

4(3) expressly states that an employer may not "support", "control," or "influence" a union. Yet most employers who have formed or are about to form company unions correctly believe that not only will the law be ignored, but that the Malaysian government encourages the formation of company unions.

The textile industry has been one of the most effective in forming company sponsored unions. An official of the Textile Workers Union stated that his union is not doing any more organizing since the government began its policy of encouraging in-house unions. In Kedak state, where many of the textile companies are located, the state government held a seminar on March 31, 1990 to advise companies on how to set up an-house unions.

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The textile union official stated that when he starts to organize a union, the company quickly forms an in-house union and the government immediately recognizes it. He cited several companies, including Tanako, Pen Apparel and South Island Garments, as examples of companies that have recently preempted the formation of independent unions by establishing company unions, in some cases even before the union formally began organization efforts. In each case the company unions were formed registered and recognized in less than two weeks. This is in sharp contrast to the sometimes multi-year process that independent unions must go through and illustrates that the process doesn't require delay. The preferential treatment of in-house unions suggests that the lengthy delays and legal entanglements faced by independent unions is purposeful, rather than just the result of an arcane system.

Under section 10 of the Trade Unions Act, a union may be registered with just seven employees. The employer can then immediately recognize the union and the process is complete. Thus, an in-house union that the employer has formed can be recognized with just seven employees. In contrast, an established union, such as the Textile Workers Union, must demonstrate that 50% of the employees have joined the union if the company refuses to voluntarily recognize it.<sup>76</sup> To gain recognition, the independent union must apply to the Director General of Trade Unions and the process for confirming that the union is the appropriate union and the confirming membership can take years. Thus, the system is heavily weighted in favor of in-house unions. This, coupled with the government's open encouragement of in-house unions, ensures that the workers will not have an independent voice.

In the textile companies noted above, the companies negotiated an agreement with the company-sponsored union. When workers who were not satisfied with the tainted representation requested copies of the agreement from both the company and the company union, they were told that the agreement, which was binding on all the workers, was confidential. The workers who are not part of the company cabal are deprived of independent representation for at least three years based on IRA section 11, which precludes the formation of a competing union once any

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<sup>76</sup> Support for this requirement, which all sources confirmed was uniformly applied, is unclear. Section 9 (1) of the Trade Unions Act requires a "majority" of the union to be regular workers and this has apparently been interpreted to require an established union to register a majority of all of the workers.

union has been recognized. The union could attempt to challenge the fraudulent recognition by protesting to the Director General of Trade Unions, but the certainty of extreme delay discourages such attempts.

To contrast the government's approach to the in-house unions discussed above that were legally functioning within two weeks with the approach to independent unions the Textile Workers Union attempted to form, two examples of the latter will be discussed.

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i. Eastern Garments

Eastern Garments is a small textile assembler based in Hong Kong doing contract work for many international labels, including Van Huesen, Ralph Lauren and Arrow. The company prevented an independent union from forming by engaging in the following anti-union campaign:

--smeared the union by telling workers the union was corrupt and only wanted to take their dues;

--formed a rival company union as a preemptive measure and charged dues of only 50 cents (Malaysian), compared with 2 dollars (Malaysian) that the independent union was asking;

--new employees were required, in clear violation of section 5(1)(a) of the IRA, to agree not to join the union as a condition of employment;

--carried on a signature campaign for the company union during working hours, while the TWU was not given access to employees, and employees caught with union registration materials were threatened with dismissal. This gave a clear advantage to the company union in violation of section 4(3) of the IRA, and the threats made were in violation of sections 4(1) and 5(1)(d) of the IRA.

While the company was freely harassing and intimidating workers to defeat the independent union, it formed and recognized a company sponsored union. Now, based on the operation of Malaysian labor law, the Textile Workers Union may not even attempt to organize for a period of three years.<sup>11</sup>

CR  
ii. Terry Prai Co.

Back in August of 1987, the Textile Workers Union had organized a majority of the workers at Terry Prai Co., a Pakistanian firm making clothes for the international market. On August 5, 1987, the union served a notice of recognition on the company and with the Director General of Trade Unions. The company refused to recognize the union and the union filed the appropriate report required by section 9 (4) of the IRA. While the matter was languishing in the Director General's office, in spite of repeated requests for help from the union, the company:

--terminated the chairman of the union's protest Worksite Committee on

<sup>11</sup> IRA section 11.

November 16, 1987;

--required other members of the protem Worksite Committee to clean the drains and the factory compound;

--threatened union supporters with dismissal;

--forced 9 female supporters of the union to stand in the hot sun for several hours when they declined to work overtime. When other workers protested, the company officials taunted them and told them to go on strike if they didn't like it. (A strike would have been illegal, and would have subjected the workers to fines and imprisonment. IRA section 10(1) forbids any strike during the pendency of recognition.).

On January 20, 1988, the Director General notified the company that the union had the support of 65.9% of the employees and advised the company to respond within 14 days. The company did not respond in any fashion. At least three times the union contacted the Director General and the Minister of Labor requesting that action be taken under IRA section 9(4)(c).

The Director General of Industrial Relations finally replied to the union and invited the union and company representatives to attend a meeting on February 25, 1988. The union representatives attended, but the company failed to appear. At the meeting, the Director General communicated the company's offer to recognize the union but only if the union agreed not to negotiate a collective agreement until three years after the recognition.

The union declined the offer and again requested that action be taken by the government to protect and enforce the unions right to recognition under section 9 of the IRA.

On March 17, 1988, the company called several employees, one by one, into the personnel office and made them sign blank sheets of paper. On March 25, the union was informed that the company had copies of complaints that the union had forced workers to join the union.

The union continued to request action from the government. On March 29, 1988, the company applied for recognition of an in-house union. The company's production manager, Yong Kok Mun, was listed as the protem Chairman and the personnel director, Fadzil Bin Ahmad, was listed as the protem Secretary. One of the principals of the company, Mr. Faisal, opened a \$500 bank account for the union with his own funds.

The Minister of Labor finally issued an order requiring recognition in late 1988. The company appealed to the High Court. Even though appeals of the Minister's orders regarding recognition are expressly prohibited by IRA section 9(6), the matter remained unresolved at the court until April 5, 1990, when it dismissed the company's appeal.

At this writing, it has been nearly three years since the union fairly and in accordance with the law organized the vast majority of employees at the company. They still have not been recognized and the government has done nothing

to require the company to comply with the law.

The situations at Eastern Garment and Terry Prai serve as excellent examples of the reality of worker rights in Malaysia. The long struggles of the union, contrasted with the two week formation of company unions at the other textile companies, demonstrate that the government simply does not enforce the law to protect independent worker rights. Pro forma orders occasionally issued do not result in enforcement, and the companies know that they can flaunt the law without consequence. This is not a problem of a lack of resources or information.

The government is aggressively pursuing a plan to lure investors by promising that independent unions will not be formed. To keep this promise, the government responds quickly to company sponsored, preemptive unions and when companies oppose the formation of independent unions, the government gives them the time they need to erode union support.

The government policy of encouraging company sponsored unions violates section 4(3) of the IRA, which prohibits an employer from controlling or influencing a union. This provision is not being enforced because the government believes that these company unions will encourage industrial peace. When the company and the union are both controlled by the owners of the company, there is certainly little likelihood of conflict, yet the workers are being deprived of their independent voice as required by Malaysian law and internationally recognized standards for the right to associate.

This is a foreshadowing of what will happen in the electronics sector if the right to associate is not enforced in Malaysia.

c. Companies are free to harass and intimidate independent unions during the period of government sanctioned delay.

In addition to the examples of unrestrained harassment and intimidation from the textile and electronics industries discussed above, a few other examples will be provided. In all of these cases, the employers were acting while the employees were waiting, in some cases for years, for the government to apply the law and recognize the union. While in this state of limbo, the workers are precluded from striking to protest unlawful employer actions.<sup>15</sup> The examples will be followed by a discussion as to why companies are able to engage in anti-union campaigns without fear of reprisal.

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i. Meritex Co.

Meritex is an American company that produces plastic shipping tubes for semiconductors. The plant is located in the Kampung Jawa Free Trade Zone in Penang. The company has one of the lower salary scales in the free trade zone and pays beginning production operators just \$240 (Malaysian) per month.

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<sup>15</sup> The suppression of the right to strike in Malaysia is specifically discussed in subsection 5 below.

Responding to requests from workers to help them obtain decent wages and benefits, the Chemical Workers Union of Malaysia ("CWU") organized a majority of the workers. The union served a claim for recognition on the company on October 2, 1989. The company refused to recognize the union and argued that the plastic tubing manufactured at the company is not within the province of the CWU.

Regardless of the validity of the company's assertion, it automatically bought them time to harass the employees while the matter is pending before the Director General of Trade Unions. Resolving these types of disputes normally takes a year or more. As soon as the referral was made the company embarked on the following anti-union campaign:

--The workers were called in small groups to the plant manager's office and told that the parent company, Illinois Tool Works, didn't have a union, didn't like unions, and would surely close the plant if a union was registered;

--The workers were also told by the plant manager that if the union was successful, production would be shifted to the company's other facility in Malacca;

--The workers were also told that most of the company's customers were American semiconductor companies, including Intel and National Semiconductor, and they wouldn't buy products from unionized companies. If the Meritex became unionized, the workers were told, it would lose all of its customers and close;

--The company told the workers that the CWU was known for going on strike and that if they unionized the company, there would certainly be a strike which would interrupt production and cause the customers to look elsewhere;

--Resorting to the common strategy discussed above, the company formed an in-house union. The seven charter members were mostly supervisors and they solicited members during working hours.

In April, 1990, the Director General finally ruled that the CWU was the appropriate union to organize the Meritex workers. The union is currently waiting to see which of the available delay tactics the company will use. It can either appeal the Director General's decision to the High Court and tie the matter up for a year or more, or it can appeal to the Minister of Human Resources and if that decision is unfavorable, appeal it to the High Court,<sup>79</sup> again gaining at least a year of delay.

ii. B. Braun Co. ✓

B. Braun was previously discussed in the context of the Director General's refusal to register the Chemical Worker's Union to represent the employees. Prior

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<sup>79</sup> Appeals of recognition decisions by the Minister are expressly prohibited by IRA section 9(6). However, companies routinely appeal the decisions to delay further the recognition. The only penalty faced by a company bringing such an appeal is that they might be required to bear the union's costs of appeal.

to the Director General's decision, the company tried to undermine the union's organizing campaign, and among other things:

--Sent an escort along with the workers' bus to make sure the workers did not stop at the MTUC Service Center on the way home;

--Guards at the plant searched individuals and their lockers looking for union literature;

--Work performance of known union members was constantly checked as the company searched for a colorable reason to discharge them.

The result is that B. Braun does not have a union due to the combination of its unchecked intimidation of workers and the government's draconian application of the registration procedures. The workers who still want a union will now face the additional burden of convincing the others that it will be worth the effort and risk to try again in the face of their past failure orchestrated by the combined forces of the government and B. Braun.

In all of the cases of harassment and intimidation discussed throughout this petition, the common problem is that the workers have no effective legal protection or recourse to strike. Only in the Harris case were the workers able to get an injunction against employer harassment and intimidation, but the injunction was ultimately lifted.

Malaysian law purports to prohibit employer harassment and intimidation. Sections 4 and 5 of the IRA literally cover every employer tactic that has been described. The law is meaningless, however, because there is no remedy. This is perhaps the most serious threat to the right to associate in Malaysia. Workers who are attempting to organize have no legal remedy for employer threats, harassment, coercion or intimidation unless they are ultimately terminated. Upon termination, a worker can challenge the dismissal under section 20 of the IRA, and by uniform agreement of union officials, can look forward to delays for up to three years before getting a hearing. One MTUC official who specializes in handling dismissals of union organizers said that the minimum delay is one and a half years. Any backpay award is limited to two years. Due to the extreme delays and the common practice of blacklisting workers who file victimization complaints, many workers accept a "voluntary" termination and attempt to find further employment rather than pursue their rights.

Even if the delay period is shortened for those who are victims of termination, this would do nothing to solve an aspiring union's main problem -- employer intimidation of rank and file workers who are coerced into voting against the union. The law leaves the workers who are attempting to organize their colleagues with no way to stop an employer's blatantly illegal conduct. If the workers have sufficient funds, they can attempt to get an injunction, but this would only buy them a lengthy legal battle which will, even if successful, do nothing while the action is pending in the courts. Further, as was the case with Harris, the employer is free to ignore the order and continue to appeal.

The I.R.A. purports to provide a remedy -- file a complaint with the Director General of Industrial Relations who can, if he feels the complaint has

merit, not the Minister of Human Resources, who arguably has the power to refer such allegations to the industrial court. However, this has the same problem as seeking an injunction--the delay could be for several years and the end result will be that there is no remedy under the law. The industrial court would at most be empowered to order the employer to stop and the employer will be free to ignore the order or appeal for several years. The workers can register the industrial court order with the High Court under I.R.A. section 56, but only the court has the power to again order compliance.

Because this option is futile, there are no reported cases of workers seeking relief from the industrial court for harassment that does not include a termination. As part of their struggle against Harris, the HSSMWU attempted to bring a mass harassment claim in the industrial court. They were advised by the Minister of Human resources that there was no remedy for harassment and they should just drop the case. The union refused and decided to pursue the matter in order to address this important defect in the law. The Minister has refused to allow them to proceed as a group, however, so each of the employees must file an individual claim. This will require the union leadership, from their isolation in the Harris Gulag, to convince each employee who was threatened with the loss of employment for supporting the union to publicly file a charge. The union will have to convince the workers that filing an individual charge will not cause them to be suddenly transferred to the soon to be defunct Harris Solid State.

To date, several individual complaints have been filed. The first, brought by an officer of the union, Azlinah Abdullah, on July 4, 1989, has yet to be decided.

The Minister's approach to this problem is yet another example of government discretion being used to protect barbaric behavior by a large multinational employer. The law also provides that it is a criminal offense to threaten a worker for exercising his rights to join a union. I.R.A. section 59 expressly makes such threats a crime. However, the Government has never prosecuted an employer under this section.

ILO Convention No. 87 requires a government to ensure that its laws protect the right to associate. The government of Malaysia, by not protecting its workers from anti-union campaigns and by depriving workers of any right to strike in retaliation, has created a free-for-all zone for employers that are limited only by their imagination in their efforts to resist workers' attempts to assert their right to associate.

#### 4. The Government Sanctions the Use Of Contract Labor.

The use of contract labor is widespread and takes many forms. The most troubling from the worker rights perspective is that employers are increasingly terminating union members and highly paid workers and replacing them with contract workers. These arrangements typically involve an agreement with a labor contractor who provides low-wage workers for a fee. If the contract workers attempt to organize, the employer declines to renew the contract. This practice has an adverse impact on the right to associate -- unionized workers are being replaced by workers who know that they will lose their jobs if they form a union.

A common practice in the construction and plantation sectors is that employers directly hire contract workers, many from Indonesia, Bangladesh, Thailand, and the Philippines, who are placed on fixed term contracts for periods of one month to one year. Employers can easily control these workers both because the workers know that if they cause any trouble by getting involved with unions, their contracts will not be renewed and they will be sent back to their countries.

These temporary employees are often not given benefits, such as overtime pay, annual leave, sick leave, and injury protection, which are required under Malaysian law. This gives employers an additional incentive to hire these workers and undermine union efforts.<sup>80</sup> These workers are ignorant of the law, often do not speak the local language, and know that they will be terminated if they assert their rights.

The government's response to date has been to deny that the use of contract labor is widespread and to claim that they do not have the resources to police the use of contract labor. Union leaders assert that they have repeatedly brought examples of illegal contract labor to the attention of the government, but that no action is taken. One union leader offered to wait in his office to personally take government officials to textile factories that employed contract workers from Bangladesh<sup>81</sup> without providing benefits. To date, the government has not responded with an effective policy.

#### 4. The Exemption of Pioneer Industries From Major Collective Bargaining Obligations Discourages Union Formation.

A further hindrance to union organization fostered by the Malaysian government's singular purpose of encouraging foreign investment at the expense of worker rights is that a company labeled a "pioneer" enterprise is exempt from collective bargaining over any terms and conditions of employment established by the Employment Act of 1955. Section 15 (2) of the IRA defines a pioneer enterprise as either one so labeled by the Investment Incentives Act or one that the Minister of Human Resources identifies as such.

An industry that is labeled a "pioneer" enterprise thus has an additional protection against unionization. Since such industries need not bargain over any terms or conditions of employment covered by the Employment Act, much of the incentive for joining a union is removed. No matter how strong a union is, section 15 (1) of the IRA expressly provides that

No collective agreement to which this section applies shall contain provisions with regard to terms and conditions of service that are more favorable to workmen than those contained in [the Employment Act of 1955].

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<sup>80</sup> E.g., New Straits Times, April 10, 1990. A copy of the article is attached hereto as Exhibit 21.

<sup>81</sup> E.g., The Star, April 15, 1990. a copy of the article is attached hereto as Exhibit 22.

The Employment Act covers most essential aspects of employment terms including standards for termination,<sup>82</sup> terms of payment of wages,<sup>83</sup> maternity protections,<sup>84</sup> holidays<sup>85</sup> and termination of benefits.<sup>86</sup> Thus, when the employees are invited to join a union, they are informed by the employer that there is little reason to do so as the union is precluded from bargaining over the most essential aspects of the employment relationship.<sup>87</sup>

The Malaysian government grants pioneer status for an initial period of five years under the Promotion of Investments Act of 1986 and extensions of this initial period are liberally granted. Most foreign companies, including those in the electronics sector, are operating as pioneer industries.<sup>88</sup>

While the Malaysian government is certainly free to pursue whatever policies it deems appropriate to encourage foreign investment, eligibility for GSP status is also a strong attraction for foreign investors and to remain eligible for this substantial benefit, the government must respect worker rights. Its policy of giving virtually all foreign investors a safe haven from unions for a minimum period of five years violates any accepted definition of the right of freedom of association.

#### 5. There is Effectively No Right to Strike in Malaysia.

The right to strike is fundamental to freedom of association. It is the only weapon a union has to confront illegal or unfair employer conduct in a union's effort to secure recognition or other essential rights.<sup>89</sup> This fundamental right is virtually nonexistent in Malaysia due to express government policies and discretionary practices designed to suppress strikes.

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<sup>82</sup> Sections 18-23 of the Employment Act.

<sup>83</sup> Sections 18-23 of the Employment Act.

<sup>84</sup> Sections 37-44 of the Employment Act.

<sup>85</sup> Subsections 60(d) and 60(e) of the Employment Act.

<sup>86</sup> Subsection 60 (j) of the Employment Act.

<sup>87</sup> This also has an obvious impact on the protected right of unions to bargain collectively. This is discussed in section II(B) below.

<sup>88</sup> This status also entitles them under the Promotion of Investments Act to investment tax credits, abatement of adjusted income, export allowances, and accelerated deductions in relation to the amount exported.

<sup>89</sup> The right to strike also is essential to the right to bargain collectively as it provides the only weapon a union may utilize in response to unfair bargaining by an employer.

During a union's attempt to gain recognition, once the question of recognition is referred to the Director General of Trade Unions under section 9 of the IRA, the workers are expressly denied the right to strike by IRA section 10(1) while the matter is pending: "No workman shall go on strike . . . for whatever reason during the pendency of proceedings under section 9." Further, section 10(1) prohibits any strike after the recognition decision if the union is dissatisfied with the government's decision. A union is also prohibited from any appeal. Section 9(6) provides that recognition decisions are "final and shall not be questioned in any court." Thus, for example, NEW has no right whatsoever to organize a strike to obtain recognition even though recognition has been unlawfully denied for over 15 years. Likewise, the Harris union is precluded from striking in its efforts to respond to the anti-union activities of the company. A small demonstration by the union on May 19, 1990, was terminated by the police who said the strike was illegal.

The right to strike is likewise denied in the collective bargaining process. If an agreement cannot be reached and the matter is referred to the industrial court, the workers are prohibited from striking by IRA section 44(b). The government affirmatively acts to deny the right to strike by abusing the Director General's discretion to refer matters to the industrial court for compulsory arbitration. Section 18(3) of the IRA gives the Director General the power to refer "trade disputes," which are simply failures to reach agreement through collective bargaining, to the industrial court, thus precluding a strike, if such referral is in "the public interest." The Director General can make such referrals on his own or he may refer it if one of the parties reports a trade dispute under IRA section 18(1).

In practice, the Director General uses this referral power in virtually all cases in which a strike is threatened. While it may have been arguably in "the public interest" to refer the plantation workers' dispute in April of 1990 to the industrial court and end the three-day strike in that sector<sup>90</sup>, the Director General also referred such small companies as Power Steel, a firm with less than 70 employees who make nuts and bolts. A dispute in a Kentucky Fried Chicken franchise was likewise referred to the industrial court and an award was made in November of 1989.<sup>91</sup>

Workers providing services in industries labeled "essential services" are further restricted in their right to strike by IRA section 43, which places onerous notice requirements on the workers to ensure that the dispute will be

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<sup>90</sup> The longstanding, exploitative conditions in the plantation sector gave these workers no choice but to strike. The Director General's referral to the industrial court stopped the three-day strike and prevented the workers from improving their situation. While this was certainly in the interests of the plantation owners, which include the ruling Malay party, it was in the interests of the country's 70,000 plus plantation workers.

<sup>91</sup> Further figures on referrals to the industrial court are provided in the discussion of collective bargaining in section II(B) below.

referred to the industrial court without any chance for a strike. Other employees are likewise subject to notice requirements that allow the Director General to quickly refer the matter to the industrial court before the workers can strike.

The Malaysian government will undoubtedly respond with statistics establishing that there have been strikes and assert that the right to strike must be viable. Official government figures indicate that there were nine strikes in 1988 and seven from January to June in 1989.<sup>92</sup> While these figures are so low, given the number of workers and collective agreements in Malaysia, that they support the assertion that the right to strike is severely limited, they are inherently misleading in that they record strikes that started. If the Director General subsequently defeated the purpose of a strike by ending it with a referral to the industrial court, as he did after just three days of the plantation workers' strike, this still counts as a "strike" for purposes of the government's statistics.

Interviews with union officials confirmed that there were no strikes in Malaysia in 1988 or 1989 that were permitted to go the full course and allow the workers to make the decision to return to work. In every case, the strikes ended either by a referral to the industrial court or an informal indication from the government that the matter would be referred to the industrial court if it was not settled.

An additional measure of the degree of suppression of the right to strike is to compare the number of strikes that were permitted to start with disputes that were immediately referred to the industrial court for the purpose of suppressing a strike. During just 1989, there were at least 41 awards by the industrial court resolving trade disputes involving the failure to negotiate a collective agreement.<sup>93</sup> In all of these cases the workers were absolutely prevented from exercising their right to strike.

If workers violate any of the various prohibitions of the right to strike, they are subject to imprisonment for up to two years and/or a fine of \$5000 (Malaysian) under the general provisions of section 60(1) of the IRA or one year in prison and/or a fine of \$1000 (Malaysian) under the specific prohibition of strikes in section 46(1). If a union is involved in an illegal strike, it can be deregistered under the Trade Unions Act.

One of the primary reasons that the Malaysian workers have been unable to effectively assert their rights is that they have no ability to strike. They

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<sup>92</sup> See 1988/89 Economic Report (Malaysian Ministry of Finance) at p. liv and Labor Trends in Malaysia, 1988 (U.S. Embassy, K.L. Malaysia) at p. 18.

<sup>93</sup> This figure is derived from a review of all cases that unions had records for during 1989. There may well be more examples, but official figures were not made available to the Fund. The complete list is provided in the discussion of collective bargaining in section II(B) below.

cannot strike to gain recognition, to retaliate for anti-union harassment, or to improve their position during bargaining. The government has systematically denied them substantive rights and then has deprived them of the only possible weapon that they have. In the past, the government has denied that the right to strike is restricted, but a close examination of the facts compels the conclusion that this is a misleading and untrue assertion. The right to strike is fundamental to the protected right to associate and consequently the government's denial of the right is grounds to deny Malaysia the privilege of receiving GSP benefits.

#### 6. Union Officers Are Denied Political Rights Due to Their Status As Union Officers.

Under Malaysian law, an officer of a trade union is expressly prohibited from becoming an officer of a political party. This denies the right to associate because trade union leaders are singled out and restricted in their political activity. This also prevents those with political power, i.e. officers of political parties, from becoming effective advocates for labor.

Aside from this express legal prohibition, there is a further repression of political rights for union officers in that they are strongly discouraged from even joining political parties. There was a tremendous outcry from government officials when MTUC President Zainal Rampak announced that he was simply joining Semangat 46, an opposition political party. Mr. Zainal was publicly criticized for "politicizing" the labor movement and was forced to publicly defend his decision.<sup>94</sup> The Human Resources Minister, Lim Ah Lek, who himself is an employer in that he owns an interest in one of Malaysia's largest bus companies, criticized Mr. Zainal and said that Mr. Zainal's move would distract him from his duties as MTUC President.<sup>95</sup>

The reality is that the labor leaders realize that the whittling away of worker rights is occurring because employers do have political power, while the unions do not. For the government to restrict union officers in their efforts to acquire political power, whether by law or by practice, diminishes the right of those labor leaders to freely associate with other who share their concerns.

#### B. Malaysia Denies Unions the Right to Bargain Collectively.

The right of unions and/or workers to bargain collectively is expressly protected by the worker rights standard of GSP and is likewise protected by ILO Convention No. 98. Compliance with this requirement means that a government must not restrict a union's ability to bargain either by restricting the scope of bargaining or by denying unions the right to exact concessions, consistent with

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<sup>94</sup> New Straits Times, May 2, 1990. A copy of the article, along with the Human Resources Minister's criticism, are attached as Exhibit 23.

<sup>95</sup> New Straits Times, May 2, 1990. A copy of the article is included with Exhibit 23.

local conditions and the employer's ability to pay.<sup>96</sup>

Malaysia fails to meet both of these generally agreed components of the right to bargain collectively. First, through the application of several laws, Malaysia greatly restricts the terms and conditions of employment that may be subject to bargaining. Further, both the law and practice in Malaysia prevent unions from acquiring bargaining power. Finally, Malaysian law and practice results in compulsory arbitration that systematically denies unions the ability to obtain just and equitable awards for their members.

#### 1. Restrictions on the Scope of Bargaining.

Malaysia, by law, severely restricts the terms and conditions of employment that may be subject to bargaining. Even strong unions that would otherwise be able to improve the desperate conditions of their workers are precluded by law from making demands in areas that are at the core of the employment relationship. There can be no true right to bargain if the topics that are essential to the workers may not be discussed.

The exemption given to "pioneer" industries removes terminations, terms of payment of wages, maternity benefits, holidays, and terminations of benefits from the scope of bargaining.<sup>97</sup> By law, no union may attempt to secure terms more favorable in these crucial areas than are provided in the Employment Act.<sup>98</sup> This protection applies to the all "pioneer" industries, which include most of the multinational companies who would otherwise be in a position to provide better wages<sup>99</sup> and benefits than the barely subsistence terms provided by operation of law.

Even non-pioneer industries are protected from having to bargain over essential terms and conditions of employment. Section 13(3) of the IRA prohibits unions from making demands with respect to promotion of employees, dismissal of employees, or terminations during slow periods or reorganizations. Workers interviewed in the electronics sector listed job security as one of their primary concerns because of the massive layoffs that occurred during the mid-80's recession and the prevalence of arbitrary dismissals in the industry, yet even if they had a union, they would never be able to bargain over provisions for job security.

A further limitation on the scope of bargaining is that under Malaysian

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<sup>96</sup> See, e.g., ILO Convention No. 98, Article 4.

<sup>97</sup> Citations to the specific provisions of the Employment Act that remove these topics from the scope of bargaining are provided in notes 82-86, supra.

<sup>98</sup> IRA section 15(1).

<sup>99</sup> A discussion of the wages and benefits paid to workers, and how these conditions fail to satisfy the GSP requirement of "acceptable," is provided in section II(C)(1), infra.

law, the period of the contract must not be less than three years.<sup>100</sup> Thus, unions forced to negotiate when they are just beginning or during an economic slump are locked into the terms of any agreement for a minimum of three years.

## 2. Restrictions on Union Bargaining Power.

When the right to collectively bargain is respected and a government does not affirmatively hamper a union's power, both the employer and the union are able to make demands consistent with their bargaining power and limited by market conditions. If an employer is making a healthy profit and the union has bargaining power, it is able to secure a fair share of the profits for its workers. In Malaysia, the government binds the unions so that they are prevented from ever acquiring bargaining power.

The primary impediment to union bargaining power is the denial of the right to strike, discussed above in section II(A)(5). In addition to the limitations already discussed, unions are expressly prohibited from striking to enforce the terms of a collective agreement.<sup>101</sup> As the strike is the only weapon a union has if an employer refuses to make reasonable concessions, unions must always enter negotiations knowing that they can do nothing if the employer fails to cooperate.<sup>102</sup>

A further method the government uses to deprive the unions of bargaining power is to systematically fragment unions so that small unions cannot band together for purposes of bargaining. This is done through the promotion of in-house unions, which are by definition limited to a single facility, and restrictions placed on unions' ability to organize several facilities of a single employer. The latter is done both by law and in practice. The Trade Unions Act allows unions to organize only in their "particular trade, occupation, or industry . . ." This limitation is exacerbated by the previously discussed abuses of discretion by the Director General of Trade Unions in making recognition decisions.

Thus, for example, when the employees of the three facilities operated by B. Braun, discussed earlier, tried to organize a union covering all of B. Braun's employees, they were prevented from doing so because of the fortuitous fact that several different types of products were made by the company.

The government's practice goes well beyond a reasonable reading of the law as employees of several facilities of the same employer making the same product have been prevented from organizing a union. This is the reason there is a

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<sup>100</sup> IRA section 14(2)(b).

<sup>101</sup> IRA section 44(d).

<sup>102</sup> The unions do have access to the industrial court, but as the discussion in subsection 3 *infra* establishes, referral to the industrial court consistently works against the interests of workers.

proliferation of multiple facilities owned by the same employer, often next door to each other and using equipment and facilities in common. It is also one of the reasons that Harris was able to further delay recognition of a union; by forming three separate entities, Harris Semiconductor, Harris Solid State and Harris Advanced Technology, Harris can apparently switch employees at will and play hide-the-ball from the union, while the employees must go through the cumbersome process of starting a new union from scratch each time there is a name change or a new corporate form created.

### 3. Restrictions on the Collective Bargaining Process.

The Malaysian government's policy of prohibiting strikes by referring most unsettled negotiations to the industrial court also severely restricts the employees' right to bargain collectively. The industrial court is widely acknowledged by government officials (speaking off the record), management and union lawyers, and union officials to be heavily biased in favor of employers. These knowledgeable sources agreed that in a contract wage dispute the industrial court will only award an increase to match the estimated cost-of-living increase for the year in which the award is made (rather than the accumulated increase since the last contract). One prominent management lawyer stated, "the company can always do better than the union's demand by going to the industrial court." A leading union officer agreed, adding that "in many cases the court awards less than the employer's last offer." The court is not informed of the parties' prior offers in making an award.

The result is that the unions have a strong incentive to take whatever the employer offers, especially since they lack the right to strike. Thus, the rate of "voluntary" settlements of trade disputes is high, but it is because the unions have no other choice. For example, in settling the plantation workers dispute, the National Union of Plantation Workers accepted the employers' offer of an increase in the daily rate of pay from \$7.90 to \$8.85 (Malaysian) even though they had not had an increase in over four years, rather than rely on the government, which had just terminated their three-day strike, to make a more generous award.

Even if a union is desperate enough to go to the industrial court, the delays are extreme and awards are only retroactive for six months.<sup>103</sup> IRA section 30(3) requires the industrial court to "make its award without delay and where practicable within thirty days from the date of [referral to the court]." In no cases involving contract disputes during 1989 was the award made in less than 30 days, and in many cases the delay is much longer than six months.

The following chart is a list of contract awards made by the industrial court during 1989 and illustrates the delay involved in each award:<sup>104</sup>

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<sup>103</sup> IRA section 30(7) limits the retroactive effect of an award to six months.

<sup>104</sup> The chart was compiled from union records. While the union indicated that it was a complete list, official government records, if they exist, may include additional cases. Regardless of its

Cases of Contract Awards by the Industrial Court --1989

<u>Award No.</u>	<u>Employer Name</u>	<u>Date Referred to Court</u>	<u>Award Date</u>
4	Lam Soon	11/23/88	1/10/89
9	Malaysian Commercial Bankers	7/8/88	2/15/89
12	Safety Life & General Insurance	7/16/88	1/19/89*
22	Decop Wood Industries	9/29/88	2/15/89
24	Plastic Centre	2/29/88	2/22/89*
39	Ling Cheng Lin Holdings	9/9/88	3/22/89*
40	United Plywood & Sawmills	9/9/88	3/22/89*
49	Associated Concrete Products	6/19/88	3/30/89*
51	Autofilter Industries	11/3/88	3/31/89
54	Lever Brothers (Malaysia)	11/14/88	4/14/89
56	Sarawak Commercial Banks	7/15/88	4/15/89*
61	Sabah Commercial Banks	7/15/88	4/24/89*
64	Stevedore Employers' Assn.	11/3/88	4/24/89
68	Sen Langat Palm Oil Mill	5/13/88	4/24/89*
69	Hotel Fortuna	1/28/88	4/29/89**
77	Faben Komydex	11/11/87	5/23/89*
101	Johor Bahru Flour Mill	12/10/88	6/16/89*
102	Subang Jaya Hotel Development	7/16/88	6/21/89*
105	Malaysia Shipyard & Engineering	7/9/88	6/29/89*
106	Penangsang Delima	12/10/88	6/27/89*
108	Kilang Minyak Jaya	7/9/88	6/30/89*
110	Doc Industries	8/17/88	7/11/89*

completeness, the chart provides a large representative sample of delays in resolving contract disputes.

111	Kaolin (M)	2/15/89	7/10/89
118	Naga Tembaga	5/27/88	7/20/89**
120	Toppam Moore Paragon	1/18/89	7/24/89*
131	Rangkaiyan Setia	7/9/88	7/29/89**
132	Electrical Power Co.	9/9/88	7/31/89*
136	Seri Langat Palm Oil Mill	5/13/88	8/9/89**
149	Seri Pacific Corp.	1/28/89	8/23/89*
151	Koperasi Serbaguna Tanjong Karang	11/17/87	8/30/89**
163	Tractors Manufacturing & Assembly	3/28/89	9/7/89
185	Sun U Books Co.	3/28/89	9/30/89*
195	Petro Pipe Industries (Malaysia)	12/15/88	10/16/89*
209	Pacific Refractory Industries	7/11/89	10/31/89
211	PRHS Protons Haus	4/3/89	11/7/89*
216	Kentucky Fried Chicken	2/29/88	11/11/89**
221	Froben Komplex (Merlin Penang)	11/11/87	11/18/89**
xxx <sup>105</sup>	Fernnghi Beach Hotel (Penang)	1/28/88	11/28/89**
235	Sabah Shell Petroleum Co.	2/5/88	12/13/89**
240	JG Containers (Malaysia)	7/9/88	12/23/89**
241	Pangkor Bland Resort	7/9/88	12/29/89**

\* Indicates a delay of over six months

\*\* Indicates a delay of over one year

The chart reflects that out of a total of 41 cases involving contract disputes referred to the industrial court, 32 cases were delayed for over six months and 11 of those were delayed for over a year. It is also important to observe that since these cases were referred to the court, the employees were statutorily precluded from striking and were forced to continue working without

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<sup>105</sup> The number on this file was illegible.

a contract while the case lingered in the court.<sup>105</sup>

Delays in any system are to be expected, but the statute that forces unions to submit to the onerous compulsory arbitration system sets a target of 30 days, and for none of the cases to meet that deadline indicates the extreme hardship suffered by the unions if they are forced to go to the court. A union that endures this delay once is not likely to participate in the process again and will, instead, have no choice but to accept the employers offer.

Thus, to say that unions have the right to collectively bargain and are protected by the statutory conciliation process is simply not true. The reality is that the entire employment community realizes that, in practice, unions have no rights in the collective bargaining process. They are unable to strike because the Director General of Industrial Relations can routinely preclude a strike by referring the matter to the industrial court either on his own or at the request of the employer. They are prevented from acquiring bargaining power by the government's policy of fragmenting and localizing unions.

Once in the industrial court, unions are denied the benefit of any increase they might have acquired if they could bargain while the case lingers on in the court. Finally, when they get an award, it is artificially low due to the government's policy of suppressing wages and is only retroactive for six months. As a result, the unions often have no choice but to accept whatever is offered to them by employers. Unions do sometimes request referral to the industrial court, but most often this means that the employer has offered nothing or has refused to bargain. The fact that many cases are settled under these terms is no barometer of the extent of collective bargaining rights for unions.

C. The Malaysian Government Does Not Provide for "Acceptable" Conditions of Work as Required by the GSP Statute.

The GSP worker rights standard expressly requires that to qualify for the privilege of GSP benefits, the government of Malaysia must provide for "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."<sup>107</sup>

The Malaysian government fails to meet this standard in two important areas -- it actively suppresses wages below a reasonable subsistence level by Malaysian standards and it fails to regulate worker safety and health in any meaningful way. Further, although not expressly provided for, but certainly within any reasonable definition of "acceptable" working conditions, the Malaysian government does not prohibit sexual discrimination or harassment with the result

<sup>106</sup> Information was not available as to who requested referral to the industrial court, but based on section 18(3) of the IRA, the Director General is only supposed to intervene in matters in "the public interest." It is difficult to imagine how the public interest was implicated in many of the cases in the chart that were referred to the industrial court.

<sup>107</sup> 19 U.S.C. § 2642 (a)(4) (1985).

that most unskilled production jobs are reserved for women, who are then subject to widespread sexual harassment on the job.

1. The Malaysian Government Suppresses Wages Below an Acceptable Minimum Based on Malaysian Cost of Living.

The ability of workers to earn a decent wage and share in a country's economic growth is probably the most important issue facing workers in a developing country. In most cases, the reason that unions form, often in the face of active suppression in Malaysia, is to obtain decent wages and benefits for their workers.

The GSP subcommittee has yet to ever analyze whether any country has met this standard and provides for an "acceptable" minimum wage. Instead, as in the last Malaysia decision, the subcommittee simply relies on the notion that wages will vary from country to country and that developing countries cannot be expected to meet the standards in the industrialized countries.<sup>108</sup> This approach ignores the specific and express requirement of the GSP worker rights standard. A country must provide for "acceptable" minimum wages.

There are a number of possible approaches to measure whether a country's workers are being paid an acceptable wage in proportion to local conditions. First, a baseline for subsistence could be developed using local costs for necessities such as food, clothing and shelter. This type of baseline has already been attempted for various developing countries by the World Bank, the IMF and the Overseas development Corp.

After a baseline is developed, minimum wages would have to meet that subsistence level to be deemed acceptable. Government wage policies could then be measured from the initial determination against objective criteria such as productivity growth, increase in GNP, value added by labor in manufacturing, overall per capita income increase, or the inflation rate.<sup>109</sup>

Such an approach would allow individual country situations to be taken into account. One factor that should not be considered is the conditions the workers endured prior to becoming employed. Employers in Malaysia repeatedly asserted that the workers should be happy just because they have a job. One employer stated "they [the workers] were living in filthy kampongs without any source of cash. We are paying them more than they could have ever earned if they had stayed in the kampongs."

This attitude perhaps allows employers to feel they are performing some service by employing previously impoverished workers at any wage. Yet the previous condition of the workers is precisely why a minimum wage is needed.

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<sup>108</sup> E.g. Malaysia decision at 20-21.

<sup>109</sup> These possible measures were suggested by Dr. Richard Rothstein in a paper presented on March, 30, 1990 at a seminar on international worker rights at the Institute of Management and Labor Relations, Rutgers University.

Workers that have experienced poverty and are desperate for a job are the ones that are the most exploitable. They will work for anything because they have no choice. Employers who shop the world for cheap labor are simply taking advantage of this grim fact. Educated, affluent, and/or skilled workers do not need minimum wage protection because they have other options. Wage protection is needed for those at the other end of the spectrum who would otherwise remain so desperate that they would accept any wage that allows them to be sufficiently fed to keep working. Those that oppose a minimum livable wage want to keep the poorest workers in that condition.

The above suggestions represent an approach that would provide for a fair measure of acceptable wages, and the Fund urges the GSP subcommittee to adopt such an approach to provide substantive content to the express language of the GSP statute. However, in examining the government of Malaysia's record on wages, a sophisticated analysis is not needed to determine that the government has not complied with the GSP minimum wage standard.

Malaysia has no generally applicable minimum wage law, and actively suppresses wages below an acceptable minimum judged by Malaysian standards. The Fund urges that in any case in which either of these two conditions are met, a prima facie violation should be found.

There is no dispute that Malaysia does not have a minimum wage law. Some narrow categories of workers, hotel and restaurant employees, cinema workers, store clerks and stevedores are covered, but the bulk of Malaysia's workers, including the hundreds of thousands in the manufacturing sector, are not covered. This violates ILO Convention No. 131, which requires in Article 1 "the establishment of a system of minimum wages which covers all groups of wage earners." It further provides in Article 3 that "needs of workers and their families should be taken into consideration in determining the level of minimum wages."

Malaysia's failure to make any provision for most of its workers clearly violates this standard and necessarily violates the GSP standard. The MTUC and other employee organizations have repeatedly called for a national minimum wage. Their demands have not been unreasonable, nor have they ignored the limitations of the Malaysian economy. As one leading union official put it, a minimum wage is needed "to provide three decent and nutritious meals daily, adequate shelter, clothing, and the normal needs of a family."<sup>110</sup>

The Malaysian government's traditional response to such requests has been to deny that it is feasible to implement a national minimum wage law:

the development of the country has not been spread out evenly. In view of this it is not uncommon to find areas of high economic activity being surrounded by industries and establishments that cannot make ends meet. If a uniform minimum wage were to be implemented in the country, it is obvious that a large number of

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<sup>110</sup> New Straits Times, April 4, 1990. A copy of the article is attached hereto as Exhibit 24.

establishments in the vast rural sector would not be able to comply.<sup>111</sup>

It is also obvious that this rationale does not defend the complete absence of a comprehensive minimum wage policy. Neighboring Thailand has managed to construct a minimum wage scale that varies depending on the region.<sup>112</sup>

In a more frank and troubling explanation for the lack of a minimum wage policy, the Human Resources Minister, Lim Ah Lek, stated in, ironically, his May 1, 1990 workers day address that:

"the government was not prepared to implement the minimum living wage, as recommended by the MTUC, because it would lead to an increase in production costs."<sup>113</sup>

This statement in a candid moment clearly establishes the government's true reason for denying its workers a livable wage. It has made the decision to sacrifice its workers in order to attract investment. Not only is this not an acceptable defense, but it directly conflicts with the premise of GSP to not give benefits to countries that suppress wages in order to lure investment from countries that do respect worker rights.

The government could comply by devising a system that would give all workers a livable minimum wage. The ILO suggests consultations with unions and employers to devise a workable plan to take account of regional or industry-based differentials.<sup>114</sup> As was previously noted, the MTUC has offered to meet with the government to discuss alternatives to implement a workable minimum wage system,<sup>115</sup> but the government has yet to take these requests seriously and instead is pushing for a "flexi wage system" that would give employers greater control in setting wages by overriding wage provisions for incremental increases in collective agreements.<sup>116</sup> This proposal apparently could be implemented on a national level in spite of the articulated difficulties in setting a national minimum wage policy that would benefit workers.

A policy that would comply with the minimum wage requirement could, for

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<sup>111</sup> Government of Malaysia's Post Hearing Statement at p.29, para. 70 (Dec. 1, 1988)(Submitted by St. Maxens & Co.).

<sup>112</sup> It is, however, widely reported that in Thailand the minimum wage law is not enforced.

<sup>113</sup> The Star, April 30, 1990, at p. 7. A copy of the Article is attached as Exhibit 25.

<sup>114</sup> See, e.g. ILO Convention No. 131, Article 1.

<sup>115</sup> E.g., The Star, August 8, 1989. A copy of the article is attached hereto as Exhibit 26.

<sup>116</sup> See note 122 infra and the accompanying text.

example, be broken down by region and/or industry. The consequence in Malaysia of the absence of a minimum wage law is that wages for nonunion workers throughout the country remain close to the level of wages in the small, rural plants that the government claims to be protecting. When there is a surplus of unskilled labor as exists in Malaysia, the absence of wage regulation tends to drive wages down as workers compete for jobs by working for less fulfilling "a kind of Gresham's Law of labor standards -- bad standards tend to drive out good."<sup>117</sup>

The best example of the lack of candor in the government's explanation for not complying with the minimum wage requirement is the electronics sector. The large multinational firms in that sector are certainly not within the government's description of firms that could not comply with a reasonable minimum wage. These companies are making record profits each year in large part due to the low wages paid to workers. Further, all of these companies were previously producing in countries with substantially lower wages than are paid in Malaysia.

Due to the absence of minimum wage legislation, and the government policy prohibiting unions for electronics workers, the electronics companies are able to pay wages that are lower than other developed sectors of the economy, and certainly lower than those companies could pay and still make a healthy profit. When the American firms are defending their flight to developing countries from the U.S., they uniformly deny that high American labor costs are the reason since labor costs are a small fraction of total operating costs. Yet, once in Malaysia, they claim that any increase in wages will drive them to bankruptcy due to the fierce "foreign competition." Since most of the world's electronics companies are making their chips within yards of each other in Malaysia's free trade zones, and all of them are getting the benefit of the artificially suppressed wages in Malaysia, it is difficult to imagine who they are competing with that would gain an advantage if electronics workers' wages were uniformly increased.

A useful comparison in assessing the windfall that the electronics companies are enjoying because of the absence of unions in the industry and the lack of a minimum wage law is provided by the partially unionized electrical sector. According to one knowledgeable union official, the average starting wage in an electronics company is approximately \$100 (Malaysian) lower per month than in the electrical sector. The wages in neither industry are sufficient to allow a worker to provide the basic necessities for his or her family,<sup>118</sup> but the

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<sup>117</sup> R. Marshall, Jobs: The Shifting Structure of Global Employment at p. 198, in J. Sewell and S. Tucker, Growth, Exports and Jobs in a Changing World Economy: Agenda 1988 (1988).

<sup>118</sup> Most of the starting production workers in the electronics sector are female. 78% of total employment in 1986 was female and very few females held positions above entry level production operators. This is one reason the government seems indifferent to the low wages paid for these jobs. No one has asserted with any conviction that the starting wages in the electronics industry would come close to meeting the needs of a worker with dependents. Females are simply not regarded as the primary breadwinners,

substantial difference illustrates the fallacy of the government's asserted reason for not having a minimum wage. Clearly, the electronics firms, which are often next-door to the electrical firms in Malaysia's many free trade zones, could afford to pay at least the standard in the electrical sector, where similar companies are managing to make increased profits each year even paying the higher rate. Ironically, the electrical companies themselves asserted an inability to pay increased wages when unions first started organizing them, but this has not proven true.

At a minimum, the government could meet its responsibility to "take steps" under GSP by applying a minimum wage to its large industrial sector dominated by foreign multinationals. Instead, the government continues to lure foreign investment by promising potential investors cheap, educated laborers. In the electronics sector, the promise also includes docile females who are obedient to authority.<sup>119</sup> The Malaysian government even went against Islamic pressures to keep women out of the workforce and exempted electronics companies from the Employment Act's prohibition of requiring women to work between 10 p.m. and 5 a.m.<sup>120</sup>

The failure to provide for a minimum wage with the result that many of the workers are paid less than a reasonable subsistence wage even in the wealthy industrial sector,<sup>121</sup> is itself sufficient to find that the Malaysian government has not complied with the GSP standard. But the government takes a further step and systematically suppresses wages through a series of policies.

Among the policies the government utilizes to suppress wages are:

--the absence of a minimum wage law;

--denial of the rights to organize and bargain collectively to prevent unions from demanding fair wages;

--the failure to enforce laws that protect workers in their efforts to assert demands;

--express promises to investors that the government will provide cheap labor;

--assertion of a recent policy that would allow for the lowering of wages. Along with the Malaysian Employers' Federation and other management groups

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regardless of whether they are in fact supporting their families. See, e.g. Grace, supra note 26 at 15-22.

<sup>119</sup> Id at 15-16.

<sup>120</sup> See, e.g., id at 16.

<sup>121</sup> A discussion of the living conditions of the workers in the electronics sector follows this discussion of government policies to suppress wages.

including the MAEI, the government has been advocating a system of "flexi-wages" that would allow employers to make adjustments to the already low wages only if productivity and profits met a specific goal. This would end any incremental increases based on cost of living and seniority, and would not adjust wages to reflect that in the past workers have not benefitted from productivity or profit increases;<sup>122</sup>

--promotion of the use of contract labor from Bangladesh, Thailand, the Philippines and Indonesia to ensure a surplus of workers willing to work for low wages;

--creation of special exemptions to facilitate the greater use of politically and socially powerless female workers; and

--forced use of compulsory arbitration of contract disputes in the industrial courts where government policy is to deny reasonable demands for wage increases.

If Malaysian workers were less expensive simply due to market forces and local conditions, then the government could assert a legitimate comparative advantage. However, Malaysian workers are cheap due to the government's active intervention to keep them that way and deprive them of a reasonable standard of living. This type of conduct warrants GSP removal in and of itself.

The basic premise of GSP is to help a country and its workers develop an economy that will share the benefits of development to all. Malaysia has used GSP to lure investors at the expense of workers so that multinational firms and the Malaysian elite are getting a windfall, subsidized by the American taxpayers, while the majority of Malaysian workers struggle to survive.

If all or most of the Malaysian workers in fact were paid above an "acceptable" minimum wage, then arguably there would be compliance regardless of the government's policies. However, an examination of the cost of living in both Kuala Lumpur and Penang, both relatively expensive cities where the largest free trade zones are and the unorganized workers remain at the mercy of employers for wage scales, reveals that even long term workers in large American electronics companies are not being paid an "acceptable" wage. The difference between what they are paid and a truly livable wage can be attributed to government wage suppression policies.

To examine living standards for long term electronics workers in Kuala

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<sup>122</sup> The government initially commissioned a study on a "flexi-wage system" and then formally proposed its adoption through the Minister of Human Resources Lim Ah Lek. See, e.g., The Star, March 15, 1990 and The New Straits Times, March 15, 1990. A copy of both of these articles is attached as Exhibit 27. The MTUC objected to this proposal and again called for national minimum wage legislation. The New Straits Times, March 16, 1990. A copy of this article is attached as Exhibit 28.

Lumpur and Penang, the Fund surveyed numerous employees and simply asked them to list what their regular monthly expenses were. Five of the many employees interviewed had been employed for over 10 years and their living expenses are provided below. Three of the employees worked at Advanced Micro Devices in Penang and had worked there for 11, 13 and 14 years; the other two worked at Harris Solid State (now Harris Advanced Technology) for 10 and 12 years. All were unmarried females and held the position reserved for females, production operator. Each of them came from rural villages in order to obtain employment. Four of them stated that they had only expected to stay a few years, save money, and return home to marry and start a small business. The other said that she had no particular plans when she came to the city to work.

Their gross salary range was \$460 to \$520. All employees are required by law to pay 9% of their salary to the Employee Provident Fund. The living expenses were nearly identical in both cities.

The following chart provides the range of response for each item of expense as well as the average:

<u>Item</u>	<u>Monthly Expense Range (Malaysian \$)</u>	<u>Average</u>
Food	\$150 - \$225	\$187.50
Rent	\$40 - \$85*	\$62.50
Clothing	\$40 - \$60**	\$50.00
Household goods and toiletries	\$35 - \$50	\$42.50
Money sent to family	\$0 - \$200	\$100.00
Transportation	\$10 - \$45***	\$27.50
Entertainment (movies)	\$10 - \$30	\$20.00
<b>TOTAL AVERAGE MONTHLY EXPENSES</b>		<b>\$490.00</b>

\* All but one of the rent figures were \$40 to \$50 per month. This represents the typical situation in which five or six workers share a two or three room flat that goes for \$240 - \$300 per month. The one worker who paid \$85 was renting a small one room flat that she shared with one other person.

\*\* This was based on a yearly average divided by 12.

\*\*\* All of the workers were given transportation to and from work by their employers. This expense represents transportation for errands, groceries or social visits.

While not absolutely precise, the figures provide a representative picture of the cost of living for a single, long term employee of an American electronics firm. Because the workers surveyed were long term employees, their salaries

permitted them to meet their respective basic expenses. However, in order to survive, all but one of them had to share housing with four or five other people. All of them stated that they had to work overtime regularly in order to buy clothes or send money to their families.

Whether the workers surveyed were paid an "acceptable" wage is quite doubtful. Those at the lower end of the salary range could not possibly afford the luxuries of sending money to their families or going to a movie once a month. Certainly none of the workers could afford to have a family. The basic premise of the wage system is that the workers will tolerate the conditions for a while and return to their villages at some point to marry and raise a family, yet the five women surveyed were all over 30, well past the traditional age of marriage in Malaysia. Thus, while the exploitative system of bringing young girls from villages to work in factories for a few years is based on the assumption that they will have new opportunities once they return home, it is not supported by the facts. The women are increasingly remaining at their jobs while they make a futile effort to save money.

The more troubling issue is how the workers who make substantially less than the workers surveyed are able to survive. Many small companies pay salaries substantially lower than those paid in the multinationals, and starting salaries in the multinationals are substantially lower than that paid to the long term employees. The Penang Development Corp., a government entity that functions much like a "chamber of commerce" for Penang's free trade zones, published a wage survey which provides the median salaries for various job categories as of December 31, 1988.<sup>123</sup>

The chart combines the higher paying electrical companies with the electronics companies with the electronics so no differentiation is possible. The survey indicates the median daily salary for an unskilled production operator in an electronics/electrical firm, the highest paying industry on the chart, is \$9.00. Based on the average 26 days per month that the workers can work, the total monthly salary is \$234. A skilled production operator makes \$13 per day or \$338 per month. Without working substantial overtime, clearly most of the workers in these categories, which constitute the vast majority of the workers, could not meet the average basic expenses of living identified in the Fund's survey.

One worker interviewed who made \$240 per month stated that she had to do without everything but basic food during months in which she was not able to work substantial overtime. She said that the five other people who shared her house helped each other whenever they could. Other workers reduced expenses by sharing their one or two-room apartments with up to 12 people who sleep in shifts.

The Malaysian government apparently does not attempt to identify an accurate poverty line for industrial workers. There is a program in place to help the rural poor, particularly "smallholders," which are families that own small rubber farms. The government asserted that in 1985, 40% of the smallholders earned less than \$200 (Malaysian) per month and this was the basis for

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<sup>123</sup> A copy of the salary survey is attached as Exhibit 29.

implementing a poverty eradication program.<sup>124</sup> Yet, in 1990, many workers in Kuala Lumpur, Penang and other expensive, developed areas must survive on less than \$240 per month because of government policies to suppress wages.

Regardless of any arbitrarily defined poverty level that the government may assert, poverty is not the standard. GSP eligibility is dependent on whether the government provides for an "acceptable" minimum wage. The conditions that workers must endure working for artificially low wages do not meet this standard. Acceptable standards will vary from country to country and Malaysia must be judged by its success. One union official commented that whenever he raises the issue of minimum wages with the government, he is told that wages are high in Malaysia compared to Bangladesh and Indonesia. Yet whenever the government talks about productivity of Malaysian workers, they are compared to Taiwan, Korea and Singapore. "Give us Korea's or Taiwan's wages and we will meet their productivity," he stated.

By all barometers, the Malaysian economy is booming, yet workers have not yet been permitted to participate in the success because, in the words of the Minister of Human Resources, granting them "minimum living wages . . . would lead to an increase in production costs." This admission establishes both that it is the government's policy not to provide for a minimum wage as required by GSP, and that the government continues to systematically suppress wages and deny workers a "minimum living wage" in order to attract investment.

Even accepting Malaysia's other rationale for not having a minimum wage, that small rural companies could not pay the same as large multinationals, does not excuse the failure to apply a reasonable standard to the multinationals that are getting a windfall after having fled the substantially higher wages in their home countries. Accordingly, Malaysia's GSP status must be terminated for its admitted failure to comply with an express requirement of the GSP worker rights standard.

## 2. The Malaysian Government Does Not Provide Acceptable Conditions to Assure the Health and Safety of Workers.

MNSTD

Health and safety regulation, like wages, will vary from country to country, but the subcommittee is required to determine whether the conditions in a particular country are acceptable. Malaysia boasts a highly developed industrial base with increasingly sophisticated technology, yet its regulation of worker safety and health remains at the level of a country that is primarily agrarian.

The only legislation governing industrial health and safety is the Factories and Machines Act. It was passed to regulate boilers and other equipment used in tin production at the start of Malaysia's industrialization. It has been amended through regulations to monitor worker exposure to lead, noise, mineral dust and asbestos. There is no legislation to address the new hazards that have been brought to the country in the last decade, including exposure to chemicals

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<sup>124</sup> See, e.g., The Star, December 29, 1989. A copy of the Article is attached as Exhibit 30.

used in the electronics industry, low level radiation, eye damage from using inspection equipment in the electronics industry, brown lung from cotton dust in the textile industry, and various other chemicals that in many cases the workers can not even name.

One concerned union official said, "the government is so short sighted. The new diseases from chemical and radiation exposure take 15 or 20 years to develop. Since the workers are not sick now, the government is doing nothing. But we are reaching the point where some of our workers are approaching 15 years of exposure and we are suddenly going to see how serious the problem is. There are so many multinationals using chemicals here that are banned in their own countries."

In the plantation sector it is widely reported that workers are using paraquat and various derivatives of agent orange to defoliate. At most, they are given paper masks to protect them while breathing the fumes.

Even in industries that are covered by regulations, facilities are rarely inspected more than once every two years. One union official indicated that when inspections are conducted, the inspector often relies on employer representations and that corruption is widespread.

The government of Malaysia has an obligation to its workers to protect them with reasonable regulation of the hazardous industries that it is aggressively luring to Malaysia. While policing the regulations will involve certain expenses, at present the government is doing virtually nothing. Given its record in other areas, it seems likely that this is because of the same desire to lure investors, who in addition to wanting cheap labor, also do not want to be burdened with costly health and safety regulations.

Providing for the health and safety of its workers is not optional; the government of Malaysia is required to do so as a condition to receiving GSP benefits.

### 3. The Malaysian Government Permits Gender Discrimination in the Workplace and Does Nothing to Prohibit Sexual Harassment of Female Workers.

*Gade*

The requirement that a GSP eligible government provide "acceptable conditions of work with respect to . . . occupational safety and health" must certainly include a policy to prevent gender discrimination and sexual harassment. The ILO has long required member states to provide an atmosphere free of gender discrimination and sexual harassment. The Malaysian government actually encourages gender discrimination and does nothing to prevent sexual harassment.

Once again the best example of the Malaysian government's failure to comply with internationally recognized worker rights is provided by the electronics sector. As has been previously discussed, the multinational electronics companies prefer female workers because they are believed to be docile and obedient to authority. Further, woman can be paid less money. The generally accepted explanation offered by the multinationals is that the women are more dexterous and can be trained more easily than men to perform the routinized, repetitive tasks involved in semiconductor assembly. The Malaysian government not only permits this differential treatment, but has modified

policies to allow women to do shift work to meet the electronics industry's demand for female workers.

Virtually every multinational electronics company restricts its hiring of production operators, the entry level position, to females. A random sampling of employment ads placed by American, Japanese and European electronics companies reveals that all of them specify they are seeking "female production operators."<sup>125</sup> Companies that do not place ads post notices on their bulletin boards likewise seeking females for the low level positions.<sup>126</sup>

Gender discrimination also extends to training opportunities and promotions. A common complaint of female production operators is that they are not trained to assume more responsibility because the better paying jobs are reserved for men, who are presumed to be the primary breadwinners.<sup>127</sup> Also, women are expected to work a few years and return to their government-encouraged duty to fulfill Prime Minister Mahathir's quota of bearing five children each.<sup>128</sup>

To make matters worse, the multinationals also require the women to be young. For example, Texas Instruments' ad requires the female applicants to be "between 17-25 years old."<sup>129</sup> Grundig specifies that it wants its females to be "between 16-30,"<sup>130</sup> and JVC limits applicants to those between 19-23.<sup>131</sup>

A further hardship the women workers suffer is that when a company seeks to reduce its payroll costs, it will retrench the older workers who have become relatively expensive due to yearly incremental increases. This violates the normal practice of "last in, first out, so the companies must devise pretextual reasons to explain a termination for cause or else convince the workers to resign "voluntarily" to avoid termination. For example, in late 1988 Advanced Micro Devices retrenched approximately 900 workers, most of whom were senior employees, meaning they had been with the company more than eight years and were around 30 years old. Only 14 of these workers were bold enough to overcome their fear of blacklisting and cultural inhibitions to go to the MTUC Service Center in Penang and seek legal assistance. After a legal battle of over a year, the company finally agreed to reinstate the 14. Relief was not extended to the others who did not participate in the legal action, and most of them were unable to apply

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<sup>125</sup> Exhibits 31-36 are samples of ads placed in Malaysian newspapers from April 17 to May 8, 1990.

<sup>126</sup> Various interviews with electronics workers.

<sup>127</sup> Various interviews. See also, Grace, supra note 26 at p.53.

<sup>128</sup> E.g., Grace, supra note 26 at 18-19.

<sup>129</sup> See Exhibit 31.

<sup>130</sup> See Exhibit 31.

<sup>131</sup> See Exhibit 34.

their limited skills in other electronics companies due to the preference for younger female workers.

As a function of a predominantly female workforce being governed by an almost exclusively male supervisor force, sexual harassment is widely reported.<sup>132</sup> Women in the electronics sector, as well as textiles, electrical and other industrial sectors, are subjected to requests for sexual favors in return for better assignments, protection from retrenchment or, most bluntly, to avoid discharge. The female electrical workers are particularly susceptible to harassment because they are typically young and have left their villages to work in the factories of the larger cities. They are referred to as "minah karan," which translates roughly to "hot stuff."<sup>133</sup> This merely reflects that the female workers are regarded as less orthodox and more approachable.

In contrast, women who are more traditional moslems wear a tunding or veil, which makes them distinct in appearance. The purpose of the veil in Islamic culture is so the woman will not herself commit a sin by tempting a male with her body. Thus, an orthodox Islamic woman who complains of sexual harassment will be admitting to sin because she caused her male supervisor to become aroused. This sets up a perfect system for unremedied harassment.

Even if a woman wanted to complain, there is little in the way of legal protection. The criminal law in Malaysia does prohibit sexual assault, but there is no law dealing with sexual harassment in the workplace. Thus, the only remedy available to a female worker is to file a police report against her supervisor in response to sexual harassment.

In the only case that the Fund was able to discover in which a female worker did file a police report against her supervisor, even though it is widely acknowledged that sexual harassment is common, the police ridiculed the woman and told her that her reputation would be ruined if she brought public charges that her supervisor forced her to have sex with him. When the woman insisted that she wanted to file a complaint, the male interviewers made her describe in great detail the nature of the sexual encounter.

The Fund was unable to determine whether action had been taken against the supervisor. The case does demonstrate, however, the extent of the problem. Without some form of protection for these female workers, employers will continue to take advantage of the fact that it is extremely unlikely that any victim will complain and go through the public humiliation in a largely Islamic country, of admitting to having had sex under even forced circumstances.

It is not unusual for a supervisor to discharge an unwilling victim of harassment for a pretextual reason. Again, the supervisor can be relatively certain that the worker will be too ashamed to publicly complain. The MTUC Service Center in Penang reported that it receives numerous reports of sexual

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<sup>132</sup> Various interviews. See also, Grace, *supra* note 26 at 53.

<sup>133</sup> See, e.g., *Brave New World*, in *Far Eastern Economic Review*, December 21, 1989 at pp. 32-34.

harassment followed by pretextual termination, but once the victims are fully apprised of the realities of the legal process, they decline to pursue their rights. Again, there is but a single example of a case in which wrongfully terminated women decided to pursue their case. Four employees of Bontec, a French electronics company in Penang, were terminated by a supervisor who constantly made suggestive remarks and touched the women. When they refused his advances, he terminated them and claimed they had taken a day's leave without permission. The women were terminated on March 21, 1987. No hearing has been held yet. Thus, even if they prevail, their example will be a further discouragement to other workers who would not want to endure the public trauma for the years that it would take to even get a hearing. C/5

No workers should be subject to gender discrimination and sexual harassment at this point in time. That such barbaric behavior is occurring in multinational companies, including American companies, and that all of the multinational electronics companies at the very least hire female production operators so they can be paid less than men would require, is shocking. These companies apparently feel no moral responsibility and respond only to forced compliance with minimal standards of decency in the workplace. Hopefully the American government will not condone this behavior and require the American taxpayers to subsidize this particularly heinous form of worker exploitation.

### III. CONCLUSION

The government of Malaysia is an extreme example of a regime that does not protect worker rights. The only progress made since the last petition was during the period when the government was under review. As soon as the threat of GSP removal was lifted, the government returned to business as usual and labor rights have deteriorated even further.

In virtually all of the five requirements for compliance with the GSP worker rights standard, the government has continued its blatant violations. The problem is particularly acute because of strong evidence that the government is acting in response to intense pressure from the many multinationals, including the American electronics firms in the MAEI, that have invested in Malaysia to take advantage of the absence of worker rights. These companies have traveled a long way to flee the labor regulations in their home countries and will not lightly tolerate a change in their current safe haven.

The only way to improve worker rights for Malaysian workers is to remove GSP benefits until the government actually complies with the standard. Although V. David's experience in prison for advocating GSP removal is fresh on their minds, there is a growing consensus among concerned labor leaders that the threat of GSP removal may be the only hope for real progress in worker rights.

Following the AFL-CIO's 1988 petition, Prime Minister Mahathir was widely quoted stating that the AFL-CIO was trying to hurt Malaysian workers by attempting to terminate Malaysia's GSP benefits. He hounded V. David in the press 32 and repeatedly asserted that V. David likewise was taking food from the mouths of Malaysian workers for initially supporting the petition. Such comments were obviously designed to divert attention from the true issue of the systematic denial of worker rights by the government of Malaysia.

The responsibility for the consequences of GSP removal rests squarely with Prime Minister Mahatir and the government's repressive policies. GSP benefits are a privilege conferred upon countries that respect worker rights, not an inducement to lure investors who seek a free zone from the civilized world.

The Fund and its members from the human rights, labor, government, religious and academic communities have but one goal in filing this petition - forcing the Malaysian government and the employer community to respect the rights of Malaysian workers so they can acquire a fair share of Malaysia's remarkable economic progress. Faced with the dilemma of whether to file, the choice was clear - the extreme denial of worker rights and the current plans by the government to further restrict those rights requires the only course available. The opportunity to restore the privilege of GSP benefits, like the responsibility for the removal, rests with the Malaysian government.