Can OSHA Survive in the New International Economic Order? New Constraints on the Promulgation of Permanent Health Standards

Richard Braden

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INTRODUCTION

This article examines the negative impact that heightened global economic competition is likely to have on the Occupational Safety and Health Administration's (OSHA) ability to promulgate health standards that protect employees from exposure to toxic substances in the workplace. Growing threats to regulated U.S. industries from foreign competition under free trade will likely impose added constraints on OSHA in fulfilling one of its primary functions: the promulgation of permanent health standards under Section 6(b) of the Occupational Safety and Health Act.\(^2\) The recent ratification and implementation of the North American Free Trade Agreement (NAFTA)\(^3\) will only heighten U.S. industry vulnerability to low-cost imports. Consequently, threatened industries will have added incentive to challenge, or at least delay, any new health standards in order to keep costs down so as to remain competitive in the U.S. market. Moreover, the revised General Agreement on

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* The author is a 1995 graduate of the University at Buffalo School of Law, and wishes to thank Lucinda Odell Lapoff for her assistance in preparing this article.


Tariffs and Trade (GATT), that has been approved by the U.S. Congress, will further heighten global competition. GATT currently includes no international standards regarding worker rights.

Both NAFTA and GATT will exacerbate the currently existing pressures on many U.S. industries to cut costs, or relocate, in order to remain competitive with foreign-based businesses located in countries with few protective laws and regulations. One of the costs of doing business in the United States is compliance with federal, and state, worker safety laws and regulations. Free trade, however, will threaten the viability of certain U.S. industries, particularly those that must comply with government-imposed regulations protecting worker health and safety. Paradoxically, such competition may also further constrain OSHA's already difficult task of promulgating standards dealing with "toxic materials" under Section 6(b)(5).

I. WHY ARE HEALTH STANDARDS IMPORTANT?

Health standards promulgated under section 6(b)(5) provide OSHA with its main weapon for protecting employees from the adverse health effects of long-term exposure to carcinogens and other

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4 James T. Madore, Congress Likely to OK GATT: UB Professor sees no repeat of Battle over NAFTA, BUFF. NEWS, Mar. 16, 1994 at B5 (GATT affects 117 countries and will lower trade barriers between the U.S. and Europe. In addition, some firms fear that it may create the potential for floods of cheap imports from products manufactured in lesser developed, Third-World countries).


6 The Act requires that "... the Secretary, in promulgating standards dealing with toxic materials or harmful physical agents ... set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity ..." 29 U.S.C. § 655(b).
toxic materials. These standards are particularly important as preventive measures because state worker's compensation schemes are patently inadequate in compensating workers for wage losses and medical expenses caused by the onset of latent occupational diseases.\(^7\) In fact, it is estimated that "only five percent of those severely disabled from an occupational disease receive worker's compensation benefits."\(^8\) Therefore, the prevention of occupational diseases, through the promulgation and enforcement of health standards, is an extremely important approach. Health standards protect U.S. workers in a proactive way because they prevent the occupational exposures that can lead to the onset of latent diseases.

All employers covered by the OSH Act have a general duty to "furnish to each of their employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm..."\(^9\) Moreover, Congress has stipulated that the promulgation of safety and health standards, as defined in Section 3(8), will require employers to maintain certain conditions or adopt work practices "reasonably necessary or appropriate to provide safe or healthful employment..."\(^10\) Section 6(b)(5) further delineates OSHA's authority to create standards regulating employee exposure to toxic substances whereby OSHA "shall set the standard which most adequately assures, to the

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\(^9\) 29 U.S.C. § 654. The OSH Act requires all employers engaged in interstate commerce to comply with OSHA's standards. *Id.* at § 652(5). The term "employer" does not include any federal, state or local government. *Id.*

\(^10\) 29 U.S.C.§ 652 (part of the definition of "occupational safety and health standard" within the OSH Act).
extent feasible, . . . that no employee will suffer material impairment of health. . . .

OSHA's "feasibility" requirement has been interpreted to include both technological and economic feasibility. A standard is economically feasible if its costs neither threaten the competitive structure of an entire industry, nor render it unable to compete with imports or substitute products. Both NAFTA and GATT will increase pressure on U.S. industry to keep costs down in order to remain competitive. Consequently, future health standards may be more difficult to promulgate in light of the pressing need for U.S. industry to remain internationally competitive.

II. CONSTRAINTS ON OSHA RULEMAKING

Despite a broad mandate "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," OSHA has been somewhat of a disappointment, particularly in its promulgation of health standards. OSHA's standard setting process has been exceedingly slow-paced. In fact,


12 American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490, 509-531 (1981) (holding that the feasibility requirement precludes the Secretary of Labor from having to engage in formal cost-benefit analysis); see also discussion infra, pp. 135-36.


14 29 U.S.C. § 651 (Congressional findings and purpose).

15 See Thomas O. McGarity & Sidney A. Shapiro, Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration 13-14 (1993) (asserting that OSHA's most important role may be to prevent occupational diseases and criticizing the paucity of health standards that have been enacted).
between 1972 and 1988, OSHA promulgated only 24 permanent health standards regulating employee exposure to chemical substances. This is a woefully inadequate number, given "that there are approximately 2000 suspected or known carcinogens in use in the workplace." OSHA must overcome numerous practical, political, statutory and judicial obstacles in its effort to promulgate health standards that legitimately protect U.S. workers from exposure to toxic chemicals. For example, OSHA is responsible for making complex scientific, engineering and policy judgments at the frontiers of human knowledge. OSHA lacks the authority to license businesses or their products, unlike other federal agencies, and it encounters "regulated industries with strong economic incentives to delay regulation." Furthermore, OSHA must utilize time consuming "hybrid" rulemaking procedures in which interested parties are entitled to appear and cross-examine key witnesses at public hearings.

In the judicial context, the agency carries the unusual burden of defending its rationale for specific final standards based on "substantial evidence in the record considered as a whole." Significantly, the substantial evidence test that burdens OSHA in its decisionmaking process has enabled interested parties to challenge

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16 Ashford, supra note 8, at 100 (these figures include final rules and rulemaking initiated as of June 7, 1988).

17 Charles Noble, Liberalism at Work: The Rise and Fall of OSHA 179 (1986).


19 Id. at 4-5.

20 Id. at 6.

21 Id. at 9 & n. 45-47.

the validity of most final standards in the courts. Standards therefore invariably take several years to become finalized, only to be tied up for additional years while courts review substantive and procedural challenges to the rulemaking in pre-enforcement actions under section 6(f).

A. BENZENE AND SIGNIFICANT RISK

OSHA encountered a major setback in its ability to protect the health of U.S. workers when the United States Supreme Court decided Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene). In Benzene, a plurality of the Supreme Court held that in promulgating any permanent health standard, OSHA must prove, as a threshold matter, that workers are faced with a "significant risk," based on the best available evidence. The Benzene decision significantly undercut OSHA's ability to promulgate health standards, particularly in light of its need to support all decisionmaking under the substantial evidence test. As a direct result of the Benzene decision, OSHA had to withdraw one of its most innovative and far-reaching final rules.

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23 In the most recent example, the Eleventh Circuit Court of Appeals remanded for OSHA's redetermination a September 1992 final standard governing occupational exposure to cadmium on grounds that OSHA failed to present substantial evidence that the permissible exposure limit was "technologically and economically feasible for the dry color formulator industry. . . ." Color Pigments Mfrs. Ass'n., Inc. v. OSHA, 16 F.3d 1157 (11th Cir. 1994).

24 Id.


26 Id. at 657.


28 See id. at 52-55 & n. 63. The "Generic Cancer Policy" was one of the more ambitious rulemaking efforts ever carried out by any agency. The proposed rule established four categories of workplace chemicals. Category I substances would be presumed to be carcinogenic and OSHA would then be authorized to issue an
preliminary determination of significant risk continues to frustrate OSHA's attempts to regulate employee exposure to suspected carcinogens, since scientific knowledge about the long-term effects of low-level exposure to many carcinogens is limited.

B. COTTON DUST AND COST-BENEFIT ANALYSIS

Soon after the Benzene decision, OSHA won a reprieve of sorts in American Textile Manufacturers Institute, Inc. v. Donovan 29(Cotton Dust). In this case, representatives of the cotton industry challenged the validity of OSHA's cotton dust standard. 30 At issue was whether OSHA was required to engage in a formal, cost-benefit analysis in determining whether any proposed reduction of a significant risk to worker health is "reasonably necessary" within the meaning of Section 3(8)'s definition of health and safety standards. 31

In Cotton Dust, the Supreme Court held that, in promulgating health standards under section 6(b)(5), OSHA is not required to determine whether the costs of a permanent standard bear a reasonable relationship to its benefits. 32 The Court reasoned that the

"emergency temporary standard." Industry would then have the opportunity to rebut the presumption during subsequent rulemaking. This policy never went into effect due to the Benzene decision. Id.


30 29 C.F.R. § 1910.1043 (1994) (setting a permissible exposure limit (PEL) of 0.2 mg. of cotton dust per cubic meter for yarn manufacturers; 0.750 mg./m³ for slashing and weaving operations; and 0.5 mg/m³ for all other processes in the cotton industry); see also, Kathleen McKeon, Recent Development, 12 ENVTL. L. 505 (1982) (discussing the history and background of the Cotton Dust decision).

31 Cotton Dust, 452 U.S. at 504-508; see also, supra note 12 and accompanying text.

statute requires feasibility, not cost-benefit analysis. The majority further held that OSHA's final cotton dust standard was "economically feasible" because OSHA had validly determined that the costs of compliance "were well within the financial capability of the covered industries." The Court did not, however, "decide... the question whether a standard that threatens the long-term profitability and competitiveness of an industry is 'feasible' within the meaning of Section 6(b)(5) of the Act..." 

C. LEAD AND FEASIBILITY

A more thorough analysis of the meaning of "feasibility" was conducted by the D.C. Circuit Court of Appeals in United Steelworkers of America, AFL-CIO-CLC v. Marshall and Bingham (Lead). Chief Judge J. Skelly Wright's analysis of the statute's "economic feasibility" requirement provides a strong basis for industry to argue that future health standards are economically

33 Id.

34 Id. at 530-31 n.55 (citing Secretary of Labor's reasoning in 43 Fed. Reg. 27, 379 (1978)).

35 452 U.S. at 530-31(refering to 29 U.S.C. § 655(b)(5)); see also, supra note 12 and accompanying text.

36 647 F.2d 1189 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981) (holding that OSHA presented substantial evidence for the technological and economic feasibility of the lead standard for certain industries, including primary lead smelting, battery manufacturing, and printing but failed to present substantial evidence or adequate reasons to support the feasibility of this standard for other industries, including nonferrous foundries, auto manufacture, pottery, paint spraying, and secondary scrap lead processors). See also, McGarity, supra note 15, at 1570 (discussing the complicated events following issuance of a supplemental lead standard by the outgoing Carter Administration, its subsequent suspension by President Reagan, and the events surrounding the petition for review by the Supreme Court).
infeasible, in light of intense foreign competition.\textsuperscript{37}

In the \textit{Lead} decision, Chief Judge Wright observed that:

\begin{quote}
The peculiar problem of reviewing the rules of agencies like OSHA lies in applying the substantial evidence test to regulations which are essentially legislative and rooted in inferences from complex scientific and factual data, and which often necessarily involve highly speculative projections of technological development in areas wholly lacking in scientific and economic certainty.\textsuperscript{38}
\end{quote}

Nevertheless, he determined that a reviewing court need only ensure that OSHA rationally explains the logic behind its reasoning and "policies underlying any legislative choice . . ..\textsuperscript{39} The court ultimately found nothing wrong with OSHA's procedural conduct.\textsuperscript{40}

The bulk of the court's analysis in the \textit{Lead} decision focused on the meaning of economic feasibility under section 6(b)(5). This analysis was required to resolve a charge by industry groups that OSHA had improperly deleted language in its final rule that "industry need only install those engineering controls that are 'feasible.'"\textsuperscript{41} OSHA claimed in its brief that it had proven the general feasibility of the lead standard and had simply revised the final rule to prevent individual employers from raising the issue of the infeasibility of compliance in subsequent enforcement hearings.\textsuperscript{42} The final lead

\textsuperscript{37} See discussion \textit{infra} pp. 142-45.

\textsuperscript{38} 647 F.2d at 1206-1207.

\textsuperscript{39} \textit{Id.} at 1207.

\textsuperscript{40} \textit{Id.} at 1208.

\textsuperscript{41} \textit{Id.} at 1224.

\textsuperscript{42} \textit{Id.}
standard allowed for several levels of employer compliance methods. First employers were required to attempt engineering and work practice controls to meet the permissible exposure limit (PEL); if such controls were insufficient, employers had to furnish respirators as a supplement.43

The final lead standard therefore created a "strong general presumption of the feasibility of meeting the PEL [permissible exposure limit] without reliance on respirators"44 and put added emphasis on the primary use of engineering and work practice controls.45 Engineering and work practice controls can be expensive and are usually preferred by unions as the only realistic method of protecting workers.46 Industry, on the other hand, usually argues that personal protective devices are more cost-effective and therefore preferable, particularly when other methods are deemed too costly.47

Judge Wright identified, however, a logical flaw of "circularity" in any court's analysis as to whether a standard is technologically or economically feasible.48 He noted that "[w]e cannot know if a standard is feasible until we know exactly what it expects of employers,"49 and to the extent that the standard or the regulatory scheme provides for flexibility in compliance, a court

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43 See 29 C.F.R. § 1910.1025(e)(1)(i)(stating that where engineering and work practice controls cannot sufficiently reduce exposure below the PEL, "the employer shall nonetheless use them to reduce exposures to the lowest feasible level and shall supplement them by the use of respiratory protection. . . .").

44 Id.

45 Id.

46 See MCGARITY, supra note 15, at 72-74; see also NOBLE, supra note 17, at 223.

47 See MCGARITY, supra note 15, at 72-74; see also NOBLE, supra note 17, at 222.

48 Lead, 647 F.2d at 1267-1268.

49 Id. at 1267.
would be more likely to agree that the standard is feasible.\textsuperscript{50} Furthermore, Judge Wright noted that most of OSHA's earlier health standards had created a hierarchy among means of compliance. Thus employers could protect employees by the use of personal protective devices as a last resort and when no other preferred means were proven feasible.\textsuperscript{51} This practice "built the very concept of feasibility into the standard."\textsuperscript{52} Consequently, employers could not simply assert during rulemaking, or in pre-enforcement review, that engineering controls were technologically or economically infeasible unless they provided substantial evidence in the record.\textsuperscript{53}

As for economic feasibility in particular, the court stated that "OSHA must construct a reasonable estimate of compliance costs and demonstrate a reasonable likelihood that these costs will not threaten the existence or competitive structure of an industry, even if it does portend disaster for some marginal firms."\textsuperscript{54} Additionally, the court stated that "OSHA can revise any gloomy forecast that estimated costs will imperil an industry by allowing for the industry's demonstrated ability to pass through costs to consumers."\textsuperscript{55} Therefore, "in pre-enforcement review the court would not expect OSHA to prove the standard certainly feasible for all firms at all times in all jobs. [B]ut it would have to justify the presumption, and the attendant shift in burden, with reasonable technological and economic evidence and analysis."\textsuperscript{56}

Under this analytical framework, courts can conduct "a

\textsuperscript{50} Id. at 1267-69.

\textsuperscript{51} Id. at 1269-70.

\textsuperscript{52} Id. at 1269.

\textsuperscript{53} Id. at 1269-70.

\textsuperscript{54} Id. at 1272.

\textsuperscript{55} Id. at 1267 (citing AFL-CIO v. Marshall, 617 F.2d 636, 671 (D.C. Cir. 1979)).

\textsuperscript{56} Id. at 1270.
preliminary test of feasibility on any pre-enforcement challenge to the rulemaking" with a court reserving the opportunity to "test feasibility again later-in reviewing denial of a temporary variance or . . . in judicial review of an enforcement proceeding" where the employer would have the burden of proof. This feasibility analysis has thwarted industry groups from tying up OSHA's rulemaking. Nevertheless, there is currently major occupational safety and health reform legislation in Congress that will alter one of its underlying assumptions by preventing industry from raising the feasibility issue in enforcement proceedings.

V. CONGRESSIONAL REFORM

Congress recently considered the first comprehensive reform package for the OSH Act since its original passage in 1970. Senators Kennedy and Metzenbaum recently reintroduced a bill to amend the Act. The bill would greatly expand OSHA's jurisdiction. It would extend coverage to public sector employees and almost all construction workers. The bill would also require many employers to form labor-management safety committees. The reform package appeared to go very far in its effort to better equip

57 Id.

58 Id.

59 139 CONG. REC. S2779-02 (statement of Sen. Kennedy and complete text of S. 575, 103d Cong., 1st Sess. (1993)).

60 Id.


62 Id. at § 301 (amending 29 U.S.C. § 652(5) (1988)).

63 Id. at § 1201 (amending 29 U.S.C. 651 et seq. (1988)).

64 Id. at § 27 (amending 29 U.S.C. § 657 (1988)).
OSHA, and employees themselves, in the quest for safer working environments.

Nevertheless, one of its minor changes would have seriously impeded OSHA's already difficult task of promulgating health standards in light of the feasibility analysis in the Lead decision. The bill would have amended section 6(f) by adding the following new sentence: "The procedures under this subsection shall be the exclusive means of challenging the validity of any occupational safety or health standard and the validity of any such standard may not be raised in an enforcement action under section 10 or 11."

At first blush, the additional language appears to offer a bonus for employees by preventing industry from raising infeasibility as a defense to OSHA compliance enforcement actions. The proposed clause, however, removes the built-in flexibility of the statute. In fact, the new language eviscerates Judge Wright's analytical resolution of the circularity problem as discussed in the Lead case. Congress might have thus unwittingly made it more difficult for OSHA to promulgate permanent health standards by removing industry's capability to raise the feasibility issue in enforcement proceedings.

It is now highly unlikely that the reform bill will be passed because the primary sponsors do not have the power to get the bill out of committee, much less for a vote on the floor. If, however, the bill remains intact and ultimately becomes law, reviewing courts will be

65 See discussion supra pp. 136-40.


67 S. 575, 103d Cong. 1st Session (1994); § 401(e) (amending 29 U.S.C. 655(f)).

68 See discussion supra p. 10.

forced to engage in higher scrutiny of OSHA's underlying rationale for its determination of the general economic feasibility of any standard during pre-enforcement challenges to its rulemaking. OSHA's burden of proving the general feasibility of a standard would be raised because reviewing courts would not be able to reserve judgment on individual employers later. This higher burden would provide industry groups added incentive to contest feasibility throughout the entire rulemaking; and OSHA will be further constrained in its efforts to effectively protect workers from exposure to toxic substances.

Irrespective of any congressional reform of the Act, the growing liberalization of international trade and commerce will exert pressure on U.S.-based industry to cut costs in order to remain competitive in the U.S. marketplace. Both NAFTA and GATT will allow under-regulated foreign industries virtually free access to the U.S. marketplace. Therefore, there can no longer be a strong presumption that U.S. industry can readily pass on the costs of compliance to consumers. OSHA will have a difficult task proving the economic feasibility of stringent health standards when affected U.S. industries are threatened by foreign competitors who can effectively combine the benefits of free trade with the competitive advantages derived from less demanding regulations.

IV. FREE TRADE

The liberalization of international trade and increasing global economic competition will further constrain OSHA's ability to prove the general economic feasibility of future health standards. U.S. industry now continually competes with low-cost imports. Productivity and competitiveness in the international market means cutting costs wherever possible. One area that may be considered expendable is employee safety and health. Free trade will exacerbate the situation by making it virtually impossible for U.S. industry to pass the costs of compliance on to consumers. Before NAFTA was passed, there were a number of reasons that liberalization of trade with Mexico and Canada would benefit the U.S. economy, and
businesses in particular, in the long run. Nevertheless, during debate before congressional committees prior to enactment, representatives from organized labor groups expressed concern that passage of NAFTA would serve not only to lower wages in the United States, but also would enable U.S. companies to relocate their operations in Mexico to take advantage of lower wage structures. Job losses were thus the major focus of labor's objections. Also of concern was NAFTA's effect on already lax enforcement of environmental and worker safety laws by the Mexican government, which would seek to maintain a competitive advantage vis-a-vis the United States and Canada. Congressional critics of NAFTA felt that the agreement "should alter the market by forcing Mexico to adopt policies supporting higher wages . . . raising worker safety and requiring environmental standards of industry."

In fact, some commentators argued that "[t]he only way to raise, [sic] standards in Mexico and improve practices in that country was to force Mexican companies to comply with U.S. standards as a quid pro quo for the access to the U.S. market granted by the NAFTA." Essentially, the argument was that since higher labor standards act as a barrier to trade, the U.S. must either lower standards at home or seek to improve standards in Mexico. The Bush administration's response to these concerns included negotiating


71 Id.

72 Id.


74 McCaffrey, supra note 70, at 465 (citation omitted).

75 Id.
for safeguards against sudden surges in imports, providing for
dislocated worker assistance and retraining, encouraging cooperation
between the U.S. and Mexico on labor issues, and initiating "parallel
track" negotiations on worker safety and environmental issues.\textsuperscript{76}

The "parallel track" negotiations are arguably one of the
weakest strategies for protecting the safety of U.S. workers. Despite
the existence of solid Mexican worker safety laws,\textsuperscript{77} serious
enforcement problems\textsuperscript{78} are likely to persist into the foreseeable
future. Pursuant to a Memorandum of Understanding on labor
matters signed on May 3, 1991 by the Secretaries of Labor from both
countries,\textsuperscript{79} the U.S. and Mexico agreed that representatives from
OSHA and its Mexican counterpart would jointly analyze and study
a wide variety of worker safety issues. In addition, they would
engage in jointly sponsored seminars and allow for extensive
technical assistance by OSHA, including training on safety and health
inspection and enforcement.\textsuperscript{80}

These agreements were extensive and wide-reaching efforts
to provide "guidance" to Mexican bureaucrats. They may indeed
have played an important role. Nevertheless, the reality is that
enforcement of worker standards in Mexico continues to be lax and
there now exists only cooperative joint "advisory" groups on worker
safety enforcement and training.\textsuperscript{81} Permissive enforcement of
standards by the Mexican government will likely continue into the
foreseeable future. In fact, there currently are no penalties provided
in NAFTA for any Mexican-made products created under sub-

\textsuperscript{76} See id. at 466-69.

\textsuperscript{77} See id. at 469 and accompanying notes 83 and 84, citing portions of the
Mexican constitution and federal labor law.

\textsuperscript{78} Id.

\textsuperscript{79} Id. at 474 and accompanying notes.

\textsuperscript{80} See id. at 474-75 and accompanying notes.

\textsuperscript{81} Trade Pact's Cooperative Projects to Include Workplace Safety, Training,
standard health and safety standards.82

Consequently many U.S. industries must now compete for sales to U.S. consumers with cheaper products manufactured in Mexico. The Mexican-made products with the best competitive advantage in the U.S. marketplace will be those that are most labor intensive (to take advantage of wage differentials), and the ones that are most dangerous to worker health and safety or the environment. U.S. workers in these industries are precisely those in need of the most protection through promulgation of health standards, yet their employers also face the stiffest competition and will likely be able to successfully argue economic infeasibility in light of foreign competition.

Some might argue that, in the international marketplace, these are the kinds of jobs that U.S. workers do not need; that we should just retrain them for other jobs in the new global economy.83 Despite that rationale, most U.S. workers will likely prefer to keep their current jobs, particularly if they hold unionized manufacturing jobs that pay well. They may, in fact, be willing to trade less demanding health and safety protection for job protection.

This is a very complex policy dilemma now confronting U.S. workers, their employers, and OSHA. Increased liberalization of world trade may allow for higher profits for U.S. firms that currently export their products to more markets. Nevertheless, they will be competing with companies choosing to locate their manufacturing operations in countries with lax safety and environmental standards and low wage structures. Consequently, as U.S. safety regulations increasingly become financially burdensome, smart U.S. corporate managers and executives with their eyes on profits will undoubtedly see the benefit of relocating in countries like Mexico. Such moves will be particularly appealing when there are no trade barriers to the U.S. market.

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83 Edsall, supra note 73.
VI. SOLUTIONS?

The situation now faced by OSHA, Congress and U.S. workers is analogous to that currently faced by individual states in the context of workers' compensation. Currently, each state has an individual worker's compensation scheme. In setting rates of compensation, states must consider whether their statutory schemes will deter industry from locating within their boundaries. Thus, states with more liberal compensation schemes risk being at a competitive disadvantage in attracting industry. This situation has had the effect of chilling reform and has prompted calls for federalizing workers' compensation to ensure fairness and equity.

Immediate solutions to the negative implications of free-trade for worker safety and health standards are not readily apparent. They are also beyond the scope of this article. Nevertheless, Congress, as well as the governments of other industrialized nations, will need to focus on creating international safety and environmental standards to accompany future free-trade agreements. Otherwise, the playing field will continue to tilt against those countries with tough, but expensive, environmental and labor standards. Such negotiations would, however, be extremely complicated and enforcement of such standards would likely vary. There are also many contingencies and countervailing policy arguments for and against attaching any conditions to free trade.

There appear to be few short-term solutions to the problem of competitive disadvantage vis-a-vis varying environmental and labor standards within a free-trade context. One possible solution would be to make trade less "free" for those countries with inadequate standards. Otherwise, the more dangerous and labor intensive jobs will naturally flow towards those countries. Workers unlucky enough to have those jobs will have to wait many years before their organized

84 ASHFORD, supra note 8, at 453.

efforts can raise standards to a level on par with the "industrialized" world.

CONCLUSION

The world has changed rapidly since the OSHA Act was passed in 1970. There is a new economic order and a move towards the liberalization of trade. This trend provides U.S. industry with new weapons to undermine the health of U.S. workers given OSHA's need to prove "economic feasibility." In addition, while recent reform legislation considered by Congress is quite comprehensive and long overdue, if enacted it would have constrained OSHA's ability to promulgate stringent health standards.

One of the reasons that Congress placed the cost of health standards on all covered employers was to prevent conscientious employers from suffering a competitive disadvantage from investing in occupational safety and health. The approach was particularly important since occupational illness often manifests itself long after the period of chronic exposure. Consequently, without regulation, employers would have no economic incentive, such as a reduction of workers' compensation costs, to protect workers because employers would seldom be required to pay for the consequences of their own neglect.

This is precisely the situation now confronted by regulated

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86 See discussion supra pp. 136-40.


88 See discussion supra p. 140.


90 Id.
U.S. industries vis-a-vis foreign competitors within the free trade paradigm. Because many U.S. industries are heavily regulated, their higher compliance costs will hamper efforts to compete with rival products from less regulated competitors under free trade, particularly those produced in developing nations such as Mexico. These developments will further constrain OSHA in protecting workers from toxic substances, particularly in light of heightened international competition.

The world has also changed dramatically since the *Lead* decision. Judge Skelly Wright's "resolution" of the circularity problem regarding economic feasibility under 6(b)(5) rulemaking made sense in 1980. Nevertheless, the ability of American industry to thrive in the next century will be based upon its international competitiveness. Consumers will happily pay lower prices for comparable goods manufactured in countries with less exacting worker safety standards. Consequently, Americans face a Hobson's choice between less demanding worker safety standards or the loss of jobs, and entire industries, because U.S. firms are now in position to challenge most future health standards as economically infeasible. All future standards will need to automatically build in feasibility with personal protective devices, which are cheaper and less effective than engineering and work practice controls.

Protecting U.S. workers from exposure to toxic chemicals should always remain a very important goal. There is a moral component to this proposition. Nevertheless, the risks of contracting diseases are difficult to quantify and often manifest themselves only after many years, even decades, of exposure. In addition, OSHA faces numerous constraints in its ability to lower the chances that employees will contract often preventable diseases. Protecting workers from occupational illness can be quite expensive. If U.S. industry is going to be forced by OSHA to implement costly preventive measures, it will often find itself at a competitive disadvantage in the international marketplace.

Consequently, economic feasibility will be much easier to challenge because continued industry viability is now threatened by the strains of increasing international competition. This is particularly true after the passage of NAFTA and in light of the
potential new GATT. Massive dislocation might increasingly be the result of future safety regulation because American industry can no longer effectively pass the compliance costs on to consumers. These developments will have serious negative implications for the continuing viability of OSHA.