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TABLE OF CONTENTS

ARTICLES

COMMENTS

WARRIORS BETRAYED: HOW THE "UNWRITTEN LAW" PREVAILS IN JAPAN

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Unless otherwise noted, the author is responsible for the accuracy of all Japanese translations. Japanese authors are cited as they appear on the publication. Some authors followed the traditional Japanese style of placing the author's surname first, followed by the first name; others follow the Western style. For authors in the former category, only surnames are used for subsequent abbreviated references.

[C]an't it be said that today's armies of corporate workers are in fact slaves in almost every sense of the word?[1]

[T]he freedom of an individual to live and die naturally without being subjected to destruction by others is the foundation of all human rights.[2]

I. INTRODUCTION

Having risen from the ashes of World War II, Japan today prides itself on its global economic power.[3] Japanese corporations have triumphed in marketplaces across the globe.[4] The devotion to work by male white-collar workers, often called corporate warriors,[5] has heavily fueled Japan's economic growth.[6] It is the workers, not executives, who have shaped

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1. NATIONAL DEFENSE COUNSEL FOR VICTIMS OF KAROSHI, KAROSHI: WHEN THE "CORPORATE WARRIOR" DIES 4 (1990)[hereinafter NATIONAL DEFENSE]. For a description of the Defense Counsel for Victims of Karoshi, see *infra* section VII.B.2.

2. NATIONAL DEFENSE, *supra* note 1, at Preface IV. For the unabridged quote, see *infra* text accompanying note 228.

3. Ronald E. Yates, *Japanese Live...and Die...for Their Work*, CHI. TRIB., Nov. 13, 1988, at 1. Japan's rapid accumulation of assets has constituted one of the most visible trends in the American financial market. *Five Ways to Fight Back*, NEWSWEEK, Oct. 9, 1989, at 71. Between 1979 and 1990, annual Japanese investment in the U.S. skyrocketed nearly eighty-fold, from 257 million to 19.9 billion dollars. Eileen M. Mullen, *Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law*, 45 STAN. L. REV. 687, 729 n.13 (citing Bureau of Economic Analysis, U.S. Department of Commerce, *U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1985*, 66 SURV. OF CURRENT BUS., May 1986, at 50, tbl. 5; *Bureau of Economic Analysis, U.S. Department of Commerce, U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1991*, 72 SURV. OF CURRENT BUS., May 1992, at 72, tbl. 4). The U.S. media has often portrayed Japan as a zealous investor. To the majority of Americans surveyed in 1989, Japan's economic power posed a greater threat than the military power of the then Soviet Union. *Japan Goes Hollywood*, NEWSWEEK, Oct. 9, 1989, at 62.

4. Political economist Pat Choate reported the following as of 1990: the Japanese own $285 billion of U.S. banking assets (a 14% share of the U.S. market); possess more real estate holdings in the U.S. than the members of the European Community (EC) combined; and trade up to 25% of the daily volume on the New York Stock Exchange. PAT CHOATE, AGENTS OF INFLUENCE, at Introduction. (1990).

5. "Corporate warrior" is a term often used to describe a Japanese businessman. Tatuso Inoue, *The Poverty of Rights-Blind Communality: Looking Through the Window of Japan*, 1993 B.Y.U. L. REV. 517, 528 (1993). *See also generally* Kawahito Hiroshi, *Death and the Corporate Warrior*, 37 JAPAN Q. 149 (1991); Esaka Akira & Kusaka Kimindo, *Farewell to the Corporate Warrior*, 17 JAPAN ECHO 37 (1990).

6. *See* Yates, *supra* note 2; Osamu Katayama, *Back to the Drawing Board*, 39 LOOK JAPAN 4 (1993); Esaka Akira, *Strong Medicine for an Ailing Labor Movement*, 13 JAPAN ECHO 65 (1986); JAPAN TRAVEL BUREAU, SALARYMAN IN JAPAN 85 (1986); JARED TAYLOR, THE SHADOWS OF THE RISING SUN: A CRITICAL VIEW OF THE "JAPANESE MIRACLE" 148 (1983).

Japan's success.[7] Built upon a notion of lifetime commitment,[8] the Japanese employment system has dictated that these men endure inordinately long work hours.[9] The rigor of corporate life has stripped Japanese employees of the freedom to cultivate themselves as individuals.[10] Such harsh working conditions have caused sudden collapses of some warriors; *karoshi* (a Japanese word for death from overwork)[11] has emerged as one of the most pressing issues facing the Japanese labor market today.[12]

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7. TAYLOR, *supra* note 6, at 148.

8. Japanese business management has been distinguished by its guarantee of job security through lifetime employment. This security has obliged workers to put in extensive work hours at the cost of their private lives. Observers have described the essential nature of the Japanese employment system as feudalistic and paternalistic. *See generally* JAPAN: A COUNTRY STUDY 115, 116-17, & 216-18 (Ronald E. Dolan & Robert L. Worden eds., 5th ed. 1992). For a comparative analysis of employment practices in Japan and the United States, see generally Robert Abraham, *Limitations on the Right of Japanese Employers to Select Employees of Their Choice under the Treaty of Friendship, Commerce, and Navigation*, 6 AM. U. J. INT'L L. & POL'Y 475, 479-84 (1991); Marcia J. Cavens, *Japanese Labor Relations and Legal Implications of Their Possible Use in the United States*, 5 NW. J. INT'L L. & BUS. 585 (1983). For a more complete discussion of the Japanese employment system, see *infra* section V.

9. For a discussion of work hours in Japanese corporations from a comparative perspective, see generally Robert E. Cole, *Work and Leisure in Japan*, CA. MGMT. REV. 52 (Spring 1992). *See also infra* section III.A.

10. In Japan, both the workplace and the home have served as "vital mechanisms in the collectivizing of individual emotions toward the goals of increased productivity and the income-doubling program." Yamazaki Masakazu, *Signs of New Individualism*, 11 JAPAN ECHO 8, 13 (1984).

11. *Karoshi* generally involves diseases of the brain and heart. For a definition of *karoshi* by Dr. Uehata Tetsunojo of the National Institute of Public Health, see *infra* note 33 and accompanying text. *See also generally* KAROSHI BENGO-DAN ZENKOKU RENRAKU-KAI [THE NATIONAL DEFENSE COUNSEL FOR VICTIMS OF KAROSHI], KAROSHI! [DEATH FROM OVERWORK] (1989) [hereinafter VICTIMS OF KAROSHI]; OSAKA KAROSHI MONDAI RENRAKU-KAI [OSAKA KAROSHI ISSUES RESEARCH GROUP], KAROSHI: 110-BAN [DEATH FROM OVERWORK: 911] (1989)[hereinafter OSAKA KAROSHI MONDAI] ("110" is the Japanese equivalent of "911," the emergency telephone number in the United States); Miyuki Muneshige, *Enough is Enough*, 37 LOOK JAPAN 36 (1991).

12. *See infra* section II.

Karoshi can be called a symbolic death.[13] It offers insights into a grave injustice resulting from the primacy of corporate welfare in Japan.[14] Japanese corporations unilaterally create and enforce their own mechanisms of control and order over employees. These unwritten rules often prevail over the system of the written laws or universal principles of justice and equity.[15] In the shadow of the global economic power lies a legal culture that has impoverished individual lives.

The prevalence of *karoshi* highlights two particular areas of Japanese law, which have utterly failed to protect rights of workers and their families: the work hour regulations and the workers' compensation system. First and foremost, a provision of the Labor Standards Law[16] has allowed employers to impose a vast amount of overtime upon their employees.[17] Second, families of *karoshi* victims face procedural and substantive obstacles as they seek the Survivors Compensation under the Workers' Accident Compensation Insurance Law.[18] Claimants endure considerable hardships,

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13. Inoue, *supra* note 5, at 533; Kazuhiko Komatsu, *Karo-no Shisutemu* [*The System of Work-Related Fatigue*], ASAHI SHINBUN [ASAHI NEWS], June 25, 1994, at 13. Inoue elaborates on the concept of the symbolic death as follows:

> *Karoshi*, therefore, is not an isolated personal tragedy. Just as egoistic and anomic suicides symbolize the anxiety and despair of the individualistic society, *karoshi* symbolizes the tension and distress of a hyperindustrialized and secularized communitarian society, not of a primitive and religious community.

Inoue, *supra* note 5, at 538. *See also* Kawahito, *supra* note 5, at 154 (discussing various cultural elements of *karoshi*, such as "the work ethic, a social value system that extols perseverance in the face of all odds, and a family structure in which the man is still the only breadwinner").

14. Japan boasts one of the world's highest GNP's per capita. Nonetheless, most Japanese "do not feel theirs is an affluent life." Their sources of complaints typically include: heavy tax burdens, long working hours, unsatisfactory housing conditions, and the skyrocketing cost of living. Cole, *supra* note 9, at 54.

15. Inoue, *supra* note 5, at 520. One observer notes that "the customary Japanese way of doing business inexorably works to defeat the stated purpose of that law." Paul Lansing & Tamra Domeyer, *The Tatemae and Honne of Japan's Internationalization: The Japan-South Africa Relationship*, 5 FLA. J. INT'L L. 61, 68 (1989) (citing Iwakuni, *Laws May Change But Japanese Society Does Not*, 6 INT'L TAX & BUS. L. 300, 304 (1988)).

16. Rodo Kijun Ho [Labor Standards Law], Law No. 49 (1947) (Japan) [hereinafter LSL].

17. *See* Cole, *supra* note 9, at 56-57. *See also infra* section III.A.

18. Rodo Saigai Hoken Hosyo Ho [Workers' Accident Compensation Insurance Law], Law No. 50 (1947) (Japan) [hereinafter Compensation Law]. The Law covers all workers except government employees and seafarers. For the latter group, the following laws apply: (1) the Central Government Employee's Injury Compensation Law; (2) the Local Government Employee's Injury Compensation Law; and (3) the Seafarers' Insurance Law. All these laws provide benefits under coverage formulas similar to those of the Workers' Accident Compensation Law. *Id. See generally* Ryuichi Yamakawa, *The Applicability of Japanese Labor and Employment Laws to Americans Working in Japan*, 29 SAN DIEGO L. REV. 175, 184-86 (1992).

including the following: a heavy burden of proving the relationship of the death to the victim's work, lack of access to evidence, and prolongation of the proceedings.[19] It is thus inaccurate to characterize *karoshi* solely as a socio-economic problem, let alone a personal tragedy; efforts to eradicate *karoshi* will be futile without legal solutions.[20]

It is time for Japan to start building a labor force that enables its participants to work with dignity and hope. The battle against the continued dominance of corporations over the worth of the individual demands the force of law. For this reason, legislative reform should play an active role in expanding workers' protections and punishing offending employers. Enforcement of more stringent law, coupled with effective sanctions, will fulfill this goal. At the same time, families of *karoshi* victims and their advocates need to work collectively toward fostering public dialogue on the Japanese labor practice.

This paper explores *karoshi*, which offers a valuable glimpse into Japanese society, notably devoid of effective law enforcement.[21] Issues on *karoshi* often remain confined to a sphere of labor law. This paper, however, expands the subject to include a more fundamental discussion of underlying societal values. Part II gives an overview of the general problems associated with *karoshi*. Part III critically evaluates the failure of the Japanese legal system to prevent *karoshi* and to compensate victims' families. Part IV illustrates the weak enforcement of law in Japan from a comparative perspective. Part V describes the Japanese labor practice, which has allowed corporations to exert vigorous power over individuals. Part VI discusses attitudinal changes among younger Japanese, which may profoundly affect the nation's legal landscape. Finally, Part VII concludes that the law should provide a more powerful vehicle for the full attainment of human dignity in the Japanese labor force. It also suggests that the organized efforts by the community are vital to enhance societal condemnation of employers' abuse of power.

II. OVERVIEW OF *KAROSHI*

In a few weeks, Shinji Yasuda (not his real name) would have held his third child in his arms.[22] At age thirty-seven, the car engine designer died of a stroke after collapsing at his company cafeteria in August, 1987.[23] For more than three years, Yasuda had left for work before seven o'clock in the

19. *See* NATIONAL DEFENSE, *supra* note 1, at 94. This paper focuses on the first two of the problems.

20. *See infra* section VII.A.

21. *See infra* section IV.B.

22. NATIONAL DEFENSE, *supra* note 1, at 5.

23. *Id.*

morning and returned home as late as two in the next morning.[24] His death signified the ultimate sacrifice of a corporate warrior, immersed in the keen competition of the car industry, a symbol of Japan's economic superpower.[25]

Toshitsugu Yagi, a forty-three year-old middle manager of Sogei Inc., an advertising agency in Tokyo, collapsed and died of myocardial infarction at his home on February 4, 1987.[26] Yagi had constantly worked overtime, even until after the last train left; he had either taken a taxi home or stayed at a hotel.[27] The company had no system of recording or compensating for overtime work.[28] After his death, Yagi's wife found the following words in Yagi's notebooks:

> Let's think about slavery, then and now. In the past, slaves were loaded onto slave ships and carried off to the new world. But in some way, aren't our daily commuter trains packed to overflowing even more inhumane? And, can't it be said that today's armies of corporate workers are in fact slaves in almost every sense of the word? . . . Their worth is measured in working hours.[29]

These words convey a powerful message, casting light on the shadows of Japan's prosperity.[30]

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24. *Id.*
25. *Id.* at 6.
26. *Id.* at 37.
27. *Id.* at 39.
28. *Id.* at 39-40.
29. *Id.* at 4-5.
30. Also, some corporate warriors have sent messages about the rigor of their working lives through *senryu*. *Senryu* is a type of Japanese poetry portraying everyday lives of contemporary people. It is intended to be short and succinct, generally with five-seven-five syllable lines. The following are samples of *senryu* that businessmen submitted to an annual contest held by a major life insurance firm.

Spent the weekend with
Perfect Strangers, or were they
My wife and kids?

The boss works me too hard,
And works himself a little too hard
Telling me not to work too hard.

Where else can a pawn
Feel like a king but at a
Karaoke bar.

Shokichi Oda, *Worker Bees*, 36 LOOK JAPAN 41 (1990).

Like Yasuda and Yagi, more than ten thousand Japanese workers[31] fall victims to *karoshi* every year.[32] Dr. Tetsunojo Uehata of the National Institute of Public Health defines *karoshi* as follows:

> a condition in which a worker's normal rhythms are disrupted by continuing unsound work patterns, resulting in a buildup of fatigue. The exhaustion induced by chronic overwork aggravates pre-existent health problems, such as high blood pressure and hardening of arteries, and causes a life-threatening crisis.[33]

The most often cited causes of *karoshi* include the following: subarachnoidal hemorrhage, cerebral hemorrhage, myocardial infarction, and acute cardiac insufficiency.[34]

Victims have been found in "virtually every occupational category," ranging from "top level management to the laborer in the workshop."[35] Although most victims are in their prime working years of the forties and fifties, those younger have notably increased.[36] Reflecting the expansion of the female labor force, there are now more documented cases involving women.[37] A sense of vulnerability has spread among the public. According

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31. This figure roughly equals the number of traffic fatalities in one year. Kawahito, *supra* note 5, at 150. Japan has a population of 120.75 million. NIPPON STEEL HUMAN RESOURCES DEVELOPMENT, NIPPON: THE LAND AND ITS PEOPLE 36 (1988).

32. Kawahito, *supra* note 5, at 150. *Karoshi* problems first emerged in Japan in the late 1970s. They have become more acute since then. NATIONAL DEFENSE, *supra* note 1, at 98. Some employees have committed suicide due to stress from overwork. For instance, in June 1991, Junichi Watanabe, then 42, killed himself by jumping off the building of Kawasaki Steel Company in Okayama Prefecture where he worked as a manager. During the six months before his death, Watanabe was able to take only two days off. Suffering from deteriorating health, he had regularly consulted a doctor. Shortly before his death, Watanabe shouted out of anger: "My work is not going very well. I wish I could die. Am I only a beast of burden?" On June 15, 1995, Watanabe's wife filed a lawsuit against Kawasaki Steel, alleging the company's negligence in failing to prevent overwork. *Otto-wa Karo-de Jisatsu* [*Husband Killed Himself Due to Overwork*], ASAHI SHIMBUN [ASAHI NEWS], June 16, 1994, at 31.

33. Kawahito, *supra* note 5, at 150.

34. NATIONAL DEFENSE, *supra* note 1, at 7.

35. Kawahito, *supra* note 5, at 150. In a recent survey on 200 *karoshi* victims, white-collar workers amounted to 125 persons, comprising 62.5 percent. VICTIMS OF KAROSHI, *supra* note 11, at 13. The *karoshi* victims among prominent figures include former Prime Minister Masayoshi Ohira who died in 1978 and the presidents of the Fuji Sankei Group and Seiko Watches who both died in 1987. Kawahito, *supra* note 5, at 150.

36. Among 150 consultation cases dealt with by *karoshi* hotlines as of June 1991, fatalities involving those in their twenties and thirties comprised 20%. VICTIMS OF KAROSHI, *supra* note 11, at 225. For a description of the *karoshi* hotlines, see *infra* section VII.B.2.

37. As of 1991, more than 30 cases involving women were documented. Kawahiro, *supra* note 5, at 152.

to a poll, one out of five (and one out of four male) office workers in Tokyo fears that he or she may suffer *karoshi*.[38]

Karoshi has captured international attention as well. The American media has used *karoshi* as a vivid and well-documented example of the backwardness inherent in the seemingly affluent society. *Rich Japan, Poor Japanese* was the title chosen for a special report on *karoshi* run in a popular program, *Twenty-Twenty*, on the ABC television network on June 22, 1990.[39] The problem of *karoshi* has become so acute that the United Nations formally adopted *karoshi* as part of its agenda.[40] A representative of International Education Development, a non-governmental organization headquartered in Washington D.C., reported on *karoshi* at a United Nations conference in Geneva on August 29, 1991.[41]

III. LEGAL PROBLEMS ASSOCIATED WITH *KAROSHI*

A. *The Failure of Work Hour Regulations*

Karoshi results from an accumulation of fatigue and stress, caused by excessive workloads accompanying long work hours.[42] The average work hours in Japan far surpass their Western counterparts. In 1988, the peak year of overwork, 6,850,000 workers in Japan accumulated over 3100 hours annually (an average of 60 hours per week).[43] This compares with 1949 hours in the United States, 1947 hours in England, and 1642 hours in West Germany from 1989 statistics.[44] Currently, one out of every six Japanese

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38. Inoue, *supra* note 5, at 533 (citing ASAHI SHIMBUN [ASAHI NEWS] June 2, 1992, at 26). Another survey on employees of 100 major firms reveals these startling facts: 10% of those employees were suspected to be neurotic while 20% required psychiatric examinations. VICTIMS OF KAROSHI, *supra* note 11, at 28.

39. NATIONAL DEFENSE, *supra* note 1, at preface IV. Similarly, under the title *Japanese Live...and Die...for Their Work*, the Chicago Tribune reported on *karoshi* of a middle manager who weekly put in 72 hours and sometimes as many as 95 hours. Yates, *supra* note 3, at 1.

40. *Karoshi: Kokuren-de Uttae [Death from Overwork: Appeal at the United Nations]*, NIHON KEIZAI SHIMBUN [JAPAN ECONOMIC JOURNAL], Feb. 17, 1992.

41. *Id.*

42. NATIONAL DEFENSE, *supra* note 1, at 8. Medical research has established that the severe work conditions can affect one's autonomic nervous system and endocrine system, triggering high blood pressure and abnormalities in lipoid metabolism. *Id.* at 102. Another contributing factor is the time spent on commuting; in Tokyo, for instance, a one-way commute of over one hour is common. Recently, a sharp rise in real estate values has forced many workers to seek housing farther from the city center and to make round-trip commutes of three hours or more. *Id.* at 10.

43. *Karoshi Nintei Kanwa-o [Death from Overwork: The Need to Relax the Standard of Proof]*, ASAHI SHINBUN [ASAHI NEWS] Jan. 7, 1994, at 4 [hereinafter *Death from Overwork*].

44. Toshio Taketani, *No More 9 to 5*, 36 LOOK JAPAN 32, 33 (1991).

employees puts in more than 3000 hours annually (12 hours a day for 250 days).[45]

Koji Morioka, Professor of Economics at Kansai University, has found that overtime amounts to one-third of the total work hours.[46] Japanese companies have institutionalized "service overtime," meaning overtime work unrecorded on the employees' time cards, or "*furoshiki*[47] overtime," meaning paperwork done at home.[48] In other words, employees are prohibited from reporting their work hours officially, thereby foregoing their overtime pay.[49] Experts estimate that the value of unrecorded overtime work in Japan equaled twenty-three trillion yen, approximately five percent of the Gross National Product in 1990.[50]

The work hour regulations remain problematic.[51] Article 32 of the Labor Standards Law[52] does prescribe eight hours per day or forty hours per

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45. *Death from Overwork*, *supra* note 43.

46. NATIONAL DEFENSE, *supra* note 1, at 67.

47. *Furoshiki* is a Japanese word for a large square cloth used for wrapping and carrying.

48. *See* NATIONAL DEFENSE, *supra* note 1, at 9.

49. Cole, *supra* note 9, at 56-57. A custom known as a "Seven-Eleven" in the banking industry typifies such gratis overtime: most bank employees put in sixteen hours a day, leaving for work at seven o'clock in the morning and working overtime until eleven o'clock at night. In addition, bank employees often work at home at night or on days off. Kawahito, *supra* note 5, at 153. Nevertheless, overtime pay remains restricted. Unpaid compensation for overtime work accounts for more than 20% of the profits at the Fuji Bank and more than 10% at the Sanwa Bank. MAKOTO SATAKA, KK NIPPON: SHUSHOKU JIJYO [REALITIES OF THE JAPANESE EMPLOYMENT SYSTEM] 5 (1990). One employee of another major bank explains that he puts in 120 hours of overtime monthly although compensated for only about 20 hours. *Id.* at 4. One can observe the same trend in financial institutions as well: according to the Tokyo Prefectural Labor Standards Office, over one-third of the surveyed companies failed to pay their employees for all their overtime hours. Cole, *supra* note 9, at 56. Also importantly, statistics often fail to include the amount of time spent on work-related activities such as quality control circles and socializing with co-workers and clients. In fact, a 1985 study by the Japan Federation of Electric Machine Worker's Union reveals that such activities can amount to three hours and thirty-nine minutes per week. Likewise, much time spent on commuting remains overlooked; according to the Transportation Census for Major Cities released by the Ministry of Transport in 1985, the average commuting time is about two hours roundtrip. *See* NATIONAL DEFENSE, *supra* note 1.

50. *Messhi Hoko [Self Sacrifice and Public Service]*, SHUNKAN SHINCHO [WEEKLY SHINCHO], Dec. 2, 1993, at 111.

51. NATIONAL DEFENSE, *supra* note 1, at 96. Presently, the Japanese law fails to regulate maximum work hours with the exception of a regulation limiting overtime to two hours a day for such hazardous jobs as those involving exposure to radiation or toxic particles such as lead, and a regulation limiting overtime for women to 150 hours a year. *See id.* at 86 (referring to Article 64 of the Labor Standards Law).

52. LSL, *supra* note 16, art. 32. This Act provides general guidelines regarding labor contract, wages, work hours, safety, and health. For an overview of the LSL, see generally Yamakawa, *supra* note 18, at 178-82. For a more complete discussion of work hours in Japan, see generally NATIONAL DEFENSE, *supra* note 1, at 84-88.

week as the maximum working hours.[53] Nonetheless, many employers have found ways around this mandate, pursuant to Article 36 of the Labor Standards Law; Article 36 allows work hours to remain unrestricted as long as the employer's representatives have signed an agreement with the trade union or a representative of the majority of the workers involved.[54] Thus, once such an agreement has been reached, the employer can virtually force its employees to put in as many hours as the employer believes is necessary.[55]

Furthermore, refusal to work overtime or choosing to take paid vacation can impair one's promotional opportunities.[56] In 1991, the Japanese Supreme Court upheld the decision of Hitachi Ltd. to dismiss its employee, Hideyuki Tanaka, who had refused to work overtime solely on one occasion.[57] The Court declared that "an individual worker has no right to

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53. Article 32 of the LSL provides as follows: "1. An employer shall not have a worker work more than forty hours per week, excluding rest periods. 2. An employer shall not have a worker work more than eight hours per day for each day of the week, excluding rest periods." LSL, *supra* note 16, at art. 32.

54. The relevant part of Article 36 provides as follows:

> In the event that the employer has entered a written agreement with either a trade union organized by a majority of the workers at the workplace concerned, where such a trade union exists, or with a person representing a majority of the workers, where no such trade union exists, . . . the employer may, in accordance with the provisions of such agreement, . . . extend the working hours or have workers work on rest days.

LSL, *supra* note 16, at art. 36.

55. NATIONAL DEFENSE, *supra* note 1, at 86. The following anecdote shows how the employees' rights can be exploited under Article 36. One *karoshi* victim, Satoru Hiraoka, put in 3500 hours in the year before his death; these hours included more than 110 hours of overtime in each of the three months immediately before his death. However, no violation of the Labor Standards Law was found, pursuant to Article 36. *Id.* at 71. The Chicago Tribune featured an article on Hiraoka's death on November 13, 1988. *See* Yates, *supra* note 2. ("For more than 28 years, Hiraoka, a middle manager, faithfully put in 12 to 16-hour days, usually working 72 hours and sometimes as many as 95 hours each week . . . .")

56. NATIONAL DEFENSE, *supra* note 1, at 11; Cole, *supra* note 9, at 60. In 1990, the average Japanese employee was legally entitled to 15.5 days of paid annual vacation. This sounds modest compared to vacations in France and Germany which typically last 35 days. Nevertheless, the average Japanese worker took off only 53% (8.2 days) of his or her paid leave. Cole, *supra* note 9, at 59.

57. Inoue, *supra* note 5, at 535. Even if dismissal may be avoided, bosses and co-workers exert tremendous pressure on employees who refuse to work overtime. For example, the Osaka Karoshi Research Group tells the story of a manager in a large securities company who chose to go home after his regular work hours twice a week. He made this decision after reflecting on the meaning of his life after facing his co-worker's death from overwork. By going home early, he began spending more time with his family. At the same time, however, he had to abandon any prospects for promotion. His company viewed his refusal to work overtime (although only twice a week) as an "unforgiving act of extraordinary nature." His bosses and co-workers called him a "company pirate." OSAKA KAROSHI MONDAI, *supra* note 11, at 106.

refuse an employer's request for overtime if the time does not exceed the limit agreed upon by the employer and the union."[58] The Court evaluated Tanaka's agreement with the company and construed it as being reasonable. This agreement included ambiguous provisions such as "the necessity of working overtime to attain production goals."[59]

Excessive work hours in Japan has triggered criticism overseas as well.[60] Supposedly in response to adverse publicity, the Ministry of Labor has pledged to shorten work hours.[61] Despite its slogan, however, it has failed to make any noticeable improvements.[62] Likewise, the Japanese labor unions, which consist of over 12,000,000 members, have neglected to tackle the *karoshi* issues.[63] According to Shinsuke Miyano, Secretary of Japan Federation of Newspaper Workers' Unions, wage-related issues preoccupy most unions; in fact, Miyano adds, it is no exaggeration to say that they act as if life can be exchanged for money.[64]

B. *Failure of the Workers' Compensation System*

1. *Overview*

The tragedy of *karoshi* continues as victims' families seek survivors' benefits under the workers' compensation system. In Japan, the Workers' Accident Compensation Insurance Law (hereinafter "the Compensation

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58. Inoue, *supra* note 5, at 535.

59. *Id.*

60. "United under the banner of 'Japan Inc.,'" one observer says, "[Japanese workers] struggle mindlessly to increase productivity and invade foreign markets." Toshio Taketani, *No More 9 to 5*, 36 LOOK JAPAN 32 (1991). Various well-known figures, such as Sony Chairman Akio Morita and former Prime Minister Miyazawa, have called for shorter working hours. Cole, *supra* note 9, at 52.

61. NATIONAL DEFENSE, *supra* note 1, at 9, 13. Against the Ministry, however, two organizations led the counterattack, arguing that Japanese workers are well treated. These organizations are *Keidanren* (the nation's most influential business organization) and *Nikkeiren* (the management organization focused on labor management relationships). Cole, *supra* note 9, at 52.

62. NATIONAL DEFENSE, *supra* note 1, at 9, 13. To take one example, many banks have made a superficial effort to adopt a five-day workweek as proposed by the government; they simply deleted their old system of extra holidays for special purposes such as weddings and birthdays while adding 40 minutes to an hour longer on regular work days. As a result, the average worker in the banking industry puts in 3000 hours a year. *Id.* As of 1992, one observer noted that Japan had made no progress in reducing working hours for the past 17 years. Cole, *supra* note 9, at 57.

63. NATIONAL DEFENSE, *supra* note 1, at 80. Many unions have opted for a policy of cooperation between labor and management; Japan reports a far fewer labor disputes than in any other developed nation. Kawahito, *supra* note 5, at 156.

64. NATIONAL DEFENSE, *supra* note 1, at 80.

Law")[65] mainly governs compensation for employees who suffer work-related injuries or their families.[66] The law requires employers to pay premiums for workers' accident insurance and to provide fixed amounts of compensation for "employment injuries," defined as "workers' injury, disease, physical disability or death resulting from employment."[67] It allows families of *karoshi* victims[68] to apply for the Survivors Compensation Pensions.[69] The claimant initially files his or her claim with the Labor Standards Inspection Office, an administrative agency located in each prefecture.[70] The Office then determines the compensability of the claim by determining whether the decedent's employment bears a sufficient relationship to the death.[71]

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65. *See generally id.* at 89-96.

66. KAZUO SUGENO, JAPANESE LABOR LAW (Leo Kanowitz trans.) 319-20 (1992). The law covers all workers except government employees and seafarers. NATIONAL DEFENSE, *supra* note 1, at 91.

67. SUGENO, *supra* note 66, at 317 & 324.

68. Potential recipients are ranked as follows: the spouse, children (including an unborn child), parents, grandchildren, grandparents, and brothers and sisters of the worker who had been sustained by the earnings of the worker at the time of the worker's death. *Id.* at 325.

69. The amount of the Survivors Compensation Pension is determined on the basis of the number of persons who are entitled to receive the pension and the number of persons living with them who are potentially entitled to receive the pension. For instance, if the number of such persons is one, it is 153 days of the 'basic daily amount of benefit' [equivalent to the average daily wage] a year [but 175 days if the recipient is over 55 years old or is the wife who suffers from certain disabilities]. If the number is two persons, it is 193 days of the basic daily wage a year.

Id. at 329. For most wives and children, the compensability of the Survivors Pensions can materially affect their economic welfare. As noted earlier, many victims of *karoshi* are in their forties, prime working years. Their children are usually in elementary or junior high school. Because many Japanese families purchase a house when the husbands are in their late thirties or early forties, survivors are often left with little savings at the time of the husbands' death. Although some employers pay retirement allowances to the survivors, those payments may be limited. VICTIMS OF KAROSHI, *supra* note 11, at 18.

70. VICTIMS OF KAROSHI, *supra* note 11, at 210.

71. This process may take as long as one to two years. *Id.* The law lacks provisions requiring the time period within which the Office must decide a case. NATIONAL DEFENSE, *supra* note 1, at 94. If a claim is denied, claimants may appeal to the Workers' Injury Compensation Referee, an official of the Labor Standards Bureaus (agencies that are the superior of the Labor Standards Inspection Offices). *Id.* One may file a subsequent appeal with the Labor Insurance Referee Board in Tokyo. Claimants reach this stage about four to six years after filing their initial claims. It gives claimants their first opportunity to argue their cases orally. NATIONAL DEFENSE, *supra* 1, at 94. The Board's heavy caseload often delays the review; it could take two years even before the Board sets the date for a hearing. OSAKA KAROSHI MONDAI, *supra* note 11, at 120. Following the administrative proceeding, claimants may initiate a lawsuit in the district court. It usually takes two to four years for the district court to review a case; furthermore, it takes an additional one to three years for the intermediate appellate court. NATIONAL DEFENSE, *supra* note 1, at 95. Japan has five kinds

The declared goal of the Compensation Law is two-fold: to assist victims or their dependents financially so that they can maintain a decent standard of living; and to help prevent future cases of work-related injury or disease by means of its insurance system and active investigation of working conditions.[72] Thus, to fulfill such goals, the formula of standards governing compensation coverage, its content and the amount of funding allotted to the compensation system should be liberally construed.[73]

In reality, however, the Ministry of Labor[74] has managed to suppress the payments of compensation benefits to the lowest level possible.[75] The Ministry has imposed upon the claimant a high burden of proving causation between one's employment and his or her death.[76] To meet this burden, the claimant must establish the following with concrete evidence: that the decedent had constantly performed "extraordinary"[77] job duties during the

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of courts: the Supreme Court as the highest court, High Courts under the Supreme Court, District Courts and Family Courts under High Courts, and Summary Courts as the lowest courts. SUPREME COURT OF JAPAN, COURT ORGANIZATION IN JAPAN 4 (1970).

72. NATIONAL DEFENSE, *supra* note 1, at 89. Article 1 of the Compensation Law states as follows:

> The object . . . shall be to grant necessary insurance benefits to workers in order to give them prompt and equitable protection against injury, disease, physical disability or death resulting from employment or commutation, and to promote rehabilitation of workers who have suffered injury, or contracted a disease, resulting from employment or commutation, to assist said workers and their survivors and to secure proper working conditions, . . . and thereby to contribute to the promotion of the welfare of workers.

Compensation Law, *supra* note 18, at art.1.

73. NATIONAL DEFENSE, *supra* note 1, at 89.

74. The Ministry of Labor is a governmental body that administers the workers' compensation system in Japan.

75. *Id. See also* Kawahito, *supra* note 5, at 156. Hiroshi Kawahito, one of the nation's leading lawyers on *karoshi*, criticizes the government's indifference toward *karoshi*:

> We have many problems with specific procedures. But the biggest obstacle is the basic stance of the Ministry of Labor. Since they don't even recognize the existence of *karoshi*, they will not consider measures designed to eliminate it. They are insensitive to the fact that *karoshi* has become a household term.

Muneshige, *supra* note 11, at 37.

76. NATIONAL DEFENSE, *supra* note 1, at 89.

77. Although the definition of "extraordinary" job duties remains unclear, it must amount to a substantial increase in workload that far exceeds what the decedent had normally performed. OSAKA KAROSHI MONDAI, *supra* note 11, at 20-21. The Ministry's in-house manual, which was disclosed in 1991, further demonstrates the heavy burden of proof imposed on claimants: they must prove by convincing evidence that the decedent worked either at least twice as hard as usual during the week before death or three times as hard on the day of death. VICTIMS OF KAROSHI, *supra* note 11, at 43. This standard of proof is based on the 1987 amendment to the older standard, whose narrower scope of compensability had evoked harsh criticism. Designated in 1961, the older standard required the claimant to prove that the decedent experienced an "excessively heavy burden *immediately before falling ill, at least on the same day when the illness occurred.*" Id. (emphasis added.) Due to the difficulty of

week immediately before the occurrence of the illness leading to his or her death.[78] In other words, most cases of *karoshi*, which result from the gradual development of fatigue over an extended period of time, fall outside the coverage.[79] Largely due to this difficulty in proving causation, the vast majority of claims are denied each year. In 1987, only 21 of the 499 claims of *karoshi* filed with the Ministry were approved. This result was followed by 29 of 676 claims in 1988 and 30 of 777 in 1989. More recently, at a symposium on *karoshi* held in Osaka, Japan on June 17, 1994, lawyers protested the small number of *karoshi* claims for which compensation has been awarded; in the last four to five years, the number of claims approved has averaged about thirty out of five hundred to seven hundred claims.[80] In 1992, the number further went down to eighteen.[81] Also, numerous families have reported on the indifference of the Labor Standards Inspection Office; on their visits to the Office for initial consultations, they were asked to leave after being simply told that compensation would unlikely be granted.[82] The

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proving this immediacy, most *karoshi* claims were denied under the older standard. *See id.* at 43.

78. Lawyers forcefully argue that this standard remains too restrictive. OSAKA KAROSHI MONDAI, *supra* note 11, at 218. Contesting the high burden of proof, labor lawyers in Osaka, the second major city of Japan, held a symposium entitled *Challenging the Obstacle in the Workers' Compensation System* on June 17, 1994. Symposium, *Rosai Nintei-no Kabe-wa Naze Kaku-mo Takainoka* [*Challenging the Obstacle in the Workers' Compensation System*] (June 17, 1994)[hereinafter *Symposium*]. The Ministry of Labor acknowledges that no medical evidence supported its decision to designate "the week before death" as the period for consideration. OSAKA KAROSHI MONDAI, *supra* note 11, at 20-21. The duties performed before this period may be taken into account only as supplementary factors. *Id.* at 50-52. On December 19, 1994, the Ministry of Labor publicly announced its intent to relax the burden of proof, although only slightly, by considering the decedent's age and work experience as supplementary factors. However, lawyers remain doubtful as to the impact of this "relaxation." *Karoshi Nintei-o Kanwa* [*Relaxing the Burden of Proof for Karoshi Cases*], ASAHI SHIMBUN [ASAHI NEWS], Dec. 20, 1994, at 1.

79. A claim is denied, for instance, if a worker dies after a few months of performing heavy work on a regular basis. Ironically, the longer one worked hard, the more difficult it becomes to prove his or her death as work-related. To take one example, taxi drivers on the night shift are often required to work for more than 10 hours regularly. Because their usual work is physically demanding, death from overwork is not uncommon among them. OSAKA KAROSHI MONDAI, *supra* note 11, at 20.

80. The number of claims for which compensation was awarded was 33 in 1990 and 34 in 1991. Even the Minister of Labor admitted that he was "under the impression that the number [of the *karoshi* claims approved] has remained quite low." Handout delivered at *Symposium*, *supra* note 78 (on file with the author).

81. *Id.*

82. OSAKA KAROSHI MONDAI, *supra* note 11, at 67. At a symposium on *karoshi*, one lawyer shared with the audience the following experience of his own. He telephoned the office, calling himself a family member of *karoshi* victim, and asked questions regarding workers' compensation. The Office clerk refused to answer questions, saying: "We are sorry, but death from overwork is non-compensable." *Symposium*, *supra* note 78.

Ministry's indifference has encouraged employers to disregard the tragic consequences of overwork and make no attempt to improve the working conditions.[83]

The claimant is likely to face an additional obstacle as he or she attempts to gather evidence necessary to establish causation between work and death. Too often, this fact-gathering process creates hostile, even angry, reactions by employers. Many employers flatly refuse to submit requested documents such as timecards and employment regulations.[84] They tend to exert pressure upon claimants, calling their request for compensation as an act of betrayal.[85] Lawyers presume that these employers, fearful of adverse publicity, attempt to conceal their severe working conditions.[86] Withdrawal of relevant records clearly violates Article 23 of the Compensation Law, which provides: "Employers must provide claimants documents necessary for compensation immediately upon request."[87] However, no sanctions exist against offending employers. In fact, the absence of sanctions constitutes a common feature of Japanese law.[88] Employers' refusal to cooperate substantially constrains the investigation necessary to establish the compensability.

In sum, families of *karoshi* victims often incur emotional injuries not only from the death itself but also from their legal experience thereafter. The procedural and substantive obstacles also tend to discourage potential applicants to go forward with their claims.[89] As a result, the inadequate compensation system "constitute[s] one more cause that tends to perpetrate the chronic long work hours and patterns of overwork that prevail in Japan today."[90]

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83. Kawahito, *supra* note 5, at 156.

84. OSAKA KAROSHI MONDAI, *supra* note 11, at 114.

85. To explain this prevailing hostile attitude among employers, the Defense Counsel uses an example of a widow whose husband died of a myocardial infarction. Before applying for compensation, she had to overcome considerable resistance of the employer, who viewed the granting of compensation as bringing dishonor to itself. VICTIMS OF KAROSHI, *supra* note 11, at 22.

86. *See id.* NATIONAL DEFENSE, *supra* note 1, at 81.

87. Compensation Law, *supra* note 18, art. 23.

88. *See* John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions*, 8 J. JAPANESE STUD. 265 (1982).

89. NATIONAL DEFENSE, *supra* note 1, at 89.

90. *Id.*

2. *An Illustration of the System's Failure*

The following case illustrates some of the legal constraints in the workers' compensation system as well as the government's inhuman stance.[91] Koichi Fujiwara, a forty-two-year-old truck driver, died of cardiac insufficiency on September 18, 1988. There was no question that his job routine was grueling; Fujiwara was required to drive an average of six hundred kilometers per day. During the week preceding his death, Fujiwara made two long round trips, driving more than 3500 kilometers in six days. Every month his overtime exceeded 200 hours; in one month, it amounted to 340 hours. His lawyers established that Fujiwara had put in about 5700 hours yearly.[92]

Ignoring its employees' well-being, the company had repeatedly violated the law. Between 1975 to 1991, the Nishinomiya City Labor Standards Inspection Office had given the employer as many as five warnings for its violations of the work hour provision in the Labor Standards Law; nevertheless, the company had made no effort to improve its harsh working conditions. In October 1987, about one year before Fujiwara's death, the company had received an additional warning for its failure to follow drivers' safety regulations.[93] Afterwards, the company notified the authority that it had ensured compliance with the regulation; in reality, however, the company had failed to make any improvements.[94]

On June 18, 1990, the decedent's wife, assisted by five lawyers, applied for the Survivor's Compensation. In March 1993, the director of the Nishinomiya City Labor Standards Inspection Office ("Office") found the claimant ineligible for compensation. Disregarding the nearly 6000 work hours accumulated in one year, the Office boldly asserted that no causal relationship existed between the victim's death and work. The Office reasoned that the company's three other drivers, who put in just as many

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91. Handout delivered at the symposium, *supra* note 78 (on file with the author) [hereinafter Handout].

92. There are 8760 hours in a year. When reporting this case at a symposium on *karoshi*, lawyers distributed to the audience a chart that outlined Fujiwara's work hours for each of the 20 days in June 1988, shortly before Fujiwara's death. To take one example, on June 8, Fujiwara put in 22 hours and 15 minutes, including: 12 hours and 45 minutes for driving; 1 hour and 40 minutes for loading; 5 hours of a break while on duty; and 2 hours and 40 minutes for miscellaneous work. Because his truck carried a hazardous substance, a component of whisky that catches fire easily, Fujiwara was required to carefully follow various safety regulations even during the break. Prohibited from leaving the truck, for instance, Fujiwara had to rest in the driver's seat. Receiving only 52,900 yen (about $500 today) as the monthly base pay, Fujiwara was forced to work as hard as possible. *Id.*

93. *Id.*

94. Furthermore, the company gave Fujiwara only one of the bi-annual physical checkups required by law. *Id.*

hours, had never suffered serious illness.[95] Moreover, the Office chose not to hold the employer liable for its past violations of labor regulations discussed above. The decision was affirmed at the appellate level.

In June 1994, a group of lawyers reported on this case at a symposium on *karoshi*.[96] They emphatically stated that the government had shown its "lack of common sense" by denying Fujiwara's claim. There one lawyer posed the following question to the audience: "If the government refuses to call Fujiwara's death *karoshi*, what kind of death do they acknowledge as *karoshi*?" Indeed, the outcome of the case evoked public anger. Lawyers and labor activists have formed a support group for Fujiwara's family, protesting the gravity of the decision.[97]

IV. WEAK ENFORCEMENT OF LAW IN JAPAN

The human drama of *karoshi* painfully depicts a mere ornamental role that law plays in Japan.[98] In sum, a profound difference separates the American and Japanese legal landscapes. This section illustrates the insignificance of law in Japan from a comparative perspective. For that purpose, it discusses social values underlying the American legal culture as well. It gives only a brief summary of the American legal culture, for this paper is not intended to explore in detail the comparison of the two systems.

A. *The Role of Law in the United States*

Historically, law has played a more prominent role in the West than in the East.[99] This is largely because law originally emerged as a product of Western rationalism.[100] Private law derived from Roman law, a system of

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95. The lawyers who handled the case attacked this reasoning as follows: the Office's decision suggests that no compensation can be made unless all employees under the same working conditions had collapsed. Under such a theory, no *karoshi* would exist even in a case involving a victim who put in 8000 hours a year—unless others similarly situated have died. *Id.*

96. For more information on this symposium, see *supra* note 78.

97. On the other hand, the government has yet to soften its stance. For example, in the middle of a dispute with the claimant's representatives, a government official threatened to call the police if the representatives would not leave the office immediately. Handout, *supra* note 91.

98. NATIONAL DEFENSE, *supra* note 1, at 84, 97 (discussing the weak law enforcement concerning *karoshi*).

99. Chin Kim & Craig M. Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L & COMP. L.Q. 491 (1979) ("Westerners are accustomed to the idea of justice under a system of rational and impersonal laws.")

100. Tetsuya Obuchi, *Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects, With Special Emphasis on In-court Compromise*, 20 LAW IN JAPAN: AN ANNUAL 84 (1987).

rights that provided specific procedures and remedies to protect the claims of individuals.[101] The Roman law maxim *ubi jus ibi remedium* ("where there is a right, there is a remedy") expresses the crux of the Western legal tradition.[102] The primacy of private law and an adjudicatory process of enforcement constituted a distinctive feature of the Western legal tradition.[103]

Americans in particular are noted for vigorously using law as a tool for redressing grievances.[104] Social problems often develop into legal problems in the United States.[105] A vital concern in a nation of immigrants is to build consensus. Cultural pluralism produced by the sheer number of varying races, religions, and creeds[106] inescapably creates tension between competing values.[107] Coercive powers inherent in the law help induce predictable and conforming behavior.[108] Law thereby articulates and enforces standards of conduct, which encourages maximization of the common good.[109] The

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101. JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 11 (1991).

102. *Id.* The Romans asserted their rights as legally protected interests. Yoshiyuki Noda, *Nihon-jin no Seikaku to Sono Ho-Kannen [The Character of the Japanese People and their Conceptions of Law]*, 140 MISUZU 2, 14-26 (1971), *reprinted in* HIDEO TANAKA, THE JAPANESE LEGAL SYSTEM 304 (1976).

103. "Only within an adjudicatory private law system was a mechanism for allocating control over enforcement necessary: to determine who may bring what actions against whom for what remedy or sanction." HALEY, *supra* note 101, at 21.

104. Thomas P. Walsh, *American and Japanese Legalism: Alternative Viewpoints and Approaches to Dispute Resolution*, 15 LEGAL STD. F. 103, 121 (1991).

105. Kim & Lawson, *supra* note 99, at 491.

106. *See, e.g.*, Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993).

107. Walsh, *supra* note 104, at 108.

108. *See* HALEY, *supra* note 101, at 12 (stating that the ultimate goal of law is to promote conforming conduct).

109. Thomas M. Riordan, *Coping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 LOY. L.A. L. REV. 675, 676-679 (1994). One scholar writes that the law serves the following functions: "to enable a large mass of diversified human beings to live together, to serve as a repository of society's most cherished values, and to promote justice." Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 748 (1988). He also points out that the law enshrines central values such as fairness; the notions of equality before the law; procedural due process; individual freedom; equality of opportunity; and justice. *Id.* at 753. *See also* Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988) (defining legal culture and institutions as "the clearest articulations of the reigning social vision and, thus, are important elements in the function of both popular beliefs about commonplace relationships and popular acquiescence to the existing distribution of social goods and power").

legitimacy[110] and presumed objectivity[111] of the law relieves people of the task of exercising individual judgment regarding ethics and moral choices.[112] When in doubt, one can point to the paper that the law is written on as a tangible frame of reference. In this respect, one may describe the role of law in America as follows: a mass of diversified individuals must confine their behavior within the limits fixed by law;[113] nonetheless, they remain free, within such boundaries, to explore and carve out for themselves a place of their own.

The area within the boundaries signifies widely shared values, which appeal to conceptions of justice.[114] The antidiscrimination principle exemplifies such a value.[115] At the core of the American concept of justice lies individual freedom and autonomy.[116] The following concept has been firmly embedded in the American concept of justice: one should not be penalized due to his or her immutable characteristics such as race and gender.[117] Accordingly, judicial aid has functioned as a major device for the pursuit of civil rights.[118] John R. Dunne, Assistant Attorney General of the

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110. The legitimacy of legal rules can be defined as "community recognition of the bindingness of the [legal] norm and the appropriateness of the sanction for its violation." HALEY, *supra* note 101, at 6.

111. That something is protected by the law implies that it is protected by an objective standard equally applicable. Noda, *supra* note 102.

112. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 407 (1991).

113. Law provides the "framework within which consensual ordering occurs or a means of legitimating norms around which a consensus can be formed, and thereby channels behavior." HALEY, *supra* note 101, at 168.

114. In the Western legal tradition, law continues to be fused with morality. John Haley explains as follows: "The 'good and the fair' still pervades all notions of at least an ideal legal process and ultimately determines the legitimacy of law as made and as enforced." HALEY, *supra* note 101, at 24.

115. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

116. Sociologist Robert Bellah has observed that "[i]ndividualism lies at the very core of American culture." Abraham, *supra* note 8, at 480. *See* Inoue, *supra* note 5, at 521 (discussing individual liberties in American society). Extreme emphasis on individualism, however, creates problems as well. In an article that provides a moral framework for universal access to health care, the author discusses the decline of a communal sense and civil duties among Americans. Note, *Universal Access to Health Care*, 108 HARV. L. REV. 1323, 1330 (1995). *See also* Inoue, *supra* note 5, at 518 (pointing out that individualism in the U.S. has caused social problems, such as crime, moral and social decay and inner-city collapse).

117. Americans "abhor the totalitarian arrogance which makes one say that he will respect another man as his equal only if he has 'my race, my religion, my political views, my social position.'" Juan F.Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination under Title VII*, 35 WM. & MARY L. REV. 805 (1994).

118. *See* M. Diana Helweg, *Japan's Equal Employment Opportunity Act: A Five-Year Look at Its Effectiveness*, 9 B.U. INT'L L.J. 293, 312 (1991). Employment discrimination exemplifies an area where Americans have effectively used law as an instrument of social

Civil Rights Division of the U.S. Department of Justice, explains that the rule of law has helped remedy disadvantages cast on minorities over the course of the past two generations.[119]

B. *The Role of Law in Japan*

The Japanese legal environment stands in sharp contrast to its American counterpart.[120] The diversion of the law from actual practice remains a fact of life in Japan.[121] The written law in Japan may be best described as a mere "heirloom sword that is no more than an ornament or a prestige symbol."[122] In fact, the weakness of law enforcement in Japan

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reform. For instance, the United States took up the challenge of eradicating employment discrimination three decades ago. In 1964, Congress enacted Title VII of the Civil Rights Act of 1964. Title VII of the Civil Rights Act of 1964 (hereinafter Title VII), 42 U.S.C. § 2000e-2000e-2 (1988 & Supp.III 1991). Title VII prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1988 & Supp.III). The Act constitutes "the cornerstone, as well as touchstone, of employment discrimination law." EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS 15 (Mack A. Player et al. eds., 1990). At the core of Title VII is the principle of fairness to individuals. *See, e.g.,* Diaz v. Pan American World Airways, 442 F.2d 161, 166 (5th Cir. 1974). The Act has provided for litigants a useful tool in regulating employers' outward behavior influenced by arbitrary generalizations of particular groups. *See* Int'l Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n.15 (1977) (emphasizing Congressional intent to combat overt discrimination, "the most obvious evil"). Jody Armour discusses the instrumental conceptions of the law in the United States:

> [T]he law cannot merely be concerned with accommodating a cultural belief system that induces individuals to repeatedly traverse stereotypical channels (and make some of us susceptible to pathological phobias). The law must also strive to lay out the channels of the maze, and to eliminate those pathways that foster the oppression of minorities.

Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 815 (1994).

119. In discussing the legal enforcement of civil rights, Dunne explores federal statutes such as: the Civil Rights Act of 1964, the Fair Housing Act, and the Americans with Disabilities Act. *See generally* John R. Dunne, *Civil Rights in the 1990's*, 9 HOFSTRA LAB. L.J. 289 (1992). For a U.S.-Japan comparison of societal commitment to job discrimination, see Uchihashi Katsuto, *Downsizing, Japanese Style*, 21 JAPAN ECHO 47, 48 (1994).

120. *See, e.g.,* Inoue, *supra* note 5, at 517 (comparing Americans, who have stressed the role of individual rights with the Japanese who have emphasized community values as a hallmark of society).

121. Haley, *supra* note 88, at 265. For an overview of Japanese attitude toward law, see David A. Funk, *Traditional Japanese Jurisprudence: Justifying Loyalty and Law*, 17 S.U. L. REV. 171 (1990); Michael Thompson, *Dispute Resolution in Japan: the Non-Litigious Way*, LAW & SOC'Y J., 30, 31 (May 1986); YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW 14 (A. Angelo trans., 1976).

122. Jan M. Bergeson & Kaoru Yamamoto Oba, *Japan's New Equal Employment Opportunity Law: Real Weapon or Heirloom Sword?* 1986 B.Y.U. L. REV. 865 (1986) (citing KAWASHIMA TAKEYOSHI, NIHONJIN NO HOISHIKI [LEGAL CONSCIOUSNESS OF THE

remains unparalleled in any other industrial nation.[123] As one observer noted, the Japanese word for law, *ho* (or *horitsu*), means only the corpus of legal rules.[124] It "carries no connotation either of subjective law or of personal rights."[125] The American values such as individual freedom and equality can be "considered as 'foreign protein' introduced into the traditional body of Japanese society."[126]

Racial, cultural and linguistic homogeneity of Japan[127] has profoundly affected the nation's legal landscape.[128] Once secluded from the world for more than two centuries, Japan fully developed its own distinctive culture and mentality.[129] To protect the nation from "contamination of Christianity," the Japanese government zealously guarded its seclusion policy until 1853, when Commodore Matthew Perry arrived at Edo (Tokyo today) Bay and finally "[opened] the Japanese Oyster."[130] Even today common language, history, culture, and a shared value system unify the Japanese.[131] Harmony and consensus flows from the group of people who share similar values and experiences.[132] The resulting uniformity of behavior and thought diminishes the need to use law.[133]

JAPANESE] 47 (1967)).

123. HALEY, *supra* note 101, at 265. Haley further stated: "To a degree that is unparalleled in any other industrial society, Japanese enjoy a remarkable freedom from legal restraints." John O. Haley, *Introduction: Legal vs. Social Controls*, 17 LAW IN JAPAN: AN ANNUAL 1 (1984). Tatsuo Inoue explains that individual autonomy and rights consciousness have remained alien to the Japanese view of the moral world. Inoue, *supra* note 5, at 528.

124. Kim & Lawson, *supra* note 99, at 503.

125. *Id.*

126. FRANK UPHAM, LAW AND SOCIAL CHANGE IN POST WAR JAPAN 206 (1987). Perhaps that explains why the egalitarian concept has failed to take root in the Japanese law. The Japanese Ministry of Justice rejected antidiscrimination legislation, asserting that "discrimination is a matter of the heart, not the law." *Id.* at 208-09.

127. Japan is characterized as racially and culturally the most homogeneous of the world's major nations. ROBERT CHRISTOPHER, THE JAPANESE MIND 44 (1983). *See also* TAYLOR, *supra* note 6, at 34 ("If the Japanese population has a homogeneity index of 99 percent -the highest in the world- the United States has an index of 50 percent").

128. *See* Kim & Lawson, *supra* note 99, at 496.

129. TAYLOR, *supra* note 6, at 35-36. Its physical isolation as an island nation enabled Japan to produce a national ethnic cohesion. Kim & Lawson, *supra* note 99, at 492; Dean J. Gibbon, *Law and the Group Ethos in Japan*, 3 INT'L L. PERSPECTIVES, 98, 107 (1990). During the period of seclusion, the Japanese developed their "deep-seated awareness of and pride in their unique identity as a people." CHRISTOPHER, *supra* note 127, at 48.

130. TAYLOR, *supra* note 6, at 35-36.

131. Emma Louise Young, *in* JAPAN: A COUNTRY STUDY 71 (Frederica M. Bunge ed., 1983).

132. UPHAM, *supra* note 126, at 24.

133. HALEY, *supra* note 101, at 165 (stating that, because of their shared attitude, the Japanese may be more tolerant of informal dispute settlement than Westerners); Kim & Lawson, *supra* note 99, at 496 (explaining that the Japanese consider it unnecessary to rely upon the formal legal order due to their prevailing belief that everyone thinks alike).

Preservation of *wa* (the spirit of harmony)[134] motivates action. In the Japanese mind, the warmth of human relations prevails over the cold eloquence of logic or rhetoric.[135] Logic can be defined as a set of rules that enables anyone to arrive at a similar conclusion[136] and rhetoric the art of persuasion.[137] Westerners have used logic and rhetoric, which help them communicate their ideas. The Japanese, however, instinctively accept things as self-evident without any explanation or persuasion.[138] Edwin Reischauer, a former American ambassador to Japan, observed as follows: "To the Westerner the Japanese may seem weak or even lacking in principles; to the Japanese the Westerner may seem harsh and self-righteous in his judgments and lacking in human feelings."[139]

The Japanese have condemned litigation as subversive and rebellious.[140] Sharing an aversion to law,[141] the Japanese in general perceive litigation as a threat to society.[142] The people have created their own informal legal system built on loyalty, acquiescence, and group identity.[143] By seeking a legal solution to a problem, one will reach an impersonal, concrete outcome based on logical reasoning.[144] Litigation further divides parties into the winner and the loser in an analytical fashion.[145] Such a black and white

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134. *Wa*, as a prime virtue, characterizes an ideal human relationship in Japan. *See* Kim & Larson, *supra* note 99, at 500.

135. *See, e.g., id.* at 513; TAYLOR, *supra* note 6, at 143.

136. NODA, *supra* note 121.

137. *Id.* at 298.

138. *Id.* at 297.

139. EDWIN O. REISCHAUER, THE JAPANESE TODAY 140 (1988).

140. Bergeson & Oba, *supra* note 122, at 868.

141. The following explanation best summarizes the Japanese aversion to law:

> To an honorable Japanese, the law is something that is undesirable, even detestable, something to keep as far away from as possible . . . . To never use the law, or be involved with the law is the normal hope of honorable people . . . . In a word, Japanese do not like law.

NODA, *supra* note 121, at 263.

142. *Id.* at 14. *See also* REISCHAUER, *supra* note 139, at 136 ("To operate their group system successfully, the Japanese have found it advisable to avoid open confrontations.")

143. *See* Robert J. Smith, *Lawyers, Litigiousness, and the Law in Japan*, 11 CORNELL L. REV. 53, 54 (1985) (explaining that the Japanese have heavily relied upon implicit understanding and shared responsibility in lieu of law); HALEY, *supra* note 101, at 165 (stating that the Japanese tend to tolerate informal enforcement). Japanese attitudes toward contractual relationships exemplify such reliance on informal enforcement. Mutual trust is more important than written contracts. *Id.* at 181. Japanese legal culture bears a striking resemblance to its Chinese counterpart in numerous respects. China developed a public law order in which law functioned independently as "a less effective alternative to moral imperatives and custom as a source of legitimacy and means of social control." *Id.* at 28. *See also* CHRISTOPHER, *supra* note 127, at 45-47 (discussing China's enduring influence on Japanese culture).

144. *See* Kim & Lawson, *supra* note 99, at 496-97.

145. Mark B. Schaffer, *The Implications of Japanese Culture on Employment*

approach, the Japanese say, would disrupt human relationships built on harmony.[146] The social climate often discourages aggrieved individuals to go forward with their claims and forces them to internalize their grievances.[147] A strong cultural preference for informal dispute resolution has remained in force in Japan.[148]

The following case vividly illustrates the enormous social pressure against Japanese litigants in general.[149] In 1977, a married couple sued their neighbors for failing to supervise the couple's infant son, who drowned in an irrigation pond.[150] In 1983, the court awarded the plaintiffs five million yen.[151] This legal victory was followed by media headlines such as *Judgment Hard on Kind Neighbors*.[152] Within the following week, the couple also received six hundred phone calls and three hundred letters, many of which were anonymous and threatening.[153] Moreover, the husband was fired from his job the day after the judgment.[154]

Social order and control in Japan is derived from a concept of duties, not rights.[155] The Japanese do not perceive rights as rigidly as Westerners

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Discrimination Laws in the United States, 16 HOUS. J. INT'L L. 375, 389 (1993) (noting that litigation contradicts "the cultural norm of apology, forgiveness, and subsequent reconciliation between groups"). Japanese parents endeavor to instill in their children such values as restraint in the expression of desires and opinions, empathy for others, and civility. *See* Smith, *supra* note 143, at 55.

146. Kim & Lawson, *supra* note 99, at 497. Japanese society in general values tolerance for ambiguity in social relations. Hiroshi Wagatuma & Arthur Rosett, *Cultural Attitudes towards Contract Law: Japan and the United States Compared*, 2 PAC. BASIN L.J. 76, 87 (1983).

147. Experts estimate that the number of civil lawsuits per capita in Japan stands between one-tenth and one-twentieth of those in common law countries. Thompson, *supra* note 121, at 31. Furthermore, Japan has only about 16,000 qualified lawyers to serve a population of nearly 118 million; per capita, the United States has seventeen times more lawyers. Donald L. Utchtmann, Richard P. Blessen & Vince Maloney, *The Developing Japanese Legal System: Growth and Change in the Modern Era*, 23 GONZAGA L. REV. 349, 356-57 (1988).

148. The Japanese generally prefer social settlements such as *wakai* (compromise) or *chotei* (conciliation) to the formal legal order. Schaffer, *supra* note 145, at 389.

149. Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83, 102 (1995)(citing Inoue, *supra* note 5, at 542; and Judgment of Feb. 25, 1983 (Yamanaka v. Kondo), Chisai [District Court], 495 HANTA 64 (Japan)).

150. *Id.*

151. *Id.*

152. *Id.*

153. Many of them included accusations and threats, such as "Are you using your dead boy to make money?"; "Devils!"; "Do you want me to set fire to your house?" and so forth. *Id.*

154. *Id.*

155. HALEY, *supra* note 101, at 11 (exploring a concept of duties in traditional East Asian law).

do; they tend to feel more comfortable with duties.[156] In the Japanese mind, the distinction between legitimate exercise of rights and extortion remains blurred.[157] Concepts such as individual freedom and equality have remained foreign to the traditional Japanese value system.[158] In fact, *kojin-shugi*, the Japanese word for individualism, often suggests selfishness to the Japanese.[159] The following anecdote helps to explain a weak legal enforcement of civil liberties in Japan; the Japanese language did not contain a word to express the concept of individual rights until the 1870s.[160] Rinsho Mitsujuri, who was commissioned to translate the French Civil Code into Japanese, had to invent such a word.[161] Likewise, *seigi*, the Japanese equivalent of the word "justice," bears no relation to legal matters.[162] It contrasts with the English word "justice," which reflects the fusion of law with the notions of good and fair.[163]

The limited functions of law have contributed to the suppression of individual employees' rights in Japan. Tatsuo Inoue, Professor of Law at Tokyo University, observed that the "primacy of group loyalty" has resulted in a "weak commitment to such universal principles as human rights, justice, and fairness--principles that theoretically do not discriminate between insiders and outsiders."[164] Such a weakness has manifested itself in the prevalence of unpaid overtime as well as in lack of adequate workers' compensation.

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156. Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?* 8 EMORY INT'L L. REV. 127, 133 (1994).

157. "It is regarded as extraordinary, if not avaricious, to bring a claim for damages before the courts, even when the claim is against the author of the damage suffered." NODA, *supra* note 121.

158. UPHAM, *supra* note 126, at 206.

159. REISCHAUER, *supra* note 139, at 160.

160. Ramlogan, *supra* note 156.

161. *Id.*; Utchtmann, *supra* note 147, at 351. Japan marks a sharp contrast to the United States, where people have used law as an effective tool of asserting individual rights. *See, e.g.*, Inoue, *supra* note 5, at 517 (comparing Americans, who have stressed the role of individual rights with the Japanese who have emphasized community values as a hallmark of society); Loraine Parkinson, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604 (1989)(noting that Americans have viewed law as primarily an instrument of coercion in such areas as civil rights and women's rights); *Body Politics*, NEWSWEEK, Sept. 12, 1994, at 22 (stating that "[i]t's a good American ideal -that all individuals have rights. But applied to other countries, it has explosive connotations"). *But see* Inoue, *supra* note 5, at 518 (pointing out that extreme emphasis on individualism in the United States has created social problems, such as crime, moral and social decay, and inner-city collapse).

162. HALEY, *supra* note 101, at 25-26; CHRISTOPHER, *supra* note 127, at 168.

163. HALEY, *supra* note 101, at 24.

164. Inoue, *supra* note 5, at 527.

V. CORPORATE DOMINANCE IN JAPAN

For further insight into the *karoshi* issues, one must understand the values at the core of the Japanese employment system. In short, the primacy of group cohesiveness distinguishes the Japanese corporate culture most sharply.[165] The Japanese workplace has long functioned as a clan built upon the notion of *wa* ("harmony"). Employers have condemned rugged individualism, which can disrupt the harmony in the work environment. Consequently, workers have strived to maintain harmonious relationships at the cost of the individual.[166] They have remained too reluctant to assert their individual legal rights against their companies.

Lifetime employment stands out as the most striking feature of Japanese labor practice.[167] Major firms hire fresh graduates annually, train them to value corporate loyalty, and retain them until mandatory retirement at age sixty.[168] As a result, homogeneity prevails in the Japanese workplace; particularly at major firms, the core labor force consists predominantly, if not exclusively, of male Japanese nationals, who join the organizations fresh out of college. William Ouchi[169] observed that a typical Japanese firm, which functions as a clan, tends to develop a fear of outsiders and resists

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165. REISCHAUER, *supra* note 139, at 136. Tatsuo Inoue calls the following three features of the Japanese employment system as "three sacred regalia" which have helped create the communal character of corporations: lifetime employment; seniority-based wages; and in-corporate labor unions based on the capital-labor conciliation policy. Inoue, *supra* note 5, at 530.

166. *See* Yamazaki, *supra* note 10, at 13; Okamoto Hideo, *Corporations and Social Change*, 12 JAPAN ECHO 64 (1985).

167. REISCHAUER, *supra* note 139, at 320 (discussing the characteristics of the Japanese employment system). Japanese companies value workers who can prove their long-term commitment and loyalty to the employers. At the same time, employers tend to disdain mid-life career changes, which deviate from the established norm. Because lifetime employment forms the core of traditional Japanese management, companies have long discriminated against employees who fail to make life-long commitment, such women and those hired midway through their careers. Thomas Mcrozkowski & Masao Hanaoka, *Continuity and Change in Japanese Management*, JAPANESE BUSINESS 271, 273 (Subhash Durlabhji & Norton E. Marks, eds. 1993).

168. JAPAN: A COUNTRY STUDY 116 (Ronald E. Dolan & Robert L. Worden eds., 1992).

169. Ouchi introduced Japanese management to an American audience in his book *Theory Z*. WILLIAM OUCHI, THEORY Z 74 (1981).

deviance in all forms.[170] Such a system notably lacks the flexibility to accommodate divergent values slowly emerging among Japanese youth.[171]

Using a broad range of motivational devices such as pep talks, boot camps, calisthenics, and company slogans, employers take every possible step to instill values such as duty and group loyalty into their employees.[172] To foster the community spirit,[173] companies mandate employees' participation in non-business activities.[174] Through such rituals, the values of the company become the individual values.[175]

As one of the most dominant social institutions in Japan, corporations have exerted a vigorous power that totally absorbs individuals.[176] Critics often portray Japan as a *kigyo-shakai* (corporate-dominant society).[177] Similarly, noting the spiritual dimensions in the Japanese workplace, one observer asserts that the most widespread religion in Japan is *kigyo-kyo*

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170. Ouchi further asserts that Japanese companies are more sexist or racist than any other form of organizations. He explains: "[Japanese firms] simply operate as culturally homogeneous social systems that have very weak explicit or hierarchical monitoring properties and thus can withstand no internal cultural diversity." *Id.* at 74. *See also* Schaffer, *supra* note 145, at 385 (explaining that "[t]he concept of ethnic homogeneity is deeply rooted in the national psyche, and it is deliberately fostered by the nation's leaders as the force behind the nation's social cohesion and sense of shared purpose"); TAYLOR, *supra* note 6, at 28 (explaining that the profound sense of uniqueness isolates the Japanese mentally from the rest of the world).

171. For a more complete discussion of attitudinal changes among Japanese youth, see *infra* section VI.

172. WILLIAM C. BYHAM, SHOGUN MANAGEMENT 47 (1993); James R. Lincoln, *Employee Work Attitudes and Management Practice in the U.S. and Japan: Evidence from a Large Comparative Survey*, Fall 1988, CAL. MGMT. REV. 89, 99 (1989).

173. REISCHAUER, *supra* note 139, at 321 ("No one tries to demonstrate individual brilliance or aggressive leadership for fear of being considered a misfit.")

174. Examples abound. To take one example, a workday at Panasonic Inc. begins with a morning gathering where employees chant company slogans and sing the company anthem. Makoto Sataka shares his observation of the morning gathering at the Panasonic head office in Kadoma City, Osaka Prefecture. About 150 employees from accounting, personnel, and general affairs departments gathered on the first floor at 8:30. A person on duty proceeded to the front and opened a scroll embodying seven philosophical slogans. All workers repeated them in union. Next, another person on duty gave a three-minute speech. Lastly, employees sing the company anthem entitled *Love, Light, and Dream*. This is not an unusual sight among Japanese companies, including multinational firms. SATAKA, *supra* note 49, at 180-85.

175. TAYLOR, *supra* 6, at 70. Japanese men learn to seek self-identity through companies they work for; a person's job serves as "a vital source of his self-respect, a firm basis for his self-interpretation, and a prime determinant of the social recognition he gains." Inoue, *supra* note 5, at 528.

176. *See* Inoue, *supra* note 5, at 520 (stating that the primacy of group conformity has enhanced corporate productivity but has also impoverished individual workers' lives).

177. *See generally* Atsumi Ninomiya et. al., *Kigyo Shakai-no Kokufuku-ni Mukete* [*How to Overcome the Corporate-Dominant Society*], 1303 RODO HORITSU JUNPO [LABOR L. REPT.] 6, 6-32 (1993).

(corporate religion).[178] Life-long job security ultimately produces an enthusiastic work force that takes pride in hard work.[179] The spirit of corporate warriors embodies elements such as "stamina, intestinal fortitude, and dogged loyalty."[180] It is this spirit that has partly made Japan's unprecedented economic growth possible. Parochial values underlying corporate dominance has pervaded various aspects of Japanese society.

VI. RISE OF INDIVIDUALISM AMONG JAPANESE YOUTH

Conventional legal scholarship has focused almost exclusively on the law's limited functions in Japan.[181] On the other hand, few observers have devoted attention to contemporary realities of Japan. The Japanese legal consciousness does not remain immune to the dynamics of social change.[182] Without doubt, Japan today is in a transitional phase. The Japanese have shown their capability of making rapid and purposeful change.[183] Such capability is particularly notable among younger generations; they freely express their discontent with limitations imposed by the primacy of group conformity.[184]

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178. SATAKA, *supra* note 49, at 180. *See also* BYHAM, *supra* note 172, at 13 (stating that "[t]he fatherly role of many Japanese managers would seem inappropriately paternalistic and strangely out of place in the more impersonal American workplace"). The following survey on the role of the company reflects a striking contrast between Japanese and American employees:

> I think of my company as:
> (1) the central concern in my life and of greater importance than my personal life; Japan 9% U.S. 1%
> (2) a part of my life at least equal in importance to my personal life; Japan 64% U.S. 20%
> (3) a place for me to work with management, during work hours, to accomplish mutual goals; Japan 15 % U.S. 37%
> (4) strictly a place to work and entirely separate from my personal life; Japan 12% U.S. 37%

ARTHUR M. WHITEHILL, JAPANESE MANAGEMENT: TRADITION AND TRANSITION 154-55 (1991).

179. REISCHAUER, *supra* note 139, at 324.

180. Takada Masatoshi, *Woman and Man in Modern Japan*, 16 JAPAN ECHO 39, 42 (1989).

181. *See, e.g.*, Kim & Lawson, *supra* note 99. *See also* UPHAM, *supra* note 126, at 1 ("When Japanese law has been dealt with at all, the focus has been on the minimal role that it plays.")

182. OUCHI, *supra* note 169.

183. Edwin Reischauer expressly rejects the perception among Westerners that Japan consists of "a uniform race of pliant, obedient robots, meekly comforting to rigid social rules and endlessly repeating the established patterns of their society." REISCHAUER, *supra* note 139, at 159.

184. *Id.* at 160. Survey results confirm that younger Japanese share American-style values. Lincoln, *supra* note 172, at 93.

Of vital importance is the growing diversification of values.[185] A shift in the labor consciousness marks one of the most indicative signs of such diversification.[186] Most strikingly, the labor mobility has considerably increased in accordance with the decline of traditional lifetime employment. Switching jobs, once an unthinkable betrayal,[187] has gradually gained more social acceptance. A rising number of Japanese men are now aspiring to free themselves from the rigor of corporate culture.[188] Work no longer occupies a central place of their lives. Polls confirm that young workers crave more freedom in their personal lives:[189] 31.5 percent of men responded that they view work as a means of making life more enjoyable; also, 25.3 percent of men expressed their desire to work for the purpose of maximizing their individual potential.[190] In contrast, only 0.4 percent stated that their main goal is to contribute to corporate development.[191]

Outside the corporate world, men are now entering a broader array of fields, including those traditionally considered women's territories. The November 1994 issue of *Nikkei Woman*, a magazine for working women, featured an article on some of these men, who work as a dog groomer, a nurse, a nurse's aid, and a kindergarten teacher.[192] This article conveys a clear message: more men are now refusing to climb the corporate ladder simply to fulfill their culturally expected role as breadwinners.[193] These men view work as a means of individual self-expression.

Given the diversity of values, a naive belief that everyone thinks alike[194] can no longer prevail. When employees do not share the same value

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185. *See generally* Yamazaki, *supra* note 10.

186. *See generally* Yoichiro Hamabe, *Inadvertent Support of Traditional Employment Practices: Impediments to the Internationalization of Japanese Employment Law*, 12 UCLA PAC. BASIN L.J. 306 (1994).

187. TAYLOR, *supra* note 6, at 150.

188. REISCHAUER, *supra* note 139, at 326.

189. *Id.* (discussing less loyalty and commitment among younger workers, who reject the paternalistic nature of traditional management and crave more freedom in their personal lives).

190. NIJYU ISSEIKI ZAIDAN [JAPAN INSTITUTE OF WOMEN'S EMPLOYMENT], JYOSEI KOYO NO KANRI TO KOMYUNIKEESYON GYAPPU NI KANSURU KENKYU KAI HOKOKUSHO [STUDY ON WOMEN'S EMPLOYMENT AND GENDER-BASED COMMUNICATION GAP] 6 (1993).

191. *Id.*

192. *Onna no Shigoto ni Tsuku Otoko-tachi* [*Men who Enter Women's Fields*], NIKKEI WOMAN, Nov. 1994, at 138-43.

193. *Id.* at 138. *Asahi Shimbun*, a major newspaper in Japan reported on the nation's first symposium on "fathers' rights" held in Kyoto City. It suggests a heightened societal awareness of men's rights which have been long ignored. The symposium also included a discussion of what should be done to eradicate *karoshi*. *Chichioya-no Tachiba-de Karoshi-o Kobamo* [*Let Us Challenge* Karoshi *from the Father's Perspective*], ASAHI SHIMBUN [ASAHI NEWS], July 6, 1994, at 14.

194. *See* Kim & Lawson, *supra* note 99, at 496-97.

system, the workplace will have difficulty operating as a quasi-community.[195] Inevitably, to seek unity out of growing diversity emerges as a new challenge.[196] The feudalistic nature of Japanese business management collides with some trends demanding a lasting change in society.[197] The Japanese can no longer heavily rely upon informal social sanctions that override the written law. Coercive legal powers should thereby play a heightened role in accommodating a divergence of visions.

The Westernization of Japanese society may heighten people's awareness of individual legal rights.[198] Japanese youth perhaps will feel less reluctant to assert their legal rights through a formal adjudicating process. Japanese society has long condemned legal battles against one's own employer as a "radical, threatening act to fellow employees as well as to management."[199] In pursuit of greater personal autonomy, however, the modern Japanese may learn the value of litigation as a tool of confronting and overcoming injustices.

A recent sexual harassment suit[200] provides a striking example of heightened legal consciousness in Japan.[201] In April 1992, a woman won the nation's first "hostile environment" sexual harassment case in the Fukuoka District Court. Plaintiff, who worked for a publishing company, asserted that her editor had spread rumors about her private life. This legal battle, which had captured national attention, ended in the woman's victory. The court decision urged many employers to prevent potential claims by implementing sexual harassment policies. The outcome of this case is

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195. Okamoto, *supra* note 166, at 64. One critic predicts that Japanese-style management will die a "quiet, peaceful death" due to the rise of individualism, as well as low growth and globalization. Osamu Katayama, *Back to the Drawing Board*, 39 LOOK JAPAN 13 (1993).

196. Gibbon, *supra* note 129, at 125. *See also* Inoue, *supra* note 5, at 521 (discussing an "urgent need [in Japan] to heed the voice that calls for increased respect for individual rights"); REISCHAUER, *supra* note 139, at 160 (explaining that Japanese youth are now seeking to break out of the strict molds of their society); Okamoto, *supra* note 166, at 66 (pointing out that an alternative approach to managing the workplace should "emphasize personal commitment to one's work and individual interests rather than, as in the past, the subordination of those interests to group effort").

197. *See* Esaka, *supra* note 6, at 70. For recent social changes in Japan, see also generally Katayama, *supra* note 6; Yamamoto Harumi, *The Lifetime Employment System*, 40 JAPAN Q. 381 (1993); Takada Masatoshi, *Woman and Man in Modern Japan*, 16 JAPAN ECHO 39 (1989); Ogata Takaaki, *Young Workers Move with Times*, 12 JAPAN ECHO 68 (1985).

198. Obuchi, *supra* note 100, at 74.

199. UPHAM, *supra* note 126, at 140.

200. For a more complete discussion of this case, see generally Nancy Patterson, *No More* Naki-Neiri? *The State of Japanese Sexual Harassment Law*, 34 HARV. INT'L L.J. 206 (1993).

201. Sexual harassment litigation still remains rare in Japan today. In the U.S., however, about 38,000 sexual harassment suits have been brought as of 1989. Helweg, *supra* note 118, at 316. For sexual harassment in Japan, see also generally Miyuki Muneshige & Ann Saphir, *Learning to Say No*, 36 LOOK JAPAN 22 (1990).

noteworthy, given societal pressure against litigants. Having observed the court proceedings of the case, Mikiko Taga, a journalist on women's issues, shares her impression as follows: "I was impressed by the way the plaintiff held her head high, unashamed that she should be suing a company for something unheard of in the company-is-God Japan."[202] As this case suggests, younger Japanese may feel less constrained to haul their employers into the legal battleground when labor disputes arise.

VII. THE FIGHT FOR HUMAN DIGNITY

A. *The Need for More Forceful Laws*

The concept of corporate loyalty is so deeply ingrained in the Japanese consciousness that its adverse impact has long remained unquestioned. Sadly, it has taken the tragedy of *karoshi* for the people to grasp the magnitude of the problem. To eradicate *karoshi*, Japan must stand firm against employers' abuse of power by seeking to expand legal protection of workers. Human rights are too precious to be buried in an abstract, ideological discussion. The battle against the primacy of corporate welfare demands the force of law.

Law is no panacea; it does not completely transform traditional patriarchy.[203] In the United States, for instance, deep-rooted racial prejudice unavoidably stands beyond the reach of law,[204] and the struggle for equality continues today.[205] Notwithstanding such limitations, one should not disregard the critical role that legal reform has played in the area of civil

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202. Mikiko Taga, *It's Time to Get Serious*, 35 LOOK JAPAN 3 (1990). Taga further adds that the concept of sexual harassment "shocked the Japanese because it broke a social taboo, one that had existed for many, many years." *Id.*

203. Law has failed to provide the complete solution to racial discrimination in the U.S. Evidence suggests that Whites have shown greater tolerance of African Americans since the 1950s; nonetheless, much remains to achieve social integration in today's America. *See* Richard H. McAdams, *Cooperation and Conflict: the Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1005, 1056 (1995). One author discusses continued discrimination against African Americans in the U.S. and, more importantly, the law's failure to remedy the problem. She asserts that "Martin Luther King's marches and peaceful protests have done as much as the courts have for African Americans, if not more." Helweg, *supra* note 118, at 312-13. The ongoing controversy over affirmative action illustrates the difficulty of achieving true equality. *See, e.g.*, MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY, Introduction (1991) ("For the past two decades, affirmative action has ranked among the most controversial publicly debated issues in the United States.") *See also* KATHANNE W. GREENE, AFFIRMATIVE ACTION AND PRINCIPLES OF JUSTICE (1989); Robert J. Samuelson, *Affirmative Action as Theater*, NEWSWEEK, Aug. 14, 1995, at 51.

204. *See* Torres, *supra* note 109, at 1052.

205. *See supra* note 203.

rights.[206] One author illustrates greater tolerance of minority groups in America as follows: even the power of law fails to "force a white person to accept a black person (or vice versa)"; yet, law retains the ability to "force the two people to interact in certain areas of public life."[207] The imposition of force is meaningful because it regulates one's outward behavior.

In Japan, regulation of management behavior, although only part of the solution, represents one essential step to be taken. Thus, a heightened role of law should serve as a vital part of a catalyst for social change in Japan. As noted, U.S. antidiscrimination legislation reflects a widely shared concept that one should be recognized for his or her intrinsic worth.[208] Vigorous enforcement of the law, which appeals to the public sense of justice, will direct the community to move toward declared goals. Thus, societal condemnation of exploitative employers should form the core of appropriate legislation in Japan as well. Also importantly, the enforcement should include the threat of sanctions; articulation of rules, by itself, remains insufficient to induce socially desirable behavior.[209] A mere embodiment of utopian visions would fail to bring about deep and lasting change.

The legal framework must be restructured to condemn and correct employers' abuse of power while maximizing compensation benefits for victims' families. The following are some suggestions of possible legal solutions. Not intended to be exhaustive, they only provide a few concrete examples of necessary changes. First and foremost, the maximum work hour provision of the Labor Standards Law should be strictly enforced, deterring corporations from unfairly benefiting from unpaid overtime. For this purpose, Article 36 of the Law, which has rendered the work hour regulation virtually meaningless,[210] should be amended, if not repealed. The signing of the agreement between management and its workers should be in effect only if all workers have participated, directly or indirectly, in the decision-making process. Although representatives of the workers are inevitably the ones in charge of face-to-face negotiation with the employer, those in such a responsible position must be elected through a fairly structured voting system. Furthermore, an enforcement mechanism of recording accurate work hours should be implemented; this system necessitates regular inspection of reported hours by an administrative agency as well as sanctions against violations.

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206. Helweg, *supra* note 118, at 312-13. *See also* LESLIE BENDER & DAAN BRAVEMAN, POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER (1995) (pointing out that law must validate effective social change).

207. Note, *Legal Realism and the Race Question: Some Realism about Realism on Race Relations*, 108 HARV. L. REV. 1607, 1616 (1995).

208. *See supra* notes 115-17 and accompanying text.

209. HALEY, *supra* note 101, at 5.

210. *See supra* note 54 and accompanying text.

Second, the Ministry of Labor should expand access to workers' compensation for families of *karoshi* victims by relaxing the high burden of establishing causation. The Ministry should not avert its eyes to the fact that many people engage in physically grueling work as a matter of routine; gradually-accumulated exhaustion can cause sudden death, although the workload during the week preceding death may happen to be somewhat lighter than usual.[211] Based on this recognition, the amended statute should adopt a broader factual inquiry on a case-by-case basis.

Finally, the law should clearly set forth the time period within which employers must submit information requested by compensation claimants. Employers who refuse to cooperate with the investigation should be subjected to stringent penalties.

B. *Possibilities of Working within the Existing System*

The necessity of statutory reform cannot be overemphasized. Nevertheless, sweeping changes do not take place overnight. Tadashi Matsumaru, a lawyer and recognized authority on *karoshi*, explains that the attempt to reform has been made; yet, he adds, the progress has remained slow.[212]

One may find it easy to criticize the failure of the legal system and to conclude that little can be gained without institutional changes.[213] Robert Elias, an author of a book on crime victims and victimization, cautions that such an attitude in effect will confine the oppressed to a passive role of an onlooker; one reinforces the existing structures as correctable flaws and patiently awaits future improvements.[214] Elias' caution becomes of greater importance in the Japanese setting, in which people are used to seeing themselves as onlookers. *Kaho wa Nete Mate* ("Lie down and await good news."), goes a popular saying. The Japanese tend to believe that pursuit of fairness and equity lies with some authority rather than themselves.[215] In other words, one's life is simply given; it is not to be built.[216] Society values the virtue of submission to fate as a sign of one's maturity.[217]

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211. OSAKA KAROSHI MONDAI, *supra* note 11, at 20-21.

212. Interview with Tadashi Matsumaru, Attorney at Law, Sakai Law Office (Osaka, Japan), June 30, 1994. Issues concerning procedural obstacles in the passage of legislation extend beyond the scope of this paper.

213. ROBERT ELIAS, THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY AND HUMAN RIGHTS 210 (1986).

214. *Id.*

215. YOZO WATANABE, HO TO-WA NANI-KA [WHAT IS LAW?] 19 (1979).

216. *See* Yamazaki, *supra* note 10, at 14.

217. The Japanese culture has absorbed Buddhist teachings which embrace submission to fate as "the source of all true happiness." *See* NODA, *supra* note 121, at 173.

Notwithstanding the tradition, individuals should learn to accept greater responsibility for effecting social change. The Japanese Constitution proclaims that "freedoms and rights . . . shall be maintained by the *constant endeavor of the people*, who shall refrain from any abuse of these freedoms and rights."[218] (Emphasis added.) When this proclamation actually penetrates Japanese minds, that will mark one critical step toward building a better workplace. Based on that view, this section will explore what individuals and communities can undertake within the present system.

1. *Learning about Law*

The minimal role of law in Japan partly stems from lack of educational opportunities to enhance people's appreciation of law as a source of power. In the United States, people have absorbed the value of asserting one's legal rights through various means in their everyday lives, ranging from frequent trial scenes on television to mock trials in high school.[219] In contrast, the Japanese people's exposure to law, if any, remains considerably limited. Law remains no more than an ornament unless citizens enforce them. The more people become informed of their legal rights, the more likely that they will exercise them. Thus, the Japanese need to be taught that they are entitled to fight for their beliefs and that participation in the adversarial process is not a shameful act. For this purpose, education should help increase societal awareness of legal rights. To take one example, at the secondary school level, educators should broaden the regular curriculum to include lessons that impart an understanding of law. The subject areas may range from an introductory survey of the legal system to the study of contemporary issues such as those concerning *karoshi*. To stress the notion that law functions to reconcile diverse values, the teacher should substitute the conventional lecture format with various activities that will enable participants to communicate their ideas; the options include debate, group discussions, and mock trials.[220] When conflicting views arise, students should be reminded that they are entitled to exercise their right to disagree. Most of all, students should learn the following lesson: conflicts inevitably become a way of life as a mass of individuals seek to pursue their best interests; although an effort to prevent or minimize the conflicts should be valued, certain problems may require legal solutions.

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218. KENPO [Constitution] art. XII (Japan). Also, Article 13 of the Constitution declares that people's right to life, liberty, and *the pursuit of happiness* shall . . . be the supreme consideration." (Emphasis added.) *Id.* art. XIII.

219. *See, e.g.*, Riordan, *supra* note 109, at 675.

220. Other methods may include making a field trip to the courthouse and inviting legal professionals as guest speakers.

For students entering the job market following graduation, the teacher should further offer seminars on the relationship between management and its workers. Currently, at most Japanese schools, job search strategies occupy a large part of career guidance. Consequently, many graduates step into the real world without making a full assessment of their occupational and personal goals. Especially among men, companies' prestige often serves as the sole motivating factor for employment. At the same time, they tend to overlook what may possibly lie in the shadows of "big names": long work hours, periodic transfers including overseas assignments, work-related socializing, and other constraints that can totally absorb one's personal freedom. These students should critically evaluate the traditional labor policy, which demands religious devotion by workers.[221] By exposing them to the harsh reality of corporate culture, the teacher should encourage the students to clarify their values and make responsible choices.[222]

2. *Participating in the System*

Aside from reform legislation, a battle against the workers' compensation law can start with participation in the system itself. As noted above, many families of *karoshi* victims forgo their claims, deciding that the application for benefits will not be worth the price.[223] Their decision is perhaps understandable, given the procedural burdens inherent in each step of the application process.[224] Notwithstanding the obstacles, families should be strongly encouraged to assert their compensation claims; direct involvement paves the way for bringing one's grievance to public attention. *Karoshi* is not only a personal crisis; it is a threat to Japanese society as a whole.[225] Thus, instead of directing their grief inward, families should endeavor to make their voices heard, exposing the employer's abuse of power to the public.

For many, application for compensation marks their first personal encounter with formal legal proceedings. Law, which may have remained comfortably out of their reach, suddenly enters their lives. The technical rules of law operate to exclude the inexperienced.[226] Saddled with

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221. For this purpose, students may benefit from listening to guest speakers, such as a businessman, a lawyer working on *karoshi* cases, and a family member of *karoshi* victims.

222. More specifically, the following questions should be presented. Why is a job important to you? What do you value most in your life? What are your personal, occupational, social, economic and/or spiritual goals?

223. *See supra* note 89 and accompanying text.

224. For a discussion of the application process, see *supra* notes 69-71 and accompanying text.

225. *See supra* note 13 and accompanying text.

226. ELLEN ALDERMAN & CAROLINE KENNEDY, IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION (1991), at Author's Note.

procedural burdens, claimants will probably find each step of the legal process intimidating and frustrating. Thus, instead of struggling through the system on their own, claimants should seek legal counsel from workers' compensation specialists.

They can retain an attorney through the National Defense Counsel for Victims of *Karoshi* (*Defense Counsel*). Lawyers across the nation joined in 1988 to form this organization that aids and empowers families of *karoshi* victims.[227] Consisting of about three hundred members, the Defense Counsel proclaims the philosophy behind its advocacy as follows:

> It is said that all human rights are based on respect for the individual. We believe that the freedom of an individual to live and die naturally without being subjected to destruction by others is the foundation of all human rights. We therefore believe that conditions and practices which destroy workers' health and life should never be tolerated.[228]

In 1988, lawyers, physicians, and labor activists launched nationwide *karoshi* hotlines to answer the public's questions.[229] On the first day alone, the phones were ringing constantly across the nation, and a total of 135 calls were answered.[230] As of June 1994, the hotlines had received more than 3500 claims.[231] Of the 1806 cases reported to the hotlines during the first two years, about 55% came from distressed widows seeking compensation for their husbands' deaths.[232] Many calls also came from wives who feared that it was simply a matter of time before their husbands would collapse of fatigue.[233] This consultation program, which started in seven major cities, has expanded to all forty-seven prefectures of the nation.[234] Additionally, international hotlines were set up in New York and Brussels in 1991 due to a steady increase of Japanese businessmen working overseas.[235]

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227. NATIONAL DEFENSE, *supra* note 1, at Preface IV.
228. *Id.*
229. Kawahito, *supra* note 5, at 150.
230. NATIONAL DEFENSE, *supra* note 1, at 7.
231. *Symposium*, *supra* note 78.
232. NATIONAL DEFENSE, *supra* note 1, at 7.
233. *Id.*
234. *Id.*
235. For example, wives of businessmen working or traveling overseas have consulted the hotlines related to the following claims: "He worked straight through without a break after returning from overseas[;]" "[h]e collapsed at the end of more than 150 days of business trips abroad in one year[;]" "[h]e died after being forced to go abroad on a business trip even after being warned about his high blood pressure[;]" "[h]is health deteriorated while working overseas, but he was not allowed to come home in time to seek medical attention . . . ." Kawahito, *supra* note 5, at 152.

Some claimants may need moral support more strongly than legal counsel. They should build a supportive network through an advocacy group, sharing information and consulting one another. Also, collective efforts can enable a sole grievant to publicize her compensation claim; various options are available, ranging from distributing fliers to writing letters to the media. In the past, families of victims often internalized their grievances. In the late 1980s, however, many have begun to rise in protest with the recognition that silence may only add to lasting harm to society. They began fighting against the bureaucracy, which remains insensitive to the survivors who lost their loved ones under severe working conditions.[236] In 1990, they formed an organization called The Families of Karoshi Victims.[237] The group's activities include campaigning to win workers' compensation benefits and helping prevent future cases of *karoshi*.[238]

Furthermore, in 1991, fifty wives who had lost their husbands to *karoshi* published a thought-provoking collection of their essays.[239] Each essay not only gives a wrenching account of the tragic death but also sheds light on the shadows of Japan's economic triumph. Entitled *Nihon-wa Shiawase-ka* ("Is Japan a Happy Nation?"), the book sends a poignant message to its audience: it is time to begin creating a new workplace that integrates work and home, collective responsibility, and personal freedom.

The work of the Defense Counsel and the Families of Karoshi Victims will serve as a milestone in the battle to enhance public awareness of individual employees' rights. Lasting change requires organized efforts of the community. Japan should strive to breathe life into Article 1 of the Labor Standards Law, which now appears to be a mere ornament: "Working conditions shall be those which should meet the needs of workers who live lives worthy of human lives."[240]

Only with a societal commitment to challenge inequities in the workplace will Japan have embarked on the journey to the restoration of individual dignity.[241] Human lives are a very high price to be paid for economic gains.

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236. *Id.* at 157.

237. NATIONAL DEFENSE, *supra* note 1, at 13.

238. *Id.*

239. NIHON-WA SHIAWASE-KA [IS JAPAN A HAPPY NATION?] (Families of Karoshi Victims ed.)(1991).

240. LSL, *supra* note 16, art. 4.

241. Armour, *supra* note 118, at 815. For attitudinal change in younger employees, see REISCHAUER, *supra* note 139, at 326 (discussing less loyalty and commitment among younger workers who reject the paternalistic nature of traditional management and crave more freedom in their personal lives).

VIII. CONCLUSION

The primacy of corporate welfare has penetrated various aspects of Japanese society. The Japanese government has utterly failed to confront the problems arising from the inhuman labor practice. The defects in the work hour regulations and the workers' compensation system reflect the mere decorative function of law in Japan.

In recent years, the Japanese labor practice is showing signs of erosion.[242] Accordingly, Japan will not be able to "stay drunk on the wine of postwar success much longer."[243] The diversification of values will sooner or later necessitate a major change in the Japanese legal landscape. To meet that challenge, the force of law should provide a vehicle for integrating divergent values and enhancing individual rights.

242. REISCHAUER, *supra* note 139, at 326. *See generally* Hamabe, *supra* note 186; Uchihashi, *supra* note 119, at 47.

243. Katayama, *supra* note 6, at 13.

TAIWAN'S ANTITRUST STATUTES: PROPOSALS FOR A REGULATORY REGIME AND COMPARISON OF U.S. AND TAIWANESE ANTITRUST LAW

*Lawrence L.C. Lee**

TABLE OF CONTENTS

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I. INTRODUCTION

Along with its miraculous economic growth in the past four decades, the Republic of China on Taiwan (ROC or Taiwan) has created external and internal pressure for political reform and democratization and reform of the

antiquated, unruly, and inadequate economic order.[1] Furthermore, there are demands from the major industrial countries for equal competitive opportunities in Taiwan for their companies. In particular, the United States (U.S.) places great emphasis on the protection of American intellectual property rights for the U.S. possessors.[2] Consequently, the Legislative Yuan[3] of the ROC enacted the *Kung Píng Jiau Yih Fa* (*Fair Trade Law* or *FTL*)[4] on February 4, 1991, which protects customers' interests, provides a competitive market,[5] and encourages the increase of foreign investment in Taiwan.[6]

This article attempts to discuss the underlying philosophy behind the Republic of China on Taiwan's Fair Trade Law, *Kung Píng Jiau Yih Fa Shih Hsing Hsi Tsê* (*Enforcement Rules of Fair Trade Law* or *ERFTL*),[7] and the experience of the Taiwanese Fair Trade Commission (FTC)[8] in implementing and enforcing the FTL for the past three years. It focuses primarily on a

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1. Lawrence S. Lee, *Legal and Policy Perspectives on United States Trade Initiatives and Economic Liberalization in the Republic of China*, 11 MICH. J. INT'L L. 326, 326-27 (1990).

2. Jeffrey V. Crabill, Note, *Taiwan Keeps Torch Burning by Enacting Trade Law*, 2 IND. INT'L & COMP. L. REV. 449, 449-50 (1992).

3. The Constitution of the Republic of China, adopted in 1946 and amended in 1991, 1992, and 1994, provides for a central government with five branches. The government of the Republic of China is headed by the President of the ROC, who is currently elected by the National Assembly and will be popularly elected after March 1996. The president is the highest representative of the nation, possessing specific constitutional powers to conduct national affairs.

The five branches consist of the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Examination Yuan, and the Control Yuan. The Executive Yuan is responsible for national policy making and implementation. The Legislative Yuan, similar to the U.S. Congress, represents the people in passing legislation and supervising the operation of the Executive Yuan. The Judicial Yuan is in charge of civil, criminal, and administrative trials and the disciplining of public functionaries. The Examination Yuan is responsible for the examination, appointment, screening, recording, payment, and other personnel matters of government agencies. The Control Yuan, the highest supervisory organ of the nation, has the rights of consent, impeachment, censure, correction, and audit. For background on the Constitution of the ROC, see GOVERNMENT INFORMATION OFFICE OF ROC, CONSTITUTION OF THE REPUBLIC OF CHINA (6th ed., 1994).

4. *See infra* notes 65-95 and accompanying text explaining Taiwanese Fair Trade Law.

5. Chih-Kang Wang, Chairman, Fair Trade Commission, Executive Yuan, ROC, Address at the Symposium on International Harmonization of Competition Laws, Taipei, ROC (Mar. 12-13, 1994) *in* INTERNATIONAL HARMONIZATION OF COMPETITION LAW (Chia-Jui Cheng, Lawrence S. Liu & Chih-Kang eds. 1995).

6. Paul S. P. Hsu, *International Trade and Investment Regulation: Developing Jurisprudence in Taiwan*, 11 MICH. J. INT'L L. 368, 378 (1990).

7. *See infra* notes 96-99 and accompanying text interpreting the Taiwanese Enforcement Rules of the Fair Trade Law.

8. *See infra* notes 120-34 and accompanying text discussing the Taiwanese Fair Trade Commission.

review of the current FTL and a survey of comparable legislation in advanced nations, particularly the antitrust laws of the United States, including the Sherman Antitrust Act,[9] Clayton Act,[10] and Federal Trade Commission Act.[11] Finally, this article proposes a model antitrust law to serve as a useful pattern for future development of the Fair Trade Law of the ROC.

Undoubtedly, a hallmark of a democratic, market-driven economy is that businesses should be free to compete fairly without the distraction of unfair competition. In theory, antitrust laws protect competition without regard to enforcement of public or private enterprises.[12] Free and open competition benefits consumer interests by ensuring low prices and new and better products. "In a freely competitive market, competing businesses try to attract consumers by cutting their prices and increasing the quality of their product or services."[13] Competition also provides incentives for businesses to develop new technical progress and innovative, more production-efficient methods.[14]

Consequently, such situations indirectly promote the vitality of business enterprises, while consumers benefit from competition through lower prices, better products, and better services. Meanwhile, inefficient manufacturers or companies that fail to react to consumer needs soon find themselves falling behind in the marketplace competition.[15]

The primary goal of antitrust law is ultimately to increase consumer welfare and economic efficiencies through competition.[16] To achieve this, it is necessary for antitrust law to keep markets pure and to keep behavior fair. It achieves this by limiting the restrictive practices of business firms and by eliminating other inhibitions to the achievement or maintenance of noncompetitive market structures.[17] Thus, rigorous antitrust laws, rather than being seen as a hinderance to business efficiency, should be viewed as

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9. Sherman Act, 15 U.S.C. §§ 1-7 (1994). For background on antitrust law and the legislative history of the Sherman Act, see James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L. J. 257-395 (1989).

10. Clayton Act, 15 U.S.C. §§ 12-27 (1994).

11. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1994) [hereinafter FTC Act].

12. Joseph F. Brodely, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1020 (1987).

13. U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER 1 (1992).

14. *Id.*

15. *Id.*

16. Roger Bern and Michael M. Tansey, *Proper Application of the Rule of Reason to Vertical, Territorial Restraints: Debunking the "Intrabrand-Interbrand" and "Efficiencies" Deviations*, 20 AM. BUS. L.J. 435, 437 (1983); Brodely, *supra* note 12, at 1023.

17. *Id.*

beneficial, even necessary, to the well-being of both consumer and industry interests.

A. *Source of Antitrust Laws*

The antitrust laws' historical lineage extends from common law actions which limited restraints of trade and, to some extent, sought to proscribe monopoly power and middleman profits.[18] Today, however, antitrust laws are aimed at controlling private economic power through the prevention of monopolies, the punishment of cartels, and the protection of competition in other ways.

The schools of antitrust law and economics believe that when competitors negotiate to allocate markets, such as when they fix prices, rig bids or allocate customers or markets, consumers forfeit the benefit of competition.[19] When competitors agree in these ways, prices become artificially high, inaccurately reflecting cost, and therefore distorting the allocation of societal resources.[20] Consequently, a net loss is borne not only by individual consumers and taxpayers, but also by the economy as a whole.

Antitrust law also seeks to establish a regulatory framework within which private enterprises are free to seek maximized profits without invoking governmental interference which diversifies competition.[21] Maximized economic profits for private industries, however, will frequently be contrary to governmental economic policy, as expressed through a comprehensive set of antitrust laws. For example, arrangements that divide markets between competitors and thereby limit competition are violative of antitrust principles, as are requirements of mandatory resale prices imposed on retailers by manufacturers.

Generally speaking, the government does not prosecute all agreements between companies—only those that threaten to raise prices for consumers or deprive them of new and better products. However, once competing companies come together to fix prices, limit outputs, divide business territory between them, or make other anticompetitive arrangements that provide no benefits to consumers, government should act promptly to protect the interest of its consumers and taxpayers.

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18. MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 1890-1916 105-07 (1988).

19. ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 3-5 (1985).

20. Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 14 (1995).

21. Andrew A. Bernstein, Note, *Access to Cable, Natural Monopoly, and the First Amendment*, 86 COLUM. L. REV. 1663, 1688 (1986).

B. *Economic Theories of Antitrust Laws*

Microeconomic theory provides both the basis and vocabulary of antitrust law.[22] Economists postulate that market efficiency is the product of optimal allocation—that is, the level of production that satisfies societal needs (Allocation Efficiency), while at the same time achieves the maximum profit for the enterprise (Productive Efficiency). In a perfect model, price is regulated in terms of demand. For example, if a manufacturer seeking excessive profit on a product prices it too far above the cost of production, it provides an incentive for a new supplier to enter the market at a lower realized profit.[23]

Consumers create demand for a product and establish its price; where the demand for a product is high and the market fails to provide a viable substitute, consumers will pay a correspondingly high price for the value of the good.[24] Alternatively, when there are viable substitutes for the products in demand, consumers are apt to pay less. The value of the good reaches a point in the equation where consumers will forego it altogether or seek alternatives. It is precisely this unrealized demand that demonstrates the benefits of competition in the marketplace.

Economic theory also defines such antitrust terminology as consumer, firm, industry, and seller concentration rate. Both economics and antitrust law also outline barriers to entry into a marketplace, including capital cost, trademark, and longevity of competition. They prefer market competition rather than oligopoly, monopoly, and unfair competitive methods.

Critics point out, however, that the model of market efficiency is too simplistic to benefit antitrust policy. Others see economic theory as being little better than educated post-hoc guesswork which has little practical value in a society in which optimal efficiency may not be the highest good.

C. *Ideological Spectrum of Antitrust Law*

The evolution of an antitrust regulatory framework in the United States developed out of populist distrust of big business interests such as those found in the railroad, petroleum, and financial industries. In reaction to the excess produced by the Industrial Revolution, several trust-busting

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22. For a discussion of economic theories and antitrust law, see Walter Adams & James W. Brock, *Antitrust, Ideology, and The Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257 (1995); TERRY CALVANI & JOHN SIEGFRIED, ECONOMIC ANALYSIS AND ANTITRUST LAW (2d ed. 1988).

23. Prof. Robert H. Lande, Lectures in Antitrust Law at Washington College of Law, the American University Washington College of Law (Jan. 10, 1994) (on file with author).

24. Steven B. Johnson & John B. Corgel, *Antitrust Immunity and the Economic of Occupational Licensing*, 20 AM. BUS. L. J. 471, 479 (1983).

regulations were implemented to protect the little guy by limiting the most abusive tactics of the big businesses of the period.

Many schools and theories of antitrust law have emerged and influenced the development of the antitrust law,[25] such as the so-called Traditional Modulate Theory[26] which permits mergers resulting in an entity having fifteen to twenty percent of the total market. The basic idea espoused by proponents of the Traditional Modulate School is one based on the notions of economic efficiency and the protection of consumers.

Similarly, the Liberal School[27] allows limited vertical restraint and mergers of ten percent or less of the market power. The Liberal School's goal is economic efficiency and the protection of both individual consumers and society and political interest as a whole.[28]

The Conservative School, typified by the work of Judge Robert Bork,[29] views the application of antitrust laws as a form of misguided social and political engineering[30] practiced by the Warren Court.[31] Bork was critical of the evisceration of American business by the Court's reckless and primitive egalitarianism.[32] To conservatives, the movement away from such outcome-driven economic adjudication came as a result of the influence of the so-

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25. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 213-14 (1985).

26. The Traditional Modulate Theory modified Realist/Traditionalist Theory which stressed that competition was the core of antitrust law rather than efficiency and is diametrically opposed to theories espoused by the Chicago School. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust--Retrospective and Prospective: Where Are We Coming From? Where Are We Going?* 62 N.Y.U. L. REV. 936, 969-88 (1987). Advocates of the Traditional Modulate School include former Justices Blackmun, Marshall, and Timothy Brennan, as well as Ann Bingamun, Assistant Attorney General of the Antitrust Division of the Justice Department. Professor Robert H. Lande is also a proponent of the Traditional Modulate School.

27. Advocates of liberalism included Judge Learned Hand and the Warren Court, as well as Louis B. Schwartz, John J. Flynn, and Harry First. While this position is less influential today, it is still asserted by plaintiffs' lawyers.

28. For background on the Liberal School, see Edward O. Correia, *Antitrust and Liberalism*, 40 ANTITRUST BULL. 99 (1995).

29. ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS 505 (4th ed. 1994).

30. Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817, 826 n.30 and 827 (1987) (describing libertarians emphasis on no need for antitrust law because the market could contain and erode anticompetitive behavior).

31. Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 431 (1988).

32. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

called Chicago School[33] of law and economics which stressed market efficiency as the primary goal.[34] Obviously, economic theories affected the interpretation and application of the antitrust laws.[35] The Chicago School became tremendously influential during the Reagan Administration.[36] Judge Richard Posner of the Seventh Circuit is a well-known proponent of the Chicago School's theory of economics.[37]

While there are jurists and legal scholars who believe that antitrust laws are necessary, others (for example, libertarians) believe that there is no need for antitrust law.[38] At the risk of oversimplification, the libertarian position is that government regulation of business is inconsistent with the liberty interests of business. Libertarians prefer a "hands off" approach, permitting price fixing and other practices, while holding a minimalist perspective of the government's role in commerce, which Libertarians believe should function primarily as a referee. In many ways, the Libertarians' view is the polar opposite to the liberal regulatory model and almost represents a throwback to nineteenth century *laissez faire* capitalism.[39]

Marxists are another opponent of antitrust laws.[40] A Marxist critique of antitrust law is that it is a farce, another tool for capitalist exploitation of the dispossessed classes. In this view, antitrust law is misleading due to the fact it provides a false sense of security, while in reality it permits businesses to do whatever they wish. This position has largely been discredited, and today is merely of historic interest.

A more fashionable, contemporary theory is that of the Industrial Policy School, whose advocates view the nexus of government policy and corporate development as highly desirable.[41] This is patterned on the

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33. In addition to Richard Posner, advocates of the Chicago School also include Judge Robert Bork, Alchian W. Allen, William F. Baxter, former Attorney General, Antitrust Division, and Demsetz. *See* U.S. Dep't of Justice 1984 Merger Guidelines, 49 Fed. Reg. 26,827 (1984); *see* Fox & Sullivan, *supra* note 26, at 969 n.2.

34. Joe Sims & Robert H. Lande, *The End of Antitrust-or a New Beginning?* 31 ANTITRUST BULL. 301, 306-07 (1986).

35. While serving as Assistant Attorney General of the Antitrust Division from 1972-1976, Thomas Kauper adjusted the organization of the Antitrust Division by creating the Economic Policy Office which was responsible for antitrust economic analysis.

36. 1980's election-appointees are Robert Bork and Richard Posner, proponents of the Chicago School's economic arguments. Lande, *supra* note 31, at 438.

37. *See, e.g.*, RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1978).

38. Pitofsky, *supra* note 30, at 818.

39. May, *supra* note 9, at 275.

40. Alan S. Greenspan, *Thoughts about the Transitioning Market Economics of Eastern Europe and the Former Soviet Union*, 6 DEPAUL BUS. L.J. 1, 13 (1994) (indicating that Marxist ideology, emphasizing central economic planning, presumed competition to be destructive and therefore organized its production through state monopolies).

41. Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP L. 1, 4 (1996).

Japanese model, which systematically targets industry for development through regulatory practices,[42] such as the establishment of standards for the telecommunications industry and high-definition television.

D. *Development of Antitrust Laws*

The Sherman Act[43] was created in the nineteenth century and is still at the center of U.S. antitrust legislation.[44] The antitrust laws are designed to control the exercise of private economic power by preventing monopolies and protecting competition.[45] Under this basic theory of antitrust law, many modern commercial powers, including the United States, Germany, and other wealthy nations, have enacted antitrust laws to ensure fair trade and consumer protection. Essentially, these laws prohibit business practices that unreasonably deprive consumers of the benefits of competition and would otherwise result in higher prices for inferior products and services.

The Uruguay Round of the General Agreement on Tariffs and Trade (GATT), concluded in 1994,[46] emphasized the importance of fair trade practices in international trade. The successful conclusion of the GATT indirectly increases the attention to antitrust laws, policies, and harmonization.[47] Moreover, a Draft International Antitrust Code was prepared by a group of international antitrust experts, as a GATT/World Trade Organization (WTO) Plurilateral Agreement.[48] As a result, countries world-wide—especially developing countries—are beginning to revise or adopt their competition laws. Through these bilateral and multinational

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42. John M. Williams, III, *The Sun Rises over the Pacific: The Dissolution of Statutory Barriers to the Japanese Market for U.S. Joint Ventures*, 22 L. & POL'Y INT'L BUS. 441, 453 (1991) (discussing the Japanese Antimonopoly Act as applied by the Japanese Fair Trade Commission and Japanese Fair Trade Commission administrative guidelines).

43. Sherman Act, 15 U.S.C. §§ 1-7 (1994).

44. JOHN H. SHENEFIELD & IRWIN M. STELZER, THE ANTITRUST LAWS: A PRIMER 14 (1993).

45. *See, e.g.*, Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951).

46. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948), and superseded by the WTO, according to the Agreement Establishing the World Trade Organization, *opened for signature* Dec. 15, 1993, 33 I.L.M. 13. The WTO Agreement is a "single undertaking," integrating many Uruguay Round and previous GATT agreements into a single legal framework.

47. EARL W. KINTNER & MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 268-69 (1974).

48. The Draft International Antitrust Code of July 10, 1993, was published in *Working Group Unveils Draft Code on Antitrust within Framework of GATT*, 64 Antitrust & Trade Reg. Rep. Sp'l Supp't, (BNA) No. 1628 (Aug. 19, 1993).

cooperation agreements, antitrust statutes may be harmonized at the international level.[49]

II. ANTITRUST LAWS IN THE UNITED STATES AND TAIWAN

Antitrust law represents a system of positive law, judge-made law, and law enforcement agencies' regulations which are unified in an effort to promote fair competition among rival businesses in the marketplace. Antitrust law looks to commerce as a whole and to a societal goal of eliminating collusion or predatory business practices. In doing so, it protects the consumer by protecting competition, while assuring the benefits of market efficiency, quality, and innovation.[50]

The antitrust law of the United States provides an efficient enforcement mechanism to ensure compliance with U.S. laws. It establishes broad principles of competition that are designed to preserve an unrestrained interaction of competitive forces that will yield the best allocation of resources, the lowest price, and the highest quality goods and services for consumers.[51]

By contrast, Taiwan's Fair Trade Law is one of the world's newest antitrust regulatory schemes. It is similar to the legislation of many civil law countries. Taiwan's FTL provides a checklist of detailed regulatory requirements.[52] To achieve its goal of avoiding anti-competitive business practices, while at the same time promoting the welfare of consumers, the FTL frequently requires modification to adapt to the needs of a dynamic society.[53]

A. *Overview of the Antitrust Laws of the United States*

The American antitrust laws were drafted to preserve and protect the economic health of the United States. The vigorous enforcement of these principles has proven essential to ensuring that the U.S. economy remains

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49. For a discussion of the development of international antitrust law, see Claus-Dieter Ehlermann, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L. J. 833-45 (1994) (addressed in a Japan-EC competition seminar in Tokyo, Japan on November 4, 1993) (analyzing how increased international trade is facilitating the convergence of international antitrust statutes).

50. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

51. U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 6 (1988).

52. For example, Article 10 of the FTL provides parameters which identify an enterprise as monopolistic. Kung Píng Jiau Yih Fa [Fair Trade Law], ch. 2, art. 10 (promulgated on February 4, 1991) [hereinafter FTL], *translated in* FAIR TRADE LAW (Lee & Li trans.) (on file with the IND. INT'L & COMP. L. REV.).

53. *Id.* ch. 1, art. 1.

vibrant while promoting productivity and innovation. Furthermore, antitrust laws seek to assure continued consumer choice of a wide variety of products offered at competitive prices while allowing U.S. industry to face the ever increasing challenge of the domestic and global marketplace.[54]

Most of the individual states comprising the United States have antitrust laws closely parallelling their federal counterparts. These state laws are generally applicable to violations that occur wholly within one state. They are enforced through the states' attorney generals offices, just as federal antitrust laws are a matter for the U.S. Attorney General.[55]

In addition to the various state antitrust laws, three major federal antitrust laws exist:[56] (1) Sections 1 and 2 of the Sherman Antitrust Act,[57] which make it a felony to attempt to monopolize an industry or restrain trade and commerce; (2) the Clayton Act,[58] Section 2 of which prohibits price discrimination, sections 4 and 5 which provide for a private right of action with treble damages and criminal section of up to four years of imprisonment, and Section 7 (the "Anti-Merger Act") which stops mergers early to prevent monopolies if "the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly"; and (3) Section 5(a)(1) of the Federal Trade Commission Act,[59] which prohibits unfair or deceptive methods of competition.

Since 1890 the Sherman Antitrust Act[60] has represented the main law expressing the national commitment to a free market economy. This American ideal postulates that competition relatively free from private and governmental restraints leads to the best results for the consumers. The Congress which enacted the Sherman Act felt so strongly about this commitment to abolish anticompetitive practices that only one vote was cast

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54. Letter from President Bill Clinton to the Antitrust Division of Department of Justice on the occasion of the Department's 60th anniversary (Jan. 6, 1994) (duplicate on file with the IND. INT'L & COMP. L. REV.).

55. Moreover, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 empowers state attorney generals to file civil actions on behalf of resident customers who have been injured by a violation of the Sherman Act.

56. EUGENE M. SINGER, ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS 8 (1969).

57. The Sherman Act, 15 U.S.C. §§ 1-7, was subsequently amended by the Miller-Tydings Act in 1937.

58. The Clayton Act was amended by the Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13, 13a, 13b, and 21b (1936) and by the Celler-Kefauver Antimerger Act, 15 U.S.C. § 18 (1950).

59. The Federal Trade Commission Act was amended by the Wheeler-Lea Act, 15 U.S.C. § 41 (1938), and by the McGuire Act, 15 U.S.C. § 35 (1952).

60. *See* Sherman Act, 15 U.S.C. §§ 1-7 (1994).

against it.[61] The Clayton Act is a civil statute,[62] initially passed in 1914 and later amended substantially in 1950. It prohibits mergers or acquisitions that have significant potential to weaken the competitive force of the market. Under the Clayton Act, the federal government challenges mergers that a careful economic analysis shows are likely to result in increased consumer prices. All persons considering a merger or acquisition above a certain size must notify both the Antitrust Division and the Federal Trade Commission. Moreover, the Clayton Act also prohibits certain other business practices which have the potential to harm competition.[63]

The Federal Trade Commission Act,[64] enacted in 1914, prohibits unfair methods of competition in interstate commerce but carries no criminal penalties. It also created the Federal Trade Commission to police violations of the Federal Trade Commission Act. The goals of the Federal Trade Act are stricter and more narrow than those of the Sherman Act.

B. *The Taiwan Fair Trade Law*

The ROC enacted the Fair Trade Law on January 18, 1991. The FTL, consisting of seven chapters and forty-nine articles,[65] was passed by the Legislative Yuan[66] and promulgated by President Lee Teng-Hui on February 4, 1991. The FTL became effective on February 4, 1992.[67] The one-year delay created the FTC and allowed companies to become acquainted with the new law and make the necessary adjustments.

Because Taiwan began with a *tabula rasa* regarding antitrust law, the Fair Trade Law was patterned primarily after the antitrust laws of advanced industrial states—notably Japan, South Korea, Germany, and the United

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61. U.S. DEP'T OF JUSTICE, *supra* note 13, at 2-3.

62. The Clayton Act carries no criminal penalties. *See* Clayton Act, 15 U.S.C. §§ 12-27 (1994).

63. U.S. DEP'T OF JUSTICE, *supra* note 13, at 4.

64. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1994).

65. The Fair Trade Law consists of the following seven chapters: Chapter One-Legislative Purpose and Definition; Chapter Two-Monopolies, Combinations and Concerted Actions; Chapter Three-Unfair Competition; Chapter Four-Fair Trade Commission; Chapter Five-Damages; Chapter Six-Penalties; and Chapter Seven-Supplementary Provisions.

66. *See supra* note 3.

67. Although the FTL was the product of four decades of impressive economic growth in Taiwan, under a policy of strong government intervention in the economy, it is believed that the policy trend now is clearly toward increased market liberalization. As the domestic economy became less restrained, policymakers increasingly felt that antitrust and unfair competition legislation was needed in order to ensure adequate competition in the marketplace and restrain unfair or excessive competitive practices.

The original FTL was drafted by the Ministry of Economic Affairs in 1985. The following year it was sent to the Legislative Yuan but was not passed until 1991, becoming effective in February 1992.

States.[68] It is widely perceived that the decisions of the FTC have done little to establish the level of legal predictability necessary in commercial transactions. This has been because the FTL lacks a coherent economic theory with which to define the parameters of antitrust rules. The consequent ad hoc determinations have resulted in commercial uncertainty for the development of Taiwanese industry. As a result, the FTL and Taiwanese courts should espouse the relevant foreign precedents and experiences as guidance and judicial reference to accord realistic demands.

The primary purpose of enacting the FTL was to maintain order in transactions, protect the interests of consumers, ensure fair competition, and promote the stability and prosperity of the national economy.[69] It limits business monopolies and prohibits collusion and unfair competition. In addition, it forbids a wide range of practices intended to damage other businesses, including the use of force, bribery, or similar methods in order to obtain technology or business secrets, and the dissemination of false reports to damage the commercial reputation of another company.

The Fair Trade Law, like its American counterpart, the Sherman Act, provides both civil and criminal penalties for violations. Under the FTL, both an enterprise itself and its officers are subject to such sanctions. Significantly, however, according to Taiwanese legal tradition, criminal violations must be stated with specificity because an overarching principle of Chinese law is that a person may act within the limits of conduct not forbidden by a particular law.[70] In this context, the decisions of the FTC are limited to civil remedies and administrative fines, not including criminal sentences which are within the exclusive jurisdiction of the courts.

Similar to competition statutes in other countries, such as the United States,[71] the FTL is more ambitious in protecting customer welfare and economic order. The FTL contains two major legal regimes:[72] antitrust law[73] and unfair competition law,[74] including provisions on misappropriation of

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68. *See* FAIR TRADE COMM'N OF THE ROC, EXPLANATION OF THE ARTICLE AND LEGISLATIVE PURPOSE FOR THE FAIR TRADE LAW 1 (Aug. 1993).

69. FTL, *supra* note 52, ch. 1, art. 1.

70. Article 1 of the Criminal Code of the ROC, which was promulgated on January 1, 1935, and effective July 1, 1935, also amended effective November 7, 1948; July 21, 1954; October 23. 1954; December 26, 1969; and May 16, 1992 states: "[a]n act is punishable only if expressly so provided by the law in force at the time of its commission."

71. The United States has three major federal antitrust laws to complete an antitrust system: the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act.

72. Lawrence S. Liu, *In the Name of Fair Trade: A Commentary on the New Competition Law and Policy of Taiwan, The Republic of China*, 27 INT'L LAW. 145, 147 (1993).

73. FTL, *supra* note 52, chs. 2-3, arts. 10-19.

74. *Id.* ch. 3, arts. 20-24.

trade secrets,[75] copying of trade dress,[76] and other forms of unfair trading that are more closely related to the field of intellectual property law.[77] The antitrust provisions, which prohibit the abuse of market power and the creation of horizontal affiliations, along with other conventional kinds of restraints of trade, were viewed at the time as the primary obstacle to the enactment of the FTL.

The FTL also bans multi-level sales schemes,[78] making it illegal for participants to obtain commissions, monetary awards, bonuses, or other economic benefits merely from inducing others to join in the sales in such scheme rather than from the marketing or sale of the goods or services at reasonable market prices.[79]

Because of the substantial role of foreign investment in Taiwan, and in order to nurture foreign-owned companies located in Taiwan,[80] under Article 47 of the FTL, even unrecognized foreign legal persons and entities who are not registered to do business in Taiwan may nevertheless bring an action

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75. The legislative history of the FTL recognizes that trade secrets represent a form of intellectual property. Any valuable business information which has independent commercial value will be soundly protected. Therefore, owners of valuable trade secrets can seek compensation from infringers or persons leaking such trade data under Article 19 of the FTL. But the rule is still not up to standards set by the GATT. Thus, the Ministry of Economic Affairs of the Republic of China is drafting a new set of laws protecting trade secrets in order to not only protect the owners of trade secret but also to reach the standards of GATT.

76. Article 19(5) of the FTL prohibits the use of unfair practices to obtain trade secrets, trade information, or other kinds of related technical information. Although Articles 316-318 of the Criminal Code presently include the appropriation of a rival's trade secrets, this provision focuses on the conspiracy aspect of the dissemination of commercial information and is generally viewed as an insufficient remedy against a party who receives and uses the trade secret information.

Article 21 of the FTL prohibits misleading the public and commercial misrepresentations regarding the price, quality, use, country of origin, manufacture, or place of processing. The sale, export, import, or transportation of goods that violate this Article are also forbidden. *See also* Glenn P. Rickards, *New Fair Trade Law Will Strengthen Intellectual Property Protection*, Int'l Bus. Daily (BNA) (Apr. 3, 1991), *available in* LEXIS, World Library, ALLWLD File.

77. Article 20 of the FTL complements Articles 2, 21, and 34 of the Trademark Law on infringement. This Article protects against the unauthorized use of a similar trade name, individual's name, trademark, product container, package, product appearance, or other trade indicator which might cause confusion with the products or services of another. The sale, export, import, and transportation of a product as described above is also prohibited.

78. Supervisory Regulation of Multi-Level Sales, promulgated on February 28, 1992. Its legitimacy is derived from an express grant of regulatory power to the Fair Trade Commission pursuant to Article 23(2) of the Fair Trade Law.

79. FTL, *supra* note 52, ch. 3, art. 23(1).

80. *See, e.g.*, Statute for the Investment by Foreign Nationals, protecting and administrating of investments by foreign nationals within the territory of the ROC, promulgated on July 14, 1954, as amended on May 26, 1989 (amended nine times between 1954 and the present).

under the FTL on the basis of reciprocity.[81] Since diplomatic recognition is a prerequisite for foreign companies to transact business in Taiwan, this provision potentially gives foreign companies not doing business in Taiwan equal standing to sue.

Traditionally, many of the monopolies[82] in Taiwan are run by state-owned enterprises or state-sanctioned private monopolies and have been an integral part of Taiwan's economy since the Japanese colonial era.[83] Under certain circumstances, discussed later, monopolies are exempt from the anti-monopoly law until February 1996.[84]

Critics of the FTL contended that the legislation was spurred by three factors:[85] (1) Taiwan's desire to enter international conventions and organizations, such as the GATT/WTO and the United Nations;[86] (2) pressure from major trading partners, including Japan, Europe, and especially the United States;[87] and (3) recognition by local authorities of the positive impact of strengthened protection for intellectual property on the development of local industry and commerce.[88]

Other provisions that deal with unfair competition are somewhat commonplace.[89] The FTL outlaws boycotts, along with false advertising of prices, quality, origin, or manufacturing formulae,[90] spreading false

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81. Article 47 of the FTL states that unrecognized legal persons or groups may file a complaint, private prosecution, or civil action with respect to the matters specified in this Law provided, however, that nationals or groups of the ROC are entitled to the same privileges in their countries under treaties, laws and regulations or customary practices of such countries, or mutual protection agreement(s) entered into by and between groups or organizations with the approval of the central competent authority. FTL, *supra* note 52, ch. 7, art. 47.

82. The major monopolies in Taiwan are: railway transport, life insurance, securities, television, sugar, alcohol, tobacco, petroleum, natural gas, fertilizer, salt, flat glass, electric power, and water supply. *See* GAZETTE OF THE FAIR TRADE COMMISSION OF THE ROC, Jan. 1993.

83. The Japanese colonial period began in the Treaty of Shimonoseki in 1895, under which Taiwan and the Pescadores islands were ceded to Japan by the Manchu imperial government. The colonial era ended at the close after Second World War in 1945. LIANG SHIH-CHIU, A NEW PRACTICAL CHINESE-ENGLISH DICTIONARY 1236 (1991).

84. Article 4 of the FTL states the provisions of this Law shall not apply to any act performed by an enterprise in accordance with other laws. The acts of a governmental enterprise, public utility, or communications and transportation enterprise approved by the Executive Yuan shall not be subject to the application of this Law until the elapse of five years after the promulgation of this law.

85. *See Update on Intellectual Property Rights Protection in Taiwan*, E. ASIAN EXECUTIVE REP., June 15, 1987, *available in* LEXIS, World Library, ALLWLD File.

86. *Id.*

87. *Id.*

88. *Id.*

89. FTL, *supra* note 52, ch. 3.

90. *Id.* art. 21.

information about competitors,[91] pyramid marketing schemes,[92] preferential treatment of specific enterprises without adequate and proper reason,[93] coercion, or other improper means to force dealer, distributors, or retailers into business relations,[94] and industrial and commercial espionage.[95]

C. *The Taiwan Enforcement Rule of Fair Trade Law*

According to Article 48 of the FTL, the FTC enacted the Enforcement Rule of Fair Trade Law.[96] It is difficult to assess at this time which provisions of the Fair Trade Law are likely to be modified by the Legislative Yuan. Moreover, in order to implement the Fair Trade Law, the Enforcement Rule of the Fair Trade Law also provides more clarity and objectivity to the requirements of the Fair Trade Law.[97] Consequently, in order to alleviate the FTL's vague provisions and provide useful guidelines to private-sector companies and relevant authorities, the Taiwanese Fair Trade Commission promulgated the Enforcement Rule of the Fair Trade Law on June 24, 1992, which has 32 articles and became effective immediately. Therefore, the FTL and ERFTL together comprise the primary rules governing antitrust law and unfair competition in Taiwan.

Many entrepreneurs worry that compliance with the FTL will increase the cost of operations to businesses. Some even consider the FTL a kind of "martial law" for manufacturing industries.[98] Therefore, besides the ERFTL, several other related regulations also need to be enacted clearly and promptly. For example, there is a need for regulations for setting, determining, and calculating a company's market share. Without defined standards, the company will have no way of knowing in advance whether its market share has reached the threshold established by the FTL.[99] Under this circumstance, the FTC must play a role by supplementing the FTL and

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91. *Id.* art. 22.

92. *Id.* art. 23.

93. *Id.* art. 19.

94. *Id.*

95. *Id. See also Rules of Competition-General*, INVESTING LICENSING & TRADING, Mar. 1, 1989, *available in* LEXIS, World Library, ALLWLD File.

96. FTL, *supra* note 52, ch. 7, art. 48 and Kung Píng Jiau Yih Fa Shih Hsing Hsi Tsê [Enforcement Rules of Fair Trade Law], art. 1 (promulgated on June 24, 1992) [hereinafter ERFTL], *translated in* ENFORCEMENT RULES OF FAIR TRADE LAW (Lee & Li trans.) (on file with the IND. INT'L & COMP. L. REV.) (indicating the FTC, as the promulgator of the FTL, is in charge of the enactment of the ERFTL).

97. Lawrence S. Liu, *Draft Fair Trade Law*, E. ASIAN EXECUTIVE REP., July 15, 1986, *available in* LEXIS, World Library, ALLWLD File.

98. *See 1991's Top 10 Domestic Economic New Events*, BUS. TAIWAN, Dec. 30, 1991, *available in* LEXIS, World Library, ALLWLD File.

99. *See* Osman Tseng, *Understanding the Fair Trade Law*, BUS. TAIWAN, Jan. 27, 1992, *available in* LEXIS, World Library, ALLWLD File.

explaining to the public how to follow the goals of the FTL. Regardless of whether it is desirable or undesirable, the FTL and ERFTL represent a significant legal consideration for anyone seeking to do business in Taiwan.

III. ENFORCEMENT OF THE ANTITRUST LAWS

There are three main ways in which the federal antitrust laws of United States are enforced:[100] criminal and civil enforcement actions brought by the Antitrust Division of the Department of Justice, civil enforcement actions brought by the Federal Trade Commission, and lawsuits brought by private individuals asserting damage claims.[101] As a consequence of the dual jurisdiction of the Department of Justice Antitrust Division and the Federal Trade Commission, there is a potential duplication of effort. Both the Federal Trade Commission and the Justice Department generally attempt to negotiate consent decrees prior to instituting litigation to prevent duplication of activities.[102] However, the cross-agencies' participation often was deemed inefficient to bring antitrust cases to trial.

Unlike the dual agency system of the United States, the ROC established the Fair Trade Commission to enforce all relevant antitrust law cases and uncompetitive practices. Such enforcement power is somewhat limited by the FTC's structure.[103] Although the FTC has sole authority to institute antitrust cases in Taiwan, its actual mandate is limited to the imposition of administrative penalties. Failure to comply with its determination subjecting the perpetrator to higher dollar penalties set forth by other relevant agencies, and ultimately, criminal sanctions are handed down for the most blatant violations.

A. *The Antitrust Division of the U.S. Department of Justice*

The U.S. Congress authorizes the Antitrust Division of the U.S. Department of Justice to initiate criminal and civil prosecutions for violations of the Sherman Act and Clayton Act.[104] The Justice Department, the sole agent enforcing criminal antitrust cases, uses a variety of techniques in the

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100. *See* GENERAL ACCOUNTING OFFICE, JUSTICE DEPARTMENT: CHANGES IN ANTITRUST ENFORCEMENT POLICIES AND ACTIVITIES 10 (Oct. 1990) [hereinafter GAO].

101. Clayton Act § 4, 15 U.S.C § 15 (1994) (Action for Damages) authorizes private individuals who suffer "injury in business or property by reason of anything forbidden in the antitrust laws" to recover damages, including treble and actual damages, court costs, and attorneys' fees. *See also* WARREN F. SCHWARTZ, PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS: AN ECONOMIC CRITIQUE 1 (1981).

102. *See* GAO, *supra* note 100, at 14.

103. FTL, *supra* note 52, ch. 1, art. 9.

104. Thane D. Scott et al., *Antitrust Analysis of Mergers, Acquisitions and Joint Ventures* 149, 158 *in* ANTITRUST UNDER THE CLINTON ADMINISTRATION (Mass. CLE ed. 1993).

investigation and prosecution of criminal antitrust violations under Sections 1 and 2 of the Sherman Act. Meanwhile, the Justice Department in cooperation with the Federal Bureau of Investigation or other relevant investigative agencies and the attorneys of the Justice Department ferret out evidence of antitrust violations. Violators of the FTL are subject to substantial fines and potential incarceration.[105]

Violation of Section 4 of the Sherman Act[106] and Section 15 of the Clayton Act[107] confer jurisdiction on the federal courts and permit the government to institute proceedings in equity to prevent and restrain antitrust violations. Therefore, the Antitrust Division, in the areas of mergers and acquisitions, is authorized to enforce the Sherman and Clayton Acts with the power to institute a civil action. Section 15 of the Clayton Act[108] empowers the Antitrust Division of the Justice Department with numerous enforcement mechanisms, including injunctions, divestiture, and other ancillary equitable relief.[109]

B. *The U.S. Federal Trade Commission*

The Federal Trade Commission, created in 1914, was designed to prevent unfair methods of commercial competition, referred to as "trade busting."[110] The FTC's initial authority was derived from two Congressional acts dating from 1914—the Federal Trade Commission Act and the Clayton Act. Since that time, Congress has expanded its authority by passing additional laws to give the Federal Trade Commission broader power to police unfair methods of commercial competition. However, the Department of Justice Antitrust Division is unable to enforce the Federal Trade Commission Act.[111]

Congress has since passed several additional acts to broaden the Federal Trade Commission's authority in dealing with unfair or deceptive

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105. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?* 54 OHIO ST. L. J. 115, 122-23 (1993).

106. Sherman Act, 15 U.S.C. § 4 (1994).

107. Clayton Act, 15 U.S.C. § 15 (1994).

108. Section 15 of the Clayton Act states: "[t]he several district courts of the United States are invested with jurisdiction to present and restrain violations of this Act, and it shall be the duty of the several United States attorneys . . . to institute proceedings in equity to prevent and restrain such violations. Such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited." *Id.*

109. Scott, *supra* note 104, at 158.

110. The Federal Trade Commission's work is divided up among the Bureaus of Consumer Protection, Competition, and Economics.

111. GELLHORN & KOVACIC, *supra* note 29, at 29.

trade practices, including the Wheeler-Lea Amendment,[112] the Fair Packaging and Labeling Act,[113] and the Equal Credit Opportunity Act.[114]

Furthermore, Congress passed the Magnuson-Moss Act[115] in 1975, providing the Federal Trade Commission with the necessary authority to adopt trade regulation rules defining unfair or deceptive acts in particular industries. Such trade regulation rules have the force of law. However, the Federal Trade Commission is limited in authority and allowed solely to issue "cease and desist" orders.[116] These orders restrain further unlawful action but do not impose civil or criminal penalties. Section 11 of the Clayton Act provides for Federal Trade Commission enforcement of Sections 2, 3, 7, and 8 of the Act. The Federal Trade Commission may enforce the Sherman Act indirectly under Section 5 of the Federal Trade Commission Act.[117]

The Federal Trade Commission has concurrent jurisdiction with the Antitrust Division of the Justice Department to enforce Section 7 of the Clayton Act.[118] According to Section 13(b) of the Federal Trade Commission Act, the Federal Trade Commission is allowed to pursue preliminary relief as well as permanent injunctive relief.[119]

C. *The Taiwan Fair Trade Commission*

The FTL is administered by the Fair Trade Commission which was established by the Executive Yuan.[120] The FTC, an independent agency[121] with quasi-judicial authority under Article 25 of the FTL, plays a major role in the enforcement of the FTL. In the context of the Fair Trade Law, the FTC is empowered to investigate possible violations[122] and impose administrative sanctions.[123] The FTC may issue executive decrees ordering

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112. 15 U.S.C. §§ 41 (FTC Established), 44-45 (Terms Defined and Unfair Methods of Competition and Unfair or Deceptive Acts or Practices), 52-58 (1994).

113. 15 U.S.C. §§ 1451-61 (1994).

114. 15 U.S.C. § 1691 (1994).

115. 15 U.S.C. § 2301 (1994).

116. U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, ANTITRUST FOR SMALL BUSINESS 9 (1985).

117. Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 239-40 (1980).

118. Clayton Act, 15 U.S.C. § 7 (1994).

119. Federal Trade Commission Act, 15 U.S.C. § 13(b) (1994).

120. FTL, *supra* note 52, ch. 4, art. 25.

121. Article 28 of the FTL declares that the FTC operate independently subject to the FTL and relevant regulations and gives authority to the FTC to issue administrative orders. *Id.* art. 28.

122. *Id.* art. 26.

123. According to Chapter Six (Penalties and Regulations) of the FTL, the Fair Trade Commission penalized 71 local businesses for violations of the Fair Trade Law during the first three quarters of 1993. Violations included, inter alia, false or misleading advertising claims,

violators of the Fair Trade Law to correct unlawful activities or issue a fine[124] and then, if necessary, will refer the case to the courts for compulsory execution.[125]

Under this provision, an enterprise engaged in monopolistic or unfair competitive practices will first be served with an administrative order to cease and desist the infractions. If the violations persist, the FTC may then impose administrative fines not exceeding one million New Taiwanese Dollars (NT) (approximately U.S. $ 39,000) until the violating act is corrected or halted.[126] The responsible parties may be taken to court by the FTC if they refuse to comply with the executive orders and face a maximum of three years imprisonment.[127] In the meantime, the enterprise and responsible parties may face maximum fines of NT $ 1 million.[128]

Unlike the Federal Trade Commission[129] and the Department of Justice Antitrust Division of the United States,[130] which has 200 attorneys reporting to the attorney general and utilizes a large number of attorneys and experts to deal with antitrust matters, the Fair Trade Commission of Taiwan thus far employs 120 workers. Almost all of the workers in Taiwan were transferred from the former Supervisory Board of Commodity Prices of the Ministry of

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pyramid schemes, price fixing, and attempted mergers without prior permission. *Fair Trade Commission Finally Acts*, CHINA ECON. NEWS SERVICE, Oct. 21, 1993, *available in* LEXIS, World Library, ALLWLD File.

124. See, for example, Article 41 of the FTL states:

> [w]here an enterprise violates the provisions of this Law, the FTC may order the said enterprise to discontinue its act or set a time limit for it to take corrective action. In the event the enterprise fails to discontinue its act or to take corrective action within the given time limit after having been ordered to do so, the FTC may continue to give orders and, in addition thereto, the said enterprise shall be punished successively by a fine of not exceeding one million New Taiwan dollars until its violating act is discounted or corrected.

FTL, *supra* note 52, ch. 6, art. 41.

125. *Id.* art. 44.

126. *Id.*

127. *Id.* art. 35.

128. Article 38 of the FTL states:

> [i]n the event that the violator referred to in any of the three preceding Articles [meaning an act violates articles 10, 14, 19, 20, 22, or 23(1) of the FTL], is a legal person, in addition to the punishment to be imposed upon the person committing the act, the said legal person shall be subject to the fine specified in the respective Article.

Id. art. 38.

129. The Federal Trade Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. Currently, the Federal Trade Commission has 200 attorneys, 75 economic experts, and 200 consumer protect works.

130. The Department of Justice Antitrust Division has 200 attorneys who report to the U.S. Attorney General.

Economic Affairs.[131] By and large, these workers lack the specialization and experience required for complex antitrust investigations. The FTC utilizes a civil service organization made up of persons who passed a public examination held by the Examination Yuan. Merely passing a civil service examination is not indicative of a person's ability to master a complex area such as antitrust law.

Consequently, these individuals must learn as they go, which lessens the effectiveness of the FTC. Therefore, in order to compensate for the lack of specialization and experience, the Organic Statute of the Fair Trade Commission provides that the FTC may, if necessary, invite scholars and experts to work as advisors or consultative members.[132]

Further complicating the efficient administration of the FTC are the vagueness and ambiguity inherent in the language of the FTL. Many ill-defined phrases such as "improperly determining"[133] and "without proper reason"[134] are so vague that they could be arbitrarily invoked by the FTL's enforcement authorities to either prosecute businesses or overlook anticompetitive practices. Present efforts at establishing enforcement rules are far from satisfactory. The FTC must therefore resolve these problems by setting and implementing clear enforcement rules which are still in the drafting process.

IV. EXEMPTIONS FROM THE ANTITRUST LAWS

Because the United States and Taiwan have differing economic policies and political needs, their antitrust law exemptions tend to differ.[135] Since 1914, the U.S. Congress' focus has been on writing exceptions to the Sherman Act's coverage and other American antitrust statutes. This has led to the isolation of several industries and activities from the reach of U.S. antitrust laws.[136]

Similarly, the Fair Trade Law of Taiwan allows for legal patent, trademark, and copyright monopolies, as long as they are granted by the government and operated in accordance with the Trademark Law, Copyright Law, and Patent Law of Taiwan.[137] For the first five years after the

131. Organic Statute of the Fair Trade Commission, art. 21, Jan. 13, 1992.

132. *Id.* art. 22.

133. *See, e.g.*, FTL, *supra* note 52, ch. 2, art. 10(1)(2).

134. *See, e.g.*, *id.* art. 15(2).

135. *See* Thomas E. Kauper, *The Treatment of Cartel under the Antitrust Laws of the United States*, *in* INTERNATIONAL HARMONIZATION OF COMPETITION LAWS 75, 90 (Chia-Jui Cheng, Lawrence S. Liu & Chih-Kang Wang eds., 1995).

136. For example, public utilities, broadcasters, common carriers, banking and financial enterprises, as well as professional baseball organizations, have been held largely exempt from antitrust laws.

137. Hsu, *supra* note 6, at 377.

enactment of the Fair Trade Law, the government has also allowed for exemptions of certain public utilities,[138] government-owned enterprises, transportation enterprises, and acts approved by the Executive Yuan.[139]

A. *Relevant U.S. Regulations*

Several statutory exemptions found in the Sherman Act, the Clayton Act, and the Federal Trade Commission Act protect certain categories of business behavior from antitrust liability. To enforce these Acts, the Supreme Court now requires that antitrust plaintiffs satisfy two prongs in order to recover damages: first, the injury must have resulted from the alleged antitrust violation, and second, it must be shown that the injury was one which the antitrust laws are intended to prevent.[140]

Restraints on trade are shielded by the so-called state action exemption as long as: (1) state policy plainly requires it, and (2) the action is actively supervised by the state.[141] Moreover, this state action doctrine appears to cover permissive conduct as well as conduct compelled by state policy.[142] The state exemption will be applied even if it is the product of an anticompetitive conspiracy and not in the public interest, and even if it involves bribery of a public official.[143] Such conduct, however, violates the Supremacy Clause[144] of the United States Constitution.[145]

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138. Such exemptions apply to electric utilities, the post office, mining enterprises, insurance companies, and certain tobacco enterprises.

139. Article 46(2) of the FTL states: "[t]he acts of a government enterprise, public utility or communications and transportation enterprises approved by the Executive Yuan shall not be subject to the application of this Law until the lapse of five years after the promulgation of this Law." FTL, *supra* note 52, ch. 7, art. 46.

140. *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (holding for the defendant and stating the plaintiff failed to prove "antitrust injury, which is to say injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendant's act unlawful").

141. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

142. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

143. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991). *See also* Robert M. Buchanan, *Antitrust Overview*, *in* ANTITRUST UNDER THE CLINTON ADMINISTRATION 1, 24-25 (Mass. CLE ed. 1993).

144. Article VI of the U.S. Constitution declares that all laws made in pursuance of the Constitution and all treaties made under the authority of the United States shall be the "supreme law of the land" and shall enjoy legal superiority over any conflicting provision of a State constitution or law. BLACK'S LAW DICTIONARY 1004 (6th ed. 1991).

145. *See, e.g.*, Schwegmann Bros v. Calvert Distillers Corp., 341 U.S. 384 (1951); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980).

The business of insurance is expressly exempted from the Sherman and Clayton Acts by the McCarran-Ferguson Insurance Regulation Act.[146] But the scope of this Act only reaches the aspects of the business which are regulated by state law. Whether or not activities are considered business of insurance activities under this exemption has recently been addressed by the Court, and the application has been increasingly narrowed.[147] Even when activities fall under the business of insurance, if it involves boycotts or intimidation aimed at policy holders or competitors, it is not protected by the McCarran-Ferguson Act.[148]

The Webb-Pomerene Export Trade Act of 1918 (Webb-Pomerene Act)[149] limits "antitrust exemption for the formation and operation of associations of otherwise competing businesses to engage in collective export sales."[150] In contrast to the 1982 Export Trading Company Act (ETC Act),[151] the Webb-Pomerene Act cannot be applied to the export of services, including intellectual property rights licensing.[152]

Many activities have been placed beyond the scope of the antitrust laws by the U.S. Congress. Partial exemptions (statutory and judicial) from antitrust liability are granted to labor union activities[153] and cooperative agricultural activities.[154] Additionally, limited liability is sometimes available for joint research and development[155] ventures and joint production ventures.[156] Additionally, these exemptions are applied to banking, public

146. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013 (1994).

147. Buchanan, *supra* note 143.

148. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

149. Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1982), is administrated by the Federal Trade Commission. The Act provides a qualified exemption for an export association from the prohibitions of the antitrust laws.

150. *See* U.S. DEP'T OF JUSTICE, *supra* note 51, at 4. The exemption of the Webb-Pomerene Act applies only to the export of goods, wares, or merchandise.

151. Exports Trading Company Act of 1982, 15 U.S.C. §§ 4001-4003, 4011-4021 (1994) [hereinafter ETC].

152. The purpose of the ETC Act is to increase U.S. exports of goods and services by enacting more efficient provisions of export trade service to U.S. producers and suppliers.

153. Clayton Act §§ 6, 20, 15 U.S.C. §§ 17, 52 (1994) (Exemption of Labor, Agricultural, and Horticultural Organizational and Injunctions in Labor Disputes).

154. The Capper-Volstead Act, 7 U.S.C. §§ 291-292 (1994), provides a limited antitrust exemption for price fixing and other joint marketing activities of farm cooperatives. However, the Supreme Court has added the further requirement that to qualify for the exemption, the challenged joint action must be reasonably related to bona fide collective marketing efforts and must not consist of predatory or anticompetitive practices extending beyond the legitimate needs of collective marketing. *See* United States v. Borden, 308 U.S. 188 (1939) and Maryland & Virginia Milk Prod. Assoc. v. United States, 362 U.S. 458 (1960).

155. The National Cooperative Research Act of 1984 (NCRA), 15 U.S.C. §§ 4301-4305 (Supp. II 1984), clarifies substantive application of the U.S. antitrust laws to joint research and development activities.

156. *See* U.S. DEP'T OF JUSTICE, *supra* note 51, at 25-26.

utilities, the Newspaper Preservation Act of 1970,[157] export joint ventures, health care, organized baseball,[158] professional sport television contracts,[159] and intellectual property.

B. *The Exemption under the Taiwan Fair Trade Law §§ 45-46*

The Fair Trade Law represents a form of an "Economic Constitution" for Taiwan, which includes not only traditional anti-trust provisions, but also specific regulations governing intellectual property rights.[160] Consequently, in addition to the exemption of patents from the FTL,[161] Article 46(1) of the FTL also exempts activities otherwise in violation of the FTL if they are authorized by law, which literally means statutes enacted by the Legislative Yuan.[162] The FTL offers no clear guidance as to what other regulated activities will be exempt from the FTL. A structural problem arises in the application of the FTL which reflects the cultural preference of the Taiwanese to avoid purely legal, rule-driven remedies. Given the lack of clear standards in the drafting of the FTL, conflicts regarding unfair competition or practices in restraint of trade are often resolved by the use of

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157. 15 U.S.C. §§ 1801-1804 (1994).

158. Professional baseball is at least partially exempt from the antitrust laws by *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, Inc.*, 259 U.S. 200 (1922). *See also* Buchanan, *supra* note 143, at 26. However, this exemption has been recently criticized in the 1994 baseball strike and two recent decisions: *Piazza v. Major League Baseball Clubs*, 831 F. Supp. 420 (E.D. Pa. 1993) and *Butterworth v. National League of Professional Baseball Clubs*, 644 So.2d 1021 (Fla. 1994). This latter case ruled that baseball's exemption was an invalid defense to suits challenging Major League Baseball's decision.

159. Sport Broadcasting Act of 1961, 15 U.S.C §§ 1291-1294 (1988) (indicating professional sports leagues could choose the sponsored television broadcasts of their sports games without violating antitrust laws). *See* Kathleen L. Turland, *Major League Baseball and Antitrust: Bottom of the Ninth, Bases Loaded, Two Outs, Full Count and Congress Takes a Swing*, 45 SYRACUSE L. REV. 1329, 1350-51 (1995).

160. A critical theme in the background of the enactment of Article 45 of the FTL was the goal of avoiding being pressured into changing the Patent Law in order to protect the foreign intellectual property rights of trading partners, in particular the United States, while respecting the decision to maintain the existing Patent Law as drafted by the Legislative Yuan.

It has been suggested that the combination of anti-trust and intellectual property regulations in the Fair Trade Law are a result of the Executive Yuan's desire to comply with western pressure for more rigorous intellectual property protection while avoiding the political cost of being seen to "knuckle under" to American business interests. Consequently, parallel provisions governing, for example, patent law appears in both the Fair Trade Law and the Patent Law.

161. "The provisions of the Law shall not apply to the proper exercise of the right(s) under the Copyright Law, Trademark Law, or Patent Law." FTL, *supra* note 52, ch. 7, art. 45.

162. Article 46(1) of Fair Trade Law states: [t]he provisions of the law shall not apply to any act performed by an enterprise in accordance with other laws. *Id.* art. 46(1).

administrative guidance or moral suasion,[163] which are informal compromises proposed by judges or by the relevant authority under the FTC, before the controversy reaches the formal adjudicative stage. As a result, many practices, which arguably are themselves violative of the FTL, are tolerated as acceptable trade customs. This has the obvious effect of limiting commercial certainty as to acceptable business practices.[164]

Article 46(2) of the FTL provides exemptions for activities of public utilities,[165] government-owned enterprises, and transportation enterprises upon approval of the Executive Yuan for a maximum of five years. This exemption for government enterprises is seen by the private sector as particularly controversial because it effectively creates an uneven playing field for public and privately owned enterprises. Moreover, exemptions for public utilities and transportation enterprises also overlap in part with the exemption under Article 46(1) of the FTL, further complicating the interpretation of these exemptions.[166]

V. MONOPOLIES AND OLIGOPOLIES

A monopoly provides peculiar advantage to individuals or companies.[167] This privilege consists of the exclusive power to operate in a particular business or time, including the production and sale of particular commodities.

By contrast, a perfectly competitive market is one which has numerous sellers, each of whose participation is so small that individual sellers perceive themselves as being unable to affect the product's price. Firms in perfectly competitive markets are "efficient," producing goods at the lowest cost possible ("productive efficiency") while providing society with the total amount of goods in question that it desires ("allocative efficiency").[168]

A monopoly enterprise is able not only to create barriers restricting the entry of potential competitors, but may also restrict output thereby raising

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163. Liu, *supra* note 72, at 148.

164. *Id.*

165. Article 144 of the ROC Constitution states that "[p]ublic utilities and other enterprises of a monopolistic nature shall, in principle, be under public operation."

166. Liu, *supra* note 97.

167. There are three different approaches to measuring market power (or "monopoly power"): performance, determining how much a firm's prices depart from its marginal cost, or the amount that a firm's net profits exceed the industry average; rivalry, focusing on the sensitivity of the firm's sales or output to changes in its rivals' sales and prices; and structure, counting the number of firms within a market and comparing the sales volume controlled by each firm and taking into account entry barriers and product differentiation among other concerns.

168. Lande, *supra* note 31 (addressing that market competition increases economic efficiency).

prices above competitive levels to the detriment of its customers. Professor Robert H. Lande recognizes that a monopolized market will result in a market having no incentive to be innovative, to produce efficiently, and to allocate resources efficiently. With no prospect of elastic response in a monopolistic market, wealth transfers into the hands of the monopolist, producing few social benefits and perpetuating defective competition.[169] Therefore, except for certain legal monopolies[170] and natural monopolies,[171] all monopolies are prohibited under the relevant national statutes.

An oligopoly is defined as a market in which there are a few producers which do not engage in price competition among themselves.[172] The pricing decisions of each member is interdependent with those of its competitors. Economics postulate that if a high percentage of sales volume, employment, or value added is concentrated in a select group of entities in an identified industry, rivals will behave more like a monopolist than a competitor. Professor Lande assumes that on the average, few firms providing essentially the same goods or services will price their output at competitive levels, or at monopoly level, but will tend to fall in between the two polar levels.[173]

Nevertheless, U.S. antitrust laws fail to deal explicitly with oligopolies. They concentrate instead on monopolies.[174] For example, monopolies are prohibited by Section 2 of the Sherman Antitrust Act, which provides that no

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169. *Id.* at 432-40.

170. Legal monopoly refers to an exclusive right granted by a governmental unit to business to provide such services as electric and telephone service. The rates and services of such utilities are in turn regulated by the government. BLACK'S LAW DICTIONARY 696 (6th ed. 1991).

171. A "natural monopoly" results where one firm of efficient size can produce all or more than the market can take at a remunerative price. One which is created from circumstances over which the monopolist has no power. For example, a market for a particular product may be so limited that it is impossible to profitably produce such product except by a single plant large enough to supply the whole demand. *Id.* at 696-97.

172. In an oligopoly economic conditions exist whereby only a few companies sell substantially similar or standardized products. Oligopoly markets often exhibit the lack of competition, high prices, and low output of monopoly markets. *See id.* at 750. *See also* Michael L. Freedman, Note, *Predatory Pricing After Brook Group: Economic Goals Prevail*, 58 ALB. L. REV. 243, 250 n.69 (1994).

173. This reflects the difficulty of attempting to maintain a fixed percentage conception of the term "oligopoly." For example, if four top firms representing 55 percent of the market share or cooperate to the detriment of their competitors, this may represent an oligopoly, while eight firms controlling 70 percent of a similar market absent such agreement may not be deemed oligopolistic. Lande, *supra* note 23 (lecture from March 14, 1994).

174. Frederick M. Rowe, *The Delusions of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L. J. 1511, 1524-29 (1984) (describing the U.S. Supreme Court's use of the Oligopoly Model for a decision).

person shall monopolize, attempt to monopolize, or combine or conspire to monopolize any part of interstate or international commerce.[175]

The FTL prohibits a monopolistic enterprise from unfairly excluding others from the market, unjustifiably maintaining or modifying prices, or unjustifiably requesting favored treatment.[176] The mere possession of monopolistic power, however, is not in and of itself objectionable. Both predatory and monopolistic pricing may, conceivably, constitute a prohibited act under the FTL. Unlike the U.S. antitrust laws, which take a pragmatic approach using a variety of reasonable theories, principles, and market share statistics to assess monopoly cases, the FTL utilizes the simple percentage of an enterprise's market share and relevant regulations and guidelines to assess monopoly cases.[177]

A. *The Sherman Act § 2*

The U.S. offense of unlawful monopolization under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market (relevant product and geographic market); and (2) willful acquisition or maintenance of that power through anticompetitive or predatory acts (monopoly power creation and conduct), as opposed to growth or development as a consequence of superior product, business acumen, or "historic accident."[178] The offense of unlawful attempt to monopolize has three elements: (1) a specific intent to monopolize; (2) the use of anticompetitive or predatory means to that end; and (3) a dangerous probability of recoupment that the attempt will succeed.[179]

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175. Sherman Act § 2, 15 U.S.C. § 2 (1994) (discussing monopolization, attempted monopolization, and conspiracies to monopolize).

176. Article 10 of the FTL states:

> [a] monopolistic enterprise shall not engage in any of the following acts:
>
> 1. using unfair methods directly or indirectly to prevent other enterprises from taking part in competition;
> 2. improperly determining, maintaining or changing the prices of goods or the remuneration for services;
> 3. without proper reason, causing a trading counterpart to provide preferential treatment; or
> 4. conducting other acts by abusing its market standing.
>
> The names of monopolistic enterprises shall be periodically announced to the public by the central competent authority.

FTL, *supra* note 52, ch. 2, art. 10.

177. ERFTL, *supra* note 96, arts. 4 and 5 (indicating the approaches to determine the percentage of market share as monopoly) (on file with the IND. INT'L & COMP. L. REV.).

178. United States v. Grinnell Corp., 348 U.S. 563, 570-71 (1966).

179. Lande, *supra* note 23.

If it appears to the Department of Justice that there is a danger of achieving or sustaining monopoly power,[180] then it will not inquire further but rather will refer the case for adjudication. In assessing the probability of monopolization, the Department of Justice considers the market share of the firm, concentration in the market, and the probability that new competitors would enter the market in response to an anticompetitive price increase.[181] On the other hand, if the conduct only makes sense if it results in a monopoly with consequent monopoly profits, it is prohibited conduct.[182] However, if a proper motive for the conduct can be shown, it will not violate the Sherman Act.[183]

The Sherman Act outlaws all contracts, combinations, and conspiracies that unreasonably restrain interstate trade, including agreements among competitors to fix prices, rig bids, and allocate customers. The Sherman Act also makes it a crime to monopolize any part of interstate commerce. An unlawful monopoly exists when only one firm provides a product or service, and it has become the sole supplier not through the lack of other suppliers, but by suppressing competition through anticompetitive conduct.

B. *The Taiwan Fair Trade Law §§ 5, 10*

Similarly, the primary concern of the FTL of Taiwan is monopolies and attempts to monopolize. According to the definition of "monopoly" under Article 5 of the FTL,[184] a monopoly clearly includes two forms: classical monopoly[185] and oligopoly.[186] Under the FTL, the term monopoly refers to a condition where an enterprise faces no competition or has an overwhelming position enabling it to exclude other competitors in a

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180. United States v. E.I. Du Pont De Nemours & Co., 351 U.S. 377 (1956).

181. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

182. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (Unlawful exclusionary practices gave rise to monopoly position for Alcoa.)

183. Lande, *supra* note 23 (lecture from Feb. 7, 1994).

184. Article 5 of the FTL states:

> [t]he term 'monopoly' as used herein refers to a condition wherein an enterprise faces no competition or has an overwhelming position to enable it to exclude other competitions in a particular market.
>
> When two or more enterprises do not in fact compete with each other in pricing and their relations as a whole with other entities are such as specified in the preceding paragraph, such situation shall be deemed a monopoly.
>
> The term 'particular market' as used in the first paragraph of this Article refers to a geographic area or a sector wherein enterprises engage in competition in respect to a particular commodity or service.

FTL, *supra* note 52, ch. 1, art. 5.

185. *Id.* art. 5(1).

186. *Id.* art. 5(2).

particular market.[187] An oligopoly occurs when two or more enterprises do not, in fact, compete with each other in pricing and in their relations as a whole.[188] Under the policy expressed in the FTL, oligoplistic firms will be treated as if they were monopolies.[189]

The FTL requires the FTC to annually review data submitted to it by companies and publish a list of companies that meet the criteria of a monopoly, even if no legal action is pending against the firm.[190] In addition, the FTL must publish a list of companies that hold a one-fifth market share.[191] Both lists are to be issued each February.

The FTL defines a monopoly as a condition under which an enterprise[192] does not face competition or has such superior market power as to exclude competition in a particular market.[193] In defining a market, the FTL considers both the relevant product or service market and the relevant geographical market. This represents a functional definition on the part of the FTL in order to determine market power.

The Enforcement Rules of Fair Trade Law set forth guidance to this determination of market power. Under Article 4 of the ERFTL, a company may be investigated as a potential monopoly if it reaches fifty percent of a particular market share, with total sales in that market segment from the preceding fiscal year totalling more than $40 million.[194] If the business in question fails to satisfy both prongs of this test, it will not be deemed to be a monopoly.[195]

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187. *Id.* art. 5.

188. *Id.* art. 5(2).

189. *Id.*

190. *Id.* ch. 2, art. 10(2).

191. *Id.* art. 11(2).

192. Under Article 2 of the FTL, the enterprise refers to (1) a company; (2) an industrial or commercial firm owned by a sole owner or in the form of a partnership; (3) a trade association; or (4) any other person or organizations engaged in transactions by providing goods or services. *Id.* ch. 1, art. 2.

193. The Fair Trade Law further exempts from its provisions certain public utilities, government-owned enterprises, transportation enterprises, and other acts approved by the Executive Yuan. A "sunset clause" was included in Article 46(2) of the FTL by the Legislative Yuan exempting such state-owned enterprises from the effect of the FTL for a period of five years. There is also a provision that state-owned enterprises may be granted further exemptions from the FTL for five years after this statute is promulgated.

194. Unless otherwise indicated, all amounts listed are calculated in U.S. dollars, rather than New Taiwanese dollars (NT) at a rate of US$ 1 = NT$ 27.50, as of April 2, 1997 (Source: The Central Bank of China).

195. *See Taiwan's Fair Trade Commission Approves Monopoly, Merger Rules*, 9 Special Correspondent (BNA) No. 536 (Mar. 25, 1992), *available in* LEXIS, World Library, ALLWLD File.

In addition, the rules apply when several companies dominate a particular market.[196] If two or three companies enjoy a two-thirds share; or four or five companies dominate three-fourths of the market with each enterprise individually enjoying one-tenth market share; or each such enterprise's total sales in the preceding fiscal year was more than forty million U.S. dollars in sales,[197] the FTC could list those firms as monopolies.[198]

Moreover, Article 10 of the FTL addresses classical monopolies and oligopolies.[199] Basically, it does not prohibit all monopolies and oligopolies, unless such enterprises use unfair methods or acts to prevent other companies from competing. These include using unfair methods either directly or indirectly to prevent other enterprises from taking part in competition; improperly determining, maintaining, or fixing the prices of goods or the remuneration for services without proper reason; causing a trading counterpart to provide preferential treatment; or conducting other acts by abusing its market standing.[200]

The FTL provides its own unique definition of an oligopoly.[201] In theory, an oligopoly means a market that is not diverse, yet has more than a single enterprise, and in which the sellers in question perceive their pricing decisions as being interdependent with those of their competitors.[202] This reflects the concern of the Taiwanese government that converts anticompetitive acts have frequently been engaged in by many enterprises.

Merely possessing monopoly power is not objectionable per se under Article 10 of the FTL. Nevertheless, the FTL prohibits such monopolistic or oligopolistic businesses from unfairly excluding others from the market, maintaining or modifying prices without commercial justification, requesting favored treatment from the government without just cause, and engaging in similar activities that constitute an abuse of dominant market position.[203]

Although an entity may meet all of the requirements mentioned above, such an entity shall not be considered a monopolistic enterprise if each of the enterprises individually enjoys a market share that is less than one-tenth of

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196. Due to the lack of sound, basic theory and methods however the real problem remains the definition of a market. The FTC is reportedly working on the problem of defining the various markets, but much of what the FTC will do will be based on a combination of regulations and internal rulings.

197. ERFTL, *supra* note 96, art. 4.

198. *Id.*

199. FTL, *supra* note 52, ch. 2, art. 10.

200. *Id.*

201. FTL, *supra* note 52, ch. 1, art. 5(2).

202. *See* Eleanor M. Fox, *The Future if the Per Se Rule: Two Visions at War with One Another*, 29 WASHBURN L. J. 200, 201 (1990).

203. Lawrence S. Liu, *Fair Trade Law and New Policy on Competition*, 13 E. ASIAN EXECUTIVE REP. 9 (Mar. 15, 1991), *available in* LEXIS, World Library, ALLWLD File.

total market share or if each such enterprise's total sales in the preceding fiscal year was less than about forty million U.S. dollars.[204]

If the establishment of one enterprise or the entry into the particular goods or services market is restricted subject to laws and regulations, technology, or other conditions which may impede competition, all such enterprises will not be deemed a monopolistic under Article 4(3) of the ERFTL.[205]

The issue of the monopoly of the FTL is not whether a company dominates any given market, but rather whether that company dominates the market because of illegal actions or unfair trade practices.[206] The purpose of the law is not to do away with monopolies but to make sure that fair competition is maintained.[207]

VI. MERGERS AND ACQUISITIONS

In addition to issues regarding monopolies, merger actions also raise general anticompetition policy questions concerning market concentration arrangements.[208] Therefore, it is important to observe the measures by which firms integrate their operations, usually through the purchase of another corporations' stocks or assets.[209]

U.S. antitrust laws classify merger transactions into three categories: horizontal, vertical, and conglomerate.[210] Horizontal mergers occur when a firm, in an attempt to limit competition, acquires another firm that produces and sells an identical or similar product in the same geographic area.[211] Vertical mergers, on the other hand, occur when one firm acquires either a customer or supplier from another.[212] All other acquisitions are

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204. ERFTL, *supra* note 96, art. 4.

205. Article 4(3) of ERFTL states that "[t]he central competent authority may find a business which, under the preceding two paragraphs should not be deemed a monopoly, nevertheless to constitute a monopolistic enterprise if the establishment of such enterprise is restricted by law and regulations, technology or other conditions that may impede competition." *Id.* art. 4(3).

206. *See* FAIR TRADE COMM'N OF THE ROC, *supra* note 68, at 11.

207. *Id.*

208. Wesley A. Cann, Jr., *The New Merger Guidelines--Is the Department of Justice Enforcing the Law?* 21 AM. B.L. J. 1, 33 (1983).

209. Antitrust law uses the terms merger and acquisition interchangeably to denote all methods by which firms legally unify ownership of assets formerly subject to separate control.

210. Cann, *supra* note 208, at 4.

211. United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y.) (stating an increase in concentration of an oligopolistic industry constitutes a substantial lessening of competition or tendency to monopolize).

212. Brown Shoe Co. v. United States, 370 U.S. 294 (1962). *Brown* involves a vertical merger between two shoe companies, where one was a manufacturer, supplying the other a small amount of its shoes. Even though the foreclosure was small, it was the largest possible

viewed as conglomerate mergers. These include transactions which are purely conglomerate in which the merging entities have no economic relationships;[213] geographic extension mergers in which the purchasers produce the same commodities as the acquired company but in a different geographic market;[214] and product extension mergers in which a corporation producing one product buys a company whose products are different but require the application of similar manufacturing or marketing techniques.[215] Consequently, each merger transaction contains factors that contain unique anti-competitive aspects.

Sections 7 and 7A of the Clayton Act [216] and the Hart-Scott-Rodino Antitrust Improvement Act of 1976[217] are the major statutes to enforce anticompetitive mergers, along with the merger guidelines issued jointly by the Department of Commerce and the Justice Department,[218] and the Securities Exchange Commission regarding anticompetitive mergers and acquisitions.

Article 6 of the Fair Trade Law broadly defines "combination" to include mergers or acquisitions of more than one firm. In order to prevent the occurrence of potential monopolies, the FTL authorizes the FTC to review a merger, acquisition, and similar forms of economic integration by requiring pre-merger notification and approval.[219] Similarly, when any type of combination is proposed, prior notice and approval of the FTC is required.[220] Failure to obtain the FTC's prior approval may result in divestiture, compulsory divestment of assets, termination of business, and fines.[221]

This analysis is clouded, however, by the continued reliance on the simple percentage market share of an enterprise to assess merger and acquisitions cases.[222] Moreover, Taiwan's policy to increase competitiveness

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within the context of this industry. Neither corporation was small or failing, and past conduct demonstrated that Brown would force the acquired entity to purchase its products.

213. For example, where a steel producer buys a petroleum refiner.

214. For example, where a baker in Atlanta purchases a bakery in Honolulu.

215. For example, where a producer of household detergents buys a producer of liquid bleach.

216. Clayton Act, 15 U.S.C. §§ 7, 7A (1994).

217. Clayton Act, 15 U.S.C. § 18a (1994).

218. *Horizontal Merger Guideline of Department of Justice and Federal Trade Commission*, 62 Antitrust & Trade Reg. Rep. Sp'l Supp't. (BNA) No. 1559 (Apr. 2, 1992); *see also infra* notes 230-31 and accompanying text analyzing the 1992 Horizontal Merger Guidelines.

219. FTL, *supra* note 52, ch. 1, art. 6(1).

220. *Id.* art. 6(2)-(5).

221. *Id.* ch. 2, art. 13.

222. *Id.* art. 11.

encourages merger by tax incentive. The result is commercial uncertainty for Taiwanese enterprises which contemplate such actions.

A. *The Clayton Act § 7*

In 1950, Congress amended Section 7 of the Clayton Act, by enacting the Celler-Kefauver Act. This led to the prohibition of certain business acquisitions of other businesses, whether by way of stock or purchase of assets.[223] The reach of Celler-Kefauver Act extends to transactions which may lessen competition[224] or tend to create a monopoly but do not run afoul of Section 7 and are not illegal under the Sherman Act. Thus, Section 7 of the Clayton Act limits the acquisitions of a competitor which easily creates anti-competitive effects.[225]

If a merger creates a new firm having an undue percentage share of the relevant market, resulting in a significant increase in the concentration of firms in that market segment,[226] then that merger is deemed inherently likely

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223. Section 7 of the Clayton Act states:

> [n]o person engaged in commerce or in activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

224. United States v. General Dynamics Corp., 415 U.S. 486 (1974) (The Court allowed a coal company merger despite the high market share number (31.1% + 21.8%) because of other factors, making the coal less important. Because coal is sold in long-term contracts, the actual numbers are less important.)

225. Brown Shoe Co. v. United States, 370 U.S. 294 (1962). This case is not only noteworthy as the first merger case, but it also held that the Clayton Act protects competition, not competitors.

226. The Antitrust Division of the Department of Justice adopted Herfindahl-Hirschman Index [hereinafter HHI] (also called the "H index") to evaluate market concentration in the merger context. According to 1984 Merger Guideline § 3.1,

> the Antitrust Division divides the spectrum of market concentration as measured by the HHI (ranging from near zero in an atomistic market to 10,000 in the case of a pure monopoly) into three regions that can be broadly characterized as unconcentrated (post-merger HHI below 1000), moderately concentrated (post-merger HHI between 1000 and 1800), and highly concentrated (post-merger HHI above 1800).

See U.S. Dep't of Justice 1984 Merger Guidelines, *supra* note 33, at 20.

Under this system, individual market shares (expressed in decimals-for example, a 50% share expressed as .50) are squared (.50 x .50=.25) and the sum of the squared market shares of every firm in the industry equals the H index. A pure monopoly would have an H index of 1.0.

It will not challenge a merger that would result in an HHI of less than 1000

to substantially lessen competition.[227] Therefore, it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[228]

A rule of reason analysis is employed on a case specific basis to consider factors relevant to merger conduct, such as entry barriers, the power buyer factor, trends toward market concentration, homogeneousness of products, increase in the likelihood of collusion, adverse effects on competition, and efficiency defense.[229] Moreover, under the Clayton Act, the Federal Trade Commission has jurisdiction over both corporate mergers and acquisitions. The Bureau of Competition, the antitrust wing of the Federal Trade Commission, also reviews proposed corporate mergers and acquisitions of a corporation's stock or assets to determine if the merger would substantially lessen competition or tends to create a monopoly.

B. *The 1992 Horizontal Merger Guidelines*[230]

The Horizontal Merger Guidelines (Merger Guidelines) promulgated in 1992 by the Department of Justice and Federal Trade Commission have been updated to restate the policies on enforcement of horizontal mergers and acquisitions which were previously found in Section 7 of Clayton Act, Section 1 of the Sherman Act, and Section 5 of the Federal Trade Commissions Act. The policies reflect the view that strict oversight and enforcement of merger rules is essential to the continued vitality of the free market system and to the competitive position of American firms and their consumers. Enforcing merger rules, therefore, requires a balancing of the need to prevent anticompetitive mergers and to avoid deterring routine competitive or competitively neutral mergers.

When considering whether consumers or producers would be likely to undertake specific actions, reflecting on the economic incentive of the actor

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> because the structure of the market itself indicates that the successful exercise of market power by one or more firms is unlikely. Also, it will not challenge a merger that would result in moderate concentration if the level of concentration would increase by 100 HHI points or less, or a merger that would result in high concentration if the level of concentration would increase by 50 HHI points or less.

U.S. DEP'T OF JUSTICE, *supra* note 51, at 12; *See* Charles R. Laine, *The Herfindhl-Hirschman Index: a Concentration measure taking the Consumer's Point of View*, 40 ANTITRUST BULL. 423-32 (1995) (discussing how law enforcement agencies applied the HHI to determinate concentration rate).

227. Pitofsky, *supra* note 30, at 819.

228. *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

229. Lande, *supra* note 23, (lecture from Mar. 14, 1994).

230. *See Horizontal Merger Guideline of Department of Justice and Federal Trade Commission*, *supra* note 218.

is an important consideration throughout the Merger Guidelines. The focus, therefore, is on "economic profits" rather than accounting profits. Economic profits are defined as the excess of revenues over costs, where the costs include the opportunity cost of invested capital.[231]

C. *The Clayton Act § 7A (Hart-Scott-Rodino Antitrust Improvement Act)*

In 1976, Article 7A of the Clayton Act was amended by the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (H-S-R Act).[232] The H-S-R Act requires both parties to a merger or acquisition (or the acquiring party in the case of a tender offer) to file premerger notification of the transaction with the Federal Trade Commission and the Antitrust Division. Thus, the primary aim of Congress in passing the Act is to enable the government to stop anticompetitive mergers before they are consummated. Furthermore, in the case of mergers, the H-S-R Act requires a thirty-day waiting period after notification before the acquisition of voting securities or assets. A request for additional information by one of the Government agencies before the waiting period expires triggers an additional twenty-day waiting period (ten days for cash tender offers) after compliance with the request.[233] Notification depends on two factors: the size of the parties and the size of the transaction. Notification is required when a firm with sales or assets of $100 million acquires voting securities or assets of a ten million dollar firm. Additionally, the acquiring firm must either hold fifteen percent or more of the voting securities or assets of the acquired firm, or the value of the acquired voting securities and assets must exceed fifteen million dollars. There are several exemptions from the notification requirement, including the acquisitions of bonds, mortgages, non-voting securities, acquisitions of limited amounts of voting securities solely for investment purposes, and transactions subject to approval by a federal regulatory agency.[234]

D. *The Taiwan Fair Trade Law §§ 6, 11-13*

The FTL provides guidance on how the FTC should respond to companies wishing to merge.[235] Applications for a merger must be sent to the FTC if the merger will affect the company's percentage of market

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231. *Id.*

232. Clayton Act, 15 U.S.C §§ 7a, 18 (1994) (discussing premerger notification and waiting requirements).

233. *Id.*

234. *Id.*

235. Articles 7-9 of the ERFTL guide the requirements and procedure for approval of mergers (known as a combination in the FTL). ERFTL, *supra* note 96, arts. 7-9.

share.[236] Besides the basic information on ownership of the companies involved, the FTC also requires information on companies' revenues in preceding years;[237] a list of companies operated as subsidiaries; the previous year's fiscal statements, production, or operation costs; product sales prices;[238] and an explanation of why the proposed merger would benefit the economy.[239]

Under Article 17 of the ERFTL, the FTC may require additional information, including fiscal data going back three years. It is then required to pass judgment on the proposed action within two months of receiving all the required data.

The law permits exemptions for companies proposing to operate joint ventures or share research and development programs (R&D), but those proposals must also be approved by the FTC.[240] Data must be submitted on the cost structure of the companies and the projected structure after the joint venture. In the case of R&D programs, the cost of each company conducting research must be compared with the cost and effectiveness of having a joint venture.[241] The same criteria holds true for import and export operations, control of production output,[242] or any action that will improve the efficiency and competitiveness of small- and medium-sized enterprises.[243]

Approvals for joint ventures or reverse approved mergers will be valid for another three years.[244] At that time, the company may apply for an extension. However, each extension is given in three-year increments, with no limit on the number of extensions a company may receive. At renewal time, the FTC may impose conditions or restrictions on the company to ensure that the new enterprise does not enjoy an unfair advantage over its competitors.

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236. Article 5 of the ERFTL states:

> [w]hen calculating the market share of an enterprise, information concerning the production, sales, inventory, import and export value (volume) of each enterprise and the relevant market shall be taken into account.
>
> Information necessary for the calculation of the market share may be based on such information as obtained upon investigation by the central competent authority or that recorded in other government agencies.

Id. art. 5.

237. *Id.* art. 8(1)(3).

238. *Id.* art. 8(1)(4).

239. *Id.* art. 8(1)(5).

240. FTL, *supra* note 52, ch. 2, art. 14.

241. *Id.* art. 14(1)-(4).

242. *Id.* art. 14(5).

243. *Id.* art. 14(7).

244. Article 15(2) of the FTL states that "[t]he approval shall be valid for a limited period not exceeding three years. The enterprises involved may, with proper reasons, file a written application for an extension thereof with the central competent authority . . . however, that the term of each extension shall not exceed three years." *Id.* art. 15(2).

The FTC must use an economic cost benefit analysis in determining whether approval of a merger should be granted. If the combination's advantages[245] to the national economy outweigh its disadvantages, the combination may be approved. The FTC must act on an application for a combination within two months after it is filed.[246]

Similarly, Article 11 of the FTL governs the restriction of mergers. Mergers under certain conditions will be allowed providing that the benefits of the alliance outweigh the disadvantage of blocking competition.

The FTL is also concerned with the future contours of industrial organizations. In order to forestall the development of monopolies, the FTL, through the pre-merger notification and approval requirement, enables the FTC to review mergers and similar forms of economic integration. Where any "combination" of the following types is proposed, prior notice to and approval from the FTC will be required.

VII. HORIZONTAL CONCERTED ACTIONS

Professor Phillip Areeda has stated that horizontal concerted actions—those agreements among competitors regarding price-fixing output restrictions or market allocation—have the potential of being the most socially repugnant actions undertaken by businesses in a market economy.[247] Such practices by their very nature are within the reach of the antitrust law of all modern commercial powers.

Even though the FTL never explicitly uses the terms horizontal and vertical restraints, "concerted action," as used in the FTL, has been defined in the broadest sense of the term. The official commentary to Article 7 of the FTL, promulgated by the FTC, states that in theory concerted action encompasses both horizontal and vertical concerted actions.[248]

A. *The Sherman Act § 1*

Section 1 of the Sherman Act prohibits any contract, conspiracy, or combination from restraining trade. However, the primary role of the Sherman Act has not been to control single-firm monopolies, but rather to

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245. Advantages include increased economy of scale, reduction of production costs, and rationalization of management.

246. Liu, *supra* note 203.

247. Phillip Areeda, *American Antitrust Law* 197, 203-08 *in* TALKS ON AMERICAN LAW (Harold J. Berman ed., 2d ed. 1973).

248. FTL, *supra* note 52, ch. 1, art. 7 (comment). Legislative section-by-section analysis of the FTL (FTC Aug. 1993); *See also* C.C. Lee & Joyce Fan, *Enforcement Rules for Fair Trade Law*, 14 E. ASIAN EXECUTIVE REP. 14 (1992), *available in* LEXIS, World Library, ALLWLD File.

deal with concerted efforts by competitors to fix prices, restrict output, divide markets, or exclude other rivals.

By definition, horizontal restraints require the actions of more than one person. Cooperation is required because a person cannot meaningfully boycott on his own. Moreover, a person cannot engage in price fixing on his own because the agreement to fix prices is crucial.[249] Note that it is impossible to disagree with a wholly-owned subsidiary.[250] As a general proposition, the U.S. Justice Department utilizes two modes of analysis: per se condemnation and case-by-case examination under a rule of reason. Also, the Supreme Court in recent years has continued to invoke per se rules for certain types of horizontal and vertical agreements.[251] The Court has retained this approach for maximum price fixing and vertical resale price maintenance despite substantial criticism contending that such arrangements can promote competition. Generally, the U.S. Supreme Court has expanded its use of the more extended rule of reason analysis and has reduced the frequency and scope of per se treatment.[252]

B. *Per Se Rule and Rule of Reason (as Applied to U.S. Precedents)*

The Sherman Act also stipulates that certain agreements are per se violative of antitrust law. For example, in *United States v. Socony-Vacuum Oil Co.*,[253] the Court concluded that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se."[254] Other per se violations include output restrictions,[255] agreements to restrict bidding,[256] product allocation agreements,[257] market allocation agreements,[258] and group boycotts.[259]

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249. *See, e.g.*, Hopkins v. United States, 171 U.S. 578 (1898) (Only agreements whose main purpose was to fix prices were condemned.).

250. *See, e.g.*, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

251. *See, e.g.*, United States v. Standard Manufacturing Co., 226 U.S. 20 (1911) (holding that it does not matter if a product is made pursuant to a patented process by a patented machine indicating per se rule in finding a violation of the Sherman Act).

252. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc.,433 U.S. 36 (1977) (overturning decade-old per se condemnation of non-price vertical restrictions on deals).

253. 310 U.S. 150, 223 (1940).

254. *Id.*

255. *See, e.g.*, Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (holding that output restrictions are per se violative of Sherman Act).

256. *See, e.g.*, National Soc'y of Professional Eng'r v. United States, 435 U.S. 679 (1978).

257. *See, e.g.*, Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

258. *See, e.g.*, United States v. Topco Assoc. Inc., 405 U.S. 596 (1972).

259. *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).

However, courts have moderated the rigidity of the per se rule through the adoption of the "rule of reason" doctrine. The judiciary will uphold agreements that are inherently efficient despite any unreasonable restraints on competition under the rule of reason test.[260] This pragmatic view recognizes the societal value of some business agreements. For example, agreements to exchange information,[261] establish product standards,[262] and engage in joint ventures[263] have been upheld.

C. *The Taiwan Fair Trade Law §§ 7, 14-17*

Under Article 14 of the FTL, enterprises in competition with each other may not engage in horizontal concerted actions, such as agreements entered into by two or more competing companies to determine prices, restrict prices, quantities, customers, and territories, or otherwise restrict each other's commercial activities, unless such actions can be proved to be beneficial to the overall economy or public interests and are approved by the FTC.[264]

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260. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) (music licensing system justified as the only practical method of collecting royalty payments for composers, where other, less efficient methods were not explicitly excluded).

261. United States v. Container Corp. of America, 393 U.S. 333 (1969).

262. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988).

263. *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945).

264. Article 14 of the FTL states:

> [e]nterprises may not engage in concerted actions, unless the concerted action satisfies any of the following circumstances, is beneficial to the national economy as a whole and to the public interests, and has been approved by the central competent authority:
>
> 1. to unify the specifications or models of goods in order to reduce cost, improve quality or increase efficiency;
> 2. to jointly research and develop goods or market in order to upgrade technical skills, improve quality, reduce costs or increase efficiency;
> 3. to engage in specialized areas of business in order to achieve the enterprise's rational operation;
> 4. to enter into an agreement in respect of the competition in overseas markets in order to secure or promote exports;
> 5. to take concerted action in respect of the importation of foreign goods in order to strengthen trading capability;
> 6. to take concerted action in imposing limitations restrictions on the quantity of production and sales, equipment or prices in order to adjust to orderly demand when the enterprises in a particular industrial sector suffer hardship to continue their business operations or over-production due to the fact that the market price of goods remains at a level below the average production cost during economic recession; or
> 7. to take concerned action in order to improve the operational efficiency or strengthen the competitiveness of the small- and medium-sized enterprises concerned.

Accordingly, enterprises in Taiwan are prohibited from engaging in horizontal price-fixing, horizontal territorial allocation, and output restrictions.[265] As stated above, provided such actions are found to increase efficiency, unify standards, increase joint research and development, maintain orderly imports and exports, or avoid bankruptcy, they will be tolerated.[266] Only the FTC has the power to make such determinations.[267] Since the decisions of the FTC must be published in government gazettes,[268] a body of administrative precedents will become apparent and available as the FTC builds up its expertise in dealing with any concerted actions.

D. *Rule of Reason (as Applied to Taiwanese Precedents)*

The FTC initially employed the principle of a case-by-case approach, similar to the rule of reason, to evaluate application for exception approvals. Moreover, it was the unclear meaning of the rule of reason defense that caused the FTL to disregard the distinction between per se and "rule of reason" altogether and to add to the general prohibition principle in Chapter 2 of the FTL. Nonetheless, exceptions exist under Articles 14 and 7 of the FTL and Article 2 of the ERFTL. The FTL seems to expressly assign the burden of proof for the facts establishing a rule of reason upon the defendant. Professor Lawrence Liu, in his article on the impact and interpretation of the FTL,[269] states that with the exception of "combination actions," the "rule of reason" line of analysis will be employed as the test of legality for all business practices that have a potential anticompetitive effect.[270]

VIII. VERTICAL RESTRAINTS

Vertical restraints occur when a manufacturer or other party higher in the chain of distribution imposes obligatory actions on the retailer. For

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FTL, *supra* note 52, ch. 2, art. 14.

265. *Id.* art. 7.

266. *Id.* art. 14. The exception of horizontal concerted action in the FTL is similar to the European pattern requiring government approval and registration. See Jan Peeters, *The Rules of Reasons Revisited: Prohibition on Restraints of Competition in the Sherman Act and the EEC Treaty*, 37 AM. J. COMP. L. 521, 551 (1989).

267. FTL, *supra* note 52, ch. 2, art. 11 (guiding requirements and procedure for merger actions).

268. *Id.* art. 17 (ruling that the FTC proceed with applications for merger actions within a limited time and publish decisions in government gazette).

269. Liu, *supra* note 72, at 166.

270. *Id.*

example, tying agreements,[271] which require a buyer to purchase additional products from the seller in order to obtain the desired product, are violative of antitrust laws.[272] Other vertical restraints, such as territorial resale restrictions, are deemed to unreasonably limit competition.[273]

U.S. antitrust laws deal with a number of such vertical relationships, including the relationship between a manufacturer and a retailer and a wholesaler and a manufacturer. Anything less than a merger may involve vertical restraints. U.S. antitrust laws provide three categories of restraints: vertical price restraints such as Resale Price Maintenance (RPM); non-price restraints such as exclusive dealing; territory; and tying arrangements.[274]

Again, while the FTL does not explicitly refer to the term "vertical restraints" in the comments to Article 18 of the FTL, it is clear that the FTL is intended to regulate and prohibit both vertical restraints and exclusionary arrangements. Article 18 of the FTL will nullify resale price maintenance unless daily consumption goods are involved that may be readily substituted in the marketplace through free competition.[275]

A. *The Sherman Act § 1*

The Sherman Act clearly prohibits agreements which lead to restraint of trade. The Act states that every contract, combination (whether trust or otherwise), or conspiracy which leads to a domestic or international restraint of trade or commerce is illegal.[276]

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271. Clayton Act, 15 U.S.C. § 3 (1994).

272. *See, e.g.*, Northwest Pacific R. Co. v. United States, 356 U.S. 1 (1958); *see also* Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072 (1992).

273. *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253 (1963).

274. Recently, the Antitrust Division of the Justice Department settled an important case involving software giant Microsoft. United States of America v, Microsoft Corp., No. 94-1564 (SS). Under the terms of the agreement, Microsoft will change its royalty agreements from a "per processor" scheme and will not enter into a license of more than one year's duration. Microsoft's previous policy had been seen as effectively foreclosing competitors from entering the market for computer operating systems. The philosophy underlying the settlement was widely criticized by conservative, free market proponents.

275. *See* Fair Trade Commission, Press Release (Apr. 22, 1991).

276. Sherman Act, 15 U.S.C. § 1 (1994).

B. *The Clayton Act § 3 (Tying Arrangement)*

The scope of Section 3 of the Clayton Act[277] is restricted to arrangements involving "commodities." Therefore, tying and exclusive dealing restrictions which involve service, real estate, intangibles, or other non-commodities need to be challenged under other provisions such as Section 1 of the Sherman Act.[278]

According to Section 3 of the Clayton Act, tying arrangements occur when sellers insist that purchasers take unwanted products (tied products) as a prerequisite to purchasing at all, at the best price, or to purchase the desired products. Essentially, this prohibition of tying arrangements is helpful to competitors of the seller attempting to force the unwanted purchase and to purchasers who are forced to take the unwanted tied product.[279] The Supreme Court recently restated its view that tying arrangements can be classified as per se antitrust violations.[280] Just as in other categories of non-price vertical restraints, tying arrangements may be looked at under the "rule of reason" analysis. This occurs when the seller has less than thirty percent of the tying product's market.[281]

C. *The Taiwan Fair Trade Law § 18*

Article 18 of the FTL prohibits resale price maintenance (vertical restraints) by an enterprise unless the goods involved are daily consumption goods and substitutes are readily available in the marketplace.[282] However, the FTL provides for no criminal liability for a violation of this provision,

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277. It shall be unlawful for any person . . . to lease or make a sale . . . of goods . . . on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly . . . .

15 U.S.C. § 14 (1994).

278. WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK 1994 EDITION § 4.02, 479481 (1994).

279. Buchanan, *supra* note 143, at 17.

280. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) (Because the seller has 30 percent of the tying product market, the Court assumed the effect of the tie "may be to substantially lessen competition[.]"); Eastman Kodak Co. v. Image Technical Service, Inc., 112 S. Ct. 2072 (1992) (Although there was a market power problem, the Court assumed that Kodak tied the servicing of its copying machine to the sale of parts for those machines, a market that Kodak dominated.)

281. Buchanan, *supra* note 143, at 18.

282. Article 18 of the FTL states that "[a]n enterprise which supplies goods to its trading counterpart shall allow its trading counterpart to freely decide the prices at which such goods will be resold to a third party by the trading counterpart or at which such goods will be resold by the said third party." FTL, *supra* note 52, ch. 3, art. 18.

reducing the incentive not to engage in such anticompetitive activities. These daily consumption goods are to be listed and published in the FTC press release for enterprises and customers,[283] and the FTC has hinted that the list of goods that can be subject to an RPM will be short. On the other hand, the FTC has also taken the position that, in the case of an agency or consignment sale, an RPM will be permitted because no resale of goods occurs.[284] In addition, the FTC has indicated that nonbinding resale price suggestions should be acceptable.[285]

IX. UNFAIR COMPETITION AND EXCLUSIONARY PRACTICES

Both the United States and Taiwan impede unfair competition and exclusionary practices. In 1914, the U.S. Congress legislated the Federal Trade Commission Act to focus on blocking unfair methods of competition under the enforcement of the Federal Trade Commission.[286] In the meantime, Congress also enacted the Clayton Act dealing with price discrimination, tying and exclusive supply agreements, mergers, and interlocking directorates, with enforcement authority given to both the Department of Justice and the Federal Trade Commission. These two statutes compensated for the weakness of the Sherman Act by preventing appropriate antitrust activities.

In general, the Taiwanese FTL's unfair practices provision are much less controversial than its antitrust provisions. Primarily, the FTL prohibits unfair competition practices.[287] For example, it prohibits false statements on or in connection with the distribution of goods,[288] and it prohibits trade libel where the aim is to obtain a competitive advantage.[289]

The FTL also prohibits certain exclusionary practices[290] which include boycotts, discrimination, unfair inducement, and breaches of confidence. Violators who are found to be unreasonable would suffer a maximum imprisonment of two years.[291] Obviously, similar to the evaluation of the

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283. Article 18(1) of the FTL states that "[a]ny agreement contrary to this provision shall be null and void except for daily products to be used by general consumers which are subject to free competition with similar kinds of goods available in the market." *Id.* art. 18(1).

Article 18(2) of the FTL states that "[t]he items of daily products referred to in the preceding paragraph shall be publicly announced by the central competent authority." *Id.* art. 18(2)

284. *Id.*

285. *Id.*

286. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1994).

287. FTL, *supra* note 52, ch. 3.

288. *Id.* art. 21.

289. *Id.* art. 22.

290. *Id.* art. 19.

291. *Id.* ch. 6, art. 36.

horizontal concerted action exception, a "rule of reason" technique is generally applied by the FTC which usually adopts a case-by-case approach.

A. *The Clayton Act § 2 (Robinson-Patman Act of 1936)*

The Robinson-Patman Act, amended the Clayton Act in 1936, prohibits sellers from changing different prices to competing customers.[292] Section 2 of the Clayton Act also deals with violations of discrimination in the provision of allowances from advertising and other services. However, there are two lawful exceptions to price discrimination. Price discrimination will be allowed either if the distinction specific costs are associated with particular buyers or the discrimination results from a seller's ability to match a competitor's price or services.[293]

B. *The Clayton Act § 8 (Interlocking Directorates and Officers)*

According to Section 8 of the Clayton Act,[294] an individual is prohibited from serving in a dual role as a director or officer of two competitive non-banking congolomerations if both companies have a net worth greater than ten million dollars. The crucial determination is the identification of the companies as competitors. Typically, the issue exists if a non-competitive agreement between the two would violate the antitrust laws. However, the potential violators will be exempt if either the business' annual sales are less than two percent of that corporation's total sales or if the competitive sales of each corporation are less than four percent of that corporation's total sales.[295]

C. *Federal Trade Commission Act § 5*

The Federal Trade Commission, established by Congress in 1914, is exclusively responsible for Section 5 of the Federal Trade Commission Act

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292. Clayton Act § 2(a), *as amended* by the Robinson-Patman Act § 51(a)(1), 15 U.S.C. § 13 (1936) (price discrimination).

293. *Id.*

294. Section 8 of the Clayton Act, 15 U.S.C. § 19 (1994) (interlocking directorates and officers).

295. *See* EARL W. KINTNER, AN ANTITRUST PRIMER 110 (2d ed., 1973).

which prohibits unfair methods of competition.[296] The Federal Trade Commission also shares enforcement jurisdiction over Clayton antitrust violations with the Department of Justice. This jurisdiction is complementary and not exclusive.[297] The Federal Trade Commission effectively enjoys a broad range of latitude in attacking any action which would constitute a violation under the Sherman Act.[298] Essentially, this "unfairness" rubric has created a type of equity power of enforcement.

In 1990, the Supreme Court upheld a Federal Trade Commission determination that a group boycott by attorneys violated antitrust law.[299] The Supreme Court has extended this ruling to other professional groups, including boycotts by the state medical association and its member doctors regarding insurers' abilities to affect the fees paid to competing doctors[300] and agreements among auto dealers to restrict their hours of operation.[301]

The Federal Trade Commission Act also prohibits a wide range of uncompetitive practices including those which would not, by themselves, be considered sufficient to invoke the Sherman or Clayton Acts.[302]

Unlike the Sherman Act, the Federal Trade Commission Act is generally not directly enforceable in federal court. Rather, the Act is enforced through administrative proceedings before the Federal Trade Commission that issues a civil injunctive order, termed a "cease and desist" order.

D. *The Taiwan Fair Trade Law § 19-24*

Article 19(5) of the FTL prohibits the use of unfair practices to obtain the trade secrets, trade information, or other kinds of related technical information of another. Although the Criminal Code presently contains a prohibition on the intentional disclosure of information known to include

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296. Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45 (1994), states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

297. Note, however, that the Justice Department cannot enforce the Federal Trade Commission Act.

298. *See, e.g.*, FTC v. Cement Institute, 333 U.S. 683 (1948) (The Court interpreted "unfair methods of competition" to include any practice violative of the Sherman Act.)

299. FTC v. Trial Lawyer's Ass'n, 493 U.S. 411 (1990); FTC v. Superior Court Trial Lawyers, 493 U.S. 426-27 (1994).

300. FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

301. *In re* Detroit Area Auto Dealer's Ass'n, 955 F.2d 457 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992).

302. FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953), FTC v. Sperry Hutchinson Co., 405 U.S. 233 (1972). *See also* Buchanan, *supra* note 143, at 22-23.

another's trade secrets,[303] this provision is generally viewed as not providing any remedy against a party who receives and uses the trade secret information, so long as the information is not received as part of a conspiracy with the disclosing party.[304]

Article 20 of the Fair Trade Law complements the Trademark Law provisions on infringement. This Article protects against the unauthorized use of a similar trade name, individual's name, trademark, product container, package, product appearance, or other trade indicator so as to cause confusion with the products or services of another. The sale, export, import, and transportation of a product as described above is also prohibited.[305]

The use of a commercial symbol that is identical or similar to the commercial symbol of others constitutes an act of unfair competition.[306] "Use" is also defined to include the sale, transportation, and import and export of goods or services bearing such symbol.[307]

To prevent unfair competition, the FTL stipulates that a manufacturer will allow traders to freely set the prices at which its goods will be sold to third parties and at which the third parties will sell the goods to retailers.[308]

X. CIVIL REMEDIES AND CRIMINAL PENALTIES

Enforcement of the U.S. antitrust laws is primarily by the Department of Justice, which brings both criminal and civil cases and shares enforcement

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303. Article 317 of the Criminal Code (ROC) states that a person who is required by law, order, or contract to preserve the commercial or industrial secrets of another which he knows or possesses because of his occupation and who disclosed such secrets without reason shall be punished with imprisonment for not more than one year, detention, or a fine of not more than 1,000 *yuan* (1 Yuan= NT $ 3.00).

304. Furthermore, because the illicit use of trade secrets need not be preceded by illicit disclosure, the protection afforded by this provision is incomplete. The new Article 19 thus supplements the Criminal Code by prohibiting the obtaining of trade secret information through unfair practices such as industrial espionage or bribery.

305. The prohibition need not be on a product directly associated with the protected trademark. For example, dress shirts and jewelry bearing the names of well-known luxury automobiles might fall within the scope of Article 20 of the FTC even though the goods may not be related. Distinctive packaging might also receive protection.

306. FTL, *supra* note 52, ch. 3, art. 20(1)(b).

307. *Id.* art. 20(1)(c).

308. *Id.* art. 18(1).

responsibility with the Federal Trade Commission and state attorney general.[309] Additionally, private individuals harmed by the violation of antitrust laws may file civil suits in federal district courts. Criminal sanctions are stiff—fines of up to ten million dollars for corporations and jail sentences of up to three years, plus fines of up to $350,000 for individuals.[310] Federal Trade Commission enforcement also can result in injunctive relief, including divestiture of assets acquired by merger and orders of restitution to consumers. Private plaintiffs can seek treble damages, attorneys fees, and injunctive relief for antitrust violations.[311]

A unique aspect of the traditional societal orientation of the Chinese character is the fear that a period of imprisonment will destroy the reputation of a person's family. Moreover, criminal remedies may be the most effective means of curbing violations of the law at the earliest possible date. In the case of relatively judgment-proof defendants, the possibility of imprisonment could be a powerful deterrent.

In this process, the FTL adopts civil remedies[312] and criminal sanctions for violators of the FTL.[313] In the meantime, it may be possible to address the problem very quickly through a policy authorizing, an injunctive relief, and the seizure and forfeiture of products found to violate this provision of the law.[314]

A. *Relevant U.S. Regulations*

Violations of the Sherman Act may be prosecuted as a civil or criminal offense depending on the nature of the violation. Criminal violations of the Sherman Act are punishable by fine and imprisonment. Violations of the Clayton Act and the Federal Trade Commission Act only provide civil remedies to compensate for the injured person's damages and maintain the fair economic order.[315]

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309. *See* Robert H. Land, *When Should State Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1054 (1990).

310. Sherman Act, 15 U.S.C. § 1 (1994).

311. Clayton Act, 15 U.S.C. § 15 (1994). *See also* Buchanan, *supra* note 143, at 3.

312. Chapter 5 of the FTL directs that civil remedies be awarded to the victims of FTL violations at the discretion of the courts. FTL, *supra* note 52, ch. 5.

313. Chapter 6 of the FTL regulates the penalties for violators of the FTL, which include civil remedies and criminal sanctions. *Id.* ch. 6.

314. Rickards, *supra* note 76.

315. However, Section 3 of the Robinson-Patman Act does provide criminal penalties in the case of certain international price discrimination violations.

Section 4 of the Sherman Act[316] and Section 15 of the Clayton Act[317] confer jurisdiction on district courts to prevent and restrain violation of the respective acts by means of injunctions and direct the government to institute proceedings in equity to prevent further violations.

Section 4 of the Clayton Act permits private parties who are injured by an antitrust violation to sue in federal court for treble damages plus court costs and attorneys' fees. However, the U.S. antitrust statutes do not allow individuals to sue subject to the FTC Act.[318] Furthermore, Section 16 of the Clayton Act establishes that any person, firm, corporation, or association shall be entitled to sue for injunctive relief against threatened loss or damage by a violation of antitrust laws.

B. *The Taiwan Fair Trade Law Chapters 5 and 6*

The FTL provides a strong regime of both civil and criminal remedies to achieve the purpose of protecting customers and market order.[319] Criminal penalties include fines of up to about $37,000 for violations of monopolies and mergers and about $18,300 for violations of unfair competition.[320] Violators may also face prison sentences of up to three years for the commission of illegal acts under Article 20[321] and up to two years for illegal acts under Article 19.[322] There are no criminal penalties attached to Article 21 violations.

The foregoing offer legal and equitable remedies for any person who is injured by an anticompetitive act or an unfair method of competition under the FTL. In this sense, such a person could seek both injunctive relief

316. Sherman Act, 15 U.S.C. § 4 (1994).

317. Clayton Act, 15 U.S.C. § 15 (1994).

318. U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, *supra* note 116, at 9.

319. FTL, *supra* note 52, chs. 5 & 6.

320. Article 36 of the FTL provides that

> [a]nyone violating the anticompetitive restrictions of Art. 19 who nevertheless continue the violation after having been ordered by the central competent authority to cease and desist shall be punished by imprisonment of not more than two years, detention, or in lieu thereof or in addition thereto, a fine of not more than five hundred thousand New Taiwan Dollars.

Id. ch. 6, art. 36.

321. *Id.* art. 35.

322. *Id.* art. 36.

against further illegal acts[323] and recovery of damages to compensate for provable economic injury[324] following a civil verdict.

In addition to these remedies, the injured party may also be able to seek discretionary treble damages.[325] The amount may be increased based on the benefit obtained by the defendant from his illegal activity.[326] For example, the court may use the unfair advantage gained by the unlawful act as the measure of compensation, implicitly recognizing a misappropriation theory of recovery. In such a case, if monopoly profits are NT $1 million, a court could find that actual damages are NT $3 million by applying the misappropriation theory of recovery. It could treble this amount at its discretion, resulting in a penalty of NT $3 million. As a practical matter, however, the absence of discovery procedures make it difficult to prove the defendant's unjust enrichment to the satisfaction of a court.

XI. DECISIONS UNDER THE TAIWAN FAIR TRADE LAW DECISIONS

The Fair Trade Law, even with its current limitations, has already made a significant impact on commerce in the Republic of China on Taiwan. In a seminal case, the Taipei District Court invoked the Fair Trade Law to impose seven months imprisonment on an individual convicted of selling fake Nintendo machines imported from Hong Kong. Previously, the case would have been brought under the Trademark Law which only provides civil fines.[327]

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323. Article 30 of the FTL states that "[i]f an enterprise violates any provision of the FTL and infringes upon another person's rights or interests, the injured party may petition to eliminate such infringement. If there is a likelihood of infringement, the party may petition for prevention thereof." *Id.* ch. 5, art. 30.

324. Article 31 of the FTL states that "[a]n enterprise which infringes upon the rights and interests of another person as a result of its violation of the FTL shall be liable for the damages arising therefrom." *Id.* art. 31.

325. Article 32(1) of the FTL states "[i]n the case of an intentional act, a court may, at the request of the injured party referred to in Article 31 of the FTL and based on the extent of infringement, award a compensation greater than the amount of damages actually incurred; provided, however, that the amount so awarded may not exceed three times the amount of proven damages." *Id.* art. 32(1).

326. Article 32(2) of the FTL regulates that "[i]n case the infringing party gains any profits from his act of infringement, the injured party may request to have the amount of damages calculated based exclusively on such profits." *Id.* art. 32(2).

327. *Game Pirate Does Time*, CHINA ECON. NEWS SERV. (Oct. 21, 1993), *available in* LEXIS, World Library, ALLNWS File; *Taiwan Nationals Sentenced to Jail for Pirating Microsoft Programs*, AFX NEWS (Oct. 19, 1993), *available in* LEXIS, World Library, ALLWLD File.

In late February 1994, the FTC issued its first order against a government agency,[328] stating that Taipei's Department of Rapid Transit System (DORTS) illegally used a narrow eligibility criteria in qualifying bidders for a procurement contract of building the new metro system in violation of Article 19(2) of the Fair Trade Law.[329] DORTS tried to justify its restrictive procurement practice because of the perceived need for specialized construction. Nevertheless, the FTC asserted that open bidding was required.

Also, the FTC ruled that AMP Inc., an American leader in the manufacturing of electronic connectors, violated the FTL by its "overaggressive" tactics in attempting to combat counterfeit products. It stated that AMP had insufficient evidence to back up its allegations which had an adverse effect on a Taiwanese supplier, Hon Hai Precision Machinery Co.[330]

The Fair Trade Commission has taken numerous actions to protect against FTL violations. Recently, the FTC ruled that the Shang Ta Company, a shipping firm purporting to be a "privately operated post office" had to cease using the name "post office" in its activities or face the termination of its business license. The FTC ruled that the use of these terms had a potential to unfairly mislead consumers in violation of Art. 20(2) of the FTL.[331] Similarly, in the first decision under the FTL, the FTC ruled that promoters using the term "Super Auto/Motorcycle Show '92" were required

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328. *See* Sally Gelston, *Crackdown on Public Transit System Procurement in Taiwan*, E. ASIAN EXECUTIVE REP., Vol. 16, No. 16, Mar. 15, 1994, at 4, *available in* LEXIS, World Library, ALLWLD File.

329. The order made based on Article 19(2) of the FTL states that an enterprise shall not commit any of the following acts which is likely to impede fair competition: treating another enterprise discriminately without due cause. It was also based on Article 36 of the FTL. The DORTS must open the bid to the public. If DORTS continues its procedure, it could be punished by imprisonment of not more than two years, detention, or in lieu thereof or in addition thereto, a fine of not more than five hundred thousand New Taiwan dollars.

330. *FTC Slams US Firm*, CHINA ECON. NEWS SERVICE, June 17, 1994, *available in* LEXIS, World Library, ALLWLD File. Apparently, AMP's actions violated Article 22 of the FTL, with potential penalties of imprisonment for up to one year and/or a fine of not more than NT $500,000. Article 22 states that [a]n enterprise shall not, for the purpose of competition, make or publish any false statements which is likely to cause damage to another's business reputation.

331. *FTC Rules Delivery Firm's Name Violates Fair Trade Law*, CHINA ECON. NEWS SERVICE, Dec. 16, 1993, *available in* LEXIS, World Library, ALLWLD File. Article 20(2) of the FTL states: "[a]n enterprise shall not . . . use in an identical or similar manner the name of any other . . . corporate name or other symbols . . . that are commonly known to the relevant public, if such use causes confusion."

to revise their advertising to avoid misleading consumers who were angered at the lack of "super" cars and motorcycles on display at the exhibition.[332]

The FTC has also issued orders regarding violations of the FTL's prohibition against concerted action in cases involving warehouses,[333] regional credit corporations,[334] tire manufacturers,[335] and container manufacturers.[336] In addition, the FTC has warned manufacturers having a dominant market position that they may face potential liability under the FTL if they abuse their position to restrict trade. Firms receiving a warning included Cathay Life Insurance Co. Ltd. and Yamaha Motorcycle Co. Taiwan, a subsidiary of a well-known Japanese industrial conglomerate.[337]

XII. CONCLUDING OBSERVATIONS: THE FUTURE OF ANTITRUST LAWS IN TAIWAN

The implementation of the Fair Trade Law has opened a new era of law and business ethics for the Taiwanese economy.[338] The Fair Trade Law also has become an incentive to encourage Taiwan's economic liberalization and internationalization.[339] Meanwhile, the FTL has introduced the Taiwanese people to recognition of competition as a key factor in the maintenance of the free enterprise system.

In the coming years, the Fair Trade Law will undoubtedly have a major impact on the business practices of firms competing in Taiwan. Due to its lack of specificity and predictable rules, however, it is an imperfect guide, offering little to predict whether a proposed merger violates its provisions or not. Furthermore, in the past three years the Taiwanese Fair Trade Commission has been inadequate in fulfilling its responsibility to

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332. *FTC Issues First Ruling on Violation of Fair Trade Law*, CHINA ECON. NEWS SERVICE, Sept. 7, 1994, *available in* LEXIS, World Library, ALLWLD File. Article 21 of the FTL states that: "[a]n enterprise shall not make . . . in advertising . . . any false or misleading presentation which may likely cause confusion or mistake by consumers."

333. FTC v. E-Fa Warehouse et al., *Order Kung-Yen-008047*, (Aug. 17, 1992).

334. FTC v. Kaohsiung First Credit Corp. et al, *Order Kung-Yen-08331* (Sept. 10, 1992).

335. FTC v. Taiwan Province Tire Mfg. Ass'n, *Order Kung-Tsu 030* (Oct. 2, 1992).

336. FTC v. Taiwan Province Commercial Container Ass'n, *Order Kung-Yen 09277* (Dec. 17, 1992).

337. *Taiwan Warns 40 Companies Over Fair Trade*, REUTERS, Feb. 4, 1993, *available in* LEXIS, World Library, ALLWLD File.

338. J. W. Wheeler, *Comparative Development Strategies of South Korea and Taiwan as Reflected in Their Respective International Trade Policies*, 11 MICH. J. INT'L L. 472, 489-90 (1990).

339. *Premier Lien Advocates Fair Trade*, CENTRAL NEWS AGENCY, (Mar. 12, 1994), *available in* LEXIS, World Library, ALLWLD File.

prevent unfair trade activities because it is entrusted only with the right to investigate alleged illegal activities.

Determining how to solve the FTL's many vague and controversial provisions has become the first step in the smooth enforcement of the law. Many terms used in the FTL are so vague that they could be invoked arbitrarily by law enforcement authorities to prosecute businesses.[340] Several other related regulations also need to be enacted clearly and promptly. For example, there is a need for regulations to determine a company's market share. Without such a standard, companies will have no way to know in advance whether their individual "market share"[341] has reached the limit set by the FTL.[342] Moreover, it is critical for the FTL to provide a legal framework for the prosecution of companies that joined with competitors to fix prices.

It therefore becomes much more important for the Taiwanese Fair Trade Commission to get support from other agencies such as the police, prosecutor's office, investigative authorities, and other relevant agencies in order to help the FTC conduct timely searches and lawful seizures of products or documents relevant in its investigations.

To reiterate, in order to facilitate the function and enforcement power of the Fair Trade Commission, amending the Fair Trade Law might be the most effective way to accomplish the intent of the Legislature—to limit business monopolies and prevent collusion and unfair competition. On April 21, 1994, the Executive Yuan of the ROC on April 21, 1994, approved a draft revision of the Fair Trade Law to allow the Fair Trade Commission to immediately impose penalties and fines on enterprises in violation of the rule.[343] This draft represents a recognition of some of the shortcomings of the Fair Trade Law and attempted enforcement by the Fair Trade Commission after three years.

The new changes will allow the watchdog agency to take administrative actions before legal actions are completed. They are designed to impose timely and effective penalties against violators so that they will not continue any illegal practices during the prolonged legal procedures.

This draft revision, which was prepared by the Fair Trade Commission and forwarded to Legislative Yuan for ratification by the Executive Yuan also exempts the commission from the ineffective and time-consuming responsibility of identifying and publicizing monopoly enterprises and

340. Tseng, *supra* note 99.

341. FTL, *supra* note 52, ch. 2, art. 11 (1)-(2) and ERFTL, *supra* note 96, art. 5.

342. *Id.* art. 5(1).

343. *Executive Yuan Approves Draft Revision of Fair Trade Law*, CHINA ECON. NEWS SERVICE, Apr. 22, 1994, *available in* LEXIS, World Library, ALLWLD File.

regularly announcing those enterprises that have large market shares of more than twenty percent.[344]

While these efforts represent an important step toward effectuating the goals of the FTL, it remains obvious that the Republic of China on Taiwan needs to continue to identify and adopt effective models of modern antitrust law, such as those employed by the United States, Germany, and other advanced countries, in order to facilitate the future reform of its Fair Trade Law. In the meantime, the FTL must not be applied rigidly; rather, the "rule of reason" must guide its judicious shaping of the Taiwanese economy.

344. *Id.*

EQUITY IN THE AMERICAN COURTS AND IN THE WORLD COURT: DOES THE END JUSTIFY THE MEANS?

I. INTRODUCTION

Equity, as a legal concept, has enjoyed sustained acceptance by lawyers throughout history. It has been present in the law of ancient civilizations[1] and continues to exist in modern legal systems.[2] But equity is no longer a concept confined exclusively to local or national adjudication. Today, equity shows itself to be a vital part of international law.[3] The International Court of Justice—"the most visible, and perhaps hegemonic, tribunal in the sphere of public international law"[4]—has made a significant contribution to the development of equity. Particularly in cases involving maritime delimitation,[5] equity has frequently been applied by the Court to adjudicate disputes.[6]

Equity is prominent in national legal systems and has become increasingly important in international law. It is useful, perhaps essential, for the international lawyer to have a proper understanding of it. Yet the meaning of equity remains elusive. "A lawyer asked to define 'equity' will not have an easy time of it; the definition of equity, let alone the term's application in the field of international law, is notoriously uncertain, though its use is rife."[7]

Through a comparative analysis, this note seeks to provide a more precise understanding of the legal concept of equity as it relates to two distinct systems of law: the American and the international. To compare the equity administered by the American courts with that administered by the World Court, this note

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1. *See* sources cited *infra* notes 10, 22.

2. *See* sources cited *infra* notes 54, 68.

3. Stephen W. DeVine, *Polyconnotational Equity and the Role of* Epieikeia *in International Law*, 24 TEX. INT'L L. J. 149, 155 (1989). "One who has studied [international] judicial and arbitral proceedings relating to the allocation of maritime rights and resources, in particular those concerning the delimitation of the continental shelf, cannot help but remark the apparently central role of 'equity' and 'equitable principles' in the decisions rendered to date." *Id.*

4. *Id.* at 199.

5. "Maritime delimitation" refers to the adjudication of ocean boundary disputes between nation-states.

6. CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING 173, 251 (1993).

7. DeVine, *supra* note 3, at 150. "That intellectual quicksilver of justice called equity has taken on many different guises in many different contexts throughout the history of law." Sharon K. Dobbins, *Equity: The Court of Conscience or the King's Command, the Dialogues of St. German and Hobbes Compared*, 9 J.L. & RELIGION 113 (1991). "An impressive literature on the concept of equity or justice can be found in any law library. A superficial look at it confirms the incredible variety of significate coming out of the same significant (*i.e.*, the word 'equity'). Despite this, lawyers have been working with the idea of *aequitas* [i.e., equity] since their profession began, and they have built up a number of legal traditions around this ambiguous term." Ugo Mattei, *Efficiency as Equity: Insights from Comparative Law and Economics*, 18 HASTINGS INT'L & COMP. L. REV. 168 (1994) (footnote omitted).

briefly traces the history of equity from its earliest beginnings to its subsequent establishment in the American and the international legal traditions. The similarities between the two traditions of equity are then examined. An analysis of the differences between the two traditions follows, in which it is argued that in the American tradition, equity is a means-based system, while in the international tradition, equity is an ends-based system. This note concludes by offering objections to the World Court's use of ends-based equity.

II. THE PATHS TO MODERN EQUITY

Both the American[8] and international[9] systems of equity spring from the Western legal tradition. This tradition has its origin in antiquity. "While it is said that all roads of the Western experience lead to Rome, equity's road begins in ancient Greece with the legal theory of Aristotle."[10]

The teaching of Aristotle is most closely identified with the Greek conception of equity. Among the Greeks, Aristotle was the first to put forth equity as a legal concept.[11] The earlier understanding of equity,[12] in which the Greeks perceived "the law" and "equity" to be set in opposition to one another,[13] was challenged by Aristotle's novel explanation of equity:

> When the law states a universal proposition, and the facts in a given case do not square with the proposition, the right course to pursue is therefore the following. The legislator having left a gap, and committed an error, by making an unqualified proposition, we must correct his omission; we must say for him what he would have said himself if he had been present, and what he would have put into his law if only he had known. So considered, the corrective action of equity is just, and an improvement upon one sort of justice; but the justice upon which it is an improvement is not absolute justice—it is [legal justice—or rather] the error that arises from the absolute statements of law. The nature of the equitable may accordingly be defined as "a correction of law where law is defective owing to its universality."[14]

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8. HENRY L. MCCLINTOCK, HANDBOOK OF EQUITY 6 (1936). "When the English colonists came to this country [i.e., the United States], they brought with them the laws of England, including the system of equity which had been developed in England by the chancellors." *Id.*

9. ROSSI, *supra* note 6, at 22.

10. *Id.* at 22-23.

11. GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION 15 (1982).

12. In Greek, "equity" is *epieikeia*. *Id.*

13. *Id.*

14. ARISTOTLE, THE POLITICS OF ARISTOTLE 368 app. (translation of the NICOMACHEAN

Two distinct ways of thinking about equity have emerged from Aristotle's explanation. It is possible to think of equity as "only the corrective function of the law and not something different from the law."[15] Equity may also be thought of as "an extension of natural justice."[16]

In Aristotle's conception of equity, discretion played an important role. "The discretion of the adjudicator conditioned the resort to and application of equity."[17] But the prominent role of discretion in Aristotle's theory of equity should not be overstated. Aristotle recognized that the use of discretion was inherently dangerous. For him, "equity was something far less than a license for unfettered discretion."[18]

Aristotle's formulation of equity as a legal concept had an enormous impact on the subsequent development of legal theory in the West.[19] Not only did Aristotle articulate the doctrine of equity so as to assimilate it into orthodox jurisprudence,[20] but he also, "by distinguishing equity from law and by implicitly sanctioning a procedure for its application, . . . laid the basis for a doctrinal fissure that was to erupt eventually in the complete separation of law from equity."[21]

Although Rome embraced Aristotle's formulation of equity, the Roman understanding of equity experienced further development.[22] The compartmentalization of Roman law into separate areas would shape the way Romans thought about equity.[23] Prominent in Roman law was the separation of "the law common to all nations" (*ius gentium*) from "the law promulgated for Roman citizens" (*ius civile*).[24] As Roman law developed, "equity . . . came to be associated with the tradition of natural law" (*ius naturale*).[25] A connection was subsequently established between the concept of *ius gentium* and *ius naturale*[26] on the supposition that the latter was "law that reflects the common

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ETHICS) (Ernest Barker trans., 1958) (section numbers omitted).

15. MAX HAMBURGER, MORALS AND LAW: THE GROWTH OF ARISTOTLE'S LEGAL THEORY 96 (1965), *quoted in* MCDOWELL, *supra* note 11, at 15. Equity has been perceived to be, in its "corrective" capacity, "a means to justice" and "a procedure whereby equity follow[s] the law." ROSSI, *supra* note 6, at 23-24.

16. ROSSI, *supra* note 6, at 23. As an extension of natural justice, equity is "an all-inclusive, rationally discernible legal order." *Id.*

17. *Id.* at 24.

18. MCDOWELL, *supra* note 11, at 18.

19. ROSSI, *supra* note 6, at 23.

20. *Id.*

21. *Id.* at 24.

22. MCDOWELL, *supra* note 11, at 19.

23. In Latin, "equity" is *aequitas*. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* *But see* ROSSI, *supra* note 6, at 29. "This identification of the law of nations with natural law (*ius naturale*) was close and confusing. Indeed, it has been suggested that the

nature of mankind."[27] *Ius civile* having been set apart from *ius gentium* and *ius naturale*,[28] "[i]t came to be seen as part of the duty of the [Roman magistrate] to supersede [with *ius naturale*] the *ius civile* where necessary in order to restore the natural standard of justice in the Roman law."[29]

The Romans and the Greeks perceived a duality in the nature of equity. Equity was thought of not only as a way of meliorating the law's rigidity,[30] but also as a catalyst for the application of natural law.[31] Although various paths to modern equity were to emerge—one path leading to the American tradition, another leading to the international tradition—the legacy of ancient Greece and Rome would continue to influence equity's development.

Notwithstanding the fact that no juridical concept of equity existed in the England of the Anglo-Saxons, Rome had a tremendous impact on the development of the English tradition of equity[32] from which the American tradition springs.[33] Also significant in the shaping of English equity was the thinking of Aristotle.[34] These ancient sources of equity influenced, and were reformulated by, the English legal scholars Glanville, Bracton, and St. Germain.[35] Yet while the English tradition of equity traces its theoretical basis back to antiquity, its experimental basis begins in the era of the Norman conquest.[36]

Although a bifurcated system of common law courts and equity courts would eventually arise in England, for almost two centuries after the Norman conquest the "common law and equity existed as one undifferentiated system administered by the prerogative power of the king."[37] Before the fourteenth century, English equity courts were unknown since "the common law was equitable."[38] But by the mid-fourteenth century, it was apparent that the

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two were not distinct enough to have the character of separate bodies of law." *Id.* (footnotes omitted).

27. MCDOWELL, *supra* note 11, at 19. "The point of contact between *ius gentium* and *ius naturale* was the notion of [equity] or, more precisely, . . . natural equity." *Id.*

28. ROSSI, *supra* note 6, at 29.

29. MCDOWELL, *supra* note 11, at 19.

30. *Id.*

31. ROSSI, *supra* note 6, at 23; MCDOWELL, *supra* note 11, at 19.

32. MCDOWELL, *supra* note 11, at 21.

33. *See supra* text accompanying note 8.

34. MCDOWELL, *supra* note 11, at 24.

35. *Id.* at 21-25. Equity in England was also influenced by Christianity. *See* Timothy A.O. Endicott, *The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity*, 47 U. TORONTO FAC. L. REV. 549-70 (1989) (discussing the way in which Christian doctrine influenced the development of the English tradition of equity).

36. ROSSI, *supra* note 6, at 32.

37. *Id.*; MCDOWELL, *supra* note 11, at 24.

38. ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 188 (Liberty Fund 1985) (1966).

common law had lost the flexibility necessary to satisfactorily adjudicate all legal controversies.[39] Due in part to the influence of *stare decisis*, the common law had become "hardened";[40] it was now "limited . . . to a set of restricted forms of action covering fairly well defined types of cases."[41] "The separate administration of courts of equity arose around the middle of the 14th century because common law courts were either unwilling or unable to give relief to every claim."[42]

The courts of equity[43] were established to allow those without an adequate remedy at common law to benefit from the extraordinary relief of equity.[44] Equity served as a corrective of the law,[45] and the chancellor "applied a rational form of discretionary justice often based on nothing more than unarticulated conceptions of right and wrong."[46] Adjudications of cases in equity were made on the basis of "natural justice" because guiding precedent for such cases had not yet been established.[47] But as more cases were decided, equity courts began to adhere to precedent rather than only "natural justice."

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39. MCDOWELL, *supra* note 11, at 24.

40. *Id.*

41. 5 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 582-86 (1931), *reprinted in* WALTER WHEELER COOK, CASES AND MATERIALS ON EQUITY 2 (4th ed. 1948).

42. ROSSI, *supra* note 6, at 33 (footnotes omitted).

> So long as those who administered the common law were prepared to create and apply competent remedies, the common-law courts required no supplemental jurisdiction such as Chancery later supplied. The mysterious hardening of common-law procedures at the close of the thirteenth century, perhaps due to the lack of confident invention and initiative, forced the development of other means of rendering justice in new and difficult cases and ultimately created the division between common-law and Equity courts . . . .

HOGUE, *supra* note 38, at 188.

43. At their inception, the courts of equity, via the king, received petitions from those seeking a remedy in equity. "The monarch seems always to have referred these special petitions to his chancellor (usually an ecclesiastic), the Keeper of the Great Seal, for resolution. By the fifteenth century this practice had solidified into a Court of Chancery . . . ." MCDOWELL, *supra* note 11, at 24-25.

44. Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 22 (1989); ROSSI, *supra* note 6, at 34; MCDOWELL, *supra* note 11, at 24.

45. ROSSI, *supra* note 6, at 35.

> The English legal system has always shown a concern for what *ought* to be the results of a legal principle as well as a concern for the strict application of that principle. This distinction between *what is* and *what ought to be* may serve as a rough guide to the difference between common law and equity in the centuries after the fourteenth. Equity supplements the common law; its rules do not contradict the common law; rather, they aim at securing substantial justice when the strict rule of common law might work hardship.

HOGUE, *supra* note 38, at 175.

46. ROSSI, *supra* note 6, at 35.

47. 5 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *supra* note 41, at 4.

As in the common law, the principle of *stare decisis* had a hardening effect on equity and turned it into a thoroughgoing system of law.[48]

Despite adherence to precedent, the courts of equity continued to utilize natural law as a basis of decisionmaking. "Through the common law doctrine of *stare decisis*, equity became a system of positive jurisprudence without ever shedding its association with natural law."[49] Although there had been fear that the decisions of the equity courts either would be subject solely to the conscience of the chancellor,[50] or would become an instrument of political despotism,[51] the fact that equity had become a fixed body of law precluded these dangers.[52]

The English tradition of equity was transported to the United States.[53]

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48. *Id.*

> [A]s the petitions became more and more numerous, the chancellor began to follow more or less the precedents established by himself in prior cases which seemed to him similar and then later to examine into and follow the decisions of the chancellors who had preceded him. This [was the] development of equity from a system of natural justice into a system of law . . . .

Id.

49. ROSSI, *supra* note 6, at 36 (footnote omitted).

50. H. Jefferson Powell, *"Cardozo's Foot": The Chancellor's Conscience and Constructive Trusts*, 56 LAW AND CONTEMP. PROBS. 7 (Summer 1993). This article refers to the legal philosophy of John Selden. "The displacement of the known rules of the (common) law by the chancellor's exercise of conscience, in Selden's view, rendered legal rights and liabilities uncertain . . . and dependent on the moral character and wisdom (and the politics) of the individual who happens at any given moment to be chancellor." *Id.* at 8 (footnote omitted).

51. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 250 (Liberty Fund 1982) (8th ed. 1915).

52. *Id.*

> The law administered by the Lord Chancellor, or, in other words, Equity, had in it originally an arbitrary or discretionary element, but it in fact conferred real benefits upon the nation and was felt to be in many respects superior to the common law administered by the common-law judges. Even before 1660 acute observers might note that Equity was growing into a system of fixed law. Equity, which originally meant the discretionary, not to say arbitrary interference of the Chancellor, for the avowed and often real purpose of securing substantial justice between the parties in a given case, might, no doubt, have been so developed as to shelter and extend the despotic prerogative of the Crown. But this was not the course of development which Equity actually followed; at any rate from the time of Lord Nottingham (1673) it was obvious that Equity was developing into a judicial system for the application of principles which, though different from those of the common law, were not less fixed. The danger of Equity turning into the servant of despotism had passed away, and English statesmen, many of them lawyers, were little likely to destroy a body of law which, if in one sense an anomaly, was productive of beneficial reforms.

Id.

53. *See supra* text accompanying note 8. "The equity known by the framers [of the Constitution] was that of Blackstone: tame, precedent-bound, and not at all extraordinary."

But although in the United States the substance of English equity doctrine remained intact,[54] the administration of equity experienced procedural modification. Although a uniform separation between the courts of law and courts of equity existed in England at the time of the American Revolution, the governments of the United States used various methods to administer equity.[55] In most states, remedies both at common law and at equity were administered by a single court.[56] In the federal realm, the courts had equity jurisdiction equivalent to that of the English chancery court.[57] Today, a distinction between actions at law and actions at equity no longer exists in the majority of states,[58] such actions having been replaced by a "civil action" in which all legal remedies are received.[59] The federal courts also feature a single "civil action" for the administration of remedies at law and at equity.[60] The civil action procedurally eliminates the distinction between law and equity, but the substantive distinction still remains: in both the state[61] and federal[62] courts, remedies at law and remedies at equity are recognized as separate.

The influence of Aristotle and of ancient Rome extends to the interna-

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Honorable H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919, 943 (1994).

54. MCCLINTOCK, *supra* note 8, at 1. "In Anglo-American law, equity means the system of legal materials developed and applied by the court of chancery in England and the courts succeeding to its powers in the British Empire and the United States." *Id.*

55. 27 AM. JUR. 2D *Equity* § 4 (1966). "In some states, separate courts of chancery were constituted. In other states, the courts of common law were empowered to exercise equity jurisdiction. In still other states, the rules and principles of equity were administered by existing courts without any express constitutional or statutory authorization." *Id.* (footnotes omitted).

56. Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L. J. 215, 234-35 (1995).

> In the early republic years and beyond, states and territories did not generally create separate chancery courts. States primarily followed the federal model and gave chancery powers to the circuit courts (or their equivalents), leaving it to the legislature to create chancery courts if and when those courts were considered necessary.

Id.

57. Matthews v. Rogers, 284 U.S. 521, 529 (1932). "The equity jurisdiction conferred on inferior courts of the United States by section 11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by section 24 of the Judicial Code (28 USCA s 41), is that of the English court of chancery at the time of the separation of the two countries." *Id.*

58. 30A C.J.S. *Equity* § 4 (1992). "Only four states, Arkansas, Delaware, Mississippi, and Tennessee, still have separate courts of equity." Gitelman, *supra* note 56, at 244.

59. 30A C.J.S. *Equity* § 4 (1992).

60. FED. R. CIV. P. 2.

61. 27 AM. JUR. 2D *Equity* § 4 (1966).

62. 30A C.J.S. *Equity* § 4 (1992).

tional tradition of equity,[63] as well as to the American tradition. But unlike the courts of the United States, which inherited[64] from England a comprehensive and largely fixed set of equity principles which developed systematically and over time,[65] the International Court of Justice[66] has succeeded to a different system of equity. In the international realm, "[n]o wellspring of equity jurisprudence exists; there is no hardened international law of equity on which the international judge . . . can rely. Equity jurisprudence developed in piecemeal fashion."[67]

The modern tradition of international equity has been derived from two main sources: international claims conventions and international arbitration agreements,[68] the history of which begins with the Jay Treaty (1794), and the *Alabama Claims Arbitration* case (1871-1872).[69] In the late nineteenth century, these two arbitrations, coupled with a "burgeoning climate of internationalism," paved the way for many more arbitrations between nation-states.[70] Great confidence in international law existed in the late nineteenth and early twentieth centuries, during which time rules to regulate war between nation-states were established by various conferences, forums for dispute settlement were created, and numerous international treaties were signed.[71] International law was characterized by positivism.[72] The incorporation of naturalism into international law soon followed.

In the early twentieth century, international arbitral decisions often utilized principles of natural law to meliorate "the rigidities of the positivist international legal framework."[73] Woodrow Wilson is credited with reviving the ideas of natural law which international arbiters were then applying.[74] The League of Nations he envisioned, which had its basis in natural law,[75] aided "[t]he rise of naturalism in the first three decades of the 20th century."[76]

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63. ROSSI, *supra* note 6, at 39.

64. *See supra* text accompanying note 8.

65. *See* sources cited *supra* notes 40, 41.

66. The International Court of Justice is the successor to the Permanent Court of International Justice (1922-1946), which was established by the League of Nations. When the League ceased to exist in 1946, so did the Permanent Court. Under the authority of the United Nations, the International Court of Justice was established in 1946. The International Court of Justice is the "principal judicial organ of the United Nations." SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 14-15, 21, 24-25 (1995).

67. ROSSI, *supra* note 6, at 41.

68. *Id.* at 42, 59.

69. *Id.* at 42.

70. *Id.* at 43.

71. *Id.* at 43-45.

72. *Id.* at 45.

73. *Id.* at 46.

74. *Id.*

75. *Id.* at 46-47, 50.

76. *Id.* at 51.

In earlier arbitration decisions, equity was "an end in itself, . . . the standard of review on which the correctness of a decision was based."[77] In later decisions, a transformation occurred in which equity "also became a means by which the end result was achieved."[78] An important consequence of this transformation[79] was the application of positive doctrines of equity by arbitral tribunals.[80] No longer separate from the law, equity was now an essential part of the law. "[A]s a natural law concept, [equity] became an integral component in the administrative aspect of international decision making."[81] Numerous decisions of the Permanent Court of International Justice,[82] which utilized international rules of equity,[83] attest to the strong role equity played in substantive international law.

On the basis of its implied judicial powers, the International Court of Justice incorporated the principles of international equity for use in decision-making.[84] Although the Statute of the International Court of Justice does not authorize the Court to utilize the principles of equity in deciding cases,[85] "the very nature of the judicial function"[86] provides justification for the Court's use

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77. *Id.* at 76.

78. *Id.*

79. *Id.* at 76, 81. The transformation "incorporated two aspects of equity . . . . For conceptual purposes, they may be referred to as 'administrative postulates or principles of equity', which are found in both common and civil law systems, and 'rules of equity', which stem primarily from the Anglo-Saxon common law tradition." *Id.* at 80.

80. *Id.* at 76.

81. *Id.*

82. *See supra* text accompanying note 66.

83. ROSSI, *supra* note 6, at 127.

84. *Id.* at 129.

85. *Id.* As stated in Article 38 of the Statute of the International Court of Justice:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

ROSENNE, *supra* note 66, at 288-89 (quoting STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para. 1-2).

86. ROSSI, *supra* note 6, at 129.

of equity.[87] "[W]hen rules fail to provide a standard for the resolution of disputes, [international] judges rely on inherent interpretive powers to apply principles they deem essential to the proper performance of their duties. This . . . explains the judicial recourse to equitable principles."[88]

International arbitration agreements and claims conventions—the parties to which have largely been Western nation-states—"were the avenues through which equity initially was received into international law."[89] It is therefore no surprise that, "[a]lthough rooted in the world's major legal systems and religious traditions, equity as it is known in international law developed from and is associated most closely with the Western tradition."[90] Yet the meaning of equity in the international tradition is also infused with ideas other than those of Western jurisprudence; notions of equity in the legal systems of many other civilizations have penetrated international law.[91] Traditions of equity

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87. *Id.* at 142.

> [T]he law as applied by the International Court represents the highest grade of international law, matching in jural quality the law of any municipal legal system. It is a grade of law qualitatively superior to auto-interpretative and arbitrable grades. Given this classification, there is a heavy presumption in support of the proposition that the Court knows best how to do what it does. This presumption spawns a great deal of deference over the means chosen by the Court to effectuate its end. It is this deference to the judicial process that enables the Court to craft its own set of implied powers and construct its own *lex judicia*.

Id. (footnote omitted).

88. *Id.* at 143.

89. *Id.* at 59.

90. *Id.* at 22.

> The rise of international law in Europe in the 16th and 17th centuries, facilitated by the development of the modern European state system and the alacrity with which Jean Bodin's doctrine of sovereignty was accepted by statesmen and scholars alike, brought with it the incorporation of many of the teachings and practices of the Western experience. Equity was one among them and for this reason the classical understanding of equity in international law bears the imprimatur of the Western legal tradition.

Id. (footnotes omitted).

91. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 139-40 (Feb. 20) (separate opinion of Judge Ammoun).

> Incorporated into the great legal systems of the modern world referred to in Article 9 of the Statute of the Court, the principle of equity manifests itself in the law of Western Europe and of Latin America, the direct heirs of the Romano-Mediterranean *jus gentium*; in the common law, tempered and supplemented by equity described as accessory; in Muslim law which is placed on the basis of equity (and more particularly on its equivalent, equality) by the Koran and the teaching of the four great jurisconsults of Islam condensed in the Shari'a, which comprises, among the sources of law, the *istihsan*, which authorizes equity-judgments; Chinese law, with its primacy for the moral law and the common sense of equity, in harmony with the Marxist-Leninist philosophy; Soviet law, which quite clearly provides a place for considerations

from around the world provide the International Court of Justice with "a vast resource from which to quarry the elements of the universal sense of justice and fairness that underlies the meaning of equity."[92]

III. SIMILARITIES BETWEEN THE TWO TRADITIONS OF EQUITY

In the American courts and the World Court, equity has five prominent characteristics: (1) it is an often utilized source of law; (2) it involves the application of rules; (3) it is characterized by flexibility; (4) it allows the judge to use discretion; and (5) it promotes decisionmaking which achieves justice.

Equity is a source of law which is often used by the American courts. "Equitable doctrine is part of the warp and woof of our substantive law."[93] Equitable remedies are not extraordinary in American jurisprudence.[94] The

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> of equity; Hindu law, which recommends 'the individual to act, and the judge to decide, according to his conscience, according to justice, according to equity, if no other rule of law binds them'; finally the law of the other Asian countries, and of the African countries, the customs of which particularly urge the judge not to diverge from equity and of which 'the conciliating role and the equitable nature' have often been undervalued by Europeans; customs from which sprang a *jus gentium* constituted jointly with the rules of the common law in the former British possessions, the lacunae being filled in 'according to justice, equity and good conscience'; and in the former French possessions, jointly with the law of Western Europe, steeped in Roman law. A general principle of law has consequently become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice.

Id. (footnotes omitted).

> Some other important sources should also be mentioned—the fine analyses of justice in Greek and Judaic philosophy; the equity-impregnated concept of "dharma" in Hindu jurisprudence; the elaborately researched concept of fairness and justice in Buddhism; the Christian tradition of justice and conscience as "weightier matters of the law" as opposed to mere legalism; and the Qur'anic injunction: "If thou judge judge in equity between them for God loveth those who judge in equity" which has been the subject of extensive commentary over the centuries by the jurists of Islam. The sophisticated notions of reasonable and fair conduct currently being unveiled by modern researches in African, Pacific and Amerindian customary law, and the principle of deep harmony with the environment which underlies Australian Aboriginal customary law add to the reservoir of sources available.

Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 275-76 (June 14) (separate opinion of Judge Weeramantry) (footnotes omitted).

92. 1993 I.C.J. at 275 (separate opinion of Judge Weeramantry).

93. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 71 (Summer 1993).

94. *Id.* at 61.

"irreparable injury rule"—sometimes invoked by the courts—suggests that "equitable remedies are unavailable if legal remedies will adequately repair the harm."[95] But a predisposition in favor of legal as opposed to equitable remedies does not exist.[96] If a litigant desires a remedy at equity, he usually receives it.[97] Although the distinction between law and equity still exists in the American courts,[98] the rules of equity are frequently employed by judges,[99] even in circumstances in which a particular rule's origin in equity might not be recognized.[100]

The International Court of Justice also uses equity as a source of law. It was noted in the *North Sea Continental Shelf* cases—in which equity had been applied in the Court's decision—that "[a] general principle of law has . . . become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice."[101] But equity is not simply a general principle of law:

> In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.[102]

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95. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990).

96. *Id.* at 692.

97. *Id.* at 768.

98. *See* sources cited *supra* notes 61, 62. Laycock, however, would rather see an end to this distinction.

> My instincts are much more integrationist. The distinctive traditions of equity now pervade the legal system. The war between law and equity is over. Equity won. We should stop thinking of equity as separate and marginal, as consisting of extraordinary remedies, supplemental doctrines, and occasional exceptions, as special doctrines reserved for special occasions. Except where references to equity have been codified, as in the constitutional guarantees of jury trial, we should consider it wholly irrelevant whether a remedy, procedure, or doctrine originated at law or in equity. We should invoke equity just as we invoke law, without explanation or apology and without a preliminary showing that this is a case for equity.

Laycock, *supra* note 93, at 53-54.

99. Laycock, *supra* note 93, at 68-71.

100. *Id.*

101. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 140 (Feb. 20) (separate opinion of Judge Ammoun).

102. Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 60 (Feb. 24).

The Court has reaffirmed this notion.[103] At the bar of the World Court, "law" and "equity" are not entirely separable concepts. Litigants are assured that the Court may apply principles of equity in decisionmaking just as it applies rules of international law.

The application of rules is characteristic of equity in the American courts. "Equity may be described as 'a system of positive jurisprudence founded upon established principles.'"[104] It seems that "equity and law no longer appear to involve different methodologies of decisionmaking. Modern equity jurisprudence has itself become a great body of equitable law, as complex, doctrinal, and rule-haunted as the common law ever was."[105] In a case in which equitable relief is involved, the judge is presented with a large body of equitable doctrine from which the applicable rules may be drawn.[106]

The International Court of Justice also applies rules when resorting to equity. Because justice is a primary concern of the Court when it applies equity, the Court often refers to justice when analyzing equity's relationship to legal rules. The *North Sea Continental Shelf* cases set forth what continues to be the Court's position with respect to the relationship between equity and the rule of law:

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103. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 224 (June 14) (separate opinion of Judge Weeramantry). "[T]he term equity, as used in the Court's Judgment or in the context of international law, is quite distinct from its use to designate separate systems of judicial administration such as existed in some legal systems for the purpose of correcting insufficiencies and rigidities of the law." *Id.*

104. Associated Investment Company Limited Partnership v. Williams Associates IV, 645 A.2d 505, 511 (Conn. 1994) (quoting Harper v. Adametz, 113 A.2d 136 (Conn. 1955)).

105. Powell, *supra* note 50, at 8. "If bankruptcy is regarded as being within the traditional equitable jurisdiction, it undoubtedly has become the most regimented and codified part of equity . . . ." Zygmunt J. B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 594 n.3 (1982).

106. The role of the judge in applying the principles of equity has been compared to that of a priest.

> The judge as priest engages in a thought process that uses the tool of reason to divine sources or to apply doctrines based on orthodox principle. Judicial divination looks first to existing principles and rules for guidance in resolving problems. Such a thought process does not challenge the controlling orthodoxy of which the judge feels a part. Judicial divination accepts the principles of the orthodoxy, including its doctrinal structure, and seeks to apply those orthodox principles to the specific factual situations that come before the judges.

David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 140 (1988).

> [W]hen mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field [i.e., maritime delimitation] it is precisely a rule of law that calls for the application of equitable principles.[107]

The Court has clarified its stance on equity's relationship to rules by noting that "the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law"[108] and that "the fact that [the Court] dispenses justice does not entitle it to ignore the rules of law."[109] Further suggesting that well-defined rules allow for the successful application of equity, the Court has observed that, "[w]hile every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law, to be attained."[110]

Although rules of equity are applied by the American courts and the World Court, in the former, there is a wealth of equitable rules which has emerged through *stare decisis*, while in the latter, there are relatively fewer rules. Owing to the small number of maritime delimitation cases decided by the Court to date, a significant body of equitable rules has yet to develop. It is thought that as more decisions are made in which the rules of equity are applied, an increasingly hardened, coherent body of doctrine will emerge.[111]

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107. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 48 (Feb. 20).

108. Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 39 (June 3).

> The message of the Court is clear. It does not hold out the possibility that a clearly determinative black-letter rule of law will be established. Nor should the maritime boundary law devolve to the point where it is so indeterminate that each delimitation is decided on an ad hoc basis comparable to a decision *ex aequo et bono*. Rather, in the common-law tradition as understood by the realists, the continuing series of judgments and awards should progressively refine the legal rules and their objectives.

Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L. L. 227, 233 (1994).

109. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 240 (June 14) (separate opinion of Judge Weeramantry).

110. 1985 I.C.J. at 55. "Judge Jennings has noted that a 'structured and predictable system of equitable procedures is an essential framework for the only kind of equity that a court of law that has not been given competence to decide *ex aequo et bono*, may properly contemplate.'" L. D. M. Nelson, *The Roles of Equity in the Delimitation of Maritime Boundaries*, 84 AM. J. INT'L L. 837, 852 (1990) (quoting Jennings, *Equity and Equitable Principles*, 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27, 38 (1986)).

111. Louis B. Sohn & Russell Gabriel, *Equity in International Law*, 82 AM. SOC'Y INT'L L. PROC. 277, 288 (1988). "As judicial recourse to equitable principles increases, the outlines of the rules of equity become clearer, as is appropriate in any source of law applied by

But even if precedent does have the effect of creating a more thoroughgoing aggregation of equitable rules, the impact of such rules on the Court will not necessarily parallel that of equitable rules on the American courts. Though earlier decisions in equity bind the courts of the United States, *stare decisis* does not bind the World Court.[112] "The Court does not have to follow its precedents even though it often chooses to do so."[113]

The American courts, although bound by precedent when applying equity, have maintained flexibility when applying equitable rules.[114] "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[115] "A hallmark of equity is its 'capacity of expansion [beyond the common law], so as to keep abreast of each succeeding generation and age.'"[116]

Equity in the World Court is also characterized by flexibility. The rules of equity flex to accommodate various circumstances. "In the context of maritime delimitation, each case presents upon the facts a different shape from every other, and equity adjusts itself around that shape . . . because it is flexible, where a rigid rule would scarcely do it justice."[117] The Court avoids inelastic applications of equity because "[i]t would be a negation of [the] flexibility which is a characteristic of equity if we were at this early stage in the development of maritime demarcation to introduce into it the very element of rigidity which equitable doctrine was developed to prevent."[118]

The exercise of discretion is a vital part of equity in the American courts.[119] The grant of equitable relief is thought to entail a certain amount of discretion.[120] Benjamin Cardozo believed that the discretion applied by the

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judges." Thomas M. Franck & Dennis M. Sughrue, *The International Role of Equity-as-Fairness*, 81 GEO. L. J. 563, 595 (1993). "[O]ne should recall that a little more than 20 years has elapsed since the judicial articulation of equitable criteria in the *North Sea Continental Shelf* cases. It took equity more than 400 years to harden into a system of common law." ROSSI, *supra* note 6, at 246.

112. Charney, *supra* note 108, at 228.

113. Barbara Kelly, Note, *The International Court of Justice: Its Role in a New World Legal Order*, 3 TOURO J. TRANSNAT'L L. 223, 226 (1992).

114. *See* Plater, *supra* note 105, at 525.

115. Hays v. Regents of University of Michigan, 220 N.W.2d 91, 96 n.8 (Mich. Ct. App. 1974) (quoting Brown v. Board of Education of Topeka, 349 U.S. 294, 300 (1955)).

116. Associated Investment Company Limited Partnership v. Williams Associates IV, 645 A.2d 505, 511 (Conn. 1993) (quoting 1 J. POMEROY, EQUITY JURISPRUDENCE § 67, at 89 (5th ed. 1941)).

117. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 250 (June 14) (separate opinion of Judge Weeramantry).

118. *Id.* at 263 (separate opinion of Judge Weeramantry).

119. Laycock, *supra* note 93, at 73.

120. *See* Powell, *supra* note 50, at 22; Guignard v. Atkins, 317 S.E.2d 137, 140 (S.C. Ct. App. 1984).

judge was equivalent to "the shared morality of the community."[121] He "assumed the existence of a moral tradition, within the legal profession and in society generally."[122] "In his world, the informed conscience of the chancellor was free to exercise discretion in judgment because his decisions were embedded in a tradition that made discretion . . . an act of solidarity . . . ."[123] This view of discretion still prevails. One modern court states that "[e]quity speaks of conscience. . . . It is a judicial conscience—'a metaphorical term, designating the common standard of civil right and expediency combined . . . .'"[124] Further elaborating, this court has noted that "[e]quity also speaks of morality. The morality involved is that of society—the standards evolve through social advancement in a stabilized community life."[125]

The International Court of Justice, which is required to apply international law in the settlement of disputes,[126] probably cannot claim to exercise a form of discretion which gives effect to the values of one particular community or nation. The Court, nevertheless, exercises discretion in applying equity. Discretion is perceived to be an essential element of decisionmaking. "[T]he use of judicial discretion within the prescribed parameters [of the law] is . . . a necessary and intrinsic part of the judicial process . . . ."[127] The Court exercises discretion in selecting the principles of

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121. Powell, *supra* note 50, at 22.

122. *Id.* at 26.

123. *Id.* at 27. The views of Richard Posner seem to reinforce Cardozo's justification for the judicial exercise of discretion. For Posner, "the objectivity and therefore the legitimacy of the common law is a function of the extent to which social consensus prevails regarding the purposes and goals that it instantiates." Jack Knight & James Johnson, *Political Consequences of Pragmatism*, 24 POL. THEORY 68, 78 (1996). The cogency of Posner's position may depend in part on whether the notion of an existing social consensus can be sustained today. Even if it could, "[t]he clear objection is that consensus can be imposed by power asymmetries [in society] rather than produced through free and uncoerced assent." *Id.* at 78-79. "[Posner] nevertheless maintains that social consensus is a source of objectivity and legitimacy [of the common law]." *Id.* at 79. Posner seems to be saying that "[t]he social consensus surrounding an ethical principle may be evidence of its value, and courts may invoke it in support of their decisions. Here the justification [for judicial decisions] is a practical one. Regardless of how a society converged on a particular ethical principle, we may discover that it has socially desirable properties." *Id.* "For the pragmatist [i.e., Posner], consensus or convergence on a particular principle is evidence that it has demonstrated its value by virtue of having withstood the 'test of time'. On Posner's account, principles that demonstrate their utility over time and in the face of competing principles enjoy some presumption as to their socially desirable character." *Id.* at 80 (citation omitted).

124. *In re* Quinlan, 348 A.2d 801, 816-17 (N.J. Super. Ct. Ch. Div. 1975) (quoting 1 POMEROY, EQUITY JURISPRUDENCE § 57, at 74 (5th ed. 1941)).

125. *Id.* at 817.

126. *See supra* text accompanying note 85.

127. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 252 (June 14) (separate opinion of Judge Weeramantry).

equity to be applied in a particular case[128] and in creating equitable rules when no rules are applicable.[129]

In applying equity, the American courts strive to achieve justice. "To do justice between the parties is the object of a court of equity."[130] Not only an object which courts pursue, justice is also a non-negotiable mandate. "Equity *requires* doing justice to all parties in the action."[131] The judge achieves justice by looking to a "high standard":

> It has been stated that the power of equity is 'the power possessed by judges—and even the duty resting upon them—to decide every case according to the high standard of morality and abstract right; that is the power and duty of a judge to do justice . . . .' It involves the obedience to dictates of morality and conscience.[132]

It would seem that American judges are not only required to do justice, but are also "obligated to construct visions of justice."[133]

The idea of justice is prominent in the World Court's application of equity. "Equity in the sense of a quest for the just solution offers a firm substratum for a considerable part of the Court's reasoning."[134] The Court has noted that "[e]quity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it."[135] It follows that "[t]he task of the judge is to produce an equitable and just result in the particular case."[136]

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128. Franck & Sughrue, *supra* note 111, at 583.

129. Sohn & Gabriel, *supra* note 111, at 283.

130. Rainer v. Holmes, 75 N.W.2d 290, 292 (Wis. 1956). "The purpose of a court sitting in equity is to promote and achieve justice with some degree of flexibility." Garrett v. Arrowhead Improvement Association, 826 P.2d 850, 855 (Colo. 1992) (en banc).

131. Folkers v. Southwest Leasing, 431 N.W.2d 177, 182 (Iowa Ct. App. 1988) (emphasis added).

132. *In re* Quinlan, 348 A.2d 801, 816 (N.J. Super. Ct. Ch. Div. 1975) (quoting 1 POMEROY, EQUITY JURISPRUDENCE § 43, at 57 (5th ed. 1941)) (citation omitted).

133. Barnhizer, *supra* note 106, at 160.

134. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 240 (June 14) (separate opinion of Judge Weeramantry).

135. Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 60 (Feb. 24). "As the Court said, it is a court of justice, and therefore it has to find a just solution or avoid unjust solutions." Sohn & Gabriel, *supra* note 111, at 282.

136. Nelson, *supra* note 110, at 858.

IV. MEANS-BASED VERSUS ENDS-BASED EQUITY

Between the American courts and the World Court equity has similar characteristics. Yet these similarities are eclipsed by a significant dissimilarity: in the American courts, equity is a means-based system; in the World Court, equity is an ends-based system.

American judges have inherited a tradition of equity in which the means used to achieve a result are the paramount consideration. The equity jurisprudence of the late nineteenth century provided for a means-/rule-based approach in which all disputes could be resolved through the use of general principles of equity:

> The foundational general principles were fixed, and since those principles were ideal, their permanence presented no obstacle to rendering correct decisions in individual cases. On the other hand, more concrete principles and rules changed as new fact situations called for new concrete norms. The general principles, however, interacted with the novel fact situation to determine the more concrete elements.[137]

The judge had the power to adapt general rules to achieve the correct result in an individual case; and a precise methodology was followed to that end:

> Judicial decisionmaking . . . combined the constraint of permanent and determinate general principles with the flexibility of more concrete rules and principles sensitive to changing social facts. For late nineteenth century jurists, the virtues of equitable "flexibility" and "discretion" consisted in the fact that equity judges, rather than being bound to apply existing rules mechanically, were able to reason "scientifically" by inferring rules and principles from precedent, modifying those rules and principles when necessary, and spinning out the implications of the modified rules and principles in particular factual situations.[138]

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137. Bone, *supra* note 44, at 23 (footnotes omitted).

138. *Id.* at 24. When a judge reasons "scientifically," he, like any true scientist, uses the "scientific method" which consists of "(1) gathering evidence, (2) making a hypothesis, and (3) testing the hypothesis." CARROLL QUIGLEY, THE EVOLUTION OF CIVILIZATIONS 33 (Liberty Fund, Inc. 1979). The judge who reasons scientifically knows that "[s]cience is a method, not a body of knowledge or a picture of the world." *Id.* at 45. He does not harbor the "erroneous idea that scientific theories are true." *Id.* at 40.

> No scientist ever believes that he has the final answer or the ultimate truth on anything. Rather he feels that science advances by a series of successive (and, he hopes, closer) approximations to the truth; and, since the truth is never finally reached, the work of scientists must indefinitely continue. Science . . . is like a

Like the natural scientist, who discovers an answer by positing hypotheses and testing them within a system of nature, so the judge in equity—by discovering how a particular result is achieved through the application of general principles—follows a similar methodology within a system of law.

Perhaps the modern American judge does not consider himself a scientist; but the nineteenth century's scientific, means-based approach to equity survives in modern jurisprudence.[139] The American judge may not first decide what the correct result is, and then use equity to achieve it. To the contrary, the correct result is a product of strict adherence to equitable rules.

Although it is the office of the American judge to exercise equitable discretion,[140] that discretion is means-based, and is always exercised within the rules of equity.[141] Cardozo makes this notion plain:

> single light in darkness; as it grows brighter it shows more clearly the area of illumination and, simultaneously, lengthens the circle of surrounding darkness.

Id. at 34.

139. As a general proposition, it may be said that American equity has not lost its connection to the past. With respect to equity precedent, for instance, "the nineteenth century is still thought to provide relevant guidance." Plater, *supra* note 105, at 525.

140. *See* Laycock, *supra* note 93, at 73; Powell, *supra* note 50, at 22; Guignard v. Atkins, 317 S.E.2d 137, 140 (S.C. Ct. App. 1984).

141. *See* Rosenberg v. Haggerty, 82 N.E. 503, 504 (N.Y. 1907) ("Broad as is the jurisdiction of a court of equity . . . it nevertheless is governed in the administration of relief by settled principles and the action of the court is dependent, not upon its pleasure, but upon the facts of the case and the condition of the parties."); Youngs v. West, 27 N.W.2d 88, 91 (Mich. 1947) ("[T]he granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the properiety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case. Of course, this discretion is not an arbitrary one, but must be exercised in accordance with the fixed principles and precedents of equity jurisprudence, and in accordance with the evidence." (quoting 30 C.J.S. *Equity* § 10, at 328-29)); Yuba Consolidated Gold Fields v. Kilkeary, 206 F.2d 884, 889 (9th Cir. 1953) ("Equity jurisdiction being recognized, the question whether it will be exercised rests in the sound discretion of the chancellor. It must be a legal discretion based on principles of law and not on the arbitrary will of the chancellor."); Burke v. Hoffman, 147 A.2d 44, 48 (N.J. 1958) ("[T]he doctrine of equitable assignment involves the exercise of a sound discretion, according to the principles of equity and essential justice in the particular circumstances and the requirements of positive law and sound public policy."); Kjeldgaard v. Carlberg, 97 N.W.2d 233, 239 (Neb. 1959) ("[The] equitable remedy is not a matter of right but one that may be granted by the court in its sound judicial discretion, controlled by established principles of equity and depending upon the facts and circumstances of the particular case. It is not a discretion in the sense that it may be granted or denied at the will or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies." (quoting Mainelli v. Neuhaus, 59 N.W.2d 607, 608 (Neb. 1953))); Zimmerman v. Campbell, 245 N.W.2d 469, 471 (N.D. 1976) ("Where the overall facts indicate unfairness, artifice, sharp practice, overreaching, or the like, the court of equity, in its determination, will apply sound judicial discretion within the established principles which constitute the body of equity jurisprudence."); MLZ Inc., v. Zuckerberg, 470 F.Supp. 273, 276 (E.D. Tenn. 1978) ("The granting of preliminary injunctive relief pending final decision on the merits is a matter

> In the award of equitable remedies there is often an element of discretion, but never a discretion that is absolute or arbitrary. In equity, as at law, there are signposts for the traveler. "Discretion . . . 'must be regulated upon grounds that will make it judicial.'"[142]

The exercise of discretion may imply a resort to conscience. Indeed, "[i]n matters of equity the Court is one of conscience."[143] But the judge sitting in equity may not adopt as his creed, "[t]his above all, to thine own self be true."[144] The role of conscience in modern equity jurisprudence is set forth clearly by Judge Posner:

> The moralistic language in which the principles of equity continue to be couched is a legacy of the time when a common lawyer could, without sounding too silly, denounce equity as "a Roguish thing" because "Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is equity." But the time itself is long past, and the proposition that equitable relief is "discretionary" cannot be maintained today without careful qualification. A modern judge, English or American, state or federal, bears very little resemblance to a Becket or a Wolsey or a More, but instead administers a system of rules which bind him whether they have their origin in law or in equity and whether they are enforced by damages or by injunctions. . . . Even when the plaintiff is asking for the extraordinary remedy of a preliminary injunction . . . the request is evaluated according to definite standards, rather than committed to a free-wheeling ethical discretion.[145]

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committed to the sound discretion of the trial court. Such relief is equitable in nature, and the Court's exercise of its discretion is to be guided by the general historical principles of equity.") (citations omitted).

142. Evangelical Lutheran Church of the Ascension of Snyder v. Sahlem, 172 N.E. 455, 457 (N.Y. 1930) (quoting Haberman v. Baker, 28 N.E. 370 (N.Y. 1891) (quoting White v. Damon, 7 Ves. 30, 35)).

143. Holland v. Walls, 621 S.W.2d 496, 497 (Ark. Ct. App. 1981).

144. WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 1, sc. 3.

145. Shondel v. McDermott, 775 F.2d 859, 867-68 (7th Cir. 1985) (citations omitted).

In the case of *In re Quinlan*, in which a father, seeking to be appointed the guardian of his incompetent daughter, requested authorization to discontinue her life support, the role of the judge's conscience in exercising equitable discretion was set forth more starkly:

> Equity speaks of conscience. That conscience is not the personal conscience of the judge. For if it were, the compassion, empathy, sympathy I feel for Mr. and Mrs. Quinlan and their other two children would play a *very* significant part in the decision. It is a judicial conscience—'a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles, and limited by established doctrines to which the court appeals, and by which it tests the conduct and right of the suitors.' The rationale behind not allowing the personal conscience and therefore the noted emotional aspects are that while it may result in a decision based on a notion of what is right for these individuals, the precedential effect on future litigation . . . would be legally detrimental.[146]

The judge sitting in equity may not base his decision on what he believes to be right or wrong. His conscience works within, and is subordinated to, the established rules of equity.[147] The operation of this principle is

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146. *In re* Quinlan, 348 A.2d 801, 816-17 (N.J. Super. Ct. Ch. Div. 1975) (quoting 1 POMEROY, EQUITY JURISPRUDENCE § 57, at 74 (5th ed. 1941)). The court further noted that "[t]his does not preclude the setting of a precedent; it merely requires the setting to be within the concept of judicial conscience." *Id.* at 817 n.7.

147. *See* Hague v. Warren, 59 A.2d 440, 443 (N.J. 1948) ("An 'equity' is not a chancellor's sense of moral right, or any vague or indefinite opinion as to altruism, but is a right cognizable in a court of chancery, governed by established rules and fixed precedents." (quoting W. D. Cashin & Co. v. Alamac Hotel Co., Inc., 131 A. 117, 119 (N.J. Ch. 1925))); American Oil Co. v. Carlisle, 63 A.2d 676, 681 (Me. 1949) ("[I]t is well settled that judicial discretion must be exercised soundly according to the well-established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion." (quoting Bourisk v. Mohican Co., 175 A. 345, 346 (Me. 1934))); Cookston v. Box, 146 N.E.2d 171, 174 (Ohio Ct. Common Pleas 1957) ("[A court of equity] is a court of conscience, must do equity and must apply 'rules of reason and righteousness.' But in doing so it must stay within the framework of those precedents and rules of law and equity which govern the pertinent facts before it." (quoting 20 O.Jur.2d 18)); Las Cruces TV Cable v. Federal Communications Commission, 645 F.2d 1041, 1048 n.14 (D.C. Cir. 1981) ("[T]he discretion [of an equity court] is not the mere personal discretion of the chancellor or judge, but is a judicial discretion, which means that the judge consults precedents to find the principles, as distinguished from strict rules, which are applicable to a given situation, and then determines, from all of the facts in the case, what relief will best give effect to the various principles involved." (quoting H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 51-52 (1948))); Lewandowski v. Beverly, 420 N.E.2d 1278, 1280 (Ind. Ct. App. 1981) ("[J]udicial discretion is not . . . arbitrary . . . but is governed by and

apparent in the role which the judicial vision of justice plays in equitable decisionmaking. Not only are judges required to have visions of justice;[148] equity requires that judges achieve justice in each case.[149] But justice must be attained by adhering to equity's fixed rules. "[J]udges are neither philosopher-kings nor entitled to simply invent their own utopian fantasies in which they judge all before them in accordance with some fantastic standard . . . ."[150]

Regardless of the equitable remedy sought, the American judiciary will not neglect to follow the rules of equity;[151] it will not first settle upon a

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must conform to the well-settled rules of equity."); State v. Reed, 421 So.2d 754, 755 (Fla. Dist. Ct. App. 1982) ("'Judicial discretion' does not imply that a court may act, or fail to act, according to the mere whim or caprice of the presiding judge, but it means a discretion exercised within the limits of the applicable principles of law and equity, and the exercise of which, if clearly arbitrary, unreasonable, or unjust, when tested in the light of such principles, amounting to an abuse of such discretion, may be set aside on appeal. This is 'a government of laws and not of men.'" (quoting Carolina Portland Cement Co. v. Baumgartner, 128 So. 241, 247 (Fla. 1930))); County of Allegheny v. Commonwealth, 480 A.2d 1330, 1333 (Pa. Commw. Ct. 1984) ("While equity springs from and is administered through the conscience, the exercise of discretion by a court of equity is not an arbitrary or capricious function, but is one directed within the channels of precedent. . . . Although we appreciate the County's plight, we cannot fashion a remedy to relieve the situation where it is clear that equity has no authority to intervene."); Cordis Corporation v. Prooslin, 482 So.2d 486, 491 (Fla. Dist. Ct. App. 1986) ("In exercising its discretion, the court is guided by established rules and principles of equity jurisprudence, in view of the particular facts presented in the case."); Bercaw v. Bercaw, No. 87-04-032, 1988 WL 25925, at *2 (Ohio Ct. App. Feb. 29, 1988) ("[T]he 'equity conscience' of a court is traditionally guided and controlled by definite and established rules." (quoting Smith v. Smith, 168 Ohio St. 447, 456 (1959))); Thrifty Dutchman, Inc. v. Florida Supermarkets, Inc., 541 So.2d 634, 636 (Fla. Dist. Ct. App. 1989) ("'[J]udicial discretion' means discretion exercised within the limits of recognized rules of applicable law and equity, which, if unjust, when tested in light of those principles may be set aside on appeal."); Tiffany v. Forbes Custom Boats, Inc., No. 91-3001, 1992 WL 67358, at *8 (4th Cir. Apr. 6, 1992) (per curiam) ("A judge's discretion is not boundless and must be exercised within the applicable rules of law or equity."); Commission on Human Rights and Opportunities v. Truelove and Maclean, Inc., No. 115306, 1995 WL 415808, at *8 (Conn. Super. Ct. June 28, 1995) ("That the court's discretion is equitable in nature . . . hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review . . . . It is true that [e]quity eschews mechanical rules . . . [and] depends on flexibility . . . . But when Congress invokes the Chancellors [sic] conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not equity [which] varies like the Chancellor's foot." (quoting Albemarle Paper Company v. Moody, 422 U.S. 405, 415-23 (1975))).

148. *See* source cited *supra* note 133.

149. *See* Folkers v. Southwest Leasing, 431 N.W.2d 177, 182 (Iowa Ct. App. 1988).

150. Barnhizer, *supra* note 106, at 160.

151. *See* Griffith v. Department of Motor Vehicles, 598 P.2d 1377, 1383 (Wash. Ct. App. 1979); Booras v. Uyeda, 643 P.2d 413, 415 (Or. Ct. App. 1982); Guignard v. Atkins, 317 S.E.2d 137, 140 (S.C. Ct. App. 1984); Bailey v. Christo, 453 So.2d 1134, 1137 (Fla. Dist. Ct. App. 1984); Given v. Cappas, 486 N.E.2d 583, 591 (Ind. Ct. App. 1985); Sarasota Beverage Co. v. Johnson, No. 88-1265, 1989 WL 265294, at *2 (Fla. Dist. Ct. App. Feb. 10,

particular form of equitable relief and then seek legal justification for its decision. American equity's means-based approach to relief will not be subordinated to a judge's desire to achieve a particular end. The United States Court of International Trade has concisely summed up this sentiment by declaring that "this court's powers in equity are intended to enable it to give full effect to the requirements of justice. This tenet should not be misinterpreted to condone the circumvention of fundamental legal methods in order to achieve desired results."[152]

When the American courts apply equity, the end does not justify the means. But when the International Court of Justice applies equity, the end does justify the means. The veracity of this statement is not immediately apparent because many of the Court's declarations seem to suggest that the equity it applies is a rule-driven, means-based system of jurisprudence. In the *North Sea Continental Shelf* cases, the Court noted that, in adjudicating a case of maritime delimitation:

> [I]t is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field . . . .[153]

The Court in *Libya v. Malta* further clarified its position by stating that:

> [T]he justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.[154]

1989).

152. Timken Company v. United States, 777 F.Supp. 20, 27 (Ct. Int'l Trade 1991). *See also* County of Allegheny v. Commonwealth, 480 A.2d 1330, 1333 (Pa. Commw. Ct. 1984) ("Although we appreciate the County's plight, we cannot fashion a remedy to relieve the situation where it is clear that equity has no authority to intervene."); First Federated Savings Bank v. McDonah, 422 N.W.2d 113, 115 (Wis. Ct. App. 1988) ("The McDonahs do not cite an example of an equitable principle permitting delay to be a defense to a foreclosure action. They misinterpret 'equity' to mean that a court may ignore statutes and case law to enable it to assist someone in trouble. A court's equitable powers are not that all-encompassing.").

153. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 47 (Feb. 20).

154. Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 39 (June 3).

More recently, the Court has maintained that it "and its predecessor have of course been careful to point out that the fact that it dispenses justice does not entitle it to ignore the rules of law."[155]

Not only has the Court enunciated the rule-based nature of equity; it has also specifically defined the kind of equity it applies. There are at least five different kinds of equity which the Court might administer. Equity *ex aequo et bono* "refers to a decision untrammeled by rules of law but depending purely on the tribunal's sense of justice."[156] Absolute equity "connotes the application of a just and fair solution irrespective of whether it overrides existing rules or principles of positive law."[157] Equity *praeter legem* "refers to filling in gaps and interstices in the law."[158] Equity *infra legem* refers to the use of equity "within the law."[159] Equity *contra legem* is "the use of equity in derogation of the law."[160] The Court insists that when it applies equity, its decisions are always *infra legem*.[161]

The Court's declaration that it uses equity within the law suggests that its application of equity is in some sense rule-based and perhaps, therefore, means-based. A hint that this might not be the case stems from an appreciation that the Court, in delimiting maritime boundaries, seems to be consistently looking toward the end result of its decisionmaking. The importance of reaching an "equitable result" is often emphasized.[162] Indeed, "[t]his concern with equitable results, despite the application of equitable principles, procedures and methods, is well founded in the Court's jurisprudence."[163] But because the Court might be guided by an international convention or a precedent from a previous case which calls for "an equitable solution" to maritime delimitation,[164] and because the Court might even be asked by the

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155. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 240 (June 14) (separate opinion of Judge Weeramantry).

156. *Id.* at 230 (separate opinion of Judge Weeramantry). "[N]either [the International Court of Justice] nor [the Permanent Court of International Justice] has ever decided a case *ex aequo*." Franck & Sughrue, *supra* note 111, at 570 (footnote omitted). *See also* Edward McWhinney, *Equity in International Law*, *in* EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 582 (Ralph A. Newman ed., 1973).

157. 1993 I.C.J. at 230-31 (separate opinion of Judge Weeramantry).

158. *Id.* at 231 (separate opinion of Judge Weeramantry).

159. Sohn & Gabriel, *supra* note 111, at 278.

160. *Id.*

161. Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, 58 (Feb. 3) (separate opinion of Judge Ajibola); ROSSI, *supra* note 6, at 141; Sohn & Gabriel, *supra* note 111, at 278.

162. *See* Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 82 (Feb. 24); Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 38 (June 3); Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 61-62 (June 14).

163. 1993 I.C.J. at 222 (separate opinion of Judge Weeramantry).

164. *See, e.g.*, 1985 I.C.J. at 30.

litigants to execute delimitation with a view towards an equitable result,[165] it is improper to infer that, because of the Court's emphasis on equitable results, equity is necessarily an ends-based system.

But the ends-based nature of equity in the Court's jurisprudence need not be inferred: it has been expressly stated by the court. The *North Sea Continental Shelf* cases laid a foundation for ends-based equity in maritime delimitation by stating that, "[w]hatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable."[166] Discussing methods of maritime delimitation, the Court asserted that "it is necessary to seek not one method of delimitation but one goal."[167] The ends-based nature of equity was further articulated in *Tunisia v. Libya*:

> It is . . . the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term 'equitable principles' cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result.[168]

The Court approved of this position in the case of *Libya v. Malta* when it noted that "[i]t is . . . the goal—the equitable result—and not the means used to achieve it, that must be the primary element."[169] It seems clear that "the fundamental rule of delimitation . . . [is] that the method to be adopted should be justified by the equity of the result."[170] In the World Court, equity is used as a "self-justifying end."[171]

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165. *See, e.g.*, 1985 I.C.J. at 31.

166. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 48 (Feb. 20).

167. *Id.* at 50.

168. Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 59 (Feb. 24).

169. Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 38-39 (June 3).

170. *Id.* at 82-83; *see also* Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 222-24 (June 14) (separate opinion of Judge Weeramantry). One commentator notes that in *Tunisia v. Libya*, "the whole process engaged in by the International Court of Justice was result-oriented rather than principle-oriented." Mark B. Feldman et al., *ICJ Decision in the Libya-Tunisia Continental Shelf Case*, 76 AM. SOC'Y INT'L L. PROC. 150, 153 (1982) (remarks by Sang-myon Rhee).

171. DeVine, *supra* note 3, at 155.

The equitable outcome achieved by the Court results from[172] the application of equitable rules.[173] But this does not mean that the Court always uses the same rules in maritime delimitation. To the contrary, "the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at."[174] In searching for legal principles relevant to a particular case, the Court may choose from any number of equitable rules or considerations.[175] Once these legal principles are chosen, the Court applies them to the facts of the case. "All the relevant circumstances are to be considered and balanced; they are to be thrown together into the crucible and their interaction will yield the correct equitable solution of each individual case."[176]

The Court achieves an equitable result by applying rules of equity.[177] This is an ends-based approach producing decisionmaking in which the Court "uses equity *a priori* to work towards a result, and *a posteriori* to check a result thus reached."[178] The *a priori* use refers to the Court's initial decisionmaking process in which the law of equity is applied, and a result is reached.[179] The adjudication is consummated with an *a posteriori* "test" of the result which assures that the result is not "inequitable."[180] Further elaborating on the *a posteriori* use of equity, the Court has observed that:

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172. *See* 1982 I.C.J. at 59.

173. Under the general rubric of "equitable rules" or of "equitable considerations," "[t]he Court has distinguished between principles, criteria, and methods [of equity], although the Court has maintained that this list is not exhaustive." ROSSI, *supra* note 6, at 216 n.5. The term "rules" is here used to encompass the distinctions the Court has made under this general rubric. For a thorough, but not exhaustive, listing of particular principles, criteria, and methods used by the Court, *see id.* at 216-17 n.5.

174. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 49 (Feb. 20).

175. Sohn & Gabriel, *supra* note 111, at 278-79.

176. Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 109 (Feb. 24) (separate opinion of Judge Jimenez de Arechaga).

177. *See* 1982 I.C.J. at 59.

178. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 218 (June 14) (separate opinion of Judge Weeramantry).

179. *Id.* at 243 (separate opinion of Judge Weeramantry).

180. *Id.*

> The use of equity in this sense is analogous to the use of injustice as a test of justice, which has a long history in philosophical thought. Although justice by its very nature is incapable of comprehensive formulation, injustice by its very nature is often a matter of instant detection. Likewise, though that which is equitable cannot be formulated in advance in terms of a comprehensive set of rules, that which is inequitable can be readily identified as such when a situation has occurred . . . .[181]

An example of the ends-based approach to equity announced by the Court may be seen in the 1993 case of *Denmark v. Norway*. Here the Court was asked to delimit the maritime boundary between Greenland (a member of the Danish kingdom) and the island of Jan Mayen (a member of the Norwegian kingdom).[182] It was determined that the law to be applied in this case was Article 6 of the 1958 Geneva Convention on the Continental Shelf[183] (the "equidistance-special circumstances" rule) and customary international law of the fishery zone (the "equitable principles-relevant circumstances" rule).[184] The Court supposed the former rule "to be regarded as expressing a general norm based on equitable principles";[185] it viewed the latter rule as requiring an equitable solution.[186] The distinction between the rules was without a significant difference: it was noted that the purpose of the "special circumstances" rule of the Geneva Convention and of the "relevant circumstances" rule of the customary law was to achieve an equitable result, and that the application of either rule could lead to the same result in maritime delimitation.[187] It was also noted that "[t]he aim in each and every situation must be to achieve 'an equitable result.'"[188]

On the basis of either the Geneva Convention or Court precedent, the

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181. *Id.* (footnote omitted).

182. *Id.* at 42-44.

183. The Court here refers to the following language of the convention:

> Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

1993 I.C.J. at 52 (quoting Geneva Convention on the Continental Shelf, Apr. 29, 1958, art. 6, para. 1, 15 U.S.T. 471, 474).

184. *Id.* at 58, 215 (separate opinion of Judge Weeramantry).

185. *Id.* at 58.

186. *Id.* at 59.

187. *Id.* at 62.

188. *Id.*

maritime area in controversy was to be delimited with a median line.[189] The line was drawn, but the case was far from resolved: the Court had not yet reached its desired end. The median line drawn was only ostensibly, but not conclusively, equitable.[190] It still remained for the Court "to ask whether 'special[/relevant] circumstances' require any adjustment or shifting of that line."[191] The answer to this question required the Court to first note that:

> [T]here is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.[192]

The Court then cautioned that "although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures."[193] It was therefore concluded that, in order to properly weight various considerations, the circumstances in a given case, Court precedent, and State practice all would be referenced by the Court.[194]

The Court found that the difference in length between the coast of Greenland and the coast of Jan Mayen was a relevant consideration since the coast of the latter was much shorter than that of the former.[195] Because the provisional median line did not ensure that Greenland (Denmark) would have "equitable access" to waters containing a particular species of fish, access to these waters was also considered a relevant consideration.[196] The presence of these relevant considerations dictated that the median line "would be inequitable in its effects."[197] The Court therefore concluded that the median line "should be adjusted or shifted to become a line such as to attribute a larger area of maritime space to Denmark than would the median line."[198]

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189. *Id.* at 61.
190. *Id.* at 62.
191. *Id.* at 61.
192. *Id.* at 63 (quoting 1969 I.C.J. at 50).
193. *Id.* (quoting 1985 I.C.J. at 40).
194. *Id.* at 63-64.
195. *Id.* at 68.
196. *Id.* at 70, 72. Considerations deemed not relevant by the Court were "the presence of ice in the waters of the region[,]" "the limited nature of the population of Jan Mayen or socio-economic factors[,]" "questions of security[,]" and "the conduct of the Parties . . . where such conduct has indicated some particular method as being likely to produce an equitable result." *Id.* at 72-75, 77.
197. *Id.* at 77.
198. *Id.*

V. ANALYSIS

Is something rotten in *Denmark*? The answer to this question requires an examination of some specific objections to the ends-based equity applied by the Court. A primary objection is that the use of this kind of equity leads to a lack of predictability in the Court's decisionmaking.

In *Denmark* the Court believed that it achieved an equitable result.[199] But there is no guarantee that under facts similar to those in *Denmark* a similar result will be achieved. The only thing certain is that, whatever result is reached, it will be "equitable."[200] The considerations which may be relevant in achieving such a result are not fixed,[201] and it is up to the Court, in each individual case, to decide what these considerations should be.[202] It would therefore seem that "there is no equitable principle but that of the equitable result, a result to be achieved by the balancing of considerations the Court deems relevant to the situation of [the parties]."[203] The equitable result arrived at may be "fair" to the parties; indeed, the ends-based equity applied by the Court may simply be a synonym for "fairness."[204] But such a view of equity "assures shifting foundations, rather than emanations, of the Court's jurisprudence."[205]

In the American courts, litigants, looking to precedent to assess the strength of a claim which requires the application of equity, enjoy at least some modicum of predictability.[206] By contrast, nation-states which contemplate the presentation of a claim before the International Court of Justice are faced with the insecurity of an unpredictable result. National litigants have no way of knowing what considerations the Court will deem relevant to the achievement of an equitable solution, and even if these considerations could be known in advance, it would be impossible to anticipate how, and to what extent, each of these considerations would figure into the Court's ultimate determination of what result is "equitable." The Court's assurance, in the midst of such uncertainty, that an equitable result is

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199. *Id.*

200. *See* North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 48 (Feb. 20).

201. *See* 1993 I.C.J. at 63 (quoting 1969 I.C.J. at 50).

202. *See* 1993 I.C.J. at 63-64.

203. DeVine, *supra* note 3, at 179-80.

204. *Id.* at 178.

205. *Id.*

206. Although equity may speak of "conscience" and "morality," a litigant in the American courts may always assume that the precedents from which guidance is sought are always established, not according to a judge's subjective notions of what is right, but "within the concept of judicial conscience." *In re* Quinlan, 348 A.2d 801, 817 n.7 (N.J. Super. Ct. Ch. Div. 1975).

the inevitable outcome of litigation will be no solace to national litigants, all of whom naturally have their own ideas of what result is equitable.[207]

Even if the Court's ends-based equity could produce predictable decisionmaking, there would exist a further objection: it is not clear that the use of ends-based equity is a suitable method of attaining "peace" between nation-states. A primary objective of the United Nations is:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace.[208]

The International Court of Justice is the principal judicial organ of the United Nations.[209] The essential purpose of the Court's international adjudication—indeed, a primary reason for the Court's existence—is to prevent war between nation-states.[210] The methods the Court employs in adjudication must therefore have the effect of producing peace.[211] But although "justice

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207. Bad legal reasoning also makes for unpredictability in the Court's decisions. "Though the Court always considers its opinions and decisions as based on law, none of [my] discussion supports the proposition that the Court always provides a well-reasoned decision." ROSSI, *supra* note 6, at 142. Discussing the portion of the Court's opinion in *Tunisia v. Libya* quoted *supra* at note 168, one commentator admits that "[t]he legal reasoning of the ICJ is not very convincing." GERARD J. TANJA, THE LEGAL DETERMINATION OF INTERNATIONAL MARITIME BOUNDARIES 193 (1990).

208. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. v. Yugo.), 1993 I.C.J. 325, 391 (Sept. 13) (separate opinion of Judge Ajibola) (quoting U.N. CHARTER art. 1, para. 1).

> There is indeed one outstanding idea to be found in the text of several Articles of the Charter in regard to the paramount importance of law and of the legal administration of justice between nations for the purposes of preserving the world from war and achieving the supreme goal of international peace.

Concerning the Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 178 (Dec. 2) (dissenting opinion of Judge Bustamante).

209. *See supra* text accompanying note 66.

210. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 241 (separate opinion of Judge Weeramantry). "The International Court has been set up . . . as one of the principal organs of the United Nations and is thus obliged to act in the adjustment and settlement of international disputes 'in conformity with the principles of justice and international law.'" *Id.*

211. *Id.*

> Equity as an inherent part of justice, if not of international law itself, thus enters into the Court's jurisprudence. Its significance in this regard can be measured from the fact that the maintenance of international peace and security being among the foremost of the objects of the United Nations and all its agencies, a

and equity are inherent attributes of peace itself,"[212] the equity the Court uses, and the justice the Court achieves, may only lead to further conflict between nation-states if the litigants view the Court to be a provider of "fair" rather than "legal" remedies.

Cases brought before the court, particularly those concerning maritime delimitation, often involve issues which require the allocation of scarce resources.[213] Although the litigants expect the adjudication of this delicate matter to conclude with an equitable result, the presence of the litigants at the international bar indicates that the opposing parties have differing ideas regarding what result is equitable. At least one, and perhaps all, of the litigants will not be pleased with the Court's decision. If the Court's primary role is thought to be that of providing legal remedies by establishing the law between parties to international disputes, then perhaps even an otherwise belligerent litigant against which an adverse ruling has been entered will respect the Court's judgment. But if the role of the Court is believed to be nothing more than that of dispensing fairness, then a litigant, which perceives a judgment against it to be unfair, may be less inclined to respect the judgment of a Court which has apparently failed to fulfill its role. A subsequent resort to arms may be the choice of litigants which, after judgment, are still in search of an equitable result.[214]

It may further be objected that ends-based equity produces an anarchic[215] form of adjudication. This objection may be illustrated by contrasting how the nature of power, and how the purpose for which such power is exercised, is perceived in the American courts and in the World Court. The American courts are means-based, characterized by limited power. The World Court is ends-based, characterized by expansive power.

Bound by constitutional and self-imposed restraints, the American courts engage in decisionmaking which is limited and means-based. American courts exercise limited power; they do so for the purpose of

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> primary means of achieving this object, namely, the principles of justice and international law must themselves have primary importance. Indeed, justice and equity are inherent attributes of peace itself, which is foremost among the objects international law aims at achieving.

Id. (footnote omitted).

212. *Id.*

213. *See, e.g.*, 1993 I.C.J. at 70-72.

214. It seems unlikely that the litigants in *Denmark v. Norway* would resort to arms upon the failure of the World Court to provide satisfactory conflict resolution. But in future international adjudication, the litigants might not be so docile.

215. "Anarchic" is here used to describe that quality of government in which power is not constrained by any constitutional check. That quality of government is well exemplified by Hobbes: "during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man." THOMAS HOBBES, LEVIATHAN 88 (Richard Tuck ed., Cambridge University Press 1992).

establishing the law between parties to a particular dispute. In the United States, federal judicial power is constrained by the Constitution: "The judicial Power . . . [is] vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[216] State courts are similarly constrained by state constitutions. The limiting influence of the Constitution is apparent in that, although the federal judiciary wields governmental power like its sister branches, the power it wields is limited to the extent that it may only exercise "judicial Power."[217] In the absence of constitutional limits,[218] judiciaries of some form might continue to exist, but they would, in the absence of constitutional check, be free to exercise other kinds of power—such as legislative—which today is not delegated to them. In addition to constitutional limitations, the courts also adhere to the self-imposed constraint of *stare decisis*. Because the American judiciary must reach its end through the means provided by the Constitution and adherence to precedent, it seems that the power with which the American judiciary has been endowed should be viewed as limited and means-based.[219] So limited, the nature of American judicial power is well captured in the phrase, "this is a government of laws, and not of men."[220]

If in the American courts judicial power is perceived to be naturally

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216. U.S. CONST. art. III, § 1.

217. [T]he only power the Constitution permits to be vested in federal courts is "[t]he judicial power of the United States." Art. III, § 1. That is accordingly the only kind of power that federal judges may exercise by virtue of their Article III commissions. . . . The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. See Art. III, § 2.

Young v. United States *ex rel.* Vuitton Et Fils S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring).

218. [That which prevents the abuse of power] is what is meant by CONSTITUTION, in its most comprehensive sense, when applied to GOVERNMENT. . . . [*C*]*onstitution* stands to *government*, as *government* stands to *society*; and, as the end for which society is ordained, would be defeated without government, so that for which government is ordained would, in a great measure, be defeated without constitution. But they differ in this striking particular. There is no difficulty in forming government. It is not even a matter of choice, whether there shall be one or not. Like breathing, it is not permitted to depend on our volition. Necessity will force it on all communities in some one form or another. Very different is the case as to constitution. Instead of a matter of necessity, it is one of the most difficult tasks imposed on man to form a constitution worthy of the name . . . . Constitution is the contrivance of man, while government is of Divine ordination.

John C. Calhoun, *A Disquisition on Government*, *in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 9-10 (Ross M. Lence ed., 1992).

219. *See generally* U.S. CONST. art. III. The Constitutional limits on the judicial power of the United States are set forth here.

220. *See, e.g.*, State v. Reed, 421 So.2d 754, 755 (Fla. Dist. Ct. App. 1982).

constrained, in the World Court such power is perceived to be naturally expansive. This is not to say that the power exercised by the Court is unlimited: as the American courts, the World Court must operate within certain parameters.[221] But the Court's judicial power, particularly in the area of equity, is viewed within a context of expansion—of rising to the occasion to achieve a particular end. Results-oriented and not bound by *stare decisis*,[222] the Court's decisionmaking is typified by the use of judicial power in equity to achieve the goal of peace generally, and to achieve an equitable result specifically. Although the methods used to achieve an end result limit the Court's authority,[223] the subordination of methods to ends causes the Court's exercise of judicial power to be better characterized by expansion of power than limitation of it.

Not bound by the limitations which adherence to equitable methods provides, the Court's adjudication is anarchic. Guided by passion,[224] prejudice, or some other consideration, the Court uses its power to move toward a result which will meet the requirements of an "eternal, but paradoxically situational, and at any rate undefined, 'justice.'"[225] The Court exercises judicial authority to pursue the equitable, just result as an end,[226] but not in accordance with a precise, constraining legal method. As the Court's Judge

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221. *See, e.g., supra* note 85.

222. *See* sources cited *supra* notes 112, 113.

223. In the American courts, such limitations arise from the methods imposed by the Constitution and *stare decisis*.

224. "The common meaning of 'passion' is unqualified desire—usually love or anger—but these are notoriously inconstant and chaotic in their objects." JACQUES BARZUN, TEACHER IN AMERICA 440 (Liberty Press 1981) (1954). As the current president of the International Court of Justice candidly observes, "justitia is too enticing a goddess not to arouse some naturally partisan passions." ROSENNE, *supra* note 66, at xii (quoting H. E. Mr. Mohammed Bedjaoui). But "passions" often operate against "reason." Early in the twentieth century one commentator remarked that "[t]he tendency for some time past has been to treat international law, not theoretically as an embodiment of reason, but positively as an embodiment of will." IRVING BABBITT, DEMOCRACY AND LEADERSHIP 292-93 (Liberty Fund, Inc. 1979) (1924). At least with respect to the body of legal doctrine which has developed in connection with the Court's exercise of "will" in equitable adjudication, the commentator's observation remains accurate.

225. DeVine, *supra* note 3, at 179. At this point in adjudication, "the slate is indeed clean, if clouded . . . . [T]here is no law." *Id.* This is because the Court seems to view its power in equity as necessary to the attainment of its goals. As one of the Court's jurists has observed, "[t]o say that a power is necessary, that it logically results from a certain situation, is to admit the non-existence of any legal justification. Necessity knows no law, it is said; and indeed to invoke necessity is to step outside the law." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 339 (June 21) (dissenting opinion of Judge Gros).

226. *See* Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 59 (Feb. 24).

Jennings has warned, "[t]he doctrine of the 'equitable result' . . . leads straight into pure judicial discretion and a decision based upon nothing more than the court's subjective appreciation of what appears to be a 'fair' compromise of the claims of either side."[227]

Unlike adjudication in the American courts, of which it might be said that "justice" is the result of the proper application of legal rules in accordance with established legal methods,[228] in the World Court, "justice" reflects what a majority of judges believes to be fair and equitable. There is danger in such anarchic adjudication, particularly for wealthier countries which stand to lose much at the international bar should a redistribution of the world's resources become a goal of the Court's equity jurisprudence.[229] Affluent

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227. Nelson, *supra* note 110, at 853 (quoting Jennings, *Equity and Equitable Principles*, 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27, 30 (1986)).

228. *Cf.* DeVine, *supra* note 3, at 219-20. Here DeVine discusses the concept of "principled interpretation" of legal rules. Judicial exercise of this concept "keeps the rule's situational manifestations in a more coherent succession than result-oriented equitable interpretation need produce, allowing one to label the sum of those manifestations 'law,' rather than 'justice,' 'fairness,' or 'equity.'" *Id.* at 219. He notes that principled interpretation "assumes that a legal rule contains, perhaps in latent form, the capacity to produce a just—a fair—result in a factual context to which the rule, by its terms, applies." *Id.* at 220. Perhaps the concept of principled interpretation resembles what American judges do when they refuse to apply a particular rule of equity on the ground that the rule cannot be applied to a particular situation. If so, the notion that a properly applied legal rule can produce justice may be common to both principled interpretation and decisionmaking in American equity.

229. The call for redistribution of wealth, and equity as a means of achieving it, appears to be growing louder. It has been said that "[t]he growing inequality in the distribution of desired goods indicates that the formal equality of states before the law must be tempered by some recourse to notions of fairness." Franck & Sughrue, *supra* note 111, at 594.

> States associated with the New International Economic Order employ equity as a primary tactic to secure a division and use of resources according to the principle of *res communis*, when they are not able to secure an individual appropriation. . . . A rich and sophisticated jurisprudential history attaches to the construction given equity by the developing world, one completely consonant with the Western legal tradition. Many states and publicists from the developed world worry that the Court might give concrete legal expression to the developing world's construction [of equity] . . . .

ROSSI, *supra* note 6, at 199-200. The New International Economic Order has often been characterized by "socialist" ideas. *See generally* David George Anderson, *The New International Economic Order*, 87 AM. SOC'Y INT'L L. PROC. 459 (1993). "Collectivist" ideas have also been associated with the New International Economic Order. John Quigley, *The New World Order and the Rule of Law*, 18 SYRACUSE J. INT'L L. & COM. 75, 86 (1992). The terms "socialist" and "collectivist" are often used interchangeably, and it seems doubtful that the terms have significantly different meanings. "The collectivist . . . proposes to put land and capital into the hands of the political officers of the community, and this on the understanding that they shall hold such land and capital in trust for the advantage of the community." HILAIRE BELLOC, THE SERVILE STATE 129 (Liberty Fund 1977) (1913). The "socialist" also espouses state-ownership of capital. V.I. LENIN, STATE AND REVOLUTION 17 (International Publishers Co., Inc. 1943). The socialist/collectivist approach is to be distinguished from the "distributivist" approach. The distributivist hopes "for a society in

which the determinant mass of families [are] owners of capital and of land; for one in which production [is] regulated by self-governing corporations of small owners; and for one in which the misery and insecurity of a proletariat [is] unknown." BELLOC, *supra* note 229, at 81-82. The distributivist sees in the European Middle Ages an ideal state of economic affairs:

> The State . . . was an agglomeration of families of varying wealth, but by far the greater number owners of the means of production. It was an agglomeration in which the stability of this *distributive system* . . . was guaranteed by the existence of cooperative bodies, binding men of the same craft or of the same village together; guaranteeing the small proprietor against loss of his economic independence, while at the same time it guaranteed society against the growth of a proletariat. If liberty of purchase and sale, of mortgage and of inheritance was restricted, it was restricted with the social object of preventing the growth of an economic oligarchy which could exploit the rest of the community. The restraints upon liberty were restraints designed for the preservation of liberty; and every action of medieval society, from the flower of the Middle Ages to the approach of their catastrophe, was directed towards the establishment of a state in which men should be economically free through the possession of capital and of land.
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> . . . There was common land, but it was common land jealously guarded by men who were also personal proprietors of other land. Common property in the village was but one of the forms of property, and was used rather as the flywheel to preserve the regularity of the cooperative machine than as a type of holding in any way peculiarly sacred. The guilds had property in common, but that property was the property necessary to their cooperative life: their halls, their funds for relief, their religious endowments. As for the instruments of their trades, those instruments were owned by the individual owners, *not* by the guild, save where they were of so expensive a kind as to necessitate a corporate control.
>
> Such was the transformation which had come over European society in the course of ten Christian centuries. Slavery had gone, and in its place had come that establishment of free possession which seemed so normal to men, and so consonant to a happy human life. No particular name was then found for it. Today, and now that it has disappeared, we must construct an awkward one, and say that the Middle Ages had instinctively conceived and brought into existence the distributive state.
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> That excellent consummation of human society passed, as we know . . . .
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> . . . .
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> Those who favor [the distributive state] are the conservatives or traditionalists. They are men who respect and would, if possible, preserve the old forms of Christian European life. They know that property was thus distributed throughout the state during the happiest periods of our past history; they also know that where it is properly distributed today, you have greater social sanity and ease than elsewhere.

Id. at 80-81, 128. Hilaire Belloc believed that the distributive state failed because "Protestantism had produced free competition permitting usury and destroying the old safeguards of the small man's property—the guild and the village association." HILAIRE BELLOC, THE GREAT HERESIES 238 (Books for Libraries Press, Inc. 1968) (1938). In his view, the distributive state was replaced by the capitalist state. According to Belloc:

> A society in which private property in land and capital, that is, the ownership and therefore the control of the means of production, is confined to some

> number of free citizens not large enough to determine the social mass of the state, while the rest have not such property and are therefore proletarian, we call capitalist . . . .

HILAIRE BELLOC, THE SERVILE STATE 49 (Liberty Fund 1977) (1913). Belloc argued that a distributive economic system is more productive of human happiness than is a capitalist one. He indicated that, because the distributive system is rooted in doctrines of Catholic Christianity and because the capitalist system has a basis in Protestant Christianity, the systems are ideologically inconsistent with each other. Belloc explored the relationship between the Catholic doctrines he advocated and the industrial capitalist state in which he perceived himself to be living:

> [N]o one will doubt that Catholicism is in spirit opposed to Industrial Capitalism; the Faith would never have produced Huddersfield or Pittsburg. It is demonstrable that historically Industrial Capitalism arose out of the denial of Catholic morals at the Reformation. It has been very well said by one of the principal enemies of the Church, and said boastfully, that Industrial Capitalism is the "robust child" of the Reformation . . . .
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> . . . Not only is Industrial Capitalism as a point of historical fact the product of that spirit which destroyed the Faith in men's hearts and eradicated it from society—where they could—by the most abominable persecutions; but, also in point of historical fact, Industrial Capitalism has arisen late in societies of Catholic culture, has not flourished therein, and, what is more, in proportion as the nation is affected by Catholocism, in that proportion did it come tardily to accept the inroads of Industrial Capitalism and in that proportion does it still ill agree with Industrial Capitalism. That is why the more Catholic districts of Europe have in the past been called "backward" . . . .
>
> If we go behind the external phenomena and look at the workings of the mind we find the disagreement between Catholicism and Industrial Capitalism vivid and permanent. . . . [Industrial Capitalism is irreconcilable with] the whole scheme of Catholic morals in the matter of justice, and particularly of justice in negotiation. [It is also irreconcilable with] the great doctrine of Free Will. For out of the doctrine of Free Will grows the practice of diversity, which is the deadly enemy of mechanical standardisation, wherein Industrial Capitalism finds its best opportunity; and out of the doctrine of Free Will grows the revolt of the human spirit against restraint of will by that which has no moral authority to restrain it; and what moral authority has mere money? Why should I reverence or obey the man who happens to be richer than I am?
>
> And, with that word "authority," one may bring in that other point, the Catholic doctrine of authority. For under Industrial Capitalism the command of men does not depend upon some overt political arrangement, as it did in the feudal times of Catholicism or in the older Imperial times of Catholicism, as it does now in the peasant conditions of Catholicism, but simply upon the ridiculous, bastard, and illegitimate power of mere wealth. For under Industrial Capitalism the power which controls men is the power of arbitrarily depriving them of their livelihood because you have control, through your wealth, of the means of livelihood and they have it not. Under Industrial Capitalism the proletarian tenant can be deprived of the roof over his head at the caprice or for the purely avaricious motives of a so-called master who is not morally a master at all; who is neither a prince, nor a lord, nor a father, nor anything but a credit in the books of his fellow capitalists . . . . In no permanent organised Catholic state of society have you ever had citizens thus at the mercy of mere possessors.

Hilaire Belloc, *The Faith and Industrial Capitalism*, *in* ESSAYS OF A CATHOLIC 288, 290-92

(Books for Libraries Press, Inc. 1967) (1931). Belloc desired that the capitalist state be reformed, and he believed that reformation should be achieved by changing the prevailing religious beliefs in the state. Seeming to adhere to the maxim that "how we live is so far removed from how we ought to live, that he who abandons what is done for what ought to be done, will rather learn to bring about his own ruin than his preservation[,]" NICCOLÒ MACHIAVELLI, THE PRINCE 84 (Luigi Ricci trans., NAL Penguin Inc., 1980), he also proposed that reformation should be gradual:

> [R]eformation of our industrial society . . . must lie in our recognition of the true order of cause and effect. If we are to attack Industrial Capitalism we must do so because we are keeping in mind very clearly and continually the truth that religion is the formative element in any human society. Just as Industrial Capitalism came out of the Protestant ethic, so the remedy for it must come out of the Catholic ethic. *In other words, we must make the world Catholic before we can correct it from the evils into which the denial of Catholicism has thrown it.*
>
> Consider what happened to the institution of slavery. The Church, when it began on earth its militant career, found slavery in possession. The antique world was a servile state; the civilized man of the Graeco-Roman civilization based his society upon slavery; so did (this must always be insisted upon because our text-books always forget it) the barbarian world outside.
>
> There were plenty of revolts against that state of affairs; there was to our knowledge one huge servile war, and there was protest of every kind by the philosophers and by individuals. But they had no success. Success in this field, though it came very slowly, was due to the conversion of the Roman Empire to Catholicism.
>
> The Church did not denounce slavery, it accepted that institution. Slaves were told to obey their masters. It was one of their social duties, as it was the duty of the master to observe Christian charity towards his slave. It was part of good works (but of a rather heroic kind) to give freedom in bulk to one's slaves. But it was not an obligation. Slavery only disappeared after a process of centuries, and it only disappeared through the gradual working of the Catholic doctrine upon the European mind and through the incompatibility of that doctrine with such treatment of one's fellow men as was necessary if the discipline of servitude were to remain efficient. The slave of Pagan times was slowly transformed into the free peasant, but he was not declared free by any definite doctrine of the Church, nor at any one stage in the process would it have entered into the Catholic mind of the day to have said that slavery was in itself immoral. The freedom of the peasant developed as the beauty of external art developed in its Christian form, through the indirect working of the Catholic ethic.
>
> In the absence, the gradual decline (where it is declining) of the Catholic ethic, slavery is coming back. Anyone with eyes to see can watch it coming back slowly but certainly—like a tide. Slowly but certainly the proletarian, by every political reform which secures his well-being under new rules of insurance, of State control in education, of State medicine and the rest, is developing into the slave, leaving the rich man apart and free. All industrial civilization is clearly moving towards the re-establishment of the Servile State
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> . . . .
>
> To produce the opposite of the Servile State out of the modern inhuman economic arrangement, the Church, acting as a solvent, is the necessary and the

national actors which find themselves in an international dispute over scarce resources do well to flee from the Court's equity, for:

> The science of law is our great security against the maladministration of justice. If the decision of litigated questions were to depend upon the will of the Judge or upon his notions of what was just, our property . . . would be at the mercy of a fluctuating judgment, or of caprice.[230]

But affluent or not, all nation-states considering international litigation should proceed with caution. Although the Court intends to achieve an end in accordance with eternal justice,[231] "the pursuit of immutable principles sometimes results in decisions removed from reality."[232]

The most significant objection to ends-based equity, and perhaps the one which stands on the highest ground, is that it leads to an immoral form of decisionmaking. Ends-based philosophies are immoral; they abase the holder of the philosophy, and they injure others. Yet such philosophies have been attractive in the past and in modern times. "By plausible and dangerous paths men are drawn to the doctrine of the justice of History, of judgment by results . . . ."[233] It seems that the Court's pursuit of peace and justice is noble, but the

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> only force available. The conversion of society cannot be a rapid process, and therefore not a revolutionary one. It is therefore also, for the moment, an unsatisfactory process. But it is the right process. There is a very neat phrase which expresses the whole affair, "in better words than any poor words of mine," as the parson said in the story. These words are to be found in the vernacular translation of the New Testament. They are familiar to many of us. "Seek ye first the kingdom of God and its justice and all the rest shall be added unto you."
>
> Begin by swinging society round into the Catholic course, and you will transmute Industrial Capitalism into something other, wherein free men can live, and a reasonable measure of joy will return to the unhappy race of men. But you must begin at the beginning.

Hilaire Belloc, *The Faith and Industrial Capitalism*, *in* ESSAYS OF A CATHOLIC 294-97 (Books for Libraries Press, Inc. 1967) (1931).

230. Thomas K. Landry, *Certainty and Discretion in Patent Law: The On Sale Bar, the Doctrine of Equivalents, and Judicial Power in the Federal Circuit*, 67 S. CAL. L. REV. 1151, 1205 (1994) (quoting DAVID D. FIELD, MAGNITUDE AND IMPORTANCE OF LEGAL SCIENCE (1859), *reprinted in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 517, 530 (A. P. Sprague ed., New York, D. Appleton & Co., 1884)).

231. *See* source cited *supra* note 225.

232. ROSSI, *supra* note 6, at 251-52.

233. John E. E. Dalberg-Acton, *Introduction to Burd's Edition of* Il Principe *by Machiavelli*, *in* 2 SELECTED WRITINGS OF LORD ACTON 479, 484-85 (J. Rufus Fears ed., 1988). "When Machiavelli declared that extraordinary objects cannot be accomplished under ordinary rules, he recorded the experience of his own epoch, but also foretold the secret of men since born." *Id.* at 479.

use of Machiavellian expediency to achieve such worthy objects tends to condemn to ignominy the Court's efforts.

Machiavelli, with whom the phrase "the end justifies the means" has become so closely associated, might view with dissatisfaction the infamy which history has heaped upon him. It seems difficult to impute to Machiavelli anything but the purest of motives in his advice to the prince. His desire was to see Italy liberated so that he and his countrymen might live in peace.[234] It has been "wonder[ed] how so intelligent and reasonable a man came to propose such flagitious counsels."[235] Although his motivation may never be satisfactorily explained, Machiavelli apparently thought that whatever harm the prince might do was justified by the removal of tyranny from Italy. Though possessed of good intentions, Machiavelli's modern imitators must, if nothing else, be prepared to accept the possibility that, as occurred with their mentor, "The evil that men do lives after them, The good is oft interréd with their bones . . . ."[236]

In its pursuit of peace through the adjudication of international disputes, surely the International Court of Justice can find a better philosophy on which to base its theory of equity. This is not to suggest that the methods the Court has thus far used to achieve equitable results have necessarily been "evil." But in this era of increasing international adjudication in which the Court's role is so prominent; in this age in which international disputes increasingly center around the allocation of natural resources which are becoming more and more scarce, whether the Court's judgments in exceedingly difficult cases become morally unacceptable must be determined by the methods the Court uses to justify the ends it reaches. If the Court can demonstrate that, not only does it utilize rules of equity, but that those rules have a constraining effect on the Court's power, then perhaps its decisions will be clothed with the dignity worthy of those rendered by judges who exercise limited power within the confines of a judicial tribunal. But if Court judgments manifest expan-

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234. MACHIAVELLI, *supra* note 229, at 127.

> This opportunity must not, therefore, be allowed to pass, so that Italy may at length find her liberator. I cannot express the love with which he would be received in all those provinces which have suffered under these foreign invasions, with what thirst for vengeance, with what steadfast faith, with what love, with what grateful tears. What doors would be closed against him? What people would refuse him obedience? What envy could oppose him? What Italian would withhold allegiance? This barbarous domination stinks in the nostrils of everyone. May your illustrious house therefore assume this task with that courage and those hopes which are inspired by a just cause, so that under its banner our fatherland may be raised up . . . .

Id.

235. Dalberg-Acton, *supra* note 232, at 479.

236. WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2. Machiavelli has not been accused of performing any of the maniacal deeds he recommended; his obloquy continues simply for suggesting such deeds.

siveness; if they continue to reveal that "there is no equitable principle but that of the equitable result,"[237] then the activity of the Court will fail to pass moral muster.

The example of Machiavelli speaks a clear warning to the Court, but the Court does well to consider words of caution from within its own ranks. In the case of *India v. Pakistan*, the Court heard an appeal from decisions rendered by the Council of the International Civil Aviation Organization.[238] The Council had claimed jurisdiction over a dispute between the two parties, but India argued that the Council's decision was erroneous; that "it was vitiated by various procedural irregularities, and should accordingly . . . be declared null and void."[239] The Court dismissed this argument, reasoning that, "[s]ince the Court holds that the Council did and does have jurisdiction, then, if there were in fact procedural irregularities, the position would be that the Council would have reached the right conclusion in the wrong way. Nevertheless, it would have reached the right conclusion."[240]

One dissenter was not well-impressed with the Court's legal reasoning. In the view of Judge Morozov:

> This statement, to the effect that 'the position would be that the Council would have reached the right conclusion in the wrong way' but that 'nevertheless it would have reached the right conclusion,' to my mind goes too near saying that 'the end justifies the means' to be a proper legal argument for a court to use. The case is that the right judicial decision *can never be reached* by the wrong way. It is not possible to make such a distinction between the conclusion reached, and the way in which it is reached and the form in which it is embodied . . . .[241]

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237. DeVine, *supra* note 3, at 179.

238. Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46 (Aug. 18).

239. *Id.* at 69. "The argument was that, but for these alleged irregularities, the result before the Council would or might have been different." *Id.*

240. *Id.* at 70.

241. *Id.* at 159 (dissenting opinion of Judge Morozov) (emphasis added). Other Court jurists have disapproved of ends-based adjudication. *See, e.g.*, Certain Expenses of the United Nations, 1962 I.C.J. 151, 268 (July 20) (dissenting opinion of Judge Koretsky) ("The ends justify the means" is a "long ago condemned formula."); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319, 468 (Dec. 21) (joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice) ("In the Anglo-Saxon legal tradition there is a well-known saying that 'hard cases make bad law', which might be paraphrased to the effect that the end however good in itself does not justify the means, where the means, considered as legal means, are of such a character as to be inadmissible."); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 314 (July 18) (dissenting opinion of Judge Tanaka) ("The . . . contention of the Respondent that the policy of apartheid has a neutral character, as a tool to attain a particular end, is not right. If the policy of apartheid is a means, the

When engaged in equitable adjudication, the Court can do no better than to heed the Judge's admonition.

VI. CONCLUSION

Having originated in antiquity, equity remains a vital part of modern law although it manifests itself differently across different legal traditions. Between the American courts and the World Court, equity reveals itself as an often utilized source of law, as requiring the application of rules, as characterized by flexibility, as allowing the judge to use discretion, and as achieving justice. But the equity of the American courts is significantly different than that of the World Court in that, in the former, equity is a means-based system of adjudication, while in the latter, it is an ends-based system. The ends-based equity of the World Court may be objected to on various grounds: that it leads to a lack of predictability in the Court's decisionmaking; that it may not be a suitable method of attaining peace between nation-states; that it produces an anarchic form of adjudication; and that it leads to a morally unacceptable form of decisionmaking.

Joseph Hendel[*]

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axiom that the end cannot justify the means can be applied to this policy.").

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GLOBAL HUNGER, A DOUBLING POPULATION, AND ENVIRONMENTAL DEGRADATION: JUSTIFYING RADICAL CHANGES IN U.S. FARM POLICY

> Take some poor and unfruitful year in which hunger has carried off many thousands of men. If the barns of the rich were searched at the end of the year, I maintain that enough grain would be found to feed everyone, and to save those who died from the famine and from the plague caused by famine. How easily the bare needs of life might be provided, if money, which is meant to procure the necessities of life, did not deter us! Certainly rich men know this. They also know that it would be far more practicable to provide the necessities of life for everyone than to supply superfluities for a few, and much better to eradicate our innumerable evils than to be burdened with great concentrations of wealth.[1]

INTRODUCTION

Forget utopia. For the first three-quarters of the twentieth century an estimated twelve to fifteen million people died due to famine, and "many if not the majority were due to deliberate governmental policy, official mismanagement, or war, and not to serious crop failure."[2] Today, global hunger plagues nearly one billion people — almost one-fifth of the world's inhabitants.[3] It contributes to the deaths of an estimated 35,000 human

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1. THOMAS MORE, UTOPIA 81 (H. V. S. Ogden trans. & ed., 1949). Thomas More, born in 1478, was educated at Oxford and became a barrister in 1497. He wrote *Utopia* in 1516, and reason, the law of nature, guides More's Utopians under Christian ethics within the context of a communal social system. More accepted an office on the King's Council in 1518, but King Henry VIII had him beheaded in 1535 for refusing an oath to the King as Supreme Head of the Church of England.

2. DENNIS T. AVERY, SAVING THE PLANET WITH PESTICIDES AND PLASTIC 146 (1995) (quoting D. Gale Johnson, *World Food Problems And Prospects,* Foreign Affairs Study No. 20, American Enterprise Institute (1975)).

3. Asbjorn Eide, *Obstacles And Goals To Be Pursued, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 381, 381 (Asbjorn Eide et al. eds., 1995). *See The Hunger Web, available at* Internet, http://www.hunger.brown.edu/hungerweb (defining hunger as the insufficient intake of food to provide the energy and nutrients essential for health, activity, and human development, and malnutrition as the outgrowth of hunger in which the body does not obtain a sufficient supply of the essential nutrients). *See generally* Elizabeth Rohrbaugh, Comment, *On Our Way To Ten Billion Human Beings: A Comment on Sustainability and Population,* 5 COLO. J. INT'L ENVTL. L. & POL'Y 235, 236 (1994) (discussing limitations on global food, water, and energy resources and the population control mechanisms in China and India). *See also UNICEF's State of the World's Children 1995 Report, available at* Internet,

beings every day, seventy-five percent of whom are children less than five years old.[4] The problem is not production or overpopulation; it is poverty and accessibility.[5] People in less developed countries (LDC's) either lack the access to adequate food supplies, or they simply cannot afford to grow or pay for their own food.[6] The world's population, nonetheless, is expanding rapidly; hunger in developing countries tends to increase family size so that children can work to supplement food purchasing power.[7] The United Nations projects that the world's population will reach nearly 8.5 billion in 2025, and will exceed ten billion by 2050.[8] This could effectively endanger the food security of hundreds of millions of people.[9] In the short term,

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gopher:llhqfausor. unicef.org/11/.s495sowc (indicating that each year 13 million children die due to preventable diseases and malnutrition).

4. *See The Hunger Project, available at* Internet, http://www.igc.apc.org/thp/info bro.html#challenge.

5. *Id. See* Gerard Piel, *Worldwide Development or Population Explosion: Our Choice,* CHALLENGE, July 17, 1995, at 13, *available in* WESTLAW, TRD & IND database. *See also IFAD Conference on Hunger and Poverty, An Overview, available at* Internet, http:// www.unicc.org/ifad/over.html (discussing the history and nature of the problems of hunger and poverty).

6. *Id. See* Joel E. Cohen, *Population Growth and Earth's Human Carrying Capacity,* SCIENCE, July 21, 1995, at 341. In 1992, 15 percent of people in the world's richest countries enjoyed 79 percent of the income. In 1960, the richest countries with 20 percent of the world's population earned 70.2 percent of global income, while the poorest countries with 20 percent of world population earned 2.3 percent of global income. The ratio of income per person between the top and bottom one-fifth of the population was 31:1 in 1960; 32:1 in 1970; 45:1 in 1980; and 61:1 in 1991. This represents an ever widening gap from $1864 per person in 1960 to $15,149 in 1989. *Id.* at 345 n.7 (citing the UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT *1992).*

7. *Id. See The Hunger Web, Myths and Facts About Hunger, available at* Internet, html://www.hunger.brown.edu/hungerweb/6_myths_and_facts.html.

8. *Population Information Network (POPIN);* Gopher of the United Nations, Population Division, Department for Economic and Social Information and Policy Analysis, *available at* Internet, gopher://gopher.undp.org/11/ ungophers/popin/icpd.

9. *Food Security,* PEOPLE & THE PLANET (1995), *available at* Internet, http:// www.oneworld.org/patp/pap_foodsec.html. *See* Definitions of Food Security, *available at The Hunger Web, supra* note 3. The 1986 World Bank Policy Study on Poverty and Hunger defined Food Security as the access by all people at all times to enough food for an active, healthy life. Ensuring Food Security requires that adequate food supplies are available at all times through domestic production or imports and that the undernourished have the ability to acquire food, either because they produce it themselves or because they have the income to acquire it. *See also Population: Growth, Arable Land Scarcity Threaten Food Security,* Global Information Network, Apr. 10, 1995, *available in* WESTLAW PTS-NEWS database. (Population Action International (PAI) projects that China's population in 2025 will represent more than half of those who will be affected by global land scarcity; eight of 29 countries projected to be land-scarce in 2025 are in Africa, with six other African countries approaching the benchmark for that rating. Of the 29 projected land-scarce countries, 12 will be water-scarce; they will have less than 1000 cubic meters of renewable fresh water per person per year to use for farming, industrial, and other household purposes.)

foreign food aid needs are expected to almost double by 2005;[10] "chronic and emergency grain food aid needs are estimated for sixty developing countries in Africa, Asia, and Latin America . . . [representing] about forty percent of the world's population,"[11] amidst a trend in the United States of decreasing aid consistent with changing foreign policy objectives.[12]

Adding twice as many people to the planet, however, is not the only problem. The earth's carrying capacity will be limited in part by the strain on the environment. Whether the result of the growth in food production over the past half century, or "nation-by-nation food self-sufficiency,"[13] there has been extensive resource depletion and exploitation. Destruction of tropical rainforests, erosion of the ozone, draining of wetlands, chemical residues and over fertilization, soil erosion, salt build-up from over-irrigation, and expanding deserts all threaten the future of the world's food supply[14] as well as fragile ecosystems and wild species through habitat destruction.[15]

In responding to the ever increasing demand for food, some propose going beyond what they believe are at least moral obligations contained in the International Covenant on Economic, Social and Cultural Rights (CESCR) to give the "right to food" a more effective means of addressing world famine.[16] Unfortunately for many, neither present nor future relief for the hungry is likely to come from enforcing the corresponding duties of fundamental human rights in the United States. The barrier arguably stems from a fundamental disagreement in values between the United States and the

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10. *World Food Aid Needs and Availabilities*, Economic Research Service, USDA Oct. 20, 1995, *available at* Internet, ll.edu:70/00/reports/erssor/international/gfa/world_food_aid_10.20.95.

11. *Id.*

12. David R. Lee & Larry D. Sanders, *U.S. Foreign Food Aid Policy, available at* Internet, http://ianrwww.unl.edu/ farmbill/foodaid.htm (discussing the current situation of declining food aid assistance due to a declining commodity 'surplus' and donors preferring different forms of development assistance—U. S. Food aid from 1990-92 is significantly below that in the 1960's and 70's and the long term declining trend in U. S. Food aid commitments, budget constraints, and the focus on domestic over foreign areas of concern make additional food aid commitments in the 1995 farm bill unlikely). *See* Bard, *infra* note 19.

13. AVERY, *supra* note 2, at 321-22.

14. Norman W. Thorson, *Presidential Address — Agriculture in the Twenty-First Century: The Perils of Population Growth in a Sustainable World*, 25 U. MEM. L. REV. 863 (1995). *See* RESOURCES, ENVIRONMENT, AND POPULATION: PRESENT KNOWLEDGE, FUTURE OPTIONS 408-21 (K. Davis & M. S. Bernstam eds., 1991).

15. AVERY, *supra* note 2, at 9.

16. *See* Robert Robertson, *The Right To Food in International Law, in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 451, 451-57 (Kathleen E. Mahoney and Paul Mahoney eds., 1993).

international community.[17] Although some would argue that the "right to food" exists as a legal and enforceable right in international law,[18] the United States insists on using discretion to determine the level of contribution regarding international welfare requirements.[19]

In spite of the predictions of progressive famine,[20] there may actually be less hunger in the world than many people realize.[21] Most hunger, concentrated primarily in Sub-Saharan Africa,[22] can be attributed to disease, civil unrest, or war.[23] Yet, some believe that "[t]he real opportunities for

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17. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social, and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990).

18. *See* Asbjorn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 15 (Asbjorn Eide et al. eds., 1995).

19. *See* Robert L. Bard, *The Right to Food*, 70 IOWA L. REV. 1279 (1985).

20. AVERY, *supra* note 2, at 19. Lester Brown, a noted environmentalist of the Worldwatch Institute, has predicted that famine would occur on account of widespread population growth for the last 25 years. *See Feeding a World of 8 Billion*, PEOPLE & THE PLANET, *available at* Internet, http://www.oneworld.org/patp/vol4_overview.html. (The FAO study, *Agriculture: Toward 2010*, indicates a rise in global food output of 1.8 percent a year over the next 20 years, outpacing an expected population growth of 1.7 to 1.3 percent per year, but the study also indicates that 650 million people will still not be adequately fed in 2010.)

21. AVERY, *supra* note 2, at 147.

22. *Id.* at 151-53.

23. *Id. See* Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994.

> Tyranny is nothing new in Sierra Leone or in the rest of West Africa. But it is now part and parcel of an increasing lawlessness that is far more significant than any coup, rebel incursion, or episodic experiment in democracy . . . . The cities of West Africa at night are some of the unsafest places in the world. Streets are unlit; police often lack gasoline for their vehicles; armed burglars, carjackers, and muggers proliferate . . . . In Abidjan, effectively the capital of the . . . Ivory Coast, restaurants have stick and gun-wielding guards . . . . After university students . . . caught bandits who had been plaguing their dorms, they executed them by hanging tires around their necks and setting the tires on fire . . . . Ivorian policemen stood by and watched the "neck lacings" afraid to intervene . . . . Polygamy continues to thrive in sub-Saharan Africa . . . and loose family structures are largely responsible for the world's highest birth rates and the explosion of the HIV virus on the continent . . . . Disease, overpopulation, unprovoked crime, scarcity of resources, refugee migrations, the increasing erosion of nation-states and international borders, and the empowerment of private armies, security firms, and international drug cartels are now most tellingly demonstrated through a West African prism.

Id. Kaplan describes a slum district of Abidjan as

> a checkerboard of corrugated zinc roofs and walls made of cardboard and black plastic wrap . . . ravaged by flooding . . . [where] few residents have access to electricity, a sewage system, or a clean water supply . . . . Children defecate in a stream filled with garbage and pigs, droning with malarial mosquitos. In this stream women do the washing.

Id. See also Situation in Sierra Leone Worsens, Oct. 10, 1995, UNICEF press release, *available at* Internet, http://www.oneworld.org/unicef/sierra_10oct.html (indicating that rebel

feeding a world of eight billion in a sustainable and equitable way have been drowned by predictions of doom."[24] In spite of the negativity, a future without famine can be realized, depending to a large extent upon the United States' leadership to further integrate agriculture into international trade. This integration would continue the capital market liberalization launched by the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) by further eroding trade barriers and expanding opportunities for distribution to developing countries.[25] More important, however, are the domestic policies that undergird international free trade and whether policy makers will continue the farm programs that remain largely unchanged since their inception more than sixty years ago. Without drastic change in policies that take large expanses of fertile U.S. cropland out of production while subsidizing farmers for not producing, restrict U.S. farmers to producing for the domestic market by pricing them out of the international marketplace, control market prices through government controlled surplus, utilize export subsidies to dump U.S. agricultural products on the world market, and encourage overuse of fertilizers and pesticides, the world will neither eliminate the hunger that exists nor can it expect to feed a doubling population with environmental stewardship. "We have the ability, as members of the human race; we have the means; we have the capacity to

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attacks in Freetown-Bo-Kenema have resulted in serious shortages of food and widespread hunger and starvation leading to the deaths of an estimated 30 children per day. The number of "street children" in Kenema and Bo exceed 3000; some are only 4 years old).

24. *Energy and Food for All,* PEOPLE & THE PLANET, *available at* Internet, http://www.oneworld.org/patp/vol4_ newsfile.htm (quoting David Hall of King's College, London). *See also* Tim Dyson, *Be Wary of the Gloom,* PEOPLE & THE PLANET, *available at* Internet, http://www.oneworld.org/patp/vol4_gloom.html. Dyson reviews several misunderstandings about current trends that have contributed to the "alarmist and overly-pessimistic" views on the world's food production capacity noting that the main reason population has outpaced cereal production is that farmers in major grain-growing regions such as the United States and the European Union have had little incentive to cultivate cereals. In addition, large areas of cereal cropland have been idled or set aside.

> [I]t seems inevitable that . . . most of the world's developing regions are going to become significantly more dependent upon supplies of cereals from outside. Their collective demand for imports will greatly increase, and it will be met by increased cereal production in North America, Europe, Australia, Argentina and . . . perhaps Brazil. Most developing regions should be able to finance these imports.

Id.

25. Thomas J. Duesterberg, *The Urgent Need to Finish Farm Trade Reform,* HUDSON BRIEFING PAPER, June 1995. *See Foreclosing The Future,* PEOPLE & THE PLANET 32 (1995), *available at* Internet, http://www.oneworld.org/ patp/ vol4_ foreclosing.html. "We are at a crossroads. Humanity now has the analytical tools and basic knowledge to discern the consequences of continuing on its present course. We are headed in the direction of increasing vulnerability to various unpleasantries, such as famine, mass migration, disease, and warfare, and at the same time rapidly foreclosing many of our best options." *Id.*

eliminate hunger from the face of the earth in our lifetime. We need only the will."[26]

I. IN SEARCH OF A NEW PARADIGM FOR U.S. AGRICULTURE

The international community's failure to solve the world hunger problem is evidenced by the twenty percent of the world's population who are either starving or malnourished and the many thousands who die each day. However, this note does not purport to resolve the dilemma concerning the moral or legal obligations associated with the concept of a right to food, nor does it judge current policies attempting to curtail the world's expanding population. Instead, it establishes as a background the reality of the doubling population, the opportunity for stabilization, and the economic and environmental forces impacting on whether ten billion people are within the limits of the earth's carrying capacity.

Specifically, this note addresses the major role that American agriculture must take to help reverse the environmental trends that will threaten food security worldwide and to ensure a future world without famine.[27] Part II begins this background with some lessons from the past including an overview of population trends, economic development, food production, and distribution issues. It concludes with an overview of the global environmental degradation that has occurred indirectly, at least, because of U.S. agricultural policies, trade barriers, and the unprecedented high yield agriculture since the 1950's. Part III presents a brief discussion of the "right to food" to demonstrate the lack of any meaningful chance this notion has of changing the way the United States perceives world hunger and how it should be addressed—that is through industrialization and trade, rather than international development and food aid. This suggests the

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26. *Energy and Food for All, supra* note 24 (quoting President John F. Kennedy).

27. *See Forecasting The Future,* PEOPLE & THE PLANET, *available at* Internet, http//www.oneworld.org/patp/vol4_newsfile.html (highlighting the recommendations and findings from *A 2020 Vision for Food, Agriculture and the Environment,* a conference conducted by the International Food Policy Research Institute (IFPRI)). The IFPRI study indicates that "declines in investment in agriculture, combined with the overwhelming challenges of population growth, political unrest, urbanization, land degradation and water scarcity make the future uncertain." In addition, 10 million more children will be malnourished, developing countries will double their food imports and triple them in Sub-Saharan Africa. "Time is running out, already 1 billion people live on less than a dollar a day and 800 million people go to bed hungry. The 2020 vision will not be achieved unless the productivity of the poor is increased and their access to employment enhanced." *Id.* The study also indicates that two billion hectares of cropland, pastures, and forests have degraded over the last 50 years, most of which is reversible; however, some long-term damage has occurred. "Globally, about 18 percent of forest land, 21 percent of pastures and 37 percent of cropland is degraded." *Id.*

interconnectedness of global hunger, global environmental issues, and global free-trade, where the interdependency of the interests of the United States and the Third World start to become apparent. Part IV turns to a discussion of the United States agricultural policy and outlines the basic programs that have continued for the past sixty years. It includes analysis of both recently proposed and subsequently enacted legislation and discusses how Congress is failing to effectively change the status quo in farm policy and the ramifications of its decision. Part V concludes with some suggestions and justifications for radical changes that would allow America's farmers to better compete in the world market. More importantly, it suggests that the United States government is at the threshold of a historic juncture—to determine whether the production demands and environmental challenges of the next half-century can be realized, and whether it has the political will to implement the kind of policy reform that will allow the market economy and market forces to dominate and foster equitable and efficient resource allocation and distribution.

II. POPULATION AND DEVELOPMENT

A. *Global Population and Development Trends*

In 1798, English economist Thomas R. Malthus hypothesized that "populations left unchecked by the natural constraints of limited food resources would progress geometrically, doubling approximately every twenty-five years. [However], [n]atural resource limitations meant that food production could increase only arithmetically; food production was therefore unable to keep up with rapid geometric population growth."[28] World

28. Andrew D. Ringel, Note, *The Population Policy Debate And The World Bank: Limits to Growth vs. Supply-Side Demographics,* 6 GEO. INT'L ENVTL. L. REV. 213, 217 (1993). Malthus' hypothesis remains applicable as the "doubling time" for the world's population is decreasing steadily from 200 years in 1850 to 80 years in 1930 to 37 years today. This ideology, demonstrating that natural resources limit development, has become known as the "limits to growth" view. *Id.* at 214. The "limits to growth" view calls for active state intervention to control population increases (e.g., family planning measures). *Id.* at 220. The contrary view is "supply-side demographics," based on the view that technology will allow for increases in food production to sustain more people. *Id.* In addition, the history of world development demonstrates that technological advancement increases the standard of living and results in population stabilization (e.g., large families declined as people became a less important resource and social security provided for the elderly and the disadvantaged). *Id.* at 221. *But see* Piel, *supra* note 5 (arguing that Malthus' view does not characterize world trends in population and development over the last 200 years). The "limits to growth" view has been adopted by the United Nations and the World Bank because they argue that economic development and technological advances will not stabilize population fast enough without other population control measures. Ringel, *supra* note 28, at 224. The United Nations Fund for Population Activities (UNFPA) was established in 1969 to help developing nations with

population has increased from one billion in 1800 to 2.5 billion in 1950,[29] to 5,787,279,608 as of September 8, 1996, now adding almost three people every second.[30] The world fertility rate is currently 3.1.[31] North America has reached stability (replacement level) at a fertility rate of 2.1.[32] European countries range from 1.5 to 1.8; Africa from 4.2 to 6.5; Asia from 1.9 to 4.4; and Latin America from 2.8 to 3.5.[33] On average, the fertility rate of the least developed countries is 5.8; less developed countries 3.5; and developed countries 1.7,[34] meaning that projected growth in the world's population over the next century will occur primarily in Africa, Asia, and Latin America—in the world's less or least developed countries.[35] The World Bank has predicted twelve to nineteen billion people by 2100,[36] but this figure may be overstated.[37] Nonetheless, despite some disagreement with specific numbers, even the most optimistic agree that population momentum dictates at least one more doubling of the world's population before any stabilization can occur.[38]

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population and environmental strategies. *Id.* The Reagan-Bush Administration implemented the supply-side demographics model because it was consistent with their limited government intervention (laissez-faire ideology) and their pro-life position on abortion. *Id.* at 227. In 1984, the Reagan-Bush Administration cut funding ($36 million) to the UNFPA because of forced abortions in China. In 1994, the Clinton Administration renewed United States support to the UNFPA, and Congress included $50 million in the Foreign Operations Appropriations Act of 1994. Rohrbaugh, *supra* note 3, at 241-42. *See also* Tim Stafford, *The Bet, Understanding Population and Population Control; Are People the Problem?* CHRISTIANITY TODAY, Oct. 3, 1994, at 46. Congress designated $392 million for population policies in the 1994 budget—an all-time high. *Id.*

29. John Bongaarts, *Population Policy Options in the Developing World,* SCIENCE, Feb. 11, 1994, at 771.

30. *World POPClock, U.S. Bureau of the Census, available at* Internet, http://www.census.gov/ipc-bin /popclockw (projected to 9/8/96 at 6:09:37 PM EDT).

31. Births and age-specific fertility rates for major areas and regions of the world from 1990-1995 can be found in *Population Information Network, supra* note 8.

32. *Id.*

33. *Id.*

34. *Id.*

35. *World POPClock, supra* note 30. The population of the developing world alone is expected to grow from 4.1 billion in 1990 to 8.6 billion in 2050 and 10.2 billion in 2100. Africa is expected to increase by five times from 0.6 billion in 1990 to 2.8 billion in 2100.

36. AVERY, *supra* note 2, at 50-60.

37. *Id.* In one generation, the total fertility rates in the least developed countries have come within 30 percent of stability, dropping from 6.1 in 1965 to 3.4 in low-income countries and 3.0 in middle-income countries. *Id.* WORLD BANK, WORLD DEVELOPMENT REPORT 1994, 212-13 (1995). *See* Bongaarts, *supra* note 29. Family planning programs in the developing world has increased contraceptive usage from 10 percent in the mid-1960's to 50 percent today. In East Asia, contraceptive use is now at 75 percent. *Id.*

38. *See* Bongaarts, *supra* note 29. Population momentum is the tendency of the population size to increase for a period of time after the fertility rate reaches long-term stability as a result of a young population age structure and decline in mortality rates. Age

Even with continued implementation of the "limits to growth" ideology,[39] the world is fast approaching ten billion people, and some would suggest that in order to stabilize the world's population, the industrial revolution must expand worldwide.[40] For example, China's gross domestic product quadrupled from 1977 to 1993, and per capita income has doubled since 1980.[41] In 1949, ninety percent of China's people were illiterate; today seventy-five percent are literate, and their fertility rate approaches stability.[42] "India's industrial output has been growing three times as fast as its population for a decade,"[43] and with the development of this industrial infrastructure, India has become the world's twelfth largest economy.[44] India's fertility rate is now halfway to stability at 4.0.[45] Indonesia's economic growth is eight to nine percent annually, and the poverty level is below fifteen percent, down from sixty percent in 1970;[46] its fertility rate is also in decline. "Today, billions of Third World people are achieving new buying power more rapidly than any large group of people has before in history,"[47] and their population growth rate has fallen from a high of 2.5 percent to 1.6 percent.[48] Ethiopia is predicted to be the last major country

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structure adjustment takes several decades to accomplish at which point population growth ceases. *See also* Steven Budiansky, *10 Billion For Dinner, Please; Technology and Free Trade Can Feed More People Than Many Believe Possible,* U.S. NEWS & WORLD REP., Sept. 12, 1994.

39. *See* Ringel, *supra* note 28. *See also* Bongaarts, *supra* note 29 (indicating that an estimated four to five billion dollars is being spent annually on population control programs in Africa, Asia, and Latin America).

40. *See* Piel, *supra* note 5. "We can reach zero-growth population, if we expand the world economy fourfold and share the proceeds equitably." *Id.* Piel points out that the industrial revolution brings on a demographic revolution or transition that proceeds through two phases: (1) the death rate in an industrializing country falls, and the population increases at rates measured by the difference between its birth and death rates; followed by (2) the decline in birth rates whereby the population approaches zero-growth. *See, e.g., The Pacific Rim's Population Implosion,* MARKET ASIA PAC., July 1, 1995 (illustrating that the Asia-Pacific Region is rapidly progressing to a low-growth consumer oriented market like that of Europe and North America).

41. AVERY, *supra* note 2, at 54.

42. Piel, *supra* note 5, at 22. Piel notes that although China's lowering fertility is often attributed to their coercive population control policies ("one-child family"), recent attention has credited economic development for cultural changes in reproduction practices.

43. AVERY, *supra* note 2, at 54.

44. Piel, *supra* note 5, at 23.

45. *Id.*

46. *Id.*

47. *U. S. Farm Policy in a Real World Context,* HUDSON POLICY BULLETIN, Mar. 8, 1995 (excerpts from testimony by Dennis T. Avery, Director of the Center for Global Food Issues, Hudson Institute, before the Senate Agriculture Committee hearings on the 1995 Farm Bill, Mar. 9, 1995).

48. AVERY, *supra* note 2, at 51.

to reach stability in 2050.[49] This has encouraged some experts to predict that as the Third World gains affluence, the world's population will peak at around nine billion by 2040 and gradually decline thereafter.[50] If this prediction is correct, the world has a fighting chance to feed this many people if it continues to expand industrialization, invest in biotechnology research, and provide the economic incentives to grow more food.[51]

B. *Global Food Production and Distribution*

The Food and Agriculture Organization (FAO) of the United Nations (UN) reports a decline in global food output and a significant depletion of world surplus.[52] Drought and floods in China have resulted in that

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49. *Id.*

50. *Id.* at 57.

51. *See* Budiansky, *supra* note 38, at 59. "The world has not reached, nor is it near the upper limits of its capacity." (quoting B.H. Robinson of the U.S. Department of Agriculture). *See* AVERY, *supra* note 2, at 12 (noting that "we can feed, house, and clothe 10 billion people on less land than we use for farming and forestry today if we . . . pursue yield-enhancing agricultural and forestry research . . . [and] [u]se the best and safest land to produce our field and tree crops"). *See also* Ian Carruthers, *Trader's Fate; Global Food Distribution,* NEW STATESMAN & SOC'Y, Sept. 22, 1995 (arguing that: "[i]f the world is going to be fed, then traditional global trade flows must be reversed, . . . [and that] [c]ities in developing countries will largely be fed with food from temperate countries and pay for it by exporting manufactured goods and services traditionally produced in the north").

52. *Annual Review-FAO of UN, World Food Situation, World Food Security Threatened by Decreasing Supplies, available at* Internet, http://www.fao.org. Food staples were nearly 4 percent below 1992 levels, due to the decreased maize output in the United States. World cereal production was 5 percent below 1992, while wheat made a marginal gain due to near record harvests in Asia. Production of coarse grains fell almost 9 percent below 1992 levels, and rice production declined 1.4 percent. Production of root sand tubers increased by 2 percent; most of the growth occurred in the developing countries of Africa and Latin America, while production fell in China and India. Pulses, an important high protein staple, was up 4 percent due to near record production in Asia. Global production of milk declined 1 percent, but developing countries increased their production, and world meat production grew by only 1 percent, despite a decline in Africa. Production of fats and oils grew 2 percent due to large increases in soybean harvests in Brazil, groundnut crops in India, and palm oil output in Indonesia and Malaysia. After 1994, a 19 percent decline is expected in the global cereal surplus in developed countries, with a significant decrease in the surplus of maize, while wheat and rice carryover stocks also decline. World rice stocks are expected to reduce by 15 percent, marking the third year of decline. Global per capita food consumption in 1993-94 remained the same as 1992-93, but meat consumption declined for the first time since 1982, due primarily to economic conditions in Eastern Europe and the former USSR. Actually, meat consumption increased in most developing countries except Africa. Food aid to developing countries decreased almost 23 percent in 1993-94; cereal food aid to Low-Income Food-Deficit (LIFD) countries (primarily in Sub-Saharan Africa) were down almost one-third from 1992-93. The decline in world food security has affected many developing countries, and Africa's food situation remains threatened. *See* Rose Umoren, *Africa Agriculture: Africa's Food Situation Remains Precarious,* May 17, 1995, *available in* WESTLAW PTS-NEWS-C

government's use of rationing coupons.[53] From 1976 to 1992, Latin America, despite increasing areas of food production and technology, lost 0.3 percent per year in per capita grain production, while per capita consumption grew by 0.5 percent; Africa also lost 1.4 percent annually over that same time period.[54] In Asia, consumption is outpacing production while population increases and industrialization continue to reduce available farmland.[55] Yet, as these economies continue to grow, better diets should be affordable.[56] The global demand for farm resources is projected to rise by thirty to fifty percent during the 1990's.[57]

While agricultural productivity may have peaked for some grains in some regions, it is still increasing in others. Asian production of rice, which provides thirty percent of total caloric intake in developing countries, has leveled since the 1980's and has been reduced to 1970-74 levels in Latin America.[58] In contrast, wheat production in Asia has increased nearly three

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database.

53. *See Grain Shortages Bring Back Rationing to China,* ASIAN ECON. NEWS, June 5, 1995, *available in* WESTLAW PTS-NEWS-C database. Ration coupons allow for grain purchase at subsidized rates because of supply and demand problems. Since 1953 China's government has bought grain from its farmers and sold it to those in urban areas at heavily subsidized rates. This allowed the government to keep wages low and was a catalyst for industrialization, but it reduced the growth of agricultural output. Farmland is being reduced by factories, housing, golf courses, and roads, leading to a loss of nearly one million hectares of farmland each year. Farmers are also migrating to urban areas because they cannot earn an adequate income with grain prices staying at low levels. Analysts project that China will become the world's largest importer of grain due to severe shortages. Estimates indicate that by 2030 China could be importing 350 million tons of grain—that equals the total supply on the international market in 1993. *Id.*

54. Thomas J. Duesterberg, *The Urgent Need to Finish Farm Trade Reform,* HUDSON BRIEFING PAPER, June 1995.

55. *Id. See* Lester Brown, *Running Out of Loaves and Fishes; Global Resources,* THE HUMANIST, Nov. 1994, at 30 (densely populated countries that continue to industrialize lose grain land to other uses; Japan has lost 52 percent of its grain land; South Korea 42 percent; and Taiwan 35 percent).

56. *Id. See* Thomas J. Duesterberg, *The Coming Boom in American Agriculture,* HUDSON BRIEFING PAPER, May 1994, at 3. East Asia's economy now equals that of the United States and is growing rapidly; China's growth rate for 1994 was predicted to be 9.4 percent; South Korea's was 7.6 percent; Malaysia's was 7.5 percent; India's was 4.5 percent; Thailand's was 8.4 percent; and Indonesia's was 6.4 percent. Latin American countries also continue to show rapid growth in their economies; Mexico was expected to grow by 3.5 percent in 1994; Colombia by 4.4 percent; Chile by 6 percent; and Argentina by 5 percent. *Id.* at 4.

57. *New Farm Technology: Conquering World Famine,* AGRA EUR., July 26, 1991, *available in* WESTLAW PTS-PROMT database (citing Dennis Avery, *Global Food Progress Report 1991,* Hudson Institute) (half of the demand is expected for products used to upgrade diets such as meat, fruits and vegetables, and cooking oils).

58. *Burgeoning Population Requires New Agenda,* FERTILIZER INT'L, Mar. 1995.

percent per year over the last twenty years,[59] and maize yields are increasing at nearly the same rate.[60] The experts have had mixed reactions with some predicting that the world's population will surpass the earth's "carrying capacity."[61] Today, food production in seventy-five developing countries does not keep pace with their expanding populations.[62] Fifteen of these countries have had a twenty percent decline in per capita food production.[63] Others predict, that despite the slow growth since 1990, total grain production will stay ahead of population expansion as evidenced by the steady drop in the world price of food over the last fifty years.[64]

C. *Food Production v. The Global Environment*

From 1950 to 1984, world grain production expanded by a factor of 2.6 and outpaced population growth thereby increasing the grain harvested per person by forty percent.[65] Oceanic food supplies increased by a factor of 4.6 from 1950 to 1989, which doubled the seafood consumption per person.[66] From 1984 to 1993, however, grain production grew at only 1 percent annually, resulting in a twelve percent drop in grain production per person.[67] The 1993 per capita seafood supply fell to nine percent below that level in 1988, and the FAO reports that "seventeen major oceanic fisheries are all now being fished at or beyond capacity and that nine others are in a state of decline."[68] This record of high production, "green revolution" [69] farming, and aggressive fishing has yielded environmental casualties that

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59. *Id.*

60. *Id.*

61. *See* Budiansky, *supra* note 38, at 58.

62. Brown, *supra* note 55, at 30.

63. *Id.*

64. Budiansky, *supra* note 38, at 59. *See* AVERY, *supra* note 2, at 151-55. Per capita food production continues to gain except in Africa, particularly in Sub-Saharan Africa, where hunger remains a serious concern. However, Africa has only seven percent of the world's population, and nearly all of the recent famine there is directly related to civil strife and "shooting wars," whereas Asia, containing 75 percent of the world's population, has had much success in food production increases over the last 15 years. *See also* Cheryl Christensen & Charles Hanrahan, Comment, *African Food Crises: Short-, Medium-, and Long-Term Responses,* 70 IOWA L. REV. 1293, 1293 (1985).

65. *See* Brown, *supra* note 55, at 30.

66. *Id.*

67. *Id.*

68. *Id.*

69. The "Green Revolution" commonly refers to the increased agricultural production (since the 1960's) in developing countries due to increased crop yielding varieties (as a result of biotechnology) and modern farming techniques, including the use of pesticides, herbicides, and irrigation. *See also* Robert L. Paarlberg, *The Politics of Agricultural Resource Abuse,* ENV'T, Oct. 1994, at 6 (discussing alternative explanations for environmental degradation).

have become the focus of world environmental groups, including species extinction, soil erosion, rain forest depletion (deforestation), overgrazing, aquifer depletion from irrigation, destruction of wildlife habitat, expanding deserts (desertification), waterlogging and salt build-up (salination) from over irrigation, and the potential ill-effects of herbicide and pesticide use on water resources. All of these are not only major environmental concerns, but also factors that could endanger food security and the future of world food production.[70] The World Resources Institute has reported that almost 500 million acres of trees have been cut down since 1970, and primarily because of this destruction, deserts have expanded by some 300 million acres.[71] "Slash and burn agriculture," practiced primarily in Asia, Latin America, and Africa, contributes to a depletion of almost one percent of the total tropical area of rain forests each year. Because rain forests, the world's lungs, remove carbon dioxide from and return billions of gallons of water to the atmosphere, deforestation may contribute to global warming and risk the world's fresh water supply.[72] Moreover, rain forests supply more than twenty-five percent of the prescription drugs available in the United States and are home to the world's largest reserve of plant and animal species.[73] Yet ecosystems continue to be destroyed. "Third World residents are cutting trees 'nobody owns' because they have no jobs and need free fuel and free cropland."[74] The incentive to exploit these natural resources demonstrates the "tragedy of the commons"[75] in many Third World countries while the United States and Argentina continue to divert enough good cropland to feed an additional 1.5 billion people.[76] The UN is addressing these issues at the

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70. *See* Brown, *supra* note 55, at 30. *See also* John Skow, *The Land: Less Milk and Honey? As Population Growth Puts Pressure on Forests and Fields, Producing Food for Ten Billion Could Be a Nightmare,* TIME INT'L, Oct. 30, 1995, *available at* Internet, http://pathfinder.com/@@8nml7wgxzaaqmri/time /international/ 1995 /951030/envi, and *in* WESTLAW TIME-LIFE database. *See also* Thomas M. Landy, *Connecting Poverty and Sustainability,* 21 B.C. ENVTL. AFF. L. REV. 277 (1994) (discussing how population expansion in Brazil affects global sustainability).

71. *The HungerWeb: Hunger and the Environment, Relationships between the Hunger and Environmental Crises, available at* Internet, http://www.hunger.brown.edu/hunger web/enviro.html. *But see Soil Erosion Estimates and Costs,* SCIENCE, July 28, 1995, at 461 (demonstrating the unreliability of recent global erosion estimates as determined by the Worldwatch Institute in *State of the World 1984*).

72. Jose O. Castaneda, *Debt For Nature Swaps: An Increasingly Attractive Solution To A Pressing Global Problem,* 2 PACE INT'L L. REV. 135, 136-37 (1990).

73. *Id.*

74. AVERY, *supra* note 2, at 310.

75. *Id.* at 316.

76. *See* AVERY, *supra* note 2, at 159-60.

international level,[77] but pressure in the United States comes from environmental groups urging tighter legislation regarding farm chemicals[78] and fertilizers, as well as the pursuit of environment-friendly "sustainable" agriculture.[79]

Without farm chemicals, estimates indicate that world food production would be reduced by forty percent and food costs would rise by seventy percent.[80] In the United States, "soybean yields would drop by 37 percent, wheat by 38 percent, cotton by 62 percent, rice by 63 percent, peanuts by 78 percent, and field corn by 53 percent."[81] Most important, without chemistry, "[w]e would need the land area of both South and North America (15-16 million square miles) to produce today's food supply, . . . [and in order to feed the projected population in 2050,] we should expect to plow down another 30 to 40 million square miles of wildlife for food production. That is the equivalent of South America, North America, Europe, and much of Asia."[82]

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77. *See* William C. Burns, *The International Convention to Combat Desertification: Drawing a Line in the Sand,* 16 MICH. J. INT'L L. 831 (1995). *See also* Agenda 21, adopted by the U.N. Conference on Environment and Development (UNCED) ("Earth Summit") at Rio de Janeiro, June 13, 1992. U.N. Doc. A/CONF.151/26 (vols. I, II, & III, 1992). The Earth Summit yielded an 800-page document (Agenda 21), focusing on environmentally sustainable development through the year 2000 and beyond. Agenda 21 represents the culmination of 178 nations at the conference recognizing that agriculture has a most vital role in meeting the growing population's food demands while protecting the earth's renewable resources.

78. John Carlucci, *Reforming the Law on Pesticides,* 14 VA. ENVTL. L. J. 189 (1994).

79. James Steven Carpenter, *Farm Chemicals, Soil Erosion, and Sustainable Agriculture,* 13 STAN. ENVTL. L. J. 190 (1994). *See* Jonathan Tolman, *Poisonous Runoff From Farm Subsidies,* WALL ST. J., Sept. 8, 1995, at 7. *See also* Karen R. Hansen, *Agricultural Nonpoint Source Pollution: The Need for an American Farm Policy Based on an Integrated Systems Approach Recoupled to Ecological Stewardship,* 15 HAMLINE J. PUB. L. & POL'Y 303 (1994). *But see* Bob Holmes, *Can Sustainable Farming Win the Battle of the Bottom Line?,* SCIENCE, July 25, 1993, at 1893 (discussing regional differences and other factors in determining whether sustainable agriculture can be economically and environmentally profitable).

80. *Protection of Crops and the Environment Linked,* ECO-LOG WEEK, Apr. 21, 1995, *available in* WESTLAW PTS-NEWS database. (The Crop Protection Institute reports that less pesticides are being used and that they are less toxic, target-specific (attacking the most vulnerable part of any weed, insect, or fungus) and that many are biodegradable within two weeks of application.)

81. AVERY, *supra* note 2, at 31 (citing E.G. Smith et al., *Impacts of Chemical Use Reduction on Crop Yields and Costs,* Agricultural and Food Policy Center, Dept. of Agricultural Economics, Texas A&M University, in cooperation with the National Fertilizer and Environmental Research Center of the Tennessee Valley Authority, College Station, TX (undated)).

82. AVERY, *supra* note 2, at 31.

Further data suggests that the dangers of pesticide usage are vastly overstated,[83] that chemical residues in foods pose an extremely low risk to health, and that most of the bad publicity concerning pesticides is nothing other than "scare tactics."[84] This data favors continued pesticide usage; moreover, because of low yields, sustainable agriculture (organic farming) cannot feed the world (requiring much more land to meet demand).[85] Sustainable agriculture also suffers a much higher rate of soil erosion[86] and limits income due to substantially higher labor and management costs.[87] These factors, in addition to farm subsidies that encourage high pesticide and fertilizer use to maximize yields on less ground, provide a disincentive to farmers to either revert to organic methods or reduce their usage of chemicals.[88]

The real threat is not that the earth will run out of land, topsoil or water but that nations will fail to pursue the economic, trade and research policies that can increase the production of food, limit environmental damage and ensure that resources can reach the people who need them. Indeed, embracing the

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83. *Id.* at 79. "[W]e consume only one ten-thousandth as much cancer risk in the form of pesticide residues as we do in the form of natural carcinogens in our food, . . . [and] [*l*]*ess than 3 percent of all cancer deaths are caused by all the combined forms of environmental contamination and pollution.*" *Id.* at 72-73. *See IFIC Review: On Pesticides and Food Safety,* International Food Information Council (IFIC), *available at* http://ificinfo.health.org/ir-pest.htm. The plentiful and affordable food supplies have contributed to the longevity of Americans who now live some 20 years longer than in the early 1900's. The National Academy of Sciences has reported that this improvement is partly attributable to the use of pesticides that have increased crop yields and made more fruits and vegetables available year-round. In addition, the American Medical Association claims that there is no scientific evidence linking the proper application of pesticides and adverse health effects in humans. More than 99.99 percent of the pesticides that Americans consume are natural toxins which are present in all plants including such foods as beans, lettuce, apple juice, wine, spinach, peanut butter, and others. Americans consume 10,000 times as much by weight of natural pesticides than they do of man-made chemical residues. *Id.*

84. AVERY, *supra* note 2, at 82.

85. *Id.* at 167.

86. *Id.* at 174.

87. *Id.* at 179.

88. *Id.* at 360. U.S. farm policies that set aside cropland and paid high price supports encouraged farmers to seek additional land and higher yields. Farmers proceeded to use fertilizers and pesticides to increase yields instead of rotating crops which is a very effective way to reduce pests and weeds. Part of the land sought out by farmers due to these policies were wetlands. (The government also paid farmers for acres taken out of production). Since 1955, U.S. farmers have acquired 15 million acres of wetlands, thus reducing wildlife habitat and causing the severe erosion of these marginal agricultural soils. *Id. See also* PAUL FAETH, GROWING GREEN: ENHANCING THE ECONOMIC AND ENVIRONMENTAL PERFORMANCE OF U.S. AGRICULTURE, 24 (World Resources Institute 1995). Farm supports add to soil erosion, overuse of chemicals and loss of wildlife habitat "[b]y raising the payments farmers receive for their crops but restricting the acreage they can plant, policies encourage intensive cropping and input use on the land that was planted." *Id.*

myth of environmental scarcity could ironically prompt the United States and other countries to adopt policies that virtually guarantee that the apocalyptic future that environmentalists foretell really does come true.[89]

Regardless of what may be the problem, "[t]he persistence of hunger increases population growth, as parents strive to guarantee the survival of their children . . . [and] the world has come to recognize that hunger, the environment and population growth are inextricably linked in one common agenda for a sustainable future."[90] Arguably:

> [m]ankind is at the most critical moment in environmental history. What we do as people and societies in the next decade will determine whether we have a more crowded but sustainable world to bequeath to future generations — or whether we will bring on the very apocalypse of famine and wildlife destruction that the gloomiest environmentalists have envisioned. Our decisions on agriculture and forestry will be the most crucial of all, because they will govern how we use two-thirds of the earth's surface. They will dictate the habitat — or loss of habitat — for [ninety-five] percent of the earth's wildlife species.[91]

III. UNIVERSAL HUMAN RIGHTS

A. *The Right to Food*

Human rights, including the "freedom from want,"[92] became an international concern for the whole world when President Franklin D. Roosevelt delivered his "Four Freedoms" address in 1941.[93] That impetus allowed for the creation of the United Nations in 1945,[94] and the General Assembly's adoption of the Universal Declaration of Human Rights (UDHR)

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89. Budiansky, *supra* note 38, at 58. *See* E. F. Roots, *Population, "Carrying Capacity," and Environmental Processes, in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 529 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

90. *The Mission of the Congressional Hunger Center, available at* Internet, http://www.fh.org/chc/Mission.htmld/index.html.

91. AVERY, *supra* note 2, at 9. For a brief discussion of the interconnectedness of agriculture, hunger, and the environment and a comprehensive bibliography, see *Global Agriculture, Environment, and Hunger, Past, Present, and Future Links, available at* Internet, http://www/ciesin.org/docs/004-147/004.html.

92. Asbjorn Eide, *Strategies for the Realization of the Right to Food, in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 459, 460-72 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

93. *Id.*

94. *Id.*

in 1948.[95] The UDHR embodied in international law, for the first time, a recognition of the right to food.[96] The right to food, in order to be enforceable, must have a corresponding duty. But any hope of establishing a legally binding obligation associated with the right to food was substantially diminished when the Western States pressured the General Assembly to address the rights contained in the UDHR in two separate international covenants, the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social, and Cultural Rights (CESCR).[97] Article 11 of the CESCR specifically recognizes the right to food:

> (1) The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food . . . . The State Parties will take appropriate steps to ensure the realization of this right . . . .
> (2) The States Parties . . . recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, . . . needed:
>
> (a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, . . . in such a way as to achieve the most efficient development and utilization of natural resources;
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> (b) [t]aking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.[98]

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95. *Id.*

96. Donald E. Buckingham, *A Recipe For Change: Toward An Integrated Approach To Food Under International Law,* 6 PACE INT'L L. REV. 285 (1994). The Declaration in Article 25 states: "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services." *Id.*

97. *See* Asbjorn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 15 (Asbjorn Eide et al. eds., 1995). *See also* Robert Robertson, *The Right To Food in International Law, in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 451 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

98. International Covenant on Economic Social and Cultural Rights, G.A. Res.2200A, U.N. GAOR, 21st Sess., Annex, Supp.. No. 16 at 49, 1496th plen. mtg., U.N. Doc. A/6316 (1966). Among the 120 States to have signed the CCPR, only the United States and Haiti have not ratified the CESCR. *See* Eide, *infra* note 100, at 23. *See also* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need For An Entirely New Strategy,* 84 AM. J. INT'L L. 365 (1990) (discussing the obstacles, both philosophical and political, to be overcome if the United States is to ratify the CESCR). The

Despite the United Nations' repeated claims that "all human rights are universal, indivisible, and interdependent and interrelated"[99] and the requirement that State obligations associated with economic, social, and cultural rights be implemented in good faith,[100] their enforcement remains more a question of political will rather than a justiciable right.[101] Some argue that fulfillment of the right to food must go beyond the focus on the ratio of food to population and the distribution of available food resources[102] into an entitlement-based approach where the thinking shifts from "what exists, to who can command what."[103] This approach reaches the relationship between the hungry and the commodity (food) by recognizing, for example, one's entitlement to ownership in what one produces with one's own labor (among others).[104] However, even as the world's democracies expand and entitlements such as the right to property become more commonplace, this paradigm must presume: (1) adequate global production of food, and (2) both international and domestic instruments that can facilitate distribution. For example, a treaty incorporating international trade liberalization and domestic policies consistent with that same international agreement that encourages production, competition, and free trade on the world market seem an essential foundation unless the entitlement approach be undermined. China's people could realize the incentive through an entitlement program

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Covenant is nearly 30 years old, drafted in 1966; President Carter pursued ratification in 1978, but any inertia toward ratification has since stalled. *Id.* at 2.

99. Eide & Rosas, *supra* note 97, at 16 (quoting the World Conference on Human Rights: Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, part I, para. 5).

100. Asbjorn Eide, *Economic, Social and Cultural Rights As Human Rights, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 21 (Asbjorn Eide et al. eds., 1995).

101. *Id.* at 22. Civil and political rights remain justiciable primarily because they are considered "absolute," and they do not strain State resources, whereas economic, social and cultural rights require the larger costs of State welfare and, thus, are considered non-justiciable. This analysis has been characterized as a "gross oversimplification." *Id.* at 38. However, considering policy and legislation involving international legal obligations for the United States, the reality of world hunger and the United States' refusal to ratify the CESCR tends to reinforce this interpretation. *See* Asbjorn Eide, *Strategies for the Realization of the Right to Food, in* HUMAN RIGHTS IN THE TWENTY FIRST CENTURY: A GLOBAL CHALLENGE 459, 463 (Kathleen E. Mahoney & Paul Mahoney eds., 1993). *But see* Martin Scheinin, *Economic and Social Rights as Legal Rights, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 41-62 (Asbjorn Eide et al. eds., 1995) (demonstrating the justiciability of economic, social, and cultural rights as a realization of positive state obligations). *See also* Joy A. Weber, *Famine Aid To Africa: An International Legal Obligation,* 15 BROOK. J. INT'L L. 369 (1989) (discussing the legal obligation to assist famine victims under customary international law).

102. Asbjorn Eide, *The Right To An Adequate Standard Of Living Including The Right To Food, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 89, 95 (Asbjorn Eide et al. eds., 1995).

103. *Id.*

104. *Id.* at 94.

to reap the rewards of their labor as their country rapidly industrializes. But, as their country loses land to deserts and development and struggles against the climatic forces, these entitlements cannot purchase nor trade for what has neither been produced nor made available on the world market. It follows that any corresponding duties associated with a recognition of the right to food will not likely affect global hunger without U.S. ratification of the CESCR.[105] Yet, the obstacles to shifting public opinion and, hence, political priorities existed when the notion of "freedom from want" was first introduced,[106] and similar obstacles remain today.[107]

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105. Alston, *supra* note 17, at 370. *See also* Seymore J. Rubin, *Economic and Social Human Rights and the New International Order,* 1 AM. U. J. INT'L L. & POL'Y 67, 73-80 (1986) (discussing the divergent views with regard to the economic policies that could contribute to the recognition of economic and social human rights); Robert L. Bard, *The Right to Food,* 70 IOWA L. REV. 1279, 1289-90 (1985) (noting that even if the United States were to ratify the CESCR, the right to food is not likely to be established). Because of the consent clauses written into the covenant, nations have not accepted the right as customary international law. Furthermore,

> asserting a duty on the rich to guarantee adequate food for the poor is a welfare concept, and few nations have achieved a guaranteed, minimally accepted life for their people. [E]xtending it to foreigners is grossly utopian. This does not mean that individual nations will not recognize obligations to less fortunate nations, only that they will refuse to accept this as a legally imposed obligation. Nation-states will insist on a right to retain absolute discretion in determining the level of their contribution to world welfare requirements.

Id. at 1289.

106. *See* AYN RAND, THE VIRTUE OF SELFISHNESS (1964):

> There is no such thing as 'a right to a job' — there is only the right of free trade, that is: a man's right to take a job if another man chooses to hire him. There is no 'right to a home,' only the right of free trade: the right to build a home or to buy it. There are no 'rights to a "fair" wage or a "fair" price' if no one chooses to pay it, to hire a man or to buy his product. There are no 'rights of consumers' to milk, shoes, movies or champagne if no producers choose to manufacture such items (there is only the right to manufacture them oneself). There are no 'rights' of special groups, there are no 'rights of farmers, of workers, of businessmen, of employees, of employers, of the old, of the young, of the unborn.' There are only *the Rights of Man* — rights possessed by every individual man and by all men as individuals.

107. *See also* Alston, *supra* note 17, at 371. The Reagan administration demonstrated rejection of economic, social, and cultural rights as human rights by deleting the associated sections from the annual Country Reports on Human Rights Practices. In June 1988, the Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs delivered a statement in which the myth that economic, social, and political rights as actual human rights was dispelled. *Id.* at 371 n.42. *See also* Peter Vale, *Engaging The World's Marginalized and Promoting Global Change: Challenges For The United Nations at Fifty,* 36 HARV. INT'L L. J. 283 (1995) (discussing the failure of the United Nations to successfully assist the marginalized people of the global community—evidenced by the 40 percent increase of those living in absolute poverty in the last 15 years. Yet, when emergencies exist, the will to solve international problems seems to manifest itself, consider the 1987 Montreal Protocol on

IV. U.S. AGRICULTURAL POLICY

A. *History of U.S. Farm Policy*

Following the economic collapse of the economy by the end of the 1920's, President Franklin Roosevelt's administration initiated "New Deal"[108] legislation that represented significant change in national agricultural policy,[109] and Congress passed the Agricultural Adjustment Act of 1933.[110] The purpose of the legislation was to stabilize agriculture, help consumers by supporting commodity prices, and place farm income in parity with industry.[111] Congress realized that U.S. farmers' productive capacity exceeded domestic demand, that cycles of overproduction and low prices were followed by short supplies and higher prices, and that those individual farmers whose output influenced only a fraction of total production had little influence on commodity prices.[112] The Agricultural Adjustment Act of 1933 was the first major legislation to address these elements.[113] After the Supreme Court invalidated part of the Act in 1936,[114] Congress passed the Agricultural Adjustment Act of 1938.[115] This legislation provided for

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Substances that Deplete the Ozone Layer).

108. *Agricultural and Farm Programs: Hearings to discuss the 1995 Farm Bill before the Senate Agriculture, Nutrition and Forestry Committee,* 103rd. Cong., 2d. Sess. (1995) (statement of Senator Domenici, Chairman, Senate Budget Committee)[hereinafter Domenici, *Testimony*], *available at* Internet, http://www.hillnet.com: 80/farmbill/budget/domenici.anf.html.

109. Mark Ritchie, *Lecture on "US Agricultural Policy: Back To The Future,"* Institute For Policy Studies, Minnesota Department of Agriculture, *available at* Internet, http://www.users.interport.net/~mmaren/ritchie.html.

110. *Id.*

111. Cong. Rec., U.S. House of Rep. Mar. 21, 1933, at 695. *See also* Christopher Kelly, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659 n.2 (1994). Parity concerns the comparison of farm family income to that of nonfarm family income. *Id.* at 659 n.4. *See also* S. Rep. No. 357, 101st Cong., 2d Sess. (1990), reporting on the original Senate bill to revise and extend agricultural price support and related programs including agricultural exports, conservation, and research. This bill eventually passed to become the Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359.

112. S. Rep. No. 357, 101st Cong., 2d Sess. 18 (1990).

113. *Id.*

114. United States v. Butler, 297 U.S. 1 (1936). Justice Roberts held that the plan authorizing the Secretary of Agriculture to make contracts with farmers to reduce their productive acreage in exchange for benefit payments was a "plan to regulate and control agricultural production, [and was] a matter beyond the powers delegated to the federal government." *Id.* at 68.

115. S. Rep. No. 357, *supra* note 112, at 19.

acreage allotments, marketing quotas for price control, and price supports.[116] By this time the composition of the Supreme Court had changed and a challenge to the marketing quota provisions of the Act was held to be within the commerce power of Congress.[117] In 1949, the 1938 Act was amended to establish permanent "parity-based" price supports.[118] The Agricultural Adjustment Act of 1949 is the last permanent legislation on agricultural policy. However, since 1973, Congress has regularly amended the Act with legislation that expires every four or five years.[119]

In the Food and Agriculture Act of 1965, Congress set commodity price supports near to world levels in an attempt to determine real values under market forces with supply controlled through voluntary programs.[120] In 1973, the Agriculture and Consumer Protection Act moved toward omnibus farm legislation incorporating food aid, trade, soil conservation, and food stamp provisions.[121] Congress continued to enact farm bills in 1977 and 1981 to address overproduction and low prices, and by 1981, what later became known as the "80's farm crisis" began.[122] Farmland prices fell drastically, surplus approached near record levels, and commodity prices and

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116. *Id.* The Act established the Commodity Credit Corporation (CCC) which still exists today. The CCC allowed for the protection of farm incomes by allowing farmers to borrow from the government at floor prices established by Congress. When large grain companies (who tend to control the price of grain through buying and selling) would set market commodity prices below the floor price, farmers could get the guaranteed floor price from the government on a loan and hold their grain until the demand was such that the grain companies would bid the price back up. As the program evolved, Congress set a ceiling price so that if the price went above the ceiling, the government would release maintained surplus onto the market to lower the price below the ceiling. Balance between supply and demand was controlled through supply management programs where farmers within a particular commodity group would vote to reduce their production. In order to make the programs function, a complex system of import quotas, tariffs, and import limits was established to maintain the supply-demand balance. *See* Ritchie, *supra* note 109.

117. Wickard v. Filburn, 317 U.S. 111 (1942). Under the Act's acreage allotment provision, a farmer's total production area was limited in an attempt to control supply (and thus the price) through market quotas. In 1941, farmers in the program received an average price of about $1.16 per bushel compared to the world market price of 40 cents. Justice Jackson, considering the cumulative effect of individual farm production, held that under the commerce power Congress could regulate commodity prices by limiting the volume of the commodity on the market. *Id.* at 128-29.

118. S. Rep. No. 357, *supra* note 112, at 19.

119. *Id.*

120. *Id.*

121. *Id.* Instituted in the Act were target prices and deficiency payments as the primary means of federal government support for agriculture. (Target prices are government guaranteed price levels, and deficiency payments go to qualifying farmers whenever market prices fall below target prices.) *Id.* This Act marked a change in strategy from one of stabilizing prices to one of direct income subsidies which remains today the method by which the government provides direct income support to farmers. *See* Ritchie, *supra* note 109.

122. *See* Ritchie, *supra* note 109.

farm incomes were down. In 1983, the Reagan Administration implemented a substantial one-year acreage reduction program called the Payment-In-Kind (PIK) program. PIK paid farmers with government-owned grain if they reduced or eliminated their production of wheat and feed grains. The goal to reduce surplus and new production was the rationale behind the program that set aside fifty-five million acres of cropland and reduced corn production by one-half.[123] Regardless, the PIK program only effectively reduced surpluses for one year and reserve stocks increased thereafter.

Unfortunately, in 1985, the omnibus farm bill essentially continued the older programs[124] with supply control rooted in acreage reduction programs and deficiency payments. The Food Security Act of 1985, however, addressed soil conservation by establishing the Conservation Reserve Program (CRP). This provision paid farmers to withdraw land from production for ten years if it was subject to high erosion[125] and further denied commodity payments to farmers who converted wetlands or highly erodible soil to cropland.[126] In addition, the 1985 Act established the 0/92 and 50/92 acreage diversion programs where farmers with base acreage in wheat and feed grains could receive ninety-two percent of their deficiency payments for not producing on any of their base land or, in the case of rice or cotton, on one-half of their base acreage.[127] The payment share was reduced from ninety-two percent to eighty-five percent in the Omnibus Budget Reconciliation Act of 1993.[128] The Export Enhancement Program (EEP) was also initiated as part of the 1985 farm legislation and allows for the use of export subsidies toward agricultural products dumped[129] on the world market.[130]

The Food, Agriculture, Conservation, and Trade (FACT) Act of 1990 reauthorized various programs and statutes covering all of the federal food and agricultural policies. FACT updated the agricultural price support programs and revised programs involving agricultural trade, farm credit, agricultural research, and conservation.[131] "The ultimate purposes of these provisions are to ensure consumers an abundance of food and fiber at reasonable prices, to maintain the competitiveness of American farm

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123. *Review of the Payment-in-Kind (PIK) Program, 1983: Hearings Before the Committee on Agriculture, U.S. House of Representatives,* 98th Cong., 1st Sess. 12 (1983).

124. *Id. See* S. Rep. No. 357, *supra* note 112, at 19.

125. *Id.*

126. *See* FAETH, *supra* note 88, at 26.

127. *Id.*

128. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

129. Dumping refers to the sale of imported goods in the U.S. market at prices below those set for the same goods in the exporters' home market, or lower than the cost of manufacturing and marketing the goods in that home market.

130. Food Security Act of 1985, Pub. L. No. 98-198, 99 Stat. 1354.

131. S. Rep. No. 357, *supra* note 112, at 1.

products while providing a fair return to producers, and to conserve the natural resources which serve as the basis for all agricultural production."[132] FACT contains a host of programs including non-recourse loans, marketing loans, deficiency payments, the conservation reserve program (CRP), conservation compliance, research and education, food programs, rural development, crop insurance, and credit and trade expansion programs among others.[133] Notably, since the 1950's, each successive farm bill became more wide-reaching in scope, yet four main elements are identifiable through most of the legislation: (1) a price or income support program; (2) some type of stored surplus program; (3) a land set-aside program (land retirement); and (4) domestic and foreign food programs.[134] These considerations in the 1995-96 farm bill intertwined with a budget reconciliation package that promised reductions in federal spending caused spirited debate. The pivotal question was whether Congress would again continue the status quo by extending the 1990 legislation, initiate gradual reduction of government programs over a period of several years, or make radical changes to eliminate programs and move toward trade liberalization requiring American farmers to compete in the world market.[135]

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132. *Id.*

133. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359.

134. *Id.* *See* FAETH, *supra* note 88, at 26. The price support programs allow for deficiency payments determined by a farmer's base acreage for one or more of seven crops: wheat, corn, barley, oats, sorghum, rice, and cotton. The farmers who voluntarily participate are required to set aside a certain percentage of their acreage base in the Acreage Reduction Program (ARP). The government also provides non-recourse loans where farmers use crops for collateral. If the farmer defaults on the loan, the government's only recourse is to confiscate the crop. *Id.* Included in the 1990 farm bill are sodbuster and swampbuster provisions that discourage cultivation of marginal soils and wetlands. Depending on the circumstances, repeated violations of these provisions can result in a loss of federal benefits. *Id.* at 27.

135. *See Saving World Wildlife—and the American Farm—with High Yields and Free Trade: Hearings before the Senate Agriculture Committee on the 1995 Farm Bill*, 103rd Cong., 2d. Sess. (1995) (testimony of Dennis Avery, Director of Global Food Issues for the Hudson Institute), *available in* WESTLAW USTESTIMONY database at 1995 WL 100509 [hereinafter Avery, *Testimony*]. "It is now clear that for 60 years the U.S. has been running the second-dumbest farm policy in the history of the modern world. Only communal farming, invented by Joseph Stalin, has had a worse record of achievement than America's farm price supports and cropland diversion." *Id.* *See also* Roy Frederick, *A Fateful Month Ahead for Farm Bill*, Ag Policy Update, No. 20 Oct. 13, 1995, *available at* Internet, http://ianrwww.unl.edu/farmbill /apu 20.htm; *1995 Farm Bill: Hearings before the Senate Committee on Agriculture*, 103rd Cong., 2d. Sess. (1995) (statement of the Hon. Calvin M. Dooley, Congressman, 20th District, California), *available in* WESTLAW USTESTIMONY database at 1995 WL 113201(F.D.C.H.).

> U.S. farm policy was born in 1933 . . . [with] the New Deal farm programs as a temporary solution to deal with an emergency. Sixty years later, we are still using those same solutions as the basis for our farm policy . . . . A continued

B. *The GATT*

Final resolution of the 1995-96 farm bill necessarily involved consideration of the United States' position in the world marketplace as impacted by the conclusion of the Uruguay Round negotiations of the GATT.[136] By the year 2000, the Uruguay Round Agreements Act[137] (URA) requires a twenty-one percent decrease in the export of subsidized goods and a thirty-six percent decrease in funding of export subsidies compared to

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> reliance on programs that require farmers to set aside up to 15 percent of acreage is a prescription for reducing the U.S. share of the international market and declining profitability in the long term. Every acre that we take out of production is not driving up prices, but rather is presenting an opportunity for our foreign competitors to capture markets that should be the domain of U.S. farmers. The time has come to break our addiction to a farm policy that seduces us with income supports but leads us down a path of reduced opportunities. It is time that we embrace a farm policy that encompasses three fundamental objectives: [m]arket expansion, . . . [r]isk management, . . . [and] [m]aintaining competitiveness.

Id. Cf. Agricultural Trade: Hearings before the General Farm Commodity Subcommittee on the 1995 Farm Bill, 103rd Cong., 2d. Sess. (1995) (statement of John Burritt, President of the Northern Sun Division of Archer Daniels Midland Co., Decatur, Ill.), *available in* WESTLAW USTESTIMONY database at 1995 WL 354988 (F.D.C.H.) (testifying on U.S. oilseed policy, export potential, and associated trade barriers while encouraging continued use of support programs).

136. The General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. pts 5-6, 55 U.N.T.S. 187 [hereinafter GATT]. The GATT is a formal multilateral agreement whose purpose is to expand and liberalize world trade. GATT provisions regulate the use of trade barriers and eliminate some of the confusion involved in international trade. GATT also provides for a process to settle trade disputes and negotiate the liberalization of tariff and nontariff barriers. However, prior to the Uruguay Round, GATT did not address domestic agricultural policies which allowed implementation of nontariff barriers. *See* Liane L. Heggy, *Free Trade Meets U.S. Farm Policy: Life after the Uruguay Round,* 25 L. & POL'Y INT'L BUS. 1367 (1994). The Uruguay Round began in September 1986 as the eighth round of negotiations to GATT. Originally, the Round was to be completed by the end of 1990, but primarily because of a basic disagreement on agricultural reform, the negotiations stalled. The United States wanted to phase out agricultural subsidies affecting international trade, but the European Community (EC), whose Common Agricultural Policy (CAP) allows for extensive subsidizing of agricultural production to counter imports, opposed the plan. After seven-plus years of negotiations, 117 countries concluded the Final Act of the Uruguay Round (URA) on December 15, 1993. The URA involves more than 26,000 pages and represents the most comprehensive international trade agreement in history. The successor to GATT, the World Trade Organization (WTO) was also established in the URA negotiations. S. Rep. 412, 103rd Cong., 2d Sess. (1994) (Senate report on Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994)).

137. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

prevailing 1986-90 levels.[138] Nontariff import barriers (NTB's), such as quantity restrictions or even outright bans, import levies, minimal import pricing, and discretionary import licensing, must all be converted to tariffs and reduced by an average of thirty-six percent by the year 2000, and each individual tariff must decline fifteen percent.[139] The URA also requires that developed countries reduce domestic subsidies twenty percent over the next five years as compared to 1986-88 levels.[140] Although the URA represents major reform by bringing agriculture under a multilateral discipline, the level of domestic protection is likely to remain high[141] because the URA reduction measures exclude direct-income support (including U.S. deficiency payments).[142] Still, world market prices over the next decade will likely be substantially influenced by GATT and the 1995-96 farm bill.[143]

C. *Forces Shaping the 1995-96 Farm Bill*

The world has changed dramatically since the first farm legislation in 1933, even though the basic policy remains in effect today.[144] The changes over the past sixty years and particularly the evolution in American agriculture will have a substantial influence on the extent to which the status quo in farm legislation continues. For example, in 1933, twenty-five percent of the total U.S. population were farm households that generated more than ten percent of the gross domestic product (GDP).[145] In 1995, less than two percent of the population lived in farm households and they generated less than two percent of the GDP.[146] The original concern with parity between farm incomes and industry no longer applies as the income for farm households now exceeds the average for all U.S. households.[147] However,

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138. Norman S. Fieleke, *The Uruguay Round of Trade Negotiations: An Overview,* NEW ENG. ECON. REV., May 15, 1995, at 3, 8, *available in* WESTLAW, TRD & IND database.

139. *Id.* The process of converting NTB's is known as tariffication.

140. *Id.*

141. Merlinda D. Ingco, *Agricultural Liberalization in The Uruguay Round,* FIN. & DEV., Sept. 1995, at 43, *available in* WESTLAW, TRD & IND database.

142. *Id.*

143. *GATT Market Impact Depends on U.S. Policies,* AGRA EUR., June 30, 1995, at 3, *available in* WESTLAW, TRD & IND database.

144. *See* Avery, *Testimony, supra* note 135.

145. *See* Domenici, *Testimony, supra* note 108.

146. *Id.* (Approximately 800,000 farms produce 96 percent of America's agricultural products).

147. Daryll E. Ray, *The Economic Setting for U.S. Agriculture, available at* http://ianr www.unl.edu/farm bill/setting.html.

> Farm households averaged $39,007 in income in 1990, which was $1,600 above the average income for all households, but only $5,742 of that was from their farms. Nearly three-fourths of farm operator households operate farms with less than $50,000 in gross sales and, on average, lose money on farming

farmers' non-farm income today far outweighs their farm income.[148] Even more telling is that "[o]ver the past ten years, American taxpayers made payments totaling $108.9 billion through the federal farm subsidy programs, [b]ut just two percent of the programs' recipients . . . received an astronomical 26.8 percent of the subsidies, $29.2 billion in all."[149] Further evidence suggests that the farm programs are wrought with fraud and corruption.[150] With an increased emphasis to balance the federal budget, the

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operations.

Id.

148. *See* Domenici, *Testimony, supra* note 108. The Congressional Budget Office (CBO) reported that all farm income filers showing a negative income—1.4 million filers with a negative income of $13 billion—also showed positive income of more than $70 billion meaning that most farmers will be affected by non-farm fiscal policy much more than they will by farm programs. *Id.*

149. *The Cash Cropper,* (Farm Subsidy Study conducted by the Environmental Working Group), *available at* Internet, http//www.ewg.org. The study revealed that the top 2 percent of recipients averaged $485,000 each in government farm payments in the last 10 years which was more than 13 times as much as the average recipient. Over the last decade, the top 60,000 recipients averaged more in federal farm subsidy payments each year than the typical American family earned on average each year from all sources. The top 2 percent of individual recipients from 1985 through 1994 totaled $20.83 billion which is almost 25 percent of the total payments to individuals; each averaged over $400,000 apiece—more than 12 times that paid to the average individual recipient. The report's revealing message is that almost 25 percent of all subsidy payments made over the last 10 years went to the top 2 percent of recipients! *See Rethinking the Equities of Federal Farm Programs, supra* note 111 (arguing that farmers should not be given income based on socioeconomic status). *See also* Paul Faeth, *Let's Get Welfare Farmers off the Dole*, CHI. TRIB., Oct. 6, 1995, at 21 (Forty percent of subsidy payments go to farmers with a net income of $100,000 and a net worth of $750,000 or more; subsidizing farmers is not enhancing rural development). FAETH, *supra* note 88, at 23. Faeth contends that because commodity-support programs link benefits to the acreage historically under production, the largest benefits go to the largest producers. In 1991, 30 percent of the subsidy payments went to the largest 5 percent of all farms. These farms accounted for 57 percent of gross cash income. The smallest [farm producers] 69 percent received only 17 percent of program payments and accounted for only 10 percent of gross cash income. *But see* Lee Smith, *How To Cut Farm Spending; The Government Should Quit Paying Crop Subsidies and Instead Fashion a Straightforward Welfare Program for Farmers Who Can't Hack it in the Open* Market, FORTUNE, Nov. 10, 1986, at 97, *available in* WESTLAW, TRD & IND database.

150. *Fox in the Henhouse,*(Environmental Working Group analysis of farm subsidy payments over the last 10 years), *available at* Internet, http://www.ewg.org. "Federally-funded county office employees and farmer committee members often participate more frequently in the very programs over which they exercise greatest local control than the average recipient, and they receive higher than average payments." *Id.* Between 1985 and 1994, more than $852 million was paid in federal farm subsidies to USDA committee members. All of the top 100 county committee recipients got more than $547,000 over the last 10 years, and more than 1000 farmers on USDA county committees received in excess of $250,000 each in farm subsidy payments per year of participation in farm programs. *Id.* In 1994, a California government employee was caught embezzling $165,000 from the USDA; several others were caught fraudulently issuing checks for more than $270,000. The USDA

inequities in farm payments and the ethical breakdown of the program's infrastructure should provide further incentives for drastic reduction in spending—considering that the farm bill will control about ten percent of the total non-social security budget amounting to $250 billion.[151] Implementing change will be difficult, and some would argue that the optimum moment for reforming farm trade has passed us by. "That moment came and went with the 1990 farm bill and the Uruguay Round of the GATT . . . now American farmers will be asked to take bigger risks with smaller payments because the U.S. government simply lacks the cash to cushion the transition very much."[152]

Still, other changes provide an impetus to refocus U.S. farm policy on a global marketing strategy acknowledging the emerging opportunities in the world food market. The North American Free Trade Agreement (NAFTA) and especially the Uruguay Round of GATT have deconstructed many of the trade barriers that hindered U.S. farmers in the past. Arguably, government programs have driven farmers to produce for the government instead of the market by influencing their decisions on what to plant and on how many acres. This philosophy must change as we now know that over the next thirty years eighty-five percent of the world's consumers will live in Africa, Asia and Latin America,[153] and that at least in Asia and Latin America where income is rising rapidly, local food production is not keeping pace.[154] We

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has data that shows 1783 farms violated federal conservation laws dealing with the protection of highly erodible soils or wetlands; yet, the USDA paid more than $18 million to these participants who applied for subsidies where benefits could have been denied or substantially reduced.

151. *See* Domenici, *Testimony, supra* note 108.

152. *See* Avery, *Testimony, supra* note 135.

153. Mark Drabenstott, *New Directions for U.S. Agricultural Exports, available at* Internet, http://ianrwww.unl.edu/farmbill /exports.html. *See Global Economic Prospects and the Developing Countries 1995, available at* Internet, http://www.worldbank.org/html/extpb/GepEnglish.html#Global (discussing the benefits of integrating developing countries into the global economy as a major opportunity to improve the welfare of both. "The global economic environment is brighter than it has been for many years and provides a favorable setting for continued integration of developing countries into the world economy.").

154. Drabenstott, *supra* note 153. The share of grain consumption produced locally averages 95 percent in Latin America, 92 percent in Asia, and 75 percent in Africa. *See Workers in an Integrating World,* WORLD DEVELOPMENT REPORT 1995, *available at* Internet, http://www.worldbank.org/html/extpb/wdr95/WDRENG.html. Between 1970 and 1990 manufacturing wages in East Asian economies rose 170 percent while manufacturing employment increased 400 percent. About 1.4 billion of the 2.5 billion people working worldwide lived in poor countries with a per capita income below $695 in 1993; 660 million lived in middle-income countries, and 380 million lived in high income countries with a per capita income of more than $8,626 in 1993. In poor countries, 61 percent of the labor force works in agriculture, 22 percent in rural nonfarm and urban informal sectors while 15 percent have wage contracts primarily in urban industrial and service employment. Middle income countries employ 29 percent on farms, 18 percent in rural and urban informal jobs, and 46

also know that higher incomes lead to improved diets which indicate that as population expands in these regions, the growing deficit of food production promises growth in world food trade.[155] Because "Asia, Latin America, Russia, and Africa will remain substantial importers of grain . . . it makes eminent sense to allow the world's most productive agricultural system, that of the United States, to play a large role in meeting the expected growth in demand."[156] In order for America's farmers to exploit this coming surge they must have the incentive to produce which would require the elimination of current acreage idling programs that "take 50 to 60 million acres out of production."[157] "U.S. land-idling programs only give incentives to producers in other nations, especially in South America, to produce more and invest in improving their handling and transportation systems,"[158] while "America has the world's biggest comparative advantage . . . the climate [temperate] and cropland cleared and ready . . . the world's best infrastructure, best research, and the best trained farm managers; . . .[n]o other country in the world could expand its farm output without investing billions of additional dollars and years of time."[159]

Domestic and global environmental concerns also dictate significant revision of U.S. farm programs. In the United States:

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percent in service and industry employment. Wealthy countries show 4 percent employed in agriculture, 27 percent in industry, and 60 percent in service jobs. The report also indicates that although low-income countries have the majority of the world's agricultural labor force (on family farms), they also make up almost half of the world's industrial workers.

155. Drabenstott, *supra* note 153. *See also* Avery, *Testimony*, *supra* note 135. "In 1933, it looked as though there was always more food demand coming. Today, we're looking at the last and biggest surge in world food consumption. If American farmers miss this food train, they will never catch another." *Id.*

> Most of these food exports would go to burgeoning economies of Asia. Currently there are about 3 billion Asians, averaging about 14 grams of animal protein per day . . . [t]hat compares with 71 grams for Americans and 55 for Japanese. By the year 2030, I am certain that the world will need to supply at least 55 grams of animal protein per day for 4 billion Asians . . . [which] represents almost a six-fold increase in protein calories from today. It will be the biggest surge in farm demand the world has ever seen.

Id.

156. Duesterberg, *supra* note 25.

157. *Id. See Panorama From Brussels EU Grain Prices; What Happens When The Bubble Bursts?*, AGRA EUR., Oct. 28, 1994, at 1-3 (noting that the United States currently has arable land set aside that is equal to the EU's total cereal growing area and the only way the EU can match production with demand is to eliminate both subsidies and market support). *See also UK Farmers Join Call to Cut Set-Aside Rate*, AGRA EUR., Sept. 1, 1995, at 4 (due to the GATT cuts in export subsidies the EU faces the risk of losing a share of both the domestic and international market calling for a further reduction in land set aside).

158. *Id.*

159. *U. S. Farm Policy in a Real World Context*, *supra* note 47.

> farm supports contribute to soil erosion, overuse of agriculture chemicals, and loss of wildlife habitat; [b]y raising the payments farmers receive for their crops but restricting the acreage they can plant, policies encourage intensive cropping and input use on land that is planted; . . . contamination of underground and surface waters by nitrates and pesticides has emerged as a serious problem in many farming regions.[160]

In addition, we now know that: (1) today's farmers worldwide have to triple their output if the world is going to be fed in 2050;[161] (2) that agriculture currently occupies one-third of the world's land surface leaving another one-third as forests;[162] (3) that a "high proportion of the world's best and safest land lies in the U.S.; and (4) over sixty percent of the cropland enrolled in the Conservation Reserve Program (CRP) is composed of soil types best-suited to crops."[163]

> If the United States Congress is going to impact whether people starve or not over the next fifty years; whether the forests continue to be plowed down or remain intact for the world's wildlife; and whether America's farmers continue high input chemical farming, they must develop a farm program that does not waste the world's best cropland and at the same time endorses free trade of global agricultural products.[164]

The Clinton Administration has announced that over the next five years, the United States, utilizing the Export Enhancement Program (EEP),

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160. FAETH, *supra* note 88, at 24. Faeth states that "[s]ince 1964, agricultural pesticide use in the United States has tripled, and fertilizer use has risen by two-thirds, but cropland has only expanded by 10 percent . . . [and that] off the farm, agriculture has become the single largest diffuse (or nonpoint) source of water pollution." *Id.* at 25. In addition, "the surest path to fiscal and environmental gain is to remove economic distortions created by the current commodity programs." *Id.* at 1. Faeth also suggests that a farm bill written to save tax dollars and protect the environment necessarily increases the percentage of commodity-program land on which farmers can choose to plant; this would allow for program savings that could be used to support farm income directly. *See also Weed Killers by the Glass*, *available at* Internet, http://www.ewg.org (A study conducted by the Environmental Working Group 1995 found agricultural weed killers (herbicides) including atrazine, cyanizine, and metolachlor, among others, were in the tap water of 28 out of 29 cities tested—average levels exceeded federal standards in 13 cities.).

161. *See U.S. Farm Policy in a Real World Context*, *supra* note 47.

162. *Id.*

163. AVERY, *supra* note 2, at 360.

164. Dennis Avery & Dave Juday, *A Contract With Rural America*, HUDSON BRIEFING PAPER, Oct. 1995.

will aim to increase agricultural exports by fifty percent over 1994 levels.[165] Agricultural exports for 1995 are expected to be a record high $53 billion; this total will increase the United States' share of world agricultural trade to twenty-three percent and make it the leader in world exports of agricultural products.[166] However, since the EEP has been restricted by the Uruguay Round, its potential import may be reduced, although some argue that the EEP operates as a trade restriction rather than an enhancement.[167]

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165. *International Trade, USDA Wants U.S. to Boost Exports 50 Percent By Year 2000*, BNA Oct. 27, 1995. (Agriculture Secretary, Daniel Glickman, announced the U.S. Department of Agriculture's long term strategy on October 25. The report indicates increasing dependence on the developments in the Asia and Pacific Rim region where the USDA will focus export assistance efforts.)

166. *Hearings Before the House Committee on International Relations, Subcommittee on Economic Policy and Trade, U.S. House of Rep.* Oct. 19, 1995 (Testimony of August Schumacher, Jr., Administrator of the Foreign Agriculture Service). Schumacher states that the increasing export share means the Export Enhancement Programs (EEP) are proving successful and will play a vital role in the new farm bill as 30 percent of all acres planted end up are being exported to meet the needs of the world's consumers, 96 percent of whom live outside the United States. In addition, the USDA administers the GSM-102 Export Credit Guarantee Program and GSM-103 Intermediate Export Credit Guarantee Program. Under these programs the government guarantees payment to exporters of U.S. agricultural products or their banks if the foreign purchaser fails to pay. In effect, these programs encourage U.S. lending institutions to extend credit while allowing foreign purchasers to defer payment. The Agricultural Trade Act of 1978, as amended, requires $5 billion in GSM-102 guarantees to be available each year through 1995. The GSM-103 requires not less than $500 million through 1995, and the EEP requires $500 million in funds or commodities each year through fiscal 2001. *Id.*

167. *Hearings Before the Subcommittee on International Economic Policy and Trade of the Committee on International Relations, U.S. House of Rep.* Oct. 18, 1995 (testimony of Robert W. Kohlmeyer, Executive Vice-President of World Perspectives, Inc.) (WPI is a private information, analysis, and consulting firm specializing in agricultural and trade policy). Kohlmeyer stated that the EEP was established to fight unfair trade practices abroad but is rationalized as international trade assistance and is being used for political purposes to balance the ineffective domestic policies. In addition, the EEP distorts market conditions to buyers and sellers causing poor decisions. Most importantly, "export subsidies do not create demand, nor increase total trade." *Id.* The United States share in wheat trade is lower than it was prior to the program; the trade we gained through these subsidies is offset by the trade we lost to competitors. Compare Schumacher, *supra* note 166, who credits the EEP with the record exports even though the USDA (due to market conditions) stopped using subsidies on exports of bulk grains early this year and on export sales of edible oils more than a year ago. *See also World Grain Market: Can Prices Be Sustained?*, AGRA EUR., Aug. 11, 1995, *available in* WESTLAW, TRD & IND database. "Given the favorable relationship between U.S. domestic prices and world prices - even at lower levels - and the facility to subsidize exports still retained in the 1994 GATT agreement, there is every incentive for the U.S. to remove production controls and maximize production and exports." *Id. See also Export Subsidies Make U.S. Less Competitive, Says Louis Dreyfus Corp.*, AM. INST. OF FOOD DISTRIBUTION, INC., May 1, 1995, *available in* WESTLAW, PTS-NEWS database (Export subsidies that support U.S. commodity prices above the world market price tend to reduce U.S. exports.).

D. *The Freedom to Farm Act of 1995*

In August 1995, as part of the Republican reform movement, the Freedom to Farm Act of 1995[168] was introduced in the House of Representatives. The bill represented a significant departure from the status quo of past farm programs and by placing a cap on farm subsidies would have gotten farmers growing for the market instead of the government—presuming that farmers could prosper by producing for the surging world market demand.[169] The bill would amend the Agricultural Adjustment Act of 1949 and reduce farm commodity programs by $13.4 billion from 1996 to 2002.[170] In addition, the bill would have eliminated all acreage set-asides in the farm reserve policies of the past, ending the practice of paying farmers not to plant while increasing the farm acreage ineligible for deficiency payments from fifteen to thirty percent and guaranteeing a declining payment to farmers over the seven-year period.[171] The bill would have renewed price support loan programs on wheat and feed grains and ensured compliance with the farm conservation and wetlands protection programs of the Food Security Act of 1985 using "market transition contracts."[172] These contracts make annual payments conditional on compliance with those programs.[173]

The Freedom to Farm Act sparked controversy both in Congress[174] and on the farm. Some believe that the plan emphasized the inequities between large and small farm producers[175] and locked in subsidies that are not

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168. H.R. 2195, 104th Cong., 1st Sess. (1995).

169. James Kuhnhenn, *Divided GOP Hurts Roberts Farm Reforms,* KANSAS CITY STAR, Sept. 29, 1995, at A1. *See Farm Groups Anxiously Await Congress' Aid Cuts: Longtime Subsidies May Change or End for Cotton, Dairy, Grains,* STAR-LEDGER, Oct. 1, 1995. *See also Benefits, Disadvantages of New Farm Bill Options Weighed,* MILLER & BAKING NEWS, Sept. 19, 1995, at 26.

170. H.R. 2195, 104th Cong., 1st Sess. § 102 (1995) (Total expenditures for the Commodity Credit Corporation may not exceed $43.2 billion.) *See also* James Brooke, *Freedom to Farm Bill Offers Kansasan Vision of Choice for His Open Fields,* N. Y. TIMES NEWS SERVICE, Sept. 26, 1995.

171. H.R. 2195, 104th Cong., 1st Sess. § 101 (1995).

172. *Id.*

173. Under the terms of a market transition contract, the producers shall agree, in exchange for payments under the contract, to comply with the conservation compliance plan for the farm prepared in accordance with Section 1212 of the Food Security Act of 1985 (16 U.S.C. § 3812) and wetland protection requirements applicable to the farm under subtitle C of Title XII of such Act (16 U.S.C. § 3821 et seq.).

174. James Kuhnhenn, *Divided GOP Hurts Roberts Farm Reforms,* KANSAS CITY STAR, Sept. 29, 1995.

175. "Once again, the rich and powerful are exempted from the rigors of deficit reduction, leaving farm families of modest means to shoulder the burden . . . [s]imply put, the cuts are unfair." *Big Farms Will Still Receive Big Payments Under GOP Bill, Critics Claim,* ROCKY MTN. NEWS, Oct. 22, 1995 (quoting Chuck Hassebrook, analyst with the

needed.[176] Others think that allowing America's farmers to increase production for the market would result in higher food prices[177] and at the same time cause a crash in commodity prices that would further imperil the farmer's economic status.[178]

The resentment for ending sixty-year-old New Deal policies manifested itself when the Freedom to Farm plan was voted down in the House Agricultural Committee.[179] This prompted supporters of the bill to transfer jurisdiction of the proposal to the House Budget Committee where it was incorporated into the overall GOP budget reconciliation package that President Clinton subsequently vetoed.[180]

Center for Rural Affairs in Walthill, Nebraska).

176. *See* Brooke, *supra* note 170.

177. *Risking the Harvest,* COURIER-JOURNAL (Louisville, Ky.), Sept. 27, 1995. *See* AVERY, *supra* note 2, at 362. The USDA reports that U.S. consumers spend 11 percent of their incomes to support one of the world's highest standards of eating—Europe charges consumers double what Americans pay, and Japan is two times as high as Europe. *Id.*

178. *Risking the Harvest, supra* note 177. If forced to compete without subsidies in the world market, American farmers would lose out to cheap labor in undeveloped countries and heavily subsidized European farmers. *See* Maurice Schiff & Alberto Valdes, *The Plundering of Agriculture in Developing Countries, available at* Internet, http://www.worldbank.org/html/extpb/PlunderAgri.html. Economists with the World Bank's International Economics Dept. recommend that large income gains can be realized from agricultural reform if direct taxation of exports and direct protection of imports are eliminated as well as all import quotas, licenses, state trading companies, and internal marketing regulations that prevent the free flow of goods and services. Moreover, social objectives such as protecting the poor do not justify agricultural price tampering—the impact is marginal, undeterminable over time, and implemented at the expense of agricultural growth and agricultural incomes. *Id.*

179. Bruce Ingersoll, *Four Republicans Delay GOP's Plan To Revamp Nations Farm Programs,* WALL ST. J., Sept. 22, 1995.

180. Steven Lee, *GOP Conferees Approve Farm Bill Cutting Spending 23% Market Safeguards Retained for Cotton; Clinton Promises Veto,* DALLAS MORNING NEWS, Nov. 16, 1995. *See Farmers To Profit Hugely If Subsidy Programs Die '49 Law Would Force U.S. To Buy Wheat, Corn Crops,* ARIZ. REPUBLIC, Dec. 11, 1995 (President Clinton vetoed the proposed budget package which included a version of the GOP Freedom To Farm Act; unless a budget agreement is reached which includes a farm bill, the last permanent legislation (1949 Agricultural Adjustment Act) will kick in, meaning that the government would have to purchase all of the 1996 wheat crop and most of the corn crop—a "doomsday payout" threatened by the Clinton administration that could cut wheat production by 20 percent and cost the government billions.) *See also* Robert Greene, *Farm Bill Races Against Time; Approaching Growing Season Forces Federal Hand,* DENVER POST, Jan. 19, 1996. This political gridlock is patently unfair to American farmers who are now trying to plan the type and amount of grain crops to plant in the spring of 1996, as well as purchase fertilizers and chemicals. Moreover, 15 high-ranking agricultural economists have requested that President Clinton accept the Republican farm policy proposal phasing out subsidies including: Donald Paarlberg, chief agricultural economist for the Eisenhower, Nixon, and Ford administrations; Willard Cochran, Director of Agricultural Economics for President Kennedy; John Schnittker, Assistant Agriculture Secretary for President Johnson; Dale Hathaway and Lynn Daft,

E. *Agricultural Resources Conservation Act of 1995*

The Senate Agricultural Committee approved the Agricultural Resources Conservation Act of 1995,[181] a farm bill that would amend the Food Security Act of 1985. The bill achieved more than thirteen billion dollars in savings over seven years by reducing the acreage eligible for current program subsidies—a marked contrast to the Freedom to Farm bill that eliminated the current price support programs. The Senate bill also cut funding to the Market Promotion Program by thirty-five million dollars as well as a cut of more than $700 million in the Export Enhancement Program.[182] The bill limited acreage in the Conservation Reserve Program, effectively reducing government payments by lowering the amount of land farmers take out of production.[183] It also capped subsidies available to the Commodity Credit Corporation while doubling the amount of flex acreage (from fifteen to thirty percent) that would not qualify for subsidies,[184] in effect, saving about $8.8 billion[185] over seven years. The Senate version of the 1995 farm bill, however, was essentially ignored by House and Senate conferees when they approved a version of the Freedom to Farm Act that was incorporated into the budget reconciliation package.[186]

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agricultural economists for President Carter; Robert Thompson and William Lesher, Chief Agricultural Economists for President Reagan; Daniel Sumner and Bruce Gardner, Chief Agricultural Economists for President Bush; and Robert Innes, agricultural economist for President Clinton's Council of Economic Advisors who is now at the University of Arizona. *Experts Urge Clinton to Back GOP Farm Bill, the President Insists that the Freedom to Farm Act 'Slashes the Farm Safety Net,'* COURIER-JOURNAL (Louisville, Ky.), Dec. 15, 1995. Since the farm bill is caught up in budget negotiations and reverting back to the 1949 law is not practical, the extension of the current law through this election year is likely and could further delay much needed reform. *See Lott Outlines Legislative Schedule For Second Session,* Jan. 18, 1996, *available in* WESTLAW BNA-DNEWS database.

181. S. 854, 104th Cong., 1st Sess. (1995).

182. *Farm Bill Provisions*, INDIANAPOLIS STAR, Oct. 24, 1995.

183. S.854, 104th Cong., 1st Sess. § 1231 (1995). *See Farm Bill Provisions, supra* note 182.

184. S.854, 104th Cong., 1st Sess. § 1241 et seq. (1995).

185. *See Farm Bill Provisions, supra* note 182.

186. *See* Christopher George, *GOP Completes Welfare-Overhaul Plan; Veto Still Looms, Clinton Aides Suggest,* WALL ST. J., Nov. 13, 1995.

F. *Federal Agriculture Improvement and Reform Act (FAIR) of 1996*

With pressure mounting from election year politics[187] and the spring planting season having arrived, Congress passed the Federal Agriculture Improvement and Reform Act of 1996 (FAIR).[188] Surprisingly, the bill incorporated much of the "Freedom to Farm" bill introduced earlier in the House and allegedly ends sixty-year-old New Deal policies by replacing them with a market-based philosophy.[189] Ironically, instead of saving billions of dollars as the Republican reform movement has promised, the farm bill could end up costing several million dollars more than if the old law had been extended. FAIR guarantees fixed but declining (transition) payments to farmers over the next seven years regardless of whether they farm or not and regardless of market prices.[190] These direct payments are in lieu of the "deficiency" payments of prior farm programs that only became necessary if farmers could not obtain adequate income from the market.[191] Some argue that the direct payments constitute consideration for the promise not to take additional payments after seven years.[192] However, there is no guarantee that subsidy payments will end in 2002 because the 1949 Agricultural Adjustment Act was left in place as the last permanent legislation when the 1996 law expires—meaning that planting restrictions and subsidies could resume.[193]

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187. James Kuhnhenn, *As Caucuses Loom, Bill Withers on Vine, The Inability to Pass Agriculture Reform Hurts Republican Hopefuls*, KANSAS CITY STAR, Feb. 7, 1996, at A4; Flynn McRoberts, *Stalled Farm Bill Dogs Dole in Iowa Uncertainty Over Legislation Intensifies Questions About Senate Majority Leader*, CHI. TRIB., Feb. 7, 1996.

188. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888.

189. *Id.* § 101 et seq.

190. *Id.* §§ 111-117.

191. Even though restrictions on what crops a farmer may plant and how much they are allowed to grow have been abandoned, other inequities are created. As originally proposed the "Freedom to Farm" plan was supposed to save the taxpayers $13 billion. The cost of FAIR is estimated at $35 billion over seven years versus projected spending of $13 billion under current law. For the largest 11 percent of corn farmers who receive 60 percent of the corn-subsidy payments, the average payment will be about $23,000 per year over and above the $250,000 average income from crops. The top four percent of wheat producers would receive an average payment of $15,000 over and above an average farm income of $155,000 per year. This represents windfall benefits to producers—payments that are not necessary when market prices are high. Mark Epstein, *Farm Bill a Bumper Crop of Handouts*, ARIZ. REPUBLIC, Mar. 26, 1996, at B5.

192. Victor Davis Hanson, *Taxpayers Now Asked to Shell Out $36 Billion for Agribiz*, SACRAMENTO BEE, Mar. 24, 1996, at FO1. Direct payments are in addition to profits made due to the market prices for corn and wheat nearing 20-year highs.

193. Eric Schmitt, *Farm Bill Pulls in Safety Net Supporters of Small Farmers are Expected to Take Another Run at The Legislation Next Year*, ORLANDO SENTINEL, Mar. 31, 1996, at G1. (President Clinton indicates that he will propose legislation to strengthen the farm

Other provisions demonstrate why FAIR is a kind of oxymoron for the official propaganda versus what is contained in the bill. Specifically, price supports for the sugar and peanut programs and price-fixing for milk all indicate the widening gap between the unconscionable rhetoric and the subsidized reality that cost consumers two billion dollars per year in artificially inflated prices.[194] Essentially, the bill provides for no income-based limitation, and payments are based on who owns the farmland instead of who actually farms it—allowing windfall payments to large agribusinesses at a time when market prices for these commodities are strong. At the same time, nearly half of all farm products are not produced under any government programs including potatoes, livestock, poultry, and most fruits and vegetables.[195] Yet, these producers operate in a free market with prices that are more volatile than the grain market and with no interest in getting a handout from the government.[196]

Environmental measures within FAIR include extending the Conservation Reserve Program and the Wetlands Reserve Program with 34.6 million and 975,000 acre caps respectively.[197] In addition, the bill creates a new Environmental Quality Incentives Program that provides for cost-sharing and incentive payments for up to seventy-five percent of the cost of conservation practices.[198] Other environmental provisions include: (1) a modified "Swampbuster" provision that increases a farmer's flexibility by expanding areas for wetlands mitigation; (2) a Wildlife Habitat Incentives Program with cost-sharing for landowners who develop habitat for wildlife, endangered species, and fisheries; and (3) a new conservation program

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safety net.) Regardless, keeping permanent law in the legislation acts as a hammer provision forcing Congress to consider new farm policies in 2002 when the 1996 law expires or face reverting back to the 1949 law that is considered economically infeasible. *See* James Bovard, *The 1996 Farm Bill Fiasco?*, WALL ST. J., Feb. 6, 1996, at A14. (Bovard points out that Republicans have failed to communicate the real costs of farm programs to the American people. Since President Reagan proposed to eliminate farm programs in 1985, taxpayers have paid more than $370 billion for subsidy programs to farmers—an equal sum could have bought all of the farmland in 41 of the states. Furthermore, the Clinton administration rejects the Republican attempt to eradicate government control of farming, arguing for the "preservation of a responsible safety net for farmers," but this is "ludicrous" because the largest percentage of subsidies go to very large farmers and agribusinesses who are wealthier than most other Americans. The average full-time farmer has a net worth of more than $1 million according to the Department of Agriculture.)

194. *See* Bovard, *supra* note 193; Bruce Ingersoll, *Farm Bill Ending Some Crop Limits, Biggest Subsidy Efforts Moves Forward,* WALL ST. J., Mar. 22, 1996, at A3.

195. John Merline, *Can Farming Survive Markets? Government 'Help' May Do More Harm Than Good,* INVESTORS BUS. DAILY, Mar. 9, 1995.

196. *Id.*

197. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§ 332-333, 110 Stat. 888 (1996).

198. *Id.* § 334.

offering technical and educational assistance for private grazing landowners.[199]

V. CONCLUSION

As we move into the next century, it has become apparent that many forces will shape the changes to come in American agricultural policies. A redoubling of the world's population coupled with increases in Third World incomes will readily increase the demand for food and improved diets. The strain on the earth's resources and added pressure to increase environmental protection both in America and around the world will likely put further limitations on the American farmer's capacity to produce food. These limitations are already being realized in Asia, Africa, and Latin America, the regions whose populations will increase the most despite rapidly declining fertility rates. We now know that despite significant efforts from the United Nations, one-fifth of the world's people, most of whom are in these developing regions, are going hungry every day, and many thousands die because of malnutrition. The increased food production over the last fifty years has occurred arguably at the expense of the world's natural resources. Cropland has been expanded at the expense of tropical rainforests, arid soils have been over irrigated to the point of salination, and aquifers and wetlands are being drained threatening many species of wildlife. Deserts are expanding at alarming rates, and the residue from the intensified use of farm chemicals threaten groundwater supplies and food quality. We know that the world, in which the United States is the leading exporter, has to triple its agricultural output over the next half century. We also know that poor countries will be forced to develop more through trade rather than through aid, especially as budget deficits within the United States constrict foreign aid policies, and we know that in spite of nearly fifty years of human rights development, the right to food has little, if any, meaning as a justiciable right, though some impact as a moral obligation. Last, we now know that the world has no food surplus.

The United States, with much of the world's safest and most suitable cropland, the best infrastructure, research facilities, and temperate climate, must recognize that it is at a defining moment. Perhaps the greatest challenge of the next century is for agriculture to increase production to meet the coming surge in demand primarily on land already devoted or available for that use and in a way that demonstrates environmental stewardship. The only way that U.S. farmers will rise to that challenge is to break down the international trade barriers and eliminate Federal farm micro-management through policies that inhibit production and economic growth. We need to

199. *Id.* §§ 334-391.

eliminate all supply-control programs and let the market correct itself, allow our farmers to unleash expansive land resources, and send a message to the world that American farmers can provide without policies that limit production for export, artificially inflate prices, and undermine our ability to compete abroad. We need to eliminate all of the target-price-fixing by Congress as well as the associated direct or deficiency payments and let market forces dictate the incentives for production and risk-management. If food costs increase, American consumers can afford to pay more for their high dietary standards, although arguably eliminating price supports could effectively lower market prices. For example, eliminating the government-controlled surplus in the "Farmer Owned Reserve" that has been dumped on the market in the past to artificially lower grain prices would remove the anxiety of unpredictable government control of the market through surplus management. Further, we need to eliminate the EEP because it discourages farmers from producing to compete overseas by distorting and depressing the world market price when the Federal government dumps grain on the world market for the benefit of foreign buyers at the expense of American farmers, manufacturers, and consumers. Eliminating many of these programs would effectively reduce the tax burden and help end the budget crisis. A huge USDA bureaucracy could be reduced and restructured and the opportunities for corruption minimized; the inequity of distributing over a quarter of the current federal subsidies to the top two percent of producers would end. We do not need or want a government that guarantees a farmer's success or failure; we want a guarantee that we can compete in a free market. Finally, as the recognized leader of First World capitalism, we need to pressure other countries through GATT and similar multilateral treaties to liberalize trade and reduce subsidies to allow for the economic and ecological rebalancing that the developing world and the degraded earth desperately need.

As a major shift away from the status quo, the 1996 farm legislation, FAIR, is only a gesture toward the kind of radical change justified by what American farmers need in terms of financial security and what the world is depending upon in terms of food security and environmental improvements. If Congress can muster the political will, stop the disingenuous attempts to get the federal government out of farming, recognize the inequities that they have created, and continue to foster the sense of urgency to eliminate cropland set asides and all subsidies, including transition payments, then

American farmers have a chance to truly experience a golden age—a future with hope for the utopia of a new world order in which a global family of ten billion people can be fed and for a planet that needs to be healed.

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THE RAPE CONTROVERSY: IS A REVISION OF THE STATUS OF FORCES AGREEMENT WITH JAPAN NECESSARY?

INTRODUCTION

Four young men met at a local disco and discussed getting a girl and having some "fun." They discussed hiring a prostitute, but the men had no money. One man then proposed rape instead.[1] The others thought he was joking until the discussion grew more serious. They drove their rented white Subaru to a grocery store to buy adhesive tape and condoms. At this point, one of the men left after realizing his associates were serious about the rape. He later helped identify the other three men.[2]

Around 8:00 p.m., the three young men spotted a girl walking alone on a street. The twelve-year-old girl had walked just five minutes away from her home to buy a notebook for school. She had just started sixth grade.[3] Two of the men got out of the car. While one man approached her and pretended to ask her directions, the other man hit her in the face and grabbed her from behind. They covered her eyes and mouth and bound her hands and feet with tape. After throwing her in the back seat, they beat her in the chest and face, causing injuries requiring two weeks of medical treatment. After driving to a remote farm road surrounded by fields, the man who proposed the act went into the back seat and raped her. The other men, for various reasons, did not penetrate the girl. The rape was over at 8:20 p.m. The men dumped the girl in the field and drove off.[4]

Unfortunately, this story is common in today's world. However, this particular crime set off an international furor because the sixth-grade schoolgirl is Japanese and the three men are United States (U.S.) servicemen stationed in Okinawa, Japan. The rape occurred at a time when both anti-American sentiment in Okinawa was growing, and the United States and Japan were planning to renew the security alliance between the two nations.[5]

The uproar the rape created in Japan has people from both nations calling for a revision of the security alliance between the United States and Japan. At the heart of the debate is the Status of Forces Agreement, which states that members of the American armed forces suspected of crimes will

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1. Edward W. Desmond, *Rape of an Innocent, Dishonor in the Ranks*, TIME, Oct. 2, 1995, at 51.

2. Andrew Pollack, *One Guilty Plea in Okinawa Rape; 2 Others Admit Role*, N.Y. TIMES, Nov. 8, 1995, at A3.

3. Desmond, *supra* note 1, at 51.

4. Pollack, *supra* note 2, at A3.

5. *Id.*

not be turned over to Japanese authorities until after they are formally indicted by Japanese prosecutors.[6]

Okinawans, in particular, claim that this agreement allows many U.S. servicepersons stationed in Okinawa to commit crimes and avoid prosecution.[7] However, top U.S. and Japanese officials have stated there is no need to revise this part of the security agreement. Instead they created a bilateral group of experts to explore ways to improve the current agreement.[8]

This note will discuss the ramifications of a possible revision of the Status of Forces Agreement (SOFA) between the United States and Japan. The discussion includes an examination of the history and nature of SOFA's and the Japanese criminal system. This discussion will demonstrate why a revision of the Japanese SOFA is unnecessary. It also will explore the similarities between the Japanese SOFA and the SOFA's the United States has with other nations. Also, a discussion of the Japanese criminal system will demonstrate why the Japanese SOFA is vital to protect the rights of U.S. military personnel in Japan. First, however, a brief historical overview of modern Japan and a discussion of why this rape case has created an international dilemma will be considered.

I. HISTORICAL OVERVIEW

Japan began to modernize with the Meiji Restoration in 1868. Japan established a new government and began a vigorous policy of "westernizing" by learning as much as possible from Europe and the United States. The previous government, the Tokugawa-bakufu system (1639-1868), had closed Japan to foreign relations, permitting only limited contact with Dutch and Chinese traders at one southern Japanese port.[9]

During this seclusion period, Japan was peaceful and prosperous. However, Japan's seclusion policy isolated the island nation from the progress of the rest of the world, particularly the industrialization occurring in Europe and the United States.[10] The Tokugawa period of seclusion ended in 1853 when Matthew C. Perry of the United States arrived in Japan with

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6. Andrew Pollack, *Rape Case in Japan Turns Harsh Light on U.S. Military*, N.Y. TIMES, Sept. 20, 1995, at A3.

7. *Id.*

8. *Strengthen Japan-U.S. Alliance*, THE DAILY YOMIURI, Sept. 22, 1995, at 13, *available in* LEXIS, Nexis Library, AP File.

9. 2 HARUMI KOJO & MAKOTO KOJO, THE LEGAL SYSTEM OF JAPAN, MODERN LEGAL SYSTEMS CYCLOPEDIA Ch. 6 § 2.2(A) (Kenneth R. Redden ed. 1989).

10. *Id.*

four warships. He carried a letter from President Millard Fillmore urging Japan to open the country to trade.[11]

In 1854, Japan signed a treaty of peace and friendship with the United States. Similar treaties followed with Russia, the Netherlands, and the United Kingdom. This, however, ended the period of internal peace and created over a decade of political turmoil which ended with the Tokugawa-bakufu being overthrown for the new Meiji government. The root of the political division was the opening of Japan to trade and avoiding the colonization of Japan, such as had happened in China.[12]

In 1868, a group of southern daimyos (feudal lords) took political leadership, re-established the emperor as the head of the nation, and organized the new Meiji government. The most important task of the new government was to strengthen the country both economically and militarily. This was accomplished by inviting foreign scholars to teach modern science and technology and by sending Japanese students to Europe and the United States to be trained in modern western methods. Additionally, a modern legal system was implemented as an important step to strengthen Japan.[13]

In 1889, the Meiji Constitution was promulgated, and it took effect in 1890. Modeled after the Prussian Constitution, it contained both provisions providing for a strong, centralized government and elements of a modern democracy. This enabled Japan to claim it had a civilized system of government and was therefore entitled to treaty revision with other nations. While the constitution made the emperor the divine and sovereign head of state, it also created the Imperial Diet to limit the emperor's power.[14]

However, the new Meiji Constitution provided no mechanism to control the military. The military was directly subordinate to the Emperor and could act independently of the Diet in his name.[15] This set the stage for the aggressive expansionist and colonization policies of Japan during the next half century.

The unchecked power of the military, coupled with Japan's strong desire to become a world power, led to Japan's policy of expansionism. In 1904, Japan went to war with Russia over conflicts of interest in Korea and in Chinese territory.[16] Japan's victory over Russia[17] surprised the world because it marked the first time a non-European power had defeated a

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11. *Id.* However, the warships sent a message that the United States was not going to take no for an answer. The United States wanted to be the first nation to open trade with Japan to gain an advantage over its European competitors.

12. *Id.*

13. *Id.*

14. *Id.* § 2.2(E)(1).

15. *Id.*

16. SYDNEY GIFFARD, JAPAN AMONG THE POWERS 1890-1990, 30 (1994).

17. *Id.* at 32.

European power. From its victory, Japan gained control of the Korean peninsula, the Liatong peninsula, and the southern half of the Sakhalin peninsula.[18] Japan also took footholds in Manchuria, Taiwan, and Shantung.[19] The Japanese wanted these territories for raw materials and protection by creating a buffer zone around the nation. During World War II, Japan took a large part of East Asia and was advancing on Australia.[20] By 1942, the Japanese Empire stretched from the Kuriles in the north, to the Marshall Islands in the east, to New Guinea in the south, and to Burma in the west.

This expansion was halted, however, by the eventual victory of the Allies over the Japanese forces. After Japan's surrender on September 2, 1945, the Allied Powers began a period of occupation.[21] Although it was officially an Allied Powers occupation, the American forces were actually in command. General Douglas MacArthur was the Supreme Commander for the Allied Powers (SCAP) and oversaw the twin objectives of the occupation. Those objectives were demilitarization and democratization. This policy was pursued to ensure that Japan could never again pose a threat to international security and to introduce a responsible government in Japanese society.[22] Individual freedom and democratic government were encouraged along with the development of the Japanese economy on a peaceful basis.[23] A few of the transformation measures included: demobilization of the military, demilitarization of industry, land reform, liberalization of political activities, reform of the education system, and revision of the old constitution.[24]

A revised constitution was promulgated in 1946 and took effect in 1947.[25] Formally, it was an amendment to the Meiji Constitution due to the utilization of that document's amendment procedures. It was, however, a totally new constitution because it was based on popular sovereignty, rather than the principle of "divine sovereignty" of the emperor.[26] A large part of the 1946 constitution was based on American ideas and on pacifism, provided for in the Preamble and in Article 9 of the Japanese constitution.[27] These provisions renounce war as a sovereign right of Japan and the threat to use force to settle international disputes. However, this was soon interpreted as permitting the maintenance of sufficient forces for self-

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18. *Id.*

19. *Id.* at 37, 41. Shantung was a part of China.

20. *Id.* at 121. This area was deemed the Greater East Asia Co-Prosperity Sphere.

21. *Id.* at 132-33.

22. *Id.* at 133.

23. NISUKE ANDO, SURRENDER, OCCUPATION, AND PRIVATE PROPERTY IN INTERNATIONAL LAW - AN EVALUATION OF US PRACTICE IN JAPAN 11 (1991).

24. *Id.*

25. GIFFARD, *supra* note 16, at 136.

26. KOJO & KOJO, *supra* note 9, § 2.2(E)(2).

27. GIFFARD, *supra* note 16, at 136-37.

defense,[28] now known as the Japanese Self-Defense Forces (SDF).[29] This interpretation came in light of the outbreak of the Korean War in 1950. At that time MacArthur authorized the creation of the SDF.[30] Today, the SDF has the third largest defense budget in the world and the largest budget among non-nuclear powers. Japan maintains fleets comparable to those of the United Kingdom and the United States, despite Japan's defense spending being only one percent of its GNP.[31]

II. OKINAWA AND THE CURRENT RAPE CONTROVERSY

The preceding discussion of modern Japanese history gives a good background for discussion of the current rape controversy. The rape of the schoolgirl not only caused tensions between Japan and the United States, but it also emphasized the problems between Okinawa and the Japanese government.

When Navy Seaman Marcus D. Gill confessed to raping the Okinawan girl and Marine Private first class Rodrico Harp and Kendrick Ledet admitted to helping him in the Naha District Court on November 7, 1995,[32] Americans were both shocked and dismayed by their actions. If charged with the maximum sentence for rape resulting in injury, the servicemen would face life in prison in Japan.[33] To many Okinawans, the rape is just one example of the many crimes committed by United States servicemen throughout the years.

Okinawa is home to the largest Marine base outside the United States, containing 29,000 of the 45,000 American troops in Japan.[34] Including civilians and dependents, there are 54,000 Americans who live a relatively isolated life from the rest of the Okinawans. Most do not venture far from the base, unless visiting a nearby bar. In light of the recent rape, discipline has been tightened, the sale of alcohol has been restricted after 8:00 p.m.,[35] military police patrols have been increased, and a large entertainment district

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28. *Id.*

29. James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 LAW & CONTEMP. PROBS. 171, 179 (1990).

30. *Id.* at 176.

31. *Id.* at 184.

32. Eric Talmadge, *U.S. Servicemen Admit Plotting Girl's Rape*, INDIANAPOLIS STAR, Nov. 8, 1995, at A5.

33. Peter Landers, *Okinawa's Governor Steps Up Pressure Despite Handover of U.S. Suspects*, Associated Press, Sept. 29, 1995.

34. Andrew Pollack, *Marines Seek Peace with Okinawa in Rape Case*, N.Y. TIMES, Oct. 8, 1995, at A3.

35. *Id.*

near Kadena Air Base is off limits for U.S. soldiers after midnight.[36] However, this might just be a bandage for the problem, especially when one considers that the rape occurred at 8:00 p.m. The Okinawan government reports that 4700 crimes have been committed by military personnel since Okinawa's reversion to Japan in 1972, including 509 particularly heinous crimes.[37] Americans in Okinawa account for 4.2 percent of the population but committed 11.5 percent of felonies such as murder, rape, and robbery.[38] However, crimes significantly declined from more than 300 a year during the 1970's to 98 in 1994.[39] The Defense Facilities Administration Agency confirms these figures but notes that they reflect crime throughout all of Japan, not just the Okinawan prefecture.[40]

Okinawans see the current rape case as just one of a long list of crimes committed over the past fifty years. Thus, even before the rape, concern about the conduct of U.S. troops was building. Examples of the more heinous crimes committed during the last forty years include:

- In 1955, a six-year-old girl was raped and murdered in the Kadena area. A U.S. sergeant was arrested and eventually sentenced to forty-five years heavy labor. This is known as the Yumikochan incident.[41]
- In 1974, a sleeping woman was beaten to death with a cement block by a U.S. serviceman intending to commit robbery.[42]
- In 1985, a man was stabbed to death by a U.S. serviceman.[43]
- On September 16, 1995, a U.S. sailor exposed himself to a sixth-grade schoolgirl.[44]

These crimes are just a few of the many crimes Okinawans claim are an everyday part of their lives. The same types of crimes have occurred both before and after Okinawa's 1972 reversion to Japan. While Okinawa comprises only 0.6 percent of Japan's land mass, it houses nearly seventy-

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36. Eric Talmadge, *After Alleged Rape, U.S. Soldiers Face Restrictions*, Associated Press, Oct. 11, 1995.

37. Landers, *supra* note 33.

38. *Id.*

39. *Id.*

40. *U.S. Forces Involved in 1,264 Crimes Since '85*, Japan Economic Newswire, Sept. 19, 1995, *available in* LEXIS, Nexis Library, AP File.

41. *List of Main Crimes Committed and Incidents Concerning US Military on Okinawa*, OKINAWA TIMES, Oct. 12, 1995, *available in* the Internet, http://www.inforyukyu.or.jp/~koj/rape/index-e.html. This list was compiled by an Okinawan newspaper and might be biased since the Okinawans are trying to reduce the U.S. presence on Okinawa.

42. *Id.*

43. *Id.*

44. *U.S. Sailor Accused of Exposing Himself to Schoolgirl*, Japan Economic Newswire, Sept. 22, 1995, *available in* LEXIS, Nexis Library, AP File.

five percent of U.S. military bases and operations, taking up nearly twenty percent of Okinawan land. Additionally, thirty-one zones of the sea surrounding Okinawa are reserved for U.S. military use.[45] Okinawans claim that their subjection to such American control is a result of the second-class perception they have among the Japanese and Americans.

The Okinawans have a real sense of being deprived of their culture and history. Okinawa, a tropical island south of the main part of Japan, was annexed by Japan in the 1870's.[46] Its king was forced to abdicate, and his subjects were assimilated into the Japanese Empire.[47] At the close of World War II, Okinawa was the site of one of the bloodiest battles of the war, which cost the island one-quarter of its civilian population. After the Japanese surrendered, Okinawa was sacrificed for political expediency. Even though the occupation of Japan ended in 1952, the United States retained control over Okinawa, with Tokyo's consent, until 1972.[48]

Okinawans claim Tokyo continues to treat them like second-class citizens by burdening the island with nearly seventy-five percent of the U.S. military facilities. The Okinawan people, including their governor, Masahide Ota, have called for the reduction and realignment of the U.S. bases to the rest of mainland Japan.[49] The Okinawan government has even taken out a large advertisement in the *New York Times* pleading with the American public to help them in their fight to reduce and realign U.S. bases located on their island.[50] Okinawans allege U.S. bases are a hotbed for crime and violence. Nearly 85,000 protestors turned out on October 21, 1995, in the biggest protest ever against U.S. bases. The protestors claimed that brutal crimes, such as the rape, show a decline in U.S. forces' discipline and indicate an occupation mentality.[51] Governor Ota and many local assemblies in Okinawa have also called for a revision of the SOFA.[52]

The SOFA between the United States and Japan is the main source of conflict. This provision is part of the larger Treaty of Mutual Cooperation and Security. Under Article 17, Paragraph 5(c) of the 1960 treaty, the United States is obliged to hand over criminal suspects only after they have been indicted.[53] Thus, when the Japanese police arrived to take custody of the three servicemen, the U.S. military police denied the request. This

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45. Desmond, *supra* note 1, at 52.
46. Pollack, *supra* note 34, at A3.
47. *Id.*
48. *Id.*
49. Landers, *supra* note 33.
50. N.Y. TIMES, Nov. 15, 1995, at A13.
51. David Elsner, *85,000 Okinawans Turn Out to Protest U.S. Presence*, CHI. TRIB., Oct. 22, 1995, at C11.
52. Pollack, *supra* note 6, at A3.
53. Desmond, *supra* note 1, at 52.

decision angered many Okinawans who claim the SOFA puts the American military above the law, making it more difficult for Japanese police to apprehend them. For example, two years ago an American soldier accused of raping a Japanese woman escaped to the United States after being held on his base. The man was eventually brought back to Japan, but the charges against him were dropped by the accuser.[54] However, Foreign Minister Yohei Kono said there was no need to revise the agreement because it was not impeding the investigation.[55] Thus, there is a true discrepancy between the viewpoints of Okinawa and the Japanese government in Tokyo regarding the possible revision of the SOFA. Even so, critics contend that the SOFA makes it hard to investigate. Also, they have accused the U.S. military of using exemptions in the SOFA to avoid paying full compensation to Japanese civilians injured by American soldiers.[56]

The United States made the suspects in the rape case available to Japanese investigators whenever necessary, which was a step to stop criticism that the investigation was being hampered by time restrictions. The three men were driven from a Marine facility to police headquarters in Naha for daily sessions with investigators.[57]

In an effort to calm a nationwide uproar in Japan against American military bases, the United States agreed on October 25, 1995, to new criminal procedures allowing Japanese officials to gain early custody of U.S. military suspects in rape and murder cases.[58] This is the first time the Japanese have been able to request early custody of suspects. The United States pledged to give sympathetic consideration to requests concerning rape and murder cases. The accord gives Japan the same process given Germany, which resolved a major complaint that Japan has been receiving unequal treatment compared to European nations.[59]

The United States also has decided to consider redeployment of the troops currently in Okinawa to other areas of Japan.[60] The United States has announced this move in an effort to reduce tensions on the island and to keep plans intact of reaffirming the security relationship between the United States and Japan when President Clinton visits Japan in November 1995. However, the move would only occur if Tokyo agrees to finance construction of new

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54. Pollack, *supra* note 6, at A3.

55. *Id.*

56. Charles Smith, *Rape Sparks Call to Review US Pact*, S. CHINA MORNING POST, Sept. 22, 1995, at 12.

57. *Id.*

58. Teresa Watanabe, *U.S., Japan OK Pact on Military Crime Suspects*, L.A. TIMES, Oct. 26, 1995, at A1.

59. *Id.*

60. Art Pine, *U.S. Willing to Cut Troops on Okinawa*, L.A. TIMES, Oct. 28, 1995, at A23.

military facilities elsewhere in Japan. Analysts state that they do not expect Japan to accept this idea because of the cost of the plan. Moreover, the Japanese traditionally have not been enthusiastic about keeping large numbers of U.S. troops on their home territory.[61] This statement is in accordance with what many Okinawans believe — that the Japanese think of them as second-class citizens. The message from Tokyo seems to be that U.S. troops will be tolerated as long as they do not interfere with the home territory. Currently, Japan pays the United States about five billion dollars a year to help finance the cost of stationing troops in Japan, which is about seventy percent of the total cost of the operation.[62]

This historical background, along with the current rape case, illuminate the discord in Okinawa. To fully understand the problem, this note next examines the issues of the Japanese criminal system and why the United States has a SOFA with Japan or any other nation.

III. THE JAPANESE CRIMINAL SYSTEM

The modern Japanese criminal system is an assimilation of criminal codes from other countries. Japan is a nation that aggressively studies the practices of other nations and modifies those practices to fit into the Japanese way of thinking. After the Tokugawa period ended in 1868, the Japanese studied the Western codes of jurisprudence so they could model their new system of government after these "modern" systems. Early in the Meiji period, Japanese law was strongly influenced by French law. In the 1880's, the German influence became visible. In the 1900's, German legal theories came to have an overwhelming influence and superseded the French influence. Thus, scholars introduced German legal theory as a guide to interpret Japanese codes.[63]

The Code of Criminal Procedure of 1880 was drafted by the French scholar Boissonade and introduced modern fundamentals of criminal justice. Strongly influenced by the French inquisitorial system, the code encouraged a very limited role for the defense counsel throughout the proceedings. Although a new German-influenced code was introduced in 1922, the strong French influence was not eliminated. The limited role of defense counsel and the insufficient protection of the suspect remained unchanged.[64] Although a new code was promulgated in 1948 under the heavy influence of American law by giving suspects more rights and protections, the French and

61. *Id.*
62. *Id.*
63. KOJO & KOJO, *supra* note 9, § 2.2(C).
64. *Id.* § 2.2(G).

German traditions still are evident in actual practice by the Japanese police and prosecutors.

Daniel Foote classified Japan's criminal justice system as "benevolent-paternalism."[65] During the Tokugawa period, close questioning of suspects and intensive pretrial questioning of suspects guarded against the possibility of an acquittal, which was seen as a disgrace to the shogunate, and it could also have undermined respect for the government itself.[66] Confessions also played a central role in the Tokugawa period as confession was regarded as the best evidence of the truth. Further, torture was accepted and even codified as a means to extract a confession. Confessions also maintained the public's trust in the shogunate criminal process.[67]

Under the influence of European scholars during the Meiji period, the idea that criminal behavior could be attributed to an identifiable cause became more accepted. Thus, the primary role of penalties became not punishment but rehabilitation. Yet confessions, extracted through intimidation and physical abuse, were still the centerpiece of the Japanese criminal system. However, keeping with the new prominence of rehabilitation in Japan, true confessions were deemed to play an important role in the rehabilitation of suspects and their reintegration into society.[68]

As mentioned, the new constitution, adopted after the American occupation, set forth ideas of protection against self-incrimination, the right to refuse to answer questions, and prohibitions against admission at trial of coerced confessions.[69] However, in practice, these statutory and constitutional reforms were interpreted narrowly by Japanese courts.

Authorities have wide discretion when investigating a person under suspicion of criminal conduct. This discretion leaves the potential for intrusion into a person's privacy rights. Police may request that individuals voluntarily submit to questioning and to voluntarily accompany the police to the station. This police power, to suggest voluntary accompaniment, has been broadly interpreted by the courts.[70] However, the distinction between a compulsory and a voluntary questioning and accompaniment does not relate to the use of physical force. The authorities can use physical force to "persuade" a suspect to comply with a request to cooperate.[71] The

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65. Daniel H. Foote, *The Benevolent-Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 317 (1992).

66. *Id.* at 328. A shogun is a chief military commander who governed Japan, and a shogunate is the office or rule of a shogun. The Emperor played only a minor role in the government during this period.

67. *Id.* at 329.

68. *Id.*

69. *Id.* at 330.

70. *Id.* at 334.

71. William B. Cleary, *Criminal Investigation in Japan*, 26 CAL. W. L. REV. 123, 125 (1989).

prosecutor is given wide latitude when investigating and interrogating a suspect. Although the exercise of this power is usually done with concern for the individual's rights, abuse of this power has occurred. The purpose of the interrogation is to obtain a confession. In order to effectively accomplish this, the suspect is isolated from family and legal counsel for up to twenty-three days.[72]

Police prefer that a suspect voluntarily agree to questioning because there is no provision in the Code of Criminal Procedure to limit the length of time the police can question someone. Although the suspect has the right to refuse to be questioned, this right is rarely exercised.[73] If an arrest is made, police have forty-eight hours to question the person. After that, the police must either release the person or refer the person to the prosecutor. The prosecutor then has one day to decide whether to release the suspect or to seek a warrant for the suspect's detention. [74]

Even though the criteria appear narrow for the extension of detention time, an overwhelming majority of detention requests are granted by judges[75] 99.7 percent of the time.[76] The length of the first detention is ten days from the time prosecutors petitioned the court for the writ of detention. This detention period can be extended for another ten days upon the request of the prosecutor. Thus, suspects may be detained for a total of twenty-three days without a formal charge against them. After a prosecutor has indicted a suspect under a criminal charge, the prosecutor has all the detention time desired because suspects are seldom released on bail.[77] Police refer over ninety percent of suspects to the prosecutors, and the prosecutors request detention for about eighty-five percent of those suspects with ten days of additional detention time requested for approximately one-third of them.[78]

Arrest is merely the beginning of the criminal investigation. The suspect's detention time is used to build the prosecution's case. The police and prosecutors, who work together as a unit, view the suspect as the center of the investigation, relying on the confession instead of extrinsic evidence gathered through investigative skill.[79] In the United States, arrest usually occurs after an extensive investigation which reveals enough extrinsic evidence to indict a person. Prosecutors in Japan have freely admitted that

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72. *Id.* at 123-24.

73. *Id.* at 126.

74. Foote, *supra* note 65, at 335.

75. Christopher J. Neumann, *Arrest First, Ask Questions Later: The Japanese Police Detention System*, 7 DICK. J. INT'L L. 253, 257-58 (1989). *See* Keiji Soshōhō (Code of Criminal Procedure) art. 60 § 1.

76. Foote, *supra* note 65, at 335.

77. Neumann, *supra* note 75, at 258.

78. Foote, *supra* note 65, at 335.

79. Neumann, *supra* note 75, at 259.

the purpose of this pre-indictment detention period is to "demand a confession."[80]

There are no restrictions the police must follow when interrogating a suspect. Questioning may exceed ten hours per day. Judges do not have authority to interfere with the police and prosecutors' interrogations during the detention period.[81] Under the Code of Criminal Procedure, the suspect has the right to remain silent and must be informed of this right.[82] However, under a literal reading of the Code, there is an inference that a suspect has no right to leave the interrogation room, and there is no requirement that investigators stop questioning if a suspect invokes the right to silence. Thus a duty to submit to questioning has resulted. This is the duty to sit in the interrogation room and listen to questions and comments of the investigators during the twenty-three day detention period. In cases where the suspect has invoked the right to silence, investigators have applied the maximum pressure, which leads to the problem of coerced confessions.[83]

The Japanese make a distinction between the investigation and the trial. Until a person is formally indicted, there is no litigation and no adversarial relationship between any parties. The Japanese view it as logical that because there is no litigation, just an investigation, there is no need for legal counsel. A suspect, therefore, has virtually no right to legal counsel during the investigative phase of the case.[84]

This practice might seem contrary to Article 34 of their constitution which states: "No person shall be arrested or detained without being at once informed of the charges against him or without being granted the right to retain the services of legal counsel."[85] However, the language of Article 39(3) of the Code has been used by investigators to circumvent this constitutional guarantee. The article states: "a prosecutor may . . . designate the dates, places, and times for interviews."[86] Under this article, a system has been created where visits are permitted at the convenience of the investigators and are usually very brief. Some critics have noted this practice results in false confessions.

Under the Code, investigators may impose conditions on meetings between the suspect and legal counsel. Meetings with counsel can be limited to fifteen minutes once every four or five days, and this is not even likely to occur until after prosecutors have finalized their case. The Supreme Court of Japan has upheld this practice as well. In *Sugiyama v. Osaka*, an attorney

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80. Foote, *supra* note 65, at 336.
81. Neumann, *supra* note 75, at 260.
82. Foote, *supra* note 65, at 336.
83. *Id.*
84. Cleary, *supra* note 71, at 141.
85. Neumann, *supra* note 75, at 261.
86. *Id.*

filed suit after being consistently denied access to his client. The court held that although it is very important for an attorney to meet with his client, the prosecution must be given wide discretion to control contact with anyone on the outside in order to regulate the investigation and interrogation of suspects.[87]

During these interrogation periods, the investigators may barter with the suspect for "privileges" such as food, water, or bathroom visits. Some suspects have been subjected to other forms of cruel and degrading treatment in order to extract confessions.[88] Why is the confession so vital to the investigators in Japan? It relates to the maxim that confession is good for the soul.

Japan has one of the lowest crime rates in the world. Its conviction rate is more than 99.8 percent, but fewer than five percent are sentenced to prison, and those who do go to prison serve an average sentence of less than two years.[89] An explanation for the low crime rate is the emphasis in Japanese society on affiliation with a group. Society's norms and mores subject the individual to the needs of the entire group. Thus, individuals act with the group in mind. There typically is a strong commitment to uphold the honor of one's family, employer, and nation. Consequently, an individual is cautious not to commit an act which could cause the loss of prestige or honor to any group to which the individual belongs, or else expulsion from the group may occur.[90]

An apology is used extensively for misconduct. It serves not only as an admission of guilt, but also as a promise to refrain from committing the offense again. There are strong ethical norms in Japanese society to acknowledge one's guilt. "Police often adjust their reaction to misconduct based on the repentance of the individual."[91] This once again demonstrates the great amount of discretion the police possess when dealing with suspects.

Japan's criminal justice system places emphasis on the reintegration and rehabilitation of the offender. Maintenance of order is achieved through this "specific prevention" method. Japan's system resembles an inquisitive family that insists on keeping tabs on its relatives and learning everything about the person if the person should come under suspicion. Thus, great trust must be placed in the authorities. This is the paternalistic part of Daniel Foote's model.[92] The display of concern for the rehabilitation and reform of the individual is the benevolent part of Foote's model. The model would not

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87. Cleary, *supra* note 71, at 142-43. *See* Sugiyama v. Osaka, 32 Minshū 820 (Supreme Court 1978).

88. Neumann, *supra* note 75, at 253.

89. Foote, *supra* note 65, at 318.

90. Neumann, *supra* note 75, at 254-55.

91. *Id.* at 255.

92. Foote, *supra* note 65, at 321.

only permit but would expect public officials to maintain a careful watch over members of society. It also would allow officials to intrude on the personal autonomy of suspects so they could determine the most suitable means for reformation and reintegration into the community.[93]

Foote also describes Japan as following more of a crime-control model of criminal justice, than a due process model, which the United States more closely follows.[94] The crime-control model emphasizes the repression of criminal conduct, which is seen as the most important function to be performed by the criminal process. The main features of this model are speed, finality, and uniformity. The process is based on the assumption that the suspect is probably guilty. Mistakes are accepted as long as the mistakes do not interfere with the efficiency seen as essential to repressing crime.[95]

Foote describes Herbert Packer's due-process model as emphasizing the rights of the individual. The model stresses reliability rather than efficiency, demonstrated by its concern for avoiding mistakes and limiting official power. The model also establishes many restrictions on the fact-finding procedure by excluding evidence. By placing primacy on the individual, the due-process model shows a concern for "equality of justice and a [general] skepticism [of] the morality and utility of the criminal" process itself.[96]

Foote notes that although Japan's criminal justice system appears no different from the crime-control model, there are some crucial differences. Speed and finality are not regarded in Japan as essential for deterrence purposes. The Japanese system does allow one level of full review of both the facts and the law on the motion of either the prosecution or the defense. The Japanese system does not emphasize uniformity but stresses the importance of individualized determinations. It places great weight on achieving rehabilitation without resorting to incarceration, basing itself on specific prevention. Incarceration is only resorted to when the gravity of the crime, such as rape, commands no other viable alternative.[97] Thus, Japan's system, according to Foote, is a mixture of the benevolent-paternalism model with the influence of the crime-control model.

In Japan, informal social controls play as much a part of deterring crime as the public officials. In Japan, offenders are more willing than those in the United States to throw themselves on the mercy of the police, prosecutors, and judges because reconciliation with one's group is considered more important than the process of legal vindication.

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93. *Id.* at 327.

94. *Id.* at 319. These two models are based on an exposition by Herbert Packer. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (1968).

95. Foote, *supra* note 65, at 323.

96. *Id.* at 323-24.

97. *Id.* at 340-41.

Investigators not only expect a confession but act in a way to reinforce the norm of confessions. Hence, a moral obligation is created in Japanese society to confess one's misdeeds.[98]

An involuntary confession may still be upheld at trial as valid because the judge has the discretion to decide whether specific items in the confession are true or not.[99] In Japan, complex case trials, such as rape cases, are often comprised of separate hearings held between long intervals. In the current rape case, the trial opened on November 7, 1995, but the next date for the trial is in December 1995. There are no jury trials in Japan. Instead, in cases such as rape, a three judge panel in a district court presides over the case. The acquittal rate in trials during 1987 was less than one percent.[100]

In Japan, the concept of individual freedom and liberty is secondary to the perceived necessity for public safety and social control. Thus, the criminal investigative procedures described are not seen as an extreme violation of an individual's rights. Although too much reliance is placed on the confession, it is seen as a vital first step at rehabilitating the offender. The Japanese believe the extraction of a confession will help the individual feel remorse and encourage him to conform with the standards of society.

Now that the Japanese criminal system has been examined, the discussion will turn to the need for a SOFA between the United States and Japan. It is interesting to note that while modern Japanese criminal law has been heavily influenced by French and German law, American criminal law is a direct descendant of the English criminal codes. This could explain the divergent views between the United States and Japan on the issue of criminal justice.

IV. STATUS OF FORCES AGREEMENTS AND WHY THEY ARE NECESSARY

The voluntary acceptance by a host nation of large, foreign land forces on a permanent basis is a new historical development, unique to the twentieth century. Until World War I, there was no clear customary rule of international law relating to the status of visiting friendly foreign forces. The conditions of that war made it necessary to create international law to resolve this uncertainty in international relations.

Under most World War I agreements, the law of the flag was dominant. Fighting forces were not subject to the host nation's jurisdiction. It was felt that if they were subject to the host nation's sovereignty, the exercise of disciplinary power which is an essential part of military organization would be lost. Thus, the United States received exclusive

98. Neumann, *supra* note 75, at 255.
99. *Id.* at 256.
100. *Id.* at 259.

jurisdiction over its forces in France. However, France's desire to receive allies during the war made it easy for France to yield its interests of jurisdiction. The United Kingdom, however, was in a much stronger bargaining position during the First World War. The United Kingdom maintained its territorial jurisdiction over visiting forces and did not surrender to the law of the flag.[101]

World War II presented a different situation. The United States was in a strong position, while the United Kingdom was much weaker. The United States received exclusive jurisdiction over its troops while in Britain. The lessons of both world wars left a lasting impact on European nations. The structure of a jurisdictional agreement will depend on the relative bargaining power of each nation. "When both states are not politically and economically equal, the more powerful state will obtain a broader right of jurisdiction, even in peacetime."[102] The more a nation needs the presence of foreign troops, the more likely it will be to grant more jurisdiction to the sending state.

Thus in 1949, with a concern over a growing threat from the Soviet Union, five European nations signed the Brussels Pact. This pact became the predecessor to the NATO SOFA. The main clause in the agreement stated: "Members of a foreign force who commit an offense in the 'receiving State' against the laws in force in that state can be prosecuted in the courts of the 'receiving State.'"[103]

The United States was a party to the NATO SOFA signed in 1951. It has served as the prototype for numerous bilateral SOFA's and has remained the benchmark from which all other SOFA's are measured. Its main themes are reciprocity and concurrent jurisdiction. The NATO SOFA provides exclusive jurisdiction when the laws of only one state have been broken. In all other cases, concurrent criminal jurisdiction is granted. This arrangement is outlined in Article VII of the NATO SOFA.[104]

Concurrent jurisdiction calls for the sending state to exercise primary criminal jurisdiction over its personnel for official duty offenses and for offenses against it or members of the sending state force. The receiving state maintains primary jurisdiction in all other cases. "The state with primary

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101. Maj. Manuel E.F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, 1994-MAY ARMY LAW. 3, 8.

102. *Id.* at 9. *See* SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 45 (1971).

103. Supervielle, *supra* note 101, at 8. This passage is taken from Article 7 of the Brussels Treaty SOFA to which Belgium, France, Luxembourg, the Netherlands, and the United Kingdom were parties.

104. *Id.* at 10.

jurisdiction must give sympathetic consideration to a request by the other state to waive its primary right, but is not required to grant the request."[105]

The NATO SOFA is reciprocal, meaning whatever is granted to one nation's forces, the other nation receives the same grants. Thus, forces from France would be under the same jurisdictional agreement in the United States as U.S. forces would be in France. However, some U.S. bilateral SOFA's are comprehensive. Although modeled after the NATO SOFA with regard to jurisdictional formulas, these agreements are nonreciprocal. Under a nonreciprocal SOFA, military personnel of the receiving nation are not provided SOFA protection if they visit the sending state. The SOFA between the United States and Japan is a comprehensive nonreciprocal agreement.[106]

The United States has traditionally insisted on obtaining SOFA's for its troops overseas, yet resists providing SOFA protection to foreign military personnel in the United States. The NATO SOFA is the only reciprocal SOFA to which the United States is a party. When the threat of communism was high, many non-NATO allies accepted these nonreciprocal SOFA's because the American presence and protection were worthwhile to them. Protection from the communist threat was worth the cost of partial waiver of jurisdiction over American troops without reciprocal rights for their troops in the United States. However, "[w]ith the end of the Cold War, the need for United States military presence, . . . may not seem as obvious to [these] foreign [nations]."[107] In the future, foreign politicians might not be so willing to acquiesce to U.S. demands of nonreciprocal SOFA's. The United States might have to offer reciprocity in exchange for the jurisdictional concessions it wants from the receiving state.

The built-in equality of a reciprocal SOFA gives a universal sense of fairness not found in nonreciprocal SOFA's. The terms of a nonreciprocal bilateral SOFA often reflect the unequal bargaining power between the two nations.[108] The United States often gives practical and legal reasons against reciprocity. One reason is that foreign nations needed the presence of American troops in their countries much more than the United States needed the presence of foreign military personnel in America. The United States cites that they have often carried a disproportionately high cost of maintaining the defense against the Communists and other threats in foreign nations. The United States considers nonreciprocal SOFA's as partial compensation by the foreign nation for the protection the United States has provided.[109]

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105. *Id.*
106. *Id.* at 12.
107. *Id.* at 14.
108. *Id.*
109. *Id.* at 15.

U.S. lawmakers assume that the American legal system will treat all parties equitably, regardless of nationality. Yet the inverse assumption is often made of foreign legal systems. Thus, the conclusion has been that foreign troops in the United States do not need the protection of a SOFA, but American troops do need a SOFA to guarantee minimum due process fairness overseas.[110] A SOFA requires the receiving state to yield some territorial jurisdiction to the sending state, therefore losing some of its power to exercise jurisdiction. The United States benefits from having the SOFA protection for its troops while not being legally required to reciprocate by international agreement. The U.S. insistence on nonreciprocal SOFA's generates the perception that the United States is not "playing fair" and that the United States believes it is "superior" to foreign nations. Thus, a feeling that the United States is biased toward European governments, and biased against nonwhite, Asian, Arab, or African people and governments has resulted.[111] Foreign governments may view nonreciprocity as a matter of principle and symbolism. Their point is that equal sovereign states should treat each other with mutual respect, even if one nation is more powerful.

SOFA's define the status of U.S. forces in the territory of friendly states, but do not authorize the presence or activities of those forces. The purpose of the agreement is not to immunize a serviceperson from criminal sanctions in the host nation, but to protect individual rights and liberties. SOFA's are intended to strike a balance between the jurisdictional rights and demands of the sending and receiving states. There is a balancing of the justification of stationing troops abroad against the possibility of any deprivation of constitutionally protected rights when a serviceperson is subjected to foreign local law which does not conform to American law.[112] SOFA's work to retrieve jurisdiction for the United States.

Under international law, which is a part of U.S. law, visiting forces are subject to the unlimited jurisdiction of the receiving sovereign unless that receiving state has agreed to partially waive some of its jurisdiction over visiting forces. The absolute jurisdiction of a nation was established in *The Schooner Exchange v. M'Faddon*, in which the court stated that a nation's jurisdiction is susceptible to no limitation not imposed by itself.[113] Thus, it is clear that a host nation would have the right under international law to take custody of a U.S. serviceperson and try him for violations of that nation's

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110. *Id.*

111. *Id.* at 18-19.

112. Donald T. Kramer, *Criminal Jurisdiction of Courts of Foreign Nations Over American Armed Forces Stationed Abroad*, A.L.R. FED. 725, 747 (1973).

113. The Schooner Exchange v. M'Faddon, 11 U.S. 116, 136 (1812). In *Schooner Exchange*, the Supreme Court held that a war vessel in the service and possession of a foreign power (France) could not be subject to libel while in the port of another nation (United States) as the host country is presumed to have consented to such immunity under international law.

criminal laws, in the absence of any agreement.[114] The court in *Underhill v. Hernadez* emphasized this point:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances . . . must be obtained through the means open to be availed of by sovereign powers as between themselves.[115]

The Supreme Court in *Wilson v. Girard* held a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it consents to waive its jurisdiction.[116] *Wilson* involved an American serviceman who was to be tried in Japan for murder under the SOFA between the United States and Japan. The United States initially claimed primary jurisdiction, but later decided to waive it at the request of Japan. After an indictment, the serviceman brought a petition for habeas corpus challenging the legality of the waiver. He claimed he would be denied a fair trial in Japan and would not be afforded his due process rights. The Supreme Court refused to consider his due process claim, thus indicating that an American serviceman being tried in a foreign court pursuant to a SOFA cannot successfully assert in an American court that the procedures in the foreign court do not comply with due process.[117] The court also held that it found no constitutional barrier or statutory barrier to the Security Treaty[118] between the United States and Japan.[119]

The court in *Gallina v. Fraser* addressed the question of constitutional protection in a foreign court. The court stated that foreign court processes differing from those used in the United States is not a sufficient ground upon which to impeach a foreign judgment.[120] Thus, based on the decisions in *Wilson* and *Gallina*, the trial of an American serviceperson for offenses committed abroad by the courts of nations having different systems of jurisprudence than the United States is not violative of the serviceperson's rights under the U.S. Constitution. However, in *Starks v. Seamans*, the district court held that adherence by a foreign court to the due process

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114. Brig. Gen. C. Claude Teagarden, *Status Of Forces Agreements: An International and Domestic Obligation to Return Military Personnel from the United States to Foreign Countries for Criminal Prosecution and Confinement*, 26 A.F. L. REV. 21, 24 (1987).

115. Underhill v. Hernadez, 168 U.S. 250, 252 (1897).

116. Wilson v. Girard, 354 U.S. 524, 529 (1957).

117. *Id.* at 530.

118. *See* 3 U.S.T. § 3329 (1952).

119. Teagarden, *supra* note 114, at 24.

120. Gallina v. Fraser, 177 F. Supp. 856, 866 (D.C. Conn. 1959).

requirements is nevertheless a condition precedent to the release of American servicemen to the jurisdiction of foreign courts.[121]

Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States deals with the use of facilities and areas by the U.S. armed forces in Japan, as well as the status of the U.S. forces stationed in Japan.[122] This agreement, entered into force June 23, 1960, also replaced the Security Treaty of 1952 between Japan and the United States.[123] A supplementary agreement to this 1960 treaty, called the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security, became effective at the same time.[124] Article XVII of this agreement is the heart of the current dispute concerning the criminal jurisdiction of accused U.S. military personnel. The provision closely follows the NATO prototype. It sets forth the rules of exclusive and concurrent jurisdiction with respect to each nation. Most objections concern paragraph five of Article XVII. It states that U.S. military authorities and Japanese authorities will assist one another in the arrest of U.S. military personnel when Japan is exercising its primary jurisdiction. Also, the Japanese authorities are to promptly notify U.S. military authorities when any American serviceperson has been arrested. Section (c) of paragraph five states: "The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan."[125] This provision of the SOFA is what the Japanese and Okinawans claim impedes their investigations and allows many U.S. offenders to go free.

Paragraph nine outlines guarantees granted to a member of the U.S. armed forces at trial in Japanese courts. Some of these guarantees include: to receive a prompt and speedy trial; to be informed in advance of trial of the specific charges against him; to be confronted with the witnesses against him; to have legal representation; and to communicate with a representative of the U.S. government and to have the representative present at his trial.[126] It should be noted, however, that the Japanese Constitution provides many of these same "protections" for its citizens, yet the above discussion has demonstrated how narrowly the Japanese courts have read these provisions. There are also no provisions in the SOFA concerning the investigative techniques of Japanese authorities.

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121. Starks v. Seamans, 334 F. Supp. 1255 (1971).

122. 11 U.S.T. § 1632, 1634 (1960).

123. *Id.*

124. 11 U.S.T. § 1652 (1960). The full name of the agreement is Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan. *Id.*

125. Article XVII, Paragraph 5, Section (c). *Id.* at 1665.

126. Article XVII, Paragraph 9, Sections (a), (b), (c), (e), and (g). *Id.* at 1666.

It is not clear whether the recent agreement between Japan and the United States is violative of the 1960 treaty. The new agreement, as discussed above, gives Japan the option to request the United States turn over U.S. military personnel suspected of committing particularly heinous crimes, such as rape and murder, before Japan issues any indictments. The United States is only obliged to give "sympathetic consideration" to the request.[127] Article XVII, 5(c) of the 1960 treaty states that the suspect will remain with the United States *until* he is charged. It does not state whether or not the United States may, at its discretion, turn over a suspect to Japanese officials before he is charged.

This new accord gives Japan the same process given to Germany, thereby addressing the complaint that the United States was treating Japan unequally compared to the treatment given to European nations. However, it could be argued that U.S. servicemen being tried in German courts have more rights than a serviceman being tried in a Japanese court. The 1965 German Code of Criminal Procedure includes safeguards for the accused that parallel those guaranteed by *Miranda v. Arizona*.[128] The accused, at all stages of the investigation, must be informed of the charges against him and of his right to counsel. Although the right to remain silent and right to free counsel are not clearly included in the German Code, a U.S. serviceman being tried in Germany is afforded most of the protections guaranteed by *Miranda* when the rights in the code are coupled with the rights guaranteed in the U.S.-German SOFA.[129] The *Miranda* protections covered by the German Code do not exist in the Japanese Code of Criminal Procedure, nor in the SOFA with the United States. Thus, an accused U.S. serviceman in Japan is not given exactly the same protection to his rights as an accused U.S. serviceman is given in Germany.

Now that both the Japanese criminal system and Status of Forces Agreements have been discussed, the ramifications of revising the current SOFA between the United States and Japan will be considered.

V. ANALYSIS AND CONCLUSION

Both United States and Japanese government officials have said that there is no need to revise the Status of Forces Agreement. The Okinawans

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127. Watanabe, *supra* note 58, at A1.

128. James S. Fraser, *Some Thoughts on Status of Forces Agreements*, 3 CONN. L. REV. 335, 346-48 (1971). *See* Miranda v. Arizona, 384 U.S. 436 (1966). That case provides that an accused must be warned of his right to remain silent, that he has the right to counsel, and that if he is indigent, the government will appoint counsel for him.

129. *Id.* at 347-48. In the Supplemental Agreement, the same rights that are afforded the accused in the Japan-U.S. SOFA are provided for in this provision to the Germany-U.S. SOFA.

want a revision. There is growing disenchantment and resentment in Okinawa against both the American and the Japanese governments. This was evident by the mass demonstration in October 1995. By the United States agreeing to possible early release of accused U.S. servicemen to Japanese authorities, it was acknowledging the Okinawans' complaints.

The new accord served two functions. First, it sought to ease tensions between the two nations prior to the security summit held November 20, 1995. Secondly, the move was an effort to appease the Okinawans' claims that the current SOFA allows many American servicemen to escape justice under the Japanese criminal system. The United States wants to maintain good relations with Japan, and especially with the Okinawans. Seventy-five percent of U.S. military facilities in Japan are located on Okinawa, and there are growing demands from the Okinawans for the realignment and reduction of U.S. military bases there. It would be costly for both the United States and Japan to move any facilities to another part of Japan. Thus, it appears that the vow by the U.S. government to consider such a move seems hollow because both Japan and the United States realize this would be too costly a measure to implement.

The current rape controversy comes at a crucial time in U.S.-Japanese relations. The rape caused a storm of apologies from almost every level of the U.S. government and military. But does this one rape case signify that the SOFA is so repressive of Japanese officials' ability to investigate crimes committed by U.S. servicepersons that it must be revised? The new agreement should satisfy many critics of Paragraph 5(c) of the treaty. It gives the Japanese the ability to request early release of suspects from U.S. custody, which brings Japan's rights into harmony with those granted to Germany and other European nations by the United States. This was the heart, it seemed, of the criticism regarding the current rape case. However, it appears that more concessions are wanted, especially by the Okinawans.

Although there is nothing in Paragraph 5(c) which forbids early release of suspects into Japanese custody, nothing in the treaty allows it either. The treaty states that suspects are to stay in U.S. custody until the Japanese file formal charges against the American suspect. One could read the treaty narrowly and construe it to be exclusive of granting any early release. The treaty does state sympathetic consideration should be given to Japan when the United States has primary jurisdiction; however, the United States does not have primary jurisdiction in this case. The sympathetic consideration provision also did not expressly relate to the custody of suspects. Thus, this appeasement agreement that the United States has entered could be interpreted as violative of Article XVII of the Treaty of Mutual Cooperation and Security.

If the United States' aim is to ease tensions, it could revise the treaty in such a way to maintain the current SOFA, but make it reciprocal. Japan is one of the strongest economic world powers. It could demand reciprocity

on the basis of the desire to be recognized and treated by the United States as a sovereign nation legally equal to both the United States and its NATO allies. It would be presumptuous of the United States to assume that foreign troops will automatically receive a fair trial in American courts.

Currently Japan pays for approximately seventy percent of the operating costs of U.S. military facilities there, amounting to about five billion dollars a year. Japan might not be willing to continue paying for these operating costs or the cost of relocating facilities on Okinawa to other areas of Japan. This fact could become especially potent at the upcoming security summit. However, this unwillingness might be lessened if Japan was given a sign from the United States government that they were equal partners. This could be attained through a reciprocal SOFA. The United States needs to be a consensus builder and a partner. The United States wants all countries to bear their fair share of military responsibility. Thus, it is counterproductive for the United States to demand greater equality in military responsibility, yet hang on to the unequal policy of nonreciprocal SOFA's. Although the strong presence of the United States is still needed in Japan and East Asia, Japan could easily place itself in the better bargaining position for full reciprocity or no SOFA at all due to the sensitive situation created by the rape case and the anti-U.S. sentiment in Okinawa.

The Status of Forces Agreement was promulgated to protect the rights and liberties of U.S. service personnel stationed in Japan. As discussed above, the Japanese criminal system follows a different theory than the United States' system of criminal justice. While the U.S. system's primary objective is the maintenance of the suspect's due process rights, the Japanese system is more concerned with eradicating crime from society and rehabilitating the offender through the use of the confession. Without the SOFA, American servicemen could be forced to endure up to twenty-three days of potentially inhumane investigative techniques before even being charged with a crime. Also, due process at trial would not be guaranteed and the serviceman probably would not be allowed to communicate with anyone from the outside world. The SOFA is meant to protect Americans from violations of the individual's personal rights. The SOFA attempts to maintain as many of the U.S. serviceman's rights granted under the U.S. Constitution as possible when being tried in Japan. However many of these rights are narrowly interpreted by the Japanese courts, even with the SOFA. It is not hard to imagine the violations that could ensue if the SOFA did not exist as it does currently.

In many ways, the SOFA with Japan and the SOFA with the NATO allies are nearly identical. The Japanese SOFA and its criminal code do not, however, provide for some rights like those of the NATO nations. The *Miranda* rights are an example of this difference. U.S. troops stationed in Germany have these rights, while those stationed in Japan do not have these

explicitly. However, unlike the German SOFA, the Japanese SOFA is not reciprocal.

In order to maintain the current security relationship with Japan, it is not necessary to revise the current SOFA. However, to promote the furtherance of this security relationship, the United States should consider making the SOFA with Japan a reciprocal agreement, thus demonstrating the equality between the sovereigns.

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THE UNITED STATES MOVES AHEAD OF THE EUROPEAN UNION IN PATENT PROTECTION FOR COMPUTER SOFTWARE

INTRODUCTION

Patent protection is much sought after by persons or companies who have invented a valuable machine or process. The limited monopoly a patent provides gives exclusive rights to control that invention. Not all inventions or new ideas are patentable, however. Patents directly on computer programs have been historically unavailable in the United States and Europe. Software has long been considered non-statutory subject matter. Therefore, copyright has been the popular alternative to patent protection, but it is not as strong as a patent. Copyright does not protect the idea behind the software, and that idea or invention is what many developers want to protect. On June 2, 1995, the United States Patent and Trademark Office (PTO) issued "Request for Comments on Proposed Examination Guidelines for Computer-Implemented Inventions." This publication signals a change in attitude by the PTO toward computer software patents. The patent systems of all industrialized nations, including the United States, were established for the purpose of stimulating technical progress. This stimulus is in the form of a limited monopoly, giving the patent holder exclusive rights to his ideas. These exclusive rights are an economic reward for inventing new and useful technologies. Computer programs are as deserving of the protection of patent laws as any other technology. The new patentability of computer programs gives American software developers more incentive to invent than their European Union counterparts.

The purpose of this note is to discuss the differences in software patent protection in the European Union and the United States. Part II of this note discusses the relative merits of software patents, including the views of the United States government and software industry, as well as the European view. In Part III of this note, the statutory and case law development of the United States is studied. Part IV discusses European treaties and case law, while Part V analyzes the United States Patent Office's Proposed Guidelines and shows how the guidelines conform to case precedent.

I. THE PATENT SYSTEM

A grant of a patent by the United States government confers upon an individual the right to exercise a monopoly over his invention.[1] This

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1. The right granted by statute is the right to exclude others from making, using, or selling the patented invention. THE CONCISE GUIDE TO PATENTS TRADEMARKS AND COPYRIGHTS 6 (Solomon J. Schepps ed., 1980).

monopoly is given to an inventor as an incentive to invent new and useful products. In exchange for a limited monopoly on his idea, the inventor provides a new and useful invention for society to use when the term of his patent expires. The category of patentable subject matter[2] is very broad, but it does not include natural principles,[3] such as the mathematical formula $E=mc^2$. The principles of nature have always existed and are commonly considered to be in the public domain.[4] An item which is in the public domain cannot be removed from the public domain by a patent. Although Webster's Dictionary defines "invent" as "to discover,"[5] invention is commonly viewed as an application of a scientific principle to solve a problem. The distinction is that a person can "discover" a scientific principle but cannot take it out of the public domain, while an inventor must create something new and unique in order to "invent." The production of a new and unique idea is the very basis of the patent system in the United States and around the world.

A United States patent is comprised of two parts. The first part contains a written description of the invention, which may include the problem that the invention addresses, a description of the prior art in the field, and a summary of the advantages of the invention followed by a detailed technical description of the invention.[6] The second part of a patent is a claim or set of claims which "particularly point out" the subject matter of the invention.[7] The claims define the idea that is being patented and delineate the scope of the patent.

There are several statutory conditions which must be met before a patent will be issued. These conditions include: inventorship, priority over any other similar patent, novelty, lack of publication or prior patenting within one year, non-obviousness, and statutory subject matter.[8] This last condition is the focus of this note as applied to computer software.

A. *Software Industry Performance*

The international software industry is a swiftly growing industry. The United States Department of Commerce puts 1994 worldwide sales of

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2. Statutory subject matter is the definition by statute of the classes of inventions that are included in the patent law. TOM ARNOLD & FRANK S. VADEN III, INVENTION PROTECTION FOR PRACTICING ENGINEERS 21-22 (1971).

3. ROBERT A. CHOATE & WILLIAM H. FRANCIS, CASES AND MATERIALS ON PATENT LAW 471-72 (1981).

4. *Id.* at 471-74.

5. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1622 (Deluxe 2d ed., Dorset & Baber 1983).

6. CHOATE & FRANCIS, *supra* note 3, at 85.

7. *Id.* at 85-86.

8. *See* 35 U.S.C. §§ 101-112 (1995).

packaged software at more than seventy-seven billion dollars.[9] The European software market will expand at a slower pace than other regions, reaching forty-five billion dollars in the year 2000.[10] In contrast, the computer software industry is the fastest growing industry in the United States.[11] The U.S. software industry grew by 269 percent in the years 1984-1994, while the total U.S. economy grew by only thirty percent.[12] The International Data Corporation predicts that the United States software market will grow at a rate of thirteen percent, from forty billion dollars in 1995 to seventy-four billion dollars in the year 2000.[13] The strength of the American software industry is demonstrated by a seventy-five percent share of the world market for prepackaged software.[14] The growth in the software industry is reflected in the number of software patents granted. In America in 1989, more than 700 software patents were granted.[15] In 1993, the total number of software-related patent applications had grown to 8391, of which 3613 were actually granted.[16] It is estimated that around the globe there are 30,000 mainframe computers, 300,000 super minicomputers, and nearly 100 million personal computers.[17] These numbers demonstrate that the domestic software industry is of vital importance to the American economy and will continue to grow in importance. Protecting and encouraging this industry will be necessary for America's future economic health.

B. *United States Software Developers Will Benefit from the New Guidelines*

The new attitude by the PTO will give United States software developers an advantage over their European competitors. According to one analyst, "[b]y offering the strongest protection, the United States has stimulated more creativity and new industries than anywhere else--and an annual thirty billion dollar intellectual property trade surplus."[18] A patent

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9. Robert Holleyman, *Copyright Protection for Computer Software: A Global Overview*, *in* INTELLECTUAL PROPERTY LAW 1995, 313 (PLI Patents, Copyrights, Trademarks, and Literary Porperty Course Handbook Series No. G4-3948, 1995).

10. *Id.*

11. Derek Leebaert, *News from the Frontiers*, *in* THE FUTURE OF SOFTWARE 1, 5 (Derek Leebaert ed., 1995).

12. *Id.*

13. Holleyman, *supra* note 9, at 313.

14. Leebaert, *supra* note 11, at 5.

15. Effy Oz, *Software Intellectual Property . . . Protection Alternatives*, J. OF SYSTEMS MGMT., 50, 56 (July 1995).

16. Clair Whitmer, *Industry Divided Over Software Patents*, INFOWORLD, Feb. 28, 1994, at 20.

17. David Vaskevitch, *Is Any of This Relevant? in* THE FUTURE OF SOFTWARE 45, 74 (Derek Leebaert ed., 1995).

18. David Friedman, *A Policy that Punishes American Ingenuity*, L.A. TIMES, Nov. 19, 1995, at M2.

can give its owner the advantage of a long-term outlook, and it may help parties to determine whether to fight over a market niche.[19] This effect helps stabilize industry and minimizes disputes by making clear boundaries between competitors.[20]

Patents can be used either offensively or defensively. Offensively, a patent can be used to gain a limited monopoly for a product. This monopoly can be used to block competition and establish the patent owner firmly in the market. When used defensively, a patent can keep competitors from acquiring broad patents that shut everyone else out of a particular area. As software developer and entreprenuer Paul Heckel says:

> Patents, like a cat's claws, function as weapons when necessary. A declawed cat will not survive in the wild; neither can a defenseless startup once it succeeds and attracts substantial competitors. Patents are not the only defense, but they are vital to innovative startups that must survive. In business, as in the jungle, respect is given only to those who can protect themselves.[21]

Heckel feels that much of a patent's value is as a potential threat. [22] He claims that software patents will help the industry by stimulating companies to bring commercial products to the market, and by stimulating the formation of new businesses.[23] An existing patent may force competitors to innovate their way around the patent, thereby producing new and useful products that do not infringe on the original patent. Heckel also believes that patents can protect small innovators against big companies who would muscle them out of the market without patent protection.[24]

C. *The European View*

The attitude toward software protection in the European Union (EU) is different from the attitude in the United States. The EU States are barred by treaty from granting patents on software,[25] and are consequently

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19. Paul Heckel, *Debunking the Software Patent Myths*, 35 COMM. OF THE ACM, No. 6, at 132 (June 1992).

20. *Id.*

21. *Id.* at 129.

22. *Id.* at 134.

23. *Id.*

24. *Id.* at 135.

25. Convention on the Grant of European Patents (European Patent Convention), Oct. 5, 1973, 13 I.L.M. 270, art. 52(2)(c) [hereinafter EPC].

encouraged to rely on copyright for protection.[26] Under the European Patent Office (EPO), patent applications are published eighteen months after the patent application is filed.[27] The Europeans view this publication of the patent as risky.[28] They believe that the legal process is too protracted to be useful for protection against infringement in an area such as software, where there is rapid technological change.[29] The European Strategic Programme for Research and Development in Information Technology (ESPRIT) Report acknowledges that European copyright protection offers less protection "than that conferred by the law of some countries, and the difference operates to the detriment of those who hold European rights."[30] The ESPRIT report also states that, as a result, "undertakings tend to fall back on secrecy."[31] The EPO does not believe that any changes in patent law are necessary, as "[t]he approach initiated by the revised guidelines in 1985 has proved basically satisfactory and offered wide scope for patenting software technology."[32] The EPO does not totally rule out changes in its patent law, admitting that:

> [i]n the USA, a number of decisions of the court of Appeals for the Federal Circuit in Washington have made it much easier to patent any type of computer software, thereby further lowering the barriers against software patents. The EPO will be analysing these decisions carefully to see whether thay have any bearing on European patent practice.

It has recently been suggested that the solution to the problem of protecting computer software lies in discarding the section of Article 52 EPC which prohibits the patenting of computer programs as such. Those who advocate this approach cite the WTO/TRIPS agreement which calls for

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26. "Software is not protected by universal regulations such as apply to patents. The community did make provision for its own system of protection, by means of the directive of 14 May 1991(34), which adapted the system of copyright which applies to literary and artistic works." Special Report No. 6/93 Concerning the European Research and Development Programmes in the Field of Information Technology (the Esprit Programmes) Together with the Commission's Replies 1994 O.J. (C 45) 1, § 2.33 *available in* WESTLAW, CELEX-LEG Database [hereinafter Special Report No. 6/93].

27. EPC, *supra* note 25, art. 93.

28. "[S]ince a decision concerning the possible grant of a European patent can rarely be made so quickly, an applicant for a European patent is in effect forced to publish the subject matter of his application without knowing whether his application will be successful . . . ." GERALD PATERSON, THE EUROPEAN PATENT SYSTEM 20 (1992).

29. Special Report No. 6/93, *supra* note 26, § 2.32.

30. *Id.* § 2.33.

31. *Id.*

32. Patenting Computer Software 1994 Annual Report, European Patent Office (copy on file in the IND. INT'L & COMP. L. REV. office).

unrestricted patent protection for computer programs. Even if the EPO does not share this view, the suggestions will have to be more carefully evaluated when the time comes to revise the EPC.[33]

While not completely closing the door on any changes, it is apparent that it will be a major undertaking to make software per se patentable in the European Union.

D. *Pros and Cons of Software Patents*

The issue of whether software should be patentable, like any such debate, has valid points both pro and con. There are several commonly given reasons as to why computer programs should not be patented. These reasons reflect the difficulty of granting a patent on something that cannot be seen or touched. The most common reason given is that a person cannot patent an algorithm or a mathematical formula. An algorithm is a series of sequential steps used to solve a problem. Software designers usually draw up an algorithm before starting to write a computer program. It is essentially a strategy for solving a problem using a computer. The resulting computer program is an implementation of that algorithm, just as the first atomic bomb was an implementation of the mathematical equation $E=mc^2$. Another reason given for not granting a patent is the problem of clearly specifying the components and operation of the computer program. Source code cannot be used to specify the invention,[34] and the specification may well determine if the claimed computer program is found to be statutory. Patent drafters must be very careful to include a thorough description of the process or machine in the specification. Another common reason given for denying software patents is the policy against taking laws of nature out of the public domain. Such "preemption" of a law of nature is not tolerated, as laws of nature must remain free for all to use.

There are several compelling reasons why patents should be granted on computer programs. A computer program, when reduced down to its essence, is a system of electronic controls which manipulate electronic signals as they travel through a computer. When a computer performs an action, the computer program turns transistors in the machine on or off in a predetermined sequence. The program converts a general configuration of computer hardware into a specific configuration by effectively "rewiring" it. The same effect can be produced by actually constructing an equivalent logic circuit with electronic components. It has been argued that if the physical

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33. *Id.*

34. Request for Comments on Proposed Examination Guidelines for Computer-Implemented Inventions, 60 Fed. Reg. 28,778 I(B)(2)(a) (1995) [hereinafter PTO Guidelines] (proposed June 2, 1995).

circuit is patentable, why is the software that configures the machine unpatentable?[35] The PTO Guidelines would allow almost all software to be patented. Another argument in favor of patenting software is that computer software is not an algorithm, but rather it is an implementation of an algorithm. Much confusion and needless complication has arisen through courts trying to determine patentability based on whether the patent claims were attempting to patent a computer algorithm. This test has not helped to determine what is patentable. It only clouds the issue by trying to apply a characterization that is completely unhelpful. The term "mathematical equation" is similarly unhelpful. Many, if not most, inventions are based on mathematical equations. Electronic circuits certainly can be based on equations, yet electronic patents are not rejected on those grounds.

Another compelling reason to grant intellectual protection to software is due to its status as a large and growing industry. Computer software is a very important industry, and it continues to grow in importance as the electronics industry grows. Even if the current rate of growth levels off, there is no doubt that in the future, computers and their programs will be running much of people's lives. Economic reasons have not been previously cited as a reason why software should be patentable, but the economic reality cannot be ignored. The software industry needs the protection of intellectual property law. The need for this protection will grow as the industry grows. The move toward software patents seems inexorable, and arguably, "[a]ttempting to make software unpatentable will no more prevent practical software patents from issuing and being enforced than prohibition will eliminate alcoholism."[36]

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35. "[A]ny implementation carried out by programming a computer can also be carried out in hardware, so that premising patentability on one of the two makes no scientific sense." James R. Goodman et al., *Toward a Fact-Based Standard for Determining Whether Programmed Computers are Patentable Subject Matter: the Scientific Wisdom of Alappat and Ignorance of Trovato*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 353, 353-54 (1995).

> If *Trovato* can be understood to require a disclosure of computer architecture and hardware of the programmed computer, then the way to obtain a patent is to simply convert the software implementation into a hardware implementation of the programmed computer, obtain a patent on the hardware, and show infringement under the doctrine of equivalents. Converting from software to hardware is routine . . . . Thus, requiring a hardware disclosure would be a mindless increase in the cost for a patent application, particularly where the best mode of the invention is a software implementation.

Id. at 357. "[S]imple software programs can infringe almost pure hardware patents [which] suggests the difficulty of drawing a legal distinction between hardware and software." Heckel, *supra* note 19, at 125.

36. Heckel, *supra* note 19, at 128.

1. *The Position of the United States Government*

The extensive public debate over the patenting of computer programs has given rise to groups advocating both more and less protection. The most important viewpoint to consider is that of the PTO because it determines what patents are issued. The PTO has long held that software is not patentable. The PTO has issued three separate sets of guidelines on patentability. The first guideline, published in 1968, stated that computer programs, per se, were not patentable. However, programs could be patented as part of a process or apparatus, but only if they operated on a physical quantity and did not simply manipulate abstract quantities.[37] The second guideline, issued in 1981, stated that if the patent claim as a whole merely recited an algorithm, then that claim did not recite statutory subject matter.[38] The second guideline also reaffirmed the statement made by the Supreme Court in *Diamond v. Diehr*[39] that a claim on a mathematical formula may be found to be non-statutory even if the claim is limited or does not totally preempt the formula.[40] The third guideline is the subject of this note and will be discussed later.

In the absence of broad patent protection for software, the applicability of copyright protection was investigated. In 1974, the United States Congress established the Commission on New Technological Uses of Copyrighted Works (CONTU). The Commission was created to determine whether copyright law could be used to adequately protect software without the need for software patents.[41] The CONTU report concluded that computer programs were an expression of ideas and therefore could be protected under copyright law.[42]

2. *The Position of the Software Industry*

The software industry is divided over the issue of patent protection. This struggle is caused by a tension between the distrust of monopolies and the belief that a person is entitled to his or her own creation and can therefore control and monopolize it.[43] Several groups are opposed to software patents. Some of the industry members that are against patenting

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37. Examination of Patent Applications on Computer Programs, 68 FR 15609 (1968).

38. 1 DONALD S. CHISUM, PATENTS, A TREATISE ON THE LAW OF PATENTABILITY, VALIDITY AND INFRINGEMENT 103[6][h] (1995).

39. Diamond v. Diehr, 450 U.S. 175 (1981).

40. *Id.*

41. JEFFREY P. CUNARD, *Property of the Mind: Software and the Law, supra* note 11, 227, 232.

42. *Id.*

43. Oz, *supra* note 15, at 50.

software are Adobe Systems, Oracle Corp., Autodesk, Inc., and the 600 member League for Programming Freedom.[44] Both Lotus Development Corporation founder Mitch Kapor and the League for Programming Freedom feel that patents are being granted on fundamental technology, and such patents will hurt United States' competitiveness.[45] These opponents feel that software patents will stifle innovation and prevent all but the largest corporations from thriving.[46] The League relies on a survey taken at the 1991 SIGGRAPH conference to validate their position. The League claims that the survey shows industry support for patents on computer programs is low and getting lower.[47] One of the League's concerns is that an inventor who independently develops an idea at the same time as the patentor could be precluded from obtaining a patent.[48] The League's second concern is the PTO's "ignorance of the prior art."[49] If the PTO does not have an extensive catalogue of prior art, it will not be able to screen out new inventions from the prior art.[50] But the League's most powerful argument is the success of the United States software industry, which was achieved without the benefit of patent protection.[51]

Many industry members, including IBM, Microsoft, Apple Computers, Taligent, AT&T, and Intel, support patents on computer software.[52] These companies fear that foreign competition will capture the United States software market if they are not given patent protection.[53] The Association of Data Processing Service Organizations (ADAPSO) argues that because of the economic risk in the software industry software patents are needed as an

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44. Whitmer, *supra* note 16, at 20.

45. CUNARD, *supra* note 41, at 252.

46. Whitmer, *supra* note 16, at 20.

47. Pamela Samuelson et al., *Developments on the Intellectual Property Front*, 35 COMM. OF THE ACM, No. 6, at 33, 34 (June 1992).

48. *Id.* at 35.

49. *Id.* at 36. Prior art has been defined as "knowledge in certain statutorily defined categories which predated the invention or, in some instances, which predated the application for patent by more than one year even though it may have been subsequent to the invention." ARNOLD & VADEN, *supra* note 2, at 28. "To obtain a patent, the applicant has to show that there is no 'prior art,' publications describing the idea or existing devices that are based on the idea. In the language of the law, the existence of such prior art renders the 'invention' obvious." Oz, *supra* note 15, at 55.

50. The claim is that because the PTO has not previously accepted computer software claims, it does not have the requisite database of "prior art" to use when examining patent applications. Pamela Samuelson, *Benson Revisited: The Case Against Patent Protection for Algorithms and Other Computer Program-Related Inventions*, 39 EMORY L.J. 1025, 1138-39 (1990).

51. Samuelson, *supra* note 47, at 38.

52. Whitmer, *supra* note 16, at 20.

53. *Id.*

incentive for new software inventions.[54] ADAPSO claims that software patents may help in obtaining loans and attracting investors.[55] Software patents may also be instrumental in attracting talent.[56] Another strong argument is that software is no different than any other technology and should not be treated differently.[57] In response to the argument that the software industry has thrived without patents, software entrepreneur Paul Heckel states "[w]hen there is no established competition, new companies can compete without patents. As the industry matures it becomes difficult for new companies to enter the market without a sustainable advantage such as patents."[58] In the past computer programs may not have needed patent protection in order for the industry to survive. Nevertheless, the software industry would be well advised to play it safe and assume that innovation occurs in the software industry just like it does in other industries.[59] As worldwide industry gears up to gain more of the global software market, United States industry will need the protection of the Patent Office to protect the software industry and avoid the fate of the semiconductor industry.

E. *The Importance of Software Patents*

In reality, software patents already exist.[60] In many cases, software developers can get patents on computer programs if they know the rules. But the patent protection could be broader and easier to obtain. As some have argued, patents on computer programs have to be obtuse to be granted. Pamela Samuelson, an attorney for the League for Programming Freedom, asserts that patent lawyers write patent applications in a less than straightforward manner.[61] All patents should be as straightforward and informative as possible. Obtuse patents will defeat the main goal of the patent system, which is to teach the patent to the public upon its disclosure. Straightforward software patents will be easier to obtain and more effective.

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54. Brief for ADAPSO as Amicus Curiae at 44, Parker v. Flook, 437 U.S. 584 (1978) (No. 77-642), *quoted in* Diamond v. Diehr, 450 U.S. 175, 218 n.42 (1981) (Stevens, J., dissenting).

55. *Id.*

56. *Id.*

57. Oz, *supra* note 15, at 56.

58. Heckel, *supra* note 19, at 126.

59. *Id.* at 137.

60. "Software, or 'computer-related' patents were obtained in the 1960s. Martin Goetz of Applied Data Research received U.S. patents 3,380,029 in 1968 on a Sorting System, and 3,533,086 in 1970 on AutoFlow, an automatic flow charting program." *Id.* at 131.

61. *Id.* at 125.

II. HISTORY AND DEVELOPMENT OF SOFTWARE PATENT LAW

A. *Statutory Patent Law*

The United States Constitution established the patent system by granting Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[62] Pursuant to the Constitution, Congress enacted the Patent Act of 1793. The Act protects "any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement [thereof]."[63] The Supreme Court has held that by "choosing such expansive terms as 'manufacture' and 'composition of matter,' modified by the comprehensive 'any,' Congress contemplated that the patent laws should be given wide scope, and the relevant legislative history also supports a broad construction."[64] This definition of patentable subject matter was maintained through the Patent Acts in 1836, 1870, and 1874.[65] The Patent Act of 1952 codified then existing patent law.[66] The only change made by Congress was the replacement of the word "art" with the word "process."[67] Title 35 of the United States Code contains the requirements for obtaining a patent. Section 101 of Title 35 governs the patentability of subject matter. "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."[68]

B. *Development of United States Case Law*

The earliest computer software case was *In re Prater*.[69] In the patent, Prater claimed a method of spectrographic analysis useful in determining the identity of an unknown gas or gases. The claim was for an improved method of solving one particular subset of equations. This new method gave a more accurate determination of the makeup of the gas over the prior art. The United States Court of Customs and Patent Appeals held that Prater's process

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62. U.S. CONST. art. I, § 8, cl. 8.

63. Diamond v. Chakrabarty, 447 U.S. 303, 308 (1980) (quoting Patent Act of Feb. 21, 1793, § 1, 1 Stat. 319).

64. *Id.* at 303.

65. *Id.* at 309.

66. S. Rep. No. 1979, 82d Cong., 2d Sess. 5 (1952); H.R. Rep. No. 1923, 82d Cong., 2d Sess. 6 (1952).

67. *Id.*

68. 35 U.S.C. § 101 (1994).

69. *In re* Prater, 56 C.C.P.A. 1376 (1968).

and apparatus claims were patentable subject matter under 35 U.S.C. § 101.[70] The court held that claims for a process to be performed on a computer were not invalid just because they could be performed in a person's mind.[71]

The patent application in *Gottschalk v. Benson* claimed a method for converting binary-coded decimal numerals into pure binary numerals for use by a computer.[72] The Supreme Court held the patent to be invalid, stating that ideas or mathematical formulas cannot be patented.[73] The Court held that Benson's claims were broad enough that the patent would preempt any application of the mathematical formula contained in the patent application.[74] However, the Court did not find software per se to be unpatentable. The court stated that computer programs might be patentable as long as they met prior precedents.[75]

The next software case was *Parker v. Flook*.[76] Flook's patent application claimed a method of updating alarm limits in a catalytic conversion process. In *Flook*, the United States Supreme Court held that the use of a computer as part of a method of monitoring alarm limits was non-statutory.[77] The Court held that the mathematical formula impiemented in the computer software was the only novel feature.[78] *Flook* held that the adjustment of the alarm limit to the number calculated by the computer was just "post-solution activity," and as such it was not enough to make the idea patentable.[79] One part of the holding went so far as to claim that "[t]he process itself, not merely the mathematical algorithm, must be new and useful. Indeed, the novelty of the mathematical algorithm is not a determining factor at all."[80] This statement, implying that one novel element was not enough for patentability, was not supported by later holdings.

In 1981, the Supreme Court decided the landmark case of *Diamond v. Diehr*.[81] In the patent the co-inventors, Diehr and Lutton, claimed an improved process for molding and curing synthetic rubber. The rubber mold had to be opened at a certain time and temperature to ensure a quality

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70. *Id.*

71. *Id.* at 1374. This was the so-called "mental steps" doctrine.

72. Gottschalk v. Benson, 409 U.S. 63, 71 (1972).

73. *Id.*

74. *Id.*

75. "We do not hold that no process patent could ever qualify if it did not meet the requirements of our prior precedents. It is said that the decision precludes a patent for any program servicing a computer. We do not so hold." *Id.*

76. Parker v. Flook, 437 U.S. 584 (1978).

77. *Id.*

78. *Id.* at 588.

79. *Id.* at 590.

80. *Id.* at 591.

81. Diamond v. Diehr, 450 U.S. 175 (1981).

molding.[82] The inventors incorporated a computer into the process to closely monitor mold temperatures and the appropriate time to open the molds. The computer used Arrhenius' equation[83] to calculate the proper opening time. Even though the computer used by Diehr and Lutton implemented a known mathematical equation, the formula did not render the patent invalid.[84] If a computer is part of a patentable process, the process is still patentable even if the mathematical formula (or computer algorithm) is not patentable on its own.[85] The Supreme Court held that Diehr's patent claims were patentable subject matter. The Court decided that the application of Arrhenius' equation did not preempt the formula since its use was narrowly limited to this particular process.[86] In the case of *Benson*, it is apparent that Benson's patent, if granted, would have taken a law of nature out of the public domain. However, it is not always that easy to tell if a patent would preempt a law of nature or a mathematical formula. Although Diehr's patent for curing synthetic rubber might have been viewed as removing a law of nature from the public domain, it was granted by the Patent Office. The difference between the two is in the breadth of the claims. Benson claimed a broad method of converting a binary-coded decimal number into a pure binary number. Diehr's patent claim specifically limited the application of a mathematical formula to determine the correct time to open a rubber curing mold. In *Diehr*, the Court instructed the Patent Office to determine statutory subject matter by looking at all claims as a whole and not the novelty of the claim.[87] The Court reiterated *Benson* by stating that the legislature had not placed any limitations on computer software patents in Title 35 of the United States Code.[88] It is interesting to note that the process in *Diehr* is very similar to the process in *Flook*.[89] What had been previously unpatentable in *Flook* was now considered statutory subject matter.

The dissent in *Diehr* asserted that Diehr and Lutton's invention was not unique. It was novel only in that the opening time of the rubber mold was calculated by a computer instead of a human.[90] The dissent argued that Diehr was attempting to patent an algorithm, and therefore the claim was

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82. *Id.* at 177.

83. Arrhenius' equation was named after its discoverer Svante Arrhenius. It is of the form $\ln v = CZ + x$, where v is the total required cure time, C is the activation constant, Z is the temperature in the mold, and x is a constant dependent on the geometry of the mold. *Id.* at 178 n.2.

84. *Id.* at 188-89.

85. *Id.* at 192.

86. *Id.* at 187.

87. *Id.* at 188-89.

88. *Id.* at 187.

89. Both monitored a chemical process with a computer to determine when the process was done.

90. *Diehr*, 450 U.S. at 207-08.

unpatentable under 35 U.S.C. § 101.[91] The computer application of Arrhenius' equation was just the "discovery" and application of a law of nature and mathematical principal.[92] The dissent raised two valid concerns: precedent did not provide any hard rules for inventors, and the term "computer algorithm" was too vague and over-inclusive.[93]

In *Arrhythmia Research Technology, Inc. v. Corazonix Corporation*, the patent application claimed a method and apparatus for analyzing electrocardiographic signals as a way of monitoring the heart activity of heart-attack victims.[94] The Court of Appeals for the Federal Circuit (CAFC) held that the patent was valid. The court held that the inputs and outputs to the computer were not abstract numbers but were, however, related to the victim's heart activity.[95] The court further held that the process was statutory because the "claimed steps of 'converting,' 'applying,' 'determining,' and 'comparing' are physical process steps that transform one physical, electrical signal into another."[96] The court declared that "[t]he claimed invention . . . converts one physical thing into another physical thing just as any other electrical circuitry would do."[97]

The next landmark case in computer software patents was *In re Alappat*.[98] Alappat and his co-inventors claimed a means for smoothing a waveform display on a digital oscilloscope.[99] The CAFC reiterated the Supreme Court's statement in *Benson* that there were no limitations on computer software patents in 35 U.S.C. § 101 or any legislative history.[100]

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91. *Id.* at 212-15.

92. *Id.* at 194, 207-08.

93. *Id.* at 219.

94. Arrhythmia Research Technology, Inc. v. Corazonix Corporation, 958 F.2d 1053 (Fed. Cir. 1992).

95. *Id.* at 1059.

96. *Id.*

97. *Id.* at 1060 (quoting *In re* Sherwood, 613 F.2d 809, 819 (C.C.P.A. 1980), *cert. denied*, 450 U.S. 994 (1981)).

98. *In re* Alappat, 33 F.3d 1526 (Fed. Cir. 1994).

99. *Id.* A digital oscilloscope is an instrument used to display electronic waveforms. A digital oscilloscope display screen has a fixed number of dots of light (pixels) it uses to display waveforms, similar to a TV picture tube. When the waveform changes abruptly, the displayed waveform can appear discontinuous or jagged. Alappat's invention applies an anti-aliasing system to smooth out such irregularities in the displayed waveform. *Id.* at 1537.

100. *Id.* at 1542.

> The plain and unambiguous meaning of s 101 is that any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may be patented if it meets the requirements for patentability set forth in Title 35, such as those found in ss 102, 103, and 112. The use of the expansive term 'any' in s 101 represents Congress's intent not to place any restrictions on the subject matter for which a patent may be obtained beyond those specifically recited in s 101 and the other parts of Title 35. Indeed, the Supreme Court has acknowledged that Congress intended s 101

The CAFC acknowledged that the laws of nature, natural phenomena, and abstract ideas are excluded from patentability.[101] However, the court explained that a claim containing a mathematical formula and an implementation of that formula in a machine or process, when "considered as a whole, is performing a function which the patent laws were designed to protect . . . then the claim satisfies the requirements of § 101."[102] The CAFC stated that a computer program creates a new machine when it programs the computer.[103] The *Alappat* court did not stop there. It took the bold and prescient step of declaring that a computer program is statutory subject matter if it meets all other requirements of patentability.[104] This was the first real acknowledgment that software is patentable on its own.

The dissenting judges in *Alappat* felt Alappat was trying to patent a mathematical discovery and not an invention.[105] The dissent stressed that Congress is directed by the Constitution to promote the "useful arts" and not "science."[106] Patents are supposed to be rewards to entice people to invent technologically useful applications of science and not just theoretical discoveries.[107] The dissent argued that the crucial issue was if an invention was determined to be more than just mathematics, it had to be a technologically useful application of mathematics.[108]

In *In re Warmerdam*, the patent application claimed a method and apparatus for preventing collisions between computer-controlled machines and their surroundings by using data structures called bubble hierarchies.[109] The CAFC held that the claims regarding the use of bubble hierarchies for preventing collisions were not patentable because they were merely manipulations of abstract ideas.[110] The court relied on *Alappat*, saying that claims must go beyond simply manipulating abstract ideas or natural phenomena.[111] However, the court held that the claim for a machine with a memory containing data representing a bubble hierarchy was patentable.[112]

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to extend to 'anything under the sun that is made by man.'

Id. at 1542 (quoting Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980)).

101. *Id.* at 1543.

102. *Id.*

103. *Id.* at 1545.

104. *Id.* The requirements of Title 35 referred to by the CAFC are found in 35 U.S.C. § 102, 103, and 112.

105. *Id.* at 1552-54.

106. *Id.* at 1552.

107. *Id.*

108. *Id.* at 1557.

109. *In re* Warmerdam, 33 F.3d 1354 (Fed. Cir. 1994). Bubble hierarchies are defined as artificial circular boundaries that are used to detect potential collisions between objects. If a potential collision is detected, the boundary is reduced to a smaller bubble zone. *Id.* at 1355.

110. *Id.* at 1359-60.

111. *Id.* at 1360.

112. *Id.* at 1360-61.

In *In re Trovato*, the patent application claimed a method for calculating the optimal path between two locations by solving the shortest path between points.[113] The CAFC held that Trovato's patent was non-statutory. The patent application did not disclose any apparatus. The entire disclosure of the patent consisted of flow charts and program code.[114] The CAFC felt that Trovato was trying to indirectly patent a mathematical algorithm by wording the claim as a machine.[115] A major difficulty for the court was that Trovato's invention did not manipulate any physical quantities.[116] Even though *Alappat* had already been decided, the CAFC seemed reluctant to accept software as patentable subject matter. Trovato's case was weakened by the fact that the patent application did not describe how the calculated values were used or how the computer program would configure and use the computer hardware.[117] To make matters worse, the CAFC typified Trovato's inclusion of an electronic readout of the computer data as "mere post-solution display."[118] The applicant's petition for a rehearing was granted on July 25, 1995. The CAFC granted the petition in light of *Alappat*[119] and the PTO's Proposed Guidelines.[120] The dissent argued that there was no basis for a rehearing because the law had not changed.[121] The PTO Guidelines were issued to garner feedback from the software industry and the legal community, thus it does not have any legal force on the court. The dissent also argued that the patent application did not disclose any specific structure for its claims.[122]

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113. *In re* Trovato, 42 F.3d 1376 (Fed. Cir. 1994) *vacated*, 60 F.3d 807 (Fed. Cir. 1995).

114. *Id.* at 1380.

115. *Id. at* 1382-83.

116. *Id.* at 1381.

117. Trovato's applications fail even to explain how the claimed inventions actually employ the numbers derived to control movement. Although the inventions likely employ techniques known to the art to move an object along the lowest cost path it calculates, the absence of even a cursory description of how the computed values are implemented further indicates that the claimed methods comprise only numerical manipulation.

Id. "Indeed, the specifications note the inventions' 'general applicability to numerical methods' and seek to describe them '[f]rom a mathematical point of view.'" *Id.* at 1380.

118. *Trovato*, 42 F.3d at 1380.

119. *Trovato* was originally heard by the PTO Board of Appeals on July 22, 1992, and May 26, 1993, Appeal Numbers 92-1843 and 92-4106 respectively. The CAFC decided *Alappat* on July 29, 1994. The CAFC originally decided *Trovato* on December 19, 1994. The PTO issued guidelines for software patents on June 2, 1995.

120. *In re* Trovato, 60 F.3d 807 (Fed. Cir. 1995).

121. *Id.*

122. *Id.*

In *Etak v. Zexel*, Etak's patent claimed a computer navigation apparatus for use in a vehicle.[123] The U.S. District Court for the Northern District of California held that Etak's patent was statutory subject matter. The court reaffirmed the statement that an application of an algorithm is not barred by 35 U.S.C. § 101.[124] The court listed three types of claims it considered to be non-statutory: a new method of producing a number, antecedent data gathering steps, and post-solution displays of computer generated results.[125] The court also reiterated the idea first presented in *Alappat* that a computer program makes a general purpose computer into a new and unique machine.[126] The court distinguished this case from *Trovato* in that Etak's specification recited some hardware while Trovato's did not.[127] The court reaffirmed the holding of *Diehr*, stating that a combination of known elements (hardware and software) could be patentable even if the individual components were not patentable.[128]

In *In re Beauregard*, the Commissioner of Patents and Trademarks moved to dismiss the petitioner's appeal.[129] The CAFC vacated the Board of Patent Appeals and Interferences' rejection of the patent application in light of the Commissioner's statement that "computer programs embodied in a tangible medium, such as floppy diskettes, are patentable subject matter under 35 U.S.C. § 101."[130] The Commissioner of Patents' statement was a clear signal that the PTO was changing its position on software patents.

The Supreme Court has not ruled on the patentability of a computer program since 1981 when it decided *Diehr*. The CAFC has decided all of the recent cases except *Etak*. It is apparent from the cases above that the positions of the PTO and the courts are evolving. At the start, both viewed computers and computer programs as little more that abstract mathematical formulas. The current position is slowly gaining acceptance. If any trend can be extrapolated from the case law, it is a trend of increased protection as software grows in importance in the American economy.

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123. Etak, Inc. v. Zexel USA Corp., No. C 94-4041, 1995 WL 462240 (N.D. Cal. May 8, 1995).

124. *Id.* at 2.

125. *Id.*

126. *Id.* at 5.

127. *Id.*

128. *Id.*

129. *In re* Beauregard, 53 F.3d 1583 (Fed. Cir. 1995).

130. *Id.*

III. DISCUSSION OF CURRENT EUROPEAN UNION LAW

A. *Convention on the Grant of European Patents*

The Convention on the Grant of European Patents, known as the European Patent Convention (EPC), was created for the purpose of eliminating the patent boundaries between member states as part of the effort to form the European Economic Community (EEC).[131] The European Union was formed on November 1, 1993, when the Treaty on European Union[132] (Maastricht Treaty) went into effect. As of 1992 there were twelve member states in the EU: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.[133] The EPC came into force in 1978,[134] and all EU states have signed the EPC.[135] Effectively the EPC is one application and one examination process. After the application is granted, applicants receive national patents in all designated countries.[136] However, the European Patent Office (EPO)[137] does not replace the national patent offices of the member states.[138] The EU members did not make the EPC the sole patent provider because they realized that the individual states would not immediately change over from their national patent systems to the EU system.[139] Inventors can still simply file a national patent if they do not want or need a EU patent.[140] When an EPC patent application is filed, the EPO determines patentability of the subject matter. If the application is filed only in a member state, that state's patent law determines patentability.[141] Unlike the United States Code and court decisions, the EPC unequivocally excludes patents on computer

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131. PATERSON, *supra* note 28, at 2.

132. Treaty on European Union (Maastricht Treaty), February 1, 1992, 31 I.L.M. 247 (entered into force November 1, 1993).

133. PATERSON, *supra* note 28, at map preceding 1.

134. *Id.* at 2.

135. *Id.* at map preceding 1.

136. *Id.* at 20.

137. The European Patent Office was established by the EPC as part of the European Patent Organisation. The EPO was given the responsibility of granting patents under the treaty. EPC, *supra* note 25, art. 4. The Organisation and Office were established in Munich, Germany. *Id.* art. 6.

138. Jeffrey L. Thompson, Note, *The North American Patent Office? A Comparative Look at the NAFTA, the European Community, and the Community Patent Convention*, 27 GEO. WASH. J. INT'L L. & ECON. 501, 510 (1993). *See also* EPC, *supra* note 25, arts. 2 and 66.

139. PATERSON, *supra* note 28, at 19-20.

140. Thompson, *supra* note 138, at 510.

141. "The coexistence of the European patent system with existing national systems has been generally recognized as the main reason for its international acceptability." PATERSON, *supra* note 28, at 20.

programs from its categorization of patentable subject matter.[142] This exclusion is qualified by the statement that the excluded subject matter is barred from patentability "only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such."[143] In other words, a computer program cannot be patented on its own. The rationale behind this exclusion is that a computer program is not an "invention" because it is essentially abstract in character.[144]

B. *Community Patent Convention*

The Community Patent Convention (CPC)[145] was initiated shortly after the EEC Treaty became effective in 1958.[146] The goal of the CPC was to further open borders to trade within the European Community (EC) by eliminating differences in patent enforcement between the member states. Nine countries initiated and signed the first draft of the CPC in 1975.[147] Article 98 provided that the convention would not go into effect until it was ratified by all of the EC countries.[148] It has yet to be ratified by all EU

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142. EPC art. 52 reads in part:

> (1) European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step.
> (2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:
> (a) discoveries, scientific theories and mathematical methods;
> (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers.

EPC, *supra* note 25, art. 52(1), (2).

143. EPC, *supra* note 25, art. 52(3).

144. PATERSON, *supra* note 28, at 314.

> Whatever their differences, these exclusions have in common that they refer to activities which do not aim at any direct technical result but are rather of an abstract and intellectual character. The requirement that an invention must have a technical character, or in other words, must provide a technical contribution to the art, is at the basis of a long-standing legal practice in at least the majority of Contracting States of the EPO. Neither from the terms of Article 52 EPC, nor from the legislative history of that Article as appearing from the preparatory documents, can it be deduced that these Contracting States would have intended to deviate from their national laws and jurisprudence in this respect. On the contrary, it seems to be borne out by the list of exceptions in Article 52(2)(a) to (d) EPC that they did not wish to do so.

Id. at 314-15 (quoting T22/85 (IBM/Document abstracting and retrieving) O.J. EPO 1990, 12).

145. Convention for the European Patent for the Common Market (Community Patent Convention), 1975 O.J. (L 017) 1 [hereinafter CPC], *available in* WESTLAW, CELEX-LEG Database.

146. Thompson, *supra* note 138, at 511.

147. PATERSON, *supra* note 28, at 21.

148. Thompson, *supra* note 138, at 512 n.90.

member states.[149] The CPC will convert the bundle of patents of the EPC into one unified patent for all of the member states.[150] This single Community Patent will be enforced in all member states with a Common Appeal Court given exclusive jurisdiction to determine issues raised on appeal and a single body of law within the Convention itself.[151] The CPC maintains the EPC's prohibition against computer program patents. [152]

C. *National Laws of the European Community Member States*

The member states of the EU generally have the same prohibition against the patenting of computer programs as the EPC.[153] The EU members that specifically prohibit the patenting of computer programs are: Belgium,[154] Denmark,[155] France,[156] Germany,[157] Greece,[158] Ireland,[159] Italy,[160]

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149. *Id.* at 511. The EC was supplanted by the EU by the Maastricht Treaty, Feb. 7, 1992. *See supra* note 132.

150. PATERSON, *supra* note 28, at 22.

151. Thompson, *supra* note 138, at 512.

152. Article 56 of the CPC states that any person can contest a patent by filing an application for revocation. CPC, *supra* note 25, art. 56(1), 475A3490 at 19. The applicable grounds for filing an application for revocation with respect to a computer program would be that the subject matter is excluded from patentability under Articles 52 to 57 of the EPC. CPC, *supra* note 25, art. 57(1)(a), at 17-20.

153. *See supra* note 144 for the EPC's provision excluding software from patentability.

154. New Belgian Patent Law of March 28, 1984, ch. II, pt. 1, § 3(1)(3), *translated in* 2C JOHN P. SINNOTT & WILLIAM J. COTREAU, WORLD PATENT LAW AND PRACTICE, Belgium-12 (1995).

155. Patents Act. No. 479 of December 20, 1967, amended June 7, 1989 pt. I, § I(2)(iii), *translated in* 2C JOHN P. SINNOTT & WILLIAM J. COTREAU, WORLD PATENT LAW AND PRACTICE, Denmark-43.

156. French Patent Law, ch. 1, art. 6(2)(c), *translated in* 2D JOHN P. SINNOTT, WORLD PATENT LAW AND PRACTICE, France-111 (1995).

157. Patent Law, pt. I, § 1(2)3. *translated in* 2D JOHN P. SINNOTT, WORLD PATENT LAW AND PRACTICE, West Germany-78.21.

158. Law 1733/87, pt. II, Chap. 1, art. 5(2)(c), *translated in* 2E JOHN P. SINNOTT, WORLD PATENT LAW AND PRACTICE, Greece-10 (1994).

159. Patents Act, 1992, pt. II, ch. II, 9(2)(c), *reprinted in* 2E JOHN P. SINNOTT, WORLD PATENT LAW AND PRACTICE, Ireland-88 (1994).

160. Italian Royal Decree of 29th June 1939, *as amended by* June 22, 1979, tit. II, ch. I, § 12(b), *translated in* 2F JOHN P. SINNOTT & WILLIAM J. COTREAU, WORLD PATENT LAW AND PRACTICE, Italy-5 (1995).

Spain,[161] the Netherlands,[162] and the United Kingdom.[163] Portugal [164] and Luxembourg[165] do not have statutory provisions prohibiting computer program patents.

D. *European Cases on the Patenting of Computer Programs*

The leading European case on computer program patents is *Vicom*.[166] The patent applicant, Vicom Systems Inc., claimed an invention for the digital processing of images. The images were input in the form of a data array. The EPO Technical Board of Appeal[167] held that the patent application was valid. The issue before the Board was whether the patent must be excluded under EPC 52(2) and (3) because it related to a computer program as such.[168] The Board held that the computer program was part of a technical process, and a computer controlled technical process is not statutorily barred by EPC 52(3).[169] Since the patent application did not attempt to patent just a computer program, it did not violate the exclusion "as such." The Board declared that even though computer programs under the EPC are non-statutory subject matter, including a computer program in the

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161. Royal Decree 2424/1986, of 10 October, Relating to the Application of the Convention on the Grant of European Patents Made at Munich on 5 October, 1973, pt. I, art. 4, § 2(c) *translated in* 2H JOHN P. SINNOTT, WORLD PATENT LAW AND PRACTICE, Spain-94 (1994).

162. The Patents Act (Rijksoctrooiwet) *as amended by* May 29, 1987 *translated in* 2 LESTER NELSON, DIGEST OF INTELLECTUAL PROPERTY LAWS OF THE WORLD, Netherlands-2 (1995).

163. Patents Act 1977, § 1(2)(c), *reprinted in* GERALD PATERSON, THE EUROPEAN PATENT SYSTEM 785 (1992).

164. Portugese Industrial Property Act, Decree No. 30,679 of August 24, 1940, *as amended by* 1987, *translated in* 2H JOHN P. SINNOTT, WORLD PATENT LAW AND PRACTICE, Portugal-3 (1995).

165. The Law on Patents of Invention of June 30, 1880 *as amended by* April 27, 1922, *translated in* 2 LESTER NELSON, DIGEST OF INTELLECTUAL PROPERTY LAWS OF THE WORLD, Luxembourg-2 (1995).

166. T208/84 (VICOM/Computer-related invention) O.J. EPO 1987, 14, *reprinted in* 2M JOHN P. SINNOTT & WILLIAM J. COTREAU, WORLD PATENT LAW AND PRACTICE EPD-622 (1995).

167. The Board of Appeals hears appeals from persons contesting the decisions of the Receiving Section, Examining Divisions, Opposition Divisions, or Legal Division. EPC, *supra* note 25, art. 21.

168. 2M SINNOTT & COTREAU, *supra* note 166, at EPD-622.

169. The Board declared that a mathematical method used in a process does not render that process non-statutory if it is "used in a technical process, [and] that process is carried out on a physical entity (which may be a material object but equally an image stored as an electric signal) by some technical means implementing the method and provides as its result a certain change in that entity." *Id.* at EPD-626.

invention will not make the invention unpatentable as well.[170] The court stated that the digital filtering/signal processing involved in the patent was a "real world" activity that went beyond the abstract mathematical methods prohibited by the EPC.[171] A computer process that changes some physical entity, not just numbers, is patentable.[172] The Board held that the electrical signals which represented the digital picture were the physical entities changed by the process. It is remarkable that the Board took this view, in light of the fact that the data input and output by the "process" was an array of numbers. In many ways the Board's holding resembled the United States decision in *Diamond v. Diehr*,[173] and even more closely paralleled the holding in *In re Alappat*.[174] The most interesting statement made by the Technical Board of Appeal was that "it would seem illogical to grant protection for a technical process controlled by a suitably programmed computer but not for the computer itself when set up to execute the control."[175]

In the case of *Merrill Lynch's Application*,[176] the patent application claimed an automated securities trading system which analyzed and processed customers' buy and sell orders. *Merrill Lynch* claimed the invention as a process. This patent application was made under United Kingdom national law and the case was heard by the United Kingdom Patents Court, not the EPO Board of Appeal. The United Kingdom Patents Court held that the application was invalid. The Patents Court reasoned that if the only inventive step resided in a computer then the invention as a whole was not patentable.[177] Since the idea underlying the invention was to use a computer to perform a known function that had previously been performed by humans, the Patent Court held that what Merrill Lynch was trying to patent was a computer program as such. The Court even went so far as to hint that section 1(2)(c) of the Patents Act of 1977[178] contemplates a patent

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170. *Id.* at EPD-627.

171. *Id.* at EPD-624.

172. *Id.* at EPD-626.

173. In *Diehr*, the U.S. Supreme Court held that even though a computer program standing alone was not statutory subject matter, it was patentable as part of a process. Diamond v. Diehr, 450 U.S. 175 (1981).

174. In *In re Alappat*, the CAFC held that a computer program used to smooth waveforms displayed by a digital oscilloscope was a patentable machine. *In re* Alappat, 33 F.3d 1526 (1994). It is interesting that the claimed machine in *Alappat* was remarkably similar to the claimed process here.

175. 2M SINNOTT & COTREAU, *supra* note 166, at EPD-6627.

176. [1988] R.P.C. 1. *cited in* PATERSON, *supra* note 28, at 316.

177. 2M SINNOTT & COTREAU, *supra* note 167, at EPD-823.

178. United Kingdom Patents Act of 1977 states in part:

> 1.—(1) A patent may be granted only for an invention in respect of which the following conditions are satisfied, that is to say—
>
> (a) the invention is new;

to be non-statutory if it involves one of the excluded subjects, even if that subject is not the only inventive idea in the patent claim.[179] The court's logic was that if the invention was useful but was no more than a computer program, the invention could not be patentable.[180] The court was influenced by the fact that the claims were for a process which operated only on numbers and on its face was no more than a "mere method of doing business."[181] The *Merrill Lynch* court concurred with the EPO Board of Appeal's definition of a process as "providing a resulting change in the physical entity on which the process is carried out."[182] Merrill Lynch's patent application claimed no such change in a physical entity.

In the case of *Koch and Sterzel*,[183] the patent application claimed a computer-controlled X-ray apparatus. The Board of Appeal held that Koch's patent was statutory. The reasoning of the Board was that the invention had to be assessed as a whole, and even though a computer program as such was non-statutory, a mix of "technical" and "non-technical" features was patentable.[184] The Board stated that "[t]he EPC does not ask that a patentable invention be exclusively or largely of a technical nature; in other

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(b) it involves an inventive step;
(c) it is capable of industrial application;
(d) the grant of a patent for it is not excluded by subsections (2) and (3) below;

and references in this Act to a patentable invention shall be construed accordingly.

(2) It is hereby declared that the following (among other things) are not inventions for the purposes of this Act, that is to say, anything which consists of—

(a) a discovery, scientific theory or mathematical method;
(b) a literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever;
(c) a scheme, rule or method for performing a mental act, playing a game or doing business, or a program for a computer;
(d) the presentation of information.

Patents Act 1977 (U.K.) *reprinted in* GERALD PATERSON, THE EUROPEAN PATENT SYSTEM 785-86 (1992). Section 130(7) of the Patents Act further states that

> [section] 1(1) . . . [is] so framed as to have, as nearly as practicable, the same [effect] in the United Kingdom as the corresponding provisions of the European Patent Convention, the Community Patent Convention and the Patent Co-operation Treaty have in the territories to which those Conventions apply.

Id. at 796.

179. Decision of the High Court of Justice, Patents Court (Merril Lynch's application) (1987), *reprinted in* 2M SINNOTT & COTREAU, *supra* note 166, at EPD-820.

180. *Id.*

181. *Id.* at EPD-822.

182. *Id.* at EPD-825.

183. T26/86 (KOCH AND STERZEL/X-ray apparatus) O.J. EPO 1988, 19, *cited in* PATERSON, *supra* note 28, at 317.

184. *Id.* at 318.

words, it does not prohibit the patenting of inventions consisting of a mix of technical and non-technical elements."[185]

In the case of IBM's patent application,[186] the patent application claimed a method of analyzing and displaying the events occurring in a text processing system in a computer. The EPO Board of Appeal held that the application was valid. There was no disclosure of any special hardware needed by the embodiment of the patent; it only required a combination of known hardware and new software. The Board of Appeal stated that a display of the internal conditions of an apparatus or system was a "technical problem."[187] The Board argued that even though the claimed idea resided in a computer program, the claim was directed toward the solution of a technical problem, and therefore the patent application was not seeking protection for the software as such within the meaning of EPC 52(2)(c) and (32).[188] This use of the "technical problem" test sidesteps the issue of patentability.[189] It would seem that the Board had already decided that a useful computer program could be patented. Having classified the patent to its liking, the Board found it easy to issue an opinion consistent with the classification. A European inventor can win the battle if his patent is acknowledged as a solution to a "technical problem." This backdoor method of patenting a computer program eviscerates EPC 52(3). Moreover, *New Scientist* magazine claims that the EPO is purposefully helping inventors get around the statutory bar by suggesting that they can get a patent if the claimed invention solves a technical, commercial problem.[190] The EPO has already granted approximately 11,000 software related patents,[191] and its approach to software patents has been copied by the national patent offices of Germany, the Netherlands, Great Britain, and Sweden.[192] In light of these facts, the only remaining effect of EPC 52(3) is that one cannot unartfully

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185. *Id.*

186. T22/85 (IBM/Document abstracting and retrieving) O.J. EPO 1990, 12, *reprinted in* 20 JOHN P. SINNOTT & WILLIAM J. COTREAU, EPD-1900, EPD-1901 (1995).

187. *Id.* at EPD-1902.

188. *Id.*

189. "Instead of rejecting software patents out of hand, the examiners apply the 'problem and solution' test. If the inventor uses technical know-how to solve a commercial problem, the EPO grants a patent." Barry Fox, *Patents*, NEW SCIENTIST, July 29, 1995, at 21.

190. *Id.* (*quoting* the EPO's 1994 Annual Report, see *infra* note 191).

191. Patenting Computer Software 1994 Annual Report, European Patent Office [hereinafter EPO's 1994 Annual Report] (copy on file in the IND. INT'L & COMP. L. REV. office).

192. *Id.*

claim a computer program standing alone.[193] This is reminiscent of the conditions in the United States before *In re Alappat*.

IV. DISCUSSION OF CURRENT UNITED STATES LAW

A. *The Proposed Guidelines*

On June 2, 1995, the PTO published "Request for Comments on Proposed Examination Guidelines for Computer-Implemented Inventions."[194] The PTO Guidelines were issued in response to recent changes in case law.[195] The purpose of the PTO Guidelines is to stimulate feedback which will be used to measure the acceptability of the proposed changes. If adopted, the PTO Guidelines will bring Patent Office examination procedures into alignment with court rulings. The PTO Guidelines were also published to clarify the PTO's position on the patentability of software.[196] If adopted, the PTO Guidelines will be used by patent examiners for determining the patentability of computer-related patent applications. As of yet, no rulings have been made on a patent application which relies on the PTO Guidelines.[197]

The PTO Guidelines initially set forth three ways a software patent can be specified in a patent claim. The first claim method is as a "machine."[198] To classify an item as a machine, the claim must be directed towards "a computer or other programmable apparatus" controlled by a computer program or software.[199]

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193. "[T]he new Guidelines of the European Patent Office state that 'patentability (of [the] subject-matter [of a patent application]) should not be denied merely on the ground that a computer program is involved in its implementation.'" Jack E. Brown, *Recent International Trends in the Legal Protection of Computer Software*, 2 J. L. & TECH. 167, 169-170 (1987) (quoting Gall, *European Patent Office Guidelines 1985 on the Protection of Inventions Relating to Computer Programs*, COMPUTER L. & PRAC., Sept.-Oct. 1985, at 6).

194. *See* PTO Guidelines *supra* note 34.

195. *Id.* at I(A).

196. Legal Analysis to Support Proposed Examination Guidelines for Computer-Implemented Inventions, at I [hereinafter Legal Analysis] (October 3, 1995). File "swanal.txt" *available in* the Internet at ftp.uspto.gov::/pub/software (copy on file in the IND. INT'L & COMP. L. REV. office).

197. In the rehearing of *Trovato*, the CAFC granted the petitioner's request. The previous judgment of the CAFC was vacated, along with the decision of the Board of Patent Appeals. The case was remanded to the PTO for reconsideration. The CAFC made its decision based on the issuance of the PTO Guidelines, but Trovato's patent application did not rely on the PTO Guidelines, as it in all likelihood was drafted long before the PTO Guidelines were issued. *See In re* Trovato, 60 F.3d 807 (1995).

198. PTO Guidelines, *supra* note 34, at I(B)(1)(c)(i).

199. *Id.* at I(B)(1)(c)(i).

The second claim classification is an "article of manufacture."[200] The PTO Guidelines define an article of manufacture as having two elements. The first element is a computer-readable storage medium.[201] This includes, but evidently is not limited to a floppy disc, CD-ROM, or a "memory device."[202] The memory device is required to "impart the functionality represented by the data onto a computer."[203] The key word here is functionality. The memory device must contain more than just data, it must make the computer function. The second element is the configuration of the storage medium. The configuration must cause the using computer to operate in a specific and predetermined manner.[204] The two elements combine to form a storage medium featuring a specific structure and function. For these machines and articles of manufacture, the patent claims are required to define discrete physical structures.[205] These structures "may be comprised of hardware or a combination of hardware and software."[206]

The third type of claim classification is a claim of the algorithm as a "process."[207] For a software patent to qualify as a process, the claim must recite a series of specific operational steps to be performed on or with the aid of a computer.[208] It is implied in this specification that a physical machine is part of the claimed process.

The PTO Guidelines also specify non-statutory subject matter for computer software. The principle behind these non-statutory categories is that an invention must represent a practical application of an idea to be statutory.[209] The PTO states that it is not fear of preemption but rather the

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200. *Id.* at I(B)(1)(c)(ii).

201. *Id.* at I(C)[1](1).

202. The guidelines do not specify what is meant by a memory device. The Legal Analysis states that an article of manufacture "will typically be a component of a specific computer, such as a logic circuit or a computer memory." Legal Analysis, *supra* note 196, at III(B)(2)(a)(i). A memory device could mean any Random Access Memory (RAM) or Read-Only Memory (ROM), since RAM and ROM are composed of a multitude of memory logic circuits.

203. PTO Guidelines, *supra* note 34, at I(C)[1](2). The PTO also tells inventors how to define a computer memory. A claim must identify "the physical characteristics of the memory (e.g., a logic circuit or a storage medium), and the functionality of the memory." Legal Analysis, *supra* note 196, at (III)(B)(2)(a)(i). A computer memory can be defined in a claim in three ways. The first way is as a logic circuit formed by the loading of software onto a computer. *Id.* The second way is as a computer memory that is defined by its purpose or organization. *Id.* The third way of defining a computer memory is by claiming the physical arrangement of the memory that results when the computer program is executed. *Id.*

204. PTO Guidelines, *supra* note 34, at I(C)[1](2).

205. Legal Analysis, *supra* note 196, at (II)(C).

206. *Id.*

207. PTO Guidelines, *supra* note 34, at I(B)(1)(c)(iii).

208. *Id.*

209. Legal Analysis, *supra* note 196, at (III).

"practical application" requirement that prevents abstract ideas, laws of nature, and natural phenomena from being patentable.[210] There are four specific proscriptions. The first is an arrangement of *data* which is not tied to any physical element.[211] The second type of non-statutory subject matter is a storage medium which contains *data* that is a creative or artistic expression.[212] This prohibits any pictures or music on a disc or CD-ROM from being patentable. These two prohibitions of data do not apply to computer programs, which are not merely data but are also data structures. The third type of non-statutory subject matter is a data structure[213] which is not tied to any physical element. This prohibition is a reinforcement of the mandate that a software "article of manufacture" must include 1) some physical memory substrate in which the software resides; 2) a physical apparatus if the software is claimed as a "machine"; or 3) a series of steps to be performed on a computer if the software is claimed as a "process." The fourth type of non-statutory subject matter is a process that only manipulates abstract ideas or concepts.[214] This proscription illustrates the often quoted proviso that a mathematical formula cannot be patented.[215] This prohibition is necessary because the PTO's definition of a process is wide open. The PTO evidently felt that it needed to narrow its definition of a process as a "series of operational steps."

B. *Comparison of the Guidelines to Legal Precedent*

The PTO Guidelines were designed to follow all applicable court precedent. But the Guidelines significantly broaden precedent in defining a "process." The PTO Guidelines do not present a new definition, but the Legal Analysis extends the definition of a process to any "electrical signal representing data corresponding to a physical object or physical activity."[216] The first significant computer software precedent was established in *Benson*. The PTO Guidelines specifically point out that a claim that does nothing more than convert one set of numbers into another set of numbers is non-

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210. *Id.*

211. PTO Guidelines, *supra* note 34, at I(B)(1) (emphasis added).

212. *Id.*

213. The PTO's legal analysis defines a data structure as "[t]he relationship that exists among the ordered data elements." Legal Analysis, *supra* note 196, at III(B)(1)(a). At its most basic level, a computer program is just a sequence of numbers. The order and structure of the numbers is what give the program its meaning, just as the order of the alphabetic characters in a book make a story.

214. PTO Guidelines, *supra* note 34, at I(B)(1).

215. *See, e.g.*, Gottschalk v. Benson, 409 U.S. 63, 67 (1972).

216. Legal Analysis, *supra* note 196, at (III)(B)(2)(b)(i).

statutory.[217] This preserves the holding in *Benson*,[218] but as a reinforcement of the prohibition against patenting laws of nature, it is unnecessary in light of the fourth prohibition which disallows processes that only manipulate abstract ideas or concepts. Nonetheless, the preemption test of *Benson* has been eliminated in favor of a test for practical application. The decision of the CAFC in *In re Warmerdam* stated that patent claims as a whole must go beyond simply manipulating abstract ideas.[219] The PTO Guidelines embrace this holding. The CAFC in *In re Trovato* held that a patent application should recite some hardware to be statutory.[220] The PTO Guidelines maintain this holding but expand the definition of hardware. The PTO Guidelines view inclusion of a computer memory device to be a sufficient hardware disclosure, but it seems unlikely that the *Trovato* court would find it sufficient.

V. CONCLUSION

The practical effect of the PTO Guidelines is that now an inventor can patent a computer program as part of a process, part of a machine, or on its own, if it is claimed as a part of a computer memory. In the near future a computer program on a floppy disc may be patentable standing alone. A computer program that is claimed without any physical structure cannot yet be patented, even though the software would be patentable if claimed in conjunction with an appropriate physical structure. Ultimately the PTO Guidelines are nothing more than a codification of the holding in *Alappat*. But puzzling questions remain. For example, it is unclear why a computer program must be claimed as a machine when a "machine" is understood to be necessary for its use. Perhaps this is a concession to those who maintain that patents should not be granted on software.

Changes in patent law are ultimately like changes in other areas of law; they occur slowly and in small increments. These changes are evolutionary and are not a change of direction. The attitude towards software patents in the United States has been slowly changing from one of suspicion to grudging acceptance. If the new PTO Guidelines are implemented, computer programs will be almost as patentable as other forms of technology. In contrast to the attitude of the United States, the EU seems to have a reactionary attitude toward software patents. There has been very little indication that their attitude might change. Copyright is still a widely accepted form of software protection in the EU. The lack of official

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217. PTO Guidelines, *supra* note 34, at I(C)[5].

218. *Benson*, 409 U.S. at 67 (holding that a patent application for converting binary-coded decimal numbers into pure binary numbers was not patentable subject matter).

219. *In re* Warmerdam, 33 F.3d 1354, 1360 (Fed. Cir. 1994).

220. *Trovato*, 42 F.3d at 1382.

encouragement in the EU toward software patents may become very telling in the future. It seems highly likely that the current differences between the United States and the EU will work in the United States' favor. The availability of software patents will give American software developers added protection and this will encourage growth in the domestic software industry. Although the processes for obtaining a patent for a computer program in the United States and Europe are still somewhat similar, the difference between the processes is growing. The largest difference currently is seen in the official attitudes of the respective patent offices. The small change made by the United States could lead to the acceptance of software as patentable subject matter all over the globe.

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