

# Michigan Journal of International Law

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Volume 6 | Issue 1

---

1984

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### Recommended Citation

Linda Elliott, *The Role of the Federal Government in Worker Adjustment Assistance*, 6 MICH. J. INT'L L. 445 (1984).

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# The Role of the Federal Government in Worker Adjustment Assistance

## An Evaluation of the 1974 Trade Act in the Light of Worker Adjustment Assistance in Japan

Linda Elliott\*

National industrial policies designed to promote the adjustment of national economies to new economic realities pose the challenge of assisting experienced industrial workers obtain new skills. In the United States, the role of the federal government in this process is brought into sharp focus in the criticism of the Trade Adjustment Assistance (TAA) program for displaced workers.<sup>1</sup>

TAA is shaped by the confluence of two principles of political economy: standard free market theory and a prescriptive extension of the compensation theory of welfare economics, referred to in this note as the compensation principle.<sup>2</sup>

The command of the market principle regarding adjustment assistance is easy to summarize: it would limit government involvement as much as possible, allowing supply and demand to bring about adjustment of workers to job loss caused by imports. Strictly applied, the free market principle would preclude any trade adjustment assistance for workers. While it has obviously not held such

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1. See Trade Act of 1974, §§ 221–250, Pub. L. No. 93-618, 88 Stat. 1978, 2019–2030 (current version at 19 U.S.C. §§ 2271–2322 (1982)) [hereinafter cited as Trade Act]. In this note “TAA” refers to those portions of the Trade Act of 1974 concerning assistance to workers as well as to the worker adjustment assistance provisions contained in the predecessor of the Trade Act, the Trade Expansion Act of 1962, §§ 321–338, Pub. L. No. 87-794, 76 Stat. 872, 892–99. The Trade Act contains provisions entitling firms and communities as well as workers to trade adjustment assistance. See 19 U.S.C. §§ 2341–2374 (1982). TAA is not the only federal program providing assistance to unemployed experienced workers, but it is the only one with widespread impact. With the exception of the Disaster Unemployment Assistance Act, the others—the Redwood Employee Protection Program, the Railroad Employee Protection Program, the Urban Mass Transportation Employee Protection Act, and the Airline Employee Protection Program—target a much more narrowly defined group of workers than does TAA. For a summary of these programs, as well as TAA, see M. ISHIKAWA, UNEMPLOYMENT INSURANCE AND PROLIFERATION OF OTHER INCOME PROTECTION PROGRAMS FOR EXPERIENCED WORKERS (U.S. Dep’t of Labor Employment and Training Admin., Unemployment Insurance Occasional Paper 80-1 (1980)).

2. See C. FRANK, FOREIGN TRADE AND DOMESTIC AID 12 (1977) (supporting only the assertion regarding the compensation principle).

sway since the enactment of TAA, the free market principle's influence is visible in TAA program procedures restricting government involvement in worker re-training.<sup>3</sup>

The compensation principle, on the other hand, both mandates and limits government involvement in the adjustment process. It holds that government policies of net benefit to society should not be allowed to impose disproportionate costs on any one segment of the population. Thus, when the government formulates policies to encourage international trade and lower prices for consumers, the compensation principle justifies government assistance to workers suffering the effects of decreased sales of American products.<sup>4</sup> It does not justify assistance for

3. See *infra* notes 37–38 and accompanying text, and notes 69–73 and accompanying text. Prior to enactment of TAA the desire to permit labor markets to operate freely dominated discussion of worker adjustment to job loss due to increased imports. Escape clause relief for workers and firms hurt by U.S. trade agreements officially became part of U.S. trade policy in 1947. However, it was rarely used, and, in any case, provided only short-term maintenance of protective tariffs or quotas for the purpose of allowing an industry to recapture its competitive advantage. It did not compensate workers for job loss or facilitate their transition into new jobs. See Metzger, *Adjustment Assistance*, in 1 U.S. COMM'N ON INT'L TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 320–23 (1971). Although the idea of an adjustment assistance program was raised with some frequency in the 1940s, see, e.g., Wilcox, *Relief for Victims of Tariff Cuts*, 40 AM. ECON. REV. 884–89 (1950) (discussing various proposals), it failed to gain the support of a significant number of policy makers.

In 1950, a proposal based on the compensation theory was forwarded in a draft report to the President on foreign economic policy. However, the published version did not specifically address how domestic industries might adapt to increased imports. O. REISCHER, *TRADE ADJUSTMENT IN THEORY AND PRACTICE* 20 (1961). It has been suggested that this omission was based on the fear that objections to proposed tariff reductions on the grounds that a related adjustment assistance program would be difficult to administer, would be as strong as objections to a tariff reduction proposal that did not provide for compensation. *Id.* Finally, in 1954, the Commission on Foreign Economic Policy published an adjustment assistance proposal by the President of the United Steel Workers. The Commission as a whole, however, did not endorse it. *Id.* at 22. Between 1954 and 1962, adjustment assistance bills were regularly proposed in Congress, but no hearings were held on them and the idea received little attention during the debates over the Trade Agreement Extension Acts of 1955 and 1958. See Metzger, *supra*, at 323. The major bills are discussed in O. REISCHER, *supra*, at 23.

4. For an early discussion of this prescriptive extension of the compensation theory of welfare economics in the context of adjustment assistance for workers suffering job loss as a result of increased international trade, see E. STANLEY, *WORLD ECONOMIC DEVELOPMENT* 159–72 (1945).

The compensation theory, in its classic, non-prescriptive form, is a test used by welfare economists to determine whether a policy change should be undertaken: it does not describe how individuals or groups should be treated following enactment of a policy. See H. VAN DEN DOEL, *DEMOCRACY AND WELFARE ECONOMICS* 36–40 (1979); C. PRICE, *WELFARE ECONOMICS IN THEORY AND PRACTICE* 1–18 (1977); A. FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* 1–8 (1943). Before the development of the compensation theory, welfare economists attempted to measure the potential community benefits of a policy change by measuring its effect on individuals. This proved unworkable. A change that one person finds beneficial, may be viewed with distress by another. Since individuals can not express welfare changes in absolute terms, it was impossible to measure the aggregate effect of a change on community welfare without making judgments about the relative merits of various distribution patterns. Even if such judgments could be made, economists found it difficult to quantify information regarding individual welfare so that it could be incorporated into a model of community welfare. See C. PRICE, *supra*, at 4–6.

Recognizing these limitations, and hoping to avoid the value judgments implicit in distribution patterns, Vilfredo Pareto developed the basic premise of 20th century welfare economics: a change will be deemed an improvement in community welfare only if it results in an improvement in at least one individual's welfare and a decrease in the welfare of none. See *id.* at 6–7. The problem that Pareto

all unemployed workers, but only those whose job loss is a direct result of increased imports. Determining when "import injury" has occurred is the crucial and often problematic task involved in administering adjustment assistance according to the compensation principle.

TAA's severest critics argue for the elimination of the requirements mandated by one or the other of these two guiding principles. Advocates of greater federal government involvement in worker adjustment, referred to in this note as "expansionists," would increase the flexibility of national industrial planners. They would endow the federal government with a greater role in searching out trade-impacted workers and directing them to new skills and industries.<sup>5</sup>

Proponents of the elimination of government-sponsored trade adjustment programs, including the Reagan Administration, would ignore the compensatory rationale of the current program. They argue that federal assistance for trade-impacted workers is unfair, costly, and unnecessary in light of existing state-run manpower training programs.<sup>6</sup>

Given the desire of these critics to eliminate aspects of TAA arising from the compensation and free market principles, useful insight into federal adjustment assistance may be gained by examining a worker adjustment system that is not constrained by either idea. Although many countries have created assistance programs without reference to the compensation and free market principles,<sup>7</sup> Japan's, as an example of a successful model of anticipatory government planning<sup>8</sup> operating in a largely "market oriented, private enterprise economic system,"<sup>9</sup> is particularly relevant for comparison.

Part I of this note examines worker adjustment assistance in the United States. It traces TAA's evolution from its inception as a means of compensating trade-displaced workers while minimizing government intervention in the market adjustment process, through its amendment to reflect congressional concern over

ignored is that most economic decisions over which there is debate result in both loss and gain. Changes which benefit some and harm none are usually undertaken without discussion. Thus, his formula was of little use in evaluating most economic policy questions. *See id.* at 19.

The original compensation theory was an attempt to overcome this limitation. The classic example of the theory was described by N. Kaldor in 1939. Looking to the English Corn Laws of the 19th century, Kaldor argued that while their repeal (which lowered the price of bread) did not improve welfare in the Paretian sense—it made farmers worse off—it nevertheless could be seen as an improvement in the welfare of society as a whole because consumers were so much better off that they could, theoretically, compensate the injured farmers. *See Kaldor, Welfare Proposition of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549–52 (1939). Kaldor and other neo-Paretians did not go so far as to urge that consumers should compensate the farmers; they merely used the ability to compensate as an index of the positive net social benefit of the change. *See H. VAN DEN DOEL, supra*, at 37–38.

5. *See infra* notes 76–98 and accompanying text.

6. *See infra* notes 99–127 and accompanying text.

7. For convenient summaries of worker adjustment programs used in other countries, see INT'L LABOR OFFICE, *WORKFORCE REDUCTIONS IN UNDERTAKINGS* (E. Yemin ed. 1982) and 1 & 2 COMPTROLLER GEN., GEN. ACCOUNTING OFFICE, I.D. NO. 78-43, *CONSIDERATIONS FOR ADJUSTMENT ASSISTANCE UNDER THE 1974 TRADE ACT: A SUMMARY OF TECHNIQUES USED IN OTHER COUNTRIES* (1979) [volume 2 hereinafter cited as GAO REPORT].

8. GAO REPORT, *supra* note 7, at 75.

9. Patrick & Rosovsky, *Japan's Economic Performance: An Overview*, in *ASIA'S NEW GIANT* 43 (H. Patrick & H. Rosovsky eds. 1976).

the low number of worker certifications, to the criticism of its procedures arising out of more recent congressional interest in government-sponsored retraining as a means of attaining worker adjustment. After arguing that current certification and distribution procedures continue to reflect the original goal of the program—compensation with minimal intervention in the market—the note examines alternatives to TAA proposed by the expansionists and the Reagan Administration.

Part II focuses on the Japanese system of worker adjustment. It describes the lifetime employment system underlying labor relations in Japan and it examines government adjustment policies implemented in the wake of the 1973–1974 oil crisis. It concludes that government assistance encouraging local private-adjustment initiatives, rather than government designed and administered retraining and placement programs, was responsible for the post-oil crisis adjustment of a large portion of the Japanese workforce.

Part III analyzes proposed alternatives to TAA in the light of the Japanese experience. Accepting that modification of the current program is necessary, it argues that neither the expansionists' nor the current Administration's proposals will encourage the development of local, privately directed retraining and re-employment initiatives similar to those driving the continuous adjustment of many Japanese workers. Acknowledging that different labor-management structures prevent imitation of Japanese adjustment measures by U.S. companies, part III suggests that the cooperative labor-management attitude crucial to continuous adjustment of workers in Japan could be fostered in the United States if Congress did not attempt to give expression to both the compensation and free market principles in a single program. Arguing that neither principle can be ignored, the note suggests that attempts to combine them frustrate the achievement of both their goals. Thus, it proposes a two-pronged adjustment program, the first prong of which would be devoted to compensating import-injured workers and the second to encouraging private on-the-job retraining for all workers.

## I. ADJUSTMENT ASSISTANCE IN THE UNITED STATES

### A. *The Original Goal: Balancing Two Principles*

In 1962, President Kennedy articulated the purpose of the first trade adjustment assistance program (TAA).<sup>10</sup> Equating the "obligation to render assistance to those who suffer as a result of national trade policy" to the obligation of the federal government to assist former military personnel, he nevertheless warned that TAA was not to be "a subsidy program of governmental paternalism." Rather, it was to afford time for "American initiative, American adaptability, and American resiliency to assert themselves."<sup>11</sup> Throughout congressional debate,

10. Trade Expansion Act of 1962, §§ 321–338, Pub. L. No. 87-794, 76 Stat. 872, 892–99 (repealed by the Trade Act of 1974) [hereinafter cited as TEA]. See *supra* note 1. A convenient source for the legislative history of the TEA is HOUSE COMM. ON WAYS AND MEANS, 90th Cong., 1st Sess., LEGISLATIVE HISTORY OF H.R. 11970 (1967) [hereinafter cited as LEGISLATIVE HISTORY OF TEA].

11. *Trade Expansion Act of 1962, Hearings Before the House Comm. on Ways and Means*, 87th Cong., 2d Sess. 8–9 (1962) (Message from the President of the United States Relative to the

the focus of the program's supporters was on compensation, not retraining.<sup>12</sup> Nowhere in the legislative history of this first program is there any indication that TAA was designed to provide large-scale government directed labor adjustment. TAA "benefits [were] intended as a reasonable substitute for [a worker's] previous job security, until the period of adjustment to new conditions [could] be completed." The government was to act simply "to minimize the adverse impact [of increased imports] and facilitate the transition to new areas of production and service."<sup>13</sup>

Program requirements ensured that "American initiative" had a chance to assert itself. The 1962 Act made a worker petition a prerequisite to government assistance.<sup>14</sup> Only upon the filing of such a petition was the Tariff Commission to investigate whether a group of workers had suffered import injury. The Commission's task was to determine

whether, as a result in major part of concessions granted under trade agreements, an article like or directly competitive with an article produced by such workers' firm, or an appropriate subdivision thereof, [was] being imported into the United States in such increased quantities as to cause, or threaten to cause, unemployment or underemployment of a significant number or proportion of the workers of such firm or subdivision.<sup>15</sup>

Reciprocal Trade Agreements Program), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 43, 90.

12. This is not to say that debate on the bill contained no reference to retraining, but only that the emphasis was on the obligation of the federal government to help workers through periods of unemployment caused by lowered tariffs. *See, e.g.*, 108 CONG. REC. 22,286 (1962) (remarks of Cong. Gross and Cong. Byrnes on the conference report), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1981; 108 CONG. REC. 19,793 (1962) (remarks of Sen. Kert on H.R. 11970), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1706; 108 CONG. REC. 19,787 (1962) (remarks of Sen. Smathers on H.R. 11970), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1698; 108 CONG. REC. 19,798 (1962) (remarks of Sen. Long on H.R. 11970), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1714.

The focus on cash benefits rather than retraining was also apparent in the reasoning of those Congressional representatives who did not support adjustment assistance for workers. Their major objection to TAA was that it would federalize and standardize state unemployment compensation systems, *see, e.g.*, 108 CONG. REC. 19,792 (1962) (remarks of Sen. Curtis on H.R. 11970), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1704; 108 CONG. REC. 22,286-87 (1962) (remarks of Cong. Collier and Cong. Byrnes on the conference report), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 7981-83, and that it was unfair and would cause resentment among workers who, unemployed for non-import-related reasons, would receive only state unemployment compensation payments. *See, e.g.*, 108 CONG. REC. 22,179 (1962) (remarks of Sen. Bush on the conference report), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 2022; 108 CONG. REC. 22,287 (1962) (remarks of Cong. Byrnes on the conference report), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1983; 108 CONG. REC. 22,291 (1962) (remarks of Cong. Cahill on H.R. 11970), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1990; 108 CONG. REC. 19,792 (1962) (remarks of Sen. Curtis on H.R. 11970), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1701-02; 108 CONG. REC. 19,792 (1962) (remarks of Sen. Curtis and Sen. Williams), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1704; 108 CONG. REC. 19,795-96 (1962) (remarks of Sen. Byrd) *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1710.

13. 108 CONG. REC. 19,793-94 (1962) (remarks of Sen. Williams on H.R. 11970), *reprinted in* LEGISLATIVE HISTORY OF TEA, *supra* note 10, at 1707.

14. TEA, *supra* note 10, at § 332(a).

15. *Id.* at § 301(b).

The Commission generally interpreted this language to mean that the alleged increase in imports must have occurred nearly simultaneously with trade concessions and that increased imports must have been more responsible for job loss than all other factors combined.<sup>16</sup> Furthermore, it required the Commission to find that the job loss of the petitioning workers was a result of trade concessions made in 1952, the last year in which major trade legislation was enacted.<sup>17</sup>

This strict interpretation of import injury almost completely shielded market forces of adjustment from government intervention. Between 1962 and 1969 not a single worker qualified for assistance.<sup>18</sup> Not until the Kennedy Round of tariff negotiations took effect in 1968 was the Commission able to identify the requisite connection between imports and job loss.<sup>19</sup> Even then, however, the number of workers certified was relatively low. Between 1969 and 1974, the Tariff Commission provided assistance only to an estimated 47,000 workers in 29 states.<sup>20</sup>

Motivated largely by the low number of certifications, Congress in 1974 streamlined the petitioning process and eased the program's definition of import injury to allow for a more attenuated connection between federal trade policies and job loss.<sup>21</sup> The general character of the changes was compensatory. Although the Act improved the employment services available to workers, congressional concern focused largely on providing workers with more adequate cash allowances and on expediting benefit delivery procedures.<sup>22</sup>

### B. *The Growing Concern With Retraining*

In the year and a half following enactment of the 1974 Trade Act, 178,363 workers were certified for assistance,<sup>23</sup> over three times as many as had been certified in the entire 12-year history of TAA prior to amendment.<sup>24</sup> As more workers were certified for assistance, Congress listened with growing interest to arguments that TAA should more directly promote retraining.

16. Rosenblatt, *Trade Adjustment Program: Crossroads or Dead End?* 9 LAW & POL'Y INT'L BUS. 1065, 1069 (1977).

17. C. FRANK, *supra* note 2, at 41.

18. S. REP. NO. 1298, 93rd Cong., 2d Sess. 131 (1974) [hereinafter cited as S. REP. NO. 1298].

19. See C. FRANK, *supra* note 2, at 47.

20. S. REP. NO. 1298, *supra* note 18, at 131.

21. Trade Act, *supra* note 1, at § 222, 19 U.S.C. § 2272. As a result of these amendments, the government no longer had to find that trade concessions were the direct cause of the injurious increase in imports. Instead, a finding that a significant number of workers at a firm had lost their jobs, that the firm's sales had decreased, that imports of goods directly competitive with those produced by the firm had increased, and that the increase "contributed importantly" to the loss of jobs, was considered prima facie evidence of the connection between trade policy and job loss. *Id.* The law also redefined "contributed importantly" to mean "a cause which is important but not necessarily more important than any other cause." *Id.* For a discussion of the problems involved in the application of these requirements, see *infra* notes 39-62 and accompanying text.

22. S. REP. NO. 1298, *supra* note 18, at 131.

23. Office of Trade Adjustment Assistance, Dep't of Labor, TAA Activity 1975-1984 (unpublished chart composed from internal reports of the Employment and Training Administration and monthly reports of State Employment Security Agencies) [hereinafter cited as TAA Activity].

24. *Id.* Since 1976 certification levels have fluctuated between a low of 16,910 in 1982 and a high of 670,735 in 1980. *Id.*

In 1977, the Subcommittee on Trade of the House Ways and Means Committee solicited the opinions of labor and business leaders regarding "possible changes in [the 1974 Trade Act] and the regulations to improve the effectiveness of [its assistance] programs in achieving orderly adjustment to import injury."<sup>25</sup> One of the major criticisms of the program was the lack of federal involvement in retraining.<sup>26</sup> It was suggested that because it left the burden of retraining to state employment offices, TAA "concentrated on maintaining the status quo, rather than becoming the outward looking and dynamic program" which Congress intended it to be.<sup>27</sup>

The Office of Program Evaluation of the Department of Labor also criticized TAA in 1977. It noted that the provision of training to TAA recipients had been "spotty and problematical throughout the country, with uncertainty and confusion in the [state] agencies regarding its desirability, feasibility, and appropriateness for trade affected applicants."<sup>28</sup> It reported that some state employment offices disliked being forced to administer the training promises of TAA when they had been told that they were to function largely as job exchanges.<sup>29</sup> The staff report of the trade subcommittee contained similar evidence of program failure. It found that many state offices were unwilling to differentiate between import-injured workers and other unemployed persons.<sup>30</sup>

Members of the trade subcommittee agreed that TAA should give greater emphasis to retraining. The committee staff report stated that "[t]he basic purpose of a program of benefits to trade-impacted workers, separate from programs for workers laid off for non-trade-related reasons, is to assist their adjustment to reemployment in the same or a different industry, as opposed to providing compensation for unemployment."<sup>31</sup>

25. *Trade Adjustment Assistance Programs Under Title II of the Trade Act of 1974: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 1 (1977) [hereinafter cited as *Title II Hearings*] (opening statement by Cong. Gibbons).

26. See *Title II Hearings*, *supra* note 25, at 175 (statement of Samuel M. Rosenblatt, Senior Economic Consultant, International Economic Policy Association); see also *Title II Hearings*, *supra* note 25, at 41 (statement of John Oshinsky, Legislative Representative, United Steelworkers of America); *Title II Hearings*, *supra* note 25, at 118 (statement of Governor Thomson of New Hampshire); *Title II Hearings*, *supra* note 25, at 124 (statement of Mark Richardson, President, American Footwear Industries Association); *Title II Hearings*, *supra* note 25, at 137-40 (statement of Leonard Woodcock, President, United Auto Workers). Witnesses and legislators also severely criticized time limitations on worker petitions for assistance as well as the lack of information about certification procedures. See, e.g., *Title II Hearings*, *supra* note 25, at 4-10 (statement of Cong. Sharp); *Title II Hearings*, *supra* note 25, at 36 (statement of John Oshinski, Legislative Representative, United Steelworkers of America); *Title II Hearings*, *supra* note 25, at 53-54 (statement of Cong. Vanik).

27. *Title II Hearings*, *supra* note 25, at 170 (statement of Samuel M. Rosenblatt, Senior Economic Consultant, International Economic Policy Association).

28. OFFICE OF PROGRAM EVALUATION, EMPLOYMENT AND TRAINING ADMIN., DEP'T OF LABOR, EVALUATION STUDY OF TRADE ADJUSTMENT ASSISTANCE FOR WORKERS UNDER THE TRADE ACT OF 1974, at 61 (1977).

29. *Id.*

30. STAFF OF SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 95TH CONG., 2D SESS., BACKGROUND MATERIALS ON THE TRADE ADJUSTMENT ASSISTANCE PROGRAMS UNDER TITLE II OF THE TRADE ACT OF 1974, at 24 (Comm. Print 1977).

31. *Id.* at 14.



Despite the new congressional interest in adjustment as opposed to compensation, none of the bills under consideration at the time of the hearings would have changed TAA procedures to promote greater federal involvement in retraining.<sup>32</sup> Yet the performance of the Ohio Employment Office after the steel manufacturing shutdowns in the late 1970s glaringly demonstrated the continued ineffectiveness of administering retraining programs through state offices.<sup>33</sup> In 1980, President Carter acknowledged that new methods of retraining were necessary for communities suffering massive layoffs.<sup>34</sup> The report of the study group on which the President's conclusion was based emphasized the need for federal coordination of adjustment efforts, implying that state administration was inadequate.<sup>35</sup>

Finally, in 1981, federal interest in retraining found legislative expression in TAA amendments that effectively, if not explicitly, limited cash benefits to those workers enrolled in retraining programs, thus ensuring more retraining for every TAA dollar spent.<sup>36</sup> The retraining goal that first began to draw attention after the

32. See *id.* at 1-9 for a summary of the bills.

33. A detailed study of dismissals from steel plants in Youngstown, Ohio found that the officials of the Ohio Bureau of Employment Services (OBES) administered TAA and other available programs with enthusiasm, but that their adjustment efforts, beyond the provision of cash benefits, were largely unsuccessful. See T. BUSS & F. REDBURNS, SHUTDOWN AT YOUNGSTOWN 108 (1983). It concludes that the failure of the OBES to achieve its reemployment goals was a function of the "complex interaction between several fundamental shortcomings of employment service delivery systems, which . . . are not particular to the Youngstown area." *Id.* at 109. The study states that the primary problems with the system were the lack of information regarding available jobs in the community, the tendency to fund retraining without evidence of demand for the skills being developed, and the encouragement of relocation without knowledge of job availability. *Id.* at 111.

34. American Steel Industry—Statement on the Revitalization Program, 16 WEEKLY COMP. PRES. DOC. 1960, 1967-69 (Sept. 30, 1980) (based on the conclusions of an ad hoc committee of government, management, and labor representatives created to evaluate and facilitate aid to steel workers).

35. See STEEL TRIPARTITE ADVISORY COMM., FINDINGS AND RECOMMENDATIONS FOR COMMUNITY AND LABOR ADJUSTMENT ASSISTANCE 1, 3-5, 7 (1980).

36. The 1981 amendments did not change the length of time for which a TAA qualified worker is eligible for cash benefits—52 weeks plus 26 additional weeks when he or she is enrolled in an approved training program. Compare 19 U.S.C. 2293 (1976) with 19 U.S.C. 2293 (1982). However, by limiting benefit amounts to state unemployment insurance payment levels, the amendment not only ensured that import injured workers receive exactly the same cash compensation as all other unemployed individuals during the period they are eligible for unemployment payments, it also ensured that during periods in which federal extended unemployment benefits are available, TAA cash payments would generally be available only to those in retraining.

Prior to 1981, the size of TAA weekly cash benefits equaled 70 percent of a certified worker's wage (not to exceed 70 percent of the average weekly manufacturing wage) reduced by any amount of payable unemployment benefits. 19 U.S.C. § 2292 (1976). In most states, weekly unemployment benefits equal approximately 50 percent of weekly wages. P. HONIGSBERG, THE UNEMPLOYMENT BENEFITS HANDBOOK 22 (1981) (The appendix describes the exact methods of calculating weekly benefit amounts in each state.) Under the unamended version of TAA, workers receiving unemployment benefits equaling 50 percent of their weekly wages would, if TAA qualified, receive TAA cash benefits amounting to 20 percent of their wages. Thus, prior to 1981, TAA certified workers received some amount of compensation for import injury regardless of whether they were receiving unemployment benefits. The 1981 amendment, by limiting TAA cash payments to the level of unemployment benefits in each certified worker's state, insured that import injured workers receive only the same amount of money as all other unemployed workers for as long as they are eligible for unemployment payments. 19 U.S.C. § 2293 (1982).

The 1981 ceiling on cash allowances further limits the availability of compensation for import injured workers during difficult economic periods. In most states "regular" unemployment payments

enactment of the Trade Act of 1974 thus obtained at least a limited place in the law. These amendments, however, remain the only, and a minor, legislative reflection of post-1974 Congressional interest in retraining as a core goal of TAA. The interplay of the free market and compensation principles that shaped the first program continues to define the two major procedures required in the operation of TAA: "certification," including the application procedures required of workers and the investigative procedures followed by the Department of Labor as well as the substantive standards that workers must meet in order to qualify for assistance; and "distribution," encompassing the means by which the government administers assistance.

### C. *Current Program Procedures: Maintainance of the Original Goals*

#### 1. *Certification.*

A worker petition continues to be a prerequisite to adjustment assistance. The Department of Labor, which is responsible for certification investigations,<sup>37</sup> is prohibited from seeking out individuals or groups of workers for federal assistance. Rather, three or more employees from a single company, their authorized union, or another authorized representative must initiate the certification process.<sup>38</sup> Government intervention in private adjustment thus continues to be limited to those enterprises in which at least some workers desire assistance.

are provided for 26 weeks. P. HONIGSBERG, *supra*, at 24. If this were the full extent of available unemployment benefits, the compensation provided import injured workers would, despite the limitation on amount, be considerable. Following expiration of unemployment benefits, TAA would, for the remaining 24 weeks of the 52 week TAA payment period, provide TAA workers with cash benefits equal to state unemployment benefits. Since 1970, however, federally mandated extended benefits have provided workers with 13 weeks of additional benefits whenever national or state unemployment rates surpass specified levels. *See id.*; S. WADNER, A PROPOSAL FOR A PROGRAM PAYING UI BENEFITS BEYOND 39 WEEKS 2 and Appendix A (1980). This reduces significantly the additional cash compensation available to import injured workers. Furthermore, during recessionary periods, emergency measures have provided additional payments, sometimes making the combined benefit period as long as 65 weeks. S. WADNER, *supra*, at 2. When the 1981 amendments were enacted, such emergency measures were in place, allowing for over 52 weeks of unemployment benefit payments in nearly every state. Telephone conversation with Ellen Blum, Legislative Assistant to Senator Metzbaum, November, 1983. (notes on file, Michigan Yearbook of International Legal Studies). Thus, cash benefits were limited to workers who entered retraining upon the expiration of their unemployment insurance benefits.

37. 19 U.S.C. § 2273(a) (1982). Departmental regulations specify that investigations will be carried out under the supervision of the director of the Office of Trade Adjustment Assistance. 29 C.F.R. § 90.2 (1984).

38. 29 C.F.R. § 90.11(a)(b). Although the Department cannot initiate the certification process, it is required to investigate all properly filed worker petitions for assistance. 19 U.S.C. § 2273(a) (1982). The closest the Trade Act comes to empowering the Department to initiate an investigation absent a worker petition is the requirement that the Department, upon notification from the International Trade Commission (ITC) of the commencement of an escape clause investigation for import injury relief to an industry, undertake a study of workers in that industry who are likely to be eligible for assistance. 19 U.S.C. § 2274(a) (1982). The findings of the study are delivered to the President and published in the Federal Register. 19 U.S.C. § 2274(b) (1982). Prior to the 1981 amendments, the Department was also required to provide program information to potential recipients of adjustment assistance if the ITC made an affirmative finding regarding import relief. 19 U.S.C. § 1174(c) (1976) (repealed 1981).

Substantive certification requirements and the investigation procedures used by the Department to ensure that they are met by workers receiving certification reflect a desire to maintain the compensatory nature of TAA. The Labor Department is to certify petitioning workers only if it determines:

- (1) that a significant number or proportion of the workers in the petitioning workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
- (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
- (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.<sup>39</sup>

Administrative and judicial definition of when increased imports "contributed importantly" to a decline in sales or production and layoffs,<sup>40</sup> and when workers "produce" an article that is "like or directly competitive with" an imported good,<sup>41</sup> should distinguish between those workers who are import-injured and those workers who are not. Such interpretations have failed, however, to provide a useful bright-line test for application of the "contributed importantly" standard.

While the measurable facts involved make it relatively simple to find that a significant number of workers at a firm have been laid off, that the sales or production of a firm has declined absolutely, and that there has been an increase in imports of a particular product,<sup>42</sup> the determinations that the increase in imports "contributed importantly" to layoffs or a decrease in sales and that the petitioning worker "produced" an "article that is like or directly competitive with" an imported good have proved complex.

The "contributed importantly" standard is particularly difficult as it demands an assessment of the more nebulous cause and effect relationships between the three factual determinations. To obtain information upon which to make the "contributed importantly" assessment, the Department conducts customer surveys of the petitioning workers' firms to determine whether there was any change in their import buying habits that correlates with the decline in sales of the product produced at the workers' firms.<sup>43</sup>

39. 19 U.S.C. § 2272 (1982 & Supp. II 1983-1985).

40. 19 U.S.C. § 2272(3) (Supp. II 1983-1985).

41. 19 U.S.C. § 2272(3) (Supp. II 1983-1985).

42. An investigation by the General Accounting Office of the problems encountered in administering TAA does not refer to the determination of either of the first two requirements. In order to determine the third—whether there has been an increase in the level of imports of a particular product—the Department develops an industry study containing the competitive product's description, an industry perspective, the level of import and export of the product, and consumption data. There appears to be little dissatisfaction with this portion of Department investigations. GEN. ACCOUNTING OFFICE, GAO/HRD-82-121, INFORMATION ON THE 1974 TRADE ACT WORKER ADJUSTMENT ASSISTANCE PROGRAM CERTIFICATION PROCESS 3 (1982) [hereinafter cited as CERTIFICATION PROCESS].

43. See *id.* at 3-4.

Disappointed applicants have challenged the accuracy of information obtained through these surveys. Although the courts have generally deferred to Department findings,<sup>44</sup> officials responsible for investigations themselves acknowledge the substantial limitations of the survey method. First, it is difficult to determine to whom surveys should be distributed. Firms are often reluctant to provide complete customer lists because they consider such information confidential. Second, customers who respond to such surveys often represent a small, nonprojectable sample of a firm's sales. Finally, though officials admit that information often appears inconsistent or inaccurate, they have been unable to devise a method of verification.<sup>45</sup>

Even when adequate information can be obtained, the Department finds it difficult to define and apply the "contributed importantly" standard.<sup>46</sup> Statutory language provides little guidance—a cause that contributes importantly is "a cause which is important, but not necessarily more important than any other cause."<sup>47</sup> The Act's legislative history is only slightly more definitive. The Senate report states that the effect of imports must "be significantly more than de minimus."<sup>48</sup> If dismissals and declines in sales or production would have been the same regardless of the increased imports, the petitioning workers cannot be certified.<sup>49</sup> Although this is helpful in determining when import injury is inadequate to warrant assistance, it provides scant guidance as to when it is adequate.

Although the Department has concluded that the "contributed importantly" test cannot be reduced to specific procedures,<sup>50</sup> the standard has clearly limited the scope of both investigations and certifications. Under the language of the Act a union, such as the United Auto Workers, representing workers at many different firms, could theoretically affect the private adjustment process of an entire industry on the basis of a single certification request.<sup>51</sup> However, when a petition is filed on behalf of workers from different firms or even all of the workers at a single, multi-plant enterprise, the Department usually examines each plant individually and generally limits group certification to a plant or plant division.<sup>52</sup> The Department argues that the plant is the largest subdivision permitting the Secre-

44. *See, e.g.*, *Local 167, International Molders & Allied Workers' Union v. Marshall*, 643 F.2d 26 (1st Cir. 1981) (upholding the Department's denial of certification over the petitioners' argument that the Department's survey was inadequate because it failed to detect relative import substitution and was submitted to less than all of the producing firm's customers).

45. *See* CERTIFICATION PROCESS, *supra* note 42, at cover letter and 4–5.

46. *Id.* at 6.

47. 19 U.S.C. § 2272 (Supp. II 1983–1985).

48. S. REP. NO. 1298, *supra* note 18, at 133.

49. *See id.*

50. CERTIFICATION PROCESS, *supra* note 42, at 6.

51. *See, e.g.*, *UAW v. Marshall*, 584 F.2d 390, 391 (D.C. Cir. 1978).

52. *See id.* at 391–97; *UAW v. Marshall*, 627 F.2d 559 (D.C. Cir. 1980). Although individual plant investigations are not required by either the Trade Act of 1974 or the Code of Federal Regulations, *see* 29 C.F.R. § 90.12 (1984), these two cases indicate that the Department's general practice is to investigate separately each plant covered by a petition involving multiplant enterprises and to limit certifications to plants or plant divisions. It should be noted, however, that these two opinions sometimes fail to distinguish the problem of defining an appropriate subdivision for investigations from the problem of defining an appropriate subdivision for certification. For an example of an opinion dealing strictly with the latter, *see* *Paden v. Dep't of Labor*, 562 F.2d 470 (7th Cir. 1977).

tary to differentiate between separations to which an increase in imports "contributed importantly" and separations to which it did not.<sup>53</sup>

A Department memorandum justifying the use of the plant-by-plant investigation procedure states that "the Secretary's broad discretion to establish the appropriate subdivision . . . should be utilized to seek out specific import related situations within a firm, even though certification would not be warranted if only firm experience in total was subject to import-impact analysis."<sup>54</sup> It elaborates:

Congressional guidance on how "contributed importantly" is to be interpreted and applied governs the Secretary's approach in determining the appropriate subdivision in any given case. The Secretary has to consider seasonal, cyclical and technological impacts on employment and other factors which may be "dominant" causes of unemployment. All of these may impact differently on different firms and/or segments of firms.<sup>55</sup>

The Department's comments recognize that the size of the entity examined may render a certification over- or under-inclusive. It may be, as the first comment suggests, that the loss of sales to imports suffered by a firm as a whole is too small in comparison to its overall sales to have contributed importantly to layoffs. Yet, if all of those losses were due to the decline in sales of a product produced at one plant within the enterprise, a plant-level investigation might enable the Department to find that the effect of increased imports on layoffs met the "significantly more than de minimus" requirement set forth in the Senate Report.<sup>56</sup>

Conversely, in a situation in which increased imports did contribute importantly to layoffs throughout an entire enterprise or industry, it is possible that particular plants within the enterprise, or enterprises within the industry, suffered sales losses from something other than import competition and would have been forced to carry out layoffs regardless of the increased competition from abroad. To award the unemployed workers of such plants adjustment assistance would provide them with a windfall not foreseen by Congress.

The development of a test for the requirement that assisted workers "produce" an article that is "like or directly competitive with" an imported article<sup>57</sup> has proved nearly as difficult as the definition of the "contributed importantly" standard. If strictly applied, this requirement would force the Department to discriminate first between workers who manufacture a particular finished product and workers who produce a component for that product, and second between workers who are directly involved in the creation of a good and workers who provide services necessary to the production of that good. Rather than attempting to draw such distinctions among individual workers, the Department has chosen to apply this standard through what might be called a "corporate structure" test.

53. *UAW v. Marshall*, 584 F.2d at 396.

54. *UAW v. Marshall*, 627 F.2d at 561 n.3 (quoting from the Memorandum of Recommendation of the Office of Trade Adjustment Assistance, adopted by the Secretary of Labor as a "clarification of the Department's reasons concerning the determination of 'an appropriate subdivision'" *id.*).

55. *Id.*

56. See *supra* note 48 and accompanying text.

57. 19 U.S.C. § 2272(3) (1982 & Supp. II 1983-1985).

The Department looks first to the item sold by the workers' employer. If it is a product, as opposed to a service, the Department determines if it can be "substituted for" or "interchanged with" the imported good that has presumably caused the sales decline. If it can, the petitioning workers in the plants or the plant divisions involved in the product's manufacture may be certified.<sup>58</sup> If the product is not interchangeable with the imported good but is only a component of a product that is interchangeable with the imported good, the eligibility of the workers will depend on the corporate structure of the company for which they work. Workers manufacturing component parts for a subsidiary of a corporation selling the import-competitive good will be certified. But employees of an independent manufacturer of a component part will be deemed to have failed the "substitutable for" or "interchangeable with" requirement and will not be certified even though the good they produce may be sold to manufacturers of the import-impacted good.<sup>59</sup>

In any plant or plant division that produces a product held to be like or directly competitive with the imported product, there will be some workers who provide services essential to production, but who are not technically part of the production process. Rather than discriminating between "line workers" and their equally unemployed co-workers without whose services production could not take place, the Department will certify all of the workers in a certifiable plant or division.<sup>60</sup> In contrast, the eligibility of service workers who, though ultimately employees of a manufacturer of the import-impacted good, work at a corporate subdivision or a plant division that provides only associated services, will depend on whether their services transform the existing product into a different article, thus causing something new to enter into the stream of commerce.<sup>61</sup> Employees of service firms that are not managed, owned, or controlled by a manufacturer of an import-impacted product are excluded from the Act's program.<sup>62</sup>

Although the prohibition against government initiation of adjustment assistance affords some protection to market forces (at least insofar as the "market" may be defined as a product of private demand rather than government direction), the certification component of TAA, in its sometimes complex endeavor to identify workers who have truly suffered import injury, is most significantly influenced by the compensation principle. The strength of the free market principle's influence on TAA is seen more clearly in the program's distribution requirements.

## 2. *Distribution*

While the federal government through the Department of Labor carries out the certification procedures of TAA, distribution of cash benefits and supervision of the administration of employment services, including retraining, is left to state

58. *Gropper v. Donovan*, 569 F. Supp. 883, 887 (Ct. Int'l Trade 1983) (citing *Machine Printers and Engravers Association of the United States v. Marshall*, 595 F.2d 860, 862 (D.C. Cir. 1979)).

59. *ACTWU Local 1627 v. Donovan*, 587 F. Supp. 74 (Ct. Int'l Trade 1984).

60. *Abbott v. Donovan*, 570 F. Supp. 41, 49 (Ct. Int'l Trade 1983).

61. *Nagy v. Donovan*, 571 F. Supp. 1261, 1264 (Ct. Int'l Trade 1983) (citing *Pemberton v. Marshall*, 639 F.2d 798, 800 (D.C. Cir. 1981)).

62. *Woodrum v. Donovan*, 564 F. Supp. 826, 832-33 (Ct. Int'l Trade 1983).

employment insurance officials. Once the Department certifies a plant division, state officials, acting as agents of the federal government, must determine whether the affected employees are individually eligible for benefits<sup>63</sup> including cash allowances,<sup>64</sup> counseling, testing, placement and employment support services,<sup>65</sup> retraining,<sup>66</sup> and job search<sup>67</sup> and relocation allowances.<sup>68</sup>

The distribution procedures of TAA reflect an intent to preserve market choices regarding shifts in the labor force. Assistance, other than cash benefits, is geared toward matching laborers with existing employment opportunities. Training of any type is clearly a second choice to the provision of services promoting immediate reemployment. In fact, training is not even an option unless the state employment insurance office determines that there "is no suitable employment available for a worker."<sup>69</sup> Even when no jobs are available, employment insurance officials may only approve of training if it would benefit the worker<sup>70</sup> "and there is a reasonable expectation of employment following completion of such training."<sup>71</sup> Furthermore, the statute requires that employment officials, insofar as possible, provide on-the-job training,<sup>72</sup> thus demonstrating a preference for existing market demand rather than jobs in industries with future potential growth.

Finally, even if state employment insurance officials determine that a given labor market area is suffering a high level of unemployment, suitable employment opportunities are not available, and suitable training is available, they can suspend the cash benefits of workers refusing to accept training or actively search for work outside of the area.<sup>73</sup> Theoretically, this enables state officials to ensure that workers receiving assistance follow the indications of the market in seeking new jobs.

#### *D. Alternatives to TAA: Shifting the Balance?*

Despite the 1981 amendment, or perhaps because it actually did little to shift the program's focus,<sup>74</sup> TAA continues to be criticized by both proponents and critics of federal adjustment assistance. All argue that the current program's certification and distribution procedures result in inefficient administration of assistance, applicant backlog, and limited retraining. Expansionists seek a larger

63. 289 C.F.R. § 91.6 (1984). State employment insurance agencies apply a federally standardized test set out in the Code of Federal Regulations. 29 C.F.R. § 91.7 (1984).

64. 19 U.S.C. § 2292(a) (1982). The 1981 amendment decreased cash benefits from 70 percent of a worker's salary, 19 U.S.C. § 2292(a) (1976), to a level equal to the unemployment benefit amount in each eligible worker's state. See *supra* note 36 and accompanying text.

65. 19 U.S.C. § 2295 (1982).

66. 19 U.S.C. § 2292 (1982 & Supp. II 1983-1985).

67. 19 U.S.C. § 2297 (1982 & Supp. II 1983-1985).

68. 19 U.S.C. § 2298 (1982).

69. 19 U.S.C. § 2296(a)(1)(A) (1982).

70. 19 U.S.C. § 2296(a)(1)(B) (1982).

71. 19 U.S.C. § 2296(a)(1)(C) (1982).

72. 19 U.S.C. § 2296(a) (1982).

73. 19 U.S.C. § 2291(b) (1982).

74. See *supra* note 36 and accompanying text.

federal government role on the grounds that TAA can and should serve the broader policy goals of industrial growth in the United States. The current Administration, contending that federal assistance is unnecessary given the availability of state-administered manpower programs, argues that TAA should be eliminated because the import injury requirement and the distinctions that the Labor Department is forced to draw in applying it<sup>75</sup> improperly discriminate among similarly situated workers.

### 1. *Enlarging the Role of the Federal Government*

The expansionists blame TAA's failure to move workers into new jobs on the certification and distribution procedures that limit government involvement in adjustment because of the confines of the free market and compensation principles. Convinced of the potential effectiveness of federal coordination of labor adjustment, expansionists propose modifications to TAA's procedures that would increase federal involvement in adjustment and thus, they argue, promote more efficient movement of labor into growth industries.<sup>76</sup>

Harold A. Bratt, former Deputy Director of the Office of Trade Adjustment Assistance of the Department of Labor, proposes a government-initiated, industry-wide investigation and certification process.<sup>77</sup> Citing the backlog of worker initiated petitions filed between 1976 and 1982 and "the somewhat artificial distinction" created by certifying workers on a plant or plant-division basis, he suggests that a less strict standard, together with a single industry-wide, government-initiated investigation for determining worker eligibility, would result in faster delivery of assistance.<sup>78</sup> He argues, for example, that aid to auto, steel, and footwear workers in the late 1970s would have been available more quickly had the Department been able to undertake industry-wide investigations rather than the "piecemeal, plant-by-plant" examinations required by the statute and current Department of Labor practices.<sup>79</sup>

Harold W. Williams, the Deputy Assistant Secretary for Trade Adjustment Assistance from 1981 to 1982 and Deputy Assistant Secretary for Economic Development responsible for the management of TAA between 1977 and 1981,

75. See *supra* note 39–62 and accompanying text.

76. This note focuses on the proposals of what might be called moderate expansionists—those who would maintain, at least formally, some form of import injury test as a prerequisite to adjustment assistance. Other, more radical expansionists would abandon the restraints of the compensation and free market principles altogether and provide adjustment assistance to workers suffering structural and cyclical unemployment of all varieties, regardless of its relation to import injury. See, e.g., H.R. 2267, 98th Cong., 1st Sess. (1983) (providing, among other things, special extensions of credit, health insurance, and retraining for dislocated workers); H.R. 807, 98th Cong., 1st Sess. (1983) (authorizing the Secretary of Labor to investigate proposed plant closings or relocations and to provide assistance to certain affected employees, businesses, and local governments); H.R. 5040, 96th Cong., 2d Sess. (1980) (proposing new mechanisms of federal control to prevent or minimize the harmful effects of unemployment on employees when businesses change production methods or plant locations); see also LABOR UNION STUDY TOUR PARTICIPANTS, ECONOMIC DISLOCATION-PLANT CLOSINGS, PLANT RELOCATIONS AND PLANT CONVERSION 32–34 (1979).

77. See Bratt, *Issues in Worker Certification and Questions of Future Direction in the Trade Adjustment Assistance Program*, 14 LAW & POL'Y INT'L BUS. 819, 855–56 (1982).

78. *Id.*

79. *Id.*



puts forward another more strongly expansionist proposal.<sup>80</sup> Like Bratt, Williams supports a government-initiated, industry-wide investigation procedure that would empower a single federal agency to determine when an industry has been harmed or seriously threatened by imports.<sup>81</sup> But, whereas Bratt would allow the federal agency to investigate entire industries, implicitly suggesting that certification might be granted on a sub-industry basis, Williams' proposal explicitly states that certification should only be provided to industries, not individual firms or groups of workers.<sup>82</sup>

Moreover, Williams would reshape the distribution methods of the current program. Under Williams' proposal, all of the technological and worker adjustment problems of a particular industry would be simultaneously addressed. Upon a determination that an industry had suffered or was about to suffer injury, a federally organized committee consisting of representatives from management, labor, and government would prepare a plan to reinvigorate the industry.<sup>83</sup> No assistance would be provided to anyone within the industry until the federal government approved of the plan.<sup>84</sup> Williams suggests that the plan might subsidize worker retraining and relocation, research and development, and below-market credit for companies.<sup>85</sup>

Williams' proposal would significantly increase the involvement of the federal government in industry adjustment. The federal government would not only have to approve initial adjustment plans, but it also would retain the right to revoke assistance if any labor or management party failed to carry out its designated obligations.<sup>86</sup>

Although formally retaining the import injury requirement, Bratt's and Williams' proposals both explicitly and implicitly weaken the link between adjustment assistance and federal trade policies. They would broaden the definition of import injury and allow the federal government to carry out industry-wide certifications, thus increasing the possibility that workers suffering job loss from

80. *Oversight of Trade Adjustment Assistance Programs and Authorization of Appropriations for U.S. Trade Representative, International Trade Commission, and Customs Service: Hearing Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance, 98th Cong., 1st Sess. 242, 243 (1983)* (statement of Harold W. Williams, President, Industrial Policy Council) [hereinafter cited as *Williams Statement*].

81. *Id.* at 255. Williams suggests that the responsibility for certification might be given to the International Trade Commission. *Id.*

82. *Id.*

83. *Id.* at 255-56. Williams is not the only critic to have suggested that trade readjustment assistance be administered by a tripartite committee. Similar proposals have been forwarded by both organized labor and legislators. *See, e.g.,* 129 CONG. REC. S3400 (daily ed. Mar. 18, 1983) (statement of Sen. Heinz in support of S. 849 which would have amended the 1974 Trade Act to allow for greater import relief to industries in exchange for the cooperation of the labor and management of any requesting industry in creating a comprehensive industry-wide adjustment plan); *Hearing on the Industrial Competitiveness Act, H.R. 4360, and Related Acts, Before the Econ. Stabilization Subcomm. of the Comm. on Banking, Finance and Urban Affairs, 98th Cong., 1st Sess. 55 (1983)* (statement of Lane Kirkland, President, AFL-CIO, in support of a tripartite board to oversee labor and industry adjustment).

84. *Williams Statement, supra* note 80, at 255-56.

85. *Id.* at 255-56.

86. *Id.* at 256.

market cycles or the inefficiencies of their firms would benefit from the import-related job loss of others.

A number of other expansionist suggestions for speeding the certification process would, in one way or another, also weaken the compensation/import injury restraint on government intervention in the labor market. Many set forth certain broad categories of workers to whom assistance would be provided without proof of import injury. They would, for example, automatically provide aid to workers in industries for which the United States had negotiated export restraints with foreign suppliers,<sup>87</sup> to workers dismissed due to plant closures (if closure were part of a plan for future adjustment)<sup>88</sup> or to plant relocation overseas,<sup>89</sup> to workers in export industries who lost their jobs because foreign governments subsidized exports in third countries,<sup>90</sup> and to workers who manufactured products against which foreign governments had erected non-tariff barriers.<sup>91</sup> As in the case of industry-wide certification, application of such broad objective tests would inevitably result in the certification of workers whose job loss is not actually due to increased imports.

Measures for reducing the role of the market in the distribution of assistance have also been suggested. For example, a bill introduced in the Senate in 1983, while not proposing to give the federal government greater control over adjustment, would have made at least three modifications in the current market-oriented distribution procedures to allow individual workers a greater say in the skills they might obtain through federally funded retraining.<sup>92</sup> First, the bill would have made funding an entitlement,<sup>93</sup> thus eliminating the possibility that an applicant might be denied training because appropriations had run out. Second, it would have required retraining unless work of a "substantially equal or higher skill level" was available<sup>94</sup> rather than allowing retraining only in the absence of "suitable employment."<sup>95</sup> Finally, the bill would have clarified TAA's current requirement that there be "a reasonable expectation of employment" following training.<sup>96</sup> Under the existing program, current labor market demands weigh heavily in decisions to fund retraining.<sup>97</sup> By specifying that "reasonable expectation" does not mean that employment opportunities for a worker must be available or offered immediately upon completion of training,<sup>98</sup> the bill would have diluted this market constraint, shifting the emphasis from immediate market

87. CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, ISSUE BRIEF NO. IB83135, TRADE ADJUSTMENT ASSISTANCE 6 (Aug. 17, 1983) [hereinafter cited as ISSUE BRIEF]; Bratt, *supra* note 77, at 856.

88. Bratt, *supra* note 77, at 856.

89. See H.R. 3391, 98th Cong., 1st Sess. § 1 (1983).

90. ISSUE BRIEF, *supra* note 87, at 6.

91. *Id.*

92. S. 749, 98th Cong., 1st Sess. (1983).

93. *Id.* at § 1(a)(1).

94. *Id.* at § 4(a).

95. See *supra* note 69 and accompanying text.

96. See *supra* note 71 and accompanying text.

97. See *supra* notes 69-73 and accompanying text.

98. S. 749, *supra* note 92, at § 1(a)(2).

demands to the development of skills that individual workers believe will be of future value.

## 2. *Eliminating the Role of the Federal Government*

In sharp contrast to the expansionists, the Reagan Administration would almost completely eliminate federal government participation in worker adjustment.<sup>99</sup> Claiming that TAA is not cost effective, that it is not targeted to those most in need, and that it is duplicative and does not effectively carry out its purpose, the Administration has suggested that TAA be subsumed in the existing network of state social welfare programs.<sup>100</sup>

The Administration's proposal would eliminate all federal readjustment allowances to import-injured workers, as well as federal oversight of the administration of employment services, training, and relocation benefits.<sup>101</sup> Citing the availability of unemployment insurance to all workers as well as supplementary unemployment benefits and severance pay under labor-management agreements to a significant number, the administration argues against singling out any workers for additional assistance. It suggests that "workers who have lost their jobs through no fault of their own should be treated similarly regardless of the reasons for job loss."<sup>102</sup>

Supporting its proposal on more practical grounds, the Administration asserts that research on unemployment insurance indicates that the extra cash benefits

99. Amendments enacted in 1981 have already substantially reduced federal benefits to import-impacted workers. See *supra* note 36.

100. This note focuses on the Administration's most recent proposal which was presented to Congress in February 1985. See *Fiscal Year 1986 Authorizations for the U.S. Service, International Trade Commission, U.S. Trade Representative; and Trade Recommendations for Report to the Budget Committee, Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 99th Cong., 1st Sess. 237, 240 (1985) (statement of Patrick O'Keefe, Deputy Assistant Secretary for Labor) [hereinafter cited as *1985 O'Keefe Testimony*].

In 1983, the Administration put forth a more ambitious proposal to restrict TAA. As in its current proposal, the Administration suggested that benefits for import impacted workers be limited to the benefits available to all unemployed workers under the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1651-1658 (1982). *Oversight of Trade Adjustment Assistance Programs and Authorization of Appropriations for U.S. Trade Representative, International Trade Commission, and Customs Service: Hearings Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 98th Cong., 1st Sess. 211-13 (1983) (statement of Joyce Kaiser, Assistant Secretary for Employment and Training, Dep't of Labor). In addition, it suggested that Congress amend the current state unemployment insurance program to address structural and cyclical unemployment. *Id.* at 213. Under existing federal law a state may use unemployment trust funds only for payment of cash benefits to unemployed workers. *Id.* The Administration's proposal would have allowed states to use these funds to pay for training and relocation of unemployed workers. According to the Administration, the change would have permitted states to tailor their assistance to the needs of the long-term, structurally unemployed by encouraging individuals suffering permanent job loss to undergo retraining and relocation. *Id.* Finally, the Administration recommended that Congress amend the Federal Supplemental Compensation Act. *Id.* Under the unmodified plan, workers with previous labor force attachments who have exhausted all regular benefits, are eligible for income maintenance payments. Under the Administration's 1983 proposal, workers would have been able to forego their cash benefits for vouchers entitling employers who hired them to credits against their state or federal unemployment tax or federal income tax liabilities. *Id.*

101. *1985 O'Keefe Testimony, supra* note 100, at 240.

102. *Id.*

provided TAA-certified workers in retraining acts as a disincentive to job search and thus lengthens the period of unemployment.<sup>103</sup> In addition, the Administration argues that the fact that most workers eligible for TAA have taken advantage only of the cash benefits, and not the retraining or other adjustment assistance services, justifies the elimination of adjustment allowances.<sup>104</sup>

To offer training to workers currently receiving trade adjustment assistance, the Administration would rely on the Job Training Partnership Act (JTPA)<sup>105</sup>—the most recent manifestation of the “manpower” programs in the Area Redevelopment and Comprehensive Employment and Training Acts<sup>106</sup>—and the fairly new and as yet untried concept of individual training accounts (ITAs).<sup>107</sup> Under the Administration’s proposal, trade-impacted skilled workers would be forced to seek retraining in the same manner as all other unemployed workers—through reliance on their personal savings and the JTPA.<sup>108</sup>

The JTPA is administered by state governors’ offices and local Private Industry Councils (PICs) designed to ensure the active involvement of the private sector in retraining decisions.<sup>109</sup> The federal government’s role is limited. Its sole responsibility, in addition to matching state funds dollar for dollar with federal money,<sup>110</sup> is the specification of performance standards against which state programs are to be evaluated.<sup>111</sup>

According to the Administration, one of the major advantages of the JTPA is that it avoids the lengthy petitioning process of TAA.<sup>112</sup> Each state is responsible for establishing procedures to identify substantial groups of eligible individuals who have been laid off or received notice of layoff, who are eligible for or have exhausted unemployment compensation and are unlikely to return to their previous jobs,<sup>113</sup> who have lost their jobs as a result of plant closure,<sup>114</sup> or who are long-term unemployed with little chance for obtaining jobs in the area in which

103. *Id.* at 240–43. But see the questions of Congressman Gibbons and Congressman Pease regarding the reliability of such data. *Id.* at 241–44.

104. *Id.* at 240.

105. 29 U.S.C. §§ 1501–1781 (1982).

106. For a summary of the development of “manpower” training programs, see Gutman, *Job Training Partnership Act: New Help for the Unemployed*, MONTHLY LAB. REV., Mar. 1983, at 3.

107. See *Retraining of Displaced Worker, Hearing Before the Subcomm. on Banking and Urban Affairs, House of Representatives*, 98th Cong., 2d Sess. 55 (statement of Patrick O’Keefe, Deputy Assistance Secretary, U.S. Department of Labor) [hereinafter cited as *O’Keefe ITA Testimony*]. The committee report notes that due to the speed with which the hearing was organized, Mr. O’Keefe presented his personal views, rather than the formal position of the Department. *Id.*

108. In addition to serving dislocated workers, JTPA provides training assistance to disadvantaged adults and youths, 29 U.S.C. §§ 1601–1603 (1982), native Americans, 29 U.S.C. § 1671 (1982), and migrant and seasonal farmworkers, 29 U.S.C. §§ 1672 (1982).

109. S. REP. NO. 469, 97th Cong., 2d Sess. 2 (1982); 29 U.S.C. § 1512 (1982).

110. 29 U.S.C. § 1654(a)(1) (1982). When the average rate of unemployment in a state is higher than the average rate of unemployment for all states, the non-federal matching funds required by section (a)(1) will be reduced by ten percent for each one percent that the state unemployment rate exceeds the national average. 29 U.S.C. § 1654(a)(2).

111. 29 U.S.C. § 1516(g) (1982).

112. 1985 *O’Keefe Testimony*, *supra* note 100, at 240.

113. 29 U.S.C. § 1652(a)(1) (1982).

114. 29 U.S.C. § 1652(a)(2) (1982).

they reside.<sup>115</sup> At the discretion of the state, PICs may be involved in the certification process.<sup>116</sup> When a group of workers is certified as eligible for assistance, the state, in conjunction with the PICs, determines whether any job opportunities exist within the local labor market area for which such individuals could be retrained.<sup>117</sup> The state is responsible for determining whether training opportunities for such employment opportunities exist within the local labor market area.<sup>118</sup>

While the Administration's proposed reliance on the JTPA would shift responsibility for assisting trade impacted workers from the federal government to the states, implementation of the individual training account concept would largely remove retraining decisions from even state government direction. If a program based on the ITA concept were enacted,<sup>119</sup> it would enable a worker and his or her employer to open a joint account into which they would both make deposits and from which the worker could draw funds to finance retraining in the event of involuntary job loss.<sup>120</sup> Both could deduct deposits from their income tax assessments.<sup>121</sup> The funds would not be available for any use other than retraining following permanent layoff. Workers seeking to use the funds would be issued vouchers through their state employment insurance offices.<sup>122</sup> At the time of a worker's retirement, or in the case of disability, unused funds would be divided between the worker and the employer.<sup>123</sup> The federal government would not contribute funds or lend administrative guidance to the program. The only federal cost incurred would be lost tax revenues.<sup>124</sup>

An Administration spokesperson from the Labor Department has endorsed the use of ITAs for all dislocated workers.<sup>125</sup> He commends the aspects of the program which give it a strong market orientation and he argues that it is, most importantly, voluntary, thus allowing employees and workers, in the context of collective bargaining, to decide "how the compensation package is to be allo-

115. 29 U.S.C. § 1652(a)(3) (1982).

116. 29 U.S.C. § 1652(b) (1982).

117. 29 U.S.C. § 1652(c)(1) (1982).

118. 29 U.S.C. § 1652(c)(2) (1982).

119. Two bills incorporating the ITA concept were presented to Congress in 1984, the National Individual Retirement Account Act, H.R. 4832, 98th Cong., 2d Sess., 130 CONG. REC. H706 (daily ed. Feb. 9, 1984) and the National Training Incentives Act, H.R. 5519, 98th Cong. 2d Sess., 130 CONG. REC. H1,716 (daily ed. Mar. 15, 1984). Both were referred to the Committee on Ways and Means and the Committee on Education and Labor and both appear to have died with the expiration of the 98th Congress. See *Comm. on Ways and Means, 98th Cong., Legislative Calendar* 333,346 (final ed., Dec. 1984); *Comm. on Education and Labor, 98th Cong., Legislative Calendar* 97, 104 (final ed., Dec. 1984). For a convenient summary of these two bills, see *Retraining Displaced Workers, Hearing Before the Subcomm. on Banking, Finance and Urban Affairs, House of Representatives, 98th Cong., 2d Sess. (1984)*. The description of ITAs in the text of this note is taken from the National Individual Training Account Act. The National Training Incentives Act differs mainly in that it allows workers to withdraw savings from Individual Retraining Accounts without the usual penalties, if the money is used for retraining.

120. *Id.* at 220 (facts on the National Individual Training Account Act).

121. *Id.* at 222.

122. *Id.* at 221.

123. *Id.* at 222.

124. *Id.* at 221.

125. *O'Keefe ITA Testimony, supra* note 107, at 55.

cated across a full spectrum of benefits—wages, leisure, training, and so on.”<sup>126</sup> He also cites its flexibility, which he believes will allow workers to determine their interests and aspirations as job seekers.<sup>127</sup>

The Administration’s proposal, with its reliance on the JTPA and ITAs, would eliminate rather than amend TAA. In placing workers who have lost their jobs as a result of increased imports on the same footing as all other unemployed workers the Administration denies that a society that benefits from liberalized trade should compensate those who suffer the consequences of increased international competition.

## II. THE JAPANESE EXPERIENCE WITH ADJUSTMENT ASSISTANCE

Within the large industrial corporations of Japan, worker adjustment is basically a private undertaking.<sup>128</sup> Retraining and reassignment of the skilled industrial workforce is generally carried out by management and company-wide unions within the framework of a lifetime employment system.<sup>129</sup> However, in the aftermath of the oil shock of 1973–1974 management appeared prepared to abandon lifetime employment and the system of private adjustment associated with it. The government response included the repeal of existing Unemployment Insurance Law, the implementation of measures to counter increasing job loss among the skilled labor force, and the improvement of basic unemployment benefits.<sup>130</sup> Reflecting neither the compensation nor the free market principles

126. *Id.* at 57.

127. *Id.* at 57.

128. See Kanabayashi, *Japan's Recession-Hit Companies Make Complex Arrangements to Avoid Layoffs*, WALL ST. J., Feb. 17, 1983, at 34; Hanami, *Worker Motivation in Japan-II*, JAPAN LAB. BULL., Mar. 1, 1982, at 5, 6–7 [hereinafter cited as *Worker Motivation-II*].

129. J. ORR, H. SHIMADA, & A. SEIKE, UNITED STATES-JAPAN COMPARATIVE STUDY OF EMPLOYMENT ADJUSTMENT 13 (March 1985) [hereinafter cited as COMPARATIVE STUDY]. Private adjustment and lifetime employment, as discussed in this note, are not universally practiced within the Japanese workforce. Since the mid-1950s permanent employment has been part of the industrial relations systems of a substantial number of large- and mid-sized firms. Smaller firms, however, rarely utilize the system. Galeson & Odaka, *The Japanese Labor Market*, in ASIA'S NEW GIANT 587, 614 (H. Patrick & H. Rosovsky eds. 1976). This note focuses on the adjustment of workers associated with large- and mid-sized firms. It should be noted, however, that it is, in part, the non-permanent status of workers in smaller firms that contract to perform services for larger firms that makes lifetime employment in the larger firms feasible. Small subcontracting firms often handle non-production work including construction, maintenance, and loading. Peak production demands are also frequently met through increased use of subcontracted workers. When demand declines, large companies allow their contracts with smaller firms to lapse. Since the tradition of lifetime employment is often not part of the ethic of small firms, all of their employees are subject to dismissal. Despite the fact that many subcontractors work exclusively for a single firm and may even be located on the same site as their contracting firms, the employees of subcontractors, together with temporary workers at larger firms, bear the burden of workforce reductions. Large firms essentially shift the risk of dismissal from their permanent employees to the employees of smaller firms. See *id.* at 619–21; COMPTROLLER GEN., GEN. ACCOUNTING OFFICE, GAO/ID-82-32, INDUSTRIAL POLICY: JAPAN'S FLEXIBLE APPROACH 75–76 (1982) [hereinafter cited as JAPAN'S FLEXIBLE APPROACH]; Koshiro, *The Quality of Working Life*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 81–83 (T. Shirai ed. 1985); E. VOGEL, JAPAN AS NUMBER ONE 139 (1979).

130. See Employment Insurance Law, Law No. 116 of 1974, as amended by Law No. 33 of 1976, Law No. 43 of 1977, Law No. 40 of 1978 and Law No. 40 of 1979, translated in [8-HB] EHS L.

integral to adjustment assistance in the United States,<sup>131</sup> these provisions empowered the Japanese Government to intervene in the marketplace without regard for the relationship between government policies and job loss. They provided for two types of assistance: "direct aid," through government-created retraining and placement programs and job search assistance, and "indirect aid," through salary subsidies to employers who continued to use private adjustment methods.

The direct aid measures were extensions of the basic unemployment insurance system enacted in the early post-war period.<sup>132</sup> Through these measures, the Japanese Government provided adjustment assistance similar to that advocated by proponents of increased government assistance in the United States.<sup>133</sup> It assumed responsibility for deciding where and in what capacity new workers would be needed and established programs to retrain and relocate workers to meet those needs. In contrast, through indirect aid provisions, which were not enacted until the 1970s, the government provided financial assistance to encourage management and workers to make their own adjustment decisions.

This section first describes the basic attributes of Japan's private adjustment system. It then discusses the severe challenge to the system posed by the 1973-1974 oil crisis and analyzes the measures that were enacted to combat its effect on unemployment. It concludes that the failure of direct aid to promote worker adjustment suggests that government guidance is not necessarily the solution to the unemployment problems of skilled workers.<sup>134</sup>

### *A. Adjustment in Large Private Enterprises: The Dichotomized Labor System*

Since the late 1950s, the management and unions of large private enterprises have cooperated to help skilled workers<sup>135</sup> adjust to changing technological and

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BULL. SERIES (1983); Hanami, *Japan*, in *WORKFORCE REDUCTIONS IN UNDERTAKINGS* 167, 169 (E. Yemin ed. 1982) (discussing Law Concerning Temporary Measures for Workers Displaced from Specific Depressed Industries, December 26, 1977, as amended by Law No. 40 of May 8, 1978, Law No. 107 of November 28, 1978 and Law No. 64 of December 18, 1979).

131. See *supra*, notes 1-2 and accompanying text.

132. Unemployment Insurance Law, Law No. 146 of 1947, repealed by Employment Insurance Law, *supra* note 130, at supplementary provisions art. 2, translated in [8-HA] EHS L. BULL. SERIES, (1972). The Employment Insurance System, which repealed the Unemployment Insurance Law, contains both direct and indirect aid methods as well as provisions for basic unemployment benefits.

133. See *supra*, notes 76-98 and accompanying text.

134. Cf. T. UCHINO, *JAPAN'S POSTWAR ECONOMY* 235 (1978) ("In fact, after the first oil crisis, labor and management within individual companies collaborated in developing strategies for the survival of their companies in opposition to government policies aimed at rationalization and reorganization." *Id.*). This conclusion contrasts with popular analysis of the effectiveness of government guidance of labor adjustment in Japan. See, e.g., Comment, *Letting Obsolete Firms Die: Trade Adjustment Assistance in the United States and Japan*, 22 *HARVARD INT'L L. J.* 595 (1981).

135. In this note, the term "skilled workers" refers to unionized, regular, employees employed by large- and mid-sized companies. These workers are also referred to as "permanent employees." For further definition, see *infra* note 140.

market demands.<sup>136</sup> Despite the slower economic growth of the past decade, permanent dismissals of full-time skilled employees are rare in large Japanese companies.<sup>137</sup> The typical methods of meeting structural changes include retraining and transfer of skilled workers from one production line to another, one plant to another, and from production lines to service support staff positions. Reductions in overtime, increases in the number of holidays, and limited annual wage increases are also employed.<sup>138</sup> The managements of unrelated companies even arrange intercompany transfers of skilled workers to avoid dismissals.<sup>139</sup>

This system of private labor adjustment is based on and made possible by a labor force divided into two groups: lifetime, unionized, skilled employees, and non-unionized temporary workers.<sup>140</sup> The existence of both types of workers

136. Cooperative adjustment has not always been a feature of Japanese labor relations. In the mid-1950s, labor-management negotiations were characterized by confrontation and hostility. During that period, the number of work days lost per 10 employees was approximately the same as the number lost in the United States and the United Kingdom during the 1970s. See Shimada, *New Challenges for Japanese Labor-Management Relations in the Era of Global Structural Change*, JAPAN LAB. BULL., July 1, 1983, at 5, 7 [hereinafter cited as *New Challenges*].

137. See Sato, *Japanese Companies Are Curbing Production and Holding Down Hiring in the Face of Slack Domestic Demand and Exports*, AP-Dow Jones News Service, July 7, 1982.

138. See *Worker Motivation-II*, *supra* note 128, at 5, 6. In a typical adjustment scenario, a large manufacturer of cars, large trucks, and heavy machinery might cope with a slump in car sales by failing to renew the short-term (generally one month) contracts of temporary workers throughout the company, transferring some permanent but redundant auto workers to another heavy-industry division to handle tasks formerly performed by temporary workers, and retraining other permanent employees to staff an expansion in heavy machinery. A number of companies have recently undertaken this type of adjustment. See Sato, *supra* note 137 (describing how Mitsubishi Electric Corporation moved 30 percent of its workers out of its main audio-production plant and placed them in factories producing high-growth products such as computers); Hanami, *Worker Motivation in Japan-I*, JAPAN LAB. BULL., Feb. 1, 1982, at 5, 8 [hereinafter cited as *Worker Motivation-I*]. (Describing how Asahi Shinbun Co. shifted 570 of 890 employees at its main plant from production into editorial, sales, and advertising positions as well as production positions at other plants. During the year prior to the move, management and union representatives met 240 times to discuss methods of worker replacement.); Lohr, *How Japan Helps Industry*, N.Y. Times, May 18, 1983, at D1, D26 (Describing how Petrochemical producers were drawing up plans to reduce production, although they had not yet determined exactly which plants to scrap or how many workers might be laid off. They intended to avoid layoffs by transferring workers to other operations.).

139. See Kanabayashi, *supra* note 128, at 34.

140. Japan's Labor Ministry defines three classes of employees: "regular" employees are all those excluding temporary and day laborers; "temporary" employees are those employed for a term of not less than one month and not more than one year; "day laborers" are those employed for less than one month. See, YEARBOOK OF JAPANESE LABOR STATISTICS (1982) (Japan Labor Ministry). In this note, "temporary worker" is used to refer to the temporary workers and day laborers. "Regular" employees, commonly referred to as "permanent employees," typically enjoy lifetime employment, a seniority-based wage scale, and extensive on the job training. Although temporary workers may be repeatedly rehired and may perform the same tasks as permanent employees, they may not become members of enterprise unions and they do not receive the same training or the same salary as permanent workers. See Galeson & Odaka, *supra* note 129, at 619.

The origins of the lifetime employment system are disputed. Some ascribe it to anthropological and cultural patterns peculiar to the Japanese. See *New Challenges*, *supra* note 136. Studies of labor relations conducted in the past decade have attributed it variously to management attempts to deal with labor shortages in the 1920s and worker desires for job security during the periods of labor oversupply following World War II, see Galeson & Odaka, *supra* note 129, at 616, or to efforts by



enables corporations to dismiss temporary workers and retrain and transfer permanent employees to meet changing company needs.<sup>141</sup> Through this system, companies collectively satisfy demands for new skills throughout the economy.<sup>142</sup>

Neither judicial nor statutory rules sustain the distinction between permanent and temporary workers.<sup>143</sup> Rather, management, motivated by profit potential, perpetuates the system through the guarantee of lifetime work for permanent employees.<sup>144</sup> The security fostered by lifetime employment breeds a cooperative attitude toward management among permanent workers and inhibits the development of union organizations encompassing both permanent and temporary employees.<sup>145</sup>

Permanent employees typically belong to company-wide "enterprise unions."<sup>146</sup> Relieved of the fear of job loss which may accompany the introduc-

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some union leaders and the management of industries such as steel and shipbuilding to defuse the confrontational, communist-dominated union organizations of the mid 1950s. See Shimada, *Japan's Industrial Competitiveness? The Human Factor*, JAPAN LAB. BULL., May 1, 1982, at 5, 7 [hereinafter cited as *The Human Factor*]. For an elaboration of the latter theory that minimizes management's role and emphasizes the "spontaneous choice of the working masses" in the shift from "radical," "political" unionism to "economic," "enterprise unionism," see Shimada, *Japan's Misunderstood Labor-Management Relations*, LOOK JAPAN, June 10, 1983, at 4, 5.

141. This is perhaps an oversimplified description of the actors involved in the adjustment process of large enterprises. See *supra* note 129.

142. See *New Challenges*, *supra* note 136, at 5-6.

143. The most significant distinction between permanent and temporary employees is the low rate of dismissal enjoyed by the former. And thus far, the Japanese Government has not enacted statutes restricting an employer's right to undertake dismissal to achieve workforce reductions. There is no legislatively mandated notice period, workers are not provided with time off to seek new employment, and consultation with unions or the government is generally not required. See Hanami, *supra* note 130, at 183. Case law developed by the judiciary does require that employers have a "just cause" for dismissal. However, this principle does not prohibit dismissals for efficiency purposes (the usual rationale for large scale dismissals). Furthermore, in Japan, the role of judicial legal norms is not given much sway in industrial relations. See *Worker Motivation-II*, *supra* note 128.

144. See H. SHIMADA, *THE JAPANESE EMPLOYMENT SYSTEM 27* (Japan Inst. of Labor, Japanese Industrial Relations Series No. 6, 1980).

145. See Shirai, *A Theory of Enterprise Unionism*, in *CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 117, 135* (T. Shirai ed. 1983).

146. Although there are few craft and industrial unions in Japan, more than 90 percent of all organized workers are members of enterprise unions. T. HANAMI, *LABOR RELATIONS IN JAPAN TODAY 88* (1979). Enterprise unions vary in size from single unit unions in small firms with only one plant to unions of larger multiplant enterprises that have several local branches. Each enterprise union bargains separately with the management of its enterprise. Only employees of a particular enterprise are qualified to be members of the enterprise union operating at that enterprise. *Id.* This contrasts sharply with the "closed-shop" practice employed in other industrialized nations. Under closed-shop agreements, once a union has been recognized and has negotiated an agreement with a company, the company is bound to hire workers from that union only. *Id.* at 88-89.

Despite the predominance of enterprise unions in Japan, industrial unions do exist. With few exceptions, however, they are federations of enterprise unions within a particular industry. Most generally function as advisory bodies. Only about 20 percent of the federations make policy decisions binding on their members. The overwhelming majority of these federations do not have the authority to collectively bargain, conclude employment agreements, or call strikes. See *id.* at 90-93; Shirai, *supra* note 145, at 117-43.

Most of Japan's industrial federations are associated with one of three national confederations: Shoyo, a politically liberal organization made up of approximately 36 percent of organized labor; Domei, a conservative organization with a membership of 17 percent of the organized workforce; and

tion of labor-efficient technology and new product lines, permanent employees generally are willing to devote themselves to any kind of work their company requires.<sup>147</sup> The guarantee of continued employment removes much of the incentive to negotiate the rigid, protective work rules favored by U.S. unions.<sup>148</sup> Unencumbered by such restrictive rules, Japanese union members can accept new job assignments and transfers involving interindustry mobility<sup>149</sup> without fear of reprisal from fellow union members who, in the absence of lifetime employment, might view such occupational flexibility as a threat to union strength.

The recruitment, training, and remuneration methods developed for permanent employees enhance their flexibility and encourage loyalty to their employers, thus facilitating the private adjustment process.<sup>150</sup> Each year large firms seek out new graduates from middle schools, high schools, colleges, and universities. In contrast to western workers, these graduates do not seek employment in a particular type of job, but rather in a particular enterprise.<sup>151</sup> They immediately enter training programs which may take several years to complete. These programs, which employ job rotation as a primary training vehicle,<sup>152</sup> are designed to ensure that new recruits become multi-skilled employees.<sup>153</sup> This extensive training requires substantial employer investment, but the flexibility and the positive effect that it has on workers' attitudes toward their companies appear to be adequate compensation for most large companies.<sup>154</sup>

Through experience gained in a variety of jobs, workers become proficient at learning new skills. The time and monetary resources required by job adjustment are minimized. Ongoing transfers ensure that employees' skill flexibility continues to increase through their working lifetime.<sup>155</sup> In recognition of the value of permanent workers, Japanese management has developed a remuneration system

Churitsunoren, created to facilitate organization among the industrial organizations not affiliated with either of the other organizations. Notwithstanding the existence of these organizations, union power is largely decentralized. Despite provisions in the constitutions of some national industrial federations empowering them to regulate and control affiliated unions, federations rarely force any decisions on their member enterprise unions. *Id.* at 92-93.

147. See *Worker Motivation in Japan-I*, *supra* note 138, at 6.

148. See Galeston & Odaka, *supra* note 121, at 622-24. See also J. HERSCHMEIRA & T. YUI, *THE DEVELOPMENT OF JAPANESE BUSINESS* 287 (2d ed. 1981) (describing the willingness of permanent workers in Japan to shift jobs); *UAW in Ohio Spurns Ford Bid for Concessions*, Wall St. J., June 28, 1982, at 2 (an account of the importance that U.S. unions place on work rules and restraints on job transfers).

149. See Galeston & Odaka, *supra* note 129, at 622-24.

150. For a discussion of these and other methods by which company officials encourage loyalty, see E. VOGEL, *supra* note 129, at 146-50.

151. See JAPAN INST. OF LABOR, *WAGES AND HOURS OF WORK* 13 (Japan Industrial Relations Series No. 3, 1984).

152. For anecdotal descriptions of training through job rotation, see Koike, *Internal Labor Markets*, in *CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN* 29, 42-44 (T. Shirai ed. 1983).

153. See Shimada, *New Challenges*, *supra* note 136, at 6. The Japan Institute of Labor estimated that this initial training period typically takes from a few years to ten years to complete. *Id.*

154. See T. ISHIKAWA, *VOCATIONAL TRAINING* 21-25 (Japan Inst. of Labor, Japanese Industrial Relations Series No. 7, 1981).

155. See *id.*

that emphasizes seniority rather than the particular job that a worker may hold.<sup>156</sup> This wage system naturally enhances worker loyalty.<sup>157</sup> Temporary workers, hired for short fixed terms, do not enjoy the security of lifetime employment and the accompanying benefits of a seniority wage scale and continuous training.<sup>158</sup> Thus, they do not generally have the opportunity to develop the workplace flexibility or loyalty of permanent employees.<sup>159</sup> Having made a significant investment in the training of their lifetime employees, a Japanese company will strive, as far as is possible, to maintain its permanent workforce. Temporary workers are the logical choice for dismissal during economic downturns.<sup>160</sup>

Temporary workers do not have the numerical strength to fight this system,<sup>161</sup> and permanent employees do not need the additional bargaining strength that would be gained from solidarity with temporary workers.<sup>162</sup> Without the backing of permanent employees, temporary workers lack the power to press strike threats to further their own interests. Thus, management can, without reprisal from employees, dismiss temporary workers as profits fall.<sup>163</sup>

### B. *Lifetime Employment Tested: The 1973–1974 Oil Crisis*

Through the early seventies, the dichotomized labor force and private labor adjustment provided Japanese companies with adequate flexibility to meet chang-

156. See Shimada, *supra* note 136, at 16. Shimada notes that while age, length-of-service, and education are major determinates of wage, it would be incorrect to say that wages are not related to productivity. Pointing to the long term trend toward an increase in the proportion of job-based or skill-based wage components, Shimada suggests that the close correlation of age, length-of-service, and education to wages simply implies that skill levels and job ranking themselves relate closely to such factors. See *id.*

157. For a discussion of the possible changes in the dominant systems of training and remuneration, see T. AMAYA, HUMAN RESOURCE DEVELOPMENT IN INDUSTRY (Japan Inst. of Labor, Japanese Industrial Relations Series No. 10, 1983)

158. See Galeson & Odaka, *supra* note 129, at 619–20.

159. *But cf.* T. HANAMI, *supra* note 146, at 35 (noting that in the latter half of the 1970s, temporary workers were staying for extended periods of time with one enterprise, developing the desire to be treated like permanent employees, and were sometimes promoted to permanent status).

160. See Shirai, *supra* note 145, at 135.

161. A 1985 study contracted by the U.S. Labor Department and the Japan Labor Ministry estimates that in many large firms temporary workers ordinarily constitute less than 10 percent of the workforce. COMPARATIVE STUDY, *supra* note 129, at 73. In 1972, official statistics put the number of temporary workers at 7.3 percent of all employees. Galeson & Odaka, *supra* note 129, at 619. It should be noted that these figures reflect only the number of temporary workers employed directly by large companies. They do not include employees of the small subcontracting firms who essentially function as temporary workers for larger firms. See, *supra* note 129. It should also be noted that several commentators suggest that official statistics often underestimate the ratio of temporary to permanent employees. Galeson & Odaka, *supra* note 129 at 619. Furthermore, some industries make substantially greater use than others of temporary laborers. *Id.*; see also JAPAN'S FLEXIBLE APPROACH, *supra* note 129, at 75–76 (discussing the significant flexibility in employment adjustment afforded to the shipbuilding and textile industries as a result of their heavy reliance on women workers who generally attain only temporary status).

162. See Shirai, *supra* note 145, at 135, 141 (implying that it is the memory of the late 1950s strikes staged in response to employee reductions that continues to motivate employers to avoid layoff of permanent employees).

163. See M. SHINOHARA, STRUCTURAL CHANGES IN JAPAN'S ECONOMIC DEVELOPMENT 315–16 (1974); *Cf.* Galeson & Odaka, *supra* note 129, at 619–20 (describing management's similar treatment of temporary workers and the employees of companies to whom work is subcontracted).

ing market demands and new technological innovations. In 1973–1974 however, increases in world oil prices sparked a recession and rendered less competitive a host of Japanese industries, production technologies, and products.<sup>164</sup> The emerging industrial power of developing countries with low labor costs and demands for wage increases by Japanese workers in 1975 and 1976, further exacerbated the immediate problems of the oil crisis.<sup>165</sup>

Inflation and the need to alter business and production strategies to achieve greater efficiency led to predictions that management would be forced to reexamine lifetime employment.<sup>166</sup> The management of large enterprises voiced dissatisfaction with the system.<sup>167</sup> They argued that it forced firms to bear an unfair portion of the cost of economic adjustment by requiring them to retain idle workers.<sup>168</sup> Between late 1974 and early 1976 companies in the textile, petroleum refining, shipbuilding, industrial machinery, heavy electric machinery, and non-ferrous metal industries began announcing reductions of their permanent workforces.<sup>169</sup> In addition to seeking volunteers for early retirement, these companies began to dismiss unionized employees.<sup>170</sup>

### C. Indirect Aid: Reinforcement of Private Labor Adjustment

In 1974, partially in response to the increasing dismissals of permanent employees, the Japanese Government enacted the Employment Insurance Law.<sup>171</sup> In

164. See T. UCHINO, JAPANS POSTWAR ECONOMY 217–18. See generally *id.* at 196–212 (detailing the domestic effects of the oil crisis and world-wide inflation on the Japanese economy).

165. See *Odds Against Big Wage Boosts*, Yomiuri Shimbun, Mar. 7, 1975, at 5; Nakamura, *The Politics of Appeasement*, FAR E. ECON. REV., Apr. 22, 1974, at 36 (describing the effect of the spring 1974 labor strikes and the consequent 30 percent wage increase).

166. See Nakamura, *supra* note 165, at 37.

167. See Shimada, *supra* note 140, at 28, 29 n.2.

168. *Id.*

169. See, e.g., *Dismissals of Workers Are Growing in Textile Field*, JAPAN ECON. J., Oct. 29, 1974, at 8; *Lay-offs Dismissals and Other Belt Tightening Are Spreading*, JAPAN ECON. J., Nov. 5, 1974, at 15; *Employment Adjustment is Progressing Swiftly Along With Worsening Recession*, JAPAN ECON. J., Dec. 31, 1974, at 5; *Average Wage Increase in Spring Pay Drive is 14%*, JAPAN ECON. J., May 20, 1975, at 1; *Labor Market Seems Headed for Long-Range Slackening as Economic Growth Slows*, JAPAN ECON. J., Nov. 4, 1975, at 5; *Nihon Keizai*, Feb. 26, 1976, at 7, translated in SUMMARIES OF SELECTED JAPANESE PRESS, Mar. 2, 1976, at 31 (U.S. Embassy Tokyo ed.); *More Enterprises Are Beginning to Resort to Personal Reduction*, JAPAN ECON. J., Mar. 2, 1976, at 2.

170. See Hanami, *supra* note 146, at 170–71 (noting that not all early retirements are entirely voluntary).

The retirement system employed by many large enterprises itself appears to be designed to ensure some of the flexibility that is crucial to the lifetime employment system. Permanent employees generally face mandatory retirement at age 55. Many retirees, in need of income and able to work, seek reemployment with smaller firms. Some of these firms subcontract with the former employers of their new, “elderly” workers. Retirees employed by these firms experience a substantial decline in wages and are subject to job loss during periods when workforce reductions are necessary. See Galenson & Odaka, *supra* note 129, at 621–22; Shimada, *supra* note 144, at 15–16. It should be noted, however, that it is not clear how much longer this system will last. In 1979, the government announced its intention to increase the retirement age for public employees from 55 to 60. Unions immediately pushed for parity in private companies. See HARV. BUS. SCHOOL, NIPPON STEEL CORPORATION 11–18 (HBS Case Service No. 9-482-07 1981).

171. Employment Insurance Law, Law No. 116 of 1974, unamended version translated in [8-HB] EHS L. BULL. SERIES (1975) [hereinafter cited as Employment Insurance Law 1975]; *Talk Between*

addition to providing monetary assistance to most unemployed workers,<sup>172</sup> the law enabled the government to indirectly aid permanent employees who without government intervention might have suffered permanent dismissal.<sup>173</sup> Drawing on funds obtained entirely through employer contributions, the government subsidized the wages of permanent workers whom management retained in support positions, placed in retraining programs, or furloughed.<sup>174</sup> Through this indirect form of assistance, the government created a mechanism whereby the more successful businesses underwrote the traditional means of adjustment for the less successful and thus prevented the dissolution of the private adjustment system.<sup>175</sup>

The 1977 Employment Stabilization Fund System (Stabilization Fund), amending the Employment Insurance Law, further reinforced the private system of labor adjustment.<sup>176</sup> The Stabilization Fund pays half the wages of employees at large enterprises who are furloughed but not dismissed.<sup>177</sup> If workers are placed in retraining programs, the government provides half their wages and a stipend for training costs.<sup>178</sup> The government also reimburses half the differential that large enterprises pay to employees whom they transfer to lower-paying positions at other enterprises.<sup>179</sup>

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*Labor Ministry Employment Security Bureau Director General Endo and Yomiuri Shimbum Commentator Keizo Okudo*, Yomiuri Shimbum, Mar. 1, 1974, at 4, translated in DAILY SUMMARY OF JAPANESE PRESS, Mar. 26, 1975, at 17 (U.S. Embassy Tokyo ed.) [hereinafter cited as *Talk With Employment Security Bureau Director*]; Okabe, *Present Unemployment May Become Very Serious*, JAPAN ECON. J., Feb. 25, 1975, at 1.

172. The Employment Insurance Law is the main source of unemployment benefits of all types. Its purpose is to stabilize the livelihood of workers by granting subsistence benefits when they are out of work, facilitate job seeking activities, prevent unemployment, increase employment opportunities, improve the employment structure, develop and improve workers' capabilities, and promote their welfare with a view to contributing to their continuing employment. JAPAN INST. OF LABOR, EMPLOYMENT AND EMPLOYMENT POLICY 20, 21 (Jap. Inst. of Labor, Japanese Industrial Relations Series No. 10, 1982) [hereinafter cited as EMPLOYMENT AND EMPLOYMENT POLICY]. The law's coverage is not all encompassing, however. While all permanent employees qualify for assistance, only in certain circumstances will temporary workers be afforded any assistance. Employment Insurance Law, *supra* note 130, at arts. 3, 6, 42, 43.

173. Indirect aid is available under articles 62(4), 63(1), and 63(4) of the Employment Insurance Law of 1975, Employment Insurance Law 1975, *supra* note 164. The law also contains direct aid provisions, *see, e.g., id.* at arts. 6(3), (5). These direct aid measures, together with direct aid measures enacted in later laws, are discussed *infra* notes 191–202.

174. *See* Employment Insurance Law 1975, *supra* note 171, at arts. 62(4), 63(4); Employment and Employment Policy, *supra* note 172, at 23–24; Hanami, *supra* note 130, at 168–69.

175. *See Talk With Employment Security Bureau Director*, *supra* note 171 at 18; GAO REPORT, *supra* note 7, at 80.

176. Law No. 43 of May 20, 1977, art. 61–2(1) (amending article 55 of the Employment Insurance Law, *supra* note 130); *see* Employment and Employment Policy, *supra* note 172, at 23–24.

177. EMPLOYMENT AND EMPLOYMENT POLICY, *supra* note 172, at 23. The government subsidizes two-thirds of the wages of employees of small- and mid-sized firms. *Id.*

178. *Id.*

179. *Id.* Transfer subsidies are determined in advance according to the type of industry and the period of subsidization. *Id.* The General Accounting Office (GAO) provides a slightly different description of the Employment Stabilization Fund. Like the Japanese Labor Institute in Employment and Employment Policy, *id.*, it indicates that wage subsidization for workers in retraining is available to all employers. GAO REPORT, *supra* note 7, at 81. According to the GAO, however, payment to employers of the wage differential of the employees who are laid off and rehired at (or transferred to) lower paying jobs, is limited to workers in government designated industries. *Id.* at 81–82. According

In 1975, the Director General of the Labor Ministry Employment Security Bureau attributed the stabilization of unemployment that began in December 1974 to government subsidization of employer adjustment measures.<sup>180</sup> Available figures support this assessment. The United States General Accounting Office (GAO) estimates that between April 1, 1975 and March 31, 1976, the wages of 2.85 million workers in 5,948 companies in 152 industries were subsidized by funds distributed to employers.<sup>181</sup> The GAO found that the indirect aid measures of the employment law saved approximately 200,000 to 300,000 jobs in 1975 alone.<sup>182</sup> It also found that the Stabilization Fund, in its first six months of operation, provided 4.2 million subsidized days of training to permanent workers.<sup>183</sup>

More telling than the impact of these indirect aid methods on employment figures is the renewed acceptance of the lifetime employment system that they stimulated among private-sector managers. Underemployment among permanent employees is now accepted and sustained by most large companies as a "welfare responsibility of Japanese corporations."<sup>184</sup> A recession at the beginning of the current decade once again increased the difficulties of negotiating private adjustment through intra- and inter-company transfers.<sup>185</sup> Yet the management of large companies did not call for an end to the lifetime employment system as they did in 1975. Rather, with indirect assistance from the government, management sought creative ways to avoid dismissals of their permanent workers.<sup>186</sup>

Indirect aid helped arrest a trend that might otherwise have destroyed the distinction between permanent and temporary workers,<sup>187</sup> and with it the flexibility needed for management-union directed adjustment of the labor force to be successful.<sup>188</sup> Had permanent workers been stripped of the certainty of lifetime employment, they might have resorted to the organizational practices and self-protective demands of workers in other countries. They would likely have been

to the report, employers in government-designated industries are also eligible for additional long-term assistance in the form of wage subsidization during periods of retooling or retraining for the purpose of switching product lines. *Id.* at 81-82.

According to either description, the Employment Stabilization Fund System is primarily an indirect aid method in that it distributes funds to employers who, in turn, use the money to maintain their permanent workforce. It should be noted, however, that, at least according to the GAO description, the system has some of the flavor of direct aid in that it provides the government with the power to designate certain industries as eligible for extended assistance.

180. See *Talk With Employment Security Bureau Director*, *supra* note 171, at 18.

181. GAO REPORT, *supra* note 7, at 81.

182. *Id.* Less conservative than the GAO, the Japanese Labor Institute estimated that the subsidy saved approximately 300,000 workers from unemployment during 1975. H. SHIMADA, *supra* note 144, at 17.

183. GAO REPORT, *supra* note 7, at 81.

184. See Lohr, *supra* note 138, at 41.

185. Kanbayashi, *supra* note 128, at 34.

186. See *id.* Kanbayashi states that a company must be part of a designated depressed industry in order to receive retraining assistance. But according to the Japanese Labor Institute and the GAO, retraining assistance is available to all companies in all industries. See *supra* note 179.

187. See *Talk With Employment Bureau Director*, *supra* note 171, at 5 (Without the government created wage subsidy or "lay-off allowance. . . there would probably have appeared a considerable number of enterprises, which rushed into personnel curtailment beyond a lay-off." *Id.*).

188. See text accompanying notes 135-63.

drawn to a more traditional union structure that would have included both permanent and temporary employees. The enterprise loyalty of unionized employees, which facilitated adjustment, would perhaps have been replaced by interfirm worker solidarity. Thus, temporary workers would likely have become part of the organized labor force and in so doing have empowered themselves to fight employment loss during slack periods.<sup>189</sup>

Management for its part would probably have rejected the currently accepted belief that underemployment of permanent workers is a welfare aspect of Japanese corporations and government policy makers thus might have been forced to intervene explicitly, possibly to direct adjustment in all cases of workforce reductions.<sup>190</sup> In short, the cooperative attitude of management and organized labor and the weakness of temporary workers, which facilitated the efficient adjustment of the country's skilled labor force without significant government responsibility for change, might have been destroyed.

#### *D. Direct Aid: The Government's Inability To Guide Labor Adjustment*

Measures supporting private adjustment were not the only legislative response to rising unemployment among permanent workers in the 1970s. In addition to certain limited direct aid measures in the Employment Insurance Law,<sup>191</sup> the Japanese Government enacted an important direct aid provision—the "employ-

189. A recent analysis of the effects of the microelectronics revolution of the mid-1980s on the lifetime employment system and labor management relations supports this analysis. See *New Technology in Japan Challenges Tradition*, WORLD OF WORK REPORT 2 (July 1984). The specialized skills required in microelectronic production demand outside experts and younger staff for whom new, highly technical skills are more accessible. These individuals often assume positions of seniority that would normally go to older permanent employees. Furthermore, information about new computer data storage often requires high security measures which conflict with the traditional policy of open communication between management and workers and limits worker skill flexibility and exposure to the entire production process. According to Takao Nuki, Professor at Musashi University, Tokyo, and author of the microelectronics analysis, the resulting decline in permanent employees has eroded the group spirit that supports the enterprise union system, and reliance on outside personnel has weakened the strength of enterprise unions. *Id.* at 3. He suggests that a new kind of union which can meet the needs of newly mobile workers may need to be formed. *Id.* It is likely that such a union would necessarily be industry-wide and include temporary workers.

190. In most industrialized countries, except the United States, government involvement in workforce adjustment is legislatively mandated whether or not government assistance is sought. The involvement required by such legislation varies. In Canada, the Federal Republic of Germany (West Germany), the United Kingdom, and Italy, management must provide government officials with prior notification of all dismissals and follow legislatively determined negotiating procedures. Yemin, *Introduction*, in *WORKFORCE REDUCTIONS IN UNDERTAKINGS* 1, 12 (E. Yemin ed. 1982). In France, Portugal, the Netherlands, and Spain, explicit authorization by government officials is required before individual or mass dismissals can be carried out. These governments often effectively become the bargaining representatives of the workers whom management would like to dismiss. *Id.* at 13. Although an exploration of the correlation between the inability of organized labor and management to reach a private consensus over how redundancies are to be carried out and government direction of adjustment is beyond the scope of this note, it seems likely that there is a positive relationship between government decisions to take an increasingly active role in workforce reductions and lack of consensus among private parties as to how the issue should be handled.

191. *Supra* note 172.

ment shift system”—in the Employment Countermeasures Law.<sup>192</sup> The shift system theoretically placed control over the matching of labor resources and production demands in the hands of the government.<sup>193</sup> Funds for the program were drawn from general government revenues rather than from employer contributions,<sup>194</sup> and, in contrast to indirect aid methods, employers and unions did not plan and control the adjustment process.

This direct aid law was similar to the government-initiated, industry-wide assistance program advocated by expansionists in the United States.<sup>195</sup> The Japanese Government was effectively responsible for initiating the adjustment process since only workers in government-designated industries could receive direct aid.<sup>196</sup> The government certified workers on an industry-wide basis<sup>197</sup> and chose the industries to be assisted without reference to statutory criteria such as import injury.<sup>198</sup> These aspects of the law, along with the power it provided government officials to withhold benefits until certified workers complied with relocation and

192. GAO REPORT, *supra* note 7, at 79. The Countermeasures Law is variously referred to as the Temporary Relief Law for Workers Displaced From Specific Depressed Industries, EMPLOYMENT AND EMPLOYMENT POLICY, *supra* note 172, at 24, the Employees in Structural Depressed Industries Law, Comment, *supra* note 134, at 604; and Law No. 95 Concerning Temporary Measures for Workers Displaced from Specific Depressed Industries, T. HANAMI, *supra* note 146, at 169. In this note, subsequent citations are to the Law Concerning Temporary Measures for Workers Displaced from Specified Depressed Industries, as amended by Law No. 40 of May 8, 1978, Law No. 107 of Nov. 18, 1978 and Law No. 64 of Dec. 18, 1979 [hereinafter cited as Temporary Measures Law], translation provided by Akimichi Mikami, Chief Second Employment Trend Analysis Section, Employment Policy Division, Employment Security Bureau, the Ministry of Labour (copy on file, Michigan Yearbook of International Legal Studies). This translation is, however, missing one page covering articles 10, 11, 12, and part of 13. Those texts, unofficially translated by Oke K. Chun, are hereinafter cited as Temporary Measures (Chun) (copy on file, Michigan Yearbook of International Legal Studies).

Just as the Employment Insurance Law is not a pure manifestation of the indirect aid concept, see *supra* note 132, neither was the Countermeasures Law based solely on the direct aid ideal. In Chapter II, Prevention of Unemployment, it incorporates some of the indirect aid measures of the Employment Insurance Law itself. Temporary Measures Law, *supra* note 192, at art. 5.

193. See, e.g., Temporary Measures Law, *supra* note 192, at arts. 6, 7(3), 7(4), 8, 9; Temporary Measures (Chun), *supra* note 192, at arts. 10(D), (E), (F), 11(B), (C); see also GAO REPORT, *supra* note 7, at 79.

194. Temporary Measures Law, *supra* note 192, at art. 15; GAO REPORT, *supra* note 7, at 79.

195. See *supra*, notes 76–98 and accompanying text.

196. See Temporary Measures Law, *supra* note 192, at arts. 1, 2; GAO REPORT, *supra* note 7, at 79.

197. Temporary Measures Law, *supra* note 192, at arts. 1, 2.

198. *Id.* at art. 2. The article defines a “specified depressed industry” as

an industry in which economic conditions such as changes in the basic economic environment, depression over a protracted period, etc., have caused a conspicuous surplus in its capacity of supplying [sic] products or services and such a situation is likely to continue over a long period of time and because of this curtailment of the scale of business or business activities, or change or abolition of business . . . has been carried out in conformity with an action based on legislation or with State measures, with the result that a considerably large number of displaced workers have appeared or are likely to appear, and which is designated by Cabinet Order as one in need of special measures prescribed by this Law in respect of the said displaced workers.



retraining requirements,<sup>199</sup> should have enabled the government to coordinate and direct employment growth and contraction in various industries.<sup>200</sup>

It appears, however, that the shift system was not used to move workers into growth industries. Government officials found it difficult to decide how to transfer workers from one industry to another.<sup>201</sup> In some instances jobs for the eligible unemployed were so scarce that the Minister of Labor waived the provision requiring workers to participate in retraining or relocation programs prior to receipt of cash benefits. Instead, he authorized the extension of benefits for specified periods.<sup>202</sup> Waiver of this portion of the law significantly decreased the ability of the government to redirect underutilized labor resources.

Although some argue that direct aid was responsible for successful worker adjustment assistance,<sup>203</sup> it appears to have functioned largely as a source of unemployment benefits, not a tool that enabled the government to move labor into growth industries.<sup>204</sup> Having abandoned the coercive measure of the employment shift mechanism, the government could not have been the guiding force behind the relocation of workers from one industry to another. Thus, worker adjustment in Japan appears to have been the result of government encouragement of private adjustment methods between employers and enterprise unions. By providing a mechanism for redistributing resources from profitable companies to those in need of funds to carry out management-labor directed retraining, the Japanese Government facilitated the development of new worker skills without interfering in the adjustment process of the private labor market.

### III. EVALUATING U.S. ALTERNATIVES: LESSONS OF THE JAPANESE EXPERIENCE

Innovation and flexibility at the company or plant level appears to have been the key to successful labor adjustment in Japan. In the wake of the 1973–1974 oil crisis, government financial aid that encouraged the lifetime employment system and cooperative private adjustment proved more useful than nationwide government-coordinated worker retraining and relocation. The ineffectiveness of the Japanese direct aid provisions argues against expansionist proposals requiring similar government initiative and government planning in the United States. Such programs may supplant private initiatives while themselves deteriorating into simple unemployment compensation. Yet, Japanese management's desire in 1974 for mass dismissals of permanent employees suggests, contrary to the hypothesis

199. Temporary Measures (Chun), *supra* note 192, at arts. 10(D)(3), 11(C); GAO REPORT, *supra* note 7, at 79.

200. See Comment, *supra* note 192, at 607 (arguing that the legislation, by tying benefits to worker participation, allows the government to offer "positive incentives in order to shift human resources into competitive areas of the economy").

201. Discussion between Akimichi Mikami, Chief, Second Employment Trend Analysis Section, Employment Policy Division, Employment Security Bureau, Ministry of Labor and John Hitchcock, AP-Dow Jones News Service, Feb. 4, 1986 [hereinafter cited as Discussion with Mikami] (notes on file, Michigan Yearbook of International Legal Studies).

202. *Id.*; GAO REPORT, *supra* note 7, at 79.

203. See, e.g., Comment, *supra* note 134.

204. Discussion with Mikami, *supra* note 201.

of the Reagan Administration, that financial assistance from the federal government may be necessary to encourage private adjustment methods.

How, then, should assistance be administered? The differences between Japanese and U.S. labor-management relations and union structures caution against a program designed to encourage U.S. companies to emulate the specific adjustment methods employed by Japanese management and labor.<sup>205</sup> Furthermore, the opposition of U.S. labor organizations to trade liberalization<sup>206</sup> will, in all like-

205. The adjustment methods generally used by large Japanese enterprises are designed for a labor pool of temporary and permanent employees operating in a non-adversarial labor relations system dominated by plant-based enterprise units. See *supra* text accompanying notes 135–63. None of these qualities characterize U.S. labor-management relations. Although over 80 percent of the U.S. labor force is not unionized, L. TROY & N. SHEFLIN, *UNION SOURCE BOOK 1-1* (Industrial Relations Data Information Service, 1985), the effect within the United States' major manufacturing sectors does not resemble the permanent-temporary worker dichotomy of Japan. Workers in the United States' major manufacturing industries tend to be unionized, and even in the instances in which unorganized laborers work alongside union members, nonunion workers are ensured virtually the same treatment as their unionized counterparts. See R. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING*, 374–98 (1976). Thus, there is little opportunity for management to foster a special class of less privileged employees who, like temporary workers in Japan, would cushion other workers from job loss during slow economic periods. It should be noted, however, that the seniority system used by most U.S. unions can arguably be viewed as a *de facto* form of lifetime employment. See HARV. BUS. SCHOOL, *REFLECTIONS ON JAPANESE FACTORY MANAGEMENT 11* (HBS Case Services No. 9-681-084, Apr. 1983).

Although the adversarial nature of a labor-management relationship is difficult to quantify, one computation, using figures supplied by the Prime Minister's Office and the Labor Minister's Office in Japan and the Department of Labor in the United States, divided the average number of work days lost through strikes in 1978–1980 by the number of employed persons in 1978 to find that .028 work days were lost in Japan per person while .390 were lost in the United States. JAPAN INST. OF LABOR, *LABOR UNIONS AND LABOR-MANAGEMENT RELATIONS 34* (Japan Inst. of Labor, Japan Industrial Relations Series No. 2, 1983). In the relatively non-adversarial setting of Japan, adjustment provisions can be and generally are designed to preserve the position of permanent employees. See *supra* notes 135–39, and accompanying text. The management and unions of individual enterprises orally agree upon such adjustment measures as the need arises. *COMPARATIVE STUDY, supra* note 129, at 81.

The more adversarial character of labor-management relations in the United States, the relatively rigid rules and job classifications on which the power of industrial unionism is based, and the fact that union strength more often lies with international organizations than with their local membership, see J. FOSSUM, *LABOR RELATIONS 92–93* (1979), creates an atmosphere which is less than conducive to the spontaneous development of the private adjustment procedures used in Japan.

206. Without special compensation for workers affected by imports, it is doubtful that the 1974 Trade Act would have been enacted. Although many of the major labor unions endorsed liberalizing trade legislation in the early 1960s, C. FRANK, *supra* note 2, at 4–5, by 1965, some of the most powerful were advocating strong protectionist measures. *Id.* In the late 1960s, the AFL-CIO helped draft what would become the 1971 Burke-Hartke Bill—legislation intended to reduce imports through the imposition of mandatory quotas. See Ross, *Labor's Big Push for Protectionism*, *FORTUNE*, March 1973, at 92, 93. In 1973, organized labor refused to endorse the Trade Act of 1974, believing that it would not reconcile the advantages and disadvantages of liberalized trade. *Fiscal Year 1984 Authorizations for Customs Service, International Trade Commission, and the U.S. Trade Representative; Recommendations for March 15 Report to the Budget Committee, Subcomm. on Trade of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 104 (statement of John H. Sheehan, Legislative Director, United Steelworkers of America). Instead of free trade, the labor movement favored market shares and greater assurances of protection for U.S. industry and U.S. workers. *Id.* Labor appears to have acquiesced to the liberalizing measures of the 1974 Trade Act only on the presumption that adjustment assistance—compensation beyond existing unemployment measures—would be available to affected workers. See *id.* at 102–05; *Oversight of Trade Adjustment Assistance, Programs And*

lihood, result in the continued recognition that a special injury is sustained by workers who suffer job loss as a result of international trade.<sup>207</sup>

Nevertheless, the respective success and failure of the Japanese indirect and direct aid programs provide a useful backdrop against which to evaluate U.S. proposals for change. Assuming that an element of compensation for import injury must be included in any U.S. adjustment program, this section compares Japanese methods of worker adjustment to the methods of TAA and the methods contained in the proposed replacements for TAA. It argues that the certification requirements and investigation procedures of TAA provide the greatest opportunity for Japanese-like innovation and flexibility among workers and management. It suggests, however, that TAA's distribution methods, as well as the distribution methods proposed by the expansionists and the Administration, are ineffective because they do not give workers and plant level management a voice in the development of adjustment programs.

Part III concludes with a proposal for a two-pronged program of government assistance that should encourage the worker-management cooperation that has proved crucial to continuous worker adjustment in Japan. The compensation and free market principles would continue to drive this program. However, rather than creating a compromise between the two principles, as does the current TAA, or nearly eliminating one or both, as suggested by the Reagan Administration and the expansionists respectively, the system proposed here would create separate measures to implement each principle. The first prong, embodying the compensation principle, would employ the certification methods of TAA but would distribute cash benefits only. The second would consist of a tax incentive system for employer retraining to encourage private (free market) adjustment, without reference to import competition.

### A. Certification

The certification procedures of TAA, limiting investigations to the plant level and certification itself to single plants or plant divisions, are largely a reflection

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*Authorization of Appropriations for the U.S. Trade Representative, International Trade Commission, and Customs Service: Hearing Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance, 98th Cong., 1st Sess. 218-19 (1983) (statement of Stephan Koplan, Legislative Representative, AFL-CIO).*

207. This argument is often used by economists, politicians, and political commentators in defense of TAA, see, e.g., Aho, *Comment*, in *IMPORT COMPETITION AND RESPONSE* 358 (J. Bhagwati ed. 1982); *Oversight of Trade Adjustment Assistance and Authorization of Appropriations for U.S. Trade Representative, International Trade Representative, International Trade Commission, and Customs Service: Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance, 98th Cong., 1st Sess. 223 (1983) (statement of Sen. Heinz); Fiscal Year 1984 Authorizations for Customs Service, International Trade Commission, and the U.S. Trade Representative: Recommendations for March 15 Report to the Budget Committee, Subcomm. on Trade of the House Comm. on Ways and Means, 98th Cong., 1st Sess. 113 (1983) (statement of Cong. Page); Birenbaum & Moser, *Trade Adjustment Assistance: Vital Program in a Recession Year*, *Wall St. J.*, Jan. 21, 1980, at 19. While there are those who refute this argument, see, e.g., Wolf, *Comment*, in *IMPACT COMPETITION AND RESPONSE* 364 (J. Bhagwati ed. 1982) (questioning the effectiveness of TAA as a political "bribe" *id.* at 366.), relief for import-injured workers has historically appeared to be a less protectionist alternative to the quota restrictions and duty increases for which the U.S. labor movement has lobbied over the last 20 years. See C. FRANK, *supra* note 2, at 5.*

of the compensation principle.<sup>208</sup> Expansionist proposals would replace the current worker-initiated, plant-by-plant system with a government-initiated, industry-wide certification process.<sup>209</sup> The Japanese adjustment experience and the nature of labor-management relations in the United States suggest that such a change would likely hinder rather than encourage worker adjustment.

In the post-oil crisis period, successful adjustment in Japan resulted from management and union-negotiated retraining aimed at matching worker skills to new production methods. Over the last two decades, a similar trend of joint labor-management directed adjustment has begun to emerge in union contracts in the United States.<sup>210</sup> The generally adversarial character of U.S. labor-management relations makes it likely, however, that implementation of the government-initi-

208. See *supra* notes 50–62 and accompanying text.

209. See *supra* notes 76–98 and accompanying text.

210. This trend can be seen in the increasing number of contracts containing technological change, plant closing, and retraining provisions. In 1966, the Bureau of National Affairs (BNA) surveyed a sample of 300 manufacturing industry contracts and found that 13 percent contained technological change clauses. Somewhat less than half of these required prior discussion with the union and only a handful required employee training. See BUREAU NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 65:4 (1966). In 1983, the BNA found that 20 percent of the sample 300 agreements contained such clauses. *Id.* at 65 (1983). In a 1981 review of 522 major contracts, each covering over 1,000 workers, the Bureau of Labor Statistics (BLS) found that 36 percent placed restrictions on plant relocation—an increase over the 22 percent of the contracts examined in 1966. *Unions Taking Bigger Role in Plant Closing, Relocation, According to BLS Review of Contracts*, DAILY LAB. REP. (BNA), at A-2 (Aug. 27, 1981).

For a detailed account of the technological changes and plant closing provisions contained in 100 pattern-setting contracts in a variety of industries, see INDUSTRIAL UNION DEPARTMENT, AFL-CIO, COMPARATIVE SURVEY OF MAJOR BARGAINING AGREEMENTS 162–78 (Nov. 1984).

For a fairly pessimistic evaluation of the usefulness of current technological change provisions, see K. MURPHY, TECHNOLOGICAL CHANGE CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS 28–29 (Dep't for Professional Employees, AFL-CIO Aug. 1981).

In recent years a number of major labor agreements have included worker retraining provisions. The Ford-UAW training and development program, perhaps the best known joint labor-management program for worker adjustment, provided the prototype for other agreements. The plan was part of the “detailed partnership approach”: adopted by the parties in their 1982 contract. *Ford-UAW Training Program Seen as Model Private Sector Plan*, DAILY LAB. REP. (BNA), at C-1 (Feb. 2, 1983). Commonly known as the “nickel fund,” it provides up to \$5,000 per worker for retraining. See Serrin, *The 'Nickel Fund': A Prototype Program for Retraining Jobless Workers*, N.Y. Times, Apr. 2, 1985, at 17. Workers and management at the plant level attempt to determine future job prospects and approach local chambers of commerce and school boards about developing related training programs. *Training and Job Placement Highlight Gains Under Auto Job Security Pacts*, DAILY LAB. REP. (BNA), at A-4, A-6 (June 1, 1983). A similar program has been created by the UAW and General Motors. *Id.* For descriptions of other negotiated retraining programs, see *Unemployed Longshoremen in New York to Get Special Dockside Treatment*, DAILY LAB. REP. (BNA), at A-5 (Jan. 12, 1982) (agreement between employers in New York and the International Longshoremen's Association); Savoie, *Current Developments and Future Agenda in Union-Management Cooperation in Training and Retraining of Workers*, 1985 INDUS. REL. RESEARCH A. 535, 536–37 (agreement between the Communications Workers of America, AT&T, and other communications companies); *id.* at 538 (steel industry agreement pledging the parties to jointly pursue government funds for retraining).

Managerial interest in avoiding layoffs can also be seen in increased reliance on work sharing and temporary contract workers among non-unionized companies. See *How Motorola Avoids Layoffs*, WORLD OF WORK REPORT, Sept. 1984, at 2. In contrast to the measures included in collectively bargained contracts, the practices of such companies more closely parallel the adjustment methods employed by Japanese companies. For an argument as to why these specific practices may often be of little use in the United States, see *supra* note 205.

ated investigation methods and industry-wide certification procedures suggested by the expansionists would encourage employers and unions who have negotiated or are thinking about negotiating such an agreement, to abdicate all retraining responsibility to government policy makers.<sup>211</sup>

Government-initiated industry-wide investigations and certifications might also inhibit adjustment by reducing incentives for labor, management, and creditors to restructure weak firms. Workers in certified industries, aware that the government had decided to support and retrain them, would likely be less receptive to the real and symbolic sacrifices required by the pay cuts and changes in work rules or production methods that management would likely view as vital to restoring the health of a firm hurt by imports.<sup>212</sup> Faced with labor resistance to concessions, creditors and management would be more inclined to abandon their investment rather than look for creative ways to restructure.<sup>213</sup> In contrast, maintenance of worker or union initiation of the certification process would provide

211. J. David Richardson's discussion of the effect of TAA on workers and management supports, by analogy, this analysis. Richardson, *Trade Adjustment Under the Trade Act of 1974: An Analytical Examination and Worker Survey*, in *IMPORT COMPETITION AND RESPONSE* 321, 330, 353 n.16 (J. Bhagwati ed. 1982). According to Richardson, the "generous benefit" terms TAA may have increased, rather than decreased, unemployment. Under TAA, a worker, once certified, is automatically eligible for assistance for two years. Thus, a worker who is laid off, certified, and subsequently rehired by the same company will automatically receive benefits if he or she is laid off again within two years of the first certification. Richardson suggests that once a group of workers had been certified, employers become more willing to lay them off and workers themselves become less resistant to job loss. *See id.* at 321, 330, 353 n.16. Similarly, once workers are certified for assistance, management may lose any inhibitions it has regarding layoffs and workers may find it easier to accept assistance—in whatever form available—than to organize themselves to force management to work with them to develop retraining programs to circumvent layoffs.

212. Despite the developing trend in favor of cooperative labor-management solutions to adjustment problems, worker approval of such methods is at best tenuous. For example, in 1982, following the conclusion of agreements with the UAW that included cost-saving and union give-backs, Ford and General Motors successfully negotiated a number of plant level changes in work rules, seniority, overtime, and shift preferences. Ford and General Motors argued that if workers did not help reduce costs through such methods, the companies would be forced to subcontract with outside concerns for the production of parts for future models. Ford also suggested that it might be forced to construct new production facilities in Mexico. However, despite the implied threats, and even without the assurance of government assistance in the case of layoffs, not all union members accepted the proposed change. One president of a UAW local said that his membership rejected Ford's proposal because it believed that the company's national agreement with the union contained enough sacrifices. *UAW in Ohio Spurs Bid for Concessions*, Wall St. J., June 28, 1982 at 8. He said that the requested concessions were "minor. But the principle involved in not giving up any more is much more important." *Id.*

213. Although no one has done any empirical studies testing the strength of this hypothesis, the argument has an intuitive appeal born out by anecdotal accounts. When, for instance, the Wheeling-Pittsburgh Steel Corporation filed for reorganization under Chapter 11 of the Federal Bankruptcy Code, management blamed the United Steelworkers for the failure of creditor negotiations aimed at restructuring the company. The union was willing to give up \$200 million in wages and benefits in exchange for preferred stock. Seeking a similar sacrifice from the company's creditors, the union requested that in exchange for equity in the company, the lenders defer and forgive interest and principle payments for two years. The creditors agreed to the deferrals, but refused to convert any of the company's debt to equity. Subsequently, negotiations collapsed. The company insisted that it had worked out an accord with its creditors that would have prevented bankruptcy, but that the union refused to participate. Cuff, *Chapter 11 Petition Filed by Wheeling*, N.Y. Times, Apr. 16, 1985, at D1, D5.

labor and management with the opportunity to bargain for and undertake gradual, company-sponsored, contract-specific adjustment.

Mandatory worker initiation of the certification procedure, the plant-by-plant method of government investigation, and the plant or plant-division limitation on certification, also provide some assurance that workers have an opportunity to negotiate adjustment provisions specific to their needs. In Japan, the strength of enterprise unions ensures that the interests of workers at individual plants are not subordinated to the political goals of national unions.<sup>214</sup> In the United States, however, bargaining practices often subordinate local concerns to the interests of national unions. Bargaining between broad-based industrial unions and corporate management or management associations and the practice of bargaining pacesetting contracts for industry-wide application are common.<sup>215</sup> Without the plant-by-plant limitation on investigations and certifications, workers sharing concerns and insights unique to their plant or company might find their interest in seeking, avoiding, or shaping government assistance overshadowed by the goals of national unions. Although a national union may initiate the application process on behalf of workers at a number of enterprises, the plant-by-plant limit on investigations and the plant or plant-division limit on certification focus government inquiry on the situation and interests of workers at individual plants.

Finally, worker initiation of the certification process also somewhat limits the degree to which TAA can be exploited to serve the political proclivities of a particular presidential administration.<sup>216</sup> If the process were to begin only at the initiation of the government, an administration hostile to the concept of adjustment assistance could effectively eliminate the program through disuse. Furthermore, a politically motivated administration might be overly sensitive to workers in industries that have lobbying clout or workers in key congressional districts, and less inclined to meet the adjustment needs of the constituents of political opponents. The current statutory obligation of the Labor Department to investigate all properly filed worker petitions,<sup>217</sup> together with workers' right to judicial review of the Department's investigative methods,<sup>218</sup> limits the potential for such abuse.

214. Galeson & Odaka, *supra* note 129, at 243-35.

215. *See id.* at 243. For a descriptive example of bargaining in the United States, see *Moderating Wage Settlements Seen in 1982's Major Contract Talks*, DAILY LAB. REP. (BNA), at A-8 to A-9 (Nov. 20, 1981).

216. The ability of an administration to shape even the current adjustment assistance program according to its political views can be seen by comparing the number of workers certified during the year preceding and the year following President Reagan's election. In 1980 the Department of Labor denied 62 percent of the 3,213 petitions investigated. In 1981 the denial rate rose to 84 percent of the 2,626 petitions investigated. Through June 1982 the denial rate was approximately 81 percent. Department investigators interviewed in 1982 said that borderline cases that would have been certified before 1981 were denied after the election of President Reagan. They explained that the change in practice was a reflection of a new atmosphere brought about by the Reagan Administration and made possible by the flexibility of the certification requirements. *See* CERTIFICATION PROCESS, *supra* note 42, at 7.

217. 19 U.S.C. § 2273(a) (1982).

218. 19 U.S.C. § 2395 (1982).

## B. Distribution

In their focus on current job openings rather than skills which are likely to be in demand in the future, the guidelines governing the distribution of TAA benefits reflect the free market principle.<sup>219</sup> Thus far, however, their effect has not been favorably evaluated. Both the Reagan Administration and the expansionists have suggestions for improving distribution procedures: the Administration would incorporate trade adjustment assistance into state-run manpower training programs and provide a tax incentive to encourage the establishment of individual, voluntary, joint worker-company savings accounts (ITAs) to finance post-dismissal retraining;<sup>220</sup> the expansionists would decrease market restraints on state employment insurance officials or move coordination of adjustment to the federal level.<sup>221</sup> Although these mechanisms may prove more effective than the current procedures, none reflect the most basic lesson of the Japanese experience—that the flexibility and innovation necessary to continuous worker adjustment can best be achieved through a significant degree of management and worker involvement in the design of retraining programs.

While the savings promoted by ITAs may cushion the effects of dismissal for some workers,<sup>222</sup> they will not encourage the cooperative spirit driving worker adjustment in Japan. The concept's post-job loss, individual orientation will not only not encourage labor-management initiatives for continuous adjustment, it will discourage them. The ITA concept prohibits the use of employer-employee savings to finance on-the-job retraining to meet changing company needs.<sup>223</sup> Thus, if a company that has deposited funds in an ITA decides to retool to meet new market demands or accommodate production innovations, it will be unable to tap its ITA funds to retrain current employees. Companies foreseeing this possibility will either be discouraged from updating their plant and production methods, or, despite the tax incentive, decline to invest in ITAs for their employees.

Theoretically, the Job Training Partnership Act (JTPA), designed to foster greater private sector involvement in job training,<sup>224</sup> should promote the local-level participation that has been critical to Japanese adjustment. There are, however, several reasons why the Administration's proposed use of the JTPA is likely to result in even less retraining than takes place under the current state-administered distribution system.

Under President Reagan's proposal, officials of state employment insurance offices would be absolved of their current responsibility for determining labor market needs and creating or evaluating the appropriateness of retraining programs for skilled labor. They would no longer be required to assess the state-wide employment situation to determine whether workers should be required to relocate and accept a specified type of training or forfeit their readjustment allow-

219. See *supra* notes 69–73 and accompanying text.

220. See *supra* notes 99–127 and accompanying text.

221. See *supra* notes 76–98 and accompanying text.

222. See *supra* note 120 and accompanying text.

223. See *supra* note 123 and accompanying text.

224. See *supra* notes 109–73 and accompanying text.

ances.<sup>225</sup> Instead, distribution activities would be left to the Private Industry Councils (PICs) formed under the JTPA. Although oversight of worker retraining by the PICs would increase local, private involvement in the development of retraining programs, it would fail to give workers an adequate voice in the design of the adjustment process.

Insofar as the Administration's proposed use of PICs shifts retraining decisions from state officials to a board composed largely of local, private sector representatives, it does move U.S. adjustment assistance in the direction of Japanese indirect aid. And, unlike the proposals for national tripartite planning,<sup>226</sup> it avoids the centralized adjustment guidance found to be ineffective in Japan. A closer examination of the membership of the PICs reveals, however, that "local private-sector" representation does not necessarily translate into labor-management decisions.

The majority of the representatives on each PIC are owners of businesses or private sector executives.<sup>227</sup> The remaining positions are held by representatives of educational agencies, organized labor, rehabilitation agencies, community-based organizations, economic development agencies, and public employment service offices.<sup>228</sup> The chair of each council must be selected from among the representatives of the private sector.<sup>229</sup> Organized labor thus has only a limited voice in the creation and approval of public and private retraining programs. Furthermore, there is no provision for the representation of non-unionized labor on the PICs. Thus, workers at non-unionized plants have no opportunity to ensure that their concerns are considered in retraining decisions.<sup>230</sup>

A second reason why the JTPA is likely to fail to stimulate retraining is that it does not provide income maintenance. The Japanese experience suggests that innovation and flexibility in company-sponsored worker retraining programs decreases without some public financial assistance. Furthermore, in the United States, there is evidence that without some income subsidy, displaced workers who are heads of households find it difficult to take advantage of retraining programs.<sup>231</sup> Under TAA, workers in training can receive up to 26 weeks of cash benefits beyond the basic income maintenance period.<sup>232</sup> Proponents of the Rea-

225. See *supra* notes 69–73 and accompanying text.

226. See *supra* notes 83–85 and accompanying text.

227. 29 U.S.C. § 1512(a)(1) (1982).

228. 29 U.S.C. § 1512(a)(2) (1982).

229. 29 U.S.C. § 1512(b) (1982).

230. It should be remembered, however, that in Japan temporary workers similarly have no voice in retraining decisions. See *supra* notes 158–68 and accompanying text. For further criticism of the private industry council concept, see *Industrial Policy: The Retraining Needs of the Nation's Long Term Structurally Unemployed Workers, Hearing Before the Joint Economic Comm.*, 98th Cong., 1st Sess. 35 (1983) [hereinafter cited as *Industrial Policy*] (statement of Marvin Cetron, President Forecasting Int'l, Ltd.) (Cetron does not criticize the PICs of the JTPA, but rather, focuses on the problems in the operation of similar councils set up under the Comprehensive Employment and Training Act.).

231. See *Industrial Policy, supra* note 230, at 20 (statement of Marc Bendick Jr., Senior Research Associate, Urban Institute); *Industrial Policy, supra* note 230, at 29–30 (statement of Marvin Cetron, President, Forecasting Int'l, Ltd.).

232. 19 U.S.C. §§ 2292(b), 2293(a) (1982 & Supp. II 1983–1985).



gan proposal assert that the availability of cash benefits beyond the expiration of unemployment acts as a disincentive to job hunting.<sup>233</sup> Other critics of TAA, pointing to the increase in retraining dropouts at the end of the 26 week extended benefit periods argue that most workers enter retraining only to obtain the extra cash benefits available to trainees.<sup>234</sup> It is equally plausible, however, that the dropout rate demonstrates the pressure that a lack of income places on the unemployed to spend their time and resources looking for a job rather than training for one.<sup>235</sup>

A third problem with providing adjustment assistance through the JTPA is that the program's eligibility requirements guarantee that assistance will be delivered too late to encourage the gradual, on-the-job adjustment that is least disruptive to workers and has proven so successful in Japan. Theoretically, under TAA, benefits are available on threat of import injury.<sup>236</sup> The JTPA, in contrast, only provides post-job-loss assistance. Only workers who have been permanently laid off or served notice of permanent layoff and are unlikely to return to their previous occupation or have lost their jobs as a result of a permanent plant closure are eligible for aid.<sup>237</sup> Financial aid is delivered too late to help underwrite labor-management programs that would maintain employment. Assistance through the JTPA is explicitly unavailable unless a decision to sever the employment relationship has been made or executed. Thus, the Administration's proposed use of the JTPA will do little to encourage the recently emerging trend of collectively bargained worker-management adjustment plans.<sup>238</sup>

Similarly, the expansionists' plans to reduce market constraints on distribution<sup>239</sup> would do little to encourage programs jointly designed by labor and management to preserve existing employment relationships. Expansionist Harold Williams argues that a national level tripartite planning committee charged with creating an industry-wide plan would ensure this type of labor-management involvement.<sup>240</sup> However, the failure of the nationally planned direct aid methods of the Japanese Government, a bureaucracy that is known for its use of cooperative decision making in industrial planning,<sup>241</sup> indicates that labor-management

233. 1985 O'Keefe Testimony, *supra* note 103, at 240.

234. Conversation with Glenn Zech, Director, Trade Adjustment Assistance Office, Department of Labor (Mar. 22, 1985) (discussing the positions of various observers of TAA) (notes on file, Michigan Yearbook of International Legal Studies).

235. *Id.*

236. 19 U.S.C. § 2272 (1982 & Supp. II 1983-1985).

237. 29 U.S.C. § 1652(a) (1982).

238. *See supra* note 210.

239. *See supra* notes 83-86 and accompanying text.

240. *See supra* notes 83-85 and accompanying text.

241. Examples of such cooperative industrial planning are numerous. In addition to Sanrokon (the Industry Round Table Labor Conference) and Korokon (the Round Table Conference for Public Corporations and National Enterprise Labor Problems)—organizations composed of top ranking leaders of labor, management, and government created to establish trust and cooperation in the operation of both private and public enterprises—a significant number of government ministries have set up tripartite councils to advise them on policy planning. Such councils exist in the Ministry of Labor, the Prime Minister's Office, the Administrative Management Agency, Economic Planning Agency, Environment Agency, Ministry of Finance, Ministry of Health and Welfare, Ministry of International Trade and Industry, Ministry of Transport, and the Ministry of Construction. In the

planning on a national level to implement industry-wide change may well be ineffective. The flexibility and innovation required for successful adjustment demands guidance from management and workers at the plant or company level.

### C. *An Alternative Proposal for a Two-Pronged Adjustment Assistance Program*

An adjustment program that targets those suffering import injury inevitably involves both formalistic distinctions between similarly situated workers and post-job loss adjustment<sup>242</sup>—neither of which is conducive to the cooperative, company-specific, on-the-job retraining that the Japanese experience suggests is crucial to continuous worker adjustment. Still, retraining provisions in some recent U.S. labor contracts<sup>243</sup> do hold out some hope that this cooperative attitude can be fostered in the United States. Some might even argue that the emergence of these provisions through the market-defined collective bargaining process supports the maintenance of existing market checks on the distribution procedures of TAA or even the adoption of the Administration's proposal to eliminate compensation for trade-impacted workers and reduce federal involvement in adjustment generally. However, if the United States is to continue to pursue free international trade, some type of federal compensation must be provided to workers in import-competitive firms.<sup>244</sup> Furthermore, the Japanese experience suggests that during difficult economic periods, private retraining initiatives will be dropped unless underwritten by the government.

Thus it seems that both the compensation and market adjustment principles of the current program must be maintained. They would function more smoothly, however, if they operated independently of one another. The remainder of this note proposes a two pronged adjustment program that would maintain but separate these two driving forces of TAA.

The first prong of this program is intended to satisfy the compensation principle. It would consist of a modified version of TAA incorporating the current program's certification requirements and procedures, but limiting the distribution

Ministry of Labor, there are tripartite councils concerning labor standards, industrial homework, workmen accident compensation insurance, minimum wages, workmen's property accumulation, women and young worker's problems, employment security, physically handicapped person's employment, land vocational training. Draft bills and policy outlines are decided after being discussed by these councils. See JAPAN INST. OF LABOR, LABOR UNIONS AND LABOR MANAGEMENT RELATIONS 31-32 (Japan Inst. of Labor, Japan Industrial Relations Series No. 2, 1983).

242. Line drawing is an unavoidable dilemma of extending the compensation principle to workers suffering the effects of increased imports since there are few industries, manufacturing or service, to which some connection to imports can not be demonstrated. The problem of getting aid to workers prior to dismissal, while maintaining the compensation principle, similarly seems to be intractable. Predicting import injury whether to firms, industries, or workers is difficult. As a result, the "threat" clauses of trade laws, such as section 2251 of the TRADE ACT of 1974, are rarely used. The International Trade Commission almost always investigates and determines whether an injury exists, not whether the "threat" of injury exists. See e.g., Note, *An Examination of ITC Determinations on Imports: the Basis for Substantial Injury*, 6 INT'L TRADE L.J. 242.

243. See *supra* note 210.

244. See *supra* note 206.

of assistance to a lump sum cash payment. Although TAA's certification procedures exclude some workers who can trace their job loss to imports, they appear to satisfy the desire of organized labor for some type of recognition of the injury workers may suffer from international trade policies designed to benefit consumers. They also provide workers and management at individual plants with the opportunity to work out their own solutions to adjustment problems prior to certification.

Under this first, compensatory prong, benefits would be limited to a lump sum cash allowance paid in addition to unemployment insurance benefits. Employment services would not be available. This limitation on benefits would enable the federal government to provide compensation without having to direct workers to new jobs. The workers who received compensation could use their benefits to support themselves during an extended period of job search or to obtain new skills to make themselves more attractive to prospective employers.

While the program's compensatory prong would likely quiet union opposition to the liberalization of trade, it would not encourage the formation of on-the-job, worker-management designed adjustment programs. Furthermore, it would maintain the current, arguably unfair, distinction between unemployed individuals. The second prong of the program, consisting of tax incentives for on-the-job training, would minimize these problems while creating a relationship among government, labor, and management like that fostered by the indirect aid program in Japan.

The concept of the second prong is based on an obligation to retrain. Every company would be required to spend a specified percentage of its total wage bill on maintaining and expanding employee skills. If a company chose not to train its own workers, it would be required to pay the percentage to the government through a payroll tax. Similarly, if it chose not to spend the full percentage required, the remainder would also be owed to the government. The amount of time spent in training and the type of training made available would be subject to collective bargaining.

This system should encourage management and labor to adopt up-to-date, flexible production methods. The obligation to spend would provide management with an incentive to update its production processes since the outlay of the payroll percentage would be a fixed operating cost whether or not it was used to retrain workers. The collective bargaining requirement should assuage the fear of job loss that often motivates unions to maintain rigid work rules that hinder adaptation to new production technologies. Guaranteed a voice in allocating money set aside to keep worker skills on a par with plant improvements, unions are likely to be more willing to subject work rules to frequent scrutiny.

Many companies may find that they do not need to spend the entire payroll percentage in order to provide their workers with the skills demanded by new equipment and production process. If these extra funds were used to provide employees with new skills and education unrelated to company products, some might object that the program was no more than a federally mandated employee bonus. However, such expenditures might also be viewed as "privatized public adjustment." With the idea that they were preparing workers for new jobs in different companies or even in new industries, management and unions would

bargain for education and training in a variety of areas unrelated to company production. Thus, the program would be a privately driven means of moving workers from dying to developing industries.

Although intriguing, the latter argument is likely to win few supporters. To rest what is essentially a welfare responsibility (that is, a responsibility unrelated to the production or market goals of a company) on the collective bargaining process places too much faith in the belief that bureaucratic representatives of management and unions can effectively pursue values other than those related to profit and wage maximization. A better alternative, and the one proposed by this note, is a requirement that all private training funded by the payroll percentage be related to the funding company's current or future output. Any unused portion would be given to the federal government which, in turn, would distribute it to JTPA programs or retraining schemes designed by national unions or community based organizations. These funds might also be used to underwrite the benefit payments of the proposal's import compensation prong.

The payroll percentage prong of the proposal would necessitate an enforcement mechanism to prevent companies from creating sham training programs designed to avoid both the tax and the expense of retraining. A worker evaluation and complaint provision backed by civil or criminal penalties, while requiring an investment of Labor Department and judicial resources, would likely minimize the instances of employer-generated sham. Of course, sham training would pose a greater threat if a local union colluded with its management to retain unused funds. However, the influence and self-interest of union co-members who are employed by different companies and who might, in the event of lay off, benefit from government distribution of the unused payroll percentage, would probably minimize this possibility.<sup>245</sup>

245. The payroll percentage prong of the program described in this note draws on a French program that was described to Congress in 1983. *Industrial Policy*, *supra* note 230, at 20-23 (statement of Marc Bendick Jr., Senior Research Associate, Urban Institute). Based on an "obligation to spend," each French employer of more than 10 employees is required to spend 1.1 percent of its total bill on retraining. *Id.* at 20-21. Employers may conduct the training themselves, donate the funds to one of several industry-wide training programs which are generally run by employers' associations, or give the money to a government training center. *Id.* at 21. The proposal in this note differs mainly in requiring that that collective bargaining be used to determine how funds will be used and in mandating that all company-conducted training be related to the product or service sold by the company.

California and Delaware have also enacted training programs similar to the one described here, but with certain substantial differences. See O'Connell & Hoerr, *There Really Are Jobs After Retraining*, BUS. WEEK, Jan. 28, at 76; *Retraining: California's Novel Approach*, WORLD OF WORK REPORT, July 1984 at 1. Instead of requiring all companies to spend a designated amount on retraining, California and Delaware cut unemployment insurance taxes and created a new tax on companies to raise retraining funds. Those funds are distributed through a panel that includes representatives of unions and business as well as state officials. The panel reimburses companies that hire and retrain workers. To ensure that the tax funds are not misused, employers are reimbursed only after having employed the newly trained employee for 90 days. *Id.* at 76. Businesses that have experienced few layoffs, and thus received few benefits from the unemployment insurance taxes they pay, see this as an opportunity to receive a return on their investment. *Id.* at 77.

#### IV. CONCLUSION

The two-pronged approach to adjustment assistance described in this note would address several of the concerns raised by the critics of TAA. First, like the Japanese indirect aid measures, this proposal would minimize program dependence on general federal revenues. The payroll percentage prong contains a transfer mechanism that requires successful companies to underwrite the retraining of former employees of less successful companies.

Second, it would deemphasize the import injury distinction of TAA while maintaining the compensatory function that that law originally was intended to serve. Although distinctions are at the heart of any compensation program, they can often appear unfair and thus cause unrest. This two-pronged proposal would minimize the visibility and force of the import injury distinction by limiting benefits to one lump sum payment per worker. Yet, in providing some type of compensation for import injury it would acknowledge the sacrifices made by particular U.S. workers to preserve the position of the United States in the international market.

Finally, and perhaps most importantly, the proposal would encourage the development of a Japanese-like adjustment attitude among unions and management in the United States. The prevalence of this attitude—which favors continuous, on-the-job worker retraining—would hopefully minimize the need for national government planners to determine which new skills workers need and how they should obtain them.