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Articles

REPRESENTATIVE PAPERS FROM THE SYMPOSIUM ON TRANSATLANTIC PERSPECTIVES ON LABOR AND EMPLOYMENT LAW CONFERENCE

Recent Decisions

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Introduction to Symposium Papers from the Transatlantic Perspectives on Labor and Employment Law Conference

By Professor David L. Gregory

I had the privilege of co-chairing the Transatlantic Perspectives on Labor and Employment Law Conference at the University College Dublin Law School on July 21 and 22, 2000. The Conference was co-sponsored by the St. John's University School of Law and was a featured event during the School's Diamond Anniversary year. Additional co-sponsors included the Labor and Employment Law and International Law and Practice Sections of the New York State Bar Association, and the Irish law firms Arthur Cox and Matheson Ormsby Prentice.

More than 180 people attended the Conference. Stanford Law Professor and immediate past Chairperson of the National Labor Relations Board, William B. Gould IV, and Irish Supreme Court Justice Hugh Goeghegan were the keynote speakers. St. John's Interim Law Dean, Vincent Alexander, Dublin Law School Dean Paul O'Connor, New York State Bar Labor Section Chair David Pellow, Dublin Law Professor and Conference Co-chair James Bergeron and I provided official welcoming remarks. In addition to several members of the Irish judiciary and practicing bar, lawyers from Paris, Brussels, Amsterdam, London, and Rome attended the Conference. The lawyers from the United States were a "Who's Who" list of the leading labor and employment lawyers from the major law firms and labor unions.

There were almost one hundred individual speakers on more than twenty concurrent panels. Panel topics included international alternative dispute resolution, human resources, employment discrimination, the future of unions, employee rights, labor in the public sector, labor history, globalization and the European Union, retirement security, mergers and acquisitions, and workplace violence. Every panel emphasized the comparative and international dimensions of the particular issue, with speakers from the U.S., Ireland, and the European Union interacting with the audience.

The *New York International Law Review* is the gracious publication forum for representative papers from the Conference.

The Internationalization of Employment Dispute Mediation

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By Professor David L. Gregory*

This paper is designed as a brief introduction, albeit one fast-eclipsed by current developments, to alternative dispute resolution (hereinafter "ADR") in international employment disputes.

I. Introduction: Globalization and Employment

The world is increasingly and inexorably moving toward the proverbial "global village."[1] Some influential observers such as Thomas Friedman, the Pulitzer-prize winning foreign affairs correspondent for the *New York Times,* describe the exponential acceleration of globalization to be facilitated—if not exacerbated, dramatically by the proliferation of computer mediated tech-

1. *See* Jayan Nayar, *Re-Framing International Law for the 21st Century: Orders of Inhumanity*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 599, 603 (1999) (discussing how we have moved from a world organized through the isolationism of co-existing states to one coordinated by United Nations led interactions of cooperating states); Steven R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?: Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 229 (1999) (noting that the logic behind global collaboration is to extend traditional village dynamics to a global scale to establish a system of shared values, norms, and beliefs which in turn helps to provide social order); Franklyn P. Salimbene*, U.S. Business and Technology Transfer in the Post UNCED Environment*, 17 MD. J. INT'L L. & TRADE 31, 31 (1993) ("[The global village] is 'global' because people are more aware than ever of the reach and effect of their activities on the whole planet, and it is a "village" because directing those activities to life-sustaining ends requires the cooperation of every nation working and pulling together as members of the same community.").

* **Professor of Law, St. John's University. B.A., 1973, The Catholic University of America; M.B.A., 1977, Wayne State University; J.D., 1980 University of Detroit; LL.M., 1982, J.S.D., 1987, Yale University.**

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nologies.[2] Others are decidedly more skeptical than the virtually breathless, cheerleading Mr. Friedman, but they share his sense of the inevitability of the current frenzy toward globalization.[3] The skeptics see a decidedly less benign culmination of the globalization trends.[4] The road to globalization, however, may be more volatile and certainly more complex than Thomas Friedman or the skeptics anticipate.[5]

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2. *See* THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE 7, 63 (1999) (discussing how globalization is the integration of capital, technology and information across national borders in a way that is creating a single global market; and how countries who resist changes brought about by the microchip are less able to deal with consumer demand); Michael Hart, *Coercion or Cooperation: Social Policy and Future Trade Negotiations*, 20 CAN.-U.S. L.J. 351, 356 (1994) (noting that a basic catalyst to the acceleration of globalization is the impact of technological changes that have brought down the costs of transportation and communication); Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream,* 66 S. CAL. L. REV. 1599, 1604 (1993) (noting that the availability of technology worldwide tends to equalize worker productivity and reduce international wage discrepancies among similarly skilled workers); Jim Chen, Comment, *Globalization and its Losers,* 9 MINN. J. GLOBAL TRADE 157, 160 (2000) (observing that globalization is erasing "the traditional boundaries between politics, culture, technology, finance, national security and ecology."); *see also* Leon Hadar, *Globalization Debate Takes a Silly Turn*, BUS. TIMES (SINGAPORE), Aug. 11, 1999, at 12 (noting that Thomas Friedman is a veteran journalist of the *New York Times* and a Pulitzer Prize correspondent and is a global optimist who argues that globalization is irrevocably changing the way business is done and is raising living standards throughout the world).

3. *See* Obijiofor Aginam, *Global Village, Divided World: South-North Gap and Global Health Challenges at Century's Dawn*, 7 IND. J. GLOBAL LEGAL STUD. 603, 608 (2000) (discussing that this global neighborhood is divided by disparities in wealth and health conditions of populations which has left the majority of the world's population poor, with adverse consequences for its health); Jacinta O'Hagan, *Reframing International Law for the 21st Century: Conflict, Convergence or Co-existence? The Relevance of Culture in Reframing World Order*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 537, 553 (1999) (noting that modernization and technology are weakening the role of the nation state and enhancing the role of cultural and religious identity in politics); *see, e.g.,* Christopher W. Rudolph, *Globalization, Sovereignty and Migration: A Conceptual Framework*, 3 UCLA J. INT'L & FOREIGN AFF. 325, 331 (1998) (asserting that as technology makes information more crucial to successful migration increasingly accessible to the world, such information flows can only serve to further decrease the costs of transnational migration).

4. *See* Salbu, *supra* note 1 (noting that as the world is transformed into a single global village, worldwide harmony will be fostered but the global village remains an ideal rather than a reality because cultural heterogeneity confounds efforts to address world problems as a single community); *see also* Peter A. Coclanis & Tilak Doshi, *Globalization in Southeast Asia,* 570 ANNALS 49, 62 (2000) (stating that Southeast Asia needs to emerge from its recent turmoil in order to be able to better confront the challenges of inevitable globalization); Aginam, *supra* note 3, at 610 (discussing that after centuries of monopoly of global capital and advanced technology by industrialized countries, the developing world has no option but to follow reluctantly the prescriptions given by the developed world which controls international financial institutions and other multilateral agencies).

5. *See* Dr. Tim Dunne, *Symposium on Globalization at the Margins: Perspectives on Globalization for Developing States: The Spectre of Globalization*, 7 IND. J. GLOBAL LEGAL STUD. 17, 25-26 (1999) (noting that international businesses are still largely confined to their home territory in terms of their overall business activity); David P. Fidler, *Micropolitik: Infectious Diseases and International Relations*, 14 AM. U. INT'L L. REV. 1, 41 (1998) (noting globalization faces problems created by social, economic, and environmental problems and the difficulty that always exists in international relations in getting sovereign states to agree to effective cooperation); *see also* ROBERT D. KAPLAN, THE COMING ANARCHY 81-82 (2000) (believing that as technology innovations accelerate, corporations become more responsible to the global community and less amoral in their evolution toward new political and cultural forms); Adelle Blackett, *Globalization and its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 61 (1998) (speculating that a number of skeptics claim that the existence of a global economy is exaggerated and resonates slightly better if globalization is viewed as aspirational); Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 262 (1999) (concluding that the linking of rich and poor countries through globalization will increase inequality in the rich countries and will cause dislocation in the poor countries); *see, e.g.,* WILLIAM GREIDER, ONE WORLD READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 15 (1997) (noting that people don't need to understand how technology works, so long as it just works).

Work, or at least the aspiration to work, is ubiquitous. It is part of the human fabric, as much as one yearns for the transcendent.[6] One of the greatest public intellectuals of the twentieth century, His Holiness Pope John Paul the Great, astutely examines the importance of integrated work in his classic Papal encyclicals.[7] The encyclicals discuss the rights of workers and the dignity of work, structured within His Holiness' profound critique of the Darwinistic materialist and political economy of regnant neo-liberalism.[8] The global economy necessarily

6. *See* SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATION 69 (1997) (noting that work in traditional societies was based on agriculture and modern work is based on industry); *see also* HERBERT APPLEBAUM, THE CONCEPT OF WORK: ANCIENT, MEDIEVAL, AND MODERN 398-406 (1992) (describing the writings of Benjamin Franklin, which espoused the notion that a strong work ethic was the key to happiness and the good life); HARRY C. TRIANDIS, WORK AND NONWORK: INTERCULTURAL PERSPECTIVES, IN WORK AND NON-WORK IN THE YEAR 2001 29, 43 (Marvin D. Dunnette ed., 1973) (commenting on the American preoccupation with work); C. John Cicero, *TNS, Inc.—The National Labor Relations Board's Failed Vision of Worker Self-Help to Escape Long-term Health Threats from Workplace Carcinogens and Toxins*, 24 STETSON L. REV. 19, 80 (1994) (suggesting that work permeates, and is often nearly synonymous with, much of individual and social life because the individual person is dignified by work and the community is enriched by work); James W. Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workforce,* 74 WASH. U. L.Q. 103, 108 (1996) (noting that work is a universal primary value of American society because Americans expect people to work in order to support themselves and their families, regardless of whether that person is poor, middle income, or wealthy); Kathryn R. Lang, Note, *Fair Work, Not "Workforce": Examining the Role of Subsidized Jobs in Fulfilling States' Work Requirements Under the Personal Responsibility and Work Reconciliation Act of 1996*, 25 FORDHAM URB. L.J. 959, 972 (1998) (emphasizing work as a universal value of American society and an essential feature of citizenship).

7. *See* CATHOLIC INFORMATION NETWORK, (last visited Sept. 19, 2000) <http://www.cin.org/jp2doc.html> (setting forth Pope John Paul's Papal Encyclicals); Arthur F. McGovern, *Entitlements and Catholic Social Teachings*, 11 NOTRE DAME J. L. ETHICS & PUB. POL'Y 445, 454 (1997) (noting that the centrality of work in human life translates into a fundamental principle that should guide all economic policies and activity); *see also* Lucia Ann Silecchia, *The 1996 Mirror of Justice Lecture: On Doing Justice & Walking Humbly with God: Catholic Social Thought on Law as a Tool for Building Justice*, 46 CATH. U. L. REV. 1163, 1170 (1997) (discussing that in the economic sphere, it is evident that a man has the inherent right not only to be given the opportunity to work but also to be allowed the exercise of personal initiative in the work he does).

8. *See Catholic Information Network, Laborem Exercens (On the Nature of Work),* (1981) (last visited Sept. 19, 2000) <http://www.cin.org/jp2ency/laborem.html> (describing the Ninetieth Anniversary of Rerum Novarum); *see also Catholic Information Network, Sollicitodo Rei Socialis* (last visited Sept. 19, 2000) <http://www.cin.org/jp2ency/sollic.html> (discussing the social concerns of the Church); *see also Catholic Information Network, Centessimus Annus* (1991) (last visited Sept. 19, 2000) <http://www.cin.org/jp2ency/c-annus.html> (noting the Hundredth Anniversary of "Rerum Novarum"); *Catholic Information Network, Ecclesia in America* (1999) (last visited Sept. 19, 2000) <http://www. cin.org/jp2/ecclamer.html> (discussing Pope John Paul's post-Synodal Apostolic Exhortation delivered in January, 1999 upon his visit to Mexico City).

internationalizes many aspects of the employment relationship.[9] The international legal regimen must also provide for effective mediation of transnational employment disputes.[10]

II. Employment Alternative Dispute Resolution (ADR): Some Core Considerations

Disputes within work environments are inevitable.[11] Effective means to resolve disputes, whether they occur in purely localized or in the most transnational employment environments, are more important than ever.

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9. *See* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace,* 62 FORDHAM L. REV. 469, 542 (1993) (noting that continued decentralization of regulatory authority over employment relationships allow flexibility, autonomy, and experimentation values to be maximized as the process of adjustment inherent in the emerging global economy continues); Audrey Anne Smith, *The Future of Labor-Management Cooperation Following Electromation and E.I. Du Pont,* 35 SANTA CLARA L. REV. 225, 252 (1995) (discussing that labor and management have common interests which grew exponentially as American businesses began experimenting with methods to increase productivity so as to remain globally competitive); *see, e.g.*, JULIUS GETMAN, BERT POGREBIN & DAVID GREGORY, LABOR MANAGEMENT RELATIONS AND THE LAW 411 (2d ed., Foundation Press 1999) (discussing how the International Labour Organization is the most established international instrument today for furtherance of the right to unionize and for the international expression of workers' aspirations).

10. *See* James B. Boskey, *The Resolution of Disputes in Transnational Employment: Arbitration and its Discontents,* 3 J. SMALL & EMERGING BUS. L. 189, 192 (1999) (discussing in the transnational employment, it is increasingly common for the employment agreement to contain an arbitration or a dispute resolution clause that limits the role of national); Eric D. Green, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation,* 15 B.U. INT'L L.J. 175, 178 (1997) (noting that mediation, has yet to make much of an impact on international commercial disputes); *see also* J.H. Reichman & David Lange, *Bargaining Around the TRIPs Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions,* 9 DUKE J. COMP. & INT'L L. 11, 52 (1998) (illustrating that there is growing interest in mediation and alternative dispute resolution and the advantages).

11. *See* Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is too Little too Late: An Organizational Conflict Management Perspective on Resolving Disputes,* 21 HAMLINE L. REV. 261, 266-67 (1998) (stating that conflict is a normal result of interaction between two persons who have differences, not only interpersonal or basic personality conflicts, but also involving conditions of employment, conflicts created as a result of changing conditions, and conflicts involving managers and supervisors). *See generally* SANDRA E. GLEASON, WORKPLACE DISPUTE RESOLUTION 1 (1997) (discussing a variety of causal factors of workplace conflicts, including structural features of the workplace, job frustration, personality characteristics, and differences in culture, race, values, gender, personal preferences and social status); Clyde Summers, *Patterns of Dispute Resolution: Lessons from Four Countries,* 12 COMP. LAB. L. 165, 165 (1991) (discussing how conflicts of interest between management and workers is inevitable in the workplace and exists in every system whether capitalist or communist).

ADR is an alternative to litigation; this method of resolving workplace disputes is here to stay.[12] Conventional labor arbitration methodologies have, for more than a half-century, provided a fine conceptual and practical platform for enhancing both the theory and practice of ADR.[13]

Mediation, a non-binding dispute resolution procedure, is an increasingly important component of ADR.[14] Within the past few years, more private and public organizations, ranging from private investment banks to the U.S. Postal Service to many other agencies within the fed-

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12. *See* Robert B. McKay, *The Fiftieth Anniversary of the Federal Rules of Civil Procedure: Rule 16 and Alternative Dispute Resolution,* 63 NOTRE DAME L. REV. 818, 829 (1988) (noting that alternative dispute resolution is beneficial and now it is necessary to question the best way to employ its advantages of flexibility, economy and superior resolution of disputes in some kinds of cases); *see, e.g.*, Harold Brown, *Alternative Dispute Resolution: Realities and Remedies*, 30 SUFFOLK U. L. REV. 743, 777 (1997) (noting that since ADR is here to stay, there is a necessity to promote resolution as alternatives to state legislation, rules of court, or common law decision). *See generally* Sean Cooney, *The New Taiwan and Its Old Labour Law: Authoritarian Legislation in a Democratized Society,* 18 COMP. LAB. L. 1, 15 (1996) (discussing that labor instability was a result of the lack of effective dispute resolution favorable to employees which left dissatisfied workers to simply change jobs); Victoria J. Craine, Note, *The Mandatory Arbitration Clause: Forum Selection or Employee Coercion?,* 8 B.U. PUB. INT. L.J. 537, 551-52 (1999) (stating that alternative dispute resolution for workplace conflicts are generally effective in resolving issues efficiently and equitably); L. Camille Herbert, *Establishing and Evaluating a Workplace Mediation Pilot Project: An Ohio Case Study,* 14 OHIO ST. J. ON DISP. RESOL. 415, 449 (1999) ("Agencies that are convinced of the utility of mediation as a method for resolving workplace disputes are more likely to provide an employee sufficient release time from his or her other responsibilities to administer the program"); James R. Holbrook & Laura M. Gray, *Court-Annexed Alternative Dispute Resolution*, 21 J. CONTEMP. L. 1, 1 (1995) (noting that Alternative Dispute Resolution is a phrase used to describe problem solving methods and techniques which have became institutionalized in response to a need for more efficient and cost-effective dispute settlement); David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR,* 1 U. PA. J. LAB. & EMP. L. 133, 134 (1998) (defining ADR as any form of mediation or arbitration as a substitute for the judicial or administrative process available to resolve a dispute).

13. *See* Holbrook & Gray, *supra* note 12, at 11-12 (noting how Utah created an ADR task force to study the workloads of the court and determined how costs to litigants could be reduced and the decision making process improved); Lipsky & Seeber, *supra* note 12, at 143 (discussing the Civil Justice Reform Act of 1990 which required each federal district court to assess its dockets and to develop a plan to reduce costs and delays); *see, e.g.,* Sid L. Moller, *Birth of Contract: Arbitration in the Non-Union Workplace*, 50 S. C. L. REV. 183, 216-17 (1988) (noting that the American Arbitration Association provides a practical guide for employers in developing ADR procedures to resolve workplace disputes).

14. *See* Kimberlee K. Kovach, *The Lawyer's Duties and Responsibilities in Dispute Resolution: Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic,* 38 S. TEX L. REV. 575, 576 (1997) (illustrating how the use of alternative dispute resolution and mediation, specifically, has had a dramatic increase over the past 20 years); Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability Against Immunity,* 31 RUTGERS L.J. 131, 131-32 (1999) (stating that alternative dispute resolution and mediation have become a valuable tool for resolving disagreements in today's society). *See generally* Peter Marksteiner, *How Confidential Are Federal Sector Employment-Related Dispute Mediations?,* 14 OHIO ST. J. ON DISP. RESOL. 89, 89 (1998) ("Mediation is a dispute resolution process which is non-adversarial in nature. It seeks not to declare winners or losers, but to find reconciliation between disputing parties.").

eral government, have embraced mediation of employment disputes.[15] Major ADR providers, such as the American Arbitration Association (hereinafter "AAA"), have endeavored to anticipate and to meet client needs for mediation of employment disputes by, for example, the implementation of employment mediation mechanisms and well-trained mediators.[16]

My experience as an arbitrator and mediator has recently involved more issues of transnational and international employment dispute mediation. My work as a professor of labor and employment law provides a conceptual framework for me to evaluate the fluid dynamics, and the evolving architecture, of the internationalization of employment dispute mediation. Scholarly law review literature related to ADR, exemplified by the *Harvard Negotiation Law Review* and the *Ohio State Journal of Dispute Resolution*, and supplemented by professional publica-

15. *See* Stuart H. Bompey, Michael Delikat & Lisa K. McClelland, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 34 (1997) ("The principal advantages to employers of arbitration compared to civil litigation are time and money."); Catherine Cronin-Harris, *Symposium on Business Dispute Resolution: ADR and Beyond: Mainstreaming: Systemizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 878 (1996) (stating that broad Alternative Dispute Resolution programs have been initiated in the banking industry); Thomas J. Gagliardo, *ADR's Growing Role in Employment*, 33-JUN MD. B.J. 38, 39 (2000) ("The EEOC has also required federal agencies to establish alternative dispute resolution programs to resolve federal employee discrimination claims."); Susan S. Locke, *Counseling Fiduciaries on How to Avoid Beneficiary Complaints and Quickly Settle Complaints*, SD84 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 73, 87 (1999) (noting that investment banks would be wise to participate in some mediation before a claim ends up in litigation); Stacia Marie Jones, Note & Comment, *Confidentiality in Discrimination-Related Dispute Mediation: Is There a Congressional Mandate for Union Employees to have an Individual Right to Pursue Mediation Without Union Representation?,* 15 OHIO ST. J. ON DISP. RESOL. 483, 483 n.6 (2000) (discussing the types of benefits that U.S. Postal Workers want from their mediation program); *see also* Barbara Chvany, *Using Mediation Effectively*, 625 PLI LITIG. ADMIN. PRAC. COURSE HANDBOOK SERIES 745, 748 (2000) (asserting that early mediation of disputes make way for creative problem solving); Cynthia B. Dauber, Notes & Comment, *The Ties That Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies*, 9 ADMIN. L.J. AM. U. 165, 175 (1995*)* ("Mediation of [Equal Employment Opportunity] disputes at the Air Force Civilian Appellate Review Agency has worked with more than fifty percent of all complaints settled."); *see, e.g.*, Jeffrey P. Ayres, *Common Law Labor Remedies: A Milenium [sic] of Retrenchment*, 33 MD. B.J. 22, 23 (2000) (stating that mediation has become more frequently utilized especially when parties agree to the process). *See generally* Major Sherry R. Wetsch, *Alternative Dispute Resolution- An Introduction for Legal Assistance Attorneys*, 2000 ARMY LAW. 8, 15 (2000) ("United States Postal Service currently uses the transformative approach to mediate certain employment disputes, hoping that the parties will gain skills that will assist them in future situations.").

16. *See* Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1909 (2000) (stating that the American Arbitration Association helped to reconstruct the arbitral system); *see also* Susan A. Fitzgibbon, *After Gardner-Denver, Gilmer and Wright: The Supreme Court's Next Arbitration Decision*, 44 ST. LOUIS U. L.J. 833, 846 (2000) (stating that the AAA offers programs to train arbitrators to handle statutory employment claims); Bridget Genteman Hoy, Comment, *The Draft Uniform Mediation Act in Context: Can it Clear Up the Clutter*, 44 ST. LOUIS U. L.J. 1121, 1136 (2000) (asserting that the Model Standards of Conduct for Mediators was developed by the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution).

tions, such as the AAA's *Dispute Resolution Journal*, have also addressed these international employment ADR themes and practices.[17]

Thus far, most of the international focus in employment dispute mediation is an amalgam derived from international commercial arbitration considerations,[18] where ADR has probably had its most established international basis.[19] The heterogeneity of international ADR also has roots in human rights, international law, and admiralty law, among many other sources.[20]

Effective employment mediation operates according to the eight base values of "Yale Policy Sciences" jurisprudence: (1) the realization of power, (2) wealth, (3) respect, (4) rectitude, (5) enlightenment, (6) skill, (7) affection, and (8) well-being.[21] The mediator focuses on several indispensable intellectual tasks such as goal clarification, trend and factor analysis, predictions

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17. *See, e.g.*, Andrew Sagartz, Note & Comment, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO ST. J. ON DISP. RESOL. 675, 692 (1998) (discussing that international disputes are best resolved through resolution processes); *see also* Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 37, 37 (1996) ("Alternative dispute resolution (ADR) has become a popular and accepted part of the national and international legal systems."). *See generally* Martin C. Karamon, *ADR on the Internet*, 11 OHIO ST. J. ON DISP. RESOL. 537, 546 (1996) (discussing Global Arbitration & Mediation Association, Inc. which assists in arbitration of international commerce); Anthony Wanis-St. John, *Implementing ADR in Transitioning States,* 5 HARV. NEGOTIATION L. REV. 339, 339 (2000) (noting the inclusion of ADR as an "explicit tool of international development programs); *see generally* American Arbitration Association, *A Guide to Mediation and Arbitration for Business People*, 1999 WL 1627992 at 17 (A.A.A.) (1999) (providing that the American Arbitration Association has created the Supplementary Procedures for Commercial Arbitration).

18. *See* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 93 (2000) ("[I]nternational commercial arbitration can provide valuable evidence about the costs and benefits of using commercial norms to resolve contract disputes."); *see also* Jill A. Pietrowski, Comments, *Enforcing International Commercial Arbitration Agreements—Post Mutsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U. L. REV. 57, 60 (1986) (arguing that arbitration swiftly and conclusively disposes of international commercial transaction disputes). *See generally* Michael R. Voorhees, *International Commercial Arbitration and the Arbitrability of Antitrust Claims: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 14 N. KY. L. REV. 65, 89 (1987) (stating that commercial arbitration considerations have been a motivating factor for world trade and peace).

19. *See* Betty Southard Murphy, *ADR's Impact on International Commerce*, 48 DISP. RESOL. J. 68, 68 (1993) (discussing the benefits of international commercial arbitration); *see also* Silver, *supra* note 17 (providing that ADR is a popular and established part of international commerce). *See generally* Sagartz, *supra* note 17 ("Parties often use ADR in international commerce because it allows a neutral forum, free from bias toward either party.").

20. *See* Michael Barber, Comment, *NAFTA Dispute Resolution Provisions: Leaving Room for Abusive Tactics by Airlines Looking Southward*, 61 J. AIR L. & COM. 991, 991 (1996) (explaining American business and employment law has had an impact on international dispute resolution); s*ee also* Robert F. Blomquist, *Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution in America,* 34 VAL. U. L. REV. 343, 352-53 (2000) (stating ADR has developed out of labor law and contract law); Murphy, *supra* note 19, at 68-69 (noting that ADR's history has roots in the international setting, dating back fifty years); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 140-46 (1985) (discussing the involvement of regulatory agencies in the negotiation process).

21. *See* W. MICHAEL REISMAN AND AARON M. SCHREIBER, JURISPRUDENCE 561 (1987) (discussing an overview of jurisprudence); *see, e.g.*, HAROLD D. LASSWELL AND MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY 50 (1992) (discussing policy-oriented jurisprudence). *See generally* David L. Gregory, *Dorothy Day's Lessons for the Transformation of Work,* 14 HOFSTRA LAB. L.J. 57, 150 (1996) (stating that the main insight of the Yale Policy Sciences jurisprudence is the enhancement of human dignity).

and formations of alternatives.[22] In doing so, the mediator operates in a configurative, contextual, and complex mediation matrix.[23] He must constantly be aware of the mediation's various effective powers and constitutive processes, consider who the participants are, what their perspectives are, the various situations that evolve, the parties' base values, the various tactics and strategies that are effective in the mediation and how the mediator can assist the parties in appreciating and assessing various possible outcomes.[24]

If the employment relationship has been severed and if neither party seeks or is amenable to its restoration, the mediation dynamic generally involves issues of ascertainment, realization of appropriate compensation and related closure issues. If, however, the employment relationship may be restored to some degree, the dynamic is much more "relational."[25]

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22. *See, e.g.,* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risk's of Riskin's Grid,* 3 HARV. NEGOTIATION L. REV. 71, 82, 87 (1998) (explaining mediators can 'raise questions' and 'make suggestions' for the parties' consideration in order to facilitate achievement of goals; and asserting Minnesota law indicates that "[I]t is acceptable for the mediator to suggest options in response to parties' requests"). *See generally* John D. Feerick, *The Lawyers Duties and Responsibilities in Dispute Resolution: Toward Uniform Standards of Conduct for Mediators,* 38 S. TEX. L. REV. 455, 463 (1997) (illustrating how a mediator can help to clarify goals by pointing out "different interests that might be involved"); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?,* 24 FLA. ST. U. L. REV. 839, 854 (1997) (discussing how promoters of mediation services are "intellectual entrepreneurs").

23. *See generally* Esquibel, *supra* note 14, at 137 (submitting mediation is a process where an impartial mediator facilitates the resolution of a dispute by promoting voluntary agreement); Kovach & Love, *supra* note 22, at 82-83 (explaining the different roles of a mediator); Karen A. Zerhusen, *Reflections on the Role of the Nestrol Lawyers; The Lawyer as Mediator,* 81 KY. L.J. 1165, 1169 (1992) (discussing different aspects of the mediator's responsibilities).

24. *See* Kovach & Love, *supra* note 22, at 92 ("[T]he central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and dispositions toward one another."); *see, e.g.*, LASSWELL & MCDOUGAL, *supra* note 21 (emphasizing the role of the participants in mediation). *See generally* Richard M. Calkins, *Mediation: The Gentler Way,* 41 S.D. L. REV. 277, 293 (1996) (discussing the qualifies a mediator must possess and the goals he must keep in mind).

25. *See* Deborah L. Levi, *The Role of Apology in Mediation,* 72 N.Y.U.L. REV. 1165, 1173 (1997) (explaining the different types of apologies in mediation). *See generally* L. Camille Hebert, *Establishing and Evaluating a Workplace Mediation Pilot Project: An Ohio Case Study,* 14 OHIO ST. J. ON DISP. RESOL. 415, 429 (1999) (discussing the disposition of disputes referred to mediation and explaining those dispositions); Mark R. Privartsky, Comment, *A Practitioner's Guide to General Order 93-10: Mediation Plan for the United States District Court of Nebraska,* 75 NEB. L. REV. 91, 102 (1996) ("A successful mediation settlement where both parties are satisfied with the outcome allows the parties to continue their existing relationship without interruption.").

A. International Mediation

In the context of international mediation of employment disputes, the same core dynamics must also take into account issues of culture, currency, language, conflicts and choice of law and a myriad of practices within potentially quite disparate regimes.[26]

Different cultures and systems of law have varied approaches towards mediation.[27] For example, civil and common-law systems approach arbitration procedures in different ways.[28]

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26. *See* Michael T. Colatrella, Jr., *"Court-Performed" Mediation in the People's Republic of China: A Proposed Model to Improve the United States Federal District Courts' Mediation Programs,* 15 OHIO ST. J. ON DISP. RESOL. 391, 394 ("A country's procedures for resolving disputes are interconnected with its culture."); Walter A. Wright, *Mediation of Private United States-Mexico Commercial Disputes: Will it Work?,* 26 N.M. L. REV. 57, 60-66 (1996) (noting differences in American and Latin American cultures have resulted in different approaches to mediation); *see also* Julie Barker*, International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L.J. 1, 30 (1996) ("Communication problems may . . . arise in the use of currency symbols."); Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 416 (1998) ("[C]ultural factors are relevant concerns in dispute resolution."). *See generally* Jonathan R. Cohen, *Advising Clients to Apologize,* 72 S. CAL. L. REV. 1009, 1037 (1999) (questioning whether one jurisdiction will honor another jurisdiction's mediation confidentiality rules); Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China,* 15 UCLA PAC. BASIN L.J. 122, 132 (1996) ("Arbitration can be carried out in English or other foreign languages as agreed upon by the parties involved."); Michael A. Perino, *Drafting Mediation Privileges: Lessons From the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1, 21 (1995) (asserting that conflict of law issues arise from applying a state statute to a federal court mediation program); Lucille M. Ponte & Erika M. Brown, *Resolving Information Technology Disputes After NAFTA: A Practical Comparison of Domestic and International Arbitration*, 7 TUL. J. INT'L & COMP. L. 43, 70 (1999) ("Once the arbitral award has been presented for enforcement, a further concern for the award recipient is the currency of the award."); Hans Smit, *Substance and Procedure in International Arbitration: The Development of a New Legal Order*, 65 TUL. L. REV. 1309, 1319 (1991) (discussing currency conversion of international arbitration settlements); Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards,* 24 SYRACUSE J. INT'L L. & COM. 1, 8 (1997) ("Further, language divides parties into groups, to an extent they were not already:—negotiators who speak a particular language and negotiators who do not, instead of just a group of negotiators trying to reach an agreement.").

27. *See* Joshua P. Rosenberg, Note & Comment, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157 (1994); *see also* Perino, *supra* note 26 (asserting conflict of law issues arise from applying a state statute to a federal court mediation program); *see, e.g.,* Cohen, *supra* note 26, at 1037-38 (recognizing issue of different jurisdictions recognizing another jurisdictions rules on mediation confidentiality).

28. *See, e.g.,* Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989) (recognizing the movement of the U.S. away from the adversarial system); Thompson, *supra* note 26, at 14 (discussing Asian countries movement toward mediation and Latin America's movement toward arbitration laws). *See generally* Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L.J. 333, 336 (1999) (discussing the fact that in civil law all the countries laws are contained in civil codes).

Both legal systems differ in the examination of witnesses,[29] pleadings,[30] expert evidence,[31] costs[32] and tribunal approaches.[33] The common law technique in examining a witness tends to emphasize the character and reliability of the witness[34] while the civil law technique attempts

29. *See* Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration* Procedure, 30 TEX. INT'L L.J. 89, 95 (1995) ("The traditional international arbitration hearing is an amalgam of the civil law and common law traditions, involving the formal presentation of evidence, but often conducted with a preference for presentation of evidence in affidavit or summary-statement form and with limited cross-examination of witnesses."); Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure Rules and Commentary*, 30 CORNELL INT'L L. REV. 493, 500 (1997) (discussing the role of witnesses in the statement of the claim); *see also* Henry P. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 71 (1982) (emphasizing the emphasis on testimonial evidence in the common law system).

30. *See* Hazard, Jr. & Taruffo, *supra* note 29 (discussing the requirements for the statement of the claim). *See generally* Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens* 1997 B.Y.U. L. REV. 1, 7 (1997) (discussing specificity of pleadings); Sward, *supra* note 28, at 322-23 (discussing the importance of pleading in framing the legal issue).

31. *See* Peter Krug, *The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation*, 94 AM. J. INT'L L. 317, 323 (2000) ("[T]he international prosecution system's framework for the admissibility and presentation of evidence is conducive to a significant role for experts."). *See generally* Bernard Adell, *Evidence in Labour Arbitration: Is there too Much Pressure to Admit Almost Everything*?, 23 QUEEN'S L.J. 67, 101 (1997) (presenting the standards for admitting evidence); Hazard, Jr. & Taruffo, *supra* note 29, at 494 (discussing the civil law system for expert witness).

32. *See* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 156 (discussing the fact that parties to an arbitration can control the costs); William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805, 824 (1999) ("[B]y weighing arbitration's costs and benefits differently, some countries impose court scrutiny of a dispute's legal merits, while others allow waiver of all pre-enforcement review."); *see also* Lee, *supra* note 30, at 6 (discussing the direct and error costs of arbitration).

33. *See* Caron, *supra* note 32, at 155 ("[T]he trend away from classic interstate arbitration is desirable politically because it reduces the significance of the state as a world actor in areas where the sensitivities of the state need not be implicated."); Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT.'L L. 238, 239 (1996) (discussing the *Tadic* decision and the decision of the International Committee of the Red Cross (ICRC) to embark on a study of customary international law.); *see also* De Vries, *supra* note 29, at 69 (illustrating the organization and composition of the tribunal).

34. *See* Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT.'L L. 75, 77 (1997) (discussing that in U.S. courts, a judge must be able to observe the demeanor of a witness to assess reliability); *see also* James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT.'L L. 639, 654 (1993) (emphasizing the reliance on the credibility of witnesses in prosecuting commanding officers for the offenses). *See generally* Marian Nash Leich, *U.S Practice*, 84 AM. J. INT.'L L. 536, 537 (1990) ("[W]e would tend to think, however, that the fairness of the deposition procedure and the reliability of the witnesses' testimony should be assessed . . . rather after the evidence has been gathered and if and when the government seeks to introduce it.").

to adduce relevant facts from the witness.[35] Further, the common law system is very adversarial,[36] as compared to the civil "inquisitorial approach."[37]

International employment agreements usually contain ADR clauses that will limit the role of national courts.[38] These clauses are mutually agreed upon in order to avoid the uncertainties of international litigation[39] and the state's ability to impose regulations.[40] Parties to agreements

35. *See* Thomas M. Franck, *Current Development*: *The Belgrade Minimal Rules of Procedure for International Human Rights Fact Finding Missions*, 75 AM. J. INT'L L. 163, 165 (1981) (discussing the fact finding process for questioning a witness); Keith Highet, *Evidence: The Court and the Nicaragus Case*, 81 AM. J. INT'L L. 1, 56 (1987) (stating "[E]ach witness could have been examined from top to bottom, to attempt to disprove the accuracy of the testimony and the bias of the recollection, and to attempt to illustrate at each turning point in the case that this dispute was not ripe for decision — or was not a dispute as to which the Court was capable of functioning in accordance with its Statute."); *see also* Hazard, Jr., & Taruffo, *supra* note 29, at 504 (discussing the credibility of the testimony of a witness).

36. *See* Hon. Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer,* 33 TULSA L.J. 293, 303 (1997) (explaining the differences between the adversarial approach and the inquisitorial approach); *see also* Peter G. Stein, *Relationships Among Roman Law, Common Law, and Modern Civil Law: Roman Law, Common Law, and Civil Law,* 66 TUL. L. REV. 1591, 1592 (1992) (same). *But see* Anna M. Kvzmik, *Recent Developments: Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law*, 34 HARV. INT'L L.J. 611, 622 (1993) (noting that by instituting an adversarial approach, there is a great impact on eliminating the inquisitorial approach).

37. *See* John H. Langbein, *The German Advantage in Civil Procedure,* 52 U. CHI. L. REV. 823, 828 (1985) (discussing the judge's role in examining witnesses and conducting hearings); Sward, *supra* note 28, at 313 (noting that the essential elements in the inquisitorial approach is that the judge is primarily responsible for supervising the gathering of evidence and that the decision maker is an active participant); *see also* Marianne Roth & Tobias Brinkmann, *New Arbitral Legislation: English Arbitration Act 1996: The English Arbitration Act 1996—A Comparative Assessment*, 5 CROAT. ARB. Y.B. 49, 62 (1998) (asserting that the Arbitration Act empowers the tribunal to take an inquisitorial approach if it will bring about a fair, speedy and economic decision).

38. *See* Boskey, *supra* note 10 (stating that it is increasingly common for employment agreements to contain provisions that limits the role of national courts); *see also* Julia A. Martin, *The Advantages of International Intellectual Property: Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, 936 (1997) (noting that courts have begun to recognize their limits due to the advantages of ADR in resolving international disputes). *See generally* Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 942 (1996) ("An arbitration clause may include provisions regarding the scope and standards for the judicial review of an award.").

39. *See* Gary B. Born, *Critical Observations on the Draft Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 387, 389 (1998) ("The [Transnational Rules of Civil Procedure's] drafters begin from the premise that 'anxiety and uncertainty' result from those procedural aspects of international litigation that are addressed by the draft Rules."); Lawrence W. Newman & David Zaslowski, *Litigating International Commercial Disputes*, 15 WIS. INT'L L.J. 229, 230 (1996) (discussing the problems such as a court's ignorance of the doctrine of comity that remain in international dispute resolution); *see also* Melvin C. Steen, *"Transcending the Ostensible": Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. 211, 211 (1987) ("One persistent impediment to an understanding of what problems are and their cause, common to all international legal institutions, is the observer's natural tendency to treat international legal institutions as though they were the same as domestic legal institutions.").

40. *See* Boskey, *supra* note 10, at 194 ("[T]he parties would have a mutual interest in avoiding the imposition of state regulations limiting the scope of their agreement."); Enrico Colombatto & Jonathan R. Macey, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law*: *Contribution*: *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 926 (1996) ("[I]t is clear that the trend toward international agreements and the formation of international institutions are consistent with the basic desire of governmental actors to maintain their sovereignty. Such agreements and institutions ought to be viewed as attempts to preserve as much autonomy as possible in the modern world."); *see, e.g.,* Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation,* 16 MICH. J. INT'L L. 987, 999 (1995) (discussing resistance to international regulation of labor).

containing an ADR clause determine its provisions,[41] such as the law to be applied to the agreement,[42] and a forum in which disputes arising from the agreement will be heard.[43]

In most cases, the employer maintains control over the terms of the agreement because of superior bargaining power.[44] The employer has the resources to assert in the first instance which law should apply, because he can probably better determine which legal system will more likely rule in his favor in the event of a dispute.[45] The employer can more effectively winnow from the list of available arbitrators because the costs and degree of expertise required for an employee to make a similar determination will probably exceed most employees' limited resources.[46] Given the employer's superior power to "suggest" ADR provisions, the United

41. *See* Richard A. Bales, *A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 618 (1995) (discussing the different options that can be written into a compulsory arbitration provision); Shea Welch, *Arbitration Agreements: Standard of Review, Interpretation and Who is Bound*, 1997 J. DISP. RESOL. 271, 275 (1997) ("[A]n arbitration agreement may not be read so broadly as to include parties and disputes that were clearly not meant to be a part of the agreement."); *see also* Kenneth R. Davis, *A Model for Arbitration: Autonomy, Cooperation and Curtailment of State Power*, 26 FORDHAM URB L.J. 167, 169 (1999) (noting that parties exercise their autonomy to establish jointly a mutually advantageous method for resolving disputes).

42. *See* Dr. I. Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT'L L. REV. 221, 228 (1998) ("The choice of the forum comprises an important consideration that carries important legal consequences."); *see also* Hrvoje Sikiric, *Selection of the Place of Arbitration*, 3 CROT. ARB. Y.B. 7, 10 (1996) (discussing the parties choice of institutional arbitration rules or international arbitration rules); *see, e.g.,* Sandra Obuljen, *New Trends in International Arbitration and Croatian Arbitration Law: Croatian and Portuguese Arbitration Law Compared*, 3 CROAT. ARB. Y.B. 183, 186 (1996) (discussing how in Portuguese law the parties' can decide what rules govern the procedure provided they agree).

43. *See* Boskey, *supra* note 10, at 194-95 ("[I]t is generally accepted that the parties to an agreement can determine the law governing that agreement, at least if the selected law bears some reasonable relationship to the subject matter of the contract."); Phillip A. Buhler, *Forum Selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading*, 27 U. MIAMI INTER-AM. L. REV. 1, 2 (1995) ("One of the most important developments in private international and maritime law, benefiting international commerce, was the recent recognition of commercial contracting parties' right to choose which legal forum will hear their disputes and what laws will be used to decide them."); *see also* Jon A. Jacobson, *Other International Issues: Your Place or Mine: The Enforceability of Choice-of-Law/Forum Clauses in International Securities*, 8 DUKE J. COMP. & INT'L L. 469, 470 (1998) (discussing the fact that parties have increasingly decided to incorporate choice-of-law clauses in their agreements).

44. *See* Boskey, *supra* note 10, at 198 (discussing the superior position of the employer over the employee in the bargaining process; Martin H. Malin, *Labor Law Reform: Waiting For Congress?,* 69 CHI.-KENT L. REV. 277, 285 (1993) (noting that the economically advantaged employer will abuse its superior bargaining power to walk away from the bargaining process entirely); *see also* Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U.L. REV. 849, 872 (1994) ("[T]he average employee has little or no bargaining power").

45. *See* Boskey, *supra* note 10, at 199 (discussing the fact that an employer's counsel may have the opportunity to research the implications of arbitrating in a particular jurisdiction while drafting the clause, whereas an employee's counsel would not); *see also* Stone, *supra* note 40, at 1047 n.196 (noting that employers are at an advantage over employees because they are often "repeat players" in the arbitration system). *See generally* Monica J. Washington, Note, *Compulsory Arbitration of Statutory Employment Disputes: Judicial Review Without Judicial Reformation*, 74 N.Y.U. L. REV. 844, 861-62 (1999) (discussing how an employer's repeated exposure to the arbitration process can lead to a position of greater familiarity with which cases can be won and lost and who are the best arbiters).

46. *See* Boskey, *supra* note 10, at 200 (asserting there are costs that may place an unreasonable burden on the employee); *see also* Steven P. Garmisa, *Courts Disagree on Arbitration Clauses*, CHI. SUN-TIMES, April 15, 1997, at 42 (noting that "repeat player" employers have an advantage when selecting from a list of arbiters); Washington, *supra* note 45 (stating that some employers have a greater familiarity with a particular arbiter's tendencies for decision-making).

States Supreme Court has implicitly condoned, in a series of decisions, the use of such "contouring" power.[47]

III. Due Process Issues in International Mediation

In order to combat against employer abuses such as the power to assert a choice of law, as discussed above, the panel of arbitrators selected by the parties must determine whether due process standards have been met.[48] Due process safeguards must be incorporated into any viable ADR system such that a fair and equitable forum is provided for both the employee and the employer.[49] Common employee concerns include whether the arbitrator(s) has certain "skill[s] in the conduct of hearings, knowledge of the statutory issue at stake in the dispute, and familiarity with the workplace and the employment environment."[50] All of these concerns clearly address the need for neutrality, capability and specialty of the middleman.[51]

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47. *See* Boskey, *supra* note 10, at 201 (discussing the employer's power to impose a particular system of arbitration on an employee); Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255, 268-96 (1998) (presenting the Supreme Court cases supporting arbitration policy). *See generally* Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration,* 74 WASH. U. L.Q. 637, 648-73 (1996) (illustrating the line of Supreme Court cases and the Court's pro-arbitration stance).

48. *See* Boskey, *supra* note 10, at 203–04 (discussing the importance of due process in the arbitration process); *see also* Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come To The United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345, 393 (1998) (noting that arbitration panels must begin to meet the emerging standards of due process for employment law arbitration); *American Arbitration Association, A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (last visited Sept. 19, 2000) <http://www.adr.org/rules/employment/protocol.html> (encouraging proper due process safeguards in an effort to provide adequate enforcement of statutory disputes for the members of the workforce).

49. *See* Boskey, *supra* note 10, at 204 ("If the [American Arbitration Association] determines that a dispute resolution program on its face substantially and materially deviates from the minimum due process standards . . . [it] will decline to administer cases under that program."); Moller, *supra* note 13, at 217 (discussing due process safeguards that are critical to any employment dispute resolution program because they ensure a fair and equitable forum). *See generally* Roberto L. Corrada, *Labor/Employment Law: Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U.L. REV. 1051, 1066 (1996) (noting that there are several private organizations that are attempting to incorporate due process requirements in to the arbitration process in order to make it more fair).

50. *See* Boskey, *supra* note 10, at 204-05 (discussing the qualifications that a mediator should possess); *see also* Leona Green, *Mandatory Arbitration Of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J. L. ETHICS & PUB. POL'Y 173, 213 (1998) (noting that the ADR Protocol calls for particularized skills in an arbiter); Jennifer N. Manuszak, *Pre-Dispute Civil Rights Arbitration in the Nonunion Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stages*, 12 OHIO ST. J. ON DISP. RESOL. 387, 419 (1997) (discussing expected skills of arbiter).

51. *See* Boskey, *supra* note 10, at 204-05 (providing examples of qualifications that a mediator should possess—such as skill in the conduct of hearings, knowledge of the statutory issues at stake and familiarity with the workplace and employment environment); *see also* Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J. L. ETHICS & PUB. POL'Y 173, 213 (1998) (noting that the ADR Protocol calls for particularized skills in an arbiter); Manuszak, *supra* note 50 (noting the skills that an arbiter should possess).

Some requisite qualities of the mediator are that he must be "evenhanded and unbiased, trustworthy and diligent."[52] In order to ensure that a mediator effectuates the above qualities, he must be held accountable for any negligence on his part, as a fiduciary of both parties.[53]

Due process, however, may be compromised in many ways.[54] For example, while China's system of mediation has improved in recent years,[55] it still typifies many potential shortcomings according to United States due process standards.[56] There is a distinct home field advantage for the Chinese national in a dispute with a foreigner.[57] The mediator in most cases is a Chinese national.[58] For this and many other reasons, outcomes in mediation are skewed in

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52. *See* Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876, 1883 (1986) (discussing the fiduciary duties of the mediator); *see also* Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?,* 53 U. CIN. L. REV. 731, 749 (1984) (discussing the nature of the mediator's duty); J. Sue Richardson, Comment, *Mediation: The Florida Legislature Grants Judicial Immunity To Court-Appointed Mediators*, 17 FLA. ST. U. L. REV. 623, 627 (1990) (noting that a mediator has a duty to be "evenhanded and unbiased, trustworthy and diligent").

53. *See supra* note 52, at 1883-84 (discussing the fiduciary standard and the mediator's duties as it pertains to her duty to adequately inform both sides); *see also* Chaykin, *supra* note 52, at 749 (explaining who carries the burden of proof, in the event that either party charges the mediator with negligence); Richardson, *supra* note 52, at 627 (noting that in order to preserve the reliability of the process, there has to be some form of accountability on the mediator).

54. *See* Washington, *supra* note 45, at 845 (discussing the lack of procedural safeguards in arbitral force such as the right to discovery, reasoned opinions and judicial review); *see also* Stone, *supra* note 40, at 1046 (1996) (noting that arbitration rarely allows for basic due process such as the right to discovery and cross-examination). *See generally* Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1053 (1998) (noting that arbitration decisions are immune from judicial review).

55. *See* Colatrella, Jr., *supra* note 26, at 414-15 (claiming that China has trained judges better and have greater confidence in the codification and application of laws); Charles Kenworthey Harer, *Arbitration Fails to Reduce Investors' Risk in China*, 8 PAC. RIM L. & POL'Y 393, 394 (1999) (stating that arbitration has gained both importance and influence in China); *see also* WANG SHENG CHANG, RESOLVING DISPUTES IN THE PRC 5 (1996) (noting the increasing importance of arbitration in recent years).

56. *See* Stanley B. Lubman, *There's No Rushing China's Slow March to a Rule of Law*, L.A. TIMES, Oct. 19, 1997, at M2 (stating that administrative law does not play a central role in the Chinese system); *see also* Harer, *supra* note 55, at 394 (claiming that the arbitration system does not work in favor of foreigners because they are denied choice of forum, lack of independent arbitral and must follow Chinese procedure). *See generally* Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the PRC*, 15 BERKELEY J. INT'L L. 329, 345 (1997) (noting that prior agreements regarding arbitration are not necessarily enforceable, thus, showing that there are differences in the United States' system and China's).

57. *See* Harer, *supra* note 55, at 402 (illustrating mediation procedure in a Chinese system); *see also* Brown & Rogers, *supra* note 56, at 345 (discussing the fact that Chinese tribunals can render agreements to mediate in another country void); Ge Liu & Alexander Lourie, *China on the Horizon: Exploring Current Legal Issues: Article: International Commercial Arbitration In China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539, 547 (1995) (noting that with the adoption of the Arbitration Provisions of the China International Economic and Trade Commission, there was going to be a majority of Chinese nationals on all arbitral boards).

58. *See* Harer, *supra* note 55, at 395, 402 (asserting that it is rare to get an independent arbitral board); *see also* ALASTAIR CRAWFORD, PLOTTING YOUR DISPUTE RESOLUTION STRATEGY: FROM NEGOTIATING THE DISPUTE RESOLUTION CLAUSE TO ENFORCEMENT AGAINST ASSETS, IN DISPUTE RESOLUTION IN THE PRC 22, 37 (Chris Hunter ed., 1995) (noting that, in China, it is rare to have a foreigner appointed as an arbiter in an international dispute); Sally A. Harpole, *How China Organizes Arbitral Tribunals: Arbitration in China*, 52 DISP. RESOL. J. 72, 74 (1997) (stating that it is rare that a non-Chinese national will become a Chief Arbitrator).

favor of the Chinese disputant.[59] In many disputes, the foreign national is coerced to settle. He realistically has little alternative[60] because the next stage in the dispute resolution process, arbitration, can be even less equitable.[61] If a favorable judgment is obtained by a foreign national, though rare, enforcement of the judgment is even less likely.[62] It is unlikely that the Rule of Law, let alone employment mediation, will become viable in China in the foreseeable future.[63] Theoretically, these exhortations should substantially dissipate with China's full entry into the WTO regime. Prudence, however, cautions against undue optimism, at least during the short-term transitional period of entry and acclimation to the Rule of Law.

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59. *See* Liu & Lourie, *supra* note 57 (explaining the rise of Chinese nationals on each arbitral board as a result of adopting the Arbitration Provisions of the Chinese International Economic and Trade Commission); *see, e.g.,* Harer, *supra* note 55, at 402 (discussing mediation procedure in a Chinese tribunal).

60. *See* Harer, *supra* note 55, 402-03 (asserting that foreigners, in a Chinese tribunal, are left with no alternative but to settle). *See generally* Brown & Rogers, *supra* note 56, at 334 (noting that the parties to the arbitration have little control over the proceedings); Dexter Roberts, *Cheated in China*, BUS. WK., Oct. 6, 1997, at 142 (claiming that foreigners are not widely protected under the Chinese arbitration system).

61. *See* Harer, *supra* note 55, at 402-03 (discussing the many disadvantages a foreigner faces in front of a Chinese tribunal); *see also* Harpole, *supra* note 58 (concluding that a Chinese tribunal is a less than equitable forum for a foreigner because having a non-Chinese chief arbiter is rare). *See generally* Benjaman P. Fishburne, III & Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. PA. J. INT'L ECON. L. 297, 307 (1997) (noting all of the inconsistencies and conflicts within China's legal system and the need for reform).

62. *See* Harer, *supra* note 55, 402 (noting that it is unlikely that a Chinese tribunal will enforce a judgment in favor of a foreign party); *see also* Brown & Rogers, *supra* note 56, at 336 (stating that foreign investors who "obtain a favorable arbitration award against a Chinese party more often than not will be forced to seek enforcement from Chinese courts."); Roberts, *supra* note 60 (noting that there is a lack of protection for foreigners under the Chinese system).

63. *See* Stanley B. Lubman, *Making China a Nation of Laws, Not Whims*, L.A. TIMES, Sept. 6, 1998, at M2 (discussing the slow movement toward establishing a Rule of Law in China); Stanley B. Lubman, *Doing Business in China Could Give You A Big Mac Attack; When What's Between the Contract Lines is as Important as What's Explicitly Stated, Investors Can Expect Turbulence*, L.A. TIMES, January 8, 1995, at M2 (describing the legal system in China as a loose set of laws that are neither closely adhered to nor uniformly applied). *See generally* Fishburne, III & Lian, *supa* note 61, at 308 (noting that it is unlikely that China will be able to gain the financial independence or the independence of their arbitration panels in the near future).

If a foreigner or foreign business anticipates doing business in China, arbitration agreements with Chinese nationals should be avoided.[64] Local bias[65] and protectionism,[66] as well as a lack of expertise[67] and enforcement,[68] are some of the major problems relating to arbitration

64. *See* Harer, *supra* note 55, at 394-95 ("The arbitration process [in China] is "stacked against" foreigners due to the lack of choice of forum, lack of an independent arbitral board, and the requirement that the Chinese rules be followed."); *see also* Brown & Rogers, *supra* note 56, at 334-38 (discussing various limitations on the reliability of the arbitration system in China); Katherine L. Lynch, *Chinese Law: The New Arbitration Law*, 26 H.K. L.J. 104, 114 (1996) (discussing provisions of China's arbitration law which provide that the People's Court may refuse to enforce a domestic award under specified circumstances).

65. *See* Margaret Y. K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y 581, 591 (1999) ("Local allocation of funds for judicial services has led to inconsistent levels of service from province to province and has also rendered courts dependent on the whims of local ties and relationships."); *see also* Brown & Rogers, *supra* note 56, at 335 ("[A]rbitrators and legal advisors . . . drawn from the local legal community . . . are inevitably shaped by the legal system in which they were educated and trained . . . affect[ing] the way they conduct or participate in arbitration proceedings."); Mark T. Kremzner, *Managing Urban Land in China: The Emerging Legal Framework and its Role in Development*, 7 PAC. RIM L. & POL'Y 611, 649 (1998) (illustrating ways local officials manipulate economic development and political strategies).

66. *See* Woo, *supra* note 65, at 591 ("Local Protection occurs when a court refuses to accept or delays a case brought by a party from outside the area, competes with other courts for jurisdiction over cases, or favors local parties in adjudication, mediation, and the enforcement of judgments."); *see also* Brown & Rogers, *supra* note 56, at 342 (providing example of manifestation of political pressure on the enforcement of arbitral awards). *See generally* Lynch, *supra* note 64, at 106 ("In an effort to reduce the interference of local government and local protectionism in the PRC arbitration system, the AL re-organizes all existing arbitration bodies.").

67. *See* Harer, *supra* note 55, at 393 ("A general lack of expertise in foreign-related disputes law, and difficulty in enforcing arbitration awards in favor of foreign parties in Chinese Courts are major problems that investors must consider."); *see, e.g.,* Roberts, *supra* note 60 (discussing problems of local protectionism and cronyism faced by U.S businesses when trying to do business with China). *See generally* Jake Stratton, *Despite the Opaque Legal Environment, Foreign Companies Continue to Brave the Risks of Doing Business in China,* CHINA BUS. REV., Jan. 1, 1998 (discussing various reasons why China is one of the most difficult countries to do business with).

68. *See* Kremzner, *supra* note 65, at 653 ("The lack of local enforcement is a manifestation of local economic development ambitions that do not necessarily coincide with those of the center."); *see also* Kam Wing Chan*, Infrastructure Services and Financing in Chinese Cities*, 7 PAC. RIM L. & POL'Y 503, 509-11(1998) (discussing the urge of local governments in China to make a "quick buck"). *See generally* Brown & Rogers, *supra* note 56, at 341 ("The enforcement problems are legendary for victorious parties seeking to enforce awards in China. Despite the limited grounds upon which a Chinese court can legitimately deny enforcement of an arbitral award, prevailing parties are routinely unable to enforce arbitral awards.").

clauses.[69] Other detriments to ADR in China are a lack of choices of forums,[70] lack of independent arbitral board[71] and a requirement that Chinese law must be followed.[72] The perception of the unfairness of ADR processors in China emphasizes the necessity of correcting this perception, as well as of any similar transnational employment setting of other nations.[73] It remains to be seen if China will conform to the Rule of Law upon entry into the World Trade

69. *See* Jeff Trask, Note, *Montreal Protocol Noncompliance Procedure: The Best Approach to Resolving International Environmental Disputes?*, 80 GEO. L.J. 1973, 1993-94 (1992) (discussing Chinese preference for less formal procedure and wish to exhaust all voluntary dispute settlement before turning to artbitration); *see also* Chin Kim, *Eason-Weinmann Center for Comparative Law Eighth Annual Symposium: An Examination of the Unity and Diversity Within the Socialist Legal Family: The Modern Chinese Legal System*, 61 TUL. L. REV. 1413, 1432 (1987) (proclaiming that the misguided goal to further the interests of the country should be subordinate to furthering the interests of the parties). *See generally* Don Bohl, Anne Skagen, & Julie A. Cohen, *Executive Insights; Includes Various Articles on Trends, Environmental Issues, Quality Control, Globalism and Management*, MGMT. REV. 11, 21 (1990) (stating that ADR may not be the best alternative for certain parties and asserting that litigation may be preferred).

70. *See* Frank N. Fisanich, Note and Comment, *Application of the U.N. Sales Convention in Chinese International Commercial Arbitration: Implications for International Uniformity*, 10 AM. REV. INT'L ARB. 101, 108 (1999) (stating that the Supreme People's Court in China has explained that though the parties to a contract may choose the law applicable to the settlement of disputes arising from the contract at the time of the signing of the contract or after a dispute arises, they cannot use any law other than the law of the PRC); *see also* Ge, *supra* note 26 ("CIETAC's jurisdiction will extend to "disputes concerning international or foreign economic relations and trade bounded or not bounded by contracts as arising between foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons, among foreign legal persons and/or natural persons or among Chinese legal persons and/or natural persons."). *But see* Mark C. Lewis, Note, *Contract Law in the People's Republic of China-Rule or Tool: Can the PRC's Foreign Economic Contract Law be Administered According to the Rule of Law,* 30 VAND. J. TRANSNAT'L L. 495, 513 (1997) (stating that the parties can indicate which law will govern the arbitration procedure).

71. *See* Brown & Rogers, *supra* note 56, at 335 ("When arbitration occurs in China, through an arbitration institution created by Chinese law, it is inevitable that Chinese law and courts will affect the progress of that arbitration."); *see also* Woo, *supra* note 65, at 585-91 (discussing the problems of Judicial Discretion in the Chinese court systems and various attempts made by the government to improve these deficiencies). *See generally* Matthew D. Bersani, *Enforcement of Arbitration Awards in China: Foreigners Find the System Sorely Lacking*, CHINA BUS. REV., May 1992, at 7 (explaining the difficulties of enforcement faced by foreign companies trying to utilize the arbitration system in China).

72. *See* Fisanich, *supra* note 70, at 107 (providing a list of what kinds of things are subject to the law of the People's Republic of China); *see also* Harer, *supra* note 55, at 394-95 ("The arbitration process is 'stacked against' foreigners due to the lack of choice of forum, lack of an independent arbitral board, and the requirement that the Chinese rules be followed."); Jeremy Brooks Rosen, *Twenty-Eighth Annual Administrative Law Issue: Note: China, Emerging Economies, and the World Trade Order*, 46 DUKE L.J. 1519, 1548 (1997) (discussing how China's admission to the WTO will benefit both China and all other members of the international community).

73. *See* Harer, *supra* note 55, at 393 (arguing the validity to the perception of unfairness of arbitration system in China is validated by the general lack of expertise and weak enforcement of awards)*; see also* Kremzner, *supra* note 65, at 649 (stating that unfair manipulation of social settings seek to advance the economic and political development driven by self-interest). *See generally* Harry T. Edwards, *Commentary: Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 680-84 (1986) (discussing over-riding considerations in increasing popularity of Alternate Dispute Resolution methods); Woo, *supra* note 65, at 591 (stating that courts operate on theories of bias and unfair judicial services).

Organization and whether its membership will substantially influence change in its ADR system.[74]

A. Due Process Issues in Mediation via Long Distance Telephone or Cyberspace

In the age of globalization, the telephone and cyberspace provide efficient mediums in which to conduct mediation.[75] There are many resources on the internet that could become normative in on-line mediation.[76] On-line newsgroups are a means for people with certain areas of interest to receive the latest information on any given subject.[77] These newsgroups pro-

74. *See* Sam Blay, *Current Development: Party Autonomy in Chinese International Arbitrational Arbitration: A Comment on Recent Developments*, 8 AM. REV. INT'L ARB. 331, 332-39 (1997) (discussing the 1998 changes to the China International Economic and Trade Arbitration in an effort to bring the international arbitration regime in China closer to international standards); Ramon R. Gupta, *Appellate Body Interpretation of the WTO Agreement: A Critique in Light of Japan—Taxes on Alcoholic Beverages*, 6 PAC. RIM L. & POL'Y 683, 690-91 (1997) (stating that the WTO provides a substantive code of conduct, an institutional framework for the administration of the various agreements, a medium for the conduct of international trade relations among member states, and insures implementation of international agreements). *See generally* Brown & Rogers, *supra* note 56, at 348 ("The international community has offered several forms of encouragement and vehicles for reform to China's legal system. . . . Perhaps the biggest enticement for China is admission to the World Trade Organization. . . ."); George W. Coombe, Jr., *The Resolution of Transnational Commercial Disputes: A Perspective from North America*, 5 ANN. SURV. INT'L & COMP. L. 13, 20 (1999) (demonstrating China's intention to make it an acceptable venue for international arbitration through adoption of comprehensive arbitration legislation).

75. *See Developments in the Law—The Paths of Civil Litigation: VI. ADR, the Judiciary, and Justice: Coming, to Terms with the Alternative*, 113 HARV. L. REV. 1851, 1851, n.37-38 (2000) ("ADR is also apt for disputes involving online commerce between geographically disparate parties, and a rapidly developing area of ADR is on the Internet itself, where an array of dispute resolution services are available online."); *see also* William T. D'Zurilla, et al., *ADR Hits the Internet*, 43 LA BAR JNL. 187, 187 (1995) (discussing growing access to ADR resources through the Internet). *See generally* Bohl, Skagen & Cohen, *supra* note 69 (questioning whether managers have completely anticipated the way global proliferation of information systems will change fundamental aspects of business).

76. *See* D'Zurilla, et al., *supra* note 75 (giving examples of what ADR practitioners and others interested in ADR can obtain on the internet); *see also* Tricia A. Hoefling, *Note & Comment: The (Draft)WIPO Arbitration Rules For Administrative Challenge Panel Procedures Concerning Internet Domain Names,* 8 AM. REV. INT'L ARB. 173, 177 (1997) (discussing the role of on-line mediation within the framework and application of rules set forth by The World Intellectual Property Organization); Harold M. White, Jr. & Rita Lauiria, *The Impact of New Communication Technologies on International Law and Policy: Cyberspace and the Restructuring of the International Telecommunications Union*, 32 CAL. W. L. REV. 1, 1-3 (1995) (discussing the powerful impact of the international telecommunications in the framework of international law and policy).

77. *See* Karamon, *supra* note 17, at 538 ("Through these newsgroups, more Internet users are increasing their knowledge of ADR issues, and, as a result, coming to accept ADR as a true alternative to the litigation process."); *see also* Dana Rachlin, *Research on the Internet: Using Newsgroups for Research*, INTERNET LAW., Feb. 1996, at 1 (discussing the availability and composition of information through on-line newsgroups); D'Zurilla, et al., *supra* note 75 (noting the increasingly growing popularity of arbitration related resources on the internet).

vide a wealth of resources for ADR services,[78] such as postings for mediators[79] and other websites that deal with ADR.[80] Cyberspace is no longer the next frontier.[81] It is upon us to further the development of mediation.[82] Video conferencing, for example, seems especially well suited to mediation of international employment disputes. Many unique due process issues, however, arise in these contexts of on-line and long distance telephone mediation.[83]

> People are most comfortable in face to face contact which provides a richness of cues and information. Body language, tonal variations, pauses, all

78. *See* Rachlin, *supra* note 77 (discussing basic structure of on-line newsgroups); *see also* White, Jr. & Lauiria, *supra* note 76 (noting the development of the growing effectiveness of the international communications system in the framework of international law and policy). *See generally* Fred H. Cate, *Law in Cyberspace,* 39 HOW. L.J. 565, 565 (1996) (recognizing the rapid expanding of internet use in the international arena).

79. *See* Karamon, *supra* note 17, at 538 ("Anyone who has subscribed can submit comments or "post" ideas on the particular subject to the newsgroup . . . [a]s a result, members of the newsgroup are "flooded" with a wealth of opinions and information on any designated subject for which a newsgroup exists."); *see also* Llewellyn Joseph Gibbons, *No Regulation*, *Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J. L. & PUB. POL'Y 475, 548-51 (1997) (arguing that due to the positive effects of the internet, the regulatory mechanism of the courts should decrease); James C. Goodale et al., *Panel I: The Changing Landscape of Jurisprudence in Light of the New Communications and Media Alliances*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 427, 427 (1996) (explaining how the traditional set-up of jurisprudence has changed substantively and procedurally as a result of rapidly growing communications and technologies).

80. *See* Karamon*, supra* note 17, at 538-48 (providing examples of specific websites that deal with ADR, such as Lexis Counsel Connect and Nova University CCR); *see also* Rachlin, *supra* note 77 (discussing the set-up and effectiveness of newsgroups on the internet). *See generally* D'Zurilla, et al., *supra* note 75 (discussing how internet access is available through popular servers such as Prodigy, CompuServe and America Online, specifically for lawyers is Lexis Counsel Connect).

81. *See* Gibbons, *supra* note 79, at 476 (recognizing a "new age in cyberspace" and a formal recognition of "post-industrial, post-service, global information driven economy."); Karamon, *supra* note 17, at 548 (posing various concerns regarding how the internet access to ADR will affect the practice of litigation); *see also Developments in the Law—The Paths of Civil Litigation: VI. ADR, the Judiciary, and Justice: Coming to Terms with the Alternative*, *supra* note 75, at 1851 ("Any discussion of recent developments in civil litigation must address the virtual revolution that has taken place regarding alternative dispute resolution (ADR).").

82. *See* Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 B.Y.U.L. REV. 1305, 1357-58 (1998) ("[B]oth cyberspace's size and scope are changing rapidly, and new forms of personal interaction are evolving almost daily. This transformation makes mediation virtually certain to become popular in cyberspace."); *see also* Justice Robert F. Utter, *Tribute: Dispute Resolution in China*, 62 WASH. L. REV. 383-93 (1987) (arguing that the most important issue in Chinese politics is the effect of the Four Modernizations on the general encouragement of harmony and settlement). *See generally* Ge, *supra* note 26, at 128 (discussing how mediation is beneficial to both the disputants and government, providing disputants with an amicable environment, and providing the government with the chance to save judicial resources).

83. *See also* Eisen, *supra* note 82, at 1308 (asserting that it is too soon to mediate disputes online because mediators cannot adequately address many difficult issues); *Jurisdiction, Choice of Law, Copyright, and the Internet: Protection Against Framing in an International Setting*, 9 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 625, 625 (1999) (discussing due process considerations in assessing a minimum contacts standard in internet disputes). *See generally* Sally M. Abel, *Trademark Issues In Cyberspace: The Brave New Frontier*, 5 MICH. TELECOMM. TECH. L. Rev. 91, 91 (1998-99) (analyzing personal jurisdiction issues in violation of due process, in context of cyberspace litigation issues); David W. Maher, *A Cyberspace Perspective on Governance, Standards, And Control: Trademark Law on the Internet—Will it Scale? The Challenge to Develop International Trademark Law*, 16 J. MARSHALL J. COMPUTER & INFO. L. 3, 11 (1997) (discussing due process issues within the framework of the domain name system and the claims of trademark owners).

> become part of the conversation. We also like to know as much as we can about the people with whom we are interacting. We want to know their age, gender, ethnicity, how they dress and wear their hair. We relate to people in the context of this information; we don't know whether trust between mediator and the participants can be developed as quickly in an on-line context, rather than a face-to-face environment.[84]

Yet, as many parties rush heading into cyberspace,[85] telephonic,[86] video interactive,[87] and other-than-in-person-ADR types of proceedings,[88] the parties and the mediator must be especially sensitized to the dynamics of these forms of mediation.[89]

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84. *See* Blomquist, *supra* note 20, at 362 (recognizing that mediators would find it difficult to transfer their skills online without the face-to-face conversations that foster communication); Eisen, *supra* note 82, at 1308 (stating that electronic communication is not an adequate substitute for face-to-face conversations that foster important values of mediation and mediations would as a result breakdown). *See generally Instant Justice in a Box*, THE TORONTO STAR, Aug. 13, 2000 at News (noting that the chance to assess the credibility of either side by hearing and seeing them in person is missing).

85. *See* Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 986 (1997) (stating that the increased use of the internet has resulted in the rapid evolution of online dispute resolution system and the presence of arbitrating authorities in Cyberspace); *see also* M. Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 953 (1996) (recognizing that the technology is there for widely separated parties to meet in cyberspace). *See generally* Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal*, 3 HARV. NEG. L. REV. 175, 176 (1998) (exploring the unique nature of the cyberspace community and how it will affect lawyers who will resolve disputes that will occur).

86. *See* Mary Southard, *Tales from the Interior: Mediation Program Available at the Alaska State Commission for Human Rights*, 23 AK. BAR. RAG. 16, 16 (1999) (discussing how the commission is now expanding its program to offer telephone mediation as well to those parties who are willing to pay for the cost of the telephone call); *see also* Eisen, *supra* note 82, at 1311 (discussing differences in the way one can express emotion on-line); *see also* Daniel Yamshon, *The New Age of Dispute Resolution By Telephone & Electronic Communications: Dial "M" For Mediation*, 49 J. DISP. RESOL. 32, 34 (1994) (claiming that telephone and electronic ADR will probably become more commonplace).

87. *See* David R. Johnson, *Screening the Future for Virtual ADR*, SEP. 51 J. DISP. RESOL. 117, 117 (1996) (explaining how the advance in technology has had a profound effect on ADR, especially teleconferencing); Christine Lepera & Jeannie Costello, *Benefits of Mediating Intellectual Property and Entertainment-Related Disputes,* 605 PRAC. L. INS. 593, 604 (1999) (stating that a program of discussion groups and video conferencing is envisioned); Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH 149, 178 (1998) (discussing video links for websites as a means of mediation).

88. *See* Cona, *supra* note 85, at 986 (noting that the increased use of the internet has resulted in the rapid evolution of online dispute resolution system and the presence of arbitrating authorities in Cyberspace); Johnson, *supra* note 87 (discussing the advance in technology and the profound effect it has had on ADR, especially teleconferencing); Yamshon, *supra* note 86 (claiming that telephone and electronic ADR will probably become more commonplace).

89. *See* Douglas D. Knowlton & Tara Lee Muhlhauseer, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is it a Train on the Track*?, 70 N.D. L. REV. 255, 264 (1994) (discussing how mediators should receive sufficient training in the preparation process to enable them to encounter dynamics and seek appropriate information from the parties when considering the family violence quotient). *See generally* Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 47 (1997) (discussing the way the mediator handles the situation can affect the parties' ability to communicate); Jacqueline M. Nolan-Haley, *Proper Honoris Respectum: Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV. 1369, 1373 (1998) (expressing that the idea of mutuality of respect between the mediator and the client which is often missing in the traditional mediation practice).

In her article discussing telephone mediation, Laurie S. Coltri emphasizes its general advantages and disadvantages, and how it can be applied to resolve international employment disputes.[90] Among the advantages, the most obvious one is the low cost of telephone mediation.[91] Other advantages include the high responsiveness of those parties who either lack mobility, are disabled, or are resistant to a traditional office setting.[92] Presumably, an individual employee would feel less intimidated engaging in telephone mediation from her home than at the office before institutional or corporate parties.[93]

Coltri warns, however, that there are several disadvantages associated with telephone mediation, such as obscured communication because of a lack of non-verbal cues[94] and the inability of mediators to assess the emotional status of the parties.[95] Other disadvantages

90. *See* Michael F. Hollering, *Mediation & Arbitration: A Growing Interaction*, 52 J. DISP. RESOL. 23, 24 (1997) (discussing how mediation in international disputes context predates arbitration); Laurie S. Coltri & C. Joan Hunt, *A Model for Telephone Mediation*, 36 FAM & CONCILIATION CTS. REV. 179, 179 (1998) (stating that there are advantages of telephone mediation including the low costs to families that lack the resources to participate in face-to-face mediation); *see also* Thompson, *supra* note 26, at 12 (discussing the way international diplomats have employed mediation for years); Donald T. Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLIAMETTE L. REV. 501, 514 (1997) (noting mediation of labor interest disputes have similar objectives to that of most other mediations).

91. *See* Coltri & Hunt, *supra* note 90 (stating that an advantage of telephone mediation is the low costs to families that lack the resources to participate in face-to-face mediation); Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act: A Report of the Conference of the U.S.,* 9 ADMIN. L. J. AM. U. 1007, 1055 (1996) (discussing the advantage of the low cost of mediation in comparison with litigation); Richard S. Granat, *Creating an Environment for Mediating Disputes on the Internet* (last visited Oct. 16, 2000) http://www.law.vill.edu/ncair/disres/granat.htm (illustrating similarities between telephone and online mediation).

92. *See* Coltri & Hunt, *supra* note 90, at 181 (recognizing the benefits of telephone mediation for the disabled). *See generally* Rose A. Daly-Rooney, *Designing Reasonable Accommodation Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act*, 8 J. L. & HEALTH 89, 90 (1993-94) (discussing the American with Disabilities Act and particularly how it affects employers who may discriminate against an employee who needs accommodations made because of a disability); Hodges, *supra* note 91, at 1011 (providing examples of reasonable accommodations which should be made for disabled workers).

93. *See Work and Money, the Corporate View: Face-to-Face Won't Bow Soon to Technology,* THE CHRISTIAN SCI. MONITOR, Dec. 20, 1999, at 15 (recognizing the importance of face-to-face communication, in light of advancements in telecommunication and e-mail); *see also* Coltri & Hunt, *supra* note 90, at 181 (recognizing the benefits of telephone mediation because it can help to equalize power imbalances between the professional and client). *But see* John Powers, *Online and in Disguise*, BOST. GLOBE, Sept. 18, 1994 at 11 (criticizing how we have become a country of strangers doing business without ever shaking hands).

94. *See* Barker, *supra* note 26, at 32 (assessing the fact that Mexican negotiators pay more attention to nonverbal behavior in a mediation, and therefore, are adept at reading nonverbal cues and the environment of the mediation); Coltri & Hunt, *supra* note 90, at 181 (recognizing that the lack of nonverbal cues can block effective communication and can inhibit helpers from assessing the emotional status of clients); *see also* Jeffrey S. Wolfe, *The Hidden Parameter: Spatial Dynamics and Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 685, 701 (1997) (stating that a mediator plays her greatest role recognizing persuasive communication including nonverbal communication).

95. *See* Coltri & Hunt, *supra* note 90, at 182 (recognizing that often clients are in an emotional state and that the mediators need to recognize this); Barker, *supra* note 26, at 32 (recognizing importance of the ability to read non-verbal cues while researching); *see also* Wolfe, *supra* note 94 (stating that a mediator plays her greatest role recognizing persuasive communication including nonverbal communication).

include difficulty in arranging convenient times to converse with parties,[96] phone calls that are not returned,[97] and difficulty in contacting parties.[98]

In maintaining the low cost of telephone mediation, Coltri pointed out that a toll-free number should be required, so that the low cost service advantage can be maintained.[99] Further, a group of ethnically diverse mediators would be preferable to deal with parties' special cultural needs[100] or to reaffirm their belief in the neutrality of the process.[101]

Other issues arising from mediation via the telephone are: (1) in what language should the mediation being conducted; (2) in addition to the parties to the dispute, whether the representatives of each party are also on conference phone calls; (3) if yes, overtly or silently, whether there will be confusion if several people participate in the phone call; and, (4) whether confi-

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96. *See* Tracy Varnadore, *Home Alone: Working from a Home Office,* 28 COLO. LAW. 81, 82 (1999) (discussing the inconveniences of meeting with a client and the possibility of making house calls to the clients' homes or businesses); *see also* Coltri & Hunt, *supra* note 90, at 190 (recognizing the difficulties in timing the phone calls and recognizing that mediators were quite frustrated by their inability to contact clients). *See generally* Burton I. Zoub, *Mediation in Custody Disputes, Illinois Inst. for CLE*, (Main Handbook 5-1, 5.13) (1998) (stating that a mutually convenient time to hold a session for both the mediator and the client should be set).

97. *See* Coltri & Hunt, *supra* note 90, at 190 (stating that mediators are often frustrated when phone calls are not returned). *Compare* David H. Webb, *Returning Phone Calls: Use a Bulletin Board,* 10 W. VA. L. REV. 21, 21 (1997) (recognizing that returning phone calls is often a very difficult part of an attorney's legal practice); Barbara S. Fishleder, *Stop, Look and Listen Dealing with Clients by Phone*, 56 OR. ST. B. BULL. 35, 35 (1995) (emphasizing the importance of a lawyer returning a client's phone call).

98. *See* Coltri & Hunt, *supra* note 90, at 190 (recognizing that mediators were quite frustrated by their inability to contact clients). *See generally* Isaac Shapiro, *Counseling a Foreign Client: The Problems of Communication, Document Control, and Antitrust Compliance,* 502 PRAC. L. INST. 423, 423 (1985) (noting distance as one of the problems associated with counseling a foreign client); Zoub, *supra* note 96 (stating that a mutually convenient time for a session is to be set in order to eliminate difficulties in scheduling).

99. *See* Coltri & Hunt, *supra* note 90 (noting the advantage of telephone mediation as the low costs to families that lack the resources to participate in face-to-face mediation); *see also* L. Roger Johnson, *The North Dakota Agricultural Mediation Service*, 70 N.D. L. REV. 295, 299 (stating that farmers may access informal mediation assistance by calling a toll-free telephone number in the North Dakota Department of Agriculture). *See generally* Eisen, *supra* note 82, at 1311 (contrasting the differences between electronic communication, face-to-face conversations and telephone mediation).

100. *See* Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 459 (2000) (arguing that mediators need "cross-cultural mediation training" in order to "think about power imbalances that result from negative cultural myths and interpretive frameworks"); Dominguez-Urban, *supra* note 89, at 28-29 (discussing the problems associated with interpreting phone mediations because of the diversity of clients); *see also* Connie Reeve*, The Quandary of Setting Standards for Mediators: Where are We Headed*?, 23 QUEEN'S L.J. 441, 468 (1998) (explaining that standards of mediators include neutrality and diversity in gender and ethnicity).

101. *See* Wallace Warfield, *Building Consensus for Racial Harmony in American Cities: A Case Model Approach*, 1996 J. DISP. RESOL. 151, 157 (1996) (discussing the myths of dispute and the role of the mediator as a neutral intervenor); *see also* Joseph B. Stulberg & B. Ruth Montgomery, *Design Requirements for Mediator Development Programs*, 15 HOFSTRA L. REV. 499, 505 (1987) (stating that a mediator must be neutral). *See generally* Dwight Golann, *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators*, 14 OHIO ST. J. ON DISP. RESOL. 259, 268 (1998) (noting that parties as less likely to view mediation as a neutral process when settlements are recommended).

dentiality and privacy may be established in communications between the party's representative and the party.[102]

IV. Arbitrator and/or Mediator?: "MED-ARB" Consideration

The experiences of the mediator in facilitating negotiations can differ significantly from those of an arbitrator.[103] A mediator fundamentally attempts to reconcile the parties' conflicting positions,[104] while the arbitrator primarily focuses on evaluating their relative validity.[105]

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102. *See* Stephen A. Hochman, *Confidentiality Provisions Under the Proposed Uniform Mediation Act: A Partial Dissent,* 4 CONF. MGMNT. 1,1 (1999) (speculating that many in the mediation community believe mediation communications should be privileged communications similar to confidential communications between a lawyer and client or priest and penitent); *see also* Dominguez-Urban, *supra* note 89, at 5 (considering use of interpreters in traditional dispute resolution settings and within the system of ADR); *see, e.g.,* Coltri & Hunt, *supra* note 90, at 183 ("Mediation was confidential, with the understanding that the mediator would not testify in court for either parent or share information with attorneys or judges.").

103. S*ee* Barbara Bowers, *Give and Take; Mediation; Statistical Data Included*, BEST'S REV. July 1, 2000 (stating that while an arbitrator can impose a decision, a mediator helps the parties decide for themselves whether to settle and on what terms); *see also* Darlene Y. Ross, *Settlement Techniques Utilizing Buffer Zones and Alternative Dispute Resolutions*, 446 PRACTICING LAW INSTITUTE: LITIG. & ADMIN. PRACTICE COURSE HANDBOOK SERIES 395-96 (1992) ("The mediators role is significantly different from an arbitrator's role. In arbitration, the parties must submit evidence to a neutral third party, the arbitrator, who ultimately decides for one party over the other and renders a binding decision."); Yaroslav Sochynsky, *Mediating Real Estate Disputes,* 12 PROB. & PROP. 22, 23 (1998) (describing mediation as a "facilitated negotiation" where by a neutral helps the parties reach a binding resolution to a legal dispute).

104. *See* David M. Stern, *An Old Dog With Some New Tricks*, 24 LITIG. 31, 31 (1998) (noting that mediation is a 'collaborative process,' dedicated to 'win-win' resolutions and designed to achieve consensus); *see also* STEPHEN B. GOLDBERG, FRANK E. A. SANDER & NANCY H. ROGERS, DISPUTE RESOLUTION—NEGOTIATION, MEDIATION, AND OTHER PROCESSES 103 (2d ed. 1992) (discussing role of third party in mediation process); WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 49 (1988).

105. *See* Mary F. Radford*, An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters,* 34 REAL PROP. PROB. & TR. J. 601, 609 (2000) (discussing decision making process once the parties submit the case to a neutral third party or panel). *See generally* Pierre-Yves Tschanz, *A Breakthrough in International Arbitration: Switzerland's New Act*, 24 INT'L LAW. 1107 (1990) (explaining the general role of the arbitrator); Ross, *supra* note 103 ("In arbitration, the parties must submit evidence to a neutral third party, the arbitrator, who ultimately decides for one party over the other and renders a binding decision.").

Mediation is less formal.[106] The role of a lawyer in presenting his client's case may also be less significant in mediation than in arbitration.[107]

Nonetheless, during the course of the mediation proceedings, a mediator may form an opinion as to which party's position is more credible.[108] That opinion, however, may have been otherwise had information been presented more formally, as in arbitration.[109] Yet, once formulated, that opinion may color the evaluation of facts later presented in arbitration.[110] Where

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106. *See* Richard C. Reuben, *The Lawyer Turns Peacemaker: With Mediation Emerging as the Most Popular Form of Alternative Dispute Resolution, The Quest for Common Ground Could Force Attorneys to Reinterpret Everything They Do in the Future*, 82 A.B.A.J. 54, 59 (1996) ("The controversies surrounding mediation tend to be more subtle than those in arbitration because it is a less formal process."); Jeffrey B. Groy & Donald L. Elliot, *Using Arbitration and Mediation to Resolve Land Use Disputes*, 15 CURRENT MUN. PROBS. 190, 192-93 (1988) (noting that mediation is less formal, more expedient and more private than the judicial process); *see also* Hon. James DeAnda & S. Shawn Stephens, *Feature: Texas Examines the Need for More Extensive Confidentiality Rules In Mediation,* 37 HOUS. LAW. 38, 38 (2000) (discussing aspects of mediation that render it less formal, including the applicability of evidentiary and procedural rules and the broad range of available remedies).

107. *See* Jane Morley, *Focus On CBA Annual Conference and Forensic Evidence Mediation: A Lawyer Asks -What's In It For Lawyers?* THE LAWYERS WEEKLY Aug. 18, 2000 ("Mediation involves the client directly in the process of negotiating. Clients themselves define the issues, articulate their interests, suggest solutions and make immediate decisions about resolutions that can be implemented quickly."); *see also* Omar Saleem, *The Spratly Islands Dispute: China Defines the New Millennium*, 15 AM. U. INT'L L. R. 527, 545 (2000) (comparing China's reliance on mediation to settle disputes to the United States slow move toward relying on such a system). *See generally* Kovach & Love, *supra* note 22, at 110 (discussing how the mediator leads an informal and cooperative process, in the facilitative phase, involving active client participation).

108. *See* James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 93 (1997) ("The problem lies in the fact that the med-arbitrator may subconsciously and for whatever reason become more understanding and supportive of a particular party's position once becoming aware of certain facts."); *see also* CHRISTIAN BUHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS: DESIGNING PROCEDURES FOR EFFECTIVE CONFLICT MANAGEMENT 204 (1996) (asserting that since med-arbitrators participate in caucuses with parties, extraneous matters come up in general discussion introducing the potential for bias unrelated to the disputed issue to be resolved). *See generally* Paul Newman, *Mediation-Arbitration (Med-Arb) Can it Work Legally?,* 60 ARB. 176 (1994) (concluding that med-arbitrators cannot be realistically expected to remain impartial after exposure to legally irrelevant information given to them in meetings with parties with no formal rules of evidence to guide them).

109. *See* Peter, *supra* note 108, at 83 ("In a more formal arbitration, the decision is based on only facts that are relevant to the decision as opposed to a mediation where the parties present their version of relevant facts."); Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy Mediation Programs*, 68 AM. BANKR. L.J. 55, 56 (1994) (noting that the arbitrator acts more like a judge where the mediator typically allows the parties to tell their side of the story); *see also* Ross, *supra* note 103 (contrasting the roles of arbitrator and mediator).

110. *See* Peter, *supra* note 108 ("The problem lies in the fact that the med-arbitrator may subconsciously and for whatever reason become more understanding and supportive of a particular party's position once becoming aware of certain facts."); *see also* Dwight Golann & Marjorie Cormon Aaron, *Using Evolutions in Mediation,* 52 SPG DISP. RESOL. J. 26, 29 (1997) (citing the difficulty mediators have when trying to hide their opinions about the merits); Michael E. Harrington, *A Review and Evaluation of the Hong Kong Airport Core Programme Mediation Rules: Specifically Rules 15 and 16 in the Context Of Impasse,* 15 B.U. INT'L L.J. 213, 218 (1997) (finding that parties may be unwilling to fully disclose all of the facts available to them out of a concern that those facts could work against them during the arbitration phase).

this is the case, due process can ultimately be outcome determinative.[111] Therefore, the mediator should be especially sensitive to the dynamics of the mediation in order to serve later as arbitrator in a "Med-Arb" proceeding involving the same dispute.[112]

The "Med-Arb" process is a combination of aspects of mediation and arbitration, where the same person serves in both the roles of the mediator and arbitrator of the same dispute.[113] Med-Arb proceedings are most common in the German and Swiss ADR systems.[114] Although the combination of both roles may not be desirable in international contests,[115] there can be

111. *See* Bompey, Delikat & McClelland, *supra* note 15, at 81 (expressing concern regarding arbitrator will be able to discount unfavorable information learned within the confidence of the mediation); *see also* STEPHEN B. GOLDBERG, DISPUTE RESOLUTION 246 (1985) (arguing that because the med-arb method first employ mediation, the med-arbitrator is likely to have acquired information in attempting to bring about a settlement that should have no bearing on his decision as an adjudicator); Bruce A. Coane & Ross W. Wooten, *Successful Strategies in Mediating Employment Cases,* 23 WM. MITCHELL L. REV. 901, 923 (1997) (stating that when the same person acts as mediator and arbitrator, med-arb may be inappropriate).

112. *See* Bompey, Delikat & McClelland, *supra* note 15, at 81 (discussing the way bias may develop during the process of med-arb and its effect on making an arbitration award); *see also* GOLDBERG, *supra* note 111 (arguing that because the med-arb method first employ mediation, the med-arbitrator is likely to have acquired information in attempting to bring about a settlement that should have no bearing on his decision as an adjudicator); Coane & Wooten, *supra* note 111, at 923 (discussing whether the same person may act as both arbitrator and mediator).

113. *See* William C. Smith, *Taking The Fast Track To 2000: An ADR Provider Steps In To Hurry Resolution Of Y2K Disputes,* 85 A.B.A.J. 80 (1999) (stating that a 'med-arb' option allows parties that strike out in mediation to proceed immediately to arbitration before the same person); *see also* Bompey, Delikat & McClelland, *supra* note 15, at 81 (describing med-arb as a mix of mediation and arbitration where the same individual acts as both mediator and the arbitrator); Lewis M. Gill, *The Nature of Arbitration: The Blurred Line Between Mediatory and Judicial Arbitration Proceedings* 39 CASE W. RES. 545, 553 (1989) (noting that in "med-arb," the parties expressly authorize the arbitrator to act not only as mediator, but also authorize him to make final and binding decisions when mediation fails to produce agreement); Sherry Landry, *Med-Arb! Mediation With a Bite and on Effective ADR Model,* 63 DEF. COUND. J. 263, 266 (1996) (the Med-Arb model is the most basic form of ADR in that the same person acts as mediator and arbitrator).

114. *See* Kresmir Sajko, *Arbitration in Croatia: Current Status and Future Prospects: Croatian Companies as Parties of International Arbitral Disputes Governed by Application of Swiss Law,* 2 CROAT. ARBIT. YEARB. 79, 80-83 (1995) (discussing the application of Swiss procedural law in the context of international arbitration). *See generally* Peter, *supra* note 108, at 112 ("German/Swiss settlement intervention process has certain differences and limitations which set it apart from that which is generally understood by mediation, and is accordingly not what one used to the American practice would expect from a mediator: The main purpose of the German/Swiss arbitrator is to arbitrate, not to settle the case."); Rau & Sherman, *supra* note 29, at 119 (noting the continuing changes in international arbitration processes, including commitment to less formal dispute resolution processes).

115. *See* Peter, *supra* note 108, at 84 ("[T]he original med-arb process is not a desirable process format for international arbitration. This, therefore, implies that an alternative med-arb format should be used"); *see also* Darrick M. Mix, *ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanisms*, 12 OHIO ST. J. DISP. RESOL. 463, 477 (1997) (stating how that process of med-arb has come under fire by critics who claim that it undermines the neutral's ability to mediate because parties may not be as forthcoming if they know the mediator may become the arbitrator). *See generally* Michael F. Hoellering, *Mediation & Arbitration: A Growing Interaction*, 52 DISP. RESOL. J. 23 (1997) (reaffirming conventional wisdom that arbitration and mediation operate best when employed as separate processes).

several advantages to merging a mediator and an arbitrator in Med-Arb.[116] There is legitimate concern that the same person assumes both roles because remaining neutral becomes a problem and thereby may compromise the integrity of each process.[117] Further, the disputants might also be confused with the switch in roles by the mediator/arbitrator.[118] The advantage of having the integrated Med-Arb process is its efficiency, however, given that the parties will not lose any time or momentum attained in the combined proceeding, had they otherwise engaged in separate proceedings.[119]

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116. *See* Richard W. Laner & Julia W. Manning, *Interest Arbitration: A New Terminal Impasse Resolution Procedure For Illinois Public Sector Employees,* 60 CHI.-KENT. L. REV. 839, 850 (1984) ("The "med-arb" process can be effective because first, it encourages the parties to settle in arbitration and second, the "parties participate in the outcome, challenging the arbitrator to justify and explain settlements suggested or compromises proposed."); *see also* David Zukher, Note*, The Role Of Arbitration In Resolving Medical Malpractice Disputes: Will A Well-Drafted Arbitration Agreement Help The Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 141 n.27 (1998) (citing examples of why med-arb would be a beneficial way for parties to resolve their disputes outside of the court system). *But see* Hoellering, *supra* note 115 (reaffirming conventional wisdom that arbitration and mediation operate best when employed as separate processes).

117. *See* Bompey, Delikat & McClelland, *supra* note 15, at 81 (questioning the ability to discount unfavorable information when making the arbitration award); Gil Fried & Michael Hiller, *Alternative Dispute Resolution Symposium: ADR In Youth And Intercollegiate Athletics,* 1997 B.Y.U.L. REV. 631, 640 (1997) ("This concern can chill the communication process in mediation and force arbitration."); *see also* BUHRING-UHLE*, supra* note 108, at 206 ("The arbitrator cannot be expected to banish from his mind things he heard as a mediator; it perverts arbitration"); Fried & Hiller, *supra* note 117 (posing possible drawbacks to the system if a party knows the mediator/arbitrator might also arbitrate the dispute); Hoellering, *supra* note 115 (reaffirms conventional wisdom that arbitration and mediation operate best when employed as separate processes); Darrick M. Mix, *ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanism,* 12 OHIO ST. J. ON DISP. RESOL. 463, 477 (1997) ("This process has come under some fire by critics who charge that it may undermine the neutral's ability to mediate because parties may not be as forthcoming if they know the mediator may become the arbitrator.").

118. *See* CHIEF JUDGE'S N.Y. STATE COURT ALTERNATIVE DISPUTE RESOL. PROJECT, COURT-REFERRED ADR IN N.Y. STATE 7 (1996) (finding that the blurring of "the lines between mediation, neutral evaluation and even arbitration can have serious consequences."); *see, e.g.,* Gill, *supra* note 113 (asserting that in 'med-arb,' the parties expressly authorize the arbitrator to act not only as a mediator, but also authorize him to make final and binding decisions when mediation fails to produce agreement). *See generally* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U.L. REV. 937, 937 (1997) (citing confusion as one reason not to mix roles between arbitrators and mediators).

119. *See* Kathryn L. Hale, *Nonbinding Arbitration: An Oxymoron?*, 24 U. TOL. L. REV. 1003, 1005 n.18 (1993) ("An advantage of med-arb is efficiency. After the mediation fails, the parties do not seek another neutral party to render a decision. Instead, they simply continue with the mediator who likely knows most of the information needed to make a decision."); *see also* Landry, *supra* note 113, at 263 (discussing the benefits of med-arb). *But see* Hoellering, *supra* note 115 (reaffirming conventional wisdom that arbitration and mediation operate best when employed as separate processes).

Some other advantages of the Med-Arb process include: (1) cost efficiency;[120] (2) flexible remedies;[121] (3) a speedy process;[122] (4) an informal setting[123] and (5) a result satisfactory to all parties.[124] This Med-Arb method may be more productive than arbitration alone, because the initial emphasis on mediation allows the parties to narrow the issues and thereby make the ultimate result somewhat more predictable.[125] This process, however, also has disadvantages.[126]

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120. *See* Landry, *supra* note 113, at 263 (discussing mediation in general, and its advantages over trial and other methods of dispute resolution); *see also* Edward Brunet, *Measuring the Costs of Civil Justice*, 83 MICH. L. REV. 916, 934 (1985) (noting how the relatively high cost of all trials, jury or bench, is certain to feed existing efforts to implement new settlement and mediation mechanisms); Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 16 (1990) (speculating that if mediation were universally available, taxpayers would save $9.6 million annually in court costs and divorce litigants would save over $88.6 million per year in legal fees).

121. *See* Landry, *supra* note 113, at 263 (noting how during joint mediation sessions are combined with individual caucuses where mediators take an active role in dispute resolution); *see also* Leonard L. Riskin, *The Special Place of Mediation In Alternative Dispute Processing*, 37 U. FLA. L. REV. 19, 27 (1988) (noting the continuing confusion regarding the distinctions among the various ADR methods); *see, e.g.*, Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA L. REV. 885, 901 (1997) (noting that proponents of interest-based mediation argue that by focusing the parties away from their legal rights and offering more flexible remedies than a court can render, disputes can be resolved in ways that are better for both parties).

122. *See* Landry, *supra* note 113, at 263 (comparing length of trial proceedings to effective ADR models); *see also* Stephen B. Goldberg, *The Mediation of Grievances under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270, 290 (1982) (noting that if mediation is conducted in the most efficient fashion, that is three grievances per day on a regularly scheduled basis, a success rate slightly in excess of twenty percent will produce both time and cost savings); *see, e.g.*, New York City Commission on Human Rights, *Civil Rights Law in Transition,* 27 FORDHAM URB. L.J. 1105, 1120 (2000) (discussing how the EEOC can process a case through mediation within thirty days, and if the parties are willing, can do it even more quickly than that).

123. *See* Landry, *supra* note 113, at 263 (discussing how participants in mediation can air their concerns more freely); *see, e.g.,* Detlev Frehsee, *Restitution and Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications*, 3 BUFF. CRIM. L. R. 235, 236 (1999) (discussing how in German criminal cases the informal setting offers the opportunity to get to know the offender as a person instead of a monster); Gerber, *supra* note 120 (discussing how in divorce proceedings, the informal atmosphere reduces hostility, encourages direct communication, and allows an airing of emotional feelings, even if they are irrelevant).

124. *See* Landry, *supra* note 113, at 263 (noting how a satisfactory solution can be obtained to which all the participants have agreed as opposed to being imposed upon them); *see also* Jones, *supra* note 15, at 491 (noting that a more satisfactory result is dependant on parties being frank and free to share with one another); *see, e.g.,* Patricia Monroe Wisnom, *Probate Law and Mediation: A Therapeutic Perspective*, 37 ARIZ. L. REV. 1345, 1358-59 (1995) (discussing mediation's role in satisfactorily resolving conflicts in the probate system).

125. *See* Landry, *supra* note 113, at 265 (comparing the med-arb method with orthodox arbitration or the trial process where participants have less control over the issues in dispute); *see also* GOLDBERG, *supra* note 111, at 246 (noting relevance in disputes involving many complex contractual issues as opposed to personal injury disputes, where the single contested issue is damages); Peter, *supra* note 108, at 106 (noting that by identifying and isolating disputed facts the parties should be able to narrow the issues in dispute, dispose of undisputed issues, and hence save time and money).

126. *See* Peter, *supra* note 108, at 98 ("First, the settlement agreement is likely to resemble a decision more than a voluntary dispute resolution. Second, the parties are more reluctant to be candid with the med-arbitrator than with a mediator. Third, the arbitration part suffers from the possibility of a biased arbitrator."); *see also* Lon Fuller, *Collective Bargaining and the Arbitrator*, 1962 NAT'L ACED. ARB. 8 (1985) (arguing that an agreement resulting from such strong-arm tactics is neither voluntary nor superior to a judicially imposed decision). *See generally* Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role,* 24 FLA. ST. U.L. REV. 949, 974 (1997) (discussing how mediation can convert to med-arb).

There is significant criticism that, if the person serving as the "Med-Arb" can make a binding decision, the integrity of the adjudicative role is somehow compromised.[127] The "Med-Arb" is likely to hear more inadmissible evidence than a trial judge;[128] given the lack of formal procedures of the Med-Arb process,[129] incidents of perjury may result.[130] The parties to a Med-Arb proceeding may be more hesitant to reveal information, knowing that the "Med-Arb" will exercise judgment.[131] In contrast, parties to a mediation are more likely to reveal information because the result of the proceeding is non-binding.[132] The binding nature of the

127. *See* Landry, *supra* note 113, at 265 (citing an argument by Professor Lon Fuller, that if an impasse occurs and a binding decision must be made, the med-arbitrator will have compromised the integrity of the adjudicative role); *see also* WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT 78 (1988) (arguing that the binding nature will give the parties incentives to take the mediation stage more seriously). *But see* GOLDBERG, *supra* note 111, at 246 (arguing that because the med-arb method first employs mediation, the med-arbitrator is likely to have acquired information in attempting to bring about a settlement that should have no bearing on his decision as an adjudicator).

128. *See* Landry, *supra* note 113, at 265 (arguing that a "med-arb" is more likely than a bench judge to hear inadmissible evidence, thereby making the arbitrator's job more difficult). *But see* BRAZIL, *supra* note 127 (arguing that bench judges will hear inadmissible evidence yet routinely disregard it, and med-arbiters can successfully do the same); Kwang-Taeck Woo, *A Comparison of Court-Connected Mediation in Florida and Korea,* 22 BROOK. J. INT'L L. 605, 627 (1997) (noting how in "med-arb" hearings, privileged communications that are used in a disciplinary proceeding must be used only for the internal use of the body conducting the investigation, and are inadmissible as evidence in any subsequent legal proceedings).

129. *See* Kovach & Love, *supra* note 22, at 108 (discussing how in the facilitative phase, the neutral leads an informal and cooperative process involving active client participation and both joint and private sessions); *see also* LAURENCE D. CONNOR, HOW TO COMBINE FACILITATION WITH EVALUATION: FOURTEEN ALTERNATIVES TO HIGH COST LITIGATION 15 (1996) (describing the med-arb model in a two-step which the neutral facilitates settlement until impasse is reached and then evaluates the case to bring closure). *See generally* Stephen Hayford, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue,* 10 OHIO ST. J. ON DISP. RESOL. 343, 393 (1995) ("In order to preserve the separation between the mediation and arbitration processes, arbitrators who mediate would be particularly well-advised to avoid engaging in premature evaluation of the strengths and weaknesses of the parties' respective cases.").

130. *See* Landry, *supra* note 113, at 265-66 (citing critics that fear that participants will attempt to manipulate the mediator by hiding damaging information, exaggerating the truth and even lying); Kovach & Love, *supra* note 22, at 108 (describing the steps that should be taken in med-arb process to ensure efficiency). *But see* Dominguez-Urban, *supra* note 89, at 15 (arguing that med-arb and other adjudicative forms of ADR would require interpretation closer to the court model than traditional mediation, thereby confiding in the med-arbiter is not a substantial problem).

131. *See* Landry, *supra* note 113, at 266 (discussing how the truth lies somewhere between the two extremes set forth by med-arb critics and proponents, that the absence of information will neither destroy nor taint the fairness of the med-arb method); *see also* GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 79 (1983) ("The competitive negotiator relies on tension and fear to reach his or her desired outcome, so there is a tendency for communications to be distorted, thereby causing strained relationships."); Jeffrey C. Y. Li, *Strategic Negotiation in the Greater Chinese Economic Area: A New American Perspective*, 59 ALB. L. REV. 1035, 1042 (1996) (citing that competitive theory is flawed in that it is prepossessed towards confrontation, especially where there is a lack of information).

132. *See* Landry, *supra* note 113, at 264 (discussing how non-binding mediation is perceived to be conciliatory, as opposed to adversarial, and valuable when the participants want to maintain an ongoing relationship); *see, e.g.,* Michael Fitzgerald & Lynne M.L. Fitzgerald, *Mediation: A Systematic Alternative to Litigation for Resolution of Church Employment Disputes,* 5 ST. THOMAS L. REV. 507, 511 (1993) (discussing successful non-binding proceedings where participants use the process merely to gain information for future negotiations). *But see, e.g.,* Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U.L. REV. 493, 577 (1989) (stating that parties will likely not reveal information that will prejudice themselves in a binding arbitration proceeding when it is a divorce proceeding).

Med-Arb process may create a chilling effect on the parties, and thus, may impede the resolution of the matter in dispute.[133]

"While abhorrent to the legal cultures in most so-called Western societies, a number of Asian arbitral regimes (but not all) integrate the mediation or conciliation right into the arbitration process itself (to varying degrees) using the arbitrator as the conciliator."[134] This is especially important in maintaining sound trade relations between the United States and Asia, given that 40% of U.S. exports are to Asian countries.[135] Further, German and Swiss arbitrators also incorporate elements of mediation during arbitration, thereby serving the dual roles of a Med-Arb.[136]

The definition of mediation and the plethora methods of mediation employed by parties vary among different cultures.[137] These various methods have been described as facilitative,

133. *See* Landry, *supra* note 113 ("Some people believe that classical mediation theory exaggerates the level of trust and the freedom from posturing the parties."). *But see* John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 805 (1992) (discussing the necessity of all clients understanding that some information will not be shared with one or more other clients involved so long as withholding the information does not operate unfairly to disadvantage or mislead any other party to the mediation). *But see, e.g.,* Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1701 (1992) (reasoning that nondisclosure of information is often not critical to reasoned decision-making).

134. *See* Carmen Collar Fernandez*, International Intellectual Property Dispute Resolution: Is Mediation A Sleeping Giant?*, 53 DISP. RESOL. J. 62, 65 (1998) (discussing how in some cultures, mediation is deemed a mandatory step before the arbitration process); *see, e.g.*, Harold I. Abramson, *Protocols For International Arbitrators Who Dare to Settle Cases*, 10 AM. REV. INT'L ARB. 1, 5 (1999) ("[T]he most complete integration of the role of the arbitrator and conciliator is in the Chinese model, where the arbitrator may become a conciliator, then become an arbitrator again at any stage of the proceedings."); S. Isabella Chung, *Developing a Documentary Credit Dispute Resolution System: An ICC Perspective*, 19 FORDHAM INT'L L.J. 1349, 1363 (1996) (discussing how international disputes invoking non-arbitral procedures, including conciliation and mediation, continue to represent only a small proportion of cross-border claims).

135. *See* Fernandez*, supra* note 134, at 68 (discussing how cultural and experience-based influences toward mediation certainly indicate an increase in the use of mediation in international disputes); *see also* Saleem*, supra* note 107, at 582 ("China was at a stage which the United States currently wants to explore, namely less use of lawyers and more reliance upon mediation to settle disputes."). *See generally* Qizhi Luo, *Autonomy, Qualification and Professionalism of the PRC Bar*, 12 COLUM. J. ASIAN L. 1, 8-9 (1998) (commenting on the exclusion of lawyers from the political and social arenas in China during this period and the reliance upon mediation).

136. *See* Peter, *supra* note 108, at 112 (submitting that a German or Swiss arbitrator believes the settlement conference part is not the main task but merely a "noble office" and accordingly, this may be one reason for the rather "low-intensity form of mediation."); *see also* Vincent Fischer-Zernin & Abbo Junker, *Arbitration and Mediation: Synthesis or Antithesis?*, 5 J. INT'L ARB., MARCH 1988, 21, 30 (1988) (noting German authors who seem to say that the settlement intervention is regularly practiced in German arbitration); Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 537, 554 (noting that priority will always then be afforded to the rendering of an enforceable award and towards making sure that the arbitrator's impartiality is not questioned).

137. *See e.g.*, The Administrative Dispute Resolution Act, 5 U.S.C. § 571(3) (1994) ("[A]lternative means of dispute resolution is defined as "any procedure used in lieu of an adjudication . . . to resolve issues in controversy, including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials and arbitration, or any combination thereof."); Harrington, *supra* note 110, at 216-17 (providing that the Government of Hong Kong defines mediation as a private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement that should be entered into by both parties with an open mind in an attempt to settle the dispute amicably); J. Joseph Loewenberg, *Introduction and Overview: The Neutral and Public Interests in Resolving Disputes,* 13 COMP. LAB. L. 371, 377 (1992) (commenting on how Italian mediators may be more sensitive to public interests in the form of announced policies, as well as to the parties' relationship, when they are conciliating).

evaluative, transformative, bargaining, therapeutic and non-caucus.[138] The term "mediation" in an international context may be analogous to "conciliation," and "mediators" are commonly known as "conciliators."[139] One variety of mediation involves each party appointing a conciliator, whom together are charged with the duty to negotiate a settlement.[140] In the international employment dispute context, all of these ADR modalities are all readily adaptable.[141]

V. Conclusion

Whenever and wherever possible, I am a proponent of transformative forms of mediation as discussed above, whereby the parties take primary responsibility for the dynamics. The role of the mediator is to facilitate communication, not to impose terms or to dictate results. This presumes restoring a continuing relationship between the parties as an important objective. The dynamics of transformative mediation, however, can take somewhat more time than other forms of mediation.

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138. *See* Alison E. Gerencser, *Dispute Resolution in the Law School Curriculum Opportunities And Challenges, Part Ii: Alternative Dispute Resolution Has Morphed Into Mediation: Standards Of Conduct Must Be Changed,* 50 FLA. L. REV. 843, 848 (1998) ("[T]here are numerous dichotomous approaches to . . . mediation: bargaining vs. therapeutic, directive vs. passive, broad vs. narrow, aggressive vs. regular, settlement vs. transformative, and evaluative vs. facilitative."); *see, e.g.,* Amy S. Wei, *Can Mediation Be the Answer to Taxpayer's Woes?: An Examination of the Internal Revenue Service's Mediation Program,* 15 OHIO ST. J. ON DISP. RESOL. 549, 566 (2000) ("[T]he Georgia Office of Dispute Resolution allows mediation . . . [to be] arranged on a case-by-case basis by the judge, and the judge may refer any civil, criminal, or juvenile ease to mediation."). *See generally* Maureen E. Laffin, *Preserving the Integrity of Mediation Through Adoption of Ethical Rules for Lawyer-Mediators,* 14 N.D. J.L. ETHICS & PUB. POL'Y 479, 526 (2000) (discussing the limits and parameters defined by process of mediation).

139. *See* Mao-chang Li, *Doing Business In China And Latin America: Developments In Comparative And International Labor Law: Legal Aspects of Labor Relations in China: Critical Issues for International Investors*, 33 COLUM. J. TRANSNAT'L L. 521, 555 (1995) ("China's labor dispute resolution mechanism is highly administrative rather than judicial, it is advisable for international investors involved in labor disputes to exhaust informal means, such as mutual consultation, mediation, or conciliation, to the fullest extent possible before referring the dispute to the arbitration commission."); P. Mweti Munya, *The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L.J. 537, 544-45 (1999) (citing "Principle Four" of the Organization of African Unity Charter, which immortalizes the principle of peaceful settlement of disputes by mediation or conciliation); *see, e.g.*, Daniela Ivascanu*, Legal Issues in Electronic Commerce in the Western Hemisphere*, 17 ARIZ. J. INT'L & COMP. LAW 219, 224-25 (2000) (discussing how in the International Chamber of Commerce, conciliation, which can also be referred to as mediation offers parties a variety of high-speed, low-cost methods for resolving disputes).

140. *See Protecting Confidentiality in Mediation,* 98 HARV. L. REV. 441, 459 (1984) (stating that conciliators should maintain a reputation for impartiality to encourage open communication); *see, e.g.,* Kresmir Puharic, *Conciliation as a Method of Settlement of International Commercial Disputes,* 4 CROAT. ARBIT. YEARB. 155, 162 (1997) (describing three ways in which the Arbitration Court selects conciliators); Antti Suviranta, *The Neutral and Public Interest in Resolving Labour Disputes in Finland,* 13 COMP. LAB. L. 421, 422 (1992) (discussing the integral role of the official conciliator with Finland's mediation in labor disputes).

141. *See* Boskey, *supra* note 10, at 196 (discussing basic principles governing international commercial arbitration); *see also* Henry H. Drummonds, *Transnational Small and Emerging Business in a World of Nikes and Microsofts*, 4 J. SMALL & EMERGING BUS. L. 249, 305-06 (2000) (discussing how the perception grows that only unions that are international in more than name can counterbalance the monopoly powers of transnational business in the global markets); Melissa Leigh Lauderdale, *Forum Selection Clauses and Forum Non Conveniens in International Employment Contracts*, 4 D.C.L. J. INT'L L. & PRAC. 117, 117-18 (1995) (discussing procedural limits for the resolution of international employment contractual issues by means of alternative dispute resolution).

With the proliferation of video conferencing, cyberspace can quickly become conducive to transformative mediation dynamics. Abstract cyberspace that is not complemented by video technology may not be conducive to many types of otherwise potentially effective forms of transformative mediation. I have few concerns about employment mediation viability in transnational circumstances, because I am cautiously optimistic that computer technology can expedite and alleviate otherwise more structural concerns.

Where the mediator and the parties to an international employment dispute are especially sensitive to effectuating open communications and issues of due process, the integration of technology promises to remedy these concerns and advance the new era of ADR.

Ireland, the host country for this unprecedented international labor conference, is a world leader in many aspects of computer technology. The Irish legal regime, however, has not had extensive, vibrant, and enthusiastic extensive experience with employment dispute mediation. As a major international site for global computerization and as an important member of the European Union, Ireland must quickly adapt its very modest and tentative dispute resolution mechanisms to its state-of-the-art technological capacities.

A Comparison of Union and Non-Union Employee Protections in Ireland and the United States

By George Nicolau*

It is a pleasure to be at this Transatlantic Perspectives Conference to both speak and learn. As my topic, I have chosen to compare union and non-union employee protections in Ireland and the United States.

Let me begin this presentation with a confession. I do not know as much as I would like to about employee protections in Ireland. This is not from want of trying, but it is not easy to gather precise information from 3000 miles away, even with the Internet and all other forms of modern communication. I know the basics, including the statutory protections provided to both union and non-union workers through the various Unfair Dismissal Acts,[1] the existence and structure of the Employment Appeals Tribunals,[2] and the alternatives at common law.[3] What is difficult to understand is how all of these work in practice.[4] Precise answers to questions dealing with the impediments to workplace justice in the tribunal system and the associated delays, and employees' unions' and employers' satisfaction with the system are hard to come by.[5] I have some information in this regard, but you should understand that my impres-

1. *See* DOING BUS. IN IR. (MB) § 6.05 (1999) (discussing The Unfair Dismissals Act 1977, which was enacted to provide "protection against arbitrary or unjustified dismissal by giving the dismissed employee a right of redress").

2. *See* DOING BUS. IN IR., *supra* note 1 (discussing the establishment of the Employment Appeals Tribunal "under section 18 of The Unfair Dismissals Act 1977.")

3. *See* Mary Cummins, *Seanad Welcomes Bill to Amend Legislation on Unfair Dismissals*, IRISH TIMES, Mar. 11, 1993, at 6 (mentioning employee protection against wrongful dismissal under the common law as compared to protection through legislation). DOING BUS. IN IR., *supra* note 1 (describing the influences of both statutory law and the common law on Ireland's employment law); DOING BUS. IN IR., *supra* note 1, at § 6.02 (discussing both case law and legislative implications on an employer's options when dealing with unions).

4. *See* Declan Madden & Tony Kerr, Capsule Review, *Unfair Dismissal: Cases and Commentary*, 13 COMP. LAB. L.J. 247 (1992) (book review which examines current Irish unfair dismissal law); Michael Foley, *Employment Appeals Increase by 6%*, IRISH TIMES, Sept. 17, 1996, at 2 (noting that "the number of claims and appeals referred to the Employment Appeals Tribunal increased by 6 percent last year."). *See generally* Iseult O'Malley, *Bill to Give Equality Before Law to Narrow the Flaws of the Civil Legal Aid Scheme Are Not Adequately Addressed in the New Bill*, IRISH TIMES, May 11, 1995, at 14 (discussing generally the expansion of employment and social welfare law in Ireland since the enactment of the Unfair Dismissals Act, 1977).

5. *See* Brian Wilkinson, *Legal Protection of Part-Time Workers: Some Irish Developments*, 14 COMP. LAB. L. 33, 33 (1992) (discussing the specific issue of legal protection of part-time workers in the Irish system); Cummins, *supra* note 3 (discussing the Unfair Dismissals Act's effect on Ireland's employment law); *See generally* Ferdinand Von Prondzynski, *Irish Labour Law and the European Community*, 11 COMP. LAB. L. 498, 498 (1990) (discussing the framework of Irish labor law in general and in relation to the European Community).

* **Long-time arbitrator and mediator, George Nicolau is a Past President of both the National Academy of Arbitrators and the International Society of Professionals in Dispute Resolution. A version of this paper was delivered at the Transatlantic Perspectives on Labor & Employment Law Conference at University College Dublin, July 22, 2000.**

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sions are just that, impressions, and should not be taken as a complete description or a definitive analysis of the way Ireland deals with issues of workplace justice.

There is a significant difference between the way in which Ireland and the United States approach the issue of worker protection.[6] In fact, this difference exists when you compare the United States with virtually any other country in the world.[7] In the United States the difference is the lack of, or the limited nature of, governmental involvement.[8] I'd like to discuss why this is so, how and why it came about, in a moment but first the differences.

It's best to begin by looking at the differences from the perspective of a few decades ago. There has been, in the United States, over the last four decades, what I have called elsewhere, the "Europeanization of the American workplace"[9]—an overlay of protective legislation that is relatively new and which introduces protections that largely did not exist before the 1960s.[10] This legislation includes the Civil Rights Act of 1964,[11] the Occupational Safety and Health

6. *See* Carol Daugherty Rasnic, *Balancing Respective Rights in the Employment Contract*: *Contrasting the U.S. "Employment-at-Will" Rule with the Worker Statutory Protections Against Dismissal in European Community Countries*, 4 D.C. L. J. INT'L L. & PRAC. 441, 441 (1995) (comparing employment law in the United States with that in the European Community, which includes Ireland); Donald C. Dowling, Jr., *Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers*, 11 J. INTL. L. BUS. 564, 564 (1991) (discussing employment laws in the European community as compared to the United States' model); Americo Pla Rodriguez, *Termination of Employment on the Initiative of the Employer*, 5 COMP. LAB. L. 221, 221 (1982) (discussing the law on termination of employment in several countries, including Ireland and the United States).

7. *See* Janice R. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REFORM 207, 207 (1983) (comparing the United States' position on unfair dismissal with that of other major industrialized nations); Rasnic, *supra* note 6 (comparing employment law in the United States with that in the European Community); Jack Stieber, *Protection Against Unfair Dismissal*: *A Comparative View*, 3 COMP. LAB. L. 229 (1980) (contrasting the approach in the United States toward the issue of unfair dismissal with the approach of other countries, and proposing that the United States provide further statutory protection for employees).

8. *See* Rasnic, *supra* note 6, at 444-45 (1995) (noting the American idea of "non-governmental intervention in economic affairs," specifically as seen in the at-will contractual rule); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1144 (1989) (discussing the American common law presumption of employment-at-will and indicating that a system of further governmental involvement in this area would be costly). *See generally* Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 1 (1984) (generally discussing the employment at will doctrine and issues which might arise if the doctrine was altered).

9. *See* George Nicolau, Gilmer v. Interstate/Johnson Lane Corp.: *Its Ramifications and Implications for Employees, Employers, and Practitioners*, 11 U. PA. J. LAB. & EMP. L. 177, 177 (1998).

10. *See* Kyle B. Arndt & Christina A. Bull, *Recent Development: The Impact of the Family and Medical Leave Act of 1993 on the Legal Profession*, 3 UCLA WOMEN'S L.J. 77, 78 (1993) (describing the lack of both the existence and the need for an act such as the Family and Medical Leave Act a generation ago); Nicolau, *supra* note 9 (discussing this growth in protective legislation); J. Clay Smith Jr., *Shifts of Federalism and Its Implications for Civil Rights*, 39 HOW. L.J. 737, 739 (1996) (describing the existence of some civil rights laws prior to the 1960s civil rights movement, and the ultimate passage of the more comprehensive Civil Rights Act of 1964).

11. *See* The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1–2000e-17 (2000); *see also* J. Smith, *supra* note 10, at 739-40 (describing the Civil Rights Act of 1964 as a "comprehensive undertaking to prevent through peaceful and voluntary settlement discrimination in voting . . . in places of accommodation and public facilities, [in] federally secured programs and in employment.").

Act (OSHA),[12] the Employee Retirement Security Act (ERISA),[13] the Americans with Disabilities Acts (ADA),[14] the Age Discrimination in Employment Act (ADEA),[15] and the Family and Medical Leave Act (FMLA),[16] almost all of which presuppose individual litigants seeking to enforce public norms.[17]

However, in the United States, prior to the 1960s, statutory protections against unfair discharge[18] were essentially limited to rights conferred by the 1935 National Labor Relations Act[19]—delineating the right to organize in unions[20] or to engage in protected concerted activ-

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12. *See* Occupational Safety and Health Act, 29 U.S.C. § 651 (LEXIS 2000); *see also* Jonathan Jacob Nadler, Note, *Employee Participation in Occupational Safety and Health Review Commission Proceedings*, 85 COLUM. L. REV. 1317, 1318 (1985) (describing the Occupational Safety and Health Act as providing a system of standards intended to ensure safe working conditions).

13. *See* Employment Retirement Income Security Act, 29 U.S.C. § 1141(a) (LEXIS 2000); *see also* Jane D. Bailey, *Tenth Circuit Survey: ERISA Preemption*, 74 DENV. U. L. REV. 473, 474 (1997) (describing the Employment Retirement Income Security Act as providing protection for pension plans by requiring minimum standards of the plans).

14. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–12117 (LEXIS 2000); *see also* Edward J. McGraw, *Compliance Costs of the Americans with Disabilities Act*, 18 DEL. J. CORP. L. 521 (1993) (describing the Americans with Disabilities Act as being enacted to prevent discrimination against individuals with disabilities by providing standards and a private right of action).

15. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (LEXIS 2000); Grace Perry-Gaiter, Case Note, 27 HOW. L.J. 561 (1984) (describing the Age Discrimination in Employment Act as prohibiting employment discrimination based on age by employers, employment agencies, labor organizations and federal agencies).

16. *See* Family and Medical Leave Act, 5 U.S.C. §§ 6381–6387 (LEXIS 2000); Arndt & Bull, *supra* note 10, at 80-81 (describing the Family and Medical Leave Act as entitling eligible employees up to three months "unpaid leave per year" to care for family members).

17. *See* Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 157 (1984) (specifically discussing private litigants and the burden of proof under the Voting Rights Act); James T. O'Reilly, *Deregulation and Private Causes of Action: Second Bites at the Apple*, 28 WM. & MARY L. REV. 235, 239 (1987) (discussing litigants in product liability actions wherein the "product's manufacturer failed to notify the government about the product's deficiencies"); Nicolau, *supra* note 9 (describing these types of protective legislation "presuppos[ing] individual litigants seeking to enforce public norms").

18. *See* Janet C. Fisher, Note, *Reinventing a Livelihood: How United States Labor Laws, Labor-Management Cooperative Initiatives, and Privatization Influence Public Sector Labor Markets*, 34 HARV. J. ON LEGIS. 557, 575 (1997) (discussing private sector employees and "constitutional protections against unfair discharges"); Thomas C. Kohler, Propter Honoris Respectum: *The Disintegration of Labor Law: Some Notes for a Comparative Study of Legal Transformation*, 73 NOTRE DAME L. REV. 1311, 1325-26 (1998) (comparing American and German labor law, including the German "statutorily-based scheme of protection against unfair discharge"); Mary Jean Navaretta, *The Model Employment Termination Act—META—More Aptly the Menace to Employment Tranquility Act: A Critique*, 25 STETSON L. REV. 1027, 1027 (1996) (discussing the Model Employment Act and discharge law).

19. *See* National Labor and Relations Act, 29 U.S.C. §§ 141-197 (LEXIS 2000); David W. Orlandini, Comment, *Employee Participation Programs: How to Make Them Work Today and in the Twenty-First Century*, 24 CAP. U. L. REV. 597, 600 (1995) (describing the National Labor and Relations Act, which guaranteed employees the right to join labor organizations).

20. *See* David L. Gregory, *Breaking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L.J. 1, 30-31 (1997) (discussing the right to unionize in general and the "statutory labor relation law regime in the United States"); David A. Morand, *Questioning the Preemption Doctrine: Opportunities for State-Level Labor Law Initiatives*, 5 WIDENER J. PUB. L. 35, 82-85 (1995) (discussing ways to protect the right to unionize). *See generally* Peter B. Ajalat, Comment, *The Decline of the American Labor Movement: A Proposal for the Constitution As a Source of Workers' Rights*, 6 SETON HALL CONST. L.J. 683, 683 (1996) (discussing the right to unionize under the United States Constitution).

ity.[21] Obtaining even that limited legislative protection was not easy.[22] According to the Supreme Court at that time,[23] prior versions of such protection could not even pass constitutional muster.[24]

Protections against termination for reasons such as misconduct and incompetence existed only in the unionized sector.[25] If a person did not work in an enterprise that was unionized, protection against unfair discharge did not exist.[26] This protection in the unionized sector was

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21. *See* Rita Gail Smith & Richard A. Parr II, Note, *Protection of Individual Action As "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 369 (1983) (discussing the right of employees to engage in "concerted activities" under section 7 of the National Labor Relations Act); Charles E. Wilson, *The Replacement of Lawful Economic Strikers in the Public Sector in Ohio*, 46 OHIO ST. L.J. 639 (1985) (discussing concerted activities under the National Labor Relations Act and the replacement of "lawful economic strikers"); s*ee also* Charles J. Morris, *NLRB Protection in the NonUnion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1677 (1989) (discussing what constitutes concerted activities in a variety of settings).

22. *See* Ajalat, *supra* note 20, at 685-91 (describing the anti-labor forces present at the time leading up to the enactment of the National Labor and Relations Act); Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 IOWA J. CORP. L. 657, 719 (1996) (describing U.S. labor law as a "political bargain"); Orlandini, *supra* note 19, at 600-03 (describing the debate over unions leading up to the adoption of the National Labor and Relations Act).

23. *See* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 504-08 (1987) (discussing the role of the supreme court justices in respect to major constitutional decisions in the 1930s).

24. *See* PETER H. IRONS, THE NEW DEAL LAWYERS 252-253 (1982). Chief Justice Hughes and Justice Roberts voted to uphold the National Labor and Relations Act notwithstanding their key votes to strike down the Bituminous Coal Conservation Act of 1935, which established labor rules for coal mining, in Carter v. Carter Coal Co., 298 U.S. 238 (1936); *see also* NLRB v. Jones & Laughlin Steel Corp, 301 U.S. 1 (1937) (declaring the constitutionality of the National Labor Relations Act); *see also* Eric Grossman, Comment, *Where Do We Go From Here?* The Aftermath and Application of United States v. Lopez, 33 HOUS. L. REV. 795, 815-33 (1996). The Court initially resisted President Roosevelt's New Deal Reforms, however, "[s]hortly after his landslide re-election, President Roosevelt proposed legislation aimed at expanding the number of Justices from nine to fifteen, which would have allowed him to 'pack the Court.'" Although Congress did not support the President's plan, the Supreme Court heeded the President's message and began to "uphold" New Deal legislation. Thus, in 1937, the Court upheld the National Labor Relations Act under Congress' Commerce Clause power reasoning that "intrastate activities" are within Congress' power "if they bear such a close" relationship to commerce as to make their control "essential or appropriate to protect that commerce from burdens and obstructions . . ." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

25. *See* Christopher Osakwe, *Eason-Weinmann Center for Comparative Law Symposium on American Labor Relations Law in Comparative Perspective*, 58 TUL. L. REV. 1291, 1298 (1984) (asserting that employees collective bargaining only affords protection to union members); Spiros Simitis, *The Juridification of Labor Relations*, 7 COMP. LAB. L. 93, 123 (1986) (stating that "unions exercise their functions within a regulatory system combining guarantees of activity with control measures intended to secure the adjustment of the labor market to the general economic and social policy"); W. Gary Vause & Dulcina de Holanda Palhano, *Doing Business in China and Latin America: Developments in Comparative and International Labor Law: Labor Law in Brazil and the United States-Statism and Classical Liberalism Compared*, 33 COLUM. J. TRANSNAT'L L. 583, 608 (1995) (referring to unions that utilize the collective bargaining system as a means of obtaining employee protection).

26. *See* Sara Needleman Kline, *Sexual Harassment, Wrongful Discharge, and Employer Liability: The Employer's Dilemma*, 43 AM. U. L. REV. 191, 211 (1993) (stating that "[t]oday, just cause provisions are standard for collective bargaining agreements"); Osakwe, *supra* note 25, at 1293 (stating the importance of union membership and collective bargaining agreements to assure employee protection); Vause & Holanda Palhano, *supra* note 25, at 607-08 (stating that "protections are more likely to be obtained when employees are represented by unions . . . [t]hus the collective bargaining system is a principal means by which contractual employee protections against arbitrary discipline are obtained").

the result of privately conceived collective bargaining agreements that established individual systems of industrial government.[27] Sometimes, as in auto, steel and other basic industries, this system was industry-wide.[28] In other areas of employment, however, it only covered a single plant or workplace.[29] In each instance, the adjudicator of fairness was a private arbitrator,[30] selected by the union and the employer, who was empowered by their joint agreement to decide issues that they could not decide in their individual capacities.[31] These issues included contract interpretation and dismissal for cause.[32]

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27. *See* Richard A. Epstein, *Paper From the Yale Law Journal Symposium on the Legacy of the New Deal: Problems and Possibilities in the Administrative State: A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983) (stating that "[s]ince the advent of the New Deal, . . . common law principles have largely given way to a complex body of statutory and administrative law that treats labor law as a separate and self-contained subject"); Roger C. Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U. L. REV. 13, 18-9 (1982) (explaining how "unions . . . administer their own internal governments, asserting institutional authority to govern themselves and their members through internal rules, customs, and procedures"); Vause & Holanda Palhano, *supra* note 25 (discussing that the "collective bargaining system is a principal means by which contractual employee protections against arbitrary discipline are obtained in the United States").

28. *See* William Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1197 (1989) (discussing how unions brought stability into the garment industry); Hartley, *supra* note 27, at 44 (stating that "by 1940, the sectors of the economy having the heaviest concentration of blue-collar workers—mining construction, transportation, and manufacturing—became highly unionized as both the AFL and the Congress of Industrial Organization (CIO) organized industrial workers"); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 88-9 (1990) (discussing how collective bargaining can exist in specific labor markets such as the trucking and steel industry).

29. *See* Forbath, *supra* note 28, at 1200 (referring to a union composed of cigarmakers in Detroit); Hartley, *supra* note 27, at 84 (asserting that "[a]s early as 1962, nearly half of all union assets were held by local unions"); Rogers, *supra* note 28, at 89 (stating that union organization does not always exist on a national level, and that it may be more "disorganized and fractious").

30. *See* Hartley, *supra* note 27, at 58 (explaining that "unions get 'nominees seated in the governments' inner councils and administrative agencies . . . [and that] organized labor designates them"); Calvin William Sharpe, *Symposium: An Oral History of the National War Labor Board and Critical Issues in the Development of Modern Grievance Arbitration*, 39 CASE W. RES. 505, 505-06 (1989) (stating that "an overwhelming majority of these arbitration awards are issued by a single arbitrator"); Vause & Holanda Palhano, *supra* note 25 (asserting that the "labor arbitrator is a private adjudicator empowered by the parties").

31. *See* Victoria G.T. Bassetti, *Weeding RICO Out of Garden Variety Labor Disputes*, 92 COLUM. L. REV. 103, 108-09 (1992) (referring to the federal labor law system as a means of settling labor disputes); Sharpe, *supra* note 30 (explaining that the arbitrator is chosen by the parties in order to decide contractual issues that the management and union are unable to resolve on their own); Vause & Holanda Palhano, *supra* note 25 (explaining that the "parties make their own rules by private contract . . . [and that there is a] widespread reliance on a private institution, arbitration").

32. *See* Hartley, *supra* note 27, at 53 (referring to "the negotiation and administration of these industrial rules"); Sharpe, *supra* note 30, at 507 (discussing the importance of arbitration in labor contract disputes); Vause & Holanda Palhano, *supra* note 25 (stating that "unions can demand in negotiation of a collective bargaining agreement . . . that the employer must have "just cause" for discharge").

The predominant characteristic of these systems was that they were voluntary; the result of agreements between unions and employers.[33] This is not to say that all employers enthusiastically agreed to third party determinations.[34] After all, this agreement involved sacrificing what had previously been their unilateral authority.[35]

Oftentimes, these agreements were executed in order to establish industrial peace.[36] Specifically, unions demanded arbitration, in the form of third party determinations, as the condition for abandoning industrial warfare.[37] Professor David Feller,[38] along with oth-

33. *See* Bassetti, *supra* note 31, at 115 (discussing how unions and employers create their own agreements); Sharpe, *supra* note 30, at 510 (explaining that collective bargaining is characterized by "bilaterally determined terms and conditions of employment"); Osakwe, *supra* note 25, at 1293 (explaining that collective bargaining is "still the best mechanism available to companies to tell their employees "we are all in this together," which illustrates the voluntary nature of the agreement).

34. *See* Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 693 (1993) (stating that there are instances where an employer might opt for less efficient alternatives in order to avoid the union); Hartley, *supra* note 27, at 41 (discussing an instance in which "business leaders . . . launched an attack on [a] union movement"); Martin H. Malin, *Symposium on Labor Arbitration Thirty Years After the Steelworkers Trilogy*, 66 CHI.-KENT. L. REV. 551, 554 (1990) (illustrating instances where "unions and employees could not enforce collective bargaining agreements because they lacked consideration or mutuality").

35. *See* Bassetti, *supra* note 31, at 115 (stating that the "two sides create their own living arrangements" which indicates that the employer must sacrifice some autonomy); Sharpe, *supra* note 30, at 510 (stating that decisions were made bilaterally); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 580 (1992) (referring to unions as detracting from employer authority which has served to create an anti-union sentiment).

36. *See* Bassetti, *supra* note 31, at 106 (1992) (discussing "a cohesive approach to labor law that preserves a precarious peace between labor and management"); Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 420 (1992) (stating that a key aspect of labor law has been to "promote industrial peace"); Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1317 (1990) (stating that the "primary intent . . . was to preserve industrial peace and to eliminate labor disruption that interfered with commerce").

37. *See* Dau-Schmidt, *supra* note 36 (proposing that much of the need for labor-management relations stemmed from a desire to avoid "strife and economic warfare" in the workplace); Hartley, *supra* note 27, at 19 (discussing how arbitration functions as a means for avoiding conflicts that arise between unions and employers); Rogers, *supra* note 28, at 107 (discussing the avoidance of industrial warfare through no-strike provisions which increased union members' job security).

38. *See* James B. Atleson, *Law and Union Power: Thoughts on the United States and Canada*, 42 BUFF. L. REV. 463, 498 (1994) (referring to an "observation . . . made by David Feller . . . [that] courts have viewed arbitration to be a substitute for the strike"); *See* Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135, 168 n.202 (2000) (referring to a brief filed by David Feller in a companion case to Lincoln Mills. In Lincoln Mills, Justice Douglas remarks "on the need to promote industrial peace and linking arbitration to agreements not to strike").

ers,[39] has pointed out that, unlike the situation that exists in the commercial world, arbitration in the labor-management arena is not the alternative to litigation.[40] In labor-management relations, arbitration is truly the alternative to the strike.[41]

Over the years, many of these agreements providing for voluntary arbitration were created through the efforts of third party facilitators or mediators.[42] Beginning with the Anthracite Board of Conciliation established by a commission appointed by President Theodore Roosevelt[43] and continuing through and beyond to the 1910 Protocols of Peace fostered by Louis Brandeis[44] and the 1911 Hart, Schaffner & Mark Accord fashioned by Clarence Dar-

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39. *See* Roberto Corrada, *Taft-Hartley Symposium: The First Fifty Years: The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919, 931 n.61 (1998) (noting David Feller as "acknowledging a trend toward arbitration as a substitute for litigation"); *see also* Atleson, *supra* note 38, at 499 (asserting that "Alan Hyde concluded that legislation is likely when 'a perceived upsurge of worker discontent or unrest leads to a perception . . . [that] some concession is desirable in order to restore worker loyalty to the regime, restore order, or simply 'cool down' the situation'"); Turner, *supra* note 38 (referring to Arthur Goldberg and David Feller as filing a brief on the impact of arbitration agreements on the prevention of strikes).

40. *See* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L 104, 116 n.51 (1990) (stating that "domestic labor arbitration, particularly labor grievance arbitration, arguably 'is not a substitute for litigation . . . [but] rather, a device by which the parties agree to accept the judgment of a third party instead of fighting out the issues on the picket lines'"); *see also* Corrada, *supra* note 39 (stating that "David Feller has echoed the sentiment that labor arbitration is different and special based on its goals, while at the same time acknowledging a trend toward viewing all arbitration as a substitute for litigation"); Vause & Holanda Palhano, *supra* note 25, at 608-609 (stating that arbitration is a more effective and economically efficient tool for settling labor disputes than is litigation).

41. *See* Kenneth A. Sprang, *Beware The Toothless Tiger: A Critique of The Model Employment Termination Act*, 43 AM. U. L. REV. 849, 911 (1994) (nothing that comprehensive dispute resolution system work well in the traditional labor-management environment, where arbitration is a part of the unionized industrial culture); *see, e.g.,* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960) (holding that arbitration is the most effective tool in the collective bargaining process).

42. *See* Malin, *supra* note 34, at 553 (discussing arbitration as a way of settling labor disputes so as not to disrupt production in industries during wartime); Sharpe, *supra* note 30, at 509 (explaining that one of the features of arbitration agreements was a "no-strike/no lockout pledge . . . to resolve labor disputes.").

43. *See* Malin, *supra* note 34, at 552 n.5 (referring to the Anthracite Board of Trade and the Workingmen's Benevolent Association); Sharpe, *supra* note 30, at 508 n.14 (referencing the Anthracite Board of Trade and the Committee of the Workingmen's Benevolent Association band its power "to decide questions involving job interference and wrongful discharge").

44. *See* Patrick T. Connors, *1988 Survey of Books Relating to the Law; VI. Legal History: New Deal Labor Policy and the American Industrial Economy*, 86 MICH. L. REV. 1425, 1426 (1988) (explaining that "in the pre-World War I era a "Protocol of Peace" was signed between the unions and several major employers, . . . in which both the unions and the employers agreed to support unionization efforts"); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1461 (1996) (discussing to the Protocol of Peace); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Arbitration Act*, 77 N.C. L. REV, 931, 979 (1999) (referring to the Protocols of Peace which established a "permanent Board of Arbitration, made up of representatives and the union, employers, and the public, who were empowered to settle grievances and disputes").

row,[45] these intervenors helped spread the concept of arbitration.[46] Though arbitration existed in a number of industries in the early part of the 20th century,[47] particularly in the unionized portions of the garment and textile trades,[48] and began to pick up speed in the late 1930's with the unionization of auto and steel,[49] a major impetus toward the arbitration of industrial disputes, including terminations of employees, occurred during World War II with the advent of the War Labor Board.[50] During World War II, uninterrupted production was paramount.[51] In

45. *See* Matthew W. Finkin, *Directions in Labor Law—Concern for the Dignity of the Worker: Revisions in Labor Law,* 43 MD. L. REV. 23, 72 (1984) (discussing the "impartial chairman" system, which has its "roots" in "a system established in 1911 in the Hart, Schaffner & Marx factory in Chicago." The essential characteristics of the "impartial chairman" system are:

> (1) the collective bargaining agreement was quite brief and was stated in general terms; (2) the scope of arbitration was very broad, in that any problem arising between labor and management could be submitted to the impartial chairman; and (3) the settlements were achieved primarily by a process of mediation.) *Id.*

46. *See generally* Daniel R. Ernst, *The Labor Exemption, 1908-1914*, 74 IOWA L. REV. 1151 (1989) (discussing the Protocols of Peace); Finkin, *supra* note 45 (comparing and contrasting the "impartial chairman" system with the "umpire system" (which grew out of the "award" of the Anthracite Strike Commission in 1903).

47. *See* Dau-Schmidt, *supra* note 34, at 685-86 (referring to bargaining agreements that were a part of American society "since the birth of [the] wage class"); Malin, *supra* note 34, at 552 (stating that "during the late nineteenth and early twentieth centuries, labor arbitration began to gain favor as a means of settling labor disputes"). *See generally* Hartley, *supra* note 27, at 32 (discussing that union activity during nineteenth century contributed to the development of modern unions).

48. *See* Ernst, *supra* note 46, at 1168 (noting that the "Protocols of Peace," the collective bargaining agreement, brought order to the garment industry of New York City); Stone, *supra* note 44 (noting that the Protocols of Peace settled the 1910 city-wide strike for the New York City ladies' garment industry); Forbath, *supra* note 28 (discussing how unions brought stability into the garment industry).

49. *See* DAVID MONTGOMERY, WORKERS' CONTROL IN AMERICA 163-64 (1979) (discussing the mass unionization of 1936-37); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 866 (1994) (describing how the major firms in the auto industry were not unionized until after 1933); Patrick M. Kuhlmann, *The Enigma of NLRA Section 2(11): The Supervisory Exclusion and the Case of the Charge Nurse*, 2000 WIS. L. REV. 157, 162 (2000) (stating that the 1930s and 1940s presented a "favorable climate for unionization" for employees in the auto industry).

50. *See* Roy E. Brownell II, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure to Seek Acknowledgement of "National Security Rescission,"* 47 AM. U. L. REV. 1273, 1321-22 n.230 (1998) (stating that the National War Labor Board (NWLB) "addressed labor disputes during the war."); Turner, *supra* note 38, at 165 n.188 (detailing a rise in the use of labor arbitration during World War II due to the creation of the National War Labor Board); *see also* Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker*, 37 B.C. L. REV. 229, 238 (1996) (stating that the creation of the National War Labor Board with "broad sweeping powers to settle labor disputes . . ." led to the shutting down of the mediation board).

51. *See* Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 401 (1996) (stating that labor arbitration survived the end of the war need to insure the "uninterrupted production of goods."); Sharpe, *supra* note 30, at 509-10 (describing the vital nature of the uninterrupted production of goods and services during war time); Turner, *supra* note 38, at 165 n.188 ("Labor arbitration was increasingly used during World War II, as the National War Labor Board, concerned with loss of production as the result of labor stoppages. . . .").

exchange for the pledge of workers not to strike,[52] the government required arbitration in order to resolve any disputes that might arise.[53] The adjudicators of those disputes were often individuals employed by the War Labor Board,[54] which was one of many government agencies created as part of the American war effort.[55] Thus, those industries that did not have arbitration were required to adopt it as part of their working environment.[56]

In 1945, at the end of the war, all of this was dismantled, just as quickly as the army and other parts of the United States' war machine.[57] The ad hoc creation and hasty dismantling of a

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52. *See* Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."); *see also* Alleyne, *supra* note 51, at 398 (stating that even though arbitration was well established, "its institutionalized use for individual grievances began in the United States with the War Labor Board's ("WLB") efforts during Word War II to minimize strikes that could interfere with the war effort."); Sharpe *supra* note 30, at 510 ("The recognition of this national security priority by responsible leaders of labor and management led to the "no-strike/no lockout" pledge and to President Roosevelt's establishment of the NWLB to resolve labor disputes that might affect the country's war effort.").

53. *See* Fredrick Englehart, *Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation,* 29 CASE W. RES. J. INT'L L. 321, 328 (1997) (describing how noncompliant employers were encouraged to sign collective bargaining agreements); H. David Kelly, Jr., *An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 U. DET. MERCY L. REV. 1, 19 (1997) (explaining the Board's goal of attaining a higher profile for unions along with collective bargaining agreements that provided "for arbitration of future disputes over the contract's interpretation."); Sharpe, *supra* note 30, at 510 (stating how this national security priority "led to the 'no-strike/no lockout' pledge and to President Roosevelt's establishment of the NWLB to resolve labor disputes that might affect the country's war effort.").

54. *See* Stone, *supra* note 44, at 1010 (describing that many of the WLB officials later became professional labor arbitrators encouraging widespread use of arbitration "as the natural outgrowth of a collective bargaining relationship."); s*ee also* Alleyne, *supra* note 51, at 398 (stating that Board staff members were available to be used as arbitrators); Englehart, *supra* note 53, at 329-30 (detailing how restraints on wage increases expedited the inclusion of fringe benefits, therefore contributing to the ascendancy of the work force").

55. *See* Brownell, *supra* note 50, at 1321-22 n.230 (describing President Roosevelt's unilateral creation of a host of executive agencies including the National War Labor Board to address labor disputes that occurred during the war); Jack G. Day, *An Oral History of the National War Labor Board and Critical Issues in the Development of Modern Grievance Arbitration: Prologue*, 39 CASE W. RES. L. REV. 515, 520 n.7 (1989) (relating that the National War Labor Board's creation of collective bargaining agreements "preserved collective bargaining as a total war effort"); Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 221, 228-29 (1997) (stating that the war labor board was created to ensure that strikes would not interfere with production necessary to the war effort).

56. *See* Benjamin Aaron, *An Oral History of the National War Labor Board and Critical Issues in the Development of Modern Grievance Arbitration: Catalyst: The National War Labor Board of World War II*, 39 CASE W. RES. L. REV. 519, 520 (1989) (stating that the NWLB influenced "the use of voluntary grievance arbitration in collective bargaining and was largely responsible for the almost universal subsequent inclusion of grievance arbitration clauses in collective bargaining agreements."); Brownell, *supra* note 50, at 1351 n.230 (describing creation of the National War Labor Board to address labor disputes that occurred during the war including the adoption of arbitration procedures); FitzGibbon, *supra* note 55, at 228 ("[T]he war labor board . . . began to require arbitration clauses in labor agreements."). *See generally* LAURA J. COOPER & DENNIS R. NOLAN, LABOR ARBITRATION: A COURSEBOOK 5-9 (1994); Dennis Nolan & Roger Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983) (discussing the rise of arbitration practices in the 1930s and during the second World War); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557 (1983) (same).

57. *See* Exec. Order No. 9672, 11 Fed. Reg. 221 (1945) (abolishing the National War Labor Board); Ajalat, *supra* note 20, at 689 (stating how management "refused to accept the viewpoints of employees, and either unilaterally abolished the cooperative plans or transformed them into company unions at the conclusion of the War").

particular governmental apparatus seems to be the American way. Yet, somewhat surprisingly, arbitration remained.[58] Employers, as well as unions, found it to be a useful means of dealing with conflict.[59] From the union's perspective, it made little sense to call out all of the workers in a plant when only one employee had been denied holiday pay or overtime. It was thus determined that it would be better to put it into the grievance procedure and, if need be, arbitration.[60] From an employer's perspective, a third party determination was a fair price to pay in exchange for uninterrupted production.[61] If a particular contract interpretation was unsatisfactory, the contract could always be changed the next time around.[62] An additional remedy, not

58. *See* Aaron, *supra* note 56 (citing *Labor-Management Conference on Industrial Relations*, 62 MONTHLY LAB. REV. 37, 40 (1946)) (stating that the NWLB influenced "the use of voluntary grievance arbitration in collective bargaining and was largely responsible for the almost universal subsequent inclusion of grievance arbitration clauses in collective bargaining agreements"); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 84 (1996) (describing arbitration as the lasting legacy of the NWLB).

59. *See* Sharpe, *supra* note 30, at 509 n.20 (stating that "a grievance machinery" ending in arbitration was off great usefulness to the employer); *see also* Aaron, *supra* note 56, at 520 (explaining that "the only substantive item upon which the representatives of employees and unions were able to agree was the desirability of including grievance arbitration provisions in collective bargaining agreements."); Kelly, *supra* note 53 (describing the War Labor Board efforts of promoting the "acceptance of arbitration as a means to resolve disputes that involved the interpretation or application of a collective bargaining agreement that arose between the employer and the union").

60. *See* Aaron, *supra* note 56, at 520 (expressing that the NWLB influenced "the use of voluntary grievance arbitration in collective bargaining and was largely responsible for the almost universal subsequent inclusion of grievance arbitration clauses in collective bargaining agreements."); Kelly, *supra* note 53 (describing the War Labor Board efforts of promoting the "acceptance of arbitration as a means to resolve disputes that involved the interpretation or application of a collective bargaining agreement that arose between the employer and the union"); Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 530 (1994) (stating that "union grievance procedures, including arbitration, have developed into much admired models of industrial due process, a means through which employee grievances and disputes over the meaning of contractual provisions are settled with a high degree of satisfaction among all the parties, and usually without excessive legalism").

61. *See* Kelly, *supra* note 53. The article stated

> arbitration be resorted to in order to reach new agreements where necessary, and that all parties provide for final settlement of grievances or disputes involving the agreement by an impartial third party (whether umpire, arbitrator, or board) with the authority of this third party limited to interpreting and applying the parties' agreement, and providing further that the decision rendered would be accepted as final by both parties;

See also Ann C. Hodges, *Dispute Resolution Under The Americans With Disabilities Act: A Report To The Administrative Conference Of The United States*, 9 ADMIN. L.J. AM. U. 1007, 1042 (1996) (noting that employers are increasingly considering arbitration to resolve employment disputes).

62. *See* Weldon E. Havins, M.D., and James Dalessio, *Limiting The Scope Of Arbitration Clauses In Medical Malpractice Disputes Arising in California*, 28 CAP. U. L. REV. 331, 348 (2000) (citing Schirmer v. Fisher, 286 Cal. Rptr. 580 (Ct. App. 1991) (unpublished decision)) ("Certain basic principles of contract interpretation are applicable. First 'the policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate.' In addition, '[h]owever broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.'"); Timothy J. Heinsz, *Grieve It Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration,* 38 B.C. L. REV. 275, 281-82 (1997) (stating that in labor arbitration res judicata is not a binding ". . . but a matter of contract interpretation."); Kelly, *supra* note 53 (explaining the Board's goal of attaining a higher profile for unions along with collective bargaining agreements that provided "for arbitration of future disputes over the contract's interpretation.").

incidentally, would be to change the decision maker.[63] In many instances former employees of the War Labor Board found a calling as private arbitrators.[64]

Today, as a result of this impetus, virtually the entire unionized sector is covered by collective bargaining agreements containing arbitration clauses.[65] These clauses deal with disputes that arise out of the underlying agreements, matters of contract interpretation, questions of discipline or adherence to standards, or so-called rights disputes.[66] They do not cover what we in the United States call "interest disputes," which involve the terms and conditions of the next contract.[67]

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63. *See* Aaron, *supra* note 56, at 526 (stating that "the Board favored the establishment of permanent arbitrator arrangements, with the understanding that the word 'permanent' meant only for so long as the arbitrator continued to be acceptable to both sides. The parties, however, remained free to opt for *ad hoc* arbitration if they so desired.").

64. *See* Alleyne, *supra* note 51, at 398 (stating that the National War Labor Board provided "Board staff members available as arbitrators."); Stone, *supra* note 44, at 1010 (describing that many of the WLB officials later became professional labor arbitrators encouraging widespread use of arbitration "as the natural outgrowth of a collective bargaining relationship").

65. *See* Leroy S. Merrifield and Wilard Wirtz, Book Review, *Labor Unions: Not Well But Alive: Can Unions Survive?: The Rejuvenation of the American Labor Movement, by Charles B. Craver*, 69 CHI.-KENT. L. REV. 259, 261 (1993) (explaining that "labor unions and collective bargaining are indispensable instruments for governing the marketplace"); *see also* Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. REV. 687, 691 (1997) (providing that "[n]early every collective bargaining agreement contains an arbitration clause"); Ware, *supra* note 58, at 84 (same).

66. *See* Hodges, *supra* note 63, at 1099 (providing that the reasons for the deferral of litigation in favor of arbitration included "furthering the national labor policy favoring arbitration, requiring the parties to use their agreed-upon method of dispute resolution, deferral to arbitral expertise in contract interpretation, and conservation of the agency's resources"); Ware, *supra* note 58, at 92 (explaining that the various clauses "generally provide for arbitration of 'grievances,' the labor law term for claims alleging breach of the collective bargaining agreement."); Gregory E. Zimmerman, *The Teamster Joint Grievance Committee and NLRB Deferral Policy: A Failure to Protect the Individual Employee's Statutory Rights*, 133 U. PA. L. REV. 1453, 1461 (1985) (stating that the inclusion of arbitration clauses became the norm, "whereby they agreed to resolve disputes over contract interpretation in arbitration rather than through economic forces").

67. *See* Samuel Estreicher, *Symposium on Labor Arbitration Thirty Years After the Steelworkers Trilogy: Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT. L. REV. 753, 761 n.25 (1990) (explaining that opposition by workers "was aimed at what it feared might be government-imposed arbitration of "interests" disputes in derogation of its right to strike."); Neil Fox, *Patco and the Courts: Public Sector Labor Law as Ideology*, 1985 U. ILL. L. REV. 245, 262 (1985) ("For resolving interest disputes many states have provided for mediation and fact-finding. Numerous statutes provide for binding interest arbitration for certain classes of employees as a substitute for strikes, while a few states that have followed the private sector model very closely allow public employees to strike."); Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 297 (1987) (stating that the court held "that mandatory arbitration of interests disputes in the public sector was constitutional and desirable as an alternative to public employee strikes, which are generally prohibited by law").

The point to be remembered here is that in the year 2000, contractual protections against unfair discharge are still confined to the unionized sector.[68] This once quite large sector is now relatively small, comprising only 10% to 13% of the work force, and was until recently, shrinking.[69] For those workers who are not unionized, and who constitute the great bulk of workers in the United States, there is no comparable system.[70] A non-unionized worker who was discharged for asserted incompetence or misconduct, or who was let go because the employer contends that he had too many workers cannot appeal to an arbitrator and allege that the termination was unfair or that they picked the wrong employee. [71] Except where employers have unilaterally imposed arbitration designed to their liking, there is no such system.[72]

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68. *See* Bellace, *supra* note 7, at 209 (providing that collective bargaining agreements give American workers protection against unfair discharge); Todd M. Smith, *Wrongful Discharge Reexamined: The Crisis Matures, Ohio Responds*, 41 CASE W. RES. L. REV. 1209, 1245 (1991) (stating that "[j]ust cause protection from unfair discharge is the rule for unionized employees."); Joanne Sokachitch, *Good Faith and Fair Dealing in Illinois: An Application in the Employment Context*, 1987 U. ILL. L. REV. 183, 183 (1987) (explaining that because of the employment-at-will doctrine, employees can be dismissed for any reason, but still allows employees the use of the courts for relief when they have been wrongfully discharged).

69. *See BNA Survey on Union Membership Statistics,* 117 LAB. REL. REP. (BNA) 81 (Oct. 1, 1984); Paul Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NRLA*, 96 HARV. L. REV. 1769, 1771 (1983) (discussing the decline of union membership); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 351 (1984) (stating that "the unionized share of the work force is now about half of what it was just a quarter of a century ago").

70. *See* Smith, *supra* note 68, at 1214-15 (detailing that union members have a just cause standard for employee dismissal, but this does not cover all workers); Sokachitch, *supra* note 68, at 183 (Collective bargaining agreements are used in union employee contracts which provide for just cause dismissal); Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 2 (1988) (stating that "most private sector employees have been employees at will, [thus] unprotected by express employment contracts or collective bargaining agreements, they have had no cause of action nor remedies for arbitrary or sudden discharge.").

71. *See* Smith, *supra* note 68, at 1214-15 (detailing that union members have a just cause standard for employee dismissal, but this does not cover all workers.); Sokachitch, *supra* note 68, at 212 (stating that collective bargaining agreements are used in union employee contracts which provide for just cause dismissal); West, *supra* note 70 (stating that "most private sector employees have been employees at will, [thus] unprotected by express employment contracts or collective bargaining agreements, they have had no cause of action nor remedies for arbitrary or sudden discharge.").

72. *See* Gary Minda and Katie R. Raab, *Time for an Unjust Dismissal Statute in New York* 54 BROOK. L. REV. 1137, 1165 (1989) (stating "For nearly one hundred years . . . courts have presumed that contracts of indefinite employment are terminable at-will by either party at any time for any reason or even for no reason at all.").

As was previously mentioned, there are now certain statutory protections that extend to both unionized and non-unionized employees. An employee cannot be discharged based on race,[73] disability,[74] or age.[75] Specific legislation that was enacted into law in the 1960s exists to protect these classes from discriminatory discharge.[76] However, in order to institute a cause of action, an individual would have to go to a government agency or sue on his own.[77] If the case doesn't fit into one of these categories, then there is no appeal and no review of the employer's action.[78]

The Irish system is far different. In Ireland, protection against unfair dismissal is considered a basic right, and one that is codified under the Unfair Dismissal Acts.[79] If an individual has been continuously employed for at least one year, he is protected against dismissal for incompetence or asserted misconduct regardless of whether he was represented by a union.[80] In

73. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000) (attempting to end employment discrimination by removing "artificial, arbitrary, and unnecessary barriers to employment . . ."); *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that employment practices and decisions, not justified by business necessity causing a "disparate impact" upon a protected class violates the Civil Rights Act of 1964).

74. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000); Jan W. Henkel, *Discrimination by Supervisors: Personal Liability Under Federal Employment Discrimination Statutes*, 49 FLA. L. REV. 765, 781 (1994) (noting that the ADA allows for both compensatory and punitive damages for an employee found to be wrongfully discharged under the Act).

75. *See* Age Discrimination Act of 1967, 29 U.S.C. § 623 (2000) (imposing standard for liability by asking whether the ago of the employee "actually motivated the employer's decision"); *see, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (citing United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576-578 (1978)).

76. *See* Stephen J. Shapiro, *Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted By Title VII?*, 35 AM. U. L. REV. 93, 97-8 (1985) (noting that Title VII of the original 1964 Act only applied to private employers, but was amended in 1972 to extend to federal, state, and local government employees); Christopher P. McCormack, Note, *Business Necessity in Title VII: Importing an Employment Discrimination Doctrine Into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 563 (1986) (noting that the anti-discrimination statutes of the 1960s showed congressional determination that "personal characteristics are not proper factors for decisions in employment. . . ."); The Honorable William H. Rehnquist, Speech, *Convocation Address, Wake Forest University*, 29 WAKE FOREST L. REV. 999, 1002 (1994) (citing the Civil Rights Bill of 1964 as an example of Congress regulating areas that it feels are not being adequately addressed by the states).

77. *See generally* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000); Age Discrimination Act of 1967, 29 U.S.C. § 623 (2000); Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change* 72 N.Y.U. L. REV. 967 (discussing the Act and its social effects).

78. *See generally* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000); Age Discrimination Act of 1967, 29 U.S.C. § 623 (2000).

79. *See* Frizelle v. New Ross Credit Union [1997] (Ir. H. Ct.) (noting that the Act gives the court the power to reinstate an unfairly dismissed employee); Memorex v. The Employment Appeals Tribunal, [1990] 2 I.R. 184 (Ir. H. Ct.) (highlighting the responsibility of the employer to show good cause for a dismissal of an employee). The Unfair Dismissals Act made significant progress in Irish employment law. Prior to the Act, an employer could sever a contract of employment simply by giving adequate notice. The Act established a greater job security for employees, requiring the employer to show just cause for dismissals. *See* DOING BUS. IN IR., *supra* note 1.

80. *See generally* Wilkinson, *supra* note 5, at 44-5 (discussing the rights that extend to all employees, and more specifically, part-time employees); *Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, at 8-9 (2000) (detailing the procedures involving dismissal due for incompetence or misconduct).

the case of a female employee, even if she isn't employed for a year, she is protected against dismissal because of pregnancy or for exercising her rights under the Maternity Protection Act,[81] the Adoptive Leave Act[82] or for engaging in union activities.[83]

Under these Acts, a terminated worker can file a claim for redress and assert that termination was unfair[84] or a violation of one of the statutory protections including, but not limited to, race,[85] age,[86] sexual orientation,[87] or religious or political views.[88] Generally, the time to file a claim is no later than six months after the date of dismissal.[89] A claim may be brought before a Rights Commissioner or, if a party objects to this method, the claim may be heard directly by the Employment Appeals Tribunal.[90]

Rights Commissioners are employees of the State.[91] By the State in this context, I mean the national government. Upon hearing a case, a Rights Commissioner will make a recommendation to the Employment Appeals Tribunal,[92] and if there is no objection to that recommendation, it will stand. If there is an appeal, the Employment Appeals Tribunal reviews the matter and issues a determination.[93] Such an appeal is heard de novo.

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81. *See* Maternity Protection of Employees Act (1981); DOING BUS. IN IR., *supra* note 1 (noting that all employees are entitled to a guaranteed period of maternity leave).

82. *See* Adoptive Leave Act (1995) (stating that the purpose of the Act is to "entitle female employees, to employment leave for the purpose of child adoption.")

83. *See* Unfair Dismissals Act § 6(2)(a) (1977); DOING BUS. IN IR., *supra* note 1 (stating that this section expressly protects an employee from dismissal for trade union activities. In order to be protected, the union activities cannot take place during the employee's work hours, unless a contractual agreement permits activities while on the job).

84. *See* Unfair Dismissals Act § 6(2) (1977); DOING BUS. IN IR., *supra* note 1 (noting that the Unfair Dismissals Act provides that an employee cannot be dismissed unfairly, and provides specific instances when the dismissal will always be unfair, such as race, gender, or age).

85. *See* Unfair Dismissals Act, § 6(2) (1977); Ian Forbes & Geoffrey Mead, *Comparative Racial Discrimination Law: Measures to Combat Racial Discrimination in Employment in the Member States of the European Community*, 14 COMP. LAB. L. 403, 421 (1993) (noting that this Act makes dismissal on the basis of race *per se* illegal).

86. *See* Unfair Dismissals Act, § 6(2) (1977).

87. *See* Unfair Dismissals Act, § 6(2) (1977).

88. *See* Unfair Dismissals Act, § 6(2) (1977); Gerard Whyte, *Religion and the Irish Constitution*, 30 J. MARSHALL L. REV. 725, 729 (citing the protection from dismissal for religious or political beliefs provided by the Unfair Dismissals Act).

89. *See* Unfair Dismissals Act, § 8 (1977); DOING BUS. IN IR., *supra* note 1 (noting that failure to bring a claim within the statutorily mandated six-month period will remove the employees protections under the Act).

90. *See Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (describing the jurisdiction of the Employment Appeals Tribunal).

91. *See* Personnel Policies & Procedures—the Law in Perspective (visited Nov. 11, 2000) <http://www.graphite-hrm.ie/ppp/samples/chap04/sumleg1.aspy> (discussing the Unfair Dismissal Act).

92. *See* Eilish Barry, *Recommendations of Rights Commissioners and Judicial Review*, IRISH LAW TIMES, Feb. 21, 1993, at 30-1 (describing the process by which the Rights Commissioner makes recommendations to the Employment Appeals Tribunal).

93. *See Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 2 (discussing the procedures of the Employment Appeals Tribunal). *See generally* Martin Vranken, *Specialisation and Labour Courts: A Comparative Analysis*, 9 COMP. LAB. L.J. 219 (1988) (providing an overview of the Employment Appeals Tribunal).

If, as is the usual case, a claim is filed directly with the Tribunal, or if a party objects to a hearing before a Rights Commissioner, the claim is heard in the first instance by the Tribunal.[94] The Tribunal is a three-person panel consisting of a Chair or Vice-Chair, who are employees of the State, a representative of labour and a representative of the employers.[95] The labour representative, on the Workers' Panel side of the Tribunal, is nominated by the Irish Congress of Trade Unions and its constituent unions.[96] The management representative is nominated by the various employer organizations, such as the Irish Business and Employers Confederation and the Society of the Irish Motor Industry.[97] According to the latest report of the Employer Appeals Tribunal, there are some eighty or so panel members.[98] There is a Chair and 21 Vice Chairs, all of whom are barristers, solicitors or counsel, and 60 other members, 30 from the labour side and 30 from management.[99] They serve three-year terms, are split into divisions and travel around the country hearing cases under a variety of Acts, including a total of 11 statutes.[100]

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94. *See Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (describing the jurisdiction of the Employment Appeals Tribunal).

95. *See Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (describing the Tribunal as a government sponsored forum for protecting workers from "legal trappings and costs. . . .").

96. *See* Wood, *supra* note 94 (stating that the Employment Appeal Tribunal consists of a High Court judge and two lay members).

97. *See Another Plum Job*, IRISH TIMES, May 27, 2000, at 61 (describing the position of Director General of the Irish Business and Employers Confederation (IBEC) as "one of the country's most vital and influential jobs . . ."); Rosita Boland, *Is There a Bully in the Office*, IRISH TIMES, May 26, 1998, at 13 (citing IBEC as "the biggest business organization in the country, with a membership of more than 5,000 companies.").

98. *See* FERDINAND VON PRONDZYNSKI, EMPLOYMENT LAW IN IRELAND 201 (2d ed. 1989) (describing how the Irish Employer's Federation, the Construction Industry Federation, and the Federation of Trade Associations along with the farming organizations nominate twenty panel members each to arrive at the number of 80 or so in total); *Dispute Flares as Waterford Estate Nears the End of the Line*, IRISH TIMES, Sept. 15, 1999, at 2 (noting that complex labor disputes can be adjudicated by the Labour Court, the Labour Relations Commission and the Employment Appeals Tribunal); *see also Ruling to Benefit Retail Workers*, IRISH TIMES, Oct. 17, 1994, at 3 (describing the effectiveness of the court by citing a national officer of the union representing retail workers as saying that "[a] ruling of the Employment Appeals Tribunal (Employment Appeals Tribunal) gives greater protection to check out operators and sales assistants."); Carol Coulter, *Lawyers Criticize Flaws in Civil Legal Aid Act*, IRISH TIMES, Oct. 14, 1996, at 18 (citing that an act providing legal aid for those who can not afford it extends to representation at tribunals including the Employment Appeals Tribunal); Judith Crosbie, *Doctor Awarded (Pounds) 50,000 in Hospital Discrimination Case*, IRISH TIMES, May 17, 2000, at 4 (explaining that a situation of discrimination based on employment inequality would be heard by an equality officer at the Employment Appeals Tribunal).

99. *See* MICHAEL FORDE, EMPLOYMENT LAW 22 (1992) (stating that "in practice," vice-chairmen of the Employment Appeals Tribunal must also satisfy the same legal qualifications as chairmen although there is "no express requirement that they be lawyers, let alone lawyers with some actual experience in court work or employment law"); *see also* PRONDZYNSKI, *supra* note 98 (citing that the chairman of the Employment Appeals Tribunal "must be a practicing barrister or solicitor of at least seven years' standing"); For an overview of the Employment Appeals Tribunal, *see generally* Vranken, *supra* note 93, at 219.

100. *See* PRONDZYNSKI, *supra* note 98 (describing how the Tribunal routinely travels to towns throughout Ireland although it has two vice-chairmen stationed in Cork with the rest regularly in Dublin); RAYMOND BYRNE & J. PAUL MCCUTCHEON, THE IRISH LEGAL SYSTEM 104 (2d ed. 1989) (explaining that a Tribunal will generally be composed of "a lawyer, a representative of an employer organization and [a representative of] a trade union."); Foley, *supra* note 4 (stating that in 1995, Tribunals dealt "with disputes arising under Minimum Notice Legislation, Unfair Dismissals, Maternity Protection Act, Protection of Employees Act, Worker Protection Act, Payment of Wages Act, Terms of Employment Act and Adoptive Leave Act").

Over the course of time the jurisdiction of the Tribunal has grown as new legislation, some of which is the result of European Union directives, has been enacted.[101] The Unfair Dismissal Acts of 1977-1993[102] were established along with the Redundancy Payments Act,[103] a nationwide system of severance pay based on length of service, which was the first act over which the Tribunal had jurisdiction.[104] Other Acts include the Minimum Notice and Terms of Employment Act, [105] the Maternity Protection Act of 1994,[106] the Adoptive Leave Act of 1995,[107] the

101. *See* FORDE, *supra* note 98 (citing that in 1977 the jurisdiction of the Employment Appeals Tribunal was "further and very significantly expanded by the Unfair Dismissals Act" and that "a large portion of the European Appeals Tribunal's present workload is dealing with unfair dismissal claims"); MCCUTCHEON, *supra* note 100, at 108 (noting that the institution of the European Community's (EC) laws in Ireland has presented some "unusual problems with technique" for Irish judges since England and Ireland are the only common law countries out of the EC's member States); BRIAN DOOLAN, PRINCIPLES OF IRISH LAW 75 (3rd ed. 1991) (stating that on January 1, 1973, Ireland became a member State of the European Community).

102. *See* Unfair Dismissals Act, No. 10 (1977); FORDE, *supra* note 98, at 420-32 (providing the full text of the 1977 statute); *see also* DOING BUS. IN IR. § 6.02 (2000) (stating that "in 1977 the Unfair Dismissals Act greatly extended the functions of the Tribunal to redress for unfair dismissal. . . ."); *Woman Sacked for Pregnancy,* IRISH TIMES, Jul. 12, 2000 at 5 (noting that since October of 1999, there have been "86 inquiries under the Unfair Dismissals Act, 1977").

103. *See* Redundancy Payments Act, No. 21 (1967); *see also* Post v. McNeill, 25 SP (Ir. H. Ct. 1997) (citing the text of the Redundancy Payments Acts, 1967-1991); FORDE, *supra* note 98, at 387-402.

104. *See* PRONDZYNSKI, *supra* note 98 (noting that "section 39 of the Redundancy Payments Act 1967 set up the Redundancy Payments Tribunal to hear applications brought under the Act. It was later re-named the Employment Appeals Tribunal under section 18 of the Unfair Dismissals Act 1977."); *see also* FORDE, *supra* note 99 (stating that the Tribunal was originally created "in order to administer the system of redundancy compensation introduced by the Redundancy Payments Act."); *Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (explaining that the Redundancy Payments Act, 1967, sets out the principal judicial powers which are conferred on the Employment Appeals Tribunal).

105. *See* Minimum Notice and Terms of Employment Act, No. 4 (1973); *see also* FORDE, *supra* note 99, at 402-08; *Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (providing that the jurisdiction of the Employment Appeals Tribunal "includes legislation on minimum notice, unfair dismissal, insolvency, terms of employment, payment of wages, maternity leave, adoptive leave, parental leave, working time and the rights of young workers and part-time workers.").

106. *See* Maternity Protection of Employees Act, No. 2 (1981); *see also* FORDE, *supra* note 99, at 442-48 (laying out the provisions of the 1981 Act); *Woman Sacked for Pregnancy, supra* note 102 (noting that since October of 1999 "there have been 1,251 public inquiries under the Maternity Protection Act, 1994 . . ."); *Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (providing that the jurisdiction of the Employment Appeals Tribunal "includes legislation on minimum notice, unfair dismissal, insolvency, terms of employment, payment of wages, maternity leave, adoptive leave, parental leave, working time and the rights of young workers and part-time workers.").

107. *See* Adoptive Leave Act (1995); *see* Foley, *supra* note 4 (stating that in 1995, Tribunals dealt "with disputes arising under Minimum Notice Legislation, Unfair Dismissals, Maternity Protection Act, Protection of Employees Act, Worker Protection Act, Payment of Wages Act, Terms of Employment Act and Adoptive Leave Act."); *Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (providing that the jurisdiction of the Employment Appeals Tribunal "includes legislation on minimum notice, unfair dismissal, insolvency, terms of employment, payment of wages, maternity leave, adoptive leave, parental leave, working time and the rights of young workers and part-time workers.").

Parental Leave Act of 1998,[108] the Protections For Persons Reporting Child Abuse Act of 1998,[109] and the Employers' Insolvency Act.[110]

The Tribunal, as I mentioned, is tri-partite.[111] The United States has employed a tri-partite method of decision making in certain instances as well.[112] Tri-partite panels have existed by statute in the railroad and airline industries for years.[113] Other industries, such as the telephone

108. *See* Parental Leave Act (1998); *see also Irish Identity and the EU*, IRISH TIMES, Sept. 28, 2000, at 15 (stating that the Irish government has implemented "legislation required by Europe such as the Parental Leave Act, 1998," as well as "employment legislation not required by Europe" such as the National Minimum Wage Act, 2000); *Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (providing that the jurisdiction of the Employment Appeals Tribunal "includes legislation on minimum notice, unfair dismissal, insolvency, terms of employment, payment of wages, maternity leave, adoptive leave, parental leave, working time and the rights of young workers and part-time workers.").

109. *See* Protection for Persons Reporting Child Abuse Act (1998); *see also Doctors May Not Be Sued*, IRISH TIMES, Jun. 7, 1999, at 2 (citing that "[d]octors reporting possible child abuse cases need no longer be worried about being sued for damages" because the Act was put into effect from being sued for reporting possible cases when they are reported "responsibly and without malice . . ."); *People Who Report Child Abuse Are Immune From Being Sued*, IRISH TIMES, Jan. 29, 1999, at 4 (stating that under the Act, health board personnel including "social workers, child-care workers, all health board medical, dental and nursing personnel, psychologists, physiotherapists, radiographers, occupational therapists, health education officers, substance abuse counselors and care assistants.").

110. *See* Protection of Employees (Employers' Insolvency) Act (1984); *see also Redundancy Payments Rise Announced*, IRISH TIMES, Apr. 4, 1994, at 2 (stating that where an employee was terminated for redundancy on or after May 1, 1994 and they were earning over Pounds 13,000 a year, statutory payments under the Protection of Employees (Employers' Insolvency) Acts will be increased); *Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (providing that the jurisdiction of the Employment Appeals Tribunal "includes legislation on minimum notice, unfair dismissal, insolvency, terms of employment, payment of wages, maternity leave, adoptive leave, parental leave, working time and the rights of young workers and part-time workers.").

111. *See* MCCUTCHEON, *supra* note 100 (explaining that a Tribunal will generally be composed of "a lawyer, a representative of an employer organization and [a representative of] a trade union."); *see also Kitt Seeks Safety Rider on Contracts*, IRISH TIMES, Apr. 25, 1998, at 6 (stating that "the tri-partite approach between the Government and the social partners provided a good model for trying to improve safety in the [building] industry"); *The Parties-Alliance*, IRISH TIMES, Nov. 6, 1993, at 6 (citing the creation of a "tri-partite structure involving the two governments [of Northern Ireland and Britain] and the new NI administration to ensure consultation and cooperation on matters of common concern.").

112. *See* Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 553 (1998) (citing that "where public rights are adjudicated by a non-Article III decision-maker, institutional interests in preserving a separation of powers in our tri-partite system of government are at a minimum."); William T. Bodoh & Michelle M. Morgan, *Inequality Among Creditors: The Unconstitutional Use of Successor Liability to Create A New Class of Priority Claimants*, 4 Am. Bankr. Inst. L. Rev. 325, 353 (1996) (stating that "[t]he Constitution separates the power of government among the executive branch, the legislative branch, and the judicial branch" and that "from this tri-partite system of government the separation of powers doctrine has emerged."); Michael Mulroney, *Report on the Invitational Conference on Professionalism in Tax Practice, Washington, D.C. October 1993*, 11 AM. J. TAX POL'Y 369, 384 (1994) (arguing that the U.S. tax system creates "a tri-partite tension among taxpayers, their representatives, and the [Internal Revenue] Service, each of whom in a different way is burdened with a portion of the responsibility for making the system function in spite of itself.").

113. *See, e.g.*, 45 U.S.C. § 151 (2000) (creating a tri-partite system of review boards: the Surface Transportation Board, the National Railroad Adjustment Board, and the National Mediation Board); 45 U.S.C. § 184 (2000) (amended version of the Railway Labor Act); *see also* Chicago, M., St. P. & P. R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 397 F.2d 541, 542-43 (7th Cir. 1968) (citing that there was a tri-partite agreement between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Locomotive Engineers that was under the jurisdiction of the Railway Labor Act and therefore the court had the power to provide injunctive relief for the railroad).

industry, have incorporated them into collective bargaining agreements.[114] The difference is that those panels are industry-specific and rarely deal with statutory issues.[115] The Tribunal panels are not confined to a specific industry and frequently deal with statutory issues.[116]

Interestingly, however, the process in both jurisdictions is meant to be informal and as non-legalistic as possible.[117] Recently, the Irish Congress of Trade Unions (ICTU) published a report entitled "Guide to Presenting Cases to the Employment Appeals Tribunal."[118] It is designed for union representatives and is based largely on the experiences of Bill O'Shaughnessy, who was associated with the Tribunal in a number of capacities from its inception in 1968, when it was called the Redundancy Appeals Tribunal,[119] until his death in 1997.[120] This guide is not unlike the guides or training aids that are used in the United States to prepare

114. *See* Brian D. Kennedy, Note, 1996 J. DISP. RESOL. 237, 238-39 n.17 (1996) (citing section 903 of Pennsylvania's Public Employee Relations Act as requiring that "[a]rbitration for disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory. The procedure to be adopted is a proper subject of bargaining with the proviso that the final step shall provide for a binding decision by an arbitrator or a tri-partite board of arbitrators as the parties may agree."); *see also* United Brick & Clay Workers v. Hydraulic Press Brick Co., 371 F. Supp. 818, 826 (S.D. Mo. 1973) (stating that "the failure of Hydraulic's labor agreement to require tri-partite arbitration does not prevent the court from ordering it."); International Union E., R. & M. W. v. Remington Rand, Div. Sperry Rand Corporation, 191 N.Y.S.2d 880, 881 (N.Y. Sup. Ct. 1959) (recognizing that "the company's refusal to appoint its designee to the tri-partite arbitration board made impossible any attempt to agree upon an impartial chairman.").

115. *See generally* Chicago, M., St. P. & P. R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 397 F.2d 541 (7th Cir. 1968) (dealing with agreements in the railroad industry); United Brick & Clay Workers v. Hydraulic Press Brick Co., 371 F. Supp. 818 (S.D. Mo. 1973) (referring to a dispute in the construction materials industry); International Union E., R. & M. W. v. Remington Rand, Div. Sperry Rand Corporation, 191 N.Y.S.2d 880 (N.Y. Sup. Ct. 1959) (addressing a dispute arising between workers and management in the electronics industry).

116. *See* Crosbie, *supra* note 98 (explaining that a situation of discrimination based on employment inequality would be heard by an equality officer at the Employment Appeals Tribunal); Foley, *supra* note 4 (stating that in 1995, Tribunals dealt "with disputes arising under Minimum Notice Legislation, Unfair Dismissals, Maternity Protection Act, Protection of Employees Act, Worker Protection Act, Payment of Wages Act, Terms of Employment Act and Adoptive Leave Act."); *Woman Sacked for Pregnancy*, *supra* note 102 (noting that since October of 1999, there have been "86 inquiries under the Unfair Dismissals Act, 1977.").

117. *See* FORDE, *supra* note 99, at 23 (citing that "one of the principal objectives for having tribunals like the E.A.T. is to ensure that justice will be administered with far less formality than in the courts, so that the ordinary employer or worker will feel more at ease during the course of the proceedings and matters could be dealt with more flexibility."); *Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1 (providing that the Employment Appeals Tribunal is "designed to give workers a free and speedy remedy without the legal trappings and costs associated with national courts."). *But see* MCCUTCHEON, *supra* note 100 (explaining that "in spite of its title, the Labour Court is, in fact, a less formal court than the E.A.T.").

118. *See Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80.

119. *See* PRONDZYNSKI, *supra* note 98 (noting that "section 39 of the Redundancy Payments Act 1967 set up the Redundancy Payments Tribunal to hear applications brought under the Act. It was later re-named the Employment Appeals Tribunal under section 18 of the Unfair Dismissals Act 1977."); *Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80 (explaining that the original jurisdiction of the Employment Appeals Tribunal was under the Redundancy Payments Acts); *see also* FORDE, *supra* note 100 (stating that the Tribunal was originally created "in order to administer the system of redundancy compensation introduced by the Redundancy Payments Act.").

120. *See Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 1.

union representatives to handle arbitration cases.[121] The guide explains the importance of preparation, and how witnesses are handled.[122] One passage I particularly enjoy and wish advocates in the United States would heed reads, in its entirety:

> "Closing Statement: Much of what you say will be repetition. BE BRIEF." [123]

Here is another word of advice to union representatives that may be of some interest:

> Do not be overawed by the presence of legal representatives on the other side —no matter how pompous or "eminent" they are! Remember they are not always as well aware of the realities of industrial. . . . life as most trade union representatives. Neither are they experts in the field. Many trade union representatives have acquired a proficiency which enables them to more than hold their own with lawyers in this forum.

This is sound advice but, to the dismay of some, it is not always followed. The latest Annual Report of the Tribunal, which was printed in 1998, indicates that in 65% of the cases both sides are represented by solicitors or counsel.[124] This, as those from the United States can imagine, has led to some unfortunate results, particularly legalistic presentations and delays.[125] Before mentioning these difficulties, more should be said about the Tribunal and its responsibilities.

The work force in Ireland is comprised of approximately one and one-quarter million individuals, 47% of which are represented by unions.[126] Not all of these workers are governed

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121. *See generally Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80 (advising on whether to settle or fight a claim and gives information on how to present cases.); *Booklet Gives Legal* Advice, IRISH TIMES, Jul. 23, 1999, at 4. "A 15-page booklet, Guidelines for Presenting Cases to the Employment Appeals Tribunal, has been published by the Irish Congress of Trade Unions. *Id*. The deputy general secretary of the ICTU also states that "the aim of the booklet was to give trade union representatives, and people taking their own cases, 'a sense of competence and confidence that they can do as good a job as the solicitor or barristers they often find on the other side of the table.'" *Id*.

122. *See generally Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 11-16 (describing the process by which witnesses are preparation and how to admit evidence); *Booklet Gives Legal* Advice, *supra* note 121. The booklet "advises on whether to settle or fight a claim and gives information on how to present cases." *Id*.

123. *See Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 80, at 15.

124. *See* 31 EMPLOYMENT APPEALS TRIBUNAL ANN. REP. 9 (1998).

125. *See Irish Congress of Trade Unions, Guide to Presenting Cases to the Employment Appeals Tribunal* (1999).

126. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP., *supra* note 124 (discussing representation of employers and employees at Employment Appeals Tribunal hearings); Foley, *supra* note 4 (explaining that some employees and employers appeared at Employment Appeals Tribunal hearings without legal representation); Jackie Gallagher *Call for Legal Aid for People in Employment Appeals Cases,* IRISH TIMES, Feb. 2, 1995, at 5 (noting that Eithne Fitzgerald, the new minister of State for Labour Affairs, hopes that there will be "less wigs and gowns" in the new Employment Appeals Tribunal).

by the various acts over which the Tribunal has jurisdiction.[127] Government workers are not covered. In the private sector, only full-time or regular part-time employees who work continuously for a year are covered.[128] However, even with those limitations, a good part of the workforce is covered.[129]

In 1998, 3,537 claims were filed under all of the Acts.[130] Of those, 1,341 were withdrawn, either at the hearing or before it began.[131] Approximately 2,190 cases went to decision.[132] In 1,858 of those cases, the claim was allowed and in 408, the claim was disallowed.[133] These figures won't add up because some cases filed in 1997 were not heard until 1998 and some filed in 1998 were not heard until 1999.[134]

Sixty-seven percent of the claims that went to decision were under the Minimum Notice and Terms of Employment Act.[135] Under that Act, unless a discharge is for misconduct, employers must give minimum notice of termination or pay in lieu of notice, with the amount of notice or pay ranging from one week to eight, based on length of service.[136]

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127. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP., *supra* note 124 (reporting that out of 1134 cases heard by the Tribunal in 1998, employees were represented by solicitors on 642 occasions; the number was lower for employer parties); s*ee also* Gallagher, *supra* note 127 (discussing that the Dublin solicitor's bar association believes that legal aid should be provided by the State to employees taking action in the Employment Appeals Tribunal); Jim Dunne, *Legal Aid Urged for Unfairly Dismissed*, IRISH TIMES, Apr. 27, 1993, at 3 (explaining that two Irish legal centers expressed concern that the Irish government did not extend free legal aid to cover claimants before Employment Appeals Tribunal).

128. *See* Stieber, *supra* note 7, at 235 (stating that unions often claim that the Tribunal proceedings are too "legalistic"); Dunne, *supra* note 127 (noting the importance of legal representation because unfair dismissals generally include technical points of law).

129. *See* DEPARTMENT OF FOREIGN AFFAIRS, INFORMATION ON ECONOMIC DEVELOPMENT, (visited Oct. 13 2000) <http://www.cso.ie/principalstats/pristatleb/html> (discussing workforce distribution in Ireland). *See generally* IRELAND'S NATIONAL EMPLOYMENT ACTION PLAN 3 (2000) (discussing the significant gains in employment and simultaneous economic expansion); CENTRAL STATISTICS OFFICE, INDUS. EMPLOYMENT (Dec. 16, 1999)) (discussing national employment in all industries).

130. *See* Stieber, *supra* note 7, at 232 (discussing statutory limitations on certain employees which excludes them from Employment Appeals Tribunal hearings); Wilkinson, *supra* note 5, at 36 (examining the limitations on legal protection of part-time workers in Ireland).

131. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124 (explaining that the scope of the Tribunal has been extended over the years, but still does not include all employees); *See generally* Stieber, *supra* note 7, at 232 (noting that there are eligibility limitations for claimants in Tribunal hearings); Wilkinson, *supra* note 5, at 42-44 (noting how regular part-time employees are protected in Employment Appeals Tribunal hearings, the threshold hours-worked requirements to be eligible to be heard before the Tribunal, and how little legal protection was extended to part-time workers until the last decade).

132. *See* Foley, *supra* note 4 (noting that the increase in Tribunal case load is an indication of increasing public confidence in the Tribunal). *See generally See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124 (generally discussing the goals and objectives of the Employment Appeals Tribunal);

133. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

134. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

135. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

136. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

In 1998, the unfair dismissal cases in which the employer has the burden, as in the United States, of proving that the termination was for incompetence, misconduct, or "other substantial grounds," totaled 882.[137] Of those, 632 were withdrawn.[138] It is not exactly known how many of those withdrawals were settlements, but available information indicates that most were.[139] Of those that remained, 119 were allowed and 54 disallowed, a fair percentage of favorable employee outcomes.[140]

In the next highest category of claims, 360 arose under the Redundancy Payments Act.[141] Of those that went to hearing, 119 were allowed and 54 disallowed.[142] This is the statutory severance pay of which I spoke.[143] Again, it's based on length of service, but it's a relatively low maximum, £300, and was last revised in 1994.[144]

You would think with this relatively modest caseload that things would move swiftly. In comparison to our experience, that appears to be the case, but a closer look paints a somewhat different picture.[145] The Tribunal indicates that in Dublin, where most of the cases are heard, it only took 10 weeks (2 1/2 months) in 1998 from filing to hearing and in the provinces, it took 12 to 13 weeks.[146] This was a considerable improvement from 1996 and 1997 when the comparable figures were 24 weeks and 28 weeks and 12 weeks and 16 weeks respectively.[147] But those figures, 10 weeks in Dublin and 12 to 13 weeks in the other venues, are filing to hearing and do not tell the whole story.

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137. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

138. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

139. *See* Minimum Notice & Terms of Employment Act, § 4 (1973) (explaining the notice requirements for employers); Rasnic, *supra* note 6, at 484-85 ("within 14 days of the notice or the summary dismissal the employer must give its worker its reasons"); DEPT. OF ENTERPRISE, TRADE & EMPLOYMENT GUIDE TO LABOUR LAW (1999) (explaining the intricacies of bringing a claim under the minimum Notice & Terms of Employment Act).

140. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124 (listing a summary of claims referred to Employment Appeals Tribunal); Herbert L. Sherman, *Seniority & the Harmonization Goal of the EEC*, 4 COMP. LAB. L 26, 40-42 (discussing the effects of the Unfair Dismissals Act of 1977); Dermot MacCarthy, *Act Provides New Remedies for Unfair Dismissal,* IRISH TIMES, Sept. 10, 1993, at 12 (explaining that a dismissal is "unfair" if there are no substantial grounds to justify it).

141. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

142. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

143. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

144. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

145. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 11.

146. *See* Samuel Issacharoff, *The Changing workplace: Contracting for Employment: The Limited Return of the Common Law,* 74 TEX. L. REV. 1783, n.25 (1996) (describing the Irish formula "whereby a redundancy payment must be made in a lump sum equal to: (1) one week's pay; plus (2) one half week's pay for each year of continuous employment between the ages of 16 and 41; plus (3) one week's pay for each year of continuous employment over the age of 41"). *See generally* Rodriguez, *supra* note 6 (comparing employer's policies and obligations in the dismissal of employees in several European countries).

147. *See* (visited Oct. 25, 2000) <http://www/ormc.ie/employment_legislation.htm> (discussing the statutorily provided Redundancy Payments Scheme).

The Tribunal usually sets a case for one day with three to four weeks notice.[148] It does not actively reach out to parties to ascertain if a particular case will take longer and parties generally do not advise the Tribunal of that possibility.[149] As a result, particularly with lawyers on the scene, cases do not always finish in one day.[150] Then it becomes necessary to find another date, a task complicated by lawyers' schedules and the fact that two of the three tribunal members have other jobs that they are not always eager to leave.[151]

Even without this complication, the benchmark was the date of filing to the date of the hearing.[152] After the hearing, the parties must wait for the decision, which may not be rendered for six weeks or three months after the hearing is concluded.[153] An aggrieved party then has six weeks to appeal a Tribunal decision to the Circuit Court.[154] There are not many appeals, but when they are filed, they create further delay.[155] Of the 50 that were filed in 1998, only 10 were heard that same year.[156] Five were withdrawn, but the 35 that remained carried over into 1999.[157] Thus, the procedure is not as efficient as it first appears. Another element that is not comparable to what we know in the United States is that unless the appeal is on a specific point or the parties have agreed to limit the appeal in some way, the Circuit Court will hear the case de novo.[158] This is essentially the same procedure as is followed by the Tribunal, where a case is heard de novo if the appeal is from a recommendation of a Rights Commissioner.[159] Beyond that, a party can appeal to the High Court on a "point of law" or the Tribunal can ask the Minister of Enterprise, Trade & Employment to refer a question of law to the High Court for its determination.[160]

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148. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 8, 16.

149. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 8, 16.

150. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 8, 16 (noting that the waiting period in 1998 is a "considerable improvement on previous years").

151. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 8, 16.

152. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 8.

153. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 16.

154. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 8.

155. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 8.

156. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 8.

157. *See* EMPLOYMENT APPEALS TRIBUNAL ANN. REP, *supra* note 124, at 8.

158. *See Guide to Presenting Cases to the Employment Appeals Tribunal*, Irish Congress of Trade Unions, *supra* note 125, at 2 (stating that prior Tribunal Determinations are available, however they do not serve to bind the Tribunal in the instant case).

159. *See* Lawyer.ie, (visited Nov. 7, 2000) <http://www.lawyer.ie/legalterms.html> (stating "A District Court appeal is heard by the Circuit Court *de novo*, with the court considering afresh all the law and facts.").

160. *See* O'Reily McCarthy, (visited 11/07/200) <http://www.ormc.ie/employment_legislation.htm> (discussing the history, purpose and procedures of the Redundancy Appeals Tribunal); Interview with Anynomous, member of the Tribunal Secretariat, Dublin, Ireland (July 22, 2000) (There is an alternative to the Tribunal procedure, which highly paid employees often use. Many seek injunctions from the High Court to prevent their dismissal. However, the court proceeding, as I understand it, only tests the fairness of the employer's dismissal process and procedures.).

One final point about the Tribunal system is that in unfair dismissal cases, re-instatement or reengagement is not the remedy of choice.[161] This is in sharp contrast to the practice in the United States.[162] In the United States, reinstatement is unfair dismissal's classic remedy, and damage awards in lieu of reinstatement are relatively rare.[163]

In 181 Tribunal cases, there were only four reinstatements and 17 reengagements.[164] The usual remedy was financial compensation.[165] Of the awards in which compensation was

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161. *See* Bob Hepple, *The Duty of Loyalty Employee Loyalty in English Law,* 20 COMP. LAB. L. & POL'Y J. 205, 208 (1999) (noting that even in other commonwealth countries, e.g., England and Wales, the percentage of reinstatements or re-engagements is roughly 3 percent); Bob Hepple, *European Rules on Dismissal Law?*, 18 COMP. LAB. L. 204, 219 (1997) (pointing out that in 1994 the Committee on the European Social Charter adopted a draft for a revised Charter which makes compensation the primary remedy available to unfairly dismissed employees).

162. *See* Bohen v. City of E. Chicago, 799 F.2d 1180, 1184 (7th Cir. 1986) denying plaintiff's contention that " . . . the district court erred in denying her damages, costs, and attorney's fees under Title VII." The court further stated that "[t]he statute clearly provides that under Title VII 'the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . , back pay . . . , or any other equitable relief as the court deems appropriate.'" *Id.* The court ultimately held that ". . . damages are not equitable relief, [and] most courts have held that damages are not available to redress violations of Title VII. . . ." *See also* Douglas M. Staudmeister, *Grasping the Intangible: A Guide To Assessing Nonpecuniary Damages in the EEOC Administration Process*, 46 AM. U. L. REV. 189, 198 n.58 (1996) (noting that employees who are terminated due to intentional discrimination are only entitled to the equitable relief or reinstatement and up to two years' backpay).

163. *See* Mitchell v. Seaboard Sys. R.R., 883 F.2d 451, 452 (6th Cir. 1989) (holding that "prevailing plaintiffs in Title VII actions are entitled to equitable relief coupled with back pay and fringe benefits, but not compensatory damages."). In the United States for example, there are statutory provisions which consider reinstatement a "just and proper" relief in the union environment and provide for reinstatement as well as backpay for public policy reasons. *Id. See Procedure in Unfair Labor Practice Cases,* in 1 NAT'L LAB. REL. ACT: LAW & PRAC. (MB) Chapter 15 at § 15.05 (2000); 5 U.S.C. § 704 n.111 (2000) (noting that "[f]ederal employee[s] who claims wrongful discharge [are] entitled to pursue reinstatement and backpay claims pursuant to Administrative Procedure Act."); 42 U.S.C. § 1981a(b)(2) (2000) (precluding compensatory damage recovery in cases involving intentional discrimination in the workplace for backpay or interest thereon, but including compensatory damages for other losses, e.g., "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life.").

164. Reengagement is a form of reinstatement. However, the terms of reengagement are set by the Tribunal, while a reinstated employee receives the pay and benefits that may have been negotiated in his absence. DOING BUS. IN IR., *supra* note 106, at § 6.05 (describing re-engagement as " . . . re-employment of the employee, but not necessarily on identical terms. The terms will be determined by the Employment Appeals Tribunal (or the rights Commissioner or the courts, as the case may be) and will be governed by the circumstances surrounding the dismissal."). Reinstatement places the employee in their original position with " . . . no loss of rights, and with identical terms and conditions of employment. The employee must also get back pay for any salary, overtime pay, or other benefits which he did not get between the dismissal date and the tribunal award." DOING BUS. IN IR., *supra* note 106, at § 6.05; An interlocutory order in a reinstatement hearing can force the employer to continue to pay the employee their full salary, and bar the employer from appointing a replacement. *See* Lonergan v. Townshend, [1999] Ir. H. Ct. 13005 P (Transcript).

165. *See* Hepple, *supra* note 161 (noting that even in other commonwealth countries, e.g., England and Wales, the percentage of reinstatements or re-engagements is roughly 3 percent); Bob Hepple, *European Rules on Dismissal Law?*, 18 COMP. LAB. L. 204, 219 (1997) (pointing out that in 1994 the Committee on the European Social Charter adopted a draft for a revised Charter which makes compensation the primary remedy available to unfairly dismissed employees); Maurice Neill, *Worker Rights Bill Facing Assembly Test,* BELFAST TELEGRAPH, Feb. 2, 1999 (noting that proposed "fairness at work" legislation will increase the limit for unfair dismissal to (GBP) 50,000 in the face of average settlement hovering around (GBP) 2,700).

ordered, the average was £4000, with the bulk of the awards, some 70%, below £3000.[166] As with redundancy payments, there is a maximum limit to financial compensation.[167] This limit to financial compensation is two years of gross earnings, with an offset for interim earnings, but not for social welfare payments.[168] Interestingly enough the relative health of the Irish economy, in which new jobs can readily be obtained, has mitigated compensation awards and even led employers, in some cases, to discharge workers on inadequate grounds because of the lack of substantial financial risk.[169] This has led some to suggest that the Tribunal should go beyond its present "exceptional circumstances" rule and award legal and other costs to a successful employee where the employer's action of termination was particularly blatant.[170]

Even with the delays and other concerns that have been addressed, most of which are not evident on the surface, the ICTU has indicated general satisfaction with the workings of the Tribunal and I have not, in my research, come across any chorus of criticism.[171]

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166. *See supra* note 165, at 219 n.66 (noting that compensation as a primary remedy is in direct conflict with the International Labor Organization Convention No. 158 article 10, which makes reinstatement the primary remedy).

167. *See* DOING BUS. IN IR., *supra* note 106, at § 6.05 (contrasting unfair dismissal eligibility of one year of employment to two years to qualify for redundancy); *supra* note 106, at § 6.05 (noting that the formula for calculating redundancy payments is cumbersome, and cannot exceed the statutory limit of £11,500 per year or £211.50 per week. When applying the statutory formula, any calculated figure that exceeds these limits is simply disregarded).

168. *See supra* note 105, at § 6.05 (noting that in unfair dismissal cases "[c]ompensation is the payment of a monetary award of no more than 104 weeks remuneration. It is calculated by assessing the actual and estimated future loss of income suffered by the employee."); *supra* note 105, at § 6.05 (noting that the formula for calculating redundancy payments is cumbersome, and cannot exceed the statutory limit of £11,500 per year or £211.50 per week. *But see supra* note 105, at § 6.05 (noting that " . . . [A] number of deductions [are permitted] from the compensation awarded to successful applicants. The two main headings for such deductions are contributory fault and failure to mitigate loss. The Employment Appeals Tribunal has also made a practice of deducting social welfare payments that have been received or income tax rebates."). Wilkinson, *supra* note 5, at 35 (noting that redundancy payments are not required for part-time workers of less than eighteen (18) hours per week).

169. *See* Carney v. Balkan Tours Ltd., No. 34/96, (Transcript) (Ir. S.C. Jan. 20, 1997) (LEXIS, Irish Reported and Unreported Cases) (holding that the Employment Appeals Tribunal has a wide discretion in determining how the claimant's conduct contributed to her own dismissal, thus allowing the Tribunal to reduce the claimant's compensation from 5,843 pounds to 200 pounds); Jamie Smyth, *NI Economy 'Well Placed' to Benefit From Stability*, IRISH TIMES, June 16, 2000, at 50 (noting that the "strong overall economic performance last year and business resilience are building blocks to meet future challenges"); Irish Congress of Trade Unions, *Economic Issues*, (visited Oct. 9, 2000) <http://www.ictu.ie/html/economic.htm> (noting that the "Irish Economy has been the most successful economy in the European Union over the past decade").

170. Interview with Anynomous, member of the Tribunal Secretariat, Dublin, Ireland (July 22, 2000)

171. *See Brennan to Examine Plans to Cut Claims On Motor Insurance*, IRISH TIMES, June 23, 1993, at 4 (noting high costs and delays due to the increasing number of legal representation in front of the Employment Appeals Tribunal); *Personal Injury Tribunal Urged*, IRISH TIMES, Apr. 21, 1997, at 18 (noting that a joint group which included the ICTU recommended that "personal injury claims should be heard by an independent tribunal . . . modeled on the Employment Appeals Tribunal"). *But see* Jackie Gallagher, *Study of Holidays Legislation Promised*, IRISH TIMES, Oct. 5, 1994, at 3 (stating that a "review of the Employment Appeals Tribunal is being considered because the ICTU thinks it has become too legalistic").

What is important about the system is that it covers most workers, unionized and non-unionized, and provides a unified approach under which what Americans think of as separate contractual and statutory rights can both be heard.[172]

The American system is not at all comparable. In the first place, the bulk of workers in the United States do not have protection against dismissals based on an employer's view of misconduct or incompetence.[173] Except for the previously mentioned statutory protections, most Americans remain unprotected.[174] Despite the diligent efforts of the Commissioners on Uniform State Laws, only Montana has adopted an unfair dismissal act, where there are more cattle and sheep than people.[175]

There are probably a variety of reasons for why this is the case.[176] But, Americans' distrust of government, which is embedded deep in our culture, in my judgment, provides the most thorough explanation.[177] Our treatment of government, in Garry Wills' words, is as "a neces-

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172. *See* Audrey Magee, *Gay Woman Loses Action Over Dismissal*, IRISH TIMES, Feb. 2, 1994, at 1 (stating that the amendments to the Unfair Dismissals Act in 1993 allow "sexual orientation as grounds for contesting unfair dismissals"); Emmet Oliver, *All Employees Are Covered Under Equality Legislation*, IRISH TIMES, Apr. 24, 1998, at 70 (stating that contract employees who have been employed for more than a year are covered by the Unfair Dismissals Act); *see generally* MacCarthy, *supra* note 140 (explaining the Unfair Dismissals Act).

173. *See* Stieber, *supra* note 7, at 230 (noting that some 50 million workers are not protected against unfair dismissal in the United States); Marla J. Weinstein, Comment, *The Limitations of Judicial Innovation: A Case Study of Wrongful Dismissal Litigation in Canada and The United States*, 14 COMP. LAB. L. 478, 493 (1993) (discussing the employment-at-will doctrine of the United States which allows employers to fire "'for good cause, for no cause or even for cause morally wrong.'"); *see also* Rasnic, *supra* note 6 (same).

174. *See* Stieber, *supra* note 7, at 230 (noting that some 50 million workers "have no protection against unfair dismissal" in the United States unless they fall under a statute that prevents employment discrimination); Weinstein, *supra* note 174, at 494 (noting that numerous statutes including the National Labor Relations Act, the Age Discrimination in Employment Act and the Worker and Adjustment and Retraining Notification Act prevent an employer from making specified terminations). *See generally* Rasnic, *supra* note 6, at 446-47 (discussing state statutory exceptions to the employment-at-will doctrine).

175. *See* Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-901 (1999); Weinstein, *supra* note 174, at 494 (noting that Montana is the only state to enact an unfair dismissal act). *See generally* Marc Jarsulic, *Protecting Workers from Wrongful Discharge: Montana's Experience with Tort and Statutory Regimes*, 3 EMPL. RTS. & EMPLOY. POL'Y J. 105, 105 (1999) (discussing Montana's Wrongful Discharge From Employment Act).

176. *See* Michael D. Fabiano, Note, *The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It*, 44 HASTINGS L.J. 399, 400 (1993) (noting that "California, Illinois, Michigan, and New York, have considered enacting a statutory reform of employment law that would include protection against termination without cause"); Mark D. Wagoner, Jr., Comment, *The Public Policy Exception to the Employment at Will Doctrine in Ohio: A Need for a Legislative Approach,* 57 OHIO ST. L.J. 1799, 1833 (1996) (noting that the "political volatility" of the issues surrounding the employee/employer relationship is shown by "the fact that only one state has successfully passed a wrongful termination statute"). *See generally* Kathleen C. McGowan, Note, *Unequal Opportunity in At-Will Employment: The Search For A Remedy,* 72 ST. JOHN'S L. REV. 141, 145-47 (1998) (discussing the origin and nature of the employment-at-will doctrine).

177. *See* Richard A. Epstein, *Property and the Politics of Distrust: Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 47-59 (1992) (arguing that "government is a necessary evil" which maintains order but whose officials are merely self interested); Frederick Schauer, *Symposium on Democracy and Distrust: Ten Years Later: The Calculus of Distrust,* 77 VA. L. REV. 653, 657 (1991) (noting that distrust of government stems from the courts unwise use of power); Jeffrey J. Rachlinski, Book Review, *The Wages of Risk: A Review of Dealing with Risk: Why the Public and the Experts Disagree on Environmental Issues*, 6 CORNELL J. L. & PUB. POL'Y 673, 683 (1997) (noting that the general public has a distrust for the government).

sary evil"; that which governs best governs least.[178] How else can the Supreme Court's striking down a New York statute setting a maximum ten-hour day for bakers as contrary to their freedom of contract be explained?[179] How else can we explain that the Republic of South Africa, only a few years away from apartheid, has an unfair dismissal law that covers everyone from the lowest of housekeepers to high executives while in the United States, as powerful, as rich and as vast as it is, nine out of ten workers have no such protection?[180]

Certainly, the American arbitration system does work well.[181] There are delays, however, which are longer in many respects than those in Ireland.[182] Much of the United States' arbitration, like some in Ireland, is overly legalistic, with lawyers insisting on objections and the inclusion of briefs and other legal memoranda in cases where they are clearly not necessary.[183] Though the basis upon which courts in the United States can review arbitration awards is much narrower than in Ireland, with courts in the United States constrained to accept arbitral findings of fact, there is still too much review and too many courts straining to substitute their judgment for the judgment of the individual chosen by the parties.[184]

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178. *See* Epstein, *supra* note 177, at 47-59 (arguing that "government is a necessary evil . . . [which is] necessary to preserve civil order"); Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 55 (1997) (stating that the "Framers may have perceived government to be a necessary evil").

179. *See* Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n, 110 F.3d 547, 554 (8th Cir. 1997) (noting that Lochner v. New York invalidated the "maximum work hours legislation as an unconstitutional exercise of police power").

180. *See generally* Eric Taylor, *The History of Foreign Investment and Labor Law in South Africa and the Impact on Investment of the Labour Relations Act 66 of 1995*, 9 TRANSNAT'L LAW. 611, 611 (1996) (discussing South Africa's Labor Relations Act); Karon M. Coleman, Comment, *South Africa: The Unfair Labor Practice and the Industrial Court*, 12 COMP. LAB. L. 178, 178 (1991) (same).

181. *See* Michael Hunter Schwartz, *From Star to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration*, 22 W. ST. U. L. REV. 1, 12 (1994) (discussing the benefits of arbitrations); Mark Berger, *Can Employment Law Arbitration Work?*, 61 UMKC L. REV. 693, 693 (1993) (discussing various aspects of arbitration and employment law); *See generally* Stephen J. Ware, *Arbitration and Assimilation*, 77 WASH. U. L. Q. 1053, 1053 (1999) (noting that "arbitration can produce a sophisticated, comprehensive legal system").

182. *See* Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional and A Feminist View*, 1991 U. ILL. L. REV. 67, 71 n.19 (1991) (noting that the "average time elapsed between requesting an arbitrator and the award is about 230 days"); Alan Scott Rau, *Resolving Disputes Over Attorney's Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2027 n.83 (1993) (same); Schwartz, *supra* note 182, at 12 n.85 (1994) (noting that arbitration can take more than four months).

183. *See* Symposium, *New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry: Discovery*, 63 FORDHAM L. REV. 1551, 1559 (1995) (discussing the "extensive and time consuming" nature of discovery in arbitrations); Wendy Ho, Comment, *Discovery in Commercial Arbitration Proceedings*, 34 HOUS. L. REV. 199, 200 n.8 (1997) (noting the delays that discovery demands and motions have placed on the arbitration system). *See generally* A. Leo Levin, *Reducing Court Costs and Delay: Court-Annexed Arbitration*, 16 U. MICH. J. L. REF. 537, 537 (1983) (discussing delays in arbitration).

184. *See, e.g.*, Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers, Local Union Number 2713, 103 F.3d 449 (5th Cir. 1997). "Where the arbitrator exceeds the express limitations of his contractual mandate, judicial deference ends and vacatur or modification of the award is an appropriate remedy." Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers, Local Number 2713, No. 96-40279, 1997 U.S. LEXIS 12687 at 6 (5th Cir. Jan. 21, 1997) (revised opinion).

Yet those criticisms, as valid as they may be, are not the main point. Those shortcomings can be kept in check or ameliorated through diligence and effort. The main point is our failure to insist on a system, whether the adjudicators are private arbitrators or government servants, that covers all.[185]

Those familiar with the United States know that many employers have unilaterally imposed arbitration on unorganized employees.[186] This arbitration may be inherently unfair because the employee has no say in the selection of the arbitrator or because the arbitrator, unilaterally empowered to adjudicate statutory claims, such as race or age discrimination, in place of a government agency or a court, is not given the authority to award the same kind of remedies that an agency or a court could award.[187]

United States courts are beginning to look closer at these unfair systems, but the investigation has taken more than 10 years.[188] Even then, the analysis was only initiated because of the prodding of the Due Process Task Force, which is made up of representatives from the American Bar Association, the National Academy of Arbitrators, and other organizations.[189] The Academy itself has also guided this process and has advised its members to refuse to arbitrate under systems that did not meet the Standards of the 1997 Due Process Protocol.[190] The United States Congress appears to be more interested in protecting, vis-à-vis compulsory arbitration, the rights of car dealers against car manufacturers rather than the rights of ordinary

185. *See generally* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1239-40 (1993) (discussing private arbitrators); Theodore J. St. Antoine, *Symposium on Labor Arbitration Thirty Years After the Steelworkers Trilogy: Afterword*, 66 CHI.-KENT L. REV. 845, 858-60 (1990) (discussing the handling of employment disputes by private arbitrators versus an administrative agency); Wagoner, *supra* note 176, at 1799 (discussing lack of specific standards in employment litigation).

186. *See* Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1040 (1998) (noting that employers are beginning to require their employees to submit grievance claims to private dispute resolution); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 54 (1997) (noting the increase in the appearance of arbitration clauses in employment contracts); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1072 (1998) (same).

187. *See* Antoine, *supra* note 185 (discussing the handling of employment disputes by private arbitrators versus an administrative agency); Malin & Ladenson, *supra* note 185 (stating that "private employment arbitrators lack legitimate authority to apply personal standards of justice when interpreting the public law of employment statutes").

188. *See generally* Haagen, *supra* note 186, at 1039 (discussing various reasons why the courts should begin to look closer at the unfair system of mandatory arbitration); Nicolau, *supra* note 9, at 187 (discussing a pending case where the fairness of mandatory arbitration is at issue); Speidel, *supra* note 186, at 1069 (discussing the various concerns about mandatory arbitration).

189. National Academy of Arbitrators, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship*, (visited Oct. 14, 2000) <http://www.naarb.org/protocol.html> (noting that the Task Force was created "to examine questions of due process arising out of the use of mediation and arbitration for resolving employment disputes").

190. The Protocol, the Academy Statement on Mandatory Arbitration and the Academy Guidelines are available on the Academy's Web site, (visited Oct. 26, 2000) <http://www.naarb.org/guidelines> ("[m]embers of the National Academy of Arbitrators should consider and evaluate the fairness of any employment arbitration procedures in light of the Academy's 'Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems.'") (In order to advocate the most impartial and unbiased form of arbitration, the Academy endorses certain procedural guidelines).

workers.[191] Bills to address the latter's protection against unfair systems continue to languish in committee.[192]

The possibility of the establishment of a universal system protecting all against unfair dismissals appears particularly dim.[193] Although we could learn from Ireland and other countries, it appears doubtful that we will.[194]

Recently, Federal Reserve Board Chairman Alan Greenspan, to whom we all owe a debt of gratitude for his stewardship of the American economy, stated that the reason for the United States' relatively robust health in contrast with other economies was the fact that the cost to

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191. *See, e.g.,* Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, The Intellectual Property Clause and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 96 (1999) ("[t]he big 'American' car manufacturers dropped a proposed statute to protect industrial designs when the American automobile workers' unions demanded that the car parts protected by the act be manufactured in the United States" evidencing of support "big business" over interests of individual workers); Design Innovation & Technology Act of 1991, H.R. 1790: Hearing before the Subcomm. on Intellectual Property and Judicial Admin., House Comm. on the Judiciary, 102d Cong. (1992); Automobile Dealers' Day in Court Act of 2000, 15 U.S.C.S. § 1221 (2000) (recent legislation enacted to protect individual automobile dealers as against automobile manufacturers in context of unfair and one sided contracts). *See generally* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) (declaring arbitration in one sided contracts (i.e., as between a business and a consumer, employee or other similarly disadvantaged bargaining party unconstitutional).

192. *See, e.g., Flawed Farm Labor Programs*, CONG. PRESS RELEASES, Oct. 27, 1999 (noting that Senators G. Smith and B. Graham introduce a bi-partisan effort to improve the "agricultural labor system" which has been an area lacking in adequate worker protection); *Pelosi Votes Against GOP Labor-HHS-Education Spending*, CONG. PRESS RELEASES, Sept. 23, 1999 (stating that Congresswoman Pelosi blocked a Republican Appropriations' Committee bill which was cited as "threatening worker safety"); Peter R., Marksteiner, *The Flying Whistleblower: It's Time for Federal Statutory Protection for Aviation Industry Workers,* 25 J. LEGIS. 39, 46 (1999) (detailing legislation [H.R. 915] to protect aviation workers in the whistleblower context to improve safety and efficiency); Joseph F. Schuler, Jr., *Electric Restructuring Legislation: Handicapping the 106th Congress; Will Inaction in the Senate and House Prompt FERC to Move Ahead?*, UTIL. FORT., Feb. 1, 1999, at 32 (noting that worker protection bill H.R. 4798 was not enacted by the 105th Congress and will hopefully be reintroduced during the 106th Congress).

193. *See* Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 111 (1998) (stating that the termination procedures will remain status quo, but workers who were victims of the massive downsizings and lay-offs of the 1980s found employment shortly thereafter); Clyde W. Summers, *Propter Honoris Respectum: Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1035-36 (noting that in absence of collective bargaining agreements, United States workers are predominantly subject to at-will termination); *Greenspan Sees Worker Insecurity; Technology May Cap Demands and Inflation*, HOUS. CHRON., July 12, 2000, at 1 ("putting workers on edge about their skills and job security, makes people more likely to innovate").

194. *Accord* Hyde, *supra* note 193, at 108 (noting that current U.S. forms of employment provide little incentive to restructure modes of employee dismissal); *See* Summers, *supra* note 194, at 1066-67 (contrasting traditions of employment and its societal effects as found in the United States and various foreign countries); *c.f.* Wilkinson, *supra* note 5, at 33-34 (describing that Irish regulatory schemes are moving towards fuller coverage of part-time workers as well as full time).

companies in the United States of "dismissing workers are lower."[195] Hence, the "potential costs of hiring and the risks associated with expanding employment are less."[196]

Of course, there are differences. One only need examine the Italian system of dismissal payments and associated costs to appreciate just what labor market inflexibility means.[197] But the United States should not take pride in what Mr. Greenspan has called its "significantly higher capacity for job dismissal"[198] when it lacks adequate means to test the fairness of those dismissals.[199] The economy of the United States may lead the developed world, but so does its poverty and inequality of income and wealth.[200] It is indeed the time to examine the systems of other nations and strike an appropriate balance so that basic protections are not sacrificed in the name of production and progress.

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195. *See Technology is Heightening Job Worries, Greenspan Says*, N.Y. TIMES, July 12, 2000, at C2; (quoting an Alan Greenspan speech given before the National Governors' Association giving rise to a debate over the effect of technology on employment and inflation figures); *see also Greenspan Sees Worker Insecurity; Technology May Cap Demands and Inflation*, *supra* note 193 (quoting an Alan Greenspan speech given before the National Governors' Association giving rise to a debate over the effect of technology on employment and inflation figures).

196. *See Technology is Heightening Job Worries, Greenspan Says*, *supra* note 195; *Greenspan Sees Worker Insecurity; Technology May Cap Demands and Inflation*, *supra* note 194.

197. *See* Benjamin Aaron, *The Duty of Loyalty a Ten Nation Study by the Committee on International Studies of the National Academy of Arbitrators Employees' Duty of Loyalty*, 20 COMP. LAB. L. & POL'Y J. 143, 145 (1999) (noting Biagi's contention that with the introduction of contingent employment contracts, new and "more sophisticated interpretations of the principle of loyalty are to be expected"); Marco Biagi, *The Duty of Employee Loyalty in Italian Labor Law*, 20 COMP. LAB. L. & POL'Y J. 249, 249-50 (1999) (discussing the concept of employee loyalty as it effects labor market movement and its role in termination of employees). *But c.f.,* Hyde, *supra* note 193, at 109 (illustrating how the United States system of employment and termination allows for great flexibility when confronted by developments in labor organization).

198. *See Technology is Heightening Job Worries, Greenspan Says*, *supra* note 195 (discussing the "heightened level of potential job dismissal"); *Greenspan Sees Worker Insecurity; Technology May Cap Demands and Inflation*, *supra* note 194 (discussing the "heightened level of potential job dismissal").

199. United States corporate employers, for the most part utilize the at-will system for job dismissal, which is relatively unrestricted other than limited provisions prohibiting "wrongful termination." A "wrongful termination" does not equate to a dismissal occurring as a result of a change in the economy due to technological influences. *See* Cynthia L. Estlund, *The Changing Workplace: Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657-63 (1996) (positing that "just cause" termination is a necessary guideline for promoting fairness and stability in corporate employment structure); McGowan, *supra* note 176, at 142-47 (noting that the legal system must remedy the at-will doctrine as it promotes unfairness, uncertainty and corporate instability); *see, e.g.,* Raffif S. Baroutjian, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis, in with Romer v. Evans*, 30 LOY. L.A. L. REV. 1277, 1307 (1997) (proposing an extension of the Equal Protection Clause to prevent termination of homosexuals as "arbitrary").

200. *See* Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 481 (1987) ("The gap between rich and poor is widening."); William J. Curran, *After 100 Years: A Disquieting Discourse of Poverty and Wealth*, 35 N.Y.L. SCH. L. REV. 1031, 1034 ("Poverty flourishes. . . Poverty increased during the 1980's, the nation's longest sustained postwar period of economic expansion."); Leonard J. Long, *Optimum Poverty, Character, and the Non-Relevance of Poverty Law*, 47 RUTGERS L. REV. 693, 699 (1995) (noting that "35.7 million, or 14.2% of the American people, lived below the official level of poverty in 1991."); Arnie Arnesen, *New Hampshire Weekly; Big Money Keeps Most Out of the Picture*, B. GLOBE, Dec. 5, 1999, at 2 (noting a dramatic shift in concentration of wealth in the upper classes since the 1970s); Gary Burtless, *Growing American Inequality in Income*, BROOKINGS REV., Jan. 1, 1999, at 31 (promoting changes in public policy initiatives to address income disparities of U.S. families which have continued to increase since the 1970s); Pollack, *supra* note 192, at 96-97 (while discussing First Amendment rights as they effect intellectual property issues, Pollack criticizes the "trickle down" economic theory, noting that industry is further increasing the income disparity between the upper and lower classes).

My Executive Makes More Than Your Executive: Rationalizing Executive Pay in a Global Economy

By Professor Susan J. Stabile*

I. Introduction

During the discussion session following a presentation I made on executive pay at the 1999 conference of the Society for the Advancement of Socio-Economics, a German sociologist described U.S. compensation packages as "obscene." That is not an isolated view, either from abroad or from within the United States.[1]

Frequently, critics of the levels of compensation paid to U.S. executives point to the fact that top-paid executives in large companies in the United States generally earn more than their counterparts in countries like Germany and Japan and that the disparity in pay between foreign (i.e., non-U.S.) executives and rank and file employees is much smaller than the correlative disparity in the U.S.[2] This criticism is sometimes coupled with a charge that the differential in pay between the United States and foreign executives contributes to the United States' competitive difficulties.[3]

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1. *See Business Subsidies: Hearings Before the House Committee on the Budget*, 106th Cong. (1999), *available in* 1999 WL 20009714 (statement of Ralph Nader, describing executive pay as "bloated"); Don Bauder, *Corporate Welfare, Excessive Pay are Warts of Capitalism*, SAN DIEGO UNION-TRIB., Dec. 2, 1998, at C1, *available in* 1998 WL 20062673 (citing comment of Graef Crystal that executive compensation is "worse than ever"); *e.g., CBS This Morning* (CBS television broadcast, Mar. 10, 1999), *available in* LEXIS, CBS News Transcript (interviewing Judith Fischer of *Executive Compensation Reports*, describing CEO pay as "total excess").

2. *See* Mark J. Loewenstein, *The Conundrum of Executive Compensation,* 35 Wake Forest L. Rev. 1, 2-3 (2000) (stating that foreign executives earn considerably less than U.S. executives); Michael E. Ragsdale, *Executive Compensation: Will the New SEC Disclosure Rules Control "Excessive" Pay At the Top?*, 61 UMKC L. REV. 537, 541-43 (1993) (discussing the disparity in pay between CEOs from the United States and those from Japan while noting the large disparity between the earnings of U.S. CEOs and rank and file employees); Tracy Scott Johnson, Note, *Pay For Performance: Corporate Executive Compensation In the 1990's*, 20 DEL. J. CORP. L. 183, 191 (1995) (stating that the disproportionate compensation for U.S. executives compared to senior executives of foreign corporations has increased at a rate far exceeding that of the general American work force). *See generally* Mark J. Loewenstein, *Making America Competitive: Michael T. Jacobs' Short-Term America: The Causes and Cures of Our Business Myopia*, 18 DEL. J. CORP. L. 453, 463 (1993) (book review).

3. *See* Ragsdale, *supra* note 2, at 541 (positing that the excessive pay to U.S. CEOs has made American companies uncompetitive); Mark A. Salky, Comment, *The Regulatory Regimes for Controlling Excessive Executive Compensation: Are Both, Either, or Neither Necessary?*, 49 U. MIAMI L. REV. 795, 796 (1995) (noting that American competitiveness has been questioned because of the excess sums paid to CEOs); *see also* Susan J. Stabile, *Viewing Corporate Executive Compensation Through A Partnership Lens: A Tool To Focus Reform*, 35 WAKE FOREST L. REV. 153, 166 n.58 (2000) (noting the argument that high ranking U.S. CEO pay effects the competitiveness of U.S. corporations).

* **Associate Dean and Professor of Law, St. John's University School of Law; Adjunct Assistant Professor of Law, New York University School of Law. J.D. 1982, New York University School of Law; B.A. 1979, Georgetown University.**

While laments about the existence of a large disparity in pay between U.S. and foreign executives are frequently heard, very little attention or analysis has been focused on the question whether or why the foreign experience is meaningful in evaluating the compensation paid to U.S. executives,[4] that is, whether the difference in absolute pay levels and/or the smaller disparity in pay in those countries between executives and rank and file employees is reason to question U.S. pay levels or differentials. This paper considers the historical disparity in pay between U.S. and foreign executives and explores reasons we might care about the existence of such a disparity. It also forecasts whether it can be expected that the historical disparity in U.S. vs. foreign executive pay will continue in an increasingly global economy.

II. Evaluating the Extent of the U.S. vs. Foreign Executive Pay Differential

One can find many reports suggesting that American executives are paid significantly more than the executives of other industrialized nations.[5] Reports frequently take the form of comparisons of the gap in pay between U.S. executives and rank and file employees and the corresponding gap between executives and rank and file workers in other countries. Thus, recent figures suggest that whereas the gap in pay between U.S. executives and rank and file workers is currently 419 times the pay of average employees,[6] the corresponding pay gap in

4. The one exception is the assertion that executive compensation is responsible for the country's competitive difficulties. *See* Jude Rich, *Due Diligence on executive pay; Chairman's Agenda: Governing for Shareholder Prosperity,* INV. DEALERS' DIGEST INC. DIRECTORS & BOARDS, March 22, 1992, at 46 (noting high levels of pay without high performance have created a "trust gap," and rank-and-file employees have watched executive pay soar at the same time they have seen force reductions, fewer promotions, and smaller merit increases); *see also infra* note 22.

5. *See, e.g.,* DEREK BOK, THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA 71 (1993) (American CEOs of the two hundred largest companies earn significantly more than the average compensation for CEOs in large companies in France, Germany, England, other European countries, and Japan); GRAEF S. CRYSTAL, IN SEARCH OF EXCESS 205-08 (1991) (comparing compensation of U.S. executives with that of executives in Japan and Germany). *But see* Richard Morais, Gale Eisnestodt and Steve Kichen, *The Global Boss' Pay: Where (and How) the Money is*, FORBES, June 7, 1993, at 90 (discounting disparities between American and foreign executive pay).

6. *See* Loewenstein, *supra* note 2, at 3 (noting that the compensation of CEOs has increased to 419 times than that of the general labor force); *see also* Tim Smart, *The Worker-Boss Pay Gap Widens to a Chasm in U.S.*, INT'L HERALD TRIB., Aug. 31, 1999, at 11 (citing annual survey of executive compensation by the Institute for Policy Studies finding that the ratio of top executive to factory worker pay is 419 to 1, compared to 42 to 1 in 1980); Jerri Stroud, *Top Executives Continue to Rake It In Even Though A Lot of Shareholders Didn't: The Gap Between Executives and Workers Widens*, ST. LOUIS POST-DISPATCH, July 18, 1999, at E1 citing *Business Week* estimates that U.S. CEO pay was 419 times the amount earned by the average U.S. worker).

Germany is only eight to one,[7] in Japan, in the range of 20 or 30 to one,[8] in Sweden, seven to one,[9] and in the U.K., eighteen to one.[10]

However, several factors make it difficult to evaluate reports of the pay differentials between U.S. and foreign executives. First, because income tax rates are so high in many other countries,[11] non-United States executives generally receive a significant amount of nontaxable compensation, far in excess of the types of fringe benefits most American executives are accustomed to receiving.[12] Generous housing allowances are not uncommon and it is not unheard of

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7. *See* IRA T. KAY, CEO PAY AND SHAREHOLDER VALUE: HELPING THE U.S. WIN THE GLOBAL ECONOMIC WAR 69 (1998) (stating that, in Germany, high tax rates discourage high bonuses); Robert Taylor, *UK Executives Top "Fat Cat Pay League*," FINAN. TIMES (London), Nov. 24, 1999, at 6 (citing Germany's tax rates as an example). *See generally* Joshua A. Kreinberg, Note, *Reaching Beyond Performance Compensation In Attempts To Own the Corporate Executive*, 45 DUKE L.J. 138, 145 (1995) (discussing the ratio between CEOs and industrial workers in Japan and Germany).

8. *See* Chris Pope, *Big Bucks: Stock Options Growing Larger in Executive Pay Packages*, SUN. TELE., July 4, 1999, at E1 (noting that ratio in Japan is 25 to 1); Stroud, *supra* note 6 (noting that in Japan top executives generally earn 20 to 30 times what the lowest-paid workers earn); *see also* ROBERT S. OZAKI, HUMAN CAPITALISM: THE JAPANESE ENTERPRISE SYSTEM AS WORLD MODEL 8 (1991) (describing gap between highest executive and lowest rank and file worker in Japan as "incomparably narrower" than the correlative U.S. gap).

9. *See* Taylor, *supra* note 7 (providing the pay gap with Sweden); *see also* Reinhold Fahlbeck, *The Role of Neutrals in the Resolution of Interest Disputes in Sweden*, 10 COMP. LAB. L. 391, 394 (1989) (noting a narrow gap between employees in different categories in Sweden); Derrick Z. Jackson, *Falling Into the Gap*, THE BOSTON GLOBE, Sept. 3, 1999, at A19. CEOs of America, now make 419 times the salary of the average worker. *Id*. The gap has grown tenfold since 1980, when CEOs made 42 times the salary of the average worker. *Id*.

10. *See* Taylor, *supra* note 7. The figure is slightly larger, 26-to-1 when stock options and alternative forms of incentive pay are included. *Id*. *See also Creamed*, THE ECON., Nov. 27, 1999. Even at 18-1, a gap small by U.S. standards, the U.K. is derided for paying too much to its executives. *Id*. The gap between the pay of U.K. executives and rank and file workers appears to be growing. *See also* Christine Buckley, *Can the Global Market Really Justify Boardroom Excess?*, THE TIMES (London), Aug. 4, 1999, at 31 (noting that in 1997, the ratio was 16:1, and in 1994, 12:1); Jean Lebreton & John Slaven, *Evaluating Executive Compenation*, THE NATION, Nov. 15, 1999, 1999 WL 28119801 (noting that in the U.K., as in the U.S., "fierce competition for management talent has driven senior executives' remuneration to record levels"). It is certainly the case that there are a number of U.K. companies that provide quite generous compensation, even compared with the excesses attributed to U.S. companies. For example, before its collapse, Barings PLC had an incentive compensation plan under which 50% of the company's gross earnings were paid in the form of bonuses. *See* Marcus W. Beauchli et al., *Broken Bank: Barings PLC Officials May Have Been Aware of Trader's Position*, WALL ST. J., Mar. 6, 1995, at A1, A7.

11. *See* Martin D. Ginsburg, *Taxing the Components of Income: A U.S. Perspective*, 86 GEO. L.J. 123, 134 (1997) (stating that Sweden's income tax can be imposed up to rates of 90%); Morais, et al., *supra* note 5. In Japan, the top marginal tax rate is 65% of taxable income above about $155,000 a year. *Id*. *See e.g.,* KAY, *supra* note 7, at 25 (showing tax rates and social security deductions in France can equal 65% of an executive's compensation and 53% of personal income can be taxed in Germany). *See generally* CRYSTAL, *supra* note 5, at 206.

12. *See* Stephen Gates, *Aligning Performance Measures and Incentives in European Companies*, THE CONF. BOARD RES. REP. 11 (1252-99-R, 1999) (copy on file) (noting that in countries with a highly progressive tax structure, more weight is given to indirect compensation); KAY, *supra* note 7, at 25 (same); *e.g.*, Morais, et al., *supra* note 5 (noting German executives are routinely given housing allowances, Japanese executives spend three times more than American executives on entertainment, and French executives receive world-class chefs and British executives receive upscale cars with drivers for personal use); CRYSTAL, *supra* note 5, at 205-07 (1991) (Japanese executives get use of company apartments in Tokyo as well as a car and driver, German executives get many perks, including car and driver, club memberships, rent-free housing and security guards).

for bonuses to be paid outside of the executive's country to avoid imposition of income tax.[13] While American executives receive their share of "perks,"[14] the level of such non-monetary compensation does not appear to be commensurate with that received by their counterparts abroad.[15]

Second, certain valuable and traditional components of an American compensation package take the form of benefits that are governmentally provided in other countries. Thus, medical, death and disability benefits, which make up a portion of the compensation of American executives, are frequently provided through other means in Europe.[16] If those government-provided benefits (paid for with the additional money taxed from the income of foreign executives) were added into the total compensation paid to foreign executives, the disparity in their pay compared to that of U.S. executives would be narrower.

Third, the job description of American CEOs is often very different from that of CEOs of foreign companies. For example, Japanese companies typically utilize a team-management approach, which places less emphasis on the abilities and importance of a CEO than is true in

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13. *See* Gates, *supra* note 12 (noting that in countries with a highly progressive tax structure, more weight is given to indirect compensation); Morais, et al., *supra* note 5 (reporting that German executives receive two paychecks; one legally reported and the other in a foreign bank account); *see also* Loewenstein, *supra* note 2, at 6 (discussing the different ways that corporate executives are compensated).

14. It is not atypical for executives of large corporations to have company-paid membership in a club or use of an automobile. *See, e.g.,* Linda Kephart Flynn & Michael J. Flynn, *Taking Stock*, 22 INGRAM'S 28 (Aug. 1, 1996) (noting luxury automobiles and local club membership are standard perks); David Young, *Those Little Extra's: Car is Most Prevalent Perk*, CHI. TRIB., July 1, 1996, at 3 (asserting that cars are the most frequent perk); *see also Popular Perks: Forget the Salaries, the Bonuses, the Stock Options; Let's Get to the Good Stuff!*, WALL ST. J., Apr. 18, 1990, at R25 (listing other perks CEOs receive in addition to base pay). Despite the fact that generally American executives do not receive the level of perquisites of foreign executives, there are some abuses. *See, e.g.,* CRYSTAL, *supra* note 5, at 201-02 (giving examples of lavish uses of luxury cars with drivers, corporate helicopters or jets and company-paid apartments).

15. *See* Tara Parker-Pope, *So Far Away: The Gap Between Executive Pay in Europe and the U.S. was Narrowing, But Then Culture and Government Restrictions Got in the Way*, WALL ST. J., Apr. 11, 1996, at R12 (citing Hewitt Associates study suggesting American CEOs earn more than CEOs in Great Britain, Germany, France and Italy even when perquisites are included in compensation). Differences in the amounts of perquisites only narrow the gap. *Id.* It does not change the fact that American executives are paid more than their foreign counterparts. *Id. See also* Loewenstein, *supra* note 2, at 2-3 (stating that foreign executives earn considerably less than U.S. executives); Ragsdale, *supra* note 2, at 541-43 (same); Loewenstein, *supra* note 2, at 463.

16. *See* Gates, *supra* note 12; Celestine Bohlen, *Officially, Sicily Is Desperately Short of Jobs, but Sub Rosa, Things are Rosier*, N.Y. TIMES, June 17, 1997, at A6. The elaborate social protection system also provides liberal maternity leave, early pensions, long holidays, free medical care and generous public payrolls. *Id. See also* Robert D. Hershey, Jr., *YOUR TAXES: Cheer Up, It Could Be Worse*, N.Y. TIMES, Feb. 28, 1993, at 13 (quoting Bruce B. McLaughlin, international tax partner at KPMG Peat Marwick, that "Europe generally has very high social benefits").

American companies.[17] In contrast to the CEO of an American company, a Japanese executive does not have the high level of responsibility and direct involvement in managing the corporation.[18] That makes comparisons between the compensation of U.S. CEOs and non-U.S. CEOs alone, without taking into account compensation and duties of other executives,[19] not very meaningful.

Factors such as these mean that there is reason to question the widely quoted figures showing vast disparity in the pay ratios of U.S. and foreign executives in relation to their rank and file employees. Even if one ignores arguments suggesting that American executives may deserve

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17. *See* OZAKI, *supra* note 8, at 1-2, 8, 24 (discussing Japanese human capitalism model, one of the characteristics of which is more diffused and consensual decision making); Wesley Liebtag, *Compensating Executives: The Development of Responsible Management*, *reprinted in* EXECUTIVE COMPENSATION: A STRATEGIC GUIDE FOR THE 1990S (1991) (describing the team management approach); *see also* Gordon Platt, *Tokyo Allows Stock Options As Executive Compensation*, J. OF COMMERCE, June 10, 1997, at 3A. Japanese culture and tradition focuses on personal modesty and concern for group harmony whereas, American culture admires the individual achiever. *Id*. This may be explained by a cultural difference between Japan and the United States. In Japan, there is a much closer relationship between managers and workers than in the United States; workers and managers work much more closely in the daily running of the business than in the U.S. *See* EZRA F. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 154 (1979) (suggesting that companies in postwar Japan were formed by managers with a modest life style similar to that of rank and file workers rather than that of a wealthy propertied class); Haruo Shimada, *Japan's Postwar Industrial Growth and Labor Management Relations*, *in* PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 245-48 (1983) (emphasizing cooperative style of management in Japanese companies).

18. *See* KAY, *supra* note 7, at 25 (suggesting that differences in responsibility and management may mean that a Japanese CEO is worth less to a company than an American CEO). The difference in the view of the CEO may also impact CEO pay because of the operation of the tournament theory. *See* Edward Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 90 J. OF POL. ECON. 841 (1981). The tournament theory, which attempts to justify paying high amounts to CEOs, conceives of CEO compensation as a tournament prize for which corporate vice-presidents compete. *See* Brian G.M. Main, Charles A. O'Reilly III & James Wade, *Top Executive Pay: Tournament or Teamwork*, 11 J. OF LAB. ECON. 606 (1993). Under that theory, the high compensation paid to a CEO does not reflect his current productivity, but rather induces that individual and all other junior individuals to "compete" for the top spot. *See* Sherwin Rosen, *Prizes and Incentives in Elimination Tournaments*, 76 AMER. ECON. REV. 701 (1986). It is hypothesized that those competing individuals agree to give up some of their earnings, which are put into the prize for which they compete. *Id*.

19. *See* BOK, *supra* note 5, at 70-71 (midlevel executives in America tend to earn less than their equivalent in other countries); Jonathan R. Macey & Geoffrey P. Miller, *Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan and the United States*, 48 STAN. L. REV. 73, 81 (1995) (stating that "the American structure of corporate governance largely focuses power in management, particularly in the chief executive officer" as compared to foreign nations which allow more shareholder management); *see also* Loewenstein, *supra* note 2, at 9. U.S. executive compensation often takes the form of non-salaried vehicles, including stock plans and other long term compensation schemes. *Id*. These forms serve a corporate governance function that is lacking in foreign countries such as Germany or Japan due to differences in corporate infrastructure. *Id*. Due to U.S. corporate infrastructure, executive monitoring duties differ, and therefore, they are compensated accordingly.

to be paid more as a reward for the profitability of U.S. firms compared to foreign ones,[20] the figures appearing in the popular press are potentially misleading. That is not to say that there is not a pay disparity between U.S. executives and foreign ones—there assuredly is—just that it is not as obscenely great as the popularly quoted figures suggest.

III. Significance of the Pay Differential

Assuming that American executives are, in fact, excessively compensated in relation to their counterparts abroad, the question is whether we should care about such a pay differential. This section explores two reasons we might, finding one unpersuasive and the other worthy of serious consideration.

A. Adverse Effect on U.S. Trade Competitiveness

In the early 1990s, when then President Bush visited Japan with a number of CEOs of American companies, the issue of compensation of American executives in relation to that of Japanese executives received a lot of attention.[21] Concern was then expressed (and has continued to be expressed) that the disparity in compensation between American and foreign execu-

20. *See* Hiroyuki Tezuka, *Success as the Source of Failure? Competition and Cooperation in the Japanese Economy*, 38 SLOAN MGMT. REV. 83 (Jan. 1997). This is the argument that even if an accurate comparison can be made and it could be demonstrated that American executives are in fact compensated more generously than their counterparts abroad, they may deserve to be so. *Id*. This argument is based on an analysis of the profitability of the top U.S. firms and their Japanese counterparts in several major industries, which reveals that the Japanese firms are significantly lower in profitability. *Id*. One may claim that if American executives receive higher pay than their Japanese counterparts, perhaps they should be paid more for producing greater profits. *See* Kevin J. Murphy, *Top Executives Are Worth Every Nickel They Get*, HARV. BUS. REV., Mar.-Apr. 1986, at 125. U.S. compensation schemes in fact cause executives to focus on long-term profitability and competitiveness of their companies rather than maximizing earnings through short-term salary incentives. *Id*. *See also* Loewenstein, *supra* note 2, at 19 (noting that American CEOs, notably those in international firms are compensated generously because of the management skills required for such intricately structured business endeavors); Charles M. Yablon, *Bonus Questions—Executive Compensation in the Era of Pay for Performance*, 75 NOTRE DAME L. REV. 271, 273 (1999).

> In the good old days, circa 1990 or so, the problem of executive compensation was that greedy CEOs were receiving outrageous levels of compensation they did not deserve. These days the problem is that greedy CEOs are receiving even more outrageous levels of compensation, which they very may well deserve. The trend towards performance-based pay means that some (although far from all) of the highest paid CEOs are those that have obtained extremely good results for their shareholders, making their multi-million dollar bonuses seem like justifiable rewards for a job well done and making plausible (although hardly proving) the proposition that such CEOs are being appropriately compensated for their unique managerial skills.

Id.

21. *See* Jeffrey H. Birnbaum, *Campaigning '92: From Quayle to Clinton, Politicians are Pouncing on the Hot Issue of Top Executives' Hefty Salaries*, WALL ST. J., Jan. 15, 1992 at A14. President Bush's trip to Japan fueled executive compensation as hot political issue. *Id*. *See also* James Risen, *Ford Chairman Blasts Japanese on Trade Again Commerce: Harold A. Poling Says Nothing Has Changed in Bilateral Automobile Dealings Since President Bush's Trip to Asia in January*, L.A. TIMES, Apr. 6, 1992 at 2 (discussing Japanese emphasis on compensation issues); David E. Sanger, *Top Japanese Salaries: Land of the Falling Sun*, FORT WORTH STAR TELE., Apr. 26, 1992 at 7 (noting American executives earn six times more than Japanese executives).

tives adversely affects the competitiveness of American companies, contributing to the economic problems of the United States.[22]

However, there appears to be insufficient evidence upon which to draw a conclusion about whether executive pay historically has contributed in any meaningful way to the competitive difficulties of American companies. Despite the fact that compensation figures sound (and are) huge, they really are a small item in relation to the total costs of a large corporation.[23] It may be argued that increasing globalization means that more attention should be paid to the effect of executive pay on American business interests abroad. However, even then, ultimately a concern with competitiveness will lead to a focus on compensation in relation to performance, since American competitiveness is unlikely to suffer if there is a sufficient correlation between pay and performance.[24] That means that notwithstanding the press attention paid to the issue and the emotional appeal of seeking a scapegoat for competitive difficulties of American companies, analyzing compensation of American executives in relation to foreign executives may not be a not helpful avenue to look for a solution to trade difficulties. This may be why institutional

22. *See* CRYSTAL, *supra* note 5, at 212-13 (arguing that high U.S. compensation results in increased purchases by consumers of foreign vs. domestic products); Kreinberg, *supra* note 7 (stating that excessive executive compensation reduces the nation's ability to compete in foreign trade with countries that do not spend vast sums on their top executives). As examples, Kreinberg employs the automobile production and oil and gas distribution industries, "in which the pay of American CEOs outstrips amounts awarded to Japanese and European corporate leaders by multiples of five to thirty." *Id*. *See also* David R. Francis, *The Boss's Cut of the Pie*, CHRISTIAN SCI. MONITOR, Aug. 4, 1999, at 11. Foreign countries' ability to introduce highly competitive products for sale in the United States has prompted the current U.S. trend towards the pay for performance form of executive compensation. *Id*. Francis argues, by citing to business school economists, that to become competitive, executive pay must be focused so that executives concentrate on creating long term corporate value for shareholders, which will in turn spur corporate efficiency and national productivity. *Id*. *See* Robert W. Keidel, *Executive Rewards and Their Impact on Teamwork*, *in* EXECUTIVE COMPENSATION: A STRATEGIC GUIDE FOR THE 1990'S 212, 212-13 (Fred K. Foulkes ed., 1991) (arguing that gross disparities in income between executives and rank and file workers leads to a general malaise and creates instability thus detrimentally effecting competitiveness and firm productivity).

23. *See* ANDREW HACKER, MONEY: WHO HAS HOW MUCH AND WHY 114 (1977) (stating that compensation paid to top executives comprises a very small item in total company costs); Detlev Vagts, *Challenges to Executive Compensation: For the Markets or the Courts?*, 8 J. CORP. L. 231, 238 (1983) (using an automobile corporation as an example with sales of eight billion dollars a year that pays its president $500,000 in excess compensation; the excess amounts to only 1/16,000th of total sales, which would not increase the price of a car by more than $0.25); Lauren Belsie, *Executives Make Hay, But the Sun is Not Shining: Recession Pressures Push More Firms to Link Managers' Pay to Profits*, CHRISTIAN SCI. MONITOR, Feb. 13, 1992, at 8 (noting that compensation experts agree that reducing executive pay will not have a direct impact on U.S. competitiveness).

24. *See Executive Compensation Hearings on S.2298, H.R. 4727 and H.R. 5260 Before the Subcommittee on Taxation of the Senate Committee on Finance*, 102nd Cong., 2d Sess. 10 (1992) (statement of Sen. Levin) ("executive pay unrelated to corporate performance is a threat to our competitiveness. It rewards poor results, causes work place resentment, and raises red flags in international trade negotiations."). Alternatively, other studies show that regardless of pay for performance measures, the U.S. corporation is still competitive. *See* Loewenstein, *supra* note 2, at 17 (citing Steven N. Kaplan, *Top Executive Rewards and Firm Performance: A Comparison of Japan and the United States*, 102 J. POL. ECON. 510, 533 (1994)) (finding that, regardless of the correlation between pay and performance for executives, U.S. companies performed just as well as their Japanese counterparts and compensation responded to performance measures equivalently); *compare* Susan J. Stabile, *Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?,* 2 U. PA. J. LAB. & EMP. L. 227, 238-41 (1999) (suggesting empirical data detailing the effectiveness of executive contingent compensation is hard to assess because the bulk of studies involve non-executive employees as the data source).

investors in the United States have recently tended to focus on performance and on pay for performance rather than on complaints of pay of U.S. executives in comparison to foreign ones.[25]

B. What the Gap Says to the World About the U.S.

To say that paying U.S. executives significantly more than their foreign counterparts does not cause economic harm to the United States[26] is not to say that the pay disparity is something we should ignore. There may be noneconomic reasons to care about the disparity in pay between U.S. and foreign executives.

The United States has long had a different view toward its workers than other countries[27] and has been willing to tolerate far greater degrees of wealth inequality than other industrialized nations.[28] Even more than that, CEOs who lay off workers and cut jobs of rank and file

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25. *See, e.g.,* Dale M. Hanson, *Much, Much More than Investors*, FINAN. EXEC., Mar.-Apr. 1993, at 48, 50-51 (discussing CalPERS focus on executive pay as it ties to performance). For a long time, nevertheless, executive compensation has been a focus of American institutional investors. *See* Stabile, *supra* note 3, at 194-96 (discussing shareholder proposals and other initiatives regarding executive compensation); Teresa Wyszomierski & Pieter Bierkens, *Feathering the Nest of Honchos, Not Investors*, WASH. POST, Sept. 5, 1999 at B2. The authors advocate for even stricter guidelines beyond the pay for performance criterion for institutional investors when evaluating an investment because of the pervasiveness of market forces. *Id*.

26. *See* KAY, *supra* note 7, at 43-49 (arguing that the U.S. pay system produce superior economic returns than the system in place in many non-U.S. countries); *see also* Kevin J. Murphy, *Politics, Economics, and Executive Compensation*, 63 U. CIN. L. REV. 713, 748 (1995) (concluding that U.S. companies that provide innovative executive compensation schemes will be most profitable and best able to take advantage of the new economy, even if increased executive salaries and incentives are a by-product); Shirley Fung, *How Should We Pay Them?*, ACROSS THE BOARD, Jun. 1, 1999 at 36. With the increasing globalization of markets, industry and the entire corporate sphere, European countries are even looking to adopt some of the U.S. executive compensation provisions, like certain stock package and long term incentives as one indicator of their success. *Id*.

27. *See* ETHAN B. KAPSTEIN, SHARING THE WEALTH 182 (1999) ("The United States has adopted a position toward labor that is fundamentally at odds with the historical experience of other societies."); *see also* Yablon, *supra* note 20, at 294-95. America has always been the land of opportunity. *Id*. Why should we care if a group with managerial talent is getting a lot richer a lot faster than it used to? Not only are workers viewed differently, but corporate structures, policies and practices all have fundamental differences when making across the board comparisons and any attempt towards uniformity relatively futile. *See, e.g.,* Fung, *supra* note 26, at 36 (debating the veracity of instituting U.S. executive pay initiatives in countries like China, where tax structure and policy differences may render them not as beneficial, because of historical differences in corporate and industry infrastructure).

28. *See, e.g.,* LESTER C. THUROW, THE FUTURE OF CAPITALISM 21 (1996) (citing increase in earnings disparity in 1980s); Marleen O'Connor, *Organized Labor as Shareholder Activists: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345, 1367 (1997) (describing the American norm of disparate pay); EDWARD N. WOLFF, TOP HEAVY: A STUDY IN THE INCREASING INEQUALITY OF WEALTH IN AMERICA 5 (1995) (A Twentieth Century Fund Report) (reporting increasing inequality in both income and wealth); KEVIN PHILIPS, THE POLITICS OF RICH AND POOR at ix (1991). The combined net worth of the four hundred richest Americans nearly trebled from $92 billion in 1982 to $270 billion in 1989, while at the same time the U.S. median for family income barely stayed ahead of inflation. *Id*.

workers are rewarded with higher than average pay increases,[29] telling the world that we are willing to reward those at the top, even while we are depriving those less well off of a livelihood.

This is in stark contrast to the views toward labor that exist in other industrialized countries.[30] Germany, for example, "is famed for its concern for stakeholder interests, particularly employees,"[31] one of the results of which is a resistance to layoffs.[32] Similarly, Japan has made a conscious decision to try to protect its workers from unemployment, even at the expense of

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29. *See, e.g.,* Sarah Anderson & John Cavanagh, *CEOs Win, Workers Lose: How Wall Street Rewards Job Destroyers*, THE INSTITUTE FOR POLICY STUDIES' THIRD ANNUAL ANALYSIS OF EXECUTIVE COMPENSATION 2000 (copy on file with author) (finding that CEOs in companies who laid off the most workers had an average pay increase that was about 3% higher than the pay increase of CEOs in general). CEOs receive further positive reinforcement for such actions from the fact that the stock market generally responds quite favorably to layoffs of rank and file employees. *See* THUROW, *supra* note 28, at 27. Indeed, the market response to announcements of downsizing suggest a belief among investors that downsizing has positive effects, enabling a company to reduce payroll costs, thus freeing revenues for reinvestment in the corporation or for payment of dividends to shareholders. *Id.* For example, when AT&T announced at the end of 1995 that it planned to downsize by 40,000 employees, its stock rose $2.625 to $67.375, a 4% increase. *See* Randall Smith & Steven Lipin, *Are Companies Using Restructuring Costs to Fudge the Figures?*, WALL ST. J., Jan. 30, 1996, at A1. In Japan, workers accept a tradeoff that involves accepting lower compensation and smaller pay increases in exchange for job security. *See* KAY, *supra* note 7, at 59. In the U.S. workers are paid very low in relation to compensation of executives and have little job security. *Id.*

30. *See* Jacob Heilbrunn, *Globalization's Boosters and Critics*, THE NATIONAL INTEREST 118, 121 (1999). The wealth inequality that exists in the United States bears a closer resemblance to the inequality in countries like the Philippines and Brazil than it does to other major industrialized countries. *Id. See also* Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 290 (2000) (discussing income disparity in Western nations including the United States and the ideologies that encourage the less well-off to accept such disparity). *See generally* Chinhui Juhn, *Wage Inequality and Demand for Skill: Evidence From Five Decades*, 52 IND. & LAB. REL. REV. 424 (1999) (discussing the history of wage inequality in the United States).

31. *See* Jeffrey N. Gordon, *Corporate Governance: Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany*, 5 COLUM. J. EUR. L. 219, 224 (1999); *see also* Kenneth G. Dau-Schmidt, *Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan Under the Bargaining Model*, 8 TUL. INT'L & COMP. L. 117, 141 (2000) (discussing Germany's system of codetermination in which both capital and labor have a voice in corporate decisions); Gerald L. Neuman and Mark J. Roe, *The Third Frankfurt-Columbia Symposium on Comparative Law: Convergence and Diversity in Private and Public Law: Introduction to the Symposium*, 5 COLUM. J. EUR. L. 181 (1999) (discussing corporate governance systems around the world, including Germany).

32. *See* Benjamin Aaron, *The Kenneth M. Piper Lectures: Plant Closings: American and Comparative Perspectives*, 59 CHI-KENT L. REV. 941, 956 (1983) (explaining Germany's procedures for protecting workers being considered for dismissal); Gordon, *supra* note 31, at 224 (describing Germany's reluctance to lay off workers as a result of shareholder status). *See generally* Mark G. Robilotti, *Recent Development: Codetermination, Stakeholder Rights, and Hostile Takeovers: A Reevaluation of the Evidence from Abroad*, 38 HARV. INT'L L.J. 536, 537 (1997) (discussing Germany's emphasis on corporations taking employee's interests into account and avoiding hostile takeovers).

financial gain.[33] As a byproduct of that type of thinking, "[t]he cult of the American business superstar . . . has historically offended the sensibilities of people in many foreign countries,"[34] who feel that executives simply do not deserve to be paid the amounts paid to U.S. top executives,[35] in the words of my German sociologist—they are paid obscenely.

The United States needs to think about whether a country that, in many ways, views itself as a moral leader for the rest of the world should hold itself out as willing to accept an economic structure that looks more like that of an underdeveloped country than an industrialized one—a nation of haves and have-nots, with a vast chasm between them. As James K. Galbraith has observed, the United States is headed towards a transformation from a "middle-class democracy into something that more closely resembles an authoritarian quasi-democracy, with an overclass, an underclass, and a hidden politics driven by money."[36] That transformation may very well destroy any U.S. claim of moral leadership.[37]

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33. *See* OZAKI, *supra* note 8, at 24-25 (discussing Japanese minimum layoff policy as way of "sharing the pain of hard times"); Heilbrunn, *supra* note 30, at 118, 120 (noting that in contrast to the U.S., Japan has opted to shield its population from unemployment, even at the expense of financial gain); Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508, 526 (1999) (discussing Japanese resistance to layoffs even during times of economic reversals). Not everyone believes the Japanese approach is a sound one. Professors Gilson and Roe argue that the Japanese system of permanent employment limits the hiring of junior employees destined to become the future leaders of the corporations. *See id.* at 538; Kaiulani Eileen and Sumi Kidani, *Japanese Corporate Warriors in Pursuit of a Legal Remedy: The Story of Karoshi, or "Death from Overwork" in Japan*, 21 U. HAW. L. REV. 169, 178 (1999). There are also other respects in which workers in Japan are not necessarily better off in all respects than their American counterparts. *Id*. The annual work hours of Japanese employees are "about 100-200 hours more than in the United States or Great Britain, and 400-500 hours more than in Germany, France or North European countries." *Id*.

34. *See* Adam Bryant, *The World: Raising the Stakes; American Pay Rattles Foreign Partners*, N.Y. TIMES, Jan. 17, 1999, § 4, at 1 (noting that in other countries, the "best and the brightest" tend to pursue careers other than in business); Janice Castro, *How's Your Pay?*, TIME, Apr. 15, 1991 at 40. American CEOs are highly paid, consistently outpacing the considerably lower salaries of their European counterparts. *Id. See also* John Brandt, *Pay for Performance?*, INDUSTRY WEEK, Sept. 1, 1997 at 4. American CEOs are grossly overpaid in terms of job performance. *Id*.

35. *See* Greg Steinmetz & Gregory L. White, *A Matter of Millions of Marks*, HOUS. CHRON., May 31, 1998, at 3 (noting view of Daimler shareholder activist that shareholders will carefully scrutinize Daimler-Chrysler compensation scheme). This view is reflected in the reaction of many shareholders to the perceived Americanization of German executive salaries following the DaimlerChrysler merger. *Id. See also* Paul Geitner, *Executives' Pay at DaimlerChrysler is Hot Shareholder Topic*, THE ATL. CONSTIT., May 18, 1999, at 11f (noting that certain "critical shareholders" view DaimlerChrysler's Juergen Schrempp's $2.9 million salary to be "shameless"); Daniel Howes, *World Auto View: Americans' 1st DCX Meeting is Going to Be an Endurance Test*, DET. NEWS, May 18, 1999, at B1 (noting shareholder complaints about compensation issues).

36. *See* JAMES K. GALBRAITH, CREATED UNEQUAL: THE CRISIS IN AMERICAN PAY 4 (1998); Enrico Marcelli, *Economic Growth and Inequality in San Diego County: Evidence and Policy Implications*, 36 CAL. W. L. REV. 307, 311-12 (2000) (discussing generally income inequality in the United States in comparison to other industrial nations); Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 567 ANNALS 123, 125 (1978) (discussing the large gap between the rich and the poor in the United States as compared to other industrialized nations).

37. *See* KAPSTEIN, *supra* note 27, at 24 (suggesting that U.S. liberal tradition of laissez-faire policies toward labor "may ultimately endanger its leadership in the global economy"); *see also* Henry H. Drummonds, *Transnational Small and Emerging Business in a World of Nikes and Microsofts*, 4 J. SMALL AND EMERGING BUS. L. 249, 268-69 (2000) (discussing the increasing gap in the United States between a growing middle class and a small percentage of the very wealthy); Kramer, *supra* note 36, at 125 (discussing the large gap between the rich and the poor in the United States as compared to other industrialized nations).

IV. A System in Need of Change, or One Changing on Its Own?

I make no attempt to hide my view that the vast disparity between the ratio of pay of U.S. executives and rank and file workers and that of foreign executives and rank and file workers, as well as the absolute difference in pay between U.S. and foreign executives, is something we should care about as a matter of social policy, even if not for economic reasons. However, if there are reasons to think the gap might narrow over time, the concerns may be lessened or disappear on their own. This section addresses both factors that are contributing to a narrowing of the pay disparity between U.S. and foreign executives as well as some reasons that some disparity will continue to remain.

A. Factors Narrowing the Gap

There are three interrelated or overlapping factors that have contributed, and will continue to contribute, to a narrowing of the gap between the pay of U.S. and non-U.S. executives.

1. Cross-border Mergers

Cross-border mergers are no longer surprising phenomena. As the world becomes a smaller place, we can expect countries of different nations to unite more frequently. The experience in Japan typifies the situation. At the beginning of the last decade, there were 15 foreign acquisitions in Japan. A decade later, there were 121, with a total value of $7 billion.[38] Other countries are experiencing a similar phenomenon.[39]

The 1998 merger of Chrysler Corporation and Daimler-Benz,[40] illustrates the impact on compensation when companies with vastly different approaches to executive compensation

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38. *See* Stephen M. Banker, *Climate for M&A in Japan Shifts*, N.Y.L.J., Nov. 15, 1999, at S4 (noting that in 1989 there were 15 foreign acquisitions in Japan, but that in 1998, there were 121). Some of the major acquisitions of Japanese companies by U.S. companies include Citigroup's acquisition of 25% of Nikko Securities, Merrill Lynch's acquisition of 30 brokerage offices from Yamaichi Securities and GE Capital's acquisition of Japan Lease and Lake Company. *Id. See also* Yomiuri Shimbun, *Govt. Welcomes M&As of Japanese Firms by Foreigners*, THE DAILY YOMIURI, Apr. 27, 1996, at 12 (discussing promulgation of a government declaration welcoming foreign acquisitions in Japan); Kevin Commins, *Japanese, US Banks Promote Ventures Partners Focus on US-Asia Deals*, J. OF COM., Nov. 2, 1990, at 3A (stating that U.S. and Japanese banks are trying vociferously to promote joint ventures).

39. *See* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 678 (1999) (noting that cross-border mergers satisfy the need to grow globally); Gordon, *supra* note 31, at 219 (noting the "intensifying pace of cross-border acquisition activity"). To give some recent examples, within the last two years, in addition to the Daimler-Benz merger with Chrysler, the German Bertelsmann acquired Random House, British Petroleum agreed to takeover Amoco, Deutsche Bank agreed to acquire Bankers Trust and Scottish Power agreed to acquire Pacificorp. *See* Bryant, *supra* note 34.

40. *See* Gordon, *supra* note 31, at 227. The DaimlerChrysler merger is the largest industrial merger that has ever taken place, making it also the largest cross-border industrial merger. *Id. See also DaimlerChrysler to unveil its next-generation Neon,* TORONTO STAR, Dec. 29, 1998, at E3. After the 1998 merger of Daimler-Benz and the Chrysler Corporation, the resulting DaimlerChrysler tallied in as the fifth largest global automaker. *Id*. Alisha Davis & Bret Begun, *The State of the World,* NEWSWEEK, Jan. 4, 1999, at 70. The merger deal between Chrysler Corporation and Daimler-Benz had a value in excess of $40 billion. *Id.*

come together. No more evidence of the difference in compensation philosophy is needed than the fact that in 1997, the year prior to the merger, the CEO of Chrysler was paid more than seven times the amount paid to the CEO of Daimler.[41]

What happens when a merger such as this takes place? Speculation in the Chrysler/Daimler situation was that although the merged entity would be a German codetermined corporation,[42] the holdings of large American institutional investors would lead to pressures to maximize shareholder value, resulting in a more "American-style" run company.[43] Although both Chrysler and Daimler told their shareholders at the time of the merger that they expected to have separate pay plans for their German and American executives following the merger,[44] it did not take long for Daimler CEO Jurgen Schrempp to term the pay discrepancy a "major problem," that would result in the company adopting "world-competitive compensation."[45]

Schrempp's conclusion is easy to understand. When a U.S. company mergers with a foreign one, the U.S. executives are not likely to happily accept a pay cut. That leaves the merged entity with two choices: upgrade the compensation of the executives of the non-U.S. entity, or

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41. *See* Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133, 1173 (1999) (noting that the "raw level of compensation" is significantly higher for American executives as a result of stock options and bonuses); Gordon, *supra* note 31, at 235 (noting that top German executives are paid much less than their U.S. counterparts and that in the year prior to the merger, the CEO of Daimler received approximately 1/8 of the compensation paid to the CEO of Chrysler); Fung, *supra* note 26 at 36 (noting that in 1997, Chrysler CEO Robert Eaton was paid $16.1 million, while Daimler chairman and CEO Jurgen Schrempp took home $1.9 million).

42. *See* Gordon, *supra* note 31, at 219-224 (describing the anticipated structure of DaimlerChrysler); *see also* William Braton & Joseph McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference,* 33 COLUM. J. TRANSNAT'L L. 213, 262 n.154 (1999) (noting that co-determination limits the influence that banks have in corporate governance); Roberta S. Karmel, *Transnational Takeover Talk-Regulations Relating to Tender Offers and Insider Trading in the United States, the United Kingdom, Germany, and Australia,* 66 U. CIN. L. REV 1133, 1134 (1998) (noting that in contrast to equity-based systems of finance, like those found in the United States, German corporation finances are creditor-based, giving workers co-determination in corporate governance).

43. *See* Gordon, *supra* note 31, at 219-20 (noting that cross-border mergers result in influx of new shareholders with different governance expectations and traditions). Professor Gordon also notes that upon consummation of the merger, U.S. shareholders held 44% of the stock of the merged entity, in comparison with German shareholders, who held 37%. *Id. See also* Braton & McCahery, *supra* note 42, at 262 n.154 (describing transnational influence of mergers); Neuman & Roe, *supra* note 31, at 182 (detailing the likely effects that follow after a transnational mergers).

44. *See* David Cay Johnston, *U.S.-Style Executive Pay Slowly Catches on Worldwide; From Rich to Richer/Stock Options Make the Difference*, INT'L HERALD TRIB., Sept. 4, 1998, at 2 (stating that both companies intended to keep separate pay plans). Both Daimler and Chrysler intended to have separate pay plans for executives of different countries—even at the outset of the merger. *Id. Safe Haven,* FORBES, May 17, 1999 at § Executive Compensation. The German based corporation is not obligated to release compensation information for its executives since the pay disparity is veiled after the merger. *Id.*

45. *See* Fung, *supra* note 26 at 36 (quoting Schrempp); Gordon, *supra* note 31, at 237 n.83 (noting that separate compensation scales for U.S. and German executives would interfere with efforts to integrate the operations of the two entities); *Irrational Rewards: With Executive Pay Rising to $500m and More, Richard Waters Considers Whether Such Rewards Can Be Justified,* FIN. TIMES (London), Mar. 31, 1999 at 17. Foreign executives may soon command American-style compensation following mergers with and the continued emulation of American corporations. *Id.*

retain differing pay scales.[46] The "natural reaction" of the non-U.S. executives would be to demand parity,[47] increasing the likelihood that all DaimlerChrysler executives, whether German or American, would end up with typical U.S. executive compensation packages (and levels).[48]

In fact, after deciding to merge with Chrysler, Daimler-Benz announced a new system of compensating its executives, in which the vast bulk of pay would be in performance bonuses and other incentives.[49] DaimlerChrysler was the first German company to include stock options as part of its executive compensation package.[50] Following the merger, the company's compensation package for executives looks increasingly like the package for a typical American

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46. *See* Bill Vlasic, *Key Chrysler Execs To Work in Germany; Some Daimler Managers to Come Here*, THE DET. NEWS, Oct. 17, 1998, at A1 (noting that up to 10% of Chrysler's senior executives could relocate to Germany after the merger and that some Daimler executives were expected to move to the U.S.). Retaining different pay scales becomes particularly difficult when, as in the DaimlerChrysler merger, U.S. executives are relocated to another country. *Id.* Under these circumstances, it becomes much harder to maintain different pay scales. *See Daimler-Chrysler AGM Approves Stock Options, Share Buyback Proposals,* AFX EUR. FOCUS, Apr. 19, 2000 at § Company News. Two years after the DaimlerChrysler merger, shareholders approved proposals for management stock option plans. *Id. See also* Edmund Andrews, *International Business; Daimler Revenue Rises 17%, but Profit Is Up Only Slightly,* N.Y. TIMES, Apr. 20, 2000 at C4 (noting that DaimlerChrysler's Chairman intends to model the German stock option plan on its American counterpart, to include a stock buyback program as well).

47. *See* William Davis, *America Calling the Shots in Chief Execs' Bonanza*, EVE. STD. (London), May 10, 1999, at 40 (noting that when Daimler-Benz took over Chrysler, it paid over $300 million to cash out the options of Chrysler's top executives); Bryant, *supra* note 34 (asserting that mergers between American and foreign companies will result in "spirit of compromise" in which lower-paid foreign executives see their pay rise to the level of American executives). In 1998, the discrepancy in pay between U.S. executives (over $1 million) and German executives (less than $400,000) is growing each year. *Id. See* Vlasic, *supra* note 46 (stating that some of Chrysler's senior executives could relocate to Germany after the merger).

48. *See* Gordon, *supra* note 31, at 236 (stating that the likely result will be compensation matching the American system); Neuman & Roe, *supra* note 31, at 184 (same); Karen Miller, *A Secret Weapon for German Reform,* BUS. WEEK, Oct. 12, 1998 at 138. DaimlerChrysler intends to set up an American-style compensation package with lower base salaries and increased incentives such as stock options and phantom shares, which are paid out only if earnings goals are met. *Id.*

49. *See* Bryant, *supra* note 34 (describing the new system installed by DaimlerChrysler); *see also* Miller, *supra* note 48. DaimlerChrysler intends to set up an American-style compensation package with lower base salaries and increased incentives such as stock options and phantom shares, which are paid out only if earnings goals are met. *Id. See* Gordon, *supra* note 31, at 236 (noting that DaimlerChrysler is shifting to a cash payout system of stock appreciation rights, rather than stock option grants to avoid shareholder approval).

50. *See* Justin Doebele, *No More Barriers*, FORBES, Jan. 11, 1999, at 65 (quoting DaimlerChrysler cochairman Jurgen Schrempp); *Daimler-Benz Stock Option Plan Ruled Legal by Stuttgart Appeal Court,* AFX NEWS, August 12, 1998, at § Company News. The introduction of a stock option plan, which would enable managers to exchange bonds for Daimler-Benz shares after two years, landed Daimler in court defending the legality of its plan. *Id. See also* Richard Waters and Haig Simonian, *Unlikely Fellow Travelers: Richard Waters and Haig Simonian Ask Whether the Different Corporate Cultures of Daimler-Benz and Chrysler Mean that Americans and Germans Cannot Work Together,* FIN. TIMES (London), May 9, 1998 at 10. In the past, German law did not even recognize stock option plans. *Id.*

executive.[51] Given the stature of DaimlerChrysler, one can expect other Germany companies to feel pressure to follow suit.[52] In fact, many foreign companies are moving toward developing "globally uniform executive compensation plans."[53]

2. Increasingly Global Executive Market

Part of the historical explanation for differences in the pay of U.S. executives vs. foreign ones was differences in the competitive market for executives. Although the historical norm in the United States was internal hiring for CEOs,[54] over the last twenty years, the external market for top U.S. executives has grown[55] and companies in the United States have experienced vigorous competition for talent in their executive searches.[56] This is in sharp contrast to execu-

51. *See* Doebele, *supra* note 50 (quoting DaimlerChrysler cochairman Jurgen Schrempp). Schrempp describes a four-part component to executive compensation: fixed base salary, bonus, medium-term stock plan and stock options. *Id*. The company also requires that top executives buy company stock. *Id. See also* Andrews, *supra* note 46. Jurgen Schrempp wants to introduce a stock option program that is modeled more closely on American plans. *Id. See also* Andrews, *supra* note 46 (noting that Jurgen Schrempp wants to introduce a stock option program that is modeled more closely on American plans); Bryant, *supra* note 34 (describing the new system installed by DaimlerChrysler).

52. *See* Doebele, *supra* note 50 (quoting DaimlerChrysler cochairman Jurgen Schrempp). Following Daimler's decision to offer stock options, other German companies began to do so as well. *Id. See also* Gordon, *supra* note 31, at 224 (noting that the importance of DaimlerChrysler to the German economy will result in the corporate governance norms developed in that company spreading to other German companies); Bryant, *supra* note 34 (describing the new system installed by DaimlerChrysler).

53. *See* Gates, *supra* note 12 (recognizing this trend among continental European countries); Robert Taylor, *National News: Plan to double share options NEWS DIGEST*, FIN. TIMES, Aug. 24, 2000, at 4 (arguing that momentum has been building up with companies coming under pressure to compete in the global market, particularly against U.S. packages); *see also* Martin Porter, *Masayoshi Son: Japanese businessman's membership in US corporate boards*, DIRECTORS & BOARDS, Sept. 22, 1998, at 54, *available in* 1998 IAC 53566901. Son has adopted some U.S. board practices to Softbank's board, as well as granting stock options and adopting innovative compensation). *Id.*

54. *See* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE ALL-SOCIETY 56 (1995) (describing surprise of the business community when in 1984 Apple hired a new CEO from the outside); Ron Charan and Geoffrey Colvin, *The Right Fit; Most boards handle CEO succession poorly. The result: They choose new leaders who are a bad fit for the company*, FORTUNE, April 17, 2000, at 226 (noting that, typically, a CEO looks to internal candidates prior to looking outside the corporation). *But see Allen Questrom to Take Helm at J.C. Penney; Retail: Executive Credited with Overhauling Barney's and Federated Department Stores Will Take Over Troubled Chain No. 2*, L.A. TIMES, July 28, 2000, at 1 (citing that the new CEO could also push for management changes, such as hiring more executives from outside the company).

55. *Allen Questrom to Take Helm at J.C. Penney; Retail: Executive Credited with Overhauling Barney's and Federated Department Stores Will Take Over Troubled Chain No. 2*, *supra* note 54 (citing 1995 study of CEOs hired by 800 large U.S. manufacturing and service companies); Geoffrey Colvin and Patricia Sellers; Tom Neff et al., *How Many Headhunters Can a Headhunter Hunt?*, FORTUNE, May 29, 2000, at 118 (noting that the trend is now more companies bringing in talent from the outside); Charan and Colvin, *supra* note 54 (describing that the most successful companies are constantly restocking the gene pool and hiring managers from the outside).

56. *See* FRANK & COOK, *supra* note 54, at 68-69 (asserting that competition and external hiring in the U.S. also drives up executive pay because companies feel the need to pay their CEOs more to keep them from being wooed away by other organizations); KAY, *supra* note 7, at 19 (commenting on the small pool of persons having attributes necessary to be a successful CEO); Smart, *supra* note 6 (noting that competition for talent drives executive pay up); *see also 4 Studies Analyze Executive Pay Raises*, IOMA REPORT ON SALARY SURVEYS, June 2000, at 1 (noting that CEO pay is increasing "because boards are competing for a handful of big names and fear that their current CEOs may leave for higher pay or better stock options").

tive hiring in Europe and Japan, which predominantly hire from within and face limited competition in their executive hiring.[57]

However, "as business becomes more international, so does the market for executive talent."[58] Correspondingly, as the recruitment of executives becomes increasingly worldwide and as other countries move away from promotion from within an organization, it is reasonable to expect that the gap in pay between U.S. and non-U.S. executives will narrow.[59]

3. Increased Ability to Compensate With Incentive Compensation

A not insignificant part of the historical difference in the compensation paid to U.S. executives vs. that of foreign executives relates to the form of compensation paid to each. Over the last 15-20 years or so, an increasing portion of the pay of U.S. executives has taken the form of contingent or incentive based compensation arrangements rather than a guaranteed base salary.[60] A significant component of that contingent pay takes the form of stock options.[61] In

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57. *See* KAY, *supra* note 7, at 24 (describing system of internal promotion of CEO from within in Europe and Japan); OZAKI, *supra* note 8, at 16 (describing Japanese executive market as internalized); Bernard Weinraub, *Sony Ousts the Chairman of Its Studios*, N.Y. TIMES, Sept. 14, 1996, section 1 at 31 (noting that Sony Corporation of Japan preferred to stay inside the company instead of hiring an outsider).

58. Stewart Pinkerton, *The Itch to Get Rich: Top Executive Pay in Europe Has Lagged Far Behind U.S. Levels, But is Starting to Catch Up*, FORBES, Apr. 21, 1997, at 132. *See* Luisa Kroll, *Warning: Capitalism is Contagious: Like Blue Jeans, Like Rock Music, Like Coca-Cola, U.S.-Style Stock Options are Catching On Abroad*, FORBES, May 18, 1998, at 200 (providing examples of companies that look for talent wherever it can be found and do not restrict their executive searches to their own country, such as, Ford Motor headed by an Australian, Compaq Computer by a German, and Hartford Insurance by an Indian); Pam Kufahi, *Taking Home the Loot*, UTIL. BUS., Dec. 1999, *available in* IPC 1097-6981 (stating that the market is becoming more global, and utilities from overseas are hiring away U.S. executives).

59. *See* KAY, *supra* note 7, at 57 (arguing that global labor market for CEOs should rationalize the compensation of all CEOs); Pinkerton, *supra* note 58 (stating that globalization of market for executive talent requires companies to "pay their best managers according to world scales"); David Wighton, *Business Welcomes Minister's Comments on Remuneration*, FIN. TIMES (London), July 20, 1999, at 8 (purporting that the trade and industry secretary's comments were seen as acknowledgement that UK companies have little option but to match the big packages increasingly common in the U.S.).

60. *See* MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 89 (1995). In a widespread effort to tie executive pay more strongly to long-term stock price performance, corporations in the 1980s increased their use of compensation schemes that include stock options. *Id. See also 4 Studies Analyze Executive Pay Raises*, *supra* note 56 (citing Mercer study findings that stock options and other long-term incentives make up 2/3 of average CEO pay package); Andrew R. Brownstein & Morris J. Panner, *Who Should Set CEO Pay? The Press? Congress? Shareholders?*, HARV. BUS. REV., May-Jun. 1992, at 28, 31 (citing consultant report that more than 80% of the largest U.S. companies now use stock compensation to link long-term performance of a company to executive salaries); Adam Bryant, *Flying High on the Option Express*, N.Y. TIMES, Apr. 5, 1998, at § 3, at 1 (suggesting that large option grants became common as a result of demands from activist shareholders that compensation be linked to performance).

61. *See* CRYSTAL, *supra* note 5, at 175 (stating that stock options are the favorite form of long-term incentive compensation); Mark A. Clawson & Thomas C. Klein, *Indexed Stock Options: A Proposal for Compensation Commensurate with Performance*, 3 STAN. J. OF L., BUS. AND FIN. 33, 42 (1997) (describing stock options as an almost universal compensation method and noting that 94% of the country's largest 250 companies compensate their executives with stock); Fung, *supra* note 26 at 36 (citing study finding that the average CEO received four times his base salary in stock options).

contrast, until recently, Japanese law did not allow compensation of Japanese executives with stock options.[62] Similarly, options were illegal in both Germany and Finland until 1998.[63]

The effect of the difference in the structure of compensation is enormous—it is the increased use of option compensation in the U.S. that has contributed to enormous increases in compensation of American executives.[64] "While American executives were loading up with stock options, restricted stock and other compensation intended to align their interests with those of shareholders, their counterparts overseas continued to collect only salary and modest bonuses."[65]

The change in the legal climate that allows European and Japanese companies to offer stock options is occurring at the same time that there is an increasing move on the part of com-

62. *See* Platt, *supra* note 17. Romesh Ratnesar, Bruce Crumley, Jane Walker and Steve Zwick, *Get Rich Quick!; Europe's Executives Are Finally Following the Lead of Their U.S. Counterparts and Making a Bundle on Stock-Option Bonuses*, TIME, May 8, 2000 at B7. In Germany and Finland, it was illegal to pay executives in stock options until 1998, and in countries from Belgium to Britain, tax laws made option plans unappealing to corporate boards and executives alike. *Id.* Porter, *supra* note 53 (citing that Softbank was the first company to grant stock options to its executives, something that was prohibited in Japan only three years ago).

63. *See* Gordon, *supra* note 31, at 236 (citing May 1, 1998 German amendments to the Stock Corporation Act, the Act on Control and the Transparency of Enterprises, which alleviated restrictions on use of stock options); Vikas Bajaj, *Foreign Firms Attracting Talent With Stock Options*, DALLAS MORNING NEWS, Sept. 19, 1999 (noting that Swedish law makes it difficult to offer options); Johnston, *supra* note 44. A German court, in 1998, upheld stock options offered by Daimler to its executives. *Id.* Obstacles to the use of option compensation remain in other countries. *Id. See, e.g.,* Fung, *supra* note 26 at 36 (citing example of Poland, which requires prior approval of the Polish Central Bank before options can be purchased).

64. *See* BLAIR, *supra* note 60, at 92. The large pay increases in the last 10 years are the result of the shift toward the use of stock options; stock options are the largest component of long-term compensation, and in nearly every case where total compensation in 1992 exceeded $5 packages were attributable to the exercise of stock options. *Id. See also* Smart, *supra* note 6 (attributing gains in executive pay during the 1990s to stock option portion of compensation); Daniel Kadlec, *How CEO Pay Got Away*, TIME, Apr. 28, 1997, at 59 (noting the packages that give "astronomical amounts" to CEOs are those heavily composed of stock options).

65. David Cay Johnston, *American-Style Pay Moves Abroad: Importance of Stock Options Expands in a Global Economy*, N.Y. TIMES, Sept. 3, 1998, at C2. *See* Fung, *supra* note 26 at 36 (suggestion that what has really caused the differences in American and European executive pay is long-term incentive compensation); *see also* Steve Lohr, *Recession Puts a Harsh Spotlight on Hefty Pay of Top Executives,* N.Y. TIMES, Jan. 20, 1992, at A1 (asserting that the main reason for the gap between executive pay in the United States and abroad is the American practice of compensation through stock options).

panies in Europe[66] and Japan[67] toward increased use of performance-based compensation. In addition to other forms of incentive compensation, there is evidence that a growing number of European and Japanese companies are starting to offer stock options as part of their compensation packages.[68] Just as institutional investors in the United States clamored for incentive compensation here, the rise of foreign institutional investment in European companies[69] can be expected to bring similar pressures there.[70] Similarly, the rise of multinational corporations will naturally lead to increased use of incentive compensation as a means of addressing agency problems.[71]

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66. *See* Eamonn Ryan, *Survey—Multinationals—Upward Pressure on Pay Packages*, BUSINESS TIMES (South Africa), Sept. 19, 1999, at 20 (recognizing that "US-style performance incentives have become the norm in Europe and Japan," with more and more companies incorporating stock and other performance-based forms of compensation); Konstantin Richter, *Bonuses Linked to Performance Spread in Europe*, WALL ST. J., June 30, 1999, at B15A (presenting findings of study of executive compensation in 11 European countries). Johnston, *supra* note 65 at C2 (discussing European companies looking to increased use of incentive compensation to compete with American companies operating abroad); *see also* Gates, *supra* note 12, at 5, 8 (noting trend to intensification of performance-based compensation).

67. *See Study Finds Growing Use of Variable Pay and Performance-Based Financial Incentives by Companies Around the World to Attract and Retain Key Talent*, BUSINESS WIRE, Dec. 1, 1999. Results showed that seniority-based compensation systems in many Asian countries, including Japan and Korea, are being replaced with performance-based compensation systems. *Id. See also Foreign Companies Adopt U.S.-Style Pay*, HR FOCUS, June 1999, at 16 (citing Watson Wyatt Worldwide survey asserting that 56% of Japanese companies offer long-term incentive plans as a means of competing for the best employees); Michiyo Nakamoto, *Performance Begins to Win a Wider Audience: Management Japanese Executive Pay: Companies are Beginning to Emphasize Pay Equality,* FIN. TIMES (London), Dec. 22, 1998, at 12 (noting an increase in performance-based incentives among Japanese companies).

68. *See* Johnston, *supra* note 65 at C2 (noting that at least 160 Japanese companies have opted for stock option plans and that companies in France, the Netherlands and Australia have also started granting options); *see also* Patrick Speekaert, *Corporate Governance in Europe,* 2 FORDHAM FIN. SEC. & TAX L.F. 31, 38 (1997) (recognizing that United States institutions are rapidly increasing their investments in European companies, citing, for example, the doubling of investments in Sweden from 1990-1994, as well as a significant rise in France); Johnston, *supra* note 44 (stating that many British companies are granting options and that some "are moving toward American-style mega-grants").

69. *See* Gates, *supra* note 12, at 10 (noting that foreign investors are expanding in most European companies); *see also* Speekaert, *supra* note 68 (noting that United States institutions are rapidly increasing their investments in European companies, citing, for example, the doubling of investments in Sweden from 1990-1994, as well as a significant rise in France). *See, e.g.,* Thomas J. Andre, Jr., *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany,* 73 TUL. L. REV. 69, 76 (1998) (providing, as an example, that CalPERS, one of the most active U.S. institutional investors, allocates approximately 20% of its total assets to international equity securities, for a total investment in foreign equities of approximately $20 billion).

70. *See* Andre, *supra* note 69, at 77 (1998) (discussing efforts by U.S. institutional investors to export to foreign companies their notions of corporate governance); *see also* Gates, *supra* note 12, at 5, 8 (describing release by CalPERS of governance principles for foreign countries in which it invests); Brian R. Cheffins, *Current Trends in Corporate Governance: Going From London To Milan Via Toronto*, 10 DUKE J. COMP. & INT'L L. 5, 17, 23-24 (1999) (noting developing European view of linking pay with performance as a means of improving managerial accountability).

71. *See* Sharon O'Donnell, *Compensation Design As A Tool for Implementing Foreign Subsidiary Strategy*, 39 MGMT. INT'L REV. 149 (1999) (suggesting that incentive compensation is a means of addressing the potential for high agency problems that exist in the case of MNCs and their foreign subsidiaries); *see also* Margo D. Beller, *Companies Rethink Ways to Attract, Keep Employees; Use of Bonuses, Stock-Options Rises,* J. OF COM., Nov. 18, 1997, at 13A (noting that multinational companies are using incentive compensation to lure and keep qualified employees); Bryant, *supra* note 34 (noting that multinational companies are using stock options in order to compete with the American pay scale).

The big question is, will the move toward incentive compensation and the desire to better compete with American business interests abroad change the "political cultures of many European and Asian countries [which] recoiled at the idea of lavishing vast riches on capitalist chieftains for a single year's work."[72] Since part of the motivation for their doing so appears to be a desire to compete with American companies, who are beginning to pay their European executives on an American pay scale,[73] the move certainly can be expected to cause compensation of non-American executives to rise.[74]

There are, however, several reasons to think that the move to performance-based compensation and the granting of stock options may not result in non-U.S. executives being as exorbitantly paid as their U.S. counterparts.

First, there seems to be greater concern in other countries about the potential dilutive effect of stock options on existing shareholders. That concern has been manifest in several ways. One is that there appears to be a move in at least some European countries to demand that shares delivered upon exercise of options be shares bought back by the company on the open market, with the difference between the market price and the option exercise price being charged as a loss to the company.[75] This sort of approach may have the positive effect of leading to more responsibility on the part of those granting options. In the United States, option grants

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72. *See* Johnston, *supra* note 65; *see also* Bajaj, *supra* note 63 (discussing the historically negative attitudes of Japanese and Europeans towards stock options as one reason for slow adoption of incentive pay); Johnston, *supra* note 44 (noting the negative European reaction to the pay packages of the United States' most highly paid executives, like Sanford Weill and Michael Eisner).

73. *See* Gates, *supra* note 12, at 6, 13 (discussing factors moving companies towards a more globally uniform compensation scheme); Fung, *supra* note 26 at 36 (noting that companies are forced to give stock compensation to stay competitive with American companies); Buckley, *supra* note 10 (citing argument that globalization means companies must pay high rates to prevent their executives from joining competitors); Johnston, *supra* note 65 (noting movement of rest of world to an American pay model). However, competition will not necessarily result in European executives seeing higher salaries. *See* Davis, *supra* note 47 (noting that U.K. companies offer base salaries for CEOs from the U.S. that are 30% higher than the base salaries paid to British CEOs).

74. *See* Terril Yue Jones, *Warning: Capitalism is Contagious: Like Blue Jeans, Like Rock Music, Like Coca-Cola, U.S.-Style Stock Options are Catching On Abroad*, FORBES, May 18, 1998, 1998 WL 2087094. As a result of spread of "stock option mania," the gap between pay of U.S. chief executives and executives abroad is narrowing. *Id. See also* Bryant, *supra* note 34 (noting the increase in salaries of executives in European companies); Robert Taylor, *Recruitment: World of Difference in Human Resources: A Survey on Globalisation Suggests There is a Long Way to go for Most Companies to Achieve the Best Policies for Recruitment*, FIN. TIMES (London), Jan. 7, 2000, at 11 (citing a Tower Perrin study finding a world-wide increase in the number of companies using stock options and performance-based pay to compete for global talent).

75. *See* Gates, *supra* note 12; *see also* Nat Stern, *The Practicality of Outreach Statutes Enforcing Directors' Duty of Care*, 72 NEB. L. REV. 905, 936 (1993) (describing how company directors had harmed shareholders by purchasing their shares on the open market, and that stock options awarded to some members of the company's management violated the corporations duty to protect shareholders); Randall S. Thomas and Kenneth J. Martin, *The Effect of Shareholder Proposals on Executive Compensation,* 67 U. CIN. L. REV. 1021, 1050 (1999) (stating that, even in the United States, there has been greater shareholder opposition to company stock option plans and that these opposed plans potentially would have increased the dilution of existing shareholders stocks).

are frequently very huge[76] and, as I have argued elsewhere,[77] one of the reasons they are so huge is that options in the U.S. are costless from an accounting point of view.[78] Another approach to a dilution concern is seen in the United Kingdom, which legislatively limits the amount of a company's equity that can be used to provide options to executives.[79]

Second, differences in taxation may serve to curb the enthusiasm of foreign companies for stock options. In some countries, the grant of a stock option gives rise to taxation in addition to the tax that occurs upon exercise.[80] In fact, "high tax rates have been an important mechanism for controlling executive pay" in Europe.[81]

Third, the adoption of an incentive compensation scheme in the United States generally has very little impact on an executive's base salary. That is, an incentive compensation plan is typically viewed as an additional benefit, rather than replacing a portion of base salary, which

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76. *See Report on Executive Pay*, N.Y. TIMES, Apr. 2, 2000, at 16-17. With respect to 1999 executive pay, the average grant date value of options granted in 1999 to executives at 100 of the largest non-technology companies was $5,029,631. *Id. See Management; Stock Option Splitsville*, N.Y. TIMES, Apr. 9, 2000, at C1 (stating that "In just the last decade, stock options have gone from being icing on the cake in many executive pay packages to being the cake itself"); *see also Economic View; Stock Option Bonanzas vs. Stagnant Paychecks,* N.Y. TIMES, Nov. 21, 1999 at C4 (citing four economists at the Federal Reserve as saying "Our calculations suggest that in recent years, stock options have been a not-insignificant part of actual overall compensation growth.").

77. *See* Stabile, *supra* note 24, at 276 (concluding that "[s]tock options are the only type of compensation that generate an expense that is deductible for tax purposes, but that does not have to be expensed for financial accounting purposes."); *see also* Stabile, *supra* note 3, at 213-14 (stating "options are costless from an accounting point of view").

78. *See Accounting Principles Board Opinion No. 25, Accounting for Stock Issued to Employees*, § 10, *in* FASB, ACCOUNTING STANDARDS: ORIGINAL PRONOUNCEMENTS 585, 591 (1998). Under current accounting standards, companies need not recognize a compensation expense with respect to options granted, so long as the option is granted with an exercise price that is at least equal to the fair market value on the grant date of the shares subject to the grant. *Id. See also Economic view; Stock Option Bonanzas vs. Stagnant Paychecks, supra* note 76. American accounting practices grant special treatment for stock options. *Id.* The government does not measure stock options under the Employment Cost Index and that unexercised option grants are not calculated under the compensation per hour method of labor cost measurement. *Id.*

79. *See* Gates, *supra* note 12, at 18 (citing U.K. legislation providing that no more than 5% of a company's equity can be used to provide options over a 10-year period); *see also* Fung, *supra* note 26, at 36 (providing an explanation for the fact that long-term incentives are a much larger piece of a U.S. CEO's total compensation than of a U.K.'s CEO); Thomas & Martin, *supra* note 75, at 1072 (observing that, in American companies, binding bylaw amendments have permitted shareholders to vote directly to limit certain methods of compensating executives, such as option repricing).

80. *See, e.g.,* Gates, *supra* note 12, at 29 (citing the example of the Scandinavian countries); Fung, *supra* note 26 at 36 (citing Holland as example). *But cf.* George R. Zodrow and Charles E. McClure, Jr., *Direct Consumption Taxes,* 46 TAX L. REV. 407, 471 (1991) (recognizing to the contrary that in the United States "no additional tax need be assessed when the individual exercises the stock options; the individual has effectively made a tax-prepaid investment in the firm" through its options).

81. Anderson & Cavanagh, *supra* note 29. *See 1998 Annual Report and Accounts,* AMVESCAP Plc, ICC ONLINE LTD. 1, 12 (1998). Decreases in UK tax rates were primarily due to benefits relating to the exercise of stock options and the recognition of certain deferred tax assets. *Id.* "Changes in UK tax legislation abolishing Advance Corporation Tax and foreign income dividends will have a material impact both on tax planning and dividend funding." *Id.* at 12.

base salary is quite high in the United States.[82] In contrast, when European companies add incentive compensation schemes, that fact serves to restrain increases in base pay.[83] In part this may be because some European countries impose a limit on increases in compensation or otherwise index wages.[84]

These factors suggest that, notwithstanding pressures arising from the expansion of American companies abroad, the European views that "[n]o executive deserves that much money"[85] and that "[t]he enrichment of an individual on the backs of workers is considered exploitation"[86] may not disappear and may prevent the excessive use of options and other forms of incentive compensation.

B. Reasons Some Gap Will Remain

The last part of the previous section suggests that increased use of incentive compensation will not result in closing the gap between U.S. and foreign executives. There are also other rea-

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82. *See, e.g., New Avon CEO Got $2.35 Million Salary in '99, 86% of Bonus*, WALL ST. J., Mar. 28, 2000, at C15 (giving example of Avon CEO Andrea Jung, whose base salary rose 38% in 1000 to $900,000 despite significant payments from long-term incentive plans); *The 1999 Softletter Executive Compensation Survey; Industry Trend or Event*, SOFT-LETTER, Aug. 21, 1999 (purporting that, despite significant incentive compensation, most CEOs that expect increases in base salary, get them). *See generally* Brian J. Hall and Jeffrey B. Liebman, *Are CEO's Really Paid Like Bureaucrats?,* Q. J. OF ECONOMICS 653, 656-57 (1998) (discussing the alignment of incentives of executives with the interests of shareholders by granting stock options to CEOs).

83. *See* Gates, *supra* note 12, at 23 (noting that 48% of companies adopting incentive compensation plans have restrained increases in base pay); *see also* Konstantin Richter, *Performance-Based Bonuses Become More Popular in Europe, Study Finds*, WALL ST. J., June 30, 1999, at B15A ("[i]n some countries, the shift toward variable pay came at the expense of increases in base pay, giving example of France, where companies are not increasing base salaries because they are increasing variable pay"). *See generally* Christine Williamson, *Primed With Perks: Individual Managers Hold Cards in Pay Game,* PENSIONS AND INVESTMENTS, May 29, 2000, at 19 (analyzing compensation packages for a range of investment management professionals).

84. *See* Gates, *supra* note 12, at 29. *See* Charles M. Yablon, *Overcompensating: The Corporate Lawyer and Executive* Pay, 92 COLUM. L. REV. 1867 (1992) (reviewing CRYSTAL GRAEF, IN SEARCH OF EXCESS (1991)) (noting that in America "[r]ecent expressions of concern from both politicians and representatives of the investing public . . . indicate that executive compensation may now have reached such levels of outrageousness that some form of legal reaction is likely to occur."); *see also* Halle Fine Terrion, *Regulation S-K, Item 402: The New Executive Compensation Disclosure Rules*, 43 CASE W. RES. 1175, 1193 (1993) (discussing revisions to Item 402 of Regulation S-K as a response to rising criticism of executive compensation).

85. Fung, *supra* note 26, at 36 (quoting German Shareholder activist Ekkehard Wenger). *See* Kreinberg, *supra* note 22 (comparing CEO compensation in particular industries between America and Japan, showing that Americans are paid between five to thirty times more than CEOs of Japan)*; see also* Gordon, *supra* note 31, at 235 (stating "Top managers in Germany are paid considerably less than their U.S. counterparts").

86. Fung, *supra* note 26 at 36 (quoting executive director of the German Shareholder Protection Association, Joerg Pluta). *See also* G. Wayne Miller, *R.I. Socialists Envision a Revolution Carrying on the Fight, They Say Capitalism Cannot Answer Workers' Needs,* THE PROVIDENCE J.-BULL., May 12, 1997 at A1 (presenting the "extreme" view as one that mandates the capitalist system must be overthrown for "true justice and reform" to occur; *see, e.g.,* Dewanna Lofton, *Nike Unveils New Wear, Social Plans*, THE COM. APPEAL, Sept. 24, 1998, at B4 (referring to Philip Knight, Nike president and chief executive officer, as a "parasite" for the low wages the company pays its Asian factory workers).

sons to think that the gap between U.S. executives and rank and file employees will continue to be much larger than that between foreign executives and rank and file employees.[87]

First, corporate share ownership is more dispersed in the U.S. than in many other countries, where concentrated shareholding is the norm.[88] A good example is Germany, where a small number of financial institutions own or control significant blocks of stocks of German companies.[89] Another is Japan, in which many companies are controlled by keiretsu groups.[90] Notwithstanding increased shareholder activism among U.S. investors, "shareholder activism

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87. *See* Brownstein & Panner, *supra* note 59, at 32 (arguing that the difference in the level of executive compensation of American and Japanese executives is related to job security); *see, e.g.,* BLAIR, *supra* note 60, at 80 (citing as examples the ouster of Robert Stempel from General Motors in October 1992, Paul E. Lego from Westinghouse and John F. Akers from IBM in January 1993, James Robinson from American Express in February 1993, Kay R. Whitmore from Kodak in August 1993, and Anthony D'Amato from Borden in December 1993). *But see, e.g., Tezuka, supra* note 20 (stating that the five major Japanese steel companies reduced the combined total of their employees by 23,000 between 1993 and 1995); Stephanie Strom, *Japan's New 'Temp' Workers*, NEW YORK TIMES, June 17, 1998, at D1, D3 (noting that "Japan is trying to reduce its reliance on lifetime employment"); *Japanese Firms Hire More Graduates but Some Companies Continue to Cut Jobs Despite Economic Recovery*, ASIAN WALL ST. J., Aug. 21, 1996 at 4 (66% of major employers cut jobs in recent economic downturn); *Telekom Denies Planning Massive Lay-Off*, BUS. TIMES, Mar. 20, 1996, 1996 WL 20967 (noting Telekom denied lay-offs but offered attractive incentives for employees to take early retirement). *See generally* David J. Denis and Diane K. Denis, *Performance Changes Following Top Management Dismissals*, 50 J. OF FIN. 1029 (1995) (describing fact that a number of large corporations have responded to poor corporate performance by terminating their CEOs).

88. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS 6 (1994) (asserting that U.S. shareholders rarely own more than 1% of any individual corporation's stock); *see also* Coffee, *supra* note 39, at 641 (describing dispersed share ownership as a "localized phenomenon," characteristic of the U.S. and Great Britain, contrary to the "dominant world-wide pattern" of concentrated ownership). *See generally* Michael Useem, INVESTOR CAPITALISM: HOW MONEY MANAGERS ARE CHANGING THE FACT OF CORPORATE AMERICA 174 (1997) (describing common policy of institutional investors of limiting individual holdings to 1% to 2% of the voting stock in any individual company).

89. *See, e.g.*, Neuman & Roe, *supra* note 31, at 181 (noting that, in contrast to the U.S., in Germany, "ownership of even the largest firms is concentrated, with families and financial institutions owning or controlling big blocks of stock"); Gates, *supra* note 12, 9-10 (same); Peter F. Drucker, *Reckoning with the Pension Fund Revolution*, HARV. BUS. REV., Apr. 1991, at 316 (noting that share ownership in the U.S. is much less concentrated than in countries like Germany and Japan); Cheffins, *supra* note 70, at 36 (1999) (recognizing Canadian system of public corporations under the control of one shareholder or a small affiliated group of shareholders).

90. *See* OZAKI, *supra* note 8, at 53-56 (noting that firms in Japan belong to keirestu, or enterprise groups, consisting of a major bank, a major trading company and a major manufacturing company at the core and then several large manufacturing firms and smaller affiliated firms); Drucker, *supra* note 89 (explaining keiretsu as 20% to 30% of the share capital of each member company held "by the other members and by the group's bank and trading company, and practically all credit to the member companies is provided by the group's bank"); *see also* Mark J. Roe, *Symposium: Economic Competitiveness and the Law: Article and Comment: Some Differences in Corporate Structure in Germany, Japan and the United States*, 102 YALE L.J. 1927, 1939, (1993) (stating "[l]arge Japanese firms typically belong to a Keiretsu . . . ").

increases in direct proportion to ownership concentration."[91] Whether causal or not,[92] German executives are not paid nearly as lavishly as U.S. ones[93] and the pay gap between executives and rank and file workers in Germany is much more compressed than it is in the United States.[94] Similarly, in Japan, companies with financial keiretsu affiliation pay their CEOs less than companies without such affiliations.[95] In contrast, in the United Kingdom, which has more dispersed share ownership without a dominant shareholder,[96] executives are paid much more than executives in other European countries and the pay gap between U.K. executives and rank and file workers is growing.[97] Studies demonstrate that executive pay grows more slowly in firms with a large shareholder than in firms lacking a large shareholder.[98]

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91. Coffee, *supra* note 39, at 641-42. *See* Cheffins, *supra* note 70, at 33. Dispersed share ownership means that investors "are rarely poised to intervene or take a hand in running a business," whereas controlling shareholders are likely to have sufficient influence to affect management. *Id. See also* Jeffrey N. Gordon, *The Shaping Force of Corporate Law in the New Economic Order*, 31 U. RICH. L. REV. 1473, 1475 (asserting that it is difficult and expensive for dispersed shareholders to coordinate their actions).

92. *See* Gordon, *supra* note 31, at 221 (giving several examples of failure of the Grossbanken to monitor managerial performance); *see also* THEODOR BAUMS, CORPORATE GOVERNANCE IN GERMANY: System and Current Developments 17-18 (University of Osnabruck Working Paper No. 70, 1998) (purporting that, while banks in Germany have a significant impact, their influence can be overstated); William W. Bratton and Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference,* 38 COLUM. J. TRANSNAT'L L. 213, 262 (1999) (stating that "German bank monitors, as it turned out, do not take an activist role in effecting investment and divestment policies keyed to shareholder value.").

93. *See* Morais, et al., *supra* note 5 (comparing executive compensation in the United States, Japan, and Germany); *see also* Belsie*, supra* note 23, at 8 (stating that "[American] executive salaries are nearly double the pay of any foreign peer . . ."); Yablon, *supra* note 84, at 1871 (claiming that levels of compensation available to American CEO"s is unparalleled in the throughout the rest of the world).

94. *See* Yablon, *supra* note 84 (comparing average compensation of American CEO and manufacturing worker against German CEO and German manufacturing and service workers); *see also* Kreinberg, *supra* note 22 (asserting that the salary of a CEO in Germany can reach up to 21 times that of an industrial worker in Germany); Salky, *supra* note 3 (noting that CEOs earn approximately 23 times that of average workers in Germany).

95. *See* Takao Kato, *Chief Executive Compensation and Corporate Groups in Japan: New Evidence From Micro Data*, 15 INT'L J. OF INDUS. ORG. 455, 458 (1997) (finding that even after controlling for performance and other variables, CEO compensation is less in keiretsu firms than independent ones). *See generally* Ronald J. Gilson and Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L. J. 871, 871 (1993) (discussing the structure of the Japanese corporation); Stephen D. Prowse, *The Structure of Corporate Ownership in Japan*, 48 J. FIN. 1121, 1123 (1992) (analyzing the structure of the Japanese corporate system).

96. *See* Cheffins, *supra* note 70, at 7, 12 (1999) (noting that shareholding is diffuse and that very few companies have owners controlling more than 25% of a company's shares). Professor Cheffins also observes that another important similarity between the U.S. and the U.K. is that both have well-developed equity markets. *See id.* at 12. Rafael La Porta, et. al., *Corporate Ownership Around the World,* 54 J. FIN. 471, 491-95 (1999).

97. *See* Buckley, *supra* note 10 (noting that in 1997, the ratio was 16:1, and in 1994, 12:1); *see also* Lebreton & Slaven, *supra* note 10 (stating that in the U.K., as in the U.S., "fierce competition for management talent has driven senior executives remuneration to record level"). *See generally* Beauchli et al., *supra* note 10, at A1, A7 (discussing the generous compensation package of Barings PLC).

98. *See, e.g.*, Loewenstein, *supra* note 2, at 25-28 (discussing the structure of shareholder compensation in U.S. corporations).

That is not to say that institutional investors in the United States have not had some success in affecting executive compensation.[99] However, that success has generally not translated into lowering either the absolute level of executive compensation or the gap in pay between U.S. executives and rank and file workers, and thus the disparity in pay (and pay gap) between U.S. and foreign executives.

Second, in the U.S., labor has traditionally had relatively little influence on a corporation's board of directors, whereas in Germany, codetermination means labor influence is very large.[100] One characteristic of this codetermination is that German companies have a "supervisory board" which both chooses members of the "managing board" and gets to determine other important corporate matters.[101] Labor gets half of the seats on the supervisory board.[102] It is generally believed that "union representation on the board of directors tends to result in more egalitarian compensation practices than in other countries."[103] In contrast, in the United States, despite the increasing presence on boards of directors of outside directors,[104] executives

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99. *See* Stabile, *supra* note 3, at 191-97 (discussing shareholder efforts aimed at executive compensation); *see also* Greg A. Jarrell, *An Overview of the Executive Compensation Debate*, 5 J. APPLIED CORP. FIN. 76, 78 (1993) (analyzing the specifics of the debate on whether executive compensation should be reduced); Nikos Vafeas & Zaharoulla Afxentiou, *The Association Between the SEC's 1992 Compensation Disclosure Rule and Executive Compensation Policy Changes,* 17 J. ACCT. & PUB. POL'Y 27, 28, 51 (1998) (noting efforts to reduce executive compensation levels).

100. *See, e.g.,* Neuman & Roe, *supra* note 31, at 182; *see also* Dau-Schmidt, *supra* note 31, at 121 (explaining employee organization in the United States and Germany); Alvin L. Goldman, *Potential Refinements of Employment Relations Law in the Twenty-First Century,* 3 EMPL. RTS. & EMPLOY. POL'Y J. 269, 297 (1999) (discussing how employee representatives in Germany, under co-determination, may be privy to information that often is hidden from upper level management).

101. *See* Gordon, *supra* note 31, at 219-222 (analyzing structure of German supervisory boards); *see also* Thomas J. Andre, Jr., *Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Boards*, 70 TUL. L. REV. 1819, 1826 (1996) (examining structure of German supervisory boards); Mark J. Roe, *German Codetermination and German Securities Markets*, 1998 COLUM. BUS. L. REV. 167, 167 (1998) (discussing German supervisory boards under the system of co-determination).

102. *See* Coffee, *supra* note 39, at 678 (citing German Co-Determination Act); Gordon, *supra* note 31, at 219-22 (discussing German supervisory boards); Helmut Kohl, *Path Dependence and German Corporate Law: Some Skeptical Remarks from the Sidelines*, 5 COLUM. J. EUR. L. 189, 194 (1999) (commenting on the German supervisory boards).

103. Gates, *supra* note 12, at 11-12. *See* Lawrence A. Cunningham, *Symposium: Corporate Social Responsibility: Paradigm or Paradox? Commonalties and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133, 1175 (1999) (discussing the existing pay differences in more egalitarian countries like Germany, as demonstrated by the presence of labor representation on supervisory boards); Fung, *supra* note 26, at 36 (suggesting that presence on board of labor leaders inhibits board from excessively compensating executives).

104. *See, e.g.*, Matthew Greco, *Proxy Season Redux: Same Old Poison Pill: Board Practices and Executive Compensation Remain Hot Spots*, INV. REL. BUS., June 30, 1997, 1997 WL8784076 (citing study by Investor Responsibility Research Center that shows, on average, 66% of directors of S&P 500 companies in 1996 were independent and 90% of compensation committee members are independent); Mark J. Loewenstein, *Reflections on Executive Compensation and a Modest Proposal for (Further) Reform*, 50 SMU L. REV. 201, 208 (1996) (stating that independent directors dominate most corporate boards); John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 NYU L. REV. 1003, 1005 (1993) (asserting that independent directors are becoming increasingly involved in overseeing corporate direction).

still have significant influence on the amount and composition of their compensation packages.[105]

Again, however, it is important not to overstate the significance of labor influence in systems such as the German system of codetermination. In that particular case, many would complain that the supervisory board meets too infrequently and is provided with too little information to effectively monitor the managing board.[106] On the other side of the equation, U.S. labor's increasing shareholder power[107] may provide it with influence on boards of American companies.

V. Conclusion

It is assuredly the case that the popularly quoted figures about the disparity in pay between U.S. and non-U.S. executives is overstated. However, the fact of the disparity can not be disputed. American executives are paid much more lavishly than their foreign counterparts and they are paid so on the backs of workers. Perhaps the reason why the levels of executive pay in the United States have not led to serious competitive difficulties is the fact that we permit to exist a much larger gap in pay between U.S. executives and rank and file workers than the corresponding gap that exists in other industrialized countries.

Having said that, there are reasons to think that the disparity that exists and that has historically existed between the pay of U.S. executives and those abroad will narrow over time. Cross-border mergers, an increasingly global executive market and the worldwide trend toward increased use of incentive compensation will all contribute towards increased rationalization of executive pay worldwide. Disparity will remain, but it is an open question whether the disparity will remain large enough over time to justify some legal or political intervention to change the situation.

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105. *See* Cheffins, *supra* note 70, at 15 (1999) (asserting that senior executives can use influence on board to ensure generous compensation); *see also* Stabile, *supra* note 3, at 174-78 (discussing several reasons why executives still influence compensation despite significant presence of outside directors on boards); Joann S. Lublin, *In Whose Interest? Compensation Committees Are Supposed to Be Independent; That May Be Tough When the CEO is a Member*, WALL ST. J., Apr. 8, 1999, at R4 (noting that CEOs serve on the board's compensation committee at a large number of companies).

106. *See* Gordon, *supra* note 31, at 233 (discussing the flexibility of German Corporate Law); *see also* Roe, *supra* note 101, at 185 (concluding that a board that seldom meets will be less informed and less able to monitor management than one that meets frequently); Gilson & Roe, *supra* note 33, at 535 (noting that labor is less well represented on committees than on the full supervisory board).

107. *See* Marleen A. O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345, 1346 (1997) (noting that, in recent years, labor-shareholders are highly "visible players" as they exercise unprecedented power over managers); Steward J. Schwab & Randall Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1032 (1998) (concluding that unions must find ways to assert power and "work within the current framework"); Randall S. Thomas & Kenneth J. Martin, *Should Labor Be Allowed to Make Shareholder Proposals?*, 73 WASH. L. REV. 41, 51-53 (1998) (discussing labor's increasing power in corporate decision making).

Transnational Issues of Women and Pension Security and Reform

By Professor Lorraine A. Schmall*

Poets, philosophers, and playwrights have long told us that youth is only temporary.[1] Old age is an inevitable contingency. No society can develop without planning for its elderly, not only out of respect, or fondness, or pity, but because advancing age may signify increased dependency.[2] A woman's quest for economic security is as old and as continuous as our records of human life itself. How well a society provides for at least the elemental needs of the unfortunate is now and has always been a test of civilization. Pensions, then, are crucially important. However, age may be revered in many cultures,[3] the elderly are, despite all their wisdom, con-

1. *See* Jordana Willner, *Cindy Crawford—Branching Out or Caving In?*, S.F. CHRON., Jan. 16, 2000, at 3/Z1 (discussing how model Cindy Crawford knew that her youth would be temporary and that "looks fade"); *see also* Tom Guarisco, *Poll: Home Internet use in EBR depends on Wealth, Education*, THE BATON ROUGE ADVOC., Jan. 14, 2000, at 1-A (explaining that since youth is temporary, the low rate of elderly users of the internet is also temporary because, the young internet users will age until one day the elderly will be the majority of people online). *See generally* Alan Binenstock, *Skin Care in the '90s; Includes Article About Market Trends in Sun Care,* 66 INFORMATION ACCESS COMPANY 32, No. 2, (1990) (advocating anti-aging skin care products to promote continuation of youth, inherently contrary to the temporary nature of youth).

2. *See generally* Lorraine Schmall, *Keeping Employer Promises When Relational Incentives No Longer Pertain: Right-Sizing and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 298-99 (2000) (noting that pensions will continue to be a significant source of income to retirees); William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1475 (1986) (noting that pension expenditures will continue to increase at a faster rate than Social Security revenue for several decades); Senator Don Nickles, *Retiring in America: Why the United States Needs a New Kind of Social Security for the New Millennium*, 36 HARV. J. ON LEGIS. 77, 96-98 (1999) (proposing that a privatization system of benefits would reduce the problem of unfunded federal retirement).

3. *See* Lester C. Thurow, *Globalization: The Product of a Knowledge-Based Economy*, 570 ANNALS 19, 27 (2000) (discussing how the new electronic culture "jumps right across to the young" and therefore, is "profoundly different" than traditional culture which instilled values); *see also* Elaine Sit, *Broken Promises: The Status of Expropriated Property in the People's Republic of China*, 3 ASIAN L.J. 111, 138 (1996) (discussing how the elderly are traditionally revered as the "fabric of Chinese society and culture"). *See generally* Kay S. Hymowitz, *Tinker and the Lessons From the Slippery Slope,* 48 DRAKE L. REV. 547, 552 (2000) ("Throughout history and across cultures, the older generation has had the responsibility of inducting the younger generation into the traditions, norms, and expectations of a culture.").

* **Northern Illinois University College of Law.**

Author's Note: Being a typically self-interested American, I have been of late preoccupied with our Social Security System. It is not odd that I would be; my scholarly and political interests have developed along with my chronological age. When I began my studies, I was taken with the Constitutional right of an unmarried person to have access to birth control; that was followed by forays into research and writing about daycare; then I studied the so-called "glass ceiling" for women; now, retirement security. One might anticipate my developing interest in the right to die.

tributions, and desserts, the poorest segment of the population.[4] Last year, the United Nation's General Assembly observed the "International Year of Older Persons,"[5] in recognition of "humanity's demographic coming of age and the promise it holds for maturing attitudes and capabilities in social, economic, cultural and spiritual undertakings, not least for global peace and development in the next century."[6] Yet, the "International Year of Older Persons" has passed and "apparently the world's recognition of the worth of the ancients has come and gone, but pensions are still in need of reform."[7] Although there has been much excited and necessary debate about funding, privatization and the sheer joy of market watching, such discussions

4. *See* Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 AM. U. J. GENDER & L. 369, 408 (1998) (discussing how at least 60% of Russians live below the poverty line, particularly the elderly and disabled); *see also* Michael B. Katz, *Race, Poverty, and Welfare: Du Bois's Legacy for Policy*, 568 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 111, 122 (2000) ("The sheer magnitude of poverty among the elderly leaps out from even a cursory look. . . ."); *see, e.g.,* Francesca Marzari, *Pensions, and Policy Power*, 2 APPEAL 34, 35 (1996) ("The aging of Canada's population and the persistence of poverty among Canada's elderly . . . means that the laws that shape our economic well being in old age are of significant concern to people of all ages. Pensions are required because the poverty of the elderly is structural.").

5. *See* Susan Broli, *Center Marks Year of Older Persons*, THE CHAPEL HILL HERALD, 1 (1999) (discussing the trend of aging demographics in the context of the International Year of Older Persons); *see also* Keith Graham & Don Melvin, *Atlanta and the World; Ghana School Named for Atlantans*, THE ATLANTA J. & CONST., Jan. 14, 1999, at B3 (discussing how the elderly are the fastest growing population segment and are expected to climb to 370 million by the year 2050); *see, e.g., The World Ages, Gracefully; Includes Related Article On Care of Older Persons*, 35 UN MONTHLY CHRON. 30, No. 4, (1998) (discussing how the United Nations Principles of Older Persons translate into policy and practical programmes thus fostering the inclusive concept of a "society for all.").

6. *See World Summit for Social Development To Be Held in Denmark in 1995; Social Committee Carries Broadest Agenda, Heaviest Workload Ever; Third Committee of the United Nations General Assembly; includes related articles on aging and on the International Day of Disabled Persons*, 30 UN CHRON. 82, No. 1, (1993) (discussing how the U.N. Proclamation calls for international cooperation to be promoted for life-long health, income generation and new forms of productive aging); *see also Caring for the Elderly by Making Sure They Get the Right Medicines*, NEW STRAITS TIMES (Malaysia), Dec. 26, 1999, at 29 (discussing how the growing number of elderly are influencing the International Plan of Action on Aging, promulgating ideas of a positive, active and developmentally oriented view of aging). *See generally* Joseph J. Norton, *Pension Reform Around the World: Privatization of Public Pension Systems in Developing Nations: A Call for International Standards*, 64 BROOK. L. REV. 817, 819 (1998) ("The current . . . public pension system reforms generally envision new distributions of duties and responsibilities between the national government and its citizens.").

7. *See* Erin E. Lynch, *Late-Life Crisis: A Comparative Analysis of the Social Insurance Schemes For Retirees of Japan, Germany, and the United States*, 14 COMP. LAB. L.J. 339, 341 (1993) (discussing the development of the treatment of the elderly, in terms of financial problems, retirement pension systems, poor relief programs, and the overall worsened status of the elderly); *see also* Norton, *supra* note 6, at 820 (arguing that the timing of relevant pension reforms is critical, as fiscal measures such as reducing pension benefits or increasing the age of pension eligibility will necessarily cause political debate and difficulties in reaching consensus, especially in nations with higher levels of unemployment). *See generally* Michael Alan Paskin, Note, *Privatization of Old-Age Pensions In Latin America: Lessons for Social Security Reform in The United States,* 62 FORDHAM L. REV. 2199, 2199 (1994) (presenting various criticisms of he United States Social Security system, including its inability to generate national savings to promote investment and its long-term inability to pay for itself when the current working generation of baby-boomers retires).

should provide a special consideration as to how *women* will be affected by pension reform.[8] Their lack of equal access, opportunity and remuneration need to be considered when retirement security is discussed.

Older women as a class occupy an even lower rung than the elderly because they are, essentially, "the poorest of the poor."[9] Consequently, the question of how to best provide women with some modicum of support in old age has occupied our governments for the past decade.[10] Although the economic problems of women are recognized at a universal level, the solutions are unique to each and every country.[11] Although some countries have begun to reform their systems, the United States is still in the midst of a great debate.[12] Even though sys-

8. *See* Anne Moss, *Women's Pension Reform: Congress Inches Toward Equity*, 19 U. MICH. J. L. REFORM 165, 165 (1985) (discussing how the inequities of our private and governmental pension systems compound the financial problems of women, particularly causing inadequate retirement income for older women); *see also* Senator Carol Moseley-Braun, *Women's Retirement Security*, 4 ELDER L.J. 493, 494 (1996) (discussing how reform on women's issues should address the elimination of historical and institutional inequities and unfairness in an effort to combat institutional sexism). *See generally* Marzari, *supra* note 4, at 49 (discusses how the current tax structure and pension system is "rooted in a bias toward the patriarchal family in which women are economically dependant upon men.").

9. *See* Jane Lee Saber, *Women and The International Monetary Fund*, 5 ILSA J. INT'L & COMP. L. 335, 337 (1999) (stating that women are the "poorest of the poor" particularly in developing countries); *see also* Moseley-Braun, *supra* note 8 (presenting statistical studies showing that women currently comprise the majority of the world's poor and are much more likely to spend their final years in poverty); *see also* Debra Maranville, *New Approaches To Poverty Law, Teaching, and Practice: Changing Economy, Changing Lives: Unemployment Insurance and The Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291, 293-94 (1995) (discussing how labor market segregation causes women to hold lower-paying jobs with less security and fewer benefits than men). *See generally* Karen C. Burke & Grayson M.P. McCouch, *The Impact of Social Security Reform on Women's Economic Security*, 16 N.Y.L. SCH. J. HUM. RTS. 375, 380 (1999) (discussing that on average, women will continue to earn less than men).

10. *See* Moseley-Braun, *supra* note 8 (discussing how pension policy making traditionally has been predicated on a fictionalized model of women's role in society and in the economy); *see also* Saber, *supra* note 9, at 341 (posing a discussion of how efforts to reduce systemic biases and negative impact of structural adjustment need to be made). *See generally* Rebecca E. Zietlow, *Exploring A Substantive Approach to Equal Justice Under Law*, 28 N.M. L. REV. 411, 431 (1998) (discussing how our system's disenfranchisement of the poor shows a failure in the democratic system).

11. *See* Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2006-08 (1996) (discussing three major tax proposals intended to ameliorate economic disadvantages of women); *see, e.g.*, Catherine T. Barbieri, Comment, *Women Workers In Transition: The Potential Impact of the NAFTA Labor Side Agreements On Women Workers In Argentina and Chile,* 17 COMP. LAB. L. 526, 535-42 (1996) (discussing how feminist movements and increased politicization of women in Argentina and Chile helped to address exploitation of women workers). *See generally* Barbara Austin*, Policies, Preferences and Perversions in the Tax-Assisted Retirement Savings System*, 41 MCGILL L. J. 571, 573-76 (1996) (discussing Canada's proposals for reformation of tax-assisted retirement savings).

12. *See* Ann Graham, *Women in the Age of Economic Transformation: Gender Impact of Reforms in Post-Socialist and Developing Countries*, 73 ECON. GEOGRAPHY 363, No.3 (1997) (presenting a collection of 12 essays analyzing the gender impact of economic in post-socialist and developing countries); *see also* Molly Sinclair, *Elderly Blacks Poorest, National Study Affirms; Low-Paying Jobs, Lack of Pensions Cited*, THE WASH. POST, July 15, 1987, at B5 ("Elderly black women . . . are clearly one of the most economically deprived groups in our society today−about seven out of every eight are either poor or economically vulnerable."); *see*, *e.g.*, Jane Biondi, Note, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV 611, 611 (1999) ("Divorce law reform is a growing concern of state legislators and legal scholars. . . . Some of these reform agendas include the creation of new and different kinds of marriage contracts and criteria.").

tems here and abroad are changing, the issue of gender must be considered before any decision is made about how to save and improve the pension system.[13] Perhaps in this one, small way, we can avoid further economic and social discrimination against women.

If any generalization about international pension reform can be made, it is that pensions are less likely to be publicly subsidized and more likely to be attached to wage-earning, since self-contributions are coming to represent an increasing percentage of retirement funds.[14] Although in nearly every case, legislation grants tax benefits or other incentives for retirement savings, there are few citizens who can fund their pension plans from their own resources without enjoying the fruits of paid labor.[15] Moreover, there are many who, though not employed out of their homes for most of their lives, receive derivative pension benefits from their husband's paid labor, since there are more single women.[16] Consequently, women's pension issues cannot be resolved fairly without a careful determination of what paid labor is. What kind of work leads to vesting in employer sponsored pension plans? What kind of income must women earn in order to allow some reserve with which to self-fund pensions? Why is it that so much of the work that women perform brings low pay and few benefits? Short of a radical transformation of all economic systems to one that mandates gender pay equity, how can and must pension reformers accommodate women's particular retirement needs? To comply with this movement toward an earned and saved-for old-age pension, rather than pensions which is a

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13. *See* Milton C. Regan, Jr., *1992 Survey of Books Relating to the Law; V. Law and Society: Divorce Reform and the Legacy of Gender*, 90 MICH. L. REV. 1453, 1453-54 (1992) (discussing the impact of divorce on women, particularly the economic implications of "no-fault" divorce law); *see also* J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 151, 151-52 (1999) (addressing doctrine of self-determination and its applicability to women, within the framework of international biases). *See generally* Donna J. Sullivan, *Current Developments: Women's Human Rights and the 1993 World Conference On Human Rights*, 88 AM. J. INT'L L. 152, 152-53 (1994) (discussing the June 1993 World Conference on Human Rights and its treatment of systematic gender discrimination, focusing on human rights violations against women).

14. *See* Mary E. O'Connell, *On the Fringe: Re-thinking the Link Between Wages and Benefits*, 67 TUL. L. REV 1422, 1452-53 (1993) (noting that an employee's Social Security benefits reflect earnings throughout the course of a lifetime). *See generally* Kathryn L. Moore, *Privatization of Social Security: Misguided Reform,* 71 TEMP. L. REV. 131, 133 (1998) (explaining a common system within privatized social security contributions to private funds and expect the benefits to correlate to the amount of those contributions); Lewis D. Solomon & Geoffrey A. Barrow, *Privitization of Social Security: A Legal and Policy Analysis*, 5 KAN. J. L. & PUB. POL'Y 9, 19 (1995) (discussing various plans for reforming social security and discussing the impact of privitization).

15. *See* David M. Cutler, *Reexamining the Three-Legged Stool in Social Security: What Role for the Future?*, 125, 125-27 (Peter A. Diamond et al. eds.) (1996) (concluding that retirees today need to depend upon Social Security, private pensions and private savings). *See generally* Brian J. Kreiswirth, *The Role of the Basic Public Pension in a Retirement Income Security System*, 19 COMP. LAB. L. & POLICY J. 393, 394 (1998) (identifying "three pillars of support for the elderly" as Social Security, employer-provided pensions and individual savings); O'Connell, *supra* note 14 (noting that an employee's Social Security benefits reflect earnings throughout the course of a lifetime).

16. *See* Richard L. Kaplan, *Top Ten Myths of Social Security,* 3 ELDER L. J. 191, 204 (1995) (noting that women can receive a derivative pension based on their ex-spouses earnings only if the couple was married at least ten years); *see also* Catherine J. Ross & Naomi R. Lahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U. J. GENDER SOC. POL'Y & L. 55, 63 (2000) (noting that few laws allowed unmarried mothers to receive benefits). *See generally* Marzari, *supra* note 4, at 34 (noting that women were not even viewed as members of specified plans, but merely as dependents or survivors of plan members).

public benefit, reformers must reconsider what the word "work" means and then determine how to provide retirement benefits that represent, at least in part, a recognition for that work.[17]

It is arguable that an international audience might have some interest in the pension system of the United States "as a paradigm for what to emulate, and what to scrap."[18] The United States pension system has some features, especially its emphasis on "earned" benefits, that deserve closer examination.[19] Moreover, the trend toward emulating the western notions of free market demand a study of what common improvements can be made to pension systems transnationally.[20] Many nations have long attempted to guarantee basic pension security, often as a

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17. *See* Christopher T. Kelley, *Uncertainty in the Golden Years: The Growing Demands Upon the American Retirement Security System*, 2 ELDER L.J. 225, 231-47 (1994) (discussing the Social Security system's ability to provide the baby boom generation with full retirement benefits); *see also* Nancy C. Staudt, *The Theory and Practice of Taxing Difference*, 65 U. CHI. L. REV. 653, 661-62 (1998) (discussing the implications of a tax credit and the fact that it may cause women to want to be outside the market and be at home, yet still receive benefits). *See generally* Kris Wehrmeister, Note, *Early Retirement Benefits and Gilis v. Hoechst Celanese Corp; Same Desk, Same Job, So What?*, 28 U.C. DAVIS L. REV. 475, 475 (1995) (discussing Employee Retirement Income Security Act of 1974 and its protection of early retirement benefits).

18. *See A False Choice*, ECONOMIST, Dec. 14, 1996, at 20 ("To many, Social Security is the crowning achievement of America's welfare state. It has stretched a safety net beneath every American family and drastically reduced poverty among the elderly. . . . But change it must."); *World Statistics on Divorce* <http://www.divorcereform.org/nonus.html> (visited Sept. 20, 2000) (stating that world statistics on divorce range from a high in the States of 4.95 per 1000 population, to a low of .15 per 1000 population in Sri Lanka); *see also* Sveinbjorn Blondal & Stefano Scarpetta, *Retire Early, Stay at Work? Aging: Analysis,* OECD OBSERVER, June 16, 1998, at 15 (discussing how pensions and benefits are driving down the average retirement age in various OECD countries, but countries including United States, Denmark, and Iceland have been able to maintain considerably higher participation rates among older workers). *See generally* Stuart Dorsey, *Pension Portability and Labor Market Efficiency: A Survey of the Literature*, 48 INDUS. & LAB. REL. REV. 276, 277 (1995) (discussing a review of studies that show how various labor market policies can enhance pension portability).

19. *See* William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 461, 463 (1996) ("Congress created both Social Security and Medicare as social insurance programs. Congress intended that they operate as earned benefits, not as welfare."); *see also* Christina A. Smith, Note, *The Road to Retirement—Paved with Good Intentions but Dotted with Potholes of Untold Liability: ERISA, Section 510, Mixed Motives and Title VII*, 81 MINN. L. REV. 735, 736-39 (1997) (discussing the effects of corporate downsizing on employee's receiving their "earned benefits" under ERISA, Section 510 and Title VII); *see, e.g.,* Peter M.Van Zante, *Mandated Vesting: Suppression of Voluntary Retirement Benefits*, 75 NOTRE DAME L. REV. 125, 137-38 (1999) (discussing the effect of mandated vesting on "earned benefits" of employees in form of pension plans).

20. *See* Ferdinand P. Schoettle, *Commerce Clause Challenges to State Taxes*, 75 MINN. L. REV. 907, 907-08 (1991) ("Despite such international replication of our institutional arrangements, some United States jurists and scholars argue that courts should grant the states greater freedom from commerce clause regulation."); *see also* John J. A. Burke, *The Economic Basis of Law As Demonstrated by the Reformation of NIS Legal Systems*, 18 LOY. L.A. INT'L & COMP. L.J. 207, 207 (1996) (discussing how countries in Eastern Europe and in the former states of the Soviet Union have made the transition from planned economies to Western type free market economies); *see, e.g.,* Don Bauder, SAN DIEGO UNION-TRIB., Dec. 28, 1989, at C-1 ("[T]he Western ideal of free markets has triumphed, but we delude ourselves if we don't also recognize that the most crucial markets in today's capitalism are not at all free. They are rigged by governments to stave off panics.").

right of citizenship, rather than as an "earned" benefit of former employment.[21] Even socialist economies have moved toward a social retirement insurance jointly paid for by employees, the enterprise for which they work, and, less heavily subsidized by the government.[22] The problems with the old systems are exacerbated by the universally aging populations in developed nations, and the globalization of financial and labor markets in the developing and transition countries.[23] That has led to uneven but first-time employment of women often at barely subsistence-level wages; to loss of government-sponsored jobs for women that offered pension benefits; and to the swift abandonment of public-sponsored benefits either because foreign investment or ownership of newly-privatized or just-developed industries have brought with it western style pension plans: niggardly and partially self-funded, or because there are no pension plans to replace the now-depleted old-age benefit funds of the former socialist republics.[24]

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21. *See* Kristen V. Campana, Comment, *Paying Our Own Way: The Privatization of the Chilean Social Security System and Its Lessons for American Reform,* 20 U. PA. J. INT'L ECON. L. 385, 388 (1999) (stating that the emphasis on privatization in the United States has just recently been considered by the federal government); George Parker, *Darling Considers Radical Extension of State Pensions*, FIN. TIMES (London), Aug. 17, 1998, at 6 ("The 'citizenship pension' is likely to be at the heart of the government's plans for pensions reform—which have been the subject of intense debate inside government."); *see also* Joe Serge, *Woman Needs a Visa to Live in West Germany and Regain Citizenship*, THE TORONTO STAR, May 17, 1986, at A-7 ("Canadian citizenship has no bearing on pensions. . . . However, people from countries that have signed pension agreements with Canada may still qualify for a partial pension."). *See generally* Max Horlick et al., *Social Security Programs Throughout The World—1977,* 3 COMP. LAB. L. 95, 96-98 (1980) (discussing social security systems throughout the world, including pension plans and citizenship policies in different countries).

22. *See* Jonathan Barry Forman, *The Tax Treatment of Public and Private Pension Plans Around the World*, 14 AM. J. TAX POL'Y 299, 310 (1997) (stating that the most advantageous way to save for retirement is by employer-sponsored pension plans); *see also* Kent Klaudt, *Hungary After the Revolution: Privatization, Economic Ideology and the False Promise of the Free Market,* 13 LAW & INEQ. J. 303, 307 (1995) (stating that privatization and foreign investment have transformed Hungary into a capitalist market economy); Mark R. Yzaguirre, *Project Finance and Privatization: The Bolivian Example*, 20 HOUS. J. INT'L L. 597, 597 (1998) (stating that the move towards privatization is a dominant trend in the global economy); *see generally* Max Horlick et al., *Social Security Programs Throughout the World,* 3 COMP. LAB. L.J. 95, 97 (1980) (stating that frequently pensions plans are governed by representatives of employers, employees and the government); Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System,* 25 GA. L. REV. 1, 5 (1990) (stressing the importance of retirement benefits in general and employer-provided benefits in particular).

23. *See* Norton, *supra* note 6, at 818 (recognizing aging as the principal factor dominating pension reform); *see also* George Walker, *Pension Reform Around the World: United Kingdom Pensions Law Reform,* 64 BROOK. L. REV. 871, 871 (1998) (criticizing the dated structure of most national pension plans as failing to create proper saving mechanisms). *See generally* Lynch, *supra* note 7, at 349 (stating that pension plans are too inadequate to qualify as income replacements and those age sixty-five and older will be subject to financial hardship in the twenty-first century).

24. *See* Melissa R. H. Hall, *Foreigners Funding the Future: Investment Opportunities in Mexico's Privatized Pension System,* 34 TEX. INT'L L.J. 151, 152-53 (1999) (stating that rapidly growing populations were not accounted for when Social Security systems were set up and as a result many countries are headed for bankruptcy); *see also* Paul Nuki, *Fears Rise of Pension Underclass*, SUN. TIMES, Aug. 8, 1993 (warning that a "pension underclass" will develop if the government does not adopt a coherent policy on pensions). *See generally* Norton, *supra* note 6, at 818 (recognizing aging as the principal factor which dominates pension reform).

Women constitute a large and vital part of any national development.[25] To ignore or—at best—tolerate older women's poverty, should not be written off as a necessary tragedy. The rapidly-growing private economy world wide is creating an increased demand for workers.[26] Beyond that, women with pension income can provide investment funds to increase indigenous investment and perhaps reduce foreign investment. Their deferred compensation, in the form of private and public pensions, is needed as surely as men's to fuel a developing or advance an already developed economy. Their deferred compensation, in the form of private and public pensions, is needed as surely as men's to fuel a developing or advance an already developed economy.[27] Women must be enabled to participate as investors (either privately through their own accrued wealth or contributions to supplemental retirement funds), suppliers, producers and undeniably as consumers.[28]

The basic tenets of retirement security for women are four-fold: (1) recognition of women's relative poverty; (2) their common exclusion from the kind of work that earns deferred benefits; (3) retention of old-age pensions as retirement income rather than undeserved welfare; and, (4) protection against the move to privatization of pension plans and abandonment of any government safety-net.[29] Women, as the poorest group of the population

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25. *See* Manuelita Ureta, *Women, Work and Family: Recent Economic Trends,* 19 N. ILL. U. L. REV. 57, 57 (1998) (focusing on recent economic trends in the labor force between men and women). *See generally* Karen C. Burke & Grayson M. P. McCouch, *Women, Fairness, and Social Security,* 82 IOWA L. REV. 1209, 1210 (1997) (exploring the topic of Social Security privatization, paying particular attention to how it relates to women); Watson, *supra* note 22, at 12 (examining women's role in the workforce and the relationship of that with the difference in requirement security between men and women).

26. *See* John M. Berry, *U.S. Posts the Largest Jobs Gain in 6 Years*, CHICAGO SUN TIMES, January 8, 1995, at 24 (stating that economic growth created a demand for workers); *see also* Rich Miller & Laura Cohn, *Cleared for a Soft Landing*, BUS. WK., July 24, 2000, at 30 (noting that there is a reliance on temporary workers to handle sudden bursts of demand). *See generally* Alvin L. Goldman, *Potential Refinements of Employment Relations Law in the 21st Century*, 3 EMPL. RTS. & EMPLOY. POL'Y J. 269, 275-76 (1999) (noting the increased demand for workers with specialized knowledge in the U.S. and elsewhere).

27. *See* ROBERT L. CLARK & ELISA WOLPER, PENSION TAX EXPENDITURES: MAGNITUDE, DISTRIBUTION AND ECONOMIC EFFECTS, IN PUBLIC POLICY TOWARDS PENSIONS 41, 84 (Sylvester J. Scheiber & John B. Shoven eds. 1997) (discussing the fact that the single largest tax expenditure is attributable to pension plan provisions); s*ee also* Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory,* 58 U. CHI. L. REV. 1275, 1279 (1991) (discussing how the United States attempts to provide retirement income through Social Security and the system of tax subsidiaries for retirement savings). *See generally* Klaudt, *supra* note 22 (stating that privatization and foreign investment in Hungary has resulted in steps towards a capitalist market economy).

28. *See* Klaudt, *supra* note 22 (stating that privatization and foreign investment in Hungary has resulted in steps towards a capitalist market economy); *see also* Watson, *supra* note 22 (stressing the importance of retirement benefits in general and employer-provided benefits in particular). *See generally* Burke & McCouch, *supra* note 25 (exploring the topic of Social Security privatization, paying particular attention to how it relates to women).

29. *See* Rachel Pergament & Brian Raphael, *Gerontology and the Law: A Selected Annotated Bibliography*: 1995-98 Update 72 S. CAL. L. REV. 1461, 1478 (1999) (analyzing the potential impact on women of proposals to privatize Social Security). *See generally* Burke & McCouch, *supra* note 25 (exploring the topic of Social Security privatization, paying particular attention to how it relates to women); Watson, *supra* note 22 (stressing the importance of retirement benefits in general and employer-provided benefits in particular).

worldwide, are amongst the neediest of old-age income.[30] They have experienced job and wage discrimination when they have worked in the public and private sphere and are likely to have earned less than men over their lifetimes.[31] Women frequently interrupt their careers or work part-time to care for children and the home.[32] Women are also increasingly unable to qualify for derivative benefits from their spouses because fewer women are now marrying,[33] more women have been divorcing[34] and women are outliving men.[35] Women are also the least likely

30. *See* Jonathan Barry Forman, *Federal Tax Policy in the New Millennium: Universal Pensions,* 2 CHAPMAN L. REV. 95, 104 (1999) (stating that women over sixty-five continue to face a much higher risk of poverty than men in old age); National Council of Women's Organizations, WOMEN AND SOCIAL SECURITY PROJECT, <http://www.women4socialsecurity.org> (visited Sept. 13, 2000) (recognizing that because women earn less and live longer they are more dependant on Social Security); *see also* Ann Bookman, *Flexibility at What Price? The Costs of Part-time Work for Women Workers,* 52 WASH. & LEE L. REV. 799, 800 (1995) (recognizing that many women work part-time because it is a necessary part of economic survival for themselves and their families); Jonathan Barry Forman, *Making Social Security Work for Women and Men,* 16 N.Y.L. SCH. J. HUM. RTS. 359, 367 (1999) (recognizing that there are many reasons for the gender gap in private retirement income, including that women tend to earn less and spend more time away from the workplace to raise a family); Marzari, *supra* note 4, at 39 (stating that the concerns of women, or the poor, have not been addressed regarding pensions because they are not regarded as pension plan holders but merely as survivors); Staudt, *supra* note 18, at 1597 (stating that Social Security benefits are the only protection for women in many cases).

31. *See* Forman, *supra* note 30 (recognizing that there are many reasons for the gender gap in private retirement income, including that women tend to earn less and spend more time away from the workplace to raise a family); *see also* Clifford German, *Fear of Finance*, THE INDEPENDENT (London), June 29, 1996, at 1 (suggesting that on average, women earn less than men and certainly have much poorer pension expectations than men); Lorraine Schmall, *Work and Family: Introduction*, 19 N. ILL. U. L. REV. 1, 6 (1998) (stating that women only earn 75% of what men earn because of wage discrimination in the workplace). *See generally* Andrew Herrmann, *Here are Half-Million Reasons to Get a Degree*, CHICAGO SUN-TIMES, July 17, 1992, at 1 (stating that men will earn about 30% more money than women over a lifetime).

32. *See* Ureta, *supra* note 25 (focusing on recent economic trends in the labor force between men and women including women's choices to work part-time); *see also* Bookman, *supra* note 30 (recognizing that many women work part-time because it is a necessary part of economic survival for themselves and their families); Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues,* 52 WASH. & LEE L. REV. 771, 774-75 (1995) (stating that part-time workers tend to be women in general, especially those with more family responsibilities).

33. *See* Naomi R. Cahn, *The Moral Complexities of Family Law,* 50 STAN. L. REV. 225, 226 (1997) (exploring single parent families, formed by divorce or by nonmarital birth); *see also* Arthur J. Norton & Louise F. Miller, Marriage, Divorce, and Remarriage in the 1990s at 1-4, BUREAU OF THE CENSUS, U.S. DEP'T OF COM., (1992) (indicating a significant decline in the number of women who marry). *See generally* Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric,* 81 VA. L. REV. 2181, 2183 (1995) (discussing the family as a social and political construct, including women's rejection of the hierarchical family).

34. *See* Andrew Verity, *Divorce Pension Split Can Work,* SUNDAY TIMES, March 3, 1996 (stating that plans to split pensions on divorce are workable despite strong government opposition to the idea); *see also* David Fletcher, *Equal Right to Pension Sought for Divorces,* THE DAILY TELEGRAPH, Aug. 27, 1992, at 2 (reporting the recommendation of the National Association of Pension Funds, that divorced women should be entitled to half their husband's pension unless their pension is equal). *See generally* Scheherazade Daneshkhu, *Finance and the Family: Pensions May Be Split in Divorce—Scheherazade Daneshkhu On Moves to Give Women a Share of their Ex-Husband's Pensions*, FIN. TIMES (London), Aug. 29, 1992, at IV (discussing the effects of splitting pensions in divorce).

35. *See* Watson, *supra* note 22 (stressing the importance of retirement benefits in general and employer-provided benefits in particular); *see* Forman, *supra* note 30 (stating that women over sixty-five continue to face a much higher risk of poverty than men in old age and women tend to live longer than men). *See generally* Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law,* 42 HASTINGS L.J. 683, 689 (1991) (discussing aging in general and life expectancy rates based upon gender and race).

to have private supplemental retirement income because a majority of women do not work in "covered employment" that is, work that leads to eligibility for pensions that are government-sponsored, managed, or sanctioned.[36]

Secondly, women should no longer be marginalized and stigmatized as recipients of welfare-type benefits, but their work must rather be counted as "paid labor."[37] Women working to contribute to the national economy in direct ways must be incorporated into the ranks of those who are formally employed and are already eligible to become vested in their nations old-age benefits.[38] This includes placing part-time and contingent women workers into national insurance programs that cover contingencies like sickness and old-age, despite their incomes.[39] It is incumbent upon the governments seeking to reform pension systems to enforce or modify their labor laws to guarantee that women's paid labor is counted toward vesting in pension systems.[40] Too often, women work "off the books." As a consequence, their employers need not pay a minimum wage; offer private benefits, like insurance, that may be available to the officially

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36. See Nina Mojiri-Azad, Article: *Social Security Benefits to Widows: The Ongoing Favoritism of Single Earner Families and the Impact on Elderly Women*, 17 LAW & INEQ. J. 537, 545 (1999) (stating that Social Security benefits are not sufficient to prevent women from falling into poverty despite the fact that most widows have worked at some point in their lives and contributed to the Social Security fund); *see also* Forman, *supra* note 31(discussing that despite women have a greater need for retirement income they have not found much support in the private retirement system); Jonathan Barry Forman, *Whose Pension Is It Anyway? Protecting Spousal Rights in a Privatized Social Security System,* 76 N.C. L. REV. 1653, 1653-55 (1998) (discussing what pension protections should be available to spouses and that presently 96% of the work force works in covered employment); Pergament & Raphael, *supra* note 29 (analyzing the potential impact on women of proposals to privatize Social Security).

37. *See* Joel F. Handler, *Institutional Barriers to Women in the Workplace: Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN'S L.J. 375, 375-76 (1996) (discussing the issues women face in the workplace and challenges to economic and social independence); *see also* Gwendolyn Mink, *The Day, Berry & Howard Visiting Scholar: Welfare Reform in Historical Perspective,* 26 CONN. L. REV. 879, 883 (1994) (stating that welfare politics has always entangled our social obligations to mothers with the social stigma we stamp upon them). *See generally* Melinda Henneberger, *The World: Washington's Bad Vibes: Welfare Bashing Finds Its Mark*, N.Y. TIMES, March 5, 1995, section 4, at 5 (discussing the stereotypes welfare recipients face, and those blamed and punished for their circumstances).

38. *See* Pergament & Raphael, *supra* note 29 (analyzing the potential impact on women of proposals to privatize Social Security); *see also* Burke & McCouch, *supra* note 25 (exploring the topic of Social Security privatization, paying particular attention to how it relates to women). *See generally* Watson, *supra* note 22 (stressing the importance of retirement benefits in general and employer-provided benefits in particular).

39. *See* Kalleberg, *supra* note 32, at 771-72 (discussing the recent changes in employment including the increase in part-time and contingent workers); *see also* Gwen Thayer Handelman, *On Our Own: Strategies For Securing Health and Retirement Benefits in Contingent Employment,* 52 WASH. & LEE L. REV. 815, 821 (1995) (discussing part-time and contingent workers who are not covered under employment provided health or retirement income plans). *See generally* Karl E. Klare, *New Approaches to Poverty Law, Teaching, and Practice; Toward New Strategies for Low-Wage Workers,* 4 B.U. PUB. INT. L.J. 245, 256 (1995) (recognizing that low-wage and contingent employment are prevalent in the United States).

40. *See* Forman, *supra* note 22 (stating that the most advantageous way to save for retirement is by employer-sponsored pension plans). *See generally* Campana, *supra* note 21 (stating that the emphasis on privatization in the United States has just recently been considered by the federal government); Klaudt, *supra* note 22 (stating that privatization and foreign investment in Hungary has resulted in steps towards a capitalist market economy).

employed workers; or contribute premiums to government insurance systems that protect against old-age poverty.[41]

Third, governments must retain those aspects of social security that make it an "earned right," endemic based upon some history of paid employment, rather than a government handout.[42] In the United States, Social Security is a retirement insurance program that makes the recipients "worthy" and not likely to be "viewed as on the dole."[43] Such paid-for benefits obviate the types of characterizations that keep woman at the bottom of all economic scales.[44]

Finally, precipitous privatization of state-sponsored retirement income—in whole, or even, in part—would not only fail to take most women's work into account, but would further

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41. *See generally* Moss, *supra* note 8, at 176 (suggesting that pension reforms may be beneficial to those women who take advantage of chances in vesting, integration, and portability, whereas many other women will not benefit from reform simply because they do not have pension plans at all); *see also* Moseley-Braun, *supra* note 8, at 496 (asserting pension plan statistics indicate that not even one-third of female retirees from the private sector receive pension plans). *See generally,* Rosheen Callender, *Savings Plan is Timely Solution*, THE IRISH TIMES, Oct. 20, 2000, at 55 (noting that only 70% of women of the workforce are members of occupational pension schemes).

42. *See* Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 17 (1996) ("[T]he Roosevelt administration and its business allies fought successfully to create federally guaranteed and administered old age pensions on a carefully limited ideological basis that reinforced the work ethic by guaranteeing benefits to those who 'earned them' through their contributions from wages."); *see also* Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 CONN. INS. L.J. 11, 23 (1999) ("Even though beneficiaries' payment into the system rarely, if ever, cover the cost of their benefits, there is a widely sustained belief that social insurance benefits are earned and are not 'handouts'"); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2532 (1995) ("[A] central collective function of government in the liberal vision is to assure moderate, but adequate and non-stigmatizing, financial support to impoverished parents so that no children have to live in poverty.").

43. *See also* Kost & Munger, *supra* note 42, at 17 n.50 ("Roosevelt was opposed to any program which resembled the dole and which was redistributive. He argued that legitimacy of the pension program would be enhanced by shielding recipients from the stigma of the dole."); *see also* Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 697 (1998) ("The very idea of welfare as property, in this sense, seems self-contradictory. [T]he scheme of minimal entitlements he attributes to the Thirteenth Amendment—forty acres and a mule—from welfare: Forty acres and a mule is not a dole. It is not welfare. It is much more like workfare"). *See generally,* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 998 (2000) (discussing forms of public welfare that are restrictive in their standards of worthy recipients).

44. *See* Linda M. Finley, *Female Trouble: The Implementation of Tort Reform for Women,* 64 TENN. L. REV. 847, 862 (1998) ("Wage rates for home health care aides, child care workers, cooks, food servers and dishwashers, and household or 'domestic' cleaners, hover near the bottom of the economic scale."); *see also* HILDA SCOTT, WORKING YOUR WAY TO THE BOTTOM: THE FEMINIZATION OF POVERTY (1984) (describing the structural factors that disproportionately group women into occupations at the low end of the economic scale, and into part-time work); Peter Pitegoff, *Poverty Law and Policy: Child Care Enterprise, Community Development, and Work,* 81 GEO. L.J. 1897, 1921 (1993) ("Employment growth 'at the bottom of the occupational hierarchy,' although encouraging more female workers, has channeled women into jobs deemed unskilled and thus underpaid.").

penalize women more than men.[45] The guarantee of a defined benefit upon retirement from employment and the possibility of at least some of the redistributive elements of mandatory universal participation by all workers are essential.[46] Many of the world's women have no or less cash to save or invest than most men and women may be less likely to use what disposable income they have to fund their own pensions.[47] For example, in the U.S., it has been found that 40% of women have not set money aside for retirement on a regular basis, and 65% of all people with incomes of less than $25,000 per year have saved nothing.[48] Mandated pension benefits can be justified on the grounds that individuals may generally value certain benefits too little. They may irrationally underestimate the probability of catastroph[es] . . . since indi-

45. *See Study Shows Women Short-Changed by Current Social Security System*; *Policymakers At Whitehouse Conference Should Be Aware Of Programs Paternalistic Design,* PR NEWSWIRE, Dec. 7, 1998 ("A new study by the Pacific Research Institute for Public Policy (PRI) shows that today's social security system retains a paternalistic design that penalizes women of all ages."); *see also Election 2000–Still "The Economy Stupid?" MIT Economists Weigh In,* PR NEWSWIRE Aug. 31, 2000 ("Once you have individual accounts, you have changed social security from defined benefits to defined contributions, Pensions would not be guaranteed but would be dependent upon your luck in choosing stocks or your portfolio manager."). *But see* Robin Blackburn, *How To Bring Back Collectivism; Investments,* NEW STATESMAN (1996) Jan. 17, 2000, at 25 ("In fact, people in an occupational scheme with 'defined benefits', such as benefits linked to final salary, were almost bound to be worse off if they joined a personal pension plan.").

46. *See* MARILYN E. MANSER, HISTORICAL AND POLITICAL ISSUES IN SOCIAL SECURITY FINANCING, IN SOCIAL SECURITY FINANCING 21, 29 (Felicity Skidmore ed., 1981) ("The goal of redistribution was important in the creation of the U.S. social security system during the Great Depression. Many aged persons were poor, and their needs were not being met adequately by existing programs."); *see also* Kathryn L. Moore, *The Privitization Process: Redistribution Under a Partially Privatized Social Security System*, 64 BROOK. L. REV. 969, 969 (1998) ("Social adequacy means that a certain standard of living should be provided for all contributors, regardless of the level of their contributions and implies some degree of income redistribution."); U.S. Gen. Accounting Office, *Social Security: Different Approaches for Addressing Program Solvency* 13 (GAO/HEHS-98-33, July 1998) ("The appropriate balance between individual equity and social adequacy is a fundamental issue surrounding Social Security's benefit structure and reflects the extent to which the program redistributes income among workers and beneficiaries.").

47. *See* Victor Hull, *Boomers To Shake Florida's Foundation,* SARASOTA HERALD-TRIBUNE, Mar. 5, 2000, at 2 ("When it comes to retirement and saving, women in general, and single mothers in particular, are in a bind. Women have a longer life expectancy than men, and thus need more savings for retirement. Yet they are least able to save because they have lower earnings than men—about 75 cents to every $ 1 for men. They are less likely to have a pension and their 401(k) retirement accounts average 37 percent less then those of men, according to the Access Research company."); *see also* DAILY MAIL (London), Dec. 16, 1998, at 9 ("The 19-year-old stylist at top Edinburgh salon Joseph Quigley has been working for four years and earns $8,000 a year, leaving her with little disposable income to invest in a pension."). *See generally* Ellen Hoffman, *It's Never Too Late to Make a Plan* BUSINESS WEEK, July 17, 2000, at 120 ("At some point, women who think this way realize they must provide their own financial resources for retirement.").

48. *See* Burke & McCouch, *supra* note 25 (exploring the topic of Social Security privatization, paying particular attention to how it relates to women); *see also* Forman, *supra* note 31 (discussing that even though women have a greater need for retirement income they have not found much support in the private retirement system); Pergament & Raphael, *supra* note 29 (analyzing the potential impact on women of proposals to privatize Social Security). *See generally* Watson, *supra* note 22, at 27 (stating that Congress still does not take seriously the issue of inequality in women's coverage under the private retirement system).

viduals are likely to be especially inept at making inter/employee decisions. They need mandated employer-matching contributions and cannot be exposed to the risk of market failure.[49]

Women's Lack of Wealth

Although many women do not work, those women who do work make less than men during their working lives for a variety of reasons.[50] Despite years of laws and conventions guaranteeing equality and equity, *de jure* discrimination against women has continued to remain unremediated to a large degree.[51] Beyond that, however, lies *de facto* discrimination that accompanies gender (like race) and must also be considered in the pension reform colloquy.[52]

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49. *See* Patricia E. Dilley, *Hidden in Plain View, The Pension Shield Against Creditors*, 74 IND. L.J. 355, 407 (1999) ("It is hardly surprising that poverty rates among elderly women of all races, and among minority men, are much higher, reflecting little or no pension income as well as lower Social Security benefits); *see, e.g.,* Taxpayer Refund and Relief Act of 1999 (mandating that employer matching contributions under a 401(k) plan must vest according to either a three-year cliff vesting schedule or a six-year graded vesting schedule); *see also* Susan J. Wells, *Investigate Your Vesting: Retirement Planning*, HR MAGAZINE, July 1, 1999, at 91 ("Widely supported pension legislation in Congress calls for reducing the maximum vesting periods for employers' contributions to employee retirement plans. And the tight labor market continues to pressure more employers to reevaluate benefits—including vesting schedules—to stay competitive, particularly for working women and young professionals.").

50. *See* Kingsly R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 977 (1995) ("The 'glass ceiling' is a metaphor that is meant to reflect the fact that women tend to be substantially underrepresented in the upper reaches of management."); *see also* June O'Neill & Solomon Polachek, *Why the Gender Gap in Wages Narrowed in the 1980s*, 11 J. LAB. ECON. 205, 206 (1993) (the current figure is more like seventy-one or seventy-two cents, and for young women the figure is much higher. Again, the term "gender gap" is a loaded one in that it implies the need for correction; whether a "gap" is a gender gap or a missile gap, it is something that presumptively needs to be closed); Jonathan Bailey & Linda Anderson, *Letters,* ATLANTA J. & CONST., Sept. 29, 2000, at 23A ("Although it's true that women generally don't make as much money as men, it occurs because many women take time off from work to raise children.").

51. *See* David L. Kirp, Mark G. Yudof, & Marlene S. Franks, *Gender Justice and Its Critics*, 76 CALIF. L. REV. 1377, 1388 (1998) ("Progress has been accelerated by the enactment of the Equal Pay Act of 1963, which prohibits sex-based discrimination in wages; Despite such enactments and the broader cultural transformation they reflect, wide disparities in the sexes' vocational status have persisted. In 1955, the annual wages of full-time women workers were approximately sixty-four percent of the annual wages of males."); *see also* Deborah L. Rhode, *Occupational Inequality,* 1988 DUKE L.J. 1207, 1207 (1988) ("Over the last quarter century, changes in social, economic, political, and demographic patterns have all contributed to major transformations in gender roles. Law has both reflected and reinforced these changes."); Joe Sonneman, *Equal Pay & Benefits For Temps & Part-Timers,* 23 AK. BAR RAG 8, 8 (1999) ("[M]ore women than men work part-time, suggesting that lower wages and lower benefits for part-time employment may have a gender-based difference.").

52. *See* Kimberley Crenshaw, *Whose Story Is It Anyway: Feminist and Antiracist Appropriations of Anita Hill, in* RACEING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 404 (Toni Morrison ed., 1992) ("W]hile women of color will have certain concerns about workplace discrimination which are similar to the concerns of men of color and white women, it is also true that women of color will have additional and distinct concerns and problems related to racism and discrimination in employment matters"); *see also* Joan E. Steinman, *A Legal Sampler: Women, Medical Care, and Mass Tort Litigation,* 68 CHI.-KENT. L. REV. 409, 417 (1992) ("Blatant de jure discrimination may be largely a thing of the past, but de facto discrimination is alive and well, living everywhere in the United States."); Judith Welch Wegner, *The Anti-discrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 430 (1984) (although agreeing on the need for additional measures to address the problem of intentional, de jure discrimination, Congress has been sharply divided over whether legislation should address de facto discrimination that denies equal opportunity on the basis of race).

Some cultures demand that women stay out of "official" labor markets.[53] It is no wonder then, that third-world women's issues have historically been based on a "universal concern with welfare-oriented, family-centered programs which assumed motherhood as the most important role for women."[54] Women are consequently forced to remain unemployed or work in "informal sectors" within the private realm of the home, farm or the neighborhood.[55] This societal posture precludes the consideration of women who deserve retirement income as the normal deferred compensation for years of employment in the public marketplace.

Western nations, however, have imposed the same type of discrete and gendered roles as those found within third-world nations.[56] For example, German mothers are under considerable pressure to look after their children themselves during the day.[57] It is considered detrimen-

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53. *See Employment: EU States Must Speed Up Labour Market Reforms, Say New Guidelines,* EUROPEAN REPORT, Sept. 9, 2000 ("Equal opportunities: Women still have lower employment rates than men. Equal pay for equal work is still not a reality in the EU; women on average receive 83% of men's hourly wages. The gaps are widest in Germany, Ireland, Austria and the UK. Spain and Greece."); *see, e.g.,* Dagmar Schiek, *Lifting the Ban on Women's Night-Work in Europe—A Straight Road to Equality in Employment?,* 3 CARDOZO WOMEN['S] L.J. 309, 322-23 (1996) (explaining that if women would stay out of paid work, their night work would not be a problem); *see also* Peter Dickinson, *£26m Bid To Boost North Skill Levels,* EVENING CHRONICLE (UK) Aug. 28, 2000, at 15 (discussing a fund that would be used to help women and ethnic minorities improve skills for the labor market); Office of the Press Secretary, *Women's Equality Day 2000*, M2 PRESSWIRE Aug. 30, 2000 ("Despite historic changes in laws and attitudes, a significant wage gap between men and women persists. While employment of computer scientists, programmers, and operators has increased at a breathtaking rate—by 80 percent since 1983—fewer than one in three of these high-wage jobs is filled by a woman.").

54. *See* Geetanjali Misra, Veronica Magar & Susan Legro, *Poor Reproductive Health and Environmental Degradation: Outcomes of Women's Low Status in India*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 273, 297 (1995) (noting that one of the steps adopted at an international conference in 1994 to ensure that women reach their fertility goals in a healthy manner is to provide women with social identities separate from motherhood); *see also* Handler, *supra* note 37 (discussing the issues women face in the workplace and challenges to economic and social independence); C. Overholt, M. Anderson, K. Cloud, & J. Austin, GENDER ROLES IN DEVELOPMENT, 3 (1984) (stating women have been long left out of development and leaving them as an untapped resource has left out their potentially large contribution).

55. *See* Rehka Mehra, *The Role of NGO's: Charity and Empowerment: Women Empowerment and Economic Development,* 554 ANNALS 136, 143-44 (1997) (noting the higher percentage of women than men in the informal section); *see also* Misra et al., *supra* note 54, at 277 (discussing the fact that in 19991, ninety-four percent of the women workers in India were in the informal sector). *See generally* Kalleberg, *supra* note 32, at 771-72 (discussing the recent changes in employment including part time and contingent workers).

56. *See* Elvia R. Arriola, *Voices From The Barbed Wires Of Despair: Women In The Maquiladoras, Latina Critical Legal Theory, And Gender At The U.S.-Mexico Border*, 49 DEPAUL L. REV. 729, 736 (2000) ("The concept . . . also allows one to theorize about how other power dynamics (e.g., the United States capitalist dominance over Mexico or other Third World nations) intersect with one or more traits (e.g., sex, race, and class) to produce a unique example of gendered oppression."). *See generally* Elizabeth Fox-Genovese, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH 29 (1988) ("Gender relations means interaction between men and women within specific communities. Gender roles are activities that men and women use to find their identities. Gender identities refer to the deepest sense of what men and women are.").

57. *See* Ira Mark Ellman, *Divorce Rates, Marriage Rates, And The Problematic Persistence Of Traditional Marital Roles*, 34 FAM. L.Q. 1, 35 n.82 (2000) ("60% of married American women with preschool children are employed, compared with 46% of comparable German women. Moreover, while only a quarter of employed American women are working part-time, a third of the employed German women are."); *see also* Carla Power, *The New Singles*, NEWSWEEK Aug. 14, 2000, at 48 (stating that German "women are still expected to be the housewife in couples."); *but see* David Quinn, *Death In A City Where The Neighbours Have No Name*, SUN. TIMES (LONDON), July 16, 2000 (discussing the extinction of the stay-at-home mother).

tal to a child's development if they are cared for by professionals or unskilled nannies.[58] According to German culture, a child's development is instead properly promoted by "constant contact with a female blood relative."[59] Nineteenth century American jurists had no problem justifying the exclusion of women from lucrative paid labor, like the practice of law,[60] since the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[61] Even today, "modern" American women often refrain from or leave paid employment due to the unavailability of daycare for their children, their adult-care responsibilities or the implicit pressure to be a "good mother."[62] Many American scholars have also noted that decisions concerning whether and where to work are strongly colored by "cultural stereotypes and community norms that reinforce . . . 'traditional' family and economic roles for men

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58. *See* Suzanne W. Helburn, *The Silent Crisis In U.S. Child Care*, 563 ANNALS 8,9 ("Progressives, child development professionals and most of industry recognize that children are not being well served in the present system."). *But see* Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE L.J. & FEMINISM 51, 58 (1997) ("[T]he mother's spiritual moments with her child are far more valuable than hours the nanny spends caring for the child."), *See generally* Karen Houppert, *Nannypacks,* THE VILLAGE VOICE, Nov. 24, 1998, at 55 ("Among poor New Yorkers, there are 28,000 families on the waiting list for public day care.").

59. *See* Timothy W. Bratcher, *Ireland v. Smith: Who Better Serves A Child's Best Interests, Day Care Providers or Blood Relatives?*, 34 U. OF LOUISVILLE J. OF FAM. L. 159, 168 (1996) (discussing how one parent plus daycare is less than one parent plus blood relatives); *see also* Krista Carpenter, *Why Are Mothers Still Losing: An Analysis Of Gender Bias In Child Custody Determinations*, 1996 DET. C.L. REV. 33, 60 (1996) (John Bowlby, a noted child psychologist, argues that most infants by the age of four months respond differently to their primary caretaker then to other figures in their lives, and that this attachment process continues beyond a child's first year of life). *See generally* Kets De Vries & F. R. Manfred, *High-Performance Teams: Lessons from the Pygmies,* ORGANIZATIONAL DYNAMICS, Jan. 1, 1999 ("As child development studies have shown, primary interaction patterns color all later experiences; one's original ways of dealing with caregivers remain the model for all future relationships. Thus the earliest social experimentation of children toward the people close to them forms the lasting basis for trust.").

60. *See* Sarah N. Gratson, *Labor Policy and the Social Meaning of Parenthood*, 22 LAW & DOC. INQUIRY 277, 281-82 (1997) (noting that even the most progressive of women activists often expressed the view that wrong physical conditions react upon women workers with most terrible significance); *The Founding Of The Washington College Of Law: The First Law School Established By Women For Women,* 47 AM. U. L. REV. 613 (1998) (one of the founders actually believed it inappropriate for women to practice law, and instead accepted the prevailing belief that men and women should occupy separate spheres). *But see* David J. Brewer, *Women in the Professions*, THE DELINEATOR, May 1996, at 877 (applauding the success of women in professional occupations).

61. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (noting that it was wrong to assume "that it is one of the privileges and immunities of women as citizens to engage in any and every profession."). *But see* Dianne Post, *Why Marriage Should be Abolished*, 18 WOMEN'S RIGHTS L. REP. 283, 291 (1997) (noting that in the nineteenth century women were slaves). *See generally* Berta Esperanza Hernandez Truyol, *Out In Left Field: Cuba's Post-Cold War Strikeout,* 18 FORDHAM INT'L L.J. 15, 30 (1994) ("[I]n developing countries gender discrimination is broadly based, occurring in employment, nutritional support, health care, and in education where 'women are likely to lose out' in educational achievement.").

62. *But see* Schmall, *supra* note 31, at 4 ("[I]f work and family are as old as we are a race, the nature, the quantity and the division of labor has in some senses changed radically."); *see also* Sue Doerfler, *Nostalgia is Right at Home in Brookside,* ARIZ. REP., June 7, 1997, at AH2 (discussing the Pew Center for Research report that found most women do not feel that two working parents is the "ideal" situation for children); Shailaigh Murray, *Job Split: How Sweden's Push for Gender Equality Ended in Segregation,* WALL. ST. J. EUR., Jan. 19, 1999 (discussing how "progressive" Nordic countries liberally grant family leave when a woman gives birth and if a woman does not take that leave, people tend to think the woman is not trustworthy).

and women. . . ."[63] Recently in the last decade, during China's transition to a market economy and in the wake of the restructuring of state enterprises formerly guaranteeing lifetime employment, Chinese employers adopted an aggressive "return home policy."[64] This policy encouraged women to leave their paid employment and return home to take care of their children.[65] The theory exists across many cultures that "men 'belong in the market' because of their natural competitiveness, whereas women's 'selflessness' puts them appropriately at the hearth and the cradle."[66] This is a bizarre notion that flies in the face of economic reality: in many nations, most women work within *and* outside their homes.

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63. *See* Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 113 (1998) (noting various segmentationists who view at least some of the reasons labeled as personal, such as a woman's decision to stay home to raise children, as additional constraints on the manifestation of true preferences"); *see also* Kathryn Abrams, *Law and the New American Family: Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 526, 531 (1998) (asserting that working women are beset by pressures from perturbed spouses, conservative pundits and the mainstream media); Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 525 (1999) (noting that changing roles in the family through legal regulation is conceptually harder because there is a history of believing that [women] should not "intervene" in the family).

64. *See* Norman Macrae, *For Enter the Dragon, Read Enter the World Trade Organization*, SUNDAY BUS., Nov. 21, 1999 ("For the first time in its thousands of years of history, China will conduct its trade according to an agreed and rather free-trading code of rule of international law."); Lucy A. Williams & Margaret Y. K. Woo, *Doing Business in China and Latin America: Development in Comparative and International Labor Law: The "Worthy" Unemployed: Societal Stratification and Unemployment: Insurance Programs in China and the United States,* 33 COLUM. J. TRANSNAT'L L. 457, 511 (1995) (noting that "gender-oriented disparity was particularly evident in the mid-1980's when, in an effort to reduce the bloated work force, some managers adopted [the] policy encouraging women to return home to take care of children and housework."); *see also* Angela Mackay, *Asia Letter: Japan's Little Blue Pill to Uplift the Yen,* SUNDAY BUS., June 13, 1999, at 17 (discussing how some 750,000 public and private sector positions will come on stream to battle record unemployment); Maria L. Ontiveros, *A Vision of Global Capitalism That Puts Women and People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27, 35 (1999) (describing how the policy is modified to encourage women to labor in the dead-end conditions of home-based microenterprises or the inhumane conditions of foreign factories, which often require coerced sexual intercourse and feature extremely dangerous work conditions); *see, e.g.,* Angela Mckay, *China Finally Opens Its Doors But the Waiting Game Goes On*, SUNDAY BUS., November 21, 1999, at 32 ("[O]fficially, unemployment runs at about 3%; realistically it's about 10%. As the state sector is reformed or dismantled, the country desperately needs injections of foreign capital and technology to patch up the economic bedrock.").

65. *See* Williams & Woo, *supra* note 64, at 511-12 ("Even without such pressure from their enterprises, women workers are more likely than men to withdraw from the labor market because of family and child care responsibilities."); *see also* EMILY HONIG & GAIL HERSHATTER, PERSONAL VOICES: CHINESE WOMEN IN THE 1980'S 243-63 (1988) (describing an account of the status of women workers in China since the reform); MARGARET WOO, CHINESE WOMEN WORKERS: THE DELICATE BALANCE BETWEEN PROTECTION AND EQUALITY, IN ENGENDERING CHINA: WOMEN, CULTURE AND THE STATE 279-99 (Christina K. Gilmartin et. al. eds., 1994) ("Women workers not hired or fired before the one-year requirement would not be protected under the unemployment insurance scheme, as presently configured.").

66. *See* Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 90 (1998) (discussing how domesticity introduced not only a new structuring of market work and family work but also a new description of men and women.); *see also* NANCY FALIK COTT, THE BONDS OF WOMANHOOD 63 (1977) (noting that domesticity's descriptions of men and women served to justify and reproduce its breadwinner/housewife roles by establishing norms that identified successful gender performance with character traits suitable for those roles). *See generally* Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat; Poll Shows Sexes Agree on Pros and Cons of New Roles*, WASH. POST, Mar. 22, 1998, at A1 (discussing a recent survey that found that two-thirds of Americans believe it would be best for women to stay home and care for family and children).

The increase in women's employment has been "one of the most significant changes in the West European labour market in the last two decades."[67] In the U.S., approximately 75% of women between the ages of twenty and fifty-four now work.[68] Aside from cultural persuasions, there are the pragmatics of motherhood.[69] Somebody has to care for the children, and typically it is the mother who fulfills that role.[70] Nearly 65% of women with children under six are employed in the United States.[71] But "the rise in women's paid work had been largely concentrated in part-time low paid jobs."[72] Less-than-full-time employment is often necessitated by

67. *See* Katarina Tomasevski, *Reproduction, Rights, and Reality: How Facts and Law Can Work for Women: European Approaches to Enhancing Reproductive Freedom,* 44 AM. U. L. REV. 1037, 1044 (1995) (submitting that states workers with family responsibilities should be able to choose the type of employment best suited to their individual family circumstances, free from discriminatory constraints); *see also* Joel F. Handler, *Women, Families, Work and Poverty: A Cloudy Future*, 6 UCLA WOMEN'S L. J. 375, 375 (1996) (noting that the increase in the number of female employees is a result of changes in family structures as well as changes in the labor market itself). *See generally* Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 437 (1990) (noting a pattern of steadily increasing labor participation by women).

68. *See* Bureau of Labor Statistics, *U.S. Dep't of Labor, Employment and Earnings,* EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 1998, Jan. 1999, at 175 (measuring the organization of the workplace by gender as well as the organization of the modern working family). *See generally* Bureau of Labor Statistics, U.S. Dep't of Labor, *Perspective on Working Women: A Databook,* 62-63 (1980) (listing the statistics for working wives and mothers by race/gender since 1955); Elizabeth F. Thompson, *Unemployment Compensation: Women and Children-The Denials*, 46 U. MIAMI L. REV. 751, 751 (1992) (stating that 63% of married mothers are members of the work force).

69. *See, e.g.,* Mary Ann Mason, *Motherhood vs. Equal Treatment,* 29 J. FAM. L. 1, 49 (1990) (advocating special treatment for women in the workplace based on a modern, pragmatic view that takes women's differences into consideration without reliance on an "outdated stereotypic view of feminine weakness or dependence"); *see also* Christine A. Littleton, *Reconstructing Sexual Equality,* 75 CAL. L. REV. 1279, 1284-85 (1987) (arguing that women can achieve equality in the workplace only through acceptance of differences between men and women instead of focusing on deviations from the male norm). *See generally* Martin H. Malin, *Fathers Leave,* 72 TEX. L. REV. 1047, 1052 (1994) (discussing strategies that allow new mothers to keep moving forward in their careers).

70. *See* Odeana R. Neal, *National Issues: Myths and Moms: Images of Women and Termination of Parental Rights,* 5 KAN. J. L. & PUB. POL'Y 61, 64 (1995) (discussing the traditional role of mothers and how mothers are seen as being better equipped—physically, psychologically, emotionally, and mentally—to take primary responsibility for raising their children); *see also* Marion Crain, *Where Have All The Cowboys Gone?" Marriage and Breadwinning in Postindustrial Society,* 60 OHIO ST. L.J. 1877, 1903 (1999) (discussing how women's employment may upset the breadwinner/homemaker ideal that has shaped our vision of marriage, whether by altering the economic power balance between the partners or by changing men's and women's perceptions of themselves); Clare Huntington, *Welfare Reform and Child Care: A Proposal For State Legislation,* 6 CORNELL J. L. & PUB. POL'Y 95, 109 (1996) (suggesting that as greater numbers of mothers enter the work force, child care plays an increasingly important role in the development of children, especially since scientific research demonstrated that the first three years of a child's life are crucial to a child's mental development).

71. *See* Dowd, *supra* note 67, at 437 (noting that close to sixty percent of women with children under the age of eighteen are employed): *see also* JoAnne McCracken, *Child Care as an Employee Fringe Benefit: May an Employer Discriminate*, 26 SANTA CLARA L. REV. 667, 671 (1986) (noting that a majority of women with children under six years old are working mothers). *Compare* Thomas R. Marton, *Child-Centered Child Care: An Argument for a Class Integrated Approach*, 1993 U. CHI. L. SCH ROUNDTABLE 313, 320 (1993) ("[I]n 1950 only 12% of women with children under six worked.").

72. *See* Judy Jones & Barrie Clement, *Social Security System "Biased Against Women,"* THE INDEPENDENT (London), May 1, 1992, at 6 (stating communities have undertaken steps towards remedying this lack of national protection by extending labor rights to part-time workers, specifically with the aim of eliminating gender discrimination); *see also* McCracken, *supra* note 71 (indicating that working mothers are often forced to take employed positions which pay lower wages and have less job security). *See generally* Jane Friesen, *Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation*, 82 GEO. L. J. 31, 47 (1993) (comparing wage-models for male and female workers).

women "attempting to reconcile labour participation and family responsibilities, which often excludes them from labour protections."[73] Writers from Europe, Asia, and developing nations argue that intentional discrimination against pregnant women or mothers is rampant,[74] and daycare continues to be one of the most vexing problems for working women across continents.[75] A real problem for women is the "organization of market work around the ideal of a worker who works full-time and overtime and takes little or no time off for childbearing or child-rearing."[76] Though this ideal worker paradigm does not define all jobs today, "it defines the good ones: full-time blue collar jobs in the working class context and high-level and professional jobs for the middle class and above."[77]

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73. *See* Tomasevski, *supra* note 67 (noting further that the process of enhancing equal enjoyment of human rights entails much more than legislation affirming equal rights for women and specifying corresponding governmental obligations, but also involves the breakdown of powerful sex stereotyping, which prevents women from demanding their rights from men in positions of authority); *see also* Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 COLUM. J. GENDER & L. 143, 144 (1999) (discussing that although the EEOL regulates employers' discriminatory practices against women in the following five categories: (1) recruitment and hiring, (2) assignment and promotion, (3) training, (4) fringe benefits, and (5) mandatory retirement age, resignation, and dismissal, the law has failed to launch Japan on its proclaimed journey); McCracken, *supra* note 71 (noting that concerns about child care often force women to take part-time jobs).

74. *See* Tomasevski, *supra* note 67, at 1043 (stating that the International Labour Organization (ILO) generally provides protection against discrimination on the grounds of pregnancy and maternity leave)*; see also* Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed.*, 77 CALIF. L. REV. 171, 187 (1989) (suggesting that discrimination against women workers cannot be eradicated unless the root discrimination, based on pregnancy and childbirth, is also eliminated). *See generally* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS 308 (6th ed. 1997) (employers tend to provide less training to women, since their separation from the workforce due to childbearing and raising is anticipated).

75. *See* Tomasevski, *supra* note 67, at 1043 (noting how single mothers in the European Union are at an extreme disadvantage due to societal stigma and few daycare options); *see also* Susan Beth Jacobs, *The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV 845, 848 (1997) (discussing how many single mothers in the U.S. who use daycare are penalized in custody decisions based on the "best interests" standard*); see, e.g.*, Burchard v. Garay, 724 P.2d 486, 495 (Cal. 1986) (asserting that fathers generally have an advantage of "superior economic resources" in custody disputes).

76. *See* Williams, *supra* note 66, at 89 (discussing how domesticity remains the "entrenched, almost unquestioned, American norm and practice")*; see also* Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 855-70 (1988) (submitting that alimony, like contract damages, emphasizes restitution, and that the law analogizes marriage to a business partnership). *See generally* Frances Elisabeth Olsen, *Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement*, 106 YALE L.J. 2215, 2232 (1997) (describing lessons that can be learned from feminists in Central and Eastern Europe).

77. *See* Williams, *supra* note 66, at 89-90 (noting that when work is structured in this way, caregivers often cannot perform as ideal workers); *see also* Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & LAW 147, 161-62 (1996) (discussing some recent cases where women and women's roles in society have been defined and characterized); Williams, *supra* note 66, at 128 n.228 (comparing the division of "family work" between spouses as a function of the woman's employment, full- or part-time).

The standard notion in capitalist economics is that a truly free market establishes wage levels as a reflection of demand for labor and the value of the employee's work.[78] Since the wages of part-time workers are commensurately lower than the full-time employed, one logical conclusion is that part-time employees are not valued as highly, or are otherwise less efficient, than full-time workers.[79] Another explanation may be that the employee's valuation of the flexibility of part-time work, which, though costly, is the only practical accommodation of combining parenting and wage earning, lowers the cost of her labor.[80] It is possible that it is more difficult to find part-time work than full-time jobs, and that workers choosing part-time work may agree to do without benefits like pensions.

Arguably employers exact penalties on women not only because of their actual behavior, which differs from men's, but also because of the presumption that women will leave the workforce when they have children.[81] Women across the world, including the United States, constitute the largest number of contingent workers; which include the classes of migrant workers,

78. *See* Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency and Social Change*, 103 YALE L.J. 596, 622-23 (1993) (discussing how an employee's level of education and experience are functions of the offered wage). *But see* Daniel K. Gifford, *Labor Policy in Late Twentieth Century Capitalism*, 26 HOFSTRA L. REV. 85, 99 (1997) ("[M]odern societies tend to be pragmatic in their approach to fairness. They largely regard wage levels as properly subject to determination through a process of individual or collective bargaining between employers and employees, where the result depends upon the relative strengths of the parties."); Kacki Ruff, *Job Security in Poland & Economic Privitization Policy and Workplace Protections*, 7 TEMP. INT'L & COMP. L.J. 1, 16 (1993) (noting that the government can modify the freely negotiated wage level by imposing a penalty tax on employers that diverge from the guidelines set by the government).

79. *See, e.g.,* Kalleberg, *supra* note 32, at 771 (noting that in 1987 part-time workers earned 59% of what full-time workers did); *see also* Patricia Schroeder, *Does the Growth in the Contingent Workforce Demand a Change in Federal Policy*, 52 WASH & LEE L. REV. 731, 731 (1995) (discussing how part-time workers receive lower wages, reduced or no employment based health, retirement, and other benefits, and the constant threat of being released with little or no warning). *See generally* Friesen, *supra* note 72, at 40-50 (discussing the compensation of part-time employees versus full-time wage earners).

80. *See* Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 57 (1995) (noting women are far more likely to accommodate work to family, either by choice of job, or by choosing flexible hours or part-time work); *see also* Crain, *supra* note 70, at 1921 (1999) (discussing a policy initiated by family friendly employers designed to assist parents to work at home and paid maternity leave for up to ten weeks). *But see* Kathryn Abrams, *The Stake of the Union: Civil Rights: Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1190-91 (1989) ("[I]n the employment context, those whose careers include frequent leaving or part-time work to facilitate the care of children should receive the same support and esteem within the workplace as those workers whose careers are uninterrupted because they subordinate family to work responsibilities.").

81. *See* Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 707 (2000) (arguing an employer ought to be interested in determining the cost from a 3 or 6 month leave that occurs once or twice in the course of a career, rather than assuming that women are likely to exit the labor market permanently); Michael Selmi, *The Limited Vision of the Family & Medical Leave Act*, 44 VILL. L. REV. 395, 395 (1999) (discussing the fact that the gender gap is somewhere between one-third to one-half of the pay difference between men and women); *see also* Thompson, *supra* note 68, at 751 (recognizing that the law ignores the difficult issues associated with working women and child care, including the gender bias inherent in the unemployment compensation and the financial consequences of denying benefits to women when they choose to leave their jobs or refuse suitable work to care for their children).

part-timers, and temporary employees.[82] These positions have become prevalent since the birth of free trade and international economies, yet few of them offer benefits.[83] Arguably, uncontrolled and as-yet-unregulated labor markets lead to improper designation of workers as part-time or contingent, when, in fact, they perform the same amount of labor as those designated regular and full-time.

Women who work in part-time or contingent positions, or experience more than minimal interruptions in their employment, tend to suffer drastic consequences in not only their real wages but also in the accrual of benefits and in opportunities for advancement. Many of these contingent positions have become frequent since the birth of free trade and international economies, yet few of them offer benefits. It is likely the proverbial "tip of the iceberg" that technology giant Microsoft has recently been found to have violated American laws relating to employee benefits by mischaracterizing regular, common law employees as "independent contractors" who were ineligible for deferred benefits like pensions and profit-sharing.[84] Women who engage in "freelance" work, sometimes even at very high salaries, are excluded from government-sponsored pensions.[85]

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82. *See* Kalleberg, *supra* note 32, at 771 ("[B]etween 25 to 30% of all employees in the U.S. civilian labor force, or 29.9 to 36.6 million workers, in 1988 were either part-time workers, temporary workers, contract employees, or independent consultants."); *see also* Deborah Maranville, *Changing Economy: Changing Lives: Unemployment Insurance and the Contingent Workforce,* 4 B.U. PUB. INT. L.J. 291, 293-94 (1995) (discussing how women's family responsibilities often limit their opportunities to part-time employment); *see, e.g.,* Williams & Woo, *supra* note 64, at 510 ("[I]n 1992, 55.86 million women were permanent state workers as compared to the 92.06 million men.").

83. *See* Kalleberg, *supra* note 32, at 784 (indicating that male and female part-timers were significantly less likely than full-timers to be eligible for dental care benefits, life insurance, and cash or stock bonuses for performance or merit*); see also* Mary Romero, *Bursting the Foundational Myths of Reproductive Labor Under Capitalism: A Call for Brave New Families or Brave New Villages*, 8 AM. U.J. GENDER SOC. POL'Y & L. 177, 193 (2000) (citing that in 1994, women's private-pension benefits were less than half those of men—just $ 3,000 a year, compared with $ 7,800); Ureta, *supra* note 25, at 72 (arguing that many women chose to eschew full-time work and concomitant benefits because of their connection to the home).

84. *See* Vizcaino v. Microsoft Corp*.,* 120 F.3d 1006, 1015 (9th Cir. 1997), *cert. denied,* 522 U.S. 1098 (1998) (holding that Microsoft was mistaken in their belief that certain workers were "independent contractors," who failed to meet minimum conditions of eligibility for benefits); *see also* Richard J. Freddo, Comment, *Contingent Workers: A Full-Time Job for Employers, Benefit Plan Administrators and the Courts*, 52 SMU L. REV. 1817, 1818 (1999) (focusing on the impact of classification of workers on the benefits required to be provided to the members of the contingent workforce). *See generally* Mark Berger, *The Contingent Employee Benefits Problem*, 32 IND. L. REV. 301, 302 (1999) (commenting on the problem of workplace benefits and their relationship to contingent employment work arrangements).

85. *See* Jeffrey N. Gordon*, Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519, 1537 (1997) (questioning whether women's addition to the labor force distorts the picture because more women work part time or because of discrimination problems); *see also* Burke & McCouch, *supra* note 25, at 1217 (criticizing the social security system for subsidizing "traditional" one-earner families in which the wife is relegated to the role of a dependent homemaker this amounting to a charge of discrimination against working women, particularly married working women); *see, e.g.,* Ureta, *supra* note 25, at 65 (arguing that women chose to eschew full-time work and concomitant benefits because of their connection to home).

The European and American courts have held that women must have the same rights to pensions and social security as men.[86] But pensions are derivatives from paid labor, which has never been equal here or abroad.[87] For instance, even in the United States, the Gender Gap is well documented.[88] Even though it has been narrowed over the last years, there are significant, and inexplicable, differences in income based on gender. Although some women earn nearly three-fourths of what men earn, it is clear that "lower paid women suffer the most, and no woman earns, statistically, what her male counterpart gets paid."[89] The American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO")[90] issued a recent report noting that the average women's family would earn $4,205.00 more each year if women

86. *See* Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating social security provisions requiring men, not women, to show dependency as a condition for receiving benefits); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating a provision that allowed benefits to be paid to the widow of a deceased husband and not the widower of a deceased wife); Califano v. Westcutt, 843 U.S. 76 (1979) (holding unconstitutional a Social Security provision that awarded benefits to families with unemployed fathers but not unemployed mothers).

87. *See* Margriet Kraamwinkel, *For Mary Joe Frug: A Symposium of Feminist Critical Legal Studies and Postmodernism: Part One: A Diversity of Influence: Women's Work and Law: New Perspectives on the Labor Market Strategy*, 26 NEW ENG. L. REV. 823, 829 (1992) (discussing that women's weak position in the labor market are determined by low pay, unskilled jobs and flexible contracts); *see also* Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1477 (1997) (noting that labor force discrimination encourages wives to work at home and husbands to work in the paid labor force); Handler, *supra* note 37, at 402 (noting that a substantial number of women would like to work in the paid labor force but cannot because of the lack of child care options).

88. *See* Sharon M. Oster, *The Gender Gap in Compensation: Is There a Policy Problem? The Gender Wage Gap*, 82 GEO. L.J. 109, 109 (1993) (discussing the ratio of women's earnings to men's earnings is approximately two-thirds); *see also,* B. Bednarek, Note, *The Gender Wage Gap: Searching for Equality in a Global Economy*, 6 IND. J. GLOBAL LEG. STUD. 213, 221 (1998) (noting the statistics of the wage gap between men and women); *see, e.g.,* Jerry A. Jacobs, *Women's Entry into Management: Trends in Earnings, Authority, and Values Among Salaried Managers*, 37 ADMIN. SCI. Q. 282, 296 (1992) (marital status has a negative effect upon the wages of women managers, in contrast to the positive effect on male wages). *See generally* Rosemary Hunter, *The Gender Gap in Compensation: A Feminist Response to the Gender Gap in Compensation Symposium*, 82 GEO. L.J. 147, 147 (1993) (discussing the gender gap has been a focus of feminist theory and activism for over twenty years).

89. *See* Sharon M. Oster, *Is There a Policy Problem?: The Gender Wage Gap*, 82 GEO. L.J. 109, 110 (1993) (discussing that between 1960 and 1985, despite the fact that women's rate of participation in the labor force increased dramatically from 37% to 57%, the aggregate wage gap remained constant); *see, e.g.,* William J. Carrington & Kenneth R. Troske, *Sex Segregation in U.S. Manufacturing*, 51 IND. & LAB. REL. REV. 445, 448 (1998) (noting that there is a substantial wage gap between men and women in the Worker-Establishment Characteristics Database, and this gap is roughly consistent with that observed in manufacturing as a whole); Thomas F. Crossley, *Gender Differences in Displacement Cost: Evidence and Implications*, 29 J. HUM. RESOURCES 461 (1994) (in one Canadian study, women suffered greater wage losses following job displacement than men).

90. *See* Rodney B. Sorensen, Comment, *Crossing the Picket Line in Support of the Union: The New Flavor of Salting*, 38 SANTA CLARA L. REV. 165, 165 (1997) (noting the history of the American Federation of Labor and Congress of Industrial Organizations); *see also* Stanley Aronowitz & William DiFazio, *Refining the Challenge: High Technology and Work Tomorrow*, 544 ANNALS 52, 58 (1996) (noting that the American Federation of Labor and Congress of Industrial Organizations was perhaps the most reliable and most powerful non-governmental organization that provided a social base for U.S. foreign policy). *See generally* Fredrick Englehart, Note, *Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation*, 29 CASE W. RES. J. INT'L L. 321, 325 (1997) (noting that the American Federation of Labor-Congress of Industrial Organizations has many problems, including reversing its loss of membership and thus reestablishing a significant presence in the workplace).

were paid the same as men for comparable work.[91] According to this American labor union, this wage gap costs women's families "$200 billion of income" each year.[92]

American labor law, however, has not typically included antidiscrimination principles, apart from those statutes specifically prohibiting discrimination on the basis of certain immutable statuses, like age, race, national origin, religion and gender.[93] Laws regulating pensions, employee benefits, unemployment, workers compensation and unionism are looked at as if all workers are treated equally.[94] But race and gender discrimination is a separate matter, and is only implicated in "labor laws" when otherwise legal terms, conditions and decisions intentionally discriminate against or when a facially neutral employer policy is proved to "have a dispar-

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91. *See* Tamara Lewis, *Union Links Women's Pay to Poverty*, N.Y. TIMES, Feb. 25, 1999, at 22 (discussing the wage gap between men and women); *see, e.g.,* Robert F. Seibel, *An Examination of Lower Salaries Paid to Women Clinical Teachers*, 6 UCLA WOMEN'S L.J. 541, 544 (1996) (data combined over a period of three years concluded that women clinical teachers were paid less than men for the same job). *See generally* Margriet Kraamwinkel, *Women's Work and Law: New Perspectives on the Labor Market Strategy*, 26 NEW ENG. L. REV. 823, 831 (1992) (discussing that women are paid lower wages because "women's work" which requires dexterity has a lower value than "men's work" requiring strength and the value of strength is used to justify the disparity between men's and women's salaries).

92. *See* Tamara Lewin, *Union Links Women's Pay to Poverty Among Families*, N.Y. TIMES, Feb. 25, 1999, at 22 (discussing that the legislation the A.F.L.-C.I.O. is based on the idea of comparable worth so that the pay scales are balanced so that the jobs traditionally filled by women pay as much as jobs filled by men which require comparable skills, effort, responsibility and working conditions); *see also* Kraamwinkel, *supra* note 87, at 831 (discussing that women have little chance to earn the high wages within the hierarchy due to the discrimination against them in the job market and differences in education); *see, e.g.,* Lisa A. Bireline Sarver, *Athletics: Coaching Contracts Take on the Equal Pay Act: Can (and Should) Female Coaches Tie the Score*? 28 CREIGHTON L. REV. 885, 889-90 (1995) (discussing that a men's basketball coach, a male, is paid over $40,000 more than a female women's coach with bonuses dependent upon leading the team to championship games and the female women's basketball coach's bonus and raise was based upon attendance at the games).

93. *See* Kirsten L. McCaw, Comment, *Freedom of Contract Versus the Antidiscrimination Principle: A Critical Look at the Tension between Contractual Freedom and Antidiscrimination Provisions*, 7 SETON HALL CONST. L.J. 195, 198 (1996) (discussing that the desirability of individual autonomy and economic efficiency lies at the core of freedom of contract and usually trumps antidiscrimination principles); *see, e.g.,* Robert Post, *The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 3 (2000) (discussing that efforts of employers to control the look of their workforce is responsible for the kind of mentality that kept blacks and other minorities out of the public eye). *Compare* Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 12 (1994) (noting that a world without an antidiscrimination provision is a well-functioning competitive market because there are no gains that might justify the antidiscrimination law).

94. *See* Walker, *supra* note 23, at 915 (discussing that any occupational pensions scheme which does not contain an equal treatment rule shall be treated as including one for the purposes of the Pension Act because women must not be treated any less favorably than men, failing which the relevant term will be automatically adjusted); *see, e.g.,* Leah F. Vosko*, Leased Workers and the Law: Legitimizing the Triangular Employment Relationship: Emerging International Labour Standards from a Comparative Perspective*, 19 COMP. LAB. L. & POL'Y J. 43, 68 (1997) (noting in France, workers receive equal treatment with respect to wages and conditions of work, the provision of safety equipment, and collective bargaining rights). *But see, e.g.*, Edward LaZear & Sherwin Rosen, *Pension Inequality, in* ISSUES IN PENSION ECONOMICS 341 (Zvi Bodie et al, eds. 1987) (pensions have increased economic inequality, particularly between blacks and whites and between black men and black women).

ate impact upon a protected class."[95] Furthermore, each violation must be separately and painfully proven.[96] That has not been effective in remedying discrimination. Some other countries have realized this shortcoming. New laws in Canada, for example, start from the premise that there is widespread discrimination—which has not been effectively redressed by complaint-based human rights litigation.[97] To date, pension reform has not been evaluated in terms of anti-discrimination principles or its particularly bad effect upon women.[98] In Europe and other countries, unlike the United States, labor laws appear to incorporate affirmative anti-dis-

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95. *See, e.g.,* Joni F. Katz, Comment, *Hazardous Working Conditions and Fetal Protection Policies: Women are Going Back to the Future,* 17 B.C. ENVTL. AFF. L. REV. 201, 207-08 (1989) (discussing that although disparate impact can be established by the use of statistical data, showing that a protected group is disproportionately affected by the employer's actions, Title VII requires more than a mere showing of a statistical imbalance to make out a prima facie case, the plaintiff must show causation by demonstrating that the application of a particular employment practice created the disparate impact); Mark J. Simeon, *Perspective on Equal Employment Opportunity Litigation: Title VII Defenses: An Overview,* 27 HOW. L.J. 479, 481 (1984) ("The disparate impact theory of Title VII discrimination evolved in 1971 when the Supreme Court decided *Griggs v. Duck Power Co.* The general rule that comes out of *Griggs* is that employment practices and decisions, unjustified by business necessity, that cause a disparate impact upon a protected class violate Title VII."); *see also* Joel P. Peller, Comment, *Fetal Protection Policies: An Employer's Struggle to Comply with Title VII,* 1 J. PHARM. & LAW 215, 227 (1992) (noting that the Civil Rights Act of 1991 changed the burden of proof requirement so that an employee must establish that the employer's practice has a disparate impact upon a protected class and how the employee needs to demonstrate that an alternative policy would satisfy the employer's business interests and would not result in a disparate impact).

96. *See* Peller, *supra* note 95, at 218 (providing the two approaches under which violations of Title VII can be proven); *see also* Pendleton Elizabeth Hamlet, Note, *Fetal Protection Policies: A Statutory Proposal in the Wake of International Union, UAW v. Johnson Controls, Inc.*, 75 CORNELL L. REV. 1110, 1114-15 (1990) (noting that in cases alleging disparate treatment, the plaintiff bears the burden of proof throughout the proceedings and is required to establish a prima facie case of intent to discriminate under the challenged employment policy); *see, e.g.,* Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (setting forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment).

97. *See* Canadian Human Rights Act of 1985, c. H-6, s. 59. *Intimidation or Discrimination, Consolidated States of Canada* (discussing the fact that a person in the workplace cannot be discriminated against); *see, e.g.*, Soma Ray, Barrister, *The Need for Systematic Labour Law Reform in Ontario: The ABC Task Force Tables its Report*, 7 E.L.L.R. 5, 5 (1997) (discussing the enforcement of the Pay Equity Act); *see also* Lorne Sossin, *Salvaging the Welfare State? The Prospects for Judicial Review of the Canada Health & Social Transfer*, 21 DALEHOUSIE L.J. 141, 141 (1998) (discussing the welfare state).

98. *See* Moss, *supra* note 8, at 170-71 (noting that women are less likely to receive pensions and when they do receive pensions, their benefits are typically smaller than those of men because they are paid less, change jobs frequently, and take several years off because of family responsibilities); *see also* Stacy Lynn Anderson, Comment, *The Right to Pension Benefits Under ERISA When a Nonemployee Spouse Predeceases the Employee Spouse,* 67 WASH. L. REV. 625, 628 (1992) (discussing how Congress drafted the Employee Retirement Income Security Act with male workers in mind by showing how it is discriminatory against women); Moseley-Braun, *supra* note 8, at 495 (noting that because pensions are based on a formula which combines the number of years of work and salary earned, women suffer a "gender gap" that carries over into retirement resulting in women receiving inadequate pension support).

crimination principles and duties.[99] Equal employment rights are almost constitutional. In fact, the theory of disparate impact upon women is often presumed without more than simple data that most women work part-time. The Beijing Declaration of the 4th World U.N. Conference on Women (hereinafter "Declaration")[100] declared that "the advancement of women and the achievement of equality between men and women are a matter of human rights and a condition for social justice and should not be seen in isolation as women's issues."[101] The Declaration also stated that the "empowerment of women and equality between men and women are prerequisites for . . . economic . . . security among peoples."[102]

To that end, certain courts and some new statutes have mandated pro-active employment and pay equity laws. German commentators strongly advocate an approach that would go be-

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99. *See* Tiziano Treu, *Equal Pay and Comparable Worth: A View From Europe*, 8 COMP. LAB. L. 1, 4 (1986) (noting that the initial approach of equal pay for equal work is common to both Europe and the U.S., but the relatively centralized structure of collective bargaining and wage determination which is characteristic of most continental European countries, had greater impact in some of them as a result of this first intervention, than in the U.K. and the U.S.); *see also* Donald C. Dowling, Jr., *From the Social Charter to the Social Action Program 1995-1997: European Union Employment Law Comes Alive*, 29 CORNELL INT'L L.J. 43, 49 (1996) (stating while the U.S. anti-discrimination model protects only certain classes of workers, Europe's employment laws are more democratic in that they protect everybody); *See* Tomasevski, *supra* note 67, at 1044 (noting that the elimination of multiple obstacles to equal rights for women embodied in private economic and social relations is a significant accomplishment of human rights protection in Europe, and was made possible by the co-existence of two national systems).

100. *See* United Nations Department for Policy Coordination and Sustainable Development, *Report of the Fourth World Conference on Women,* (visited Sept. 10, 2000) <gopher://gopher.un.org/00/conf/fwcw/off/a—20.en.> (discussing the Fourth World Conference on Women); *see also* Benjamin D. Knaupp, Comment, *Classifying International Agreements Under U.S. Law: The Beijing Platform as a Case Study*, 1998 BYU L. REV. 239, 254 (1998) (discussing the Beijing platform); Susan Roosevelt Weld, *Excerpts from Dr. Susan Roosevelt Weld's Address at Suffolk University Law School: February 29, 1996*, 19 SUFFOLK TRANSNAT'L L. REV. 435, 436 (1996) (using the Beijing conference as a guide for what should be accomplished at this conference).

101. *See, e.g.,* United Nations Department for Policy Coordination and Sustainable Development, *Report of the Fourth World Conference on Women*, (visited Sept. 10, 2000) <gopher://gopher.un.org/00/conf/fwcw/off/a—20.en.> (noting equality of women as a critical area of concern); *see also* Charlotte Bunch*, The Global Campaign for Women's Human Rights: Where Next After Vienna?*, 69 ST. JOHN'S L. REV. 171, 172 (1995) (noting that this issue had been left out of the human rights agenda which demonstrates the degree to which women's human rights have gone unrecognized in the world and emphasizes the need to embrace issues pertaining specifically to women); Elizabeth M. Misiaveg, Note, *Important Steps and Instructive Models in the Fight to Eliminate Violence Against Women*, 52 WASH. & LEE L. REV. 1109, 1119 (1995) (discussing that violence against women significantly interferes with women's enjoyment of human rights and fundamental freedoms on an equal level with men).

102. *See* United Nations Department for Policy Coordination and Sustainable Development, *Report of the Fourth World Conference on Women*, (visited Sept. 10, 2000) <gopher://gopher.un.org/00/conf/fwcw/off/a—20.en.> (noted as among the critical areas of concerns); Eva A. Cicoria, *Pregnancy and Equality: A Precarious Alliance*, 60 S. CAL. L. REV. 1345, 1348 (1987) (discussing as women achieve economic independence and attain influential positions, the image of women as inferior will fade, beginning a cycle in which people make employment decisions on individual merit rather than gender stereotypes); Alison M. Jaggar*, Sexual Equality as Parity of Effective Voice*, 9 J. CONTEMP. LEGAL ISSUES 179, 183 (1998) (stating that men's reluctance to accept women's authority has been seen as depriving women of equal opportunities for employment or career advancement).

yond formal equality to encompass factual equality.[103] The strides toward substantive parity between men and women workers made in Nordic countries devolve, in part, on the guarantee of benefits to part-time workers, most of whom are female.[104] But, to date, pension reform has not been evaluated in terms of anti-discrimination principles or its particular effect upon women.

The United States unfortunately does not have a corner on bias against women and "even the loftiest of pronouncements abroad may remain exhortative."[105] In most developed nations, however, efforts have been made to achieve some kind of substantive equality between men and women.[106] In the United States, pension programs such as Social Security[107] allows a woman to

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103. *See* Julianne B. Kokott, *Decision: European Community Case Note*, 87 A.J.I.L. 444, 444 (1993) (advocating social policy considerations in gender equity issues); *see, e.g.*, Dagmar Schiek, *Women's Rights in Germany Since Unification: Article: Lifting the Ban on Women's Night Work in Europe—A Straight Road to Equality in Employment?*, 3 CARDOZO WOMEN'S L.J. 309, 326-27 (1996) (arguing that differential treatment of women and men is justified under German constitutional law only where differential treatment is necessary to protect constitutional rights or to further equalize gender distinctions); *see also* Susanne Baer, *Constitutional Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 250 (1999) (describing the tools which German constitutional law uses to respond to the gender equity issues).

104. *See* Treu, *supra* note 99, at 25 (discussing the main preoccupation of trade unions in Nordic countries beginning in the sixties was the revision of existing job classification systems with the aim of reducing excessive and "unjustified" wage differentials, and pursuing a more solidaristic or equitable wage policy); *see, e.g.*, Schiek, *supra* note 103, at 309 (discussing how the Nordic countries never enacted anything like the ban on women's night working); *see also* Senator Maria de los Angeles Moreno, *Women's Rights and International Dialogue*, 16 DICK. J. INT'L L. 191, 198 (1997) (discussing how the Nordic nations are the only ones with a high proportion (36.4%) of women in their parliaments).

105. *See* Kathy Mack, *Developments in Criminal Law and Criminal Justice: Gender Awareness in Australian Courts—Violence against Women*, 5 CRIM. L.F. 788, 790 (1994) (noting that bias against women is a systemic problem that judges and legal practitioners at all levels may exhibit biased attitudes or engage in actions that reveal bias, and that the law itself may be biased); *see also* Robin S. Block, Note & Comment, *The New Face of Connecticut's Constancy of Accusation Doctrine: State v. Troupe*, 29 CONN. L. REV. 1713, 1732-33 (1997) (noting that societal misconceptions were built into the system resulting in systemic bias against women which leads to implications that in a "he said, she said" situation, a jury would tend to believe the man because jurors have been taught that women (as alleged victims) are less reliable).

106. *See* Geraldine A. del Prado, *The United Nations and the Promotion and Protection of the Rights of Women: How Well has the Organization Fulfilled its Responsibility?*, 2 WM. & MARY J. WOMEN & L. 51, 59-60 (1995) (discussing that the large gap between developed nations and developing states in terms of the advancement of women is a result of stereotypes about traditional gender roles, as well as other social factors including poverty, rising divorce rates, population growth, and the deteriorating economic conditions in developing countries); Meredith Marshall, *Recent Development: United Nations Conference on Population and Development: The Road to a New Reality for Reproductive Health*, 10 EMORY INT'L L. REV. 441, 467 (1996) (discussing an approach for empowering women at the public level by placing emphasis on women in management and policy-making positions, as well as providing a procedure gender-based analysis of development programs); *see also* Reed Boland, *Population and Development: The Cairo Conference and Programme of Action: An Innovative Approach to Population Policy or Old Wine in a New Bottle?*, 1995 ST. LOUIS-WARSAW TRANSNAT'L L.J. 23, 38 (1995) (noting that a growing awareness in the population community that most of the responsibility for reproductive behavior is borne by women and, to be successful, a population program will have to address their needs and desires).

107. *See* Kathleen M. Keller, *Federalizing Social Welfare in a World of Gender Difference*: *A History of Women's Work in New Deal Policy*. 8 S. CAL. REV. L & WOMEN'[S] STUD. 145, 175 (1999) (discussing the progress women have made in the benefits they receive under the Social Security Act); Andrew Weissmann, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983) (noting that the under the Pregnancy Discrimination Act pregnancy is classified as sex discrimination under Title VII of the Civil Rights Act of 1964); *see generally* Mojiri-Azad, *supra* note 36, at 545 (discussing the dual entitlement rule).

receive either the benefits she earned during her lifetime or the benefits she can receive as her spouse's survivor.[108] Affirmative action has the potential to achieve equality of results in moderating the effects of the free market while eradicating intentional and sex-blind discrimination.[109] In some cases, this includes preferential treatment for women like paying them higher benefits than, or allowing them paid leave for child-care needs. Reforms in the United Kingdom offer a second pension to "increase the entitlements of those on low incomes and 'carers' which have otherwise been penalized" under earlier pension laws and attempt to provide some balance for a lifetime of inequity.[110] In most cases the "carers" or low wage earners are women. Although pension eligibility and contribution rates and periods have been different for men and women in many countries,[111] the Agreement on Social Policy among the member states of the European Community (excluding Great Britain and Northern Ireland)[112] allow member states to maintain or adopt "measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in

108. *See* Kilolo Kijakazi, *Lies, Damn Lies and Statistics: Debunking Flawed Research on People of Color and Women in Social Security Reform* (visited Sept. 10, 2000) <http://www.nasi.org/SocSec/unity99> (discussing the Unity Conference Paper in 1999 and how progressive and dependent spouse benefits usually net greater returns for woman and people of color than for white men); *see also* Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, & Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law,* 89 COLUM. L. REV. 264, 282 (1989) (discussing the benefits widows receive). *But see* Scott A. Caplan-Cotenoff, *Parental Leave: The Need for a National Policy to Foster Sexual Equality,* 13 AM. J.L. & MED. 71, 73 (1987) (noting that when women return from maternity leave they are not guaranteed job security or accrued seniority).

109. *See* Nina Farber, *Justifying Affirmative Action After City of Richmond v. J.A. Croson: The Court Needs A Standard For Proving Past Discrimination,* 56 BROOK. L. REV. 975, 978 (1990) (discussing the definition of affirmative action); Glen D. Nager, *Symposium: The Civil Rights of 1991: Theory And Practice Article: Affirmative Action After the Civil Rights Act of 1991: The Effects of a "Neutral" Statute*, 68 NOTRE DAME L. REV. 1057, 1072 (1993) (discussing the challenges to the Civil Rights Act of 1991); *see also* Mary K. O'Melveny, *The Sesquicentennial of the 1848 Seneca Falls Women's Rights Convention: American Women's Unfinished Quest for Legal Economic, Political, and Social Equality: Article Playing the "Gender" Card: Affirmative Action and Working Women*, 84 KY. L.J. 863, 866-70 (1995/1996) (discussing the history of discrimination against women).

110. *See* Richard Hudson, *Age-Old Problem*, 143 NEW L.J. 6597, 585 (1993) (discussing age requirement for British women); George Walker, *United Kingdom Pensions Law Reform*, 64 BROOK. L. REV. 871, 923 (1998) (discussing the principle features of the new approach to the pension system); *see also* Benjamin Stocker, *Equality and Equilibrium*, LAW SOCIETY'S GUARDIAN GAZETTE, Dec. 16, 1992, at 20 (discussing the concern of the Member states for equal treatment).

111. *See* Juliane B. Kokott, Note, *Equal Treatment for Men and Women-Different Pensionable Ages*, 87 AM. J. INT'L L. 444, 445 (1993) (discussing the difference in time that men and men in the U.K. have to contribute in order to obtain the same pension benefits); *but see* Max Horlick, *Social Security Programs Through the World*, 3 COMP. LAB. L. 95, 99-100 (1977) (discussing different pension plans for women); *see also* Norton, *supra* note 6 (discussing factors including: (1) globalization of financial markets and economies; (2) changes in labor market conditions, family structures, and other social safety net costs into global challenges to pension arrangements; and (3) the growth of population and economic sectors that are largely uncovered by existing pension schemes).

112. *See* Kokott, *supra* note 111, at 447 (discussing the difference in time that men and men in the U.K. have to contribute in order to obtain the same pension benefits); Norton, *supra* note 6, at 820 (discussing the factors to examine in the necessity for a reform of the public pension system) (1998). *But see* Max Horlick, *Social Security Programs Through the World*, 3 COMP. LAB. L. 95, 99-100 (1977) (discussing different pension plans for women).

their professional careers."[113] Even though the substantive equality approach is far from becoming a universal concept, attempts to redress discrimination do tend to be proscriptive and forward-looking.[114] Even where sex discrimination in the workplace is ending, it does not meet the needs of women about to enter, or already into retirement, especially women, who have earned less throughout their lives.[115]

Not enough progress toward equality of opportunity for women's work—which include things like income subsidies, day care, or paid leave in order to attempt to create both equality of work opportunity and parity in wages—can be made before pension systems are reformed. Legislation such as the Equal Pay Act in the United States[116] and Canadian Pay Equity Laws,[117] which are premised upon formal equality, obviate the legality of comparable worth wages or subsidies to achieve parity for current discrimination and job segregation.[118] The demand for equal treatment—equal pay for equal work—has led, inexorably, to less than equal opportunity, since women as caretakers, contingent workers, or historically victimized by past discrimi-

113. *See Acquired Rights Directive,* Art. 6(3), 31 ILM 358, 360 (1992) (discussing the lower age requirement for women); Kokott, *supra* note 111 (the European Court held that women retire earlier than men to compensate for the professional disadvantages they endured because of child rearing); *see also* Todd Joseph Koback, *The Long, Hard Road to Amsterdam: Effects of Kalanke v. Freie Hansestadt Bremen and The Treaty of Amsterdam on Positive Action and Gender Equality in European Community Law*, 17 WIS. INT'L L.J. 463, 485-86 (1999) (discussing the Social Policy in the context of equal treatment of women in the workforce). *But see* Rebecca Means, Note, *Kalanke v. Freie Hansestadt Bremen: The Significance of the Kalanke Decision on Future Positive Action Programs in the European Union,* 30 VAND. J. TRANSNAT'L L. 1087 (1997) (discussing a German law that guaranteed women priority over men was not consistent with the Directive that prohibits sex-based discrimination).

114. *See* Jane Stackpool-Moore, *From Equal Pay to Equal Value in Australia: Myth or Reality*? 11 COMP. LAB. L. 273, 273 (1990) (discussing the legal protection women have against wage discrimination); *see also* Joshua M. Henderson, *The Institutional and Normative Significance of the European Union's Acquired Rights Directive*, 29 GEO WASH J. INT'L L. & ECON. 803, 803 (1996) (discussing the Social Policy of the Members).

115. *See* Nancy Gertner, *Thoughts on Comparable Worth Litigation and Organization Strategies*, 20 U. MICH. J.L. REF. 163, 163 (1986) (discussing the subtle ways women are discriminated against); Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335, 338 (1996) (discussing the Sex Discrimination Ordinance and its inadequacies); *see also* Caplan-Cotenoff, *supra* note 8, at 71 (discussing the discrimination against pregnant women in the workforce).

116. *See* Equal Pay Act, 29 U.S.C. §206(d)(1) (2000) (discussing the fact that an employer cannot pay a woman less than a man because of gender); *see also* Todd A. Gale, *Use of Market Wage Rate in Employment Discrimination Suits*: *Equal Work as the Key to Application*, 61 NOTRE DAME L. REV. 513, 513 (1986) (exploring other ways to bring an employment discrimination suit). *See generally* Nina Joan Kimball, *Not Just Any "Factor Other Than Sex"*: *An Analysis of the Fourth Affirmative Defense of the Equal Pay Act*, 52 GEO. WASH. L. REV. 318, 318 (1984) (discussing the notion that differences in wages are due to gender).

117. *See, e.g.*, Ray, *supra* note 97 (discussing the enforcement of the Pay Equity Act); *see also* Nancy K. Kubasek, Jennifer Johnson & M. Neil Browne, *Comparable Worth in Ontario: Lessons the United States Can Learn*, 17 HARV. WOMEN'S L.J. 103, 106 (1994) (discussing Ontario's pay equity act and its effect on women's comparable worth); Sossin, *supra* note 97 (discussing the welfare state).

118. *See* O'Connell, *supra* note 14 (discussing the impact of taking time away from work as women do on average 4.5 times and its negative effect on the amount of women's pensions at retirement). *See generally* Mary E. Becker, *Comparable Worth in Antidiscrimination Legislation*, 51 U. CHI. L. REV. 1112, 1117 (1984) (discussing the effect of discrimination in the workplace as it relates to wages); *see, e.g., Whitehead v. Oklahoma Gas & Electric Company*, 187 F.3d 1184, 1184 (10th Cir. 1999) (discussing the loss of pension benefits while out of the workforce because of pregnancy).

nation, do not have the same access—or time for—equal work.[119] An identical treatment of men and women perpetuates inequality; the terminology and provisions of subsequent instruments changed to include equal opportunities for women, not only equal treatment.[120] The solution may need to be to give women preferential treatment.

De facto discrimination against women, because of their family responsibilities and burdens, their marginalization in many industries, and their proclivity to work for less money with fewer or no benefits, makes equality of opportunity elusive.[121] At least one scholar observes that in the developing economies of Eastern Europe, the labor market engages in "the penalization of motherhood."[122] A German official in charge of women's affairs for the State of Saxony-Anhalt remarked that women "are having themselves sterilized either because employers tell them they must, or because they believe it to be their only chance."[123] Inevitably, abortion rates among women in that part of the world is alarming.[124] In Lithuania, for example, abortions nearly equaled live births and Russia experienced twice as many terminated pregnancies as

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119. *See* Herma Hill Kay, *Equality and Difference*: *The Case of Pregnancy*, BERKELEY WOMEN'S L.J. 1, 21-35 (1985) (discussing the equal treatment analysis and the special treatment insights and the fact that pregnancy must be taken into consideration by the workplace); *see also* Wendy O. Williams, *Equality's Riddle*: *Pregnancy and the Equal Treatment Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 329, 330 (1984-85) ("[S]ex-based classifications are generally impermissible whether derived from physical differences such as size or strength, from cultural role assignments as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man."); *see, e.g.*, Caplan-Cotenoff, *supra* note 8, at 78 ("[M]en hold a disproportionate amount of power in American society. Pregnancy benefits may be a way to achieve equal employment standards, but may also be a threat to male dominance.").

120. *See* Tomasevski, *supra* note 67, at 1043 (discussing the disparities in benefits single women in different European countries receive to support their children). *See generally* Weissmann, *supra* note 107, at 704 (discussing the redress women have legally for discrimination based on their sex); *see also* Rosalind Barnett, *A New Work-Life Model for the Twenty-first Century*, 526 ANNALS 143, 148 (discussing the fact that more and more women are able to go back to work after childbirth).

121. *See* Forman, *supra* note 121 (discussing the inequalities for women under Social Security); *see also* Tomasevski, *supra* note 67, at 1041 (describing the history of discrimination against women); Amy S. Wharton, *Feminism at Work*, 571 ANNALS 167, 168 (2000) (discussing unpaid full-time housewives).

122. *See* Tomasevski, *supra* note 67, at 1048 (discussing the consequences an unequal labor market has on Eastern European women's reproduction choices); *see also* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace* Debate, 86 COLUM. L. REV. 118, 118 (1986) (asserting that women who bear children have a major hurdle to overcome in the workforce); *see, e.g.*, Hermine G. De Soto, *"In the Name of the Folk": Women and Nation in the New Germany*, 5 UCLA WOMEN'S L.J. 83, 83 (1994) (discussing the lack of a role for women with children in the German workforce).

123. *See* Tomasevski, *supra* note 67, at 1050 (discussing the need for political activism on the part of women to protect their rights in a time of political transition); *see also* Mary B. Young, *Diverse Families: Work-Family Backlash: Begging the Question, What's Fair*? 562 ANNALS AM. ACAD. POL. & SOC. SCI. 32, 33 (1999) ("[A]ccording to the U.S. Census Bureau, childless households will increase fifty percent between 1996 and 2005). *But see* The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000) (women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes).

124. *See* Alessandra Stanley, *Russians and Americans Join in Anti-Abortion Fight*, N.Y. TIMES, May 19, 1994, at A12 (discussing the anti-abortion campaign); *see also* Nicki Negrau, *The Status of Women in New Market Economies: Listening to Women's Voices: Living in Post-Communist Romania*, 12 CONN. J. INT'L L. 117, 118 (1996) (discussing the increase in abortion rate in Romania as the political structure changed); *see, e.g.*, Mertus, *supra* note 4, at 369 (discussing several Eastern European Countries abortion rates).

there were babies born in 1992.[125] Since pensions provided by the state tend to be minimal, women *need* to work, not only for subsistence, but to contribute to the second-pillar pensions that are tied to employment, and which might make the difference between old age poverty and moderate security. There is still some affirmative action, both in the United States and abroad, but it has been very carefully circumscribed and can almost never by sustained where it works to the detriment of a favored majority.[126] Since substantive equality is too expensive, and politically inexpedient, we must guarantee the more modest solution of pension protection for women.

A New Definition of Work

Many women are not employed in what most governments call "covered employment" and retirement security is, unavailable to those women who have been out of the formal market.[127] Most of the world's women for example, in Eastern Europe, Asia, and Africa—work outside the formal market and economic development has had little effect upon their lives.[128] They are not workers in the sense of being documented, tied to a firm and compensated by

125. *See* Tomasevski, *supra* note 67, at 1048 (discussing the empowerment of women to make reproductive choices); *see also* Mark Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of* China: *Women's Rights in Two Socialist* Countries, 40 STAN. L. REV. 1027, 1044 (1988) (stating that women had an average of more than nine abortions per lifetime); *see, e.g.*, *See* Tomasevski, *supra* note 67, at 1050 ("[T]he brutal reality of having to provide for one's children and not being able to has obviously jeopardized reproductive freedom.").

126. *See, e.g.,* United Steelworkers of America v. Weber, 99 S. Ct. 2721, 2721 (1979) (voluntarily-adopted affirmative action plan to bring in new African-American trainees where they were conspicuously, or for a long-time, intentionally excluded, is legal, as long as the measures were temporary, and did not lead to the job loss or displacement of white male workers who had previously benefited from race discrimination); *see also* Margaret Erin Buckley, *Affirmative Action Plans Under Title VII and The Equal Protection Clause*, 56 GEO. WASH. L. REV. 711, 713-14 (1988) (discussing whether voluntary affirmative action violates the Equal Protection Clause). *See generally* Jennifer C. Brooks, *The Demise of Affirmative Action and the Effect on Higher Education Admissions: A Chilling Effect on Much Ado About Nothing,* 48 DRAKE L. REV. 567, 585 (2000) (including that affirmative action has reached the limit of its usefulness and is counter-productive because it damages those it was intended to benefit).

127. *See* Goodwin Liu, *Social Security and the Treatment of Marriage*: *Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 3 (1999) (discussing gender inequality under Social Security); *see also* Forman, *supra* note 121, at 104 (discussing problems of contribution plans for women). *See generally* Staudt, *supra* note 18, at 1581 (discussing the traditional view of women as housewives).

128. *See* Kerry Rittich, *Transformed Pursuits: The Quest for Equality in Globalized Markets*, 13 HARV. HUM. RTS. J. 231, 231 (2000) (asserting that the unpaid work of women is virtually invisible in terms of calculating economic growth); *see, e.g.,* Elizabeth Spahn, *Shattered Jade, Broken Shoe: Foreign Economic Development and the Sexual Exploitation of Women in China*, 50 ME. L. REV. 255, 268 (1998) (stating that in China, a woman's contribution to the economy is often rendered undetectable because it merges with other domestic labor to which no value is given). *See generally* Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381, 384 (2000) (stating that the contributions that women make to an economy are often ignored because they work outside the formal workplace).

wages or publicly subsidized benefits like pensions.[129] Pensions rather "depends upon working in the public sphere and unpaid work in the home or community is categorized as unproductive, unoccupied, and economically inactive."[130] The United Nations System of National Accounts,[131] which monitors financial positions, markets, and development of the states generally ignores the contributions of women in the economy despite their overwhelming participation in cottage industries and agricultural production.[132] These women are not even counted as employed in official census. Of course, in no measure of job activity in any country is repro-

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129. *See* Shin-Kap Han & Phyllis Moen, *The Evolving World of Work and Family: New Stakeholders, New Voices: Families In Transition: Work and Family Over Time: A Life Course Approach*, 562 ANNALS 8, 8 (1999) (noting that even women who return to work have to do a disproportionate amount of unpaid domestic labor); *see, e.g.*, Melissa A. Childs, *The Changing Face of Unions: What Women Want From Employers*, 12 DEPAUL BUS. L. J. 381, 384 (2000) (discussing the ways in which the National Labor Relations Act inhibits women to bargain collectively in the workplace); *see also* Douglas D. Scherer, James C. Scharf Ph.D., Richard T. Seymour, Maria O'Brien Hylton & Paulette Cadwell, *Proceedings of the 1999 Annual Meeting Association of American Law Schools Section on Employment Discrimination Law: Is There A Disconnect Between Law and the Workplace?,* 3 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 349, 350 (1999) (noting that accepted gender norms find men in the workplace and women in the home).

130. *See* Susan M. Davis, *Women's Rights as International Human Rights: Women's Environment and Development Organization ("WEDO") and the Public Advocacy Agenda in Creating Sustainable Human Development*, 69 ST. JOHN'S L. REV. 179, 186 (1995) (finding that statistics do not account for the unpaid work that women do because it does not result in a market-based transaction); *see also* J.K. GIBSON-GRAHAM, *The End of Capitalism (As We Knew It): A Feminist Critique Of Political Economy* 263, 265 (1996) (discussing that women's activities and responsibilities are not valued by their male counterparts). *See generally* Lucy A. Williams & Margaret Y. K. Woo, *Doing Business in China and Latin America: Development in Comparative and International Labor Law: The "Worthy" Unemployed: Societal Stratification and Unemployment: Insurance Programs in China and the United States,* 33 COLUM. J. TRANSNAT'L L. 457, 510 (1995) (stating "in 1992, 55.86 million women were permanent state workers as compared to 92.06 million men").

131. *See* Elizabeth L. Larson, *United Nations Fourth World Conference on Women: Action for Equality, Development, and Peace (Beijing, China: September 1995)*, 10 EMORY INT'L L. REV. 695, 736-37 (1996) (explaining that the United Nations System of National Accounts is the internationally recognized system for measuring and recording the values that economic theorists have observed and as such it assigns value to the "work" performed in each country which is used to calculate a nation's Gross National Product and Gross Domestic Product figures). *See generally* Robert W. Benson, *Free Trade as an Extremist Ideology: The Case of NAFTA*, 17 U. PUGET SOUND L. REV. 555, 585 n.9 (1994) (stating that the UN System of National Accounts is considered to be the world's yardstick for measuring economic performance); Kristina M. Tridico, *Sustainable America in the Twenty-First Century: A Critique of President Clinton's Council on Sustainable Development*, 14 J. NAT. RESOURCES & ENVTL. L. 205, 235 (2000) (noting that the UNSNA accounts have been used to provide, "aggregate measure of economic performance and economic welfare.").

132. *See* Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1500 (1983) (finding that excluding women from the marketplace has harmed the gender as a whole); *see also* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 640 (1991) (finding that while cottage industries keep women close to home, they permit flexibility in working conditions and little investment of the woman's time). *See generally* Emily Stoper & Emelia Ianeva, *The Status of Women in New Market Economies: Democratization and Women's Employment Policy in Post-Communist Bulgaria*, 12 CONN. J. INT'L L. 9, 26 (1996) (finding that many women's home businesses even include accounting and computers)

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duction, childcare, domestic work and subsistence production counted or compensated.[133] Although there are scholars who advocate that home and housework should be compensated, it is not clear by whom.[134] Except for those women whose pensions are derived from their husband's productive labor, as in the United States Social Security system, a woman will be at the lowest end of the pension benefit food chain if she has never worked, worked in an underground market (as in most developing nations), worked for cash only or has never made contributions to a government pension system or private supplemental plan.[135] If a woman receives a pension, it will likely mirror her "productive" years of hard work and low or no pay because most pension systems require either paid work experience or marriage to a worker in covered employment.[136] The failure to allow for compensation of work done within the home under the U.S. Social Security System has been attacked because it "presupposes a dependency on the primary wage-earner (usually the man) and precludes the possibility of a wife who performs traditionally 'wifely duties' from earning her own pension, forcing her to draw upon her husband's."[137] The efficacy of taxing and counting work done in the private in-home sphere, how-

133. *See* Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, *Work Programs are Deliberately Structured So That They are Virtually Never Comparable to Holding an Actual Job,* 9 STAN. L. & POL'Y REV. 19, 20 (1998) (stating women with children under three were exempted from participating in the Job Opportunities and Basic Skills program); *see also* Becker, *supra* note 108, at 279 (stating women cannot combine domestic and wage-labor production in accruing social security benefits). *See generally* Frank A. Sloan, *Cost and Compensation of Injuries in Medical Malpractice*, 54 WTR-LAW & CONTEMP. PROBS. 131, 164 (1991) (finding that not counting these women's activities disproportionately emphasizes market loss of men).

134. *See, e.g.*, Katherine K. Baker, *Contracting for Security: Paying Married Women What They've Earned*, 55 U.CHI. L. REV. 1193, 1194-95 (1988) (discussing post-divorce division of assets and whether a woman increased her husband's earning power during their marriage by balancing the value of her housework with the amount of paid work she gave up in order to maintain the home and raise the children); *see also* Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 67 (1996) (stating that house workers should be compensated for the accumulated wealth they bring to the relationship). *See generally* Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing With Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. OF CHI. L. REV. 67, 70 (1993) (discussing women's disadvantages during the divorce process).

135. *See* Charles T. Caliendo, Jr., *Removing the "Natural Distaste" from the Mouth of the Supreme Court with a Criminal Fraud Amendment to ERISA's Anti-Alienation Rule*, 68 ST. JOHN'S L. REV. 667, 712 (1994) (showing how Congress is attempting to remedy the inequalities women face); s*ee, e.g.*, Dilley, *supra* note 49, at 357 (stating that higher pension benefits stem from employment patterns more likely found in white men than any women therefore accounting for the higher poverty rates among elderly women of all races); s*ee also* Jonathan Barry Forman, *Universal Pensions*, 2 CHAP. L. REV. 95, 105-06 (1999) (demonstrating the large gender gap between men and women in private pension income despite their longer life expectancy and subsequently greater need for retirement income).

136. *See* Moseley-Braun, *supra* note 8, at 495 ("Because pensions are based on a formula which combines the number of years of work and salary earned, women suffer a 'gender gap' that carries over into retirement."); O'Connell, *supra* note 14, at 1487 (finding that the lower income earned by women attributes to their lower pension benefits); *see also* Forman, *supra* note 135, at 131 n.69 (1999) (stating that women's pensions are lower in part because they tend to earn less than men, work for smaller companies without retirement plans and spend less time in the workplace due to family obligations).

137. *See, e.g.,* Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1571 (1996) (stating that many tax provisions provide financial incentives for women to stay at home instead of returning to the mainstream workforce); *see also* Burke & McCouch, *supra* note 25, at 1213 (asserting that the social security system in its nature favors one-earner couples over two earner couples). *But see* Dorothy A. Brown, 54 WASH. & LEE L. REV. 1469, 1507 (1997) (providing that "tax laws do not encourage low-income married women to work at home when they are the primary support for their families.").

ever, is beyond the purview of this paper and the pragmatics of its consideration has eluded many experts.[138] If governments were able to force all employers of any women who performed any labor for pay—most especially, cash wage-earners—to participate in the public social security system, the majority of women would be vastly better off. How that can be accomplished depends upon the laws that govern employment relationships in every nation.

Classifying women's work as "contingent" means their work will not count when their working lives are over no matter how long they have been employed.[139] Women should no longer look upon what they spend their lives doing as "temporary" but rather make the tax contributions that inure to the benefit of the formally employed. Although such mandated pension plan participation, both in government and private plans, may be resisted by low paid contingent and part-time female workers, and can be viewed as paternalistic, it will inure, ultimately, to women's benefit.

What Is Good About the American Social Security System?

The American Social Security System, like many of its international counterparts, is called "Pay as You Go," meaning that current pension revenue from the working population are expected to finance current pension benefits to the retired population.[140] The source of financing is the national payroll tax, to which over 90% of legally employed American workers contribute each year.[141] Day care providers, domestic workers, migrant workers—many of the

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138. *See* Kahn v. Kahn, 801 F. Supp. 1237, 1244 (1992) (stating that specific government plans were created to protect women who had contributed to their marriage's financial security through their work in the home, anticipated sharing in the pension income received upon their husband's retirement, but were left dependent on their husband's earnings, at the mercy of death or divorce); *see also* Ablamis v. Roper, 937 F.2d 1450, 1453 (1991) (arguing that women who worked in the home were often forced to depend upon their husbands pension benefits); Anne Barbo, Note, *Ablamis v. Roper: Preemption of the Nonemployee Spouse's Community; Property Rights in ERISA Pension Plans*, 49 WASH. & LEE L. REV. 1085, 1092 (1992) (discussing the belief that spouses share their retirement income).

139. *See* Schroeder, *supra* note 79 (discussing part-time work and recognizing that one of the drawbacks is a limited pension). *See generally* Bookman, *supra* note 30, at 803 (stating that women are disproportionately represented in the contingent work force); Lester, *supra* note 63, at 104 ("[W]omen tend to be concentrated in occupations and industries that have more contingent jobs.").

140. *See* Amity Shlaes, *Forum on Women and Social Security: What Would Equity Look Like? Panel IV: The Social Security System and Women Today,* 16 N.Y.L. SCH. J. HUM. RTS. 225, 227 (1999) (stating that the American Social Security System is called "Pay as You Go" meaning the money coming in now, pays the recipients of social security now); s*ee also* Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1136 (1997) (indicating that the 1939 Act put Social Security on a pay-as-you-go status as opposed to an advance funding basis); Moore, *supra* note 14 (providing that Social Security has historically been a compulsory, defined retirement system funded on a pay-as-you-go basis). *See generally* Burke & McCouch, *supra* note 25, at 1214 (discussing the pay-as–you-go system and how the benefits are a product of the taxation of worker's wages).

141. *See* Kelley, *supra* note 17, at 231 (explaining that all workers and employers finance the social security system through payroll taxes); s*ee also* Edward M. Gramlich, *The United States: How to Deal with Uncovered Future Social Security Liabilities*, 2 ELDER L.J. 225, 225 (1998) (stating that the social security system is a government defined benefit program supported by worker payroll taxes); Senator Judd Gregg & Charles Blahous*, Mobilizing the Marketplace to Renew American Productivity: A Program for the Twenty-First Century*, 35 HARV. J. ON LEGIS. 63, 77 (1998) (noting that it is not one's lifetime contributions that benefit them later on, but rather the contributions only ensure that someone else's tax contributions will support them.)

kinds of jobs women hold—are often not a part of this system. The United States, like the rest of the world, is concerned about the social security trust fund due to an increase in the aging population, a lower birthrate, unemployment and lower-paying jobs due to international competition.[142] Although unemployment is down in the U.S., so are real wages.[143] In the U.S. and many nations that follow the Organization for Economic Cooperation and Development (hereinafter "OECD"),[144] the government's promise of continued income after one's retirement is premised upon a continuing supply of present workers to earn wages upon which a tax may be assessed to pay for the retirement benefits of those who are retiring.[145] Yet many OECD countries suffer from serious shortfalls where present worker contributions do not cover the cost of current retirement obligations.[146]

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142. *See* Lawrence J. Latto, *The President's Plan for Social Security Evades the Problem*, 9-SUM EXPERIENCE 26, 27 (1999) (asserting that the collections gathered to pay out to social security recipients will fall short and the social security money will run out); *see, e.g.*, Gregg & Blahous, *supra* note 141, at 66 (stating that our social security system is not prepared for the swell which will inevitably occur when the baby boomers reach the age in which they can collect social security). *See generally* Forman, *supra* note 135, at 95 (providing that the trustees of the Social Security Trust Fund are concerned and predict that the fund's assents will be depleted by 2032).

143. *See* Mark Egan, *A Million May No Longer Be Enough,* THE NATIONAL POST, Jan. 31, 2000, at C11 (discussing how average Americans' stock holdings are typically in pension funds, and that real income of high-income families grew by 15% while wages for poor and middle income families stagnated or actually declined). *But see* Kirk Kennedy, *Book Review: Deconstructing Protectionism: Assessing the Case for A Protectionist American Trade Policy,* 28 CASE W. RES. J. INT'L L. 197, 200 (1996) (stating that even President Clinton conceded that in the last ten years real wages have declined by 12% for working Americans.); Mark Weisbrot, *Globalization for Whom?,* 31 CORNELL INT'L L.J. 631, 635 (1998) ("Since 1973, by contrast, real wages have declined. Since 1973, the rate of unemployment has increased.").

144. *See* Robert H. Sutton, *Controlling Corruption through Collective Means: Advocating the InterAmerican Convention Against Corruption*, 20 FORDHAM INT'L L.J. 1427, 1450 ("The OECD is an international association of states whose common goal is to pursue worldwide economic growth and stability."); *see also* James F. Rill, *Thirteenth Annual International Law Symposium "Negotiating the Free Trade Labyrinth: Your Map to the Twenty First Century": A Framework for Cooperation: The Status of International Antitrust Enforcement*, 18 WHITTIER L. REV. 321, 328 (1997) (discussing that the OECD is a major force in the international antitrust arena and the foremost intergovernmental forum for economic and social policy consultation); David A. Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 1, 13 (1996) (the Organization for Economic Cooperation and Development was established in 1970 and was set up as an intergovernmental organization to be active in the environmental arena).

145. *See* Moore, *supra* note 14, at 137 ("Social security is a "contributory" system; that is, it is funded by "contributions," or payroll taxes imposed on employers and employees."); *see also* Kaplan, *supra* note, at 199 (discussing that taxes from today's workers are needed to fund the Social Security program). *See generally* Jonathan Barry Forman, *Reforming Social Security to Encourage the Elderly to Work*, 9 STAN. L. & POL'Y REV. 289, 292 (1998) (stating that the Social Security beneficiaries are supported by the current workers which is troubling in that the amount of workers is decreasing and the number of Social Security recipients is increasing).

146. *See* Norton, *supra* note 6, at 817-18 (asserting that major reformation is necessary in the pension systems of OECD nations because of the increase in longevity and the disproportionate number of people contributing to the system). *See generally* James A. Fanto, *Regulatory Implication of Individual Management of Pension Fund:* Comparative Investor Education, 64 BROOK. L. REV. 1083, 1110 n.11 (1998) (OECD nations are currently encouraging privately-funded pensions as additional retirement security); Monika Queisser, *Pension Reforms: Lessons from Latin America*, 5 NAFTA: L & BUS. REV. AM. 544, 564 (1997) (arguing that although it is often said that a transition to partially or fully funded pension plans would be unfeasible in OECD countries, this is not true).

Capitalism, with retirement income guarantees, has brought with it a demand for new approaches to retirement security.[147] But these changes must not make things even bleaker for the women who already occupy the margins. If their work was recognized, and earned them pension benefits, not only would they have some guaranteed income for their later years but they would also add to the contributors to any national pension system.

Despite its current problems and plethora of critics, the American Social Security System has worked in reducing elderly poverty from 50% in 1935 to 11% today.[148] Of course, the elderly receive an enormous extra benefit from Medicare (typically available to eligible social security recipients),[149] which is estimated to pay for approximately 45% of all medical care received by the aged population, with private insurance and cash self payments accounting for 37%.[150] Since doctors, hospitals, and nursing homes take an inordinate amount of older people's income,[151] the combination of pensions and medical benefits are the real reasons for the reduc-

147. *See* Forman, *supra* note 30 ("The time has come to admit that America's current retirement policies are failing. Only then can a new comprehensive retirement policy be developed."); *see, e.g.*, Dilley, *supra* note 141, at 1179 (discussing various proposals for new retirement programs); *see also* Kelley, *supra* note 17, at 240-245 (describing three proposals for the Social Security system).

148. *See* Maria O'Brien Hylton, *Evaluating the Case for Social Security Reform: Elderly Poverty, Paternalism and Private Pensions,* 64 BROOK. L. REV. 749, 754 (1998) (stating that despite criticism of the Social Security system, it has reduced the elderly poverty level dramatically); *see also* Forman, *supra* note 135, at 104 (stating that the triumph of the Social Security system is that it has diminished poverty rates in the elderly). *See generally* Nickles, *supra* note 2, at 77-78 ("Social Security has been a highly successful program, helping to significantly reduce the percentage of seniors living in poverty during the past twenty-five years.").

149. *See* Judith Feder, *Health Care of the Disadvantaged: The Elderly*, 15 J. HEALTH POL. POL'Y & L. 259, 259 (1990) (the elderly are advantaged because they are the recipients of Medicare); *see generally* George P. Smith, II, *Patient Dumping: Implications for the Elderly*, 6 ELDER L.J. 165, 174 (1998) ("Ninety-six percent of elderly Americans are covered by the federal Medicare program."). *See generally* Peter J. Ferrara, *Medicare and the Private Sector*, 6 YALE L. & POL'Y REV. 61, 61 (1988) (explaining that Medicare was enacted to provide medical care coverage and hospital coverage for persons 65 and over who are eligible and receive Social Security benefits).

150. *See* Robert Pear, *White House Challenges Drug Companies for Charging Higher Prices to the Uninsured*, N.Y. TIMES, April 10, 2000, at A15 (noting that about 37% of beneficiaries 85 and older lack coverage); *see also* Robert P. Hey, *Medicare: Balancing health care quality and hospital* profits, THE CHRISTIAN SCI. MONITOR, June 6, 1986, at 5 (noting that Medicare covers about 45 percent of the total medical costs of long-term care for older Americans). *See generally* Social Security Act, 42 U.S.C.A. § 426 *et seq.* (2000) (discussing elderly entitlement to benefits); Harry S. Margolis, *A Proposal for Reform of Medicaid Rules Governing Coverage of Nursing Home Care,* 9 STAN. L. & POL'Y REV. 303, 304 (1998) (noting that Medicare is a major source of nursing home funding by the elderly).

151. *See* Harry S. Margolis, *supra* note 150 (discussing the sky-rocketing nursing home costs and the depletion of the life savings of the elderly); *see also* Katherine R. Levit, et al., *National Health Care Expenditures 1995*, HEALTH CARE FINANCING REVIEW, September 1996, at 175 (illustrating the rising costs of medical care for the elderly); Robert Pear, *Study Issued in Bid to Halt Medicare Cut*, N.Y. TIMES, March 5, 1998, at A24 (noting that poor Medicare beneficiaries who do not qualify for Medicaid, spend about one-half of their income on health care).

tion of poverty.[152] Wealth is then positively correlated with health for those 70 and over.[153] Those in excellent health have more than three times the wealth of those in poor health.[154] Except for the top half of wage earners, social security represents the bulk of income for most older Americans.[155] Social Security is distinguishable from welfare because "it is the fruit of a lifetime of joint or individual labor regardless of the redistributive aspects of any state-run pension system."[156]

Moreover, pensions are economically efficient for employers because they are an important way to manage a labor force.[157] In the private sector, they are recruitment tools and provide

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152. *See* Michael J. Graetz, *The Troubled Marriage of Retirement Security Tax and Tax Policies*, 135 U. PA. L. REV. 851, 873 (1987) (discussing the role that social security benefits should play in lessening the prospects of poverty among the elderly); *see also* David Cay Johnston, *A Growing Gap Between Savers and Save Nots*, N.Y. TIMES, March 21, 1999, § 15 (Retirement) at 12 (discussing the fact that social security pensions have turned retirement into an "era of comfort for many and golden years for more than a few"). *See generally* Robert Pear, *Is Poverty a Condition or is it a Definition?*, N.Y. TIMES, Sept. 1, 1985, § 4, at 4 (noting that poverty is measured based on cash income such as pensions).

153. *See* Robert L. Clark & Joseph F. Quinn, *The Economic Status of the Elderly*, NATIONAL ACADEMY OF SOCIAL INSURANCE, MEDICARE BRIEF NO. 4 (visited May 3, 1999) <http://www.nasi.org/Medicare/Briefs/medbr4.htm> (noting that health is positively correlated with wealth for those aged 70 and over). *See generally* Leonard J. Long, *Optimum Poverty, Character, and the Non-relevance of Poverty Law*, 47 RUTGERS L. REV. 693, 705 (1995) (discussing the relationship between poverty and health dangers); Steve A. Rabin, *A Private Sector View Of Health, Surveillance, And Communities Of Color; Papers From The CDC-ATSDR Workshop On The Use Of Race And Ethnicity In Public Health Surveillance; Centers For Disease Control And Prevention agency For Toxic Substances And Disease Registry*; 109 PUB. HEALTH REPORTS 42, 42 (1994) (noting that poverty is as equally determinant of health as race).

154. *See* Thomas S. Ulen, *Book Review Essay: The Law and Economics of the Elderly*, 4 ELDER L. J. 99, 108 (1996) (explaining the existence of a correlation between socio-economic status and the overall health and longevity of the elderly); *see also* RICHARD POSNER, AGING AND OLD AGE 265 (1995) (noting that elderly pay approximately one-third of their medical expenses); Clark & Quinn, *supra* note 152 (discussing the correlation between health and wealth amongst the elderly).

155. *See* Spencer Rich, *Social Security Benefits Going Up; 'Entitlements' Escalating*, THE WASHINGTON POST, Oct. 19, 1990, at A1 (noting that benefit checks will increase by 5.4 percent and that it will effect approximately 40 million recipients); *see also* Charlotte Grimes, *A Middle Class Hooked on Handouts; Americans Say They Don't Want Government But They Do*, ST. LOUIS POST-DISPATCH, June 23, 1996, at 1B ("Social Security is the major source of income for 40 percent of older Americans."). *See generally* Gene Green, *Must Keep Safety Net in Social Security Reform Effort*, THE HOUS.CHRONICLE, Apr. 1, 1999, at A29 (noting that social security benefits are a major source of income for nearly two-thirds of the elderly population).

156. *See* Nancy J. Altman, *The Reconciliation of Retirement Security and Tax Policies: A Response to Professor Graetz*, 136 U. PA. L. REV. 1419, 1446 (1988) (discussing that social security can be distinguished from social welfare programs); *see also* Simon, *supra* note 2, at 1453-54 ("Public assistance occupied a lower normative status than social insurance"). *See generally* Burke & McCouch, *supra* note 25, at 1213 ("The formal linkage between wages, contributions and benefits distinguishes social security from pure social welfare programs and reinforces the widely-held perception of social security benefits as an "earned right").

157. *See* Schmall, *supra* note 2, at 287 (noting that various economists agree that it is highly unlikely that employers would use pensions if they did not "lower labor costs in some way"); *see also* DAVID A. WISE, PENSIONS, LABOR, AND INDIVIDUAL CHOICE 9 (1985) (discussing the positive impact that a reduction in employee turnover will have on the economics of a business); Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1118 (1988) (pointing out that the provision of pensions and other forms of benefits reduce the amount of employee turnover and thus the savings incurred by the employer will ultimately be passed on to the employee).

incentives to earn as much as one can.[158] Both public and private pensions allow for the necessary departure of superannuated employees because few people would have the inclination, physical need or the financial wherewithal to leave paid work without them.[159] Pensions, however, are not gratuities and government or private deferred benefits are not largesse.[160] Pensions are actually insurance, typically bought and paid for by the worker through the payment of substantial taxes on any earned income.[161] In the United States, Social Security represents a modest and probably conservative substitute for governmental guarantees of lifetime employment, universal health care, adequate housing and subsidies for other of life's necessities.[162] It is the money we contributed from our earlier labor and saved even though the savings were mandated by the state.[163]

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158. *See* Schmall, *supra* note 2, at 287 (noting that various economists agree that it is highly unlikely that employers would use pensions if they did not lower labor costs in some way); *see also* POSNER, *supra* note 154, at 301 (discussing the incentives that employees have for staying with an employer for a significant length of time); Fischel & Langbein, *supra* note 157 (pointing out that the provision of pensions and other forms of benefits reduce the amount of employee turnover and thus the savings incurred by the employer will ultimately be passed on to the employee).

159. *See* WISE, *supra* note 157, at 9 (noting that benefits deter early retirement and switching jobs at very young ages); *see also* Schmall, *supra* note 2, at 277 (discussing an employee's ability and willingness to work until she elects to retire and also how subsequent pension payments that will come as a result of the employee's sacrifice during her working years). *See generally* Harry Anderson & Mary Hager, *The Crisis in Social Security*, NEWSWEEK, June 1, 1981, at 25 (noting that Americans are entering the work force later and leaving it earlier, along with some elderly who are being forced out).

160. *See* JILL QUADAGNO, TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN WELFARE STATE 92 (1988) (noting that some courts began to view pensions as contractual agreements); *see also* Dilley, *supra* note 141, at 1115 (noting that some began to view a pension as a contractual agreement). *See generally FPR: Best Advice: To Cap It All,* MONEY MARKETING, Oct. 31, 1999, at 44 (referring to a pension as a contractual agreement).

161. *See* Schmall, *supra* note 2, at 287-88 (noting the fact that economists explain that benefits provided by a firm are typically "paid for" by the employee, since those costs reduce her salary concomitantly); *see also* POSNER, *supra* note 154, at 141 ("[T]he receipt of social security retirement benefits is . . . contingent on the recipient not having significant income from work. The effect is that of a heavy tax on the income of those persons eligible for those benefits until they reach seventy."); Fischel & Langbein, *supra* note 157, at 1117 (discussing employee contributions to pension plans and how that results in lower wages for the employee while in the work force).

162. *See* Kenneth Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259, 262-63 (1994) (making observations about unemployment insurance which was a moderated compromise among the government, workers with more radical demands, and employers who would have preferred to pay nothing); Lester B. Snyder & Marianne Gallegos, *Redefining the Role of Federal Income Tax: Taking the Tax Law "Privilege" Through the Flat Tax and Other Consumption Taxes,* 13 AM. J. TAX POL'Y 1, 47-48 (1996) (noting that current law requires employers to pay half of the social security tax). *See generally* Michael B. Rappaport, *The Private Provision of Unemployment Insurance*, 1992 WIS. L. REV. 61, 68 (1992) (discussing the implications of a lack of unemployment insurance until the establishment of Social Security); Bruce Wolk, *Discrimination Rules For Qualified Retirement Plans: Goods Intentions Confront Economic Reality*, 70 VA. L. REV. 419, 466 (1984) (discussing that Congress has accepted the fact that some degree of paternalism is required in order that long term interests are adequately accounted for).

163. *See* Hylton, *supra* note 148, at 760 ("Social security is clearly paternalistic. . . . Paternalism, in this context, is seen as a substantial infringement of liberty—the forced taking of earned dollars and the subsequent placement of that money in what must surely be judged a low risk/low return investment."); *see also* Weiss, *supra* note 27 ("[E]veryone who is subject to Social Security withholding knows that America has a policy of forced savings and must suspect that that policy has a paternalistic objective"). *See generally* POSNER, *supra* note 154, at 263 (discussing the reasoning behind the compulsory nature of the social security system).

Be Wary of Pension "Reform"

Privatizing social security pensions systems is promoted as the best way to guarantee funding and provide a better yield on a worker's contributions.[164] Reforms hail the creation of self-directed private defined contribution plans that guarantee a greater return through investment in private securities and debentures.[165] The proposals include both mandatory contributions (usually through a government-sponsored plan), voluntary savings and investment.[166] Because of the aging of the world's population, and the diminishing ratio of young employed workers to older retired persons, there seems to be an international understanding that 'Pay As You Go' systems or total government subsidies "will require either that taxes be substantially increased or pension benefits correspondingly reduced.[167] The United Kingdom, like the United States, has a plethora of commissions studying the problem and each commission seems to be calling for a "new public-private partnership building on the best features of state and private provisions."[168] One American policy group noted that a "number of companies have adopted an

164. *See* Paskin, *supra* note 7, at 2209 (stating that in several Latin American countries, programs which privatized social security have caused a boom in economic development and have allowed workers to receive pensions proportionate to their contributions). *But see* Solomon & Barrow, *supra* note 14 (describing the problems with the privatization of pension plans with respect to administration, fraud and abuse, and management of the transition form public to private organization). *See generally* Nickles, *supra* note 2 (proposing that a privatized system of pension benefits would reduce the problem of unfunded federal retirement and would increase the rate of return on workers' retirement investments).

165. *See* Moore, *supra* note 14 (explaining a common system within privatized pension plans where workers invest portions of their social security contributions to private funds and expect the benefits to correlate to the amount of those contributions as well as the earnings and losses on investments); *see also* Morris D. Bernstein, *Social Security Reform and the Growth of Inequality* 8 KAN. J.L. & PUB. POL'Y 57, 57 (1999) (asserting that some plans include individual contribution to private securities because such investments are said to improve returns for current owners and allow for more resources for the needy). *See generally* Roberta S. Karmel, *Regulatory Implication of Individual Management of Pension Fund: The Challenge to Financial Regulators Posed by Social Security Privatization*, 64 BROOK. L. REV. 1043, 1043-44 (1998) (noting that, while plans for social security include privatization in the form of investment in private securities, those investments may be subject to federal regulation).

166. *See* Cutler, *supra* note 15 (Peter A. Diamond et al. eds.) (1996) (concluding that retirees today need to depend upon Social Security, private pensions and private savings); Kreiswirth, *supra* note 16, at 394 (identifying "three pillars of support for the elderly" as Social Security, employer-provided pensions, and individual savings). *See generally* Norton, *supra* note 6 ("The current or planned public pension system reforms generally envision new distributions of duties and responsibilities between the respective national government and its citizens as part of an integrated economic and social approach to the 'social safety net' system").

167. *See* Walker, *supra* note 110, at 872 (discussing the fact that many countries will be facing a pension funding crisis which will result in either a substantial tax increase or a reduction in pension benefits); *see also* Lynch, *supra* note 7, at 372 (stating that the United States' Social Security program "initially established a typical pay-as-you-go scheme in which the tax revenue each year from employers and employees pays the next year's obligations. Thus, with an aging population, seemingly either payroll taxes would need to be increased or benefits decreased to keep the system solvent."). *See generally* Norton, *supra* note 6, at 820 (1998) (noting that countries with aging populations face a funding crisis that may force them to restrict the amount of benefits extended or to increase the age of public pension eligibility).

168. *See* John Vann, *Pensions & Investment: Major Pension Schemes,* 1137 N. L.J. 1, 2 (1987) ("[I]n 1983 the Centre for Policy Studies advocated personal pensions for all. This kindled the government's interest. The result was that the government established a wide ranging inquiry into state and private retirement provision."); Walker, *supra* note 110 (discussing the principal features of the new approach); *see also* David A. Chatterton, *The Proposed Reform of the Social Security in the 1980-A Critical Assessment,* 136 NEW L.J. 810, 810 (1986) (discussing the reform of pensions).

organizational philosophy that emphasizes a movement away from paternalism and toward individual responsibility, creating a new 'social contract' between employers and employees."[169] But nearly half of all full-time workers in the U.S. receive private pensions (as opposed to social security) and that number is considerably less than one-half when the highly unionized public sector is not counted.[170] The "Virtue of Selfishness" seems to have permeated the private workplace despite significant tax benefits and subsidies (including termination insurance) provided to private employers as an incentive for maintaining pension plans for their workers.[171] The U.S. tax expenditure, or loss of federal tax revenues due to the preferential treatment of pension plans in the tax code, was $69.6 billion in 1996.[172] Furthermore, private pension plans have never been required to provide for wealth redistribution in any form.[173] Indeed, although pension contributions have been tax deductions for employers and tax deferrals for employees since

169. *See* John M. Conley & William M. O'Barr, *The Culture of Capital: An Anthropological Investigation of Institutional Investment,* 70 N.C.L. REV. 823, 823 (1992) (discussing concerns about the economic influence of institutional investors generally and pension funds in particular); Colleen E. Medly, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality,* 49 EMORY L.J. 1, 14 (2000) ("[I]n the world of individual responsibility model, retirement income security will be determined by the decisions of the plan participants themselves. It is crucial to know whether participants are making retirement planning decisions that are likely to result in the accumulation of adequate retirement income."). *But see* Ken J. Moyle, *A Cultural Exchange: Singapore & the U.S. Can Learn from Each Other in Restructuring Social Security Plans,* 6 PAC. RIM. L. & POL'Y 449, 468 (1997) (discussing how Social Security decreases individual responsibility.)

170. *See* Alicia H. Munnell, *ERISA-The First Decade: Was the Legislation Consistent with Other National, Goals?,* 19 U. MICH. J.L. REF. 51, 58 (1985) ("[I]RA provisions violate the basic goal of tax policy in the pensions area to encourage pension provisions that ensure employees at all levels of compensation relatively comparable retirement protection."); Mark J. Roe, *The Modern Corporation & Private Pensions,* 41 UCLA L. REV. 75, 75 (1993) ("[I]n other industrialized nations, social security plays a much larger role in old age pensions than it does in America."); *see also* Schmall, *supra* note 2, at 298 ("[P]ensions will continue to provide a significant source of income to retirees, even though only about half of the working population participate in private pension plans.").

171. *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1011, *et seq.* (1997) (enacted to protect the interests of participants in voluntarily adopted retirement and other employee welfare plans); Bruce Wolk, *Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality,* 70 VA. L. REV. 419, 420-21 (1984) (discussing the creation of subsidy for employers as an incentive to set up pension coverage); *see also* Lee G. Knight, Ray A. Knight & Wayne T. Nix, *An Application of the Analytic Hierarchy Process To Tax Policy Decisions: The Termination of Overfunded Pension Plans,* 12 AM. J. TAX POL'Y 101, 101 (1995) (discussing a possible solution to overfunded pension plans).

172. *See* Alicia H. Munnell, *The First Decade: Was the Legislation Consistent with Other National Goods?,* 19 U. MICH. J.L. REF. 51, 62 (1985) ("[T]ax concessions for pension plans represent a loss to the Treasury of significant revenues."). *See generally* Austin, *supra* note 11 (discussing Canada's proposals for reformation of tax-assisted retirement savings); Forman, *supra* note 22, at 302 (suggesting that countries should adopt taxation plans under which pension fund income is exempt from taxation, pension benefit earnings are fully taxable, and employer contributions to private pensions are deductible by employers).

173. *See* Burke & McCouch, *supra* note 25, at 1238-39 (1997) ("[R]educing the amount of benefits based on the recipient's income from other sources might encourage relatively well off retirees to spend down or give away accumulated wealth in order to become eligible for benefits."); Dilley, *supra* note 141, at 1084 (discussing how Social Security attempts to bridge the gap in distribution of retirement benefits, but fails to do so); *see also See* Paskin, *supra* note 7, at 2199-222 (discussing unequal distribution of wealth in the U.S.).

1914, there had been no provisions requiring non-discrimination between highly compensated managers and rank-and-file workers for several decades.[174]

Even those employers who offer pension benefits in the non-union sector offer defined contribution plans rather than defined benefit plans like Social Security.[175] In a majority of these cases, there are no or only minimal matching contributions from employers.[176] The present U.S. government plan requires a fifty-fifty match, with total contributions of 15%.[177] Private plans, however, with self-directed contributions are light years away from the present government system.[178]

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174. *See* Dana M. Muir, *Contemporary Social Policy Analysis and Employment Benefits Programs: Boomers, Benefits and Bargains,* 54 WASH. & LEE L. REV. 1351, 1362-63 (1997) (explaining why Congress added a provision to the Internal Revenue Code in 1942 which served to limit a benefit plan's ability to discriminate in providing benefits). *But see* Joseph Bankman, *Tax Policy & Retirement Incentive: Are Pension Plan Anti-Discrimination Provisions Desirable,* 55 U. CHI. L. REV. 790, 790 (1988) ("[F]avorable tax treatment is conditioned upon compliance with certain anti-discrimination rules."). *See generally* Labor, 29 U.S.C. §186 (2000) (providing that the legislative purposes of the Labor Management Relations Act of 1947 were to insure honest representation of employees in the benefit bargaining process, to remove dishonesty in the administration of employee benefits, and to prevent corruption).

175. *See* Forman, *supra* note 121, at 192 (stating that only 40% of private sector employees have defined benefit plans, whereas 91% of state and local government employees have defined benefit plans); *see also* John R. Keville, *Retire At Your Own Risk: ERISA's Return on Investment?,* 68 ST. JOHN'S L. REV. 527, 534 (1994) (asserting that there is currently a trend toward defined contribution plans, whereas the number of defined-contribution plans has decreased); Yolanda Sayles, *ERISA Section 404(c) Plan Fees and Expenses: Is There an Affirmative Fiduciary Duty to Disclose?,* 25 WM. MITCHELL L. REV. 1461, 1464-65 (1999) (discussing the fact that the number of defined contribution plans has substantially increased since the enactment of ERISA).

176. *See* Forman, *supra* note 121, at 194 (stating that an employer's pension funding contribution is satisfied when the employer makes the necessary contributions to the individual accounts); Richard J. Kovach, *A Critique of Sample-Yet Another Tax-Favored Retirement Plan,* 32 N. ENG. L. REV. 401, 403 (1998) (discussing how Simple plans require employers to make matching contributions of up to 3% of the compensation of employees who make elective deferrals). *Compare* Norman P. Stein, *Simplification and IRC § 415,* 2 FLA. TAX REV. 69, 72 (1994) (describing Section 415 of the Internal Revenue Code as providing a maximum amount of employer contribution to pension funds: "The defined contribution limit provides that the annual additions to an employee's accounts in all defined contribution plans maintained by an employer may not exceed the lesser of $30,000 a year or 25% of the employee's compensation").

177. *See* Munnell, *supra* note 170, at 57 (indicating that ERISA legislation provided for the "individual retirement account" (IRA)); Schiller & Weiss, *Pensions & Wages: A Test for Equalizing Differences,* 62 REV. ECON. & STATISTICS 529, 529 (1980) ("[F]or evidence that workers trade off current wages for future retirement benefits."); *see also* Kaplan, *supra* note, at 202 ("[A] person's contributions into Social Security are proportional to one's earnings, but one's benefits are not.").

178. *See* Forman, *supra* note 22, at 306-32 ("[I]n the U.S. the deduction allowed to an employment for contributions to a qualified defined contribution plan may not exceed 15% of aggregate compensation."); Leigh Allyson Wolfe, *Is Your Pension Safe? Call For Reform of the Pension Benefit Guaranty Corporation and Protection of Pension Benefits*, 24 SW. U. L. REV. 145, 152 (1994) (stating that "as a result of recent increases in pension plan participation, the assets of private pension plans have exploded, for example from 1983 to 1992, private pension assets have increased from approximately $900 billion to $2.3 trillion."); *see also* Michael Anzick, *Demographic and Employment Shifts: Implications for Benefits and Economic Security,* EBRI Issue Brief, Aug. 1993, at 1 (noting that employer-sponsoring pension plans will become dramatically more important in the next several decades when the elderly population is expected to reach 20.2% of the population); Roe, *supra* note, at 113 (discussing the rise of private pensions); Celia Silverman, *Private Trusted Pension Assets Reach $2.5 Trillion by The End of the Third Quarter 1993*, 15 EBRI NOTES, Feb. 1994, at 5 ("As of the end of the third quarter of 1993, single employer defined benefit plan assets were approximately $1.1 trillion or 45.5% of total private pension assets.").

Reform of this kind will clearly add to the problems of women workers. Not only do they have lower earnings, interrupted careers and far fewer private pensions, women also have less experience in investment.[179] They tend to invest more conservatively and, like many of their counterparts, who are presented with a self-managed pension plan option for the first time, they have little experience in making investment decisions.[180] The market is complex and cannot be expected to guarantee old-age security on its own.[181] Even more conservative economists have recognized "how poorly the poor will fare" if the market fails.[182] The most that can be said is "that the sum weight of the arguments, in light of the multiple miseries faced by the elderly poor, not only support a compulsory system of retirement savings but one that puts, at most, a

179. *See* Moss, *supra* note 8, at 170-71 (hypothesizing that "because women tend to be paid less on the average than male workers, change jobs frequently, and take several years off to work part-time because of family responsibilities, they are less likely to receive pensions; when they do receive pensions, their benefits are typically smaller than those of men"); Marzari, *supra* note 4, at 39-40 (suggesting that the pension programs in Canada demonstrate similar problems for female workers stating that "women who do have access to private employer plans in their own right, many are still at a disadvantage within the wage earning model because of women's lower wages and their decreased and interrupted participation in the paid work force."); *see also* Rebecca E. Perrine Wade, *The Face of Social Security in the Twenty-First Century: An Analysis of the Reform Proposals Offered by the Social Security Advisory Council,* 6 ELDER L.J. 115, 142 (1998) (claiming that females who earn wages under $28,000 are at risk under certain pension reform proposals because they lack experience investing and tend to take a conservative approach to investing which results in lower rates of return).

180. *See* Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 998-99 (1993) (noting evidence suggesting that women are generally more risk averse than men in financial decision making); Colleen E. Medill, *The Individual Responsibility Model of Retirement Today: Conforming ERISA Policy to Reality,* 49 EMORY L.J. 1, 22 (2000) (noting that a study found that women were more likely than male participants to invest in the conservative fixed income funds and less likely to invest in diversified equities); *see also* RICHARD P. HINZ ET AL., ARE WOMEN MORE CONSERVATIVE INVESTORS? GENDER DIFFERENCES IN PARTICIPANT-DIRECTED PENSION INVESTMENTS, IN POSITIONING PENSIONS FOR THE TWENTY-FIRST CENTURY 91, 99-100 (Michael S. Gordon et al. eds., 1997) (analyzing data on participants in the federal Thrift Savings Plan and concluding that women appear to invest their pension assets more conservatively than men).

181. *See* Karen C. Burke & Grayson M.P. McCouch, *Perspectives on Social Security Reform,* 4 FLA. TAX REV. 417, 423 (1999) (raising another concern of private accounts as the "issue of market risk," to the extent that "individual participants had a wide range of investment choices, many of whom would likely end up with inadequate balances in their private accounts at retirement, due to poor investment decisions or simple bad luck."); *see also* Stephen C. Goss, *Measuring Solvency in the Social Security System, in* PROSPECTS FOR SOCIAL SECURITY REFORM 16, 34 (Olivia S. Mitchell, Robert J. Myers & Howard Young eds., 1999) (noting that unfunded liability already stands at around $9 trillion). *See generally* FRAMING THE SOCIAL SECURITY DEBATE: VALUES, POLITICS AND ECONOMICS (R. Douglas Arnold et al. eds., 1998) (for a series of provocative and well-researched articles on the privatization debate and investments).

182. *See* NICHOLAS A. ASHFORD & CHARLES C. CALDART, TECHNOLOGY, LAW, AND THE WORKING ENVIRONMENT, 240-41 (rev. ed., Image Books 1996) (noting that market failures lead the poor to take jobs with the greatest risks); Paul H. Brietzke, *Urban Development and Human Development*, 25 IND. L. REV. 741, 763 (1992) (discussing poverty as a market failure caused by barriers to entry, market fragmentation and uncompetitive behavior); Burke & Grayson, *supra* note 423, at 422 (noting that the poor may suffer the most from market failure: "Under a system of private accounts, special safeguards would be necessary to prevent an even higher poverty rate among elderly widows.").

relatively small portion of those savings at risk."[183] Moreover, problems arise when asking the poor and underpaid to make their own investments. Those with the economic wherewithal will no longer be required to put their retirement savings into the commonwealth fund; instead the high wage earners and those with disposable cash will guarantee the effect of adverse selection by investing in other vehicles.[184] Privatization, which in its most extreme version, would do away entirely with state programs and substitute a system of fully-funded individual accounts is intuitively attractive to younger workers because they could arguably get a higher rate of return on their contributions than they would get under a social security system.[185] Since there is a larger percentage of women working all the time and, in many countries, an increase in the ranks of professional positions, *some* women would clearly do better with private investment.[186] There is no doubt that the funding problems of all state-sponsored pension systems must be addressed, but the move toward privatization would be disastrous for most of the world's women.[187] Even if some combination of public and private supplemental pensions were to be

183. *See* Hylton, *supra* note 148, at 762 (discussing that in light of the risks that elderly retirees face, a compulsory program of saving for retirement which put relatively little of those savings at risk appears to be in order); s*ee also* Bankman, *supra* note 174, at 821 (considering "in light of the misery faced by the elderly poor" that the cumulative weight of evidence might "plausibly support a regimen of forced saving"); Moore, *supra* note 14, 159 (noting that paternalism suggests that the government should compel people "to participate in social security to protect themselves from starvation, misery, poverty, and regret.").

184. *See* Hylton, *supra* note 148, at 762-63 (noting that under private pension planning, the investment choices made by individuals can cause two workers with similar employment histories to have radically different retirement savings in the end); NANCY VAN GELDER, DEFINED CONTRIBUTION UPSURGE SHIFTS SPONSOR OBLIGATION, PENSION WORLD, July 1993, at 23, 25 (noting that trend toward defined-contribution plans shifts responsibility for investment choices from plan sponsors to participants); *see also* Curtis Vosti, *Panacea or Problem Child; Questions Surround Popular Defined Contribution Plans,* PENSIONS & INVESTMENTS, Apr. 1, 1991, at 23 (noting that employees are forced to become more sophisticated about investing since their investment decisions will determine retirement income).

185. *See* Moore, *supra* note 46, at 977-78 (providing that the partial privatization of social security benefits averaged 7% long term rate of return over the past 100 years, and the foreseeable rate will likely level out to 1-2%); *see also* John Geanakopolos et al., *Would a Privatized Social Security System Really Pay a Higher Rate of Return?,* National Bureau of Economic Research Working Paper No. 98-6, 8-13 (1998) (explaining why projected rates of return on social security are so low); *see, e.g.,* Laurence J. Kotlikoff, *Privatization of Social Security: How it Works and Why it Matters,* NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER NO. 5330 (1995) (discussing the future solvency of social security).

186. *See* Advisory Council on Social Security, Rep. of the 1994-96, ADVISORY COUNCIL ON SOCIAL SECURITY, 122-24 (1997) (providing that some of the reporters argue that concerns about the impact on women reflect an "increasingly outdated view of women" as "dependent in their husbands for their means of support in old age."); Amity Shlaes, *The Social Security System and Women Today,* 16 N.Y.L. SCH. J. HUM. RTS. 217, 234-35 (1999) (discussing that private investment decisions are of greater importance for women than for men due to the fact that women live longer than men and earn considerably less); Kimberly Medlock Wigger, *Ethiopia: A Dichotomy of Despair and Hope*, 5 TULSA J. COMP. & INT'L L. 389, 409 (1998) (emphasizing the need for women entrepreneurs to support innovative investment practices that expand opportunities for women and that maximize employment opportunities for the poor).

187. *See* Ruth Ben-Israel, *Social Security in the Year 2000: Potentialities and Problems*, 16 COMP. LAB. L. 139, 158 (1995) (suggesting that women should be recognized with regard to pensions during their time outside of the work force); O'Connell, *supra* note 14 (discussing the impact of women taking 4.5 the amount of time away from work as men and its negative effects on women's pensions at retirement); *see also* Larry Polivka, *In Florida the Future is Now: Aging Issues and Policies in the 1990's*, 18 FLA. ST. U. L. REV. 401, 428 (1991) (noting how the structure of pensions penalize women for time away from work and suggesting that there should be some attempt to provide women with credit for their time away from the work force).

adopted, social security should remain a "floor of protection on which private-sector economic security can be built."[188]

Conclusion

Women who do any work for pay must be counted as workers. Their status should earn them pension benefits in any government-sponsored plan. Their marginalization should end; and their benefits accrued as employees, not dependent on the state. They cannot afford to be divested by a replacement of a system involving redistribution with a fully funded private investment scheme, and they must not be stereotyped as unproductive and perpetually on the dole.

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188. *See* ROBERT J. MYERS, SOCIAL SECURITY 231 (4th ed. 1993) ("There are many advocates of the fully-funded, privately managed pension scheme created by Chile, and followed in many South and Central American countries . . . its success is disputed, and its applicability to women in general and poor, underpaid women specifically, would be disastrous"); Monika Queisser, *Pension Reform: Lessons from Latin America*, 5 NAFTA: L. & BUS. REV. AM. 544, 558 (1999) (discussing how the increasing share of noncontributing affiliates jeopardizes the effectiveness of the pension system in providing old age income security). *But see* Campana, *supra* note 21, at 389 (discussing whether privatization can work as a plan for social security reform in an industrial nation with a mature economy); AFL-CIO, *What's Wrong with Individual Investment Accounts?* <http://www.aflcio.org/socialsecurity/inv_acct.htm> (visited July 12, 2000) (noting that privatization would replace guaranteed benefits with benefits dependent on workers' luck and skill as investors and the ups and downs of the stock market).

The Business Judgment Rule and Shareholder Derivative Suits in Japan: A Comparison with Those in the United States

By Kenji Utsumi*

I. Introduction

Courts in Japan and the United States affirm a rule to shield directors from liability for unprofitable or even harmful corporate transactions, as long as the transactions were made under certain conditions. That is the so-called "business judgment rule."[1] In both countries, directors of a company have fiduciary relationships with the company.[2] Under this relationship, directors owe to the company the duty of care of an ordinary prudent person. In other words, a director must discharge his duties in good faith and with the diligence, care and skill that an ordinarily prudent person would exercise in similar circumstances.[3] If the directors of a company violate this duty of care, and the company is damaged by the violation, the directors may become personally liable to compensate for the damages.[4] However, if directors bear any and all risk of the company resulting from unprofitable or harmful corporate transactions, it leads directors to overly conservative and risk averse behavior. It may prevent a company from taking certain risks, which are necessary to expand its business opportunity and attain continuous growth. In addition, judges do not necessarily have deep knowledge of a company's business. Excessive interventions by courts may result in unfair decisions. The courts should not second-guess the directors' decisions, if they were based on a reasonable judgment.[5]

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1. *See* In Re Fleet/Norstar Securities Litigation, 935 F. Supp. 99, 115 (D. R.I. July 31,1996) (citing Resolution Trust Corp. v. Gladstone, 895 F. Supp. 356, 368 (D. Mass. July 18, 1995)) (stating that the Business Judgment Rule shields directors and officers from liability for corporate decisions made in good faith and after due care).

2. *See* Frances T. v. Village Green Owners Association, 42 Cal. 3d 490, 505 (Cal. 1986) (stating that "directors individually owe a duty of care, independent of the corporate entity's own duty, to refrain from acting in a manner that creates an unreasonable risk of personal injury to third parties.").

3. *See* Smith v. Van Gorkom, 488 A.2d 858, 872-73 (Del. 1985) (stating that a "directors duty to exercise an informed business judgment is in the nature of a duty of care.").

4. *See* Hoye v. Meek, 795 F.2d 893, 896 (10th Cir. 1986) (stating that "18 Okla. Stat. Ann. §1.34(b) codifying a director's duty of care sets forth an objective standard of an ordinarily prudent man").

5. *See* Shlensky v. Wrigley, 95 Ill. App. 2d 173, 183, 237 N.E.2d 776, 781 (App. Ct. 1968) (stating that "directors are elected for their business capabilities and judgment and the courts cannot require them to forego their judgment because of the decisions of directors of other companies").

* **Associate, Nagashima, Ohno & Tsunematsu, Tokyo, Japan. LL.B., University of Tokyo (Japan); Graduate, The Legal Training and Research Insititue of the Supreme Court of Japan (Wako-shi, Japan); LL.M., University of Pennsylvania Law School-Philadelphia, May 1999.**

Based on these reasons, courts in Japan as well as those in the United States affirm the so-called business judgment rule.[6] Courts always consider whether or not a transaction is an acceptable risk for actual businesses of the company. In short, contents and applications of the business judgment rule are affected by business practices of a country in which the rule works. It is noteworthy to mention that the business judgment rule is interpreted differently in the two countries due to differences in business practices, since these countries have different business practices to which the rule should be applied. Japanese courts apply the rule more strictly than in the United States in certain cases, and less strictly in others.[7] The difference depends on the business customs in each country of the various actions taken by directors. Such differences are discussed generally in Part III and more specifically in Part IV.

In Japan, a director's duty of care is mainly brought as a cause of action in cases of shareholder derivative suits. The legal practice of and issues in the shareholder derivative suits, as a procedural aspect of a director's duty of care will be discussed in Part II. Then, the business judgment rule in general will be referred to in Part III and how courts apply this rule to each type of case will be analyzed in Part IV. The similarities and differences between the United States and Japan will be discussed throughout this paper.

II. Shareholder Derivative Suits in Japan

This section will address the recent reduction in court costs for shareholder derivative suits in Japan and its effect on the number of shareholder derivative suits. In addition, this section will discuss several important procedural issues in shareholder derivative suits in Japan, for example, requirements for bringing a suit, security for expenses and settlement of the suit.

A. Court Costs and Number of Derivative Suits

Historically, there have been very few shareholders' derivative suits in Japan.[8] This is partly because of the high cost of litigation to the plaintiff.[9] Prior to an amendment of the Commer-

6. *See* Gries Sports Enters., Inc. v. Cleveland Browns Football Co., Inc., 496 N.E.2d 959, 963 (Ohio 1986) (stating that "the business judgment rule has traditionally operated as a shield to protect directors from liability for their decisions.").

7. *See* Gries Sports Enters., Inc. v. Cleveland Browns Football Co., Inc., 496 N.E.2d 959, 963-64 (Ohio 1986) (stating that "a party challenging a board of director's decision bears the burden of rebutting the presumption that the decision was a proper exercise of the business judgment of the board").

8. *See* HIDEYUKI KOBAYASHI, SHAREHOLDER DERIVATIVE SUITS 3 (1996); Mark D. West, *The Pricing of Shareholder Derivative Actions In Japan and The United States*, 88 NW. U. L. REV. 1436, 1437 (1994) (comparing the relatively low use of shareholders' derivative suits in Japan to the United States); Alfred F. Conard, *A Behavioral Analysis of Directors' Liability for Negligence,* 1972 DUKE L.J. 895, 901 (1972) (Wood Report analysis cites alternative methods to evade security for expense statutes). *See generally* J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 604 (1985) (discussing the scarcity of litigation in Japan). *See also* Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and The Rule of Law*, 37 HARV. INT'L L.J. 3, 21 (1996) (same).

9. *See* KOBAYASHI, *supra* note 8, Curtis J. Milhaupt, *Managing the Market: The Ministry of Finance and Securities Regulation in Japan*, 30 STAN. J. INT'L L. 423, 456 n.150 (1996) (noting that the high cost of initiating shareholder derivative suits reduces their utility to shareholders). *See generally* West, *supra* note 8, at 1444-42 (stating that derivative actions are expensive relative to other methods of enforcement); Ramseyer, *supra* note 8, at 608-609 (explaining that Japanese shareholder's avoid litigation because of its high costs).

cial Code of Japan in 1993, the litigation cost were proportionate to the amount of damages sought ("Sliding System"),[10] although the percentage was reduced if the amount of damages was large.[11] For example, under the "Sliding System," the litigation costs for a JPY (Japanese yen) 1 billion claim (approximately US$ 9 million)[12] was JPY 3,117,600 (approximately US$ 28,000), and those for a JPY 10 billion claim (approximately US$ 90 million) was JPY 21,117,600 (approximately US$ 192,000).[13]

The litigation for shareholder derivative suits seeking compensation for extensive losses incurred by a company, could become substantial.[14] Occasionally, a shareholder plaintiff would limit their damages in an effort to avoid the high court cost associated with this type of

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10. *See* Akihiko Kobayashi, *Comments on Revised Law Regarding Civil Litigation Court Costs*, 501 NBL at 9-10 (1992). According to Prosecutor Kobayashi, Japan's sliding system originated from the German system after Japan adopted Germany's civil law system during the mid-19th century. Before the amendment to the Commercial Code of Japan (in 1993) the court costs for civil cases were:

Court Costs System	**Countries**
Sliding System	Japan, Germany, Austria, Netherlands, Switzerland, South Korea
Flat Rate System (fixed amount without regard to the amount of claim)	United States (some states adopt the Sliding System), Great Britain, Italy, Sweden, Australia
Free (no court costs)	France, Spain

See Masayuki Tamura & Toyoki Sakata, *Shareholders Turning to Lawsuits to Assure Executive Accountability Code Change Lowers Filing Charges; 84 Suits Pending*, THE NIKKEI WEEKLY, May 9, 1994, at 1 (noting and explaining the "sliding system" of court fees for shareholders' derivative actions before the 1993 Amendment to the Commercial Code of Japan. *See generally* Shiro Kawashima & Susumu Sakurai, *Shareholder Derivative Litigation in Japan: Law, Practice, and Suggested Reforms*, 33 STAN. J. INT'L L. 9, 19-20 (1997) (discussing the filing fees required to pursue a derivative suit in Japan).

11. *See* Kobayashi, *supra* note 10, at 10; West, *supra* note 8, at 1463 n.120 (noting a decrease in the amount of stamps required for litigated amounts).

12. *See* Tamura & Sakata, *supra* note 10 ("In a case in which the plaintiff sought $47 billion compensation against a securities company, the court ruled that the filing fee should be $235 million."). The currency rate of TTM at Citibank as of September 1, 1999 was approximately 1 US dollar = 110 Japanese yen. This currency rate applies to every currency conversion in this paper. *See also Business Digest*, N.Y. TIMES, Sept. 2, 1999, at C1 (stating that on September 1, 1999 the dollar was equal to 109.05 yen).

13. *See* MINSOHO, art. 3, para 1, p 258; Tamura & Sakata, *supra* note 10 (discussing a case in which the plaintiff sought $47 billion in damages and the court ruled that the filing fee should be $235 million); Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 57 n.69 (2000) (citing a case where the filing fee was $2.4 million); Kawashima & Sakurai, *supra* note 10 (discussing the filing fees required to pursue a derivative suit in Japan).

14. *See* Kobayashi, *supra* note 10, at 10; Kawashima & Sakurai, *supra* note 13, at 19 (discussing the filing fees for derivative actions where a plaintiff seeks a large judgment); Milhaupt & West, *supra* note 13, at 57-58 (discussing the large filing fees for derivative suits). *See generally* West, *supra* note 8, at 1463-65 (explaining filing fees for derivative actions in Japan).

action.[15] Thus, the extensive cost associated with commencing a shareholder's derivative suit may have limited the commencement of such suits.[16] This de facto limitation was criticized in Japan as barring a remedy for shareholders that suffered indirect losses as a result of directors' unreasonable business judgments.[17] Consequently, the Commercial Code of Japan was partly amended in 1993,[18] and the court costs became a nominal fixed amount (JPY 8,200, approxi-

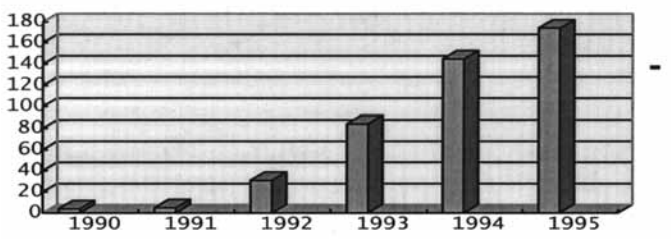
15. *See* Setsu Tatsuta, *Comments on the Supreme Court's Judgment in the Mitsui Mining Case*, 1334 SHOJI HOMUO at 37(1993) (*cited in* Mizuno v. Ariyoshi, 1474 HANREI JIHO 17) (Sup. Ct., Sept. 9, 1993) (discussing in detail in Section IV.A.(b)). The plaintiff filed a claim for JPY 100 million (approximately US$ 900,000), although the total loss of the company reached approximately JPY 3,552 million (approximately US$ 32.3 million). If the plaintiff would have filed a claim for JPY 3,552 million, then the court cost would have been substantially higher. Prof. Tatsuta supposed that the plaintiff limited the size of the claim in order to avoid the huge litigation costs. *Id*. *See also* Kawashima & Sakurai, *supra* note 13 (noting that shareholders lower the claim amount to make commencement of the suit financially possible); West, *supra* note 8, at 1463 n.119 (noting the Mitsui Mining Case and how the plaintiffs lowered the damages to avoid litigation fees).

16. *See* TOSHIRO UEYANAGI, A DISCUSSION ABOUT COURT COSTS, 74 JIYU TO SEIGI at 43-49 (1992); *see also* Kawashima & Sakurai, *supra* note 13, at 19 (noting that filing fees based on the amount of recovery discourages and prohibits shareholders from bringing derivative actions); West, *supra* note 8, at 1463 (1994) (same); Note, *The Regulation of Insider Trading in Japan: Introducing a Private Right of Action*, 73 WASH. U. L.Q. 1399, 1414-16 (1995) (same).

17. *See* UEYANAGI, *supra* note 16; West, *supra* note 8, at 1463 (noting that filing fees based on the amount of recovery discourages and prohibits shareholders from bringing derivative actions); Note, *The Regulation of Insider Trading in Japan: Introducing a Private Right of Action*, *supra* note 16 (same); *see, e.g.*, *Asai v. Iwasaki*, or the Nikko Case, Tokyo Chisai [Tokyo District Court], 797 Hanta 285 (Aug. 11, 1992) (dismissing shareholder derivative suit for failure to pay filing fee of about $2.4 million, illustrating pre-amendment fees as a precluding factor to derivative litigation). *See generally* Kawashima & Sakurai, *supra* note 13 (discussing the various issues surrounding the need for the 1993 amendments to the Commercial Code).

18. *See* SHOHO, art. 267 para 4; *See* Milhaupt, *supra* note 8, at 56 (noting the 1993 amendment to the Commercial Code and its effects on the cost of initiating derivative actions); Tamura & Sakata, *supra* note 10 (noting the 1993 revision of the Commercial Code). *See generally* Kawashima & Sakurai, *supra* note 13, at 18-21 (discussing the 1993 revisions to the Commercial Code).

mately US$ 75).[19] Thereafter, the number of shareholder derivative suits increased significantly.[20] The following chart demonstrates this increase.[21]



The increase in the number of such suits prompted the Japanese courts to examine the requirements of the business judgment rule more strictly.[22] In addition, in the advent of shareholder derivative suits, directors' and officers' ("D & O") liability insurance has gained much appeal in Japan.[23]

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19. *See* MINSOHO, art. 4, para 2; *See* Milhaupt, *supra* note 8, at 56 n.279 (stating that the 1993 amendment to the Commercial Code fixed the filing fee to initiate a derivative suit at 8200 yen); Tamura & Sakata, *supra* note 10 (same). *See generally* Kawashima & Sakurai, *supra* note 10, at 12 (noting the change in the Commercial Code which "lowered and fixed the filing fees").

20. *See* Yoshimitsu Aoyama, etc., *A Discussion on Procedural Issues at Shareholder Derivative Suits*, 1062 JURIST, Mar. 1, 1995, at 8; *See* Milhaupt, *supra* note 8, at 55 ("[T]wenty-seven derivative actions were publicly reported in the forty years between 1950 and 1990. By contrast, at least twenty-three derivative actions were filed from 1991-1994."); Tamura & Sakata, *supra* note 10 (noting "[T]he code's new provisions have shaken up companies large and small. By the end of last year, 84 lawsuits involving corporate managers were pending, according to Supreme Court statistics"); Kawashima & Sakurai, *supra* note 13, at 21 (discussing the increase in shareholder's derivative suits after the 1993 amendments to the Commercial Code).

21. *See* SHIGEKAZU TORIKAI, SHAREHOLDER DERIVATIVE SUITS 16 (1997) (Note for the chart in the cited material: Numbers in or before 1991 are numbers of cases brought to Japanese courts in each year, numbers in or after 1992 are numbers of cases pending at Japanese courts as of the end of each year); Milhaupt, *supra* note 8, at 55 (noting that in Japan, between 1950 and 1990, there were only 27 publicly reported derivative actions while from 1991 to 1994 at least 23 were filed); Curtis J. Milhaupt, *Property Rights In Firms*, 84 VA. L. REV. 1145, 1188 (1998) (noting the increase in derivative suits against managers since 1993). *See generally* Tamura & Sakata, *supra* note 10 (noting that the amendment to the Commercial Code has "shaken up" both large and small companies and by the end of 1993 there were 84 pending lawsuits involving corporate managers.)

22. *See* Aoyama, etc., *supra* note 20; Kawashima & Sakurai, *supra* note 13, at 50-52 (discussing the business judgment rule and how it is being applied in Japan); Milhaupt, *supra* note 8, at 33 n.157 (same).

23. *See* TORIKAI, *supra* note 21, at 235; Tamura & Sakata, *supra* note 10 (noting that the ease with which one may file a derivative suit after the 1993 amendment to the Commercial Code has caused insurance companies to write "hundreds of policies that protect companies and top executives against suits"). *See generally Shareholder Lawsuits Now Easier To File*, THE NIKKEI WEEKLY, Feb. 7, 1994, at Finance 17 (discussing liability insurance for directors).

B. Requirements for Bringing a Suit

(a) Stock Ownership

In the United States, some state corporate laws require that a person bringing a shareholder derivative suit must have owned stock both at the time the claim arose and when the action was commenced.[24] In Japan, Section 267(1) of the Commercial Code provides that the person who brings the suit must have owned stock for six months prior to commencement of the action, but is not required to own stock at the time the claim arose.[25] Thus, in Japan, a shareholder who purchased shares in a company after the claim arose, may bring a shareholder derivative suit.[26] However, many Japanese commentators believe that a shareholder derivative suit should require share ownership when the claim arose.[27]

(b) Demand on Board

In Japan, under Section 267(1) and (2) of the Commercial Code, before a shareholder can bring a derivative suit, they must first demand that the board of directors bring suit against the director who will be the defendant in the shareholders derivative suit.[28] Similar requirements exist in the United States under state laws.[29] However, in some states, a demand for suit is

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24. *See, e.g.*, DEL. Code Ann. tit. 8 § 327 (1974) (stating that, in any derivative suit, it must be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law); Kawashima & Sakurai, *supra* note 13, at 15-16 (explaining the U.S. contemporaneous ownership rule for derivative suits). *See also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 76-79 (1991) (defining and discussing the "contemporaneous ownership rule" in derivative suits);

25. *See* SHOHO, art. 267, para 1; Kawashima & Sakurai, *supra* note 13, at 15-16, 30-32 (discussing the qualifications of one who can bring a derivative suit under the Commercial Code); *see also* West, *supra* note 8, at 1446-48 (same);

26. *See* Aoyama, etc., *supra* note 20, at 14; Mitsue Aizawa, Esq. commented that as a civic movement, a group of lawyers purchased 1,000 shares in a company, after a claim had been published in a newspaper, and subsequently brought a shareholder derivative suit. In many Japanese companies, a shareholder does not have voting rights or the right to bring a shareholder derivative suit if they have shares less than a minimum shareholder-handling unit, which is designated by the company (Tan-i-kabu). *Id.* SHOHO, art. 18. The typical minimum unit is 1,000 shares.); West, *supra* note 8, at 1447-48 (discussing the implications of the "six-month rule" and how it allows one who purchased stock after the claim arose to bring a derivative suit); Kawashima & Sakurai, *supra* note 13, at 31 (same).

27. *See, e.g.,* Ichiro Kawamoto, etc. *A Discussion on Shareholder Derivative Suits*, MIN SHO HO ZASSHI 4, May 15, 1994 at 110-2 (provides an example of such commentary).

28. *See* SHOHO, art. 267, para 1-2; Macey & Miller, *supra* note 24, at 34; West, *supra* note 8, at 1449-50 (explaining the demand provisions of Delaware law for derivative suits); Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements In Class Actions and Derivative Suits*?, 66 TENN. L. REV. 81, 101 (1998) (explaining the demand provisions for derivative suits).

29. *See* ROBERT W. HAMILTON, THE LAW OF CORPORATIONS 472 (1996); Tamar Frankel & Wayne M. Barsky, *The Power Struggle Between Shareholders and Directors: The Demand Requirement in Derivative Suits*, 12 HOFSTRA L. REV. 39, 41-42 (1983) (discussing the implications of a demand that is deemed to be futile); Kim, *supra* note 28, at 101 n.112 (explaining how a demand that is deemed futile will be excused). *See generally* West, *supra* note 8, at 1449 n.60-61 (stating the requirements for futility and what can happen if a demand is excused).

excused if it is futile.[30] For example, in *Heineman v. Datapoint Corp*.[31] the court held that "demand is futile where a *reasonable doubt* exists that the board has the ability to exercise its managerial power, in relation to the decision to prosecute, within the strictures of its fiduciary obligations." (emphasis added).[32]

In Japan, the court in *Ikenaka v. Tabuchi*[33] held that a shareholder who brings a suit must first demand that directors bring suit in any case, because such a demand is expressly required under the Commercial Code.[34] In this case, the plaintiff shareholder sued the managing directors of the company who controlled the board of directors.[35] Applying the *Heineman* standard, this case *should* have been excused for futility, thereby exempting the plaintiff from the requirement of the first demand.

C. Security for Expenses

In the United States, a majority of the states no longer require security for expenses which are used to defray the defendant's costs and damages resulting from the suit, if the plaintiff's suit is unsuccessful.[36] In the United States, the security for expenses system has not worked

30. *See* HAMILTON, *supra* note 29, at 472-73.

31. *See* Heineman v. Datapoint Corp., 611 A.2d 950 (Del. 1992).

32. *See id.* at 952; *see also* West, *supra* note 8, at 1496 n.295 (citing Ikenaka v. Tabuchi); Milhaupt, *supra* note 8, at 31 n.150 (same).

33. *See* Ikenaka v. Tabuchi, 1427 HANREI JIHO 137, 139 (Tokyo Dist. Ct., 1992); West, *supra* note 8, at 1496 n.297 (explaining the court's decision on the demand process); Kawashima & Sakurai, *supra* note 13, at 46 n.325 (same).

34. KOBAYASHI, *supra* note 8, at 110 (commenting that, because the first demand requirement under the Commercial Code of Japan shall be strictly maintained, the *Tabuchi* rule shall be affirmed). *Id. See also* West, *supra* note 8, at 1496 (noting the claim by the plaintiff against ten directors); Milhaupt, *supra* note 8, at 31 (noting the claim by the plaintiff against the president of the company and other directors); Milhaupt, *supra* note 9 (noting the claim by the plaintiff against the directors).

35. *See* Ikenaka v. Tabuchi, 1427 HANREI JIHO 137, 138 (Tokyo Dist. Ct.).

36. *See* HAMILTON, *supra* note 29, at 469; Note *Security for Expenses in Shareholders' Derivative Suits: 23 Years' Experience,* 4 COLUM. J.L. & SOC. PROBS. 50, 59-64 (1968) (pointing to failure of security for expense statutes to accomplish their objective); *see, e.g.,* Robert W. Glatz, *Survey of Developments in North Carolina Law, 1989: Corporate Law Shareholder Derivative Suits Under the New North Carolina Business Corporations Act*, 68 N.C. L. REV. 1091, 1105 (noting that federal law making bodies also modified security for expenses measures to be exercised at the discretion of the judge); Kawashima & Sakurai, *supra* note 13, at 44-45 (many U.S. state legislatures have criticized the efficacy of security for expense statutes); G.A. CODE ANN. § 14-2-123, official comment (1981) (noting that many state legislatures, including those in Georgia and North Carolina, have either eliminated statutory security for expenses provisions or modified them to apply only in certain circumstances, i.e., to "public corporations"); Security for expense statutes do not necessarily accomplish their aim in deterring shareholder derivative suits, rather they just move suits to less convenient forums. *See also* Berkwitz v. Humphrey, 130 F. Supp. 142, 145 (N.D. Ohio 1955) ("[I]n a shareholder's derivative action on behalf of a Pennsylvania corporation instituted in Ohio court, the court noted that Ohio state courts would not apply the Pennsylvania security bond requirement, nor would the federal court in a diversity suit").

well.[37] In Japan, after the shareholder plaintiffs file their claims, a defendant director may file a motion requiring the plaintiff to submit a security for expenses.[38] Submitting a security for expenses is an effective defense strategy for defendant directors when a shareholder plaintiff abuses their right to raise a shareholder derivative suit.[39]

After the 1993 amendment to the Commercial Code to reduce the court costs of JPY 8,200 (approximately US $75),[40] the claim sizes in shareholder derivative suits increased significantly.[41] It is not rare for a shareholder to bring a suit for billions of yen in damages against a company.[42] In defense, defendant directors will file motions for security for expenses.[43] Under

37. *See* HAMILTON, *supra* note 29, at 469; *See Security for Expenses in Shareholders' Derivative Suits: 23 Years' Experience,* 4 COLUM. J.L. & SOC. PROBS. 50, 59-64 (1968) (pointing to failure of security for expense statutes to accomplish their objective). *See, e.g.,* Glatz, *supra* note 36 (noting that federal law making bodies also modified security for expenses measures to be exercised at the discretion of the judge); Kawashima & Sakurai, *supra* note 13, at 44-45 (many U.S. state legislatures have criticized the efficacy of security for expense statutes); G.A. CODE ANN. § 14-2-123, official comment (1981) (noting that many state legislatures, including those in Georgia and North Carolina, have either eliminated statutory security for expenses provisions or modified them to apply only in certain circumstances, i.e. to "public corporations"); Glatz, *supra* note 36, at 1006. Security for expense statutes do not necessarily accomplish their aim in deterring shareholder derivative suits, rather they just move suits to less convenient forums; *Berkwitz v. Humphrey,* 130 F. Supp. 142, 145 (N.D. Ohio 1955) ("[I]n a shareholder's derivative action on behalf of a Pennsylvania corporation instituted in Ohio court, the court noted that Ohio state courts would not apply the Pennsylvania security bond requirement, nor would the federal court in a diversity suit.").

38. *See* SHOHO, art. 267, para. 5; Kawashima & Sakurai, *supra* note 13, at 41-42 (stating under Japanese legal procedure, a court can order a plaintiff to post a security for expenses bond in response to defendant motion); *see also* Noguchi v. Kotani (Janome Sewing Machine case), 125 SHIRYOBAN SHOJI HOMU 184, 189-91 (Tokyo Dist. Ct. July 22, 1994) (describing how the Tokyo District court granted defendant request for plaintiffs to furnish security); Colloquy, *Kabunushi daihyo sosho no tetsuzukiteki kento [Examination of the Procedural Aspects of Shareholder Derivative Litigation]*, 1062 JURISUTO 8, 8 (1995) (comment by Yoshimitsu Aoyama) (court may order a plaintiff to submit a bond at defendant director request); Masahiro Kitazawa, Annotation; *Kabunushi no daihyo sosho [Shareholders' Derivative Litigation]* at 4; CHUSHAKU KAISHAHO: KABUSHIKI GAISHA NO KIKAN [COMPANY LAW ANNOTATED: ORGANS OF STOCK COMPANIES] 516 (Tadao Omori et al. eds., 1980).

39. *See* Morita v. Kohno, 1504 HANREI JIHO 121, 122 (Tokyo Dist. Ct., 1994); SHOHO, art. 267, para 5; *see also* Glatz, *supra* note 36, at 1104-07 ("[m]any states adopted 'security for expense' statutes to control abuse of derivative proceedings for strike pursuit purposes. These statutes allow the court to require plaintiffs to post a bond with the court to indemnify the corporation against any expenses, including attorney's fees, incurred in successfully opposing the action."); F. WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS at 16-18 (1944) (empirical data detailing security for expense fees); s*ee, e.g.,* N.C. GEN. STAT. § 55-7-40(g)(iii) (1990) (noting that at court's discretion plaintiffs may be required to post a bond to indemnify corporation for all expenses connected to the proceeding).

40. *See* SHOHO*,* art. 267, para 4.

41. *See* Aoyama, etc., *supra* note 20; Kawashima & Sakurai, *supra* note 13, at 21 ("before the reform, actions for a billion yen were almost nonexistent but as of March 1, 1995, eight actions for more than ten billion yen had been or were being litigated"). *See, e.g., Japanese Shareholders; Save it for the Judge,* ECONOMIST, Sept. 4, 1993 at 75 (reporting that a 152 billion yen ($1.4 billion) suit was the largest in Japanese history); James Sterngold, *In Japan, a Plundered Company,* N.Y. TIMES, Nov. 9, 1993 at 1 (citing same *Janome* case in which over a billion yen in damages was sought and noting how shareholder litigation has increased as a result of favorable outcomes).

42. *See* TORIKAI, *supra* note 21, at 19.

43. *See* Morita v. Kohno, 1504 HANREI JIHO 121, 122 (Tokyo Dist. Ct., 1994).

Section 267(5) of the Commercial Code of Japan,[44] once a plaintiff shareholder files a shareholder derivative suit, the defense may file a motion and the court may order a reasonable amount of security for expenses.[45] Under Sections 267(6) and 106(2) of the Commercial Code, the court order requires that the defending director shall prove "bad faith" of the plaintiff shareholder in filing the derivative suit.[46] "Bad faith" occurs where the plaintiff was objectively found to file a shareholder derivative suit for the purpose of embarrassing a company.[47] The leading case for the security for expenses order is *Morita v. Kohno*, otherwise known as the "Janome Sewing Machine K.K. Case"[48]

The facts of the *Janome* case are as follows. A greenmailer acquired a large part of shares in the company Janome Sewing Machine K.K. ("Janome"). He then blackmailed Janome by stating that he had sold the shares to a gang (Bo-ryoku-dan) and the cost of repurchasing the transferred shares would be JPY 30 billion (approximately US$ 273 million).[49] The greenmailer also blackmailed Janome for novation of his debts which was used for the acquisition of his Janome shares.[50] Fearing participation of the greenmailer or being forced out of corporate manage-

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44. *See* SHOHO, art. 267, para 5.

45. *See* SHOHO, art. 267, para 5; Glatz, *supra* note 36, at 1104-07 ("[m]any states adopted 'security for expense' statutes to control abuse of derivative proceedings for strike pursuit purposes. These statutes allow the court to require plaintiffs to post a bond with the court to indemnify the corporation against any expenses, including attorney's fees, incurred in successfully opposing the action."); See also Wood, *supra* note 39 (empirical data detailing security for expense fees); s*ee, e.g.,* N.C. GEN. STAT. § 55-7-40(g)(iii) (1990) (noting that at court's discretion plaintiffs may be required to post a bond to indemnify corporation for all expenses connected to the proceeding).

46. *See* SHOHO, art. 267, para 4.

47. *See* SHINSAKU IWAHARA SHINBAN CHUSHAKU KAISHA HO, Vol. 5 at 365.

48. *See* Morita v. Kohno, 1504 HANREI JIHO 121 (Tokyo Dist. Ct., 1994); James Sterngold, *In Japan, a Plundered Company*, N.Y. TIMES, Nov. 9, 1993 at D1 (stating that Janome's board of directors gave nearly $300 million in blackmail money to a prominent corporate raider); *Businessman Kotani Pleads Not Guilty to Janome Extortion*, JAPAN ECON. NEWSWIRE, May 17, 1991 (reporting that defendants urged that blackmail money was in fact a loan); *Kotani Pleads Not Guilty as Extortion Trial Opens*, JAPAN ECON. NEWSWIRE, May 21, 1991 ("prosecutors said that Kotani demanded Y30 billion in loans by threatening to sell his Janome shares to a gang that might cause trouble for the company").

49. *See* Morita v. Kohno, 1504 HANREI JIHO 121, 124 (Tokyo Dist. Ct., 1994); James Sterngold, *In Japan, a Plundered Company*, N.Y. TIMES, 9, 1993 at D1 (Kotani, the raider, was accused of acquiring Janome stock and threatening to sell it to gangsters unless the company repurchased the stock at inflated prices); *Shareholders Sue Janome's Former Executives*, JAPAN ECON. NEWSWIRE, Aug. 2, 1993 (noting that Kotani extorted 30 billion yen to repay the money he borrowed to corner the share price of the stock); *Businessman Kotani Pleads Not Guilty to Janome Extortion*, JAPAN ECON. NEWSWIRE, May 17, 1991 (describing how Kotani pressured other directors into loaning him money so that he could repurchase the 17.4 million shares).

50. *See* Morita v. Kohno, 1504 HANREI JIHO 121, 124 (Tokyo Dist. Ct., 1994); *Japanese Shareholders; Save it for the Judge*, ECONOMIST, Sept. 4, 1993 at 75 (noting that Janome directors acquiesced to the blackmail, believing that Kotani would sell the shares to the *yakuza*, a Japanese organized crime group); James Sterngold, *In Japan, a Plundered Company*, N.Y. TIMES, Nov. 9, 1993, at 1 (noting that Janome directors agreed to "loans" in blackmail form); *Shareholders Sue Janome's Former Executives*, JAPAN ECON. NEWSWIRE, Aug. 2, 1993 ("five former executives failed to confer with the executive board and instead paid the 30 billion yen to Kotani").

ment, the defending directors succumbed to the blackmail.[51] Plaintiff shareholders brought a shareholder derivative suit to recover the losses paid to the blackmailer.[52] In its defense the directors filed a motion for security for expenses.[53]

The court ruled that when a plaintiff shareholder brings a suit with the knowledge that (i) the plaintiff failed to state a cause of action,[54] (ii) there is little probability of success on the merits of the cause of action,[55] or (iii) there is a high probability of an affirmative defense, their suit should be deemed as bad faith.[56] The court ordered the plaintiff to submit JPY 265 million (approximately US$ 2.4 million) as security for expenses. The court reasoned the plaintiff knew that a part of the novation alleged as damages of Janome was secured by independent collateral and that Janome had collected that part of the loan from the collateral.[57]

D. Settlements

In the United States, most states require that the court approve any settlement so that the shareholders may have notice of the proposed settlement and the opportunity to intervene and oppose it.[58] The notice requirement in derivative suits is directed toward preventing collusive

51. *See* Morita v. Kohno, 1504 HANREI JIHO 121, 124 (Tokyo Dist. Ct., 1994); *Japanese Shareholders; Save it for the Judge,* ECONOMIST, Sept. 4, 1993 at 75 (citing shareholders using their new derivative suit rights and sought to enforce them); *Shareholder Files 152 Billion Yen Suit Against Janome*, JAPAN ECON. NEWSWIRE, Aug. 9, 1993 (noting that Janome shareholder filed a lawsuit against directors seeking damages allegedly caused by their negligence); *Ex-Janome Execs Face Another Class Action*, JIJI PRESS TICKER SERVICE, Aug. 9, 1993 (stating that class action suit was filed by Janome shareholders).

52. *See* Morita v. Kohno, 1504 HANREI JIHO 121, 124 (Tokyo Dist. Ct., 1994).

53. *See id*.

54. *See id.* at 129.

55. *See id.*

56. *See id.*; Kawashima & Sakurai, *supra* note 13, at 42-43 (describing that plaintiffs in Janome case were ordered to post a security for litigation costs because even without subjective bad faith, the court held that a negligently brought suit sufficed under the commercial law definition of "bad faith").

57. *See* Morita v. Kohno, 1504 HANREI JIHO 121, 130-31 (Tokyo Dist. Ct., 1994). *See* Aoyama, etc., *supra* note 20 at 17 (criticizing the holding in *Morita v. Kohno*), Under the court's standard, a plaintiff shareholder could be forced to submit security for expenses if he negligently files the suit. *Id.*

58. *Cf.* Kawashima & Sakurai, *supra* note 13, at 55 ("Japanese Commercial Code and Code of Civil Procedure do not require either judicial approval of derivative litigation settlements or notice of the proposed settlement to the shareholders."); *see also* REV. MODEL BUSINESS CORP. ACT § 55-7-40 (1984) ([w]hen a class's interest is substantially affected by a settlement, the Model Act provides that the court "shall direct that notice be given."); *see, e.g.,* Glatz, *supra* note 36, at 1103 (citing a North Carolina provision requiring court approval of derivative suit termination in settlement context).

settlements.[59] In Japan, the leading shareholder settlement case is *Yoshida v. Totani,* generally refereed to as the "Nihon Sunrise Case."[60] In *Nihon*,[61] the court found a breach of duty of care, by the directors of Nihon Sunrise K.K. because of their unreasonably speculative investment.[62] After an appeal by the defendant directors, the dispute was settled in the presence of a Tokyo High Court judge (a judge belonging to the appellate court).[63]

There is no statutory provision for the procedure of a settlement of shareholder's derivative suits,[64] but Section 266(5) of the Commercial Code of Japan expressly provides that a director's liability against a company cannot be waived unless there is unanimous shareholder approval.[65] However, it is still unclear how the *Nihon* settlement should have been decided.[66]

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59. *See* REV. MODEL BUSINESS CORP. ACT § 7.40 (i) (1984) ("This requirement seems a natural consequence of the proposition that a derivative suit is brought on behalf of the class of all shareholders and avoids many of the evils of the strike suit by preventing the individual shareholder-plaintiff from settling privately with the defendants."); Kawashima & Sakurai, *supra* note 13 at, 55-56 (discussing merits of settlement option in Japanese courts). *See also* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 COLUM. L. REV. 669, 671-77 (1986) (discussing the lack of incentives for both plaintiffs and defendants to serve the corporation's interests when settlement is an option). *See generally* Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261, 277-83 (1986) (noting that the pattern does not prove that shareholder derivative action fundamentally lacks utility, but points out that its potential utility has been diminished by other legal rules, i.e., security for expense provisions that permit collusive settlements).

60. *See* Yoshida v. Totani, 1480 HANREI JIHO 154 (Tokyo Dist. Ct., 1993); Kawashima & Sakurai, *supra* note 13, at 54-55 (discussing that settlements are growing more prevalent with the increase in shareholder derivative litigation); *Firm Ordered to Pay for Stock Speculation Losses*, MAINICHI DAILY NEWS, Sept. 23, 1993 (judge ordering directors to pay compensation of 295 million yen to stock owners for a breach of their fiduciary duty); *Yoshitake v. Todani* 1354 (Nihon Sunrise), 1354 SHOJI HOMU 134 (Tokyo Dist. Ct., Mar. 31, 1994) (noting that [t]he parties settled in Tokyo High Court after the plaintiffs prevailed in the district court); Yoshitake v. Kotani, 1480 HANREI JIHO 154 (Tokyo High Ct., Sept. 21, 1993).

61. Yoshida v. Totani, 1354 SHOJI HOMU 134 (Tokyo Dist. Ct. 1994); 1480 HANREI JIHO 154 (Tokyo Dist. Ct., 1993).

62. *See* 1480 HANREI JIHO 154 (Tokyo Dist. Ct., 1993).

63. *See* KOBAYASHI, *supra* note 8, at 177.

64. *See* SHOHO, art. 266.

65. *See* SHOHO, art. 266, para 5.

66. *See* A DISCUSSION ON PROCEDURAL ISSUES AT SHAREHOLDER DERIVATIVE SUITS, 1062 JURIST 32 (insisting that settlements with permission from a court which reviews interests of other shareholders and the company should be allowed, but a settlement without such review should not be allowed); KOBAYASHI, *supra* note 8, at 177. Prof. Kobayashi proposed that a shareholder derivative suit may be settled only if (i) a court reasonably examine the case and the decision may be expected, (ii) terms of settlement overcoming the reduced amount from amount claimed are objectively affirmative for the plaintiff shareholders, or (iii) a court positively is involved in the settlement process; unless otherwise agreed among all shareholders. *Id.*

III. Business Judgment Rule in General

Both the United States and Japan apply the business judgment rule. In addition, the application of the business judgment rule in the United States and Japan is similar.[67] In both countries directors of a corporation are expected to be sufficiently informed with respect to the subject of the business and to engage in a rational decision making process to pursue the best interests of the corporation.[68] However, between both countries, there are differences in application of the business judgment rule.[69]

A. United States

(a) ALI Restatement

There are many judicial decisions in the United States discussing the duty of care and the business judgment rule.[70] Based on the accumulation of these decisions, the American Law Institute (ALI) restated the United States business judgment rule.[71] Section 4.01(c) of the Principles of Corporate Governance, prepared by the ALI, provides:

A director or officer who makes a business judgment in good faith fulfills the duty under this Section if the director or officer:

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67. *See* Kawashima & Sakurai, *supra* note 13, at 12 (noting the import to Japan of the U.S. business judgment rule); Bayless Manning, *Current Issues in Corporate Governance: The Business Judgment Rule in Overview*, 45 OHIO ST. L.J. 615, 617 (1984) (discussing the general requirements of the business judgment rule). *See generally* West, *supra* note 8, at 1478-81 (discussing similar duty principles in Japan).

68. *See* Manning, *supra* note 67, at 619-22; Milhaupt, *supra* note 9, at 456-458 (1994) (shareholder derivative suits and the business judgment rule in Japan). D. Gordon Smith, *A Proposal to Eliminate Director Standards from the Model Business Corporation Act*, 67 U. CIN. L. REV. 1201 (1999) (discussing the Model Business Corporation Act and the business judgment rule).

69. *See* Kawashima & Sakurai, *supra* note 13, at 52 (1997) (discussing how in contrast to U.S. courts, Japanese courts have not clearly defined director's duties); Milhaupt, *supra* note 8, at 35 (discussing the somewhat informal legal environment of corporate governance in Japan). *See generally* West, *supra* note 8, at 1444-55 (discussing generally the similarities and differences between Japanese and American system rules).

70. *See* Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage of Misguided Notion?*, 67 S. CAL. L. REV. 287 (1994) (discussing the business judgment rule's existence through judicial decisions); R. Link Newcomb, Note, *The Limitations of Director's Liability: A Proposal for Legislative Reform*, 66 TEX. L. REV. 411 (1987) (discussing judicial standards and the business judgment rule). *See generally* Bruce T. Rosenbaum, Comment, *The Presumptions and Burdens of the Duty of Loyalty Regarding Target Company Defensive Tactics*, 48 OHIO ST. L.J. 273 (1987) (discussing judicial review and the business judgment rule).

71. *See* Harvey J. Goldschmid, *The Duty of Care and the Business Judgment Rule*, 1 A.L.I.-A.B.A. COURSE OF STUDY MATERIALS - CORPORATE GOVERNANCE: CURRENT AND EMERGING ISSUES SD39 (1998) (discussing the duty of care and the business judgment rule as restated by the American Law Institute); Peter Saparoff and Geri L. Haight, *Special Litigation Committees: Not Universally Effective Tools*, 2 A.L.I.-A.B.A. COURSE OF STUDY MATERIALS - SECURITIES LITIGATION SE82 (2000) (discussing the role of special litigation committees in applying the business judgment rule); *See* Joseph Hinsey IV, *American Law Institute's Corporate Governance Project: Duty of Care: Business Judgment and the American Law Institute's Corporate Governance Project: the Rule, the Doctrine, and the Reality*, 52 GEO. WASH. L. REV. 609 (1984) (discussing the business judgment rule as stated by the American Law Institute).

(1) is not interested in the subject of the business judgment;

(2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and

(3) rationally believes that the business judgment is in the best interests of the corporation.[72]

These three conditions are considered to be the basic standards of the United States business judgment rule.[73]

(b) Case Law

In the United States the leading case involving the application of the business judgment rule is *Smith v. Van Gorkom*[74] which describes the standard of the rule.[75] In *Van Gorkom*,[76] the court held that the business judgment rule provides a rebuttable presumption "that in making a

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72. *See American Law Institute, Principles of Corporate Governance: Analysis and Recommendations* § 4.01(c) (1992); Lyman Johnson, *Rethinking Judicial Review of Director Care*, 24 DEL. J. CORP. L. 787 (1999) (discussing the business judgment rule and judicial review); Jay P. Moran, Comment, *Business Judgment Rule or Relic? Cede v. Technicolor and the Continuing Metamorphosis of Director Duty of Care*, 45 EMORY L.J. 339 (1996) (discussing the formulation of the business judgment rule by the court system).

73. *See* Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., 496 N.E.2d 959, 963 (Ohio 1986) (discussing the business judgment rule as a principle of corporate governance firmly entrenched in the common law); William F. Kennedy, *American Law Institute's Corporate Governance Project: Duty of Care: The Standard of Responsibility for Directors*, 52 GEO. WASH. L. REV. 624 (1984) (discussing the business judgment rule and the duty of care as stated by the American Law Institute); *The American Law Institute, Principles of Corporate Governance: Analysis and Recommendations* § 4.01(c) (1992). The standard in § 4.01(c) is intended to provide directors and officers with a wide ambit of discretion. The judgment of a director or officer will pass muster under § 4.01(c)(3) if the director or officer believes it to be in the best interests of the corporation and the belief is rational. If, however, a challenging party can sustain the burden of proving that a director or officer was not acting in good faith or with disinterest, or was not informed with respect to business judgment, then the safe harbor will not be applicable.

74. *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). *See* Patricia A. Terian, *"It's Not Polite to Ask Questions" in the Boardroom: Van Gorkom's Due Care Standard Minimized in Paramount v. QVC*, 44 BUFF. L. REV. 887, 890-927 (1996) (discussing *Smith v. Van Gorkom* and the business judgment rule); Jonathan R. Macey & Geoffrey P. Miller, Comment, *Trans Union Reconsidered*, 98 YALE L.J. 127 (1988) (discussing the ramifications of *Van Gorkom*).

75. *See* Alexander Khutorsky, Note, *Coming in from the Cold: Reforming Shareholders' Appraisal Rights in Freeze-out Transactions*, 1997 COLUM. BUS. L. REV. 133 (1997) (discussing the impact of Van Gorkom on corporate governance); Mark J. Lowenstein, *Toward an Auction Market for Corporate Control and the Demise of the Business Judgment Rule*, 63 S. CAL. L. REV. 65, 71 (1989) (describing the "landmark" *Van Gorkom* case); Ramesh K.S. Rao, David Simon Sokolow & Derek White, *Fiduciary Duty a la Lyonnais: An Economic Perspective on Corporate Governance in a Financially-Distressed Firm*, 22 IOWA CORP. L. 53, 58 (1996) (describing *Van Gorkom* as a landmark case).

76. *See* Smith v. Van Gorkom, 488 A.2d 858, 859 (Del. 1985); Lyman, *supra* note 72, at 799-800 (discussing the holding in *Van Gorkom);* Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back – Something May Be Gaining on You,"* 68 AM. BANKR. L.J. 155, 172 (1994) (discussing the court's decision in Van Gorkom). *See generally* Terian, *supra* note 74, at 887 (discussing the *Smith v. Van Gorkom* decision).

business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[77]

The *Van Gorkom* facts are as follows. Van Gorkom, the CEO and a director of Trans Union Corporation ("Trans Union"), considered selling shares of Trans Union to Pritzker.[78] Van Gorkom did not consult either his Board or any members of senior management except Carl Peterson, Trans Union's Controller.[79] On September 18, 1980, Pritzker agreed to pay $55 per share of Trans Union Stock. However, he required that Trans Union respond to his offer within the next three days.[80] Van Gorkom called a special meeting of the Trans Union Board on September 19, 1980, which lasted about two hours.[81] Van Gorkom orally outlined the terms of Pritzker's offer.[82] Attorney Brennan advised the members of the Board that they might be sued if they failed to accept the offer and that as a matter of law a fairness opinion was not required.[83] Donald Romans, CFO of Trans Union, also told the Board that, in his opinion, the

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77. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); *see also* DEL. CODE ANN. tit. 8 § 102(b)(7) (1993) (affirming the validity of a waiver of a director's liability provided under a corporation's certificate of incorporation). A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages is valid, unless (i) for any breach of the director's duty of loyalty, (ii) for acts involving intentional misconduct or a knowing violation of law, (iii) for unlawful payment of dividend or unlawful stock purchase or redemption, or (iv) for any transaction from which the director derived an improper personal benefit. *Id.*

78. *See* Smith v. Van Gorkom, 488 A.2d 858, 866 (Del. 1985); Mark J. Lowenstein, *Board Games* 15 DEL. J. CORP. L. 135, 137 (1990) (book review) (discussing the negotiated sale of Trans Union in *Van Gorkom*); Morton Moskin, *Trans Union: A Nailed Board*, 10 DEL. J. CORP. L. 405, 428 (1986) (discussing the board of director's role in the sale of a company).

79. *See* Smith v. Van Gorkom, 488 A.2d 858, 866 (Del. 1985); Robert H. Rosh, Note *New York's Response to the Director and Officer Liability Crisis: A Need to Reexamine the Importance of D & O Insurance*, 54 BROOK. L. REV. 1305, 1311 (1989) (discussing the effects of not consulting the board of directors in *Van Gorkom*); Link, *supra* note 70, at 418-19 (noting the court's holding in *Van Gorkom* that the actions of the board of directors were uninformed).

80. *See* Smith v. Van Gorkom, 488 A.2d 858, 867 (Del. 1985); Mark J. Lowenstein, *Board Games* 15 DEL. J. CORP. L. 135, 137 (1990) (book review) (noting Pritzker's insistence that the board respond in three days); Barry F. Schwartz & James G. Wiles, *Trans Union: Neither "New" Law Nor "Bad" Law*, 10 DEL. J. CORP. L. 429, 432 (1986) (noting that Pritzker insisted that the board act on the proposal within three days).

81. *See* Smith v. Van Gorkom, 488 A.2d 858, 868-69 (Del. 1985); Naomi Ono, *Boards of Directors Under Fire: An Examination of Nonprofit Board Duties in the Health Care Environment*, 7 ANN. HEALTH L. 107, 113-14 (1998) (discussing the meeting held in *Van Gorkom*); Terian, *supra* note 74, at 897 (discussing the meeting in *Van Gorkom*).

82. *See* Smith v. Van Gorkom, 488 A.2d 858, 868-69 (Del. 1985); *See* Donald E. Pease, *Aronson v. Lewis: When Demand is Excused and Delaware's Business Judgment Rule*, 9 DEL. J. CORP. L. 39, 82 (1984) (discussing the fact that the directors of Trans Union relied only on Van Gorkom's oral presentation of the terms of the merger); Terian, *supra* note 74, at 897 (noting that Van Gorkom outlined the proposed merger orally).

83. *See* Smith v. Van Gorkom, 488 A.2d 858, 868 (Del. 1985); Robert E. Bull, Note, *Director's Responsibilities and Shareholders' Interests in the Aftermath of Paramount Communications v. Time, Inc.*, 65 CHI.-KENT. L. REV. 885, 901 (1989) (discussing the use of fairness opinions); Neil C. Rifkind, Note, *Should Uninformed Shareholders Be a Threat Justifying Defensive Action by Target Directors in Delaware? "Just Say No" After Moore v. Wallace*, 78 B.U. L. Rev. 105, 132-33 (1998) (discussing fairness opinions).

proposed price was in the range of a fair price, but at the beginning of the range.[84] Based solely upon those oral presentations, the directors approved the proposed merger agreement.[85]

Consequently, the court held that the Trans Union directors "breached their fiduciary duty to their stockholders . . . by their failure to inform themselves of all information reasonably available to them and relevant to their decision to recommend the Pritzker merger."[86]

In general, the U.S. courts require a high level of information for business judgments.[87] The liability of a director may sometimes be different between members of management team (e.g., CEO) and other non-daily managing directors.[88]

B. Japan

(a) Statute

According to § 266.1(5) of the Commercial Code of Japan,[89] if directors violate laws or articles of incorporation of a company, the directors shall compensate for the damages to the company.[90] Under Japanese law it is obvious that directors' duty of care provided under

84. *See* Smith v. Van Gorkom, 488 A.2d 858, 869 (Del. 1985); Morton Moskin, *Trans Union: A Nailed Board*, 10 DEL. J. CORP. L. 405, 409 (1986) (discussing Donald Romans' statements to the board about the price range); Steven F. Mones, Comment, *Mining the Safe Harbor? The Business Judgment Rule After Trans Union*, 10 DEL. J. CORP. L. 545, 553-54 (1986) (discussing the Trans Union board's evaluations of the price range).

85. *See* Smith v. Van Gorkom, 488 A.2d 858, 869 (Del. 1985); Craig W. Palm & Mark A. Kearney, *A Primer on the Basics of Director's Duties in Delaware: the Rules of the Game (Part II)*, 42 VILL. L. REV. 1043, 1108 (1997) (discussing the Trans Union board's uninformed decision to merge); Kenneth B. Pollock, Note, *Exclusionary Tender Offers: A Reasonably Formulated Takeover Defense or a Discriminatory Attempt to Retain Control?*, 20 GA. L. REV. 627 (1986) (discussing the Trans Union board's approval of the merger).

86. *See* Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985); Schwartz & Wiles, *supra* note 80, at 438 (discussing the insufficiently informed board of Trans Union); Jacqueline M. Veneziani, Note & Comment, *Causation and Injury in Corporate Control Transactions: Cede & Co. v. Technicolor, Inc.*, 69 WASH. L. REV. 1167, 1167 (1994) (discussing the Trans Union board's failure to inform themselves properly before approving the merger).

87. *See* Laura L. Cox, Comment, *Poison Pills: Recent Developments in Delaware Law*, 58 U. CIN. L. REV. 611, 619-20 (1989) (noting that director's have a duty to inform themselves of information relevant to the transaction); Eric J. Wittenberg, *Underwater Stock Options: What's A Board of Directors to Do?*, 38 AM. U. L. REV. 75, 91 (1988) (discussing the duty to accurately disclose relevant information); William F. Johnson, Note, *Mills Acquisition Co. v. Macmillan, Inc.: Corporate Auctions Now Require Sharper Supervision by Directors*, 39 AM. U. L. REV. 721, 728-29 (1990) (discussing the directors' duty to disclose all information relevant to a transaction).

88. *See* WILLIAM A. KLEIN & J. MARK RAMSEYER, BUSINESS ASSOCIATIONS 320 (1997) (analyzing the relationship between the role of directors and their duty of care: the board has the legal power and the responsibility to manage, while the CEO and other members of the management team must and do have authority to make routine operating decisions, and develop corporate plans and strategies); Mark David Wallace, Comment, *Life in the Boardroom After FIRREA: A Revisionist Approach to Corporate Governance in Insured Depository Institutions*, 46 U. MIAMI L. REV. 1187, 1220-44 (1992) (discussing the traditional corporate board model and directors' duties); *see also* Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After Van Gorkom*, 41 BUS. LAW 1 (1985) (discussing the effect of *Smith v. Van Gorkom* on boards of directors and corporate governance).

89. SHOHO, art. 266, para 1.

90. SHOHO, art. 266, para 1.

§ 254(3) and 254-3 of the Commercial Code is a part of the "laws."[91] However, the Commercial Code and other statutory laws of Japan, do not define "laws" or director's duty of care, nor do they provide a description of Japan's business judgment rule.[92] The particulars of the rule are shaped by case law.[93]

(b) Nomura Securities Case

Ikenaka v. Tabuchi,[94] known for the loss compensation by Nomura Securities Co., Ltd. ("Nomura Securities"), is one of the leading cases indicating a standard for the business judgment rule in Japan.[95] In this case directors were shielded from liability.[96] In *Tabuchi*, the court held that the business judgment rule shields directors from liability, unless the directors negligently misunderstood "the factual basis for the business decision and whether the decision-making process based on those facts was markedly irrational for an average corporate employee. If so, the director's business decision is removed from the permitted scope of discretion, and a finding that the director has breached his duty of care and loyalty is appropriate."[97]

The facts in *Tabuchi* are as follows. Setsuya Tabuchi and thirteen other co-defendants were directors of Nomura Securities.[98] In April of 1989, Tokyo Broadcasting System Inc. (TBS), one of the largest broadcasting companies in Japan, commenced a specified money trust.[99] TBS deposited JPY 1,000 million (approximately US$ 9 million) with a trust bank and employed Nomura Securities as its investment advisor.[100] In fact, since TBS fully relied on advice from

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91. SHOHO, art. 254, para 3.

92. *See* Milhaupt, *supra* note 8, at 34 (explaining, "the scope and content of a director's legal duties remain obscure. In the wake of a recent rash of derivative litigation [sic] Japanese management has become concerned with ways to limit the scope of liability rules. Yet there is no express legal framework in the Commercial Code for mechanisms such as exculpatory provisions in corporate charters, indemnification, and director and officer liability insurance that corporate boards in the United States use to opt out of liability rules."); Katsuhito & Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 632 (1999) ("Traditionally, Japanese have been "lenient in applying fiduciary law, even though her Commercial Code [sic] imposes strong duties of care and loyalty on the directors."); Kawashima & Sakurai, *supra* note 13, at 28 ("Whereas U.S. courts may lean towards a creative interpretation of the law (or even the development of new law), Japanese courts are hesitant expand interpretation laws enacted by the legislative branch.").

93. *See* Toshiaki Hasegawa, *Nomura Securities Case Judgment which Applies Business Judgment Rule*, KINYU ZAISEI JIJO, Oct. 4, 1993, at 39.

94. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25 (Tokyo Dist. Ct., Sept. 16, 1993).

95. *See* Hasegawa, *supra* note 93, at 36 (agreeing with ruling in this case that it would be a leading case of Japanese court that applies the Business Judgment Rule, thereby shielding directors from shareholder derivative suits).

96. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25 (Tokyo Dist. Ct., Sept. 16, 1993).

97. *See id.* at 30.

98. *See id.* at 27.

99. *See id.* Specified Money Trust (Tokutei-kinsen-shintaku) is an investment vehicle. To establish the trust, an investor deposits funds with a trust bank that will serve as trustee, giving the bank specific instructions as to how the money is to be invested. The investor usually employs an investment advisor who advises the investor how it instructs the trust bank; THE YASUDA TRUST & BANKING CO., LTD., FUNDAMENTAL 1200 BUSINESS AND BANKING TERMS 174 (1994).

100. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 27 (Tokyo Dist. Ct., Sept. 16, 1993).

Nomura Securities, Nomura Securities acted as if it had been a discretionary fund manager for TBS.[101] Through the managed transactions TBS sustained a loss around JPY 360 million (approximately US$ 3.2 million) around the end of February 1990.[102]

Although there was no prior indemnification agreement for possible losses,[103] when Nomura Securities wished to resign as TBS's investment advisor, TBS insisted that it should be compensated by Nomura Securities for its damages.[104] Because Nomura Securities had made large profits from past business transactions with TBS,[105] including an advisory fee paid for its services provided as the main managing underwriter at TBS's public offerings, and expected the same profits in the future, directors of Nomura Securities wished to maintain their good business relationship with TBS.[106] Nomura Securities also received similar claims from several other good clients.[107] At the executive board meeting[108] of Nomura Securities, held on March 13, 1990, the board approved compensation for TBS and other important clients (the total amount of loss compensation was approximately JPY 16.1 billion, approximately US$ 146 million).[109] Before the meeting, one of the directors from Nomura Securities received information regarding TBS and other clients' claims from relevant officers, and reported the information at the executive board meeting.[110] On March 14, 1990, Nomura Securities sold warrant bonds in another Japanese company at US$ 612,500 to TBS and repurchased at US$ 3,047,187.5 on the same date.[111] By this transaction, TBS received a profit of JPY 360,191,127 under then-current weak yen exchange rate,[112] and was compensated for the loss from the specified money trust.[113]

Under the prevailing Securities and Exchange Law, mere ex post facto compensation for the customer's loss was not expressly prohibited,[114] unlike a prior indemnification agreement for a future loss upon a solicitation of a client.[115] On November 20, 1991, the Fair Trade Com-

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101. *See* Tatsuo Uemura, *A Legal Analysis on the Judgment of Nomura Securities Loss Compensation Derivative Suit*, 1335 SHOJI HOMUO at 6 (1993).

102. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28 (Tokyo Dist. Ct., Sept. 16, 1993).

103. *See id.* at 27.

104. *See id.* at 28.

105. *See id.* at 29.

106. *See id.* at 30.

107. *See id.* at 28.

108. Many Japanese companies have their executive boards (Senmu-kai) separate from its board of directors. The executive board consists of the executive directors of a company and usually decides daily business operation of the company on behalf of the Board of Directors. *See generally* WATARU HORIGUCHI, SHINBAN CHUSHAKU KAISHA HO, Vol. 6 at 109-111) (discussing structure of Japanese executive boards).

109. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28 (Tokyo Dist. Ct., Sept. 16, 1993).

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.* at 31.

115. *See id.* After the 1991 amendment, mere ex post facto compensation was also expressly prohibited. *See* Shoken Torihiki Ho [Securities and Exchange Law], Law No. 25 of 1948 art. 42-2, para. 1 item 3.

mission of Japan concluded that the loss compensation was an unfair method of competition under the Antimonopoly Law[116] and issued a recommendation (Kankoku) to cease such business practices.[117] However, the *Tabuchi* Court considering Nomura Securities' expected profits from maintaining good business relationships with TBS in light of the fact that it violated the Antimonopoly Law, held that there was no reasonable causation between the loss compensation and Nomura Securities' damages.[118] Part IV of this paper will discuss how this illegality under Antimonopoly Law effects the breach of duty of care.

(c) Tokyo Tourist Ship Case

On the other hand, in *Rosenhoff v. Moritani*,[119] the Japanese court held that directors were liable for their business judgment, because they were not appropriately informed with respect to the subject of the business judgment, and that they should have collected more information before approval of loans.[120]

The facts in *Rosenhoff* are as follows. Kabushiki Kaisha Rosenhoff ("Rosenhoff") was a shareholder in Tokyo Metropolitan Tourist Ship Kabushiki Kaisha ("Tokyo Tourist Ship").[121] Kazuhiro Moritani, a defendant, was a representative director of Tokyo Tourist Ship, and Sueyoshi Tanaka and four other defendants ("Directors") were directors of the same company.[122] Kabushiki Kaisha K and Moritani ("K and Moritani") and Tokyo Tourist Ship were affiliated companies under the same share ownership control of Moritani.[123]

Although the main business of K and Moritani was yacht rental, in April 1982, the Tokyo Metropolitan Government discontinued its license to use a yacht harbor against K and Moritani, which severely harmed the business operation of K and Moritani.[124] However, after the license was discontinued, Moritani as a representative director of Tokyo Tourist Ship, proposed to loan JPY 184,406,729 (approximately US$ 1.676 million) to K and Moritani.[125]

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116. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28 (Tokyo Dist. Ct., Sept. 16, 1993) (The Fair Trade Commission held that the loss compensation by Nomura Securities was a client inducement with unfair profits. In short, the loss compensation for TBS was a commercially unfair inducement for TBS to transact in future with Nomura Securities excluding Nomura's competitors.).

117. *See id.*

118. *See id.* at 32.

119. *See* SHOHO, art. 267, para 4; *See* Rosenhoff v. Moritani, 140 SHIRYOBAN SHOJI HOMU 190 (Tokyo Dist. Ct., October 26, 1995).

120. *See* Rosenhoff v. Moritani, 140 SHIRYOBAN SHOJI HOMU 190, 200 (Tokyo Dist. Ct., October 26, 1995).

121. *See id.* at 194.

122. *See id.*

123. *See id.*

124. *See id.* at 198.

125. *See id.* at 194.

Although the Directors knew that the license had been discontinued,[126] they merely listened to Moritani's explanation, and neither requested any further information about the financial condition of K, nor did they suggest that Moritani offer collateral from K and Moritani for the loans.[127] The directors accepted the loans as proposed.[128] On October 30, 1984, a promissory note issued by K and Moritani was not honored,[129] and on December 5, 1986 they declared bankruptcy.[130] The Japanese court held that the directors were liable for their business judgment since they had accepted the loans as proposed.[131]

C. Similarities and Differences

In both countries, under certain conditions, the business judgment rule will shield directors from liability.[132] To be shielded under the rule, directors of a company must be sufficiently informed with respect to the subject of the business and engage in a rational decision-making process to pursue the best interests of the corporation.[133] The requirements for the rule indicate a fair standard to balance the necessity for the duty of care to protect shareholders' rights and for the limitations thereof to maintain the corporation's reasonable risk-taking business transac-

126. *See id.* at 199.

127. *See id.* at 200.

128. *See id.*

129. *See id.* at 194.

130. *See id.*

131. *See id.* at 200; *see also* TORIKAI, *supra* note 21, at 33 (explaining that the directors breached duty of loyalty against the company, because these loans and guarantees favored a third party at the risk of the company).

132. *See* Milhaupt, *supra* note 8, at 34 n.156 (stating that the director's business decision must fall within a scope of discretion when determining whether or not the director has breached his duty of care and loyalty); *see also* Marc S. Mayerson, *Insurance Recovery for Year 2000 Losses*, INT'L REINSURANCE DISP. REP., Vol. 3, No. 5, 16 (1998) (explaining that "although directors face personal liability for shareholder claims, most companies ensure that the directors are indemnified for any costs and expenses associated with shareholder claims").

133. *See* Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 J. INT'L L. BUS. 303, 456 (1998) (asserting that "if a plaintiff can establish a 'sustained or systematic failure to exercise reasonable oversight', then good faith is lacking and a director may have personal liability"); Milhaupt, *supra* note 8, at 34 n.156 (discussing the inquiry as to "whether there was a careless misunderstanding of the factual basis for the business decision and whether the decision-making process based on those facts was markedly irrational for an average corporate employee"); West, *supra* note 8, at 1450 n.62 (stating that "a director conforms to the business judgment rule if she is . . . (2) informed with respect to the subject of the business judgment to the extent she reasonably believes to be appropriate under the circumstances; and (3) rationally believes that the business judgment is in the best interests of the corporation").

tions.[134] Such a balancing test has universal validity in the global economy.[135] When applying the rule in *Van Gorkom*, the U.S. court held that the directors had failed to make an informed business judgment, because the meeting had lasted only two hours with mere oral explanations, although an attorney and CFO of the company supported the CEO's proposal.[136] In *Rosenhoff*, the Japanese court found directors were not appropriately informed, because they merely relied on the explanation of a representative director.[137]

However, unlike these cases, the Japanese court in *Tabuchi* concluded that an informed business judgment was made.[138] However, in *Tabuchi,* Mizuuchi, a disinterested director, had received sufficient information to examine the necessity for loss compensations from each sales representative responsible to the compensated clients, and reported his opinion to the members of the executive board.[139] In comparison, in *Rosenhoff*, no directors of Tokyo Tourist Ship other than Moritani, who had a special interest in the debtor, K and Moritani, examined in detail the necessity for the loans to K and Moritani.[140]

Furthermore, in Japan, many companies adopt a "bottom-up" decision making system,[141] in which responsible officers examine matters in detail, but the CEO or other executive directors make business decisions without examining the matters on a detailed informed basis.[142] Certainly, in *Van Gorkom*, the agenda was the sale of the company itself,[143] while in *Tabuchi*, the agenda was mere compensation for losses sustained by clients,[144] therefore, the magnitude of each resolution was different. However, considering that the bottom-up business practice is a business judgment it may affect the requisite level of information necessary for a business judgment ruling in Japan.

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134. *See* Mayerson, *supra* note 132, at 16 (referring to a "safe-harbor for director decision-making, which precludes shareholders from second-guessing the decision of the directors in the exercise of their business judgment"); Mary E. Kissane, *Global Gadflies: Applications and Implications of U.S.-Style Corporate Governance Abroad*, 17 N.Y.L SCH. J. INT'L & COMP. L. 621, 674 n.45 (1997) (stating that directors are entitled to protection under the business judgment rule); *see also* Milhaupt, *supra* note 8, at 9 (asserting that the "Tokyo District Court dismissed the suit, . . . referring to the business judgment rule").

135. *See* Kissane, *supra* note 134, at 672. (discussing how "[w]orldwide trends increasingly force institutional investors and global companies to act upon responsibilities which had, in the past, been more theoretical than practical"); Bloomberg News, *Japanese Prosecutors File First Charges in Nomura Case*, N.Y. TIMES, June 5, 1997, at D4 (reiterating the need for global rules that are appropriately applicable to global markets).

136. Smith v. Van Gorkom, 488 A.2d 858, 868 (Del. 1985).

137. *See* Rosenhoff v. Moritani, 140 SHIRYOBAN SHOJI HOMU 190, 200 (Tokyo Dist. Ct., Oct. 26, 1995).

138. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 32 (Tokyo Dist. Ct., Sept. 16, 1993).

139. *See id.* at 28.

140. *See* Rosenhoff v. Moritani, 140 SHIRYOBAN SHOJI HOMU 190, 194, 200 (Tokyo Dist. Ct., Oct. 26, 1995).

141. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28, 30 (Tokyo Dist. Ct., Sept. 16, 1993).

142. *See id.* at 28, 30.

143. Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985).

144. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28 (Tokyo Dist. Ct., Sept. 16, 1993).

In *Tabuchi*, other members of the executive board seemed to listen to Mizuuchi's explanation and immediately approved the loss compensations.[145] The Japanese court might find that this decision process was normal under Japanese business practices, subject to the proposition that the responsible director must be a disinterested one.[146] Contrasting *Tabuchi*, to *Rosenhoff*, in *Rosenhoff* the directors merely listened to the explanation of an interested director.[147] Whereas in *Tabuchi*, directors obtained no legal advice regarding the legality of the transactions,[148] while in *Van Gorkom*, directors obtained an attorney's advice regarding the necessity of a fairness opinion.[149]

In Japan, the number of attorneys is very small.[150] It is difficult and irregular for directors of a Japanese company to seek legal advice from a licensed attorney before making their business judgments.[151] Therefore, the *Tabuchi* Court found the directors' decision without an attorney's opinion to be appropriate.[152]

IV. Application of the Business Judgment Rule to Several Particular Situations

As mentioned above, there are similar business judgment rules in the United States and Japan.[153] This paper will discuss how both countries apply this in several types of cases.

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145. *See id.* at 28, 30.

146. *See id.*; Rosenhoff v. Moritani, 140 SHIRYOBAN SHOJI HOMU 190, 194, 200 (Tokyo Dist. Ct., Oct. 26, 1995).

147. *See id.*

148. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28, 30 (Tokyo Dist. Ct., Sept. 16, 1993).

149. Smith v. Van Gorkom, 488 A.2d 858, 876 (Del. 1985).

150. *See* http://www.nichibenren.or.jp/english/outline.htm (Oct. 30, 2000) (Population in Japan as of October 1, 1999, is estimated at approximately 122,686,000 by the Statistics Bureau & Statistics Center of the Management and Coordination Agency); David Hood, *Exclusivity and the Japanese Bar: Ethics or Self-Interest?*, 6 PAC. RIM L. & POL'Y J. 199, 199-200 (1997) (citing the fact that the extreme difficulty of the entrance exams into the Nichibenren ensures one of the lowest ratios of lawyers worldwide); *see also* Mary Jordan, *Japan's Paper Chase a Grueling Marathon; Stiff Bar Exams Keep Number of Attorneys to a Precious Few*, THE WASH. POST, Feb. 14, 1996, at A1 (noting that, in Japan, there is a "famine" of lawyers) Kathryn Tolbert, *Japan Altering Legal System to Produce More Lawyers; Tradition of Consensus Inadequate for Business Needs*, THE WASH. POST, Sept. 3, 2000, at A26 (stating that there are approximately 17,000 lawyers in Japan, which translates to about one attorney for every 7,000 people).

151. *See* Hoken S. Seki, *Effective Dispute Resolution in United States-Japan Commercial Transactions*, 6 J. INT'L L. BUS. 979, 986 (1984-85) (noting the fact that Japanese attorneys are traditionally part of the trial bar and not used in counseling for areas of business, tax, or legal matters); Robert J. Walters, *Now That I Ate the Sushi, Do We Have a Deal? – The Lawyer as Negotiator in Japanese-U.S. Business Transactions*, 12 J. INT'L L. BUS. 335, 350-51 (1991) (acknowledging the fact that Japanese companies only refer to counsel in limited circumstances); Hiroshi Oda, *Probing the Workings of Japan's Legal System*, FIN. TIMES (London), Sept. 4, 1989, at 16 (Japanese companies do consult lawyers from time-to-time, though the day-to-day consultation is with non-legal staff).

152. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28, 30 (Tokyo Dist. Ct., Sept. 16, 1993).

153. *See* S. Todd Huckaby, *Defensive Actions to Hostile Takeover Efforts in Japan: The Shuwa Decisions*, 29 COLUM. J. TRANSNAT'L L. 439, 471 n.32 (1991) (noting that the Japanese and American business judgment rule is similar); Kawashima & Sakurai, *supra* note 13, at 12 (noting that the U.S. derivative suit mechanism was a model for the Japanese mechanism); West, *supra* note 8, at 1496 (citing Ikenaka v. Tabuchi, 1427 HANREI JIHO 137 (Tokyo Dist. Ct., 1992) in which the court decided the case using a rule similar to the American business judgment rule).

In Japan, minority shareholders of companies have brought most of their shareholder derivative actions,[154] however, the discovery rule of Japan is not as comprehensive as that in the United States.[155] Minority shareholders tend to have some difficulty collecting evidence to support their claims.[156] Therefore, there have been few Japanese cases in which a director was held liable for their actions.[157] Thus, Japanese courts have broadly applied the business judgment rule to shield directors.[158]

Part IV will discuss the application of the business judgment rule and its strong relationship with actual business operations.[159] Japanese courts apply the rule more strictly than the

154. *See* Ikenaka v. Tabuchi, 1427 HANREI JIHO 137 (Tokyo Dist. Ct., 1992) (the "Nomura Securities" case); Asai v. Iwasaki, 101 SHIRYOBAN SHOJI HOMU 37 (Tokyo D. Ct., Aug. 11, 1992), *rev'd*, 109 SHIRYOBAN SHOJI HOMU 70 (Tokyo High Ct., Mar. 30, 1993) (the "Nikko Securities" case); *See* Aoyama, etc., *supra* note 20 at 14; Kawashima & Sakurai, *supra* note 13, at 10 (noting that shareholder derivative actions have become a "potent means" by which minority shareholders can monitor the conduct of the directors of a corporation); West, *supra* note 8, at 1496-97 (citing two examples of minority shareholder derivative suits: The "Noruma Securities" case and the "Nikko Securities" case).

155. *See* KOBAYASHI, *supra* note 8, at 313 (pointing out that the Japanese pretrial discovery system is not as comprehensive as that in the United States, in that a sufficient disclosure system is necessary for effective shareholder derivative suits). For example, in Japan, even after the recent deregulation of requirements for inspection rights of a company's account book, only a shareholder who owns 3% or more of the issued shares in the company may have inspection rights. *Id. See* KOBAYASHI, *supra* note 8, at 313; *see also* Jason Marin, *Invoking the U.S. Attorney-Client Privilege: Japanese Corporate Quasi-Lawyers Deserve Protection in U.S. Courts Too*, 21 FORDHAM INT'L L.J. 1558, 1574-75 (1998) (noting that Japanese pre-trial discovery is more limited then in the United States, and that it "is used only for the preservation of evidence"); William C. Revelos, *Patent Enforcement Difficulties in Japan: Are There Any Satisfactory Solutions for the United States*, 29 GEO. WASH. J. INT'L L. & ECON. 503, 512-13 (1995) (noting that, unlike the United States, there are no provisions for formal pretrial discovery in the Japanese legal system).

156. *See* Susan H. Easton, *The Path for Japan?: An Examination of Product Liability Laws in the United States, the United Kingdom, and Japan*, 23 B.C. INT'L & COMP. L. REV. 311, 331 (2000) (stating that the limited discovery rules as an additional barrier to plaintiffs in Japan that does not exist in the United States or the United Kingdom); Kawashima & Sakurai, *supra* note 13, at 35 (noting the lack of means for a shareholder to gather information on a corporation, including limited disclosure and discovery laws); Mark D. West, *Information, Institutions, and Extortion in Japan and the United States: Making Sense of Sokaiya Racketeers*, 93 NW. U. L. REV. 767, 783 (1999) (citing the inability to gather information under judge made Japanese discovery rules as being one cause, among others, of unsuccessful derivative actions).

157. *See* KOBAYASHI, *supra* note 8, at 356-61; Easton, *supra* note 156 (citing the limited discovery rules in Japan as an additional barrier to plaintiffs in Japan that does not exist in the United States or the United Kingdom); Kawashima & Sakurai, *supra* note 13, at 36 (detailing the limited circumstances of successful derivative suits); West, *supra* note 156 (noting the derivative suit has been successful only when the director has committed an illegal act).

158. *See* Kawashima & Sakurai, *supra* note 13, at 12 (noting that Japanese courts apply the business judgment rule to protect directors); Milhaupt, *supra* note 8, at 32-34 (citing the "Normura case" as an example of how the business judgment rule is applied to shield directors); *see also* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25 (Tokyo Dist. Ct., Sept. 16, 1993) (finding the business judgment rule to protect the director of a corporation).

159. *See Japanese Executives Running Empires from Abroad,* NIHON KEIZAI SHIMBUN, Aug. 18, 1990 (citing that "Japan has extraordinary regulations" and that "such an environment hampers sound business judgment"); HIROSHI ODA & SIR ERNEST SATOW, JAPANESE LAW 290 (1993) (instructing that the Commercial Code of Japan "provides for criminal penalties up to seven years imprisonment for directors and others who acted against the interest of the company in various way"); *LDP Planing to Overhaul Shareholder Suit System,* JIJI PRESS TICKER SERVICE, June 2, 1997 (stating that in Japan the ruling Liberal Democratic Party "now sees the importance of taking steps to protect executives who make business judgments that turn out detrimental to their firms"). *See, e.g.*, West, *supra* note 8, at 1502 (noting that director liability has altered the manner in which business is conducted).

U.S. courts in certain cases, and vice versa in other types of cases.[160] Cases regarding a company's repurchase of its own shares are generally the only type of cases belonging to the former type,[161] and cases regarding illegal actions are examples of the latter.[162]

A. Repurchase of Its Own Shares

(a) United States

Among cases discussing a company's repurchase of its own shares, *Unocal Corp. v. Mesa Petroleum Co.* ("Unocal"),[163] demonstrates application of the business judgment rule in this context.[164] The facts in *Unocal* are as follows. On April 8, 1985, Mesa Petroleum Co. ("Mesa"), the owner of approximately 13% of shares in Unocal Corp. ("Unocal") commenced a two-tier "front loaded" cash tender offer for approximately 37% of Unocal outstanding stock at a price of $54 per share.[165] The second step merger was designed to eliminate the remaining shares by an exchange with highly subordinated securities.[166] Unocal's Board then offered to buy the remaining 49% of its shares for an exchange of debt securities having an aggregate par value of $72 per share.[167] Unocal's offer to repurchase its shares excluded Mesa.[168]

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160. *See* discussion *infra* Parts A & B. *See* Kazuo Ohmura, *Japan Should Legalize Stock Repurchasing*, NIHON KEZAI SHINBUN, Apr. 21, 1990, at 9 (stating that while the practice of stock repurchasing is prohibited by law in Japan, it is common practice in the United States); *see* J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 123 (1999) (stating that while the new Commercial Code contains a few exceptions under Articles 210 to 211-2, the basic ban on allowing a corporation to repurchase its own stock remains); James D. Cox, *The Eight Abraham L. Pomerantz Lecture: The Social Meaning of Shareholder Suits* 65 BROOK. L. REV. 3, 7 (1999) ("The powers of corporations to repurchase shares, to issue securities, and to combine with one another, as well as the fiduciary standards of their managers and related disclosure obligations, reflect contemporary judgments of how best to arrange relations among owners, managers and capital markets in order to maximize wealth.").

161. *See* discussion *infra* Part A.

162. *See* discussion *infra* Part B; West, *supra* note 156 (noting the derivative suit has only succeeded when the director has committed an illegal act, but has failed otherwise).

163. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (explaining that the case involved a company's repurchase of its own shares to protect itself from a takeover bid).

164. *See id.* at 955 (stating that the trial court found "after reasonable investigation" that "Mesa's tender offer was both inadequate and coercive").

165. *See id.* at 949 (noting that Unocal's board of directors "unanimously adopted a resolution rejecting as grossly inadequate Mesa's tender offer").

166. *See id.* at 950 (citing that Unocal's exchange offer was immediately challenged by Mesa with the ensuing lawsuit).

167. *See id.* at 951.

168. *See id.* After the Unocal decision, the SEC demonstrated its disapproval of discriminatory self-tenders by amending its rules to prohibit issuer tender offers other than those made to all shareholders. That is rule 17 C.F.R. § 240. 13e-4(f)(8) (1997). *See, e.g.,* KLEIN & RAMSEYER, *supra* note 88, at 731 (noting the court's precedent that the fact that some of the board members are large stockholders does not preclude an action from the protection of the business judgment rule).

In Unocal, the court held that (i) protection under the business judgment rule is not lost merely because Unocal's directors have tendered their shares in the exchange offer,[169] and (ii) the board's action was informed and taken with due care.[170]

(b) Japan

In *Mizuno v. Ariyoshi*,[171] the Japanese Supreme Court discussed the directors' decision to repurchase its own shares in the company, and held them liable for the damages caused by the repurchase.[172] The facts in *Ariyoshi*, are as follows. Mitsui Mining planned to merge Mitsui Cement K.K., one of its subsidiaries.[173] Under the Commercial Code of Japan, the merger needed to be approved by a super majority at a shareholders' meeting at Mitsui Mining.[174] However, one of the major shareholders of Mitsui Mining, who owned approximately 26% shares in Mitsui Mining ("Major Shareholder"),[175] opposed the merger,[176] which might result in the rejection of the merger resolution at the proposed shareholders' meeting.[177] The Major Shareholder requested Mitsui Mining to repurchase its shares.[178]

On December 3, 1975, directors of Mitsui Mining instructed another wholly owned subsidiary ("Purchase Vehicle") to purchase the shares in Mitsui Mining owned by the Major Shareholder and then to sell them to several other companies.[179] On December 25 the Purchase Vehicle purchased the shares in Mitsui Mining at JPY 8,215,000,000 (approximately US$ 74.7 million) from the Major Shareholder, and then sold the same shares to several companies at JPY 4,663,400,000 (approximately US$ 42.4 million) in total until March 1976.[180]

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169. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (Del. 1985).

170. *See id.* at 959 (citing that it was clear that the boards action against Mesa (the exchange offer) was done in good faith).

171. *See* Mizuno v. Ariyoshi, 1474 HANREI JIHO 17 (Sup. Ct. Sept. 9, 1993).

172. *See id.* at 18-19.

173. *See* Mizuno v. Ariyoshi, 1474 HANREI JIHO 17 (Sup. Ct., Sept. 9, 1993).

174. *See* SHOHO, art. 408, 493.

175. *See* Mizuno v. Ariyoshi, 1474 HANREI JIHO 17 (Sup. Ct., Sept. 9, 1993).

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*; *see also* Martin Saywell, *The Ultimate Barrier Revisited: Mergers and Acquisitions in Japan*, in JAPANESE COMMERCIAL LAW IN AN ERA OF COMMERCIALIZATION 41, 74 (Hiroshi Oda ed., 1994) (stating that the prohibition of a company from buying back its own shares will not necessarily prevent it from "arranging for its subsidiaries to buy its shares to achieve the same results"); Ohmura, *supra* note 160 (observing that overseas companies repurchase their own stocks for various reasons related to improving the company's financial structure); *Gaps Seen in Cash-Flow Payout to Japan*, NIKKEI WEEKLY, Jan. 31, 2000, at 15 (noting that many U.S. corporations "buy back their own stock to prevent dilution of earnings if stock options are exercised).

Due to the good business performance of the division of the former Mitsui Cement K.K.,[181] the merger resulted in substantial benefit for shareholders in Mitsui Mining.[182] Under the then current Commercial Code, a company was, in principle, prohibited from repurchasing its own shares; however, a subsidiary was not expressly prohibited to purchase a share in its parent company.[183]

Thus, the *Ariyoshi* Court held that (i) under the purpose of prohibition of a company from the repurchase of its own shares, it was prohibited that a company instruct its subsidiary to repurchase its own shares, even before the amendment of the Commercial Code expressly prohibited the repurchase through its subsidiary,[184] (ii) a loss sustained by the Purchase Vehicle from the balance between the acquisition price and the sales price of the shares decreased the value of the Purchase Vehicle and indirectly damaged Mitsui Mining,[185] and (iii) the directors of the company were liable for such damage.[186]

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181. *See* Mizuno v. Ariyoshi, 1474 HANREI JIHO 18 (Sup. Ct., Sept. 9, 1993).

182. *See id.*; *see also* Saywell, *supra* note 180, at 41-42 (noting that "many commentators have argued that Japanese companies, the Japanese bureaucracy and Japan itself, as a cultural and social unit, oppose the use of mergers and acquisitions as a form of business activity" but also recognize that although mergers and acquisitions have traditionally been looked down on by Japanese society, they are nonetheless becoming a more common form of business practice in Japan); Ohmura, *supra* note 160, at 9 (observing that stock repurchasing often boosts the price of a corporations stock).

183. *See* SHOHO, art. 210 (expressly prohibited an acquisition of shares in a parent company by a subsidiary); *see also* RAMSEYER & NAKAZATO, *supra* note 160 (stating that while the new Commercial Code contains a few exceptions under Articles 210-212, the ban prohibits a corporation from repurchasing its own stock); Tatsuta, *supra* note 15 (commenting that even before the amendment the acquisition through its wholly owned subsidiary violated the Commercial Code, unless the acquisition was expressly exempted under the Code or made without any consideration).

184. *See* Mizuno v. Ariyoshi, 1474 HANREI JIHO 17, 18-19 (Sup. Ct., Sept. 9, 1993); ODA & SATOW, *supra* note 159, at 276 (defining subsidiary as companies that "hold more than 50% of the shares of another joint stock company or of the capital of a limited company" and stating that subsidiaries are "prohibited from acquiring or holding shares of the parent company"); *see also* Saywell, *supra* note 180, at 67 (explaining that the purpose of this prohibition "is to prevent the parent company from indirectly purchasing its own shares").

185. *See* Mizuno v. Ariyoshi, 1474 HANREI JIHO 17, 19 (Sup. Ct., Sept. 9, 1993); *see also* RAMSEYER & NAKAZATO, *supra* note 160 (stating the Tokyo District Court defined the bounds of the Business Judgment Rule by two criteria: "whether the director made a careless error in assessing the factual premises to that judgment" or whether in making the judgment, the director "used a process that for an ordinary business executive would have been egregiously unreasonable" and stating that a court must find "that the director's business judgment exceeded the scope of discretion allotted to him" and that "he violated the duty of care of a good manager or his duty of loyalty"); ODA & SATOW, *supra* note 159, at 265 (noting that there is a "considerable discrepancy between the written law and the law in practice" and that "small and medium sized companies often ignore statutory regulations" which has prompted amendments to the Commercial Code).

186. *See* Mizuno v. Ariyoshi, 1474 HANREI JIHO 17, 18 (Sup. Ct. Sept. 9, 1993) (supporting ruling and stating that it is unfair that a director controls a resolution of a merger which shall be resolved at a company's shareholders meeting); Tatsuta, *supra* note 15; *see also* RAMSEYER & NAKAZATO, *supra* note 160 (citing that "absent fraud, illegality, gross negligence, or a conflict of interest, a court will not second-guess managerial decisions"); ODA & SATOW, *supra* note 159 (1993) (detailing that under Article 489-2 of Japan's Commercial Code, a violation of the repurchasing ban is "punishable by criminal sanction").

(c) Analysis

In both cases, the companies repurchased (or planned to repurchase) their own shares in order to maintain the directors management control of the companies.[187] Historically, in Japan, a company's repurchase of its own shares was strictly restricted because (i) it may cause an excessive distribution of the assets of the company through the payment of the acquisition price,[188] (ii) it may become a method of unfair control by a board of the shareholders' voting resolution,[189] and (iii) the repurchase may be used as a price keeping operation method to manipulate the company's fair share price.[190] On the other hand, in the United States, it is an accepted practice for a company to repurchase its own shares in principle.[191]

The U.S. requirements for timely disclosure on acquisition of its own shares are more strict than in Japan.[192] This may be one of the main reasons why repurchase is permitted in the

187. *See* Tatsuta, *supra* note 15, at 37; Ohmura, *supra* note 160, at 9 (providing that "stock repurchases were originally banned out of fears that corporate officials would use them for personal gain"); *see also* ODA & SATOW, *supra* note 159 (stating that the ban on companies repurchasing their own stock is "intended to prevent directors from being involved in manipulation of the stock market or insider trading"); Saywell, *supra* note 180, at 72 (explaining that under Article 257-2 of the Japan Commercial Code "directors may only be dismissed by a special resolution of shareholders in a General Meeting").

188. *See* Mizuno v. Ariyoshi, 1474 HANREI JIHO 17 (Sup. Ct., Sept. 9, 1993); YOSHINORI HASUI, SHINBAN CHUSHAKU KAISHAHO 227 (1986); RAMSEYER & NAKAZATO, *supra* note 160 (criticizing Japanese corporate law for having "an unusual number of senseless restrictions," for example the ban on firms buying back their own stock); *see also* ELLIOT J. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 113 (1984) (describing the Japanese business system as "a hybrid unique to Japan of free market and government involvement").

189. *See* HASUI, *supra* note 188, at 228; General Aspects of Securities Regulation, DOING BUSINESS IN JAPAN (MB) Part XI, § 11(i) (2000) (stating that "a holder of more than one-third of the outstanding shares has an effective veto against shareholders' resolutions on important corporate matters (including removal of directors and amendments to articles) that require special resolutions"); *see also* Saywell, *supra* note 180 (Hiroshi Oda ed., 1994) (noting that Japanese law is "quite clear that issuing shares with multiple or weighted voting rights is prohibited because of the general principle of on share one vote"); ODA & SATOW, *supra* note 159 (explaining that "since the acquisition of the company's own shares is prohibited, the primary means of defending the company against takeover attempts was cross shareholding by stable shareholders").

190. *See* HASUI, *supra* note 188, at 228; Ohmura, *supra* note 160, at 9 (stating that "stock repurchasing operations offer one way in which a corporation can boost the price of its stock" and "by reducing the volume of shares, stock repurchasing operations can magnify the effect of any rise in a company's basic value"); *see also Gaps Seen in Cash-Flow Payout to Japan, supra* note 190 (describing how the buying back of shares prevents the dilution of a companies earnings).

191. *See* Ohmura, *supra* note 160, at 9 (stating that while the practice of stock repurchasing is prohibited by law in Japan, it is a common practice in the United States) (describing that "stock repurchases can improve a company's financial structure by reducing dependence on stock holders equity"); *see also Gaps Seen in Cash-Flow Payout to Japan, supra* note 190 (claiming that "U.S. corporations aggressively use cash to return profit to shareholders through dividends and share repurchase programs").

192. *See Tokyo Report: Record Number of Firms to Go Public in 2001*, JIJI PRESS TICKER SERVICE, June 5, 2000 (citing that in order for the listing boom to continue in Japan, "the transparency and fairness of the stock market must be secured together with the improved liquidity of stocks and timely disclosure of corporate information"); *see also As Focus Shifts to Individuals, Firms Get Investor-Friendly*, THE NIKKEI WEEKLY, July 17, 2000 at 15 (stating that due to a the influence of a companies prospects for future performance on its stock prices, Japanese firms will have to increasingly disclose corporate information in order to continue producing profits for their shareholders); *NASDAQ Japan Changes Rules of Equity Game*, THE NIKKEI WEEKLY, June 26, 2000 at 7 (observing that contrary to the low level of disclosure usually required by Japanese markets, the new NASDAQ Japan, basing itself on the requirements of its U.S. parent, has stricter requirements for disclosure).

U.S. with more flexibility than Japan.[193] Such a fundamental difference in restriction on share repurchase has resulted in the difference of application of the business judgment rule against the director's business decisions to repurchase its own shares by the company.[194] In Japan, it is difficult for a director who approved the repurchase of its own shares to be shielded from liability through the application of the business judgment rule.[195]

B. Illegal Actions

As a contrast to the cases regarding repurchase of its own shares, the United States courts apply the business judgment rule more strictly than in Japan in cases regarding a company's illegal actions.[196]

(a) United States

In *Miller v. American Telephone & Telegraph Co.*,[197] the court held (i) that the business judgment rule could not insulate the defendant directors from liability if they did in fact breach

193. *See* Ohmura, *supra* note 160, at 9 (stating that while the practice of stock repurchasing is prohibited by law in Japan, it is common practice in the United States); *Recent Developments in the Securities and Exchange Law in Japan*, in JAPANESE BANKING, SECURITIES AND ANTI-MONOPOLY LAW 77 (Hiroshi Oda & Geoffrey Grice, eds., 1988) (noting that the disclosure system in Japan was enacted following security regulations in the United States, but it was an "unfamiliar concept" for both ordinary investors and professionals and that "with the growth of the Japanese capital market, disclosure has become one of the key measures of investor protection").

194. *See Gaps Seen in Cash-Flow Payout to Japan, supra* note 190 ("Japanese corporations emphasize stability of dividend payments. In the U.S., dividends are more directly linked to earnings. Since cash-rich companies may become targets for mergers or acquisitions, U.S. corporations aggressively use cash to return profit to shareholders through dividends and share repurchase programs."); *Sell-Off Expected up to March Book Close*, THE NIKKEI WEEKLY, Feb. 1, 1992, at 31 (noting that unless Japanese companies are allowed to repurchase their own stocks, their "dividend yields will not come into line with overseas levels"); *see also Japan Airline Leader Urges Change in Accord with U.S., Japan Transportation Scan*, KYODO NEWS INT'L INC., Mar. 14, 1994 (citing that Japan Airlines' plan to raise "air fares in first-and business-class seats on overseas routes" reflects business judgments made by the company that could harm its future earnings, yet there is little recourse for such action in Japan under the business judgment rule).

195. *See* Tatsuta, *supra* note 15, at 37; *LDP Planing to Overhaul Shareholder Suit System*, JIJI PRESS TICKER SERVICE, June 2, 1997 (stating that in Japan the ruling Liberal Democratic Party "now sees the importance of taking steps to protect executives who make business judgments that turn out detrimental to their firms"); *Japanese Executives Running Empires from Abroad, supra* note 159 (citing that "Japan has extraordinary regulations" and that "such an environment hampers sound business judgment"); ODA & SATOW, *supra* note 159, at 290 (instructing that the Commercial Code of Japan "provides for criminal penalties up to seven years imprisonment for directors and others who acted against the interest of the company in various way").

196. *See generally* Miller v. American Telephone & Telegraph Co., 507 F.2d 759 (3d Cir. 1974).

197. *See generally id.*

a federal prohibition on corporate campaign spending,[198] and (ii) that the directors could not be insulated, even if they committed the spending to benefit the corporation.[199] The facts in *Miller*, are as follows. The Democratic National Committee (DNC) owed American Telephone & Telegraph Co. (AT&T) $1.5 million for communication services provided by AT&T during the 1968 Democratic national convention.[200] The directors of AT&T took no action to recover the amount.[201] This was a federal prohibition on corporate campaign spending.[202]

(b) Japan

In *Matsumaru v. Ootsuru*,[203] also known as the "Hazama Corporation bribery case," the court held that the directors were liable for the amount of the bribe.[204] The facts in *Ootsuru* are as follows. The defendant was a director of Hazama Corporation ("Hazama"), a major construction contractor.[205] In 1991, the town of Sanwa planned to construct a town gymnasium and to hold a bidding contest among designated builders to determine a contractor for the building.[206] Around August 1, 1991, before the bidding contest, the director asked the mayor of Sanwa to nominate Hazama as one of the designated constructors and to inform the scheduled order price.[207] In return for the nomination and information, the director gave the mayor

198. *See* Miller v. American Telephone & Telegraph Co., 507 F.2d 759, 762 (3d Cir. 1974) (stating that "we are convinced that the business judgment rule cannot insulate the defendant directors from liability if they did in fact breach 18 U.S.C. § 610, as plaintiffs have charged"). *See also* 18 U.S.C. § 610 (2000), addressing the "coercion of political activity" and providing in relevant part:

> It shall be unlawful for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government as defined in section 7322(1) of title 5, United States Code, to engage in, or not to engage in, any political activity, including, but not limited to, voting or refusing to vote for any candidate or measure in any election, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

Id.

199. *See* Miller v. American Telephone & Telegraph Co., 507 F.2d 759, 762 (3d Cir. 1974) (noting that "where the decision not to collect a debt owed the corporation is itself alleged to have been an illegal act," the business judgment rule does not shield the director's decision from a shareholder's action).

200. *See* Miller v. American Telephone & Telegraph Co., 507 F.2d 759, 761 (3d Cir. 1974).

201. *See id*.

202. *See id.* (stating that AT&T's failure to collect amounted to it making "a 'contribution' to the DNC in violation of a federal prohibition on corporate campaign spending, 18 U.S.C. § 610 (1970)").

203. *See* Matsumaru v. Ootsuru, 1518 HANREI JIHO 3 (Tokyo Dist. Ct., Dec. 22, 1994).

204. *See id.* at 6.

205. *See id.* at 4; J. RAMSEYER & NAKAZATO, *supra* note 160 (citing Kabushiki Gaisha Hamaza as "a large construction firm traded on the Tokyo Stock Exchange").

206. *See* Matsumaru v. Ootsuru, 1518 HANREI JIHO 3, 4 (Tokyo Dist. Ct., Dec. 22, 1994).

207. *See id*.

JPY 14 million (approximately US$ 127,000) as a bribe.[208] Hazama won the tender and made a profit from the construction of the building.[209]

The court held that (i) a company is not permitted to commit an antisocial crime such as bribery for its business development,[210] and (ii) the defendant director cannot be insulated from damage compensation liability in the amount of the bribe, even if the company earned a profit from the construction, because the profit was not the result of the bribe, but of the company's construction work.[211]

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208. *See id.*; RAMSEYER & NAKAZATO, *supra* note 160 (citing that when the government prosecuted the director of K.K. Hazama who bribed the Mayor of Sanwa, the court sentenced him to two years in prison. Later when a shareholder sued the director in a derivative suit, the court held that, "companies may not use strongly anti-social tactics like bribery that violate the Criminal Code." However, it is common for Japanese companies to bribe senior executives of a target company, thereby turning a hostile takeover into a friendly one. Bribes may take the form of "retirement bonuses, consulting contracts, or high-paying honorific positions" as well as money. *Id.*

209. *See* Matsumaru v. Ootsuru, 1518 HANREI JIHO 3, 5 (Tokyo Dist. Ct., Dec. 22, 1994); RAMSEYER & NAKAZATO, *supra* note 160 ("The [Hazama] director was liable for the full amount of the bribe and could claim no offset for any profits the scheme earned."); *Former Firm Exec Ordered to Pay Bribe Back to Company,* JAPAN ECON. NEWSWIRE, Dec. 22, 1994 ("Presiding Judge Seishi Kanetsuki said bribe-giving is beyond the boundaries of justifiable business and cannot be justified by the fact that it brings profits to a company or is widely practiced."); *Nishimatsu Exec gets Suspended Sentence in Bribery Case,* JAPAN ECON. NEWSWIRE, March 5, 1996 (stating that where the vice president of Hazama Corp., received a sentence for bribery similar to the one given to a Nishimatsu executive for violating the law in pursuit of profits).

210. *See* Matsumaru v. Ootsuru, 1518 HANREI JIHO 3, 6 (Tokyo Dist. Ct., Dec. 22, 1994); RAMSEYER & NAKAZATO, *supra* note 160. ("[Companies] may not justify bribery as a business strategy on the grounds either (i) that it raises corporate profits, or (ii) that because their competitors customarily bribe they could not otherwise obtain business") (citing Matsumaru v. Ootsuru 1518 HANREI JIHO 3, 4 (Tokyo Dist. Ct., Dec. 22, 1994); Mitsuru Misawa, *Daiwa Bank Scandal in New York: Its Causes, Significance, and Lessons in the International Society*, 29 VAND. J. TRANSNAT'L L. 1023, 1057 (1996) ("The Tokyo District Court ruled that 1) using as a means of business a crime of a highly unsocial nature, such as bribery, should not be tolerated; and 2) bribery cannot be justified as a means of business simply because it brings a profit to the company, it is difficult to get an order without it (as competitors do the same), or it is customary in the industry."); *Former Firm Exec Ordered to Pay Bribe Back to Company, supra* note 209 ("[B]ribe-giving is beyond the boundaries of justifiable business and cannot be justified by the fact that it brings profits to a company or is widely practiced.").

211. *See* Matsumaru v. Ootsuru, 1518 HANREI JIHO 3, 6 (Tokyo Dist. Ct., Dec. 22, 1994) (finding that there was no proximate causation between the profit from construction and cause of the damage, therefore, it is not fair to subtract the amount of profit from the amount of damage); RAMSEYER & NAKAZATO, *supra* note 160 (stating that "director was liable for the full amount of the bribe and could claim no offset for any profits the scheme earned"); *The Judgment in Hazama Shareholder Derivative Suit Case*, 864 HANREI TIMES at 287 (1995); *Former Firm Exec Ordered to Pay Bribe Back to Company, supra* note 209 ("The Tokyo District Court on Thursday ordered a former executive of construction company Hazama Corp. to pay the company 14 million yen, the amount given in a bribe to a town mayor.").

(c) Analysis

In both countries, the courts held that the business judgment rule did not shield directors who gave an illegal donation from liability[212] and this was true even if the illegal donation enlarged a corporate business opportunity to make a profit for the company.[213] These cases seem to suggest that directors are expected to consider the maximization of profits for shareholders and companies, and also the corporation's lawful compliance, even if the latter limits the opportunity to accomplish the former. However, presently in Japan it is unclear as to the extent that illegal acts may exempt the application of the business judgment rule.[214] Unlike *Ootsuru*, in *Tabuchi*, the court held that directors were insulated from liability, even if the company's loss compensation action violated the Anti-Monopoly Law.[215] The *Tabuchi* Court

212. *See* RAMSEYER & NAKAZATO, *supra* note 160 (stating that the director of the construction company who gave the bribe was held liable, implying that he could not use the business judgment rule as a defense); *Former Firm Exec Ordered to Pay Bribe Back to Company, supra* note 209 ("In February, the Tokyo District Court gave Otsuru a suspended two-year prison sentence for the bribe to Oyama and another bribe of 10 million yen to then Ibaraki Gov. Fujio Takeuchi."); *Ex-president of Hazama Corp. Repays Bribe Given to Mayor,* JAPAN ECON. NEWSWIRE, Sept. 21, 1995 ("The former president of construction company Hazama Corp. has repaid to the company the bribe he handed to former Sendai Mayor Toru Ishii . . .").

213. *See Former Firm Exec Ordered to Pay Bribe Back to Company, supra* note 209 ("Presiding Judge Seishi Kanetsuki said bribe-giving is beyond the boundaries of justifiable business and cannot be justified by the fact that it brings profits to a company or is widely practiced."); RAMSEYER & NAKAZATO, *supra* note 160 (describing a situation when a "director was liable for the full amount of the bribe and could claim no offset for any profits the scheme earned").

214. *See* Matsumaru v. Ootsuru 1518 HANREI JIHO 3, 4 (Tokyo Dist. Ct., Dec. 22, 1994); RAMSEYER & NAKAZATO, *supra* note 160 ("[T]he business judgment rule does not excuse fraudulent or illegal schemes, even when they earn the shareholders money."); West, *supra* note 156 ("[B]ecause of reliance on the business judgment rule in cases involving listed companies, the only shareholders who have litigated successfully have been those whose directors committed illegal acts.").

215. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, (Tokyo Dist. Ct., Sept. 16, 1993) at *supra* Part III.B(6)*;* J. RAMSEYER & NAKAZATO, *supra* note 160 (finding that the directors acted within the parameters of the business judgment rule even though they compensated clients for losses they sustained); Milhaupt, *supra* note 8, at 32 (accusing the defendant of violating the Anti-Monopoly Law when it compensated clients for their market losses. However, the court did not find a violation of the business judgment rule); *see also* Milhaupt, *supra* note 9 (stating court held that the directors did not breach their duty when they compensated clients for market losses. However, the court held that loss compensation was a violation of the Anti-Monopoly Law).

explained that the difference in responsibility of a director in a bribery case, from that in an unfair method of competition case, resulted from the difference in the level of unsociability between them.[216]

One possible explanation is that, bribery is an obviously illegal act. By contrast, although an unfair trade practice is an act that technically violates a rule issued by the Fair Trade Commission, it is difficult for a director, who normally has little professional knowledge in the area of law, to comply with such a rule.[217] Additionally, as mentioned above, in Japan the number of licensed lawyers is quite small in comparison with that in the United States.[218] Therefore, it is difficult for a director to frequently obtain a lawyer's opinion for legality on each company's action.[219]

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216. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28 (Tokyo Dist. Ct., Sept. 16, 1993); Hasegawa, *supra* note 93, at 39 (suggesting that if the level of illegality is relatively low, the liability of a director should be considered with profits resulting from the illegal act. A substantial violation of law is a requirement for director's liability, but a different standard should be applied if an illegal act does not violate public policy); Andrew H. Thorson & Frank Siegfanz, *The 1997 Deregulation of Japan's Holding Companies*, 8 PAC. RIM L. & POL'Y J. 261, 318 (1999) (mentioning that directors do not usually have legal training, rather "director positions are commonly held by individuals who, since graduating from college, have been trained and educated by the company itself." They are "insiders formally elected by stockholders and appointed by the CEO"); *see also* Uemura, *supra* note 101 at 7 (Prof. Uemura argued that the court's application of the rule was inadequate because it was unreasonable for the directors of Nomura Securities to believe that substantial harmful effects would arise without loss compensation when TBS merely claimed loss compensation resulting from the advisory agreement. Therefore TBS's request for loss compensation was unreasonable and, more importantly, the directors negligently misunderstood the facts, which was extremely unreasonable. There may have also been alternative business decisions other than the loss compensation. Moreover, the JPY 360 million (approximately US$ 3.3 million) loss compensation was too large to be justified. In total, Nomura Securities made JPY 16.1 billion (approximately US$ 146 million) loss compensation to its clients, including TBS, based upon the same board decision. The board's decision was made for the loss compensations in total when compensation to TBS should not have been discussed separately, but as a part of this huge loss compensation decision.

217. *See* Milhaupt, *supra* note 9, at 465 (determining loss of compensation to be a violation of the Anti-Monopoly Law).

218. *See* Smith v. Van Gorkom, 488 A.2d 858, 880 (Del. 1985); HANH, *supra* note 188, at 12 ("The United States has twice as many people as Japan and fifty times as many lawyers."); ODA & SATOW, *supra* note 159 at 102 (finding the number of attorneys in Japan, as compared to U.S., relatively small); Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice,* 74 B.U. L. REV. 723, 732 (1994) (". . . Japan, for example, maintains a thriving economy with a much smaller number of lawyers per capita.").

219. *See* HANH, *supra* note 188, at 14 ("The comparatively small number of attorneys in Japan and the relatively high fees they charge prevent most Japanese from consulting an attorney if they have a dispute with someone."); ODA & SATOW, *supra* note 159, at 103 ("The Japanese seldom consult an attorney unless a dispute actually arises."); ARTHUR TAYLOR VON MEHREN, LAW IN JAPAN, THE LEGAL ORDER IN A CHANGING SOCIETY 557 (1961) ("[Lawyers] do not usually give preventive counsel prior to business decisions but confine their activities largely to litigation.").

In Japan, the director's obligations of compliance do not seem to extend to technical violations of law,[220] which is beyond the reasonable care of a non-lawyer director, given Japan's current legal services deficiency.[221]

Since the date of the loss compensation in *Tabuchi*, the Securities and Exchange Law did not statutorily prohibit an ex post facto loss compensation by a securities broker.[222] In 1991 an amendment to the Securities and Exchange Law, statutorily prohibited loss compensation.[223] Therefore, if a director of a securities broker compensates a client's loss, the director may be liable for the amount paid in compensation,[224] since a director of a securities broker is assumed to have professional knowledge about laws regulating securities transactions.[225]

V. Conclusion

The business judgment rule is a balancing test between the fiduciary obligations of a director and the acceptable risk-taking management decisions.[226] The rule demonstrates what is

220. *See* RAMSEYER & NAKAZATO, *supra* note 160 (in Japan directors owe a duty of loyalty and a duty of care); Katsuhito & Iwai, *supra* note 92, at 623 n.97 (stating that although the Japanese Commercial Code imposes strong duties of care and loyalty on directors, "Japanese courts have traditionally been rather lenient in applying fiduciary law . . ."); Hasegawa, *supra* note 93, at 39.

221. *See* RAMSEYER & NAKAZATO, *supra* note 160; HANH, *supra* note 188, at 13 (concluding that Japan has a deficiency of lawyers because there is only one law school, and the highly competitive examination is given in order to enter the school); Hiroshi Sarumida, *Comparative Institutional Analysis of Product Safety Systems in the United States and Japan: Alternative Approaches to Create Incentives for Product Safety,* 29 CORNELL INT'L L.J. 79, 103 (1996) ("Victims of product-related accidents in Japan have restricted access to legal service because of the small number (approximately 14,000 of attorneys in Japan.").

222. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28 (Tokyo Dist. Ct., Sept. 16, 1993); RAMSEYER & NAKAZATO, *supra* note 160 (stating that an offer of loss compensation to their clients, by the managers in the *Tabuchi* case "did not violate the Securities and Exchange Act"); Securities Exchange Act, Law No. 25 (1948); Milhaupt, *supra* note 9 ("[The Tokyo District Court] held that payment of compensation neither constituted a breach of duty by the directors nor gave rise to a loss by the company.")

223. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 28 (Tokyo Dist. Ct., Sept. 16, 1993); *See* Securities Exchange Act §§ 50-3(a)(iii) (1991); RAMSEYER & NAKAZATO, *supra* note 160, at 113 n.13 ("Under an amendment made since that time, the act does now ban such payments."); *see also* Milhaupt, *supra* note 9 at 456 (discussing criminal and civil liability for directors in Japan); Andrew H. Thorson & Frank Siegfanz, *The 1997 Deregulation of Japan's Holding Companies*, 8 PAC. RIM L. & POL'Y J. 261, 318-320 (1999) (examining the role of directors and corporate governance in Japan's corporations); West, *supra* note 156, at 776 (mentioning how directors must return illegal payments to the company). *See generally* West, *supra* note 8, at 1436 (discussing concerning directors, managers, and shareholders of Japanese corporations).

224. Hasegawa, *supra* note 93, at 36 (Hasegawa, Esq. commented that a technical violation of applicable laws and regulations does not always result in a breach of fiduciary duty by the director who made the decision. However, the breach of fiduciary duty should be examined to determine whether the decision violated material laws and regulations, which protect the public order of a society.).

225. Hasegawa, *supra* note 93, at 36.

226. *See* Charles M. Elson, *Corporate Law Symposium: The Duty of Care, Compensation, and Stock Ownership,* 63 U. CIN. L. REV. 649, 669 n.36 (1995) (citing Aronson v. Lewis, 473 A.2d 805 (Del. 1984)) (detailing when a director would be found to have met this duty of care in making a specific business decision); Bryan Ford, *In Whose Interest: An Examination of the Duties of Directors and Officers in Control Contests,* 26 ARIZ. ST. L.J. 91, 117 (1994) (stating that "the business judgment rule protects decisions by directors who are not financially interested if the directors use reasonable procedures to reach a decision that reasonably is in the best interests of the corporation").

considered the minimum expectation of a director in the legal world.[227] Under this minimum expectation standard, directors of a company shall be sufficiently informed with respect to the subject of the business and implement a rational decision making process to pursue the best interests of the corporation.[228] This general concept of business judgment is almost the same between the United States and Japan.[229] Both countries share similar business standards in general, such as the separation of ownership and management and the fiduciary relationships between a company and its directors.[230] Thus, the basic concepts of the business judgment rule are similar between both countries.[231]

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227. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A2d 946, 949 (Del. 1985) (citing Sinclair Oil Corp. v. Levien, Del. Supr., 280 A.2d 717, 720 (1971)) (stating that a court will not interfere with a board of director's decision if the "decision can be 'attributed to any rational business purpose.'"); Roberta S. Karmel, *The Fourth Abraham L. Pomerantz: Tensions Between Institutional Owners and Corporate Managers: An International Perspective: Is Time For a Federal Corporation Law?,* 57 BROOK. L. REV. 55, 72-73, (1991) (citing D. BLOCK, N. BARTON & S. RADIN, THE BUSINESS JUDGMENT RULE 1-4 (3d ed. 1989)) (noting that a director is expected to make "disinterested business decisions made with due care, in good faith and without an abuse of discretion"); Elson, *supra* note 226, at 669 (1995) ("[A] director would be found to have met this duty of care if in making a specific business decision he or she acted without self-interest, in an informed manner, and with a rational belief that the decision was in the best interests of the corporation.")

228. *See* Karmel, *supra* note 227 (stating that in order to be shielded by the business judgment rule, directors are required to execute disinterested business decisions "with due care, in good faith and without an abuse of discretion."); Arthur R. Pinto, *Section III: Corporate Governance: Monitoring the Board of Directors in American Corporations,* 46 AM. J. COMP. L. 317, 331 (1998) ("[The Business Judgment Rule] limits judicial inquiry into business decisions and protects directors who are not negligent in the decision making process."); Bernard Singhof and Oliver Seiler, *Shareholder Participation in Corporate Decisionmaking Under German Law: A Comparative Analysis,* 24 BROOK. J. INT'L L. 493, 546 (1998) ("The business judgment intends to preserve managerial risk-taking by presuming managerial diligence and good faith in making business decisions.").

229. *See* RAMSEYER & NAKAZATO, *supra* note 160 ("In many ways, both U.S. Corporate law and Japanese corporate law begin with the business judgment rule: Absent fraud, illegality, gross negligence, or a conflict of interest, a court will not second-guess managerial decisions."); Milhaupt, *supra* note 8, at 33 n.156 *(*discussing the *Nomura* case) ("In its formulation of the business judgment rule, the court enunciated a standard close to the 'gross negligence' formulation of the rule applied in some U.S. jurisdictions."); Kawashima & Sakurai, *supra* note 13, at 12 (stating that although the Commercial Code does not authorize them to, "[Japanese] Courts are also trying to protect directors who have acted in good faith by importing the U.S. business judgment rule . . .").

230. *See* RAMSEYER & NAKAZATO, *supra* note 160 ("In many ways, both U.S. Corporate law and Japanese corporate law begin with the business judgment rule: Absent fraud, illegality, gross negligence, or a conflict of interest, a court will not second-guess managerial decisions."); Milhaupt, *supra* note 8, at 15 ("As in the United States, Japanese corporations are organized in part by mandatory structural and fiduciary rules that guide the internal processes of corporate decision-making and the external conduct of corporate actors."); Michael Bradley, et al., *Challenges to Corporate Governance: The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads,* 62 LAW & CONTEMP. PROB. 9, 76 (1999) (discussing THE CORPORATE GOVERNANCE COMMITTEE, CORPORATE GOVERNANCE FORUM OF JAPAN CORPORATE, *Governance Principles: A Japanese View (Final Report)* (May 26, 1998) at 43 ("[T]he creation of a U.S.-style concept of fiduciary duty to shareholders and implies that the current Japanese concepts of such duty may be somewhat vague, covered as they are by legal concepts such as bona fide loyalty duty and the duty of honest manager's care.").

231. *See supra* Part III.C.; *see, e.g.,* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 41 (1992) (describing the history of the business judgment rule); Thomas L. Hazen, *Corporate Directors Accountability: The Race to the Bottom—The Second Lap*, 66 N.C. L. REV. 171, 171, n.4 (1987) (noting that the business judgment rule has existed for at least 150 years).

However, the level of information necessary for appropriate business judgment seems to be different between the United States and Japan.[232] As described above, in Japan many companies adopt a "bottom-up" decision making system,[233] in which working-level officers consider matters in detail on behalf of executive managers,[234] provided however, that the responsible officers must be disinterested in the transactions.[235] Such business practices affect the level of expected information applicable to other directors and effectively amount to a business judgment.[236]

There have been only a small number of Japanese cases in which a director has become liable.[237] In general, Japanese courts tend to apply the business judgment rule more conservatively than the U.S. courts.[238] However, in the area of a company's repurchase of its own shares, the situation is reversed.[239] In Japan, the Commercial Code strictly regulates a company's repur-

232. *See* Lynne L. Dallas, *Proposals for Reform of Corporate Directors: The Dual Board and Board Ombudsperson,* 54 WASH. & LEE L. REV. 91, 146 (1997) (describing the role of the Japanese ombudsperson, and the United States should borrow some corporate techniques from Japan); Orts, *supra* note 231, at 42-44 (1992) (noting the traditional reluctance of courts to interfere with corporate decision making); West, *supra* note 8, at 1437-38 (1994) (noting the history of the Japanese shareholders' derivative suit mechanism, and how infrequently it has been used).

233. *See The Japanese Miracle*, THE ENGINEERING NEWS-REC., Oct. 21, 1982, at 96 (discussing how bottom-up decision making alone may not be the key to Japanese success); Steve Lohr, *For New IBM Chief, Spinoff May Be a Model*, N.Y. TIMES, March 29, 1993, at D1 (describing the impact of bottom-up decision making); Takehiro Fukuda, *Rift in Top Opposition Group is Widening*, NIKKEI WEEKLY, Feb. 15, 1993, at 2 (noting the Japanese practice of bottom-up decision making).

234. *See The Japanese Miracle*, *supra* note 233 (discussing how bottom-up decision making alone may not be the key to Japanese success); Lohr, *supra* note 233 (noting the impact of bottom-up decision making); Takehiro Fukuda, *Rift in Top Opposition Group is Widening*, NIKKEI WEEKLY, Feb. 15, 1993, at 2 (discussing the Japanese practice of bottom-up decision making.).

235. *See generally The Japanese Miracle*, *supra* note 233 (discussing how bottom-up decision making alone may not be the key to Japanese success); Lohr, *supra* note 233 (discussing the impact of bottom-up decision making); Takehiro Fukuda, *Rift in Top Opposition Group is Widening*, NIKKEI WEEKLY, Feb. 15, 1993, at 2 (discussing the Japanese practice of bottom-up decision making.).

236. *See supra* Part III.C.

237. *See, e.g.,* Judgment of May 29, 1986 (Ariyoshi v. Mizuno, or the Mitsui Mining Case), 1194 HANJI 33*, aff'd*, Judgment of July 3, 1989, Tokyo Kosai Tokyo High Court, 1188 KIN'YU SHOJI HOMUO 36, *aff'd*, Judgment of Sept. 9, 1993, Saikosai Supreme Court, 114 SHIRYOBAN SHOJI HOMU 167 (shareholder plaintiff in this case won y100 million); *see also* West, *supra* note 8, at 1438 (examining the "daihyo sosho," the Japanese shareholders' derivative suit mechanism and the infrequency of its use); Katsuhide Takahashi, *More Companies Exploring Directors' Liability Insurance*: *Shareholder Lawsuits Now Easier to File*, NIKKEI WEEKLY, Feb. 7, 1994, at 17 (discussing how difficult it is to determine the premium for director liability insurance because there are so few cases).

238. *See supra* Part IV; Orts, *supra* note 231, at 44-46 (discussing how courts have tightened the previously relaxed application of the business judgment rule, subjecting corporate decision making to closer judicial scrutiny); Milhaupt, *supra* note 8, at 3 (describing a director's duty of care under the Japanese Commercial Code).

239. *See supra* Part IV.A; *See* SHOHO, art. 210 (a recent amendment gives corporations certain limited rights to buy their own shares); Dan F. Henderson, *Foreign Acquisitions and Takeovers in Japan,* 39 ST. LOUIS U. L.J. 897, 904 (1995) (discussing how the Japanese Commercial Code prohibits all corporations from buying their own shares).

chase of its own shares.[240] This restriction is well supported within the business world.[241] However, in the United States, this is an acceptable business practice, thereby possibly providing directors with some latitude to repurchase its own shares, even in the case of a discriminating self-tender.[242]

In illegal action cases, there is a social consensus among people in the United States and Japan, that a company cannot use bribery as a method of business development, even if it will result in a profit for the company.[243] Therefore, in both countries directors who engage in bribery were not shielded from liability.[244] However, in Japan, because there are fewer lawyers and it is very rare for a company to employ in-house counsel or to receive a legal opinion from out-

240. *See* SHOHO, art. 210-212; S*ee* Henderson, *supra* note 239 at 904 (discussing how the Japanese Commercial Code prohibited all corporations from buying their own shares, however a recent amendment gives corporations certain limited rights to buy their own shares).

241. *See* HASUI, *supra* note 188, at 227-28.

242. *See* SHOHO, art. 210-212; *see also* DEL. CODE ANN. tit. 8, at 160(a) (1983) (Delaware General Corporate law provides a board of directors with extensive power when dealing with their own outstanding stock. Section 160 of the Delaware General Corporation Law provides, in relevant part, that "Every corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares . . ."); *see also* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 951 (Del. 1985) (by engaging in an exclusionary self-tender offer, a corporation prohibits a bidder, who is attempting a hostile takeover, from tendering his shares into the offer); *see, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 951 (Del. 1985); A board of directors will generally engage in an exclusionary self-tender offer for the corporation's shares to either frustrate a hostile takeover or to "[s]ever its relationship with a dissident stockholder." Eric Bielawski, *Selective Stock Repurchase After Grobow: The Validity of Greenmail Under Delaware and Federal Securities Laws*, 15 DEL. J. CORP. L. 95, 95 (1990).

243. *See* Orts, *supra* note 231, at 113 (discussing that the business judgment rule will not shield shareholders when manipulation and fraud are present in the share voting process); *But see* Auerbach v. Bennett, 47 N.Y.2d 619, 630-31 (1979) (In *Auerbach* corporate shareholders brought suit charging that four of the Corporation's directors and its accounting firm were liable for approximately $ 11 million paid by the corporation in bribes and kickbacks. A special litigation committee was appointed and subsequently decided to terminate the shareholders' derivative action. The Appellate Division held that the decision of the special litigation committee could not foreclose a suit challenging acts of officers and directors which offended public policy. The Court of Appeals reversed and dismissed, holding that the decision of the special litigation committee, comprised of disinterested directors, reached after a full inquiry and deliberation, was entitled to the protection of the business judgment rule). U.S. courts have distinguished between bribery and extortion. *See, e.g.*, Hornstein v. Paramount Pictures, Inc., 37 N.Y.S.2d 404 (Sup. Ct. 1942), *aff'd*, 41 N.Y.S.2d 210 (App. Div. 1943), *appeal denied*, 43 N.Y.S.2d 751 (App. Div. 1943), *aff'd*, 55 N.E.2d 740 (N.Y. 1944) *per curiam* (holding that the corporation was not guilty of bribing labor union representatives, rather it was the victim of labor organization extortion. Therefore the corporation did not violate the criminal law by paying the bribe and "[t]he payments were not such an unlawful diversion of corporate moneys as to render the directors and officers liable therefor at the suit of minority stockholders.").

244. *See* Cheff v. Mathes, 199 A.2d. 548, 554 (Del. 1964) (noting that "if the board has acted solely . . . because of the desire to perpetuate themselves in office, the use of corporate funds for such purposes is improper"); 1518 HANREI JIHO 4; RAMSEYER & NAKAZATO, *supra* note 160 (citing that when the government prosecuted the director of K.K. Hazama that bribed the Mayor of Sanwa, the court sentenced him to two years in prison. Later when a shareholder sued the director in a derivative suit, the court held that, "companies may not use strongly anti-social tactics like bribery that violate the Criminal Code"); Orts, *supra* note 231, at 113 (1992) (discussing that the business judgment rule will not shield shareholders when manipulation and fraud are present in the share voting process).

side counsel,[245] directors have difficulty in complying with detailed and technical laws and regulations, such as Antitrust Law.[246] Therefore, Japanese courts shield directors from liability in some cases of technical violations of the laws and regulations.[247]

The basic business judgment rule (requirements for sufficient information and a rational decision making process) will not substantially change where current company management systems (the separation of ownership and management) continue in the United States and Japan.[248] However, the application of the rule and resulting conclusions may change as business customs and circumstances change in these countries.[249]

After the reduction of court costs, the number of the derivative suits dramatically increased in Japan.[250] Along with this movement, Japanese courts may apply the business judg-

245. *See* Elliott J. Hahn, *Perspective: An Overview of the Japanese Legal System*, 5 NW. J. INT'L L. & BUS. 517, 531 (1983) (discussing how most Japanese corporations have corporate legal departments but rarely employ lawyers); *Concerning the Roles of the Legal Departments of Typical Japanese Enterprises,* COMM. LAW CENTER, Inc. (1979) (noting Japanese corporate legal departments are a relatively new phenomenon because most of them were formed in the 1970s); Brown, *A Lawyer By Any Other Name: Legal Advisors in Japan*, LEGAL ASPECTS OF DOING BUSINESS IN JAPAN, 201, 222 (1983) (examining how in the early 1980s there were fewer than ten attorneys directly hired by Japanese corporations).

246. *See* Hasegawa, *supra* note 93, at 39.

247. *See* Ikenaka v. Tabuchi, 1469 HANREI JIHO 25, 31-32 (Tokyo Dist. Ct., Sept. 16, 1993).

248. *See* Hazen, *supra* note 231 (noting the effectiveness and longevity of the business judgment rule); ROBERT W. HAMILTON, THE LAW OF CORPORATIONS IN A NUTSHELL, 312 (3d. ed. 1991) (discussing how the language of the business judgment rule has changed slightly, but the essential elements remain in place); Orts, *supra* note 231, at 42-44, 129 (describing the effectiveness of the typical Japanese corporation's make-up which is a coalition of suppliers, lenders, customers and shareholders, each holding a wide range of claims against the company).

249. *See* LESTER THUROW, HEAD TO HEAD: THE COMING ECONOMIC BATTLE AMONG JAPAN, EUROPE AND AMERICA, 247 (1992) (mentioning the need for corporate adaptation in the coming global economic battle); Dallas, *supra* note 232, at 92-93 (noting the importance of reforming corporate boards' customs and practices); Orts, *supra* note 231, at 133-34 (1992) ("A recent major study calling for change in the American capital allocation system sees 'the need for all the major constituencies to sacrifice some of their narrow self-interests in the pursuit of a better overall system' to 'better align the goals of American shareholders, corporations, managers, employees, and society.'").

250. *See* West, *supra* note 8, at 1437-38 (discussing how in recent years the Japanese legal and economic environments have begun to change so that the derivative suit mechanism is now prominent in Japanese corporate law); Takahashi, *supra* note 237 ("An increasing number of the Japanese companies have acquired directors and officers liability insurance as a precautionary measure since Japan's Commercial Code was revised last October. The revision reduced to 8,200 yen [74.55 dollars] the filing fee for shareholder suits against directors for alleged negligent acts or omissions. The previous high fee discouraged such actions.").

ment rule more strictly in the future,[251] although they will maintain the basic concepts of the business judgment rule.[252]

In Japan a large amount of security for expenses, which courts frequently order against plaintiff shareholders, still limits shareholders' opportunities to claim the breach of directors' duties.[253] This new de facto limitation is criticized among legal practitioners for barring a remedy for shareholders.[254] Also, the insufficiency of Japanese pretrial discovery systems bar minority shareholders from collecting evidence necessary for their derivative suits.[255] In addition to the contents of the business judgment rule and application thereof to various kinds of cases, these procedural issues under shareholder derivative suits are still open to future disagreement.

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251. *See* THUROW, *supra* note 249 (mentioning the need for corporate adaptation in the coming global economic battle); Dallas, *supra* note 232, at 92-93 (noting the importance of reforming corporate boards' customs and practices); Orts, *supra* note 231, at 41. 133-34 ("A recent major study calling for change in the American capital allocation system sees 'the need for all the major constituencies to sacrifice some of their narrow self-interests in the pursuit of a better overall system' to 'better align the goals of American shareholders, corporations, managers, employees, and society.'").

252. *See* ROBERT W. HAMILTON, THE LAW OF CORPORATIONS IN A NUTSHELL, 312 (3d. ed. 1991) (noting that the language of the business judgment rule has changed slightly, but the essential elements remain in place); Hazen, *supra* note 231 (noting the effectiveness and longevity of the business judgment rule); Orts, *supra* note 231, at 41-44 (discussing the history of the business judgment rule).

253. *See* West, *supra* note 8, at 1465-66 (noting that the requirement that a shareholder-plaintiff post a bond as security for expenses serves no purpose but to limit the number of derivative suits); *Security for Expenses in Shareholders Derivative Suits*: *23 Years' Experience,* 4 COLUM. J.L. & SOC. PROBS. 50 (1968) (finding security for expenses statutes to be a minor factor in the bringing of derivative actions); SHOHO art. 267(4).

254. *See* West, *supra* note 8, at 1465-66 (noting that the requirement that a shareholder-plaintiff post a bond as security for expenses serves no purpose but to limit the number of derivative suits); *Security for Expenses in Shareholders Derivative Suits*: *23 Years' Experience,* 4 COLUM J.L. & SOC. PROBS. 50 (1968) (finding security for expenses statutes to be a minor factor in the bringing of derivative actions); THE AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 6.01 (1994).

255. *See* Marin, *supra* note 155 (stating that the Japanese pre-trial discovery is more limited than in the United States); Revelos, *supra* note 155 ("Japan has no provisions for formal pretrial discovery like that in the United States"); West, *supra* note 8, at 1467 (noting that Japan has no system of pre-trial discovery to help them learn new information on which to base their case or to prove the case to the bench).

The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination

By Eric Ting-lun Huang*

I. Introduction

The Charter of the United Nations (hereinafter "UN") calls for the respect of "the principle of equal rights and self-determination of peoples."[1] In similar language, the principle of self-determination is formally affirmed in other legal documents such as, the Universal Declaration of Human Rights[2] (hereinafter "UDHR"), the International Covenant on Civil and Political Rights[3] (hereinafter "ICCPR"), the International Covenant on Economic, Social and Cultural Rights[4] (hereinafter "ICESCR"), various UN General Assembly resolutions and the International Court of Justice decisions and advisory opinions.[5] As a crucial principle of collective human rights, international legal instruments have elevated the principle of self-determina-

1. *See* UN CHARTER, art. 1, para. 2 (stating the purpose of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take appropriate measures to strengthen universal peace); *cf.* Minasse Haile, *Legality of Secessions: The Case of Eritrea,* 8 EMORY INT'L L. REV. 479, 501 (1994) (stating that although the Charter refers to self-determination as a right pertaining to "peoples," it contains no definition of the term); *see, e.g.,* Goler Teal Butcher, *The Immediacy of International Law for Howard University Students*, 31 HOW. L.J. 435, 443 (1988) (asserting that political leaders adopted the UN CHARTER based on the principles of equal rights and self-determination in order to achieve international peace and security, as a reaction to Nazism).

2. *Universal Declaration on Human Rights,* UN GAOR, Supp. No. 16, at 52, UN Doc. A/6316 (1948) (containing core human rights priciples that are widely recognized by the international community).

3. *International Covenant on Civil and Political Rights,* G.A. Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966) (spelling out, in greater detail, the broad principles enunciated in the UDHR).

4. *International Covenant on Economic, Social and Cultural Rights,* G.A. Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, at 48, UN Doc. A/6316 (1966)

5. *See* Laurel Remers Pardee, *The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe,* 13 ARIZ. J. INT'L & COMP. LAW 491, 509 (1996) (noting that the UN later codified the right of self-determination as a human right in Article one of both the ICCPR and the ICESCR); *see also* Bereket Habte Selassie, *Self-Determination in Priciple and Practice: The Ethiopian-Eritrean Experience,* 29 COLUM. HUMAN RIGHTS. L. REV. 91, 94 (1997) (stating that the link between human rights and self-determination was clearly established by the ICESCR and ICCPR); Prudence E. Taylor, *From Environment to Ecological Human Rights: A New Dynamic in International Law?,* 10 GEO. INT'L ENVTL. L. REV. 309, 330 (1998) (noting that Part I of both the ICCPR and the ICESCR begin by declaring that "all peoples have the right of self-determination").

* **L.L.B., Soochow University School of Law, ROC; L.L.M., Golden Gate University School of Law, U.S.; S.J.D. Candidate, Golden Gate University School of Law, U.S.**

tion to a norm of customary international law which has a legally binding effect on the international community.[6]

In today's world, self-determination is an extremely controversial issue in relation to the qualifications of the group of persons entitled to exercise the right of self-determination.[7] No one doubts that self-determination is a fundamental principle of human rights law, but full consensus on defining the holder of the right to self-determination has not yet been reached.[8]

Observing the proliferation of self-determination claims after the Cold War, the concept of self-determination has been widely acknowledged yet used differently on various occasions.[9] In general, however, it is inherent in the democratic process to allow the wishes of a people to

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6. *See* Richard N. Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L L. 80, 88-89 (1988) (noting that under current international law, political self-determination is generally equated with freedom from colonial-type rule); Eric Kolodner, *The Future of the Right to Self-Determination,*10 CONN. J. INT'L L. 153, 155 (1994) (stating that the principles of international order became more developed after the formation of the UN as respect for self-determination became a necessary precondition for a government's international legitimacy); Halim Moris, *Self-Determination: An Affirmative Right of Mere Rhetoric?,* 4 ILSA J. INT'L & COMP. L. 201, 202-03 (1997) (noting that President Woodrow Wilson was responsible for elevating the principle of self-determination to an international level when, in 1916, he included it in his fourteen points); *see also* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 27 (1990) (stating that no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination).

7. *See* Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 21 (1992) (noting the uncertainty in the application of self-determination in international law); *see also* Armen Tamzarian, *Nagorno-Karabagh's Right to Political Independence Under International Law: An Application of the Principle of Self-Determination,* 24 SW. U. L. REV. 183, 195-96 (1994) (noting that, while it has been generally accepted that people under colonial domination have a right to self-determination, the application of self-determination to "peoples" within an existing state has been much more controversial). *See generally* Gerry J. Simpson, *Judging The East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323, 340 (1994) (noting that state practice, especially since the fall of communism in Eastern Europe and the Soviet Union, has supported the right to self-determination for non-colonial peoples).

8. *See* LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 9-11 (1978) (arguing that in addition to a group's "subjective perception of distinctness," objective characteristics, such as linguistic, racial, religious, and historic differences between the group seeking self-determination and other groups must be analyzed in order to determine whether the group is an appropriate candidate for self-determination); *see also* ANTONIO CASSESE, THE SELF-DETERMINATION OF PEOPLES, IN THE INTERNATIONAL BILL OF RIGHTS 92, 94 (Louis Henkin ed., 1981) (arguing that "peoples" have a right to self-determination if they are a distinct ethnic group within a multinational state and have "a distinct legal status within the constitutional framework"); DIETRICH MURSWIEK, THE ISSUE OF A RIGHT OF SECESSION—RECONSIDERED, IN MODERN LAW OF SELF-DETERMINATION 21, 37 (Christian Tomuschat ed., 1993) (arguing that state practice supports the rule that territorial units, rather than ethnic or religious groups, may exercise self-determination).

9. *See* YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 3 (1965) (noting that under orthodox doctrine, title turned on classic forms of acquisition, occupation, accretion, cession, conquest and prescription); Steven R. Ratner, *Drawing A Better Line: UTI Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 614-15 (1996) (discussing that, alongside the postwar and post-Cold War developments regarding self-determination, there has been a change in the law governing the title of a state, or a people to a land); Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan,* 15 AM. U. INT'L L. REV. 1101, 1144 (2000) (discussing that in the post-Cold War era, ethnic, linguistic, religious, or cultural groups within nations reemerge demanding devolution or secession in pursuit of limited or full sovereignty).

determine their own political status and freely pursue their economic, social and cultural development.[10]

There is no universally accepted definition of self-determination. There are, however, two types of distinctions for self-determination that are often mentioned.[11] The first distinction between anti-colonial self-determination (meaning the right of peoples to create an independent state by liberating itself from existing colonial or alien rule) and non-colonial self-determination (meaning the right of a people to secede or to form a new representative government or to achieve a higher degree of autonomy within an existing state).[12] The other distinction is between external self-determination (meaning the right of a people to decide their own status within the international community) and internal self-determination (meaning the right of a people freely to decide the form of government they want to pursue within an existing state).[13]

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10. *See* Franz Xaver Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage,* 26 ENVTL. L. 1187, 1192 (1996) (noting that it is generally accepted that permanent sovereignty over natural resources is a prerequisite for economic development and, therefore, is a fundamental principle of contemporary international law); *see also* G.A. Res. 1803, UN GAOR, 17th Sess., Supp. No. 17, at 15, UN Doc. A/5217 (1962) *cited in* 9 UNITED NATIONS RESOULTIONS: General Assembly 107-08 (Dusan J. Djonovich ed., 1974) (declaring "the right of peoples and nations to the permanent sovereignty over their natural wealth and resources" and that "violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirits and principles of the UN Charter"). *But see* David A. Ring, *Sustainability Dynamics: Land-Based Marine Pollution and Development Priorities in the Island States of the Commonwealth Caribbean,* 22 COLUM. J. ENVTL. L. 65, 122 (1997) (noting that a general caveat has evolved that states owe a duty to ensure that activities or pollution arising within their territories or control do not cause harm to other states and their environment).

11. *See* Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era,* 88 AM. J. INT'L L. 304, 304 (1994) (stating that the drafters of the UN Charter did not bother to define self-determination or to identify who the "peoples" were, but the Soviet Foreign Minister referred to the idea as "equality and the self-determination of nations"); Jeffrey Wutzke, *Dependent Independence: Application of the Nunavut Model to Native Hawaiin Sovereignty and Self-Determination Claims,* 22 AM. INDIAN L. REV. 509, 556-57 (1998) (noting that ex-colonial sovereignty was based on a notion of a universal doctrine of self-determination for colonial peoples, which did not presuppose underlying nationhood but only subject colonial status). *See generally* Dean B. Suagee, *Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?*, 21 AM. INDIAN L. REV. 365, 381 (1997) (discussing Professor Anaya's distinction between the "substantive" and the "remedial" aspects of self-determination).

12. *See* Edward T. Canuel, *Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence,* 20 B.C. INT'L & COMP. L. REV. 85, 86-87 (1997) (noting that while theorists and international law justify the right of former colonized peoples to seek self-determination, political expedience is a major consideration in allowing self-determination movements to secede in non-colonial states). *But see* Luke P. Bellocchi, *Self-Determination in the Case of Chechnya*, 2 BUFF. J. INT'L L. 183, 184 (1995) (questioning when, where, and how, in a non-colonial context, can a people utilize their inherent and UN Chartered right to self-determination and secede into an independent nation-state); Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age,* 32 STAN. J. INT'L L. 255, 269 (1996) (discussing that the question of secession and its relationship to the right to self-determination for non-colonial peoples was raised but then dismissed either as a separate problem or as a misuse of the right to self-determination).

13. *See* Kiwanuka, *supra* note 6, at 93 (noting the International Covenants not only endorse the right of external self-determination, but also the right of internal self-determination: the right of a people to establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution); Aaron P. Micheau, *The 1991 Transitional Charter of Ethiopia: A New Application of the Self-Determination Principle?*, 28 CASE W. RES. J. INT'L L. 367, 390 (1996) (noting that external self-determination focuses on the independence of the state apparatus, while internal emphasizes the independence of the population and is only assured by a representative form of government). *See generally* Kolodner, *supra* note 6 (arguing that the international community should attempt to resolve conflicts under principles of internal self-determination before supporting a people's right to external self-determination as it encompasses potentially disruptive consequences).

As a result of a Civil War in 1949, the Republic of China (hereinafter "ROC") was divided into two governments: the ROC in Taiwan and the Peoples' Republic of China (hereinafter "PRC") located in the Chinese mainland.[14] Since 1949, the status of Taiwan has become a central issue between the two sides of the Taiwan Strait.[15] In spite of the political confrontation between the ROC and the PRC, Taiwan has, for decades, been thought of as part of China by the two governments under the mythology of One China principle.[16] This makes the independence of Taiwan ambiguous.[17] Does it imply that the indigenous natives of Taiwan are not eligible to determine their own future?

Taiwan's status and the right of its people to self-determination is relevant because the size of its population of over twenty-two million is relatively large in comparison to that of other independent states in the world.[18] The evolution of self-determination makes it clear that the

14. *See* Su Wei, *Some Reflections on the One-China Principle,* 23 FORDHAM INT'L L.J. 1169, 1170 (2000) (noting that in October 1949, the Chinese people won their New Democratic Revolution and established a new central government called the People's Republic of China); *see also* Tzu-wen Lee*, The International Legal Status of Taiwan: The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT'L L. & FOR. AFF. 351, 353 (1996) (discussing that the forces of the Republic of China finally retreated to Taiwan on December 8, 1949, leaving Mao Tse Tung and the People's Republic in control of the mainland); Shen, *supra* note 9, at 1117 (discussing the civil war that ensued between the Nationalist forces who were defeated by the People's Liberation Army and how it caused the regime of the Republic of China to be overthrown by the People's Republic of China).

15. *See* Lung-Chu Chen, *Taiwan's Current International Legal Status*, 32 NEW ENG. L. REV. 675, 680 (1998) (discussing the PRC's refusal to renounce threat or use of force in settling disputes with Taiwan has been a continuing source of insecurity, instability and anxiety in the Taiwan Strait area); *see also* Anne Hsiu-An Hsiao, *Is China's Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law?,* 32 NEW ENG. L. REV. 715, 715-16 (1998) (stating that the PRC has repeatedly reiterated that it reserves the right to take over Taiwan by force, and has taken action to demonstrate its determination to do so). *See generally* Christopher C. Joyner, *The Spratly Islands Dispute: What Role for Normalizing Relations Between China and Taiwan?,* 32 NEW ENG. L. REV. 819, 839 (1998) (noting that the PRC's conduct of combat naval maneuvers and missile firings in the Taiwan Strait in 1996 seriously aggravated political relations and diminished trust between the two).

16. *See White Paper—The One-China Principle and the Taiwan Issue* (visited September 29, 2000) <http://www.china-embassy.org/papers/taiwan00.htm> (stating that ". . . settlement of the Taiwan issue and realization of the complete reunification of China embody the fundamental interest of the Chinese nation. The Chinese government has worked persistently toward this goal in the past 50 years."); *see also* Shen, *supra* note 9, at 1117 (noting the authorities in Taiwan, until recently, also upheld the "One China" principle, although they maintained that they represented China as a whole, a claim that was false both in fact and in law). *But see* Lee*, supra* note 14, at 378 (discussing that the policy has apparently been implemented in order to prevent the PRC from resorting to the use of force against Taiwan and although the ROC repeatedly announces the "One-China" policy, in the absence of its intention to be bound, such declarations create no international legal obligations).

17. *See* Glenn R. Butterton, *Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait,* 47 CATH. U.L. REV. 51, 66 (1997) (noting that the ambiguous status of Taiwan comes from the questions of whether Taiwan is a state or a non-state); Jiunn-rong Yeh, *Institutional Capacity-Building Toward Sustainable Development: Taiwan's Environmental Protection in the Climate of Economic Development and Political Liberalization*, 6 DUKE J. COMP. & INT'L L. 229, 257 (1996) (stating that Taiwan's ambiguous diplomatic status has made participation in international environmental organizations difficult because it lacks standing as a nation); *see also* Joyner, *supra* note 15, at 838 (asserting that Taiwan's ambiguous international status undercuts it bargaining power because Taiwan has no legal standing in the dispute without any legal standing in international law).

18. *See* Alex Y. Seita, *Globalization and the Convergence of Values,* 30 CORNELL INT'L L.J. 429, 472 (1997) (noting that in 1995, Taiwan's population of 21.3 million was larger than Australia's population); THE WORLD ALMANAC AND BOOK OF FACTS 1996 822 (Robert Famighetti ed., 1995) (citing Taiwan's population statistics). *See generally* Jonathan I. Charney & J. R. V. Prescott*, Resolving Cross-Strait Relations between China and Taiwan*, 94 AM. J. INT'L L. 453, 471 (2000) (arguing that Taiwan's population should be given the option of whether or not to choose some form of association with China).

right to collectively present the will of a people or particular indigenous population regarding the chosen way of life should be deemed a universal value.[19] Does the political separation between Taiwan and Chinese mainland provide the Taiwanese people any qualification to apply the principle of self-determination as described above? This issue and related ones will be focused on and analyzed in this paper.

This paper is divided into eight parts. Part II deals with the traditional concept of anti-colonial self-determination during the Cold War. Part III discusses the evolution of self-determination from the non-colonial aspect in the aftermath of the Cold War. Part IV examines the evolution of self-determination in Taiwan after the Second World War, while Part V focuses on the potential of an armed conflict in the self-determination movement of Taiwan. In Part VI, the issue of the forcible integration and the entitlement of the people of Taiwan to external self-determination will be covered. Part VII incorporates an additional commentary and the conclusion follows in Part VIII.

II. Traditional Concept of Anti-Colonial Self-Determination During the Cold War

The term "self-determination" was first formally addressed by United States President Woodrow Wilson after World War I.[20] President Wilson was an advocate of self-determination and promoted the concept of democracy in an attempt to establish self-determination as "the guiding principle for reconstructing European society."[21] Because the principle was applied to the defeated states selectively and the authority of colonial rule was not seriously challenged,

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19. *See* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs,* 28 GA. L. REV. 309, 326 (1994) (noting the core values of freedom and equality translate into a requirement that institutions of government be created according to the will of the people governed); *see also* Benedict Kingsbury, "*Indigenous Peoples" in the International Law: A Constructivist Approach to the Asian Controversy,* 92 AM. J. INT'L L. 414, 453 (1998) (asserting the international concept of indigenous peoples connotes emphasis on self-determination and the role of groups in decisions affecting them). *But see* Michael Holley, *Recognizing the Rights of Indigenous People to Their Traditional Lands: A Case Study of an Internally-Displaced Community in Guatemala,* 15 BERK. J. INT'L L. 119, 148 (1997) (discussing the current international consensus on indigenous peoples' right to self-determination compromises between a strictly individualist and collectivist approach).

20. *See* Moris, *supra* note 6 (noting that President Woodrow Wilson was responsible for elevating the principle of self-determination to an international level when, in 1916, he included it in his Fourteen Points); *see also* Jon Hinck, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association,* 78 CAL. L. REV. 915, 947 (1990) (noting that Woodrow Wilson made self-determination one of his major foreign policy objectives); Kirgis, *supra* note 11 (noting the term, "self-determination" was first publicly used in 1918 by Woodrow Wilson).

21. *See* Canuel, *supra* note 12, at 92 (noting Woodrow Wilson felt that the realization of such aspirations by treating such peoples as credible, rather than merely considering them "property," would be achieved through a restructuring of Europe and would create a lasting peace); Kirgis, *supra* note 11 (noting that the idea of self-determination is closely identified with Woodrow Wilson, who first used the term publicly in 1918, but it did not emerge as a principle of positive international law until the Soviet Union insisted on using it at the 1945 San Francisco Conference on the United Nations); Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception,* 70 AM. J. INT'L L. 1, 2 (1976) (quoting Woodrow Wilson stating that "every people has a right to choose the sovereignty under which they shall live," and that "no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed.").

self-determination did not become a valuable principle for state creation until World War II.[22] In 1941, the principle was written into the Atlantic Charter, which later evolved into the United Nations Charter, establishing self-determination as a fundamental right of mankind.[23]

It is logical to conclude that the UN members intended to establish the right of self-determination for people under colonial or alien domination only.[24] The UN members limited this right because secessionism was considered a tactic used to violate territorial integrity guaranteed by the UN Charter.[25] As such, the principle of self-determination in international law evolved into an enforceable right to freedom from colonial rule under Resolution 1514 entitled "*The Declaration on the Granting of Independence to Colonial Countries and Peoples.*" (hereinafter "Resolution 1514").[26] Resolution 1514 states:

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22. *See* Thomas M. Franck, *Legitimacy in the International System,* 82 AM. J. INT'L L. 705, 744 (1988) (noting that after World War II the self-determination principle came to be applied even more generally as the UN Charter expressed a general obligation of states to help enable inhabitants of all dependent non-self-governing territories for the first time); Suagee, *supra* note 11, at 382 (discussing that in the period following World War II, the international community came to recognize that people living under the rule of colonial regimes had been deprived of the right of self-determination in both its constitutive and ongoing aspect); *see also* Michael C. Davis, *The Concept of Statehood and the Status of Taiwan*, 4 J. CHINESE L. 135, 148 (1990) ("[S]elf-determination" is traceable in part to Woodrow Wilson and notions of anti-colonialism.").

23. *See* UN CHARTER art. 1, para. 2 (enunciating the purpose of the Charter to establish friendly relations and economic cooperation between nations based on principles of equal rights and self-determination); Catherine J. Iorns*, Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 244 (1992) (discussing the Atlantic Charter, signed by both President Roosevelt and Prime Minister Churchill on August 14, 1941, which affirmed the principle of self-determination and, which was accepted in the Declaration of the United Nations in 1942); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States,* 32 AM. U. L. REV. 1, 48 (1982) (noting that the Atlantic Charter promised to "respect the right of all peoples to choose the form of government under which they will live," and to have "sovereign rights and self-government restored to those who have been forcibly deprived of them").

24. *See* HECTOR GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS, 13 (1980) (explaining the rule that excludes a right of secession for people not under colonial and alien domination); Taryn Ranae Tomasa, *Ho'Olahui: The Rebirth of A Nation*, 5 ASIAN L.J. 247, 262 (1998) (noting that the people entitled to self-determination under the Declaration are those who at the time of the claim are under alien domination).

25. *See* UN CHARTER art. 2, para. 7 (prohibiting the United Nations from intervening in the mere internal affairs of any state); *see also The Declaration on the Granting of Independence to Colonial Countries and Peoples,* G.A. Res. 1514, para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) (requiring states to respect the integrity of the national territory of dependent peoples); Wutzke, *supra* note 11, at 558 (stating that the UN General Assembly embraced this categorical distinction between colonies and noncolonial groups).

26. *See The Declaration on the Granting of Independence to Colonial Countries and Peoples,* G.A. Res. 1514, para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) (prohibiting the partial or total disruption of the national unity and territorial integrity of a country); *see also* Franck, *supra* note 22, at 746 (the resolution noted "that all peoples have an inalienable right to complete freedom" and demanded immediate implementation of this right "without any conditions or reservations in accordance with their freely expressed will and desire" and regardless of "political, economic, social or educational preparedness"); Thomas D. Grant*, Between Diversity and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood,* 12 AM. U. J. INT'L L. & POL'Y 629, 634 (1997) (noting that the UN moderated its statement in the Declaration that subjects of self-determination included potentially any peoples under "alien subjugation, domination, or exploitation," whether or not of a colonial origin to include any peoples lacking representative government).

> [T]he continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace, . . . [A]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[27]

Since the passage of Resolution 1514, self-determination has greatly developed in the context of anti-colonialism. Through the support of such a principle, numerous colonies in Asia, Africa and Latin America established their own sovereign states in the 1960s,[28] and the universal recognition of the right to anti-colonial self-determination has led to its acceptance as a norm of customary international law.[29] Peoples subjected to colonial oppression were entitled to seek and receive support in their struggle.[30] In this sense, any failure by a responsible state to

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27. *See The Declaration on the Granting of Independence to Colonial Countries and Peoples,* G.A. Res. 1514, para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) (discussing the right to self-determination and how colonialism impedes the rights of people and the goal of peace); *see also* Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case,* 9 EMORY INT'L L. REV. 133, 146 (1995) (noting that by placing the right to self-determination firmly in the context of colonialism, the resolution defines self-determination as a right to decolonization, therefore linking the law of self-determination to the process of decolonization); Caroline S. Palmer, *Waiting for Democracy: Congress, Control Boards and the Pursuit of Self-Determination in the District of Columbia*, 19 HAMLINE J. PUB. L. & POL'Y 339, 379 (1997) (noting that the covenant protects the right of all citizens to take part in formulating policy on all levels of government, either directly or through their elected representatives).

28. *See* Moris, *supra* note 6, at 206 (stating that while the external right to self-determination was extremely popular during the 1960s and 1970s in Asia, Africa, and Latin America, claims of a right to external self-determination in the colonial context are virtually nonexistent today); Simpson, *supra* note 12, at 257 (claiming that the post-independence nation-building in parts of Africa and Asia has been achieved at the cost of abandoning democracy and suppressing postcolonial claims to national or cultural self-determination). *But see* Hanauer, *supra* note 27, at 176 (noting that the law of self-determination inadequately addresses the ethnic and national crises that erupted in Yugoslavia, Central Asia, India, Sri Lanka, Afghanistan, and many other non-colonial and self-governing territories).

29. *See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,* G.A. Res. 2625, UN GAOR, 25th Sess., Supp. 28, at 121, UN Doc. A/8028 (1970) (explicitly expanding the right of self-determination beyond its anti-colonial implications); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 515 (4th ed. 1990) (discussing the principle of anti-colonial self-determination customary law that cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of like character and contrary effect); Jacques deLisle, *The Role of International Law in the Twenty-First Century: Disquiet on the Eastern Front: Liberal Agendas, Domestic Legal Orders, and the Role of International Law After the Cold War and Amid Resurgent Cultural Identities,* 18 FORDHAM INT'L L.J. 1725, 1729 (1995) (noting anti-colonial and separatist assaults on existing arrangements typically invoked the norms of the existing system, seeking recognition of a new sovereign state within colonial boundaries or coincident with areas inhabited by a particular people).

30. *See International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2160, UN GAOR, 21st Sess., Supp. No. 16, at 4, UN Doc. A/6316 (1966) (stating that any forcible action, direct or indirect, which deprives peoples under foreign domination of their right to self-determination, freedom, independence and of their right to determine freely their political status and pursue their economic, social and cultural development constitutes a violation of the Charter of the United Nations); *see also* Kolodner, *supra* note 6, at 157-58 (noting that while the era of decolonization might have formally ended, many peoples still suffer under neo-colonial oppression and only if the international community supports movements for self-determination can it guarantee the protection of the rights of peoples throughout the world). *See generally* Charney & Prescott, *supra* note 18, at 475 (noting that simplistic conceptions of the international legal system of the past regarding territory which was either under the complete sovereignty of a state or was not, are not valid today).

meet its obligation to support self-determination would give rise to responsibility at the international level.[31]

The preference for territorial integrity over social classification in political sovereignty was premised on the fear of the dangers of separatism.[32] Moreover, in an effort to minimize any potential hostility between the capitalist and the communist blocs during the Cold War era, the world community resisted any non-colonial self-determination by viewing it as a secessionist movement threatening the territorial integrity of the existing state.[33] In this respect, Resolution 1514 laid out it's support for the preservation of territorial integrity by indicating that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[34]

In order to avoid setting a precedent that encouraged secessionist movements, the UN Security Council adopted Resolution 169 to maintain territorial integrity which supported the

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31. *See* Suagee, *supra* note 11, at 368 (noting that Convention No. 169 is criticized for leaving in too much residual state authority and for its failure to recognize the right of indigenous "peoples" to self-determination); *see also* Sohn, *supra* note 23, at 50 (noting that every state has an obligation to respect every other state's right of self-determination and to refrain from interference in the internal affairs of a state). *But see* H. KELSEN, THE LAW OF THE UNITED NATIONS 29 (1951) (commenting that the language of the UN Charter does not adequately describe any human rights or desire to make the obligations binding on states).

32. *See* Ravi Mahalingam, *The Compatibility of the Principle of Nonintervention with the Right of Humanitarian Intervention*, 1 UCLA J. INT'L L. & FOREIGN AFF. 221, 234 (1996) (noting that nonintervention is an important principle because it preserves the sanctity of a State's rights of political sovereignty and territorial integrity and is further necessary for the principle of self-determination to take root without the corrupting interference of foreign powers); *see also* Guyora Binder, *The Kaplan Lecture on Human Rights The Case for Self-Determination*, 29 STAN. J. INT'L L. 223, 225 (1993) (stating that group separatism must be immoral, except as a remedy of last resort against discrimination, and irrational because it is premised on the mistaken belief that group identity is natural or immutable); Leslie E. Schafer, *Immigration Project: Learning from Rwanda: Addressing the Global Institutional Stalemate in Refugee Crises*, 6 IND. J. GLOBAL LEGAL STUD. 315, 337 (1998) (noting that although the United Nations has supported the use of force to overcome colonial control, many member States do not encourage separatism).

33. *See generally* Trent N. Tappe, *Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims*, 34 COLUM. J. TRANSNAT'L L. 255, 261 (1995) (noting that any right which is to be of any practical use in evaluating secessionist claims must include limitations that will address the concerns preventing states from recognizing other secessionist movements in the past). *But see* Thomas M. Franck, *The Emerging Right to Democratic Governance,* 86 AM. J. INT'L L. 46, 55 (1992) (presenting the idea that self-determination has evolved into a more general notion of internationally validated political consultation beginning to be applied even to independent states without implying the community's right to validate secessionist movements within sovereign states); Canuel, *supra* note 12, at 95 (noting that while none of the signatories of the Helsinki Accord are current colonial states, the acceptance of non-colonial self-determination movements as legally recognizable secessionist movements has thus gained momentum).

34. *See Declaration on the Granting of Independence to Colonial Countries and Peoples,* G.A. Res. 1514, para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) (discussing the United Nations ideal of universal peace); *see also* Shen*, supra* note 9, at 1154 (noting that both the Decolonization and 1970 Declarations establish self-determination explicitly with the caveat that its exercise should not disrupt territorial integrity); Wutzke, *supra* note 11, at 558 (noting that academics, politicians and the UN General Assembly embrace the categorical distinction between colonies and noncolonial groups).

existing political status of the Republic of Congo.[35] Resolution 169 provided for "[d]eploring all armed action in opposition to the authority of the Government of the Republic of the Congo, specially secessionist activities and armed action now being carried on by the provincial administration of Katanga with the aid of external resources and foreign mercenaries, and completely rejecting the claim that Katanga is a sovereign independent nation."[36] The Council thus rejected Katanga's Declaration of Independence from the Congo.[37]

In a similar move, the UN supported the position of the Nigerian federal government against the Ibos who wanted to opt out of Nigeria in 1967.[38] The UN refused to recognize the Ibos' demand to create an independent Republic of Biafra within the territory of Nigeria despite the fact that the African states of Gabon, the Ivory Coast, Tanzania and Zambia had already done so.[39]

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35. *See* S.C. Res. 169, UN SCOR, 16th Sess., 982nd mtg., UN Doc S/5002 (1961); Lawrence S. Eastwood, Jr., *Secession: State Practice and International Law After The Dissolution of the Soviet Union and Yugoslavia,* 3 DUKE J. COMP. & INT'L L. 299, 305-06 (1993) (stating that on November 24, 1961, the Security Council adopted a resolution which stated that one purpose of the involvement of the United Nations was to maintain the territorial integrity and political independence of the Republic of the Congo); *see also* Kenneth D. Heath, *Could We Have Armed the Kosovo Liberation Army? The New Norms Governing Intervention in Civil War,* 4 UCLA J. INT'L L. & FOR. AFF. 251, 297 (1999) (noting the obligation of all States to respect the territorial integrity, political independence and national sovereignty of the Democratic Republic of the Congo in accordance with the Charter of the United Nations); *see, e.g.,* S.C. Res. 199, UN SCOR, 19th Sess., 1189th mtg. at 328-29, UN Doc. S/6129 (1964) (reaffirming the sovereignty and territorial integrity of the Democratic Republic of the Congo and requesting "all states to refrain or desist from intervening in the domestic affairs of the Congo.").

36. *See* S.C. Res. 169, UN SCOR, 16th Sess., 982nd mtg., UN Doc. S/5002, at 3 (1961) (following the attempted secession of the province of Katanga from the newly independent Republic of the Congo in 1960, the Security Council of the United Nations stated the policies and purposes of the United Nations with respect to the Congo); *see also* LOUIS HENKIN ET AL., INTERNATIONAL LAW 779-80 (2d ed. 1987) (noting that the Security Council passed a resolution authorizing the Secretary General "to provide the Government of the Republic of the Congo with such military assistance as may be necessary to fully meet their task); Thomas D. Grant*, East Timor, the UN System, and Enforcing Non-Recognition in International Law,* 33 VAND. J. TRANSNAT'L L. 273, 282 (2000) (stating that the affirmation of the territorial integrity of the Congo was contained in Security Council and General Assembly resolutions).

37. *See* S.C. Res. 169, UN SCOR, 16th Sess., 982nd mtg., UN Doc. S/5002 (1961) (stating that the United Nations completely rejected the claim that Katanga was a sovereign independent nation); *see also* Eastwood, *supra* note 35 (stating that although Katanga declared its independence from the Congo and a constitution had been approved by the Katanga Assembly establishing Katanga as an independent sovereign state, Katanga was never formally recognized by any country); Grant*, supra* note 36 (noting that the rejection of the claim by Katanga to constitute an independent state was contained in Security Council and General Assembly resolutions).

38. *See* Dr. Bryan Schwartz & Susan Waywood, *A Model Declaration on the Right of Secession,* 11 N.Y. INT'L L. REV. 1, 23 (1998) (providing that the UN was slow to intervene during the massacre of 10,000 to 30,000 Ibos and when it did, the UN supported the Nigerian government); *see also* Thomas D. Grant, *Current Development: Afghanistan Recognizes Chechnya*, 15 AM. U. INT'L L. REV. 869, 887 (2000) (stating that the friction between the Ibos and the federal government of Nigeria became great which resulted in secession by the Ibos); Joel E. Starr*, "What Do You Have For Me Today?": Observing the 1999 Nigerian Elections,* 35 STAN. J. INT'L L. 389, 391 (1999) (stating that the Ibos tried to secede from Nigeria to form the Republic of Biafra).

39. *See* M. H. HALPERIN, D. J. SCHEFFER, & P. L. SMALL, SELF-DETERMINATION IN THE NEW WORLD ORDER 14 (1992); s*ee also* Franck, *supra* note 22, at 759 n.175 (stating that only five nations recognized Biafra's claim to independence while the UN never even considered recognizing it); Grant, *supra* note 38 (declaring that no state recognized Biafra).

The provisions in relevant international legal instruments holding that the right to self-determination belongs to peoples under colonial rule has been narrowly applied to colonial conditions by international law.[40] In 1970, the UN Secretary-General U. Thant affirmed this point when stating:

> [As] far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.[41]

This view reiterates the idea that the world community was greatly skeptical about self-determination claims.[42] As a result, any secessionist movement from an existing state found difficulty in gaining international recognition unless the relevant parties consented to change the territorial boundaries (as was the case in Singapore's separation from Malaysia).[43] For example, it is a clear fact that the world community did not recognize any secessionist claim during the Cold War period (the only exception was East Pakistan's secession from Pakistan).[44]

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40. *See* Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INT'L L. 433, 482 (1996) ("The statist bias of the current understanding of self-determination is not inherent in the doctrine, but rather the result of a successful attempt on the part of states to restrict in practice the recognition of sub-state peoples to the colonial context."); *see also* Dr. Sam Blay, *Self-Determination: A Reassessment in the Post Communist Era*, 22 DENV. J. INT'L L. & POL'Y 275, 275 (1994) (stating that although self-determination is an accepted legal norm, it is usually narrowly confined in cases of people under colonial rule); Kolodner, *supra* note 6, at 157 (providing that the international community has not agreed as to whether self-determination applies outside the colonial context).

41. UN MONTHLY CHRON., Feb. 1970, at 36. *See* Haile, *supra* note 1, at 502 (stating that the United Nations will never accept the principle of secession); UN Secretary-General U. Thant, *Remarks at a Press Conference in Dakar, Senegal (Jan. 4, 1970),* UN MONTHLY CHRON., Feb. 1970, at 34, 36.

42. *See* Anaya, *supra* note 19, at 329–30 (asserting that self-determination has been approached with skepticism with the exception of control exercised by the colonial power); *see also* Angela M. Lloyd, Note, *The Southern Sudan: A Compelling Case for Secession*, 32 COLUM. J. TRANSNAT'L L. 419, 424-25 (1994) ("Implicit in international accession to the right in documents like the UN CHARTER was the understanding that secessionist self-determination was not to be a general legal norm available to any group or territory that claimed it."). *See generally* Edward A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 CAL. W. INT'L L.J. 209, 250 (1992) (discussing that the General Assembly accepted self-determination in terms of colonial ruling situations).

43. *See* Lawrence M. Frankel, *International Law of Secession: New Rules For a New Era*, 14 HOUS. J. INT'L L. 521, 534 (1992) (discussing the theory of premature recognition which demonstrates the balance between recognizing a secessionist movement and questioning whether it controls its territory); *see also* Douglas L. Tookey, *Singapore's Environmental Management System: Strengths and Weaknesses and Recommendations for Years Ahead,* 23 WM. & MARY ENVTL. L. & POL'Y REV. 169, 170 (1998) (stating that Singapore separated from Malaysia in 1965). *See generally* Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733, 736-37 (1995) (providing that decolonization does not present the clash between self-determination and territorial integrity that secessionist claims present).

44. *See* Frankel, *supra* note 43, at 562 (stating that since the end of the Cold War, the United States and the former Soviet Union are more likely to recognize secessionist claims); *see also* Tappe, *supra* note 33, at 295 (stating that secessionist efforts were met with disapproval by the international community during the Cold War). *But see* Kate Greene, *International Responses to Secessionist Conflicts*, 90 AM. SOC'Y INT'L L. PROC. 296, 297 (1996) (stating that secessionist claims are not related to the end of the Cold War and are not a phenomenon of the last ten years).

The UN Security Council adopted Resolution 352 recommending that the People's Republic of Bangladesh be admitted to membership in the UN in 1947.[45] Indeed, the inhabitants of East Pakistan were ethnically and culturally distinct from West Pakistan,[46] however, the UN's ultimate recognition of East Pakistan (Bangladesh) did not imply a general acceptance of the right of secession in the name of self-determination.[47] The UN's decision was rather influenced by the fact that India sided with East Pakistan by recognizing East Pakistan's right to self-determination.[48] This led to a full-scale war between India and Pakistan, constituting an immediate threat to international peace and security.[49] At the same time, Pakistan had gathered strong support from Communist China.[50] The UN inevitably recognized East Pakistan (Bangladesh) as an independent state for fear of causing a widespread armed conflict in the area.[51]

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45. *But see* Yehuda Z. Blum, *Membership of the New Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L L. 830, 832 (1992) ("Bangladesh applied for membership as a new state and was admitted in 1974.").

46. *See* Brian K. McCalmon, *States, Refugees, and Self Defense,* 10 GEO. IMMIGR. L.J. 215, 223 (1996) (stating that there were cultural, linguistic and political differences between East Pakistan and West Pakistan); *see also* Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, 131 (1992) (stating that Pakistan was separated not only by hundreds of miles, but by cultural and linguistic differences). *See generally* Kenneth L. Rosenbaum, *Rule of the Land*, 59 OR. ST. B. BULL. 9, 10 (1999) (stating that there were different languages spoken in East Pakistan and West Pakistan).

47. *See* Eastwood, *supra* note 35, at 310 (discussing whether the recognition of East Pakistan implied acceptance of secession); M. Rafiqual Islam, *Secession Crisis in Papua New Guinea: The Proclaimed Republic of Bougainville in International Law,* 13 U. HAW. L. REV. 453, 458 (1991) ("Secession is a form of self-determination."). *See generally* Tappe, *supra* note 33 (stating that prior to 1970, there were no UN documents suggesting a recognized right to secession because of self-determination).

48. *See* Eastwood, *supra* note 35, at 312-13 ("It appears that the distinguishing feature explaining the success of the Bangladesh secession was Indian intervention."); *see also* C. Lloyd Brown-John, *Self-Determination, Autonomy and State Secession in Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 589 (1999) (asserting that the Indian Army's support of the Bangladesh secession caused the success of its secession). *See generally* Tauhidul Anwar Khan, *Management and Sharing of the Ganges*, 36 NAT. RESOURCES J. 455, 462 (1996) (providing that in 1972, India and Bangladesh worked together to set up a joint rivers commission).

49. *See* Michael L. Feeley, *Apocalypse Now? Resolving India's and Pakistan's Testing Crisis*, 23 SUFFOLK TRANSNAT'L L. REV. 777, 780 (2000) (stating that Pakistan and India fought over the Kashmir region between 1947 & 1948); *see also* Richard W. Aldrich & Deborah Charron Pollard, *Pakistan's Nuclear Weapons Program: Legal and Policy Implications of the Pressler Amendment,* 5 U.S.A.F. ACAD. J. LEGAL STUD. 103, 103 (1994) (discussing the ongoing rivalry between Pakistan and India which resulted in war and division of the two); Adam Packer, Note, *Nuclear Proliferation in South Asia*, 38 COLUM. J. TRANSNAT'L L. 631, 634-35 (2000) ("The polarization of Indo-Pakistani relations resulting from the politics of partition led to three wars, in 1947-48, 1965 and 1971.").

50. *See* Mitchell A. Silk & Lester Ross, *Transnational Deposits, Government Succession, Frozen Assets and the Taiwan Relations Act: National Bank of Pakistan v. The International Commercial Bank of China*, 8 INT'L TAX & BUS. LAW. 1, 30 n.69 (1990) ("Nevertheless, China did have an interest in maintaining friendly ties with Pakistan."); *see, e.g.,* Packer, *supra* note 49 (noting China's sharing of nuclear technology with Pakistan). *See generally* Kathleen M. Caruso, *We Need to Keep a Close Eye on Beijing*, MILWAUKEE J. SENTINEL, July 16, 2000, at 5J (noting China's sale of weapons to Pakistan).

51. *See* Grant, *supra* note 38, at 889 (providing that the recognition of East Pakistan did not arise from humanitarian concerns); Anthony Wanis St. John, *The Mediating Role in the Kashmir Dispute Between India and Pakistan*, 21 FLETCHER FOREIGN WORLD AFF. 173, 186 (1997) (stating that the UN engaged in many peacemaking efforts to prevent any additional conflict between India and Pakistan). *See generally* Gregory L. Naarden, *UN Intervention After the Cold War: Political Wars and the United States*, 29 TEX. INT'L L.J. 231, 233 (1994) (discussing how an observation team was established in order to discourage possible hostilities resulting from the India/Pakistan conflict).

The non-colonial form of self-determination was likely to be defined as a democratic concept due to its' lack of formal recognition under international law.[52] In this sense, a population group within an independent state intends to achieve a truly representative government through democratic means such as the freedom of expression, assembly and association.[53] In view of the deference that states give to the principle of sovereignty, this kind of claim for self-determination was considered a domestic affair or a matter within the jurisdiction of a state.[54] Thus, other members of the international community were hesitant to involve themselves with an issue considered internal to another state.[55]

The adoption of the ICESCR and ICCPR in 1966 however,[56] gave rise to the discussion that international law would provide support beyond the form of anti-colonial self-determina-

52. *See* Iorns, *supra* note 23, at 304 ("[T]he view was expressed that self-determination is a corollary of the democratic principle of consent of the governed."); *see also* Dr. Yussuf N. Kly, Discussion Paper, *African-Americans and the Right to Self-Determination,* 17 HAMLINE L. REV. 1, 42-43 (1993) ("A democratic right to self-determination is now seeing the light of day and tends to confirm the universality of the right of non-colonial peoples to self-determination."). *But see* J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium,* 15 AM. U. INT'L L. REV. 151, 208 (1999) (noting that no right of self-determination exists within the context of a "democratic" state and representative government).

53. *See* Haile, *supra* note 1, at 479 ("The spread of democratic ideology and the demise of the Cold War have enabled some minority groups in independent states to express their discontent openly and with varying degrees of impunity."). *But see* Anatoly Konstantinovich Kotov, *Approaching the Millenium: Are Pennsylvania's Administrative Proceedure Statutes Still Doing the Job?: The Parlimentary Process in the Republic or Kazahkistan*, 8 WIDENER J. PUB. L. 457, 466 n.50 (1994) (stating that representative governments as a collective are not necessarily all democratic). *See generally* Moris, *supra* note 6, at 210 (discussing the possibility of having a representative government by democratic means).

54. *See* Haile, *supra* note 1, at 486 (noting that Eritrea will maintain some control over its government in all matters not left to the federal government); Eric Kolodner, Note, *Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination*, 27 N.Y.U. J. INT'L L. & POL'Y 159, 192 (noting the unwillingness of the international community to infringe on state sovereignty). *See generally* Claude-Armand Sheppard, *The Cree Intervention in the Canadian Supreme Court Reference on Quebec Secession: A Subjective Assessment*, 23 VT. L. REV. 845, 858 (1999) (noting that the right to self-determination is vested in the people and not outsiders).

55. *See, e.g.,* Peter Daniel DiPaola, *A Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya*, 4 IND. J. GLOBAL LEGAL STUD. 435, 467 (1997) (stating that the international community might be hesitant to get involved in areas which resemble the Balkans). *See generally* Kolodner, *supra* note 54 ("[T]he international community, historically hesitant to infringe on state sovereignty."); Sheppard, *supra* note 54 (discussing that people have the right to self-determination as opposed to outsiders).

56. *See International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, UN GAOR, 21st Sess., Supp. No. 16, at 48, UN Doc. A/6316 (1966) (noting that the equal and inalienable rights of all members of the human family" are derived from "the inherent dignity of the human person"); *see also International Covenant on Civil and Political Rights*, G.A. Res. 2200A, UN GAOR, 21st Sess., Supp. No. 16, at 59, UN Doc. A/6316 (1966), 999 U.N.T.S. 302. (stating "[T]he equal and inalienable rights of all members of the human family" are derived from "the inherent dignity of the human person."); Kitty Arambulo, *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?*, 2 U.C. DAVIS J. INT'L L. & POL'Y 111, 111 (1996) (calling the International Covenant on Economic, Social and Cultural Rights the "main international treaty setting forth economic, social, and cultural rights").

tion.[57] Article I of both the ICESCR and the ICCPR stress that "all peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."[58]

Moreover, the 1948 UDHR states that "the will of the people shall be the basis of the authority of government," implying that the right of anti-colonial self-determination was broadened to include a political right to non-colonial self-determination.[59] This prompted the argument that the non-colonial aspect of self-determination should be honored in the same way as its external counterpart because a claim for self-determination within an existing state always arose while a central government engaged in internal colonization.[60] Unlike the right to anti-colonial self-determination, which in the external sense has been firmly established under international law, claims based on other forms of self-determination were not able to gather much international support as expected.[61] This is because the international community still

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57. *See* Kirgis, *supra* note 11, at 305 (stating that the UN expanded the ideas of self-determination past anti-colonialism); *see also* Oloka-Onyango, *supra* note 52, at 164 (ascertaining acceptance of self-determination by degree with "the recognition that the right had arguably expanded to be assertable against a government that is unrepresentative of people who are defined by characteristics not limited to race, creed or color."); Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 402 (1991) (providing that self-determination was expanded past anti-colonialism to people subject to racist regimes).

58. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, at 368, UN Doc. A/6316 (1966); *see also* Malvina Halberstam, Remark*, Nationalism and the Right to Self Determination: The Arab-Israeli Conflict,* 26 N.Y.U. J. INT'L L. & POL. 573, 573 (1994) (stating that many General Assembly resolutions affirm the right to self-determination and often supersedes the provisions of the UN Charter*);* Richard Wilner*, Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination*, 1 U.C. DAVIS J. INT'L L. & POL'Y 297, 306 (1995) (providing that the principle of self-determination was turned into a necessary condition for individual human rights).

59. *See Universal Declaration on Human Rights,* UN GAOR, 3rd Sess., Supp. No. 16, UN Doc. A/6316 (1948); *see also* James A.R. Nafziger, *Self-Determination & Humanitarian Intervention in a Community of Power,* 20 DENV. J. INT'L L. & POL'Y 9, 12 (1991) (discussing Article 21(3) of the Universal Declaration of Human Rights); Oloka-Onyango, *supra* note 52, at 170 ("Although absent from the Universal Declaration, several statements in the preamble can be taken to constitute a reference to an underlying belief in the exercise of the right of self-determination.").

60. *See* Lung-Chu Chen, *Self-Determination and World Public Order,* 66 NOTRE DAME L. REV. 1287, 1294 (1991) ("[T]he basis for either granting or rejecting the demands of a group should not be whether a given situation is colonial or non-colonial, but whether the decision would move the situation closer to goal values of human dignity."); *see also* Laing, *supra* note 42, at 248 (discussing two writers who agree that self-determination should be accepted without limitations as to colonial or non-colonial status). *See generally* Simpson, *supra* note 12, at 271-75 (discussing various methods of non-colonial self-determination including: national self-determination, democratic self-determination, devolutionary self-determination, and secession).

61. *See* Moris, *supra* note 6, at 204-05 (stating that some nation states believe only in a right to colonial self-determination and do not recognize other forms); *see also* David R. Penna, *Are International Institutions Doing Their Job? Cultural Dominance*, 90 AM. SOC'Y INT'L L. PROC. 193, 221 (1996) (noting the lack of recognition given by international law to a right to secession outside the declonization context). *But see* Lloyd*, supra* note 42, at 420 (providing that the recent rise of Eastern Europe and the former Soviet Union indicate that some form of self-determination outside of the colonial sense has been accepted).

believed that such claims might encompass the conflict of secession and threatening the territorial integrity of an existing state.[62]

When the UN General Assembly passed Resolution 2625, known as the "*Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*" (hereinafter "Resolution 2625"),[63] there was no doubt that self-determination might extend beyond the traditional notion of decolonization.[64] Resolution 2625 expanded the previous definition of self-determination, with a strong intent to authorize a collective right to cover the concept of non-colonial self-determination by specifying that a state should have a government representing all belonging to the territory without distinction as to race, creed or color.[65] There is no consensus as to whether Resolution 2625 has legalized other forms of self-determination beyond the colonial context, in an attempt to resolve any apparent conflict between the right to self-determination and the right of nations to their territorial integrity.[66] Resolution 2625, however, has clearly legalized the effect of peo-

62. *See* Tappe, *supra* note 33, at 295 n.39 ("Secession has typically been disfavored in the past by the international community because articulation of a secession right would threaten the territorial integrity of the states which themselves make international law."); *see also* Schwartz & Waywood, *supra* note 38, at 14 (stating that the territorial integrity of states in existence would be threatened by successful claims). *See generally* Holly A. Osterland, Note, *National Self Determination and Secession: The Slovak Model*, 25 CASE W. RES. J. INT'L L. 655, 669 (1993) ("Perhaps the most important legal limitation on international recognition of a right to secede is the principle of territorial integrity.").

63. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, UN GAOR, 6th Comm., 25th Sess., Supp. No.28, UN Doc A/8082 (1970) (supporting the rights of all people to determine their political status). *See generally* Canuel, *supra* note 12, at 93-94 (disussing Resolution 2625).

64. *See* Paul H. Brietzke, *Self-Determination or Juirisprudential Confusion: Exacerbating Political Conflict*, 14 WIS. INT'L L.J. 69, 102 (1995) (stating that it is agreed that self-determination could extend beyond established beliefs about decolonization); *see also* Thomas D. Grant, *Extending Decolonization: How the United States Might Have Addressed Kosovo*, 28 GA. J. INT'L & COMP. L. 9, 37 (1999) ("In at least one General Assembly Third Committee session, a state representative suggested that the ambit of self-determination might be extended beyond those situations dealt with so far by decolonization."); Kirgis, *supra* note 11 (stating that self determination extends past anticolonialism). *But see* Thomas D. Grant, *Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 VA. J. INT'L L. 115, 179 (1999) (stating that although the principle of self-determination has extended in breadth, the applications are still narrow).

65. *See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at para. E(4), UN Doc. A/8028 (1970); *see also* Christine Bell & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-Determination? Self-Determination, Group Accomodation, and the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1345, 1347 (1999) (stating that the word "peoples" as used in Resolution 2625 is not defined and as such can be extended to include ethno-nationalist groups in their claim to self-determination); Visuvanathan Rudrakumaran, *The "Requirement" of Plebiscite in Territorial Rapprochement*, 12 HOUS. J. INT'L L. 23, 40 (1989) (stating that Resolution 2625 does not distinguish between race, color or creed).

66. *See* Bell & Cavanaugh, *supra* note 65, at 1349 (stating Resolution 2625 established self-determination while providing that it should not upset the principles of territorial integrity); *see also* Julie M. Sforza, Note, *The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonization*, 22 SUFFOLK TRANSNAT'L L. REV. 481, 494 (1999) ("The UN cautiously warns, however, that the concepts enshrined in Resolution 2625 shall in no way encroach upon the territorial sovereignty of a State."). *See generally* Peter Ruffatto, Comment, *U.S. Action in Micronesia as a Norm of Customary International Law: The Effectuation of the Right to Self-Determination for Guam and Other Non-Self-Governing Territories,* 2 PAC. RIM L. & POL'Y J. 377, 383 (1993) (stating that Resolution 2625 enlarges the right of self-determination to include all peoples).

ple's domestic political collective rights.[67] The Resolution states that the right of self-determination is a right to which "people" are entitled to determine their own "political status," that may include establishing "a sovereign and independent State, the free association or integration with an independent State, or the emergence into any other political status freely determined."[68]

With the end of the colonization era and further claims for freedom from colonial or foreign domination, the external aspect of anti-colonial self-determination has ceased to be functional in the international legal context.[69] Yet, as a typical collective human right, self-determination needed to retain a valuable function under international law, especially as this post-Cold War era has been witnessing increasing claims to self-determination by peoples who are seeking a greater recognition of their cultural and political identity within their existing states.[70] Indeed, there was a comprehensive imperative that international law should play a formative role in the legalization and development of non-colonial self-determination.[71] In this

67. *See* Shen, *supra* note 9, at 1149 (stating that the people still retain a domestic right to decide their political status); *see also* Rudolph C. Ryser, *Between Indigenous Nations and the State: Self-Determination in the Balance*, 7 TULSA J. COMP. & INT'L L. 129, 156 (1999) ("[N]on-self-governing peoples obtain an internal political status of their own choosing."); *Reference Re Secession of Quebec,* 23 VT. L. REV. 721, 760 (1999) (noting that people's domestic political rights are unquestionably legal).

68. *See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 124, UN Doc. A/8028 (1970) (noting that Resolution 2625 does not define the word "peoples"); *see also* Shen, *supra* note 9, at 1147 ("The Covenant similarly contains no definition of peoples."); Suzan Dionne Balz, *Country within a Country: Redrawing Borders on the Post-Colonial Sovereign State*, 2 MICH. J. RACE & L. 537, 563 (1997) (stating that Resolution 2625 does not give a definition for peoples).

69. *See* Oloka-Onyango, *supra* note 52, at 151 (discussing perceptions and presumptions about self-determination as it relates to international law); Osterland, *supra* note 62, at 655 (stating national self-determination enjoyed a brief period of acceptance in international law after World War I and remains a powerful emotional and political principle despite the refusal of the international community to recognize its validity). *But see* Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Nation,* 12 AM. U. J. INT'L L. & POL'Y 903, 955 (1997) (stating that since self-determination has emerged in the UN era, it has forced international law to address these issues in order to remain relevant).

70. *See* Ved P. Nanda, *Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, 3 ILSA J. INT'L & COMP. L. 443, 444 (1997) ("Now, in the post-Cold War era, we are witnessing the unfolding of the explosive quality of self-determination to which he referred, as the international community confronts the challenge of ever-increasing ethnic-national self-determination claims."); *see also* Mahalingam, *supra* note 32, at 252 ("[T]he post-Cold war era has witnessed tremendous turmoil internal to States caused by movements for ethnic self-determination that have resulted in tragic humanitarian consequences."). *See generally* Kolodner, *supra* note 6, at 154 (stating that the concept of self-determination must be reevaluated following the Cold War).

71. *See* Tamzarian, *supra* note 7, at 198 (stating that while the principles of self-determination arising in non-colonial group situations have not yet been resolved by international law, there have been many proposals to do so). *See generally* Canuel, *supra* note 12, at 91 (stating that legal scholars have tried to create a set of criteria to determine self-determinist movements under international law); Gregory J. Ewald, *The Kurd's Right to Secede Under International Law: Self-Determination Prevails over Political Manipulation*, 22 DENV. J. INT'L L. & POL'Y 375, 376 (1994) (discussing the need to continue formulating international law in the area of non-colonial self-determination).

respect, the world community began to consider ways of managing other forms of self-determination in spite of the traditional rejection of such claims by international law.[72]

In recent times, the international recognition of the non-colonial component of self-determination can be traced to the collapse of the former Socialist Federal Republic of Yugoslavia (hereinafter "Former Yugoslavia") and the former Soviet Union.[73] These two events pushed the world community to reexamine the traditional principle of self-determination by extending it past the traditional anti-colonial concept.[74] Any claim for non-colonial self-determination could not be admitted because it would damage the territorial integrity of the state due to the modern non-colonial aspect of self-determination.[75] This new approach presents strong proof that the right to non-colonial self-determination cannot be ignored in today's world.[76] It is my

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72. *See* Hanauer, *supra* note 27, at 134 ("Despite the political nature of the conflict, the severe limitations on the S.A.D.R.'s political viability, and the extremely brief history of Sahrawi national consciousness, the international community has recognized the Western Sahara's legal right to decolonization and to determine its status freely."); *see also* John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self-Determination*? 46 KAN. L. REV. 283, 287 (1998) ("[T]he UN CHARTER placed obligations on the remaining colonial powers to develop self-government within their colonial territories."). *But see* Simpson, *supra* note 12, at 255 (discussing the failure of the UN to address secession properly).

73. *See* Thomas M. Franck, *Friedmann Award Address*, 38 COLUM. J. TRANSNAT'L L. 1, 6 (1999) (discussing the UN's willingness to admit seceding states such as Bangladesh and three Baltic Republics); Diba B. Majzub, *Does Secession Mean Succession? The International Law of Treaty Succession and an Independent Quebec*, 24 QUEEN'S L.J. 411, 420 (1999) (discussing the fragmentation of the Soviet Union and the Socialist Federal Republic of Yugoslavia); *see also* Canuel, *supra* note 12, at 95 ("[W]hile none of the signatories of the Helsinki Accord are current colonial states, the broadening to accept non-colonial self-determination movements as legally recognizable secessionist movements has thus gained momentum since 1975.").

74. *See* Ved P. Nanda, *The New Dynamics of Self-Determination: Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post Cold War Era*, 3 ILSA J. INT'L & COMP L. 443 (1997):

> [T]he General Assembly in 1970 unanimously adopted the Declaration on Principles of International Law Concerning Friendly Relations under which all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.

Id. at 451.

See also Moris, *supra* note 6, at 210 (providing examples of places where the viability of an internal right to self-determination has clearly been enhanced). *See generally* Cass, *supra* note 7, at 31 (stating that the right of self-determination extends beyond the colonial context).

75. *See* Bell & Cavanaugh, *supra* note 65, at 1349 (arguing that self-determination should not disrupt territorial integrity); Amy E. Eckert, *Free Determination or the Determination to be Free*? *Self-Determination and the Democratic Entitlement*, 4 UCLA J. INT'L L. & FOREIGN AFF. 55, 78 (1999) ("Ironically, an assertive pro-democratic position, which seeks to promote the protection of human rights, may undermine one of the most cherished rights, the right of a people to determine their political future through self-determination."); *see also* Roya M. Hanna, *Right to Self-Determination in In Re Secession of Quebec*, 23 MD. J. INT'L L. & TRADE 213, 216 (discussing the Canadian Court's determination that Quebec does not have the right to unilaterally secede).

76. *See* Richard Falk, *Problems and Prospects for the Kurdish Struggle for Self-Determination After the End of the Gulf and Cold Wars*, 15 MICH. J. INT'L L. 591, 598 (1994) ("[A]s expressed in the famous Declaration on the Granting of Independence to Colonial Countries and Peoples, the scope of the right of self-determination is broader than the explicit circumstances of colonial subjugation."); Simpson, *supra* note 12, at 257 (asserting that the concept of secession was consistently ignored at the official level until it caused the break-up of Yugoslavia and the Soviet Union); *see also* Oloka-Onyango, *supra* note 52, at 151 (noting how self-determination gained the most acceptance under the framework of the UN in the aftermath of the Second World War).

opinion that the above cases were not about de-colonization, but deeply related to the protection of humanitarian imperatives and the maintenance of international peace and security.[77] There are presently numerous territories in the world where there are disputes and demands for non-colonial self-determination.[78] Therefore, it is inevitable for the international community to manage these various forms of self-determination in this changing political world.[79]

A strong march towards a broader view of self-determination has commenced since the collapse of former Yugoslavia and the former Soviet Union.[80] A new type of self-determination (not based on colonialism) has become the modern approach used by the world community and has challenged the traditional concept of defined boundaries.[81] The United Nations World Conference on Human Rights, drawing participation from all members of the UN, reaffirmed

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77. *See* Jost Delbruck, *A Fresh Look at Humanitarian Intervention under the Authority of the United Nations*, 67 IND. L.J. 887, 887 (1992) (discussing the UN's intervention in the attack of Kuwait by Iraq in order to protect human rights); Hanauer, *supra* note 27:

> [S]elf-determination was not, however, originally conceived as a method through which the colonies of Germany and the Sublime Porte would gain independence, but rather as a means of attaining peace and security by preventing a recurrence of the nationalistic outbursts that precipitated World War I.

Id. at 138.

See also Ratner, *supra* note 9, at 591 ("[R]eliance on *uti possidetis* during the post-Cold War breakups reduces the prospects of armed conflict by providing the only clear outcome in such situations. Absent such a policy, all borders would be open to dispute, and new states would fall prey to irredentist neighbors or internal secessionist claimants.").

78. *See* Grant, *supra* note 64, at 28 (mentioning the struggle in Kosovo); Tamzarian, *supra* note 7, at 196 (discussing the right of Karabagh to self-determination versus the right of Azerbaijan to maintain its territorial integrity); *see also* Majzub, *supra* note 73, at 413 (discussing the requirements Quebec needs to fulfill in order to become independent).

79. *See* Will Kymlicka, *Theorizing Indigenous Rights,* 49 U. TORONTO L.J. 281, 286 (1999) (claiming that, although the UN Draft extends self-determination to include indigenous people, it focuses on internal autonomy rather than independent statehood); Leslie E. Schafer, *Learning from Rwanda: Addressing the Global Institutional Stalemate in Refugee Crises*, 6 IND. J. GLOBAL LEGAL STUD. 315, 338 (1998) ("[D]ue to this failure of the institution of the State in developing countries, perhaps some form of self-determination should be supported to remedy ethnic conflicts and their attendant refugee problems. One approach will involve promoting "ethnic self-determination" and/or "regional integration" to seek better ethnic relations."); *see also* Kolodner, *supra* note 6, at 157 (discussing the need for the international community to continue to support self-determination in order to protect human rights and to prevent internal conflict).

80. *See* Eastwood, *supra* note 35, at 299 ("[T]he international community's broad support for the secessions of the Baltic states from the Soviet Union and the speedy recognition of several seceding former Yugoslav republics may mark the beginning of a pattern of state practice that could, in time, reveal a right of secession under international law."); Igor Grazin, *The International Recognition of National Rights: The Baltic States' Case*, 66 NOTRE DAME L. REV. 1385, 1410 (1991) (discussing the Baltic States' struggle for independence). *But see* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 38 (1993) (discussing how most governments have refused to recognize demands for self-determination by ethnic groups and nations within the new states of the former Soviet Union).

81. *See* Cass, *supra* note 7, at 33 ("[C]ertain minorities have either achieved self-determination, or are in the process of seeking it, often with international sanction and recognition, in spite of the conventional view."); Simpson, *supra* note 12, at 271 (suggesting that use of the world "peoples" in the UN CHARTER was intended to mean "communities that live under (but not share in) alien sovereignty"); *see also* Oloka-Onyango, *supra* note 52, at 204 (arguing for the need for a different form of self-determination other than in the colonial context).

this right to self-determination of all peoples in 1993.[82] Although the participants unanimously adopted *The Vienna Declaration and Programme of Action,*[83] choosing a similar language as was used in Resolution 1514, it undoubtedly shows that the world community is moving towards legalizing the right to non-colonial self-determination.[84] In the cases of the former Yugoslavia and the Soviet Union for example, the secession in the name of self-determination may not have granted a clearly enforceable right under international law, but among the various possible forms of self-determination movements, the international community began to broaden its understanding of self-determination and its relations to sovereignty and territorial integrity.[85] That is, the concept of self-determination on non-colonial aspect is not only relative to international law, but might also be operative within domestic law.[86]

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82. *See* Janet E. Lord, *The United Nations High Commissioner for Human Rights: Challenges and Opportunities*, 17 LOY. L.A. INT'L & COMP. L.J. 329, 329 (1995) ("[T]he United Nations General Assembly adopted Resolution 48/141 to create the post of High Commissioner for the Promotion and Protection of All Human Rights."); Elsa Stamatopoulou, *The Development of United Nations Mechanisms for the Protection and Promotion of Human Rights*, 55 WASH. & LEE L. REV. 687, 692 (1998) (presenting the main points of consensus at the World Conference that promoted human rights); *see also* Christina M. Cerna, *A Small Step Forward for Human Rights: The Creation of the Post of United Nations High Commissioner for Human Rights*, 10 AM. U. J. INT'L L. & POL'Y 1265, 1267 (1995) ("[A]ll human rights are universal, indivisible and interdependent and interrelated.").

83. *See Vienna Declaration and Programme of Action*, adopted by the UN World Conference on Human Rights in 1993, UN Department of Public Information, US, 1995, para. 2 (discussing the right of people within the minority to enjoy their own culture and to practice their own religion); Cerna, *supra* note 82, at 1266 (discussing the fact that the Vienna Conference lead to the creation of the High Commissioner position); *see also* Lord, *supra* note 82 ("[S]uch breadth suggests that the High Commissioner will have the necessary latitude to decide the focus of his or her office without the constraints of hierarchical prescriptions as to the importance of one human right over another.").

84. *See* Andrew M. Beato, *Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 AM. U. J. INT'L L. & POL'Y 525, 541 (1994) (discussing the notion that a state should not be held answerable to treaties that it neither helped create nor ratified is inherent in the principle of self-determination); Tamzarian, *supra* note 7, at 198 ("[T]he principle of territorial integrity is recognized by the UN CHARTER and is considered by most scholars and jurists as a well-established norm of international law, vital to the stability and peace of the world community."); *see also* Franck, *supra* note 73 ("Contemporary practice recognizes that groups do succeed in seceding, for example by the UN General Assembly's willingness to admit to the UN such seceding entities as Bangladesh, the three Baltic Republics, the successor states of the former Soviet Union and of the former Yugoslavia.").

85. *See* David M. Kresock, "*Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L.J. 203, 239 (1994) (noting how international law can protect this valid interest by permitting humanitarian intervention only when necessary to protect human rights as the desire for self-determination spreads across the globe); *see also* Haile, *supra* note 1, at 479 (using France and the United States as examples of countries with democratic ideologies whose revolutions gave rise to self-determination, but who do not recognize a right of secession). *But see* Elliot Stanton Berke, *Recent Development: The Chechnya Inquiry: Constitutional Commitment or Abandonment?* 10 EMORY INT'L L. REV. 879, 905 (1996) (stating that Russia will refuse to recognize self-determination if it potentially will deprive Russia of natural or industrial resources, and justifies its behavior under its right to territorial integrity).

86. *See* U.S.S.R. CONST., Art. 72 (endorsing the inherent right of secession for member states of the Soviet Union) (visited October 25, 2000) <http:\\www.uni-wuerzburg.de/law/r100000_.html> ; Jon M. Van Dyke, Carmen Di Amore-Siah, Gerald W. Berkley-Coats, *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 HAW. L. REV. 623, 623 (1996) (discussing the rights of self-determination and self-governance given to indigenous people under international (and domestic) law that are different from those given to colonialized people); *see also* Hanna, *supra* note 75, at 222 ("[T]he Court determined that since Quebec's secession would be contrary to the constitution and laws of Canada, the international law is likely to accept the Court's conclusion unless it is contrary to the right of self-determination.").

III. Evolution of Self-Determination on Non-Colonial Aspects in the Aftermath of the Cold War

The collapse of the communist regime in Central and Eastern Europe led to the end of the Cold War yet also gave rise to numerous claims by people seeking self-determination.[87] These claims were, in the non-colonial context and almost all were denied by the responsible state due to the protection of sovereignty and territorial integrity under international law.[88] As a matter of fact, the denial of self-determination and its implementation were always sources of conflict.[89] After the Cold War, the Western liberal bloc led by the United States played an influential role in managing such non-colonial claims to self-determination.[90] The international community, including the UN, various UN bodies and regional organizations began to limit the central government of the responsible state through the use of "inhuman repression" to

87. *See* Osterland, *supra* note 62, at 657 ("[T]he most recent evidence of the continuing political force of national self-determination has occurred since the last months of 1989, when Communist regimes across Eastern and Central Europe crumbled."); Tappe, *supra* note 33, at 255 (discussing secession movements during the cold war). *But see* Ethan A. Klingsberg, *International Human Rights Intervention on Behalf of Minorities in Post-World War I Eastern Europe and Today: Placebo, Poison, or Panacea*? 1993 U. CHI. L. SCH. ROUNDTABLE 1, 11 (1993) ("[T]he physical features of the post-communist region dictate against the validation of an ethnic group's right to national self-determination.").

88. *See* Osterland, *supra* note 62, at 668 ("[A]s a matter of international law, recognition of a claim to secede, prior to the separatist's group achieving de facto status as an independent state, would improperly interfere with essential domestic matters of states in violation of the United Nations Charter."); *see also* Hercules Booysen, *South Africa: In Need of a Federal Constitution for its Minority Peoples*, 19 LOY. L.A. INT'L & COMP. L.J. 789, 799 (1997) (questioning the significance of Principle XXXIV and suggesting that Parliament may amend the Constitution to include "territorial self-determination for any cultural community"). *But see* Tappe, *supra* note 33, at 255 (discussing the recognition by the Soviet Union of self-determination for Chechnya).

89. *See* Osterland, *supra* note 62, at 668 ("[A]s a matter of international law, recognition of a claim to secede, prior to the separatist's group achieving de facto status as an independent state, would improperly interfere with essential domestic matters of states in violation of the United Nations Charter."). *But see* Tappe, *supra* note 33 (discussing Russia's recognition of self-determination for Chechnya).

90. *See* Tamzarian, *supra* note 7, at 211 ("[T]he Restatement (Third) of the Foreign Relations Law of the United States that the declaratory approach to recognition (i.e., recognition is unnecessary if an entity meets the traditional criteria for statehood) is the better rule."); *see also* Canuel, *supra* note 12, at 85 (stating that international law protects the sovereign rights of the legitimate government of the occupied territory and protects the inhabitants from being exploited."); Hannum, *supra* note 80, at 51 (discussing the supportive position of the United States and European Community for Yugoslav unity, before and after declarations of independence by Slovenia and Croatia).

block a claim for self-determination within its territory.[91] This kind of repression, however, was deemed to be a "breach of peace."[92]

Internal military conflicts, caused by the quest for self-determination, have sometimes led to massive loss of lives, grave deprivation of human rights, mass migrations and even cross-border combat (which also threatened international peace and security at the same time).[93] Therefore, the growing global commitment to the humanitarian imperatives and the maintenance of international peace and security is the major consideration as to whether the international community should lend its full support.[94] Accordingly, the international communities provided numerous forums through diplomatic intervention, in an effort to reach peaceful settlement of such conflicts so that disputes between the responsible state and the self-determined party could be addressed through negotiation, mediation or conciliation.[95] The international community has even proceeded with other suitable mechanisms, such as economic sanctions and

91. *See* Booysen, *supra* note 88 (discussing the uncertainty of significance for Principle XXXIV and the reasoning behind it); Wilson, *supra* note 40, at 433 ("[I]n short, the well-being of states required not only that they be protected from external interference, but also, paradoxically, that some internal populations be granted rights as against them."); *see also* Hannum, *supra* note 80, at 1 (1993) (discussing the range of recognized remedies available within the realm of international law as put forth though notion of "remedial secession").

92. *See* See UN CHARTER art. 1, para. 1 (concluding that the main reasons for the UN is to maintain international peace and security); *see also* Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519, 519 (1994) ("[T]hreat to the peace is a flexible concept that may cover anything from intra-State situations to inter-State confrontation; it was originally viewed as a precursor to a finding of a "breach" of the peace."); Julie Mertus, *Humanitarian Intervention and Kosovo: Reconsidering the Legality of Humanitarian Intervention Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1770 (2000) ("[I]ndeed, international peace and security must mean more than the absence of an internationally recognized war; human rights violations short of all-out war also constitute major breaches of peace and security.").

93. *See* Heath, *supra* note 35, at 276 (stating that the UN Charter "[A]rticle 2(4) does not speak directly to intervention, either in times of peace or civil war, nor does it speak to the use of force in internal conflicts."); Kresock, *supra* note 85, at 203 (discussing the internal strife in Bosnia); *see also* Satvinder S. Juss, Book Note, 6 IND. J. GLOBAL LEGAL STUD. 371 (1998) (reviewing DAVID WIPPMAN, INTERNATIONAL LAW & ETHNIC CONFLICT) ("The twentieth century is littered with examples of this, with grave threats to peace arising from partitions of previously peaceful societies along ethnic or religious distinctions.").

94. *See* UN CHARTER, arts. 39-51 (Chapter VII) (noting the Security Council possesses the authority to find that an internal conflict, as in Rwanda, rises to a level threatening international peace and security and to take measures accordingly); *see also* Reginald Ezetah, *The Right To Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT'L L. 495, 531 (1997) ("[A]ll States have the right and the duty to take collective measures to protect the democratic character of any State, provided such action is taken under the aegis of the United Nations and in accordance with its Charter.").

95. *See* C. M. Chinkin, *Third-Party Intervention before the International Court of Justice*, 80 AM. J. INT'L. L. 495, 501 (1986) (recognizing the international judicial arena as a fundamental norm in the settlement of disputes); Richard E. Rupp, *Cooperation, International Organizations, and Multilateral Interventions in the Post-Cold War Era: Lessons Learned from the Balkans, Somalia, and Cambodia*, 3 UCLA J. INT'L L. & FOREIGN AFF. 183, 191 (1998) ("[A]n effectively functioning international organization or regime can promote cooperation and peaceful relations by serving as a forum where member states exchange information."). *But see* Ved P. Nanda, Thomas F. Muther, Jr. & Amy E. Eckert, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention under International Law—Part II*, 26 DENV. J. INT'L L. & POL'Y 827, 854 (1998) (discussing the failed attempts to resolve the conflict in West Africa).

military intervention, to compel the government to engage in a reasonable dialogue with the self-determined party.[96]

Many conflicts that took place within states were attributable to the great aspiration of a people seeking recognition of their cultural, religious, linguistic, ethnic and political identity.[97] What is so clear in this connection is that the non-colonial claim for self-determination is not limited to secessionist movements.[98] The non-colonial aspect of self-determination has actually been interpreted broadly to include the incorporation into a state, some measure of autonomy within a state, a larger degree of freedom in a federation or even complete independence.[99] The failure to set up a universal standard for managing these kind of conflicts caused by non-colonial self-determination movements presupposes that the world community can only consider each condition on a case-by-case basis to determine if a conflict is serious enough to warrant international involvement.[100]

As a result, some peoples have been fortunate to receive international support in settling their problems, such as is the case in Western Sahara and East Timor.[101] On the other hand,

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96. *See* Lt. Col. Susan S. Gibson, *International Economic Sanctions: The Importance of Government Structures*, 13 EMORY INT'L L. REV. 161, 161 (1999) ("[T]he great advantage of economic sanctions is that on the one hand they can be very potent, while on the other hand they do not involve that resort to force which is repugnant to our objective of peace."); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 25 (1996) (discussing the preference of the U.S. for economic sanctions); *see also* David Wippman, *International Law in the Americas: Rethinking National Sovereignty in an Age of Regional Integration Articles & Essays: Defending Democracy Through Foreign Intervention*, 19 HOUS. J. INT'L L. 659, 659 (1997) (giving examples of recent authorizations, by the Security Council, of military intervention).

97. *See* Elizabeth F. Defeis, *Minority Protections and Bilateral Agreements: An Effective Mechanism*, 22 HAMLINE J. PUB. L. & POL'Y 291, 291 (1999) (discussing the ethnic violence in the former Soviet Union and Yugoslavia); Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431, 1431 (1991) (discussing how the proposed European Convention for the Protection of Minorities draft concerns only ethnic, religious and linguistic minorities); *see also* Jani Purnawanty, *Recent Development in East Timor: Various Perspectives in Understanding the East Timor Crisis*, 14 TEMP. INT'L & COMP. L.J. 61, 66-73 (2000) (discussing the recent crisis in East Timor).

98. *See* Canuel, *supra* note 12, at 95 ("[I]nternational law regarding occupied territories allows the occupant, or occupying state, to wield certain powers while limiting other powers, in order to ensure that the occupied peoples are treated with humanity throughout the occupation."); *see also* Simpson, *supra* note 12, at 263 (stating that the international community does not support secession as a form of self-determination); Tappe, *supra* note 33, at 267 (asserting that the international community's reaction to the Katangan and Biafran movements was grounded in the belief that recognition of a secession right threatens territorial integrity of states).

99. *See* Canuel, *supra* note 12, at 95; *see also* Moris, *supra* note 6, at 201 (discussing the recognition of a secessionist movement in Yugoslavia); Tamzarian, *supra* note 7 (discussing the struggle for freedom of Artsakh).

100. *See* Tamzarian, *supra* note 7 ("[T]he debate over the right of Karabagh to self-determination versus the right of Azerbaijan to mainatin its territorial itegrity must be analyzed in view of the de facto independence Karabagh has attained."); Tappe, *supra* note 33 (discussing the legitimacy of the Chechen claim to secession). *But see* Johan D. Van der Vyver, *Universality and Relativity of Human Rights: American Relativism,* 4 BUFF. HUM. RGT. L. REV. 43, 54 (1998) (discussing two standards of when secession can take place).

101. *See* UN Security Council Res. 384, Dec. 22, 1975 & Res. 389, April 22, 1976 (visited October 25, 2000) <http://www.etan.org/etun/genasRes.htm> (discussing the extent of UN involvement and proposals regarding the conflicts in Western Sahara and East Timor); Yahia H. Zoubir, *The Western Sahara Conflict: A Case Study in Failure of Prenegotiation and Prolongation of Conflict*, 26 CAL. W. INT'L L.J. 173, 175 (1996) (analyzing the Western Sahara dispute); *see also* Purnawanty, *supra* note 97, at 62-65 (discussing the history of East Timor).

some other peoples have not been so fortunate to gain full international support.[102] A striking example is the case of Chechnya, which is still facing horrific violence and even large-scale warfare in Russia.[103] It is therefore quite important to clarify what "people" are qualified or entitled to the right of self-determination.[104] For the purposes of self-determination, a final report by the United Nations Educational, Scientific and Cultural Organization (hereinafter "UNESCO"),[105] defined "peoplehood" as:

> [A] group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life. The group as a whole must have the will to be identified as a people or the consciousness of being a people.[106]

The UNESCO experts further emphasized that the group should be of a particular size and constitute more than a mere association of individuals within a state.[107] They also considered the existence of representative institutions as an additional criterion for the exercise of self-

102. *See* Eastwood, *supra* note 35, at 304 ("[D]uring the attempted secession of Katanga from the newly independent Congo in the early 1960s, the response of the international community to the dispute evolved from initial efforts to maintain neutrality into outright opposition to secession."); Kevin MacMillan, *Secession Perspectives and the Independence of Quebec,* 7 TUL. J. INT'L & COMP. L. 333, 335 (1999) (discussing how many nations do not take the independence movements in Lithuania and Chechnya seriously); *see also* Tappe, *supra* note 33, at 255 (discussing the rationale behind the international reaction to this invasion).

103. *See* Tappe, *supra* note 33, at 255 (discussing Russia's invasion of Chechnya because it will not allow Chechnya to remain independent); Wendy Turnoff Atrokhov, *The Khasavyurt Accords: Maintaining the Rule of Law and Legitimacy of Democracy in the Russian Federation Amidst the Chechen Crisis*, 32 CORNELL INT'L L.J. 367, 372 (1999) (discussing the post-Soviet Chechnya struggle for independence); *see also* Hanna, *supra* note 75 (discussing the Canadian Court's determination that Quebec does not have the right to unilaterally secede).

104. *See* Booysen, *supra* note 88, at 804 (suggesting that minority groups should be "concentrated in a well demarcated territory, in which its members constitute the majority."); Grant, *supra* norte 64, at 32 (discussing the requirements a territory must take in seeking its independence); *see also* Wilner, *supra* note 58, at 303 (discussing the four principles of self-determination).

105. *See* Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: A Case Study Of The Kurds*, 2 TULSA J. COMP. & INT'L L. 45, 48 (1994) (discussing the shared characteristics of groups); El-Obaid Ahmed El-Obaid & Kwadwo Appiagyei-Atua, *Human Rights in Africa—A New Perspective on Linking the Past to the Present*, 41 MCGILL L.J. 819, 840 (1994) (providing examples of what some of the shared characteristics are within a group); *see also* Grant, *supra* note 64, at 22 (noting the confusion over which groups of people actually have a self-determination claim).

106. *See* Bell & Cavanaugh, *supra* note 65, at 1351 (asserting that nationalists believe that Catholics have been discriminated against); Hannum, *supra* note 97, at 1145 (discussing the importance of language for minorities); *see also* El-Obaid Ahmed El-Obaid & Kwadwo Appiagyei-Atua, *supra* note 105 (1994) (noting the size requirement for a group).

107. *See* Goldman, *supra* note 105 (stating that a group is required to be of a specific size); *see also* Simpson, *supra* note 12, at 270 (discussing the failures of the Declaration).

determination.[108] There is no difficulty to identify a distinct "people" in most cases, but the issue arises over whether a particular group also constitutes a minority.[109] If it is held that only the term "peoples" are entitled to self-determination, it becomes important to distinguish the term "peoples" from "minority population."[110] However, as Professor Michael C. van Walt van Praag has indicated:

> [T]he existence of cases where the identification of distinct peoples by means of objectively identifiable criteria gives rise to problems, should not be caused by an ideological refusal to implement the right to self-determination based on an alleged inability to adequately define the term people.[111]

Indeed, the issue of defining a particular group in terms of "whether it satisfies the criteria of a people" is politically subjective.[112] Not only is the effort to distinguish between a people and a minority population questionable, these categories are simply too broad to have much meaning.[113] In today's world, the legal basis for authorizing a particular group to possess the right of self-determination considers the protection of humanitarian imperatives and maintenance of international peace and security.[114] The wish for self-determination in the context of

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108. *See* UNESCO, *International Meeting of Experts on Further Study of the Concept of Rights of Peoples: Final Report and Recommendations*, UNESCO doc. SHS-89/CONF.602/7, at 7-8 (1990) (visitied October 25, 2000) <http://www.unesco.org/general/eng/leg/hrights/text/html>; *see also* Moris, *supra* note 6, at 205 ("[O]thers assert that the right to internal self-determination is merely the right of minorities and indigenous peoples to have a representative democratic government chosen through a legitimate political process."); Sheppard, *supra* note 54, at 745 (stating that, under international law, Quebec is without the right to secede unilaterally from Canada).

109. *See* Brietzke, *supra* note 64, at 82-83 (noting that there is a large number of minorities claiming rights against entities which have just claimed self-determination); *see also* Cass, *supra* note 7, at 39 (recognizing particular groups which have made certain claims against groups that have successfully claimed self-determination); *see, e.g.,* Walter Laqueur, *Independence May Enslave Millions; The Rush Toward National Separatism Is An Invitation To Economic Ruin And To Undemocratic Rulers*, L.A.TIMES, September 8, 1991, at M5 (citing examples of groups that have made claims against others who have claimed self-determination).

110. *See* Y. Frank Chiang, *State, Sovereignty and Taiwan*, 23 FORDHAM INT'L L.J. 959, 1002-03 (2000) (questioning whether or not minority groups are entitled to self-determination); *see also* Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 32-33 (1997) (noting that self-determination is only a right to be exercised by groups who have been recognized as a people). *See generally* Jill Allison Weiner, *Israel, Palestine and the Oslo Accords*, 23 FORDHAM INT'L L.J. 230, 261-62 (1999) (noting that self determination can only be invoked by those recognized as a "people").

111. *See* MICHAEL V. VAN WALT VAN PRAAG, SELF-DETERMINATION IN A WORLD OF CONFLICT: A SOURCE OF INSTABILITY OR INSTRUMENT OF PEACE IN THE REPORT OF THE UNESCO INTERNATIONAL CONFERENCE OF EXPERTS, HELD IN BARCELONA FROM NOV. 21-27, 1998 63 (van Walt van Praag, ed. 1999).

112. *See* Brietzke, *supra* note 64, at 83 (1995) (stating that the "lives of people must surely transcend the integrity of the territories"); Cass, *supra* note 7, at 23-24 (1992) (noting that there are problems that exist because of a reliance by indigenous people and minorities on the concept of self-determination). *See generally* John A. Collins, *Self-Determination in International Law: The Palestinians,* 12 Case W. Res. J. Int'l L. 137, 153 (1980) (arguing that the principle of self-determination should not be considered solely as a territorial right).

113. *See* Dajani, *supra* note 110, at 30 (noting that the word "peoples" can be defined broadly); *see also* Bell & Cavanaugh, *supra* note 65 (discussing the definition of "peoples"). *See generally* Cass, *supra* note 7, at 29 (noting that there is a "critical uncertainty" as to whom the right attaches).

114. *See* Bell & Cavanaugh, *supra* note 65, at 1347-48 (discussing the distinction between self-determination as a right of "peoples" versus that of minorities); Christopher Wall, *Human Rights and Economic Sanctions*, 22 FORDHAM INT'L L.J. 577, 604 (1998) (noting that self-determination should only be allowed when human rights are ensured); *see also* Michla Pomerance, SELF DETERMINATION IN LAW & PRACTICE 41 (1982) ("[S]elf determination is the imperative basis for all human rights.").

de-colonization is not only affected by the definition of legal scholars or the UN, but also by the political will of states.[115] Once the political principle is "ripe" enough to allow the international community to render its assistance to the distress, the international community will recognize a particular group as a "peoples" and their right to self-determination even though the group might only be a minority.[116]

For example, the people of East Timor successfully exercised their right to self-determination of their own future under international process regardless of being of the same ethnic group as the people of West Timor,[117] while the people of Tibet are distinct from other ethnic groups of China and have not benefited far from the principle of self-determination.[118] This is true notwithstanding the fact that the size of the Tibetan population is quite large in comparison to that of East Timor.[119] Moreover, the right of the Tibetan people to preserve their cultural and religious life was affirmed by the UN under the principle of human rights and fundamental freedom in 1959, 1961 and 1965.[120] Based on the foregoing, it appears that it is unnecessary to make a distinction between "peoples" and "minority population" in terms of

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115. *See* UN CHARTER, Art. 73 (defining which territories are entitled to self-determination); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 74-75 (noting that the process of decolonization is formulating doctrines of self-determination as opposed to annexation); *see also* Dajani, *supra* note 110, at 32 (noting the United Nation's definition of which territories qualify as entitled to self-determination).

116. *See* Bell & Cavanaugh, *supra* note 65, at 1347-48 (noting the blurred distinction between "people" and "minorities"); *see, e.g.*, Stephen Kinzer, *Europe, Backing Germans, Accepts Yugoslav Breakup*, N.Y. TIMES, Jan. 16, 1992, at A10 (discussing the recognition by the European Union of the independence of Yugoslavia). *See generally* Cass, *supra* note 7, at 31 (noting that there are certain circumstances where minorities should be allowed to exercise the right of self-determination and cites examples of when this "controversial" approach has been allowed).

117. *See* Chiang, *supra* note 110, at 973 (mentioning that East Timor held a referendum in 1999 in order to express the common will of the people); *see also* Indonesian Institute of Science, *Embargo and Lessons from History,* THE JAKARTA POST, Sept. 30, 2000 (discussing the successful referendum in East Timor in August 1999). *See generally* Andrea Hopkins, *Australia Allowed Invasion Of East Timor: Records Show Canberra Had 3 Days' Warning But Did Nothing,* THE GUARDIAN (LONDON), Sept. 13, 2000, at 16 (noting East Timor's successful referendum).

118. *See* John Billington, *Letter, Plea for Tibet,* THE INDEPENDENT (LONDON), Oct. 7, 2000, at 2 (noting that nothing has happened by way of establishing a right of self-determination for the Tibetans); *see also* Lobsang Sangay, *UN's Shoddy Treatment of Tibet,* THE BOSTON GLOBE, July 2, 2000, at F7 (discussing the need for public support of the establishment of self-determination in Tibet). *See generally* Terence Tan, *Why China's Leaders Fear Full Democracy*, THE STRAITS TIMES (SINGAPORE), Sept. 17, 2000, at 23 (discussing China's fear of a democracy and the fact that it could cause them to lose control over Tibet).

119. *See* Frederick J. Petersen, *The Facade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations*, 15 ARIZ. J. INT'L & COMP. LAW 871, 898-900 (1998) (estimating that the population of East Timor is six hundred thousand, while the Tibetan population is comprised of nearly eight million Chinese and six million native Tibetans).

120. *See Question of Tibet,* G.A. Res. 1353, UN GAOR, 14th Sess., Supp. No. 16, UN Doc. A/L.264 (1959) (condemning Chinese invasion of Tibet and human rights abuses that took place); G.A. Res. 1723, UN GAOR, 16th Sess., Supp. No. 17, vol. 1, UN Doc. A/5100 (1961) (affirming Tibetans right to self-determination); G.A. Res. 2079, UN GAOR, 20th Sess., Supp. No. 14, UN Doc. A/L. 473 (1965) (discussing that the basic human rights of fundamental freedom are not only encouraged, but will be enforced by the UN by whatever means necessary). *See generally* Petersen, *supra* note 119, at 900 (noting the Tibetan population is at 6 million).

entitlement to the right of self-determination.[121] This is perhaps the reason why there is hardly any indication that many states are prepared to adopt the generally applicable criteria.

Another notable case is the self-determination movement in Palestine, which presents a typical claim for self-determination within an existing state.[122] In this case, the UN has repeatedly affirmed that the Palestinians have the inalienable right to self-determination.[123] The UN has established a special committee, in spite of U.S. opposition and hostile threats from Israel, to help the Palestinians in proceeding with to build their own state.[124]

There are also some other persuasive precedents visible in Europe. Concerned with increased claims for non-colonial self-determination in Eastern Europe and the Soviet Union in the early 1990s,[125] the Member states of the European Community adopted the *Guideline on*

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121. *See* Cass, *supra* note 7, at 31 (discussing the fact that there has been a change in the international community's perception of when self-determination can arise)*; see also* Kiwanuka, *supra* note 6, at 90 (concluding that the right of people to assert the right of self-determination extends to all people "within the boundaries of a country or a geographical entity"); Sohn, *supra* note 23, at 50 (discussing the distinction between allowing minorities the right of self-determination and allowing it only within the colonial borders). *See generally* Kinzer*, supra* note 116 (showing a shift in the international attitude toward recognizing the rights of minorities*).*

122. *See* Justus R. Weiner, *The Palestinian Refugees' "Right to Return" and the Peace Process*, 20 B.C. INT'L & COMP. L. REV. 1, 1 (1997) (noting that if Israel accepts Palestine's national identity, then the concept of self-determination should be guaranteed); *see also* Canuel, *supra* note 12, at 100 (discussing the movement towards self-determination and the resistance of Israeli occupation of Palestine); Shlomo Alvineri, *A Palestinian Tragedy,* THE JERUSALEM POST, July 28, 2000, at 8A (discussing the situation in Palestine and their claim for self-determination and poor leadership).

123. *See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,* G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 29, at 123, UN Doc. A/8028 (1970) (supporting the rights of all people to determine their political status); *see also Resolutions and Decisions of the UN General Assembly and the UN Security Council Relating to the Question of Palestine*, G.A. Doc. A/AC.183/L.2 (1947-1975), G.A. Coc. A/AC.83/L.2/Add.1 (1976-1979) (noting the importance of the right to freely determine one's own political future). *See generally* Canuel, *supra* note 12, at 93-94 (1997) (noting that the United Nations has repeatedly recognized the rights of all people to "freely determine their political status").

124. *See* Allegra Pacheco, *A Form of Apartheid Being Forced on Palestinians*, THE HOUS. CHRON., Oct. 6. 2000, at A45 (noting that President Clinton was a proponent of the Middle East Peace Agreement, but failed to let the Palestinians know that the agreement did not include a guarantee of self-determination); *see also* Dajani, *supra* note 110, at 41-42 (arguing that United States and Israel still refrain from acknowledging Palestinians' claimed right to self-determination); Weiner, *supra* note 110, at 241-42 (noting United States' refusal to recognize the Palestinians as a self-determined people).

125. *See* Svetozar Stojanovic, *The Destruction of Yugoslavia*, 19 FORDHAM INT'L L.J. 337, 358 (1995) (discussing that the secessions from Yugoslavia was viewed as self determination movements); *see also* Gideon A. Moor, Note, *The Republic Of Bosnia-Herzegovina And Article 51: Inherent Rights And Unmet Responsibilities*, 18 FORDHAM INT'L L.J. 870, 873-74 (199) (discussing the fall of communism in 1989, the changing face of Eastern Europe in the early 1990s and the nationalist self-determination movement). *See generally* John Tagliabue, *Conflict in Yugoslavia*, N.Y. TIMES, July 3, 1991, at A6 (describing political successors in Yugoslavia as former communists who evoke old national aspirations as a way of casting off that which originally gave rise to communism).

Recognition of New States in Eastern Europe and the Soviet Union (hereinafter "Guideline").[126] The Guideline constitutes a general criteria on the process of recognizing such new states based specifically on the principle of non-colonial self-determination.[127] As a result, numerous new states emerging from former Yugoslavia and the former Soviet Union have gained recognition from the European Community and other states.[128]

Another prominent progress relating to non-colonial self-determination has been the development of indigenous people's right to self-determination over the past two decades.[129] For instance, the UN Working Group on Indigenous Populations (hereinafter "Working Group") was established to deal with the issue of indigenous populations.[130] The Working Group adopted the *Draft Declaration of Rights of Indigenous Peoples* at its 11th session which was also later adopted by UNESCO in 1993 (hereinafter "1993 Declaration").[131] Article 31 of

126. *See Guideline on the Recognition of New States in Eastern Europe and in the Soviet Union*, E.C. BULLETIN 12-1991, at 119 (laying the foundation for self-determination with respect to former Communist Bloc countries who sought independence); *see also* Ruth Wedgwood, *NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 833 (1999) (discussing how the "Guidelines" make clear that political membership in the European-Atlantic community requires minimum guarantees for the rights of minority populations); *see, e.g., Political Cooperation: EEC Moves to Recognise Georgia*, EUROPEAN REPORT, March 25, 1992, at 13 (stating that Georgia has met the stated requirements in the *Guideline on Recognition of New States in Eastern Europe and the Soviet Union* and proceeded with recognition).

127. *See* Chiang, *supra* note 110, at 1003 (discussing the fact that many new states were created out of former Soviet Union and United States' colonies in the "name of self-determination"); *see also* Sohn, *supra* note 23, at 50 (discussing that Estonia, Latvia, and Lithuania, have been deprived of their right to independence). *See generally* Kinzer, *supra* note 116 (showing a shift in the international attitude toward recognizing the rights of minorities based on self-determination).

128. *See* Patrick R. Hugg, *The Republic of Turkey in Europe: Reconsidering the Luxembourg Exclusion*, 23 FORDHAM INT'L L.J. 606, 611-12, 653 (2000) (discussing the changing map of Europe, the newly emerging states from the old Soviet powers and the European Union's offer of membership to some emerging democracies); *see also* Kinzer, *supra* note 116 (discussing the recognition of the independence of Yugoslavia); *see, e.g., Political Cooperation: EEC Moves to Recognize Georgia*, *supra* note 123 (stating that Georgia has met the stated requirements in the *Guideline on Recognition of New States in Eastern Europe and the Soviet Union* and proceeded with recognition).

129. *See* Cass, *supra* note 7, at 23-24 (noting problems that exist because of a reliance by indigenous persons and minorities on the concept of self-determination); *see also* Patrick Macklem, *Aboriginal Rights and State Obligations*, 35 ALTA. L. REV. 97, 113 (1997) ("Indigenous peoples have the right to self-determination in accordance with international law"); Chair-Rapporteur of the Working Group on Indigenous Populations, *Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub.2/1993/26 (released 8 June 1993) (addressing fact that indigenous peoples have the right to self-determination).

130. *See* Rick Sarre, *Seeking Justice: Critical Perspectives of Native People: The Imprisonment of Indigenous Australians: Dilemmas and Challenges for Policymakers*, 4 GEO. PUB. POL'Y REV. 165, 167 n.5 (1999) (discussing the United Nation's creation of the Working Group on Indigenous Populations); *see also* Penelope Andrews, *Conceptualizing Violence: Present And Future Developments In International Law: Panel III: Sex And Sexuality: Violence And Culture In The New International Order: Violence Against Aboriginal Women In Australia: Possibilities For Redress Within The International Human Rights Framework*, 60 ALB. L. REV. 917, 932 (1997) (analyzing the Working Group on Indigenous Populations impact on international relations); Suagee, *supra* note 11, at 369-70 (noting the duties of the Working Group on Indigenous Populations).

131. *See Draft Declaration of Rights of Indigenous Peoples,* UN Doc. E/CN.4/Sub.2/1993/29; *see also* Macklem, *supra* note 129 ("Indigenous peoples have the right to self-determination in accordance with international law, subject to the same criteria and limitations as applied to other peoples in accordance with the Charter of the United Nations."); Sarre, *supra* note 130 (discussing the Draft Declaration which provides in part that indigenous peoples have the right to have their specific characteristics respected).

the 1993 Declaration provides that "indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs."[132]

As noted above, it may be hard to see the right of non-colonial self-determination being interpreted in its broadest sense in the near future. However, giving "indigenous peoples" a high degree of control over their own destiny and settling self-determination claims by guaranteeing democratic entitlement to these claimants under international processes have become more acceptable at the international level.[133] After the Cold War, the growing worldwide pressure for democracy promoted a progressive development toward self-determination by encouraging respect for human rights as a universal value (which is protected under international law).[134] Watching the development of the right to self-determination from an anti-colonial concept to a non-colonial concept, observers are likely to be convinced that, regardless of the form of self-determination contemplated, the issue of choice is an underlying factor.[135] In essence, people have the right to choose who governs them and what kind of government they should practice.[136]

With regard to political choices, the UN adopted Resolution 2625[137] on the principle of democratic entitlement. Resolution 2625 states that "the establishment of a sovereign and inde-

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132. *See* Alexandra Kersey, *The Nunavut Agreement: A Model for Preserving Indigenous Rights,* 11 ARIZ. J. INT'L & COMP. L. 429, 453 n.210 (1994) ("Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs"); *see also* Angela R. Hoeft, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective,* 14 L. & INEQ. J. 203, 227 (commenting on Article 31 of the *Draft Declaration of Rights of Indigenous Peoples*); Wilson, *supra* note 40, at 470 (discussing Article 31 of the *Draft Declaration of Rights of Indigenous Peoples*).

133. *See* Bell & Cavanaugh, *supra* note 65, at 1347-48 (discussing how indigent peoples have blurred the distinction between peoples and minorities, thus expanding the right of self-determination); *see also* Stojanovic, *supra* note 125 (asserting that the secessions from Yugoslavia were viewed as self-determination movements); Kinzer, *supra* note 116 (stating that the European Union recognized the independence of Yugoslavia).

134. *See* Stephen R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL'Y 591, 592-93 (2000) (noting that there has been "modest progress" made toward a more worldy recognition of human rights since the end of the Cold War). *See generally* Chiang, *supra* note 110, at 1003 (stating that many new states were created out of the the former Soviet Union and United States' colonies in the "name of self-determination"); Suagee, *supra* note 11, at 389-90 (explaining the United States will have to take the moral high ground in order to insure that self-determination for indigenous peoples continues to become a reality).

135. *See* Kingsbury, *supra* note 19, at 440 (recognizing existing doctrine of choice in some international institutions regarding self-determination); *see also* Tomasa, *supra* note 24, at 248-49 (listing countries that have colonized in the past define self-determination as a choice of right to freely choose a status). *See generally* Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 592 (1992) (discussing the 1966 Human Rights Covenants and their allowance for individuals to make a choice regarding ethnicity, religion and language).

136. *See* Suagee, *supra* note 11, at 380 (stating that "under international law indigenous peoples have been treated as not having one particular right that other peoples have—the right to choose to become a nation-state").

137. *See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,*G.A. Res. 2625, UN GAOR, 9th Sess., Supp. No. 28, at 121, UN Doc. 8/8028 (1970) (Resolution 2625); *see also* Hurst Hannum, 93 AM. J. INT'L L. 274, 275 (1999) (discussing Resolution 2625); Claus Arndt, *Legal Problems of the German Eastern Treaties*, 74 AM. J. INT'L L. 122, 130 (1980) (explaining specific sections of Resolution 2625).

pendent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people."[138] Yet, as a matter of international law, there exists relatively few procedures to implement the right of self-determination.[139]

To commence a direct, secret and universal ballot is a comprehensive way to assess the will of the people.[140] In order to prevent electoral fraud or any other violation of the electoral process, the international community often conducts international election observer missions to ensure that the following issues are in place: 1) whether those people entitled to vote are properly registered and that the electoral rolls are not tampered with; 2) whether all those registered are able to vote freely and that their ballots are properly and fairly counted; and 3) whether, during electoral campaign and the election itself, information flowed freely to and from the people so as to ensure that they are able to vote under the best possible conditions.[141] Thus, democratic entitlement can serve as an imperative to conflict resolution because it helps to present a real outcome of the will of the people.[142] Through this democratic procedure, however, the responsible state can satisfy the burden of proof to eliminate any legal justification for intervention by another state or international community and then, the conflicts arising from the self-determination movement can be resolved smoothly with the possibility of certain

138. *See* Major James Francis Gravelle, *Contemporary Interntaional Legal Issues—The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5, 40 (1985) (discussing Resolution 2625); Tamzarian, *supra* note 7, at 192 (explaining the substantive legal issues pertaining to the Karabagh conflict); Brian D. Vaughan, Note & Comment, *Will God Save the Queen? Share Authority and Sovereignty in Northern Ireland and the Case for Cross-Border Bodies*, 18 WIS. INT'L L.J. 511, 524 (2000) (regarding the forms that self-determination may take).

139. *See* Wall, *supra* note 114, at 603-04 (asserting there is no international procedure to insure the implementation of self-determination); *cf.* Selassie, *supra* note 5, at 98 (stating the UN CHARTER provides for procedures which give the concept of self-determination concrete form).

140. *See Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension*, June 29, 1990, *reprinted in* 29 I.L.M. 1305, 1308 (1990) (discussing the "inalienable rights of all human beings" inherent in having an election by secret ballot to ensure that free opinion of the electors is expressed); *see also* Franck, *supra* note 33, at 66 (noting that elections by secret ballot are important in protecting the rights of those voting); Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization*, 23 BROOK. J. INT'L L. 689, 759 (1998) (noting that the election of a particular individual is the "will of the people").

141. *See* YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS 37-38 (1994) (discussing what is done in order to ensure that electoral issues are in place). *See generally* Tan Lian Choo, *Good, Capable Officers Picked to Act as Republic's Envoys,* THE STRAITS TIMES (Singapore), October 24, 1994, at 4 (stating that "election monitors" were sent to observe the first non-racial elections in South Africa).

142. *See* Brietzke, *supra* note 64, at 130 (noting that it is important for the international community to define self-determination in democratic terms in order to ensure that the people get what they want); *see also* Hannum, *supra* note 80, at 66 (viewing self-determination as a means to a democratic end lends validity to the proposition because it serves to protect the interests of the people). *See generally* Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 616 (1992) (noting that a right of self-determination is generally taken to mean a declaration of independence of a territorial unit).

degrees of preference.[143] The case of Eritrea, which broke away from Ethiopia, serves as a remarkable model for such a point.[144] The Eritreans launched a long-term armed struggle against the Ethiopian regime despite the fact that the UN paved the way for the Ethiopian Empire to absorb Eritrea as an integral part of Ethiopian territory without respecting the right of the Eritrean people to self-determination.[145] The conflict remained uncontrollable for thirty years until the Eritrean People were permitted to hold a democratic referendum under international monitoring for determining the status of Eritrea in 1993.[146]

In reviewing the process that the Eritrean people took in their struggle for self-determination, it is clear that self-determination is a right to choose one's destiny by full democratic participation.[147] It also appears that oppressed people do not compromise on their right of self-

143. *See* Brietzke, *supra* note 64, at 0118-19 (discussing how the democratization of the burdens of proof would eliminate any legal justification for intervention by another state or international community). *See generally* Thomas Carothers, *Democracy and Human Rights: Policy Allies or Rivals?*, THE WASH. Q., Summer 1994, at 106 ("In their view, U.S. government pressure on a foreign government to improve its human rights behavior is a form of entirely legitimate intervention in the internal affairs of that country because human rights norms are binding under international law on all states.").

144. *See The Nations Speak; UN General Assembly General Debate, September 27 to October 13, 1993*, UN CHRON., March 1994, at 8 ("Eritrea has not only secured peace and stability; it has made the rare achievement of establishing warm relations of cooperations with its former enemy, Ethiopia."). *See generally* Africa Policy Information Center, *United States and Africa; Africa Policy: Report from the American Assembly,* AFRICA NEWS, May 6, 1997 (providing examples of many countries that have made significant progress toward democracies).

145. *See* Chris Landsberg, *Africa's Renaissance Is Being Held Hostage By Ethiopia-Eritrea Conflict; Optimism Is Delayed*, NEWS & RECORD (North Carolina), July 15, 1998, at A11 (concluding that surprise victory over the Ethiopian Army initiated the UN sanctioned referendum on Eritrean self-determination, where 98% of Eritreans voted for independence). *See generally* Henry J. Richardson, *Recent Struggles for Democracy Under Protocols I and II to the Geneva Conventions,* 6 TEMP. INT'L & COMP. L. REV. 13, 16 (1992) (recognizing combat that arises out of popular uprisings, within state boundaries, during the pursuit of self-determination); Michael A. Hiltzik, *Army Collapse Reportedly Cripples Ethiopian Regime,* L.A. TIMES, Oct. 13, 1989, at A1, col. 5 (noting that Eritrean People's Liberation Front was the dominant guerilla warfare organization); *War Brings Ethiopia to Verge of Fall: Rebellion: In an Impassioned Speech, President Mengistu Says the Mother Land Is in Collapse,* L.A. TIMES, June 23, 1990, at A11 (stating that the president of Ethiopia accused the Eritrean People's Liberation Front of being involved in a conspiracy to divide the country).

146. *See* Tom Killion, *Both Sides in Africa's Longest War Look for Peaceful Solution in Atlanta,* L.A. TIMES, Sep. 3, 1989, at page 2 (noting that the Eritrean People's Liberation Front worked for several years to obtain an internationally supervised referendum on Eritrea's political future); *see also* Robert E. Lutz, II, *Perspectives on the World Court, the United States, and International Dispute Resolution in a Changing World,* 25 INT'L LAW. 675 (1991) (speculating that international peace talks were held in Atlanta, Georgia with the hope of settling the civil war between the Ethiopian Government and Eritrean rebels); *Peace Talks in Atlanta*, L.A. TIMES, Aug. 17, 1989, at A1 (noting that President Carter would oversee international peace talks between the government of Ethiopia and the Eritrean People's Liberation Front). *See generally* HALPERIN, SCHEFFEER & SMALL, *supra* note 39, at 125-26 (discussing the UN's General Assembly adoption of Resolution 390(V) that proposed Ertrea be federated within the Ethiopian Empire).

147. *See* Kolodner, *supra* note 6, at 158 (noting that the exercise of self-determination is a prerequisite to the exercise of human rights and freedoms). *See generally* Henry J. Richardson, *A Critical Thought on Self Determination For East Timor and Kosovo,* 14 TEMP. INT'L & COMP. L.J. 101, 101 (2000) (stating that international community has a duty to uphold self-determination as a fundamental right). *Compare* American Society of International Law Proceedings, *Rights of Self-Determination of Peoples in Established States: Southern Africa and the Middle East,* 85 AM. SOC'Y INT'L L. PROC. 541, 546 (1991) (noting that in established states, this right is defined as each person's power to participate in decisions which affect the political future of the state).

determination.[148] After the Cold War, a democratic vitality has been growing around the world.[149] More significantly, democratic values have become acceptable in many regions of the world.[150] Hence, a responsible state is guaranteed its status quo "territorial integrity and political unity" against the right of self-determination only when its government has satisfied the obligation to the people by engaging in "good governance."[151] Using this approach, democracy will become a universal value irrespective of differing racial, religious and cultural characteristics.[152] By acting together through the democratic frameworks,[153] both the state and its people

148. *See generally* Brown-John, *supra* note 48, at 573 (noting that the self-determination and independence movement can be linked in situations where peoples have been oppressed); Mitchell A. Hill, *What The Principle of Self-Determination Means Today,* 1 ILSA J. INT'L & COMP. L. 119, 131 (1995) (under the 1970 Declaration of the United Nations, when a government is not representative of its people, oppressed groups within the state may be afforded the right to self-determination). *But see* Hanauer, *supra* note 27, at 133 (stating that the right of every oppressed ethnic or religious group to claim independence and freedom from domination is a very idealistic political and moral view).

149. *See* Richardson, *supra* note 147, at 102 (noting that in the post-Cold War Era, the right to self-determination has been "intensely claimed and invoked"); *see also* Clarence Davis, *Proceedings of the Conference on African-Americans and the Right to Self-Determination*, 17 HAMLINE L. REV. 1, 6 (1993) ("With the ending of the Cold War, there has been an international expansion in the desire for democracy."); Kolodner, *supra* note 6, at 153 (asserting that self-determination has gained growing acceptance in the international community in the post-Cold War era); Nafziger, *supra* note 59, at 28 (noting that in the post-Cold War Era, the United Nations has been able to facilitate self-determination more readily).

150. *See* Kolodner, *supra* note 6, at 153 (stating that democratic freedoms have become more widely accepted and promulgated since the Cold War). *See generally* Muna Ndulo, *The Democratic State in Africa: The Challenges For Institution Building*, 16 NAT'L BLACK L.J. 70, 84 (1998) (noting that in many regions of the world, providing political power to local communities has become one of the corner stones of democracy); Karen Ann Widess, *Implementing Democratization: What Role for International Organizations?,* 91 AM. SOC'Y INT'L L. PROC. 356, 357 (1997) (dicussing the fact that there has been increased support support for democratic transitions within international organizations in the post-Cold War Era).

151. *See* Henry J. Richardson, "*Failed States," Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations,* 10 TEMP. INT'L & COMP. L.J. 1, 21 (1996) (placing burden on every political state to protect the human rights of all its citizens); *see also* Hanna, *supra* note 75, at 224 (discussing protection of people within specific territories under international law of its territorial integrity). *See generally* Canuel, *supra* note 12, at 91 (stating that the international standard for determining whether self-determination is legitamite depends upon, in part, the degree of deprivation of basic human rights within the state).

152. *See United Nations And Businesses Find Common Ground; UN Chief Says Agency Creates The Conditions Necessary For Business Success,* STAR TRIB. (Minneapolis), July 20, 1998, at 3D ("Freedom and the peaceful resolution of disputes; social progress and better standards of living, equality, tolerance and dignity; these are the universal values"); *see also* Panafrican News Agency, *Africa-at-Large; Conference on Globalisation Ends in Maputo,* AFRICA NEWS July 5, 1998 (emphasizing the need for universal values based on Democracy but it cannot be forced). *See generally* Daniel J. Vargas, *Priest's Cry For Independence Remembered,* SAN ANTONIO EXPRESS-NEWS, September 15, 1998, at E1 ("[A]utonomy, self- determination, fairness, justice and democracy—universal values").

153. *See International Covenant on Civil and Political Rights*, G.A. Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, art. 25, UN Doc. A/6316 (1966). Article 25 provides:

> every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2, and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be by secret ballot, guaranteeing the free expression of the will of the electors; c) To have access, on general terms of equality, to public service in his country.

Id.

can effectuate mutual trust and minimize the conflicts that may arise between them.[154] In other words, democracy is deeply linked to peace and security because it can effectively resolve conflicts caused by self-determination movements.[155]

As mentioned above, what the international community can do to contribute is to promote the creation of the democratic institutions (which constitute an essential and indispensable stage in the economic and social development of nations).[156] In his "An Agenda for Peace," former UN Secretary General B. Boutros-Ghali stated:

> There is a new requirement for technical assistance which the United Nations has an obligation to develop and provide when requested: support for the transformation of deficient national structures and capabilities, and for the strengthening of new democratic institutions. The authority of the United Nations system to act in this field would rest on the consensus that social peace is as important as strategic or political peace. There is an obvious connection between democratic practices such as the rule of law and transparency in decision-making and the achievement of true peace and security in any new and stable political order. These elements of good governance need to be promoted at all levels of international and national political communities.[157]

There is a need for the United Nations to set up a permanent body to engineer the creation of these democratic institutions and handle the issue of self-determination.[158] It is known

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154. *See generally* Patti Waldmeir, *The System Takes The Blame, Not The Whites,* FINANCIAL TIMES (London), April 23, 1994, at 10 (emphasizing the need to minimize conflict and misunderstanding in an effort to create a government with national unity)

155. *See* Rudrakumaran, *supra* note 65, at 35 (noting that democratic principles may be useful in conflicts involving self-determination because democracy promotes deliberations, mediations, and compromises. *Compare* Nafziger, *supra* note 59, at 20 (discussing the fact that self-determination has done little to promote democracy). *See generally* Brown-John, *supra* note 48, at 595 (stating that democracy is part of the "natural order of human political evolution").

156. *See* Dianne Otto, *Challenging The "New World Order": International Law, Global Democracy and The Possibilities For Women*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 371, 374 (noting that in the international community, there are movements "seeking decolonization and self-determination, the liberation of women, freedom from racial discrimination, indigenous peoples' rights, environmental democracy, and emancipation from economic domination and political repression); *see also* William P. Alford, *Exporting "The Pursuit Of Happiness"* 113 HARV. L. REV. 1677, 1680 (2000) (discussing the fact that the Carnegie Endowment for International Peace promotes the furtherance of democratic systems abroad).

157. *See* General Boutros Boutros-Ghali, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping—Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on January 31, 1992,* UN Doc. A/47/277-S/24111, (1992) (for a report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on January 31, 1992); 31 ILM 956, 960-63 (1992) *see also* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice,* 47 UCLA L. REV. 1747 , 1787 (2000) (noting the United Nations' potential role as protector of human rights on an international level).

158. *See* Kolodner, *supra* note 6, at 158 ("Only if the international community supports movements for self-determination can it guarantee the protection of the rights of peoples throughout the world."); Robert B. Porter, *Proposal To The Hanodaganyas To Decolonize Federal Indian Control Law* 31 U. MICH. J.L. REF. 899, 946 (1998) (recognizing the UN's considerable progress in securing protection of basic human rights under international law).

that the UN trusteeship system was created to succeed the Mandate system of the League of Nations for the purpose of ensuring "well-being and development" of the non-self-governing peoples and their eventual self-government or independence under the UN Charter.[159] After the last trust territory in the island of Palau achieved its independence from the United States in 1999, the UN trusteeship system successfully fulfilled its traditional function.[160] In fact, all functions of the UN trusteeship system relating to political, economic, social and educational matters in trust territories were based on the well-being and development of the inhabitants of such territories. In order to approach their maximum well-being and development, the inhabitants of such trust territories were entitled to exercise their right to self-determination in approving their respective new status by democratic means (which were observed by visiting missions of the Trusteeship Council).[161]

Likewise, the recognition of the principle of non-colonial self-determination by the international community is also due to a similar general purpose under the UN trusteeship system to promote "well-being and development" of such peoples.[162] As of 2000, all of the trust territories had achieved independence or "self-government" within another state.[163] It is the right time for the UN to modernize the function of the trusteeship system, specifically in order to

159. *See* Michael Mandelbaum, *The Reluctance To Intervene; In Foreign Country Problems,* Information Access Company June 22, 1994 at 3 ("After the two world wars, efforts were made to use the state-building skills of the major powers under the auspices of an international organization, first with the League of Nations mandate system, then as UN trusteeships."); *see also* William Pfaff, *WWI-Era Mandate System Might Save Places Like Somalia,* CHI. TRIB., November 29, 1992 at 3C (noting the institution of mandated territories after World War I). *See generally* Walter de Gruyter, *The League Of Nations In Retrospect: Proceedings Of The Symposium*, 80 AM. J. INT'L L. 200, 200-05 (discussing historical information on the League of Nations).

160. *See* Richard D. Lyons*, Work Ended, Trusteeship Council Resists UN Ax for Now,* THE NEW YORK TIMES, November 6, 1994 at 11 ("[T]he United States, which had administered the Palau island chain since 1947 at the behest of the United Nations, formally notified the Trusteeship Council that Palau's 16,000 people had officially voted to become a sovereign nation."). *See generally* Hinck, *supra* note 20, at 916 (noting the interest in the UN CHARTER has in protecting the rights of people in non-self-governing territories and promoting their well-being).

161. *See* Franck, *supra* note 33, at 58-59 ("The Covenant clearly intends to make the right of self-determination applicable to the citizens of all nations, entitling them to determine their collective political status through democratic means."); *see, e.g.,* Marian Nash (Leich), *U.S. Practice: Contemporary Practice Of The United States Relating To International Law,* 89 A.J.I.L. 96, 97 (1995) (noting that the people of Palau had freely exercised their right to self-determination). *See generally* Hurst Hannum & Richard B. Lillich, *The Concept of Autonomy in International Law*, 74 A.J.I.L. 858, 885-86 (1980) (concluding that the key to achieving self-determination is the "freely and democratically expressed wishes" of those individuals concerned).

162. *See* Hinck, *supra* note 20, at 916 (noting the UN CHARTER's interest in protection the rights of those people in non-self-governing systems); *see also* Kolodner, *supra* note 54 ("[T]he international community, historically hesitant to infringe on state sovereignty."). *See generally* Kolodner, *supra* note 6, at 158 (stating the rights of peoples throughout the world will be protected only if the international community recognizes a right to self-determination).

163. *See* Manuel Rodriguez-Orellana, *Propter Honoris Respectrum: Human Rights Talk . . . And Self Determination Too!,* 73 NOTRE DAME L. REV. 1391, 1411 (1998) (stating that all trust territories have allegedly achieved independence or self-government within another state); *see also* Fox, *supra* note 43, at 736 (discussing the non-self-governing and trust territories that achieved independence in the post-war era retained their colonial-era boundaries). *See generally* Robert N. Wells, *United Nations is in need of reforms and restructuring*, NEW STRAITS TIMES (MALAYSIA), November 15, 1995, at 13 (stating that all the UN trust territories have achieved independence).

manage other forms of non-colonial self-determination movements.[164] By so doing, the UN cannot only avoid humanitarian crises from horrific armed conflicts in particular, but must also ensure international peace and security in general.[165]

IV. The Evolution of Self-Determination in Taiwan After the Second World War: From External Self-Determination to Internal Self-Determination

During the period of Japanese colonialism from 1895 to 1945, Japan proceeded with exclusionist and racially discriminatory policies against the inhabitants of Taiwan.[166] The inhabitants of Taiwan did not enjoy equal rights with Japanese citizens.[167] The unequal status between the Taiwanese and the Japanese gave rise to anti-Japanese resistance from the inhabitants of Taiwan in the hope of building an independent state rather than reverting to Chinese rule.[168] In an effort to approach this ideal, some anti-Japanese organizations started operation

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164. *See* Lyons, *supra* note 160 (stating that Palau is the last of the 11 territories in the United Nations trusteeship system to gain self-determination); *see also* William Pfaff, *A New Colonialism? Europe Must Go Back into Africa*, FOREIGN AFFAIRS, January, 1995 / February, 1995 at 2 (stating that leaders want the old League of Nations trusteeship system reestablished, with African and Asian nations among those appointed by the United Nations to govern certain countries). *See generally World Politics and Current Affairs*, THE ECONOMIST, November 22, 1997, at 49 (discussing the new trusteeship system under which the UN would put collapsed countries together again).

165. *See* UN CHARTER art. 2, para. 6 (providing that the UN shall ensure the compliance of non-member states for the maintenance of international peace and security); *see also* Evan T. Bloom, *Protecting Peacekeepers, The Convention on the Safety of United Nations and Associated Personnel,* 89 AM. J. INT'L L. 621, 621 (1995) (noting member states' realization that there was an urgent need for an international agreement that would deter and ensure punishment of such armed conflicts). *But see* Ernst-Ulrich Petersmann, *How to Reform the United Nations: Lessons from the International Economic Law Revolution*, 2 UCLA J. INT'L L. & FOR. AFF. 185, 188 (1998) (questioning whether the UN Charter can ensure the rule of international law or achieve the goal of peaceful settlement disputes without compulsory international adjudication).

166. *See* YU-MING SHAW, MODERN HISTORY OF TAIWAN: AN INTERPRETATIVE ACCOUNT, IN CHINA AND THE TAIWAN ISSUE 21-24 (Hungdah Chiu ed., 1979) (criticizing Japan's use of economic growth as an excuse to impose harsh exploitive rule over Tawain); *see also* TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE (1895-1945): THE RECEPTION OF WESTERN LAW 26-83 (1992) (discussing how the legal system in Taiwan has been influenced by Japanese civil law traditions); Shen, *supra* note 9, at 1108 (explaining how the Treaty of Shimonoseki in 1895 began a history of fifty years of Japanese colonial reign of Taiwan against the will of the Chinese people).

167. *See* Edgar Snow, *Red Star over China*, N.Y. TIMES, February 9, 1968, at 106-113. (discussing how Taiwanese people had to conform to Japanese ways); *see e.g.* Parris Chana and Koh-Uibim, *The International Legal Status of Taiwan's case for United Nations Membership*, 1 UCLA J. INT'L L. & FOR. AFF. 393, 467 (1997) (noting that the Japanese made Taiwanese people use the Japanese language exclusively and duplicate its educational and legal system). *See generally* Angeline G. Chen, *Taiwan's Intenational Personality: Crossing the River by Feeling the Stones*, 20 LOY. L.A. INT.'L & COMP. L.J. 223, 230 (1998) (stating that Taiwan changed hands without being consulted, after Japan defeated China in the Sino-Japanese War).

168. *See* Christopher J. Carolan, *The Republic of Taiwan: A Legal-Historical Justification for a Taiwanese Declaration of Independence*, 75 N.Y.U. L. REV. 429, 433-34 (2000) ("the Cairo Declaration of 1943 that challenged Japanese possession of Taiwan resulted in Taiwan becoming China's colony); *see also* Charney & Prescott, *supra* note 18, at 464-65 (discussing how Taiwan satisfies the criteria for statehood because it is a territory under its control, it has the capacity to enter into international relations independently of any other government, and it has a strong economy). *But see* Nii Lante Wallace, *Taiwan and Somalia: International Legal Curiosities*, 22 QUEENS L.J. 453, 461-62 (1997) (discussing the ongoing struggle for Taiwan's independence).

in China.[169] There is no evidence, however, that China argued for its nationalist credentials over Taiwan during that period.[170] In an interview by an American journalist in 1936 regarding the question: "is it the immediate task of the Chinese people to regain all the territories lost to Japanese imperialism, or only to drive Japan from North China, and all Chinese territories beyond the Great Wall?," the top leader of Chinese Communist Party (hereinafter "CCP"), Mao Tse-tung, indicated:

> It is the immediate task of China to regain all our lost territories, not merely to defend our sovereignty south of the Great Wall. This means that Manchuria must be regained. We do not, however, include Korea, formerly a Chinese colony, but when we have re-established the independence of the lost territories of China, and if the Koreans wish to break away from the chains of Japanese imperialism, we will extend them our enthusiastic help in their struggle for independence. The same thing applies for Taiwan [Formosa]. As for Inner Mongolia, which is populated by both Chinese and Mongolians, we will struggle to drive Japan from there and help Inner Mongolia to establish an autonomous state.[171]

Since Taiwan was ceded to Japan by the Manchu Ching Dynasty in the 19th century, there was no strong sense of Chinese identity to consider Taiwan a part of China.[172] On the contrary, because of Taiwan's cession from China in perpetuity under the Shimonoseki Treaty,

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169. *See* Carolan, *supra* note 168, at 448 (noting that Taiwan's resistance to Japanese control did not mean that Taiwan wanted to be a part of China, rather it fostered the goal of establishing an independent Taiwanese government); *see also* Yeh, *supra* note 17, at 237-38 (stating that, directly after decolonialization, Taiwanese nationalists failed to establish significant institutions for Taiwanese independence). *See generally* Colin P.A. Jones, *United States Arms Exports To Taiwan Under The Taiwan Relations Act: The Failed Role Of Law In United States Foreign Relations*, 9 CONN. J. INT'L L. 51, 52 n.5 (1993) (discussing the conflict between Taiwanese and Chinese Nationalists after Taiwan was returned to China after Japanese rule, and the possible initiation of a trusteeship over Taiwan by the United States.

170. *See* Carolan, *supra* note 168, at 433 (noting that prior to World War II, China did not challenge Japan's possession of Taiwan); *see also* Parris Chang & Kok-Ui Lim, *Taiwan's Case For United Nations Membership*, 1 UCLA J. INT'L L. & FOREIGN AFF. 393, 407-08 (1997) (questiong whether the signing of the 1943 Cairo Declaration and the Potsdam Declaration, which established the Allied Powers' intent to return Taiwan to China, served as conclusive evidence that China asserted control over Taiwan during that period). *Compare* Shen, *supra* note 9, at 1108 (noting that during the period of Japanese colonization of Taiwan, the Chinese never ceased in their efforts to return Taiwan to China).

171. *See* Christopher K. Costa, Comment, *One Country- Two Foreign Policies: United States Relations with Hong Kong after July 1, 1997*, 38 VILL. L. REV. 825, 834 (1993) (discussing China's eighty year quest to regain all of its lost territories). *See generally* James L. Wescoat, Jr., *Main Currents in Early Multilateral Water Treaties: A Historical Geographic Perspective, 1648-1948,* 7 COLO. J. INT'L ENVTL. L. & POL'Y 39, 68 (1996) (stating Japan conquered Manchuria from China in 1931).

172. *See* Charney & Prescott, *supra* note 18, at 456 (stating that Taiwan ceded to Japan in 1895); *see also* Chang & Lim, *supra* note 170, at 429 (asserting that while there may be civility between the two, there is no strong pull to consider Taiwan as a part of China). *See generally* Piero Tozzi, Note, *Constitutional Reform on Taiwan: Fulfilling a Chinese Notion of Democratic Soveriegnty?,* 64 FORDHAM L. REV. 1193, 1251 n.245 (1995) (discussing the difficulty of forming strong identity in the middle of their "hodgepodge" history).

there was no further cultural and historical linkage between Taiwan and China.[173] Although the 1943 Cairo Conference concluded that Taiwan should return to China, this outcome was more a result of political compromise than an expression of an emotional belonging that the people of Taiwan were Chinese culturally and historically.[174]

The 1943 Cairo Conference and 1945 Potsdam Declaration served as a basis for Nationalist China to take over Taiwan after Japan's surrender in World War II.[175] In fact, the occupation of Taiwan by China was on behalf of the Allied Powers because Japan had not formally and legally renounced its authority over Taiwan until 1951.[176] From 1945 to 1951, the Chiang Kai Shek regime of Nationalist China was only an occupying power in Taiwan, forced to abide by "The 1907 Hague Regulations on Land Warfare" (hereinafter "Hague Regulations") and "The 1949 Geneva Conventions on Protection of Civilians" (hereinafter "Geneva Conventions") to maintain public order and safety of without any change in the status of the territory.[177] Taiwan was typically qualified as a non self-governance territory at that time and the inhabitants of Taiwan were qualified as a non self-governing people, meaning that they were entitled to the opportunity of enjoying the advantage of promoting their progressive development toward self-government or independence.[178]

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173. *See* Kwan Weng Kin, *Deserted Isles Aroused Interest Only After Report Of Oil Reserves,* THE STRAITS TIMES, September 21, 1996, at 36 ("Taiwan [was] ceded to Japan as spoils of war through the Treaty of Shimonoseki after China's defeat in the 1894-95 Sino-Japanese War."); *see also* Yoshio Nakagawa & Yomiuri Shimbun, *Taiwan's Colonial Legacy Revisited,* The Daily Yomiuri, May 7, 1995, at 5 (stating that, with the signing of the treaty, Japan acquired Taiwan from China with the signing at the end of the Sino-Japanese War); Xiao-huang Yin and Tsung Chi, *Is U.S. Playing The Taiwan Card By Granting Its President A Visa?,* LOS ANGELES TIMES, June 4, 1995, at M2 (stating that since the since signing of the Shimonoseki Treaty, Taiwan has been "lost" from China).

174. *See A Brief Retrospect*, The British Broadcasting Corporation, July 14, 1982 (stating that Taiwain was returned to China as a result of the Cairo Declaration and the Potsdam Proclamation); *see also Taiwan Is Inalienable Part Of China, Says White Paper*, The Xinhua General Overseas News Service, AUGUST 31, 1993 (noting that Taiwan and the Penghu archipelago had been incorporated into the territory of China and that the people of those territories were subject to the sovereigny of China).

175. *See* Paik Choong-hyun, *Japan Renews Spurious Claim to Tokto Islets*, Feb. 16, 1996 (visited Oct. 21, 2000) <http://korea.emb.washington.dc.us/Kois/News/Backgrounder/bg140.html#Concern> (pointing to 1943 Cairo Declaration with pledge that Japan would forfeit all islands it seized, occupied, or took by force); Benjamin K. Sibbett, *Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea*, 21 FORDHAM INT'L L.J. 1606, 1637-38 (1998) (stating that Japan returned Liancourt and ended Japanese rule over Korea, as a result of the 1943 Cairo Declaration and 1945 Potsdam Proclamation).

176. *See* Charney & Prescott, *supra* note 18, at 457 (quoting Treaty of Peace, signed at Taipei on April 28, 1952, providing: "It is recognized that under Article 2 of the multilateral Peace Treaty of 1951, Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands."); *see also* Shen, *supra* note 9, at 1114 (arguing that the 1951 Peace Treaty superceded the Cairo and Potsdam declarations and problematically did not identify to whom Taiwan should be returned).

177. *See* William A. Schabas, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, 764 (1997) ("In the United Kingdom, under the 1969 Genocide Act, genocide is punishable in the same manner as 'grave breaches' of the '1949 Geneva Conventions.'"). *See generally* Theodor Meron, *The Hague Peace Conferences: The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 A.J.I.L. 78, 82 (2000) (discussing the bases of the 1949 Geneva Conventions and the ways it could be breached).

178. *See* Keith Highet, George Kahale, and Antony Anghie, Decision, 87 A.J.I.L. 282, 283 (1993) (discussing the promotion of the political, economic, social, and educational advancement of the inhabitants of Nauru towards self-government or independence).

Although Nationalist China had a strong tendency to annex Taiwan as part of China, it did not take necessary steps to give effect to the Hague Regulations or the Geneva Conventions in such an occupied territory, but rather exercised its sovereign power.[179] Soon after Nationalist China occupied Taiwan, the indigenous population of Taiwan were forced to switch their national identity from Japanese to Chinese, which led to ethnic friction in the Taiwanese society.[180] In other words, there began to arise an identity crisis concerning the relationship between being Chinese and being Taiwanese.[181] As a result, the growing ethnic differences between Taiwan and China caused a widespread uprising known as "the 2-28 Incident."[182] The 2-28 Incident cost about 18,000 to 28,000 lives due to inhuman repression by Nationalist China including almost the whole generation of Taiwanese intellectuals and society leaders.[183] After the 2-28 Incident, a strong sense of self-identity began to grow among the people of Taiwan to seek their own destiny.[184]

The lack of international awareness and condemnation of such an inhuman repression by Chinese troops prevented the population of Taiwan from seizing the opportunity to successfully express their wish to secede from Japan or China and achieve their own political destiny

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179. *See* Joakim E. Parker, *Cultural Autonomy: A Prime Directive for the Blue Helmets*, 55 U. PITT. L. REV. 207, 213-14 (1993) (stating that "the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949 are accepted as authoritative statements of customary international law, and as such have no exceptions to their applicability.").

180. *See* Sean Cooney, *Why Taiwan is not Hong Kong: A Review of the PRC's "One Country, Two Sytems" Model for Reunification with Taiwan,* 6 PAC. RIM L. & POL'Y 497, 498 (1997) (stating Beijing's remaining obstacle to national reunification as the "Taiwan question"); *see also* Chang & Lim, *supra* note 170, at 415 (accussing certain policies of intending to suppress sentiment for independence and eradicate any sense of Taiwan identity). *See generally* Charney & Prescott, *supra* note 18, at 472 (stating that Taiwan, and the ethnic and cultural identities of their populations, substantially differs from those of the metropolitan state).

181. *See* C. HUGHES, TAIWAN AND CHINESE NATIONALISM, at 12 (Routledge 2000); *see also* Margaret Chon, *Chon on Chen on Chang*, 81 IOWA L. REV. 1535, 1551 (1996) (describing self-identification as a representation of a complicated type of national identification with four different views of interpretation); *see also* Tozzi, *supra* note 172. The author articulated the "Five Threats" as the following:

> (i) the Democratic Progressive Party's advocacy of Taiwanese independence; (ii) the disappearance of the "one China" policy; (iii) conflict between native Taiwanese and those of mainland extraction; (iv) lack of devotion to the Three Principles of the People; and (v) abandonment of the five branch division of governmental power in favor of a presidential autocracy.

Id. at 1243.

182. *See* JOHN F. COPPER, TAIWAN: NATION-STATE OR PROVINCE? 35 (1996) (discussing the culmination of the "2-28 Incident" through the developing feelings of rebellion and resistance to KMT rule); *see also* Chen, *supra* note 167, at 233 (describing the "2-28 Incident").

183. *See* COPPER, *supra* note 182, at 35 (stating that the "2-28 Incident" was ingored for 48 years until President Lee Teng-hui (himself Taiwanese) issued a formal apology on behalf of the government); *see also* Chen, *supra* note 167, at 233 (noting the atrocities that took place as a result of 5,000 armed troops coming in from the mainland to "quell the disturbance.")

184. *See* Chen, *supra* note 15, at 679-80 (discussing how the common efforts of Taiwanese people have helped to develop a distinctive economic, social and cultural system of their own); *see also* Charney & Prescott, *supra* note 18, at 473 (considering Taiwanese as a separate "people" having the right of self-determination); Mark S. Zaid, *Taiwan: It Looks like It, It Acts like It, But Is It a State?*, 32 NEW ENG. L. REV. 805, 808-10 (1998) (scrutinizing Taiwan's moves and suggesting the entitlement of Taiwan to its own statehood and sovereignty strengthen its claim to self-determination as an independent entity despite the assertions of China).

through the exercise of external self-determination (as was the case in Western Sahara).[185] In response to the request for an Advisory Opinion on Western Sahara from the UN General Assembly as to the following questions: 1) was Western Sahara at the time of colonization by Spain a territory belonging to no one (*terra nullius*); 2) if not, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity, the International Court of Justice (hereinafter "ICJ") laid down the need to pay regard to the freely expressed will of peoples by suggesting that:

> Whenever there are territories inhabited by indigenous populations that are collectively organized (although not in such a manner as to constitute a state proper) and the state wielding sovereign authority over such territories decides to withdraw, it does not follow that the territories automatically become terra nullius, and hence open to appropriation by any state. Even if the indigenous populations may not come to be regarded as organized in the form of state, they must be enabled freely to express their wish to associate or integrate into an existing sovereign state, or acquire some sort of international status gradually leading to independent statehood.[186]

In this regard, it is obvious that the indigenous population of Taiwan were deprived of the opportunity to join the great wave of global anti-colonial self-determination following the World War II.[187]

In 1949, Nationalist China lost control of the Chinese mainland to Communist China and the government retreated back to Taiwan.[188] A situation was created whereby there existed

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185. *See* Chen, *supra* note 167, at 240-243 (stating that, in 1947, Japan had not yet given up its sovereignty over Taiwan, showing that Taiwan was still an occupied territory of Japan legally, despite the fact that at the same time China had already annexed Taiwan as its own political territory); *see also* Franck, *supra* note 33, at 54 (explaining that the concept of self-determination has its inception in a moral mandate directed at decolonizing European and Japanese colonies during the period following World War II); *see, e.g.*, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res 1514, UN GAOR, 15th Sess., Supp. No. 16, at 138-39, UN Doc. A/4684 (1960) (pointing to "self-determination" as the one of the purposes behind the United Nations and as one of the general objectives within the areas of social and economic development and human rights).

186. Western Sahara, 1975 I.C.J. 4, 66-68.

187. *See* Charney & Prescott, *supra* note 18, at 460 (examining post-World War II peace treaties determinative of the disposition of Taiwan); *see also* Jianming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L. REV. 1, 50 (1997) (discussing the effects of the absence of Chinese participation in 1951 multilateral peace conference); Shen, *supra* note 9, at 1158-59 (questioning the possibility for Taiwan to attain independence through self-determination or unilateral secession).

188. *See* Cheri Attix, *Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT'L L.J. 357, 361 (1995) (stating that, following defeat by the Communists in 1949, President Chiang Kai-shek and the KMT government fled to Taiwan and established the "temporary" capital of China in Taipei); *see also* Lee, *supra* note 14 (noting that the forces of the ROC retreated to Taiwan on December 8, 1949, leaving Mao Tse Tung and the People's Republic in control on the mainland); Scott A. McKenzie, *Global Protection of Trademark Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China Versus the European Union*, 34 GONZ. L. REV. 529, 549 (1999) (noting that many Western nations, including the United States, refused to recognize the People"s Republic as the government of mainland China).

two rival governments: the PRC and the ROC, in Beijing and Taipei respectively.[189] Taiwan has since then become the only effective territory of Nationalist China.[190] Hence, any growing nationalism distinct from Chinese Nationalism would be a direct challenge to the existence of the Nationalist China.[191] The ruling government therefore did not tolerate any movement toward Taiwanization.[192] On the other hand, the population of Taiwan learned that there was no room for them to develop their own nationalism under such a sociopolitical climate through the bitter memory of the 2-28 Incident.[193] Accordingly, the desire for external self-determination to seek a self-destiny became a "dead dream" in the Taiwanese people's minds.[194]

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189. *See* Chen, *supra* note 167, at 224 (noting that, until 1991, the government of the Republic of China on Taiwan insisted that it was the sole representative government of Taiwan and China); *see also* Joyner, *supra* note 15, at 823 (comparing the differing views between the ROC and PRC with respect to which legal authorty should govern both Beijing and Tapei). *Compare*, Chiang, *supra* note 110, at 981 (stating that, by 1996, Taiwan was part of the China state, as well as represented by the PRC government there and subjected to exercises of China's sovereign power).

190. *See* Lee, *supra* note 14, at 352 (noting that the names the "Republic of China," the "Republic of China on Taiwan," "Taiwan," "ROC" and "Nationalist China" are used interchangeably, depending upon the context referring to the territory under the effective control of the ROC government, rather than the Chinese mainland); *see also* McKenzie, *supra* note 188 (quoting E.D. Hirsch, Jr. et al., DICTIONARY OF CULTURAL LITERACY 299-300 (1988)) (concluding that the government of Nationalist China was forced to exile on Taiwan because People's Republic of China ruled the mainland).

191. *See* Lee, *supra* note 14, at 390 (1997) (describing how in the PRC terminology, the creation of "Two Chinas" or "One China, One Taiwan" is a violation of "the basic justice or righteousness of Chinese nationalism"); *see also* Chen, *supra* note 15, at 697 (arguing that the new course of action, led by Lee Tenghui since the early 1990s, has diminshed Beijing's hope that a peaceful reunification could be achieved by relying on traditional Chinese nationalism); James W. Soong, *Perspective: Taiwan and Mainland China: Unfinished Business*, 1 U.C. DAVIS J. INT'L L. & POL'Y 361, 365 (1995) (noting that Taiwan independence is dependent upon mainland China and Chinese nationalism acquiescence).

192. *See* HUNG-MAO TIEN, TAIWAN'S EVOLUTION TOWARD DEMOCRACY: A HISTORICAL PERSPECTIVE, IN TAIWAN: BEYOND THE ECONOMIC MIRACLE 3, 9 (Denis F. Simon & Michael Y. M. Kau eds., 1992); *see also* Chen, *supra* note 15, at 675-76 (stating that the demise of the Chiangs' reign of "white terror" in 1988 introduced a decade of profound transformation toward democratization and "Taiwanization"); Tozzi, *supra* note 172, at 1239 (1995) (describing Chiang Ching-kuo's anti-Communist "Taiwanization" efforts in the 1970s).

193. *See* Attix, *supra* note 188 (discussing the institution of martial law throughout China after the local population rebelled against the imposition of Chinese rule); *see also* Lee, *supra* note 14, at 391 (describing the political ramifications of the military actions taken to stop rebellion after the "2-28 Incident" and the growing hatred of mainland Chinese people); Nicholas D. Kristof, *The Horror of 2-28: Taiwan Rips Open the Past*, N.Y. TIMES, Apr. 3, 1993, at A4 (detailing human rights violations of the subsequent years).

194. *See* Attix, *supra* note 188 (stating that martial law, under the KMT, continued on Taiwan for the next forty years and support for Taiwanese independence was criminalized); *see also* Charney & Prescott, *supra* note 18, at 460 (asserting that the peace treaties that placed the island's population under Beijing's control would violate the doctrine of self-determination, at it later came to be understood); Shen, *supra* note 9, at 1160 (claiming that there is neither a legal basis, nor practical possibility for Taiwan to attain independence through self-determination).

Instead, the population of Taiwan could only hope that the regime of Nationalist China would grow into a more representative government.[195]

Prior to the 1970s and during the regime of Chiang Kai-shek, the whole society of Taiwan was dominated by the Chinese mainland, who embodied the myth of recovering the Chinese mainland but did not interact with Taiwan's society smoothly.[196] It was assumed that Taiwan should be an anti-communism base for recovering the Chinese mainland so the people of Taiwan were impelled to "China-ization," with a greater emphasis on cultural homogeneity, linguistic unity, common historical tradition and ethnic identity.[197] This held true despite the fact that the Chinese government had lost its effective control over Chinese mainland, showing that there was no territorial connection or common economic life between Taiwan and China.[198] The implementation of "China-ization" by the government of Nationalist China compelled the people of Taiwan to therefore accept Chinese nationalism.[199]

After the central government of Nationalist China moved to Taiwan in 1949, the Chiang Kai-shek regime of Nationalist China represented all of China by retaining the ROC Constitu-

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195. *See* SUN YAT-SEN, SAN MIN CHU I: THE THREE PRINCIPLES OF THE PEOPLE 111 (Frank W. Price trans., China Publ'g 1927) (1925) (stressing the importance of China having a representative governernment, but criticizing China's failure to learn from Western democratic systems); *see also* Lee*, supra* note 14, at 379 (1997) (asserting that the only way for the people of Taiwan to have their voices heard is at the local level, instead of attempting to overthrow the central government); David M. Morris, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations,* 36 VA. J. INT'L L. 801, 876 (1996) (noting that the UN Security Council has refused to give Nationalist China her permanent-member seat to the People's Republic of China, thereby acknowledging it as not being the legitimate representative of the Chinese people).

196. *See* Omar Saleem, *The Spratly Islands Dispute: China Defines the New Millennium*, 15 AM. U. INT'L L. REV. 527, 535 (2000) (recognizing the tension between Taipei and Beijing after the 1949 civil war when Chiang Kai-Shek fled the mainland to Taiwan); Shen, *supra* note 9, at 1118 (noting the change in government, name, form and system of the state when the PRC Government replaced the ROC Government in 1949).

197. *See* THOMAS B. GOLD, TAIWAN'S QUEST FOR IDENTITY IN THE SHADOW OF CHINA, IN IN THE SHADOW OF CHINA: POLITICAL DEVELOPMENTS IN TAIWAN SINCE 1949, 169 (Steve Tsang ed., 1993) (discussing Tawain's efforts to create a common identity with China); *see also* Yeh*, supra* note 17, at 238 (explaining why, despite their shared ethnic identity, the Taiwanese received the new "external" regime with a level of caution and distrust); *see, e.g.*, Duan Aline DeVore, *Legal Aspects of Conducting Business in Asia: Introduction: Through the Looking Glass — Cultural Factors Affecting the Perception of the East Asian Business Partner*, 8 TRANSNAT'L LAW. 55, 55 (1995) (discussing how the cultural mores, collective orientation and homogeneity of the region render its outlook particularly predominant in the thinking and views of its inhabitants).

198. *See* Chen, *supra* note 15, at 676 (describing the different political, economic, social and cultural systems found in Taiwan and China); *see also* Zhengyuan Fu, *The International Legal Status of Taiwan: China's Perception of the Taiwan Issue,* 1 UCLA J. INT'L L. & FOR. AFF. 321, 327 (1997) (describing China's policy towards Taiwan as the idea of "one country, two systems," whereby CCP leaders have expressed their willingness to tolerate Taiwan's maintenance of independent political and economic systems); *Chairman Ye Jianying's Elaborations on Policy Concerning Return of Taiwan to Motherland and Peaceful Unification,* BEIJING REV., Oct. 5, 1981, at 10 (proposing a way for a peaceful resolution).

199. *See* Chiang, *supra* note 110, at 1002 (describing the doctrine of self-determination has as an important issue, after World War II, in the context of Taiwanese nationalism); Jacques DeLisle, *Political Alchemy, The Long Transition, and Law's Promised Empire: How July 1, 1997 Matters—And Doesn't Matter—In Hong Kong's Return To China,* 18 U. PA. J. INT'L ECON. L. 69, 131 (1997) (noting China is resorting to a more aggressive nationalism); Lee*, supra* note 14, at 390 (explaining how Chinese nationalism shifted from being used as a defense against foreign aggression to a defense against mainland Chinese nationalism).

tion.[200] As a result of applying the ROC Constitution, Taiwan became a tiny part of the territories of the Republic of China.[201] Nationalist China re-established the full array of central political bodies which had existed on the mainland in order to retain the credibility of the ROC's claim as the sole legitimate government of China, rather than simply the government of Taiwan.[202]

The failure to exercise effective control over the Chinese mainland made it impossible for the government of the ROC on Taiwan to abide by the ROC Constitution in holding regular elections to reelect parliamentarians in the two parliamentary institutions, called the National Assembly and the Legislative Yuan.[203] The National Assembly and the Legislative Yuan were elected to represent Mainland areas.[204] In order to show its legitimacy by retaining these seats for representing constituencies of Chinese mainland, the ROC Constitution was amended by the "*Temporary Provisions Effective during the Period of National Mobilization for Suppression of*

200. *See* Cooney, *supra* note 180, at 513-19 (discussing the intricacies of the ROC Constitution during the martial law period); *see also* Yeh, *supra* note 17, at 250 (discussing how the nationalist authorities used Taiwan as their base for the mission to recover the mainland, centering policy around power consolidation for the ruling political party, national security and social stability); *see, e.g.*, Congressman Donald M. Fraser, *Political Repression in "Free China*," 116 Cong. Rec. E7953-56 (1970) (describing political dictatorship in Taiwan before 1971).

201. *See* THE REPUBLIC OF CHINA INFORMATION OFFICE, THE REPUBLIC OF CHINA YEARBOOK 43 (2000) (noting that under the definition of the ROC Constitution, a total territorial area of the ROC is about 11.4 million sq. km (including Mongolia), while the total area of Taiwan is only near 36,000 sq. km.); *see also* HANS KELSEN & ROBERT TUCKER, PRINCIPLES OF INTERNATIONAL LAW 328-33 (2d ed. 1966) (stating that, although the PRC claimed sovereignty over Taiwan and Taiwan claimed sovereignty over the ROC, this dispute does not disqualify Taiwan from sovereign status); Lee, *supra* note 14, at 387 (noting that Taiwan's population of 21.3 million, most of whom are of Chinese ethnicity, speak the same official language or dialects as are spoken on the Chinese mainland, and share the same cultural heritage as most residents of the PRC).

202. *See* Charney & Prescott, *supra* note 18, at 461 (noting the disagreement among the Allied Powers with respect to whether the PRC or ROC represented the legitimate government of China); *see also* McKenzie, *supra* note 188 (stating that United States did not recognize the People's Republic as the representative government of China); Shen, *supra* note 187 (discussing the bi-lateral peace treaty between Japan and either the ROC or PRC).

203. *See* Sean Cooney, *The New Taiwan and Its Old Labour Law: Authoritarian Legislation in a Democratized Society*, 18 COMP. LAB. L. 1, 4 (1996) (listing additional powers of Legislative Yuan beyond original legislative functions); *see also* Lawrence Shao-liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 AM. J. COMP. L. 509, 523-34 (1991) (noting that the judicial body charged with interpreting the ROC Constitution rarely acted to protect constitutional freedoms); Yeh, *supra* note 17, at 240 (concluding that constitutional interpretations by the Council of Grand Justices (the constitutional court in Taiwan), congressional seats were given to, and continuously occupied by, the same group of representatives).

204. *See* Cooney, *supra* note 180, at 515 (listing some main functions of the Legislative Yuan, in addition to legislative power); *see also* Dennis Te-Chung Tang, *New Developments in Environmental Law and Policy in Taiwan*, 6 PAC. RIM L. & POL'Y 245, 252 (1997) (describing that main functions of the National Assembly were to elect the president and vice president, amend the ROC Constitution and approve appointments made by the President); Tozzi, *supra* note 172, at 1233 (describing the branches of government created by the ROC Constitution and their functions in 1946).

the Communist Rebellion" (for temporary Provinces).[205] Consequently, these parliamentarians who followed the Chiang Kai-shek regime and fled to Taiwan after 1949 were permitted to hold their seats without periodic reelections pending such a time as the unification between Taiwan and Mainland China could occur.[206] Without a right fully and directly to reelect these parliamentarians, it proved that the indigenous population of Taiwan were indeed not self-governing.[207] In the meantime, the government of Nationalist China promulgated martial Law in 1949, limiting people's right to freedom of speech, belief, publication, assembly and association.[208] The authorities in Taiwan justified the need for martial law on national security considerations, regardless of whether these reasons were well-grounded or not.[209] Consequently, peaceful opposition efforts toward democratic reform were blocked by martial, even bringing

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205. *See* Cooney, *supra* note 180, at 519-20 (noting that in April 1991, the National Assembly abolished the Temporary Provisions, restoring normal constitutional order and amended the ROC Constitution so that its operation was for electoral purposes confined to the Taiwan area); *see also* Yeh, *supra* note 17, at 240 (noting that the temporary Provisions were promulgated in May 1948 to give the Executive branch more power than was granted under the ROC Constitution and was enacted in light of Article 174(1) of the ROC Constitution and remained effective until 1991 when President Lee Ten-huei terminated them); *see, e.g.,* ROC CONST. art. 47 (Republic of China) (noting that Article 47 of the Constitution specifies a two term limit for presidency, but Provision 3 of the "Temporary Provisions in the Period of Mobilization against Communist Rebellion" froze the constitutional mandate in order to allow Chiang Kai-shek to remain in power longer).

206. *See* Tak-wing Ngo, *Civil Society and Political Liberalization in Taiwan*, 25 BULL. CONCERNED ASIAN SCHOLARS 4, 5 (1993) (noting that by repressing political identities, and by denying freedom of speech, association, and other civil and political rights, the ruling party tried to destroy self-organized and autonomously defined political spaces, substituting for them a state-controlled public arena); *see also* Yeh, *supra* note 17, at 240 (explaining why same group of representatives were insulated from re-election); *see, e.g.,* Chang & Lim, *supra* note 170, at 416-21 (discussing China's territorial claim to Taiwan, its legal title, domestic jurisdiction, and de facto independence).

207. *See* Chang & Lim, *supra* note 170, at 411 (noting that the Nationalist government's treatment of the Taiwanese people and its institution of a one-party dictatorship was witnessed by American officials, some of whom lost confidence in the KMT, whereby all government positions were the exclusive domain of ethnic Chinese mainlanders); Walter J. Kendall, III, *A Peace Perspective on the Taiwan United Nations Membership Question,* 28 J. MARSHALL L. REV. 259, 260 (1994) (questioning whether the indigenous people, who represent a large majority or the current government of Taiwan should make decisions regarding Taiwan's future); Wallace-Bruce, *supra* note 168, at 459 (describing the growth in population when President Chiang Kai-Shek and his followers arrived in Taiwan in 1949, who became known as *wai sheng jen* (meaning outside province people)).

208. *See* Charney & Prescott, *supra* note 18, at 462 (arguing that human rights violations can be made against the ROC, as a result of the question period of martial law between 1949 and 1987). *Compare* Winston Hsiao, *The Development of Human Rights in the Republic of China on Taiwan*, 5 PAC. RIM L. & POL'Y J. 161, 178, 180-83 (1995) (reporting limited progress by the PRC in that area); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law,* 93 AM. J. INT'L. L. 879, 895 (1999) (comparing the martial law system to the present system in Taiwan, which allows for a vibrant democracy characterized by free elections, a free press, and dynamic political campaigns).

209. *See* Attix, *supra* note 188 (claiming that KMT declared martial law throughout China in 1948 in response to the growing success of CCP forces on the mainland); *see also* Cooney, *supra* note 203 (discussing how substantial amendment of the "frozen" laws ideologically was unacceptable as it would have compromised the KMT's claim that it was the legitimate government of China); Yeh, *supra* note 17, at 234 (characterizing the present government in Taiwan as a political regime in which presidential and congressional national elections are routinely held, partisan politics is thriving, and restrictions on constitutional rights are substantially removed).

tragedy upon innocent individuals who had no desire to engage in politics.[210] This made the Chiang Kai-shek regime of Nationalist China in Taiwan a typical dictatorship.[211]

When the Chiang Kai-Shek regime was succeeded by his son Chiang Ching-Kuo in mid 1970s, when there was an increasing political consciousness of self-governance, the indigenous population of Taiwan became concerned with democracy and open debate on the issue of constitutional reforms so that the ideal of self-governance could be substantially carried out in Taiwan.[212] Numerous campaigns were commenced by political opposition groups calling for an end to the martial law and the emergence of political pluralism.[213] In the meantime, the Foreign Relations Committee of the U.S. Senate and the Committee on Foreign Affairs (hereinafter "Committee") of the U.S. House of Representatives introduced various resolutions expressing its concerns about Taiwan's political human rights condition.[214] The Committee urged the Chiang Ching-Kuo regime to commence democratic reforms.[215] Because of the

210. *See* Chang & Lim, *supra* note 170, at 412-13 (providing examples of numerous human rights violations that took place as a result of instituting martial law); *see also* Chen, *supra* note 167, at 232 (stating that during the first fifteen months of the KMT's rule, Taiwan's intellectual elite were targeted, arrested, and often beaten, along with anyone suspected of conspiring or befriending the Japanese); Clement Cheng, *A Comparative Approach to Regulating Money Politics in Taiwan: Learning from the Mistakes of Others*, 20 LOY. L.A. INT'L & COMP. L.J. 535, 540 (1998) (noting that the KMT maintained control through martial law and through selling favors to local factions in exchange for political support).

211. *See* Chen, *supra* note 15, at 675-76 (noting that Taiwan was subject to military occupation by Chinese authorities, known as "white terror"); *see also* Soong, *supra* note 191, at 363 (referring to an antagonistic gesture toward the KMT after the period of martial law ended whereby the new mayor ordered municipal government offices to remove all pictures of Taiwan's former KMT dictator and President Chiang Kai-shek and his son Chiang Ching-kuo); Tozzi, *supra* note 172, at 1230 (stating that the Communist theory of a single class dictatorship and Chiang Kai-shek's de facto personal dictatorship is the most ruinous element of today's political systems).

212. *See* Yeh, *supra* note 17, at 244 (describing the "Ten Major Constructions" as the transition period after Chiang Ching-kuo succeeded his father as national leader); *see also* Cooney, *supra* note 180, at 519 (discussing the reforms which resulted in civilians being no longer subject to military trials, and eased restrictions on assembly, association, publication and speech); Tozzi, *supra* note 172, at 1239 (describing Chiang Ching-kuo as a "true reformer").

213. *See* John Fei, *The Taiwan Economy in the Seventies, in* CHIANG CHING-KUO'S LEADERSHIP IN THE DEVELOPMENT OF THE REPUBLIC OF CHINA ON TAIWAN 63 (Shao Chuan Leng ed., 1993) (assessing the role of Chiang Ching-kuo in Taiwan's economic development); *see also* Cooney, *supra* note 180, at 519 (discussing the political liberalization which resulted in new political parties being formed legally and the commencement of a process of Constitutional reform); Yeh, *supra* note 17, at 245-48 (noting that farmers, veterans, students, indigent people, workers, and environmentalists took their cases to the streets, demanding regulatory reforms in their respective areas).

214. *See* CHINA-TAIWAN: UNITED STATES POLICY: HEARING BEFORE THE COMMITTEE ON FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, 96TH CONG., 2D SESS. 34-37 (1982) (providing letters from President Ronald Reagan to China); *see also* W. Gary Vause, *Chinese Human Rights and United States Foreign Policy,* 42 VAND. L. REV. 1575, 1591-92 (1989) (discussing the unanimous condemnation of China by the Senate, led by a coalition of Democrats promoting human rights); Pamela Constable, *U.S. Senate Mulls Stiff Trade Terms for China,* BOSTON GLOBE, July 23, 1991, at 3 (discussing condemnation of China for human rights abuses).

215. *See* FRANK GIBNEY, THE PACIFIC CENTURY: AMERICA AND ASIA IN A CHANGING WORLD 358 (1992) (noting that political and legal reform was aided by former President Chiang Ching-Kuo's decision to end thirty-five years of martial law); *see also* Cooney, *supra* note 180, at 519 (recognizing the role of politcal liberalization in the the lifting of martial law by Chiang Ching-Kuo); Andrew Nathan & Helen Ho, *Chiang Ching-kuo's Decision for Political Reform*, in CHIANG CHING-KUO'S LEADERSHIP IN THE DEVELOPMENT OF THE REPUBLIC OF CHINA ON TAIWAN 31 (Shao Chuan Leng ed., 1993) (noting that by the end of Chiang Ching-Kuo's presidency, political reform was in action).

growing domestic and international pressure for the Ching-Kuo regime to commit to democratization, the regime adopted the Taiwanization policy and began to implement political reforms by the middle of the 1980s.[216] As a result, martial law was abolished in 1978 and the people of Taiwan were able to regain their rights guaranteed by the ROC Constitution, including the right of assembly and association.[217]

Since the founding of the Democratic Progressive Party (hereinafter "DPP") in 1986, the DPP has presented a strong desire to push the government toward "Taiwanization" in a democratic manner.[218] In order to fulfill its political ideal of self-governance, the DPP proposed that all members of the parliamentary institutions and the ROC President should be elected directly by the indigenous population of Taiwan.[219] This move gathered wide support from Taiwan's society and has resulted in electoral support for the DPP.[220] Significantly, the DPP gathered

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216. Andrew B. Brick, *For America, Taipei Offers An Example Of Chinese Democracy,* THE HERITAGE FOUNDATION, April 12, 1990, at 1 (discussing political domination of mainland Chinese that had retreated to Taiwan); *see also* Maria Shao & Bill Javetski, *Why Tapiei Plans To Let A Hundred Flowers Bloom*, BUSINESS WEEK, November 17, 1986, at 85 ("Pressure on the KMT to liberalize increased in September, when opponents set up the new Democratic Progress Party (DDP) in definance of martial law."); Sofia Wu, *DPP Chairman On Chiang's Role In Taiwan's Democratization*, CENTRAL NEWS AGENCY, January 12, 1998 (recognizing President Chiang Ching-kuo's greatest contribution to Taiwan's democratization as his nomination of Lee Teng-hui, a native Taiwanese, as vice president under his presidency).

217. *See* Brick, *supra* note 216 (discussing the first time Taiwanese people were allowed to cast ballots for an organized political opposition, the Democratic Party (DPP)); Ross A. Snel & Pierro Tozzi, T*aiwan goes to the polls: nurturing democracy,* THE NEW LEADER October 10, 1994 at 9 ("On July 15, 1987, Chiang Ching-kuo lifted the martial law imposed by his father. Among other far-reaching consequences, the move effectively ended the ban on the formation of opposition parties").

218. *See* Betsy Henderson, *Taiwan Elections Scare China,* THE DAYTON DAILY NEWS, March 18, 1996, at 5A (stating that evidence of "Taiwanization" was found in the election of Kuomintang, the first native born Taiwanese person to take office following the death of Chiang Ching-kuo); *see also Confab On Taipei's International Role Opens In Washington,* CENTRAL NEWS AGENCY, February 27, 1993 ("In the opinion of Auw, the increasing trend toward "Taiwanization" within the Taipei government and the KMT will also reinforce the argument for "one China, one Taiwan" advocated by the DPP and some factions within the KMT, thus creating new tensions in domestic politics."). *C.f.* Keith B. Richburg, *Taiwan Candidates Muffle Freedom Call to Calm Voters Fearful of China Backlash,* THE WASHINGTON POST, NOVEMBER 07, 1995, at A19 (criticizing the DPP's emphasis on "Taiwanization" in the election).

219. *See Former Taiwan Opposition Head Chooses To Serve Jail Term*, AGENCE FRANCE PRESSE, April 01, 1997 (discussing the protest march taken as a call for direct elections for president, in 1991 by Shih and DPP supporters); *see also* Ian Johnson, *Taiwan Votes In China's Shadow; Beijing Missile Rattling Fails To Scare Voters; 70% Turnout Expected,* THE BALTIMORE SUN March 23, 1996, at 1A("Under Taiwan's new democratic system, the president is elected directly by the people. He in turn appoints a prime minister with the consent of a parliament. Taiwan has already held direct elections for Parliament and local leaders."); Janet Matthews, Information Services, *Taiwan,* ASIA & PACIFIC REVIEW WORLD OF INFORMATION, January 1996 at 1 (discussing approval of constitutional reforms which allow for various elections).

220. *See Grassroots Races Confirm Democracy Vibrant In Taiwan,* FREE CHINA JOURNAL February 6, 1998 (giving examples of elections where the DPP saw its numbers rise); *see also Taiwan Tightens Security In Election Run-Up,* ASIAN POLITICAL NEWS December 5, 1994 (discussing the incentives used by the the Democratic People's Party in an effort to gather support for declaring their independence from China). B*ut see Grassroots Races Vital For Democratic Process,* FREE CHINA JOURNAL January 23, 1998 (speculating that the KMT's poor showing in the elections was more a result of internal conflict, rather than the uprising of support for the DPP's party).

thirty-six percent of the popular vote, making it the biggest opposition party with powerful influence in Taiwan's sociopolitics.[221]

Based on the increased trend towards Taiwanization since the late 1980s, the Legislative Yuan passed "*The Law on Voluntary Retirement of Senior Parliamentarians*" to persuade older members of the two parliamentary bodies to step down.[222] The following year, the Council of Grand Justices reached a constitutional decision to limit the term of those senior parliamentarians to 1991.[223] As a result of the abolition of the temporary provisions and amendment to the ROC Constitution (to end the representation of Chinese mainland in the two parliamentary institutions in 1991), all the members of the two parliamentary bodies became subject to democratic elections.[224] This has regularly been done by the people of Taiwan in the following years. Significantly, in 1994, the National Assembly passed an amendment to the Constitution to implement direct election of the president and vice president every four years beginning in 1996.[225]

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221. *See* Annie Thomas, *Taiwan,* AGENCE FRANCE PRESSE, December 2, 1995 ("Taiwan's ruling Kuomintang maintained its majority in parliament following elections. The DPP took 33 percent of the popular vote."); *see also* Lawrence Chung, *Taiwan's Ruling Kuomintang Wins Frail Majority In Parliament,* AGENCE FRANCE PRESSE, December 02, 1995 (providing specific election results); Zaid, *supra* note 184, at 810 (discussing that Taiwan's recent local elections at the end of 1997 as demonstrating the DPP's growing presence when it emerged with the greatest number of votes).

222. *See* Ann Scott Tyson, THE CHRISTIAN SCIENCE MONITOR, December 23, 1987, at 7 (discussing the establishment of a voluntary retirement plan for members of aging parliamentarians); *see also Taiwan's 1989 Election Milestone Of Roc's Democratization, Ccnaa Says,* PR NEWSWIRE, November 29, 1989 ("[A] law was passed by the Legislative Yuan on January 26 of this year, establishing the procedure for voluntary retirement for aging parliamentarians."). *See generally ROC To Join Mainland People In Toppling Communist Tyranny: Lee,* CENTRAL NEWS AGENCY, August 10, 1989 (suggesting two ways to rejuvinate the parliament).

223. *See* S. Dept. of State Dispatch, February 1, 1991, 1990 Human Rights Report (discussing the mandated retirement planfor all senior parliamentarians and resistance voiced from some of the elders who rejected the ruling as unconstitutional); *see also* TIEN, *supra* note 192 (noting that in early 1990, 632 of the 2961 members of the National Assembly and 144 of 760 Legislators originally elected were still alive and attending to their political duties); Tozzi, *supra* note 172, at 1241 (discussing the Council of Grand Justices order that the gerontocrats retire by the end of the year to solve the problem of aging parliamentarians who had not faced a competitive election since the late 1940s).

224. *See* Hung-mao Tien & Yun-han Chu, *Building Democracy in Taiwan*, 148 CHINA Q. 1141, 1163-64 (1996) (noting that in the March 1996 elections for the first time the parliament was entirely elected by the people which resulted in the former one-party authoritarian regime yielding to coalition politics); Goh Sui Noi, *Father Of Taiwan Or History's Sinner*? THE STRAITS TIMES (SINGAPORE), May 29, 2000, at 48 (stating that the parliament and National Assembly opened up to full democratic election); *see also* Chen*, supra* note 15, at 679 (noting that with the democratic elections of all members of the National Assembly in 1991 and in 1996 and of all members of the Legislative Yuan in 1992 and in 1995, Taiwan finally has had an equivalent of a parliament represents the present population and reflects the political realities of Taiwan).

225. *See Lee Teng-Hui's "Democracy" Ploy Further Refuted,* THE XINHUA NEWS AGENCY, March 13, 1996 ("[I]n 1994 the third "amendment to the constitution" was passed in Taipei, which made clear a system of "direct election for president."); *see also Taiwan: Review 1997*, ASIA & PACIFIC REVIEW WORLD OF INFORMATION, May 1997, at 232 (discussing approval of constitutional reforms to include provisions for the direct election of the president and vice-president). *See generally Successes And Sorrow,* NEW STRAITS TIMES (MALAYSIA) December 31, 1996, at 12 (stating that the election of Lee Teng Hui was Taiwan's first direct presidential elections and the first ever direct election of a leader in the 5,000-year history of Chinese civilization).

Thanks to the efforts of impelling political reforms, the people of Taiwan have achieved profound self-governance through the processes of democratization and Taiwanization.[226] This continuing process of Taiwanization and democratization created a new milestone in 1996 when the people of Taiwan directly elected their President for the first time in history.[227] In March 2000, an opposition politician from DPP, Chen Shui-Bian, was elected as president who ended more than half a century of rule by the Nationalist Party.[228] This singular act has propelled Taiwan's democracy into a new era. Since a people's domestic right to self-governance is regarded as a universal principle in the context of internal self-determination, the fact that Taiwan has evolved into full-fledged democratic governance by Taiwanization and Democratization,[229] therefore makes it clear that the people of Taiwan have successfully exercised their right

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226. *See ROC Seen To Earn A Place In World Community As A Democracy*, CENTRAL NEWS AGENCY, APRIL 30, 1991 (stating that ROC may earn a place in the world community as a democracy, as a result of its ongoing reform). *See generally* Brick, *supra* note 213 (recognizing continued political reform on Taiwan).

227. *See* Huang Kwang-chun, *Democracy Is Taiwan's Guarantee For Survival: Official,* CENTRAL NEWS AGENCY, September 22, 1998 ("Taipei has spared no effort to promote democratic reform and multi-party politics, which culminated in the first direct election of the president on March 23, 1996, setting a milestone in Taiwan's democratization."). *See generally* Chen, *supra* note 15, at 676 (noting that in March 1996 while Taiwan was peacefully holding its first ever direct election of its President, China responded by taking provocative and blatant acts of military threat and aggression against Taiwan); *Moving Toward Sovereignty*, ASIA WEEK September 29, 2000, at 56 (noting the close margin in favor of Chen Shui-bian that decided the election).

228. *See* Henry Chu, *Taiwan President Appoints New Premier, The Second Since May,* LOS ANGELES TIMES October 4, 2000, Wednesday at 4 (stating that Chen was the first presidnet in Taiwan's history that was not a Nationalist Party member); *see also* Susanne Ganz, *Taiwan Appoints New Premier, Cabinet To Be Reshuffled*, JAPAN ECONOMIC NEWSWIRE, October 4, 2000 ("[W]hen President Chen Shui-bian's DPP-led administration took power in May. The DPP ousted the KMT, which ruled Taiwan for more than half a century."); *Taiwan: Country Profile*, ASIA & PACIFIC REVIEW WORLD OF INFORMATION, September 6, 2000, at 1 ("Chen Shui-bian of the opposition DPP won the second direct presidential election on 18 March with 39 per cent of the vote.").

229. *See* Ambassador Harvey Feldman, *The Master Stroke Of Taiwan's New President,* HERITAGE FOUNDATION REPORTS, June 22, 2000 ("It is still the early days of the Chen administration, but the new administration has had an excellent beginning. The United States should celebrate not only the growth of a young democracy, but also the fortuitous ascension of someone whose master strokes may lead a region defined by misunderstanding into a new era of cooperation and peace."); *see also Perspectives of Mainichi Shimbun reporters*, MAINICHI DAILY NEWS, June 28, 2000, at 2 (discussing the symbolism behind President Chen bowing in front of the statue of Chiang Kai-shek, a man who had repressed the growth of democracy, as signifying the arrival of a new era); *Asian Editorial Excerpts: Is China Equal To New Challenge?,* ASIAN POLITICAL NEWS, May 29, 2000 ("The inauguration on Saturday of the latest Taiwanese government, led by Chen Shui-bian and his deputy Annette Lu, marks the beginning of a new era for the island.").

of internal self-determination and transformed Taiwan from a dictatorial regime to a representative government of internal and external sovereignty.[230]

V. The Potential of an Armed Conflict in the Self-Determination Movement of Taiwan

Taiwan fulfills the traditional requirements of a legal state, as its government has substantial relations with numerous countries and regions and controls a defined territory.[231] However, the PRC has repeatedly asserted that Taiwan is a political subdivision of China, and not an independent political state.[232] The PRC even threatens to use force against any separatist movement in the name of self-determination in Taiwan.[233] The government of Taiwan is cur-

230. *See* Alan M. Wachman, *Taiwan: National Identity and Democratization*, M. E. SHARP, US, 1994, pp. 78-79.

> [F]rom the perspective of Taiwanese nationalism, the continued dominance of Taiwan politics by Mainlanders has become unacceptable. Taiwanese have a sufficiently intense view of themselves as a distinct national group—regardless of how valid their claims for distinction may be—that they can no longer abide by a government that is dominated by a group they perceive to be different. This is not a matter of policy preference; it is not a matter of demanding autonomy from a power on which the island is currently dependent. It is simply a matter of a community demanding the right of self-determination so that it may govern itself.

Id. at 78-79.

See also Stephen J. Yates, *Promoting Freedom And Security In U.S.-Taiwan Policy,* HERITAGE FOUNDATION REPORTS, October 13, 1998, at 1 (discussing the Taiwan debate about whethe to allow its people to exercise their right to self-determination); Ryser, *supra* note 67, at 129 ("[T]he principle of self-determination asserts that it is the right of all peoples to freely choose their social, economic, political and cultural future without external interference.").

231. *See Convention on the Rights and Duties of States,* art. 1, 49 Stat. 3097, 165 L. N. T. S. 25. Under the 1933 Montevideo Convention, the traditional four criteria for statehood are: (1) a defined territory; (2) a permanent population; (3) an effective government; and (4) the capacity to enter into relations with other states. *See also* Alexander K. Young, *End The 'One China' Fiction*, THE JAPAN TIMES, August 15, 1999 ("Taiwan has satisfied the conditions for recognition as an independent country (a territory larger than 40 percent of the countries of the world; 22 million residents; a government that exercises control; the ability to forge treaties and fulfill all international obligations."). *But see* Jorge Castaneda, *valeur juridique des resolutions des nations unies,* in RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 206, 316 (1970) ("[N]on conventional norms do not have any exterior formal sign which indicates in an indubitable manner at which moment, in which conditions and to what extent one leaps from a pre-legal state to a legal one.") (author's translation).

232. *See China Warns Taiwan Of Independence "Disaster,"* BBC WORLDWIDE MONITORING, February 21, 2000 ("From 1979, the Chinese government has striven for the peaceful reunification of China in the form of "one country, two systems" with the greatest sincerity and the utmost effort."); *see also Excerpts of White Paper on Taiwan Issue,* XINHUA GENERAL NEWS SERVICE, February 21, 2000 (reiterating China's insistance that there is only one China in the world and one legal, representative governement); *Taiwan President Lee Teng-Hui Urges China To Open Dialogue,* DEUTSCHE PRESSE-AGENTUR, December 31, 1999 (noting that China recognizes Taiwan only as its province and bars foreign nations from recognizing it otherwise).

233. *See* James R. Lilley, *Face-off over Taiwan; Uncle Sam is the Middle as the Two Chinas Escalate Their War of Words and Threats*, THE SAN DIEGO UNION-TRIBUNE, March 19, 2000, at G1 (comparing the ways that American and Chinese leadership view democracy, self-determination and sovereignty); *see also China Warns Taiwan Of Independence "Disaster," supra* note 232 ("China would "do its best to achieve peaceful reunification" but would not rule out the use of force."); Yates, *supra* note 230 (noting China's method of imposing its will through force or intimidation).

rently is an independent regime with effective self-governance in accordance with the will of its people.[234]

Since Taiwan was controlled by the Chiang Kai-Shek regime of Nationalist China after Japan's surrender in 1945, Communist China has never exercised its sovereignty over Taiwan.[235] Taiwan has created an exclusive community with its own value and there is no doubt that the PRC is considered an outside power to the people of Taiwan.[236] The people of Taiwan have the profound desire to live in enduring peace and security and in freedom from fear and want.[237] At this point, it is clear that any outside political power, including the PRC (which engages in incitement to conflicts or acts of aggression tending to isolate the people of Taiwan from the outside world), should be condemned by the international community.[238]

The principle of non-threat or non-use of force affirmed by Article 2(4) of the UN Charter is deemed to be a part of customary international law and obliges the international commu-

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234. *See China Warns Taiwan Of Independence "Disaster," supra* note 232 ("[S]ince the early 1990s, Lee Teng-hui has gradually deviated from the one-China principle, trumpeting "two governments", "two reciprocal political entities," [and] "Taiwan is already a state with independent sovereignty."); *see also* Noi, *supra* note 224 (crediting the President with turning Taiwan from an authoritarian state into a functioning democracy); *Moving Toward Sovereignty, supra* note 227 ("After elections for the national legislature a year hence, it is likely that the DPP will take the majority and Chen will be poised to move forward in asserting Taiwan's sovereignty, backed by solid public support.").

235. *See* Maubo Chang, *VP Lu: Taiwan Belongs To Its People, Not To ROC Or PRC,* CENTRAL NEWS AGENCY May 28, 2000 ("Beijing's claims over the island—which it has never ruled before—are totally baseless under international law, and fail to account for the Taiwan people's sovereignty over their island."); *see also China Warns Taiwan Of Independence "Disaster," supra* note 232 (claiming that, since neither territories on either side of the straits recognized the jurisdiction of the other, the government of the PRC has never ruled Taiwan); Young, *supra* note 228 ("Taiwan has had a separate existence from China for the past several hundred years, especially the last 100 years (50 years under Japanese rule, 50 years under the Kuomintang government—the PRC has never ruled Taiwan")).

236. *See* Chang, *supra* note 235 ("Lee and the overwhelming majority of the people he represents want "a separate existence" from China. They resent China's continuing hostile policy of isolating and containing Taiwan internationally and bullying it militarily."); *see also China 'Must Learn From [My] Election',* BUSINESS WEEK, August 14, 2000, at 26 ("[The President] spoke boldly of Taiwan as 'a sovereign and independent country' and said China does not understand the island's democracy or its people—or him.").

237. *See China 'Must Learn From [My] Election,' supra* note 236 ("We must promote peace and stability in the Taiwan Strait."). *But see Chinese Defense Minister Warns Taiwan On PLA Anniversary,* AGENCE FRANCE PRESSE, August 1, 2000 (asserting that "hegemonism" and "power politics" continue to exist and even develop and threaten global peace and security).

238. *See* Chang, *supra* note 235 ("Lee's statement has caused a big headache for the United States, because the Taiwan Relations Act requires the president and the Congress to take "appropriate action" when Taiwan is threatened—an action that could lead to a deadly war with China."). *But see* Romana Sadurska, *Threats Of Force,* 82 A.J.I.L. 239, 249 (1988) ("[I]t seems unnecessary for all practical purposes and theoretically dubious to characterize the prohibition of the threat of force as a rule of customary international law."). *See generally* Kirsty Scott, *The Two Faces of China's Rage*, THE HERALD (GLASGOW), May 20, 1999, at 10 (stating that the West has an existing alliance system in East Asia, strong support for the sovereignty of Taiwan, and continuing condemnation of alleged human-rights abuses in China).

nity to respect it as a norm.[239] Some scholars even consider the prohibition of the use of force with the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy as the least controversial examples of *jus cogens (*meaning that it is a rule of customary law which cannot be set aside by treaty or mutual acquiescence).[240] Moreover, the UN ensures that the principle of non-threat or non-use of force is also applied to non member states of the UN in the necessary maintenance of international peace and security.[241] That is, all states of the world are obliged to abide by this principle. Significantly, regarding the self-determination movement, the principle of Article 2(4) of the UN Charter was reaffirmed by Resolution 2625 which emphasizes that states must not use force to deprive a people of their right to self-determination and independence.[242]

Accordingly, the "*Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*" adopted two Protocols in 1977.[243] These Protocols defined armed conflicts caused by self-determination movements (in which people are fighting against colonial domination or alien occupation), as international armed conflicts and therefore subject to the international law of armed conflict.[244] As discussed above, not only should the PRC be refrained from using any form of forcible action to unify Taiwan, but Taiwan has the right to exercise the related rights provided by the UN Charter as well as other international legal instruments so long as it is attacked by alien powers including the PRC.[245]

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239. *See* Danna Harman, *Clinton to Decide on Summit Today, Barak Leads to London, Paris*, THE JERUSALEM POST, July 5, 2000, at 1 (stating that Article 2(4) of the United Nations Charter prohibits the use of armed force not only against the territorial integrity of a state, but also in any other manner inconsistent with the purposes of the United Nations). *See generally* John A. Perkins, *The Changing Foundations Of International Law: From State Consent To State Responsibility,* 15 B.U. INT'L L.J. 433,465 (1997) (stating UN CHARTER Article 2 §§ 4 and 51, were also binding customary international law).

240. *See* Hsiao, *supra* note 15, at 719 (discussing the established non-use of force principle, its role in international law and the consequences of any violation). *Cf.* LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS ch. 8, 323-56 (1988).

241. *See* Hsiao, *supra* note 15, at 719 (discussing the provision); *see also* Sadurska, *supra* note 238 (Article 2(6)of the Charter provides that "[t]he Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."). *But see China's UN Envoy Reiterates One-China Principle, supra* note 235 (stating that Taiwan cannot participate in the work or activities of the UN and its specialized agencies).

242. *See* Nigel D. White & Robert Cryer, *Unilateral Enforcement of Resolution 687: A Threat Too Far?,* 29 CAL. W. INT'L L.J. 243, 244 (1999) (discussing provisions of Article 2(4)); *see also id.* at 247 ("Resolution 2625 includes the passage "such a threat or use of force constitutes a violation of international law and the Charter of the United Nations, and shall never be employed as a means of settling international issues.").

243. *See* Janet E. Lord, *Legal Restraints In The Use Of Landmines: Humanitarian And Environmental Crisis,* 25 CAL. W. INT'L L.J. 311, 330 (1995) ("[T]he Geneva Diplomatic Conference on Humanitarian Law which met from 1974 to 1977 and produced two Additional Protocols to the 1949 Geneva Conventions."); *see also* Michael J. Matheson, *Current Development: The Revision Of The Mines Protocol* 91 A.J.I.L. 158, 160. n.13 (1997) (discussing paragraph 4 of Protocol I). *See generally* George H. Aldrich, *Prospects For United States Ratification Of Additional Protocol I To The 1949 Geneva Conventions,* 85 A.J.I.L. 1, 1 (1991) (describing Protocol I as an important treaty codifying and developing international humanitarian law).

244. *See* Aldrich, *supra* note 243 (covering armed conflicts in which people are "fighting against colonial domination and alien occuation and against racist regimes in the exercise of their right of self-determination").

245. *See* Hsiao, *supra* note 15, at 721 ("It leaves only a few exceptions where the use of armed force by states is permissible. These are: individual or collective self-defense (Article 51).").

According to this approach, if China uses force to suppress the claim of the people of Taiwan to self-determination, it would be regarded as an aggressive act according to a consensus definition of aggression in Resolution 3314 of the UN General Assembly.[246] Based on the condition of necessity and proportionality, non-aggression by China would constitute a basis for Security Council jurisdiction under Article 39 of the UN Charter.[247] Taiwan is also entitled to exercise the right of individual self-defense or proceed with collective self-defense with its neighboring states in coping with any aggression by China under the principle guaranteed by Article 51 of the UN Charter.[248] An aggression against a self-determination movement is regarded as a most serious and dangerous form of illegal measures in managing claims for self-

246. *See* Stephen C. McCaffrey, *Current Development: The Fortieth Session of the International Law Commission*, 83 AM. J. INT'L L. 153, 159-60 (1989) (discussing how the adoption of the definition of aggression through Resolution 3314 (XXIX) cleared the way for further work on the Draft Code of Crimes against the Peace and Security of Mankind); *see also* Rosemary Rayfuse, *The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 43, 58-62 (1997) (defining "aggression" in Resolution 3314 (XXIX) within the framework of problems regarding the linkage of the individual crime with aggression committed by a state). *Compare* Louis Rene Beres, *After the "Peace Process:" Israel, Palestine, and Regional Nuclear War*, 15 DICK. J. INT'L L. 301, 328 n. 82 (1997) ("Resolution 3314: Article 1 enjoins members to refrain from "the threat or use of force against the territorial integrity or political independence of any state.").

247. *See* Helmut Freudenshubeta, *Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council*, 46 AUS. J. PUB. INT'L L. 1, 36 (1993) (discussing the impact of Article 39 in international disputes and the role of the security council in this context); *see also* Hanna, *supra* note 75, at 244 ("Article 39 of the UN CHARTER states that the "Security Council shall determine the existence of any threat to peace . . . and make recommendations, or decide what measures shall be taken."); *see also* Christopher K. Penny, *"No Justice, No Peace?": A Political and Legal Analysis of the International Criminal Tribunal for the Former Yugoslavia,* 30 OTTAWA L. REV. 259, 287 (1999) ("Article 39 stipulates, the determination that a threat exists to international peace and security is within the discretion of the UNSC."); *see, e.g.,* William D. Rogers, James A. Beat & Christopher Wolf, *Current Development: Application of El Salvador To Intervene In the Jurisdiction and Admissability Phase of Nicaragua v. United States And Admissability Phase of Nicaragua v. United States*, 78 A.J.I.L. 929, 931 (1984) (discussing El Salvador's argument, which stated that the International Court of Justice did not have proper jurisdiction over the matter between Nicaragua and the United States under Article 39 of the UN CHARTER).

248. Article 51 of the UN Charter provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measure necessary to maintain international peace and security. Measure taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

See also Charney & Prescott, *supra* note 18, at 477 (analyzing Taiwan's right of individual self-defense and right to seek outside support through collective self-defense in the case of an attack by China, pursuant to Article 51 of the UN Charter); Hsiao, *supra* note 15, at 721 ("It leaves only a few exceptions where the use of armed force by states is permissible. These are: individual or collective self-defense (Article 51)."); Nicholas Rostow, *Taiwan: Playing for Time*, 32 NEW ENG. L. REV. 707, 709-10 (1998) (applying Article 51 and Article 2(4) to Taiwan, while analyzing the question of whether or not Taiwan is widely recognized as an independent state); James P. Rowles, *Nicaragua Versus the United States: Issues of Law and Policy,* 20 INT'L LAW. 1245, 1245, n.155 (1986); Maria Stavropoulou, *The Right Not To Be Displaced,* 9 AM. U.J. INT'L L. & POL'Y 689, 744 (1994) ("[A] person's rights legitimize their individual or collective efforts to seek protections from threatening acts and redress adequately enough to restore a harmed interest.").

determination.[249] Therefore, the right to seek protection under armed attacks caused by self-determination has been deemed as a universal principle in customary international law.[250] Taiwan, in spite of lack of membership in the UN, is absolutely qualified to exercise the right of self-defense enshrined in Article 51 of the UN Charter.[251] There is a growing realization that any aggressive action by China to attack Taiwan should be placed on the level of "international affairs" rather than Chinese domestic issues, especially if the armed conflict is caused by a typical self-determination movement.[252]

It appears that where there are armed conflicts caused by a self-determination movement, an intervention by military forces in a peacekeeping operation will follow to deliver humanitarian assistance and to prevent a deterioration of the situation.[253] In other words, the principle of self-determination has become the very purpose for the UN to maintain international peace

249. *See* Charney & Prescott, *supra* note 18, at 460 (questioning whether the Post-World War II peace treaties between China and Taiwan constituted violations of Taiwan's self-determination movement). *See generally* George E. Edwards, *Applicability of the "One Country, Two Systems" Hong Kong Model to Taiwan: Will Hong Kong's Post-Reversion Autonomy, Accountability, and Human Rights Record Discourage Taiwan's Reunification with the People's Republic of China*?, 32 NEW ENG.L. REV. 751, 757-58 (1998) (analyzing the differences between Taiwan's self-determination movement and Hong Kong's acquiesence to Chinese rule); *see e.g.,* Kolodner, *supra* note 6, at 163-64 (discussing the aggressions of China and Israel against internal and external self-determination movements of Tibet and Palestine, respectively).

250. *See* Hsiao, *supra* note 15, at 721 (providing exceptions, found in Article 51, for when states can use armed force, such as individual or collective self-defense); *see also* Lieutenant Commander Catherine S. Knowles, *Life and Human Dignity, The Birthright of All Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 NAVAL L. REV. 152, 172-74 (1998) (discussing the International Covenant on Civil and Political Rights as a binding treaty defining various human rights described in the Universal Declaration, giving rise to customary international law); Kolodner, *supra* note 6, at 166 ("Promoted within a myriad of international instruments, principles of self-determination have become embedded within international law."); Stavropoulou, *supra* note 248 ("[A] person's rights legitimize their individual or collective efforts to seek protections from threatening acts and redress adequately enough to restore a harmed interest.").

251. *See* Charney & Prescott, *supra* note 18, at 477 (arguing that since Taiwan is not legally under Beijing's rule, the use of force by China to try and extend PRC governance over Taiwan would be a violation of the right of self-defense under Article 51); *see also* Hsiao, *supra* note 15, at 721 (emphasizing that there must be an "armed attack" before a state can claim self-defense). *See generally* Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action,* 17 MICH. J. INT'L L. 229, 248 (1996) (arguing that the most plausible interpretation of Article 51 is that a state retains the right of self-defense until the Security Council has taken measures that have succeeded in restoring international peace and security).

252. *See* Kolodner, *supra* note 6, at 167 (arguing that the international community must foster human rights, support democracy, and maintain world peace and stability by limiting movements for external self-determination and recognizing legitimate movements for internal self-determination); *see also* Chen, *supra* note 60, at 1291 (noting the vital roles of the United Nations and the world community in seeking out solutions to international problems of self-determination). *See generally* Charney & Prescott, *supra* note 18, at 465-66 (discussing the decline of the traditional state-centered framework due to the self-determination doctrine in the international arena).

253. *See* HALPERIN, SCHEFFER, & SMALL, *supra* note 39, at 105-111 (discussing the legitimacy of claims by sub-state groups by posing alternatives to the "internal" and "external" self-determination categories); *see also* Stephan A. Wangsgard, *Secession, Humanitarian Intervention, And Clear Objectives: When To Commit United States Military Forces,* 3 TULSA J. COMP. & INT'L L. 313, 315-323 (1996) (analyzing the doctrine of self-determination within the context of human assistance and intervention). *See generally* Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT'L L. 883, 891-94 (1995) (highlighting the differences between humanitarian intervention and humanitarian assistance, specifically stating that pursuant to Article 2(5), it is a duty of all member states to extend every assistance to the United Nations to promote fundamental freedoms).

and security.[254] The world community has even begun to move toward that direction by following the principle of "preventive deployment" in order to avoid the unilateral intervention to support self-determination movement.[255] This would cause an infringement of a State's sovereignty guaranteed by Article 2(7) of the UN Charter.[256] This principle of "preventive deployment" means to deploy the UN-authorized military, police or civilian personnel in conditions of crisis within an area where military conflict has occurred with the expectation of alleviating suffering and to limit or control violence.[257] In inter-state disputes, such deployment could take place when a country feels threatened and requests appropriate UN presence.[258] In a national crisis, such deployment could be employed at the request of the Government or all parties concerned with their consent.[259]

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254. *See* Eckert, *supra* note 75, at 70-78 (discussing the interpretation of self-determination by the International Court of Justice, within context of the UN's Charter to maintain international peace and democratic entitlement); *see also* Bartram S. Brown, *The Protection of Human Rights In Disintegrating States: A New Challenge,* 68 CHI.-KENT. L. REV. 203, 217-218 (1992) (noting that the maintence of international peace and security were at the forefront of the agenda for the first summit, in 1991, of the United Nations Security Council); Head, *supra* note 72, at 285 (stating the purpose of the UN CHARTER is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.").

255. *See* Stephen T. Ostrowski, *Preventive Deployment of Troops As Preventive Measures: Macedonia And Beyond*, 30 N.Y.U. J. INT'L L. & POL. 793, 801 (1998) ("Preventive diplomacy requires the constructive engagement of the international community"); *see also* Lilly R. Sucharipa-Behrmann and Thomas M. Franck, *Preventive Measures*, 30 N.Y.U. J. INT'L L. & POL. 485, 485 (1998) (discussing how United Nations measures have shifted their focus on preventive plannings in the post-Cold War era); Shashi Tharoor, *The Changing Face of Peace-Keeping And Peace-Enforcement*, 19 FORDHAM INT'L L.J. 408, 422 (1995) (noting the various positive effects of preventive deployment, including the cheaper costs in lives and resources).

256. *See* W. Michael Reisman, *NATO's Kosovo Intervention: Kosovo's Antinomies*, 93 A.J.I.L. 860, 860 (1999) (discussing how Article 2(4) was changed by the contraction of Article 2(7), eliminating serious human rights violations). *But cf.* Antonio F. Perez, 89 A.J.I.L. 658, 659 (1995) (reviewing LOUIS B. SOHN, RIGHTS IN CONFLICT: THE UNITED NATIONS AND SOUTH AFRICA (1995)); Wedgwood, *supra* note 126 (stating that Article 2(7) forbids intervention within the domestic jurisdiction of a member state except by Council decision under Chapter VII).

257. *See* Ostrowski, *supra* note 252, at 798-800 (describing preventive deployment as a "dispute resolution ladder," whereby low-cost procedures are utilized early and more costly and intrusive measures are only employed if those fail); *see also* Thomas G. Weiss, *The UN's Prevention Pipe-Dream*, 14 BERK. J. INT'L LAW 423, 424-25 (1996) (stating that the most desirable and efficient employment of diplomacy is to ease tensions before they result in conflict); *see, e.g.*, Diego Garcia-Sayan, *Human Rights And Peace-Keeping Operations*, 29 U. RICH. L. REV. 41, 44 (1994) (explaining that the only "preventive deployment" operation undertaken by the UN has been a mainly military one in the observing the boundary with Serbia since June 1993).

258. *See* Brown, *supra* note 254, at 219 (arguing that the UN presence in Yugoslavia provided an example of the new broader role for UN peacekeeping, especially as it applies to the significant problems resulting from changes to state structures); Mary Ellen O'Connell, *Continuing Limits On UN Intervention In Civil War,* 67 IND. L.J. 903, 912 (1992) (discussing U.S. presence in Yugoslavia, constituting the largest amount of deployed troops since the U.S. intervention in Congo). *See generally* Soong, *supra* note 191, at 364 (discussing how Taiwan's imminent admission to the GATT may provide the island with an indirect route to some form of UN presence).

259. *See* Ostrowski, *supra* note 252, at 796 (arguing that preventive deployment should be undertaken only with the consent of all parties to the conflict and when if it is closely linked to achievable political or humanitarian goals.); *see also* Christine Gray, *The United Nations, Regional Organizations, and Military Operations: Host-State Consent and United Nations Peacekeeping in Yugoslavia*, 7 DUKE J. COMP. & INT'L L. 241, 243-49 (1996) (discussing issue of whether consent of all parties is needed or consent of only the host government is needed for deployment of UN troops).

The Serbian Republic of Bosnia Herzegovina was proclaimed in 1992 which led to the aggression against independence and territorial integrity by the Yugoslavia National Army (Serbian troops).[260] The deteriorating situation cost thousands of lives and hundreds of thousands became homeless.[261] In response to the request for deployment of UN peace-keeping force from the new *de facto* Bosnia-Herzegovina government, the UN established the United Nations Protection Force (hereinafter "UNPROFOR") in order to operate "preventive deployment" within the territory of Bosnia-Herzegovina.[262] The UN collective military presence in Bosnia to deter Serbian aggression proves that consent could be obtained from the *de facto* government on whose territory the "preventive deployment" is to take place.[263]

As a matter of fact, the "preventive deployment" for the resolution of conflicts arising from self-determination movements has been applied not only to external situations, but also to internal conditions.[264] For example, the Kurds in Northern Iraq sought political autonomy

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260. *See* Nanda, et al., *supra* note 95, at 837-40 (discussing Yugoslavia's historical struggle in failing to succeed as a political community and always being forced to compete with its subsidiary national communities); James C. O'Brien, *The International Tribunal For Violations Of International Humanitarian Law In The Former Yugoslavia*, 87 A.J.I.L. 639, 640 (1993) (explaining the role of the Security Council in response to the ethnic cleansing and other violations of human rights); Weller, *supra* note 135, at 579 (explaining the historical setting of the dispute in Yugoslavia and how it represents a direct threat to international peace and security).

261. *See* Nanda, et al., *supra* note 95, at 837 (discussing the dispute in former Yugoslavia and how it had a huge toll in human life and property damage captured the attention of the world); *see also* O'Brien, *supra* note 260, at 639 (discussing the atrocities undertaken during the fighting in the former Yugoslavia, including the abuse of women, inhumane detention facilities, indiscriminate targeting of defenseless civilians, forced expulsions and deportations, and the obstruction of relief convoys); A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated By The War In Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 6-7 (1995) (suggesting that the death tolls for all the contending parties in Bosnia were likely in the 25,000-60,000 range, representing 0.5%-1.5% of the population of Bosnia-Herzegovina).

262. *See* Yasushi Akashi, *The Use of Force In a United Nations Peace-Making Operation: Lessons Learnt From The Safe Areas Mandate*, 19 FORDHAM INT'L L.J. 312, 312 (1995) (stating that at the height of its deployment, UNPROFOR was the largest, most complex, and most expensive peace-keeping operation in the United Nations' history, with personnel numbered some 45,000 and an annual budget close to US$ 2 billion); *see also* Weller, *supra* note 135, at 585 (1992) (discussing the composition and history of the creation of the United Nations Protection Force (UNPROFOR)).

263. *See* Gray, *supra* note 259, at 249-50 (stating that in the United Nations Peacekeeping Operation in Yugoslavia, consent for deployment of troops was supposed to be attained by the contributing states on the recommendation of the Secretary-General after consultation with the Yugoslav parties, but mostly took place in private). *See generally* Akashi, *supra* note 262, at 313 ("For peace-keeping operations to be successful, they must be based on the consent and cooperation of the parties in conflict."); Ostrowski, *supra* note 252, at 796 (discussing the idea of preventive deployment within the framework of political consent).

264. *See* Kolodner, *supra* note 6, at 163-64 (analyzing the distinctions between internal and external self-determination movements of various nations); Charney & Prescott, *supra* note 18, at 460 (questioning whether the Post World War II peace treaties between China and Taiwan constituted violations of Taiwan's self-determination movement). *See generally* Kolodner, *supra* note 6, at 166 ("Promoted within a myriad of international instruments, principles of self-determination have become embedded within international law.").

following the Gulf War in March 1991.[265] As a result of inhuman repression by Iraqi army, there was a massive flow of refugees toward and across international frontiers, which threatened international peace and security in the region.[266] In consideration of requests from Turkey and France, as well as the report on human rights situation in Iraq by the Special Rapporteur of the Commission on Human Rights, the UN Security Council conducted a collective military intervention in North Iraq under the unified command of the United States to deter the repression by the Iraqi army and to deliver humanitarian assistance.[267]

It is apparent that if the need and feasibility of protecting humanitarian imperatives and maintaining international peace and security can be proven, a proportional military intervention by the world community in response to an armed conflict caused by a non-colonial self-determination movement will be considered a necessary measure.[268] This is especially relevant to the fact that the PRC, without membership in the UN, complained to the President of the UN Security Council that the US Seven Fleet Battle Groups towards the Taiwan Strait and

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265. *See* Leslie A. Benton & Glenn T. Ware, *Haiti: A Case Study of the International Response and the Efficacy of Non-Governmental Organizations in the Crisis*, 12 EMORY INT'L L. REV. 851, 917-18 (1998) (discussing how the Kurdish rebellion against Saddam Hussein was quashed by the more powerful Hussein); *see also* Mary Ellen O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy,* 36 COLUM. J. TRANSNAT'L L. 473, 484-86 (1997) ("At the end of February 1991, as the fighting to liberate Kuwait was ending, the Kurds of northern Iraq began a rebellion against the Iraqi government, apparently either to secede from Iraq or at least to establish an autonomous Kurdish region."). *See generally* O'Connell, *supra* note 258, at 903 (noting the Kurd rebellion against the Iraqi government caught the UN off guard).

266. *See* Benton & Ware, *supra* note 265, at 917-18 (discussing the resettlement of the Kurdish refugees who had fled into southern Turkey); Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security,* 19 MD. J. INT'L L. & TRADE 1, 1 (1995) (discussing how the passing of Resolution 688 pointed to the threat to international peace and security which emanated from the transboundary impact of a mass exodus of refugees into other states); O'Connell, *supra* note 258, at 907 (stating that the United States sent its troops to place camps for the refugees inside Iraq and tried to defend the refugees from Iraqi attack).

267. *See* S.C. Res. 688, UN SCOR, 46th Sess., 2982d mtg., UN Doc. S/Res/688 (1991); *see also* Benton & Ware, *supra* note 265, at 917-18 (stating that the main primary focus of UN launched Operation Provide Comfort was humanitarian, not military). *See generally* O'Connell, *supra* note 258, at 906 (noting the UN decided not to interfere with Iraq's political internal affairs by helping the Kurds secede or re-arrange Iraq, but rather only interfered by providing humanitarian assistance, such as food, water, and shelter).

268. *See* Fink, *supra* note 266 (discussing how the humanitarian aspects of the UN assistance present the UN with new challenges to its foundational principles of sovereignty and non-intervention); *see also* Gavin A. Symes, *Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq,* 19 MICH. J. INT'L L. 581, 581 (1998) (describing the justifications of the State Department supporting military intervention in Iraq in order to protect U.S. national security, to contain an Iraqi threat to neighboring countries, to enforce general norms of international law, and to protect Kurdish human rights). *See generally* Mahalingam, *supra* note 32, at 224 (recognizing historical ambivalence and tension with respect to the legitimacy of unilateral intervention, but general support for collective intervention).

contingents of the US Air Force in Taiwan were a direct aggressive action, and that, the Security Council should take immediate measures to ensure complete withdrawal of US forces.[269]

Accordingly, the Security Council adopted a resolution to accept this complaint from the PRC and invited a representative of the PRC Government to attend the meeting of the Council held during the discussion of the issue of an armed invasion of Taiwan declared by the PRC.[270] The Council held that this action was based on its duty to investigate any situation likely to lead to international friction or endanger international peace and security.[271] Thus, the PRC was recognized as having the entitlement to request the UN Security Council to take measures necessary for the restoration of international peace and security.[272]

The presence of the UN preventive deployment in the cases of northern Iraq and Bosnia and the complaint by the PRC to the UN Security Council concerning the armed invasion of Taiwan by the US have created salient and persuasive precedents for Taiwan to apply for preventative deployment if it is ever under an armed attack by China.[273] Based on the foregoing, it

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269. *See* Joyner, *supra* note 15, at 822 (explaining how diplomatic situation became extremely tense when the United States sent a fleet of sixteen warships to the Taiwan Strait in response to PRC's firing live missiles offshore Taiwan in retaliation for US-Taiwan talks in mid-1995); *see also* Warren I. Cohen, *One China Plus One Taiwan Equals Trouble*, CHRISTIAN SCI. MONITOR, June 15, 1995, at 19 (stating that the PRC has found its relationship with the US too valuable to jeopardize over the Taiwan issue); James Lilley, *The United States, China, and Taiwan: A Future With Hope*, 32 NEW ENG. L. REV. 743, 743 (1998) (discussing how U.S. assurances concerning Taiwan's security after the Mutual Defense Treaty had been terminated were "given teeth" when the U.S. sent two carrier battle groups off the east coast of Taiwan in response to Chinese missile shots).

270. *See* Fu, *supra* note 198, at 329 (presenting different reasons as to why PRC would launch a military attack against Taiwan); *see, e.g.,* Chris Ajemian, *The 1997 U.S.-Japan Defense Guidelines Under the Japanese Constitution and their Implications for U.S. Foreign Policy,* 7 PAC. RIM L. & POL'Y 323, 344 (1998) (discussing the March 1996 incident, when China staged military exercises in the Taiwan Straits in a dramatic show of force, as a response to Taiwan's presidential message that reunification with China was uncertain). *See generally* Joyner, *supra* note 15, at 832 (discussing both China and Taiwan's geo-strategic interests in the framework of each nation's military strengths and weaknesses).

271. *See, e.g.,* Jonathan Broder, *Israel, Jordan Come Step Nearer To Peace Talks,* CHI. TRIB., May 2, 1987, at 4 (discussing the participation of the five United Nations Security Council members in the process of international peace and security); Thomas L. Friedman, *U.S. May Back International Talks if Israel Stymies Vote Plan*, N. Y. TIMES, July 9, 1989, at 1-16 (explaining the UN's plan for calling an international peace conference due to frictions between rival states). S*ee generally* O'Connell, *supra* note 258, at 904 ("The Security Council may take action only to maintain international peace and security.").

272. *See* Bruce Fein, *Rethinking Veto Power at the UN,* WASH. TIMES, December 12, 1990, at G3 ("The PRC, not the Soviet Union, is thus the likely bete noire of the Security Council in the future"). *See generally* John Metzler, *Give Taiwan a Voice at the UN,* WASH. TIMES, October 28, 1996, at A17 (discussing China's strong influence in the UN by being a part of the Security Council since 1945); John J. Metzler, *The Year of the Rat,* WASH. TIMES, March 11, 1996, at A-19 (discussing the PRC's mission of trying to work through the Association of Southeast Asian Nations to solve the Taiwanese crisis in an attempt to keep the issue away from the UN Security Council).

273. *See* Coffey, *Keynote Address: Rule of Law and Regional Conflict*, 19 WHITTIER L. REV. 257, 260 (1997) (discussing the importance of preventive diplomacy being institutionalized on the multilateral level.); *see, e.g.,* Scott Keefer, *International Control of Biological Weapons,* 6 ILSA J. INT'L & COMP. L. 107, 108 (1999) (discussing the production of preventive measures against biological warfare, including biological disaster training for first response medical personnel and stockpiling of antibiotics). *See generally* Sucharipa-Behrmann & Franck, *supra* note 252, at 485-86 (explaining how preventive diplomacy has become emphasized in the UN and in the international arena in the Post-Cold War Era).

is definite that a request by Taiwan for a preventive deployment in order to deter a deteriorating situation should be justified by the international community if China attacks Taiwan to oppose the self-determination movement.[274]

Despite the fact that the self-determination movement in Taiwan could easily trigger aggression by China, it is anticipated that this claim by the people of Taiwan for a free choice of Taiwan's status will unavoidably continue unless the dispute of Taiwan's sovereignty is amicably and smoothly settled by both sides of the Taiwan Strait.[275] Since a potential armed conflict in the Taiwan Strait has been listed with the Kashmiri and North Korean issues as the most troubled in Asia, a continuously hostile tension in the Taiwan Strait is therefore likely to endanger the maintenance of international peace and security.[276] In view of that, the situation should be monitored by the United Nations, because a peaceful Taiwan Strait is a common desire of the international community.[277]

According to Article 11(3) of the UN Charter, the General Assembly may call the attention of the Security Council to situations that are likely to endanger international peace and security.[278] In order to have a clearer understanding of the potential conflict in the Taiwan Strait, the UN General Assembly needs to build a "pre-warning system" by setting up a special committee to monitor any self-determination movement in Taiwan as well as any potential reac-

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274. *See* Ostrowski, *supra* note 252, at 794-95 (emphasizing the new international propensity towards taking preventive deployment measures); *see, e.g.,* Lilley, *supra* note 269, at 749 ("The U.S., on the Korean Peninsula and elsewhere in East Asia, must steadfastly stand behind only peaceful means to resolve disputes."); *see also* Carolan, *supra* note 168, at 467 (discussing the vital role of international law in acting as a resource in not only conflict resolution but conflict prevention).

275. *See* Carolan, *supra* note 168, at 465 (stating the absence of war between Taiwan and China does not point to the presence of peace, indicating that until a solution is found that resolves the status of the island, there will be no peace.); Joyner, *supra* note 15, at 837 (discussing how the issue of sovereignty represents different social and political dimensions for Taiwan and China); *see also* Lilley, *supra* note 269, at 744-45 (describing tensions between China and Taiwan as further exacerbated because China blames Taiwan for the major downturn in U.S.-Chinese relations in 1995).

276. *See* Charney & Prescott, *supra* note 18, at 477 ("Unfortunately, the serious differences of opinion across the Taiwan Strait stem from deep cultural, political, and historical foundations. These differences might make war inevitable."); *see also* Shen, *supra* note 9, at 1161 ("Independence for Taiwan is a dead-end. It is not only a legal impossibility, but also an actual impracticability, because the PRC Government will not allow that to happen or succeed.). *See generally* Charles R. Irish, 75 N.Y.U. L. REV. 429, 465 (2000) (discussing tension throughout Taiwan).

277. *See* Saleem, *supra* note 196, at 536 (recognizing the important implications of China accepting Taiwan as independent state); *see also* Carolan, *supra* note 168, at 465 ("Not to recognize Taiwan's claim would be to dilute the product of decades of international legal development, something that states would be hesitant to do.").

278. *See The New Security Council*, N. J. L. J., September 19, 1994, at 16 (discussing how the Security Council's powers have been redefined by allowing them to permit intervention into the internal domestic affairs of member states in order to protect people from human rights abuses); *Charter Committee Reports Progress Regarding UN Fact-Finding Process,* 27 UN CHRONICLE 2, 32 (1990) (discussing the role of the Security Council in dealing with threats to international peace and security in the framework of the UN as a whole); *see, e.g.*, Friedman, *supra* note 271 (stating the UN's plan for calling an international peace conference because of an international situation which is likely to endanger international peace).

tions from China.[279] The Assembly can then effectively call the attention of the Security Council to help in managing the increasing tensions before they result in a devastating war as was the case in the 1996 missile crisis in the Taiwan Strait.[280] The function of this committee is to create the necessary conditions for a pre-warning mechanism, based on information gathering and fact-finding without getting involved in the dispute as to Taiwan's status.[281] It is conceivable that a proposal for creating such a special committee will be accepted by the UN General Assembly because it is deeply related to the interests of most member states of the UN.[282]

VI. The Forcible Integration and the Entitlement of the People of Taiwan to External Self-Determination

As mentioned earlier, the successful political reforms in the '80s and '90s that resulted in full self-governance by the people of Taiwan led to a trend toward Taiwanization at the same time.[283] Consequently, the inhabitants of Taiwan began to question the fundamental assump-

279. *See* Coffey, *supra* note 273 (discussing the importance of early warning systems being institutionalized on the multi-lateral level.); *see also* Ambassador David J. Scheffer, *The International Criminal Tribunal Foreward: Deterrance of War Crimes in the 21st Century*, 23 MD. J. INT'L L. & TRADE 1, 1 (1999) (stating President Clinton's concern with the establishment of a formal mechanism in the U.S. Government to facilitate early warning of atrocities and to consider means to prevent or respond to them as quickly and effectively as possible); John Shattuck, *Preventing Genocide: Justice and Conflict Resolution in the Post-Cold War World,* 3 HOFSTRA L. & POL'Y SYMP. 15, 18 (1999) (recognizing the importance of early warning and preventive in an effort to prevent the recurrence of furture problems like what happened in Bosnia and Rwanda).

280. *See Why Did So Many People Look the Wrong Way?*, ECONOMIST, May 29, 1999, at 1 (categorizing the Taiwan missile crisis of 1996 as a "world changing event"); George Wehrfritz, *Blaming the Messenger*, NEWSWEEK, December 30, 1996, at 33 (classifying 1996 as a bad year for China, due to several factors including the missile crisis in the Taiwan Strait). *See generally* John Pomfret, *Business Takes Back Seat on China Trip; U.S. Firms Find Access at Low Ebb*, WASH. POST, June 26, 1998, at F01 (stating that government-to-government ties between the United States and China have improved since the 1989 crackdown on student-led protests in Tiananmen Square and the Taiwan missile crisis of 1996).

281. *See* Lucia Mouat, *Taiwan Looks for a Seat in the House of Nations,* CHRISTIAN SCI. MONITOR, August 25, 1994, at 7 (discussing how Taiwan has gained a much more democratic status in the eyes of the UN as well as the international sphere); *see also* Marilyn Greene, *Taiwan Campaigns for United Nations Status*, USA TODAY, September 17, 1993, at 4A (noting Taiwan's efforts to gain status in the U.N after two decades of exclusion); *Taiwan Offers $1 Billion to UN for Membership,* Telegraph, BALT. SUN, June 27, 1995, at 6A (discussing Taiwan's rigorous efforts to try and end its outcast status in the UN).

282. *See* Mouat, *supra* note 281 (stating that Taiwan's status is an important issue for the UN); *see also* Greene, *supra* note 281 (explaining that the issue of Taiwan's status is important to UN members). *But see* Wen-Yen Chen, *Earthquake Illustrates Importance of Recognizing Taiwan*, WASH. TIMES, October 2, 1999, at A-11 (recognizing the disappointment of Taiwanese-Americans at the fact that the UN waited to get China's approval before sending relief assistance to Taiwan after the massive earthquake of 1999).

283. *See* John Marks, *Taiwanization of SDI Allows the Dialogue to Continue*, L.A. TIMES, December 20, 1987, at 5 (providing an alternative definition to the concept of "Taiwanization"); *see also* Lena H. Sun, *Taiwan Election May Reflect Emerging Pride of a People; Opposition Turning Today's Vote into 'Taiwanization' Referendum,* WASH. POST, December 21, 1991, at A16 (explaining that the movement for "Taiwanization" began a decade ago and is indicative in Taiwan's electoral process). *See generally Voting in Taiwan is a Sign of Gains,* N.Y. TIMES, December 5, 1983, at 7 (explaining "Taiwanization" as bringing more native Taiwanese, who comprise 85 percent of the island's 18.5 million people, into positions of responsibility in the government and the ruling party).

tion of Chinese nationalism that the Chinese elite had held for decades.[284] Since the political division of the Chinese state in 1949, there has been no linkage between Taiwan and China and the population of Taiwan has developed a strong sense of self-identity belonging to their own society.[285] Although having been educated in Chinese politics through the political ideology that Taiwan should be part of China, the people of Taiwan generally do not identify themselves with China on an emotional level.[286] Meanwhile, the steady economic growth in the past two decades (due to free market principles and the increase in foreign trade) have given rise to the explicit desire for asserting Taiwanese interests economically.[287] In fact, the vast majority of the population of the Taiwanese population has already identified themselves as Taiwanese rather than Chinese in arguing that:

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284. *See* Sunny Goh, *Why China is So Testy with the West*, STRAITS TIMES (SINGAPORE), April 4, 1999, at 31 (stating that a storm of protests broke out not only in the mainland, but also among Chinese in Hong Kong and Taiwan as well); *see also* Teresa Poole, *Humiliating History Feeds an Obsession with Race—Hong Kong Handover,* INDEPENDENT (LONDON), Jan. 3, 1997, at 10 (discussing how Chinese nationalism is still a powerful mobilizing force). *See generally* Che-Fu Lee, *China's Perception of the Taiwan Issue,* 32 NEW ENG. L. REV. 695, 697 (1998) (questioning whether a peaceful reunification could be achieved by merely relying on age-old Chinese nationalism).

285. *See* Carolan, *supra* note 168, at 431 (discussing the history of Taiwan as showing that, while ethnically and culturally Taiwan may be said to be Chinese, the force of events has set the island and the mainland on different paths, providing a rationale for their current, continued separation); *see also* Daniel C.K. Chow, *Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan's Direct Participation in International Environmental Law Treaties,* 14 STAN. ENVTL. L.J. 256, 283 (1995) (stating that Taiwan adamantly refuses to submit to China's governmental authority); Zaid, *supra* note 184, at 808 (stating that recently, Taiwan has sought to stake out a position separate and distinct from that of China).

286. *See* Chung Huang, *One China Based on Fiction,* ATL. J. CONST., March 14, 2000, at 16A (recognizing that today Taiwan is a nation of 22 million free people who identify themselves as Taiwanese, not Chinese); *see also* Indira A.R. Lakshmanan, *Chinese, Taiwanese See a Reunion Through Diverging Lenses*, BOST. GLOBE, May 20, 2000, at A2 (citing the statement of a Taiwanese graduate student who regards Chinese not as brothers, but as enemies); Frank Langfitt, *Ocean of Difference Lie Across Taiwan Strait—Island Splits Over Chinese Heritage,* BALT. SUN, August 25, 1999, at 1A (recognizing that although the terms are not mutually exclusive, more and more identify themselves as "Taiwanese" rather than "Chinese" in public polls).

287. *See* Michael S. Bennett, *Unleashing a Tiger: Financial Deregulation in Taiwan,* 11 UCLA PAC. BASIN L.J. 1, 5 (1992) (discussing the small manufacturing companies that fuel Taiwan's export-driven economy that comprise eighty-five percent of the island's industrial sector); *see also* Lawrence L.C. Lee, *Integration of International Financial Regulatory Standards for the Chinese Economic Area: The Challenge for China, Hong-Kong, and Taiwan,* 20 NW. J. INT'L L. & BUS. 1, 17 (stating that the growth of Taiwan's financial market has evolved from Taiwan's stable economic environment during the past decades and how Taiwan's impressive economic performance stimulated the development of its financial sectors); Shin-Yi Peng, *Economic Relations between Taiwan and Southeast Asia: A Review of Taiwan's "Go South" Policy,* 16 WIS. INT'L L.J. 639, 647 (1998) (noting Taiwan's commitment to strengthen its economic ties with the other countries of this region and how, over the past 30 years, it has achieved the status of a dynamic region for economic growth).

> Chinese is a cultural or ethnic category, not a political category; the Taiwanese nation is not the same as the Chinese nation; Taiwanese are not Chinese, just as Americans are not British.[288]

Resulting from decades of China-ization policy from the 1940s to the 1970s, it cannot be ignored that there are some forms of shared identities between Taiwan and China in terms of ethnic identity, cultural homogeneity and linguistic unity.[289] However, the indigenous population of Taiwan does not desire to be identified as Chinese people and lacks the consciousness of being a Chinese people.[290] On the contrary, they would like to enhance their own political destiny and develop a distinctive economic, social and cultural system of their own.[291] In essence, the overwhelming majority of the Taiwanese people do not desire to be a part of China and prefer to be characterized as a people existing on their own identity—Taiwanese.[292]

These factors mentioned above are relevant to the reason why, regardless of the constant threats of force which they face from China, most Taiwanese still favor the status quo of continued autonomy rather than immediate reunification with China that remains under a dictator-

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288. *See* Keith B. Richburg, *Modern Taiwan Looks Inward for New National Identity,* WASH. POST, June 11, 1995, at A26 (recognzing the significance of deciding on a national identity); *Two Views of Monetary Park's Bilingual Dispute,* L. A. TIMES, Aug. 15, 1991 at 3 (stating that a substantial number (at least 50%) of "Chinese-Americans" prefer to be designated as "Taiwanese-Americans" instead and went to considerable pains to ensure that this classification won official recognition in the 1990 Census); *see, e.g., Letters to the Editor,* SAN. FRAN. CHRON., April 7, 1996 at 6 (stating the vast majority of those calling themselves "Taiwanese" are direct descendants of ethnic Chinese who moved to the island starting in the seventh century and the only true Taiwanese are the aborigines whose culture and civilization have existed on Taiwan since prehistory).

289. *See Two Views of Monetary Park's Bilingual Dispute, supra* note 288 (stating that a substantial number (at least 50%) of "Chinese-Americans" prefer to be designated as "Taiwanese-Americans" instead and went to considerable pains to ensure that this classification won official recognition in the 1990 Census).

290. *See Reunification,* DET. NEWS, August 29, 1999 at A18 (citing Chen, who with every threat China makes against Taiwan, states "I am Taiwanese, not Chinese."); *see also* Julie Schmit, *Despite Unification Dreams, Taiwan, China Worlds Apart Rich, Busy Island Forges Own Identity,* USA TODAY, August 26, 1999, at 10A (stating that 46% of Taiwan residents identified themselves as strictly Taiwanese). *See generally Survey Says Taiwanese Identity on the Increase,* CHINA NEWS, May 20, 1998 (finding that the number of those who still consider themselves "Chinese" has dropped to a record low, while the number identifying themselves as "Taiwanese" has surged compared to previous polls).

291. *See* Charney & Prescott, *supra* note 18, at 473 (discussing Taiwan's right of self-determination and the substantial ways in which their socioeconomic system and culture differ substantially from that of the mainland); *see also Bulldozers Demolish 44 South Military Village,* CHINA NEWS, May 5, 1999 (stating the Taipei City Government decided to restore part of Taiwan's first military village and turn it into a Military Cultural Village); *Poll- Economic Outlook Grim,* CHINA NEWS, February 22, 1999 (placing blame on barriers to developing their own systems on international economic factors and unsound systems).

292. *See* Valerie Epps, *Self-Determination in the Taiwan/China Context,* 32 NEW ENG. L. REV. 685, 692 (1998) (citing a recent poll in Taiwan, which said that if given the choice of gaining independence, maintaining the status quo or achieving unification, the majority opted for status quo); *see also* Fu, *supra* note 198, at 348 (stating that Taiwanese independence would operate against the wishes of the majority of Taiwanese resident who wish to maintain their de facto independence from China); Langfitt, *supra* note 286 (stating that since 1992, the percentage of those who say they are Chinese has dropped from 44 to about 13 while those who say they are Taiwanese have risen from 17 percent to about 39 percent).

ship.[293] Indeed, the achievement of democracy and prosperity in Taiwan has dramatically evolved into a new Taiwan value that could in turn have an influence on Chinese nationalism.[294] This evolution suggests that the growing identification with Taiwanese nationalism by the indigenous population of Taiwan would unambiguously create a new nationhood transcending Chinese nationalism.[295]

Nationalism is not synonymous with shared cultural, ethnic and linguistic identities, but with the sentiments of self-identity to be a group.[296] As Prof. P'eng Ming-Min suggested:

> [T]he most fundamental basis of the modern state is not ethnic, religious, or linguistic heritage but a sense of commonality—having the same destiny regardless of the ethnic identity. This is the most fundamental aspect of modern nationality, not one's ethnic group, but a common destiny. Even if different ethnic groups are together, people can be of the same nation

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293. *See* Epps, *supra* note 292 (stating that Taiwanese independence would operate against the wishes of the majority of Taiwanese resident who wish to maintain their de facto independence from China); *see also* James Harding, *Taiwanese Rulers Boosted in Elections,* FIN. TIMES (LONDON), Dec. 7, 1998, at A3 (asserting that the gap between the DPP and the KMT over the relationship with China has narrowed in recent years around a consensus in favor of the status quo—Taiwan's de facto independence); Wire Reports, *Taiwan Taking 'Dangerous Steps,' China Warns—President Lee Accused of Seeking Independence,* BALT. SUN, July 14, 1999, at 16A (stating that most Taiwanese favor the status quo of de facto independence from China).

294. *See* Robert Dole, *The Challenges To Peace And Prosperity in Asia,* TRADEWINDS, Sep. 8, 1997, at Business (recognizing that Taiwan's growing prosperity gives "unassailable testimony to the power of free markets to free any people from the circumstances of their birth"); *see also* Graham Hutchings, *Wind of Change Sends Shudders Through the Corridors of Power in Beijing Defiance of China by the Voters of Taiwan Has Opened a New Political Era,* DAILY TELEGRAPH (LONDON), Mar. 20, 2000, at 9 (stating democracy in Taiwan has involved an affirmation of "Taiwaneseness" and greater separation from the mainland in everything but trade and investment); Terence Tan, *Why China's Leaders Fear Full Democracy,* THE STRAITS TIMES (SINGAPORE), Sep. 17, 2000, at 23 (stating that Beijing thinks democracy will lead to the break-up of the country and threaten eventual reunification with Taiwan, says a Chinese scholar).

295. *See* Maurice Meisner, *China: The Volatile Ties With Taiwan—The Historical Basis For A Free Taiwan,* L. A. TIMES, Mar. 26, 2000, at 1 (discussing the future of Taiwan and how Chinese nationalism, at a minimum, demands "one China," including Taiwan.); *Taiwan Should Finance China Movement,* CHINA NEWS, Dec. 29, 1998, at News (recognizing that because of the lack of freedom and democracy in China, Taiwan must be more cautious in its dealings and endorsed Taiwan's so-called "Go Slow, Be Patient" policy while recognizing the island's political and economic development during the past 50 years); *see also Lee Issues National Day Address,* CHINA NEWS, Oct. 10, 1998, at News (citing President Lee Teng-hui issued a congratulatory message saying that Taiwan has completed its "quiet revolution" and has won worldwide acclaim because of its active promotion of constitutional reform, democracy and rule of law).

296. *See generally* Sarah Clift, *How Canada's Identity Is Tied to Kosovo's War,* TORONTO STAR, May 10, 1999, at News (stating there are no general values to which the nationalist subscribes—all cultural, linguistic, or historical values are, for him, dictated by that which they are not); Pankaj Mishra, *India Needs More Than Muscle to Attain Greatness,* HOUSTON CHRONICLE, Sept. 20, 2000 at 37 (discussing how the Hindu nationalists remain attached to a stern 19th-century idea of nationalism, which dilutes traditional social and cultural diversity and replaces it with one people, one culture and one language). *See id.* The author discusses how Hindu nationalists remain attached to a stern 19th-century idea of nationalism, which dilutes traditional social and cultural diversity and replaces it with one people, one culture and one language.

> because they share a common destiny. But without it, even if the people are of the same ethnic group, they cannot have that commonality.[297]

Concerning the definition of the term "people" for the right to self-determination, territorial connection and common economic life would indeed be critical criteria for identifying a people for purposes of self-determination.[298] Accordingly, this contemplates the facts that: 1) the vast majority of the inhabitants of Taiwan prefer to be characterized as a people with the term "Taiwanese" rather than "Chinese"; 2) the vast majority of the inhabitants of Taiwan have the consciousness of being a people with the term "Taiwanese"; 3) the inhabitants of Taiwan has its own common economic life differing from that of the people of mainland China; 4) the inhabitants of Taiwan are indigenous to a territory under the control of the government by their free choice not by China's authority; 5) the population of Taiwan are a large and complete society with a population of over twenty-two million, there is no doubt that the inhabitants of Taiwan are a distinct people from Chinese people.[299]

VII. Commentary

In the discussion above, it has been shown that the concept "all peoples have the right to self-determination" in international law refers to the colonial context. The internal aspect of self-determination has not been recognized as a universal right but as a principle that the world community is not necessarily obliged to provide its responsibility or recognition in response.[300]

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297. *See generally* Kevin Baxter, *Around the Dial; Radio; New Frontiers; After Helping Foster Spanish-Language Market, Liberman Adds Chinese, Vietnamese Programs* L.A. TIMES, Sept. 11, 1997, at 22 (discussing commonalties, including culture and the commonality of religion); *Times Poll On American Jews,* L. A. TIMES, Apr. 24, 1988, at 4 (discussing commonalties, including culture and the commonality of religion); Wilson, *supra* note 40, at 438 (recognizing that certain groups of people languages, religions, cultures and other characteristics — gender, occupation, political ideology, sporting activity, and so on and that ethnic group identity becomes intensely important and exclusive).

298. *See* Iorns, *supra* note 23, at 288 (noting that, in the context of self-determination, the ordinary meaning of "people" relates to "a specific type of human community sharing a common desire to establish an entity in order to ensure a common future."); *see also* Lloyd, *supra* note 42, at 434 (discussing how the problem of identifying or designating the "peoples" to whom the right to self-determination has accrued still remains). *See generally* Jill C. Watson, *Self-Determination Of Peoples And Polities,* 86 AM. SOC'Y INT'L L. PROC. 369, 393 (1992) (stating that self-determination is not simply dependent on the choice of the indigenous people but also on more precise criteria tied to the underlying purposes served by the right).

299. *See* Chang & Lim, *supra* note 170, at 428 (concluding that the international community is largely uninformed about Taiwan's democratic changes and the UN membership aspirations of its 21 million people); *see also* Shen, *supra* note 6, at 1127 (stating that there are about 21 million permanent residents in the province of Taiwan). *See generally* Chow, *supra* note 285, at 264 (stating that Taiwan illustrates the costs of the Asian economic "miracle" and now among the wealthiest nations in the world, Taiwan has achieved its success, today with twenty-one million people crowding the small island).

300. *See* Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-Determination? Self- Determination, Group Accommodation, And The Belfast Agreement*, 22 FORDHAM INT'L L.J. 1345, 1347 (1999) (stating that "[s]elf-determination is essentially a right of peoples. . . . It is peoples as such which are entitled to the right to self-determination"); *see also* Hill, *supra* note 148, at 126 (noting that the 1970 Declaration extends the right of self-determination beyond the realm of traditional colonial domination and recognizes that in some situations groups suffering oppression within an independent state may have the right to seek self-determination). *See generally* James A.R. Nafziger, *The Use Of Force In The Post-Cold War Era Self-Determination And Humanitarian Intervention In A Community Of Power*, 20 DENV. J. INT'L L. & POL'Y 9, 167 (1991) (stating that by the international community supporting movements for internal self-determination, it can potentially avoid the disruption that often accompanies movements for external self-determination).

Whether or not a particular group is entitled to self-determination, it should be judged by an international political process on a case-by-case basis. In essence, the principle of self-determination itself does not provide a right which automatically attaches to whoever claims it.[301] In that regard, if Taipei is less ambiguous on its alleged "One China Policy" so that the international community is convinced that it is not necessary for Taiwan to become a part of China, it would otherwise be harder for Taipei to gain significant recognition for its self-determination movement.[302] This is because the international principle China has created international confusion, giving a misleading impression that there is no need for the people of Taiwan to implement the external self-determination on the unwarranted assumption that Taiwan is part of China and that this is acceptable to the people of Taiwan.[303]

Even though the indigenous population of Taiwan are qualified as a people in the self-determination context, it is foreseeable that the world community will not readily respect the exercise of self-determination by the people of Taiwan on the external aspect.[304] In this regard, the implication is that any move by the indigenous people of Taiwan toward external self-determination would be subject to political negotiations between Taipei and Beijing.[305] Thus, the

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301. *See* Ryser, *supra* note 67, at 154 (recognizing the principle of self-determination as unique in that it is a recognized collective right within the realm of international law); *see also* Simpson, *supra* note 12, at 285 (stating that the reserve domain of sovereign states no longer automatically includes an exclusive right to deal with the internal claims of its peoples to self-determination). *See generally* Iorns, *supra* note 23, at 345 (discussing the characteristics associated with the term self-determination).

302. *See Clinton China Trip Fuels The Fears: Foreign Relations By Laura Tyson: There Are Concerns That The U.S. Is Carrying Out a Secret Dialogue With the Mainland*, FINANCIAL TIMES (London), Oct. 12, 1999, at 2 (citing Mr. Yang who stated "Taiwan can only take the moral approach that we are a democracy now, and as such we should be entitled to self-determination"); *see also* Joseph S. Nye Jr., *A Taiwan Deal*, WASHINGTON POST, Mar. 8, 1998, at C07 (discussing a three-part package could preserve these freedoms in Taiwan while reducing the significant risks in the present circumstances). *See generally* Edward A. Gargan, *Taiwan Pushes to Rebuild Its Position in Global Community*, N.Y. TIMES, June 26, 1994, at 8 (stating that in promoting its claims for renewed international recognition, Taiwan has trumpeted its democratic politics, its free markets and its growing economic influence, fueled by Taiwan's substantial investments in the region).

303. *See* Chen, *supra* note 167, at 227 (stating that the world community must recognize its responsibility to uphold basic tenets of international law and both challenge and resist China's coercive tactics aimed at denying Taiwan recognition as a sovereign nation-state); *see also* Shen, *supra* note 9, at 1139 (discussing that the international community recognizes the persistent Chinese position that, throughout history, Taiwan has been an inalienable part of China); *Cabinet Holds Mainland Meeting,* CHINA NEWS, Nov. 3, 1998, at News (stating that both sides of the strait are equally deserving of respect without one excluding the other).

304. *See* Chen, *supra* note 167, at 227 (stating that the world community must recognize its responsibility to uphold basic tenets of international law and both challenge and resist China's coercive tactics aimed at denying Taiwan recognition as a sovereign nation-state); *see also* Shen, *supra* note 9, at 1139 (discussing reasons why the international community sees Taiwan as a part of Taiwan).

305. *See* Ching Cheong, *Is China and Taiwan Headed For War? Look Up This Checklist,* STRAITS TIMES (SINGAPORE), Aug. 21, 2000, at 45 (stating that the Centre for Nonproliferation Studies (CNS) of the Monterey Institute of International Studies that runs this project hopes to identify both trends and incidents that could bring Beijing, Taipei and Washington into a war situation and find ways to avoid such a crisis); *see also* Tozzi, *supra* note 172, at 1243 (discussing the detailed 1994 White Paper revisions made to the Republic of China's traditional "One China" policy); Linda Jakobson, *The Taiwan That Beijing Doesn't Want To See,* WASHINGTON POST, Mar. 12, 2000, at B01 (stating that the question of Taiwanese national identity evokes excruciating anxiety in the People's Republic of China, spelled out in a white paper issued by the Communist government last month discussing Beijing's and Taipei).

key to mobilizing the right of the Taiwanese people to external self-determination is to find an effective procedure under agreement by the two sides of the Taiwan Strait.[306]

However, if Beijing carries out a forcible integration of Taiwan by claiming the area to be an integral part of its territory (as was the case in the Moroccan occupation of Western Sahara as well as the Indonesian occupation of East Timor), there is no doubt that the implication of the right to external self-determination of Taiwan's indigenous population subjected to China's military occupation will become "ripe" to gather international momentum.[307] Any hostile military action by China would be identified as an act of aggression against the will of the Taiwanese people and armed conflict would affect the maintenance of international peace and security.[308] The recent case of Kosovo has especially set the precedent that even a domestic ethnic conflict cannot be resolved by forcible means because it would engage international responsibility.[309]

VIII. Conclusion

With impressive political transformation and economic growth, the people of Taiwan deserve the rights to form their own political entity even though they live beside China who is

306. *See* Chen, *supra* note 15, at 676 (stating that in reality, Taiwan has existed as a sovereign, independent country for more than forty years and that the question today is whether to recognize Taiwan as an independent state in name, as well as in fact); *see also* Michael J. Kelly, *Political Downsizing: The Re-Emergence Of Self-Determination, And The Movement Toward Smaller, Ethnically Homogenous States,* 47 DRAKE L. REV. 209, 226 (1999) (discussing external self-determination and how most countries recognize the People's Republic of China over Taiwan). *See generally BOOK NOTES: The New GATT: Implications For The United States, Edited By Susan M. Collins And Barry P. Bosworth. Washington, D.C.,* 28 GW J. INT'L L. & ECON. 753, 753 (1995) (discussing Taiwan's economic growth and the difference between external and internal self-determination).

307. *See* Charney & Prescott, *supra* note 18, at 495 (discussing the 1940s and 50s relationship between Beijing and Taiwan saying that the peace treaties that placed the island's population under Beijing's control would violate the doctrine of self-determination, at least as it later came to be understood); see also Lee, supra note 284, at 695 (discussing Beijing's use of military threat against Taiwan). *See generally* Chang & Lim, *supra* note 170, at 424 (stating that it was the pro-independence DPP that first argued for Taiwan's pursuit of de jure independence, if not an end to the KMT's own "One China" policy, to counter Beijing's alarming diplomatic isolation tactics against the island).

308. *See* Kiyotaka Shibasaki, *G-8 Calls For Global Partnership Digital Divide, GMO Threat, Armed Conflicts Highlighted,* THE DAILY YOMIURI (TOKYO), July 24, 2000, at 1 (emphasizing the need to nurture a "culture of prevention" to prevent armed conflicts from breaking out around the world relating it to Taiwan and China as well as other areas); *see also* Felix Soh, *Bad News: Tension In N.E. Asia, Good News: Dialogues Going On* THE STRAITS TIMES (SINGAPORE), June 14, 1996, at 4 (stating that the greatest threats to the security of Asia are the cross-strait tension between China and Taiwan). *Compare War Games,* THE TIMES-PICAYUNE, Mar. 13, 1996, at B6 (stating that no one seriously expects China to attack Taiwan, but Taiwan's delicate position in international relations allows room for alarums and excursions at China's will).

309. *See* Mertus, *supra* note 92, at 1743 (discussing how international policymakers were overwhelmingly aware that the pressure in Kosovo was mounting and that an even greater human rights disaster loomed near). *See generally* Walter Gary Sharp, Sr., *Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Military Force to Defend Kosovo,* 23 MARYLAND. J. INT'L L. & TRADE 295 (1999) (discussing NATO's role in the Kosovo crisis and the support of the international community); William Drozdiak, *Nato Will Send 20,000 More Troops To Balkans—Leaders Won't Rule Out Kosovo Invasion If Mediation Fails*, THE PLAIN DEALER, May 26, 1999, at 1A (stating that NATO allies approved plans to send more than 20,000 additional troops to Macedonia and Albania as part of a peacekeeping force that will await orders to move into Kosovo and help ethnic Albanian refugees return to their homeland).

undoubtedly a more powerful nation that considers the issue differently.[310] Now, it is conceivable that the principle of non-colonial self-determination could be more generally accepted by the international community (as in the case of former Yugoslavia or the former Soviet Union). The people of Taiwan should deserve an equal chance for determining its own future. Therefore, the international community should pave a way for the Taiwanese people so that the indigenous people of Taiwan could achieve what they desire rather than what the authorities of Beijing plan for them.

As noted above, self-determination is not only an outcome of independence but it is also a process to present the legitimate will and aspirations of the people. Regarding the specific situation of Taiwan, the world community does not need to withhold an affirmative response to Taiwan's self-determination movement until an armed conflict occurs. On the contrary, the world community needs to explicitly declare the necessity of an international process to prevent the potential conflict of Taiwan's self-determination movement and recognize the right of the Taiwanese people to self-determination. To cooperate with this external aspect of self-determination in Taiwan would be more likely to contribute to a satisfactory solution. A commitment would also reconcile the divergent opinions on Taiwan's status between the two sides of the Taiwan Strait if there existed a well-defined procedure for exercising a choice that can be adopted through negotiation, commitment, or agreement by both sides of the Taiwan Strait. Since self-determination itself is not an answer but an ongoing process, the feasibility of a potential outcome cannot be confined to the level of the "independence-reunification" dichotomy.[311] If the way of implementing self-determination is based on the will of the Taiwanese people, the free choice of the people of Taiwan should be respected and recognized internationally whether or not it is for an independent state.

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310. *See* Eva Chen, *DGBAS Will Not Revise Upward Taiwan's Annual Economic Growth: Official,* CENTRAL NEWS AGENCY (Taiwan), Apr. 26, 2000, at News (stating that economic growth in Taiwan will be supported by robust foreign trade, rosy domestic consumption and increasing private investment, according to officials of the Taiwan Institute of Economic Research). *See generally* Herman Pan and Angel Liu, *IMF Says Taiwan's Economic Growth Will Reach 4.9% In 1998*, CENTRAL NEWS AGENCY (Taiwan), Dec. 22, 1998, at News (stating that Taiwan's economic growth will likely reach 4.9 percent in 1998, the third highest of 28 developed countries); *Taiwan Economic Growth Was Fifth-Highest In World In Past 11 Years,* DEUTSCHE PRESSE-AGENTUR, Mar. 16, 1997, at Financial Pages (noting Taiwan's rate of economic growth as the world's fifth-highest in the past 11 years but has begun to slow down).

311. *See* Cavanaugh, *supra* note 300 ("[s]elf-determination is essentially a right of peoples. . . . It is peoples as such which are entitled to the right to sefl-determination"); *see also* Hill, *supra* note 148, at 126 (stating that the 1970 Declaration extends the right of self-determination beyond the realm of traditional colonial domination and recognizes that in some groups suffering oppression within an independent state may have the right to seek self-determination). *See generally* Nafziger, *supra* note 300 (stating that by the international community supporting movements for internal self-detemination, it can potentially avoid the disruption that often accompanies movements for external self-determination).

Georgia-Pacific Corporation v. Multimark's International, Ltd.

265 A.D.2d 109 (1st Dep't 2000)

The New York Supreme Court, Appellate Division Held That Defendant's Use of a New York Bank to Conduct Substantially All of its Business Created a Constructive Presence Which Was Sufficient to Warrant the Exercise of Jurisdiction and That the Forum Was Not Inconvenient Since Key Witnesses and Documents Were Located in New York.

The 1992 holding by the United States District Court for the Southern District of New York that personal jurisdiction over a foreign corporation could rest solely on a bank account in New York alarmed the banking community.[1] This led to the belief that unless this decision was corrected by an immediate appeal, it would be a threat to New York's viability as a financial center and that New York banks would suffer a significant loss of deposits.[2]

In *Georgia-Pacific Corporation v. Multimark's International, Ltd.*,[3] the New York State Supreme Court, Appellate Division, First Department, held not only that Georgia-Pacific Corporation's ex parte order of attachment[4] was properly confirmed, but also that Republican's cross-motion to dismiss on the grounds of lack of personal jurisdiction and forum non conveniens was properly denied.[5]

Multimark's International, Ltd. (hereinafter "Multimark") is headquartered in and organized under the laws of the British Virgin Islands. It purchased pulp products from Georgia-Pacific Corporation ("Georgia-Pacific") for resale to third parties in various Latin American

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1. *See* United Rope Distributors v. Kimberly Line and Kimsail Ltd., 785 F. Supp. 446 (S.D.N.Y. 1992).

2. *See* Herbert M. Lord and Harold J. Bacon, *International Decisions*, 87 AM. J. INT'L L. 295, 296-97 (1993).

3. 265 A.D.2d 109 (1st Dep't 2000) [hereinafter "Georgia-Pacific"].

4. *See* Aekyung Co. v. Intra & Co., 2000 U.S. Dist. LEXIS 100 at *3 (2000) (noting that under CPLR 6201(3), a party is entitled to an ex parte order of attachment upon demonstrating that:

   (1) it has stated a claim for money judgment;

   (2) it has a probability of success on the merits;

   (3) the defendant "with intent to defraud his creditors to frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts"; and

   (4) the amount demanded from the defendant is greater than the amount of all counterclaims known to the party seeking attachment.)

   See also Bank Leumi Trust Co. v. Istim, Inc. 892 F. Supp. 478, 481-82 (S.D.N.Y. 1995) (stating that once the ex parte order of attachment is issued, the party obtaining the attachment, on a motion to confirm made on notice to the party whose property is subject to the attachment, must once again demonstrate that the foregoing requirements are met, and also demonstrate a need for continuing the levy); *see* Dillon v. Schiavo, 495 N.Y.S.2d 197, 198 (2d Dep't 1995) (noting that upon a motion to confirm an ex parte order of attachment, the plaintiff is required to establish the grounds for the attachment, the need for continuing the levy and the probability he will succeed on the merits).

5. *Georgia-Pacific*, 265 A.D.2d at 112-13.

countries.[6] Georgia-Pacific, a Georgia corporation with its principal place of business in Atlanta, filed a breach of contract action against Multimark, alleging that Multimark owed Georgia-Pacific $822,599.10. Multimark acknowledged its debt for that amount but had no funds available to pay.[7]

Georgia-Pacific filed a complaint against Multimark in the Supreme Court, New York County and obtained an ex parte order of attachment of Multimark's assets in New York, specifically Multimark's account maintained at Bank Audi.[8] Upon learning that Multimark's account did not contain sufficient funds to pay the debt, Georgia-Pacific filed an amended complaint to include as a defendant Republican Ltd. ("Republican"), on the grounds that it was Multimark's alter ego and that the two companies had conspired to avoid the order of attachment.[9]

Georgia-Pacific obtained an ex parte order against Republican's New York assets and then moved to confirm the two orders of attachment.[10] Republican cross-moved to dismiss the action against it on the grounds of lack of personal jurisdiction[11] and forum non conveniens.[12]

Republican is a Panamanian corporation with its principal place of business located in Sao Paulo, Brazil.[13] Most of Republican's business involves buying products from Korean and Uruguayan companies and reselling them in Latin America.[14] Republican is not permitted to do business nor does it solicit business or have any employees in New York. However, Republican maintains an account at Bank Audi in New York to receive payments and pay its suppliers.[15]

The court first addressed Republican's claim of lack of personal jurisdiction. Republican argued that because it conducted no business in New York, it was not subject to personal jurisdiction in New York.[16] The First Department affirmed the trial court's denial of Republican's

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6. *Id*. at 111.

7. *Id.*

8. *Id.*

9. *Georgia-Pacific*, 265 A.D.2d at 111.

10. *Id.*

11. *See* Joseph v. Siebtechnik, G.M.B.H., 172 A.D.2d 1056, 1056 (4th Dep't 1991) (holding that on a motion to dismiss for lack of personal jurisdiction pursuant to CPLR 3211(a)(8), plaintiff has the burden of establishing the fact of jurisdiction); *see also* Brown v. Blum, 1999 N.Y. Misc. LEXIS 361 at *5 (1999) (noting that the law is clear that the burden of proving jurisdiction is upon the party who asserts it).

12. *See* Sambee Corp. v. Moustafa, 216 A.D.2d 196, 198 (1st Dep't 1995) (noting that the doctrine of forum non conveniens permits a court to stay or dismiss actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere); Brian A. Waldbaum, *Defusing New York's 120-Day Time Bomb: The Meaning of New C.P.L.R. 306-B,* 20 CARDOZO L. REV. 1091, 1113-14 (1999) (stating that the doctrine of forum non conveniens permits a court having jurisdiction over an action to refuse to exercise its jurisdiction when the litigation could be brought more appropriately in another forum).

13. *Georgia-Pacific,* 265 A.D.2d at 111.

14. *Id.*

15. *Id.*

16. *Id.*

cross-motion to dismiss for lack of personal jurisdiction.[17] The First Department concluded that a single bank account in New York does not constitute doing business in a state so as to subject a person to personal jurisdiction.[18] However, the court went on to hold that the use of a bank account "for substantially all of its business expenses" does subject a defendant to personal jurisdiction.[19] The court also concluded that Republican took advantage of New York laws for its benefits and protections on a continuous basis, which resulted in an establishment of a constructive presence within the state.[20]

Based on these findings, the court concluded that there was sufficient evidence to warrant its exercise of jurisdiction over Republican. The First Department did not reach the question whether Republican was the alter ego of Multimark because it found that New York was justified in exercising personal jurisdiction over Republican.[21]

The First Department then addressed Republican's motion to dismiss on the grounds of forum non conveniens. The First Department again affirmed the trial court's ruling holding that it was proper to deny Republican's motion to dismiss because significant events took place or would take place in New York.[22] Among those dealings were making payments to Georgia-Pacific's account at a New York bank, Multimark's using its account at Bank Audi in New York as a clearing agent to effect those payments, and the alleged Republican and Multimark conspiracy to reroute funds from Multimark's accounts by instructing Multimark's customers to mail their payment to Republican's account at the same bank.[23]

The court concluded that key witnesses and documents were located in New York[24] and that this type of dispute was frequently resolved by courts of this department and therefore

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17. *Id.* at 112.

18. *Georgia-Pacific*, 265 A.D.2d at 112; *see* Fremay, Inc. v. Modern Plastic Mach, 15 A.D.2d 235, 241 (1st Dep't 1961) (noting that the existence of a bank account in New York by itself is not sufficient to establish personal jurisdiction).

19. *See* United Rope Distributors v. Kimberly Line and Kimsail Ltd., 785 F. Supp. 446, 450 (S.D.N.Y. 1992) (noting that a company that receives the entirety of its charter hire payments and those used to pay the wages of its crew and other expenses is considered to be doing business within a state); *see also* Holtzman v. Lauder, 1994 U.S. Dist. LEXIS 2837 at *11-12 (S.D.N.Y. 1994) (noting that where a bank account was used for the receipt of substantially all of the income of the business and payment of substantially all of its expenses, the foreign corporation was conducting its business through the New York account); *see* Landoil Resources v. Alexander & Alexander Serv., 77 N.Y.2d 28, 35-36 (1990) (noting that because the fund is not used merely to facilitate underwriting of New York risks, but rather is a functional predicate insuring New York customers of risks suffices to support a finding that this is "doing business" in New York).

20. *Georgia-Pacific*, 265 A.D.2d at 112; *see also* Laufer v. Ostrow, 55 N.Y.2d 305, 310 (1982) (holding that when there are activities of substance in addition to solicitation there is presence and, therefore, jurisdiction).

21. *Georgia-Pacific*, 265 A.D.2d at 112.

22. *Id.*

23. *Id.*

24. *Georgia-Pacific*, 265 A.D.2d at 112; *see* Waterways Limited v. Barclays Bank, 174 A.D.2d 324, 328 (1st Dep't 1991) (noting that a factor justifying a court's decision to retain an action in New York is that key documents are presently located in New York).

would not impose a major burden on New York courts.[25] Finally, the court stated that no other forum would be more convenient than New York, because the three parties were organized under different laws and headquartered in different fora.[26] The First Department therefore affirmed the trial court's order granting Georgia-Pacific's motion to confirm an ex parte order of attachment and denying Republican's cross-motion to dismiss the action.

CPLR 327(a) permits a court to dismiss any action if it finds that "in the interest of substantial justice the action should be heard in another forum. . . ."[27] The New York Court of Appeals has held, however, that the availability of an alternative forum is not an absolute precondition to dismissal.[28] The Third Department held that a trial court must first determine its personal jurisdiction over a defendant before undertaking a forum non conveniens analysis.[29] Additionally, several significant decisions by the First Department make it clear that a plaintiff's choice of forum should not be disturbed absent other factors that strongly favor the defendant.[30] In three other cases, the Appellate Division reversed Supreme Court decisions to grant dismissal of actions on an inconvenient forum for causes of action that arose in New Jersey,[31] Bermuda[32] and Jamaica.[33]

The decision of the Appellate Division in this case appears to be consistent with the precedents that exist regarding constructive presence in personal jurisdiction matters. Georgia-Pacific appears to continue the expansion of personal jurisdiction based on the doing business standard. This added to the dismay among foreigners with bank accounts in New York and

25. *Georgia-Pacific,* 265 A.D.2d at 112; *see* Sambee Corp. v. Moustafa, 216 A.D.2d 196, 198 (1st Dep't 1995) (stating that a "basic commercial dispute is of the type resolved in the Courts of this Department on a frequent basis, therefore, the burden of this action on the State's courts is minor").

26. *Georgia-Pacific*, 265 A.D.2d at 112.

27. 480 N.Y. C.P.L.R. 327 (McKinney 1992).

28. *See* Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597, *cert. denied*, 469 U.S. 1108 (1985).

29. *See* I.F.S. Int'l, Inc. v. S.L.M. Software, Inc., 174 A.D.2d 811, 570 N.Y.S.2d 745 (3d Dep't 1991) (holding that doctrine of forum non conveniens has no application unless state court has first obtained personal jurisdiction over defendant).

30. *See* Cadet v. Short Line Terminal Agency, Inc., 173 A.D.2d 270, 569 N.Y.S.2d 662 (1st Dep't 1991) (stating that although residence of plaintiff is not sole determining factor on forum non conveniens motion, it is generally the most significant factor in the equation); *see also* Waterways Ltd. v. Barclays Bank, PLC, 174 A.D.2d 324, 571 N.Y.S.2d 208 (1st Dep't 1991) (stating that unless balance is strongly in favor of defendant, plaintiff's choice of forum should rarely be disturbed by motion made on grounds of forum non conveniens).

31. *See* Mejia v. Car Trucking, Inc. 176 A.D.2d 592, 575 N.Y.S.2d 35 (1st Dep't 1991) (wrongful death action arising from automobile accident in New Jersey but both decedent and allegedly negligent defendant were New York residents).

32. *See Waterways Limited*, 174 A.D.2d 324, 571 N.Y.S.2d 208 (1st Dep't 1991) (holding that dismissal on forum non conveniens grounds improper even though all activities occurred in Bermuda because loan agreement and note were executed in New York and provided that New York law governed and note was payable in New York).

33. *See* Bekrot v. National Car Rental, 175 A.D.2d 80, 573 N.Y.S.2d 171 (1st Dep't 1991) (finding that the trial court abused its discretion in dismissing, on CPLR 327 grounds, action brought by New York passenger of rental vehicle involved in accident in Jamaica against New York husband of driver).

among those New York institutions that service such accounts,[34] which began with the Federal District Court's holdings in the *United Rope Distributors*[35] *and Holtzman*[36] cases. These decisions illustrate the trend of recognizing a plaintiff's choice of forum absent undue hardship on the defendant.

Melissa C. Ingrassia

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34. *See* George B. Reese, *Conflict of Laws,* 44 SYRACUSE L. REV. 167, 173 (1993).

35. *See* United Rope Distributors v. Kimberly Line and Kimsail Ltd., 785 F. Supp. 446 (S.D.N.Y. 1992).

36. *See* Holtzman v. Lauder, 1994 U.S. Dist. LEXIS 2837 (S.D.N.Y. 1994).

Credit Agricole Indosuez v. Rossiyskiy Kredit Bank

94 N.Y.2d 541 (2000)

A Preliminary Injunction by a Foreign Banking Institution in a Pure Contract Money Action Can Not Be Used to Restrain a Debtor's Asset Transfers That Would Allegedly Defeat Satisfaction of Potential Judgments.

In *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*,[1] the Court of Appeals of New York held that, in an international debt collection case, a preliminary injunction could not be used to restrain a debtor's asset transfers that would allegedly defeat satisfaction of any potential judgment in a pure contract money action.[2]

Rossiyskiy Kredit Bank is a Russian banking institution and Rossiyskiy Kredit Securities PV is its Dutch subsidiary (hereinafter, collectively, "Rossiyskiy").[3] Credit Agricole Indosuez and two other foreign banks (collectively "Plaintiffs") formed a syndicate that purchased approximately $200 million of first series debentures from Rossiyskiy in 1997.[4] The parties agreed that in the event of default New York State courts would have jurisdiction and New York State law would govern in any such action.[5]

Rossiyskiy suffered financially as a result of the economic crisis in Russia and defaulted on an interest payment on the debentures due March 29, 1999.[6] Plaintiffs subsequently exercised their right to accelerate the entire principal and interest on those debt securities owed.[7] Rossiyskiy did not contest the issue of default.[8]

Plaintiffs filed claims against Rossiyskiy to recover the full amount of principal and interest due under the debentures.[9] Their complaint set forth two causes of action on the debts.[10] In a third cause of action, they alleged that Rossiyskiy was insolvent and as a result, owed a fiduciary duty to preserve assets for general creditors; that the defendants had breached their fiduciary duty by transferring Rossiyskiy's principal assets to a third party, thus stripping Rossiyskiy of the means necessary to satisfy any judgment awarded plaintiffs; and that they are entitled to permanent injunctive relief to protect their expected monetary award.[11]

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1. 94 N.Y.2d 541 (2000) [hereinafter "*Indosuez*"].
2. *Indosuez*, 94 N.Y.2d at 545, 552.
3. *Id.* at 543.
4. *Id.*
5. *Id.* at 543-44.
6. *Id.* at 544.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* Rossiyskiy had transferred its branch network and clientele to Impexbank, another Russian banking institution. *Id.*

Simultaneously with the commencement of the action, plaintiffs moved for an order of attachment and a temporary injunction against defendants' further transfer of assets.[12] The Supreme Court granted both of those motions.[13] The Appellate Division affirmed in all respects,[14] then granted leave to appeal to the Court of Appeals on the certified question of the propriety of that affirmance.[15] The Court of Appeals reversed the grant of the injunction.[16]

Plaintiffs asserted that they were entitled to the provisional remedy of a preliminary injunction as set forth in CPLR 6301.[17] They argued that Rossiyskiy would dispose of its property with the intent to defraud, thus becoming judgment proof.[18] The Court of Appeals followed the established New York law, holding that, in a "pure contract money action," there is no right of the plaintiff in some specific subject of the action, thus no pre-judgment right to exercise control over the defendant's property.[19] The court held that it could not grant injunctive relief where it would go beyond the "traditional principles of equity jurisdiction."[20]

Plaintiffs contended that the increased globalization of capital markets, New York's prominent position in those markets and the advances in technology facilitating ever faster transfer of funds warranted an expansion of the application[21] of CPLR 6301.[22] The court disagreed,

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12. *Id*.

13. Indosuez v. Rossiyskiy Kredit Bank 271 A.D.2d 341 (1st Dep't 1999). Among other things, the preliminary injunction prohibited defendants from "(1) dissipating, transferring, conveying or otherwise encumbering their assets and (2) taking steps in furtherance of [Rossiyskiy's] alliance with Impexbank." *Indosuez*, 94 N.Y.2d at 544.

14. Indosuez v. Rossiyskiy Kredit Bank, 265 A.D.2d 257 (1st Dep't 1998).

15. *Indosuez*, 94 N.Y.2d at 544.

16. *Id.* at 551.

17. N.Y. C.P.L.R. 6301 (Consol. 1999). The pertinent portion of 6301 states:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

N.Y. C.P.L.R. 6301 (Consol. 1999).

18. *Indosuez*, 94 N.Y.2d at 545.

19. *Id.* at 545-46. The court relied upon well-settled law, established by *Campbell v. Ernest*, 64 Hun 188 (1892). The court in *Campbell* held that a preliminary injunction is unavailable to a plaintiff in a pure monetary action when the plaintiff avers that the defendant will dispose of its property during the proceedings. *Campbell*, 64 Hun at 192.

20. *Indosuez*, 94 N.Y.2d at 545 (quoting Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-19 (1999)).

21. Plaintiffs did not concede that the law needed to be expanded to apply in the case at bar. *Id*. at 545-50. It was their contention that, among other things, *Campbell* was decided prior to the enactment of CPLR 6301, and the enactment of the statute was intended to liberalize the traditional equity principle of injunctive relief. *Id*. at 547. The court rejected this argument, citing the legislative history, which tended to show that CPLR 6301, if anything, was intended to be more restrictive. *Id.* (citing *Third Preliminary Report of the Advisory Committee on Practice and Procedure*, 1959 NY Legis. Doc. No. 17, at 150).

22. *Indosuez*, 94 N.Y.2d at 550.

noting that the widespread use of preliminary injunctions would "drastically unbalance existing creditors' and debtors' rights . . . and substantially interfere with the sovereignty and debtor/creditor/bankruptcy laws of, and the rights of interested domiciliaries in, foreign countries."[23] The court expressed fears that, even with the utmost discretion and restraint, expansion of the preliminary injunction doctrine would produce uncertain results, which the current application of the rule seeks to avoid.[24]

Plaintiffs sought to have the court follow the lead of the English Courts, which, since *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*,[25] have expanded the applicability of pre-judgment injunctions in both domestic and international actions.[26] Furthermore, the First,[27] Second,[28] Third,[29] Seventh,[30] Eighth,[31] Ninth,[32] Tenth,[33] and District of Columbia[34] circuits had previously all allowed for preliminary injunctions similar to those allowed in *Mareva*.[35] Just as the Supreme Court rejected the *Mareva* approach taken by several of the circuits,[36] so to did the Court of Appeals in New York.[37]

One can conclude that the court sought to protect the reliance of the parties upon established law.[38] The court stated that matters of drastic innovation are in the charge of the legisla-

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23. *Id*.

24. *Id.* at 551.

25. 2 Lloyd's Rep. 509 (C.A. 1975); *See* Nippon Yusen Kaisha v. Karageorgis, 1 W.L.R. 1093 (C.A. 1975). The *Mareva* decision is credited with being the leading case in the expansion of the application of pre-judgment injunctions, despite the fact that both *Mareva* and *Kaisha* were decided contemporaneously. *See* James R. Theuer, Comment, *Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England's Lead?,* 25 N.C.J. INT'L LAW & COM. REG. 419, 423 n.19 (2000).

26. *See* James R. Theuer, Comment, *Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England's Lead?*, 25 N.C.J. INT'L LAW & COM. REG. 419, 421(2000).

27. *See* Teradyne, Inc. v. Mostek Corporation, 797 F.2d 43 (1st Cir. 1986).

28. *See* Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688 (2d Cir. 1998), *rev'd* 527 U.S. 308 (1999).

29. *See* Hoxworth v. Blinder, Robinson & Company, Inc., 903 F.2d 186 (3d Cir. 1990).

30. *See* Roland Machinery Company v. Dresser Industries, Inc., 747 F.2d 380 (7th Cir. 1984).

31. *See* Airlines Reporting Corporation v. Barry, 825 F.2d 1220 (8th Cir. 1986).

32. *See* Reebok International, Ltd. v. Marnatech Enterprises, Inc., 970 F.2d 552 (9th Cir. 1992).

33. *See* Transmission Association, Inc. v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986).

34. *See* Foltz v. U.S. News & World Report, 760 F.2d 1300 (D.C. Cir. 1985).

35. *See* James R. Theuer, Comment, *Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England's Lead?*, 25 N.C.J. INT'L LAW & COM. REG. 419, 421(2000).

36. *Grupo Mexico,* 527 U.S. at 333.

37. *Indosuez*, 94 N.Y.2d at 551.

38. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedental Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000). ("[P]erhaps the most relevant policy underlying stare decisis is protection of reliance interests. *Traditionally, this factor is thought most apposite in the commercial context, where resources have been committed and investments have been made in reliance on a legal rule or set of rules reflected in judicial decisions.*") *Id.* (emphasis added).

ture, and should not be left to "ad hoc judicial decision-making."[39] While there was a mutual agreement to the forum-selection clause, Rossiyskiy could not have been expected to anticipate a dramatic change in the application of preliminary injunctions.

The rejection of the *Mareva* approach, first by the Supreme Court, and now by the New York Courts, establishes clear differences between the laws of England and New York with regards to preliminary injunctions. The decision not to expand the application of preliminary injunctive relief will have major implications for the international financial markets.[40] One can assume that this will lead to a greater number of creditors seeking to use English law. However, whether international forum shopping occurs as a result cannot be a consideration of the court.

The Court of Appeals properly weighed numerous considerations and exercised proper restraint. The unanimous ruling followed the established case law that New York courts cannot be used to freeze the assets of a foreign institution.[41] While both parties in the case at bar agreed to the jurisdiction of the New York State court, judicial restraint is still essential. The diversity of finance law worldwide cannot be disregarded, and the long arm of a state court cannot be used to supercede another nation's statutorily expressed regulations.[42]

For that reason, amongst others, the court reversed the lower court's grant of the preliminary injunction.

Joshua Bardavid

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39. *Indosuez*, 94 N.Y.2d at 551 (quoting Uniformed Firefighters Assn. v. City of New York, 79 N.Y.2d 236 (1992)).

40. *See* John Caher, *Foreign Assets May Not Be Frozen; Court of Appeals Sees No New York Jurisdiction*, N.Y.L.J., Mar. 31, 2000 at 1.

41. *Id. See Campbell*, 64 Hun at 188-89, 192. The court in *Indosuez* also relied upon the Supreme Court decision of *Grupo Mexicano*, which concluded that an unsecured creditor was not entitled to a preliminary injunction to prevent the debtor's dissipation of assets prior to judgment. *Grupo Mexicano,* 527 U.S. at 332.

42. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897). *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28 (1964). One can assume that the court in the case at bar was taking into consideration the possibility that the exercise of jurisdiction by freezing international assets could contradict the act of state doctrine. That doctrine, articulated by the Supreme Court first in *Underhill* and again in *Banco Nacional,* requires that United States courts refrain from questioning or contradicting acts by a foreign sovereign within their own territory. *Banco Nacional,* 376 U.S. at 427-28. *See generally* Daniel C. K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. R. 397 (1987) (discussing the general history and framework of the act of state doctrine).

United States v. Usama Bin Laden

92 F. Supp. 2d 189 (S.D.N.Y. 2000)

United States District Court Holds That Jurisdiction Over Usama Bin Laden and His Co-conspirators Is Valid Based on U.S. Statutes Regardless of Their Nationality and the Extraterritoriality of Their Acts.

In *United States v. Usama Bin Laden*[1] the jurisdiction of the court over fifteen foreign national defendants was confirmed.[2] The charges against the defendants stemmed from the August 1998 bombings of the U.S. Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania as well as from several counts of conspiracy.[3] This opinion of the court[4] dealt solely with the issue of whether or not the statutes[5] under which the defendants were being prosecuted were meant to regulate their conduct outside of U.S. territory. Using an exhaustive analysis of the defendant's arguments, the court held that its jurisdiction over the foreign national defendants was sound.

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1. 92 F. Supp. 2d 189 (S.D.N.Y. Mar. 13, 2000) [hereinafter "*United States v. Bin Laden*"].

2. *See* John. K. Cooley, *Counterterrorism Assignment: Keep Track of the 'Afganis' [Afgan],* INT'L HERALD TRIB. (Neuilly-sur-Seine, France), Jul. 30, 1996, at Opinion (citing Usama Bin Laden as "a renegade Saudi construction tycoon" who is now a fugitive in Afghanistan and has been deprived of his Saudi citizenship. He is also described as a "financier and mentor" of the former anti-Soviet, mercenary armies in central Asia that later turned on their own governments with the intent of destroying their "Western-corrupted societies"); *United States v. Bin Laden,* 92 F. Supp. 2d at 189. Along with Usama Bin Laden, included in the indictment were fourteen other co-conspirators: Muhammad Atef, Ayaman Al Zawahiri, Mamdouh Mamud Salim, Kalid Al Fawwaz, Ali Mohamed, Wahid El Hage, Fazul Abdullah Mohammed, Mohamed Sadeek Odeh, Mohamed Rashed Daoud Al-Owhali, Mustafa Mohamed Fadhil, Khalifan Khamis Mohamed, Ahmed Khalfan Ghailani, Fahid Mohammed Ally Msalam and Sheikh Ahmed Salim Swedan.

3. *United States v. Bin Laden,* 92 F. Supp. 2d at 192 (citing that "the indictment in this case charges fifteen defendants with conspiracy to murder U.S. nationals, to use weapons of mass destruction against United States nationals, to destroy United States buildings and property, and to destroy United States defense utilities").

4. The indictment against these defendants will span the course of several decisions in the District Court. *See* United States v. Usama Bin Laden, 2000 U.S. Dist. LEXIS 14507 (S.D.N.Y. Oct. 5, 2000) (denying defendant's motion to dismiss outstanding jury subpoenas); United States v. Usama Bin Laden, 109 F. Supp 2d 211 (S.D.N.Y. Aug. 7, 2000) (denying a motion by six defendants in custody for a severance of their trial from other co-defendants); United States v. Usama Bin Laden, 93 F.Supp. 2d 484 (S.D.N.Y. Apr. 20, 2000) (denying one defendant's motion to dismiss count one of the indictment which charged the defendants with conspiracy to kill U.S. citizens).

5. The statutes in question are: 18 U.S.C. § 930 (referring to the possession of firearms and dangerous weapons in federal facilities); 18 U.S.C. § 844 (describing penalties for the importation, manufacture distribution and storage of explosive materials); 18 U.S.C. § 1111 (defining degrees of murder under the Federal code); 18 U.S.C. § 2155 (defining sabotage under the federal code); 18 U.S.C. § 1114 (setting forth protections for officers and employees of the United States); 18 U.S.C. § 924(c) (increasing the severity of the penalty for the use of a deadly or dangerous weapon or device in the course of committing a violent crime); and 18 U.S.C. § 114 (defining and describing penalties for maiming within the maritime and territorial jurisdiction of the United States).

Out of the 239 counts that defendant Mohamed Sadeek Odeh[6] (hereinafter "Odeh") moved to dismiss for lack of jurisdiction, the court dismissed only four.[7] The chief question examined in this opinion was whether or not the U.S. statutes under which the defendants were being prosecuted had elements of extraterritoriality approved by Congress[8] and in accordance with the norms of international law.

In examining extraterritoriality, the court analyzed the requirement of "clear manifestation"[9] and cited the Supreme Court's decision in *United States v. Bowman* as establishing a limited exception to this requirement for "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction."[10] The court began its analysis by pointing out that Congress's power to regulate activity outside the United States is well established.[11] It continued by justifying its use of the limited exception for criminal statutes under the *Bowman* rule, noting that since criminal statutes have the potential of being violated overseas as well as domestically, Congress need not specifically define the locality in which violations may occur.[12] The court then dismissed Odeh's claims against the application of the rule

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6. *United States v. Bin Laden,* 92 F. Supp. 2d at 192. Six other defendants were in the custody of the Bureau of Prisons at the time of this indictment and they joined Odeh in his motion to dismiss the counts. All of the remaining defendants are currently at large, including the alleged mastermind, Usama Bin Laden.

7. *Id.* at 225. The court dismissed counts 234, 235, 240 and 241 for lack of jurisdiction. All other counts were upheld. *Id.* at 215 (indicating that even with the dismissal of counts 234 and 235, the evidence and the conduct they implicated would still be covered by the other counts remaining). *Id.* at 225. Of the 239 counts in the indictment, 223 were for murder.

8. *Id.* at 192 (referring to the legislative record of the statutes and whether or not Congress intended them to extend beyond the territorial boundaries of the United States). Odeh argues that Congress did not intend these statutes to regulate conduct outside of the United States territory. The extraterritoriality of several of these provisions (§§ 844(f), (h) and (n); 930(c), and 2155) were issues of first impression for the Court.

9. *Id*. at 193. "Clear manifestation" requires that Congress clearly intended its act to apply extraterritorially. However, the act need not explicitly state this. Courts are encouraged to examine all available information about the meaning and intention of the act.

10. *See* United States v. Bowman*,* 260 U.S. 94, 98 (1922) [hereinafter "*Bowman*"] (noting that "criminal statutes are enacted because of the right of the Government to defend itself against obstructions, or fraud wherever perpetrated . . ."). *Id.* The court advanced the principle of a limited exception for criminal statutes under the clear manifestation requirement.

11. *See generally* EEOC v. Arabian American Oil Company*,* 499 U.S. 244 (1991)

12. *See Bowman,* 260 U.S. at 98 (stating that the *Bowman* rules allows for extraterritoriality "to be inferred from the offense").

in this case.[13] By showing the consistency of the *Bowman* rule with international law, the court reinforced its jurisdiction over the defendants.[14]

Using the *Bowman* rule as a foundation for its conclusions as to the extraterritoriality of the statutes being exercised to prosecute the defendants,[15] the court looked at each statute independently to determine its applicability to the case. It found that 18 U.S.C. §§ 844, 924, 930, 1114 and 2155, which deal with firearms, explosives, murder and sabotage, were each intended by Congress to "reach conduct of foreign nationals on foreign soil."[16] As for 18 U.S.C. §§ 1111 and 114, which refer to maiming, and protections for officers and employees of the United States, the court found them to be inapplicable to the counts of the indictment because Congress clearly defined the circumstances in which they were to be applied.[17] According to the court, neither counts 234 and 235 nor 240 and 241 of the indictment, which related to the maiming of and the protections for officers and employees of the United States, could stand based on the territorial restrictions imposed upon the statutes defining them.[18]

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13. *See United States v. Bin Laden,* 92 F. Supp. 2d at 194. In response to Odeh's argument that *Bowman* is not the controlling precedent, because it involved a U.S. citizen (not a foreign national), the court points out that the Court of Appeals (New York's highest court) has applied *Bowman* not merely by its particular facts, but rather by its general rule in order to reach the conduct of foreign nationals on foreign soil. *Id.* at 195. The court further distinguished *Bowman* by instructing that the "irrelevance of the defendant's nationality to the *Bowman* rule is reinforced by a consideration of the relationship that exists between this rule and the principles of extraterritorial jurisdiction recognized by international law." It cited the "subjective territorial principle" as the primary basis for jurisdiction under international law and explained five other principles of jurisdiction under international law: the objective territorial principle, the protective principle, the nationality principle, the passive personality principle and the universality principle. *Id.* at 198 (stating that the *Bowman* rule is "most directly related to the protective principle" which allows a state to exercise jurisdiction over the conduct of a foreign national outside its territory).

14. *Id.* at 196 (stating that "an application of the *Bowman* rule that results in the extraterritorial application of a statute to the conduct of foreign national is consistent with international law" in accordance with the protective principle).

15. *See* note 3, *supra.*

16. *United States v. Bin Laden,* 92 F. Supp. 2d at 198.

17. *Id.* at 204. (explaining that 18 U.S.C. § 1111(b) "limits the reach of Section 1111 murders to those committed within the special maritime and territorial jurisdiction of the United States" which is defined under 18 U.S.C. § 7 as including "any lands reserved or acquired for the use of the United States, and under exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building"). *See id.* at 216 (citing that 18 U.S.C. § 114 "criminalizes maiming within the special jurisdiction of the United States"); *id.* at 206 (explaining that neither the legislative nor interpretive history of 18 U.S.C. § 7 indicate whether it "exclusively refers to lands within the territorial boundaries of the United States, or also to lands within the territory of other nations"); *id.* at 204. Odeh contended and the court agreed that 18 U.S.C. § 7(3) does not apply to acts occurring in foreign countries "especially on United States Embassy premises."

18. *Id.* at 204. Count 234 dealt with the killing of people at the U.S. Embassy Compound in Nairobi, Kenya and count 235 with those in Dar es Salaam, Tanzania. Because the court determined that these were not within the special maritime or territorial jurisdiction of the United States under 18 U.S.C. § 1111(b), both counts were dismissed. *See id.* at 216. Count 240 dealt with the maiming of people at the U.S. Embassy Compound in Nairobi, Kenya and count 241 with those in Dar es Salaam, Tanzania. These counts were also dismissed accordingly. However, even though these counts were dismissed, the conduct being charged by them will still be covered by other counts in the indictment; *see* note 5, *supra.*

Beyond extraterritoriality, Odeh had five other arguments that challenged the court's jurisdiction.[19] The first of these was based on the Due Process Clause of the Fifth Amendment.[20] Odeh argued that "under the rule of lenity, an ambiguous criminal statute must be strictly construed against the government."[21] The court determined that Odeh's claim as to the counts based on §§ 1111 and 114 were moot because they were to be dismissed on the ground that these sections do not have extraterritorial effect. It also found the extraterritorial application of §§ 844, 924, 930, 1114 and 2155 to be unambiguous under the *Bowman* rule.[22] Next, Odeh attempted to argue that he did not have fair warning of the possibility of his indictment.[23] The court agreed with the government's contention that Odeh could not have been "surprised that his conduct was criminal under the laws of every civilized nation," so that he had "no right to complain about the particular forum in which he is brought to trial."[24] Finally, Odeh claimed that because he is Jordanian, there is not a sufficient nexus between him and the United States.[25] The court cited the protective principle as sufficient for satisfying the nexus required by due process.[26]

The court then addressed the controversial issue of whether or not 18 U.S.C. § 930(c)[27] could apply to foreign victims. The question became whether the statute was applicable only to U.S. citizens.[28] The court reasoned that many of those killed in the bombings of the embassies in Kenya and Tanzania had significant connections to the United States. For example, they may have been Embassy employees or conducting business there. Based on these premises, the court concluded that the statute could properly be applied to the deaths of foreign nationals on foreign soil.[29]

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19. *Id.* at 192, 216, 220, 221, 222, 224. Odeh argued that the statutes on which the indictment is based are inapplicable to the acts he allegedly committed. He cited them as invalid for violating the Due Process Clause of the Fifth Amendment, exceeding Congress's constitutional authority, relying on the passive personality principle, applying 18 U.S.C. § 930(c) to foreign victims and for the Government's wish to impose the death penalty for these crimes in violation of international law.

20. *Id.* at 216. Odeh argued that, according to the rule of lenity, the right to a fair warning and the requirement of a sufficient nexus between his alleged conduct and the United States, his rights to due process were violated when the court relied on the "extraterritorial conduct of a foreign national" in the indictment.

21. *Id.* at 216.

22. *Id.*

23. *Id.* at 218.

24. *Id.* The Government also supports its claim by noting that "there is no room for him to suggest that he has suddenly learned that mass murder was illegal in the United States or anywhere else."

25. *Id.* at 219.

26. *Id.* (noting that the application of the statutes to Odeh's acts is justified by the protective principle); *see* note 13, *supra* (noting that the protective principle allows a state to exercise jurisdiction over the conduct of a foreign national outside its territory).

27. *Id.* at 201. 18 U.S.C. § 930(c) states that "a person who kills or attempts to kill any person in the course of violating subsection (a) or (b), or in the course of an attack on a federal facility involving the use of a firearm or other dangerous weapon, shall be punished as further provided."

28. *Id.* at 222 (asking whether, in accordance with the principles of international law, the statute can be applied to "the deaths of Kenyan and Tanzanian citizens as opposed to U.S. citizens").

29. *Id.* at 224.

Odeh's final argument against the court's jurisdiction dealt with the potential for the imposition of the death penalty upon the defendants. He claimed that, on the facts of the case, it would be against international law for the court to impose the death penalty.[30] Because the government had not yet decided which defendants it would seek the death penalty against, the court deemed this argument premature and granted Odeh an opportunity to revisit this question.[31] Odeh then requested that the court withhold a final ruling establishing its jurisdiction based on the constitutional and statutory interpretation in this opinion until the Government made its decision with regards to the imposition of death penalty.[32] The court failed to see any connection between the arguments presented and interpreted in the case and how the Government's requests for the death penalty would change its analysis.[33] Accordingly, the court firmly established its jurisdiction over the fifteen defendants.

This decision deals with a number of complex jurisdictional issues. It establishes the ability of United States federal courts to adjudicate cases in which foreign nationals commit criminal acts in foreign territories. It even extends as far as to allow the crimes of foreign nationals against other foreign nationals to be within the jurisdiction of U.S. courts.[34] The court appears to be using its discretion questionably here. It is difficult to imagine a situation in which U.S. courts do not have jurisdiction over foreign nationals under this holding.[35] The court does clearly justify its position by using principles such as the victims' sufficient contacts with the United States and the adherence of the U.S. statutes to Congressional intent. Nevertheless, there still seems to be a gap between the court's analysis and the limits of its extraterritorial jurisdiction.

Russell Morris Iger

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30. *Id.; but see generally* Knight v. Florida, 120 S. Ct. 459 (Nov. 8, 1999) (noting that United Nations Human Rights Committee has stated that it is not per se unlawful to impose capital punishment).

31. *United States v. Bin Laden,* 92 F. Supp. 2d at 224.

32. *Id.*

33. *See id.* at 225. The court found it unclear to which arguments Odeh was referring, so it went through all of them systematically discounting the notion that a request for a death sentence would have an effect on its analysis.

34. *See* note 29, *supra*.

35. *See* Ilona Cheyne, *Environmental Unilateralism and the WTO/GATT System*, 24 GA. J. INT'L & COMP. L. 433, 455 (1995) (noting that it is interference with "the sovereign rights of other states to control the activities of their own citizens" when criminal jurisdiction over foreign nationals is exercised).