 F.2d 1264, 1282 (6th Cir. 1980) ("The problem of plant closing and plant removal from one section of the country to another is by no means new in American history.").

[93] 380 U.S. 263 (1965).

that such "runaway shops" were a violation of the NLRA.[94] The court reasoned that an employer could always go out of business, even for anti-union reasons, so the workers who lost their jobs had no recourse under the NLRA.[95] If the employer opened a new facility or had other facilities, however, these employees' rights to organize and collectively bargain would be chilled by the knowledge that the employer had in the past retaliated against union organizers.[96]

The *Darlington* court solved the problem of runaway shops relocating to non-unionized areas of the country. The international economy, however, has presented a new opportunity to revive the runaway shop. If an American employer wants to flee a unionized plant, he can close his plant and relocate to Mexico or Taiwan, for example. Whether this form of the runaway shop would violate the NLRA after *Darlington* is unclear.[97] The problem is greatly magnified by the new runaway shop, however, because it makes this tactic attractive to others besides those fleeing unions. Employers who simply want to escape high wages, whether or not they are union wages, costly health and safety regulations, or discrimination laws, can relocate to countries where such laws do not exist. Assuming that these employers have easy access to export products back to the United States,[98] American MNCs can have the best of both worlds. They can pay third world wages and charge first world prices by exporting goods from developing countries to the United States.[99] The problem is magnified further because the United

[94] *See id.* at 272–73.

[95] *Id.* at 271–72.

[96] *See id.* at 275–76.

[97] A simple case would involve a single facility employer who closes his plant in the United States and reopens in Taiwan. According to *Darlington*, the American employees have no further rights once the facility is closed and the employer-employee relationship is terminated. *See id.* at 271–72. If the employer reopened a nonunion shop in another state, there would be an 8(a)(3) violation if the employer had an intent to chill the rights of the new employees. *See id.* at 275–76. The Taiwanese workers, however, would have no rights to chill because the NLRA would not cover foreign employees in a foreign country. *Cf.* McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10 (1963).

Darlington might cover other situations. For example, an employer with several facilities in the United States could chill the rights of his remaining *American* employees by closing just one facility and relocating to Taiwan. *See, e.g.*, Great Chinese American Sewing Co. v. NLRB, 578 F.2d 251 (9th Cir. 1978).

[98] Many American trade policies designed to complement world-wide "free markets" assure this access to the United States. See text accompanying notes 231–325, *infra*, for a more complete discussion.

[99] There is evidence indicating that cost savings realized by employing cheap labor are not passed on to consumers. See *infra* note 259 and accompanying text for a similar point about this relationship.

States government is losing resources from the fleeing tax base, and has no control over the labor practices of the fleeing companies.[100]

This new version of the runaway shop obviously undermines American labor policy if jobs are being lost because of a desire to avoid costly American labor laws. As Congressman Burke stated in 1971 to support legislation designed to curb plant closings, "[t]he old-fashioned runaway shop has become a global runaway, but the U.S. law is not designed to meet this new development."[101] American labor laws can no longer be said to protect or benefit workers if employers are leaving the country to avoid compliance, and American workers are forced to compete with third world workers to keep their jobs. Just as *Darlington* recognized that labor rights were endangered if a company could avoid compliance by relocating, the protected rights to organize and bargain collectively are meaningless if companies can relocate to countries where there are no labor rights, and the foreign governments lure investment by giving assurances that there will be no labor troubles.[102]

The absence of any laws to prevent employers from fleeing costly American labor regulations illustrates a serious void in labor policy and a failure to adjust effectively to the internationalization of the economy. A recently passed worker notification bill[103] does little to prevent runaway shops, but instead simply requires sixty days notice to be given with no limitation on the reasons for a closure.[104] An earlier law addressed precisely to the problem of identifying plant closures occurring because of relocations[105] was never implemented or enforced.[106]

2. Extent of Job Loss Due to Runaway Shops

To assess accurately the need for policy reforms, lawmakers must determine the extent of job loss due to runaway shops to

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[100] 117 CONG. REC. 33,746 (1971) (remarks of Rep. Burke in support of H.R. 10914, The Foreign Trade and Investment Act of 1972).

[101] *Id.*

[102] There is clear evidence that the governments of developing countries are responding to demands from MNCs that they be given a union free environment in exchange for investing. See *infra* notes 17–77 and accompanying text for a complete discussion of this point.

[103] Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988).

[104] *Id.* § 3.

[105] 19 U.S.C. § 2394 (1975).

[106] Letter from Denise M. Robichaud, Industrial Relations Specialist, Department of Labor, Bureau of Labor-Management Relations and Cooperative Programs, to Terry Collingsworth (Sept. 21, 1987) (stating that 19 U.S.C. § 2394 was never implemented).

developing countries. This very real effect due to a lack of regulation in the area provides the primary basis for questioning the assumption that American MNCs continue to act with overall American interests in mind. The precise job loss attributable to the transfer of production is difficult to assess, as a firm might invest in a foreign facility for varied reasons. In addition, not all of these reasons conflict with labor policy and result in a loss of domestic employment. Attempts to identify job loss from foreign investment have been largely ineffective due to a failure to distinguish between types of foreign investment.

The three reasons most often given for foreign investment are to obtain access to raw materials, to protect or develop local markets, and to lower costs of production, primarily through decreased labor costs.[107] The first two of these reasons, as well as some specific problems raised by protective laws that prevent export to a foreign country and require a local facility to penetrate the market,[108] provide legitimate reasons for foreign investment that do not necessarily undermine labor policy.

In every case, many variables impact the effect on employment,[109] but the purpose for the foreign investment is crucial to the analysis. For example, if an American company wants to enter the Korean car market and decides to build the cars in Korea to do so, this choice clearly costs American jobs to the extent that the cars could have been made in the United States and exported to Korea. If the cars sell very well in Korea, however, because they are made there and can compete cost-wise with local firms, then the job loss can not be calculated based on the number of workers needed to build the cars actually sold. Further, if the cars sell well in Korea, then American jobs may be created to provide components, technical support and other necessary supporting services. This need offsets to a limited extent the jobs lost to manufacturing. The ultimate effect on employment depends upon a number of other variables, including whether the supporting services are eventually transferred to Korea.[110]

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[107] *E.g.*, INTERNATIONAL LABOR OFFICE, EMPLOYMENT EFFECTS OF MULTINATIONAL ENTERPRISES IN DEVELOPING COUNTRIES 2 (2d ed. 1985). *See also*, Ray, *Foreign Direct Investment in Manufacturing*, 85 J. POLIT. ECON. 283 (1977). For a more historical discussion, see BERGSTEN, HORST & MORAN, AMERICAN MULTINATIONALS AND AMERICAN INTERESTS 46–50 (1978).

[108] *See* BERGSTEN, HORST & MORAN *supra* note 107, at 46–47.

[109] *See id.* at 4, 97; Finley, *Foreign Trade and U.S. Employment*, in U.S. DEPT. OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS, THE IMPACT OF INTERNATIONAL TRADE AND INVESTMENT ON EMPLOYMENT 33 (1978).

[110] *See* BERGSTEN, HORST & MORAN, *supra* note 107, at 96.

A much clearer loss of American employment occurs, however, when an American car company chooses to transfer production to Korea for the purpose of making the car less expensively, and exporting it back to the United States. A refined statistical analysis is not needed to reach this conclusion,[111] and the evidence is mounting that this type of foreign investment is increasing.[112]

The competing claims as to the effects of foreign investment can naturally be divided between organized labor, which claims that foreign investment exports jobs, and MNCs, which claim that foreign investment increases domestic employment.[113] This polarization based on opposing interests certainly casts doubt on both generalizations. Because of the many variables present, there are fundamental flaws in all studies that attempt to generalize. An objective analysis of the situation must conclude that neither generalization can be supported. While certain types of foreign investment do export jobs, as organized labor contends and MNCs deny,[114] some foreign investment aimed at capturing a local market results in an increase in domestic employment because of increased exports of equipment, components and support services.[115]

A serious flaw in the research supporting the claim that foreign investment always increases employment is that the figures are aggregated,[116] and this method measures only the net effect and obviously includes an offset for employment lost. Further, initial exports to support the foreign facility enhance the employment gained, but the initial supporting exports are likely to be temporary and thus will not really offset jobs permanently lost.[117] The accuracy of any study in this area is further brought into question by varying

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[111] R. BARNNET & R. MÜLLER, *supra* note 9, at 96.

[112] GAO, PLANT CLOSINGS–LIMITED ADVANCE NOTICE AND ASSISTANCE PROVIDED DISLOCATED WORKERS 2 (1987). General Motors is currently marketing its Pontiac Lemans in the United States and advertising that the car is made in Seoul, Korea. See *infra* note 119 and accompanying text for a similar point about American MNCs producing goods in foreign countries.

[113] *See* BERGSTEN, HORST & MORAN, *supra* note 107, at 97. *See also*, Stobaugh, *U.S. Multinational Enterprises and the U.S. Economy*, in AMERICAN LABOR AND THE MULTINATIONAL CORPORATION 84–85 (D. Kujawa ed. 1973).

[114] The most important example of this occurrence is foreign investment to replace domestic employment. For a discussion of the employment effects of this type of foreign investment, see text accompanying notes 107–37, *infra*.

[115] *See* Stobaugh, *supra* note 113, at 106.

[116] *See id.*

[117] *See* BERGSTEN, HORST & MORAN, *supra* note 107, at 97. See *infra* notes 299–302 and accompanying text for a discussion of the distorted nature of these figures.

hypotheses of the effect on domestic employment of a total absence of foreign investment.[118]

The solution to the problem from a labor policy perspective is not to conclude that a definitive study is impossible, but to focus on the *type* of foreign investment that conflicts with the goals of labor policy. While some foreign investment to compete in a local market may well have an ultimate negative impact on domestic employment, that type of foreign investment is very different from foreign investment to displace American workers because of a desire to avoid the application of American labor policy. The distinguishing feature is whether the goods produced by the foreign investment are exported to the United States. The internationalization of the economy has drastically increased this type of foreign investment. Imports are increasingly of products from American MNCs that used to produce the goods here.[119] This wholesale removal of segments of the manufacturing sector corresponds with a massive loss of manufacturing jobs.[120]

When domestic production is replaced by foreign production for the U.S. market,[121] no one can seriously debate that employers made this move to avoid the costs associated with labor policy. This is the modern runaway shop that threatens the gains represented by labor policy,[122] as well as other American interests.[123]

Measuring the impact of this type of foreign investment is still very difficult because, as discussed earlier, none of the studies focuses on just this aspect. Instead, the studies try to measure the overall effect of foreign investment. The problem is compounded

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[118] *See* BERGSTEN, HORST & MORAN, *supra* note 107, at 96.

[119] *Trade Adjustment Assistance: Hearings Before the Subcomm. on Foreign Economic Policy of the House Comm. on Foreign Affairs*, 92nd Cong., 2d Sess. 38–39 (1972) (remarks by Andrew J. Biemiller, Director of Legislation, AFL-CIO).

[120] *Id.*

[121] This transfer of production may take many forms. See *infra* note 407 and accompanying text for a discussion of runaway shops, one example of this transfer.

[122] Certainly it is true that if domestic production could have serviced the foreign market, but the company chose to produce in the foreign country to avoid American labor costs, the effect on employment is the same. There are, however, important distinctions. It makes sense to produce in the market in which the product is sold. Further, there may be significant cost savings in transportation and tariffs. Finally, the product may be better received if marketed locally. If attempts to stop the more clear case of the runaway shop prove inadequate, however, the government could make some attempt to regulate this type of production. See *infra* note 417 and accompanying text for a discussion of exports and their effect on domestic labor policy.

[123] See *supra* notes 16–19 and accompanying text for a discussion of the impact of runaway shops on American interests.

by the fact that the federal government makes no attempt to gather information on the extent to which companies are replacing domestic employment through foreign facilities.[124] Private firm activity is protected as confidential.[125] Some estimates are possible, but the exact figures are not nearly as important as recognition that this type of activity directly undermines labor policy and provides a clear basis for questioning the traditional assumption that American MNCs are acting consistently with broader American interests.[126]

According to the federal government's General Accounting Office estimate, forty-five percent of all plant closures or layoffs are due to high labor costs.[127] The federal government estimates that 10.8 million jobs were lost due to plant closures or permanent layoffs for all reasons between 1981 and 1986.[128] These figures mean that roughly 4.9 million American workers lost their jobs during that period because their wages were too high.

From a labor policy perspective, this impact is staggering. While many of the workers are able to find other work, the evidence indicates that the jobs tend to be manufacturing jobs.[129] Further, the jobs created tend to be lower paying service-type positions.[130] Along with this shift, union membership has declined as heavily unionized manufacturing jobs are replaced with non-unionized service jobs.[131]

The 4.9 million jobs lost to high American labor costs do not equate precisely with runaway shops seeking refuge in developing

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[124] *See, e.g.*, B. BLUESTONE & B. HARRISON, *supra* note 13, at 26–27. Congress passed a statute to attempt to monitor this activity but never implemented it. See *supra* notes 104–05 and accompanying text for a discussion of this statute.

[125] *See, e.g.*, BERGSTEN, HORST & MORAN, *supra* note 107 at 89.

[126] For a discussion of the extent of this assumption, see *infra* notes 363–84 and the accompanying text.

[127] GAO, PLANT CLOSINGS–LIMITED ADVANCE NOTICE AND ASSISTANCE PROVIDED DISLOCATED WORKERS 20 (1987).

[128] *Id.* at 2.

[129] *Id.* at 18, 21 (approximately 60% of the jobs lost were manufacturing jobs).

[130] *See, e.g.*, CAVANAUGH, TRADE'S HIDDEN COSTS–WORKER RIGHTS IN A CHANGING WORLD ECONOMY 25 (1988) [hereinafter CAVANAUGH]; G. HAAS, PLANT CLOSURES–MYTHS, REALITIES, AND RESPONSES 28–31 (1985); Rudolph, *All Hands on Deck*, TIME, Sept. 18, 1988, at 1.

That other jobs may be available is not necessarily an optimum solution. The temptation to deal in cold statistics ignores that many loyal, hardworking people are losing jobs through no fault of their own. This can be devastating to the individual involved. *See, e.g.*, B. BLUESTONE & B. HARRISON, *supra* note 13, at 45.

[131] *See, e.g.*, *The Return of Inequality*, THE ATLANTIC MONTHLY 89–90 (June 1988). *See also* S. REP. NO. 62, 100th Cong., 1st Sess. 5 (1987) (report submitted by Senator Kennedy indicating that blue collar workers in heavy industry have been hit the hardest by plant closings).

countries, as some of the companies go completely out of business or simply reduce their American operations. Many companies, however, do transfer their operations to gain access to low wage workers, using the many incentives provided by trade policy,[132] and then export their products back to the United States. The only possible measure of this from existing information is the extent to which American companies import products to resell. One 1982 estimate is that forty-six percent of all U.S. imports are from affiliates of American companies producing goods in a foreign country for export to the United States.[133]

Specific industries provide numerous examples. For example, focusing on the automobile industry, in 1984, General Motors imported 160,000 cars from Japan for sale in the United States, and has recently begun importing from Korea.[134] Ford imports cars from Germany, and will soon bring in cars from Mexico and Korea.[135] Chrysler also imports cars from Mexico.[136] Numerous examples exist in other industries.[137] This type of foreign investment has a direct impact on American labor policy because American workers are being displaced by production using cheaper, unprotected foreign labor, and the goods are displacing goods formerly produced in the United States.

3. The Chilling Effect on Labor Rights Stemming from Plant Closures

The relocation of many companies to developing countries creates the looming possibility that a company *may* follow suit. This

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[132] See text accompanying notes 231–325, *infra*, for a discussion of trade policies that provide incentives for American companies to abandon the United States.

[133] *Mastering the World Economy: Hearing Before the Senate Committee on Finance*, 100th Cong., 1st Sess., 48–50 (1987) (statement of Owen Biber, President UAW).

One study indicates that in 1982, an MNC brought in 50% of all imports. Of this 50%, 57% were shipped by an unaffiliated foreign company to a U.S. multinational, 34% were shipped by foreign affiliates to their U.S. parent, and 8% were shipped by foreign affiliates of U.S. multinationals to unaffiliated U.S. companies. Barker, *U.S. Merchandise Trade Associated with U.S. Multinational Companies*, 186 SURV. CURRENT BUS. 55, 68 (May 1986). *See also* B. BLUESTONE & B. HARRISON, *supra* note 13, at 44, asserting that 29% of all U.S. imports in 1976 "came from the output of overseas plants and majority-owned subsidiaries of American multinational corporations.").

[134] Finn & Healy, *We've Met the Enemy, and They are U.S.?*, FORBES, Feb. 9, 1987, at 78, 83.

[135] *Id.* at 83.

[136] *Id.*

[137] See *infra* notes 374–80 and accompanying text for some examples.

also impacts several crucial labor rights, most notably the rights to form a union, to bargain collectively, and to strike.[138]

A fundamental concept in labor law is that an employer may not threaten or coerce employees in order to encourage them to reject a union. Such a threat is a violation of section 8(a)(1) of the NLRA.[139] Thus, a simple threat that the employer would move to Mexico if the employees voted to have a union would be unlawful.[140] If the employer, however, could cite objective facts that other similar industries were forced to close down after a union organized the workers, the threat to move would probably be permissible.[141] Such a prediction would obviously have a tremendous effect on the workers.

A related situation arises in the context of collective bargaining. An employer seeking concessions may raise the possibility of a relocation to a developing country as a necessary alternative if labor refuses to make requested concessions.[142] This type of threat is very effective in suppressing protected rights.[143]

Finally, in an international economy, the right to strike is greatly diluted. The employer's first response to a strike might be to transfer operations out of the country. Further, a company can wait out a strike indefinitely if alternative production is available from other plants around the world.[144] Such tactics effectively remove the right to strike as an effective bargaining tool for workers, a development that has profound implications.

While many would certainly assert that these developments have been positive, these threats to statutory labor rights have not resulted from a policy decision by Congress. Instead, they are the result of a void in policy due to the failure to recognize the implications of the international economy.[145] If overall American inter-

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[138] Section 7 of the NLRA protects all of these rights. 29 U.S.C. § 157 (1982). The failure to permit the exercise of any of the rights would be a violation of §§ 8(a)–8(a)(1) for any interference with the right of association, 8(a)(5) and 8(a)(1) for the failure to bargain in good faith and the interference with the right to bargain, and 8(a)(1) for an interference with the right to strike. 29 U.S.C. § 158 (1982). Section 13 expressly preserves the right to strike. 29 U.S.C. § 163 (1982).

[139] *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

[140] *See id.* at 618–19.

[141] *See id.* at 618; NLRB v. Golub Corp., 388 F.2d 921, 928–29 (2d Cir. 1967).

[142] *See, e.g.*, CAVANAUGH, *supra* note 130, at 2.

[143] *See id.*

[144] *See, e.g.*, BERGSTEN, HORST & MORAN, *supra* note 107, at 100; B. BLUESTONE & B. HARRISON, *supra* note 13, at 166–70.

[145] See *infra* notes 355–64 and accompanying text for a discussion of the impact of Congress's failure to recognize the implications of the international economy.

ests would be advanced by a systematic dilution of American worker rights, then such a policy should be pursued openly after careful consideration.

B. *The Moral Issue — Exploitation of Workers in Developing Countries*

Given the historic antagonism between management and labor,[146] it is perhaps naive to expect humanitarian concerns to influence the working conditions American MNCs impose on their operations in developing countries. This is especially true because of the reason that many of these companies leave the United States for foreign destinations — to avoid costly labor protections.[147] When the labor conditions in most developing countries are considered, however, it is not unreasonable to expect that American policy would reflect the importance of these humanitarian concerns. If Congress passed American labor legislation out of humanitarian concerns for American workers, then it is difficult to understand why those concerns are considered inapplicable to workers in the developing countries, who are of different races and cultures.

One of the primary rationales for the NLRA was that unprotected workers could not begin to assert themselves against the power of the large manufacturers.[148] Now, to a certain extent, these same companies are dealing with uneducated, sometimes undernourished workers in developing countries.[149] Further, labor policy clearly expresses the idea that treating workers as expendable commodities is an unfair method of competition.[150] The values underlying labor legislation require the humane treatment of workers, and these values are clearly threatened when only companies operating within the jurisdiction of the United States are bound by

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[146] See *supra* notes 25–34 and accompanying text for a discussion of working conditions prior to the labor movement.

[147] See *supra* notes 126–35 and accompanying text for a discussion of the impact of high American labor costs. *See also* 1985 U.S. CODE CONG. & ADMIN. NEWS 2577 (in discussing whether to renew the overseas Private Investment Corp., Congress expressed concern that low wages in developing countries would provide an incentive for capital flight).

[148] See *supra* text accompanying note 49 for a similar point about workers' power to organize.

[149] Virtually every large U.S. manufacturer has a major presence in the developing world. For a breakdown by country of U.S. companies operating in foreign countries, see WORLD TRADE ACADEMY PRESS, DIRECTORY OF AMERICAN FIRMS OPERATING IN FOREIGN COUNTRIES (10th ed. 1984).

[150] See *supra* notes 60–62 and accompanying text for a discussion of the humanitarian purpose behind the FLSA legislation.

the laws. This obviously provides a windfall to companies that have fled the United States and penalizes those that have remained.

Hopefully, strong opposition would mount if American companies reinstituted slavery, captured workers in an Asian country, and forced them to labor without pay. The situation should not have to reach that extreme before a sense of responsibility arises to prevent exploitive practices. Until something is done to modify the current situation, however, the race to the bottom will continue.[151]

Any problem of exploitive conditions in runaway shops in developing countries would be quite simple to remedy if American labor law applied to employment practices abroad. It seems fairly clear, however, that none of the primary statutes that comprise labor policy applies outside of the United States. The FLSA[152] expressly provides, "The provisions of . . . this title shall not apply with respect to any employee whose services during the work week are performed in a workplace within a foreign country . . . ."[153] Similarly, the NLRA[154] has been interpreted to apply only within the territory of the United States.[155] This limitation is a standard principle of international law — no nation can extend its laws to interfere with the internal concerns of another nation.[156] Generally speaking, the conditions under which citizens of a sovereign nation are employed within that nation are the exclusive concern of that nation.[157]

One possible exception to this is that a nation may extend its laws to protect its own citizens.[158] Although it is by no means certain, one commentator has concluded that Title VII of the Civil Rights Act of 1964 would apply to protect *American* employees, even when they are working abroad for American employers.[159] This position conflicts with *Boureslan v. Aramco*,[160] a 1988 decision of the United States Court of Appeals for the Fifth Circuit. Unfortunately, even if Title VII did apply to American workers abroad, it does not

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[151] *See* CAVANAUGH, *supra* note 130, at x–xi.

[152] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–214 (1988).

[153] *Id.* § 213(f).

[154] National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (1982).

[155] See *supra* note 97 and accompanying text for a discussion of *Darlington*, a decision interpreting the NLRA.

[156] *See, e.g.*, The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824).

[157] *Cf.*, United States v. Belmont, 301 U.S. 324, 330 (1937).

[158] *See* The Apollon, 22 U.S.(9 Wheat.) at 370.

[159] Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad* 19 N.Y.U.J. INT'L L. & POL. 357, 370 (1987).

[160] 857 F.2d 1014 (5th Cir. 1988), *reh'g granted*, 863 F.2d 8 (5th Cir. 1988).

protect foreign workers, who are more likely to be laboring under substandard conditions.

The goal is not to advocate the wholesale incorporation of the American labor system. Rather, it is to illustrate that if a large differential exists between labor conditions in the first and third worlds, MNCs, if left unregulated, have an incentive to seek out the cheapest labor. While some free market theorists certainly would applaud this development and argue that the market is well served by such efficiencies,[161] the policy question is whether American interests are best served when MNCs are free to seek out the cheapest labor in the world and still have complete access to American markets.

Further, regardless of the link to runaway shops, the human rights dimension cannot be ignored. While slavery or some form of subsistence wages might be very economically efficient, it is a firm component of American policy to intervene on behalf of workers. The humanitarian concerns cannot be any less compelling simply because a different set of people are now being exploited. When American companies take advantage of these systematic denials of worker's rights, and actively encourage or require the suppression of those rights, this suggests a level of moral culpability that should be handled as a matter of American policy; American workers are losing their jobs so that MNCs can increase their profits through a return to inhumane labor practices. Several of the trade benefits laws that encourage American investment abroad do attempt to impose minimum standards on working conditions as a precondition to receiving the benefits, but these efforts have suffered from ineffective enforcement.[162]

This article will now discuss labor conditions in select developing countries to illustrate the incentive for MNCs to relocate, and to establish that the conditions are so far removed from a standard of humane treatment that they violate the underlying values of labor policy on a moral level. The conditions bear a striking similarity to those in this country early in this century. Further, in competing against American companies that do respect labor rights, these MNCs have an unfair advantage. Petitions from various groups to have trade benefits revoked in most of the developing world provide

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[161] See *supra* note 22 for a discussion of the free market.

[162] See *infra* notes 269–79 and accompanying text for a discussion of a trade benefits law that suffers from inadequate enforcement.

graphic details of inadequate protections of worker rights in those countries.[163] The following are just a few examples of systematic repression of worker rights.

1. Examples of Labor Conditions in Developing Countries

a. *The Right to Organize*

The right to organize is a fundamental feature of any system to protect labor rights.[164] The workers must be free to associate with one another and choose a representative, and to be legally protected from retaliation for union organizing activities.[165] These basic rights are lacking in many developing countries where there is substantial American investment.

Malaysia is one of the major contenders to join the ranks of newly industrialized countries.[166] One of Malaysia's primary industries is the manufacture of semiconductors. It is now the world's third largest producer, following the United States and Japan.[167] Virtually all of the world's major computer chip companies have manufacturing facilities there, including large American companies.[168] One of the primary reasons the MNCs are drawn to Malaysia is that there is not a single union in any of the computer chip

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[163] The AFL-CIO and America's Watch filed extensive petitions in 1987 and 1988 with specific examples of labor repression in many developing countries as part of the process to attempt to have the GSP benefits of the offending countries revoked. See *infra* note 169 for a citation to one of these petitions. Further, there are extensive examples of labor repression in developing countries, especially Chile, Guatemala, Nicaragua, and the Republic of Korea. *Hearings on Worker Rights*, *supra* note 39, at 24–29, 72–73, 82–135, 140–80, and 195–227.

[164] The right to organize is expressly protected by section 7 of the NLRA, 29 U.S.C. § 157 (1982). Further, it is codified in the International Labor Organization ("ILO") conventions. International Labour Organization Convention (No. 98) Concerning the Right to Organize and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257; International Labour Organization Convention (No. 11) Concerning the Rights of Association and Combination of Agricultural Workers, Nov. 12, 1921, as modified by the Final Articles Revision Convention, 1946, 38 U.N.T.S. 153.

[165] *See* 29 U.S.C. § 158(a)(3) (1982).

[166] *See, e.g.*, *Asia's Emerging Superstar*, NEWSWEEK (Asia Ed.) June 27, 1988, at 6, 7 (discussing Thailand, and pointing out that the Philippines, Malaysia, and Indonesia are competing with Thailand to attract investment and develop their export economies).

[167] *Labor Trends in Malaysia — September 1, 1986 to August 31, 1987*, paper prepared by the American Embassy in Kuala Lumpur, Malaysia, at 4 (1987).

[168] Interview with Terry A. Breese, First Secretary-Economics, Embassy of the United States in Kuala Lumpur, Malaysia (July 7, 1988).

companies.[169] The union free environment is maintained by a number of government policies designed to keep the industry union free to attract foreign investment.

The first impediment is that under the Malaysian Trade Unions Act of 1959,[170] any trade union seeking to organize a group of workers must be approved by the registrar.[171] The registrar may refuse to register a union if another trade union exists that represents employees in the "particular trade, occupation or industry" in which the union seeking registration is proposing to organize workers.[172] The registrar has interpreted this language to give him the power, by implication, to refuse to register a union if it is not *appropriate* for the "particular trade, occupation or industry"; for example, the trucker's union cannot represent machinists.[173]

The effect of this law in the computer chip industry has been refusals by the registrar to register the traditional "electrical workers" union to organize the computer chip workers because they were not the same "trade, occupation or industry."[174] Because the electrical workers were the closest established union and they were prevented from organizing, no other experienced unions have been able to operate in the industry.[175]

Responding to a possible loss of duty-free benefits under the Trade and Tariff Act of 1984,[176] the Malaysian government recently indicated a willingness to open up the computer chip industry to unions.[177] Upon hearing this, one "western trade official" was quoted as saying, "The electronic guys have said if the unions come in, they'll leave."[178] In response to this type of threat by the MNCs, the government returned to its former position.[179]

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[169] *Worker Rights and The Generalized System of Preferences: The AFL-CIO Petition to the Office of the U.S. Trade Representative* at 54 (1988) [hereinafter *AFL-CIO Petition*]; Interview with A. Murugavell, Assistant Director General, Dept. of Labor (Malaysia), in Kuala Lumpur, Malaysia (July 6, 1988).

[170] Laws of Malaysia, Act 262 (1981).

[171] *Id.* at § 8(1).

[172] *See id.* at § 12(2).

[173] *See AFL-CIO Petition*, *supra* note 169, at 55; Interview with A. Murugavell, *supra* note 169.

[174] *See AFL-CIO Petition*, *supra* note 169, at 55.

[175] *See id.*

[176] For a discussion of this review process, see text accompanying notes 264–83, *infra*.

[177] 134 CONG. REC. E3588–03 (daily ed. Oct. 21, 1988) (statement of Rep. Pease).

[178] *Id.*

[179] MacShane, *Dreaming of the Forty-Hour Work Week*, THE NATION, May 15, 1989, at 658, 659.

This series of events illustrates the nature of the problem — American and other foreign firms are in Malaysia *because* the government discourages union formation. The companies are well organized through the Malaysian-American Electronics Industry Association,[180] and they are successfully manipulating the system that allows them to hire non-union labor, and export a large portion of the finished product back to the United States.[181]

A further hindrance to union organization fostered by a government policy to encourage foreign investment at the expense of worker rights is that a company labeled a "pioneer enterprise"[182] is exempt from collective bargaining over any terms and conditions of employment established by the Employment Act of 1955.[183] No collective agreement may contain terms more favorable to workers than those contained in the Employment Act,[184] thus removing a major incentive for employees to join unions. The Malaysian government is currently considering a provision to ban labor unions entirely from pioneer enterprises.[185]

The final major tactic used to discourage union formation in Malaysia, and certainly the most barbaric, is retaliation against union organizers. This takes two forms: discharge of employees engaged in union organizing and government arrest of union leaders. Discharge of union employees is, like in the United States, technically illegal in Malaysia.[186] Enforcement, however, is quite weak.[187]

The arrest of union leaders obviously involves the complicity of government and demonstrates the precarious state of worker rights in Malaysia. Among those victimized by this repressive policy

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[180] *See* 134 CONG. REC. E3588–03 (daily ed. Oct. 21, 1988) (statement of Rep. Pease).

[181] *See id.*

[182] Section 15(2) of the Industrial Relations Act of 1967 defines a pioneer enterprise as either an enterprise so labeled by the Investment Incentives Act or one that the Minister of Labor identifies as such. Industrial Relations Act of 1967, Act 177, at § 15(2) (Malaysia 1967).

[183] Employment Act of 1955, Act 265 (Malaysia 1955). The Act sets the minimum standards for employment conditions including terminations (sections 12–14), payment of wages (sections 18–23), maternity protections (sections 37–44), holidays (section 60d and 60e) and termination of benefits (section 60j).

[184] Industrial Relations Act of 1967, Act 177, § 15(1) (Malaysia 1967).

[185] Interview with Terry A. Breese, First Secretary-Economics, Embassy of the United States in Kuala Lumpur, Malaysia (July 7, 1988).

[186] Industrial Relations Act of 1967, Act 177, § 5 (Malaysia 1980) (prohibiting various forms of retaliation against union organizers or employees who join a union).

[187] The primary problem is that the employer can advance an alternative reason for the discharge, and because the burden of proof is on the employee, he seldom prevails. Interview with K.P. Gengadharan Nair, a Barrister who represents employees, in Kuala Lumpur, Malaysia (July 6, 1988).

was Dr. V. David, the General Secretary of the Malaysian Trades Union Congress.[188] Dr. David's position is roughly the Malaysian equivalent of being President of the AFL-CIO, as the Malaysian Trades Union Congress is a society of all trade unions in Malaysia.[189]

Dr. David was arrested immediately upon his return from the United States after he addressed the annual convention of the AFL-CIO and criticized his government's record on worker rights and, more broadly, human rights.[190] Dr. David was detained for seven months and was released only after he repudiated his statements criticizing the Malaysian government. The government maintains that the arrest was "political" and was not done to suppress worker rights.[191] The practice of arresting union leaders is not unique to Malaysia.[192] It is also somewhat reminiscent of early American labor history when fictitious charges were issued against union organizers who were subsequently imprisoned.[193]

Other developing countries have conditions similar to those in Malaysia. In Thailand, another country with substantial American and other multinational investment,[194] the law does not technically protect a union organizer until the union is formed.[195] Thus, workers must organize in secret or risk discharge, blacklisting or worse. Further, even if the law is violated when a union leader is discharged, remedies are inadequate and often do not include reinstatement.[196]

In Indonesia, a third Southeast Asian country competing for foreign investment,[197] the right to organize was effectively repressed

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[188] *AFL-CIO Petition*, *supra* note 169, at 46–47; Interview with Dr. V. David in Kuala Lumpur, Malaysia (July 8, 1988).

[189] Interview with Dr. V. David in Kuala Lumpur, Malaysia (July 8, 1988).

[190] *Id.* The government's position apparently is that he was arrested for *political* activities, not *labor* activities. *Id.*

[191] *Id.* Dr. David indicated that he signed the statement repudiating his criticisms only after threats were made to arrest other officers in the Malaysia Trades Union Congress. Interview with Dr. V. David in Kuala Lumpur, Malaysia (July 8, 1988).

[192] *E.g.*, CAVANAUGH, *supra* note 130, at X, 36–38 (describes arrests and in some cases murders of union leaders in Chile, Turkey, El Salvador, Korea and Guatemala). *See also Hearings on Worker Rights*, *supra* note 39, at 97–106 (statement by AFL-CIO submitted in GSP review).

[193] See *supra* notes 31–32 and accompanying text for a discussion of the use of arrest to suppress labor strikes.

[194] *See supra* note 165.

[195] Interview with Professor Nikom Chandravithum, Professor of Law at Thammasat University in Bangkok, Thailand, Chairman, National Tripartite Advisory Council on Manpower Development and former Director-General of the Department of Labour, in Bangkok, Thailand (June 21 and 29, 1988) [hereinafter Interview with Professor Nikom].

[196] *AFL-CIO Petition*, *supra* note 169, at 67–68.

[197] *See supra* note 165.

when the government nationalized the umbrella group for all Indonesian trade unions. It is now controlled by the government and any independent voice by the workers has been eliminated.[198] Further, if the government owns any shares in a particular business, it is transformed into a public sector enterprise and unions are banned.[199]

b. *The Right to Bargain Collectively*

The right of workers to bargain collectively with their employer is another basic ingredient of labor rights in the industrialized world.[200] Collective bargaining is effectively denied in many developing countries. The primary preventive device is to take steps to insure that unions are never formed.[201] Other practices are utilized as well.

In Malaysia, the law expressly sets maximum terms and conditions of employment in "pioneer enterprises," thus depriving workers of the right to bargain over those terms.[202] Collective bargaining is further limited because if agreement cannot be reached, either party can seek conciliation with the Director General of Labor.[203] If that fails, the Minister of Labor may refer the matter to the Industrial Court for compulsory arbitration.[204] The Industrial Court utilizes fixed formulas to award any wage increases, and the formulas are so low that the procedure is stacked against unions and denies them any meaningful right to bargain collectively.[205]

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[198] *AFL-CIO Petition*, *supra* note 169, at 29.

[199] *Id.* at 32–33. In practice, the government applies this ban if any member of the government owns a portion of the company in his private capacity. This practice encourages companies to solicit high ranking government officials to invest in the company for a nominal amount. Interview with Jeff Ballinger, Country Director for Asian-American Free Labor Institute, in Jakarta, Indonesia (July 14, 1988).

[200] For example, the right is protected by § 8(a)(5) of the NLRA. 29 U.S.C. § 158(a)(5) (1982). It is also expressly incorporated in ILO Convention No. 98. International Labour Organization Convention (No. 98) Concerning the Right to Organize and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257.

[201] See *supra* notes 163–98 and accompanying text for a discussion of government policies in foreign countries designed to prevent the formation of unions.

[202] See *supra* notes 181–84 and accompanying text for a discussion of the impediments to collective bargaining in Malaysia.

[203] Industrial Relations Act of 1967, Act 177, § 18 (Malaysia 1980). The Act explains that when there is a "trade dispute" either party may report the situation to the Director General. *Id.* at § 18(1). A "trade dispute" exists when there is a refusal to collectively bargain. *Id.* at § 13(7).

[204] *Id.* at § 26(2).

[205] *AFL-CIO Petition*, *supra* note 169, at 59. This was confirmed by interviews with several Malaysian labor lawyers. *E.g.*, Interview with N. Brabagarun, a lawyer with the Transport

In Indonesia, collective bargaining is limited by the fact that the government controls the unions through the All-Indonesia Workers Union.[206] The government has initiated a policy to form joint working agreements, rather than collective bargaining agreements, to reflect more accurately the relationship between management, labor and government.[207]

Thailand requires by law that union representatives must be full time employees.[208] This was allegedly designed to keep outside agitators away,[209] but has the effect of severely limiting the ability of union representatives to engage in collective bargaining.

c. *The Right to Strike*

The only true and available weapon that workers have to secure improvements in their working conditions is the strike. It is so fundamental to the American system that the NLRA expressly provides that "[n]othing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . ."[210]

The right to strike is severely restricted in many countries of the developing world. Such acts of protest are sometimes defined as political opposition, and are treated severely.[211] The most common method of restricting the right to strike is by imposing a system of compulsory mediation in lieu of the right of strike. For example, in Malaysia, once the Minister of Labor refers a trade dispute to the Industrial Court, strikes and lockouts are forbidden.[212] Further, if during the recognition phase of attempting to organize workers, the recognition question is referred to the Minister of Labor, the

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Workers Union, in Petaling Jaya, Malaysia (July 9, 1988) (Mr. Brabagarun indicated that particularly in areas of wage increases, the company has no incentive to bargain because the Industrial Court utilizes a wage increase chart that always requires awards less than the union's demand); Interview with V.T. Nathan, a management lawyer with Shearn Delaware & Co., in Kuala Lumpur, Malaysia (July 5, 1988) (Mr. Nathan stated similarly that the government's wage increase policy is such that the union's demands are always higher and the company can always do better by refusing to bargain and going before the Industrial Court.).

[206] See text accompanying note 197, *supra*, for a discussion of the right to organize in Indonesia.

[207] *AFL-CIO Petition*, *supra* note 169, at 35–36.

[208] *Id.* at 68–69.

[209] Interview with Professor Nikom, *supra* note 195.

[210] 29 U.S.C. § 163 (1982).

[211] In Taiwan, strikes in defiance of restrictions set by martial law may be punished by death. CAVANAUGH, *supra* note 130, at 3.

[212] Industrial Relations Act of 1967, Act 177, at § 44(6) (Malaysia 1967).

workers may not strike while the Minister reviews the matter.[213] In addition, a recognition decision by the Minister is final and may not be reviewed by a court.[214] Any strike to protest the Minister's decision is likewise illegal.[215] A similar system exists in Indonesia, where the right to strike is severely limited.[216]

A more direct way of restricting the right to strike is employer self-help. As an extreme example of this, in Korea recently, officials of the Hyundai Engineering and Construction Co. were charged with arranging the abduction of a union leader to undermine the union's strike attempt.[217]

d. *Minimum Wages and Hours*

The restrictions on worker rights discussed above are simply means to prevent gains in wages and working conditions, which is the main issue that attracts investment to developing countries. The figures are staggering, and certainly cannot be considered in light of the cost of living in the industrialized world. Even by the poverty standards in the developing countries, however, a large portion of the workers are severely underpaid.

In Mexico, a simple border line away from Texas and California, workers employed directly by U.S. employers in a Maquiladora arrangement[218] were paid an average of 80 cents per hour in 1986.[219] In the developing countries of Southeast Asia, wages are substantially lower.[220] The differential in wages is the primary at-

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[213] *Id.* at § 10(1).

[214] *Id.* at § 9(6).

[215] *Id.* at § 10(1).

[216] *See AFL-CIO Petition*, *supra* note 169, at 36.

[217] *E.g.*, Korea Times, June 5, 1988, at 6, col. 1.

[218] For an explanation of the Maquiladora program, see *infra* notes 314–17 and accompanying text.

[219] GODSHAW, PIÑON-FARAH, SCHINK & SINGH, THE IMPLICATION FOR THE U.S. ECONOMY OF TARIFF SCHEDULE ITEM 807 AND MEXICO'S MAQUILA PROGRAM, paper prepared for the U.S. Dept. of Labor, Office of International Economic Affairs, at 3 (1988).

[220] In Indonesia's capital Jakarta, the average monthly wage in 1986 was 122,000 rupiah, which, based on the current (April 2, 1989) exchange rate of 1,344 rupiah to the dollar, is $90.77 per month. *See* LABOR TRENDS IN INDONESIA, paper prepared by the American Embassy in Jakarta, Indonesia, at 6 (1987). The 1986 minimum wage in Jakarta was 1,300 rupiah per day, or 98 *cents* per day. In Yogyakarta, a Javanese regional capital, the minimum wage in 1986 was 450 rupiah per day or 33 *cents* per day. *Id.*

In Thailand, 1986 figures indicate that 21.9% of the entire workforce earns less than the minimum wage of 73 Baht per *day*, or 3.21 dollars at 22.74 Baht per dollar. PRELIMINARY REPORT OF THE LABOUR STATISTICS 1987, DEPARTMENT OF LABOUR, MINISTRY OF INTERIOR, THAILAND, at 46, Table 6.1 (1987). 45.4% of the workforce earned 75 Baht (3.30 dollars) or less a *day* in 1986. *Id.*

traction luring MNCs to the developing countries. When the wages are kept low because of suppression of worker rights, however, and the workers are in some cases barely able to survive, the issue becomes much more complicated than a free market approach to labor costs would suggest.

e. *Human Rights Violations in the Workplace in Developing Countries*

Perhaps human rights is the area that most clearly demonstrates that a moral issue is at stake that goes beyond simply allowing companies to find the cheapest labor under the most favorable conditions. MNCs that take the most aggressive attitude towards exploiting local practices are able to discriminate freely based on sex and utilize child labor.

American laws do not generally extend beyond the borders of the United States.[221] Therefore, companies that discriminate in hiring women technically do not violate American law. This practice is widespread in developing countries. For example, several major American-based MNCs recently placed advertisements in Bangkok and Hong Kong newspapers seeking employees based on gender-specific ads, sometimes specifying a preference in age and marital status.[222] While Title VII of the Civil Rights Act of 1964 might reach these companies if they were discriminating against American citizens,[223] foreign victims of discrimination by American companies currently have no remedy as long as the discrimination occurs outside of the territorial reach of the United States.

The exploitation of child labor is perhaps an even more basic question of morality. While documentation of the problem is difficult because of lack of information, the problem is widespread, particularly in the textile and garment industries.[224] Companies seeking cheap workers are able to find them in many cases because children are performing the tasks.

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[221] See *supra* notes 151–59 and accompanying text for a discussion of the limited application of American labor law.

[222] *E.g.*, Bangkok Post, June 24, 1988, at 38, col. 1 (Unocal ad for Computer Operator specifying "male, age not over 26"); The Nation (Bangkok), June 16, 1988, at 35, col. 1 (Esso ad for Marketing Executive Trainee specifying "male, age not over 35"); Bangkok Post, June 19, 1988, at 39 (Northwest Airlines ad for flight attendants specifying "Thai females, 20–25 years old . . . single"); South China Morning Post, June 14, 1988, at 6, col. 3 (Gould Electronics ad for Junior Secretary/Receptionist specifying "female . . . pleasant personality"); *id.* (National Panasonic ad for Sales Engineer, specifying "male").

[223] See *supra* notes 158–59 and accompanying text for a discussion of the possible extended application of Title VII of the Civil Rights Act.

[224] *See, e.g.*, *AFL-CIO Petition*, *supra* note 169, at 37, 75–76.

2. Consequences of Moral Violations

One of the apparent consequences of MNC investment in developing countries is that a downward spiral in labor conditions of some developing countries has begun.[225] Developing countries are bidding against each other to offer the cheapest, union free labor force in order to attract investment.[226] This has created an opportunity for companies in labor intensive industries to take advantage of the situation and transfer operations to obtain the lowest possible labor costs. In doing so, however, the companies are in many cases returning to labor practices long illegal in this country. Further, regardless of any technical legal application, there is a greater harm occurring when companies utilize inhumane and sometimes brutal practices in order to keep labor costs low.

A valid argument certainly exists that developing countries benefit from industrialization. If that is the goal, however, there is little justification for allowing workers to be exploited until they can somehow assert themselves, presumably after a long, bloody struggle similar to the labor movement in this country.[227] The only beneficiaries of this system are the MNCs that can take advantage of the short term access to cheap labor. There is every reason to believe that the MNCs who invest in developing countries because of the cheap labor will no longer be interested when the workers begin to make progress towards achieving protection from exploitation.[228]

If it is the policy of the United States to "develop" these underdeveloped countries through private enterprise, then this policy must be considered in light of its impact on labor policy. In spite of efforts to impose minimum standards for worker rights in developing countries,[229] the conditions discussed still exist.

The flight of MNCs from the United States is directly related to the lack of worker rights in developing countries. American workers simply cannot compete on a cost basis with workers in

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[225] *See, e.g.*, CAVANAUGH, *supra* note 130, at 2.

[226] The countries are not doing this without reason. For example, when the government of Malaysia indicated that they would allow the semiconductor industry to become unionized, the MNCs threatened to leave. See *supra* note 177 and accompanying text for a discussion of the effect of unionization in Malaysia.

[227] See *supra* notes 25–33 and accompanying text for a discussion of the early labor movement in the United States.

[228] See, e.g., *supra* note 177 and accompanying text for a discussion of the effect of unionization in Malaysia.

[229] See *infra* notes 264–68 and accompanying text for a discussion of workers' rights in developing countries.

countries willing to sacrifice the health, safety, and well-being of their workers, because of the clear American policy of elevating workers to a status beyond an exploitable resource. As Congressman Pease put it, "[W]e cannot afford to tolerate . . . a trading system that pits American workers in dog-eat-dog competition with the lowest common international denominator on worker rights."[230]

IV. Trade Policies That Provide Incentives for American Companies to Abandon the United States

The preceding section discussed the impact on American labor policy due to the shifting of production to developing countries. If this were occurring without any policy-based support and had a negative impact on labor policy, the problem would be quite simple to solve. Other competing policies, however, also have the effect of encouraging American companies to transfer production to developing countries.

To resolve this conflict, it is necessary to determine whether Congress, by enacting policies that have the effect of undermining labor policy by encouraging investment in developing countries, intended this result. The purpose for these policies must be examined to determine whether any overriding policies justify the impact on labor policy. The language of the statutes, along with the legislative history, establish that Congress had quite the opposite intent and was sensitive to any negative effects on labor policy. The statutes instead are typical examples of legislation designed to advance business and in turn, to improve domestic employment, but Congress was acting without questioning the premise that business will always act consistently with American interests. Although other policies have the effect of encouraging American investment abroad,[231] all of which will have some impact on labor policy, the trade and tariff statutes are particularly good examples. They illustrate the direct impact on labor policy when American companies manufacture in developing countries to displace American workers and export the products back to the United States.[232]

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[230] *Workers' Rights and Trade Adjustment Assistance Programs: Hearing Before the Senate Comm. on Finance*, 100th Cong., 1st Sess. 48 (1987).

[231] *See generally*, Bergsten, Horst & Morgan, *supra* note 107, at 22–31 (discussing a variety of policies that have an effect on the degree of foreign investment by Americans, including tax, monetary, antitrust, development and expropriation relief).

[232] See *supra* notes 121–37 and accompanying text for a discussion of the effect of replacing domestic production with foreign production.

This section discusses the trade and tariff statutes that have a significant impact on labor policy and establishes the purpose of each. Then, it discusses both dimensions of the impact on labor policy, along with evidence of Congressional intent to avoid any impact. The section concludes with suggestions for pursuing the express goals of each statute while preserving labor rights.

A. *Tariff Benefits For Exports From Developing Countries.*

1. The Purpose of the Statutes

The United States has two statutory systems to give duty-free status to select products exported to the United States — The Generalized System of Preferences of The Trade Act of 1974 ("GSP")[233] and the Caribbean Basin Economic Recovery Act ("CBERA").[234] Both have as their primary goal the assistance of developing countries in improving economically.[235]

The GSP created a system to provide trade benefits to developing countries. One of the primary factors considered in designating a country as a "beneficiary developing country" is "the level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which [the President] deems appropriate . . . ."[236] When the Act was substantially amended in 1984, among the stated purposes was the desire to

> (1) *promote the development of developing countries*, which often need temporary preferential advantages to compete effectively with industrialized countries; [and]
>
> . . . .
>
> (4) allow for the consideration of the fact that there are significant differences among developing countries with respect to their general development and international competitiveness.[237]

The extensive list of countries designated as "beneficiary developing countries" reflects the stated goal of helping the non-industrialized world get a start in the competitive world markets.[238]

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[233] 19 U.S.C. §§ 2461–2466 (1986).

[234] 19 U.S.C. §§ 2701–2706 (1986).

[235] *Id.* § 2462(c)(2); *Id.* § 2702(c)(2).

[236] *Id.* § 2462(c)(2).

[237] Section 501(b) of the Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573 (1984) (emphasis added).

[238] 19 U.S.C. § 2462(a)(2) (requiring the president to list all eligible countries).

Simply stated, a country must meet two requirements to be eligible for benefits.[239] First the country must be designated,[240] and second, the specific article exported must be on the list of eligible items.[241] The provisions are quite liberal and attempt to further the purpose of assisting the development of the eligible countries.

The CBERA is virtually identical to the GSP in its purpose and operation. It allows anyone to get duty-free treatment[242] of "eligible articles"[243] exported to the United States from any beneficiary country,[244] all of which are located in the Caribbean basin.[245] All of the countries that qualify for beneficiary status under the CBERA are also eligible under GSP.[246] The main differences are that the CBERA gives more liberal benefits. More products are eligible for duty-free treatment than under the GSP,[247] and the GSP provides for an automatic cutoff when the percentage of imports of a given product from a beneficiary country reaches a specified level.[248] Finally, the origin requirements under CBERA are more liberal, allowing components to originate in places other than the developing country.[249]

2. Impact on Labor Policy

The GSP and CBERA potentially contribute to both dimensions of the impact on labor policy.[250] The first dimension, the loss of jobs when companies transfer production to developing countries to escape American labor regulation, is impacted because American companies can qualify for duty-free benefits when they produce in an eligible country and export eligible items to the United States. No restriction on eligibility for benefits exists, so a local business is

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[239] *Id.* § 2461.

[240] *Id.* § 2462.

[241] *Id.* § 2463.

[242] *Id.* § 2701.

[243] *Id.* § 2703.

[244] *Id.* § 2702.

[245] *Id.* § 2702(b).

[246] U.S. DEPARTMENT OF LABOR, REPORT OF THE SECRETARY OF LABOR, TRADE AND EMPLOYMENT EFFECTS OF THE CARRIBEAN BASIN ECONOMY RECOVERY ACT, SECOND ANNUAL REPORT TO THE CONGRESS PURSUANT TO SECTION 216 OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT 7 (1986) [hereinafter SECRETARY'S REPORT].

[247] *Id.* at 8.

[248] *Id.* at 9–10.

[249] *Id.* at 49–50.

[250] For a discussion of the dimensions of labor policy impacted by foreign investment designed to displace American workers, see *supra* notes 84–87 and accompanying text.

on the same footing with a major MNC, provided it meets the two criteria — the *country* is eligible and the *product* is an eligible item.[251]

The second dimension, allowing the exploitation of workers in developing countries, is also impacted when American companies take advantage of GSP and CBERA to transfer production to developing countries. If the companies utilize exploitive labor practices, their ability to do so is in effect subsidized by American policy as the companies receive trade benefits when they export products back to the United States.

Congressional intent will be examined with respect to each dimension to determine whether Congress intended to allow labor policy to be undermined.

a. *Loss of Jobs Due to Foreign Investment*

It is unlikely that Congress intended through either GSP or the CBERA to cause American workers to lose their jobs. Legislation renewing GSP expressly provides that the goals be achieved in a way that "does not adversely affect United States *producers and workers*."[252] CBERA expressly requires annual reviews, including an examination of the domestic employment effects.[253] One of the obvious underlying assumptions of these programs was that they would help U.S. employment by increasing demand for exports. GSP's statement of purpose indicates a goal of promoting the development of developing countries to, among other things, "take advantage of the fact that developing countries provide the fastest growing markets for United States exports," and that foreign exchange earnings will allow developing countries to purchase United States exports.[254]

Further, one of the factors the President must take into account in deciding whether a particular country or product is eligible is "the anticipated impact . . . on United States producers of like or directly competitive products."[255] These statements of purpose indicate again the manifestation of a trickle down philosophy — the programs were expected to help American businesses, and ulti-

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[251] See *supra* notes 235–37 and accompanying text for a discussion of these criteria.

[252] Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, § 501(b)(10)(A) (1984).

[253] 19 U.S.C. § 2705 (1986).

[254] Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, § 501(b)(3) (1984).

[255] 19 U.S.C. § 2461(3).

mately, workers, while contributing to the long term development of developing countries.

If Congress had a clear intent not to adversely impact domestic employment, it is difficult to justify the present form of the statutes. Foreign investment done for the purpose of exporting to the United States is one of the most clear examples of foreign investment that impacts labor policy. Because the entire premise of the GSP and CBERA program is to provide the benefit when the companies export to the United States duty-free, any American company taking advantage of the program is by definition investing abroad for the purpose of exporting back to the United States, and presumably displacing American production. That the U.S. government actually subsidizes this through duty-free benefits creates a conflict with stated concerns about the impact on labor policy. Unfortunately, the fact that a statute appears to conflict with its express purpose does not normally provide a legal basis for challenge.[256]

The only marginally satisfactory explanation is to speculate that Congress knew exactly what it was doing and simply left a large loophole for MNCs to exploit.[257] The final section provides an extensive discussion of Congress' reasons for failure to act effectively, despite its expressed concern for the loss of American jobs due to foreign investment by American MNCs.[258] The need for a fresh examination of the problem is well illustrated by considering the express purpose of GSP and CBERA in comparison to the realized potential for MNCs to gain a subsidy for their foreign investment to displace American workers.

Modifying GSP and CBERA to incorporate more closely the goal of protecting American workers would be fairly simple. If the other objectives of GSP and CBERA could be accomplished without sacrificing American workers, little justification remains for not

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[256] *Cf.* U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980) (that a statute's effect conflicted with its express purpose did not provide a sufficient basis for attacking its rationality under an equal protection analysis).

[257] *See* 131 CONG. REC. S17,478-02 (daily ed. Dec. 12, 1985) (Senator Metzenbaum, questioning the wisdom of renewing legislation for the Overseas Private Investment Corporation (OPIC), remarked, "We just do not have the courage to stand up when some of the pressure lobbyists show up . . . . [OPIC] insures U.S. multinational companies and banks on their investments. By doing so, however, [OPIC] encourages the export of U.S. jobs, technology, and capital overseas. I . . . object to a policy which cares not one iota about the true needs of foreign nations but merely paves the way for some U.S. companies to set up production overseas . . . and compete with those U.S. firms who have stayed put . . . ").

[258] See *infra* notes 360–64 and accompanying text for a discussion of Congress' failure to protect American workers.

making the changes, except to pursue the undemocratic goal of benefiting American business regardless of the impact on American workers.[259]

The clear goal of providing duty-free status to products from "beneficiary developing *countries*"[260] is to give them a head start in the world market until they can compete on an equal basis with the developing world.[261] Further, as their industries develop, an increase in demand for American equipment, supplies, and services can be expected. This premise is flawed because the developing countries already have a competitive advantage in labor intensive industries, and to give them further price advantages seems misplaced.

Regardless of the wisdom of the rationale of GSP and CBERA as applied to developing countries, it certainly is not applicable to highly developed MNCs, both foreign and American, that relocate to developing countries to take advantage of the tariff benefits. This is particularly true because the "competition" is American companies that have remained in the United States and utilize American workers. As one writer put it, "we have met the enemy, and they are us."[262]

No policy basis exists to allow MNCs the right to export duty-free to the United States. This is a clear situation where the goal of the foreign production — to export to the United States — does impact labor policy.[263] Manufacturing by U.S. MNCs in developing countries for export to the United States displaces American workers.

This feature, which conflicts with labor policy, can easily be removed without detracting from the purpose of the legislation:

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[259] One possible argument that would attempt to justify the shifting of labor to developing countries is that it is more cost efficient, and the savings will be passed on to the consumer. There is little evidence, however, that savings are passed on to the consumer. *See, e.g.*, R. BARNNET & R. MÜLLER, GLOBAL REACH — THE POWER OF MULTINATIONAL CORPORATIONS 322 (1974). *See also* 117 CONG. REC. H33,746 (daily ed. Sept. 28, 1971) (remarks by Rep. Burke that "U.S. consumers are paying American prices for American brand names, often made by the cheapest labor in the world"). Further, even if this were true, it is not necessarily a justification for exploiting labor. See *supra* notes 145–50 and accompanying text for a discussion of the exploitation of workers in developing countries.

[260] The term comes from 19 U.S.C. § 2462 (1984) and 19 U.S.C. § 2702 (1986).

[261] See *supra* notes 232–34 and accompanying text for a discussion of duties on products exported to the United States.

[262] Finn & Healy, *We've Met the Enemy , and They Are Us?*, FORBES, Feb. 9, 1987, at 78.

[263] This is the most offensive sort of relocation from a labor policy perspective because, by definition, it is a relocation for the purpose of manufacturing with cheap labor and exporting back to the U.S. *See supra* notes 110–12 and accompanying text.

the benefits available from GSP and CBERA can be limited to companies owned by local investors. Many possible variations would accomplish the goal of preserving the benefits for "developing" industries. For example, trade benefits that are simply the right to export to the United States duty-free could be limited to new companies started by local investors, fulfilling the goal of assisting the developing countries to develop their own industries. A more generous plan could extend benefits to all locally owned companies under the theory that the local industries need a subsidy to allow them to become established in world markets.

To avoid subterfuge, a strict test of ownership would have to be applied to ensure that the interest is locally owned. Perhaps a small percentage could be foreign owned, but as that investment increases, the reasons for providing a subsidy disappear. Of course, the local ownership rule would exclude other foreign MNCs because they should not be subsidized by the United States for the same reasons. Further, to subsidize them, but not American companies, would put American MNCs at an unfair disadvantage.

b. *Impact on Worker Rights in Developing Countries*

The second dimension of labor policy impacted by GSP and CBERA presents a different problem. Congress expressly took steps to prevent extreme exploitation of workers in developing countries. Congress imposed as a condition for receiving development assistance through GSP[264] and CBERA[265] that the country receiving the benefit must observe a specified standard for worker rights. The problem is not the existence of the right, but instead its enforcement. This section discusses the specific labor standards imposed by these benefit programs and assesses their effectiveness in preventing exploitation of workers in developing countries.

The first specific standards for worker rights were added as a condition to eligibility for GSP. Section 2462(b)(7) provides that the President "shall not" grant beneficiary status to a country "if such country has not taken or *is not taking steps to afford internationally recognized worker rights* to workers in the country . . . ."[266] The Act defines "internationally recognized worker rights" as:

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[264] 19 U.S.C. §§ 2461–66 (1986). For a discussion of the benefits, see *supra* notes 233–38 and accompanying text.

[265] 19 U.S.C. §§ 2701–2706 (1986). For a discussion of the benefits, see *supra* notes 239–46 and accompanying text.

[266] 19 U.S.C. § 2462(b)(7) (1986).

> A. the right of association;
> B. the right to organize and bargain collectively;
> C. a prohibition on the use of any form of forced or compulsory labor;
> D. a minimum age for the employment of children; and
> E. acceptable conditions of work with respect to minimum wages, hours of work, and occupation safety and health.[267]

The CBERA has a more general provision, simply providing that the President, in deciding whether a country is eligible for benefits, shall consider "the degree to which workers in such a country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively . . . ."[268]

The GSP standard, although much more specific than the CBERA's, still leaves too much discretion for adequate enforcement. The Reagan administration's record in making determinations clearly illustrates that the law has been ineffective because of discretionary enforcement. Since 1984, the first year the Act was in effect, President Reagan terminated the duty-free status of only two countries — Nicaragua and Romania — and has suspended only one, Paraguay.[269] The administration, after investigation, declined to revoke the duty-free status of South Korea, Chile, Taiwan, Thailand, Turkey, El Salvador, Haiti, Guatemala, Singapore, Surinam and Zambia, all of which were investigated based on petitions by various organizations indicating a failure to meet the requirements of the Act.[270] The AFL-CIO charged that the administration applies "one standard to communist countries and another for noncommunist authoritarian regimes."[271] Others have criticized that the administration fails to enforce the law against its allies.[272] One need not get into the politics of the matter to realize that the potential for selective enforcement is apparent.

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[267] *Id.* § 2462(a)(4).

[268] *Id.* § 2702(c)(8).

[269] *E.g.*, 136 Daily Lab. Rep. (BNA) A-1 (July 17, 1987).

[270] *Id.* The President is required to conduct an annual review to ensure compliance with all conditions required to receive benefits. 19 U.S.C. § 2464(c)(2)(A) (1986). Any "interested party" may petition for the removal of any country for non-compliance with the terms of the Act. 15 CFR § 2007.0 (1986).

[271] 136 Daily Lab. Rep. (BNA) A-1 (July 17,1987).

[272] *See e.g., Hearings on Worker Rights, supra* note 39, at 70 (statement by Holly Burkhalter, spokesperson for Helsinki Watch, America's Watch, and Asia Watch, that "[t]he Administration has, for the most part, been reluctant to apply the labor rights conditions to countries allied with the United States.").

The law provides several opportunities for discretionary enforcement. While the Act speaks in mandatory terms, "the President *shall not* designate any country a beneficiary developing country" if it fails to "afford internationally recognized worker rights,"[273] complete discretion rests with the President as to whether a country has met the vague requirements. This problem is exacerbated by the large gap possible between legislation and actual conditions.[274]

In addition, even if the requirements are admittedly not being met, the President may still grant beneficiary status if a country is "taking steps to afford"[275] the minimum standards. This, of course, leaves considerable room for debate. If a country is simply discussing the possibility of legislation to enact workers' rights, the provision is arguably satisfied.[276] Further, disagreement exists over whether "taking steps" requires concrete action in all five areas of the standard, or just one.[277] The President has additional discretion to grant express beneficiary status even if there are violations of workers' rights "if the President determines that such designation will be in the national economic interest of the United States . . . ."[278] These problems are equally present in the more general standards of the CBERA.[279]

While GSP and CBERA have express provisions to prevent the exploitation of workers, enforcement is hindered by discretionary enforcement. The denial of minimum worker rights in developing countries covered by the legislation illustrates that more effective enforcement is needed.[280] Further clarification is needed to specify circumstances under which the President may decline to enforce

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[273] 19 U.S.C. § 2462(b)(7).

[274] *See, e.g., AFL-CIO Petition, supra* note 169, at 3 (commenting on the large gap between written law and actual conditions).

[275] 19 U.S.C. § 2462(c)(7).

[276] This principle is well illustrated by the debate over whether Chile's benefits should have been suspended. The administration acknowledged that Chile was not in compliance, was not "taking steps," but was perhaps taking steps to take steps. *Hearings on Worker Rights, supra* note 39, at 62.

[277] *Compare id.* at 37 (statement of Gerald T. West, Vice President of OPIC, which applies the same standard as GSP, that "taking steps" means the country's laws "conform to one or more of the five fundamental rights"), *with id.* at 183 (statement by Rep. Pease, the sponsor of the worker rights language in GSP, that clear progress must be made in all five areas).

[278] 19 U.S.C. § 2462(b) (1986). This provision contains a serious ambiguity because it is not clear what the "economic interest" of the U.S. is, especially when the interests of business conflict with the interests of workers. See *infra* notes 374–84 and accompanying text for a discussion of the ways that these interests may conflict.

[279] See *supra* note 266 and accompanying text for an example of one of these provisions.

[280] See *supra* notes 146–224 and accompanying text for a discussion of the exploitation of workers in developing countries.

the law. If the statutes are going to be effective, discretion to decline enforcement should be limited to economic aspects of the standard, which do vary greatly from country to country, but not to absolute rights.[281] Thus, the rights to associate, organize and bargain collectively, as well as the prohibition on forced or compulsory labor, should be absolute; the standards relating to minimum age for children, minimum wages, maximum hours and standards for health and safety could vary depending on local economic conditions. If the former rights are protected, the bargaining process will eventually take care of the latter ones.[282] By way of comparison, once the rights to associate and act collectively were protected under American law, workers made great strides in improving their situation.

Further, the "taking steps" language in GSP should not be used so broadly as to excuse major noncompliance. One possible solution to this would be to require a probation period to determine whether proposed "steps" actually result in the attainment of the right by workers.[283]

B. *OPIC-Financing Projects and Insuring the Risks when American Companies Invest in Developing Countries*

1. The Purpose of OPIC

The Overseas Private Investment Corporation ("OPIC") is a corporation with the status of an agency of the United States government.[284] Its purpose is "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas . . . ."[285] OPIC is empowered to "provide insurance, financing

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[281] *See Hearings on Worker Rights, supra* note 39, at 84–85 (statement by Rudy Oswald, Director of Research, AFL-CIO, that the provisions of GSP should be interpreted so that basic rights to associate, organize and collectively bargain should be absolute, while variable issues, such as minimum wages, should be tailored to particular countries).

[282] *See id.*

[283] The Reagan administration used such a procedure under GSP with Chile, but it is not clear whether the procedure was permitted under the law. Further, the "probation" period was apparently designed to see if Chile would even take steps, not whether the steps would result in the realization of worker rights. *See Hearings on Worker Rights, supra* note 39, at 57–61.

[284] 22 U.S.C. § 2191 (1986).

[285] *Id.*

or reinsurance"[286] to all "eligible investor[s]"[287] who participate in approved projects. The corporation has great discretion in deciding when to grant financial assistance to a proposed project,[288] subject only to guidelines imposed by Congress in an attempt to provide some consistency in policy objectives of the United States.[289]

The program, putting it in its best light, is an optimistic attempt to use private investment to develop the underdeveloped nations. By providing incentives for American companies to invest in developing countries, OPIC seeks to create centers of capitalism where the free market system will develop and ultimately advance American interests. In its worst light, it is legislation designed to facilitate the exploitation of workers in developing countries by American MNCs at the expense of American workers.[290]

Regardless of which view provides the motivation for OPIC, the assumption is that the foreign investment will create a demand for American products, particularly equipment and supplies, and allow American business to expand by capturing a local market.[291] These types of foreign investments may further American interests and provide a sound policy justification.[292] Unfortunately, the OPIC legislation fails to make a distinction between types of foreign investment. As with GSP and CBERA, the legislation fails to recognize that some foreign investment will damage American interests. For example, American companies may obtain financing and insurance for a project to expand production in a developing country. Further, it allows American companies to utilize cheap foreign labor at the expense of American workers, often under inhumane conditions. It is doubtful whether Congress left in this aspect of the legislation on the naive assumption that American MNCs would act consistently with American interests, because Senator Metzenbaum spoke out about the danger to American employment in hearings to renew OPIC's authorization.[293] Perhaps Congress believed that the precautions built into the legislation would alleviate these problems.

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[286] *Id.*

[287] *Id.* § 2198(c).

[288] *See id.* § 2191.

[289] *Id.* § 2191(a).

[290] See *supra* notes 226–29, 257 and accompanying text for a discussion of the transfer of American production to foreign countries.

[291] 22 U.S.C. § 2191 (1986).

[292] See *supra* notes 109–22 and accompanying text for a discussion of the effects of American companies moving production to foreign countries.

[293] *See supra* note 257.

Both aspects of OPIC's potential impact on labor policy will be discussed. In addition, Congress' attempts to prevent any conflict and additional proposals to remove the conflict will be discussed.

2. The Potential for Displacing American Workers

Congress recognized the potential impact on American employment if companies could utilize OPIC benefits to directly displace American workers. Congress expressly provided for this by requiring OPIC to deny assistance to a project that would "significantly reduce the number of . . . employees in the United States because [the investor] is replacing his United States production with production from [the foreign project] which involves substantially the same product for substantially the same market as his United States production . . . ."[294] This restriction, if adequately enforced, would at most prevent the loss of already existing jobs. No restriction exists on expanding operations by building new production facilities that would otherwise have been built in the United States, and perhaps phasing out American production over a period of several years.

A study required by Congress to assess the domestic employment impact of OPIC[295] illustrates the potential hidden impact on labor policy from the legislation. The study claims that there were no runaway shops among OPIC projects,[296] and that based on aggregate figures for each year,[297] OPIC projects resulted in a positive impact on U.S. employment.[298]

The analysis has several problems that indicate its failure to measure the full impact on American employment. First, by aggregating the figures to conclude that in a given year the employment impact was positive,[299] the study seems to excuse any offsetting

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[294] 22 U.S.C. § 2191(k)(1) (1986). Congress also provided a more general restriction that OPIC must decline to give assistance to a project if it is "likely to cause a significant reduction in the number of employees in the United States." *Id.* at § 2191(1).

[295] *See* 22 U.S.C. § 2200a(a)(1). The report, *A Study of the U.S. Effects of OPIC-Assisted Private Investment Overseas, Contract Number OPIC-87-C-003* (December, 1987) [hereinafter *OPIC Report*], contains a detailed statistical study of the employment effects of OPIC projects.

[296] *OPIC Report, supra* note 295, at I-4.

[297] *Id.* at V-2–V-5. The study produces aggregate figures broken down by project types to decide whether, in a particular year, the overall impact on employment was positive or neutral. The study claims that there were no years with an overall negative impact, and only a few projects with a negative impact. *Id.* at V-3.

[298] *See, e.g., id.* at V-3.

[299] *E.g., id.*

negative employment that very well might be of the type designed to displace American employment.

Second, the figures for each year include the employment generated by American exports to give the project its start.[300] Thus, this initial gain in U.S. employment offsets the employment that may be lost by the project. In the future, however, there will be little or no exports to the project, but it will continue producing and displacing U.S. employment.[301]

Finally, and perhaps most important, any yearly snapshots of statistics do not account for long term effects. Employers may not modernize their U.S. plants as expansions are done in developing countries.[302] This damages U.S. productivity and future capacity. Further, when a company needs to phase out a plant ten or fifteen years down the road, it may close the American facility rather than a new facility in a developing country, particularly because the American facility is more likely to experience labor difficulties.

The primary objection to OPIC projects from a labor policy perspective is that they may allow an American company to displace American production by producing in a developing country and exporting to the United States. This problem could easily be addressed by denying grants to companies that will export to the United States. Because OPIC awards are expressly limited to Americans or American companies,[303] the subsidy is not needed to help the companies.[304] Instead, it serves as an incentive for American companies to begin a venture that contains an element of risk, for the purpose of developing industries locally that will import American products.[305] The proposed solution will not burden this goal, but will obviously discourage projects by companies seeking to displace their American production free of risks through OPIC benefits.

Under the current system, applicants must provide information on the estimated effects of the project on U.S. employment[306] and

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[300] *E.g.*, *id.* at II-12 and V-2.

[301] See *supra* note 116 and accompanying text for a discussion of the effect of foreign investment on American employment.

[302] *See* B. BLUESTONE & B. HARRISON, *supra* note 13, at 41–46.

[303] 22 U.S.C. § 2198(c).

[304] OPIC clients include America's largest MNCs. Bechtel Group, Caterpillar Tractor Co., Citicorp, Exxon Corp., Ford Motor Co., General Electric Co., and General Motors Corp. are among OPIC's current clients. OPIC, 1987 ANNUAL REPORT 30–31.

[305] See *supra* notes 282–87 and accompanying text for a discussion of efforts to expand the market for American products.

[306] *See* 22 U.S.C. § 2191(k)–(l) (1986).

the impact on the U.S. trade balance.[307] Providing an analysis of the intended market for goods produced in the project would not be more burdensome for companies legitimately seeking to assist in the development of a local economy, and would help to make the determinations already required. An applicant that could not identify a market or planned to export to the United States, would be denied, and the incentive for full disclosure must be the certainty that the goods would be banned from export to the United States.

3. Worker Rights in Developing Countries

To encourage compliance with accepted standards of worker rights in developing countries that would be the site of OPIC projects, Congress expressly incorporated the GSP standards.[308] OPIC often defers to the GSP determinations regarding compliance with the standard.[309] The problems in enforcing the standard, and proposed solutions, are exactly the same as those discussed in reference to GSP.[310]

C. *Special Tariff Incentives for U.S. Manufacturers to Transfer Assembly Operations to Underdeveloped Nations — Item 800.00 of the Tariff Schedules*

Item 800.00 of the Tariff schedules[311] permits American companies to export unfinished goods to another country[312] for assembly. The goods can then be returned to the United States where duty is charged only on the value added by the assembly operations. Through a series of tariff schedules,[313] the system is designed to

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[307] *Id.* § 2191(m).

[308] 22 U.S.C. § 2191a(a)(1) (Supp. 1989). The only distinction in the standard is that under OPIC, a country will be in compliance if it "is taking steps to adopt and implement laws that extend internationally recognized worker rights." *Id.* GSP has more ambiguous language. See *supra* notes 273–75 and accompanying text for a discussion of this language.

[309] *Hearings on Worker Rights*, *supra* note 39, at 38–40.

[310] See *supra* notes 266–80 and accompanying text for a complete discussion of GSP.

[311] UNITED STATES INTERNATIONAL TRADE COMMISSION, TARIFF SCHEDULES OF THE UNITED STATES ANNOTATED at Item 800.00 (1986). [hereinafter TARIFF SCHEDULES].

[312] Mexico, the Caribbean basin, Hong Kong, Singapore, Korea and Taiwan are the developing areas most commonly utilized for assembly in an item 800.00 arrangement. The system is also utilized to produce items in industrialized countries such as Canada and Great Britain. *See* UNITED STATES TARIFF COMMISSION, ECONOMIC FACTORS AFFECTING THE USE OF ITEMS 807.00 AND 806.30 OF THE TARIFF SCHEDULES OF THE UNITED STATES 142–48 (1970).

[313] Item 800.00 provides the general framework and allows the duty free import of all goods originally exported from the U.S. when they return without having "advanced in value or improved in condition." Item 807.00 allows goods that are assembled abroad in whole or

facilitate the transfer of labor intensive operations to developing countries. The most popular development from this system is the Maquiladora Program[314] in Mexico.

The governments of Mexico and the United States have cooperated to set up an extensive series of border assembly operations.[315] Typically, raw materials are exported to Mexico from the United States duty free, secured by a bond.[316] The goods are then assembled in Mexico, resulting in lower labor costs, as well as savings on resources and services.[317] The goods are then exported back to the United States, and the manufacturer pays duty only on value added by the low cost labor.

This system obviously contributes to both dimensions of the impact on labor policy. It shifts production, causing job losses, and allows American companies to utilize exploited labor. The dual justifications are that it allows American business to remain competitive and it provides jobs to workers in developing countries.

The first reason is the most prevalent — eighty-two percent of the surveyed American companies operating a Maquiladora indicated that they did so in order to remain competitive.[318] The argument is that if the American companies did not have access to the cheap labor to displace high American labor costs, they would either go out of business or shift their entire operation to a developing country, both resulting in a greater loss of American jobs.[319] Thus, the apologists admit that the system costs some American jobs, but assert that this loss is necessary to allow American business to remain competitive in the world. This statement assumes that the only solution to the trade problem is to ignore labor policy concerns and provide American companies with a way to compete with cheap labor from developing countries. Other solutions are possible that would not result in an exploitive race to find the world's

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in part from components made in the U.S. to be imported to the U.S. with duty charged only in the value added by the assembly. Item 806.30 is similar but applies to metal products that are manufactured in the U.S. but sent abroad for further processing. TARIFF SCHEDULES, *supra* note 311.

[314] A Maquiladora is commonly understood to be "an off-shore assembly operation involved in export-manufacturing processing or secondary assemblage." Note, *An Investor's Introduction to Mexico's Maquiladora Program*, 22 TEX. INT. L.J. 109, 110 (1986).

[315] Many of the assembly operations are in the border towns of Matamoros, Nuevo Laredo, Ciudad Juarez or Tijuana. *Id.* at 111.

[316] *Id.* at 113–14.

[317] *Id.* at 111.

[318] *Id.* at 111–12, n.19.

[319] *Id.* at 112–13.

cheapest labor.[320] Further, the system results in a disadvantage to those companies that have kept their production in the United States.

The second reason does little to justify the program. Given the subsistence wages paid to workers in programs such as the Maquiladora in Mexico, the workers gain little but the chance to remain barely alive.[321] Item 800.00, unlike the other trade benefits, does not require any compliance with labor standards. Thus, American employers are free to realize the purpose of the program — to utilize cheap labor. The argument that development through exploitive labor practices is not in the long term interests of the host country is certainly a valid one.[322]

It is difficult to suggest a modification to Item 800.00 of the tariff regulations that would reduce the impact on American jobs, because it is so blatantly designed to allow American companies to utilize cheap labor in developing countries, particularly Mexico. If the primary goal is to allow American business to remain competitive, then this objective could be satisfied by abolishing the Item 800.00 system and making American goods more competitive by taking effective action to increase labor standards in the world.[323] To preserve a system that allows American companies to exploit workers based on a rationale that everyone else does it is not an easy position to defend from a labor policy perspective, particularly if there are alternatives to reverse the race to the bottom.

If the system is not revoked, then, at the very least, some minimum labor conditions, such as those applied in the GSP system,[324] should be applied to prevent the blatant exploitation of workers. For goods to be eligible under the Item 800.00 Tariff, the country where the value was added by labor should be required to recognize minimum worker rights.[325]

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[320] See *infra* text accompanying notes 406–419 for a discussion of other possible solutions.

[321] *See, e.g.*, M. FERNANDEZ-KELLY, *FOR WE ARE SOLD, I AND MY PEOPLE* 36, 49–50, 122–27 (1983) (descriptions of lifestyle of female employees in a Maquiladora in Mexico).

[322] See *supra* notes 146–230 and accompanying text for a discussion of the exploitation of workers in developing countries.

[323] See *infra* notes 326–47 and accompanying text for a discussion of Congressional efforts to improve labor standards.

[324] For a discussion of the GSP standard, see *supra* notes 265 and 278–80 and accompanying text.

[325] Many of the countries may already be covered by the worker rights provisions of GSP or CBERA.

V. Further Trade-Based Regulation of Worker Rights — The Omnibus Trade and Competitiveness Act of 1988

Congress took a major step in protecting labor policy when it passed the Omnibus Trade and Competitiveness Act of 1988.[326] The statute imposes broad trade-based regulation of worker rights practiced by trading partners. While the Act does nothing to stop the transfer of production to developing countries and the accompanying displacement of American workers, it is a major step in regulating the more extreme examples of worker exploitation. This section discusses the scope and enforcement of the Act, raises some potential problems with enforcement, and makes suggestions to insure greater protection for worker rights.

A. *Scope and Enforcement*

The Act makes it an express "unreasonable" trade practice for a country to engage in a persistent pattern of conduct that

> (I) denies workers the right of association,
> (II) denies workers the right to organize and bargain collectively,
> (III) permits any form of forced or compulsory labor,
> (IV) fails to provide a minimum age for the employment of children, or
> (V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.[327]

This standard is but one express definition of "unreasonable" for purposes of the Act.[328] A finding that a country is engaging in an unreasonable practice allows the United States Trade Representative[329] to take certain retaliatory actions.[330] The underlying rationale is that a country utilizing repressive policies to restrict labor rights artificially restricts the cost of labor, giving that country an unfair trading advantage. To repress labor rights is much like a

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[326] Pub. L. No. 100–418, sec. 1301, 102 Stat. 1107 (1988).

[327] *Id.* at § 301(d)(B)(iii), 102 Stat. 1107, 1167 (amending section 301 of the Trade Act of 1974, 19 U.S.C. § 2411 (1986)).

[328] *Id.* at § 301(d)(B), 102 Stat. 1107, 1167.

[329] *Id.* at § 301(a), 102 Stat. 1107, 1164.

[330] *Id.* at § 301(c), 102 Stat. 1107, 1165.

subsidy, because it is a government based policy that creates cost advantage.[331]

The Act goes well beyond GSP, CBERA or OPIC because the requirement to respect worker rights is not simply a precondition to the receipt of benefits — it is a precondition to trading with the United States at all. Thus, it applies to all trading partners and includes a wide range of remedies that goes well beyond the removal of a benefit.[332]

The primary interpretive task is to clarify what constitutes a violation. By the terms of the Act, a country's failure to recognize the specified worker rights[333] must "burden[] or restrict[] United States Commerce."[334] As yet, no case law interprets when particular violations of worker rights "burden or restrict" U.S. commerce. The requirement seems to be directed at identifying a harmful effect. Simply to deny worker rights in the abstract is not a violation — the effect has to harm U.S. trade interests either in the United States or in other markets.

Interpretations of other practices defined as unreasonable trade practices that "burden or restrict" commerce under earlier versions of the Trade Act are helpful in analyzing the potential scope of enforcement. If, for example, a company in Malaysia sells computer chips in the United States at well below market rates because of an advantage gained by a policy or practice of the Malaysian government to restrict worker rights,[335] this would be a "burden" on commerce.[336] Further, if the same chips were sold in a third country, Great Britain, at the expense of American products, this too would burden U.S. commerce.[337] Thus, American compa-

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[331] *See, e.g., Worker's Rights and Trade Adjustment Assistance Programs: Hearings on S. 490 and H.R. 3 Before the Senate Comm. on Finance*, 100th Cong., 1st Sess. 91 (1987) (comment by Howard Samuel, President of the Industrial Union Dept., AFL-CIO, that "foreign exploitation of workers is in effect the cruelest subsidy of all.").

[332] For a discussion of the possible remedies, see *infra* notes 338–41 and accompanying text.

[333] For a discussion of problems with enforcement of the worker rights provisions specified in the Act, quoted in the text *supra* at note 327, see *infra* notes 343–47 and accompanying text.

[334] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, sec. 1301, § 301(b)(1), 102 Stat. 1107, 1165 (1988).

[335] The statute makes clear that it must be the "act, policy, or practice of a foreign *country*" that must deny worker rights, not a foreign *company*. *Id.* (emphasis added).

[336] *See, e.g.*, 29 U.S.C. § 202(a)(2) (1978). Congress, in passing the FLSA, declared that "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . burdens commerce." *Id.*

[337] *See*, Bello & Holmer, *Section 301 of the Trade Act of 1974: Requirements, Procedures, and*

nies can potentially be protected at home and abroad from unfair competition gained from exploitation of labor. The irony is that American MNCs will be subject to these restrictions when operating in another country, and exports from those companies to the United States may be held to burden or restrict commerce if it leads to unfair competition with American based producers.

The remedies available are sufficiently broad and flexible to serve as a potent force in enforcing worker rights internationally. The remedies most likely to be effective are the power to "suspend, withdraw or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement" with the foreign country found to be in violation[338] and the ability to "impose duties or other import restrictions on the goods of, and . . . fees or restrictions on the services of" the foreign country.[339] Further, in selecting a penalty, the Trade Representative is authorized to single out a particular country's goods,[340] and is not required to restrict the penalty to the goods or economic sector from which the unlawful conduct occurred.[341] If the Trade Representative is inclined to enforce worker rights, the tools clearly exist.

B. *Potential Problems With Enforcement*

The primary problem with enforcement is that the Trade Representative has wide discretion to pursue other agendas besides worker rights enforcement.[342] The Act provides that alleged worker

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Developments, 7 N.W.J. OF INT. L. & BUS. 633, 644 (1986) (discussing the Trade Act of 1974 prior to the recent amendments, the authors assert that if a country unlawfully subsidized an export in a market in competition with the U.S., this would "burden" U.S. commerce.).

[338] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, sec. 1301, § 301(c)(1)(A), 102 Stat. 1107, 1165 (1988).

[339] *Id.* at § 301(c)(1)(B), 102 Stat. 1107, 1166.

[340] *Id.* at § 301(c)(3)(A), 102 Stat. 1107, 1166.

[341] *Id.* at § 301(c)(3)(B), 102 Stat. 1107, 1166. In other words, even if Malaysia's semiconductor industry is largely responsible for worker rights violations, the U.S. can impose a duty on that country's palm oil.

[342] The discretion is express for worker rights violations. The Act creates two categories of trade violations — those that require mandatory enforcement and those allowing discretionary enforcement. Worker rights violations are in the latter category. *Id.* §§ 301(b)(1) and 301(d)(3)(B)(iii), 102 Stat. 1107, 1165, 1167. In her recent confirmation hearings, the new U.S. Trade Representative appointed by President Bush, Carla Hill, pledged to enforce aggressively U.S. rights under trade laws. She explained that the prior problems of enforcement of trade policies generally were due to diffusion of enforcement power. She stated that these problems have been cured through the fusion of powers in the Trade Representative under the Omnibus Trade and Competitiveness Act of 1988. *See* Farnsworth, *Why Trade Remains a Jumble*, N.Y. Times, Jan. 29, 1989, at F-4, col. 2.

rights violations shall not be considered unreasonable if they "are not inconsistent with the level of economic development of the foreign country."[343] Further, the Trade Representative may decline enforcement if the country is taking "actions that demonstrate a significant and overall advancement" in worker rights.[344] This problem has already been discussed in the context of GSP.[345]

A further problem with enforcement is that the Act is unilateral. Trade-based regulation would be enhanced if other countries participated. Under current law, the President is directed to pursue "the adoption of international fair labor standards . . . in the GATT."[346] Inclusion of a worker rights provision in GATT would enhance greatly the stature of worker rights in the world.

Rather than being viewed as an issue the United States is unilaterally imposing on the world, GATT inclusion would spread the responsibility and reduce the chances for unfair retaliation. Without inclusion in GATT, countries that suffer penalties could retaliate consistently with GATT provisions.[347]

VI. Regulation to Prevent Displacement of American Workers

A. *The Rationale for Regulation of Worker Displacement*

Through inclusion of provisions in trade bills to require recognition of worker rights as a condition of receiving trade benefits, Congress has made definite progress in protecting the second dimension of the impact on labor policy from the shift of production to developing countries — the exploitation of workers in developing countries. Virtually no regulation, however, deals with the first dimension — the displacement of American workers by companies seeking to avoid the costs associated with American labor laws.[348]

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[343] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, sec. 1301, § 301(d)(3)(C)(i)(II), 102 Stat. 1107, 1168 (1988).

[344] *Id.* at § 301(d)(3)(C)(i), 102 Stat. 1107.

[345] See *supra* notes 278–80 and accompanying text for a discussion of these provisions of GSP.

[346] 19 U.S.C. § 213(a)(4) (1980). The GATT is a multilateral agreement that sets the ground rules for trade between member states. *See generally* D. Vagts, Transnational Business Problems 1–41 (1986).

[347] *See, e.g.*, General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, part II, art. III, sec. 2, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

[348] For a discussion of the minimal restrictions that do apply, see *id.* notes 96–97 and accompanying text.

Even if the standards for worker rights in developing countries are enforced, wages in developing countries can still be substantially lower than in the United States. As long as this differential exists, the incentive remains to transfer production.

Congress' neglect to provide effective regulation to prevent the displacement of American workers raises vital issues of American policy. Much more is at stake than simply the traditional conflict between management and organized labor. All workers, white and blue collar, professional and technical, are potential victims when companies search for cheaper labor.[349] Even if the workers are able to find other jobs, this ignores the devastating impact on their lives. Workers are not simply fungible pieces of equipment that can be readily interchanged. Studies confirm the devastating psychological consequences of job loss.[350]

Further, the impact on communities is devastating when major elements of the workforce are left unemployed.[351] In addition to impact from job loss, the trade deficit is directly related to transferring production for the purpose of exporting back to the United States.[352] Also, issues of technology transfer threaten American competitiveness[353] and environmental protection, as companies also try to escape the cost of compliance with environmental regulations.[354]

Given these important interests at stake, the obvious question is why American policy has not attempted to deal with these problems. In the absence of a compelling justification, the case for regulation to protect American workers seems clear.

It is difficult to confront the case *for* the modern runaway shop because no affirmative policy in place permits it. The displacement is occurring as a result of a void in policy, so Congress has never had to justify a policy. Further, few are willing to go on record as being in favor of such a policy because it is so clearly opposed to American interests. Instead, management simply denies that work-

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[349] *See, e.g.*, B. BLUESTONE & B. HARRISON, *supra* note 13, at 53–56. See *supra* notes 128–30 and accompanying text for a discussion of the impact of this practice on employment.

[350] *E.g.*, S. REP. No. 62, 100th Cong., 1st Sess. 6 (1987).

[351] See *supra* note 17 and accompanying text for a similar point about the impact on communities.

[352] *See, e.g.*, CAVANAUGH, *supra* note 130, at 17; BERGSTEN, HORST AND MORAN, *supra* note 107, at 45.

[353] See *supra* note 19 and accompanying text for a discussion of the exportation of American technology to foreign countries.

[354] *Cf.* 22 U.S.C. 2199(g) (1986) (OPIC requires an environmental impact statement before any project can be approved).

ers are losing jobs due to foreign investment, and mount statistical wars to show that all foreign investment creates jobs.[355]

As an initial matter then, it is reasonable to posit that Congress would act if it were clear that some foreign investment is done for the purpose of transferring production to developing countries to obtain cheap labor and export the products back to the United States, resulting in a loss of American jobs. As was discussed earlier, it is difficult to demonstrate this because little direct information is available on this point.[356] A more refined analysis, however, reveals that not all foreign investment is consistent with American interests.[357] Information measuring the impact of different types of foreign investment is crucial to a more accurate analysis of the problem.

A necessary first step is to begin gathering data on the *company source* of imports, as well as information on how companies that reduce their American workforce are replacing their production.[358] Direct information on the relationship between trade and employment would reinforce the connection and hopefully encourage broader thinking that goes beyond the historic piecemeal approach to legislation in the trade area.[359]

Congress' failure to consider seriously the need to protect American workers,[360] even though it has gone to great lengths to attempt to regulate worker rights in developing countries, requires a closer examination. Besides a collective lack of information, two explanations are likely. One is that Congress responded to the more powerful interest group and intentionally set up a system to allow

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[355] See *supra* notes 112–17 and accompanying text for a discussion of the competing claims as to the effects of foreign investment.

[356] See *supra* note 124 and accompanying text for a discussion of the federal government's failure to gather information in this area.

[357] See *supra* notes 107–23 and accompanying text for a discussion of the effects of foreign investment.

[358] The information gathering would be an integral part of a proposed regulation to prohibit runaway shops. See *infra* notes 416–17 and accompanying text for a discussion of such a proposed scheme.

[359] A traditional problem has been singularly focused legislation that examines only the narrow problem and fails to see relationships between various policies affecting trade. *See e.g.*, BERGSTEN, HORST AND MORAN, *supra* note 107, at 3–5, 16, 31.

[360] The only direct attempt to regulate in this area was the Burke-Hartke bill, The Foreign Trade and Investment Act of 1972, S.2592, which would have, among other things, restricted foreign investment by U.S. companies. 117 CONG. REC. S33,594 (daily ed. Sept. 28, 1971). The bill did not, however, differentiate between *types* of foreign investment. Thus, even foreign investment that might increase domestic employment was restricted. The bill was never enacted.

MNCs to transfer production, regardless of the impact on American workers.[361] This is certainly the most troubling explanation, but unfortunately does not lend itself to analysis.[362] Perhaps a reasonable goal is to focus more attention on the problem by gathering information and assessing any failure to act at that point.

The second and more likely explanation is that a belief system is operating that supports the assumption that no serious conflict of interest exists between MNCs' behavior and broader American interests, specifically those interests protected by labor policy. The apparent philosophy underlying a regulatory scheme that focuses only on the labor practices of foreign governments in an attempt to remedy the erosion of U.S. jobs is that these foreign countries are responsible for the exploitation of their citizens in an attempt to compete unfairly with the United States; the competitors are "us," meaning American companies, and "them," meaning the foreign competition. This philosophy was perhaps accurate prior to the internationalization of the economy,[363] but radical changes in the international economy require a re-examination of this fundamental belief.[364]

The reluctance to regulate the mobility of capital generally exacerbates the problem. Free capital mobility is a firmly held tenet of American capitalism.[365] This belief, however, is based on the assumption that American companies will act consistently with American interests when relocating capital.

Although it is comfortable to believe that Americans share the common problem of foreign competition, and the government pur-

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[361] In a debate over the wisdom of renewing OPIC, Senator Metzenbaum asserted that those in favor of the legislation had responded to pressure from lobbyists. *See supra* note 257. The Senator explained:

> According to AFL-CIO estimates, OPIC-supported business ventures over the past four years have resulted in a loss of more than 500,000 American jobs. I do not believe it is wrong for the United States to promote economic and social development in less developed countries. That is humane policy. But I do object to a policy which cares not one iota about the true needs of foreign nations but merely paves the way for some U.S. companies to set up production overseas . . . . OPIC is promoting projects and investments in some of the wealthier countries [and] is aiding . . . our stiffest trade competition.

131 CONG. REC. S17,478-02 (daily ed. Dec. 12, 1985).

[362] *See generally*, M. GREEN, WHO RUNS CONGRESS (1984).

[363] *See, e.g.*, BERGSTEN, HORST & MORAN, *supra* note 107, at 17.

[364] *See id.* at 31. *See also* 117 CONG. REC. H33,746 (daily ed. Sept. 28, 1971) (remarks by Rep. Burke that current trade regulations "were designed for another period of American history," before the internationalization of the economy).

[365] *See generally* J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 160–70 (1983).

sues policies as if that were the case, the reality is that MNCs are not acting consistently with broader American interests, which should prompt reconsideration of the reasons for continuing to assist those companies. Current trade policy provides a graphic example. In its most positive light, assuming that Congress did not intend to encourage American MNCs to transfer production to developing countries, Congress set up a trade system through GSP, CBERA and OPIC that was designed to assist developing countries in developing an industrial base primarily to create markets for U.S. exports.[366] This, again, is a manifestation of a traditional "trickle down" theory; American workers would eventually benefit from the expansion of American business. Because of the well engrained belief that American business would act consistently with American interests, it was unnecessary to go to great lengths to remove the possibility that American companies would utilize the opportunity to benefit themselves at the expense of American interests.

President Reagan's veto of the first Omnibus Trade and Competitiveness Act of 1988 provided an illustration of this belief in operation.[367] His veto message contained a reiteration of his particular trickle down philosophy — "lower tax rates, reduced regulation" and local control.[368] He stated that the criteria he used in deciding to veto the act was whether the legislation "will create jobs and help sustain our economic growth."[369]

Based on this reasoning, he vetoed the bill largely because of the mandatory plant closing notice to workers.[370] Using the specific example of the Caterpillar Company, he reasoned that jobs would be lost with a mandatory closing law because companies "need to be flexible to meet foreign competition . . . . Without the ability to be agile and responsive, [the Caterpillar Company] might have closed their doors permanently."[371]

President Reagan's veto message expresses the traditional trust that MNCs will look out for the interests of their workers if simply

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[366] See *supra* note 251 and accompanying text for a discussion of the criteria that a business must meet to be eligible for assistance.

[367] The bill was ultimately passed in a slightly modified form. See *supra* note 326 and accompanying text for a discussion of the passage of this bill.

[368] 101 Daily Lab. Rep. (BNA) at D-1 (May 25, 1988).

[369] *Id.*

[370] *Id.* at D-3. This provision was ultimately passed separately. See *supra* notes 103–04 and accompanying text for a discussion of a bill requiring worker notification.

[371] *Id.* at D-4. Interestingly, this precise argument was used in the 1920s to oppose minimum wages, child labor laws and a workers compensation system. B. BLUESTONE & B. HARRISON, *supra* note 13, at 240–41.

left alone. It illustrates the assumption that with free reign, they will pursue broader American interests. Unfortunately, more basic principles of economics prevailed to complicate the President's analysis. Caterpillar, which as an aside is an OPIC beneficiary,[372] has substantial manufacturing facilities in developing countries, such as Korea, and imports all of certain tractors sold in the United States from Japan.[373] MNCs, like Caterpillar, have used the recent internationalization of the economy as an opportunity to increase profits by obtaining cheap labor in developing countries. President Reagan's veto made it easier for them to continue the practice.

In spite of the shortage of complete information on the extent to which MNCs have transferred production to developing countries, there are numerous examples of large MNCs that have been the beneficiaries of trickle down policies for decades and are now replacing domestic production with production in developing countries and exporting back to the United States. For example, USX Corp. imports steel ingot from Korea;[374] General Motors and Ford import cars from Korea;[375] Chrysler imports cars from Mexico;[376] General Electric imports various small appliances from Asia;[377] and IBM imports data processing equipment from Asia.[378] Further, the Japanese are held up as a primary threat to our economy that requires the government to give a free reign to business to stand toe-to-toe with the enemy. The picture is complicated, however, by the fact that, for example, Ford owns 25% of Mazda, GM owns 34.4% of Isuzu Motors, and Chrysler owns 15% of Mitsubishi.[379] Further, General Electric owns 40% of Toshiba Electronics Systems Co.[380]

These specific examples illustrate that it is no longer a safe assumption that American MNCs will act consistently with American interests. A rather surprising admission by an executive of the Ford Motor Company expresses a more accurate view of modern reality:

> It is our goal to be in every single country there is. Iron curtain countries, Russia, China. We at Ford Motor company look at a world map without any boundaries.

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[372] See *supra* note 304 for a list of more OPIC clients.

[373] Finn & Healy, *supra* note 134, at 83.

[374] *Id.*

[375] *Id.*

[376] *Id.*

[377] *Id.*

[378] *Id.*

[379] G. HAAS, PLANT-CLOSURES — MYTHS, REALITIES AND RESPONSES 18–19 (1985).

[380] B. BLUESTONE & B. HARRISON, *supra* note 13, at 143.

> We don't consider ourselves basically an American company. We are a multi-national company. And when we approach a government that does not like the United States, we always say, "who do you like? Britain? Germany? We carry a lot of flags. We export from every country."[381]

There are other similar examples of the philosophy of modern MNCs.[382] These expressions of the true goals of MNCs are simply an acknowledgement of the realities of capitalism.[383] The same principles were at work when American companies resisted any efforts to improve working conditions in this country.[384] While these developments make perfect sense to an economist, they provide a graphic illustration as to why the old assumptions are harming broader American interests. MNCs will not act consistently with American interests when it is not profitable, and the mounting evidence requires recognition of this fact.[385]

Before concluding that Congress has simply failed to act because of outdated assumptions regarding the conflict between the interests of MNCs and broader American interests, it is necessary to consider whether there are compelling reasons for failing to act even though it is clear that some foreign investment by American MNCs is displacing American labor. Perhaps the best case for allowing American companies to displace costly American workers is that the companies need to remain competitive in the world market. The argument is that if American firms are prevented from freely closing plants to achieve economic efficiency, then their products will not be price competitive, and American interests will ultimately be damaged.[386]

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[381] *Trade Adjustment Assistance: Hearings Before the Subcomm. on Foreign Economic Policy of the House Comm. on Foreign Affairs*, 92nd Cong., 2d Sess. 42 (1972) (statement by Robert Stevenson, Ford Executive Vice President for International Operations).

[382] The Chairman of what was formerly U.S. Steel, David M. Roderick, was quoted as saying "U.S. Steel is not in the business of making steel. It is in the business of making money." G. HAAS, *supra* note 379, at 24.

[383] *E.g.*, Boddy & Crotty, *Class Conflict and Macro-Policy: The Political Business Cycle*, 1975 REV. OF RAD. POL. ECON. 7 (Spring 1975).

[384] See *supra* notes 25–34 and accompanying text for a discussion of the efforts of American companies to resist the labor movement.

[385] This general theme is fully explored in R. BARNNET & R. MÜLLER, *supra* note 9.

[386] One expression of this argument comes in the defense of the Maquiladora program. *See, e.g.*, Comment, *The Approaching Confrontation Over Item 807.00 of the Tariff Schedule*, 4 L. & POL. IN INT. BUS. 628, 633 (1972). *See also*, S. REP. No. 62, 100th Cong., 1st Sess. 81 (1987) (remarks by Senator Thurmond in opposition to the Worker Notification Act that regulation of plant closings causes a "drain of resources into inefficient operations").

There are four primary responses to this position. First, effective enforcement of trade-based restrictions will do much to remove any unfair advantage gained by using cheap labor.[387] This is particularly true if it becomes in the interest of American MNCs to use their influence to see that the provisions are enforced. Currently, for MNCs operating in developing countries and exporting to the United States, it is against their interest to lobby for more stringent enforcement of labor rights in developing countries.[388] While effective enforcement of the trade regulations will not equalize wages, it will do much to close the artificially wide gap caused by repression of worker rights in many developing countries.

Second, the nature of this alleged "foreign competition" must be analyzed. In some cases it is the American based MNCs that are importing products to compete with domestically produced goods.[389] This results in a disadvantage only to the American companies that have remained loyal to American workers and continue to manufacture domestically.

Third, the argument presumes that the goal of American MNCs is to operate with as large an American workforce as possible, and only reluctantly transfer operations in the interests of somehow supporting the inefficient American operations through a subsidy gained by utilizing cheap labor. This simply conflicts with the evidence. The companies leave to avoid American labor costs, not to subsidize them. There is little evidence of an overriding loyalty.[390] To assert that it is necessary to allow companies to displace American labor to preserve other American labor ignores the nature of

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[387] Rep. Donald Pease, one of the leaders in the effort to improve worker rights in the world, has stated, "if workers are given the basic freedom that they ought to have, of organizing and bargaining collectively, for example, there will be a trend toward improving the lives of those workers . . . ." CAVANAUGH, *supra* note 130, at 1. The passage of the Omnibus Trade and Competitiveness Act of 1988, with its broad application of worker rights to all trading partners, will do much to further the evolution of worker rights in developing countries. See *supra* notes 326–47 and accompanying text for a discussion of the Act.

[388] Currently, American MNCs have an incentive to lobby against any restrictions on worker rights. *See, e.g., Trade Adjustment Assistance: Hearings Before the Subcomm. on Foreign Economic Policy of the House Comm. on Foreign Affairs*, 92 Cong., 2nd Sess. 38 (1972) (remarks by Andrew J. Biemiller, Director of Legislation, AFL-CIO, that Ford-Philco, which closed an electronics facility in Sandusky, Ohio and transferred production to Taiwan, is a member of the Committee for a National Trade Policy and the Emergency Committee for American Trade).

[389] See *supra* notes 132–37 and accompanying text for a discussion of an American company with manufacturing facilities in developing countries.

[390] See *supra* notes 374–85 and accompanying text for a discussion of American companies acting inconsistently with American interests.

the problem and the extensive evidence of wholesale dislocation of American workers.[391] It is true that the companies are making their operations more cost efficient by relocating to developing countries,[392] but this is simply an acknowledgement of the problem. If the end result is that the companies become more profitable at the expense of American workers, the crucial question is whether this is necessary and consistent with American interests.[393] It makes little sense to have a policy geared exclusively towards allowing a small, elite group of large MNCs to maximize their profits if there is no corresponding benefit to broader American interests.

Finally, regardless of the extent that other countries permit the use of exploited labor, that in itself does not justify the practice. American policy should be geared to something besides the lowest common denominator.

A further argument that may be advanced to justify the displacement of expensive American workers should be addressed. The argument is that this is simply a manifestation of the free market at work. Free market advocates would contend that the market is best served when the most cost efficient means of production are utilized.[394]

The response to this argument is that this debate was resolved when labor legislation was enacted to protect workers from the exploitation of the free market. American labor policy is based on the premise that there are more important values than cost efficiency, such as preventing the exploitation of workers.[395] To revive a policy that puts cost efficiency above the interests of the millions effected by the erosion of labor policy is to step back nearly a century in humanitarian social policy.[396] If the long term future of the international economy is to have nations specialize in producing items at which they are most efficient, this does not justify allowing

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[391] See *supra* notes 127–33 and accompanying text for a discussion of the dislocation of American workers.

[392] General Motors reported record profits for 1988 of 4.86 billion dollars. The increase, however, was largely due to its foreign operations. L.A. Times, Feb. 15, 1989, at 1, col. 4.

[393] See *supra* notes 13–20 and accompanying text for a discussion of the idea that growing business benefits America.

[394] See *supra* note 22 and accompanying text for a discussion of the dangers of unrestrained business. *See also* B. BLUESTONE & B. HARRISON, *supra* note 13, at 8–9 (discussing the Lester Thurow argument that our economy would be healthier if it could move out of inefficient, unproductive activities more quickly).

[395] See *supra* notes 72–80 and accompanying text for a discussion of the range of issues that arise between workers and management.

[396] *See supra* note 53.

a short term exploitation of workers in developing countries. That is not an issue of efficiency, but instead illustrates the need to preserve labor policy to prevent a situation where countries that allow the exploitation of their workers will be deemed efficient and gain a competitive advantage.

Further, the underlying premise of the free market theory is that society benefits from more efficient production through lower prices.[397] There is, however, little evidence that cost savings realized through cheap third world labor are being passed on to the consumer.[398]

Finally, the status quo is not a true free market. To a large extent, American trade policies are subsidizing MNCs as they transfer production to developing countries.[399] This provides an artificial incentive that interferes with market decisions.

Assuming that the second explanation for the failure of Congress to act — that policymakers are simply operating from an outdated assumption that MNCs continue to act to serve broader American interests — requires a great deal of faith that elected representatives are attempting to protect American interests. The temptation is to accept the first rationale — that policymakers have been influenced by MNC lobbyists representing their clients — is great, particularly in light of the overall problems with the lobbying system.[400]

The potential conflict between the MNCs' interests and interests served by labor policy is great. The reality of the international economy must be incorporated with current policy to alter the outdated perception that American interests are served as long as business prospers. To continue to support large MNCs through incentives to expand abroad,[401] government subsidized research,[402] lucrative government contracts,[403] and tax

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[397] *See, e.g.*, R. BARNNET & R. MÜLLER, *supra* note 9, at 322; Goldfinger, *An American Trade Union View of Trade and Investment*, in AMERICAN LABOR AND THE MULTINATIONAL CORPORATION 39 (D. Kujawa ed. 1973).

[398] *See id.*

[399] See *supra* notes 231–325 and accompanying text for a discussion of American companies moving their production to foreign countries.

[400] *See generally*, M. GREEN, WHO RUNS CONGRESS (1984).

[401] The primary incentives are provided by GSP, CBERA and OPIC, discussed *supra* notes 231–325 and accompanying text.

[402] The subsidized development of technology that is then exported was identified as one of the primary factors leading to the introduction of the Foreign Trade and Investment Act of 1972. 117 CONG. REC. H33,746 (daily ed. Sept. 28, 1971) (remarks by Rep. Burke).

[403] *See, e.g.*, 135 CONG. REC. S601-01 (daily ed. Jan. 25, 1989) (discussing The Save

breaks,[404] without any requirement that those companies in fact do act to further American interests, and in the face of clear evidence that some of the companies are enriching themselves at the expense of American interests, is an extreme form of an unjust enrichment program with serious long term consequences. At the very least, the assumption should be refined to protect the clear interests served by labor policy from damage caused by a void in policy stemming from an outdated belief system. If the fundamental rationale for assisting business is to increase employment and generally spread prosperity,[405] then that goal should become the focus of a new policy designed to confront the reality of the international economy.

B. *A Proposal for Regulation of Worker Displacement*

The most important factor in making any proposal to regulate the displacement of American workers is to focus precisely on the offending practice — transfers of production to developing countries for the purpose of using cheap labor and exporting the products back to the United States. A regulation that is too broad and interferes with other types of foreign investment that are consistent with American interests will fuel legitimate objections. Expansions to foreign markets to increase U.S. exports, or capture a local market, should not be discouraged. Because most companies cite these reasons for foreign investment, and deny that they are fleeing American labor,[406] little room for principled objection should remain if a regulation could restrict only the latter practice.

To be effective, the regulation must reach more than the blatant runaway shop, which is not the normal practice,[407] and consider other ways that an American MNC might transfer production to a developing country. The company could, to give a few examples,

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American Jobs Act). The Act, introduced by Senator Metzenbaum, would ban any company that relocates to a foreign country from receiving any federal loans or grants, and require any federal agency awarding a contract to give preference to companies that have not relocated a portion of their business to other countries. *Id.*

[404] A long standing cornerstone of the trickle down philosophy has been to provide tax breaks to business. See text accompanying note 39, *supra*, for a discussion of the trickle down philosophy.

[405] See *supra* notes 358–64 and accompanying text for an example of this philosophy.

[406] See *supra* note 107 and accompanying text for a discussion of the reasons that American companies give for foreign investment.

[407] The blatant runaway shop may account for as little as 2% of job loss. It is the other, more subtle forms of disinvestment that are endangering American industry. *See, e.g.*, B. BLUESTONE & B. HARRISON, *supra* note 13, at 6–10.

build an expansion facility in a developing country and eventually phase out American production; it could simply stop producing a product and purchase it from a supplier based in a developing country; or, it could produce a competing product as a joint venture with a company in a developing country and stop producing its American product because it cannot compete on the basis of cost. All of these have the same impact as a blatant runaway shop. The only difference is timing and appearance.

The goal then is to impose a policy to prevent displacements that result in exports to the United States. The first step is to remove any incentives in place to relocate. This has already been discussed in connection with the trade policies that do provide incentives for American companies to transfer production to developing countries.[408] Along this same line, any direct government subsidies, such as grants and guaranteed loans, as well as the opportunity to participate in government contracts, should be limited to companies that are not undermining American interests by transferring production to obtain cheaper labor. These goals could be accomplished by the Save American Jobs Act[409] recently introduced by Senator Metzenbaum. As the Senator explained in introducing the legislation, "companies must understand that when they shut the door on American workers, Uncle Sam is going to close his wallet to them."[410]

Once the incentives are removed, the need to prohibit the clear displacement of American workers by transferring production to other countries remains. This could be accomplished by a simple change in present law. Under the Worker Adjustment and Retraining Notification Act,[411] an employer must give 60 days notice to employees before closing or reducing the workforce.[412] As part of the notice, the employer could be required to indicate what product lines are effected and how the discontinued production would be replaced. If the company planned to import the product, even from preexisting sources,[413] the closing would be permitted only with a corresponding ban on imports of the effected product. The em-

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[408] See *supra* notes 259–63, 303–04, and 323–25 and accompanying text for a discussion of some of these trade policies.

[409] See *supra* note 402 for a discussion of this Act.

[410] 135 CONG. REC. S601-01 (daily ed. Jan. 25, 1989).

[411] Pub. L. No. 100-379, 102 Stat. 890 (1988).

[412] *Id.* at § 3.

[413] This would prevent the delayed reaction plant closing, where domestic production is phased out after a foreign facility is operating.

ployer would still retain the right of entrepreneurial control to decide to close his plant completely,[414] but the company could not close for the purpose of displacing American workers, and still have access to the American market.

Enforcement could be quite direct. A company that closes a plant or reduces its workforce would be barred from receiving imports of the affected product.[415] This ban could be permanent or for a sufficient term of years to serve as a deterrent. Thus, access to the lucrative American market, made so by high wages, would be denied to companies seeking to have the best of both worlds.

As part of the enforcement scheme, as discussed earlier, information would be gathered to monitor the extent to which American companies are importing products for sale that displace former domestic production.[416] This would allow a true assessment of whether further steps are needed to repair the harm that has already occurred. Further, other types of foreign investment that do not directly impact labor policy, but may result in the export of jobs,[417] could be monitored to determine if further action is necessary.

While it is considered heretical today to advocate any restrictions on free market development,[418] the threat to labor policy by the internationalization of the economy cannot be ignored. In simpler times it was necessary to protect certain labor rights by prohibiting plant closings designed to escape unionization.[419] Similar action is needed to stop the modern international version of the runaway shop. Today, labor policy is much more seriously threatened as jobs, both union and non-union, are lost as employers flee to escape the

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[414] See *supra* notes 92–95 and accompanying text for a discussion of some restrictions on employer discretion.

[415] This is similar in spirit to a provision in the Burke-Hartke bill, introduced in 1971 but never passed, that would have limited imports produced abroad with U.S. components on the theory that domestic demand should not be met by U.S. companies producing abroad. *See* BERGSTEN, HORST & MORAN, *supra* note 107, at 111–12.

[416] See *supra* notes 358–59 and accompanying text for a discussion of the need for information on the extent of displacement of domestic production.

[417] See *supra* notes 107–12 and accompanying text for a discussion of foreign investment.

[418] *See, e.g., Economic Dislocation and Worker Adjustment Assistance Act: Hearings Before the Subcomms. on Labor and Employment and Productivity Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. 83 (1987) (in opposing the Worker Notification Act, Sen. Gordon Humphrey remarked "[t]his proposal . . . is a Marxist Economist's dream. Under the guise of simple notice and consultation requirements, this proposal is the most radical restructuring of economic decision making proposed in recent years").

[419] See *supra* notes 93–97 and accompanying text for a discussion of restrictions on employers' power to close plants.

costs of labor regulation. Other important interests are at stake as the national trade deficit worsens, and as the transfer of new technologies and the failure to modernize American factories threaten America's competitiveness. The proposed regulation would prevent this from occurring by focusing on the conduct that threatens labor policy, but still recognizing the value of most international growth. Legitimate foreign expansion that furthers American interests would continue to be fostered. The proposal recognizes, however, that not all foreign investment furthers American interests, and seeks to align policy with the presumed goal of furthering interests broader than the international growth of MNCs. Such an important policy question can no longer be ignored, and, in effect, resolved by default.

VII. Conclusion

The internationalization of the economy has created an exciting dynamic as companies of many nations compete to participate in the explosion of growth occurring in the developing countries. This period is reminiscent of the industrial expansion of the United States earlier in this century.

Unfortunately, there are other parallels as well. Companies expanding into developing countries set the windfall of turning back the clock to an earlier period of industrialization in the United States. These companies can employ workers under much the same conditions as were present in this country nearly a century ago.

This development speaks poorly of the priorities of the industrialized world. The moral awakening that led to modern labor legislation has been enthusiastically cast aside for the opportunity to operate free of the costly restrictions designed to give workers a chance to earn a decent wage and work under reasonable conditions.

When American companies participate in the exploitation of workers in developing countries, they are not only engaging in conduct that American law has long branded illegal, but are casting aside American workers simply because they are protected by humane legislation. A basic fairness issue is at stake when companies that were developed through American resources and workers, were beneficiaries of decades of trickle down policies, made prosperous by American consumers and government contracts, and protected in the world by American military and diplomatic efforts, seek to deny the primary thing they were expected to give in return

— the opportunity for Americans to work for a livable wage. This has violated the basic compact underlying labor policy and the other policies designed to help business prosper. The harm is magnified as other American interests, such as the expanding trade deficit, the transfer of technology, and the decline of American competitiveness stemming from the refusal to modernize American facilities are all directly effected.

Policymakers responsible for representing American interests can no longer ignore that the internationalization of the economy has changed the underlying relationship between the interests of business and the interests of Americans. The values underlying labor policy will simply be viewed as technical nuisances that can be easily circumvented unless the policy is modernized to reflect current realities.

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