CAN TORT LAW BE USED TO SAVE BLUE COLLAR JOBS IN THE UNITED STATES?

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INTRODUCTION

In recent years, American tort law, particularly, the awarding of substantial damages in American products-liability cases, has made American products less competitive in the world market. Of course, the assertion is vigorously denied in some quarters.[1] Assuming, though, that there is some truth in this proposition, there is at least one American industry in which American tort law could be used to make the American product more competitive on the world market. At the same time, perhaps some jobs could be saved in an industry that has experienced declining employment for several years.

The industry is coal mining, and the circumstances involve miners from other countries, especially the Peoples' Republic of China, who have been killed as a result of the negligence of an American company, or the use of a defective American product. The argument presented in this article is very simple: American coal miners and their unions seriously should consider doing everything possible to assist the estates of these deceased miners in prosecuting negligence and product liability claims in United States courts when there is a reasonable basis for believing that the deaths were caused by the negligence of an American company or the use of a defective American product.

This argument is based on a number of considerations: some are factual and historical; others are economic; and still others are based on law and legal policy. The argument, as presented, considers the following:

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1. David Hyman, *Lies, Damned Lies and Narrative*, 73 IND. L.J. 797 n.208 (1998); Stephen Daniels & Joanne Martin, *Punitive Damages, Change and the Politics of Ideas: Defending Public Policy Problems*, 1998 WIS. L. REV. 71 (1998); Gregory T. Miller, Comment, *Behind the Battle Lines: A Comparative Analysis of the Necessity to Enact Comprehensive Federal Product Liability Reforms*, 45 BUFF. L. REV. 241 (1997); Philip Shuchman, *It Isn't That the Tort Lawyers Are So Right, It's Just That the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 585 (1997).

(1) background and historical information about United States business location and relocation decisions; (2) labor costs as a relevant consideration in business location and relocation decisions; (3) traditional union and employee responses to business relocation proposals; (4) labor costs, including workers' compensation costs, as a factor in international business competition; (5) workers' compensation costs as a significant cost in the coal industry and a relevant factor in coal mine location decisions; (6) China as a potential competitor in the world coal market; (7) comparison of mine safety in the Chinese and American coal industries; (8) comparison of the wage structure, including workers' compensation costs, of the Chinese and American coal industries; (9) United States companies' participation in activities in China that could create civil liability under either United States or Chinese tort law; (10) the lack of theoretical obstacles precluding tort actions in the United States against American companies involved in the Chinese coal industry; and (11) increasing the cost of killing Chinese coal miners as being in the best financial interest of American coal miners and consistent with the best traditions of the labor movement.

I. BACKGROUND

For many years, businesses the world over have moved manufacturing facilities from one location to another in search of increased profitability. Typically, numerous factors contribute to these relocation decisions—improved access to raw materials, proximity to customers, and the cost of labor. For example, in the United States, many textile plants moved from New England to the Carolinas prior to 1960. The abundance of low cost labor in the South, and the various kinds of incentives local and state governments frequently provided to these businesses precipitated these moves.[2]

During the past thirty years or so, a large number of manufacturing plants have moved from the United States to various underdeveloped countries. Between 1980 and 1995, manufacturing in southeast Asia boomed.[3] A host of factors contributed to these relocation decisions, some of which bear little or no relationship to labor costs or public policy. World travel is faster, relatively less expensive, and more convenient than it was thirty years ago. Worldwide communications systems have improved vastly since the 1960s. Today, it is relatively easy to move manufacturing equipment from place to place. Shipping costs of finished products, as a percent of the total cost of production, have decreased. The cost of building a new plant in a less-

2. *See* WILLIAM F. HARTFORD, WHERE IS OUR RESPONSIBILITY?: UNIONS AND ECONOMIC CHANGE IN THE NEW ENGLAND TEXTILE INDUSTRY 1870-1960 (1996).

3. The economies of China, Indonesia, Malaysia, Singapore, and Thailand have grown rapidly during this period. The growth in Gross Domestic Product (GDP) in each of these countries is reported in the "Emerging Market Indicators" of "The Economist." *See, e.g., Emerging-Market Indicators: Economy*, ECONOMIST, Apr. 11, 1998, at 82, *available in* 1998 WL 8884844.

developed country is often less than that of constructing a similar plant in the United States. In the past twenty to thirty years, capital has become much more mobile. Undoubtedly, these and other factors contributed to these relocation decisions.[4]

Frequently, low labor costs in the less-developed countries are a reason for many business relocations.[5] When Canada, Mexico, and the United States signed the North American Free Trade Agreement (NAFTA), it was expected that some manufacturing plants in the United States would be relocated in Mexico, in part, because of lower labor costs.[6] However, on balance, the Clinton administration believed that the United States would benefit from NAFTA. The same thing can be said of trade and commerce with Asia.

Since manufacturing first moved from New England to the Southern States, and later from the United States to the developing countries, labor unions and employee interest groups have argued that the moves were largely because of low labor costs in the developing countries. Unions representing employees in manufacturing plants in the United States frequently note that United States labor, at the rate of US$20 per hour, simply cannot compete with Mexican, Southeast Asian, or Chinese labor, which is only a small fraction of that amount.[7]

Federal and state regulatory schemes have added to the cost of producing many kinds of products in the United States. Employers frequently complain that Occupational Safety and Health Administration regulations add to the cost of production.[8] Coal producers in the United States are required to follow the regulations of the Mine Safety and Health Administration (MSHA) issued pursuant to the Federal Mine Safety and Health Act.[9] All the coal mining states have had detailed statutes regulating coal mines since at least the 1930s.[10] All these statutes have harsh enforcement provisions, in-

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4. *See* CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT ch. 1. (1993); *Delivering the Goods*, ECONOMIST, Nov. 15, 1997, at 85.

5. *See* Terry Collinsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interests*, 31 B.C. L. REV. 31, 32 (1989).

6. *See* Michael McGuinness, *The Protection of Labor Rights in North America: A Commentary on the North American Agreement on Labor Cooperation*, 30 STAN. J. INT'L L. 579 (1994). *See also* Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty and America's Eroding Industrial Base*, 81 GEO. L.J. 1757 (1993).

7. *See* Robert F. Housman & Paul M. Orbuch, *Integrating Labor And Environmental Concerns Into The North American Free Trade Agreement: A Look Back And A Look Ahead*, 8 AM. U.J. INT'L L. & POL'Y 719 (1993).

8. *See* CRAIG E. RICHARDSON & GEOFF C. ZIEBART, RED TAPE IN AMERICA: STORIES FROM THE FRONT LINE 98 (1995). *See also* Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233 (1991).

9. *See* 30 U.S.C.A. §§ 801-804 (1998).

10. *See* KY. REV. STAT. ANN. §§ 352.010 to 352.9901 (Banks-Baldwin 1997); 225 ILL. COMP. STAT. 705/1.01 to 1.18 (West 1998); IND. CODE ANN. §§ 22-10-1.5-1 to 1.5-8 (West 1998); 52 PA. STAT. ANN. tit. 52, § 701 (repealed 1961); W. VA. CODE §§ 22A-1A-11 to 22A-1A-35 (repealed 1994).

cluding fines, civil penalties, injunctions, and prison sentences. Moreover, federal and state governments vigorously enforce these statutes. Unions and employers often note that work safety standards are much higher in the United States than in the developing nations. Employers in the less developed countries are permitted to work more dangerously, and hence more efficiently. If workers in these countries are injured or killed on the job, it costs employers much less than in the United States. These circumstances give developing countries an unfair advantage in competing with the United States.[11]

Additionally, economic conditions and employment traditions in the developing countries differ from those in the United States. Leaders in developing countries have been quick to point out that the relocation of businesses to their countries is nothing but an application of the doctrine of comparative advantage. If labor costs are $20 per hour in the United States and $3 per hour in southeast Asia, part of the comparative advantage of Southeast Asia is its abundant supply of low cost labor. A similar argument may be made about the cost of government safety regulations. The situation is no different from the managerial decisions made by companies that decided to move from a high wage country to a low wage country within the European Community.[12]

According to economists, manufacturing operations tend to gravitate toward the place where labor costs are the least, everything else being equal.[13] This circumstance has led to concern about a downward spiral of wages in manufacturing and a general lowering of living standards. This is a threat to work place democracy.[14] In recent years, Southeast Asia has prospered [prior to the recent currency crisis] due to a huge influx of manufacturing jobs in places like Thailand and Singapore. Today, however, economists point out that those jobs are being lost to countries having even lower wage rates, such as China and India. These economists are concerned that the downward pressure on wages will reverberate throughout the world, thereby decreasing the standard of living of workers everywhere. In the end, the consequences of this development will be harmful to the world econ-

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11. *See* Matt Witt & Steve Trossman, *NAFTA, Round Two*, 1 WORKING USA, Oct. 1997, at 30, 34. The accuracy of this assertion has been questioned. *See also* Roy J. Adams & Parbudyal Singh, *Early Experience with NAFTA's Labor Side Accord*, 18 COMP. LAB. L.J. 161 (1997).

12. *See* Bernd Baron von Maydell, *Two Tales of Trade*, ECONOMIST, July 19, 1997, at 68. See also Bernd Baron von Maydell, *The Impact of the EEC on Labor Law*, 68 CHI.-KENT L. REV. 1401 (1993), where it is argued that within the EC, low wage countries should be allowed to benefit by reason of their low wage scales. *See also* Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHI.-KENT L. REV 1427 (1993).

13. *See* Collinsworth, *supra* note 5. The basic comparative advantage arguments are summarized in *Schools Brief*, ECONOMIST, Oct. 17, 1997, at 79.

14. *See* SAMUEL ESTRICHER, LABOR LAW REFORM IN A WORLD OF COMPETITIVE PRODUCT MARKETS, IN THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION 13 (Matthew W. Finkin ed., 1994).

omy.[15] However, not all economists agree with that analysis.[16]

Unions, and others concerned about these matters, have responded largely in the political and legislative arenas. These groups have attempted to influence United States policy toward the developing nations. The United Auto Workers (UAW) played a central role in the saga which led to Japan's voluntary decision to limit the export of cars to the United States.[17] Unions contributed to the effort that prevented the recent "fast track" trade legislation from coming to a vote in Congress.[18] The Overseas Private Investment Corporation has restrictions against guaranteeing against political risks in some countries with poor human relations records. Labor argued for these restrictions.[19] However, unions have not been successful in some other areas such as preventing the Export/Import Bank from financing transactions that the unions believed ultimately would hurt some American workers.[20] These groups also have urged the United States and international organizations to enter into international agreements containing provisions for improved wages, workers' compensation, and worker safety provisions. The International Labor Organization (ILO) long has been a leading advocate of improving workers' compensation programs and working conditions in developing countries. However, its power to persuade developing countries to sign agreements providing for improved wages, workers' compensation programs, and safer working conditions is limited.

It is unlikely that developed nations and the less developed nations will agree on some form of a worldwide scheme providing relatively-equal labor costs in the near future. Nor are they likely to agree on a regime of worker safety standards such as those currently in place in the United States. Devel-

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15. *See* ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS (1997); Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993); Les Blumenthal, *Cheap Labor Has U.S. Companies Racing for Foothold in Indonesia*, SACRAMENTO BEE, Nov. 12, 1994, at 22.

16. *See Uruguay Round Experience, Services Will Dominate Future Trade Agenda*, 12 INT'L TRADE REP. (BNA) No.7 (Feb. 15, 1995); David Kennedy, *Receiving the International*, 10 CONN. J. INT'L L. 1 (1994); Katherine Van Wezel Stone, *Labor and the Global Economy; Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L., 987 (1995). *See also* Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'Y INT'L BUS. 165 (1993); Karen Vossler Champion, *Who Pays for Free Trade? The Dilemma of Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L L. & COM. REG. 181 (1996).

17. *See* MURRAY L. WEIDENBAUM, BUSINESS, GOVERNMENT AND THE PUBLIC 277-311 (3d ed. 1986). *See also* Reynolds, *Unions and Jobs: The U.S. Auto Industry*, 7 J. LAB. RES. 103 (1986).

18. Brennan Van Dyke, *Commentary, Clinton Reaped What He Sowed: Nothing Trade: Fast-track Failure Stems from the President Not Living up to his Promises to Enact Socially Responsible Trade Policy*, L.A. TIMES, Nov. 17, 1997, at B5.

19. *See* OVERSEAS PRIVATE INV. CORP., PROGRAM HANDBOOK 8, 23-24 (1995). *See also* James Zimmerman, *The Overseas Private Investment Corporation and Worker Rights: The Loss of Role Models for Employment Standards in the Foreign Workplace*, 14 HASTINGS INT'L & COMP. L. REV. 603 (1991).

20. *See generally* EXPORT/IMPORT BANK, GUIDELINES FOR FINANCING U.S. EXPORTS TO THE PEOPLE'S REPUBLIC OF CHINA (1998).

oping countries oppose such agreements because it would eliminate an important part of their comparative advantage. Consumer groups in the developed countries might also oppose such treaties because they would increase the cost of goods imported into the United States. Thus, it seems unlikely that aggressive American policies or the use of treaties will raise wage rates and working standards in the developing countries to the levels found in the United States.

II. THE BASIC PROBLEM OF COAL MINERS

In view of the foregoing circumstances, aside from political pressure, what strategies exist for unions to decrease the competitive disadvantage of employers in high wage countries when such competitive disadvantage flows from higher wages, safer working environments, and better workers' compensation programs? Unions in the United States have not given sufficient thought to alternative strategies. Over the years, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), on behalf of unions like the United Auto Workers, the International Association of Machinists, and the unions in the garment trades, has attempted to deal with this problem. However, looking back on the 1970s and 1980s, the union response to globalization sometimes seemed misguided and often ineffective. The United Mine Workers of America (UMWA), specifically, has not given sufficient thought either to the problem of global competition in the coal market as it affects miners in the United States, or to strategies for protecting its members from the adverse consequences of global competition.

Moreover, little of a scholarly nature has been written about strategies, other than domestic law reform and international agreements, for minimizing labor costs and working conditions as an element of competition at the international level. The legal scholarship in this area has tended to focus on general law reform and international agreements and has tended not to deal with specific strategies for specific industries.

What, then, can the UMWA do unilaterally to decrease the competitive advantage which China's coal industry enjoys because of its lower wages, lower workers' compensation costs, and its horrible mine fatality rate? If employee interests in the developed countries can pursue strategies to increase the cost of killing and injuring coal miners in less-developed countries like China, that would tend to reduce the advantage these countries have regarding labor costs. Unions and employee interest groups in the developed countries could use their countries' negligence and products-liability laws to pressure less-developed countries into taking steps to decrease the differences in workers' compensation benefits and to improve worker safety standards. Lawfully assisting the estates of deceased workers in bringing negligence and product-liability actions in the United States for deaths arising from negligence or the use of defective products in the less-

developed countries would accomplish this result.

Within the United States, workers' compensation costs can be a substantial part of total production costs. Until recently, workers' compensation costs have risen quite rapidly.[21] When companies are evaluating prospective locations for manufacturing operations, in addition to calculating anticipated direct labor costs, they also calculate anticipated workers' compensation costs. Within the United States, the cost of workers' compensation premiums alone has been the deciding factor in relocation decisions of some companies.[22] In Kentucky, before recent changes in the workers' compensation law, the total annual cost of the workers' compensation program was $1.1 billion.[23] Nearly one half of this was paid to injured coal miners who comprise about two percent of Kentucky's workforce. Coal mine owners uniformly argue that workers' compensation costs are a substantial expense in the production of coal, especially in the case of underground mining. Historically, high workers' compensation costs in the coal industry were generally attributed to the dangerous nature of underground coal mining and coal miners' pneumoconiosis.[24] Recently, several coal-producing states have modified their workers' compensation statutes. This was in response to the employer and economic development interests that convinced the legislatures that high workers' compensation costs were an impediment to economic development. Evidently, the cost of a workers' compensation program can be great enough that economic development and employer interests see it as having an impact on business location decisions within the United States.[25]

These assertions are not simply those of a law professor with a vivid imagination. The chief inspector of the United States Mine Safety and Health Administration has asserted flatly that American coal companies look at workers' compensation costs and safety standards in making mine location decisions. In arguing for uniform safety standards at the international level, he said, "[i]f China does not have any safety rules, Peabody [one of the largest coal companies in the United States] comes back to me and says

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21. See West's Legal News Staff, *Workers Comp Costs Falling Nationwide,* WEST'S LEGAL NEWS 13548, Dec. 19, 1996, *available in* 1996 WL 725927, for abstracts on several articles detailing state efforts to cut workers compensation costs.

22. *See* Allen G. Breed, *Kentucky, Once No. 1 in Coal, Ranks 3rd Now,* THE COURIER-JOURNAL, Nov. 10, 1996, at 4B; Robert T. Garrett, *Workers' Comp Surcharges to Rise Unless Legislators Make Changes,* THE COURIER-JOURNAL, Nov. 14, 1996, at 6B.

23. *See* Robert T. Garrett, *Workers' Comp: Patton Sides With Business Labor Allies, Lawyers Unhappy With Position,* THE COURIER-JOURNAL, Nov. 15, 1996, at 1A.

24. *See infra* Part II.C.

25. *See* Robert T. Garrett, *Workers' Comp Plan by Patton Draws Fire from Labor, Lawyers, Foes Say Proposals May Help Insurers, But Not Employers,* THE COURIER-JOURNAL, Nov. 22, 1996, at 1C; Emily A. Speiller, *Assessing Fairness in Workers Compensation Reform: A Commentary on the 1995 West Virginia Workers' Compensation Legislation,* 98 W. VA. L. REV. 23 (1995); Paul E. Jones, *House Bill 928: Solution or Band-Aid for Kentucky Workers' Compensation?,* 22 N. KY. L. REV. 357 (1995).

'Look at China. We'll just go there.'"[26]

In some other industries, the cost of defending negligence and products-liability actions, as well as the cost of product-liability insurance, has had a significant impact on the competitiveness of the industry. Dealing with this matter was a significant part of the agenda of the Bush administration's Council on Competitiveness.[27] General aviation aircraft manufacturers probably have been the most vocal industry in the nation in arguing that product liability costs were driving them out of business.[28] The question for the American coal miner is this: if large negligence and product liability damage awards make American industries less competitive, might not increasing monetary payments to workers in less developed countries who are injured or killed as a result of negligence or the use of defective products work to raise production costs in these countries, thereby decreasing their competitive advantage? Raising safety standards for workers everywhere, regardless of nationality or union affiliation, benefits the world economy in the view of worker advocacy groups. It is also in the best economic interest of union workers.

A. Wages and Workers' Compensation Benefits Compared

The United States, Canada, Great Britain, Germany, and Australia are the major coal producers in the developed world. These countries have comprehensive workers' compensation programs and coal mining safety regulations. All these countries have wages and workers' compensation benefits for industrial accidents, disease, and death that are high in comparison to China. The accident and fatality rates in the mining industry of these five developed coal-producing countries have improved dramatically over the past twenty or thirty years and the fatality rate is only a small fraction of that of the Chinese coal industry.[29] In all five of the developed countries, the conventional wisdom among mine managers is that underground coal mining, properly done, is a relatively safe undertaking. Coal miners need not be injured or killed in large numbers if they follow accepted safety rules, and if they use good equipment. In the developed countries, most mining accidents occur as a result of safety violations.[30] It is efficient to mine coal safely in the developed countries, in part, because of the high cost of accidents and job-related deaths. In China, by contrast, the very low cost of killing workers may make the killing of workers less costly than improving mine safety.

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26. *Mine Chief Seeks Safety Overseas*, CHARLESTON DAILY MAIL, July 8, 1994, at 10A.

27. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991).

28. *See* Timothy S. McAllistar, *A "Tail" of Liability Reform: General Aviation Revitalization Act of 1994 & the General Aviation Industry in the United States*, 23 TRANSP. L.J. 301 (1995).

29. *See infra* Part II.B.

30. *See International Labour Organization Safety and Health in Mines Report*, vol. 1, at 3-18 (1994).

Today, China is the world's leading coal producer. It has the largest recoverable coal reserves in the world behind the United States and the former Soviet Union.[31] Its proven reserves can meet its current demand levels for nearly 1000 years.[32] In 1984, China produced about seventy-nine million tons of coal.[33] In 1992, coal accounted for approximately seventy percent of China's energy consumption.[34] China's Director of Policy and Law Department of the Ministry of Coal Industry, Ma Dequing, has estimated that China's production will increase to 1.4 billion tons annually by the year 2000.[35] The number of employees in the Chinese coal industry has increased from approximately 4.9 million in 1988 to 5.4 million in 1993.[36] Additionally, the profit picture of Chinese mining has made steady improvement in recent years.[37] This is in sharp contrast with the United States and other developed countries where the number of employees in the coal mining industry has steadily declined in recent years. There were about 166,000 people employed in coal mining in the United States in 1988. That figure dropped to 141,000 in 1993 and the trend is continuing.[38] Notwithstanding record low unemployment in the United States, unemployment in the coal mining counties of Kentucky and West Virginia remains far above state or national averages.[39]

While China is not currently a major exporter of coal in the sense that it exports a large percent of its total coal production, statements from leading officials leave no doubt that it expects to increase coal exports substantially over the next few years. Mr. Ma Dequing has said: "China exported 25 million tons of coal in 1994 and 27 million tons of coal in 1995. This year [1996], exports are expected to reach 30 million tons. Total coal exports should increase to 50 million tons by the year 2000."[40]

In recent years, China's coal exports produced $6.7 billion in foreign

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31. *See* WORLD ENERGY COUNCIL: 1992 SURVEY OF ENERGY RESOURCES AT THE LONDON WORLD ENERGY CONFERENCE (1992).

32. *See* 20 CHINA FACTS & FIGURES ANNUAL HANDBOOK 240 (1996).

33. *See* ALMANAC OF CHINA'S ECONOMY 180 (1985/1986).

34. *See Recent Developments in the Coalmining Industry Report*, 1 INT'L LABOUR ORG. at 10-11 (1995) [hereinafter ILO Rep.]. *See also U.S. Department of Energy, Energy Outlook Rep.* (visited Nov. 11, 1997) <http://www.eia.doe.gov./emeu/pgem/ch6.html>.

35. *See* Ma Dequing, *China's Coal Industry; A Good Opportunity for Foreigners to Invest*, CHINA L.Q., No. 008, Sept. 1996, at 91.

36. *See* ILO Rep., *supra* note 34, at 22.

37. *See* Asia Pulse Analysts, *Profile—China's Coal Industry*, ASIA PULSE, Aug. 27, 1997, *available in* 1997 WL 13560354.

38. *See* ILO Rep., *supra* note 34, at 22.

39. *See* Memorandum from the Kentucky State Data Center (Mar. 10, 1998) (on file with author). *See also* Memorandum from the West Virginia Development Office (Feb. 1988) (on file with author); U.S. Dept. of Labor Statistics, *Employment and Earnings*, at Table C-2 (Jan. 1988).

40. Dequing, *supra* note 35, at 91. *See also China Opens Up Exports*, INT'L COAL REP., Oct. 16, 1992, at 16; *Beijing Seeks Foreign Funds for Coal Projects*, FBIS, Xinhua, Sept. 8, 1995 (FBIS Ind. DRCHI 176_N_95009); *U.S. Invests $4 Billion in Coal Mining*, FBIS, Frankfort, Xinhua, Aug. 10, 1995 (FBIS In. DRCHI 155_N_95009).

exchange for the state.[41] Effective January 1, 1997, China revised its Mineral Resources Law "to facilitate modernization of the mining sector, and to attract increased foreign investment."[42] On April 4, 1997, *The Asia Wall Street Journal* reported that two Chinese companies had been approved for listing on the overseas stock exchange. A reason for this approval was the profitability of the two companies.[43] One reason that China may not become a major exporter of coal in the next few years is that its domestic needs may increase at such a rate that it is forced to use most of its coal production domestically. Another reason is that the development of mines and necessary infrastructure may proceed more slowly than expected.[44] The available evidence clearly indicates, though, that China is intent on becoming a major player in the world coal market. As will be seen, it is entering that market with a huge labor cost advantage over its developed world competitors.

Historically, coal mining has been a labor-intensive industry where wages have been a significant part of the total cost of production. In recent years, coal mining in the United States has become less labor-intensive because of technological changes. There is a great difference between the wages paid to Chinese coal miners and those paid to miners in the developed countries. The overall labor cost differential between the United States and China is about seventeen to one.[45] The average annual wage of staff and workers in the "excavation occupations" in 1993 was 3711 yuan.[46] Presently, the exchange rate is about 8.3 yuan per US$1. Those employed in mining appear to have made an average wage by Chinese standards, more than those engaged in agriculture and forestry, but less than those engaged in transportation and telecommunications.[47] In China, some coal mines are operated by the national government. Provincial and city governments operate others. The employees in the national mines are paid higher wages than employees working in the provincial and city mines.[48] In 1994, the average annual wage of staff and workers in the excavation sector increased to 4679 yuan.[49] The

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41. *See* Dequing, *supra* note 35, at 91. *See generally China Opens up Exports*, INT'L COAL REP., Oct. 16, 1992, at 16; *China Seeks Investors to Develop & Improve its Coal Sector*, COAL WK. INT'L, Oct. 22, 1996, at 3.

42. Steven J. Trumper et al., *China Revises Mining Law*, 9 ASIA LAW 4, 28 (1997). *See also* OSLER, HOSKIN & HARCOURT, CHINA'S REVISED MINERAL RESOURCES LAW (visited Sept. 10, 1997) <http://www.osler.com/resources/ch/na.html>.

43. *See China's Yanzhou Mining Group Is Cleared to List Shares Abroad*, ASIA WALL ST. J., April 4, 1997, *available in* 1997 WL-WSJA 3800859.

44. *U.S. Department of Energy, Energy Outlook Report* (visited Oct. 7, 1997) <http://www.eia.doe.gov/emeu/pggm/ch6.html>

45. *See* Mao Chang Li, *Legal Aspects of Labor Relations in China: Critical Issues for International Investors*, 33 COLUM. J. TRANSNAT'L L. 521 (1995).

46. STATE STATISTICAL BUREAU OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA STATISTICAL YEAR BOOK 1994, 127 (1994).

47. *See id.*

48. *See id.* at 131.

49. *See* STATE STATISTICAL BUREAU OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA STATISTICAL YEAR BOOK 1995, 114 (1995).

annual wage of the workers in the state owned units in excavation industries in 1994 was 4863 yuan.[50] The average annual wage of staff and workers in urban collectives in the excavation field was 2793 yuan.[51]

Wages in other coal producing countries are much higher than those in China. In the United States, the average hourly rate for miners working under the National Bituminous Coal Wage Agreement in 1993 was US$17.23 per hour. Based on a 1600-hour work year, an American miner would earn more than US$27,000 per year working under the United Mine Workers' National Agreement. In 1993, the average earnings of a coal miner in New South Wales was approximately AUST$1200 per week. In Canada, hourly wage rates ranged from CAN$14.98 to CAN$24.58 per hour. Coal miners in Great Britain and Germany are, likewise, well paid.[52] Consequently, extremely low wage rates in China, standing alone, give it a large competitive advantage over other major coal producers insofar as direct labor costs are concerned. However, coal mines in China are far less efficient in the utilization of labor than the mines in the developed countries. Nevertheless, China's low wage rate is, no doubt, partially reflected in the price of Chinese coal on the world market. On May 6, 1997, the first quarter average coal price at Hampton Roads, Virginia, was US$43.65 per ton.[53] The average Chinese price quoted was US$34.90 per ton.

The difference between workers' compensation benefits in China and the United States is also substantial. An employee in China who sustains a work-related injury or illness is entitled to full pay during the period of treatment. The state also pays the employees' medical expenses. The death benefit for a Chinese worker who is killed on the job, until recently, was funeral expenses and a lump sum payment of three months wages. Dependents are entitled to twenty-five to fifty percent of the deceased's salary until the dependents either reach working age or die.[54] Death benefits for coal miners were recently raised to 50,000 yuan (about US$6400).[55]

The death benefit for a worker killed in Kentucky is US$25,000. In addition, the widow or widower of the deceased is entitled to fifty percent of the average weekly wage of the deceased until death or remarriage.[56] Similar benefits are paid in other coal mining states.[57] Clearly then, Chinese workers' compensation costs do not add nearly as much per injury or death to the total production costs as do workers' compensation costs in the United

50. *See id.* at 118.
51. *See id.* at 120.
52. *See* ILO Rep., *supra* note 34, at 86-92.
53. *See ENEL Seen Closing Deals With Colombia, China*, COAL WK. INT'L, May 6, 1997, at 4.
54. *See* HILARY K. JOSEPHS, LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY 45 (1990).
55. *See* CHINA BUSINESS INFORMATION NETWORK, Apr. 3, 1997.
56. *See* KY. REV. STAT. ANN. §§ 342.750(1)(a), 342.750(6) (Banks-Baldwin 1997).
57. *See* 820 ILL. COMP. STAT. 305/7 (West 1993); IND. CODE ANN. § 22-3-7-11 (West 1998); 77 PA. CONS. STAT. ANN. § 561 (WEST 1991); W.VA. CODE § 23-4-10 (1994).

States.

B. Mining Accidents Compared

Historically, underground coal mining has been one of the most dangerous occupations in the world. The ILO has reported that the fatality rate in all of China's coal mines is about 550 times that of the underground coal mine fatality rate in the United States for the years 1988 to 1993. Deaths in Chinese coal mines were 6.1 per million tons of coal mined from 1984 to 1993. The comparable figure for the US was .11 deaths.[58] On October 15, 1994, the *South China Morning Post* reported that Han Dongfang, a prominent Chinese labor leader, asserted that 10,000 miners were killed in Chinese mines in 1993.[59] The ILO received reports that there were over 10,000 coal mine fatalities in China in 1993.[60] The Chinese government has reported that more than 3300 workers died in Chinese mines in 1995.[61] The ILO has expressed skepticism about the official Chinese data.[62] The "Annual Forecast" of *Coal Age* stated that approximately 9974 miners were killed in China's coal mines in 1996.[63] Other reports of fatalities in the Chinese coal industry are as high as 15,000 in a single year.[64] Between January 1, 1994, and May 29, 1996, the Foreign Broadcast Information Service monitored broadcast reports of ten coal mine explosions in China in which there were multiple fatalities. It also reported other types of serious mining accidents.[65] By any measure, the mine safety record of China is much worse than that of any of the major coal producers among the developed nations. As has been seen, killing miners in China does not cost much money. Being able to do so may work to the advantage of the Chinese coal industry in competing in the international market.

By contrast, the number of fatal mine accidents in the United States has decreased dramatically in recent years. In the late 1970s and early 1980s, there were about 100 fatalities per year in the United States. Between 1990 and 1996, 337 people were killed in or around coal mines in the United States.[66] In 1995, forty-seven people were killed in coal mines in the

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58. *See* ILO Rep., *supra* note 34, at 44.

59. *See* Chan Wai-Fong, *Mining Deaths 'Soar to 10,000'*, S. CHINA MORNING POST, Oct. 15, 1994, at 10.

60. *See* ILO Rep., *supra* note 34, at 42.

61. *See* Frank Fisher, *Chinese Mine West for Ideas*, ST. LOUIS POST DISPATCH, Aug. 15, 1996, at 1.

62. *See* ILO Rep., *supra* note 34, at 42.

63. *Union Pacific Shipping Problems Continue*, COAL AGE, Jan. 30, 1998, *available in* 1998 WL 10345834.

64. *See Mine Chief Seeks Safety Overseas*, CHARLESTON DAILY MAIL, July 8, 1994, at 10A.

65. These broadcasts from Communist China were monitored between January, 1993, and May 1996. *See* Search of Foreign Broadcast Information Service CD ROM, Jan. 1993-May 1996, (search for records containing "Accidents," "Safety," "Mining," and "Coal").

66. *See* Fran Ellers, *Pyro Explosion Shook More Than Just a Mine. Scrutiny Made*

United States and in 1996, thirty-nine people died in mining accidents.[67] These low fatality figures are widely attributed to the strict enforcement of safer work practices in the United States, as mandated by state and federal mining laws.[68]

A number of factors contribute to the high accident and fatality rates in Chinese coal mines.[69] Much of the coal mining in China is underground mining. Geological conditions in China are different from those in the United States. Many more people work underground in China's coal mines than in coal mines in the United States. Today, a workforce of 500 employees in the United States is relatively average. Workforces of several thousand underground employees are common in China. Having larger numbers of underground workers increases the number of injuries and deaths when an explosion or cave-in occurs.

The United States has detailed regulations dealing with underground mining. These regulations require adherence to strict roof-control plans and prohibit miners from working under an unprotected or unsecured roof.[70] Mine safety experts from the United States who have visited Chinese coal mines have stated that in China, roof-control plans and safety systems pertaining to coal mine roofs are non-existent or primitive in comparison to those in the United States.[71]

The Chinese government does not regulate the coal mining industry in the same detailed way that the states and federal governments regulate American coal mining. China revised its coal mine safety law in 1992.[72] However, even as modified, the regulatory regimes of the two countries are totally different. While this article is not intended to be a comparative analysis of the Chinese and American mine safety regulations, a comparison of the provisions of the laws and practices of the two countries dealing with methane gas illustrates fundamental differences between the two regulatory systems. The American law provides, in part:

Coal Jobs Safer, But Blasts Still Killing Miners, THE COURIER-JOURNAL, June 16, 1996, at 18A.

67. *See* Memorandum from the Mine Safety and Heath Administration of the United States Department of Labor (Mar. 10, 1998) (on file with author). The mine fatalities in the United State since 1973 are 132 in 1973; 133 in 1974; 155 in 1975; 141 in 1976; 139 in 1977; 106 in 1978; 144 in 1979; 133 in 1980; 153 in 1981; 122 in 1982; 70 in 1983; 125 in 1984; 60 in 1985; 89 in 1986; 63 in 1987; 53 in 1988; 60 in 1989; 66 in 1990; 61 in 1991; 55 in 1992; 47 in 1993; 45 in 1994; 47 in 1995; and 39 in 1996. *Id.*

68. *See* Philip Cozart, *Safety and Health in Coal Reports*, 12 INT'L LAB. OFF. (1994). *See also* Philip Cozart, *Questions are Root of Safety Analysis*, ENGINEERING & MINING J. COAL, Mar. 1996-July 1997, at 68.

69. *See* Philip Cozart, *Mine Safety and Loss Control Management in China*, 37 PROF. SAFETY 25 (1992).

70. 30 C.F.R. § 75.203 (1998).

71. Interview with Dr. Phillip Cozart (Sept. 14, 1997); Interview with Dr. Jerry Tien (Feb. 17, 1998).

72. *See* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1990-1992 475 (compiled by Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China) (1992).

> At the start of each shift, tests for methane shall be made at each working place immediately before electrically operated equipment is energized. Such tests shall be made by qualified persons. If 1.0 volume per centum or more of methane is detected, electrical equipment shall not be energized, taken into, or operated in, such working place until the air therein contains less than 1.0 volume of methane.[73]

By contrast, article eighteen of the Chinese Mining Law provides, in part:

> Mining enterprises must adopt preventive measures against the following hidden dangers of accidents that jeopardize safety:
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> (1)roof falling, slabbing, slope sliding, and surface collapsing;
>
> (2)gas blast and coal dust explosion.[74]

For all practical purposes, this United States statute prohibits any operations when the methane level is in excess of one percent. The Chinese law allows mining operations to occur under much more dangerous conditions than would be acceptable in the United States.

The last major mine explosion in the United States occurred at the Pyro mine in Western Kentucky on September 13, 1989, in which ten miners were killed. That explosion, as is nearly always the case, was caused by a build-up of methane gas in the mine. The investigation of that accident revealed that the explosion would not have occurred had mine management followed state and federal mining regulations. Three company officials received jail sentences of up to eighteen months in connection with that explosion and the company was fined.[75] Reports of Chinese mining accidents do not indicate that China takes comparable action against mine managers who allow the existence of dangerous conditions in Chinese mines.[76] It has been known for years that a build-up of methane gas in a coal mine causes explosions. However, the regulatory response to this fact is different in the two countries.

Another work practice that is different in the United States and China concerns the matter of an employee leaving an underground mine when a dangerous condition is encountered. For years, by law, union contract, and industry practice, miners in the United States have had a right to leave a dangerous work site in a coal mine.[77] Miners jealously guard this right. State

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73. 30 U.S.C.A. § 863(g)(1) (1998).

74. THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 72, at 475.

75. *See* Ellers, *supra* note 66, at 18A.

76. See generally CHARLESTON DAILY MAIL, *supra* notes 64, where the author reproduced copies of all the broadcasts monitored by the Foreign Broadcast Information Service. None of the reproduced broadcasts gave any indication that anyone was punished in connection with those accidents.

77. *See* HOW ARBITRATION WORKS 977-78 (5th ed. 1977). *See also* KY. REV. STAT. ANN. § 352.430 (Banks-Baldwin 1997); 30 U.S.C.A. § 813 (1998).

and federal law authorizes mine inspectors summarily to close unsafe mines or parts thereof.[78] Article III of the National Bituminous Coal Agreements from 1974 onward have contained the following provisions:

> (1) No Employee will be required to work under conditions he has reasonable ground to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. When an Employee in good faith believes that he is being required to work under such conditions he shall immediately notify his supervisor of such belief and the specific conditions he believes exist. Unless there is a dispute between the Employee and management as to the existence of such condition, steps shall be taken immediately to correct or prevent exposure to such condition utilizing all necessary Employees, including the involved Employee.
>
> (2) If the existence of such condition is disputed, the Employee shall have the right to be relieved from duty on the assignment in dispute.[79]

Chinese law proceeds on an entirely different theory. Article twenty-five of the Chinese Mining Law provides, in part:

> Where the management of an enterprise gives a command contrary to the established rules and compels workers to operate under unsafe conditions, or, major hidden dangers of accidents and occupational hazards are found in the course of production, the trade union has the right to put forward proposals for a solution: where the life of the workers and staff is in danger, the trade union has the right to propose to the management that the workers and staff be evacuated from the dangerous site in an organized manner, and the management must make a decision without delay.[80]

The safety problem is simply this: what happens if an employee thinks there is a life-threatening condition in his work area of the mine, the employee or the union makes a proposal to evacuate the mine, and mine management disputes the existence of the life threatening condition? In the United States, the employee has a right to leave the area immediately and any discussion occurs *after* the employee has left the mine.[81] In China, the union has the right to "propose to management that the workers and staff be evacuated." This is a *major* difference in practice. Clearly, the American

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78. 30 U.S.C.A. §§ 814(d), 817 (1998). The federal statute refers to such orders as "*withdrawal orders.*" 30 U.S.C.A. §§ 814(d), 817(a). See also 1 M.S.H.A. PROGRAM POLICY MANUAL §§ 104-107 for the number of withdrawal orders.

79. National Bituminous Coal Agreement, Art. III (1974).

80. THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 72, at 475.

81. The author has served as arbitrator in several mine-safety disputes. An American mine foreman would never think of requiring a miner to stay underground if the employee believed his/her personal safety was in danger. To do so would invite an immediate wildcat strike.

practice is safer. Perhaps the Chinese practice is more efficient.

China's problem is that mining coal safely takes time and costs money. For example, the Federal Mine Regulations provide that if the main fan that ventilates a mine is inoperable for fifteen minutes, the entire mine must be evacuated.[82] As a practical matter, when a mine is evacuated, an entire eight-hour shift is lost. By the time the mine is inspected and the employees can re-enter the mine, the shift is over.[83] Evacuating a mine decreases production and increases costs. However, the failure to follow these procedures can cause an explosion which kills coal miners.

American mine safety experts who have visited underground coal mines in China report that Chinese coal miners regularly use equipment that, by American standards, is defective, and engage in work practices that would violate American safety regulations. This is particularly true regarding working under unprotected top, roof-control plans and ventilation plans. Designing inherently unsafe mines, using defective equipment, and permitting dangerous work practices could furnish the basis for tort actions in the United States if an American company is involved and if someone is killed as a result thereof.[84]

C. Pneumoconiosis

In addition to injuries and fatalities resulting from mine accidents, pneumoconiosis ("black lung") has been a very costly occupational disease in the United States. Pneumoconiosis is a respiratory disease caused by inhaling coal dust. Modern mining equipment creates huge amounts of coal dust unless the machinery has dust control devices. Reducing the employees' exposure to coal dust virtually can eliminate the risk of contracting this disease. The United States has detailed regulations requiring dust control devices on mining equipment.[85] Employee exposure to dust is also monitored. Employees who have received excessive exposure to coal dust are not permitted to work in dusty areas in and around a mine.[86] It should be obvious that the prevention of pneumoconiosis increases production costs.[87]

The ILO has estimated that approximately half of the Chinese coal miners have been exposed to coal dust in quantities that present a risk for pneumoconiosis. Two hundred forty thousand coal miners are suspected of having the disease. Accumulated deaths from pneumoconiosis are 38,000, with

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82. 30 C.F.R. § 75.313 (1998).

83. 30 C.F.R. § 75.323 (1998).

84. Interview with Dr. Philip Cozart (Sept. 22, 1996); Interview with Dr. Jerry Tien (Oct. 14, 1996).

85. 30 C.F.R. § 90.100 (1998).

86. 30 C.F.R. § 90 (1998).

87. *See* William S. Mattingly, *Federal Black Lung Update*, 96 W. VA. L. REV. 819 (1994). *See also* Russell G. Donaldson, Annotation, *Worker Compensation: Liability of Successor Employers for Disease or Condition Allegedly Attributable to Successive Employments*, 34 A.L.R. 4th 958 (1981); 30 C.F.R. §§ 70.1 to 70.1900 (1998).

an annual death rate from pneumoconiosis of 2500.[88] If the Chinese are not taking steps to reduce dust levels in and around coal mines so as to prevent pneumoconiosis, and if the actual costs of the disease to China are not great, then the Chinese have an advantage over their American competitors in producing coal. Significant differences between the mining practices of China and the United States contribute to China's being able to produce coal at less cost, in part, because of the Chinese government's willingness to allow coal miners to work under conditions that cause large numbers of deaths from accidents and pneumoconiosis.

D. Foreign Investment in China

As mentioned above, China recently announced a policy of encouraging increased foreign investment in its coal industry.[89] American coal companies, manufacturers of mining equipment, second-hand equipment dealers, and mine engineering firms have responded to China's overtures. In recent years, American companies have been constructing and operating mines as joint ventures, selling many types of new and used mining equipment, and design and engineering services to the Chinese.[90] The Chinese are sending representatives to the United States in order to purchase equipment and technology.[91] At least one American governor has visited China for the purpose of opening that market for American coal interests.[92] In 1994, a joint venture agreement was signed between Custom Coals and the Chinese Ministry of Coal Industry for the construction of a 500-mile coal slurry pipeline.[93] Island Creek Coal Company began operating a mine under a joint venture agreement with China in the mid-1980s.[94] This project involves the use of technology developed in the United States.[95] Another large American firm involved in Chinese coal production is Arch Coal China Corporation, which entered into a joint venture with the Chinese government in 1995.[96] Other companies have given the Chinese technical advice on all aspects of coal mining. Still others have sold all kinds of new and used mining equip-

88. *See* ILO Rep., *supra* note 34, at 82-83.

89. *See* Trumper et al., *supra* note 42 and related text.

90. *See In Brief . . . Clutha Sets Coal Project in China*, COAL WK. INT'L, JULY 26, 1994, at 10.

91. *See* Ed Peeks, *Sales Abroad Pay Off at Home*, CHARLESTON GAZETTE, Oct. 8, 1996, at 4D.

92. *See Caperton Hopes to Forge Business Ties in the Far East*, CHARLESTON GAZETTE, March 30, 1995, at 7A.

93. *See Custom/China Agree 15 mt/yr Slurry Pipeline*, INT'L COAL REP., Aug. 19, 1994, at 7.

94. *See International An Tai Boa Mine Partners Work to Overcome Development Obstacles*, COAL WK. INT'L, Feb. 24, 1988, at 3; *Market Watch An Tai Boa Partners in Marketing Dispute*, COAL WK. INT'L, July 13, 1988, at 9.

95. *See Custom/China, supra* note 93, at 7.

96. ARCO Website (visited Nov. 10, 1997) <http://www.arco.com/awe/>.

ment to China.[97] United States Department of Commerce records reflect that exports of mining equipment from the United States to China in 1996 totaled $93 million.[98] The evidence is clear that over the next several years there will be increased sales of many types of coal mining equipment, coal-related technology, and engineering services to China by United States companies.[99] The participation of United States companies in China is becoming a major force in the world coal market and should be a matter of concern for American coal miners and their unions. This involvement furnishes a basis for exerting pressure on American companies for the purpose of improving working conditions in Chinese coal mines and perhaps preserving mining jobs in the United States.

III. GLOBAL COMPETITION AND UNITED STATES COAL MINERS

Until very recently, the American coal mining industry has not had to deal with foreign competition in the United States market. However, that is changing. Recently, mines in Columbia, where wage rates are much lower than in the United States, began shipping coal to electric utilities in Florida.[100] *Coal Week International* has reported that Indonesia will likely become an exporter of coal to the United States in the near future. It is presently Australia's major competitor in Japan and the other East-Asian Markets.[101] Given these circumstances, together with American involvement in the Chinese coal industry, it is only prudent to assume that China will become an exporter of coal to the United States. Coal companies in the United States and their employees are about to encounter the same kind of foreign competition that manufacturing industries have faced for twenty-five years. The competition will come from China, Columbia, and Indonesia. Comments by officials of the UMWA and a review of *United Mine Workers Journal* lead to the conclusion that this union has done little to prepare for this new competition. In fairness to this union it must be said that it is about where the UAW was in 1970, and in recent years, officials in the UMWA

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97. *See* U.S. DEPT. OF COM., CHINA: LEADING SECTORS FOR U.S. EXPORTS & INVESTMENTS 13.

98. U.S. DEPT. OF COM., *Manufacturers' Shipments of Mining and Mineral Processing Equipment, By Type: 1996 and 1995* (visited Nov. 30, 1998) <http://www.census.gov./industry/ma35f96.txt>.

99. *See Why China Wants to Cuddle*, ECONOMIST, Nov. 16, 1997, at 39; *see also China Seeks Investors to Develop and Improve its Coal Sector*, COAL WK. INT'L, Oct. 22, 1996, at 3; *Coking Coal Demand Seen Gaining at a Rate of 1.7 Percent/Year*, COAL WK. INT'L, May 21, 1996, at 3; ALMANAC OF CHINA'S ECONOMY, *supra* note 33.

100. *See Columbia Ecocarbon Grants Consession for Coal Mine*, DOW JONES INT'L NEWS, Aug. 26, 1997; *Pittsburgh & Midway Coal Energy Service to Acquire Stake in Inter-American*, DOW JONES INT'L NEWS, Sept. 17, 1997.

101. *See MAPCO Sets Indonesia Link*, COAL WEEK INT'L, Feb. 20, 1996, at 17; *Arutmin to Open Wash Plants Mines: Facilities to Yield 3 Million MT/Y*, COAL WEEK INT'L, Oct. 27, 1992, at 13; and *CRA Coal Operators Gain: BP Units Performance Helps*, COAL WEEK INT'L, Mar. 13, 1990, at 11.

have been very busy with other matters.

There are several reasons why it is important for coal miners to think about alternative strategies for dealing with foreign competition, the most obvious of which is protecting their own jobs. The employees of coal mines in the United States today face a problem regarding foreign competition that is strategically more difficult than that faced by the unions in manufacturing industries in the 1970s. Electric utilities are the major consumer of coal in the United States. Large utilities sometimes own coal mines that sell coal exclusively to the utility that owns the mine. Some electric utilities in the United States also own interests in the companies that are mining coal in foreign countries.[102] United States coal companies are already joint venturers in some Chinese coal mines. An energy company that owns power plants in the United States, along with coal mines both in the United States and in a less developed country, will allow its electrical utility to play one coal mine off against the other. If a vertically-integrated energy company controls a source of coal in the United States and another in a foreign country, it will consume the coal that it can mine and transport to its generators at the least total cost. It will be able to go to the employees of its United States mine and say, in effect, the difference between the cost of United States coal and foreign coal lies in the cost of labor. It can use the threat of importing coal to force lower wages and unsafe work practices on its United States employees.

This is different from the problem unions such as the UAW faced in the 1970s. None of the large United States auto manufacturing companies with which the UAW had historically dealt had any control over the Japanese or German car companies that were importing cars into the United States. An integrated energy company that controls power plants in the United States as well as foreign and domestic sources of coal, has an effective tool with which to control its energy costs and its employees' wages and working conditions.

Another disadvantage to the United States miners is that they are in a poor position to mount public support for their plight. First, miners working under the National Bituminous Coal Wage Agreement earn a decent wage.[103] Second, there are not enough coal miners in the United States standing alone to be a significant force in national politics. There are only 141,000 miners in the coal industry today and they are scattered over at least ten states. Third, miners are not in a good position to exert consumer pressure. When child labor abuses were recently publicized in the garment, shoe-

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102. *See* THE ENERGY GROUP, *Fact Sheet* (visited Nov. 11, 1997) <http://www.peabody group.com/TEG/Fa>; TECO TRANSPORTATION, *Challenges We Can Meet* (visited Nov. 10, 1997) <http://www.teco.net/ttt/TRRnknSpch.html?+Imported>. *See also About Pacificorp* (visited Nov. 3, 1998) <http://wwwPacificorp.com/about/about.html>. The documents at these websites describe relationships among mining companies, coal transportation companies, and power-generating and distribution companies.

103. *See supra* note 52 and related text.

manufacturing, and sporting goods industries, there was a nationwide consumer protest against the foreign employment practices of the companies involved.[104] To some extent these protests got the attention of the companies. However, the UMWA cannot effectively exert this kind of pressure. Because coal consumers are power-generating companies, it would not be effective to picket and distribute literature at power plant gates, at corporate headquarters, or to exert pressure through the public press. Coal is not like shoes, clothing, or soccer balls. When the UMWA asks the public not to consume electricity, the public, likely, will be unresponsive. Moreover, consumers of electricity understand that higher wages in the coal industry translate into higher utility bills. These circumstances make devising alternative strategies for dealing with foreign competition very important for workers in the coal industry. This leads directly back to the theme of the article: imposing tort liability on United States companies in American courts for participation in Chinese mining operations.

IV. UNITED STATES LEGAL ACTIONS FOR INJURIES ABROAD

The involvement of United States companies in the Chinese coal mining industry has been described already.[105] This section explores the question whether these companies could be sued in the state or federal courts of the United States for deaths attributable to their activities in the Chinese coal industry. The theory of liability in the case of a United States company for its participation in a foreign coal mine disaster will vary depending on the nature of its involvement in Chinese coal mining. Tortious conduct of an American company could occur in either the United States or China. It seems that many United States companies are engaged in activities in China which subject them either to negligence or product-liability actions in the United States. The foreign plaintiff must analyze several questions in deciding whether to sue an American company in the courts of the United States. These include: (1) jurisdiction; (2) choice of law; (3) the applicable substantive law; and (4) practical considerations.

A. Jurisdiction

American courts have jurisdiction over tort actions by foreign plaintiffs against United States defendants.[106] The possible application of the doctrine of *forum non conveniens* by United States courts in an action on behalf of coal miners injured or killed in China is a potential problem for foreign

104. *See* Donica Croot, *Coalition's Goal is to End Use of Child Labor to Make Soccer Balls. Protest: Pakistan is Focus of Campaign to Have Equipment Rating Reflect Social* Concerns, L.A. TIMES, June 29, 1996, at D1; Donica Croot, *Taking Aim at Soccer Balls Made in Pakistan*, L.A. TIMES, June 30, 1996, at D1.

105. *See supra* Part II.D.

106. *See* Erwin Chemerinsky, FEDERAL JURISDICTION § 5.3 (2d ed. 1994).

plaintiffs. A federal court may dismiss the claim of a foreign plaintiff under this doctrine.

For present purposes, the federal doctrine of *forum non conveniens* may be said to begin with *Gulf Oil Corp. v. Gilbert.*[107] The court there announced a three-part test for the application of the doctrine. Initially, the court must find that another forum is available that would provide adequate relief to the plaintiff.[108] In *Piper Aircraft Co. v. Reyno,*[109] the Supreme Court stated that the availability requirement ordinarily is satisfied when the defendant is amenable to process in another jurisdiction.[110] In potential coal-mining cases, the defendant might not be amenable to suit in China. If an American company sold defective equipment to a Chinese coal producer on a single occasion and had no other connection with China, it might not be amenable to suit there. On the other hand, if the American company were a participant in a joint venture and had ongoing activities in China, it would be amenable to suit in China, in which case a federal court might dismiss on the basis of *forum non conveniens.*[111]

Once the issue of the availability of an alternative forum is resolved, federal courts next analyze the relevant private interests. In balancing the private interests, federal courts examine a number of factors including: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process; (3) the possibility of a view of the scene of the disaster; (4) other factors that would make the trial of the case easy and expeditious; and (5) whether the foreign judgment would be enforceable.[112] Again, these factors could weigh in favor of retention of jurisdiction by a United States court in some kinds of cases arising out of mine disasters in China and weigh in favor of deferral to Chinese jurisdiction in others. For example, if the case centered around the design of equipment that was designed and manufactured in the United States, most of the relevant proof might be in this country. On the other hand, if the case turned on a negligent act or omission which occurred in China, it might be more expeditious to try the case in China.

If a federal district court finds that the balance of private factors does not strongly favor dismissal, it then examines the public interest factors. The Supreme Court in *Gilbert,* and again in *Piper,* detailed the public interest factors to be considered. They include: (1) difficulties resulting from court congestion; (2) the local interest in having localized controversies decided at home; (3) having a forum decide the case that is familiar with the governing

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107. 330 U.S. 501 (1947), *superseded by statute as stated in* American Dredging Co. v. Miller, 510 U.S. 443 (1994).

108. *Id.* at 508.

109. 454 U.S. 235 (1981).

110. *Id.* at 255, n.22.

111. *See* Simon Luk & Kristine Wong, *Foreign Plaintiffs in the United States Legal System,* 5 ASIA L. 7 (1995).

112. *Piper Aircraft,* 454 U.S. at 241 n.6 (quoting *Gilbert,* 330 U.S. at 508).

law of the case; (4) avoiding unnecessary problems in conflict of laws in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty.[113] Again, the weight of the public interest factors in the kinds of cases under consideration cannot be said clearly to point in one direction. However, it should be noted that in the past fifteen years, federal courts are dismissing more actions based on personal injures occurring abroad under this doctrine than had previously been the case.[114]

No published federal cases hold that the courts of China are an adequate forum in this type of case. Even if a United States court elected to dismiss a complaint on the basis of *forum non conveniens*, it could impose certain conditions on its dismissal, as happened in the Bhopal disaster litigation.[115] In the Bhopal case, the Second Circuit affirmed the dismissal on condition that Union Carbide submit to the jurisdiction of the Indian courts and waive defenses based on the statute of limitations.[116] Although the Second Circuit rejected the portion of the district court judgment requiring Union Carbide to abide by any money judgment rendered in India, the court made it quite clear that a judgment against Union Carbide in India would be enforceable in New York.[117] This is significant because a mere seller of equipment to a Chinese coal producer might have no assets in China with which to satisfy a judgment.

A plaintiff who thought the doctrine of *forum non conveniens* was an insurmountable obstacle to an action in federal court should give thought to suing in state court. The federal doctrine of *forum non conveniens* is not binding on state courts. In fact, at least one state does not recognize the doctrine.[118]

B. Choice of Law

Actions on behalf of the estates of deceased Chinese coal miners in United States courts would present some interesting choice of law questions. If an action were based on the negligence of an American company who, for example, failed to evacuate a mine when the main mine fan was inoperable for a long period of time, the defendant would argue that the tort law of

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113. *Id.*

114. *See, e.g.*, De Aguilar v. The Boeing Co., 11 F.3d 55 (5th Cir. 1993); Sibaja v. Dow Chem. Co., 757 F.2d 1215 (11th Cir. 1985); Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd. in part*, 809 F.2d 195 (2d Cir. 1987).

115. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd. in part*, 809 F.2d 195 (2d Cir. 1987).

116. *Union Carbide*, 809 F.2d at 202.

117. *Id. at* 204.

118. *See* Dow Chemical Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990). *See also* Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369 (1991).

China applied. United States courts, which still adhere to the "place of the wrong" theory, would apply Chinese law in this situation. It is not clear that the result would be different under some of the more recent choice of law theories that are used in negligence cases.[119] If the action in the United States courts was based on a product-liability theory such as negligent design, and the design work was performed in the United States, the views of United States courts regarding the applicable substantive law are less clear. If a court applied the law of the "place of the wrong," American law would apply. It is more likely that a court would apply some form of "the most significant contacts" analysis, in which case a court might conclude that Chinese law should apply.[120]

The choice of law issues relative to damages would be as, if not more, important than the applicable law of liability. Whether an American court would apply American or Chinese damage rules in these types of cases is not clear. A state court could follow *Kilberg v. Northeast Airlines, Inc.*[121] There, damages were characterized as "procedural," so the court applied the law of the forum.[122] A state court also could decline to do this. The analysis of a federal court on this issue would be somewhat more complex.[123]

Adding to the complexity of the matter is the fact that China has its own choice of law rules. Article 146 of the "General Principles of Civil Law of the People's Republic of China" [hereinafter "Civil Law"] provides:

> [In regard to] compensation for loss caused by a tortious act, the law of the place where the tortious act occurred applies. When both parties have the same nationality, or have their domicile in the same country, their national law or the law of their domicile may also be applied.
>
> Where acts occur abroad that are not considered tortious acts by the law of the Peoples' Republic of China [when they occur] in China, they are not to be treated as tortious acts.[124]

Based on the efforts of defendants to secure dismissals or other favorable rulings from American courts on the basis of the doctrine of *forum non conveniens*, American defendants would not want to be in American courts in such cases, even if Chinese law applied to the entire case.

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119. *See* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 570-83 (2d ed. 1992).

120. *Id.* at 632.

121. 172 N.E.2d 526 (1961).

122. *Id.* at 529. Because the law of the forum controls procedural matters, including remedies, it is necessary to determine whether damages should be treated as a procedural or substantive matter. *Id.*

123. *See* SCOLES & HAY, *supra* note 119, at 110-36.

124. *See* JOSEPHS, *supra* note 54 (citing GENERAL PRINCIPLES OF CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 146).

C. United States Substantive Law

That the negligence and product-liability law of the United States provides protection for persons injured or killed in mining accidents requires little discussion. For years, the law of the United States has provided that where the defendant injures the plaintiff through negligence, the former is liable to the latter in damages. This very broad notion has been applied in the coal mine setting for years. In the case of mining accidents, the negligence of the employer is frequently the cause of the injury to an employee. In such cases, the workers' compensation statutes generally provide the exclusive remedy against the employer.[125] However, injured employees may pursue claims against third party tortfeasors.[126] Likewise, an employee injured by a defective product has an action against the seller or manufacturer of the product. Thus, in the United States, a miner who is injured or killed by defective mining equipment could recover damages from the manufacturer.[127]

D. Chinese Substantive Law

As has been suggested, whether an American company charged with killing or injuring Chinese workers is subject to and liable under Chinese law depends on the nature and location of the defendant's activity. An equipment trader that sold used mining equipment and never had any physical presence in China would stand on a different footing than a joint venturer. One would expect that an American party to a joint venture would be subject to Chinese law and it is conceivable that a joint venture agreement could mandate that Chinese law was applicable to injuries of employees of the joint venture.[128] The Civil Law provides for civil liability in a way that is roughly comparable to Western notions of negligence and product liability.[129] Section 106 of the Civil Law provides, in part:

> Where a citizen or legal person through fault interferes with and causes

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125. *See* ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 65.11 at 12-1 (1997).

126. *See* Ashland Coal, Iron & Ry. Co. v. Wallas Admin., 42 S.W. 744 (Ky. 1897).

127. *See* Beachem v. Lee-Norse, 714 F.2d 1010 (10th Cir. 1983); Wojciechowski v. Long-Airdox Div. of Marmon Group, Inc., 488 F.2d 1111 (3d Cir. 1973); American Standard, Inc. v. Goodman Equip. Co., 578 So.2d 1083 (Ala. 1991). *See also* Ayala v. Joy Mfg. Co., 610 F. Supp. 86 (E.D. Colo. 1985), *reversed and remanded*, 877 F.2d 846 (1989); White v. Jeffrey Galion, Inc., 326 F. Supp. 751 (E.D. Ill. 1971). *See generally* 63 Am. Jur. 2d *Products Liability* § 754 (1996).

128. *See* JACQUES BUHART, JOINT VENTURES IN EAST ASIA 83-105 (1992); *The Practical Solutions to Problems Occurring in PRS Joint Ventures*, ASIA L., Oct. 1994, at 7.

129. *See* WANG CHENGUANG & ZHANG XIANCHU, INTRODUCTION TO CHINESE LAW 211-35 (1997); Whitmore Gray & Henry Rutheng Zhency, *The General Principles of Civil Law of the People's Republic of China*, 34 AM. J. COMP. L. 715 (1986). The sections of the Civil Law quoted herein are taken from that source.

> damage to the property or person of another, he must bear civil liability. Where there is no fault, but the law provides that there must be civil liability, there must be civil liability.[130]

Section 119 of the Civil Law provides:

> Where personal injury is caused to a citizen, compensation must be paid for medical expenses, loss of income from work, expenses of living as a disabled person, and similar expenses; when death is caused, there must also be payment for funeral expenses, as well as expenses such as necessary maintenance of the deceased's dependents.[131]

Article 122 of the Civil Law provides: "Where because of the substandard quality of goods damage is caused to the property or person of another, the manufacturer or sellers of the goods must bear civil liability according to law."[132]

Section 131 of the Civil Law states the Chinese rule of contributory negligence. It provides: "[w]here a party who suffers a loss is also at fault with respect to occurrence of the loss, the civil liability of the person who caused the loss may be reduced."[133] The Chinese cases are similar to negligence and product-liability cases in the United States even though they arise in more simple factual settings than the current American cases.[134] China's judicial decisions roughly parallel Western negligence and product-liability decisions which could be applied to the types of mining disasters described earlier. However, major differences exist regarding the matter of damages.

Article 119 of the Civil Law requires culpable defendants to compensate plaintiffs for (1) medical expenses; (2) lost wages; and (3) a living allowance in cases of disability.[135] The elements of damage in cases of death are (1) funeral expenses and (2) living expenses of the deceased's survivors. Conspicuously absent from the elements of damages in article 119 are pain and suffering and punitive damages. The advice being given to Asian companies considering doing business in the Unites States is that "[t]he sheer number of [product liability] suits, the extensive nature of pretrial discovery of facts and the size of jury awards are notorious."[136] It is further advised

130. *Cited in* Gray & Zhency, *supra* note 129.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See, e.g., Wholesalers and Retailers Responsible for Product Quality*, 7 CHINA L. & PRAC. No. 3, Mar. 1993, at 15; *Distributors Held Liability for Fake Goods*, 7 CHINA L. & PRAC. No. 10, Dec. 1993, at 19; *Manufacturer and Seller Liable for Damages*, 6 CHINA L. & PRAC. No. 1, Jan. 1992, at 20; Lin Shucui v. Zingtian County Transp. Co., 3 CHINA L. & PRAC. No. 9, Oct. 1989, at 25; Zhao Yue v. Dalian Fruit Prod. Co., 3 CHINA L. & PRAC. No. 3, Oct. 1989, at 26; Long Ming & Zheng Aiqin v. Dongfeng Rest., 3 CHINA L. & PRAC. No. 6, July 1989, at 26; *Sellers Liability for Defective Products*, 2 ASIA L. & PRAC., No. 4, May 1990, at 30.

135. *Cited in* Gray & Zhency, *supra* note 129.

136. Sara D. Schotland & Christopher H. Lunding, *Countering the Risks of Product Liability Litigation*, ASIA L., Supp., Apr. 1996, at 99.

that:

> A significant problem for defendants is the risk of runaway or excessive jury awards for pain and suffering, which is highly subjective. Plaintiffs' attorneys utilize a variety of strategies to incite juror anger to induce jurors to give a large damage award.[137]

Moreover, claims resulting from economic loss are handled so as to maximize recovery in the United States. This advice is equally applicable to an American company sued in the United States after killing or injuring Chinese coal miners either through negligence or the sale of a defective product. Herein lies the major difference in litigating the kinds of claims under consideration in the United States as opposed to China. This is the reason that American miners might benefit if the claims of deceased Chinese coal miners which result from fault of American companies were litigated in the United States. It is also the reason that defendants will try to prevent this from happening.

E. Practical Considerations

Getting the claims of deceased Chinese miners who are killed either by negligence attributable to a United States company or a defect in an American product would require some effort. Someone in the United States must find out about the Chinese mine disasters. Chinese coal mine disasters are not prominently or widely reported in the United States. In the case of a recent coal mine explosion in China which killed eighty-six miners, Westlaw's reprint of the *Los Angeles Times* article was only eight lines in length.[138] The story appeared on page eight of that newspaper. *The New York Times* story was a mere four sentences in length.[139] This is in stark contrast to the front page publicity given an airplane crash occurring anywhere in the world that results in the death of most of the passengers on board.[140] However, finding out about serious mining accidents and establishing contact with plaintiffs and labor leaders in the Chinese mining industry should not be impossible. Serious mining accidents are regularly reported by the Foreign Broadcast Information Service.[141] Once an interested organization in the United States learns about a coal mine disaster, it could assist the interested parties in seeking redress for the deaths. Unions frequently help employees

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137. *Id.*

138. *See China Mine Blasts Kill 86, Critically Injure 3*, L.A. TIMES, Mar. 12, 1997, at A8, *available in* 1997 WL 2190477.

139. *See 86 Miners Killed in China*, N.Y. TIMES, Mar. 12, 1997, at A1.

140. In contrast, after the crash that killed all passengers aboard SwissAir Flight 111 off the coast of Nova Scotia, Canada, on September 3, 1998, the Associated Press carried the story to hundreds of newspapers across the world, most of which gave the story front-page coverage.

141. *See, e.g., supra* note 65.

with legal matters such as filing workers' compensation claims, unemployment insurance claims, or applications for social security benefits. One would also suppose that attorneys in the United States who handle mass tort litigation would be technically competent to develop the facts in a coal mine disaster case.[142]

Determining the cause of a coal mine disaster should be much less difficult than proving the cause of an airplane crash. The Ministry of Mining in China regularly investigates serious mining accidents.[143] Such a report would be admissible in a United States court on the issue of the cause of the accident.[144] One would also suppose that the plaintiffs would have little difficulty finding expert witnesses in the United States who could testify. Several experts were available for conference in preparing this article.[145] The plaintiffs could do discovery of witnesses in China, if necessary.[146] Admittedly, language would be a problem, but not an insurmountable one. Witnesses who cannot speak English regularly testify in United States courts and give depositions with the aid of interpreters. Of course, the expense of litigating in the United States and the delays involved would be important considerations.

Whether based upon a negligence theory or a product-liability theory, some of the most persuasive evidence of the defendant's breach of its legal duty could be developed from mining regulations, accepted manufacturing standards, and mining practices of the United States. Pursuant to authority granted by the Mine Safety and Health Act, the United States has adopted detailed regulations for testing and approving all kinds of mining equipment, as well as regulations governing the actual operation of coal mines. For example, if the suit were based on an explosion that occurred when a mine fan malfunctioned and the employees were not evacuated, the plaintiffs could argue that the MSHA requirement that the mine be evacuated if the main mine fan were inoperable for more than fifteen minutes is evidence of a reasonable standard of care, even though that may not have been a legally binding standard in China.[147] The federal mining regulations could be equally helpful if the action were based on a product-liability theory and the product causing the harm did not comply with the MSHA regulations. An example of this would be the use of a continuous miner in a gassy mine that did not have an automatic power-shutoff component.[148] United States courts

142. *See* Peter Perlman, *Trial Strategy in Coal Mining Machine Cases*, 1 PROD. LIAB. L.J. 67 (1986).

143. *See supra* note 72, at 477.

144. *See In re* Korea Air Lines Disaster, 932 F.2d 1475 (D.C. Cir. 1991); *In re* Air Disaster at Lockerbie Scotland, 37 F.3d 804 (2d Cir. 1996), *cert. denied,* 513 U.S. 1126 (1995).

145. *See, e.g., supra* note 71.

146. *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2005.1 (1994); JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.04 (1997).

147. 30 C.F.R. § 75.313 (1998).

148. 30 C.F.R. § 27.24 (1998).

are divided on the question of whether official safety regulations are admissible in these situations.[149] Even if the regulations were inadmissible, the practices in the mining industry of the United States would be admissible for some other purposes.[150] One could suppose that these practices and regulations, to the extent admissible, could be highly persuasive in establishing the dangerous mining methods employed in the Chinese mining industry.

V. SOME OBSERVATIONS

One would think that unions in the United States, particularly the United Mine Workers of America, would be eager to devote some attention to the matter of coal mine deaths in China. If it were successful in making Chinese coal mining safer as a result of legal actions in United States courts, it would benefit the membership and increase the stature of the union generally. Improved mine safety in China would reduce the incentive for companies in the United States to mine Chinese coal if the decision to mine Chinese coal is influenced by a desire to avoid burdensome safety rules in the United States.

Perhaps more important for the labor movement is the fact that improving the lot of workers is the kind of activity that unions have done since their inception. Unions have traditionally been at the center of the fight to secure the passage of all kinds of social legislation, even if the legislation benefited non-union workers. The labor movement, at its best, seeks to improve the wages and working conditions of all working people, irrespective of union affiliation.[151] Unions may have moved away from this philosophy in the recent past, however, actions like those proposed here are consistent with the philosophy that made unions an effective advocate for working people throughout the western world.

If injured or deceased Chinese miners successfully pursued negligence and product liability claims in the United States, that success would have an effect, not only in the mine equipment manufacturing sector, but also on other companies that sell industrial equipment and technology to China. American companies would begin to insist on provisions in sales contracts such as indemnity provisions. A contract for the sale of equipment might require that the equipment only be used in a certain way. These actions by American vendors would make coal mining in China safer and more costly.

If engineering services or technology transfers were being sold, American companies might begin to write more detailed operations and safety in-

149. *See* Stonehocker v. Gen. Motors Corp., 587 F.2d 151 (4th Cir. 1978) (admitting the evidence); *but see* McKinion v. Skill Corp., 638 F.2d 210 (1st Cir. 1986) (rejecting such evidence); Cook v. Navistor Int'l Transp. Corp., 940 F.2d 207 (7th Cir. 1991) (rejecting such evidence).

150. *See* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE, § 195 (4th ed. 1992).

151. *See* Derek C. Bok & John T. Dunlop, LABOR AND THE AMERICAN COMMUNITY ch. 14 (1970).

structions than may presently be the case. The result could be improved safety standards in Chinese industries other than coal mining. In addition, one would think that even if the United States law suits were dismissed under the *forum non conveniens* doctrine, vendors to China might still take precautionary measures which could improve safety standards in China and raise their production costs. The breadth of judicial discretion involved in *forum non conveniens* dismissals[152] should not be comforting to American manufacturers, sales organizations, or engineering firms.

However, some words of caution are necessary. The kinds of claims arising in China that might be tried in the United States courts are relatively few. It is clear that the strategy proposed here is not effective for all workplaces injuries. The course of action proposed here is impractical for isolated injuries and accidents. A worker in a Chinese factory who loses a hand as the result of an American-made punch press not having an automatic lockout device, as a practical matter, cannot get his/her case tried in an American court. The theory advanced here will only work in the case of large industrial accidents that injure or kill several people.

The response of the Chinese government to such actions might be the greatest impediment. There is no way of knowing how it would react. If increasing the cost of producing Chinese coal adversely affected the Chinese government, it could do everything in its power to prevent such suits. On the other hand, considerations such as protecting its own developing heavy-equipment manufacturing industry might cause it to take a hands-off approach.

Finally, the idea of bringing tort claims in United States courts on behalf of deceased Chinese coal miners will not make a great difference in the market price of Chinese coal. The cost of injuring or killing workers, even under the worst circumstances, is a only a part of the total cost of producing coal. However, American labor unions should not stand by idly while China becomes a major producer of coal on the world coal market[153] with the kind of safety record it has. It is in the United Mine Workers Association's narrow self-interest to try and improve the working conditions of Chinese coal miners and doing so is in keeping with the best traditions of the labor movement.

152. *See supra* Part IV.A.
153. *See supra* notes 43-44 and related text.