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ARTICLES

RECENT DEVELOPMENTS

BOOK REVIEWS

U.S. Marine Scientific Research Activities Offshore Mexico: An Evaluation of Mexico's Recent Regulatory Legal Framework

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I. INTRODUCTION

The conduct of marine scientific research activities by U.S. oceanographic vessels, in areas under Mexico's sovereignty or jurisdiction, is a topic that has been added to the agenda between the United States and Mexico only in recent years.

Marine questions, however, have not been absent from the diplomatic correspondence exchanged between the two countries. Early this century, questions regarding the territorial sovereignty of certain islands and rocks in the Gulf of Mexico,[1] attracted the attention of both governments. At the same time, the prestigious Mexican Society of Geography and Statistics decided to inquire into the validity of the United States' legal title over the California Channel Islands.[2] The claim was based on the fact that the islands were not explicitly mentioned in the Treaty of Guadalupe Hidalgo of 1848 upon which Mexico ceded vast extensions of its northern territories to the United States.

Half a century later, in 1948, President Truman enacted the Procla-

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1. In his State of the Nation Address (*Informe Presidencial*) of September 1, 1902, Mexico's President Porfirio Diaz informed the nation of an agreement reached with the U.S. regarding the territorial sovereignty over certain islands and rocks located in the Gulf of Mexico. *See Informe Presidencial.* 10 BOLETIN DE LA SOCIEDAD MEXICANA DE GEOGRAFIA Y ESTADISTICA 175-199 (1903).

2. The question of the territorial sovereignty exercised by the United States over the California Channel Islands was also raised during the administration of President Diaz. *See* Jorge A. Vargas, *California's Offshore Islands: Is the "Northern Archipelago" a Subject for International Law of Political Rhetoric?*, 12 LOY. L.A. INT'L & COMP. L.J. 687-724 (1990); JORGE A. VARGAS, EL ARCHIPIELAGO DEL NORTE: TERRITORIO DE MEXICO O DE LOS ESTADOS UNIDOS? (Seccion de Obras de Politica y Derecho Series, 1st ed., 1993).

mation on the Continental Shelf. This innovative legal development was almost immediately followed by Mexico. In return this Proclamation generated an exchange of legal opinions from both sides of the border.[3]

For many years, in particular in relation to the work of the Second United Nations Conference on the Law of the Sea, the then controversial question of the maximum width of the territorial sea provoked an interesting exchange of ideas between reputed experts from the U.S. Department of State and Tlatelolco.[4] A few years later, in 1968, the straight baseline system used by Mexico to delimit its territorial sea in the interior of the Gulf of California[5] led to the creation of an oceanic space formed exclusively by internal waters in the northern portion of it. This resulted in the informal exchange of views between the two countries.[6]

For a time, fishing disputes involving commercial species, such as tuna and shrimp,[7] occupied a sensitive space in the bilateral diplomacy between Mexico and the United States. This delicate consideration was also demonstrated at the regional level between the United States and Latin America.[8] These fishing dispute incidents became frequent during

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3. *See* Marjorie M. Whiteman, *Proclamation of President Truman on the Continental Shelf*, 4 DIG. INT'L L. 756 (1965). On October 30, 1945, Mexico decided to adopt a similar policy through an amendment to its Constitution that never passed due to certain legal technicalities. An improved version was later approved as an Amendment to Articles 27, 42 and 48 of the 1917 Mexican Constitution. For some of the details pertaining to this legislative process, *see* Benardo Sepulveda Amor, *Derecho del Mar, in* LA POLITICA EXTERIOR DE MEXICO: REALIDAD Y PERSPECTIVAS 159-64 (Coleccion Centro de Estudios Internacionales Series No. 9, 1972).

4. For years, the United States and Mexico exchanged incisive correspondence regarding Mexico's first 9 n.m. and then 12 n.m. territorial sea at the time when the U.S. had a 3 n.m. territorial sea. *See* Alfonso Garcia Robles, *La Anchura Del Mar Territorial in* MEXICO Y EL REGIMEN DEL MAR (Coleccion de Estudios Internacionales Series No. 2, 1966); Arthur Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for the Freedom of the Seas*, 54 AM. J. INT'L L. 751, 775 (1960); Alfonso Garcia Robles, *The Second U.N. Conference of the Law of the Sea: A Reply*, 55 AM. J. INT'L L. 669, 680 (1961).

5. Mexico applied this method by Presidential Decree of August 28, 1968. This was published in the official daily, similar to the Federal Register (*Diario Oficial de la Federacion*, [hereinafter D.O.]) D.O. of August 30, 1968; *Fe de Erratas*, D.O. of October 5, 1968. For a legal discussion on this question, *see* Sepulveda Amor, *supra* note 3, at 159-64; Antonio Gomez Robeldo, El Derecho del Mar en la Legislacion Mexicana (Sinopsis Historico-Evolutiva), in MEXICO Y EL REGIMEN DEL MAR 15, 99-105 (Secretaria de Relaciones Exteriores ed., 1974).

6. For the text of Mexico's decree, and the corresponding map showing the application of the straight baseline system, *see* BUREAU OF INTELLIGENCE & RESEARCH, U.S., DEP'T OF STATE, OFFICE OF GEOGRAPHER, INTERNATIONAL BOUNDARY STUDIES, SERIES A, No. 4, LIMITS IN THE SEAS, STRAIGHT BASELINES: MEXICO (1970).

7. *See* Ann L. Hollick, *Roots of the U.S. Fisheries Policy*, 5 OCEAN DEV. & INT'L L. 61, 82-88 (1978); Peter Rasumussen, *The Tuna War Fishery Jurisdiction in International Law*, 3 U. ILL. L. REV. 755, 767-68 (1981); Patricia E. Kinsey, *The Tunaboat Dispute and the International Law of Fisheries*, 6 CAL. W. L. REV. 114, 123-26 (1969). *See also* JORGE A. VARGAS, MEXICO Y LA ZONA DE PESCA DE ESTADOS UNIDOS (Universidad Autonoma de Mexico, 1979).

8. *See Fishing Rights and United States-Latin American Relations: Hearing Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs*, 92d

the 1950's and 1960's. The delicate legal issues associated with them were so confrontational that the expression "Tuna War" was coined.[9]

It was not until the 1970's that several technical questions emerged in the marine agenda of these countries. Finally, on November 23, 1970, the United States and Mexico signed a treaty. The purpose of the treaty was twofold. First, "for the clarification of the Rio Grande boundary." Second, "the creation of maritime boundaries between the claimed 12-nautical-mile Mexican territorial sea and the territorial sea and contiguous zone of the United States."[10]

Mexico's 1976 delimitation of its Exclusive economic zone of 200-nautical miles[11] and the consequent signing of the Treaty on Maritime Delimitation with the United States two years later[12] resulted in Tlatelolco and Washington turning their attention to what appeared to be an intriguing and quite novel international law question.[13] There is a

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Cong., 2d Sess. 40-69 (1972); *Rights of Vessels of the United States on the High Seas and in the Territorial Waters of Foreign Countries*, S. REP. No. 837, 85th Cong., 1st Sess. 3-60 (1957); *Protecting Rights of Vessels of the United States on the High Seas and in the Territorial Waters of Foreign Countries*, S. REP. No. 919, 83d Cong., 2d Sess. 5 (1954).

9. Jack Nelson, *Mexico Seizes U.S. Tuna Boat*, N.Y. TIMES, July 4, 1980, at A1; *Mexico Seizes Two More U.S. Tuna Boats*, L.A. TIMES, July 11, 1980, at A1; *See also Unlawful Seizure of U.S. Fishing Vessels*, S. REP. No. 815, 90th Cong., 1st Sess. 4 (1967); SENATE COMM. ON FOREIGN RELATIONS, S. REP. No. 919, 90th Cong., 1st Sess. 2,7 (1967).

10. BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, OFFICE OF GEOGRAPHER, INTERNATIONAL BOUNDARY STUDY, SERIES A, LIMITS IN THE SEAS, LIMITS IN THE SEAS, STRAIGHT BASELINES: MEXICO (1970).

11. *See* Decree that amends Article 27 of the Mexican Constitution establishing an exclusive economic zone, situated outside the territorial sea, D.O. of February 6, 1976; Regulations to Paragraph 8 of Article 27 of the Mexican Constitution, regarding the exclusive economic zone, D.O. of February 13, 1976; Decree that establishes the outside boundary of Mexico's exclusive economic zone, D.O. of June 7, 1976. For a discussion of these legislative enactments, *see* JORGE A. VARGAS, LA ZONA ECONOMICA EXCLUSIVA DE MEXICO (1980).

12. Treaty of Maritime Boundaries between the United States and Mexico, signed by Cyrus Vance and Santiago Roel in Mexico City on May 4, 1978. For the text of the treaty, *see* VARGAS, *supra* note 7, Appendix 8 at 77-80. Although this Treaty was approved by the Mexican Senate in full compliance with its constitutional procedure, the U.S. Senate has not yet given its "advice and consent" and the constitutional process continues to remain interrupted since then. However, by an *Exchange of Notes* of November 24, 1976, the U.S. and Mexico did establish a "provisional maritime boundary" between the 12 and the 200 n.m. limit in the Gulf of Mexico and the Pacific Ocean. For the tenor of this *Exchange of Notes, see* Agreement Effected by Exchange of Notes, Nov. 24, 1976, United States-Mexico, 29 U.S.T. 196-203.

13. The question is whether, under international law, there is a legally valid boundary in the center of the Gulf of Mexico between the United States and Mexico, as demarcated by the outer boundary of the respective 200-mile exclusive economic zone established by each country. For Mexico, it seems that the *Exchange of Notes* of November 24, 1976, which established a "provisional maritime boundary" may be interpreted as a perfectly valid (and maybe final) agreement *in lieu* of the still inconclusive Treaty of 1978. For the U.S., the lack of advice and consent of the Senate regarding that Treaty offers a variety of legal and political possibilities. On this intriguing question, *see* Mark B. Feldman & David Colson, *The Maritime Boundaries of the United States*, 75 AM. J. INT'L L. 729, 744 (1988); Alberto Szekely, *A Comment with the Mexican View on the Problems of Maritime Bounda-*

question of whether, under international law, a legally valid boundary exists in the center of the Gulf of Mexico between the United States and Mexico, as demarcated by the outer boundary of the respective 200-mile EEZ established by each country. For Mexico, it seems that the *Exchange of Notes* of November 24, 1976, which establishes a "provisional maritime boundary," could be interpreted as a perfectly valid (and maybe final) agreement *in lieu* of the still inconclusive Treaty of 1978. For the U.S., the lack of advice and consent of the Senate regarding that treaty offers a variety of legal and political possibilities. Until today, the outer boundary of the 200-mile EEZ continues to be in the middle of the Gulf of Mexico where the U.S. Geological Survey has confirmed the existence of a giant deposit of hydrocarbons and natural gas.[14] This may become a potential political subject leading to conflicting interpretations by each of the affected nations.

As reported recently by the media, the latest marine controversy was triggered by the incidental capture of dolphins by Mexican tuna boats[15] and the imposition of a trade embargo on Mexico.[16] These two items constitute the latest additions to the growing list of bilateral marine questions.

The topic of legal regime that regulates the conduct of marine scientific research in areas under the control of the coastal state surfaced originally as a direct consequence of the interest shown on this topic by the Third United Nations Conference on the Law of the Sea (UNCLOS III).[17] Prior to UNCLOS III, the legal subtleties associated with the conduct of these activities, including a possible definition, were discussed by Subcommittee III of the Committee for the Utilization of the Seabed and Ocean Floor for Peaceful Purposes Beyond the Limits of National Juris-

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ries in U.S.-Mexican Relations, 22 NAT. RESOURCES J. 155, 159 (1982).

14. *See* Hollis D. Hedberg, *Ocean Floor Boundaries*, 204 SCI. 135, 141 (1979). On the legal ramifications of this undefined maritime boundary, *see* Jorge A. Vargas, *Mexico's Legal Regime Over Its Marine Spaces: A Proposal for the Delimitation of the Continental Shelf in the Deepest Part of the Gulf of Mexico*, 26 INT-AM. L. REV. 189, 189-242 (1994/95).

15. *See* Phillip Shabecoff, *Senate Panel Urged to Toughen Curbs on Killing of Dolphins*, N.Y. TIMES, Apr. 14, 1988, at A31; Sean Kelly, *Still Casualties of Tuna Catch Protection Sought for Species in Pacifc*, WASH. POST, Nov. 18, 1991, at A8.

16. *See Report of the Panel, United States-Restrictions on Imports of Tuna*, GATT Doc. D/S21/R (Sept. 3, 1991); *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991); *Earth Island Inst. v. Mosbacher*, 785 F. Supp. 826 (N.D.Cal. 1992). *See also* David C. Lundsgaard & Stanley Spracker, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. 385, 386 (1993); Matthew H. Hurlock, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna Dolphin Decision*, 92 COLUM. L. REV. 2098, 2111-2113 (1992).

17. *See* Resolution 2750-C (XXV), U.N. GAOR, 25th Sess., Section 2 at 5, U.N. Doc. A/2625 (1970). The topic of "scientific research" was also included in Section 13 of the List of Topics and Questions relating to the Law of the Sea of the Committee for the Utilization of the Seabed and Ocean Floor for Peaceful Purposes beyond the Limits of National Jurisdiction. 27 U.N. GAOR Supp. No. 21, 164 U.N. DOC. A/8721 at 59-67 (1972).

diction.[18] In general, it was from UNCLOS III that marine scientific research was eventually transferred to regional and bilateral levels, including the relations between Mexico and the United States.

As of today, the most comprehensive and detailed legal regime applicable to man's quest for scientific inquiry in the oceans is contained in Part XIII[19] of the 1982 U.N. Convention on the Law of the Sea.[20] The United States and Mexico have adopted divergent positions in relation to the legal regime applicable to the conduct of marine scientific research activities in areas under the control of the coastal state. This may be attributable to the fact that Mexico is a party to the 1982 Convention,[21] whereas the United States is not. For Mexico, the legal regime governing the conduct of marine scientific research is clearly enunciated in Part XIII of said Convention. Mexico applies this regime through its pertinent domestic legislation, in particular its *Ley Federal del Mar* (Federal Oceans Act). For the United States, the legal regime governing these activities does not appear to be that simple.

The principle of consent,[22] a legal notion favored by developing coastal states, constitutes an integral piece of the newly formulated regime. This principle predicates that no marine scientific research activities may be conducted by foreign researching states in oceanic spaces under the sovereignty or control of the coastal state, i.e., internal waters, the territorial sea, the contiguous zone, the continental shelf and the Exclusive Economic Zone (EEZ), without first securing said consent from the coastal state in question.[23]

UNCLOS III may be characterized as the first multilateral conference to address, in a complete and systematic manner, the question of

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18. This committee operated as a preparatory organ of the United Nations Convention on the Law of the Sea, Dec. 10, 1982, UN Doc. A/CONF. 62/122 (1982) between 1967 and 1973. Subcommittee III was created on March 12, 1971, based upon Resolution 2750-C (XXV), *supra* note 17, § 6 at 6.

19. *See* arts. 238-265 of the United Nations Convention on the Law of the Sea, 21 I.L.M. 1261, U.N. Doc. A/CONF.62/122 at 213-216 (1982) [hereinafter UNCLOS III].

20. Attended by 164 countries and after ten years of official work, UNCLOS III signed the final text of the Convention at Kingston, Jamaica on December 17, 1982. In accordance with Article 308, after receiving its 60th instrument of ratification or adhesion, the Convention entered into force on November 1, 1994. Mexico is a signatory and the U.S. is contemplating on becoming a party.

21. Mexico became a signatory of the United Nations Convention on the Law of the Sea and its Final Act on December 10, 1982. The Convention was approved by the Mexican Senate on December 29, 1982, the corresponding decrees of approval and promulgation appeared in D.O. of February 18, 1983; D.O. of June 1, 1983. The government of Mexico deposited with the Secretary General of the United Nations the instrument of ratification on March 18, 1983. *See* RELACION DE TRATADOS EN VIGOR 186 (Secretaria de Relaciones ed., 1993).

22. *See supra* UNCLOS III note 19, arts. 245-246 ¶ 2, at 1316; arts. 248-249, at 1317.

23. *See* ALFRED H. SOONS, MARINE SCIENTIFIC RESEARCH AND THE LAW OF THE SEA (T.M.C. Asser Instituut, The Hague ed., 1982).

marine scientific research.[24] The evolution of this legal regime, as is reflected in the current practice of States in reference with its interpretation and application, is already becoming an area of controversy between researching and coastal states.

This article attempts to accomplish three objectives. First, to provide a historic overview of the initiation and development of scientific activities in Mexico. Special emphasis will center on the marine field, as these activities were first conducted by Spaniards, and then by Mexicans, during the 300 years of the Colonial period of the New Spain, encompassing the period from 1519 to 1819.[25] Some information will also be provided regarding the very first marine explorations conducted offshore Mexico by the California Academy of Sciences.[26] Second, this article evaluates the recent official publication by the government of Mexico, entitled *Regulations for the Conduct of Scientific Research by Foreigners in Marine Areas under [Mexico's] National Jurisdiction*,[27] published in late 1993.

As stated by Manuel Tello, then Mexico's Secretary of Foreign Affairs:

> The object of this work is to disseminate the guidelines of the government of Mexico to handle the requests submitted by foreigners to conduct scientific research in marine areas under the national jurisdiction. The legal framework in question seeks to protect very concrete national interests, and to comply with international law which provides that coastal states, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research activities.[28]

Specifically, a detailed analysis will be conducted to determine whether these official regulations of the Mexican government conform to Part XIII of the 1982 Convention.[29]

II. INITIAL EXPLORATIONS AND MARINE SCIENTIFIC RESEARCH ACTIVITIES OF THE UNITED STATES IN MEXICO

After the discovery of the Western hemisphere, the activities conducted by the first European explorers during the first three centuries

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24. Although the First U.N. Conference of the Law of the Sea addressed the question of marine scientific research, especially in relation with the continental shelf, it did it only in an incidental and fragmentary manner. *See* art. 5 ¶ 8, 1958 Geneva Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 473-474, 499 U.N.T.S. 311 [hereinafter Continental Shelf Convention].

25. *See id.* art. 5, § 2, at 473-474.

26. *See infra* notes 120-122 and the corresponding text.

27. This publications's official title Is: NORMATIVIDAD PARA LA INVESTIGACION CIENTIFICA POR EXTRANJEROS EN ZONAS MARINAS DE JURISDICCION NACIONAL 436 (Secretaria de Relaciones Exteriores & Secretaria de Marina eds., 1993). (Translation by the author) [hereinafter NORMATIVIDAD].

28. *See id.* at 13. (Translation by the author).

29. *See infra* notes 172-283 and the corresponding text.

can be grouped into three large categories: (1) exploration for wealth; (2) exploration for souls; and (3) exploration for knowledge.[30]

A. *Exploration for Wealth*

As a consequence of the arrival of the first Europeans to the then-recently discovered "New World", the scientific and cultural horizons of the "civilized world" of the time were considerably expanded.[31] However, during the first centuries that followed the arrival of the Spaniards and Portuguese to this continent, in particular in the area that later become known as Latin America, scientific inquiry had to yield to military and political considerations, thus relegating the conduct of purely scientific pursuits to a secondary plane.

During those early days, discoveries and explorations were undertaken with the objective of expanding the territorial base of the state, principally to gain strategic advantages and to acquire wealth. According to a scientific observer,

> Gold and pearls and precious stones were the driving force of these conquests and adventures, for the King was to receive a fifth, the expedition's private financiers were to receive their prearranged share, and the explorers all that remained and any that could be hidden from the others.[32]

A common practice among maritime powers in the 16th and 17th centuries was to keep secret any information relative to geographical discoveries and explorations in order to deprive the enemy of any knowledge that would be useful to navigation or the launching of land or maritime expeditions.[33]

Another common practice embodied the dissemination of false information through maps or nautical charts with the deliberate purpose to disorient and confuse explorers or navigators of rival powers. One example of this practice was the characterization of California as an island,[34] as depicted in a map designed by Henry Briggs, professor of astronomy at Oxford, published in London in 1625,[35] and the claimed existence of the mythical Northwest Passage, also known as the Strait of Anián.[36] The

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30. This triple categorization is taken from Richard A. Schwartzlose, *Exploration and Scientific Research in the Gulf of California* (Unpublished article, UCSD, 1983).

31. *See* IRIS H. ENGSTRAND, SPANISH SCIENTISTS IN THE NEW WORLD (1981).

32. SCHWARTZLOSE, *supra* note 30, at 2.

33. *See* ENGSTRAND, *supra* note 31, at 2.

34. *See* RONALD V. TOOLEY, CALIFORNIA AS AN ISLAND: A GEOGRAPHICAL MISCONCEPTION ILLUSTRATED BY 100 EXAMPLES 1625 TO 1770 at 92 (1964). In this book, Tooley points out that the very first representation of California as an island appeared in ANTONIO DE HERRERA, HISTORIA DE LAS INDIAS (1624).

35. This map appears in SAMUEL PURCHAS, HAKLUYTUS POSTHUMOUS OR PURCHAS HIS PILGRIMS (1625) and *reprinted in* MIGUEL LEON PORTILLA, CARTOGRAFIA Y CRONICAS DE LA ANTIGUA CALIFORNIA 90 (Universidad Autonoma de Mexico, 1989).

36. The Strait of Anian was a mythical passage connecting the Atlantic with the Pacific

eminent historian Henry R. Wagner coined the term "imaginary geography" referring to the era when cartographers found it difficult to distinguish between fantasy and reality.[37]

Evidently, the list of explorations prompted by the desire to find wealth is quite long. As such, reference will be made only to a selected few which contributed to delineate Mexico's marine profile.[38]

Francisco Hernández de Córdoba is credited with the discovery of Mexico.[39] Under the instructions of the governor Cuba, Hernández de Córdoba left the island of Cuba to explore the Caribbean Sea on February 8, 1517. A few weeks later a storm pushed him to Cabo Catoche, the eastern portion of the Yucatan Peninsula, which he bordered until reaching the Bay of Campeche, in the Gulf of Mexico.[40] A year later, Juan de Grijalva discovered Cozumel and Isla Mujeres in the Caribbean. Grijalva continued on to discover Laguna de Términos, in Campeche and San Juan de Ulúa, an island located in the midst of the tropical jungles of Veracruz in the Gulf of Mexico.[41]

The expeditions of Hernán Cortés deserve special attention. Leading a flotilla of ten ships, Cortés departed from La Habana on February 10, 1519, and arrived a few days later on the coast of Yucatán, Tabasco and Veracruz in the Gulf of Mexico.[42]

> In his instructions, personally given to him by governor Velásquez on October 23, 1518, Cortés was ordered to locate Grijalva, to explore the recently discovered lands and to take possession of them in the name of the King of Spain.[43] In addition, he was instructed to obtain the most gold and silver that he could, to impose the Catholic faith to indigenous peoples and to rescue some Spaniards who had been imprisoned in Yucatan by the Mayan tribes. This expedition culminated a couple of years later with the conquest of the Aztec empire and the

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Ocean or the Pacific with the Polar Ocean and it was depicted in numerous maps starting in 1566. Later on, according to Henry Wagner, the name "Anian" began to be attached to a strait which was suppposed to connect with Hudson Bay; other cartographers located it near Japan. *See* HENRY R. WAGNER, THE CARTOGRAPHY OF THE NORTHWEST COAST OF AMERICA TO THE YEAR 1800, at 426 (1968).

37. According to this author, "[T]he Strait of Anian figured for a long time in the *imaginary geography* of the Northwest coast and many today think that it must have had either some real existence or else was a kind of inspiration for Bering Strait . . . ." *Id.* (Emphasis added).

38. For a detailed analysis of the explorations, *see* 2 VICENTE RIVA PALACIO, MEXICO A TRAVES DE LOS SIGLOS (1956). ALVARO DEL PORTILLO Y DIEZ DE SOLLANO, DESCUBRIMIENTOS Y EXPLORACIONES EN LAS COSTAS DE CALIFORNIA (2d ed. 1980). HENRY R. WAGNER, SPANISH DISCOVERIES IN THE SOUTHWEST OF THE UNITED STATES IN THE 17TH CENTURY (1937).

39. *See* HAMMOND INNES, THE CONQUISTADORS 38-41 (1969).

40. *Id.*

41. The second expedition also departed from Cuba, reaching the Caribbean islands on May 3, 1518 and Veracruz on June 19, 1518.

42. *See* W. MICHAEL MATHES, A BRIEF HISTORY OF THE LAND OF CALAFIA: THE CALIFORNIAS 1533-1795 at 9-10 (1977).

43. *See* LUIS WECKMANN, THE MEDIEVAL HERITAGE OF MEXICO 48 (Frances M. Lopez-Morillas trans., 1992); HENRY R. WAGNER, THE RISE OF FERNANDO CORTES 29-30 (1969).

destruction of Tenochtitlan on 13 August 1521.[44]

As a promoter, Cortés had the merit of organizing the first expeditions to explore the Mexican coastline along the Pacific Ocean. Thanks to his initiative, Cristóbal de Olid[45] ventured on to conquer the Tarascos in Michoacán in 1522. Gonzalo de Sandoval[46] was the first one to reach the Pacific coastline, exploring it from Acapulco to Colima and Jalisco a year later. The unfortunate expeditions of Alvaro Saavedra Cerón,[47] who reached the Moluccas, in Indonesia, in 1527, and Diego Hurtado de Mendoza,[48] perished in Banderas Bay, Mexico, in 1532, would follow.

On October 29, 1533, Cortés instructed Hernando de Grijalva and Diego Becerra to leave the Port of Manzanillo, in the Pacific and explore its coastline to the north. Sailing in the *San Lázaro*, Grijalva discovered the Islas Revillagigedo in 1533.[49] A mutiny on board the *Concepción*, initially led by Diego de Becerra, reached the Gulf of California under the new command of Fortún Jiménez who established the city of La Paz in 1535, only to be assailed by a fire that destroyed the encampment a few months later.[50] A few survivors of this failed expedition were able to go back to Mexico City and disseminate all kinds of stories and fantasies about the recently discovered lands, describing them as rich in gold and pearls: the beginning of the legend of California.[51]

Cortés lead the next expedition, in three vessels, *San Lázaro, Santo Tomás* and *Santa Agueda*. Cortés departed from Jalisco in late April of 1535 and a few days later, on May 3, reached the Port of La Paz, taking possession of these lands in the name of the King of Spain.[52]

The exploration of California continued a few years later with Francisco de Ulloa, who left Acapulco in the *Trinidad* and the *Santa Agueda* on July 8, 1539. He reached the delta of the Colorado River, naming it Arcón de San Andrés and then explored the western coastline of the Baja

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44. *See* INNES, *supra* note 39, at 171-195.

45. *See* W. MICHAEL MATHES, VIZCAINO AND SPANISH EXPANSION IN THE PACIFIC OCEAN 1580-1630 at 2 (1968).

46. *Id.*

47. This was the first expedition from Mexico to Asia. *See* Francisco Granado, Relacion del Viaje que hizo Alvaro Saavedra desde la Costa Oriental de Nueva Espana a las Islas del Moluco, in LEON PORTILLA, *supra* note 35, at 41.

48. His expedition sailed from Acapulco on June 30, 1532. Hurtado de Mendoza discovered the Magdalena Islands and the Tres Marias, close to the tip of Baja California. *Id.* at 46-47. *See also* ALVARO DEL PORTILLO *supra* note 38, at 144.

49. Sailing on the San Lazaro, Grijalva left on October 20, 1533 and discovered the Isla Santo Tomas (known today as Isla Socorro) and Islas Revillagigedo, some 300 miles south of Baja California. *Id.* at 145. *See also* LEON PORTILLA, *supra* note 35, at 48.

50. LEON PORTILLA, *supra* note 35, at 47.

51. *See* MATHES, *supra* note 42, at 15.

52. Letter of Hernando Cortes, Auto de Posesion y Descubrimiento de la Tierra de la Santa Cruz (May 14, 1535), *see* HERNANDO CORTES, CARTAS Y DOCUMENTOS 526 (Porrua ed., 1969). *See also* ALVARO DEL PORTILLO, *supra* note 38, at 146-149; LEON PORTILLA, *supra* note 35, at 48.

California peninsula, discovering the bays of Magdalena, Ballenas and Vizcaíno and the Isla de los Cedros, in April of 1540.[53] Stimulated by these discoveries, de Ulloa decided to continue exploring in the *Trinidad*. It was this explorer, De Ulloa who utilized the expression "Mar Bermejo" (Vermillion Sea) for the Gulf of California because of the coloration of its waters.[54]

The discovery of California, and the important fact that the participants in the expeditions came back with golden nuggets, pearls, and best of all, fantastic tales, persuaded Viceroy Antonio de Mendoza to promote a more vigorous exploratory and expansionist territorial policy.[55]

This led to the important expeditions headed by Francisco Vázquez de Coronado and Hernando de Alarcón, privately financed and principally organized to find the mythical golden cities of Cíbola and Quivira.[56]

Two important expeditions would follow: first, the trip of Juan Rodríguez Cabrillo,[57] who in 1542 left Puerto de Navidad, Jalisco, in the *San Salvador* and the *Victoria*. He explored the western coast of Baja California, disembarking in what is today the Port of San Diego, and continued north to discover the California Channel Islands[58] and possibly reaching as far as Oregon.[59] Second the two expeditions of Sebastián Vizcaíno[60] in 1596 and the more successful one later, in 1602.

In his letter of instructions[61] Conde de Monterrey gave Vizcaíno in Mexico City on March 18, 1602, it becomes evident that the Spanish Crown's intention was to direct Vizcaíno to follow certain scientific methods, utilizing the most advanced equipment and techniques available when conducting his navigation and exploratory activities. In part, these

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53. ALVARO DEL PORTILLO, *supra* note 38, at 149-152; LEON PORTILLA, *supra* note 35, at 52.

54. LEON PORTILLA, *supra* note 35, at 52.

55. MATHES, *supra* note 42, at 17.

56. *Id.* at 15; LEON PORTILLA, *supra* note 35, at 61-65.

57. *See* CABRILLO'S LOG 1542-1543: A VOYAGE OF DISCOVERY (James R. Moriarty & Mary Keistman trans., Western Explorers Series No. 2-3, 1968); 1 RICHARD F. POURADE, THE EXPLORERS 33-54 (The History of San Diego Series, 1960).

58. While landing on San Miguel Island on October 3, 1542, Cabrillo fell on the rocky shore and broke an arm. Gangrene complicated his injury and he died on this island (located some 23 miles from Point Concepcion) on January 3, 1543. *See* POURADE, *supra* note 57, at 50. For a time, there was the belief that Cabrillo was Portuguese, working as a mercenary for the Spaniards, as it was customary in those days; *see, e.g.*, W. Michael Mathes, *The Discoverer of Alta California: Joao Rodriguez Cabrilho or Juan Rodriquez Cabrillo*? 19 J. SAN DIEGO HIST. 1, 1-8 (1973). However, a recent book proves that Cabrillo was a Spaniard and, indeed, Castilian. *See* HARRY KELSEY, JUAN RODRIQUEZ CABRILLO 3-21 (1986).

59. *See* POURADE, *supra* note 57, at 51. *See also* ALVARO DEL PORTILLO, *supra* note 38, at 152-157; LEON PORTILLA, *supra* note 35, at 66-71.

60. *See* ALVARO DEL PORTILLO, *supra* note 38, at 161-208. *See also* MATHES, *supra* note 42, at 55-56; LEON PORTILLA, *supra* note 35, at 84-89.

61. Instruction and order given to Sebastian Vizcaino to discover ports, bays and Ensenadas in the Mar del Sur. The original instructions are at the Archivo de Indias in Seville, Audiencia de Guadalajara, Legajo 133 (Madrid, Spain). For the complete text of these instructions, *see* ALVARO DEL PORTILLO, *supra* note 38, at 301-307.

instructions read:

1) to demarcate the coastline but not to go inland, looking for Indians;[62]

2) to take note of the direction of the winds;

3) to take detailed notes where pearls existed (*"pesquerías de perlas"*),[63] although he should not consume too much time in this endeavor;

4) to use his two boats to conduct some exploratory fishing, utilizing two *"Chinchorros"* (i.e.: long lines);

5) to demarcate the entrance to large bays;

6) to take notice of the entrances to ports, and to name them with Saints' names, without changing any of those already named;[64]

7) to demarcate all the islands, reefs and low areas (i.e. bajos), in relation with the general direction of the coastline, and to circumnavigate them, unless they were too large; and

8) to write down the time of the beginning and end of any type of solar or moon eclipse.[65]

In essence, Vizcaíno's expedition produced two specific results. First, the demarcation of the California's coastline. This accomplishment took California away from the land of mythology and placed it in the world of cartography, especially from Cabo San Lucas, in Mexico, to Cape Mendocino, in California.[66] Secondly, the expedition gave nomenclature to that part of the world.

The discovery of California stimulated a renewed interest in territorial expansionism on the American continent by a growing number of European nations. This was the case for countries such as England,[67] Russia,

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62. *Id.* at 302.

63. *Id.* at 304.

64. The names given by Vizcaino to ports, islands and bays during this second expedition while sailing along the Pacific coastline of Mexico and the United States have remained in place to date. These include such names as Bahia Santa Marina, Puerto del Marques, Sierra del Enfado, Bahia Magdalena, Sierra de los Infantes, Bahia de Ballenas, Punta Abreojos, Ensenada de Todos Santos, San Diego, San Clemente, Santa Catalina, San Nicolas, Santa Barbara, etc. *See* Sebastian Vizcaino's Relacion Oficial del Viaje (official report on the voyage), in COLECCION DE DIARIOS Y RELACIONES PARA LA HISTORIA DE LOS VIAJES Y DESCUBRIMIENTOS 4 (Luis Cebreiro Blanco ed., 1944). An English translation appears in HERBERT E. BOLTON, SPANISH EXPLORATIONS IN THE SOUTHWEST 1542-1706 (1916).

65. *Id.* at 306. *See also* MATHES, *supra* note 42, at 59.

66. *See* MATHES, *supra* note 42, at 129.

67. Francis Drake landed near San Francisco in 1579, naming it New Albion. In 1768, James Cook initiated his excursions to the South Pacific from Tahiti, sailing to Hawaii, continuing on to America, landing in 44° 30' and then proceeding north to Alaska. The British navigators Charles Duncan and James Colnett followed and reached the Port of Nootka, Canada in 1787. George Vancouver continued with these expeditions from 1791 to 1794. *See* HUBERT H. BANCROFT, HISTORY OF THE NORTHWEST COAST (Hubert Howe Bancroft Series No. 27-28, 1990).

Holland, the United States[68] and France,[69] who were eager to destroy the Spanish monopoly of the oceans, engage in maritime trade and especially increase its territorial base.

From a different perspective, California, and the need to explore and exploit its riches and to populate its land, produced an array of important consequences for the navigational and scientific activities of the time. The conduct of maritime explorations was renewed with unprecedented vigor; the study and demarcation of the Pacific coastline, up to the region of Alaska, was soon to be accomplished;[70] the search for the mythical Strait of Anián was renewed with the utmost interest, thus encouraging new discoveries;[71] finally, transoceanic navigation with the Philippines, China and Japan was finally to be established with the advent of the Manila Galleon.[72]

The merit of the first transoceanic voyage between the Philippines and California belongs to Andrés de Urdaneta. This Augustinian monk left the port of Cebú on June 1, 1565, and reached the lower portion of the Baja California peninsula almost four months later, on September 26, thus accomplishing the long search for so-called *Tornaviaje* or *Tornavuelta.*

B. *Exploration for Souls*

Apart from the sword of the Spanish conquistador, the cross of the Catholic faith was brought to America by priests and religious missionaries.

The Spanish Crown recognized that religious indoctrination was an indispensable component in its quest for exploration and discoveries during the 15th and 16th centuries. Thus, in 1492, King Charles V provided that any expedition authorized to explore the New world had to include religious missionaries with the purpose of "introducing and propagating the Catholic faith among the naturals in those lands."[73] That same year, the Franciscans started their evangelization activities in Tlaxcala,[74] soon to be followed by the Dominics[75] and the Agustinians.[76] The arrival of

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68. Two U.S. vessels from Boston entered the Port of Nootka in September of 1787.

69. The French explorer Jean Francois La Perouse visited Monterrey, California in 1787. *See* LEON PORTILLA, *supra* note 35, at 175-179.

70. In 1789, Esteban Jose Martinez and Gonzalo Lopez de Haro established an encampment in Nootka, Canada. Francisco Eliza, Salvador Fidalgo and Manuel Quimper reached Alaska in 1790 establishing a small village and fortress. *See* LEON PORTILLA, *supra* note 35, at 175-179.

71. With the explorations of a number of explorers in Canada and Alaska, it was proven that there was no connection between the Pacific and Atlantic Oceans. Thus, the myth of the Strait of Anian came to an end.

72. *See* WILLIAM L. SCHURZ, THE MANILA GALLEON 196-200 (Historical Conservation Society Series No. 40, 1985).

73. *See* Julius II's, Universalis Ecclesiae, in WECKMANN, *supra* note 43, at 184.

74. *Id.* at 318.

75. *Id.*

these religious orders to the New Spain signaled the initiation of explorations, by land and sea, in the search of souls.

Notwithstanding that the specific instructions given to these monastic orders were to focus on the propagation of the Catholic religion, the philosophy, vocation and diligence of these groups soon moved them to participate and excel in a number of important activities outside the religious arena. The direct involvement of these orders in specific fields of endeavor produced impressive results. For example, the creation of schools and training centers for indigenous peoples;[77] the establishment of hospitals, clinics and orphanages;[78] the initiation of certain industries;[79] and, in particular, the defense of the Indians based on human rights considerations,[80] clearly deserve to be mentioned here.

Because of their singular interests in relation with the oceans, and its resources, the following religious characters merit a more detailed appraisal. They not only had the time to convert Indians to the Catholic faith but also engaged in a systematic effort to provide detailed descriptions of objects, animals, vegetation and Native Americans. These descriptions were written with the desire to provide the foundation for the acquisition of scientific knowledge.

The detailed works of Fray Antonio de la Ascención should be mentioned first. Fray Antonio was a Carmelite discalced monk who served as the Cosmographer and rapporteur of Vizcaíno's second maritime expedition to California in 1602.[81] His detailed descriptions of the Mexican coastline along the Pacific Ocean, from Acapulco to California, have been recognized for their accuracy and abundance of details.

In his vivid *Relación Oficial* of this expedition, written in 1603,[82] Fray Antonio describes his arrival to the Port of San Diego in this manner:

> Following the land, they reached some four small islands, two shaped like sugar loaves and the other two somewhat larger. These were named the *"Cuatro Coronados."* To the north of them in the main-

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76. CUEVAS, *supra* note 78, at 147-165.

77. *Id.* at 167-179. *See also* SAMUEL H. MAYO, A HISTORY OF MEXICO: FROM PRE-COLUMBIAN TO PRESENT 134 (1978).

78. *Id.* at 133-134.

79. *Id.* at 132-133.

80. WITNESS: WRITINGS OF BARTOLOME DE LAS CASAS 66 (George Sanderlin trans. & ed., 1992).

81. For a detailed description of Vizcaino's second maritime expedition in 1602, *see* ALVARO DEL PORTILLO, *supra* note 38, at 174-204.

82. The documentation generated in relation with this expedition is quite prolific, consisting of instructions, summaries of meetings held by the pilots and cartographers, personal correspondence, opinions and several narratives of the expedition known as "Relaciones." Probably, the official narrative "Relacion Oficial del Viaje," dated December 8, 1603 in Mexico City is the most complete and authoritative. *See* ALVARO DEL PORTILLO, *supra* note 38, at 176-178. For an English version of this, *see* HENRY E. BOLTON, SPANISH EXPLORATIONS IN THE SOUTHWEST 1542-1706 (1906).

> land there is a large extended *ensenada,* all surrounded by hills which form a very fine port. This was named "San Diego."
> . . . Captains Alarcón and Peguero and Father San Antonio went with eight harquabusiers and found on it many live-oaks, junipers, and other trees such as rock-rose, heather, and one very similar to rosemary. There were many fragrant medicinal and healthful herbs. From the top of the hill all that spacious ensenada could be clearly seen. It was a port very capacious, good, large and safe, as it was protected from all winds. This hill is about three leagues long and half a league wide, and to the northwest of it there is another good port. With this information they returned to the ships.[83]

The works of Fray Antonio accomplished three basic objectives: first, to generate an unprecedented and growing interest in California;[84] second, to produce a reliable and accurate collection of marine charts, depicting the Pacific coastline from Acapulco to Cape Mendocino;[85] third, to describe in greater detail not only the coastline but the climate, the natural resources and the Indigenous peoples of California.[86] Most of these descriptions were enhanced with sketches and drawings.[87]

From these passages, Fray Antonio's desire to attempt to provide information couched in almost scientific terms is evident:

> On Saturday, December 14, the day cleared up a little and they found themselves near a very white high sierra, all reddish on the sides and covered with many trees. It is named the *Sierra de Santa Lucia* and is the one which ships from the Philippines ordinarily sight. Four leagues beyond a river which comes down from some high white sierras covered with snow enters the sea from between some rocks. Its banks are all full of high large trees, white and black poplars, very straight and large, willows, alder trees, blackberries, and others like those of Castile. It is called the *"Rio del Carmelo."* Two leagues beyond is a fine port between which and the river there is a forest of pine trees more than two leagues across. This land makes a point almost at the entrance of the port, which was named *"Punta de Pinos."*[88]

The final portion of Fray Antonio's *Relación Breve,*[89] is devoted to providing advise on how to communicate with the Indians in California

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83. HENRY R. WAGNER, SPANISH VOYAGES TO THE NORTHWEST COAST OF AMERICA IN THE SIXTEENTH CENTURY 232 (1929). *See also* Fray Antonio, *Relacion del Descubrimiento que se hizo en la Mar del Sur, desde el Puerto de Acapulco hasta mas adelante del Cabo Mendocino* (The Baja California Room, Special Collection, UCSD Central Library, 1620).

84. *See* MATHES, *supra* note 45, at 15. It has been properly said that the Carmelite priest was the first propagandizer of California.

85. *Id.*

86. ALVARO DEL PORTILLO, *supra* note 38.

87. *Id.*

88. HENRY R. WAGNER, SPANISH VOYAGES TO THE NORTHWEST COAST OF AMERICA IN THE SIXTEENTH CENTURY 242 (1966).

89. Written at the Convent of Saint Sebastian in Mexico City, October 12, 1620. *See* ALVARO DEL PORTILLO, *supra* note 38, at 178.

and especially on how to succeed in converting them to the Catholic faith.

> In this I trust (by the mercy of Our Lord, Jesus Christ) I may see our Evangelical law and our Holy Mother, the Roman Catholic Church, planted and widely extended, and the natives of this kingdom and New World, having come to Christians, go to enjoy heaven, where we shall all see each other. Amen. I ask all who read this account, for the love of Our Lord, Jesus Christ, to pray to Him to convert such a number of souls as are there, as He redeemed them with His blood.[90]

C. *Exploration for Knowledge*

Man has always been fascinated by his natural surroundings. This fascination has moved him to learn how things are and then to investigate how they work. It is this intellectual curiosity that has fueled man's permanent quest for knowledge.

It should be evident that the need to have valid observations based on notions of science and technology first appeared in relation to navigational matters. The primary need of these early explorers was to find out about their precise physical location as part of the geography of a recently discovered and unmapped land and ocean realm. Later, they translated that information graphically into a map for the benefit of other navigators.

This primary need explains the constant production of nautical charts and maps, permanently subject to a process of gradual but constant technical improvement. In order to be interpreted and applied correctly, these early charts and maps generally required a reference book which consisted, in most cases, of the detailed narrative of the expedition in question.

In relation to the Californias and the Pacific coast in the 16th and 17th centuries, special reference has to be made, for example, to the pioneer works of Juan Rodríguez Cabrillo's log and map of 1542;[91] to the nautical chart from Acapulco to Cape Mendocino *(Derrotero)* made by Gerónimo Martin Palacios, containing the impressive coastal sketches of Enrico Martínez, dated in 1603;[92] to Fray Antonio's map and *Relación Oficial*;[93] and, of course, to the valuable cartographic contributions of Padre Francisco Kino, in 1701, demonstrating that California was a peninsula and not an island.[94]

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90. WAGNER, *supra* note 88, at 265.

91. *See supra* notes 57-59 and accompanying text.

92. These sketches are located at Archivo General de Indias, Seccion Audiencia de Mexico, Legajo 372 at 128-142 (Seville, Spain), *reprinted in* 14 COLECCION MARTIN FERNANDEZ DE NAVARRETE 128-142 (Museo Naval de Madrid, Spain). *See also* ALVARO DEL PORTILLO, *supra* note 38, at 176, 353-417.

93. *See supra* notes 82-89 and accompanying text.

94. *See* ERNEST J. BURRUS, KINO AND THE CARTOGRAPHY OF NORTHWESTERN NEW SPAIN (1965).

In the Pacific area, from Mexico to Alaska, mention should be given to the maps and narratives produced by Juan Pérez who left from San Blas in his frigate *Santiago* and reached a latitude of 55°;[95] Juan Francisco de la Bodega y Cuadra, in his expedition on board the schooner *Sonora* from Acapulco to Alaska and the Aleutian Islands in 1775;[96] the expeditions and maps of Bruno de Hezeta, Ignacio Arteaga and Juan de Ayala, from 1775 to 1779;[97] and the trips of Alcalá, Valdés and Alejandro Malaspina who, in their corvettes *Descubierta* and *Atrevida*, reached Port Mulgrave (Yakutat Bay) in the vicinity of 60° North latitude in 1791.[98]

Thanks to these expeditions and narratives, the coastline of the Pacific Ocean from Acapulco to Alaska, with its rugged and varied geographical contours, including bays, straits and ports, was graphically depicted in a number of original cartographic works.[99] These scientific contributions ended the myth of the Strait of Anián and delineated for the first time, with a high degree of accuracy, the geographical profile of the Northwestern littoral of this hemisphere.[100]

Once the navigational matters had been settled, it was only natural for these maritime explorers to direct the same spirit of scientific inquiry to produce maps and nautical charts to other aspects of the newly discovered lands. Most of the narratives tend to provide detailed information on the presence and variety of natural resources; from drinking water, timber, fruits and fauna, to the existence of salt, sulphur, silver and gold. Fray Antonio's narrative provides outstanding examples of this:

> "All around the island there are good ports and shelters in which any ships can anchor. In the sea there is a great quantity of fish, such as sardines, smelts, lobsters, centerfish, skate, and many others. There are partridges, quail, rabbits, hares, and deer."[101]

There is little doubt that the descriptions of the resources found in the newly discovered lands constituted a most efficient strategy to promote further explorations. As it is known, the embellished descriptions of these resources played a crucial part in attracting new explorers. It is considered that in those days it was customary for the King of Spain to grant a portion of the newly discovered lands, and their riches, jointly with nobility and honorary titles, to the explorer who committed his wealth, technical expertise and personal prestige in the financing, organization and conduct of a most difficult and venturesome expedition.

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95. *See* LEON PORTILLA, *supra* note 35, at 171-173.

96. *See* Juan Francisco de la Bodega & Francisco Antonio Maurelle, Carta Reducida de las Costas y Demarcaciones, in CARTOGRAFIA Y CRONICAS DE LA ANTIGUA CALIFORNIA, *supra* note 35, at 171-172.

97. *See* LEON PORTILLA, *supra* note 35, at 171-173.

98. *See* ENGSTRAND, *supra* note 31, at 172.

99. *See* LEON PORTILLA, *supra* note 35, at 172.

100. *Id.* at 179.

101. *See* WAGNER, *supra* note 88, at 237.

Once the information pertaining to nautical charts and resources had been duly provided, it was then important for certain members of the expedition — usually the rapporteur, the cosmographer or even the physician on board — to turn their personal attention to address those questions posed by their quest for knowledge. This effort was more a matter of personal curiosity than the obligation of providing data which would advance any military or political considerations. This was the beginning of the true exploration for knowledge.

In this order of ideas, the scientific accomplishments of Malaspina's, Bodega y Cuadra's, and Longinos' maritime expeditions merit some commentary.

Alejandro Malaspina's expedition in 1789, strongly supported by Carlos IV, explored the area from Acapulco to Mexico City and produced outstanding scientific information on the Pacific northwest and Alaska. This expedition was conducted in two corvettes, the *Atrevida* and *Descubierta*, designed especially for scientific research and fully equipped with the most advanced technical equipment. They set sail from Cádiz in 1789 in a trip calculated to take almost four years.[102] It was an expedition that expressly included scientists and artists. Their task was to map the coastline, study the natives, investigate the flora and fauna of that region and describe its mineral resources.[103]

Although the major objective of Bodega y Cuadra's expedition was to solve the boundary dispute of the Nootka Sound controversy with the British commissioner George Vancouver. This Spanish explorer took advantage of the trip "to encourage his scientists to study native customs, examine natural resources, and learn the history of the region."[104]

Finally, the expedition of naturalist José Longinos Martínez, a member of the Royal Scientific Expedition to the New Spain in 1785-1789,[105] to the Baja California peninsula produced unique contributions to the scientific knowledge of this part of the Western Hemisphere in 1792.[106] Longinos devoted considerable attention to conduct scientific observations on birds; on mines in Baja California; on Sonora and Sinaloa; on springs of thermal water in the mountainous region west of Mission Santiago; on insects in San Francisco Borja; on customs, arms, clothing, and games of the Baja California Indians; on authochtonous languages in the Baja California peninsula; and, especially, on medicinal plants, such as

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102. *See* ENGSTRAND, *supra* note 31, at 46.

103. *Id.* at 9.

104. *Id.* at 10.

105. This expedition was conceived and promoted by Martin de Sesse y La Casta, with the support of Casimiro Gomez Ortega, director of the Royal Botanical Garden in Madrid. In March 20, 1787, a royal order outlined in detail the purposes of this expedition. The purposes were to examine, draw and describe methodically the natural products of the most fertile dominions of New Spain, and to banish the doubts and uncertainties then existing in medicine, dyeing and other useful arts. *See id.* at 19.

106. *Id.* at 129-142.

gobernadora, "scorpion root," *tabardillo, mesquitillo, manzo, jarramatraca, raíz barbuda*, etc. His accurate descriptions of the Chumash Indians, including their houses, *temascales*, women's dresses, canoes, weapons and flora and fauna of that region, have been recognized as the most complete, systematic and accurate descriptions of those days. On October 26, 1793, Viceroy Revillagigedo ordered Longinos to return to duty. He returned to Mexico City in early 1794.[107]

Whether the early maritime explorations of the Spaniards along the Pacific Coast of this hemisphere were principally driven to obtain gold, to convert Indian souls or to acquire knowledge, there is no doubt today that all of them contributed to the development of science and the progress of humankind.

D. *Early U.S. Marine Scientific Explorations Offshore Mexico*

After a prolonged and costly war of independence lasting over a decade, Mexico consolidated its political autonomy from Spain on September 28, 1821.[108] As a new nation emerging in the international political arena, it was only expected that Mexico's priorities would be principally directed towards solving its serious domestic problems rather than devoting time and effort in protecting its territorial waters, islands and resources from the scientific interest shown by a number of scientifically advanced nations.

It is not surprising, therefore, that the first marine collection expedition offshore Mexico was conducted by the British survey ship *HMS Blossom* in 1831.[109] Researched items consisted of shells from Mazatlán, Sinaloa, in the Gulf of California, collected by Mr. Cuming, who wrote a book published in London by Sowerby in 1833.[110] Additional shell collections took place six years later at Cabo San Lucas, San Blas and Mazatlán, conducted by Richard B. Hinds, surgeon and naturalist of the British ship *HMS Sulpher*.[111]

Another British scientist, Phillip Carpenter, published the now well-known *"Mazatlán Catalogue"* in the late 1840's. He delivered a lecture, *On the Shells of the Gulf of California*, at the Smithsonian institute in 1859. In his lecture, he reported that Mr. Reigen's collection occupied no less than 560 cubic feet. Mr. Reign is reported to have used a dredge to collect some of the shells, which must have been collected deeper than the intertidal zone.[112]

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107. *Id.* at 142.

108. Mexico's Act of Independence (Acta de la Independencia Mexicana) was signed on September 28, 1821, in Mexico City. *See* FELIPE TENA RAMIREZ, LEYES FUNDAMENTALES DE MEXICO: 1808-1991 (Porrua ed., 1991).

109. *See supra* note 38, at 8.

110. *Id.*

111. *Id.*

112. *Id.* According to Dr. Schwartzlose, using a dredge to collect the items indicated that the shells were collected "deeper than the intertidal zone."

It is only evident that, in those days, the legal principles now contained in the Contemporary Law of the Sea of 1982 had not yet been conceived and the activity of U.S. scientists to acquire marine data from foreign countries was not limited. For example, Janos Xántus, an employee of the U.S. Coast Survey who measured the tides in Cabo San Lucas from 1859 to 1861, also collected birds, plants, shells and marine animals without reporting these activities to the government of Mexico.[113] Another method commonly utilized by U.S. scientific institutions consisted in paying Mexican nationals to make specific marine collections for the benefit of those institutions.[114]

It has been reported that the decade of 1872-1882 concentrated in the conduct of U.S. coastal hydrographic surveys off the west coast of Mexico, especially along the Baja California peninsula, conducted by the *U.S.S. Narragansett*, the *U.S.S. Tuscarora* and the *U.S.S. Ranger*.[115]

According to Dr. Richard A. Schwartzlose, the first U.S. oceanographic work off the West coast of Mexico was from the *C.& I.S.S. Hassler*, with Alexander Agassiz on board, which conducted scientific research activities off Cabo Corrientes in early August of 1872 en route to San Francisco.[116]

The first non-government collecting U.S. cruise carried out in the Gulf of California for the collection of "natural science materials, including mollusks," was from a vessel chartered in San Francisco by Mr. W.J. Fisher in 1873 and 1876.[117]

This section cannot conclude without referring to the major scientific collecting cruises conducted in the Gulf of California by the U.S. Fish Commission vessel, *Albatross*, in 1888, 1889, 1891, 1904 and 1911.[118] The scientific activities of this ship included the study of bathymetry, fish, plankton, general invertebrates, shells, shore and sea birds, island animals, insects, sediments, water temperatures, dip netting and meteorological data.[119] These cruises produced an immense wealth of scientific data. The result of the processing of this information contributed enormously to the advancement of knowledge with respect to the Gulf of California.

Starting in the late 19th century, the California Academy of Sciences conducted numerous scientific explorations along Mexico's Baja California Peninsula and the Pacific coastline. Studies were made on the geology, flora and fauna in the area of the Mexican islands of Santa Margarita, Magdalena, Guadalupe, and especially Islas Revillagigedo.[120] The

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113. In 1860, Mr. Xantos published a paper describing for the first time three new starfish from Cabo San Lucas. *Id.* at 9.

114. *Id.*

115. *Id.* at 9-10.

116. *Id.* at 10.

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* 29 ADRIAN F. RICHARDS BIBLIOGRAPHY, CARTOGRAPHY, DISCOVERY AND EXPLORA-

early expeditions conducted by the California Academy of Sciences in the Gulf of California[121] laid a solid scientific foundation for the systematic study of this intriguing oceanic basin. At the same time, these expeditions fostered the conduct of scientific projects with the participation of Mexican counterparts.[122]

III. MEXICO'S LEGAL REGIME APPLICABLE TO THE CONDUCT OF MSR ACTIVITIES BY FOREIGN SCIENTISTS

Mexico is among those states which have recently enacted specific rules governing the conduct of marine scientific research activities by foreigners. From an international law perspective, since Mexico is a party to the 1982 U.N. Convention on the Law of the Sea, these rules are clearly inspired by Part XIII of this Convention. Domestically, Mexico's legal regime applicable to these activities originated from the legal foundations of the Federal Constitution of 1917 and some pertinent federal statutes. This legal regime is enunciated in a recent official publication.

Turning to Mexico's 1917 Constitution, Article 27 provides that "it corresponds to the Nation the direct ownership of any natural resources" located in the continental land mass and the continental shelf, including that of islands, which comprise any minerals, deposits or substances.[123] Special attention is given to oil, natural gas and any other hydrocarbons.[124] The same article provides that, *inter alia*, "the waters of the territorial seas and the internal marine waters are the property of the [Mexican] nation."[125]

It appears that this article's legal philosophy still adheres to the

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TION OF THE ISLAS REVILLAGIGEDO 315-360 (Proceedings of the California Academy of Sciences Series No. 9, 1959).

121. *See* Expedition of the California Academy of Sciences to the Gulf of California in 1921: A General Account. *Id.* at 55-72.

122. A publication produced by the Scripps Institution of Oceanography (SIO) with the assistance of Mexico's National University Institute of Marine Sciences and Limnology (UNAM) which enlisted over 4,000 scientific works divided into 27 categories, including some in the social sciences are dating back to 1829. *See* BIBLIOGRAPHY OF THE GULF OF CALIFORNIA: MARINE SCIENCES (Richard A. Schwartzlose & John R. Hendrickson eds., 1982).

123. Article 27 of the Mexican Constitution provides:

> [I]t corresponds to the Nation the direct ownership of all the natural resources of the continental shelf, including the continental shelves of islands; of all minerals or substances in veins, layers, masses or beds that constitute deposits whose nature is different from the components of the land, such as minerals from which metals and metalloids are extracted that are utilized in industry. The mineral and organic deposits of substances susceptible of being used as fertilizers; combustible mineral solids; petroleum and all solid, liquid or gaseous hydrocarbons and the air spaces situated over the national territory, in the extensions and terms established by international law. CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 27 at 23 (Porrua ed., 1994) [hereinafter Constitution].

124. *Id.* at 23.

125. *Id.* In Spanish this phrase reads, "Son propiedad de la Nacion las aguas de los mares territoriales, en la extension y terminos que fije el derecho internacional."

traditional but obsolete notion of the *ius dominium,* expressly granting upon the Mexican nation the direct ownership, or property, over any of these natural resources.[126] This text should be read in conjunction with Article 42 of the Constitution that enumerates the physical parts that comprise Mexico's "national territory,"[127] and Article 48 providing that "islands, cays, reefs, the continental shelf, the territorial seas, the internal maritime waters and the air space over the national territory, will depend directly from the Federal government . . . ."[128]

Mexican constitutional articles provide the legal foundation from which numerous specialized federal statutes are derived, whether they regulate questions relating to the marine environment, to areas as diverse as education, to the rendering of professional services or to indigenous peoples.

In relation with the marine environment, the Federal Oceans Act *(i.e. Ley Federal del Mar)*, enacted in 1986,[129] deserves special attention. This statute enumerates Mexico's six "marine zones:" 1) the territorial sea, 2) the "marine internal waters," 3) the contiguous zone, 4) the exclusive economic zone, 5) the continental shelf and the insular shelves, and 6) "any other [oceanic space] permitted by international law."[130] Its Article 6 provides that

> [T]he sovereignty of the Nation and its sovereign rights, jurisdictions, and authorities ("competencias") within the boundaries of the maritime zones . . . shall be exercised in accordance with the provisions of the Political Constitution of Mexico, international law, and the applicable domestic laws.[131]

This legal authority is exercised with regard to installations and artificial islands, utilization of living and non-living resources, economic development of the sea, protection and preservation of the marine environment and, specifically, "the conduct of marine scientific research

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126. For a critical appraisal of the notion of property to claim "ownership" over these resources, see Bernardo Sepulveda, *Derecho del Mar: Apuntes sobre el Sistema Legal Mexicano*, 12 FORO INT'L, 237-240 (1972).

127. According to Article 42, Mexico's "national territory" is comprised of 31 States and the Federal District of Mexico City; islands, including reefs and cays in the adjacent seas; specifically the islands of Guadaluple and Revillagigedo in the Pacific Ocean; the continental shelf appurtenant both to the continental land mass and to islands, cays and reefs; a 12 nautical mile territorial sea and the internal maritime waters, and; the superjacent air space. CONST., *supra* note 123, art. 42, at 42-43.

128. *Id.*

129. Mexico's *Ley Federal del Mar* (translated here as Federal Oceans Act) [Hereinafter FOA] appeared in D.O. of January 8, 1986. Some minor corrections were made by a subsequent presidential decree, *Fe de Erratas a la Ley Federal del Mar*, D.O. of January 9, 1986. FOA entered into force the day of its publication. For an English translation of this statute, as well as President Miguel de la Madrid's statement introducing the corresponding legislative bill to Mexico's Federal Congress, *see* 25 I.L.M. 898, 900 (1986).

130. FOA, art. 6, ¶ 1 at 890. *See also* Vargas, *supra* note 14, at 192-219.

131. FOA, art. 6, ¶ 1 at 890.

activities."[132] Therefore, foreign States and their nationals shall respect the provisions of the FOA regarding each of these marine zones, "with their respective rights and obligations."[133]

The enforcement of the FOA corresponds to the Federal Executive Power,[134] through its different departments, known in Mexico as *"Secretarías de Estado."* Each of these secretariats (or ministries) exercises its respective function and assigned jurisdiction in accordance with the Organic Act of the Federal Public Administration (i.e. *Ley Orgánica de la Administración Pública Federal*).[135]

The federal agencies which are involved in marine questions are numerous.[136] Information will be provided regarding the three secretariats that have a more direct involvement in the conduct of marine scientific research activities by foreign vessels, namely, (1) the Secretariat of the Interior, (2) the Secretariat of Foreign Affairs and (3) Secretariat of the Navy.

A. *Secretariat of the Interior (Secretaría de Gobernación or SG)*[137]

This federal agency occupies a preeminent place in the Presidential Cabinet.[138] It controls political activities and formulates the demographic policies of the nation.[139] Its functions include the organization and supervision of elections, the rights and obligations of indigenous peoples and the formulation and implementation of demographic and immigration policies.[140] Regarding marine scientific research activities by foreign scientists, SG is involved the issuance of permits relating to federal islands and the control of entry, stay and departure of foreigners in Mexico.

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132. FOA, art. 6, ¶¶ 1-6 at 889-890.

133. *Id.*

134. The federal agencies directly involved in the enforcement of the FOA include: Secretariat of the Navy; Secretariat of the Environment, Natural Resources and Fishing; Secretariat of Communications and Transports; Secretariat of the Interior; Secretariat of Health; Secretariat of Finance; Secretariat of Energy, and; Secretariat of Foreign Affairs.

135. *Ley Organica de la Administracion Publica Federal*, published in D.O. of December 29, 1976, as amended and published in D.O. of December of December 28, 1994. LEGISLACION DE LA ADMINISTRACION PUBLICA FEDERAL 1-48 (Delma ed., 1995) [Hereinafter L.A.P.F.E.].

136. *E.g.*, The Secretariat of the Environment, Natural Resources and Fishing, exercises jurisdiction over fishing and the protection of the marine environment, including the conduct of fisheries research through its National Fisheries Institute (Instituto Nacional de Pesca); the Secretariat of Energy, governs activities affecting oil exploration and exploitation in Mexico's continental shelf through PEMEX and the Mexican Petroleum Institute (Instituto Mexicano del Petroleo); the Secretariat of Communications and Transports controls the permits for foreign vessels arriving at Mexican ports, etc.

137. L.A.P.F.E., art. 27.

138. Legally and administratively, the Secretariat of Gobernacion, is placed at the top of the hierarchy of the federal public administration.

139. L.A.P.F.E., art. 27, ¶¶ 16 & 25, respectively.

140. L.A.P.F.E., art. 27, ¶¶ 4, 6 & 28.

Thus, SG is to provide its technical opinion to the Secretariat of Foreign Affairs *(Secretaría de Relaciones Exteriores or SRE)* regarding requests of foreign institutions to conduct marine scientific research and to visit or to propose any commercial or recreational activities to take place in islands under the federal jurisdiction, including *Federal islands.*

In principle, according to Article 48 of the Federal Constitution, any "islands, cays and reefs" that form a part of Mexico's national territory, "will depend directly [of] the federal government, save those islands upon which the States have exercised jurisdiction as of this date."[141] When the Mexican Constitution was enacted in 1917, Article 45 provided that the States which then united to form Mexico's Federation were to maintain the same territorial area and boundaries they had until that time, "provided there were no disputes" in relation with those boundaries.[142] However, at the time, most States were uncertain as to their precise territorial boundaries, especially with respect to the legal status of the offshore islands. During the debates of the Querétaro Constitutional Congress of 1916-17, the number and location of the islands belonging to Mexico was not determined.[143] This explains why so very few of Mexico's coastal States have enumerated in their respective Constitutions the specific islands which are to be included in their respective territorial base.[144]

As a consequence, there is no complete catalogue of islands that belong to a State or those under federal jurisdiction.[145] However, the

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141. Article 48 of the 1917 Constitution provides: "[T]he islands, cays and reefs in the adjacent seas that belong to the national territory; the continental shelf; the submarine shelves (i.e. zocalos submarino) of islands; cays and reefs; the territorial seas; the internal maritime waters and the [air] space situated over the national territory, *will directly depend on the Federal Government with the exception of those islands over which the States have exercised jurisdiction as of this date.*" *See* CONST., *supra* note 123, at 43.

142. *See Id.*, art. 45.

143. *See* REGIMEN JURIDICO Y INVENTARIO DE LAS ISLAS, CAYOS Y ARRECLIFES DEL TERRITORIO NACIONAL 15(Secretaria de Gobernacion ed., 1981). (Legal Regime and Inventory of the Islands, Cays and Reefs of the National Territory). In this report, the Secretariat of Gobernacion asserts that as of May 1, 1917, when the Constitution entered into force, only the following 13 States may have exercised jurisdiction over some islands. These are the States of Sonora, Sinaloa, Jalisco, Guerrero, Oaxaca, Yucatan, Campeche, Tabasco, Veracruz, Tamaulipas, Colima, Michoacan and Chiapas. However, Colima, Michoacan and Chiapas have no islands in front of their State territory. This report concludes that only Sonora and Campeche "incorporated islands into their State territory [in 1917]."

144. Out of 18 coastal states in the Republic of Mexico: Baja California, Baja California Sur, Sonora, Sinaloa, Nayarit, Jalisco, Colima, Michoacan, Guerrero, Oaxaca, Chiapas, Quintana Roo, Yucatan, Campeche, Tabasco, Veracruz and Tamaulipas, only the Constitutions of the three States provide the names of the islands that form a part of the State territory. The three States are Baja California Sur in Article 34, paragraph 2; Sonora in Article 3, and, Quintana Roo in Article 46, paragraph 2. The State Constitutions of Nayarit in Article 3 and Campeche in Article 4, contain a general provision incorporating the "adjacent islands." *See* REGIMEN JURIDICO DE LAS ISLAS MEXICANAS Y SU CATALOGO 29 (Secretaria de Marina ed., 2d ed., 1979).

145. In recent years, a constructive effort has been undertaken by different federal agencies of the government of Mexico to produce a complete official listing of all of the islands that belong to that country. However, these various reports appear to be incomplete

Secretaría de Gobernación exercises jurisdiction over two Mexican archipelagos, both of them located in the Pacific Ocean: 1) Islas Marías, and 2) Archipiélago Revillagigedo.

1. Islas Marías

Discovered in 1532 by Pedro de Guzmán, the islands were leased from the federal government by Alvarez de la Rosa in 1857. A few years later, the archipelago was acquired in property by José López Uranga, who sold it to Manuel Carpena in 1879. Finally, the Federal government acquired the islands for 150,000 pesos in 1905 from Gila Azcona Izquierdo viuda de Carpena, and it has exercised jurisdiction ever since.[146]

Islas Marías are located in the Pacific Ocean, facing the coast of the state of Nayarit. The archipelago is formed by four islands: 1) San Juanico or San Juanito, 2) María Madre, 3) María Magdalena, and 4) María Cleofas.[147] Located between 21° 45' N. Latitude and 106° 16' W. Longitude (Isla María Cleofas).

Legally, the islands are subject to a special legal regime. By presidential decree, the largest of these islands — María Madre — became a penal colony in 1905.[148] Controlled and administered by Gobernación, this penal colony continues in operation today. The colony operates under the authority of a director, who exercises his political authority in the islands as a "Political Delegate" of Gobernación.[149] Administratively, the penal colony operates as a small town, with its own political authority, civil registry, and civil and penal courts.[150] The colony is governed by the laws applicable to the Federal District (Mexico City) and is organized as a cooperative, directed at organizing the labor and trade of the inmates, known as "Colonos," to exploit the islands' natural resources.[151]

Today, Islas Marías constitute one of the most attractive archipelagos offshore Mexico for scientific, commercial and strategic reasons. The volcanic origin of the archipelago has produced peculiar geological features; its flora and fauna are unique, and the abundant presence of tuna

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and with divergent results. *See e.g.*, ISLAS MEXICANAS: REGIMEN JURIDICO Y CATALOGO (Secretaria de Marina ed., 1987); CATALOGO PROVISIONAL DE ISLAS Y ARRECIFES (Secretaria de Programacion y Presupuesto ed., 1981). *See also* REGIMEN JURIDICO Y INVENTARIO DE LAS ISLAS, CAYOS Y ARRECIFES DEL TERRITORIO NACIONAL, *supra* note 144.

146. *See id.* at 35.

147. *See supra* note 144, at 53, 56.

148. A "penitentiary" was established by decree published in D.O. of May 12, 1905. Currently, the islands are regulated by a special legal regime, published in D.O. of December 30, 1939 and have been in force since January 1, 1940. Maria Madre continues today to be used as a high security prison for federally sentenced inmates or for those sentenced for ordinary crimes which the Gobernacion has determined should be sent to the Islas Marias Penitentiary. *Id.*

149. *See* arts. 24-25, *Reglamento Interior de la Colonia Penal de las Islas Marias*, D.O. of March 1, 1920.

150. *Id.*, arts. 5-7.

151. *Id.*, arts. 4-6.

has recently attracted commercial fishing in the area. In Mexico, ideas have been advanced advocating a more rational use of these islands, utilizing them for tourist purposes and commercial fishing activities, putting an end to the anachronistic existence of a high security "penal colony."[152]

2. Islas Revillagigedo

Located in the Pacific Ocean, some 375 nautical miles from the coastline of Jalisco, these islands were discovered by Ruy López de Villalobos in 1542.[153] In 1861, President Juárez enacted a decree authorizing the use of these islands as a penal colony, as requested by the legislature of the State of Colima;[154]

The archipelago is formed by four islands: 1) Socorro, 2) San Benedicto, 3) Roca Partida, and, 4) Clairón.[155] Geographically, their location ranges from 18° 42' N. Latitude 110° 57' W. Longitude of Isla Socorro (which is the closest o continental Mexico) to 18° 22' N. Latitude, 114° 44' W. Longitude of Isla Clarión, the most distant.[156] Socorro and Clarión islands merit a special comment.

Isla Socorro is the largest, covering an area of some 60 square miles. In a special visit designed to assert Mexico's sovereignty over this archipelago, Socorro was visited by President López Portillo, accompanied by members of his cabinet, on March 23, 1978.[157] Since 1965, the islands have been occupied by a permanent naval detachment of the Mexican Navy. Today, Socorro is used as a naval base for a fleet of "Albatross" planes which are used for reconnaissance missions within Mexico's 200 n.m. exclusive economic zone. In addition to its small airport, the island has military barracks for Mexican marines, radar and meteorological stations, two desalination plants, a family center and a small port.[158]

During the 18th and 19th centuries, Isla Clarión was visited by pirates, explorers, fishermen, whalers and scientists.[159] Situated some 214 nautical miles from Socorro, it is the most westward of the Revillagigedo group. Because of its unique geographical situation, Clarión was used as a base point to delimit the outer boundary of Mexico's exclusive economic

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152. *See* Alicia K. Palma, Las Islas de Mexico, 82-85 (1984) (Universidad Iberoamericana de Mexico).

153. *See supra* note 145, at 35.

154. *Id.* The petition of the Colima Legislature was made to the Federal Executive July 25, 1861.

155. *See supra* note 145, at 23.

156. *Id.*

157. *See* ISLAS REVILLAGIGEDO: PRESENCIA MEXICAN EN EL PACIFICO (Secretaria de Marina ed., 1978). For a detailed scientific description of this island resulting from an expedition in 1958 by a group of Mexican scientists from Universidad Nacional Autonomous de Mexico, *see* JULIAM ADEM, LA ISLA SOCORRO: ARCHIPIELAGO DE LAS REVILLAGIGEDO (Monografia del Instituto de Geofisica ed., 1960).

158. *Id.* at 29-36.

159. *Id.* at 38-40.

zone when this country established this marine zone in 1976.[160] The presence of this island enlarged the exclusive economic zone of Mexico by some 80,000 square miles.

In recent years, Isla Clarión has attracted international attention because of its location in the part of the Pacific geologically known as the Clipperton-Clarion Trench; an area known to have the largest and richest deposits of polymetallic nodules in the world. As soon as international corporations begin to consider exploiting the mineral riches of the deep sea, an activity which may take place in a few more decades, Mexico is likely to become a serious actor in what may become a highly competitive arena.

In addition to its involvement with federal islands, the SG controls the entry, stay and expulsion of aliens.[161] Through its different delegations and agents, SG is empowered to check and investigate the immigration status of foreigners, including those who conduct marine scientific research activities, whether they arrive at a Mexican port aboard a U.S. research vessel (or at any other port of entry), or enter Mexico as a researchers, professors, technicians, lecturers, students, etc. Depending on the type of activity, their nationality, the duration of stay, etc. foreign marine scientists are required to obtain a valid and proper visa issued by the competent Mexican authorities.[162]

No immigration law question in Mexico is complete unless reference is made to Article 33 of the Mexican Constitution. This provision empowers the Executive, through the SG, with the exclusive power to make any alien abandon Mexico's national territory, "Immediately and without the need of a previous hearing," when the presence of said aliens, at the discretion of the Executive, is considered "inconvenient."[163]

B. *Secretariat of the Navy (Secretaría de Marina)*

Mexico's naval and maritime security is in the hands of this federal agency.[164] It is empowered to monitor and control the protection of the

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160. Mexico established its 200 n.m. in 1976 through a Presidential Decree that added Paragraph 8 to Article 27 of its Constitution, D.O. of February 6, 1976. The EEZ entered into force on June 6, 1976. For technical details on maritime delimitation using Isla Clarion as a base point, *see Decreto que Fija el Limite Exterior de la Zona Exclusiva de Mexico* (Decree that establishes the outer boundary of Mexico's exlusive economic zone), D.O. of June 7, 1976, entering into force on July 31, 1976.

161. L.A.P.F.E., art. 27, ¶¶ 6 & 25.

162. In general, the Secretariat de Gobernacion is the Mexican counterpart of the Immigration and Naturalization Service (INS).

163. CONST., *supra* note 123, art. 33, at 36. In its closing Paragraph, Article 33 provides that in Mexico aliens are not allowed for any reason, to get involved in the political affairs of that nation.

164. L.A.P.F.E., art. 30, ¶¶ 1, 4 & 7. The Secretariat de Marina, is empowered, *inter alia*, to organize and prepare the Navy to exercise Mexico's sovereignty over its marine zones and island; to provide the services of a marine police (i.e. coast guard); to intervene in the administration of military (naval) justice, and to structure the national oceanographic

marine environment and to play a role in coordinating oceanographic research activity, through its Intersecretarial Commission of Oceanographic Investigation (CIIO).[165]

CIIO was created in 1978. Among its original seven members, four Cabinet-level agencies were included: SM, which presided over it, and the Secretariats of Patrimony, Programming and Budget, and Public Education.[166] Mexico's National University (UNAM), the National Polytechnic Institute (IPN) and the National Science and Technology Council (CONACYT), completed its membership. CIIO'S principal objective was the undertaking of "oceanographic investigations" in waters under federal jurisdiction, as well as to conduct "studies and geographic explorations in order to know about, locate and resume *(sic)* resources likely to be utilized."[167]

CIIO was not formed to participate in the "clearance" processing of foreign marine scientific research requests. It was created to structure and coordinate oceanographic projects and geographic explorations taking place at the domestic level, in waters and other marine spaces subject to the jurisdiction of the federal government, balancing the participation of official and academic institutions in its limited membership.[168] Its central purpose was to conduct applied research projects aimed at producing practical results in the short term. These projects were to be in symmetry with the national interest and scientific priorities of that country, as perceived by CIIO'S members. Special attention was given to the study and exploration of federal islands.

During the past two decades, a subtle administrative "turf war" developed among Cabinet level agencies in Mexico regarding the institutional control and authority to be exercised over marine scientific research activities conducted by foreign institutions. In the 1970's, the control of the then recently created CONACYT exercised over these matters was undisputed. In the 1980's, the Secretariat of the Navy attempted to influence the process through its Intersecretarial Commission of Oceanographic Investigation (CIIO).

In the 1990's, principally as a consequence of the 1982 United Nations Convention on the Law of the Sea, that provided that these communications should be made "through appropriate official channels,"[169] the

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data bank. Under paragraph 12, the Secretariat is to "intervene in the granting of permits for foreign or international scientific expeditions or explorations in Mexico's national waters." Under paragraph 17, the Secretariat can "program and implement . . . the conduct of oceanographic research in waters under federal jurisdiction."

165. For the "Acuerdo" creating the Intersecretarial Commission of Oceanographic Investigation, [hereinafter CIIO], *see* D.O. of February 22, 1978.

166. Except for the Secretariat de Marina and the Secretariat of Patrimony, Programming, Budget and Public Education, the other two agencies no longer exist today. *See* L.A.P.F.E., art. 26.

167. *See supra* note 165, the legal rationales (Considerandos) of CIIO's "Acuerdo."

168. *See Id.* at art. 3.

169. *See* UNCLOS III, *supra* note 20, art. 250.

involvement of the Secretariat of Foreign Affairs (SRE) became increasingly dominant. This trend has been strengthened recently.

C. *Secretariat of Foreign Affairs (Secretaría de Relaciones Exteriores or SRE)*

Both domestically and internationally, SRE plays a crucial role in matters relating to the conduct of marine scientific research by foreign institutions in marine zones under Mexico's sovereignty or jurisdiction.[170]

According to official information made public recently,[171] in the period between 1976 and 1993, the government of Mexico approved 279 foreign requests submitted by five countries and one international organization.[172] The approved projects embraced 63 different types of scientific research ranging from studies on black abalone, the seabed and the ocean floor, to questions pertaining to the continental shelf, oil, hydrothermal vents and zoogeography.[173] Out of the total of 279 clearances, 258 approvals (almost 93%) were granted to U.S. institutions.

Empowered to conduct the foreign affairs of the nation, SRE is also authorized "to promote, propitiate and assure the coordination of actions outside Mexico, of the dependencies and agencies of the federal public administration."[174] In addition, SRE intervenes, in questions pertaining to the territorial boundaries of the country and international waters.

These functions should be read in conjunction with the 1982 Convention which provides that communications concerning marine scientific research projects must me made "through appropriate official channels,"[175] i.e. through the SRE.

Technically, pursuant to LAPFE,[176] the SRE is not expressly empowered to participate in the internal administrative process regarding the substantive evaluation of foreign requests to conduct marine scientific research activities in oceanic areas under Mexico's sovereignty or jurisdiction. This task is left in the hands of the Secretariat of the Navy,[177] and

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170. *See* FOA, *supra* note 129; VARGAS, *supra* note 11, and the accompanying text.

171. *See* NORMATIVIDAD, *supra* note 27. This is the first time Mexico has published this kind of maritime information. However, this official publication does not inform as to the number of denials given to foreign requests, or the reasons for the denials.

172. The five countries were: The United States with 258 approvals; the USSR with 13; France with 3; Japan with 2; and Poland with one. The United Nations Food and Agriculture Organization was the international organization. *See* Investigaciones Cientificas Realizadas por Extranjeros Autorizadas por el Gobierno de Mexico en Zona Marinas de Jurisdiccion Nacional (Scientific research by foreigners [which were] authorized by the government of Mexico in marine zones under national jurisdiction). *Id.* at 351-431.

173. *See* NORMATIVIDAD, *supra* note 27, at 347-350. A complete list of the different types of research conducted by foreign scientists is given in this source.

174. L.A.P.F.E., art. 28, ¶ 1.

175. UNCLOS III, *supra* note 19, art. 250.

176. *See* L.A.P.F.E., art. 28.

177. *See* L.A.P.F.E., art. 30, ¶ 12, where the Secretariat de Marina is expressly empowered to "to intervene in the granting of permits for foreign or international scientific expedi-

its CIIO.[178] This authority is concurrently shared with other entities which have the scientific and technical capabilities to render a technical opinion on the merits of any marine research project.[179] Therefore, in this internal process, the SRE serves only as the official and diplomatic conduit, or bridge, that connects the international marine scientific community with their counterparts in Mexico.

Basically, the SRE serves as a domestic and international messenger. Domestically, it transmits to the competent authorities or institutions within that country the MSR requests advanced by foreign entities, and receives back the technical opinions produced by these national authorities or institutions after they have made the determination as to whether the proposed foreign project should be authorized or not, based on Mexico's national interests and scientific priorities. At the international sphere, the SRE transmits to the interested foreign research institution the final determination reached by Mexico's competent authorities or institutions.

D. *MSR Guidelines for Foreign Scientists in Mexico*

In early 1994, the Secretariat of Foreign Affairs (SRE) and the Secretariat of the Navy (SM) jointly published an official book that describes the legal regime Mexico applies to MSR activities conducted by foreigners in the marine zones subject to its sovereignty or jurisdiction.[180] This is the first time that Mexico has produced this type of official publication. In the past, this information was transmitted directly by the SRE to interested countries via diplomatic notes.

The publication in question is comprised of a number of sections: 1) definitions; 2) guidelines applicable to MSR; 3) information on the internal administrative process designed to evaluate foreign requests for MSR activities; 4) a diagram of this process; 5) a listing of the federal public administration entities involved in the evaluation process, and their corresponding authority; 6) description of the legal regime of Mexico's marine zones; 7) a detailed listing of the information that a foreign MSR request should contain; 8) examples of various foreign requests for MSR; 9) domestic legislation (i.e. sections of certain federal statutes, regulations, "Acuerdos", etc. relating to marine questions); 10) special requirements imposed by certain federal agencies; 11) Part XIII of the 1982 Convention; 12) scientific areas in MSR projects; and, 13) a listing of 258 foreign research projects authorized by the government of Mexico, from February 1976 to November 1993.

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tions or explorations [to be conducted] in national waters." Paragraph 17 "empowers the Secretariat to program and implement, directly or in conjunction with other entities or institutions, the works of oceanographic investigation [to take place] in the waters under federal jurisdiction."

178. *See supra* note 165 and the accompanying text.

179. *See infra* note 187 and the accompanying text for a listing of these entities.

180. *See* NORMATIVIDAD, *supra* note 29.

A brief legal analysis of some of these sections follows. Special attention is given to describing, commenting and critiquing, when appropriate, those sections that articulate the newly-structured administrative regime that now governs the conduct of MSR activities by foreign scientists in Mexico's marine zones. Occasionally, a comparison is made between the administrative regime, on the one hand, and the pertinent provisions of the 1982 Convention, on the other.

1. Internal Administrative Mechanism for Official Consultations

Marine scientific research has become an area of the highest priority for the government of Mexico. A number of factors contribute to the special attention this activity has gradually acquired over the last three decades.

There is no doubt that the prolonged works of the Third United Nations Conference on the Law of the Sea, and the successful completion of the 1982 Convention, which now contains a special part devoted to this topic, served as an excellent global forum to foster and propagate the benefits of these complex and costly activities. Furthermore, the inclusion of the "Principle of consent," that central piece around which MSR now gravitates conferring upon coastal states an undisputed advantage over researching nations, clearly contributed to enhancing the role and the active participation of coastal states in this area. Today, no country in the world denies the advantages and benefits that MSR produces.

Bilaterally, MSR is playing a dynamic and unprecedented role in relations of Mexico with the United States. Geographical proximity is a key factor. More importantly, the marine environment that surrounds Mexico is, unquestionably, among the most intriguing areas for any marine scientist today. This explains why an inordinate number of U.S. marine research cruises have been conducted in the recent past, and continue to take place offshore Mexico.

It is impressive, to say the least, to attempt to analyze the volume, depth and the breadth of the numerous activities that the U.S. scientific community is so persistently directing at Mexico. It may not be a hyperbole to suggest that the MSR activities the United States has undertaken in Mexico have covered the most varied scientific fields of inquiry.[181] They have been conducted from the most diverse technical platforms,[182] and have included the most diverse of U.S. institutions,[183] taking place in any and all marine spaces subject to Mexico's sovereignty or

181. *Id.* at 347-350. The scientific areas of inquiry are listed in the publication, NORMATIVIDAD.

182. Marine scientific research activities of U.S. institutions have been conducted from any imaginable platform, including sea divers, buoys, boats, submarines, oceanographic vessels, airplanes, helicopters and artificial satellites.

183. The U.S. institutions have included federal agencies, state departments, public and private academic scientific institutions, private foundations, and private corporations.

jurisdiction.[184]

Understandably, in 1990 Mexico decided to create a "Working Group"[185] to properly evaluate the increasing number of foreign permit applicants. This group is a part of the Secretariat of the Navy's CIIO. Its objective embodies the formulation of uniform criteria applying to the administrative handling and the substantive evaluation of requests advanced by foreign institutions.[186] The group is composed of the following entities: 1) Secretariat of the Interior; 2) Secretariat of Foreign Affairs; 3) Secretariat of the National Defense; 4) Secretariat of the Navy; 5) Secretariat of Finance and Public Credit; 6) Secretariat of Energy, including PEMEX; 7) Secretariat of Agriculture and Hydraulic Resources; 8) Secretariat of Communications and Transports; 9) Secretariat of Social Development; 10) Secretariat of the Environment, Natural Resources and Fisheries; 11) Secretariat of Public Education, including the National Institute of Anthropology and History; 12) National Science and Technology Council; and, 13) National Autonomous University of Mexico.[187]

All foreign requests must be submitted to the SRE through diplomatic channels. The ordinary route would be through the applicant's embassy in Mexico City. In turn, the SRE will send this request (a) to all the competent federal agencies and institutions, and (b) to the CIIO.[188] In evaluating the merits of the foreign scientific project these agencies and institutions shall take into account:

> A. the need to coordinate the MSR conducted by foreigners in light of Mexico's interests and national programs in that area and their respective priorities;
> B. the degree of compliance of the applicable national and international legislation; and,
> C. to assure that the maximum degree of national participation takes place in an MSR project authorized to be conducted by foreigners.[189]

In rendering their respective technical opinion regarding the foreign project, each of the agencies and institutions involved must take into account the "consultative technical opinion" rendered by the CIIO. Each of the Mexican entities have to transmit their final opinion to the SRE. If this opinion is favorable, then the SRE shall communicate through diplomatic channels such a result to the embassy in question, clearly specifying the "requirements and conditions" that any of the participating Mexican entities may have imposed, if any.

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184. Mexico's internal waters, the territorial sea, islands, the continental shelf and the exclusive economic zone.

185. Its official name is Grupo de Trabajo [sobre] Solicitudes de Permisos (Working Group on Permit Requests). *See Normatividad*, *supra* note 27, at 11.

186. *See* Presentation by Admiral Luis Carlos Ruano Angulo. *Id.* at 12.

187. *Id.* at 42-43.

188. This section follows very closely the official text that appears in 2.1 of the *Procedimiento de Consultas* of NORMATIVIDAD. *Id.* at 29-30.

189. *Id.* at 29.

In the same fashion, the SRE is "the competent authority" to receive, through the proper diplomatic channels, any reports produced by foreign scientists pertaining to the authorized research project. SRE shall transmit these reports to the competent federal agencies and institutions, including the CIIO.[190]

The SRE is also empowered to act through diplomatic channels, in consultation with the competent agencies and institutions, as well as the CIIO, to develop the necessary contacts with official or scientific institutions of foreign countries in order to endeavor, when possible, that foreign MSR projects offshore Mexico "be incorporated in true programs of international cooperation that respond to the interests and priorities of national development and contribute to enrich the knowledge about the marine environment for the benefit of humankind."[191]

This section is emphatic in reiterating that the SRE is "the competent authority" at the international level to handle, always through the proper diplomatic channels, any specific requests, or any other technical or scientific information (including reports, articles, publications, etc.) pertaining to any foreign MSR projects in Mexico. In the past, this was not the case. For example, certain federal agencies occasionally engaged in direct communication with foreign entities in matters relating to MSR; in other instances, some of those agencies entered into "international inter-institutional agreements."[192]

The proliferation of these agreements and the apparent lack of coordination by a central authority led to the enactment, in 1992, of Mexico's federal statute: *Ley sobre la Celebración de Tratados* (Treaties' Making Act).[193] Pursuant to this statute, the SRE, "without affecting the exercise of the powers of the agencies and the Federal Public Administration, shall coordinate the necessary actions leading to the making of any treaty," maintaining for that purpose a "treaty registry."[194] In addition, the same statute provides that such agencies "shall keep the SRE informed on any inter-institutional agreement that they are planning to enter into with any other foreign governmental organs or international organizations."[195] However, from a statutory viewpoint, it is the Secretariat of the Navy (and not the SRE) the agency empowered to intervene in the administrative process of evaluating foreign requests to conduct MSR activities in "national waters" (Article 30, paragraph 12 of the LAPFE).[196]

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190. *Id.* at 30.

191. *Id.*

192. *E.g., supra* note 27, at 249-301. SRE's (Secretariat de Relaciones Exteriores) official publication, lists 652 inter-institutional bilateral agreements entered into by 18 federal agencies with their foreign counterparts, including a large number with the United States.

193. For a detailed analysis of the origin and legislative evolution of this statute, *see Ley de Tratados: Secretaria de Relaciones Exteriores*, D.O. January 2, 1992.

194. *Id.* art. 5, at 155.

195. *Id.*, art. 6.

196. *See* L.A.P.F.E., *supra* note 177 and the accompanying text.

In addition, the SM coordinates the other agencies and entities involved in this process. This is, precisely, the central function provided by the CIIO.

2. The Legal Regime of Mexico's Marine Zones

Section 2.5, titled "Marine Zones of National Jurisdiction,"[197] is one of the most important parts of this official publication. It describes the different types of marine zones which exist in Mexico from the perspective of its domestic legislation,[198] and adds a brief commentary on the specific requirements governing the conduct of foreign MSR activities in each of these spaces.[199] The following comments are made in regard to these "marine zones:" a) internal marine waters; b) territorial sea; c) exclusive economic zone, and d) continental shelf.

a. Internal Marine Waters

Mexico exercises full and absolute sovereignty over these waters. This sovereignty extends over the air space above these waters, as well as the seabed and subsoil.[200] The FOA expressly includes the following: 1) the northern part of the Gulf of California; 2) those of the inland bays; 3) those of the ports; 4) those inland of reefs; and, 5) those in the mouths or deltas of rivers, lagoons and estuaries connected permanently or intermittently with the sea.[201] An express authorization from the government of Mexico is required to conduct MSR activities in these waters.[202] Therefore, the Mexican Government "reserves its discretional authority to impose additional requirements," resolving what it deems convenient in its own judgement.[203]

International law of the sea recognizes the undisputed exercise of the coastal state's exclusive sovereignty over these waters.[204] This principle appears to give Mexico a firm legal basis for its claim to exercise discretionary authority in imposing "additional requirements" than those governing access to the territorial sea for the conduct of foreign MSR activities in these waters.

U.S. scientists should take note that the northern part of the Gulf of

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197. *See* Regimenes que Imperan en las Diferentes Zonas Marinas de Mexico (Regimes Applicable to Mexico's Different Marine Zones). NORMITIVIDAD, *supra* note 27, at 45-50.

198. The FOA is the federal statute that enumerates and legally describes each of Mexico's six marine zones. *See* FOA, *supra*, note 129; VARGAS, *supra* note 14 and the accompanying text.

199. The commentaries appear to be derived from, UNCLOS III, *supra* note 19, art. 240, at 1316.

200. FOA, *supra* note 129, arts. 34 & 35, at 894; *See also* UNCLOS III, *supra* note 19, art. 8, at 1272.

201. FOA, *supra* note 129, art. 36, at 894.

202. NORMATIVIDAD, *supra* note 27, at 47.

203. *Id.*

204. *See* MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS 89-173 (1965).

California, between the delta of the Rio Colorado and Isla San Esteban, Isla Turners and Isla San Pedro Mártir, in the mid section of the Gulf, is legally defined as internal waters by Mexican legislation. This is the result of Mexico's application of the straight baseline method to delimit its territorial sea in the interior of the oceanic basin in 1968, and the later establishment of its 200 nautical mile exclusive economic zone in 1976.[205]

Unquestionably, the Gulf of California constitutes one of the oceanic areas attracting the highest number and the most varied types of MSR activities by foreign scientists in Mexico, especially from the United States and, in particular, from California. For example, of the 252 United States cruises that were approved by the government of Mexico between 1976 and 1993, twenty seven are reported to have taken place in the "Gulf of California," and forty five in "Baja California," for a total of 72.[206]

b. Territorial Sea

Articles 23 through 33 of the FOA enumerate the legal features that Mexico applies to that belt of twelve nautical miles, where that nation exercises full sovereignty, including the air space, the seabed and its subsoil.[207]

In symmetry with Article 245 of the 1982 Convention, the official publication provides that an "express authorization from the government of Mexico is required for the conduct of MSR activities in the territorial sea."[208] It adds that this government "reserves its discretional authority to impose additional requisites," resolving what it considers pertinent, in its opinion.[209]

It is evident that Mexico gives the highest priority to the legal principle contained in Article 245 of the 1982 Convention, namely:

> Coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea. *Marine Scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State.*[210]

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205. Mexico established a 200 nautical mile exclusive economic zone (EEZ) in 1976 by adding Paragraph 8, to Article 27 of its Constitution through a presidential decree; *see* D.O. of February 6, 1976. *See also* the decree that established the EEZ outer boundary, D.O. of June 7, 1976 (entered into force on July 31, 1976).

206. NORMATIVIDAD, *supra* note 27, at 351-431.

207. FOA, *supra* note 129, arts. 23-25, at 893. Mexico adopted a 12-nautical miles (22,224 meter) territorial sea in 1969. *See Decreto Que Reforma el Primero y Segundo Parrafos de la Fraccion 2 del Articulo 18 de la Ley General de Bienes Nacionales* (Decree that amends the First and Second Paragraphs of the Second Section of Article 18 of the General Act of National Assets), D.O. of December 26, 1969.

208. NORMATIVIDAD, *supra* note 27, at 47.

209. *Id.*

210. UNCLOS III, *supra* note 19, art. 245, at 1316 (emphasis added).

The principle of Consent provides the legal foundation for Part XIII of the 1982 Convention. This principle represents a diplomatic victory by the developing nations who participated in the formulation of the law of the sea convention at UNCLOS III, Mexico among them. This principle favors the interests of the coastal state *vis a vis* the researching state. The legal preeminence that the 1982 Convention gives the coastal state becomes more conspicuous when it is recalled that certain researching states entered the global marine negotiations strongly in favor of the so-called "freedom of oceanic research" and the establishment, as a consequence, of a mere notification regime for MSR activities.[211]

Article 245 of the Convention may be interpreted as clearly granting the coastal State, in the exercise of its sovereignty, *the exclusive right to impose special requirements to foreign scientists as a condition to conduct MSR activities in the MSR activities.*[212]

It is only logical to expect that, in consonance with this interpretation, a number of legal variations may be advanced. For example, some countries may assert their sovereign and exclusive right to impose any kind of special requirements or conditions, even if they may appear unreasonable or arbitrary to other countries. The idea behind this interpretation would be firmly based upon the notion of absolute sovereignty. In this case, there is no doubt that the quest for knowledge and enlightenment for the benefit of humankind is going to yield to the national interest of a given coastal state.

A more moderate interpretation of this same provision may be one that is predicated upon the imposition of special requirements as a direct result of "reasonable considerations." These considerations may be derived from legal, administrative, economic, political, diplomatic, and even cultural notions that prevail in the coastal state in question. For example, additional requirements may be imposed depending upon the nature of the MSR project, its geographical location, the number of platforms or the sophistication of the scientific equipment or instruments to be used, etc. In this order of ideas, when a coastal state denies a foreign MSR project in its territorial waters because it may interfere with some religious celebration, it should by no means be perceived as a barrier to the freedom of oceanic research or as an obstacle to the scientific progress of humankind. In a way, this philosophy may suggest the importance of further scientific research in regard to coastal nations in which scientists are planning to conduct an MSR project.

Furthermore, if the coastal state in question expressly incorporates these special or additional requirements, or conditions, in its own domes-

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211. Literature produced by certain U.S. scientists emphasizing the benefits of the so-called "freedom of oceanic research" is quite abundant and highly critical of perceived barriers against U.S. marine research activities. *See* Warren S. Wooster, *Ocean Research under Foreign Jurisdiction*, 212 SCI. 754, 755 (1981); John A. Knauss, *The Effects of the Law of the Sea on Future Marine Scientific Research*, 45 LA. L. REV. 1201 (1985).

212. UNCLOS III, *supra* note 19, Art. 245, at 1316.

tic legislation, then the perception of "reasonableness" may be enhanced and better understood by the international scientific community.

It is important to assume that these special conditions or additional requirements have been established for a valid reason; evidently, they have been tailored especially for the benefit and protection of the coastal state's national interests.

c. Exclusive Economic Zone

Leading an international trend in favor of this maritime zone, Mexico is among the coastal nations that first established a 200 n.m. exclusive economic zone in 1976.[213] Almost twenty years later, the FOA now contains the most detailed description of this recently adopted marine zone.[214]

In symmetry with Article 246, paragraph 2 of the 1982 Convention, Mexico's official publication maintains that express authorization from the government of that country is needed to conduct MSR in its exclusive economic zone.[215] This publication literally reproduces the four cases in which the coastal state, in its discretion, may withhold its consent, in accordance with the said Convention.[216]

Implied Consent, Mexican Style

The publication explains that, within four months since the receipt of the foreign request, the SRE should notify the applicant, through diplomatic channels, of the decision taken by the government of that country. If within this period of time the foreign applicant does not receive any communication from the SRE (a) granting authorization, (b) denying it, (c) asserting that information relating to the MSR project does not conform to the manifestly evident facts, (d) requiring supplementary information regarding the MSR project, or (e) informing that there are obligations outstanding from a prior research *"project, then the SRE should contact each of the competent agencies and institutions in order to expedite the process."*[217] *If six months elapse since the date the foreign request was received,* and the competent Mexican authorities have not rendered their respective opinions, *"then the SRE, through diplomatic channels, must grant a permit to the foreign institution."*[218]

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213. For a review on the origin and adoption of this marine space, *see* JORGE A. VARGAS, LA ZONA ECONOMICA EXCLUSIVA DE MEXICO (1980).

214. FOA, *supra* note 129, arts. 46-56, at 895.

215. NORMATIVIDAD, *supra* note 27, at 48.

216. The coastal state's consent may be withheld if in its discretion, the MSR project affects natural resources, involves drilling into the continental shelf or artificial islands, or contains inaccurate information or if the researching state has outstanding obligations to the coastal state from a prior research project. UNCLOS III, *supra* note 19, art. 246, at 1317.

217. NORMATIVIDAD, *supra* note 27, at 49. The hypotheses enumerated in this publication parallel those in UNCLOS III, *supra* note 19, art. 252, at 1318. (Emphasis added).

218. NORMATIVIDAD, *supra* note 27, at 49-50.

This peculiar type of "implied consent" appears to have been derived from Article 252 of the 1982 Convention. However, in the Convention the researching states or competent international organizations "may proceed with the marine scientific project six months after the date upon which the information . . . was provided to the coastal state unless within four months of the receipt of the communication containing such information the coastal state" officially contacted the researching state or organization in relation with any of the four hypotheses mentioned above.[219] In the Mexican variation, the researching institution (or competent international organization) rather than proceeding with the marine research project in an automatic manner once the six months had already elapsed, as appears to be the intent in Article 252 of the Convention, must now have to wait for the SRE to send to it and then to physically receive via the proper diplomatic channels, the "Implied Consent Permit."[220]

The Mexican procedure appears to depart from the letter and spirit of Article 252 of the 1982 Convention. The clearest advantage of the implied consent system is that the researching state, knowing that it has already complied with all the requirements established by Mexico to conduct an MSR project offshore, has only to wait for four months, i.e. 120 calendar days, to officially hear from the SRE. In the absence of any official communication from the government of Mexico during this period of time, the researching institution may legally and validly assume that its MSR project already has been authorized through the new notion of implied consent. Thus, starting in, say, the 121 day after the date upon which the request information was officially received by the SRE, the researching institution may proceed with the necessary preparations to initiate the MSR project in question exactly six months, i.e. 180 calendar days, after the date SRE formally acknowledged receipt of the request. In fact, this mechanism provides the foreign research institution with some sixty days at a crucial time needed to launch the final stage of the project.

Since the United States is not a party to the 1982 Convention, it is understandable that the official policy of the U.S. Department of State is that U.S. vessels in Mexico (or elsewhere) have not ever conducted MSR activities under the notion of implied consent.

The section concludes with the enumeration of the two cases that give Mexico the right to suspend any MSR activities in progress in its exclusive economic zone, namely (i) when the research activities are not being conducted in accordance with the information provided in the request; and, (ii) when the person or the institution conducting the research activities fails to comply with the requirements that were specifically im-

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219. UNCLOS III, *supra* note 19, art. 252, at 1318. (Emphasis added).

220. Regarding this specific question, Mexico's official publication reads: "If six months have elapsed after the date of the receipt of the research application and the competent national authorities in exercise of their discretion have not resolved anything in relation with said request, the Federal Executive power must issue the (MSR) permit to the applicant through diplomatic channels." *See Normatividad*, *supra* note 27, at 48-49.

posed upon it in the corresponding permit.[221] This part literally reproduces Article 253, paragraph 1, of the 1982 Convention. However, the official publication does not include information regarding the cessation or termination of these activities.

d. Continental Shelf

The FOA's last chapter refers to the continental or insular shelf.[222] The definition of this marine zone was taken from Article 76 of the 1982 Convention.[223]

The legal regime applicable to the conduct of MSR activities in Mexico's continental shelf closely parallels the tenor of Article 246 of the 1982 Convention. The official publication expressly enumerates four specific cases in which the government of that country, "in its discretion, may withhold its authorization." These cases reproduce those enlisted in Article 246, paragraph 5, of said Convention, namely when the project 1) is of direct significance for the exploration and exploitation of natural resources;[224] 2) involves drilling into the continental shelf; 3) involves the construction, operation or use of artificial islands; and, 4) contains inaccurate information regarding the nature and objectives of the project, or if the person or institution has outstanding obligations with the government of Mexico from a prior research project.[225]

This section also contains an "Implied Consent Permit,"[226] closely paralleling the one that applies to the exclusive economic zone. This part concludes with the same two above mentioned cases of suspension of MSR activities.

The government of Mexico appears to adhere to the more traditional policy that for any foreign research institution to conduct MSR activities in any of Mexico's "marine zones," an express, formal authorization issued by the SRE is officially required.

E. *Content of the Application*

A special section is devoted to enlist the numerous pieces of information that the government of Mexico requires to be included in the formal application that foreign institutions must submit to the SRE, (1) through the proper diplomatic channels and (2) at least six months in advance of

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221. NORMATIVIDAD, *supra* note 27, at 49.

222. FOA, *supra* note 129, arts. 57-65, at 897B; Vargas, *supra* note 14, at 219-339.

223. *See* UNCLOS III, *supra* note 19, arts. 76-83, at 1285-1286.

224. The official publication accepts the application of this condition to the continental shelf beyond 200 n.m., "save in the case when the government of Mexico publicly designates specific [submarine] areas at any given time, as areas in which there are currently taking place, or will take place in a reasonable period of time, exploitation activities or exploratory operations centered in those areas." NORMATIVIDAD, *supra* note 27, at 49-50 (Translation by the author).

225. *Id.* at 49.

226. *Id.* at 50.

the expected starting date of the project, indicating its intention to conduct MSR activities in Mexico's "marine zones."[227] Officially, this document is titled "Permit Application" *(Solicitud de Permiso)*.[228]

However, practical cases suggest that the notion of implied consent is in a state of a legal and administrative definition both for Mexico and the United States. It is clear that Mexico is not willing to follow what may be a textual interpretation of Article 252 of the 1982 Convention, as commented earlier. Contrary to the letter and spirit of this article, Mexico does not appear to accept that the notion of implied consent can take place by the mere passage of time in the absence of any official reply within four months (i.e. the requisite 120 natural days) after having received the foreign MSR request through the proper diplomatic channels. According to Mexico's published guidelines, once the period of four months has elapsed and none of the numerous official agencies that intervene in the MSR process that country has expressed a technical opinion, thus maintaining an official position known in Mexico as "Administrative silence," the SRE is to undertake whatever initiatives or contacts become necessary in order to induce the official competent agencies to issue the respective opinions (i.e. *Resoluciones*), which would provide the technical basis to give the foreign applicant an appropriate answer.[229] Furthermore, the recently published guidelines provide that if this "administrative silence" goes on for two additional months (for a total of six months since the MSR request was received by the government of Mexico), only then does the Federal Executive have the power to issue the MSR permit to the foreign applicant[230] (*"Implied consent permit"*).

A literal construction of Article 252 of the Convention leads to a simpler and a more expeditious procedure. Once the four months have elapsed, the government of Mexico need not do anything. Rather than engaging in a last minute administrative effort to induce belated responses from other official agencies, it should simply recognize that, under Article 252 of the Convention, a specific foreign MSR request is deemed to be legally answered by "administrative silence;" this is precisely what constitutes an implied consent to the foreign MSR request. As a consequence of this tacit authorization, or "implied consent" as the 1982 Convention calls it, the foreign MSR project is expected to take place in some area under Mexico's jurisdiction or control, starting precisely six months after said MSR request was officially submitted to SRE. This is the proper manner in which the notion of implied consent is supposed to operate. A quick review of the discussions held at Committee III of UNCLOS III in relation with this innovative figure would prove the validity of this assertion.

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227. NORMATIVIDAD, *supra* note 27, at 53-57.

228. *Id.* at 53.

229. *Id.* at 48.

230. *Id.* at 48-49.

Mexico's departure from what appears to be a most reasonable interpretation of Article 252 of the Convention becomes more difficult to understand when it is considered that the same legal notion of implied consent under the Mexican name of *Aprobación ficta* already forms a part of Mexico's legal system. In response to the severe criticisms advanced by foreign investors who had to wait for months and sometimes even years, before knowing whether their foreign investment project had been approved or not by the Secretariat of Commerce and Industrial Development (SECOFI), the government of Mexico changed the system. In 1989, Lic. Carlos Salinas de Gortari, then President of Mexico, enacted the Regulations[231] to the 1972 Federal Act to Promote Mexican Investment and Regulate Foreign Investment. According to the 1989 Regulations, the National Commission of Foreign Investments has forty-five working days to issue a "resolution" approving or denying a foreign investment proposal. However, if the Commission does not issue such resolution within this period, the foreign investment project in question "is deemed to have received the requested authorization from SECOFI."[232] Moreover the same implied consent system applies to the Secretariat of Foreign Affairs (SRE) for the issuance of any permits associated with foreign investment when it has not produced any official response within forty five days.[233]

A strategy that would contribute enormously towards enhancing the MSR relations between our two countries would be for the Secretariat of Foreign Affairs (SRE) to apply the rationale behind the system of *Aprobación ficta* of the 1989 Regulations to Article 252 of the 1982 Convention.

However, since the U.S is not a party to said Convention, it would appear that the rights and obligations of this Convention including the benefits derived from the notion of implied consent, cannot be validly claimed by the United States. This suggests the convenience for the United States to consider negotiating a bilateral agreement on MSR questions with Mexico. A bilateral agreement of this nature would not only provide a more effective procedure for expediting specific provisions contained in Part XIII of the 1982 Convention, such as the implied consent notion, but also to add a number of mutually agreed mechanisms designed to facilitate the conduct of MSR activities between both nations.

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231. *Reglamento de la Ley para Promover la Inversion Mexicana y Regular la Inversion Extranjera*, D.O. of May 16, 1989 (entered into force May 17, 1989). Although in late 1993 Mexico enacted a new Foreign Investment Act (*Ley de Inversion Extranjera*), D.O. of December 27, 1993), the 1989 Regulations remain in force.

232. *Id.*, art. 2, 1989 Regulations. The pertinent language reads: "Transcurridos los plazos senalados . . . sin que SECOFI (Secretaria de Comercio y Fomento Industrial) emita el acto que corresponda a la solicitud presentada, se considerara que SECOFI concedio la autorizacion que se hubiera solicitado." *See* LEONEL PEREZNIETO CASTRO, MANUAL PRACTICO DEL EXTRANJERO EN MEXICO 340 (Colleccion Leyes Comentadas, 1991).

233. *Id.*

The most basic information that any foreign institution has to consider before submitting an MSR "Permit Application," is that said application, pursuant to Article 248 of the Convention, must be submitted *"not less than six months in advance of the expected starting date of the marine scientific research project."*[234] If this requisite time is not complied with by the foreign institution, the government of Mexico may not consider the request.

In a 1991 Notice to Research Vessel Operators, the U.S. Department of State requires that all requests be submitted (a) "at least seven months prior to proposed research, and in compliance with (b) Mexican requirements and (c) the "UNCOLS Handbook for International Operations of U.S. Scientific Research Vessels."[235]

According to the data compiled by the U.S. Department of State, in the period between 1977-1993 Mexico denied four MSR requests because an equal number of U.S. institutions[236] did not comply with this requirement. However, in certain cases, Mexico did authorize the project despite the late submission of the U.S. application.[237]

If Mexico is a party to the 1982 Convention, it is only practical to expect that this country will apply this time requirement (i.e. the submission of the MSR application at least six months in advance of the expected starting date of the MSR project) to any foreign scientist interested in conducting MSR activities offshore Mexico. Legal and administrative practice in the United States clearly suggests that the government of this nation recognizes and fully complies with this Mexican time requirement. However, the U.S. marine scientific community appears to be confused by the lack of consistency in the application of this policy by the government of Mexico.

This inconsistency on the part of Mexico creates an atmosphere of uncertainty and confusion for most U.S. marine scientists. Once a policy is officially established, the interested foreign marine community has the right to assume that said policy is to be implemented in a consistent manner. Or, if there are exceptions to that policy, then the foreign community is to expect an explanation from the competent Mexican authorities as to why that policy was broken, or what was the reason justifying an official deviation from it.

From another perspective, the inconsistent application of this time requirement by Mexico has no doubt created a mounting pressure by the

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234. UNCLOS III, *supra* note 19, art. 248, at 1317 (Emphasis added).

235. *See* BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 98, NOTICE TO RESEARCH VESSEL OPERATORS, (1991) [hereinafter NTRVO No. 98]; LEE R. STEVENS, HANDBOOK FOR INTERNATIONAL OPERATIONS OF U.S. SCIENTIFIC RESEARCH VESSELS (1986).

236. The U.S. institutions not complying include for example: Collection permit (Weinberg) in 1988; USNS DeSteiguer in 1979; Alaska, and Scorpius in 1978.

237. *See, e.g.*, R/V Corwith Cramer (90-093); R/V Westward (90-094) in 1991; R/V Atlantis II (89-094); and USNS DeSteiguer (90-002).

U.S. marine scientific community upon the Department of State to submit MSR applications to Mexico even if they are not in compliance with the time requirement. This may be easily explained this way: let the government of Mexico, and not the Department of State, deny the MSR request.

The information requested in the "Permit Application" is divided into four sections: 1) Foreign institution; 2) MSR program; 3) MSR project; and, 4) Field operations (Research cruise).[238]

There is no explanation for this categorization, which may appear to foreign scientists as rather lengthy, duplicative and confusing. Whereas Article 248 of the Convention contains six basic components of information the researching State has the duty to provide to the coastal State,[239] the official listing of the government of Mexico contains 122 requested "information items."[240] In particular, the information requested about the "Program" on the one hand, and the "Project" on the other, appears to be somewhat duplicative.[241] The "Application" may generate some confusion not only because of the particular content of each definition, but also because some foreign institutions may think that the requirements that appear in this "Application" represent *the totality of the information requested by the government of Mexico. Unfortunately, this is not the case.*

As explained elsewhere in this article, in addition to these "items of information," the foreign institution must comply with numerous other requirements, specifically those labeled "Terms and Conditions"[242] and "Special Requirements,"[243] which are not listed or referred to in the "Permit Application."[244]

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238. UNCLOS III, *supra* note 19, art. 248, at 1317. Since, this information constitutes the basis for the substantive evaluation of the foreign MSR project by the government of Mexico, it is evident the paramount attention that this document will receive from any foreign researching institution intending to conduct MSR activities offshore Mexico.

239. For the content of this "basic package of information," *see infra* note 245 and the accompanying text.

240. The numbering of these "information items" does not appear in the official publication. It has been developed by the author to numerically contrast them with the "basic information package" contained by UNCLOS III, *supra* note 19, art. 158, at 1295.

241. This duplication stems from the administrative definitions created by the government of Mexico and which appear in the part devoted to "Definitions". This part provides 27 peculiar definitions on topics such as marine scientific research, scientific researchers, scientific research, line of investigation, method, scientific method, methodology, objectives, research project objectives, program or line of investigation, project, research project, etc. NORMATIVIDAD, *supra* note 27, at 17-21.

242. For the "Terms and Conditions," *see infra* notes 249-264 and the accompanying text.

243. For the "Special Requirements," *see infra* notes 265-283 and the accompanying text.

244. Furthermore, in order to attempt to have the most complete enumeration of all the different types of requirement imposed by the government of Mexico, the foreign research institution should also examine: MSR Guidelines for Foreign Scientists in Mexico, comments that appear in relation to the legal regime of Mexico's maritime zones, the vari-

Article 248 of the 1982 Convention enunciates the duty of the researching State to provide information to the coastal State when a foreign institution intends to undertake an MSR project in the exclusive economic zone or on the continental shelf of that State. The information that the foreign institution has the legal duty to provide the coastal State, according to said Article 248,[245] consists of the following nineteen basic items:

> a) the nature (1) and objectives (2) of the project;
> b) the methods (3) and means (4) to be used, including name (5), tonnage (6), type (7) and class (8) of vessels and a description of scientific equipment (9);
> c) the precise geographical areas in which the project is to be conducted(10);
> d) the expected date of first appearance (11) and final departure (12) of the research vessels, or (13) deployment of the equipment and its removal (14), as appropriate;
> e) the name of the sponsoring institutions (15), its director (16), and the person in charge of the project (17); and
> f) the extent to which it is considered that the coastal State shall be able to participate (18) or to be represented (19) in the project.

These 19 items clearly contrast with the 122 information items that the government of Mexico requires in its "Permit Application."

A careful review of the Mexican requirements indicate that the totality of the 19 items enumerated in Article 248 of the Convention are included in Mexico's application. These 19 items may be characterized as the "Basic package of information," a researching foreign institution has the duty to provide to the coastal State. However, there is no clear formulation in today's conventional law of the sea to determine the obligation of a foreign institution to provide additional information to the coastal State, information which is outside and beyond the requisite 19 informational items listed in Article 248.

This delicate question may be difficult to resolve, especially when the additional information demanded by the coastal State may be perceived as intrusive, excessive, difficult to provide with accuracy, or unnecessary. For example, to require information on the source of financing of the MSR project, to describe the detailed activities undertaken in each station or transect, to disclose technically sensitive information about the vessel, to provide tentative dates for the obtention of the final results, etc.

However, some special reasons may be considered when analyzing the requirement that the applicant "should mention the source of funding of

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ous samples of foreign applications, as well as the guidance provided on these matters by the U.S. Department of State. *See Normatividad, supra* note 27.

245. This article is formed by six paragraphs only. The format presented deviates form the convention's text in order to compare this article's "basic package of information" with the requirements established by Mexico, as these appear in the "Permit Application." UNCLOS III, *supra* note 19, art. 248, at 1317.

the program, indicating if said source has granted preceding findings for MSR activities in Mexico," as provided for in the "Permit Application."[246] Funding is of the essence for the conduct of MSR activities, especially offshore foreign nations. Therefore, it may be risky for a U.S. institution to formally submit an application clearance to Mexico, via the diplomatic channels, when such funding has not been formally secured. The U.S. Department of State data contains at least ten instances of MSR projects that were canceled because the expected funding did not materialize.[247]

This strategy may prove to be counterproductive. Therefore, U.S. marine scientific institutions should seriously consider the appropriety of this behavior, especially when several of them have failed more than once to receive the funding. From Mexico's perspective, this strategy may be perceived as frivolous, if not irresponsible. Once Mexico receives a foreign application, it assumes the foreign applicant is scientifically, technically and financially prepared, especially considering the U.S. Department of State was utilized for the official submission of the MSR request. In this respect, the U.S. Department of State has to consider whether it should submit an MSR request to Mexico when the funding of the U.S. applicant is missing or pending. Under international law of the sea, an unfunded application may not be considered a good faith application. In any case, submitting a formal research clearance and then having to withdraw it or, even worse, to cancel it because of lack of funding, may impose a cost on the shoulders of the U.S. institution and, more importantly, upon the reputation of the U.S. marine scientific community at large.

However, it should also be considered that from the perspective of the U.S. marine scientific community the manner in which funding has been reduced over the last few years for MSR projects taking place in Mexico—in particular the one provided by the National Science Foundation—constitutes the single most serious concern. Simply put: with no funding there are no MSR research expeditions. Funding has been reduced because the U.S. funding agencies tend to be of the opinion that funding proposals in Mexico may be a highly risky proposition. Funding a project may not take place because the government of Mexico's approval may not be obtained in time.

The addition of new pieces of information to those enlisted in Article 248 of the Convention, as exemplified by Mexico's "Permit Application," may result in a trend advanced by coastal States to gradually increase the content of the "basic package of information."

The imposition of these numerous requirements is causing the U.S.

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246. NORMATIVIDAD, *supra* note 27, at 54. (A similar requirement is demanded regarding the "MSR Project") (Translated by the author).

247. For example; R/V Mako (90-026), canceled prior to Mexican response; R/V Yellowfin (89-110), canceled prior to response; R/V Thomas Washington (89-105), canceled prior to response; New Horizon (1986); McArthur (1985); Oregon II (1984); Nautilus (1982); Researcher (1981); Thomas Washington (1979); and New Horizon (1979).

marine scientific community to develop the opinion that Mexico, rather than endeavor to adopt reasonable rules to promote and facilitate MSR activities as mandated by Article 255 of the 1982 Convention, has adopted an obstructionist attitude on this matter. This contemporary perception echoes the gloomy mood expressed by certain marine scientists towards the end of UNCLOS III when they claimed that developing countries were "erecting barriers" against ocean science.

It seems only logical to conclude that as more "information duties" are imposed on the researching State, the more bureaucratic and costly MSR activities will become. It is not by imposing additional "information duties" upon the foreign research institutions that the coastal State is going to accrue more benefits for its scientific and academic infrastructures, the development of its marine resources or the socioeconomic progress of its people. Rather, the benefits resulting from MSR activities are likely to become more palpable and be in closer symmetry with the coastal state's national interests and priorities when there is closer and more direct participation of the coastal State's scientists in each and every phase of the foreign MSR project, especially in its planning and final evaluation stages. This goal can only be accomplished when there are closer and friendlier relations between the marine scientific communities of coastal and researching States.

Finally, foreign research institutions should be alerted that an incomplete application will likely trigger the government of Mexico to demand a few weeks or months later that the absent information be completed immediately. The lack of completeness of the requisite information is bound to produce adverse effects in the MSR project, including its eventual cancellation.[248]

F. *More Terms and More Conditions*

This section seems to have been influenced by Article 249 of the 1982 Convention, which enumerates the duty of researching States (and competent international organizations) to comply with certain specific conditions when undertaking an MSR project in the exclusive economic zone or on the continental shelf.[249] This section is officially titled: "Terms and Conditions to which the Permissionary is Subject to."[250]

Basically, Article 249 enumerates seven conditions:[251]

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248. For example, in its initial application, the Jonathan Michael 89-49 did not provide the name of the contract charter vessel, apparently this defect caused the SRE to give the permit *two weeks after* the proposed initiation of the project, as reported by the U.S. Department of State.

249. UNCLOS III, *supra* note 19, art. 249, at 1317.

250. NORMATIVIDAD, *supra* note 27, at 69-73. In Spanish, the title reads: "*Terminos y Condiciones a las que quedara sujeto el Permisionario.*"

251. The specific conditions imposed by Article 249, appear in *italics*; the other text simply reproduces the content of Mexico's official policies (as translated into English by the author), or this author's comments. UNCLOS III, *supra* note 19, art. 249, at 1317.

(a) to ensure the right of the coastal State, if it so desires, to participate or be represented in the MSR project, at no cost to the State.

The government of Mexico virtually restates this same condition in the opening paragraph of Section 4 of its official publication.[252] It adds that if the foreign applicant is not bound to providing this guarantee, the government of that country "will analyze and resolve what is convenient."[253]

(b) to provide that State, at its request, with both preliminary and final results and conclusions after the completion of the project.

If in a period of time that shall not exceed three months, the official publication continues, counted from the date of expiration of the validity of the permit, the foreign research institution shall be obliged to send to the Mexican Government, through diplomatic channels, a "Preliminary report" or "Cruise report" *(Reporte del Crucero)*, detailing the MSR operations and observations, including the activities that took place on land, and aerial reconnaissance or remote sensing observations, if any.

One year after the date when the field operations were concluded, the foreign research institution should send the SRE, via diplomatic channels, a document or final report containing the results and the final data derived from said operations.[254]

The foreign research institution must also provide:

I) copies of the field reports that include the data obtained during the field operations, as well as correcting factors and calibration curves;

II) copies of the registries generated during the field operations;

III) color, or black and white photographs of the samples and specimens obtained, indicating date and place of their collection;

IV) copies of videos, films, photographs, including those taken underwater and by remote sensing devices; and

(c) to provide access to the same State to all data and samples derived from the project.

(d) if requested, to provide the coastal State with an assessment of such data, samples and results, or to assist that State in their assessment or interpretation.

V) To undertake to give access to the government of Mexico, if it so requires, to all the data and samples derived from the MSR project, and likewise to furnish with data that may be copied and samples which may be divided without detriment to their scientific value.

(e) to ensure the research results are made internationally available.

The foreign research institution should send, through diplomatic

252. NORMATIVIDAD, *supra* note 27, at 71.
253. *Id.*
254. *Id.* at 72.

channels, a packet which contains pertinent publication and document information which was generated. Furthermore, the research institute must assist in the documents' evaluation and interpretation.

This official publication stipulates that the foreign research institution (referred to as the "Permissionary") must guarantee that it shall obtain the prior consent of the government of Mexico for the global dissemination of the MSR results, especially those of direct importance for the exploration and exploitation of natural resources.[255] In spite of the apparent severity of this requirement, Mexico's condition seems to be firmly based on paragraph 2 of Article 249 of the 1982 Convention.[256]

Furthermore, the government of Mexico must be assured that Mexican scientists shall have access to the institutions, entities and systems where the samples or the information obtained from the MSR are stored. The foreign research institution, through diplomatic channels, shall send a couple of the articles, monographs, books and any other publications and scientific works derived from the MSR project.[257]

(f) inform the coastal State immediately of any major change in the research program.

The foreign research institution must inform immediately, and through diplomatic channels, of any change in the research program. If these changes are considered important, in the opinion of the government of Mexico, a further decision will be made on this matter.[258]

(g) to remove the installations or equipment once the research is completed.[259]

This is the only paragraph of Article 249 of the 1982 Convention that is not mentioned in the official publication.

This section concludes with an enumeration of *additional conditions* which relate to paragraph 2 of this article.[260] These additional conditions

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255. *Id.*

256. Paragraph 2 of Article 249 provides *inter alia*, that the coastal state may require in its laws and regulations that the researching state obtain "prior agreement from the coastal state in order to make internationally available any research results of projects with direct significance in the exploration and exploitation of natural resources. UNCLOS III, *supra* note 19, art. 249, at 131.

257. *Id.*

258. NORMATIVIDAD, *supra* note 27, at 72-73. This legal duty is based on UNCLOS III, *supra* note 19, art. 249, ¶ (f) at 1317.

259. This obligation is imposed on the researching state "unless otherwise agreed." UNCLOS III, *supra* note 19, art. 249, ¶ (g) at 1317.

260. The second paragraph of this section provides:

> This article is without prejudice to the conditions established by the laws and regulations of the coastal State for the exercise of its discretion to grant or withhold consent pursuant to Article 246, paragraph 5, including requiring prior agreement for making internationally available the research results of a project of direct significance for the exploration and exploitation of natural resources. UNCLOS III, *supra* note 19, art. 249, at 1317.

are:

1) MSR permits (i.e. research clearances) are not transferrable. They may only be used by the foreign research institution through the researcher responsible for the MSR project, as designated by said institution.

2) Permits are only valid for the specific period of time established by the government of Mexico.

3) The foreign research institution may only use the equipment, and undertake the activities within the geographical area of research *(Zona de estudio)*, specifically authorized in the permit.

4) The objective of the field operation shall be the one specifically determined by the government of Mexico in the corresponding permit.

5) The beneficiary of the permit undertakes to allow any inspection determined by the government of Mexico.

6) When required by the Mexican Navy *(Armada de México)* the foreign research institution must inform of the (foreign) oceanographic vessel's geographical location, and of the activities which it is conducting.

7) Foreign governments may not become partners, nor construct, in their favor, any right over concessions or permits. Any acts which these governments undertake in contravention of this precept shall be null and void and the assets and rights they may have obtained as a result of these acts shall be forfeited for the benefit of the Mexican nation.

This proviso appears to have been inspired by Mexico's version of the "Calvo Clause." In a way, it is reminiscent of Article 3 of Mexico's Foreign Investment Act of 1973, and of the so-called "Article 27 Permit" issued to foreigners by the SRE when these acquire real estate assets in that country.[261] It seems that very little consideration was given to NAFTA'S Chapter 11 when this proviso was drafted.[262]

8) The beneficiary of an MSR permit must carry it during the field operation and be prepared to show said permit to any competent Mexican authority, at its request.

9) The beneficiary of the permit contracts the obligation to notify the government of Mexico (i.e. assumedly the SRE), of the use of said permit in a period of time not exceeding fifteen days from the starting date of the operations. In case the permit is not used, said beneficiary must notify the [Mexican] government within five days, from the date of the first

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261. Article 3 of this Act provides:

> Foreigners who acquire properties of any kind in the Mexican Republic agree, because of such action, to consider themselves as Mexican nationals with regard to these properties and not to invoke the protection of their government with respect to such properties, under penalty, in case of violation, of forfeiting to the Mexican government the properties thus acquired." FOREIGN INVESTMENTS: MEXICAN NATIONAL COMMISSION OF FOREIGN INVESTMENTS 46 (1984).

262. *See* Jorge A. Vargas, *Mexico's Foreign Investment Act of 1993*, 16 LOY. L.A. INT'L & COMP. L.J. 907-951 (1994).

day of its validity, and send back to said government the original [permit] document for its cancellation.[263]

The 1982 Convention imposes, as a duty, certain conditions on the researching state that conducts MSR activities in the exclusive economic zone or on the continental shelf of a coastal State.[264] By and large, these conditions seem to be the logical consequence of the developing coastal state's success in crafting a "Consent regime." Now that they form an integral part of the international conventional law of the sea, these conditions can no longer be easily ignored.

G. *Special Requirements*

As suggested earlier, for a foreign researching State *to comply with the totality* of the requirements of a "Permit Application," *it may not be sufficient* to secure Mexico's authorization to conduct MSR activities in its "marine zones"; certain other "special requirements" may still be needed.

These "special requirements" appear in Mexico's official publication and are specifically enumerated by at least the following three federal agencies:[265] 1) the Secretariat of the Environment, Natural Resources and Fishing; 2) the Secretariat of Social Development (Sedesol); and, 3) the Secretariat of the Interior (SG).[266]

Based on its Internal Regulations *(Reglamento Interior)*,[267] the SG is empowered, to administer the islands under federal jurisdiction.[268] They have established three different types of Special requirements; whether the federal islands shall be visited for scientific research purposes;[269] to initiate a development project;[270] or, to conduct an ecologically oriented

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263. The text in this section, save for the seven conditions of Article 249 which appear in italics, is an informal translation the author made for the "Terms and Conditions" stipulated by the government of Mexico in NORMATIVIDAD, its official publication.

264. UNCLOS III, *supra* note 19, art. 249, at 1317.

265. It has not been officially reported, whether the Secretariat of the National Defense (SEDENA) and the Secretariat of Energy, require certain "Special requirements" other than the requirements contained in the "Permit Application."

266. Recently, by a presidential decree published in the *D.O.* of December 28, 1994, the name and authority of some of Mexico's Cabinet-level federal agencies were modified; for instance, the former Secretariat of Fisheries (SEPESCA) changed its name and scope of authority; as a consequence, SEDESOL changed its authority and jurisdiction, etc. These legislative changes took place after Normatividad was published in early 1993. As of the time this article was being written (May 1995), some bureaucratic adjustments were still taking place.

267. *Reglamento Interior de la Secretaria de Gobernacion* (Internal Regulations of the Secretariat of the Interior), D.O. of February 13, 1989 and as amended by D.O. of June 4, 1993; *reprinted in* NORMATIVIDAD, *supra* note 27, at 129-132.

268. *See supra* notes 137-145 and the accompanying text.

269. NORMATIVIDAD, *supra* note 27, at 133.

270. *Requisitos que Solicita la Secretaria de Gobernacion para Otorgar Concesiones en las Islas de Jurisdiccion Federal para Proyectos de Desarrollo. Id.* at 134.

tour.[271]

Sepesca's special requirements provide that foreign applicants interested in conducting exploratory fishing *(Pesca de fomento)* should conduct it with the understanding that, (a) it is prohibited to engage in the commercial trading of the fish obtained from scientific research activities;[272] (b) foreign vessels should include Sepesca observers;[273] and (c) specific conditions are imposed for the collection of live specimens in waters under the federal jurisdiction.[274]

Sedesol's special requirements are numerous; applicants must submit the following information: 1) a letter to Sedesol from the Director of the foreign institution backing its researcher's activities in Mexico; 2) a letter agreeing to cover the expenses of a Mexican researcher, who shall accompany the foreign researcher during the permit's validity in Mexico; 3) to describe the collection, transportation and specimen preservation methods; 4) when specimens (i.e. flora and fauna) will have to be exported from Mexico, to indicate the date and port of exit, as well as final destination, etc.[275] Sedesol further requires, in case of scientific collection of live species, the payment of $2,135 new pesos (some $356 U.S. dollars), subject to annual adjustments. Permits issued by this federal agency are generally valid for one year.[276]

Regarding the collection of Sedesol's fees, the U.S. Department of State reportrd two cases in 1987 in which the MSR activities were canceled due to the imposition of this requirement.[277] This Department is of the opinion that "the fee is not allowed by the U.N. Law of the Sea Convention and is not in compliance with customary international practice."[278]

These "Special requirements" only strengthen the notion that it is quite problematic, unpredictable and costly for foreign institutions to engage in the conduct of MSR activities offshore Mexico. Through the eyes

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271. *Requisitos que Solicita la Secretaria de Gobernacion para Otorgar Permisos sobre Recorridos Ecotouristicos Comerciales y Privados en las Zonas de Reserva Ecologic. Id.* at 135.

272. *Pesca con Fines de Investigacion Cientifica* (Fishing for Scientific Purposes). *Id.* at 33.

273. *Reglamento de la Ley de Pesca*, D.O. of July 21, 1992, art. 16, at 312.

274. *Id.* art. 17.

275. *Requisitos para la Expedicion de Autorizaciones de Investigacion y Colecta con Caracter Cientifico de Flora y Fauna Silvestres y Acuaticas en [Mexico]*, (Requirements for the Issuance of Authorizations for Scientific Research and Collecting of Wildlife Flora and Fauna, and Aquatic [Species] in Mexico). *Id.* at 59-63.

276. *Id.* at 63.

277. A collection permit (Uetz) was approved by SEDUE (SEDESOL's name at that time) conditioned upon payment of $200,000 pesos and an MSR applicant (Spieler) was requested to pay $600,000 pesos. Under Mexican law, this type of fee is legally characterized as "Derechos," which is a form of tax.

278. *See* NTRVO No. 98, *supra* note 235. In order not to jeopardize the conduct of U.S. MSR activities, this department recommends that the fees be paid under protest. Non-payment of the fee will result in the refusal of the government of Mexico to process the request.

of a foreign scientist, the multiplicity and variety of these requirements appears somewhat like a series of bureaucratic layers which have been placed one upon the other but which are devoid of a uniform and a systematic approach, with no common or final objective. There is no doubt that these additional requirements support the claim that the government of Mexico rather than promoting and facilitating the conduct of MSR activities, as provided by the 1982 Convention, is more interested in restricting said activities.

Administratively, this may be result of the absence of a distinct hierarchical legal order in a sensitive area crowded with numerous public and private institutions. As seen earlier, the number of Cabinet-level federal agencies who exercise *concurrent jurisdiction* in the conduct of MSR activities by foreigners in Mexico is quite large pursuant to the Organic Act of the Federal Public Administration.[279] Since each official entity is empowered to participate side by side with other similar entities at the same level of coordination, the end result is the mere accumulation of concurrent layers of requirements as established by each of these public entities, with no higher administrative authority legally and politically capable of introducing order, efficiency and rationality in the process. This should explain why a given "layer of requirements," whether they may be labeled "basic requirements," "terms and conditions," or "special requirements," is more important than any other layer.

A Mexican observer[280] rightly noted some years back that this multiplicity of public entities, each aggressively asserting its "own concurrent jurisdiction" over MSR matters, but none with central authority to exercise control and coordination, is the direct consequence of the absence of a given federal agency officially appointed to occupy a preeminent position (i.e. *"Cabeza de sector")*, legally, administratively and politically, over any other public or private entity.

Consequently, the Federal Executive of Mexico may consider the option of clearly identifying a single Cabinet level Secretariat to exercise exclusive jurisdiction over MSR activities. This includes any authority to direct and coordinate the participation of any other public or private entity at both the domestic and international levels. The legal identification of the Secretariat to be recognized as the *Cabeza de sector* in the area of marine scientific research will have to be reflected by amending the Organic Act of the Federal Public Administration.

IV. CONCLUSIONS

MSR activities in Mexico have been the focus of attention not only of marine scientists but also of navigators, cartographers, pirates, explorers, priests, natural scientists, naval officers and government officials, to mention but a few. This quest for knowledge dates back to the time when

279. *See supra* notes 135-136 and the accompanying text.
280. *Id.*

Christopher Columbus first discovered these lands over five centuries ago.

Spaniards and other Europeans were the pioneers in the global advancement of the natural sciences. The study of the oceans, its creatures, and its varied and intriguing phenomena occupied a very large portion of their scientific endeavors.

The U.S. marine scientific community has had a longstanding and unwavering interest in learning more about the beautiful and mysterious marine environment that surrounds Mexico. This explains the significant contributions that the United States marine community has given to the initiation and systematic understanding of selected portions of Mexico's marine areas. The scientific discoveries made in the Gulf of California and the gradual processing of the voluminous wealth of data pertaining to this unique ocean region of the world, accumulated over decades and decades of arduous work, merit a special reference.

Turning to more contemporary questions, marine issues have occupied an expanding chapter in the diplomatic relations between our two countries. In the recent past, these questions emerged in relation with rocks and reefs, the breadth of the territorial sea, the use of straight baselines and, more recently, on environmental concerns associated with tuna, dolphins and whales. However, in the near future, and especially early next century, the marine agenda between the United States and Mexico will likely explore areas as of yet left untouched, namely: 1) protection and preservation of the marine environment, including contingency plans; 2) utilization and allocation of marine resources, both renewable and, in particular, non-renewable. Shared deposits of oil and natural gas and the commercial exploitation of polymetallic nodules, located in the Gulf of Mexico and the Pacific Ocean, are expected to generate intense controversy; and 3) the development and commercialization of innovative technologies associated with the marine environment. These technologies will likely impact our food supply, the pharmaceutical industry, transportation, stationary platforms, incipient underwater habitats, submarine mining and, in particular, energy projects. When questions like these are addressed and jointly decided by the two nations, our nations will have embarked upon a path of great change.

No scenarios like this will take place without having strong programs of marine scientific research jointly conducted by these two countries. Joint research is of paramount importance.

Both the United States and Mexico must recognize the necessity to continue joint efforts and to work harmoniously and efficiently, for their mutual benefit now and in the future. It is politically intolerable, and economically inefficient, to maintain the old cliches and the numerous obstacles that have separated them in the past, when their economies and their peoples have come to the conclusion that they genuinely complement each other and are willing and ready to work cooperatively. There is no other way to succeed in today's global arena. In his recently enacted "National Development Plan, 1995-2000," Mexican President Ernesto

Zedillo Ponce de León recognizes the special place the United States occupies in that country's foreign policy. This important document,[281] which serves as a guiding force to the tasks and actions undertaken by the government of Mexico, emphasizes the objective of expanding the scientific and technological cooperation with the United States.

281. *See* "Plan Nacional de Desarrollo, 1995-2000". D.O. of May 31, 1995 at 13.

Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria

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I. INTRODUCTION

Oil has been, and will probably remain in the foreseeable future, the most important energy source in the world.[1] But its use has attendant risks. Prominent among these risks is the environmental degradation associated with its production and use. Oil pollution ushered in by the petroleum industry worldwide has been described as a necessary price for cultural modernization and advancements in state infrastructure.[2] The task of controlling and minimizing the adverse impact of this inescapable consequence of production, trans-portation, refinement, and use of oil rests with municipal and international governments. Oil pollution affects land, water, and air. However, the focus of this article is limited to the impact of oil pollution on water, since it presents the most critical problems in Nigeria.[3]

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1. C. TUGENDGART & A. HAMILTON, OIL: THE BIG BUSINESS 1 (1975) *in* OPEC Bulletin 55 (1994). There is, however, a growing push to reduce dependence upon oil as a source of transportation fuels for environmental reasons. But the oil industry appears generally to be responding to the environmental concerns in different ways including the introduction of a new fuel-the Reformulated Gasoline-which is expected to cut certain automotive emissions by as much as 20 per cent or more. *14 Areas Exempted from the Clean Gas Plan*, N.Y. TIMES, Dec. 25, 1994, at 26.

2. M.A. Adewumi & T. Ertekin, *Oil and Natural Gas Drilling and Transportation-Environmental Problems and Control, in* ENVIRONMENTAL CONSEQUENCES OF ENERGY PRODUCTION: PROBLEMS AND PROSPECTS 141 (S.K. Majumdar et al., eds., 1987). *See also* G. ETKERENTSE, NIGERIAN PETROLEUM LAW 62 (1985) (asserting that even in the best of oil field practice, spillage of crude oil and the resultant pollution cannot be completely eliminated).

3. *See infra* notes 34-50. This is not to suggest, however, that the pollution of the other media is not troubling. Arable farmlands have been lost to oil pollution. A Bendel State Government publication in 1987 (now defunct) stated that about one-quarter of the available land in the Delta area of the state had been rendered barren due to oil spillages and leakages. *See* HAZARDS OF OIL EXPLORATION IN BENDEL STATE 6 (1987) (neither can the effects of gas flaring that goes on unabated in the oil producing areas in Nigeria be underestimated).

The problem of oil pollution in Nigeria is monumental.[4] The Nigerian government and the oil industry are doing too little to redress the situation.[5] This inaction has led to great feelings of frustration on the part of the affected communities and has forced them to resort to measures-such as civil disobedience,[6] protests, and riots, primarily aimed at attracting attention to their plight and ultimately, in most cases, leading to disruptions of oil production.[7] Perhaps the most famous was the agitation caused by the Ogoni tribe in Southeastern Nigeria for compensation and environmental restoration. This disturbance continues to attract

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4. *Id.* According to Nigeria's former Minister of Works and Housing, 2796 oil spill incidents involving a total of 88.2 million gallons of crude oil were reported between 1976 and 1990. *Nigeria To Tighten Pollution Control*, THE OIL DAILY, Dec. 17, 1991, at 2(1). Note, however, that the actual quantity spilled during this period might have been much more than that stated since for much of the period, the operating companies freely chose whether to report a spill incident or not depending particularly on their judgment of which spills they considered significant. *See* Soga A. Awobajo, *An Analysis of Oil Spill Incidents in Nigeria: 1976-1980, in* THE PETROLEUM INDUSTRY AND THE NIGERIAN ENVIRONMENT-PROCEEDINGS OF 1981 INTERNATIONAL SEMINAR 57 (1981) [hereinafter THE PETROLEUM INDUSTRY]. The country continues to be treated to reports of deaths, evacuation of whole villages, destruction of property and sea life, pollution of drinking water and drastic fall in the people's standard of living all as a result of oil pollution. F.O. McOliver, *Legislating Environmental Protection: Cost-Benefit Analysis, in* THE PETROLEUM INDUSTRY 43. In fact, recent press reports which stated that some oil producing communities in Nigeria are threatened with extinction due to oil pollution and poverty caused by oil exploration do not seem to be overstatements. *See, e.g., Nigeria: Oil-Producing Community Threatened*, INTER PRESS SERVICE, Oct. 6, 1993, *available in* LEXIS, Nexis Library, CURNWS File.

5. J.N. Nwankwo & D.O. Irrechukwu, *Problems of Environmental Pollution and Control in the Nigerian Petroleum Industry, in* THE PETROLEUM INDUSTRY AND THE NIGERIAN ENVIRONMENT 102, 105 (1985) (stating that "since the inception of the oil industry in [Nigeria] . . . there has been no concerted and effective effort on the part of government or the oil companies to control the environmental effects of the petroleum industry"). *But see* O. Adewale, *Federal Environmental Protection Agency Decree and the Petroleum Industry*, 16 J. PRIVATE & PROPERTY L. 51, 63 (1992/93) (stating that the Department of Petroleum Resources has done a commendable job). On the part of the industry little, voluntary action is ever taken to redress the situation. For instance, after nearly four decades of Shell's operations in Nigeria, and probably acting under pressure from environmental groups, it only recently saw fit to support an "independent, internationally coordinated" environmental study of operation areas. *Shell Hopes Niger Study Disproves Pollution Claims*, JOURNAL OF COMMERCE, Jan. 9, 1995, at 5B. *See also Shell Admits Causing Pollution in Nigeria, Announces Survey Plan*, AGENCE FRANCE PRESSE, Feb. 3, 1995, *available in* LEXIS, Nexis Library, CURNWS File. Earlier, the Trustee Savings Bank of U.K. sold its holdings in Shell "in protest at the company's environmental and social policies in Nigeria." *'Green' Shell Shares Sold in Protest at Spills*, THE INDEPENDENT (London), Oct. 24, 1994, at 12.

6. For instance, the Ogoni tribe in southeastern Nigeria successfully boycotted elections held in June 1993 which were, however, later annulled by the military for wholly unrelated reasons.

7. The Department of Petroleum Resources has stated that in 1993 alone oil companies "lost about 30 million barrels of crude [oil]" due to clashes with communities. *Nigeria: Tribal Heads Press Oil Companies to Meet Local Needs*, JOURNAL OF COMMERCE, Oct. 28, 1994, at 11B. Recently, one of the communities (Ugborodo) in an open letter to Nigeria's military ruler threatened to disrupt Chevron's oil field in protest against the company's failure to pay them compensation for spills dating back to 1978. *Chevron Faces Nigerian Threat Over Spill Protests*, JOURNAL OF COMMERCE, Oct. 25, 1994, at 5B.

some measure of international attention.[8] The reaction of the Nigerian government has been to forcefully suppress these uprisings, resulting in gross violations of human rights.[9] Adopting a comparative approach, this article will argue that the government of Nigeria and the oil industry can and should address the concerns of its communities, thereby curtailing the damaging consequences of continuing oil pollution and the losses incurred from disruption in production encouraged by the present situation.

First, in Section II, this article considers the sources of oil in the different water bodies and its effects. While the major concern with oil pollution in the United States appears to be with transportation-related activities, in Nigeria, oil field pollution presents the greatest risk to the health of all organisisms. The effects of oil pollution of water to humans, marine organisms, and the ecology will be briefly discussed. Second, in Section III, the attempts to regulate pollution in the oil industry, as it affects water, in Nigeria will be compared with the approach employed in the United States. The comparison is relevant despite the huge technological and economic disparities between the two nations. Since oil exploration and production is a global industry, dominated largely by the same group of transnational corporations,[10] they should be expected to adopt the same standards and technology worldwide for the uniform protection of the planet from pollution. Oil is an international commodity which brings the same price per barrel regardless of where it is produced. Thus, it can be asserted that the oil producing corporations make the same profits from their operations no matter whether the oil is produced from Nigeria or the United States.[11] Since these corporations have the technol-

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8. Various international groups (e.g. Amnesty International, Greenpeace, International PEN, etc.) and some British MPs are involved in the Ogoni struggle against exploitation and the pollution of its environment by oil extraction. This struggle by the Ogoni tribe championed by its Movement for the Survival of Ogoni People (MOSOP) earned the organization and its leader, Ken Saro-Wiwa the 1994 Right Livelihood Award. *Nigerian Rights Activist, Self-Help Groups Win Alternative Nobel*, AGENCE FRANCE PRESSE, Oct. 12, 1994, *available in* LEXIS, Nexis Library, CURNWS File. For graphic accounts of the ordeals and struggle of the Ogoni tribe, see John Vidal, *Born of Oil, Buried in Oil*, THE GUARDIAN (London), Jan. 4, 1995, at T2; *Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria*, GREENPEACE INTERNATIONAL, July 1994 [hereinafter *Shell-Shocked*].

9. According to Amnesty International in its report of November 10, 1994, "[g]overnment forces are killing and raping civilians and pillaging their towns in retribution for complaints about pollution from the country's oil industry." *Nigerian Troops Hit on Rape, Pillage*, THE WASHINGTON TIMES, Nov. 11, 1994, at A21.

10. The seven major companies, widely known as the "seven sisters" were the British Petroleum, Exxon, Mobil, Shell, Gulf, Chevron, and Texaco. But with the Chevron/Gulf merger there are now only "six sisters." *See generally* A. SAMPSON, THE SEVEN SISTERS: THE GREAT OIL COMPANIES AND THE WORLD THEY MADE (1976). The oil industry in Nigeria is dominated by four of these multinationals, with Shell accounting for about half of Nigeria's crude production.

11. The profit margins might even be higher in many of the developing countries because of lower taxes, cheaper labor, and overall lower costs of production.

ogy required to minimize the adverse impact of oil exploration and production on the environment, the same technology should be employed in all of their operations worldwide. However, Nigeria's experience in replicating operations of other countries reveals that absent a strict and viable regulatory regime, multinational corporations use less expensive and sloppy production methods with obvious deleterious effects solely to maximize profits. A recent report by Greenpeace International noted that:

> While oil companies' operations in developed regions are usually accompanied by environmental impact assessments, social and environmental policies and not to mention a great deal of effort to appease the justified concerns of local communities these practices are not exported to lesser developed regions where little or no media attention is paid and where accountability is unheard of.[12]

This article argues, therefore, that disparities in standards in oil exploration and production in different countries are more a function of the value attached to environmental care by those countries than the state of their technological and economic development.[13]

Third, in Section IV, this article assesses the strengths and weaknesses of the Nigerian and U.S. approaches. It examines the numerous and sometimes overlapping Nigerian and U.S. statutes, the common law, and, to a limited extent, international law to demonstrate that the current approach in both countries: 1) focuses largely on post-accident response rather than prevention, 2) that prevention of pollution is a more effective approach, and 3) that liability for oil spills is inappropriate. It will also show why certain aspects of environmental regulation in the oil industry are in the interest of public health and should not be subjected to economic analysis as urged by the industry.

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12. *Shell-Shocked*, *supra* note 8, at 9. With particular regard to Shell's operations in Nigeria, the report added that the company's "operations and materials are outdated, in poor condition and would be illegal in other parts of the world. *Id.* This view was clearly corroborated by a U.S. petroleum executive who stated that "foreign companies can operate in Nigeria in ways they cannot do just a few miles off the coast of California," *Oil and Politics Make for Dangerous Mix in Nigeria*, L.A. TIMES, Sept. 11, 1994, at M2, and by a senior official of the World Wide Fund for Nature who also stated that "people get away with things in Nigeria that they'd be locked up for in the Gulf of Mexico." *Shell: After Years of Criticism, Company Changing Habits*, GREENWIRE, Jan. 25, 1995, *available in* LEXIS, Nexis Library, CURNWS File. Any wonder then why the amount of oil spilled by Shell in Nigeria alone between 1982-1992 accounted for about 40 percent of the company's total spills in its operations in more than 100 countries in the same period, whereas Nigeria accounts for only 14 percent of Shell's total production. *Shell-Shocked*, *supra* note 8, at 6, 12. On the attitude of transnational corporations towards environmental care in developing countries, *see* MICHAEL REDCLIFT, SUSTAINABLE DEVELOPMENT: EXPLORING THE COTRADICTIONS 73-78 (1987).

13. The link between development and environmental protection is conceded but may not justify all cases of neglect. *See* J. MAYDA, *Environmental Legislation in Developing Countries: Some Parameters and Constraints*, 12 ECOLOGY L.Q. 997, (1984/85) (noting some of the constraints facing developing countries in their quest for environmental protection). *See infra*, notes 324-332 and accompanying text.

Finally, Section VI recommends that the enforcement machinery in the Nigerian law be strengthened and that the governments of all oil producing and consuming nations apply greater pressure on transnational oil corporations to adopt environmentally safe technologies and procedures in their operations worldwide. It is the joint respnsibility of all nations to develop a sustainable policy for all parts of the world.[14]

II. SOURCES OF OIL IN WATER

Oil, including its products and wastes can enter water from a variety of sources occuring at every stage of production, transportation, refining, and use. These sources include: 1) discharges of sludge from oil tankers, 2) disposal of oil-containing waste water from ships,[15] 3) accidental rupture or grounding of oil tankers, 4) dumping of waste oil, 5) natural oil seeps,[16] 6) intentional discharge as a weapon of war,[17] 7) leaks from storage facilities and pipelines, 8) well blowouts, 9) atmospheric fallout, and 10) improper discharge of wastes such as produced water, drilling muds, cuttings and refinery effluents. According to the U.S. Council on Environmental Quality,[18] vessel-source pollution constitutes the major source of oil pollution in and around U.S. waters. This pollution occurs mainly through operational discharges by oil tankers and accidental spills.[19] Pipeline accidents and spills at production wells, refineries, and storage facilities also contribute to the oil pollution problem but in less significant proportions.[20]

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14. *See* The Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992), Principles 6, 7 [hereinafter *Rio Declaration*].

15. *See* ENVIRONMENTAL TRENDS, COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT 50 (1989).

16. It has been estimated that somewhere between 0.2 million and 6 million metric tons of oil are discharged annually through this natural process. R. D. Wilson, *Estimates of the Annual Input from Natural Marine Seepage, in* OCEAN AFFAIRS BOARD EFFECT OF PETROLEUM IN THE MARINE ENVIRONMENT 1 (1973).

17. For instance, during the 1991 Gulf War, Iraq was reported to have intentionally released over 6 million barrels of crude oil into the Arabian Gulf as a military weapon. *See* M.J.T. Caggiano, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance Over Conventional Form*, 20 B.C. ENVTL. AFF. L. REV. 479 (1993).

18. Rio Declaration, *supra* note 14.

19. Worthy of mention is the spill resulting from the grounding of the *Exxon Valdez* in 1989 in Prince William Sound, Alaska during which a total of about 11 million gallons of crude oil were spilled. It has been characterized as the worst environmental disaster in America. The renewed concern that emerged in the wake of the spill created the political momentum that led to the passage of the Oil Pollution Act, 1990. Generally, it is estimated that ships discharge about 1.5 million tons of oil into the sea each year. INTERNATIONAL MARITIME ORGANIZATION, MANUAL ON OIL POLLUTION 1 (1988). Most spillage comes from from routine operations such as tank washings and operational discharges, accounting for four or five times more pollution than spills and blowouts. *See* CAMPBELL-MOHN ET AL., ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY 741 (1993). *See also* J.W. KINDT, MARINE POLLUTION AND THE LAW OF THE SEA 740-41 (1986) (stating that "accidental oil spills by tankers do not even account for 10 per cent of the totals for vessel-source pollution").

20. Rio Declaration, *supra* note 14. But it has been contended, with some amount of justification, that the perception of massive tanker spills as the major source of oil pollution

In comparison, in Nigeria, oil field pollution presents the greatest risk from the oil industry.[21] Nigerian waters are polluted from well blowouts,[22] indiscriminate direct discharge of production wastes and refinery effluents on land and water, leaks from pipelines and storage tanks, spills during storage and loading operations at terminals,[23] and discharges of waste oil into waters from motorized boats. Communities living close to production sites, refineries, and pipelines have had to contend with polluted rivers, streams, creeks, and groundwater for a long time.[24]

Groundwater is further contaminated by liquids from surface impoundments or spills from storage tanks, pipelines, improperly closed or abandoned oil wells, and poorly constructed injection wells. The oil, product, or waste infiltrates the ground and percolates downward to the water table. Whether the contaminants reach the groundwater, in fact, is dependent upon a number of factors including 1) the viscosity and permeability of the soil, 2) the quantity and characteristics of the pollutant, and 3) the depth of the water table aquifers.[25] Studies indicate that groundwater contamination by hydrocarbons in Nigeria is significantly influenced by a combination of these factors notably the low viscosity and high permeability of Nigerian geological formations and shallow depth

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in the U.S. is not true and could only be explained by the fact that such tanker spills grab headlines and cause public outcry. Rather, it is claimed, the majority of the spills occur at fixed facilities. *See Report of Proceedings of the International Oil Spill Conference, in* OIL SPILL U.S. LAW REPORT (1993), *available in* LEXIS, Nexis Library, CURNWS File. *But see* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 376 (1994) (stating that all eight of the catastrophic spills (those exceeding 1 million gallons) from 1976 have been the result of tanker accidents, from the *Argo Merchant* grounding in December 1976 to the *Exxon Valdez* spill in March 1989).

21. 'Equipment malfunction' has been found to account for 50 percent of all the spills recorded in Nigeria. *See* Awobajo, *supra* note 4, at 59; C.N. Ifeadi & J.N. Nwankwo, *Critical Analysis of Oil Spill Incidents in Nigerian Petroleum Industry, in* THE PETROLEUM INDUSTRY AND THE NIGERIAN ENVIRONMENT-PROCEEDINGS OF 1987 INTERNATIONAL SEMINAR 104, 108-09 [hereinafter THE PETROLEUM INDUSTRY 1987].

22. The Funiwa-5 well blowout of January 17, 1980, discharged about 17.6 million gallons of crude oil into the waters. A study done after this incident found among other results that well water in the area contained 40 times the permissible amount of petroleum, hydrocarbon penetrated about 50 miles inland, and about 100 miles of sand beach were affected. Palczynski, *Hydrocarbon Concentration in the Gulf of Guinea After Major Oil Spills*, PROCEEDINGS OF AICHE SUMMER NATIONAL MEETING, *quoted in* Okogu, *Economic Aspects of Oil Spillages: Risk Management and Options for Coping, in* PROCEEDINGS OF INTERNATIONAL SYMPOSIUM ON THE NATIONAL OIL SPILL CONTINGENCY PLANNING FOR NIGERIA 60, 65 (1991).

23. On July 6, 1979, a rupture of a storage tank at the Forcados Terminal led to an escape of some 23.9 million gallons of oil into the waters. E.C. Odogwu, *Economic and Social Impacts of Environmental Regulations on the Petroleum Industry in Nigeria, in* THE PETROLEUM INDUSTRY, *supra* note 4, at 49, 50. That incident remains to date the largest single spill in Nigeria.

24. For instance, until fairly recently there were hardly any restrictions on the discharge of wastes with the result that water bodies were the direct receiving medium. *See infra* notes 211-214 and accompanying text.

25. Akomeno U. Oteri, *A Study of the Effects of Oil Spills on Ground Water, in* THE PETROLEUM INDUSTRY, *supra* note 4, at 89.

aquifers.[26] As a result of these geologic qualities, groundwater contamination by hydrocarbons is a widespread and growing environmental problem in Nigeria.[27] Direct spills of hydrocarbons into groundwater are particularly problematic, because minor spills can pollute a large volume of water for a considerable period of time.[28] Such spills have turned water wells in some communities into "gasoline wells."[29]

III. EFFECTS OF OIL ON WATER

There has not always been a consensus, even among scientists, on the exact effects of oil pollution on water. Studies of specific spills have shown considerable disagreement on the damage and magnitude arising from such spills, attributable to the opposing interests of those undertaking the studies.[30] Yet another source of uncertainty is the many variables which could influence the impact of oil pollution on the receiving water.[31] These include the type and volume of oil, hydrography, climatic or seasonal changes, length of contact, previous exposure of the area to oil, and the indigenous biota. However, a review of the literature[32] reveals that

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26. *See, e.g.*, Ifreadi & Awa, *Groundwater Contamination by Hydrocarbons in the Nigerian Petroleum Industry, in* THE PETROLEUM INDUSTRY 1987, *supra* note 21, at 84-85. The authors stated that Nigerian crude oils are characteristically light and, therefore, have higher percentage of the lighter, more water-soluble components, and are less viscous than the heavier crudes. Their downward migration is also favored by the geology which is characterized by an overlying permeable layer.

27. *Id.* at 85 (stating that the greatest number of the contamination cases are from buried storage tanks and delivery pipelines). In the U.S., the Conservation Foundation in its 1987 review of environmental trends had observed that existing pollution control programs had done little to protect groundwater quality. It noted that "contamination is widespread, threatening drinking water supplies for millions of Americans." STATE OF THE ENVIRONMENT: A VIEW TOWARD THE NINETIES 87-88 (Conservation Foundation ed., 1987).

28. Fodeke & Ladan, *Guidelines for Environmental Quality Monitoring in Oil, Gas, and Petrochemical Industries in Nigeria, in* THE PETROLEUM INDUSTRY 1987, *supra* note 21, at 27, 28.

29. OTERI, *supra* note 5. *See also* J.O. Osgood, *Hydrocarbon Dispersion in Groundwater: Significance and Characteristics*, 12 GROUND WATER 427 (1974) (reporting the discovery of oil in a newly installed well in Pennsylvania the source of which was found to be a pipeline rupture that happened about 20 years earlier).

30. For instance, there has been considerable disagreement on the exact magnitude of the damage done by the Exxon Valdez spill between the industry and those serving its interests on the one hand and the government, the victims and environmental groups on the other hand. *See, e.g.*, INT'L PETROLEUM ENCYCLOPEDIA 189 (1993); J.M. BAKER, TWO YEARS AFTER THE SPILL: ENVIRONMENTAL RECOVERY IN PRINCE WILLIAM SOUND AND THE GULF OF ALASKA 11 (1991); *Exxon Valdez Spill Damage Worse for Animals Than Previously Thought, Government Report Says*, 21 Envtl. L. Rep. 2234 (1991). A commentator wrote that the spill not only ruined fishing in Prince William Sound but also "ruined a way of life," and accused Exxon's scientists of concealing the true consequences of the spill. R. Ott, *Exxon Oil Spill Devastated a Way of Life*, N.Y. TIMES, Sept. 8, 1994, at A16.

31. E.C. Masteller, *The Influence of Oil Drilling Operations and Crude Oil on the Biological Community, in* ENVIRONMENTAL CONSEQUENCES OF ENERGY PRODUCTION, *supra* note 2, at 164.

32. S.E. Manaham, Environmental Chemistry 29 (5th ed., 1991); Masteller, *supra* note 31 at 167; J.M. BAKER, *supra* note 30; R.O. ANDERSON, FUNDAMENTALS OF THE PETROLEUM

there is a consensus that water can be adversely affected by the presence of petroleum, its product, or waste. In other words, it is generally agreed that petroleum in water is harmful, even though the extent of the harm may not be agreed upon.

The impact could be on the aquatic life, aesthetic values, recreation, navigation, or even the health of humans. The presence of oil, or its resultant tar residues in the form of pellets, balls, or globs on the beaches, is unsightly and impairs recreational activities like swimming or water skiing. These effects are important, but the concern about petroleum-caused damage to water goes far beyond appearances and recreation. The greatest concerns are for the health and safety of lifeforms and the long-term ecological and environmental well-being of the planet.[33]

A. *Effect on Aquatic Life*

Aquatic life can be affected in more than one way. Oil, as many other pollutants in water, consumes dissolved oxygen during degradation, and a shortage of oxygen could be fatal to the living organisms in water. Many fish kills are caused not by the direct toxicity of pollutants, but by the biodegradation of pollutants which consumes and causes a deficiency of life sustaining oxygen.[34] A Council on Environmental Quality report stated:

> In relation to toxicity, a significant positive correlation has been reported between concentration of polycyclic aromatic hydrocarbons[35] metabolites and mutations in marine organisms. Studies have also shown that certain polycyclic aromatic hydrocarbons induce carcinoma formation in various marine organisms and can be acutely toxic.[36]

Known effects to marine organisms include disruption of physiological or behavioral activities which may reduce many species' resistance to

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INDUSTRY 246 (1984); Nwankwo & Irrechukwu, *supra* note 5, at 102-04; J.W. KINDT, *supra* note 19, at 751-52; ENVIRONMENTAL TRENDS, *supra* note 15; NATIONAL RESEARCH COUNCIL, OCEAN SCIENCES BOARD, OIL IN THE SEA-INPUTS, FATES, AND EFFECTS 383, 483, 487 (1985); Idoniboye & Andy, *Effect of Oil Pollution in Aquatic Environment*, *in* THE PETROLEUM INDUSTRY AND THE NIGERIAN ENVIRONMENT-PROCEEDINGS OF 1985 INTERNATIONAL SEMINAR 311; R.S. WILLIAMS, ENVIRONMENTAL CONSEQUENCES OF THE PERSIAN GULF WAR (1991); H.R. JONES, POLLUTION CONTROL IN THE PETROLEUM INDUSTRY 3 (1973).

33. ANDERSON, *supra* note 32 at 246. For a general discussion on some of these injuries, *see also* Thomas R. Post, *Private Compensation for Injuries Sustained by the Discharge of Oil from Vessels on the Navigable Waters of the United States: A Survey*, 4 J. MAR. L. & COM. 25, 29-31 (1972/73).

34. S.E. Manaham, *supra* note 32, at 29.

35. These are complex chemical compounds that are found in, among other sources, unburned fossil fuels, such as crude oil, coal, and peat.

36. Rio Declaration, *supra* note 14, at 47. *See also* ANDERSON, *supra* note 32, at 246 (stating that although petroleum products are not usually very active chemically, many products and components of crude oil are toxic and that have the potential to kill and injure marine organisms and even human beings when ingested or inhaled).

infection or stress and interference with reproductive capabilities. Additional effects are disturbance of the food chain, and "direct coating" which impedes the vital processes of respiration and feeding in animals, prevents sunlight penetration to plants, and increases temperature by absorbing solar radiation.[37] Any one, or a combination of these effects, results in massive kills of fish, fish eggs and larvae, birds, otters, crabs, and other animals inhabiting water.[38] These effects could ultimately dislocate the social and economic life of the communities who rely on the contaminated waters for fishing, particularly subsistence fishing. This has been the fate of many of the riverine oil-producing, fishing-dependent communities in Nigeria.

B. *Effect on Human Health*

Of greater concern is the potential for these contaminants to create a hazard to human health. In Nigeria, the problem is exacerbated by two factors. First, most of rural Nigeria, and even some cities, lack access to potable water. Less than 22 percent of rural Nigeria has access to safe water,[39] and most of the oil-producing communities do not fall into this small class.[40] As a result of the lack of water treatment facilities, the major sources of water for drinking are rivers, streams, and groundwater. Second, operators in the Nigerian petroleum industry have had considerable leeway in their manner of operations. Insufficient consideration has been given to the environment in which oil producers operate.[41] Wastes from their operations have, in many cases, been discharged on land or surface water, and oil leaks into fresh water bodies have not been promptly remedied.[42] More so than in developed countries, the result in Nigeria, shows that wastes from oil fields, refineries, pipelines, and stor-

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37. *Id.* at 50. *See also* KINDT, *supra* note 19, at 751.

38. A government report on the Exxon Valdez spill stated that by 1991 the spill had killed half of Prince William Sound's sea otter population, 580,000 sea birds, and had caused a 70 percent higher death rate in salmon eggs in the region. 21 Envtl. L. Rep. 2234 (1991). A 25,000 gallon oil spill from a barge in 1986 off the central California coast was reported to have "wiped out prime sea bird habitat and killed approximately 10,000 birds." *Apex Oil to Pay $6.4 Million to Settle Federal, California Claims from 1986 Spill*, 25 Envtl. L. Rep. 1029 (1994). Fish-kill was also reported from the Funiwa-5 oil well blowout in Nigeria. E. Ekekwe, *The Funiwa-5 Oil Well Blowout, in* THE PETROLEUM INDUSTRY, *supra* note 4, at 64, 66; NWANKWO & IRRECHUKWU, *supra* note 5, at 102. J.M. BAKER, *supra* note 30, at 13 (also reported a 90 percent mortality of fish eggs and larvae in the areas affected by the *Torrey Canyon* spill off southwest England and the *Argo Merchant* spill off Nantucket).

39. WORLD RESOURCE INSTITUTE, THE 1994 INFORMATON PLEASE ENVIRONMENTAL ALMANAC 437 (1994).

40. *See* Vidal, *supra* note 8.

41. *See* Nwanko & Irrechukwu, *supra* note 5.

42. *Id.*, at 103. There was a report of an incident where a damaged pipeline kept oozing crude oil into the water system for over two months without any attention from the pipeline owner. The report added that the affected water system was the source of drinking water for thousands of people but was more "like grease" as a result of the spillage. *Nigeria: Oil Spillage Fuels Nigerian Rivalries*, INDEPENDENT ON SUNDAY (LONDON), August 15, 1993, at 10.

age tanks pose an increased risk to human health because of greater contamination of drinking water by petroleum.[43]

The intake by humans of some of these contaminants poses grave health hazards, since they have been proven to be toxic.[44] Brine has been found to be sufficiently toxic to be harmful to animals, including humans.[45] Refinery effluents are also known to contain heavy metals, in concentrations beyond tolerable limits, which cause metabolic malfunctions in humans.[46] Many of the chemicals derived from crude oil, like benzene, toluene, butylene, and others are proven carcinogenic, mutagenic and teratogenic.[47] The high incidence of respiratory disorders, cancer, asthma, and birth deformity in many of Nigeria's oil-producing communities has been attributed to oil pollution.[48] Life expectancy in one community is 45 years, compared to Nigeria's nationwide rate of 57 years.[49] A report on the Funiwa 5 well blowout blamed the resultant oil spill for the deaths of 180 persons in one of the affected villages two months after the spill.[50]

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43. *Id.* The Romi and Rodi rivers near the Kaduna Refinery in northern Nigeria and the well waters in the surrounding villages are said to be heavily polluted from the petroleum product spillage that has occurred unabated from the refinery. *See* FEDERAL ENVIRONMENTAL PROTECTION AGENCY, GUIDELINES AND STANDARDS FOR ENVIRONMENTAL POLLUTION IN NIGERIA 72 (1991); FODEKE & LADAN, *supra* note 28, at 28 (reporting that community boreholes in one of the villages were turned into 'gasoline wells').

44. Madu, *Toxicity of Crude Oil, Impact on Food Chain and Man, in* PROCEEDINGS OF INTERNATIONAL SYMPOSIUM ON THE NATIONAL OIL SPILL CONTINGENCY PLANNING FOR NIGERIA 167, 168 (1991).

45. R.O. ANDERSON, *supra* note 32, at 246; Ajao et al, *The Effect of Oil Formation Water On Some Marine Organisms, in* THE PETROLEUM INDUSTRY, *supra* note 4, at 80-81. *See also* American Petroleum Institute, Environmental Guidance Document, *Onshore Solid Waste Management in Exploration and Production Operations* § 4.1 (1989) (noting that brine is strongly saline and that the amount of total dissolved solids in brine could be up to 150,000 parts per million; by contrast sea water ordinarily contains about 35,000 parts per million of total dissolved solids).

46. Nwankwo & Irrechukwu, *supra* note 5, at 102.

47. Benzene is said to be particularly harmful because of its serious toxic effect on the bone marrow. Benzene poisoning could lead to a variety of results including narcosis and death. S.O. Olusi, *Human Health Hazards Associated with Petroleum Related Pollution, in* THE PETROLEUM INDUSTRY, *supra* note 4, at 195, 195-96. *See also* Idoniboye & Andy, *supra* note 32, at 311; Bloth et al, *Cancer Mortality in U.S. Counties with Petroleum Industries*, 198 SCIENCE 51-53 (1977) (reporting the results of a survey of cancer mortality in U.S. counties with petroleum industries which showed a correlation between high mortality rate and existence of petroleum industries).

48. *Nigeria Oil-Producing Community Threatened, supra* note 4.

49. *Id.*

50. THE TEXACO OIL BLOW-OUT REPORT 120-21, 233-34 (R. Abdah ed., 1980), *quoted in* J.F. Fekumo, *Civil Liability for Damages Caused by Oil Pollution, in* ENVIRONMENTAL LAWS IN NIGERIA 254, 267-68 (J.A. Omotola ed., 1990). More recently, another spillage in Nigeria resulted in the hospitalization of about 20 villagers who "took ill after drinking water polluted by the spillage." *Nigerian Oil Spillage Causes Havoc, Agency Says*, REUTERS WORLD SERVICE, Nov. 20, 1994, *available in* LEXIS, Nexis Library, CURNWS File.

IV. THE REGULATORY REGIMES

Both the United States and Nigeria have laws which impact the problem of water pollution by oil. In addition, certain relevant international rules apply to the two nations.

A. *United States Oil Pollution Laws*

Oil pollution legislation has a long history in the United States. Beginning with the Rivers and Harbors Act of 1899, there are over a dozen federal enactments in force applying, in varying degrees, to the problem of oil pollution of water.[51] Individual states also retain jurisdiction over this area and have passed exercising this authority. Additionally, common law holds oil companies liable for oil pollution under actions including negligence, nuisance, trespass, strict liability, and negligence per se.[52] The most popular tort liability theory asserted is nuisance because it does not require the plaintiff to prove negligence on the part of the defendant, and also because, more than the other theories, it offers a greater chance of recovering higher damages, including punitive damages.[53]

These legislative and common law rules are supplemented by a large body of regulations enacted by the several agencies vested with jurisdiction.[54] The result is a complex patchwork of laws and regulations that are time-consuming and tedious for even the most sophisticated experts to wade through and emerge with any certainty of the law. While an examination of all the laws is beyond the scope of this paper, other scholarly works address the interplay between international legal frameworks and these regulatory schemes.[55] The discussion that follows is largely restricted to federal enactments and to a selected number of laws considered most significant.

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51. Some of these enactments include the Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act, Ocean Dumping Act, Clean Water Act, Outer Continental Shelf Lands Act, Oil Pollution Act, Safe Drinking Water Act, Wild and Scenic Rivers Act, Coastal Zone Management Act, Trans-Alaska Pipeline Authorization Act, Migratory Bird Treaty Act, Deepwater Port Act, Ports and Waterways Safety Act, etc.

52. *See generally* W.R. Keffer, *Drilling for Damages: Common Law Relief in Oilfield Pollution Cases*, 47 S.M.U. L. REV. 523 (1994). Specifically for the strict liability rule, *see infra* note 244.

53. *See, e.g.*, Marshall v. El Paso Natural Gas Co., 874 F.2d 1373 (10th Cir. 1989).

54. At the federal level alone there are the Environmental Protection Agency, the Department of Transportation (including the Coast Guard), the Army Corps of Engineers, the Department of Interior, the Minerals Management Service, etc. The same is true of several of the states; e.g., in Oklahoma there are the Oklahoma Corporation Commission, Department of Environmental Quality, Water Resources Board, and the Department of Wildlife Conservation all exercising jurisdiction over pollution from the oil and gas industry.

55. For a detailed and masterly coverage of the subject, *see* MICHEAL M. GIBSON, ENVIRONMENTAL REGULATION OF PETROLEUM SPILLS AND WASTES (1993).

1. The Safe Drinking Water Act[56]

The Safe Drinking Water Act (SDWA), passed in 1974 and amended in 1986, is geared towards the protection of underground sources of water. Part C protects underground waters through a regulatory program controlling the subsurface injection of substances. It requires the Environmental Protection Agency (EPA) to propose and promulgate "minimum requirements" for state programs to prevent underground injection which endangers water sources.[57] The provisions require that state programs must prohibit any underground injection except as authorized by permit or by rule. The applicant for the permit has the burden of proving to the state that the proposed underground injection will not endanger drinking water sources. The promulgation of any rule which authorizes underground injection which endangers drinking water sources is prohibited.[58] However, section 300h(b)(2) provides that EPA regulations for state underground injection control programs may not enact requirements which interfere with or impede the underground injection of brine or other fluids associated with oil and gas production either for disposal or for enhanced recovery, unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

The EPA regulations made pursuant to the Act define five different classifications for injection operations.[59] In this classification, Class II injection wells cover the oil and gas industry injection operations. The regulations for this class generally allow the injection of fluids that are brought to the surface during oil and gas production and fluids injected for enhanced recovery. In all cases, the law requires that underground sources of drinking water may not be endangered by such injection.[60]

Amendments in 1986 to the SDWA required each state to adopt and submit to the EPA in three years a state program to protect wellhead areas in their jurisdiction from contaminants which may adversely affect the health of persons.[61] Also noteworthy, particularly from the point of view of protecting public health, are the provisions of section 300(i) granting emergency powers to the EPA. The section provides that where the EPA determines that a contaminant is present, or is likely to enter a public water system or an underground source of drinking water which may present an imminent and substantial endangerment to the health of

56. 42 U.S.C. §§ 300f, 300j-26 (1988).

57. *Id.* § 300h(b)(1).

58. *Id.* § 300h(b)(1)(A),(B) 22.

59. 40 C.F.R. §§ 144.6, 146.5. (1995)

60. Section 300h(d)(2) provides that injection endangers drinking water sources if it may result in the presence of any "contaminant" in underground water "which supplies or can reasonably be expected to supply" public water systems, if the presence of such contaminant results in a system's not complying with any national primary drinking water regulation or if it "may otherwise adversely affect the health of persons."

61. 42 U.S.C. § 300h-7.

persons, the agency may take any action it deems necessary to protect the health of such persons, including issuing orders requiring the provision of alternative water supplies by persons who caused or contributed to the endangerment and commencing a civil action for appropriate relief, usually an injunction.[62]

The regulation of underground storage tanks is also relevant to the protection of underground sources of drinking water from petroleum and other contaminants. The Hazardous and Solid Waste Amendments[63] were enacted in 1984 to the Resource Conservation and Recovery Act. A portion of the amendments established a regulatory program for underground storage tanks.[64] The EPA has since promulgated regulations covering, among other things, technical standards and corrective action, investigation, and reporting requirements for underground storage tanks.[65] Tanks with a capacity of 110 gallons or less are exempt from the regulations.

2. The Federal Water Pollution Control Act[66]

The Federal Water Pollution Control Act, referred to as the Clean Water Act (CWA), was enacted in 1948, but significantly amended in 1972. It was passed principally to control any point source discharges into the "waters of the United States." The Act states national goals of fishable and swimmable waters by 1983 and the elimination of pollutant discharges into navigable waters by 1985.[67] The basic premise of the CWA makes the discharge of any contaminant into the waters of the United States unlawful unless the discharge is made pursuant to a permit issued under the Act.[68] The term "waters of the United States" has been so broadly defined by the regulations and cases that it is thought to cover all waters that contribute or could contribute to interstate commerce including non-navigable intermittent streams and isolated wetlands which may seldom fill with water.[69]

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62. *Id.* at § 300i(a). Violation of or failure or refusal to comply with any such order may attract a civil penalty of up to $5,000 for each day in which such violation or failure to comply continues. 42 U.S.C. § 300i(b).

63. 42 U.S.C. § 6901 *et seq.*

64. *Id.* § 6991 *et seq.*

65. 40 C.F.R. § 280.

66. 33 U.S.C. §§ 1251-1387 (1988).

67. *Id.* at § 1251(a). The policy goal to eliminate all discharges into navigable waters has been characterized as "impossible." W. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER 19 (1986). The adoption of a no discharge policy by the CWA was severely criticized by the National Water Commission, suggesting that water pollution should be defined in relative terms depending on the uses to which the water is put at present or in the future as may be determined by responsible public authorities. *Final Report of the National Water Commission, Water Policies for the Future* 69-70 (1973).

68. 33 U.S.C. § 1311(a).

69. *See, e.g.*, 33 C.F.R. § 328.3; United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.CT. 455, 88 L.Ed. 2d 419 (1985); United States v. Texas Pipe Line Co., 611 F.2d 345 (10th Cir. 1979); Stephen M. Johnson, *Federal Regulation of Isolated Wetlands,*

a. Liability for Oil Spills

Section 1321 of the CWA specifically addresses the discharge of oil and hazardous substances into or upon the waters of the United States. It prohibits the discharge by any person of oil or hazardous substances into or upon the waters of the United States in such quantities as "may be harmful," as determined by regulations made thereunder.[70] However, certain discharges may be permitted, namely those into the contiguous zone permitted under MARPOL 73/78,[71] and those permitted in circumstances or conditions, as regulations may stipulate.[72]

The EPA determined that a "harmful quantity" of oil is that which 1) violates a state water quality standard approved by the EPA under section 1313 of the CWA, 2) "cause[s] a film or sheen upon or discoloration of the surface of the water or upon adjoining shorelines, or [3]) cause[s] a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines."[73] A "sheen" is defined as "an iridescent appearance on the surface of the water."[74] The sheen is produced by the refraction of light at the oil-water interface. From these definitions, the quantity of oil spilled is inconsequential since it takes only a small quantity of oil to create a sheen. Accordingly, liability might arise even if no actual harm results from a discharge. This may, in fact, have been the intention of Congress in deleting "in harmful quantities" and substituting "quantities as may be harmful" in the 1978 amendments to the CWA.

Prior to the amendments, courts would not permit a penalty if the defendant could prove that the discharge had not been harmful. Thus, in *United States v. Chevron Oil Company*,[75] the court emphasized that by the language of Section 311 of the CWA, Congress had not chosen to prohibit *all* discharges of oil, but rather only discharges in "harmful quantities." However, following the amendments, the courts have held that actual harm to the environment is irrelevant when determining whether the prohibition of discharges in Section 311 were violated. In *Chevron U.S.A., Inc. v. Yost*,[76] the court held that the 1978 amendments authorized the EPA to prohibit spills that "may be harmful" regardless of whether they caused actual damage. The court stated: "In sum, the agency may both proscribe incipient injury and measure its presence by a test that avoids elaborated inquiry."[77] The court recognized that this approach might lead

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See also 23 ENVTL. L. REP. 1 (1993).

70. 33 U.S.C. § 1321(b)(3).

71. Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships. 17 I.L.M. 546.

72. *Id.*

73. 40 C.F.R. § 110.3 (this is commonly known as E.P.A.'s "sheen test" for oil discharges).

74. *Id.* at § 110.1.

75. 583 F.2d 1357 (5th Cir. 1978).

76. 919 F.2d 27 (5th Cir. 1990).

77. *Id.* at 30.

to overregulation, but it noted that "it is equally apparent that this imprecision is a trade-off for the administrative burden of case-by-case proceedings."[78]

It is pertinent to note that not all point source discharges attract liability under the CWA since certain discharges may be permitted.[79] The Act established the National Pollutant Discharge Elimination System (NPDES) for permitting point source discharges from industrial sources, with limitations set on the amount and characteristics of pollutants that can be discharged under an NPDES permit. However, EPA has promulgated regulations forbidding the discharge of *any* pollutants into surface waters from onshore oil and gas facilities.[80]

Whenever a vessel, offshore facility, onshore facility discharges oil or hazardous substances, the "person in charge" of such vessel or facility is required to report to the National Response Center as soon as he has knowledge of the discharge.[81] Failure to make the report as required exposes the person at fault to criminal liability and punishment of up to five years imprisonment or $500,000 fine or both.[82]

Violation of the "no-discharge provision" or failure to comply with the Federal Government's directives regarding cleanup operations triggers liability for civil penalties which may be assessed administratively or determined in a civil penalty action in a federal district court. The administrative penalty may be for an amount up to $25,000 per violation or $10,000 per day for each day during which the violation continues.[83] Liability for this penalty is not fault-based; instead it is a form of strict liability.[84] In *United States v. Coastal States Crude Gathering Co.*,[85] the defendant's pipeline was installed in accordance with all applicable governmental regulations and standard industry practice. Nevertheless, oil leaked from it when it was struck by a vessel owned by an unknown third party traveling well outside the navigation channel. The court upheld the Coast Guard's imposition of a civil penalty, holding that liability for civil penalties under Section 1321 of the CWA is absolute.[86]

It is difficult to rationalize the absence of any defenses to a civil pen-

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78. *Id. See also* Orgulf Transport Co. v. United States, 711 F. Supp. 344, 347 (W.D. Ky. 1989).

79. 33 U.S.C. § 1321(b)(3).

80. 40 C.F.R. § 435.32.

81. 33 U.S.C. § 1321(b)(5), 40 C.F.R. § 110.10. It is also provided that such report shall not be used against the person in any criminal case arising from the discharge, except a prosecution for perjury or for giving a false statement.

82. *Id.*

83. *Id.* at § 1321(b)(6).

84. The blameworthiness of the discharger is relevant only in the determination of the amount of the civil penalty. 33 U.S.C. § 1321(b)(8).

85. 643 F.2d 1125 (5th Cir. 1981), *cert. den.*, 454 U.S. 835 (1981).

86. *See also* United States v. Marathon Pipe Line Co., 589 F.2d 1305 (7th Cir. 1978) (upholding a civil penalty even though the facts showed that the operator was not at fault at all).

alty claim, but the discharger may avoid liability for cleanup costs under certain circumstances.[87] For instance, an owner or operator of a vessel or facility from which a discharge occurs solely because of an act of God or war would be liable for payment of a civil penalty, but be able to avoid payment of removal costs. The imposition of civil penalties in circumstances where no fault is established on the part of the operator, as in the above case, is as unjustified as it is unfair. The payment of compensation to third parties for damage, if any, resulting from such spill is sufficient liability for the discharge. The observations of Wood, Circuit Judge, in his concurring opinion in *United States v. Marathon Pipe Line Co.*[88] are noteworthy. He stated:

> I recognize . . . no justification for the basic unfairness [the payment of the penalty] involves.The company is concededly not guilty of the slightest fault. It in no way caused the accident, except it was in business. Just being in business of supplying critical energy or other needs for our society scarcely justifies this type of penalty being imposed by someone in a government agency. I fail to see how it will deter or remedy anything. The company did not conceal the accident, but actively engaged in efforts to contain the spill . . . . Little good can be accomplished in these particular circumstances by this process which is generally considered to be contrary to the accepted principles of law and equity.[89]

As noted above, the civil penalty may be assessed in federal district courts.[90] The penalty may be for an amount up to $25,000 per day of violation, or an amount up to $1,000 per barrel of oil discharged. When a discharge is found to be the result of "gross negligence or willful misconduct" the penalty can be for an amount not less than $100,000, and not more than $3,000 per barrel of oil discharged.[91] Note, however, that this procedure is an alternative to the assessment of an administrative penalty.[92] Whichever procedure is adopted, the person liable for the penalty is the "owner, operator, or person in charge" of the vessel or facility from which the oil is discharged. An action may also be initiated for an injunction to abate imminent and substantial threats to public health or welfare from a vessel or facility.[93]

Under the CWA, the owner or operator of a facility or vessel from which the harmful quantities of oil are discharged, either onto surface waters or on land from where the oil is likely to reach surface water, is

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87. *See infra* notes 102-103 and accompanying text.

88. 589 F.2d 1305 (1978).

89. *Id.* at 1310. Bauer, Circuit Judge, also opined that the punishment of a business that is faultless is a "self-defeating exercise of power" noting that " 'strict liability' concepts normally refer to *compensation*, not punishment without fault."

90. 33 U.S.C. § 1321(b)(7).

91. *Id.* at § 1321(b)(7)(D).

92. *Id.* at § 1321(b)(7)(F).

93. *Id.* at § 1321(e).

primarily liable to arrange for the removal of the oil.[94] The federal government also has authority to remove or contain oil spills or threats of oil spills.[95] Where the Federal Government acts pursuant to this authority, it is entitled to recover the removal costs from the responsible party subject to certain prescribed limits.[96] The monetary limits vary according to whether the discharge is from a vessel or an onshore or offshore facility. For onshore and offshore facilities, owners and operators are liable up to the statutory limit of $50 million. Under regulations made pursuant to section 1321(f)(2), the EPA has set lower limits for small onshore storage facilities with capacity of 1,000 barrels or less.[97] The limit is $200,000 for aboveground storage facilities and $260,000 for underground storage facilities. However, these regulations appear to have been superseded by later amendments to section 1321 which limited the agency's discretion by stipulating a minimum of $8 million in any case.[98]

In the case of an inland oil barge, the statutory limit is $125 per gross ton of such barge or $125,000, whichever is greater. For any other vessel, the amount recoverable is up to $150 per gross ton or $250,000, whichever is greater.[99] These limits do not apply where the federal government can show that the discharge was the result of "willful negligence or willful misconduct" within the privity and knowledge of the owner. If a willful violation is found, then the owner or operator is liable for the full amount of the removal costs.[100] It is important to note that the limits apply only to cleanup costs sought by the federal government, they do not in any way modify or affect the rights of the federal government, state government, and other governmental and private parties to seek compensation under any other law for damages to any public or private property resulting from the discharge or removal of oil or hazardous substances.[101]

The CWA permits certain defenses to liability. Accordingly, the owner or operator is not liable to the government for removal costs if he can prove that the discharge was caused *solely* by 1) an act of God, 2) an act of war, 3) negligence on the part of the United States Government, or 4) an act or omission of a third party.[102] In fact, where any of these de-

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94. *Id.* at 1321(c).

95. *Id.*

96. *Id.* at § 1321(f).

97. 40 C.F.R. § 113.

98. 33 U.S.C. § 1321(q). D.E. Pierce, *Regulating Surface Water Impacts Associated with the Exploration, Development, Production, and Transportation of Oil and Gas*, 1994 ROCKY MTN. MIN. L. INST., MIN. L. SER. 3-1, 3-28 to 3-29.

99. 33 U.S.C. § 1321 (f).

100. *Id.*

101. *Id.* at § 1321(o).

102. *Id.* at § 1321(f). Note, however, that under subsection (g) an owner or operator of a vessel carrying oil as cargo or an onshore or offshore facility which handles or stores oil in bulk, from which there is a discharge, who alleges that the discharge was caused solely by the act or omission of a third party is still liable to pay to the federal government the costs incurred for removal and shall be entitled by subrogation to all the rights of the federal government to recover such costs from such third party.

fenses is available, an operator or owner who already incurred removal costs is entitled to recover such costs from the federal government.[103]

b. Regulation of Produced Water

Produced water is released from containment in oil and gas bearing formations during the course of oil and gas operations. It is also commonly referred to as "brine," or "salt water," or "formation water." It is estimated that oil and gas operations in the U.S. result in the production of about 21 billion barrels of produced water annually.[104]

Discharge of produced water in groundwater is regulated under the SDWA, while the CWA regulates discharge into surface waters. As noted earlier, section 1311(a) of the CWA generally prohibits the discharge of any "pollutant" into navigable waters from a "point source" unless the discharger obtains a permit. A point source would include a source of produced water.[105] Produced water is also covered by the definition of the term "pollutant". However, the definition specifically excludes water that is either injected for disposal, or for enhanced recovery purposes when the state where the well is located "determines that such injection or disposal will not result in the degradation of ground or surface water resources."[106]

Accordingly, such injections for disposal or enhanced recovery will not require a NPDES permit. However, if the produced water is not going to be injected, a NPDES permit is required unless an alternative disposal technique, permitted under state law,[107] is used which will not result in a discharge into waters of the United States. In order to qualify for a permit, the discharge must comply with effluent limitations designed to meet state water quality standards and minimum technological requirements imposed by the Act.[108]

The EPA has promulgated minimum standards for discharge of produced water and the regulations divide oil and gas operations into five categories.[109] These categories are: 1) offshore, 2) onshore, 3) coastal, 4) agricultural and wildlife water use, and 5) stripper. The regulations provide that NPDES permits may allow some discharges into waters in the coastal and offshore categories, subject to limits on oil and grease con-

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103. *Id.* at § 1321(i).

104. S. Lansdown, *The Problem of Produced Water — Obtaining the Right to Dispose of It and Avoiding Liability for Such Disposal*, 44 INST. ON OIL & GAS L. & TAX'N 3-1, 3-4 (1993). *See also* J.C. Harrison, *An Overview of Environmental Laws and Regulations Impacting Onshore E & P Operations*, 42 INST. ON OIL & GAS L. & TAX'N 9-1, 9-4 (1991) (stating that produced water accounts for over 98 percent of all exploration and production waste volume).

105. 33 U.S.C. § 1362(14).

106. *Id.* at § 1362(6).

107. Such alternative disposal techniques could include road spreading, evaporation pits, percolation pits, agricultural use, etc.

108. 33 U.S.C. § 1342(a).

109. 40 C.F.R. Pt. 435.

tent.[110] For the onshore category, the regulations prohibit the discharge of produced water and other wastes into navigable waters.[111] The regulations, however, allow some discharges for stripper wells, defined as onshore wells that produce 10 barrels per well per day or less,[112] and agricultural and wildlife water use category subject to certain limitations.[113]

Violations of the prohibition or limitations attract both civil and criminal penalties. The penalties range between 1) $2,500 and $25,000 per day of violation, 2) $5,000 to $50,000 per day of violation for "knowing violations," or 3) imprisonment for up to three years.[114]

c. Spill Prevention and Response Plans Under the CWA

As part of the government's national response system, the CWA requires the EPA to promulgate regulations to prevent discharges of oil and hazardous substances from vessels and from onshore and offshore facilities.[115] Pursuant to this mandate, the EPA promulgated the Oil Pollution Prevention Regulations in 1973.[116] The regulations require operators to prepare written Spill Prevention Control and Countermeasure (SPCC) plans for offshore facilities and for onshore areas where spills can potentially enter the waters of the United States. The SPCC plan must be reviewed and certified by a registered professional engineer that the plan has been prepared in accordance with good engineering principles.[117]

In addition to the SPCC plans, all tank vessels, all offshore facilities, and onshore facilities, which by reason of their locations could reasonably be expected to cause substantial harm to the environment by discharging into the waters of the United States, are required to have individual re-

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110. *Id.* at §§ 435.12, 425.42. The limit on daily oil and grease content for the coastal category is 72 mg/l and a monthly average of 48 mg/l. The same limits apply to the offshore category but under the Best Available Technology Economically Achievable (BAT) and the New Source Performance Standard (NSPS) effluent limitations promulgated by EPA in 1993, the oil and grease discharge standards for produced water are 42 mg/l daily maximum and a 29 mg/l average monthly maximum. Oil and Gas Extraction Point Source Category, Offshore Sub-category; Effluent Limitations Guidelines and New Source Performance Standards, 58 FED. REG. 12,454. However, under guidelines recently proposed by the EPA, discharge of produced water into US waters from coastal areas would be prohibited altogether except in Cook Inlet, Alaska where the BAT limitations for oil and grease content of 42 mg/l daily maximum and 29 mg/l average monthly maximum would still apply. *See* Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Oil and Gas Extraction Point Source Category, Coastal Subcategory, 60 FED. REG. 9,428.

111. 40 C.F.R. § 435.32(a).

112. *Id.* at § 435.60.

113. *Id.* at §§ 435.30, 435.51-435.52. The effluent limitations established for the agricultural and wildlife water use category limit oil and grease in produced water discharges to a daily maximum of 35 mg/l. The permit for stripper wells would normally require a specified treatment, but absent such specific requirement, discharges must comply with state water quality standards.

114. 33 U.S.C. §§ 1319(c), 1319(d), 1319(g).

115. *Id.* at § 1321(j)(l).

116. 40 C.F.R. Pt. 112.

117. *Id.* at § 112.3(d).

sponse plans to address the removal of a "worst case discharge" or a "substantial threat of such a discharge" of oil or hazardous substances.[118] These individual prevention and response plans are, of course, in addition to the National Contingency Plan and the National Response System provided for under the CWA.[119]

3. The Oil Pollution Act

The Oil Pollution Act[120] (OPA), enacted on August 18, 1990, was a direct response to the 1989 Exxon Valdez spill. The Act establishes a comprehensive scheme for the prevention, removal, liability, compensation, and imposition of penalties for oil pollution. However, the pre-existing statutory regime remains in effect except for the finding of liability which is governed by the OPA. The OPA significantly raises the levels of liability, strengthens the federal government's authority to act in case of a spill, tightens tank equipment standards, raises the size of the Oil Spill Liability Trust Fund, and requires evidence of financial responsibility for vessels and other facilities, among other objectives.

The Act provides that in the case of a discharge of oil or a substantial threat of a discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone from a vessel or other facility, the "responsible party"[121] shall be liable for the removal costs and damages that result from such incident.[122] Basically, claims against the responsible party fall into two categories: removal costs and damages. The first category covers costs incurred by the United States, a state, or an Indian tribe, as well as any other person whose acts are consistent with the National Contingency Plan for the removal of oil.[123] The damage claims cover 1) damage to natural resources (including the reasonable

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118. 33 U.S.C. § 1321(j)(5). The EPA on July 1, 1994 issued final revisions to the National Oil and Hazardous Substances Pollution Contingency Plan requiring that onshore facilities not related to transportation must prepare plans to respond to discharges of oil. 59 FED. REG. 34,070 (1994).

119. 33 U.S.C. §§ 1321(d), 1321(j).

120. 33 U.S.C. §§ 2701-2761. For incisive appraisals of the OPA, *see generally* Wagner, *The Oil Pollution Act of 1990: An Analysis*, 21 J. MAR. L. & COM. 569 (1990); Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1 (1990); RODGERS, *supra* note 20, at 375-92; Randle, *The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects*, 21 ENVTL. L. REP. 10,119 (1991).

121. *See* 33 U.S.C. § 2701(32) for a definition of the term "responsible party" which for most part refers to the owner or operator, but could also include a third party.

122. 33 U.S.C. § 2702(a). *See* U.S. v. South Pacific Transportation Co., (D.C. Or. 1995)(for a definition of the scope of the OPA). The U.S. sought to recover response costs under the OPA from the defendant corporation for a spill of about 6,000 gallons of diesel fuel from the defendant's train's fuel tanks into the Yoncalla Creek in January 1993. The U.S. District Court for the District of Oregon ruled that the derailed train was not a "facility" under the OPA. More generally, the court stated that because the OPA was intended to regulate only oil spills occurring during commercial production and transportation, it does not extend to oil spills occurring during its use by consumers.

123. *Id.* at § 2702(b)(1).

cost for assessing the damage), 2) damage to real or personal property, 3) loss of subsistence use of natural resources, 4) loss of revenues to government, 5) loss of profit or impairment of earning capacity, and 6) damages for net costs of providing increased or additional public services during or after removal activities.[124]

"Natural resources" are defined to include "land, fish, wildlife, biota, air, water, ground water, [and] drinking water supplies.[125] In order to make a claim for damages for loss of subsistence use of natural resources, the ownership or management of such resources is irrelevant.[126] All that is required by a claimant is proof of reliance on the natural resources for subsistence and a causative link between the discharge and the damage to the natural resources. Natural resource damage claims could be substantial.[127] The measure of natural resource damages is "(a) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; (b) the diminution in value of those natural resources pending restoration; and (c) the reasonable cost of assessing those damages."[128]

The OPA specifically excludes certain discharges from its scope of authority. These are any discharges that are permitted by a permit issued under federal, state, or local law; originate from a "public vessel;"[129] or originate from an onshore facility which is subject to the Trans-Alaska Pipeline Authorization Act.[130]

a. Defenses

The OPA recognizes the traditional defenses in environmental law, including acts of God, acts of war, and acts or omission of a third party, if the responsible party establishes that he exercised due care with respect to the oil concerned and that he "took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions."[131] Accordingly, once a responsible

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124. *Id.* at § 2702(b)(2).

125. *Id.* at § 2701(20).

126. *Id.* at § 2702(b)(2)(C).

127. *See* Schenke, *Liability for Damages Arising from an Oil Spill*, 4 J. NAT. RESOURCES & ENV'T. L. 14 (1990).

128. 33 U.S.C. § 2706(d).

129. *See* 33 U.S.C. § 2701(29) for its definition.

130. *Id.* at § 2702(c).

131. *Id.* at § 2703(a). Notice that the sub-section does not specifically list "negligence on the part of the United States government" as one of the defenses. However, it might be argued that negligence on the part of the U.S. government could be regarded as an act or omission of a third party which is recognized as a defense to liability under the Act. Further, § 2703(b) exculpates a responsible party of liability to a claimant "to the extent that the incident is caused by the gross negligence or willful misconduct of the claimant." All claimants under § 2702 including the U.S. government are affected by this limited defense. *But see* Michael J. Uda, *The Oil Pollution Act of 1990: Is there a Bright Future Beyond Valdez?*, 10 VA. ENVTL. L.J. 403, 422 note 138 (1991) (stating that negligence on the U.S. government has ceased to be a defense under the OPA).

party establishes that a discharge was caused solely by any one, or a combination, of these defenses, then it is not liable for payment of damages and removal costs. However, these defenses do not apply where the responsible party fails or refuses 1) to report the incident as required by law, 2) to provide all reasonable cooperation and assistance sought by a responsible official in connection with removal activities, or 3) without sufficient cause, to comply with an order concerned with removal activities.[132]

b. Limits on Liability

Section 2704(a) of the OPA establishes higher liability limits for different types of vessels and facilities. The limits are as follows:[133] 1) tank vessels greater than 3,000 gross tons, $1,200 per gross ton or $10 million, whichever is greater; 2) tank vessels of 3,000 gross tons or less, $1,200 per gross ton or $2 million, whichever is greater; 3) non-tank vessels, $600 per gross ton or $500,000, whichever is greater; 4) onshore facilities, $350 million, however, through rule-making, this limit may be reduced to as low as $8 million;[134] and offshore facilities, the total of all removal costs plus $75 million. There are two major exceptions, namely 1) if the facility is a deepwater port, the limit is $350 million which may, however, by rulemaking be reduced to $50 million,[135] and 2) if the discharge or substantial threat of a discharge of oil is from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility, then the owner or operator of such facility or vessel is liable for *all* removal costs incurred by federal, state, or local government or agency.[136]

These limits do not apply 1) if the spill was caused by the gross negligence or willful misconduct of the responsible party or any person answerable to him; 2) if the responsible party violates an applicable Federal safety, construction, or operating regulation; 3) if the responsible party fails or refuses either to report the incident as required by law when he knows or has reason to know of the incident; 4) fails to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or 5) fails without sufficient cause, to comply with an order pertaining to removal activities.[137]

The OPA liability and limits just discussed are exclusively federal.

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132. 33 U.S.C. § 2703(c).

133. *Id.* at § 2704(a).

134. *Id.* at § 2704(d)(1). Such regulations are to take into account "size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges and other factors relevant to risks posed by the class or category of facility." *Id.*

135. *Id.* at §§ 2704(a)(4), 2704(d)(2)(C).

136. *Id.* at § 2704(c)(3).

137. *Id.* at § 2704(c)(1),(2). Some commentators have criticized these exceptions as being too broad, noting that in essence the OPA regime is one of unlimited liability. Cooney, for instance, observed that a major oil spill is unlikely to occur "without a violation of a federal regulation." M.K. Cooney, *Comment, The Stormy Seas of Oil Pollution Liability: Will Protection and Indemnity Clubs Survive?*, 16 HOUSTON J. INT'L L. 343, 369 (1993).

There could be additional liability under state laws since state liability laws are not preempted by the OPA. The OPA permits states to impose additional liability or requirements with respect to oil pollution.[138] In fact, most Coastal and Great Lake states have passed oil spill legislation, the vast majority of which provide for strict unlimited liability for removal costs.[139]

c. Evidence of Financial Responsibility

The law requires that there exist a responsible party for any vessel in excess of 300 gross tons that operates in any place subject to the jurisdiction of the United States and that offshore facilities must establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability for which the responsible party could be liable under the law.[140] The sanctions for violating these requirements can be severe. They include 1) revocation of clearance required for the vessel to operate in U.S. waters, 2) denial of entry to U.S. waters, 3) detention of vessel, 4) seizure and forfeiture of vessel to the U.S., 5) administrative penalty of up to $25,000 per day of violation, or 6) a judicial order terminating operations.[141]

The law gives additional assurance to claimants. A claim may be asserted directly against the guarantor providing evidence of financial responsibility for a responsible party.[142] In such a claim, the guarantor cannot invoke the defenses which would otherwise be available to it under the policy. However, the guarantor's liability is limited to the amount of financial responsibility it has provided to the responsible party.[143] It has been asserted that this possibility of a direct claim against the guarantor coupled with the potential for unlimited liability under both federal and state laws will make it extremely difficult for vessels operating in U.S. waters to obtain insurance coverage.[144] One consequence might be a serious disruption of U.S. imported oil supply leading in turn to scarcity and price rise.[145]

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138. 33 U.S.C. § 2718.

139. GIBSON, *supra* note 55, at 75, 127; Rodriguez & Jaffe, *supra* note 120, at 10-11.

140. 33 U.S.C. § 2716.

141. *Id.* at §§ 2716(b), 2716a.

142. *Id.* at § 2716(f).

143. *Id.* at § 2716(g).

144. Cooney, *supra* note 137, at 360 (asserting that as the law is, "no one will be capable of obtaining a certificate of financial responsibility"). At a hearing by the House Merchant Marine and Fisheries Subcommittee on Coast Guard and Navigation on the interim rules on financial responsibility, the Subcommittee Chairman, Representative W.J. Tauzin, expressed concern that many vessel owners would be unable to fulfill the requirements to secure the certificates of financial responsibility, and advised the Coast Guard "to proceed cautiously." He feared that up to 50 percent of U.S. oil supply could be in jeopardy if shippers fail to qualify for the certificates. *Shipping Representatives Tell Concerns on Financial Responsibility Interim Rule*, 25 ENVTL. L. REP. 584 (1994). The requirements for certificates of financial responsibility became enforceable on Dec. 28, 1994.

145. The concern about the possible disruption of imported oil supply prompted sev-

d. Other Provisions

Another source of worry for the shipping industry has been OPA's requirement of double hulls for vessels operating in U.S. waters or its exclusive economic zone. It requires that all new vessels constructed for the carriage of oil shall be equipped with double hulls when operating in U.S. waters or the exclusive economic zone.[146] With regard to existing vessels, the double hull requirement is phased in over a period of years, starting this year, depending upon the age and size of the tank vessel.[147] By 2010 all vessels over 5,000 gross tons must have double hulls, except that those which currently have double bottoms or double sides may continue operating in U.S. waters until 2015.[148] These provisions have been criticized for imposing a great financial burden on the shipping industry and the unavoidable increase on the cost of transporting oil to the U.S.[149] Questions have even been raised about the safety of double hulls.[150]

The OPA also has wide ranging provisions on the Oil Spill Liability Trust Fund.[151] Principally financed by a five cent per barrel tax on imported and domestic oil,[152] it is designed to cover removal costs and damage claims of the federal government, state governments, and uncompensated private claimants.

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eral House members to write to President Bill Clinton urging him to delay implementation of the financial responsibility rule. 25 ENVTL. L. REP. 1346 (1994). *See also Shift in Insurance to Cover Oil Ships May Disrupt Flow*, N.Y. TIMES, Dec. 12, 1994, at A1, C4; John M. Mitchell, *Comment, The United States Coast Guard's Proposed Regulation of Certificates of Financial Responsibility Under the Oil Pollution Act of 1990: Fostering a Continuing Market of Insurance for Shipowners?*, 7 ADMIN. L. J. AM. U. 121, 148-49 (1993) (predicting that the Coast Guard's "inflexible approach" will jeopardize waterborne transportation of oil to the U.S.).

146. 46 U.S.C. § 3703(a). Other preventive measures enacted by the OPA include the additional requirements for the issuance and review of licenses, certificates of registry and merchant mariner's documents, and for vessel manning. 46 U.S.C. §§ 7101, 7106, 7107, 7109, 7302, 7701-7703.

147. *Id.* at § 3703a(c)(3).

148. *Id.*

149. *See* Paul S. Edelman, *The Oil Pollution Act of 1990*, 204 N.Y.L.J. 3, 23 (1990) (stating that the average cost to retrofit a tanker with a double hull is estimated to be $30 million). The Coast Guard also estimates that the double hull requirements will increase the average annual cost of transporting oil in U.S. waters by approximately $350 million, or about $.16 per barrel of oil transported. It noted, however, that the cost per barrel of oil prevented from being spilled is estimated at $24,000. 57 FED. REG. 1855 (1992).

150. Edelman, *supra* note 149. *See also* T.A. Alcock, *"Ecology Tankers" and the Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers*, 19 ECOLOGY L.Q. 97, 107-115 (1992) (detailing the arguments for and against double hulls on oil tankers); A.A. Ayorinde, *Inconsistencies Between OPA 1990 and MARPOL 73/78: What is the Effect on Legal Rights and Obligations of the United States and Other Parties to MARPOL 73/78*, 23 J. MAR. L. & COM. 55, 89, 93-94 (1994) (suggesting that mid-deck design and double hull offer equivalent protection and that OPA's insistence on only double hulls amounts to a violation of U.S. international obligations assumed under MARPOL 73/78).

151. 33 U.S.C. § 2712. The Fund was first established in 1986. 26 U.S.C. § 9509.

152. 26 U.S.C. § 4611(c)(2)(B).

The administration of the OPA is shared mainly among three agencies: 1) the EPA, concerning non-transportation related onshore facilities that could, because of their locations, cause substantial harm to the navigable waters; 2) the Department of Transportation, including the Coast Guard, concerning transportation-related onshore facilities, deepwater ports, and vessels; and 3) to the Department of Interior concerning the offshore facilities and associated pipelines.[153]

B. *Nigerian Oil Pollution Laws*

Anti-pollution laws in Nigeria are scattered throughout several authoritative sources. They usually appear only as incidental provisions in the statutes and regulations. Each is identified and discussed below.

1. The Petroleum Act of 1969[154]

The Petroleum Act deals mainly with business regulation of the petroleum industry and contains only little on pollution prevention. Nevertheless, Section 9 empowers the Minister of Petroleum Resources (Minister) to make regulations on a wide range of issues including "the prevention of pollution of water courses and the atmosphere."[155] The Act also provides that the Minister may revoke an oil mining license or lease if, in his opinion, the licensee or lessee "is not conducting operations continuously and in a vigorous and businesslike manner and in accordance with *good oilfield practice*."[156] The law does not provide a definition of the term "good oilfield practice," which has been interpreted in various ways depending on the standpoint of the interpreter. For instance, to oil producing companies, "good oilfield practice" might mean minimizing economic cost of production without regard to safety or environmental care. However, there is a comparable concept under the Mineral Oils (Safety) Regulations,[157] and it is suggested that the term should incorporate an obligation to ensure minimal environmental harm.

Breach of the good oilfield practice requirement alone may not warrant a revocation of a license or lease under the Act; the other requirements for continuous operations conducted in a vigorous and businesslike manner must also be satisfied. Despite the few safeguards, the use of poorly defined terms permits maximization of production rather than protection of the environment.

a. The Petroleum (Drilling and Production) Regulations[158]

Pursuant to the authority conferred on the Minister to make regula-

153. Executive Order 12777, 56 FED. REG. 54, 757 (1991).
154. Cap. 350 Laws of the Federation, 1990.
155. *Id.* at § 9(1)(a)(iii).
156. *Id.* at Schedule 1, ¶ 24(1)(a)(emphasis added).
157. *See infra* note 162.
158. Enacted in Legal Notice 69 of 1969.

tions, several sets of regulations have been enacted, some of which contain provisions on oil pollution. Perhaps the most significant provision in The Petroleum (Drilling and Production) Regulations (Regulations) are contained in Regulation 25. It provides as follows:

> The licensee or lessee shall adopt *all practicable precautions including the provision of up-to-date equipment* approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shore line or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.[159]

The Regulations further require the operator to 1) maintain all apparatus, appliances, boreholes, and wells capable of producing petroleum in good repair and condition, 2) carry out all its operations in a proper and workmanlike manner accepted by the Director of Petroleum Resources[160] as amounting to good oilfield practice, and, in particular, 3) take "all steps practicable" to "control the flow and to prevent the escape or avoidable waste of petroleum" and "prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbour."[161] Regulation 40 requires the operator to drain all waste oil, brine, and sludge or refuse into proper receptacles and dispose of them in a manner approved by the Director.

Finally, the Regulations obligate an operator to pay "adequate compensation" to any person whose fishing rights are interfered with by the *unreasonable* exercise of the operator's rights.[162] This is the only provision in the Regulations that seems to aid the victim of oil pollution, but it has weaknesses and has been criticized. First, it does not clearly give a right of action to the victim. Second, the concept of "adequate compensation" is rather vague and unsatisfactory. Third, and perhaps the most serious objection, is the fact that the victim is not entitled to any compensation unless it is established that the operator exercised its rights "unreasonably." This, no doubt, is a difficult, if not impossible, task especially for the illiterate and poor fishermen who are more likely to be the beneficiaries of this particular regulation. Fourth, the scope of the Regulations is too restrictive. It does not cater to interests, other than fishing rights, that might also be harmed as a result of the unreasonable exercise of the operator's rights.

The entire body of Regulations could also be criticized for its failure to clearly assign responsibility for cleanup in the event of an oil discharge

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159. *Id.* at reg. 25 (emphasis added).
160. Hereinafter referred to as the Director.
161. *Id.* at Reg. 23.
162. *Id.* at Reg. 25.

into water. The operator is merely required to "control and, if possible, end [the pollution]."[163] This cannot be justifiably interpreted to require responsibility for cleanup and restoration of the polluted environment.[164] Another obvious shortcoming in the Regulations is the absence of any specific sanction for violation of any of the obligations imposed upon the operator apart from the general power of the Minister to revoke the operator's license or lease for failure to comply with the enabling Act or any regulations issued thereunder.[165] The sanction of revocation of a lease or license for every case of non-compliance with the Act or regulations is unrealistic and not feasible. Despite several obvious cases of non-compliance, not a single case in the quarter century that the Regulations have existed has succeeded when invocation of the Minister's power for breach of the anti-pollution provisions was requested.

The Regulations have also been severely criticized for being too general to create any legal obligation. Such terms as "proper and workmanlike manner," "good oilfield practice," "all practicable precautions," and "adequate compensation" are cited as being too vague and meaningless to be enforceable.[166] Additionally, the Regulations fail to provide any definitions of these terms. While this is a valid objection, but it might be argued that those terms do, in fact, set very high standards for the operators. For instance, the requirement of "all practicable precautions" or the provision of "up-to-date equipment" can only be reasonably judged by global standards, particularly considering the transnational status of most of the operators.[167] That argument, however, does not detract from the need for greater precision in the promulgation of standards in Nigeria.

b. Mineral Oils (Safety) Regulations[168]

Mineral Oils (Safety) Regulations were made under the Mineral Oils Act, which was repealed by the Petroleum Act. Even though the Act was repealed, its regulations were saved and deemed reconfirmed under Section 9 of the Petroleum Act.[169] They deal generally with safety concerns in the oilfield. The sections dealing specifically with oil pollution of water are regulations 7 and 16. Regulation 7 provides that in the absence of any

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163. O. Akanle, *Pollution Control Regulation in the Nigerian Oil Industry,* Nigerian Inst. of Advanced Legal Studies Occasional Paper 16 (1991).

164. Petroleum Act, Schedule 1 ¶ 24(1)(b).

165. *See, e.g.*, Akanle, *supra* note 163, at 13; O. Adewale, *Rylands v. Fletcher and the Nigerian Petroleum Industry*, 8/9 J. PRIVATE & PROPERTY L. 37, 48 (1987/88); Y. Omorogbe, *Regulation of Oil Industry Pollution in Nigeria, in* NEW FRONTIERS IN LAW 147, 152-53 (Epiphany Azinge ed., 1991).

166. *Cf.* Regulation 7 of the Mineral Oils (Safety) Regulations (Legal Notice 45 of 1963) which defines "good oilfield practice" for the purpose of the regulations as the "Current Institute of Petroleum Safety Codes, the American Petroleum Institute Codes or the American Society of Mechanical Engineers Codes." *Id.*

167. Legal Notice 45, 1963.

168. Cap. 350, Schedule 4, ¶ 4.

169. *See supra* note 162 and accompanying text.

specific provision, all drilling, production and other operations necessary for the production and subsequent handling of crude oil and natural gas shall conform with "good oilfield practice." In a marked departure from the trend of the other enactments, the regulation provides a definition of "good oilfield practice."[170] The regulations also require bulk storage tanks to have provisions made for containing any leakage to prevent oil contaminating the water when located above water.[171] The sanction for violation of these provisions is a one hundred *naira*[172] fine or six months imprisonment or both.[173]

c. Petroleum Refining Regulations[174]

In language similar to that of the Petroleum (Drilling and Production) Regulations, the Petroleum Refining Regulations require a refining company to adopt "all practicable precautions," including the provision of up-to-date equipment as may be specified by the Director to prevent pollution of the environment by petroleum or petroleum products, and where such pollution occurs, to take prompt steps to control, and if possible, end it.[175] It specifically requires that drainage and disposal of refinery effluent and drainage water shall conform to "good refining practices," subject to approval by the Director.[176] The Petroleum Refining Regulations also make provision as to the physical quality of storage tanks in order to contain leakage from tanks[177] and for reporting of "unprogrammed" spillages of crude oil, products, or chemicals inside the refinery.[178]

In sum, Regulation 7 states that, absent any specific provision, the construction, operation, and maintenance of a refinery shall conform to "international standards" subject to the approval of Director.[179]

2. Oil in Navigable Waters Act, 1968[180]

The Oil in Navigable Waters Act of 1968 (Act) has remained the only legislation entirely devoted to oil pollution of water. However, its scope is

170. Reg. 16(2)(C).

171. *Id.*

172. At the official exchange rate, one U.S. dollar exchanges for twenty two naira, but in the autonomous foreign exchange market a dollar fetches over seventy naira.

173. Reg. 27. Note that it is the "manager" of the operator who is liable for breaches of the regulations.

174. Legal Notice 45, 1974.

175. *Id.* at reg. 43(3).

176. Reg. 43(1); Reg. 27 also requires that residues, sludges, rusts, and similar matter from tanks which may have contained leaded petroleum products shall be disposed of according to "good refining practices" and only to such places as have been approved by the Director.

177. Reg. 24.

178. Reg. 38.

179. Reg. 45.

180. Cap. 337 Laws of the Federation (1990).

severely restricted, and its usefulness is suspect. It was enacted not so much out of the Nigerian government's concern for environmental well-being, but to quell the government's desire to comply with its international obligation under the International Convention for the Prevention of Pollution of the Sea by Oil to protect navigable waters from oil pollution.[181]

It is an offense for a Nigerian ship to discharge oil into a part of the sea designated as "prohibited sea area,"[182] attracting a fine for the owner or master of the ship not exceeding 2,000 *naira* on summary trial.[183] Prohibited sea areas are listed in a Schedule contained in the Act and essentially cover all sea areas within 50 miles from land and outside the territorial waters of Nigeria and all the seven seas.[184] Section 3 also makes it an offense to discharge oil from any vessel from any place on land, or from any apparatus used for transferring oil from or to a vessel into the "whole of the sea within the seaward limits of the territorial waters of Nigeria" and all other waters within those limits including inland waters which are "navigable by sea-going ships."[185] This provision would appear to cover all types of onshore and offshore facilities, but its usefulness is diminished by the restrictions on the places where it applies. The requirement that the waters must be navigable by sea-going ships clearly suggests that the legislative policy of the enactment was to protect navigation only.[186]

Another factor that seriously puts the efficacy of the Act into question is the myriad of very liberal defenses it allows. For example, it is a complete defense to establish that the discharge from a vessel occurred 1) for the purpose of securing the safety of any vessel, 2) for the purpose of preventing damage to any vessel or cargo, 3) for the purpose of saving life,[187] 4) as a consequence of damage to the vessel, or 5) by reason of leakage if the leakage was not due to any want of reasonable care.[188] Other defenses include 1) sabotage,[189] 2) absence of negligence,[190] and 3) showing that the oil was contained in an effluent produced from a refinery.[191]

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181. The Convention was subsequently amended in 1962, 1969 and 1971. The Preamble to the Act clearly confirms the motive. *See* Akanle, *supra* note 163, at 4.

182. Cap. 337, Sec. 1.

183. *Id.* at § 6.

184. ¶¶ 1 and 2 of the Schedule to the Act.

185. §§ 3(1), 3(2). A violation attracts a fine not exceeding 2,000 naira (Sec 6).

186. Other provisions of the Act (*e.g.*, §§ 8 and 9) which seek to protect only the waters of the harbor from oil additionally confirm the general intendment of the legislation.

187. § 4(1). A commentator rightly characterized this defense as "alarming." A. IBIDAPO-OBE, CRIMINAL LIABILITY FOR DAMAGES CAUSED BY OIL POLLUTION (1988). Article IV of the Convention in almost identical language makes provision for the same defenses.

188. § 4(2).

189. § 4(4).

190. § 4(3).

191. § 4(5).

3. Federal Environmental Protection Agency Act, 1988[192]

The Nigerian Federal Environmental Protection Agency Act (FEPA) remains to date the most comprehensive environmental legislation passed in the country's history. The dumping by an Italian firm of toxic waste in Nigeria in 1988 was the catalyst the government needed to enact the legislation after more than ten years of procrastination.[193] It establishes FEPA as the implementing authority with responsibility, among others, to establish environmental criteria, guidelines, and standards for the protection of the "nation's air and interstate waters as may be necessary to protect the health and welfare of the population from environmental degradation."[194]

Section 20 prohibits the "discharge in such harmful quantities of any hazardous substance into the air or upon the land and the waters of Nigeria" or adjoining shorelines except as permitted or authorized by any law in force in Nigeria. A violation of this prohibition secures a penalty of 100,000 *naira* fine, ten years imprisonment, or both; where the offense is committed by a corporate body, the penalty is 500,000 *naira* and an additional fine of 1,000 *naira* for every day the offense subsists.[195] In addition to criminal penalties, the owner or operator of the vessel or facility from which the discharge occurred is also liable for the costs of removal, restoration or replacement of natural resources destroyed as a result of the discharge, and "costs of third parties in the form of reparation, restoration, restitution, or compensation as may be determined by FEPA from time to time."[196] The owner or operator is, however, free from this additional liability if he or she can prove that the discharge was caused solely by a natural disaster, by an act of war, or by sabotage.[197] The discharger is also required to give immediate notice of the discharge to FEPA, begin "immediate cleanup operations," and promptly comply with other directions as FEPA may prescribe.[198]

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192. Cap. 131 Laws of the Federation, 1990. *See generally* Adewale, *supra* note 5.

193. The dumping incident also led to the promulgation of the Harmful Waste (Special Criminal Provisions, etc.) Act, Cap. 165 Laws of the Federation, (1990) (providing stern penalties for dumping of "harmful waste" in Nigeria).

194. § 5(g). FEPA is also mandated to make recommendations to the minister with responsibility for the environment (currently the Minister of Works & Housing) for the purpose of establishing water quality standards for the inter-state waters to protect the public health or welfare and enhance the quality of water, taking into consideration the use and value for public water supplies, propagation of fish and wildlife, recreational purposes, agricultural, industrial and other legitimate uses. § 15.

195. §§ 20(1), 20(2), 20(3). Note that under § 20(4), where the offense is committed by a corporate body, the official in charge of the corporation at the time the offense was committed is also liable to be proceeded against and punished unless he can establish that the offense was committed without his knowledge or that he exercised all due diligence to prevent the discharge.

196. § 21(1).

197. *Id.*

198. § 21(2).

The Act does not provide a definition of "hazardous substance" but mandates FEPA to determine what it amounts to for purposes of Section 20.[199] FEPA has determined that "hazardous substance" means:

1. Any material that poses a threat to human health and/or the environment. Typical hazardous substances are toxic, corrosive, ignitable, explosive, or chemically reactive, or

2. Any substance designated by FEPA to be reported if a designated quantity of the substance is spilled in the waters of Nigeria or if otherwise emitted to the environment.[200]

Though oil has not been listed as a hazardous substance, it is submitted that in view of the threat oil poses to human health and environment,[201] it qualifies as a hazardous substance under the first prong of the definition. The definition is encompassing enough to also include production wastes and oil products.[202]

FEPA has severe limitations concerning the control of oil that reduce the Act's efficacy in preventing oil pollution of water. First, Section 20 does not absolutely prohibit the discharge of hazardous substance upon the nation's waters. What is prohibited is the discharge of such substance in "harmful quantities." Consequently, the mere discharge of oil upon the waters, does not, by itself, attach liability under the Act. It must be shown, in addition, that the oil discharged was in harmful quantities, requiring a case by case determination. Similar language in the U.S.'s CWA, prior to its amendment was interpreted to require a showing that a discharge caused actual harm before liability could attach to that discharge.[203] This task is overwhelming for the enforcement agency given the large number of spills and other constraints of the regulatory agency.[204] The U.S. CWA's formula of "quantities as may be harmful" is a better approach as it gives the regulatory agency authority to determine what is prohibited by some general and verifiable yardstick not requiring an elaborate or case by case inquiry.[205]

Second, the scope of FEPA and, consequently, its mandate are restricted to "waters of Nigeria" which are defined by the Act to mean all water sources in any form which are 1) "inter-state, 2) in the Federal Capital Territory, 3) territorial waters of Nigeria, 4) within the Exclusive Economic Zone, or 5) in any other area under the jurisdiction of the Nigerian Federal Government."[206] While this scope is considerably

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199: § 20(5).

200. FEPA, GUIDELINES AND STANDARDS FOR ENVIRONMENTAL POLLUTION CONTROL IN NIGERIA 214 (1991).

201. *See supra* notes 29-49 and accompanying text.

202. The Guidelines actually list some wastes from the refining process, e.g., slop oil emulsion solids, tank bottoms (leaded), as dangerous waste. *Supra* note 195, at 178.

203. *See supra* 75-78 and accompanying text.

204. *Infra* notes 284-287 and accompanying text.

205. *See supra* notes 70-78 and accompanying text.

206. § 38.

broader than that of the Oil in Navigable Waters Act, it does not appear to cover many of the small interstate rivers, streams, and creeks which continue to be polluted by oil and which serve the drinking and other domestic needs of many of the communities in oil producing and refining areas. It is actually these waters that are in more dire need of protection given the substantial health risks posed by such pollution. It is doubtful that the affected states have the resources to protect these waters. It is, therefore, suggested that the scope of FEPA and its mandate be expanded to cover all waters in Nigeria at least temporarily, until it is seen that the states possess the ability and will to act.

The criminal liability under Section 20 also appears to be inadequate because it exempts only discharges with permit or authorization.[207] It is hardly justifiable to impose criminal liability whenever there is a discharge of hazardous substance, regardless of the cause, including a discharge caused solely by, say, an act of God.[208] The defenses available for the civil liability include acts of war, acts of God, and sabotage. So that the defense of sabotage cannot provide an easy escape route, the owner or operator seeking to avail itself of this defense should be required to show 1) that it exercised due care with respect to the discharge concerned, 2) that it took precautions against foreseeable acts or omissions of any third party, and 3) that it was aware of the foreseeable consequences of those acts or omissions.[209] The defense of sabotage should also be restricted in third party claims against the discharger. Sabotage should not be a total bar to the discharger's liability to pay compensation to third parties for whatever damage third parties suffered, except where the claimant is also the saboteur. It is only fair that innocent third parties should be compensated for damage arising from acts to which they did not contribute. The operator carrying on economic activity for profit is in a better position to bear such loss, but the operator should be given an express right of indemnification against the person causing the damage.[210]

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207. *But see* Adewale, *supra* note 5, at 57-59. She suggested that the exemptions under § 20 incorporate the defenses under the Oil in Navigable Waters Act (ONWA) and, therefore, make the offenses anything but absolute. *Id.* It is doubtful that this was the intention of the lawmaker. If it were so, it would have been absolutely unnecessary to specify the defenses to § 21 liability since the liability does not arise unless the discharge is in violation of § 20. The § 21 defenses are all (though in different words) contained in § 4, ONWA. Further, it can hardly be said that the defenses under ONWA amount to a permit or authorization to discharge oil into navigable waters. A permit or authorization, it is submitted, connotes some positive conferment of a right to act as distinct from a defense which merely shields a wrongdoer from punishment. By way of analogy, can it truly be said that a person who is provoked has a permit to kill the person offering the provocation? *Cf.* with the case of an executioner who has by law a permit or authority to carry out executions.

208. *See supra* notes 87-89 and accompanying text.

209. *Cf.* OPA 33 U.S.C. § 2703(a).

210. *Id.* at § 2702(d)(1)(B), CWA 33 U.S.C. § 1321(g). *See* Akpezi E. Ogbuigwe, *Compensation and Liability for Oil Pollution in Nigeria-Need for a Positive Approach*, 3 J. PRIVATE & PROP. L. 21, 31 (1985). Operators too frequently cite sabotage as an excuse for non-payment of compensation. It is, however, recognized that sabotage is indeed a problem

As noted earlier, the liability of the owner or operator extends to payment of costs to third parties in the form of restoration, restitution, or compensation *but* only "as may be determined by [FEPA]." It is not clear why this restriction was included, but it is clear that the fate of the many victims of oil pollution in Nigeria might turn on the manner in which FEPA discharges this trust. It is probably too early to pass judgment but after nearly seven years,[211] victims of oil pollution in Nigeria continue to go without any form of compensation, and, where any is paid, it is usually inadequate.[212] Their plight has been exacerbated by the absence of clear provisions in the statutes giving them a right of action against the polluters. The FEPA Act does not appear to have departed markedly from this tradition; nor does it create a right for the victim which can be enforced directly against the polluter, absent a prior determination by FEPA of the amount of compensation, if any, that the victim is entitled to be paid.[213]

Finally, pursuant to the FEPA Act, certain regulations have been promulgated governing several aspects of environmental care in the industries generally including the oil industry.[214] Those relevant to the oil industry are the National Environmental Protection (Effluent Limitation) Regulations[215] and the National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations,[216] both enacted in 1991. The former establishes effluent limitations for all categories of industries. For the petroleum industry, the regulations allow an oil and grease content in brine and other production wastes

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in Nigeria, but the operators and the government should double their efforts to get saboteurs prosecuted under existing laws rather than make innocent parties bear the loss.

211. *Cf.* Adewale, *supra* note 5, at 59-60 (expressing optimism that this FEPA's authority would signal the end of the hardship suffered by victims of oil pollution).

212. Gberesu, *The Concept of Fair and Adequate Compensation in Nigerian Oil Industry, in* THE PETROLEUM INDUSTRY AND THE NIGERIAN ENVIRONMENT 1987, *supra* note 21, at 48. In one spill incident which involved about 23.9 million gallons of crude oil, the affected villagers received a mere 550,000 naira for loss of fishing rights. Odogwu, *supra* note 23, at 50.

213. § 21(1)(b).

214. This is in spite of the confusion created by § 23 over whether FEPA has the authority to regulate the oil industry. The section provides that FEPA "shall cooperate" with the Department of Petroleum Resources "for the removal of oil related pollutants discharged into the Nigerian environment and play such supportive role" as the Department may from time to time request from it. The question has been whether this section retains the exclusive authority of the Department of Petroleum Resources to regulate the petroleum industry including environmental aspects, thereby leaving FEPA to play only a supportive role as may be requested by the Department. *See* Adewale, *supra* note 5, at 63 (concluding that the Department is still in charge of environmental regulation in the oil industry but called for a review of the provisions). However, this paper has proceeded on the assumption that FEPA also has authority to regulate the oil industry, relegated only in matters pertaining to removal of oil related pollutants.

215. S.I. 8 of 1991.

216. S.I. 9 of 1991.

of 10 mg/liter for discharge into inland waters.[217] Violation attracts a fine of 20,000 *naira*, two years imprisonment, or both. If the offense is committed by a corporation, the fine is 500,000 *naira*.[218] An effluent limit of 10 mg/liter for oil and grease content is, indeed, a high standard, but it does not appear to have taken into adequate consideration the almost unique Nigerian situation where the inland surface waters serve many of the communities for drinking and other domestic purposes without any form of treatment.[219] An outright ban on discharge of brine and other production wastes into inland waters would be more desirable and, accordingly, is recommended.[220]

The National Environmental Protection (Pollution Abatement in Industries Generating Wastes) Regulations also directly impact the petroleum industry. Regulation 1 states that no industry or facility shall release "hazardous or toxic substances into the air, water or land of Nigeria's ecosystems beyond limits approved" by FEPA.[221] More specifically, regulation 15(2) provides: "no oil, *in any form*, shall be discharged into public drains, rivers, lakes, sea, or underground injection without a permit issued by [FEPA] or any organization designated by [it]."[222] This is an outright ban on the discharge of oil into the specified water sources and does not seem to depend on other considerations such as whether the oil is of harmful quantity. The Regulations also restate the restriction on the discharge of effluents with constituents beyond specified limits, and provide, though scantily, for contingency planning by all industries and facilities against accidental release of pollutants.[223] The penalty for violation of these regulations is the same as with the Effluent Limitation Regulations.[224]

4. Other Legislation

In addition to the enactments already discussed, other Nigerian legislation has some relevance to the subject of oil pollution of water. Worthy

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217. Schedule 3.

218. Reg. 5, adopting the penalties specified in §§ 35 and 36 of the enabling FEPA Act.

219. With a 10 mg/l effluent limit for oil, produced water from some oil fields in Nigeria would fairly easily qualify for discharge into inland surface waters without any form of treatment. For instance, it has been demonstrated that brine from the Obagi Field contains a little less than 10 mg/l of oil and could, therefore, be discharged into the nearby Orashi river even though the river is the source of drinking water for the neighboring communities. *See* B.S. Uhuegbulem & H.N. Dala, *Handling of Production Effluents in Freshwater Environment: The Obagi Experience, in* THE PETROLEUM INDUSTRY AND THE NIGERIAN ENVIRONMENT 108, 114-15 (1989).

220. *Cf.* Murday et al., *Oil Pollution Control in Nigeria: Legal and Enforcement Considerations, in* THE PETROLEUM INDUSTRY AND THE NIGERIAN ENVIRONMENT, *supra* note 21, at 54, 58 (suggesting that the discharge of produced water in swamps be banned for "new sources" while a compliance schedule should be developed for "existing sources").

221. Reg 15(1).

222. Reg. 15(2).

223. Regs. 7 and 8.

224. *See supra* note 211 and accompanying text.

of mention are the Oil Pipelines Act[225] and the Criminal Code.[226]

The Oil Pipelines Act, enacted in 1956, is one of the earliest pieces of legislation on the subject of oil pollution and, perhaps, the only one that undoubtedly confers a right of action to victims of oil pollution from pipelines and other ancillary installations. Section 11(5) provides, in part, as follows:

> The holder of a licence shall pay compensation . . . ; (c) to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation. If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.[227]

Claimants have a fairly great chance of success under this subsection, since it does not require them to establish negligence on the part of the pipeline license holder. In other words, it creates strict liability for the license holder.[228] Ironically, this is one provision of the law that has been seriously underutilized by claimants. There is just no clear reason for this, but one probable reason is insufficient knowledge on the part of the claimants and their counsel.[229] In one of the very few cases where the subsection served as the basis for an award of damages, it was the judge who *suo motu* resorted to it after determining that the tort of negligence and the rule in *Rylands v. Fletcher*, relied on by the plaintiffs, were inapplicable.[230]

The Criminal Code applies to any person who "corrupts or fouls the water of any spring, stream, well, tank, reservoir, or place, so as to render it less fit for the purpose for which it is ordinarily used." A party guilty of this offence is punishable with imprisonment for up to six months.[231] Similarly, Section 247 states that any person who "vitiates" the atmosphere in any place so as to make it noxious to the health of persons or who does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, whether human or animal, is guilty of an offense punishable with six months imprisonment. These provisions are without doubt applicable to oil pollution of water, as well as other forms of environmental degradation, but the penalty of imprisonment provided by the Code is highly inappropri-

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225. Laws of the Federation, Cap. 338 (1990).

226. *Id.* Cap. 77.

227. The said Part IV lists some of the factors to be considered by the court in assessing the amount of compensation.

228. Ikpede v. Shell BP Petroleum Development Company of Nigeria Ltd. M.W.S.J. 61 (1973).

229. J.A. Omotola, *The Quantum of Compensation for Oil Pollution: An Overview*, *in* ENVIRONMENTAL LAWS IN NIGERIA, *supra* note 50, 285, 306.

230. Ikpede's case, M.W.S.J. 61.

231. § 245.

ate for corporate offenders.

Finally, regarding statutory enactments, the Harmful Waste (Special Criminal Provisions) Act, 1988.[232] Section 1 prohibits the "purchase, sale, importation, transit, transportation, deposit, [and] storage of harmful wastes" and makes it a crime to engage in any of these activities without lawful authority. The penalty for contravention is stern: 1) imprisonment for life and 2) forfeiture to the Federal Government of any carrier used in the transportation or importation of the harmful waste and any land on which the waste was deposited or dumped.[233] "Harmful waste" is broadly defined to mean any "injurious, poisonous, toxic, or noxious substance." This could be construed to cover oil pollutants considering their injurious or toxic nature,[234] but it is doubtful if the lawmakers intended this enactment to apply to the oil industry, particularly considering the legislative history.[235] The Act was a swift reaction to the dumping of toxic waste by an Italian firm in the port town of Koko in 1988[236] and was intended to deter any similar actions, especialy given the increasing rates of transboundary movement of radioactive and other hazardous wastes to developing countries.[237]

5. Common Law Liability

As observed earlier, most of the statutes and regulations in force in Nigeria do not confer any right of private action on the victims of oil pollution. As a consequence, claims have generally been brought as common law tort claims. The more usual theories of tort relied on are negligence, nuisance, and the rule in *Rylands v. Fletcher*. Each of these has its severe limitations as shown by some of the cases.[238]

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232. Cap. 165 Laws of the Federation, (1990).

233. *Id.*, § 6.

234. *See supra* notes 32-50 and accompanying text.

235. IBIDAPO-OBE, *supra* note 187, at 250.

236. *See* press briefing by Nigeria's Minister of External Affairs on the matter. DAILY TIMES (Nigeria), June 15, 1988, at 1; Sylvia F. Liu, *The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste*, 8 J. NAT. RESOURCES & ENV'T. L. 121 (1993).

237. The concerns aroused by those incidents led to the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, 28 I.L.M. 649 (1989), and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes Within Africa, 30 I.L.M. 773 (1991). The latter was adopted by Organization of African Unity member states following their concern that the Basel Convention did not include a total ban. For a consideration of the issues, *see* Mary Critharis, Note, *Third World Nations are Down in the Dumps: The Exportation of Hazardous Waste*, 16 BROOK J. INT'L L. 311 (1990); C. Russel H. Shearer, *Comparative Analysis of the Basel and Bamako Conventions on Hazardous Waste*, 23 ENVTL. L. REP. 141 (1993); Maureen Walsh, *The Global Trade in Hazardous Wastes: Domestic and International Attempts to Cope with a Growing Crisis in Waste Management*, 42 CATH. U. L. REV. 103 (1992).

238. *See generally* E.N.U. Uzodike, Tort Law in the Oil Industry, *in* ENVIRONMENTAL LAWS IN NIGERIA, *supra* note 50, at 237; T. Osipitan, *Problems of Proof in Environmental Litigation, in* ENVIRONMENTAL LAWS IN NIGERIA, *supra* note 50, at 112.

For claims brought under negligence, which requires the claimant to establish the existence of a duty of care, the breach of the duty and a causal link between the breach and the injury suffered[239] the main difficulty for the plaintiffs remains the showing of absence of the elements of reasonable care on the part of the operator. In a highly technical industry such as the petroleum industry, proof of negligence requires expert scientific evidence unavailable and unaffordable to the largely unschooled and poor victims of oil pollution in Nigeria. In *Atubin v. Shell BP Petroleum Development Company of Nigeria Ltd*,[240] in which the plaintiffs claimed that the defendant caused crude oil, gas, and chemicals to escape from pipelines under their control thereby destroying fishes in the lake and their farmland, the court held that the plaintiffs did not prove that defendant was negligent.[241] Though the courts, may at times, invoke the doctrine of *res ipsa loquitur*[242] to relieve the plaintiff of the burden of establishing defendant's negligence, the inference is rebuttable by expert evidence showing that the defendant took the utmost care and acted in accordance with standard industry practices. The oil polluters in Nigeria are well positioned, considering the enormous resources at their disposal, to supply the expert evidence in rebuttal, and the Nigerian courts have established that such expert evidence, if unchallenged, must be accepted and acted upon by the trial court.[243]

The rule in *Rylands v. Fletcher* has provided greater succor to claimants, since the cases show a willingness by the courts to hold operators in the oil industry liable on the basis of the rule. The rule is one of strict liability not requiring any showing of negligence on the part of the defendant.[244] The plaintiff only needs to prove: 1) that there was an "escape" from defendant's land of anything likely to do mischief, 2) that there was a "non-natural user" of the land, and 3) that the plaintiff suffered damage as a result of the "escape."[245] In *Umudje v. Shell BP Petroleum Development Company of Nigeria Ltd*,[246] the plaintiffs claimed damages for the "escape" of oil-waste from a pit in the control of the defendants which resulted in damage to plaintiffs' ponds, lakes, and farmlands. The Supreme Court held the defendant company liable for the damage to plaintiffs' property under the rule in *Rylands v. Fletcher*. Sim-

239. Donoghue v. Stevenson App. Cas. 562 (1932).

240. Suit No. UHC/48/73, Judgment of the Ughelli High Court delivered on November 12, 1974, (Unreported).

241. *See also* Chinda v. Shell BP Petroleum Development Company of Nigeria Ltd 2 R.S.L.R. 1 (1974) (holding that the plaintiffs could not establish any negligence in the defendant's operation of its flare sites which caused enormous damage to plaintiffs' crops, land, and houses). The plaintiffs in Atubin's case could have successfully maintained an action under § 11(5), Oil Pipelines Act (discussed above).

242. The doctrine raises a *prima facie* presumption of negligence against a defendant.

243. Seismograph Services Ltd. v. Akpornovo 6 S.C. 119, 135, (Nigeria S. Ct.) (1974).

244. Rylands v. Fletcher (1866) L.R. 1 Exch. 265, 277-280, *aff'd by* the House of Lords, (1868) L.R. 3 H.L. 330, 338-340.

245. *Id.*

246. (1975) 9-11 S.C. 155 (Nigeria S.Ct.).

ilarly, in *Edhemowe v. Shell BP Petroleum Development Company of Nigeria Ltd*,[247] the court held the defendant liable for damage caused to plaintiff's fish pond by the oil which escaped from the defendant's waste pit, holding that the accumulation of crude oil in a waste pit was a non-natural user of land.

In spite of the higher chances of success by plaintiffs with the rule in Rylands,[248] it must be noted that the courts have accepted statutory authority as a complete defense to a claim brought under the rule. Accordingly, in *Ikpede v. Shell BP Petroleum Development Company of Nigeria Ltd*,[249] where leakage of crude oil from defendant's pipelines caused damage to plaintiffs' fish swamp, the court held that even though all the requirements of the rule in Rylands' case were met, the defendant could not be held liable under the rule since its act of laying pipelines was done pursuant to a license issued under the Oil Pipelines Act.[250] Some commentators have expressed doubts on the appropriateness of applying the rule in Rylands' case to oil operations in Nigeria, asking whether oil operations could actually be considered non-natural users of land.[251] Such doubts are legitimate since it is difficult to see how oil operations could amount to non-natural user of land in a country whose fortune is almost entirely dependent on earnings from oil.[252] However, the utilization of the rule might be defended as an effort by Nigerian courts to regulate oil pollution and provide relief to victims in the absence of any other basis

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247. Suit No. UHC/12/70, judgment of the Ughelli High Court delivered on January 29, 1971 (unreported).

248. Other cases where the rule was accepted by the courts as the basis for their decisions include Otuku v. Shell BP Petroleum Development Company of Nigeria Ltd. Suit No. BHC/2/83, judgment of the Bori High Court delivered on January 15, 1985 (unreported); Okoro v. Shell BP Petroleum Development Company of Nigeria Ltd. Suit No. W/21/72, judgment of the Warri High Court delivered on November 27, 1972 (unreported).

249. Rylands, L.R. 1 Exch., at 273. In Umudje's case, the Supreme Court indicated that it would have been prepared to accept the defense of statutory authority had any existed in that case.

250. The court, however, awarded damages to the plaintiffs on the basis of the strict liability provisions of the Oil Pipelines Act. *See supra* note 222 and accompanying text.

251. *See* Adewale, *Rylands v. Fletcher*, *supra* note 165, at 40-42; Uzodike, *supra* note 238, at 245; Omorogbe, *supra* note 165, at 155.

252. In the U.S., the rule is not uniformly applied in all states. For instance, the courts in Texas and Oklahoma have rejected the rule holding that the use of land for oil and gas operations in those states was not an unnatural use. *See* Turner v. Big Lake Oil Co., 128 Tex. 155, 166 (1936); Atlas Chemical Industries, Inc. v. Anderson, 514 S.W.2d 309, 313 (1974); Sinclair Prairie Oil Co. v. Strell, 190 Okla. 344, 124 P.2d 255 (1942). On the other hand, the rule has been utilized in some states such as Kansas, Utah and Indiana as a basis for recovery of damages from oil and gas operations. *See* Wendtlandt v. National Cooperative Refinery Assn., 215 P.2d 209 (1950); John T. Arnold Assoc., Inc. v. City of Wichita, 615 P.2d 814, 823-26 (Kan. App. 1980); Branch v. Western Petroleum, Inc., 657 P.2d 267, 274-75 (Utah 1982); Mowrer v. Ashland Oil and Refinery Co., 518 F.2d 659, 662 (7th Cir. 1975). The Rylands v. Fletcher rule seems to have been accepted in Canada as applicable to operations in the oil and gas industry. *See* London Guarantee and Accident Co. v. Northwestern Utilities (1936) App. Cas. 108 (a Privy Council decision dealing with gas pollution in Alberta), Lohndorf v. British American Oil Company (1958) 24 W.W.R. 193, 196.

for relief. After all, the rule, being one of common law, is not immutable and is subject to modifications to meet the needs of a changing society.

Nuisance has also been used as a basis for claims against oil polluters but less frequently than negligence. It has two major drawbacks. First, the tort of private nuisance protects property interests, and is, therefore, unlikely to be available to plaintiffs claiming personal injury as a result of oil pollution.[253] Second, it appears that most acts of nuisance committed by oil companies affecting water would be regarded as public nuisances which are actionable only by the Attorney General. Since such acts affect the public as a whole, no single individual can sue under the tort of nuisance unless he can show that he suffered special damages, peculiar to himself. In *Amos v. Shell BP Petroleum Development Company of Nigeria Ltd*,[254] an action brought by the plaintiffs for and on behalf of 42 villages, the plaintiffs alleged that the defendant, in the course of oil mining operations, built a large earth dam across their creek which caused serious flooding upstream and the drying up of the creek downstream. They claimed, as a result, their farms were flooded and damaged, the movement of canoes, the main means of transportation, was hampered, and their agricultural and commercial life was paralyzed. The court dismissed the action holding that the creek was a public waterway and its blocking was a public nuisance for which the plaintiffs could not sue in the absence of any proof that they suffered any damage over and above that of the general public.[255] The court also held that the plaintiffs could not maintain a representative action for special damages because the losses were suffered separately and each individual must plead and prove his or her special individual loss.

C. *International Law*

As alluded to earlier, there are rules of international law which impact the subject of oil pollution of water. However, international regula-

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253. *See* Thompson-Schwabb v. Costaki (1956) 1 W.L.R. 335, 338.

254. 4 E.C.S.L.R. 86 (1974), *aff'd* 6 S.C. 109 (1977).

255. Nigerian courts have been too willing to hold that acts which affect more than one person amount to public nuisance thereby denying any of the victims right to sue. Unfortunately, the Attorney-General has not been known to be enthusiastic to enforce such public rights. *See* Lawani v. The West African Portland Cement Co., (1973) 3 U.I.L.R. (Part IV) 459 (a class action by inhabitants of five villages for damage to their crops, buildings and other properties arising from the operations of the defendant's cement factory was dismissed on the ground that the injuries amounted to public nuisance). In the U.S., the dichotomy between private and public nuisance is, of course, recognized, but the courts do not label an act one or the other merely on the basis of the number of people who are injured by the act complained of. In United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed. 2d 254 (1973), the U.S. Supreme Court held that in determining the issue of standing, it is of no consequence that many people suffer the injury. The Court noted that to deny standing to individuals who are injured simply because many others are also injured would mean that the more injurious government actions could be questioned by nobody. *See also* Duke Power Co. v. Carolina Environmental Study Group Inc., 438 U.S. 59 (1978).

tion of oil pollution is one area in which the United States has not enthusiastically participated with the result that the U.S. is not party to most of the major multi-lateral treaties on the subject.[256] Reasons suggested for this lukewarm attitude include the lower levels of liability allowed under the international conventions and the possibility of preemption of state liability laws.[257] There seems little prospect for any change in this attitude, since ratifying the conventions would entail reopening some of the domestic legislation, particularly the Oil Pollution Act, which is unlikely now or in the near future.[258]

Somewhat curiously, the U.S. was the first state to ratify the Convention on Oil Pollution Preparedness, Response and Cooperation.[259] The convention went into force in May, 1995, having been ratified by at least 15 countries,[260] including Nigeria. It protects the marine environment from oil spills and provides for planning, reporting procedures, technology sharing, and cooperation.[261] The OPRC requires parties to establish national systems for preparedness and response.[262]

Nigeria is a party to the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC)[263] and the 1971 Convention on the

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256. The treaties include the Convention on Civil Liability for Oil Pollution Damage, 1969, *revised by* the Protocols of 1976, 1984, and 1992; the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, *revised by* the Protocols of 1984 and 1992; and the Law of the Sea Convention, 1982.

257. *See* Cooney, *supra* note 137, at 346 n. 13, 356-58; Rodriguez & Jaffe, *supra* note 120, at 24; Gary B. Conine, *Environmental Issues in Offshore Exploration and Production Activities*, 42 INST. OIL & GAS L. & TAX'N 8-1, 8-46 to 8-47 (1991).

258. *See* William DiBenedetto, *Little Chance for Any Changes to Pollution Act*, JOURNAL OF COM., Dec. 23, 1992, at 1B. Admiral Kime, Commandant, U.S. Coast Guard, probably summed up U.S. thinking in a speech to the Propeller Club of the United States (Feb. 23, 1993): "Let's face it, Congress has voted. The vote was 535-0. Pigs will fly before the U.S. ratifies the 1984 Protocols." *Id.* (*quoted in* GIBSON, *supra* note 55, at 27). Note that the OPA, 33 U.S.C. § 2761(d) mandates the Interagency Committee to coordinate and cooperate with other nations and foreign research entities in conducting oil pollution research development and demonstration activities. Further, OPA § 3001 recognizes that "it is in the best interests of the United States to participate in an international pollution liability and compensation regime that is at least as effective as" United States law in preventing incidents and guaranteeing full and prompt compensation. President Bush, while signing the OPA, issued a statement in which he recognized the "global challenge" of oil pollution and urged the Senate to give immediate consideration to ratifying the 1984 Protocols. "[T]he solutions we devise must be broad enough to address the needs of all nations." Statement by President George Bush upon signing H.R. 1465, 26 WEEKLY COMP. PRES. DOC. 1265-66, Aug. 27, 1990.

259. 30 I.L.M. 733 (1991). Perhaps, as a further sign of things to come, the Coast Guard took steps recently to align U.S. domestic transport rules with Regulation 26 of Annex 1 of MARPOL 73/78 by adopting final rules requiring U.S. flag vessels of more than 400 gross tons and U.S. flag oil tankers of more than 150 gross tons to carry approved oil spill response plans. 59 FED. REG 51,332 (1994).

260. Article 16 provides for entry into force twelve months after fifteen ratifications.

261. Articles 3, 4.

262. Articles I(1), 6.

263. 973 U.N.T.S. 3, *reprinted in* 9 I.L.M. 45 (1970).

Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND).[264] The purpose of the CLC is to provide uniform international rules and procedures for determining questions of liability and providing adequate compensation for persons who suffer damage caused by pollution resulting from escape or discharge of oil from ships. It makes the owner of a ship, from which there is a discharge, liable for the resulting damage[265] up to specified limits.[266] The FUND, which is supplementary to the CLC, establishes the International Oil Pollution Compensation Fund to provide compensation for pollution damage to the extent that the protection afforded by the CLC is inadequate and to give effect to other related purposes.[267]

It is doubtful if victims of oil pollution in Nigeria have had any meaningful benefit from these conventions. The reason, of course, is that the conventions apply solely to discharge from ships, which has not really been of critical concern in Nigeria, even though it does constitute a real problem in the country's coastline.[268] Further, there has not been any domestic legislation promulgated to make the provisions of the conventions enforceable internally.

Also, of some relevance to Nigeria, is the Law of the Sea Convention which came into force recently.[269] The convention imposes on parties a primary obligation to protect and preserve the marine environment,[270] while at the same time recognizing their right to exploit their natural resources pursuant to their environmental policies and in accordance with the primary obligation.[271] The parties undertake individually and jointly to take measures necessary to prevent, reduce, or control pollution of marine environment from any source, using the "best practicable means at their disposal and in accordance with their capabilities."[272]

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264. 1110 U.N.T.S. 57, *reprinted in* 11 I.L.M. 284 (1972).

265. Article III(1).

266. Under Article V(1), the liability of the ship owner for any one incident is limited as follows: (a) 3 million units of account for a ship not exceeding 5,000 units of tonnage; (b) for a ship in excess thereof, 420 units of account for each additional unit of tonnage up to a limit of 59.7 million units of account. *Id.* However, under Article V(2), there is no limit to liability where an act or omission of the owner was committed with the intent to cause the pollution damage arising or recklessly with knowledge that such damage would probably result. (A unit of account is approximately $1.43). These limits of liability are as revised by the 1984 Protocol.

267. Article 2.

268. *See* ETKERENTSE, *supra* note 2, at 80 (stating that much of the oil found along Nigeria's coastline comes from ocean-going tankers).

269. U.N. Doc. A/Conf./62/122. After so many years of waiting, the Convention finally came into force on Nov. 16, 1994. Nigeria ratified it on August 14, 1986. Though the U.S. is not yet a party to the Convention, it is hoped that it would soon take the necessary steps to ratify it, its principal objections (relating to Part XI of the Convention) having been alleviated by virtue of the Agreement Relating to the Implementation of Part XI of UNCLOS of G.A. Res. 48/263, U.N. Doc. A/48/950 (1994).

270. Article 192.

271. Article 193.

272. Article 194(1).

V. ASSESSMENT

The regulatory laws in the United States and Nigeria, as summarized in the foregoing sections, have clear strengths and weaknesses. The following discussion suggests an appropriate tool and focus for enhancing the strengths and minimizing the weaknesses of these oil pollution related laws.

A. *General Observations*

The pre-FEPA (1988) regulatory regime in Nigeria is, in theory and practice, plagued with so many shortcomings that there is a temptation to write it off as non-existent. Even FEPA did not change much in practice. First, FEPA, or Nigerian law in general, to a very large extent did not set any specific standards for the oil operators to meet in order to protect and preserve the water sources and the environment in Nigeria. The statutes and regulations are couched in such general and imprecise terms that they make compliance and enforcement nearly impossible. For illustration, there was nothing in any of Nigeria's oil-related laws, outside of the Oil in Navigable Waters Act,[273] that prohibited the discharge of oil or waste into the environment.[274] Nigerian law only enjoins operators to exercise care in order to prevent spills. They are required to adopt "good oilfield practice," take "all practicable precautions," carry out their operations in a "proper and workmanlike manner," and, in the event of a spill, "control and, if possible, end it."[275] It is extremely difficult to determine the nature of any obligations created by such vague expressions.[276] The FEPA Act and the regulations made under it appear, to a large extent, to address this shortcoming by enacting a prohibition of discharge of "hazardous substance" into or upon water and by setting specific standards in certain aspects of the operations in the oil industry to protect the integrity of the "waters of Nigeria."[277]

Another shortcoming of the Nigerian laws is the wide discretion usually given to the implementing agencies. For the most part, the statutes authorize a government official, usually a minister, to make regulations without setting any time frame within which such assignment is to be carried out and in language that suggests that the official has a choice

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273. The restricted scope of the Act, the soft penalties and the many defenses allowed make the Act a nearly worthless piece of legislation. *See supra* notes 180-191 and accompanying text.

274. Rather, there are provisions which seem to suggest that operators have authority to cause damage but "as little . . . as possible." Reg. 36 of the Petroleum (Drilling and Production) Regulations provides in part as follows: "The licensee or lessee [shall] take all steps practicable . . . (e) to cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon." *Id.*

275. Emphasis added. *See supra* notes 155-157 and accompanying text.

276. *See supra* notes 162-164 and accompanying text.

277. *But see supra* notes 203-206 and accompanying text.

whether or not to make such regulations.[278] This could be contrasted with most of the provisions in U.S. law which contain definite directives to make appropriate regulations within a given time frame.[279] Environmental protection laws regarding the Nigerian oil industry must be made to reflect this stronger U.S. approach. Nigerian laws must be changed to have mandates, modes, and times for carrying out such laws.[280]

Compounding the wide discretion given to the implementing agencies is the vague nature of the power granted the Department of Petroleum Resources (DPR or Department), the main regulatory agency. For example, the regulations in several places require that oil operator practices and equipment should be approved by the Director of the DPR.[281] Here, it is onerous to interpret what the language means.

Is one entitled to assume that the operators' practice, for example, of discharging brine or equipment into inland waters,[282] some of which are outdated and the failure of which contributes significantly to the oil pollution problem in Nigeria,[283] received the prior approval or acceptance of the Director? Or is it a case of the Director's failing to insist on his prior approval or acceptance of such practices and equipment as required by law?

Whichever is the case, the role of giving prior approval or acceptance to all practices and equipment used in the oil industry is not a proper one for the DPR for several reasons. First, it is doubtful if the Department has the necessary expertise and facilities to fulfill that mandate.[284] Second, it places the Department in an awkward position, since most spills in Nigeria are caused by practices or equipment supposedly prescribed or approved by the Department.

Given these regulatory flaws, it is difficult to determine categorically who is more blame for the current state of environmental degradation caused by oil production, namely transportation and refinement in Nigeria, the Department, or the operators. The latter might even be partly responsible for the Department's unwillingness to enforce the law against the spillers.[285] The proper role for the department and other agencies should be to set and enforce the standards to protect the Nigerian environment and leave the industry to devise ways and means of attaining those standards.

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278. The statutory provisions usually state as follows: "The minister may make regulations . . . ." *See, e.g.*, Sec. 5 Oil in Navigable Waters Act; § 9 Petroleum Act; § 37 FEPA Act.

279. *See, e.g.*, CWA 33 U.S.C. §§ 1321(b)(2)(B), 1321(j)(6), OPA 33 U.S.C. §§ 2704(d), 2706(e)(1).

280. Akanle, *supra* note 163, at 6, 28.

281. *See, e.g.*, Regs. 7, 27, 43 of the Petroleum Refining Regulations, regs. 25, 36, 40 of the Petroleum (Drilling and Production) Regulations.

282. Nwankwo & Irrechukwu, *supra* note 5, at 103.

283. *See supra* notes 12 and 20.

284. Nwankwo & Irrechukwu, *supra* note 5, at 105.

285. *See infra* notes 288-290 and accompanying text.

Yet another shortcoming of the regulatory regime in Nigeria is the laughably inadequate sanctions provided for in most of the statutes and regulations. What effect, for instance, does a fine of a hundred *naira* or $4.55 mean to an oil operator for breach of environmental regulations? Clearly, the sanctions, except perhaps those in the FEPA Act,[286] are not stiff enough to be a deterrent. To be effective, regulations must induce compliance. Thus, it is critical that new regulations be developed to incorporate penalties and enforcement provisions that create strong incentives for compliance.[287]

A much more fundamental objection is the neglect or unwillingness of the regulatory agencies to enforce the existing regulations. This appears to be the main bane of Nigeria's environmental regulation of the oil industry rather than the absence of rules. Despite the several reported cases of oil spills in Nigeria, there has not been a single known case of enforcement of the statutes and regulations against the culprits.[288] The neglect or failure of the regulatory agencies to apply the stipulated sanctions has been consistent and remarkable and creates the impression of complicity and support for the oil companies with sloppy production practices. This contrasts sharply with the enthusiastic enforcement in the United States of relevant sanctions through criminal, civil, and administrative penalties. Over the last decade, the use of criminal sanctions for violations of U.S. environmental laws has increased dramatically; so have the penalties.[289] Many prosecutions are against individuals working for corporations. The extension of criminal liability to individuals who act for the corporate entity will provide a potent incentive to ensure that environmental laws are complied with and that environmental concerns are addressed in a prompt and forthright manner.[290] The selfish desire to protect one's own liberty converts, at least in theory, every employee and company manager into a motivated environmental protectionist.

The Nigerian agencies are urged to emulate the enforcement scheme in the United States recognizing that they may, indeed, be faced with some genuine constraints, including budget facilities, personnel compe-

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286. *See supra* notes 195, 196, and 218 and accompanying text.

287. *See* PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW, SCIENCE AND POLICY 984 (1992).

288. O. A. Bowen, *The Role of Private Citizens in the Enforcement of Environmental Laws, in* ENVIRONMENTAL LAWS IN NIGERIA, *supra* note 50, at 165.

289. *See* GIBSON, *supra* note 55, at 20. Statistics of criminal prosecutions for environmental crimes by the U.S. Department of Justice for the fiscal year 1983 through fiscal year 1993 showed a total of 1,081 indictments (329 corporations and 752 individuals); 804 convictions (258 corporations and 546 individuals); a total of $253,632,917 in fines and 417 years of imprisonment. United States Department of Justice Memorandum Re: Environmental Criminal Statistics Fiscal Year 83 through FY92, *cited in* Linda C. Martin, *Environmental Crimes: What You Don't Know Can Send You to Jail*, 2-4, (paper presented at a seminar on Basic Environmental Issues in the Oil Patch, College of Law, University of Tulsa (June 17, 1994)).

290. David E. Pierce & John S. Lowe, SHORT COURSE IN ENVIRONMENTAL LAW FOR THE OIL AND GAS INDUSTRY 119-120 (Seminar Materials, University of Tulsa (Dec. 6-7, 1994)).

tencies, and the role of government in the oil industry. All petroleum resources in Nigeria are vested in the Federal Government[291] which in turn enters into operating agreements, usually joint ventures,[292] between the operating companies and the Nigerian National Petroleum Corporation (NNPC), a state oil corporation. Consequently, the costs for pollution abatement must be borne by both the operating companies and the state as it does not seem the government is willing to pay its share.[293] Until 1988, the Department of Petroleum Resources, then known as the Petroleum Inspectorate, was an integral part of the NNPC but now forms a part of the Ministry of Petroleum Resources. Before 1988, the NNPC's dual role of being both an operator and a regulator meant that enforcement actions affected the NNPC; thus, it was hardly surprising that the NNPC took no enforcement action which would have resulted in adverse self-regulation.[294]

Compounding the problem of non-enforcement by the public agencies is the lack of any mechanism for private enforcement of the statutes and regulations in Nigeria.[295] Conversely, nearly every major federal environmental legislation in the United States has provisions for citizen suits.[296] U.S. law enables private citizens to bring actions against violators, and, more importantly, to compel the enforcement agencies to carry out their non-discretionary statutory duties.[297] Citizen suits are proven as a very useful tool for environmental protection, because they stimulate

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291. Constitution, Federal Republic of Nigeria 1979, § 40.

292. The government now seems to prefer the production-sharing contract to the joint venture agreements because under the former the government is not required to contribute towards the exploration and production costs. *Nigeria reviews Oil- drilling law*, DEUTSCHE PRESSE AGENTUR, Nov. 4, 1994, (*available in* LEXIS, Nexis Library, Curnws File).

293. *See* Omorogbe, *supra* note 165, at 162. It is hoped that the current shift away from joint venture agreements to production-sharing contracts will minimize the constraint posed by government's inability or failure to contribute to pollution abatement costs.

294. Akanle, *supra* note 165, at 16.

295. *See generally*, Bowen, *supra* note 288.

296. *See, e.g.*, CWA, 33 U.S.C. § 1365; SDWA, 42 U.S.C. § 300j-8; Clean Air Act, 42 U.S.C. § 7604; CERCLA, 42 U.S.C. § 9659; Endangered Species Act, 16 U.S.C. § 1540(g). The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, seems to be the only principal exception.

297. But the U.S. Supreme Court appears to have signalled a change in direction in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) in which it held that the citizen suit provision in the Endangered Species Act was unconstitutional for granting standing that exceeded the Constitutional limits of Article III. For reactions to the case and suggestions for alternative strategies, see Harold Feld, *Saving the Citizen Suit: The Effect of* Lujan v. Defenders of Wildlife *and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141 (1994); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). Earlier in 1987, the Supreme Court had interpreted § 1365(a)(1) of the CWA rather restrictively to confer jurisdiction only in cases of ongoing violations and denying jurisdiction for wholly past violations. Gwaltney of Smithfield v. Chesapeake Bay Foundations, 484 U.S. 49 (1987). The relevant part of the provisions authorizes citizens to bring suits against any person "who is alleged to be in violation" of applicable standards, limitations, or orders. For a critique of the decision, *see* Rodgers, *supra* note 20, at 289-290.

and supplement government enforcement.[298]

In Nigeria, by contrast, the absence of statutory provisions permitting private rights of action has left the common law as the only refuge for victims of oil pollution who seek judicial remedies.[299] But because of the numerous drawbacks associated with common law tort actions,[300] the victims' chances of success of recovering any substantial and meaningful remedy are slim. The claimants are thus constrained, to accept whatever compensation is offered to them by the polluting oil companies, no matter how grossly and ostensibly inadequate those offers might be.[301] The Nigerian courts make the alternative option of litigation even more unattractive because of the paltry awards they give in the few cases that succeed. For instance, in *Mon v. Shell BP Petroleum Development Company of Nigeria Ltd.*,[302] the court found that the spillage from the defendant's pipelines caused enormous damage to the plaintiffs' fish pond but awarded only two hundred *naira* as damages for the plaintiffs' loss. In another case,[303] the court merely awarded the exact amount initially offered by the defendant but rejected earlier by the plaintiffs.

The attitude of the Nigerian courts, as exemplified in the cases just cited, is in sharp contrast with the disposition of the American courts towards awards of punitive damages. In one of the several cases against the Exxon Corporation arising from the 1989 Exxon *Valdez* spill, the trial court awarded $5 billion as punitive damages in favor of the plaintiffs which included Alaskan fishermen and property owners.[304]

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298. For instance, in October 1994 some environmental groups and a Congressman sued the Coast Guard and the National Oceanic and Atmospheric Administration for failing to issue oil spill prevention and damage assessment regulations within the period mandated by the Oil Pollution Act (NRDC v. U.S. Coast Guard, DC ENY, no. 94-4892, 10/20/94, *cited in* 25 ENVTL. L. REP. 1277 (1994)). The private right of action created by the statutes was initially to help enforce the law but the OPA, moving further than any other federal environmental legislation before it, also authorizes the private citizen to sue for damages. *See supra* note 120 and accompanying text.

299. Note, however, the right of action created by § 11(5), Oil Pipelines Act, albeit limited to pollution arising from pipelines. *See supra* note 227 and accompanying text.

300. *See supra* notes 238-255 and accompanying text.

301. *See supra* note 238 and accompanying text. The victims' poor economic conditions, their ignorance, and the expensive and uncertain option of litigation are additional reasons why the inadequate compensatory payments are accepted. Under current practice, compensation is available only when there is actual physical damage to claimant's private property; claims for loss or injury arising from dependence on commonly owned natural resources such as water are not entertained. Osuno (Panel Discussion), *in* THE PETROLEUM INDUSTRY, *supra* note 4, at 213.

302. (1970-72)1 R.S.L.R. 71.

303. Nweke v. Nigerian Agip Oil Company Ltd. (1976) 10 S.C. 101.

304. *In re* Exxon Valdez, DC Alaska, No. A89-0095-CV. The verdict was handed down on Sept. 16, 1994, cited in 25 ENVTL. L. REP. 1029 (1994). Similarly, in Marshall v. El Paso Natural Gas Co., 874 F.2d 1373 (10th Cir. 1989), the court awarded over $5 million in damages for injury resulting from defendants' improper plugging of a poor well even though an official of the regulatory agency had witnessed and "approved the plugging as proper." Nigerian courts generally seem not given to awarding huge damages in tort cases. *See* H. Ogunniran, *Awarding Exemplary Damages in Tort Cases: The Dilemma of Nigerian*

Apart from the insufficient damage awards given to successful claimants in oil spill cases, Nigerian courts also never grant injunctive remedies. In balancing the harms, the courts always put the need for continuous oil operations, and, consequently, the pecuniary benefits to the operating company and the country, above the need for the protection of the environment, individuals' health and property.[305] In *Allar Iron v. Shell BP Petroleum Development Company of Nigeria Ltd.*,[306] where the plaintiff sought an injunction against continuing pollution of his land, fishpond, and creek, the court denied the injunction *inter alia* on the ground that "mineral oil is the main source of this country's revenue," and that a grant of injunction would render nugatory the oil exploration license granted the defendant company. On the other hand, American courts do, though seldomly grant injunctions in deserving cases in order to protect the environment. In *Amoco Production Co. v. Village of Gambell, Alaska*,[307] the Supreme Court observed as follows:

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at leastof long duration, that is, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.[308]

Another pertinent observation about the U.S. regime is the level of uncertainty caused by the existence of several sources of liability including numerous federal statutes, state enactments, and common law. Rodriguez and Jaffe observe that "United States law regarding water pollution is unusually confused, with overlapping statutes and common law remedies on both the federal and state levels."[309] This observation is still relevant today, even considering the attempt by the OPA to minimize the confusion with regard to liability at the federal level. It has been suggested that the existence of the complex web of laws was caused in part by the U.S. Congress's history of reacting to specific events rather than

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Courts, 36 J. AFR. L. 111 (1992).

305. Kola Adeniji, *Legal Control of Pollution Hazards from Petroleum Operations: Implications for the Nigerian Oil and Gas Industry*, 12 GHANA U. L.J. 106, 118-19 (1975).

306. Judgment of the Warri High Court (unreported) (Nov. 26, 1973) Suit No. W/89/71.

307. 480 U.S. 531 (1987).

308. *Id.* at 545. However, the court refused to affirm the order of injunction made by the Court of Appeals on the ground that no permanent damage was probable and that a balance of harms favored a refusal of injunction. But in TVA v. Hill, 437 U.S. 153 (1978), the Supreme Court authorized an injunction against the completion of a multi-million dollar dam because the dam would threaten an endangered species of fish (snail darter), holding that it was irrelevant that much money had been spent on the dam and that only little work remained to be done. It should be pointed out, however, and the Court itself noted, that the court considered its discretion in this case foreclosed by Congress and that only an injunction could vindicate the objectives of the law. *Id.* at 173. *But see* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219 (1970), where the court in denying an injunction took into account, among other factors, the fact that the cement plant was the core of the local economy.

309. Rodriguez & Jaffe, *supra* note 120, at 1.

planning regulatory regimes.[310]

B. *Focus*

One feature common to the oil related law of both Nigeria and the United States is the disproportionate emphasis placed on response. The efforts seem to focus on "after-the-spill" consequences, such as liability, compensation, and cleanup, rather than seeking to prevent the occurrence of the spill in the first place. The one, and perhaps only notable, area where the oil industry in Nigeria has demonstrated some concern for the environment is in its preparations for response to oil spills. Every producing oil company has developed a first level response plan for minor spills and a cooperative second level response plan for medium to major oil spills, developed for spills beyond the response capability of individual oil companies.[311] In the United States, the OPA has been characterized as "reactive" because its "primary provisions" are not implicated until a spill occurs.[312]

It is the position of this article that the proper focus of the regulatory regimes should be on spill prevention while treating the consequences of a spill whenever it occurs as incidental. The response approach, no matter how sophisticated, is not likely to provide any effective answer to the problem of water pollution by oil. First, it has been shown that damage to the environment from oil spills is immediate and generally short-term.[313] Thus, even the quickest response after a spill is unlikely to prevent much of the harm. Moreover, some of the components of oil, such as benzene and naphthalene, are water soluble,[314] dissolving quickly in water, with the result that even after an apparently effective cleanup, these components could still remain in the water in harmful proportions.

Second, it is now beyond doubt that even the most thorough cleanup is really never effective enough to remove all the spilled oil. For instance, even the "extensive and thorough"[315] cleanup efforts by Exxon still left approximately between 250,000 and 1.3 million gallons of oil in the Alas-

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310. CAMPBELL-MOHN ET AL., *supra* note 19, at 757-58.

311. The second level response is organized under the auspices of Clean Nigeria Associates (CNA), a cleanup cooperative of all the operating oil companies in Nigeria. The CNA effectively came into being on Sept. 20, 1984 when it signed agreements with the cleaning contractor Halliburton Ltd. with offices in Oklahoma, acting through its Nigerian subsidiary.

312. D.L. Vickers, Note, *Deterrence or Prevention Two Means of Environmental Protection: An Analysis of the Oil Pollution Act of 1990 and the Oregon Senate Bill 242*, 28 WILLAMETTE L. REV. 405, 431 (1992). Vickers argues that the OPA's focus on oil spill liability, compensation and removal is "misguided" and criticizes that focus as the Act's Achilles' heel. *Id.* at 419, 431.

313. BAKER, *supra* note 30, at 30. *See also* THE CONTROL OF OIL POLLUTION, *supra* note 15, at 50 (stating that there is "abundant evidence that freshly-spilled crude oils contain low-boiling substances which are acutely toxic").

314. *See supra* note 15 and accompanying text.

315. BAKER, *supra* note 30, at 30.

kan environment after the Exxon Valdez spill.[316] In fact, it has been estimated that mechanical skimming, now the most common cleanup method, removes only ten to twenty percent of spilled oil.[317]

Third, the cleanup chemicals and the cleaning procedures could themselves constitute environmental problems, in some cases to most damaging dimensions. For instance, the Torrey Canyon oil spill was said to have caused negligible damage to fisheries. Instead, it was found that the kerosene and aromatic hydrocarbon-based dispersants used in the cleanup caused the real damage.[318]

One final reason why the operators should prefer a prevention strategy is that many of the actions that follow an oil spill such as cleanup, negotiations, litigation, subsequent payment of compensation, restoration of the polluted environment, and adverse publicity are usually more costly and time consuming than prevention.[319]

C. *Tools*

Given the above discussion, it is pertinent at this point to consider which tool, or combination of tools, should be adopted by governments to regulate the oil industry, particularly as it relates to environmental water pollution. Generally, several different tools are employed by environmental statutes to ensure the realization of their objectives,[320] but for purposes of this paper the choice is restricted to the command-and-control mechanism and to the use of economic incentives.

Command-and-control standards refer to regulations issued by a government to prescribe the level of pollutant that a facility may emit. The standards are either 1) performance-based, which set ambient-quality levels, or 2) technology-based, which control discharges based on technological feasibility. In other words, the command-and-control strategy regulates by specifying certain goals which must be met in order to engage in

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316. Michael J. Uda, *supra* note 131, at 403 n.2.

317. *Slick Solutions to an Environmental Scourge*, N.Y. TIMES, Aug. 15, 1993, at 3.11. *See also* J.D. Kingham, *Oil Spill Chemicals: Environmental Implications and Use Policy*, *in* The Petroleum Industry and the Nigerian Environment, supra note 4, 179 (stating that regardless of any action taken after a major oil spill has occurred, the environment will suffer some damage and that it is likely that a sizable fraction of the spilled oil will remain even where the best cleaning hardware and expertise have been used); Adewumi & Ertekin, *supra* note 2, at 160 (concluding that none of the cleaning methods is a panacea for getting rid of the spilled oil but may only help to minimize the impact of the oil spill on the environment).

318. C.T.I. Odu, *Degradation and Weathering of Crude Oil Under Tropical Conditions*, *in* THE PETROLEUM INDUSTRY, *supra* note 4, at 144. *See also* THE CONTROL OF OIL POLLUTION, *supra* note 15, at 58 (pointing out that "cleaning procedures probably cause as much concern among biologists as the oily pollutants themselves and in some cases cleaning increases damage to shore life").

319. For instance, the Exxon Valdez spill caused Exxon over $2 billion in cleanup costs and well over $6 billion in penalties and damages thus far. 25 ENVTL. L. REP. 1155 (1994).

320. For an overview of the various legal tools including their effectiveness and defects, *see* CAMPBELL-MOHN ET AL, *supra* note 19, at 129-146.

a polluting activity.[321] The prescribed measures are usually cost-oblivious.

On the other hand, the use of economic incentives places emphasis on cost and price mechanisms. It involves the cost-benefit analysis, residual charges (e.g. special taxes, effluent or emission fees),[322] tax deductions or subsidies for purchase of pollution abatement equipment, etc. The cost-benefit system supports the adoption of environmental protection measures only when the benefits from such measures outweigh their costs.

The choice of a tool for the regulation of water pollution by oil should depend on the goals of the regulations. The objectives should, at a minimum, include the protection of public health, fishing, other marine organisms, navigation, recreation, and aesthetics. As shown above,[323] oil pollution of water endangers all of these interests, but the most critical is public health, particularly in Nigeria where untreated surface and ground waters serve the domestic needs of most Nigerians.[324]

Where public health considerations are involved, as in the case of water pollution by oil, the usual approach has been to enact measures aimed at protecting the public health without regard to other factors such as cost or whether the technology exists to effect the regulation.[325] This approach is reflected in many U.S. environmental statutes, including some of those regulating the oil and gas industry.[326] It has, predictably, been the subject of severe criticism by the oil industry, which charges that the regulations impose a high economic burden wholly unrelated to whatever the regulations' benefits might be.[327] But subjecting regulations

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321. Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1264 (1981).

322. For example, under current practices in Nigeria, oil producers are allowed to flare associated gas on the payment of a penalty of 50 kobo (2.27 cents) per 1,000 cubic feet (the charge until about 1992 was 2 kobo per 1,000 cubic feet). Associated Gas Reinjection (Amendment) Act 1985.

323. *See supra* notes 30-50 and accompanying text.

324. *See supra* notes 39 and 48-50 and accompanying text.

325. PERCIVAL ET AL., *supra* note 281, at 146-47. *See also* South Terminal Corp. v. E.P.A., 504 F.2d 646, 675 (1st Cir. 1974) (Judge Campbell remarking that "minimum public health requirements are often, perhaps usually, set without consideration of other economic impact"); Lakshman Guruswamy, *Integrating Thoughtways: Re-Opening of the Environmental Mind?*, WIS. L. REV. 463, 508 (1989) (observing that a number of environmental laws "emphasize ethical over economic values insofar as they aim to protect health, safety and environmental quality, rather than to make markets more efficient or to maximize consumer surplus or social wealth").

326. The OPA, the CWA, and the Clean Air Act are good examples of the command-and-control type of legislation. Such health-based standards can, of course, be found in statutes regulating other industries, e.g., the Delaney Clause of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(C)(3)(A). The clause prohibited the use of carcinogenic chemicals in foods despite the claims that the benefits of the practice outweighed the risks. W.H. Rodgers, Jr., *Benefits, Costs, and Risks: Oversight of Health and Environmental Decision-making*, 4 HARV. ENVTL. L. REV. 191, 192 (1980).

327. H.B. Scoggins, Jr., President of Independent Petroleum Association of America compared the mass of legislation and regulations on the oil industry with going after a mos-

which seek to protect public health to some form of economic analysis has its own problems. First, the cost-benefit analysis is not entirely objective; it is, to some extent, a subjective value judgment. Further, it measures only the economic efficiency of alternative actions while ignoring critical moral and aesthetic concerns.[328] Some of these concerns cannot be adequately expressed in monetary terms. When a human life is at stake, moral factors, more than any other consideration, should dominate decision making.[329]

Laws and regulations which seek to protect Nigerian waters from oil should adopt the command-and-control approach and ignore the concerns about the cost and the possibility of harming the development of the petroleum industry by discouraging investment.[330] The need to protect the health of Nigerians who rely on these waters should clearly override all of these concerns. The role of oil in Nigeria's economy is recognized, but investment and economic prosperity should not be attained at the expense of a large segment of the population.[331] The experiences of other

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quito with a shotgun and stated that "it's just not necessary." INT'L PETROLEUM ENCYCLOPEDIA 26 (1990). On his part, the chairman of the International Association of Independent Tanker Owners, Andreas Ugland, criticized the U.S. liability laws as being so stringent that given a situation where an oil tanker in U.S. waters were to hit a passenger ship or run aground and cause a spill, the liability scheme made "accidentally killing 2,000 people on the passenger ship the better choice." 23 ENVTL. L. REP. 2867 (1993). Ken Derr, Chairman of Chevron, also lamented the regulatory scheme which he said was leading the loss of jobs in the oil industry. "The upstream half of the industry has been devastated. The downstream half is coming under enormous financial pressure. In both cases, the root cause is not economic factors, not technical factors, but political or regulatory factors . . . ." INT'L PETROLEUM ENCYCLOPEDIA 192 (1993). But a recent study by the Economic Policy Institute (Jobs and the Environment: The Myth of a National Trade-Off, 1995) disputes the claims that environmental protection leads to job losses; rather, it found that environmental protection raises employment levels. 25 ENVTL. L. REP. 1745 (1995).

328. Rodgers, Jr., *supra* note 326, at 194-95.

329. Questions have been raised about the moral propriety and the practicability of placing monetary values on human lives and other intangible goods. Rodgers, *supra* note 326 at 197; Kirschten, *Can Government Place a Value on Saving a Human Life?*, NAT'L J. 252 (1979); Baram, *Cost-Benefit Analysis: An Inadequate Basis for Health, Safety, and Environmental Regulatory Decision-making*, 8 ECOLOGY L.Q. 473 (1980).

330. B.A. Osuno, *Impact of Oil Industry on the Environment, in* Proceedings of Environmental Awareness Seminar For National Policy Makers, Lagos 51, 57 (1982). *See also* Omobolaji Adewale, *Environmental Pollution in the Petroleum Industry*, 12 JUST. 9 (1991) (expressing fears that adoption of high environmental standards might discourage the development of the petroleum industry in Nigeria).

331. *See* Akanle, *supra* note 163, at 18. Nigeria no doubt is in need of development, but it should equally be interested in protecting the environment and the health of her citizens. Most developing countries have been faced with the cruel choice between environmental quality and development. The losers in these conflicts between environmental quality and development are usually those who suffer more than their fair share of the health, property, and ecosystem damage costs of pollution. *See* World Comm'n on Environment and Development, Our Common Future 48 (1987). In the case of the oil industry in Nigeria, the losers have obviously been the oil-producing communities who have been made to bear far more than their fair share of the burden of Nigeria's reliance on oil. But environmental quality and development are not necessarily mutually exclusive; they can co-exist under the princi-

developing countries, which placed premium on investment, employment, and economic development over safety and environmental concerns, should serve as lessons for Nigeria. Worth recalling is the 1984 tragic industrial accident in Union Carbide plant in Bhopal, India, blamed in part on weak regulations and lax enforcement machinery, which killed over 3,300 people and maimed over 200,000 people for life.[332] Nigeria should not wait for the deaths and injuries from water pollution by oil to reach such catastrophic proportions before acting. The time to act is now.

VI. RECOMMENDATIONS

In order to enhance the protection of the waters from oil and its products and wastes, the following recommendations are put forward in addition to others already noted in the foregoing sections. Some are also being merely restated here for clarity and emphasis. The recommendations, unless otherwise stated, apply to Nigeria.

a) The law should impose more detailed and realistic standards including the outright banning of discharges of oil, its products and wastes into, at least, inland waters in view of the uses to which these waters are put, and setting stringent limits for offshore waters.

b) The law should set deadlines for compliance with its mandates by all affected.

c) The confusion, created by Section 23 of the FEPA Act, over which agency has authority to regulate the petroleum industry should be cleared. It is suggested that both FEPA and the Department of Petroleum Resources should be vested with authority, but the problem of oil pollution in Nigeria requires concerted actions and pooling of resources.

d) The regulatory agencies should be removed substantially from ministerial control under which they currently operate. They should be able to enact and enforce regulations without reference to a minister in order to minimize political influences and red tape.

e) The scope of the FEPA Act should be expanded to cover not only "waters of Nigeria," but all waters in Nigeria.

f) The defenses allowed under the Oil in Navigable Waters Act should be significantly curtailed.

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ples of sustainable development which ensure that development takes place to meet the needs of the present without compromising the ability of future generations to meet their own needs. *See* the Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992), adopted by the United Nations Conference on Environment and Development (the "Earth Summit") in June 1992 at Rio de Janeiro. For an examination of the dilemma between development and environmental quality and the concept of sustainable development, *see* LAKSHMAN GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 306-320, 924-929 (1994).

332. *See generally* C.M. Abraham & Sushila Abraham, *The Bhopal Case and the Development of Environmental Law in India*, 40 INT'L & COMP. L.Q. 334 (1991); Meera Nanda, *Waiting for Justice-Union Carbide's Legacy in Bhopal*, MULTINATIONAL MONITOR 15 (July/August 1991).

g) The law should raise the liability of polluters to include civil or administrative penalties and damages for loss of subsistence, including impairment of earning capacity.

h) Statutory provisions should be incorporated to allow for private right of action by victims and for citizen suits.

i) Liability of polluters for payment of damages to victims should be based on strict liability, with the recognized exceptions of acts of God, acts of war and, within a restricted scope, acts of third parties.[333]

j) An oil spill liability trust fund similar to that under the U.S.'s OPA should be adopted in Nigeria. The initial amount, probably less than the $1 billion mark set by OPA, should be raised through an allocation by the Federal Government and taxes on every barrel of oil produced in Nigeria. Subsequently, all penalties and fines should be paid into the fund.

k) The U.S.'s CWA should extend the traditional defenses of acts of God, acts of war, and acts of third parties to liability for civil or administrative penalties.

l) The U.S. law on the subject should be streamlined to minimize the confusion and uncertainty that characterize the present law.[334] This may mean preemption of certain state laws.

m) For both the U.S. and Nigeria, the focus should shift to spill prevention, away from response and liability.

n) More appropriately for Nigeria, the agencies should rise to the challenge of faithfully and conscientiously enforcing the statutes and regulations. In this regard, considerable efforts and resources should be devoted to the training of monitoring and enforcement officers and the acquisition of basic working equipment.[335]

(o) The home governments of the transnational oil corporations and oil consumer nations should become seriously involved in the conditions under which oil is produced and bring pressure to bear on corporations to enhance these conditions. Such home governments could require their resident corporations to observe stipulated minimum environmental standards in their operations in foreign countries. The developed nations should assist the developing countries in defending the right of all peoples to safe and sufficient drinking water.[336]

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333. The imposition of strict liability for oil pollution damage seems to be the current trend and is reflected in recent environmental statutes applying to oil pollution, e.g., U.S. OPA, United Kingdom's Merchant Shipping (Salvage and Pollution) Act, 1994.

334. Preemption of state laws, however, seems unlikely at least for now. *See supra* notes 251-252 and accompanying text.

335. Akanle, *supra* note 163, at 28.

336. In the Mar del Plata Action Plan adopted by the United Nations Water Conference in 1977, the international community accepted as a basic premise that "all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic

VII. CONCLUSION

This article's comparison of the laws and policies of the United States and Nigeria, dealing with oil pollution of water, reveals a yawning gap in approach, commitment, and effectiveness between the two countries. The American approach includes detailed regulatory standards, a tough enforcement scheme, and broad citizen participation rights. These attributes have no equivalent in Nigeria. Instead, Nigeria chose a different course, marked largely by discretion, informality and almost total indifference to the profound detriment of the environment and the people. It is, however, desired that a new spirit of changes in Nigeria, signalled by the Federal Environmental Protection Agency Act of 1988, will be kept alive and that Nigerian law can be redirected along the lines suggested in this article, implemented with greater intensity and dedication for the enduring benefit of the Nigerian environment and the well-being of its people.

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needs." *See* The Report of the United Nations Water Conference, Mar del Plata, 14-25 March, 1977 U.N. Sales No. E.77 II.A.12, pt. one, ch.1, resolution II.

Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property

RUTH L. GANA*

I. INTRODUCTION

The recently concluded round of multilateral trade negotiations accomplished some significant changes in the multilateral trading system.[1] As with its predecessor agreements, the Uruguay Round agreement is expected to boost the world economy as a result of a negotiated reduction in tariffs. Under the new agreement, nations made commitments to reduce

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1. The Uruguay Round of multilateral trade negotiations is the eighth round of world trade negotiations since the inception of the multilateral trading system established by the General Agreement on Tariffs and Trade (GATT) in 1947. As part of the institutional framework established by the Bretton Woods system after World War II, the primary purpose of the GATT was to limit government measures which distorted international trade flows. This goal was important for both political and economic reasons. Restrictive or unfair trade policies by nations, it was felt, increased the incidence of protective measures by other sovereign nations which in turn led to retaliatory practices with widespread repercussions. Economic conflict also engendered political hostilities which had devastating effects on the world economy. The GATT system was thus the result of what the victor nations of World War II felt was advantageous for worldwide economic and political stability. Today, good trade relationships between sovereign nations is still closely linked with political cooperation. *See A Gift From the Cold War: Bretton Woods Revisited*, THE ECONOMIST, July 9, 1994, at 4, 4.

tariff rates,[2] agreed on clearer rules to govern unfair trade practices,[3] and established a unified dispute resolution system.[4] Most significantly, the Uruguay Round established a new international institution, the World Trade Organization (WTO), to administer and oversee the new body of trade rules.[5] Nations ratifying the WTO Charter automatically become subject to the three annexed agreements[6] which constitute the new GATT. By offering a "single package" GATT agreement, the WTO Charter ensures that countries wishing to join the multilateral trading system will be bound by all the agreements, thus eliminating to a large extent, the problem of free riding.[7]

As a whole, the "new GATT" is not as much "new" as it is "improved." There is a clear commitment under the WTO charter to continue to follow and uphold prior GATT decisions, practices, and proce-

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2. The Uruguay Round, it is projected, will reduce tariffs by 24% and 38% for developed and developing countries respectively. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, CASES, MATERIALS AND TEXT 6 (3RD ED. 1995).

3. The Uruguay round initially was not expected to deal with the Antidumping code established under the Tokyo Round in 1979. However, dissatisfaction with the 1979 Code led to a new compromise code, the Uruguay Round Antidumping Agreement. See AGREEMENT ON IMPLEMENTATION OF ART. VI OF GATT 1994; URUGUAY ROUND AGREEMENT ACT, PUB. L. NO. 103-465, 108 STAT. 4809 (1994). *See also* JACKSON, *supra* note 2, at 685.

4. Dispute resolution in international trade is regulated generally by GATT Art. XXIII. *See* 61 Stat. A3, 1366, T.I.A.S. 1700, 55-61 U.N.T.S. Under the Uruguay round, a Dispute Settlement Understanding was negotiated. *See* AGREEMENT ESTABLISHING THE MULTINATIONAL TRADE ORGANIZATION (WORLD TRADE ORGANIZATION) [hereinafter WTO CHARTER], THE FINAL ACT OF THE MULTINATIONAL TRADE NEGOTIATIONS (THE URUGUAY ROUND), PART II, ANNEX 2, SEC. 26.1, 26.2 [hereinafter *Uruguay Round*]. The Understanding significantly changes the difficult and frustrating dispute resolution process under the old GATT system. To reflect the new resolve for strong and effective rules for dispute resolution, Art. III of the WTO Agreement provides that the administration of the Rules and Procedures Governing the Settlement of Disputes is one of the primary purposes of the Organization. *See Uruguay Round*, Part II, Annex 2, Sec.3. Further, the Dispute Settlement Understanding clearly states that dispute settlement is a core part of the new GATT system. *Id.* at Part II, Art. III, Sec. 3.

5. The WTO is a full fledged international institution with legal personality. It is responsible for the coordination and administration of all the texts which make up the Uruguay Round Agreement. The Charter establishes a Secretariat to be headed by a Director-General who will be assisted by several Assistant Director-Generals. The Charter establishes a budget and gives the WTO authority to work with other international institutions, including non-governmental organizations, to promote the aims and objectives of the GATT. *See id.* at Art. V-VIII.

6. There are four annexes to the WTO Charter, but only three are mandatory for all contracting parties. The first annex consists of the multilateral agreements made up of GATT 1994, the General Agreement on Trade in Services and the agreement on Trade Related Aspects of Intellectual Property Rights. The second annex is the Dispute Settlement Rules and the third annex the Trade Policy Review Mechanism. *See* WTO Charter, *supra* note 4.

7. The problem of free riding had been a consistent complaint under the old GATT, particularly because ratification of side agreements was not required of all the contracting parties. Since the most favored nation (MFN) principle required the extension of concessions to all other GATT contracting parties, some countries were able to gain benefits without attendant costs in concessions. *See* JACKSON ET AL., *supra* note 2, at 383-384.

dures.[8] Old rules have been strengthened and new commitments have been secured to ensure that the world economy benefits from the fruits which free trade promises. Only months after its implementation, the Uruguay Round is already beginning to have its intended effect: world trade is expected to grow 8.9 percent in 1995 and continue into 1996 at 7.8 percent.[9]

Beyond the institutional changes which the Uruguay Round accomplished, and even beyond the economic benefits which the new multilateral agreement offers most countries, the single most important accomplishment of the Uruguay Round is the extension of trade rules to new subject matters. Prior to the Round, the multilateral trade system dealt primarily with trade in manufactured goods. Under the auspices of the Uruguay Round, two additional subject matters were added to the jurisdiction of the multilateral trading system: intellectual property and trade in services. These two new areas resulted in an agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)[10] and the General Agreement on Trade in Services (GATS),[11] both of which were negotiated as part of the Uruguay Round. These three agreements, the GATT, GATS, and TRIPS form the core of the new multilateral trading system to be administered by the WTO.

This article examines the implications of the TRIPS agreement in the context of intellectual property issues in Third World countries.[12] It focuses specifically on the impact of the new internationalization of intellectual property on creativity in Third World countries. The broad thesis is that the nature of protection of intellectual goods proceeds apace with the rate and development of capitalist relations in a society. Rather than focusing on the use of TRIPS as a means of combatting international piracy,[13] or as a tool to secure foreign compliance with minimum stan-

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8. *See* WTO Charter, *supra* note 4, at Art. XVI:1.

9. *See Economy: Slower OECD Growth May Affect Developing Nations*, Inter Press Service, June 20, 1995, *available in* LEXIS, NEWS Library, Curnws File.

10. TRIPS Agreement, 33 I.L.M. 81 (1994).

11. General Agreement for Trade in Services (GATS), Dec. 15, 1993, 33 I.L.M. 44 (1994).

12. Although aware that the term "Third World" is no longer deemed appropriate for use, I opted to use this term because the alternative term, "developing countries," typically denotes sovereign states and is not necessarily inclusive of indigenous peoples. The subjects of this paper include indigenous groups, such as Native Americans and Aboriginals, premodern societies, such as Israel in Biblical times, as well as developing countries such as China and Brazil. The common denominator among those subjects is the existence of traditional organizational norms upon which the larger suprastructure of the modern state is superimposed.

13. It is no secret that the main impetus behind the TRIPS agreement is to secure enforcement of U.S. intellectual property rights abroad. Very early on in the Uruguay negotiations, intellectual property was identified as a "high priority" for the United States. The number of articles on this issue are voluminous. For a good overview, *see, e.g.*, Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991); Alan S. Gutterman, *International Intellectual Property: A Summary of Recent Developments and Issues for the Coming Decade*, 8 COMP. & HIGH

dards of intellectual property protection,[14] this article instead examines the implications of TRIPS as a form of *passive* coercion; that is, the requirement that Third World societies establish particular forms of protection for intellectual goods as a condition to membership in the new multilateral trading system. This requirement must be met despite the fact that these forms may be both incompatible with cultural institutions within these societies and invalid under local law and custom. The TRIPS agreement thus raises a significant point of conflict between developing country governments and traditional societies which are constituents of these countries. The conflict is one which implicates the discipline of international law and human rights because the TRIPS agreement, in this regard, impinges upon the freedom of a collective to observe, develop and preserve the underlying values of its society as expressed through law. The state has conflicting obligations to these societies and to the international community under the TRIPS agreement. The article then examines what contemporary forms of intellectual property protection suggest about creativity in the Third World. Finally, the article examines the relationship between the "global model" of intellectual property protection and the underlying values and norms expressed in the protection of creativity in the Third World.

The central claim is that all forms of creative expression—mechanical, literary, or artistic—are value driven. The nature and variety of goods produced in any society is, initially, a function of needs as the popular adage "necessity is the mother of invention" attests. More important, however, the laws which protect these inventions — laws which define what is to be protected and how that protection is to be effected — reflect the underlying values of a society. Intellectual property law, like other law "is more than just another opinion; not because it embodies all right values, or because the values it does embody tend from time to time to reflect those of a majority or plurality, but because it is the value of values. *Law is the principle institution through which a society can assert its values.*"[15]

Further, the selection of what goods to protect and the nature of such protection is shaped by values and needs in accordance with a society's perceptions of what constitutes "the good life." Nowhere is this more reflected than in the Anglo-American philosophy of copyright protection which seeks to balance private reward and encouragement of creative activity with public benefit of access to a goodly supply of literary works. In Macauley's celebrated 1841 speech in the English House of

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TECH. L. J. 335 (1992).

14. For articles discussing enforcement, *see* Note, Willard A. Stanbuck, *International Intellectual Property Protection: An Integrated Solution To The Inadequate Protection Problem*, 29 VA. J. INT'L L. 517 (1989); R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223 (1989).

15. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 5 (1975) (emphasis added).

Commons, the need for copyright was expressed as a matter of value and perceptions of what is needed for a good life:

> The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures . . . but it is desirable that we should have a supply of good books: we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of renumerating them is by means of copyright.[16]

In the United States, Thomas Jefferson's famed letter to Isaac McPherson on the protection of intellectual property reveals a similar understanding of the incidents of the good life and society. In his attempt to balance the competing values implicated by a proprietary theory of intellectual property protection, Jefferson noted:

> That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature [w]hen she made them like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot in nature be subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done according to the will and convenience of society. . . .[17]

The idea that copyright, as well as other forms of exclusive privileges, was a necessary part of the good society reflects values such as liberty, property, private enterprise, accumulation of capital and rapid consumption; in a word, values that nurture capitalism. In the celebrated *Slaughter-House* cases[18] a majority of the court justified a monopoly privilege on the grounds that in Great Britain and the United States, these governments,

> . . . representing the people . . . have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges - privileges denied to other citizens — privileges which come within any just definition of the word monopoly . . .; the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to suc-

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16. MACAULEY, COPYRIGHT, 195, 197 (Trevelyan ed. 1879), *quoted in* Zechariah Chafee, *Reflections on Copyright Law*, 45 COLUMBIA L. REV. 503, 507 (1945).

17. Reproduced in F.D. Prager, *A History of Intellectual Property From 1545 to 1787*, 26 J. PATENT OFFICE SOC. 711, 759, 760 (1944).

18. 16 Wall (83 U.S.) 36, (1872).

cess in that way.[19]

These values resonate in American legal history, and continue to be reinforced by modern courts. To fully understand how deeply entrenched in the Western European and American vision of the good life intellectual property is, and how the forms of protection reflect this, particularly in the area of copyright, it is important to understand the profound intellectual, social and political influence and transformation brought about by literacy in Europe.[20]

In Gibben's *The History of The Rise and Fall of The Roman Empire*,[21] the importance of literacy was described in the following way,

> . . . the use of letters is the principal circumstance that distinguishes a civilized people from a herd of savages incapable of knowledge or reflection. Without that artificial help, the human memory soon dissipates or corrupts the ideas entrusted to her charge; and the nobler faculties of the mind, no longer supplied with models or with materials, gradually forget their powers; the judgment becomes feeble and lethargic, the imagination languid or irregular. Fully to apprehend this important truth, let us attempt, in an improved society, to calculate the immense distance between the man of learning and illiterate peasant. The former, by reading and reflection, multiplies his own experience, and lives in distant ages and remote countries; whilst the latter, rooted to a single spot, and confined to a few years of existence, surpasses, but very little, his fellow-labourer the ox in the exercise of his mental faculties. The same, and even a greater, difference will be found between nations than between individuals; and we may safely pronounce, that without some species of writing, no people has ever preserved the faithful annals of their history, ever made considerable progress in the abstract sciences, or ever possessed, in any tolerable degree of perfection, the useable and agreeable arts of life.[22]

The powerful appeal of literacy, and the vision of the good life it wrought, was felt all over the world as European expansionism took place in Asia, in Africa, and in the Americas. The legitimization of this vision of the good life found a home in Darwin's writings on evolution. Races and cultures were repeatedly classified in a hierarchical fashion, setting the stage for the series of historical events such as slavery and colonialism. Historians Vail and White explain the intellectual setting in the following:

> From the mid-1850s onwards, however, an important shift of emphasis in writings about race began to occur. By then it was becoming clear that ethnology's preoccupation with finding physical differences

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19. *Id.* at 66.

20. *See generally*, LEROY VAIL AND LANDEG WHITE, POWER AND THE PRAISE POEM, SOUTHERN AFRICAN VOICES IN HISTORY (1993).

21. EDWARD GIBBONS, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE (Womersley ed. 1994).

22. *Id.* at 235.

> between the races not only encouraged notions of polygenesis offensive to faithful christians but, equally damaging, the study was yielding conclusions of highly doubtful scientific validity. As a consequence, racial theorists began to combine in a new synthesis earlier romantic preoccupations with the uniqueness of individual national cultures with the contemporary pride in technological progress arising from literacy and education. The earlier racism based on calibration thus yielded to a new racism based on cultural distinctions perceived as determined by and linked to racial identity; that races with a common origin could possess fundamentally different cultures and ways of thinking was soon explained in terms of one of the major organizing ideas of the last half of the nineteenth century, evolutionism. The findings of the new science of archeology had transformed the Western perception of humankinds' position in Time from [B]iblical brevity to geological expansiveness. Human history thus could be thought of as a gradual evolutionary development through a set of stages. By being situated within the matrix of evolutionism, the old static hierarchy of races was given both a temporal dimension and a history. Some races were different from others because they had experienced greater cultural evolution from human-kind's common origin than the others. Important cultural distinctions between races arose from their occupying different places along the path of dynamic evolutionary development, with technological advances — such as Gutenburg's invention of movable type — central to the accumulated differences.[23]

This intellectual mood was reflected in some literature which, in linking invention to culture, yielded to the temptation to classify in hierarchical fashion:

> The Mediterranean race is the most mechanical of all, the blue-eyed and the brown-eyed variety must each settle for itself which shall bear the palm. The Semite is much less so. The mongolian is, perhaps, more ingenious with his hands. The Africans and Papuans are more mechanical than the brown Polynesians; the Eskimo than the red Indians; and the Australians are the least clever of all. In each several division of humanity there are smaller centres of invention, owing both to natural ingenuity and to natural resources. In the higher walks of language, art, social structures, literature, science and philosophy, the peoples of Europe and Asia will need a new distribution for each classific concept. The Hebrew has never been excelled for sublime conceptions on religious topics, the Egyptian invented chronicles, the Greek perfected harmony and portraiture in art, the Romans laid the foundations for jurisprudence.[24]

The modern debate over intellectual property protection in developing countries has failed to take account of cultural differences which affect the understanding of what constitutes property or what may right-

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23. VAIL & WHITE, *supra* note 20, at 3.

24. OTIS T. MASON, THE ORIGINS OF INVENTION: A STUDY OF INDUSTRY AMONG PRIMITIVE PEOPLES 31 (1st ed. 1895) (1966).

fully be the subject of private ownership. While avoiding the ethnological categorizations of the nineteenth century literature, it is important for the modern debate to link intellectual property laws to the social realities of societies in developing countries. Not only may this yield more effective approaches to securing enforcement of intellectual property rights in developing countries, it also presents the possibility that western based intellectual property laws may have some real impact on industrial innovative activity in these countries, thus contributing to the economic welfare of the Third World. However, as this article argues, culture may influence what is created but it is those values, rooted in a conception of a good society, that determine how and what kind of intellectual property laws societies enact.

II. INTERNATIONALIZATION AND THE INTERNATIONAL DIMENSIONS OF INTELLECTUAL PROPERTY PROTECTION

Central to Anglo-American intellectual property law[25] is the conviction that a system which rewards creativity by granting monopolies over the use, possession, and disposition of the objects of intellectual endeavor is a necessary prerequisite for creativity and innovation.[26] At the heart of

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25. The constitutional authority for intellectual property law in the United States is premised on the principle of national progress. Art. 1, § 8, cl. 8 of the U.S. Constitution gives Congress legislative power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST., art. I, § 8, cl. 8. Out of this mandate, several forms of protection were crafted for the different expressions of creativity. Patents protect "new and useful" inventions, 35 U.S.C. 101 (1981); copyright protects "original works of authorship" primarily of a literary and artistic nature, 17 U.S.C. 102(a) (1994); and trademarks secure a monopoly right to use a mark or appellation which identifies a product or a service (e.g. Exxon or Coca-Cola), 15 U.S.C. 1051 (1991); and trade secrets protects information such as a "formula, pattern, compilation, program, device, method, technique or process," Uniform Trade Secrets Act 1(4) (1985), that has acquired independent market value and which the owner has made reasonable efforts to keep secret. *Id.*

26. Creativity and innovation are usually used interchangeably in intellectual property literature. I use the terms distinctly because in the last few years they have come to reflect different strands of philosophies underlying intellectual property, particularly in the field of copyright. Creativity, like all esoteric terms, is difficult to define succinctly. Simply defined as the act of making something, creativity is, in one sense, the direct object of continental intellectual property systems. Under French copyright law, for example, the authors right ("droit d'auteur") was conceptualized as a natural right, protecting the very essence of the personality of the creator and existing independent of a positive grant through statutory law. As a result, the French copyright system protects a wide variety of rights which include "personality" rights, i.e., rights which inhere in the very nature of creating. These rights are referred to as moral rights and they come in three basic forms: the right to disclose the work to the world (right of publication), the right to be recognized as author (right of paternity), and the right to prevent unauthorized changes in the work (the right of integrity). For a general overview of moral rights in the context of the Berne Convention, *see* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 5-6 (1987). The philosophy behind these rights is, in one regard, theological; Just as God created man and thus man is both a reflection and the embodiment of God (*See Genesis* 1: 26,27), so also the work of a human creator reflects the personality of that creator and

the matter is a long-held economic theory that explains human behavior as a series of responses to incentives.[27] Underlying this theory is the assumption that rational human beings make choices which will maximize their individual welfare.[28] Property rights, including intellectual property

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embodies a part of that creator as well. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property In Revolutionary France and America*, 64 TUL. L. REV. 991 (1990) (arguing that the differences between the French and American copyright philosophies have been overstated).

A creativity element (Schöpfungshöhe) also exists in German copyright law. Unlike its French counterpart however, Schöpfungshöhe is not linked to individuality. Rather, it is a practical requirement that "A work must . . . rise above craftsmanship, above the average, . . ." to reflect a "minimum level of intellectual-creative achievement" which is the " quantitative aspect" of individuality. Gerhard Schricker, *Farewell to the "Level of Creativity" (Schöpfungshöhe) in German Copyright Law? in* 26 INT'L. REV. OF IND. PROP. & COPYRIGHT L. 41, 42 (1995). Schöpfungshöhe is thus deployed to help determine the satisfaction of the requirement, under German law, that a copyrightable work be a "personal intellectual creation." *Id.*

Innovation, on the other hand reflects more of the utilitarian vision of Anglo-American intellectual property systems. In both England and the United States, intellectual property was regarded solely as a creation of statute. *See* AUBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA (photo. reprint 1973) (1960). While a natural rights theory had existed in England prior to the passage of the Statute of Anne in 1709, the House of Lords decidedly quashed this notion in the case of Donaldson v. Beckett, 98 Eng. Rep. 257 (1774), deciding that the copyright was a creation of statute, and that the statutory grant superseded any prior conception of the right. In this philosophical framework, intellectual property is a means to an end. The costs of maintaining a monopoly system would be well worth the advancement in science and the useful arts, and would contribute to public welfare by encouraging dissemination of new knowledge and inventions. *See* Roger E. Meiners & Robert J. Staaf, *Patents, Copyrights, and Trademarks: Property or Monopoly?* 13 Harv. J.L. & Pub. Pol'y 911, 912-913 (1991). As a result, the goal of the intellectual property system is to balance these interests in an efficient framework. *See* S.M. Besen & L.J. Raskind, 5 JOURNAL OF ECONOMIC PERSPECTIVES 1, 5 (1991). For an international perspective, *see* Gunnar W.G. Karnell, *The Berne Convention Between Authors' Rights and Copyright Economics- An International Dilemma*, 26(1) IIC 193 (1995).

Apart from a general theme of individuality versus utilitarianism, another dimension to distinguishing creativity from innovation is the commercial impetus that has come to be associated with innovation. The deployment of large sums of capital for research and development stems primarily from a desire to exploit a felt need in the market. See Stephen J. Kline and Nathan Rosenberg, *An Overview of Innovation*, in THE POSITIVE SUM STRATEGY (N. Rosenberg and R. Landau, eds., 1986) (explaining innovation as the result of the right combination of commercial opportunities and scientific discoveries/progress). The fear of free riding from competitors who have not invested the time and resources needed to invent and market a new product is thus another traditional justification for intellectual property monopolies, particularly the patent system. It would be helpful if one could bracket creativity as an element of copyright and innovation as the function of patents, but crossbreeds in new technologies, such as computer programs and digital technologies which currently are protected under Copyright law, make this unfeasible.

27. *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW vii (1987); *See also* Comment, *An Economic View of Innovation and Property Right Protection in the Expanded Regulatory State*, 21 PEPP. L. REV. 127 (1993); Richard T. Rapp and Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 J. OF WORLD TRADE 75 (1990); Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89 (1993).

28. For a leading work on economic analysis of law, including property law, *see* RICH-

rights,[29] by securing monopoly privileges, allow individuals to make welfare maximizing choices without the fear of free-riding by members of the public.[30] In theory, the aggregate sum of individual welfare accrues to the national economy, impacting the level of national wealth and ensuring the efficient functioning of the marketplace of goods and technology which are, ultimately, the embodiments of creativity and innovation. In order to capture the aggregate gain of individual welfare, the ultimate goal of the intellectual property system must be to "maximize the benefits from creating additional works minus the losses sustained from limiting public access to the works, plus the costs of administering copyright protection."[31] The role of the courts is to police the system, and the rights claimed within it, to execute this purpose and maintain this efficient balance.[32]

ARD A. POSNER, ECONOMIC ANALYSIS OF LAW, CHAP. 3 (2d ed. 1977). *See also*, David J. Gerber, *Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct*, 38 ST. LOUIS U. L.J. 674 (1994). More specifically on the economics of the intellectual property system, *see* William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

29. An important theme to understand for the purposes of this article is the process by which intellectual goods become "propertized" in Anglo-American law, and in the western world in general. While a full examination is not possible within the confines of this article, what is important to note here is that the denial of a natural perpetual right in literary works, for example, led advocates of international copyright to substitute the natural rights basis of their cause with a property theory (*see* CLARK, *supra* note 26, at 26) which was another powerful concept in western law and, indeed, in western political systems. As early as 1765, William Blackstone had singled out property as a fundamental feature of human existence in civil society. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1766). This conception of property was, however, limited to physical objects to which rights attended to. Where incorporeal objects such as rents were concerned, the physicalist conception of property rectified the rights in order to fit them into the dominant frame of thought. In American legal history, the changing meaning of the term "property" is associated with the rise of the modern state in the nineteenth century. Property was "dephysicalized" during this period to conform to the needs of the industrial society. An expanded idea of property was necessary to embrace new alliances and interests created by modernization. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY, 3 (1992). In 1964, Charles Reich published the leading article on the dephysicalization of property, identifying government created jobs, licenses and income as "new property." *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). In the *Minnesota Rate Case*, the U.S. Supreme Court held that expected earning power, anything with exchange-value, could constitute a form of property. *See* Chicago, M.& St.P.Ry. v. Minnesota, 134 U.S. 418 (1890). Finally, in the celebrated case of International News Service v. Associated Press, 248 U.S. 215 (1918), the U.S. Supreme Court recognized copyright as a form of property: "news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news therefore, . . . it must be recognized as quasi property." *Id* at 236. By 1942, the notion that copyrightable subject matter was property was firmly entrenched in the American judiciary. *See, e.g.*, M. Witmark & Sons v. Fred Fisher Music Co., 125 F.2d 949 (2d Cir. 1942).

30. *See* JACKSON ET AL., supra note 2.

31. Gunnar W.G. Karnell, *supra* note 26, at 193.

32. *Id.*

The economic incentive theory has permeated the recent discourse on international intellectual property,[33] as indeed has the utilitarian conception of intellectual property laws.[34] International intellectual property has become, primarily, the mechanism for redressing trade deficits and for maintaining a competitive edge in global markets.[35] While international intellectual property protection has always secured market shares for holders of intellectual property rights,[36] the transformation of industrial economies into information economies has increased the stakes in the global dimensions of intellectual property rights.[37] As a result, the emphasis in this era has not been on patent laws which often take the credit for the rapid pace of western industrialization[38] but rather copyright laws which protect the expression of knowledge.

In an economic era defined by global information technologies,[39] a monopoly right in the fruits of information is indispensable for the generation of new capital and invaluable for maintaining a global competitive edge. Intellectual property under the TRIPS agreement is a means to this end. The agreement is primarily a reflection of the vulnerability of information-based economies to the demands of the market for pirated and counterfeit goods.[40] It is also a reflection of values which are integral to

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33. *Id. See also,* Eric Wolfhard, *International Trade in Intellectual Property: The Emerging GATT Regime*, 49 TORONTO FACULTY OF LAW REVIEW 107 (1991) (arguing that the distinction between trade policy and intellectual property is an artificial one, and that economic conditions beyond the control of individual nation-states create an interdependence between trade and intellectual property).

34. *See* Gutterman, *supra* note 27.

35. Anne Moebes, *Negotiating International Copyright Protection: The United States and European Community Positions!r*, 14 LOY. L.A. INT'L & COMP. L.J. 301 (1992). *See also,* Eric Wolfhard, *supra*, note 33.

36. *See, e.g.*, C.V. Vaitsos, *The Revision of the International Patent System: Legal Considerations for a Third World Position*, 4 WORLD DEVELOPMENT 85-86 (1976); *see also* C.V. Vaitsos, *Patents Revisited: Their Function in Developing Countries*, 19 INDIAN ECONOMIC J. (1972);

"The patent system in developing countries has a predominantly negative effect and is devoid of significant benefits for these countries; virtually all owned by large foreign corporations, patents are used as a vehicle for achieving monopoly privileges . . . ." *Id.*

Similarly, a study prepared in 1957 for the U.S. Senate Judiciary Committee concluded that the provisions of the international patent system " . . . it is evident, have altered the complexion of the patent grant from one designed primarily to stimulate domestic industry to one in which the foreign patentee has an increased chance of producing where he chooses while retaining his patent monopoly." *Id.*

37. *See* Moebes, *supra* note 35. *See also* R. Michael Gadbaw, *supra* note 14.

38. "As one looks back over the history of the [United States] he cannot, I think, escape the conclusion that the [patent] system has been a powerful force in our growth from an insignificant agricultural and trading federation to the most powerful industrial nation on earth. It is a force too powerful in what it has done, and in what it can still do, to be tampered with lightly." H.A. TOUMLIN JR., PATENTS AND THE PUBLIC INTEREST (1939).

39. *See* CARNOY ET AL., THE NEW GLOBAL ECONOMY IN THE INFORMATION AGE 6 (1993) (pointing out that the new international division of labor is based on the capacity to generate new knowledge and to apply it rapidly).

40. This market is the result of a combination of forces which include technological dependency of Third World countries, pervasive poverty which keeps "genuine" goods out

western post-modern, capitalist societies; values such as individual ownership, autonomy, economic theories about incentives, all of which are born out of particularized historical events such as, for example, the industrial revolution.

By the late eighteenth century in the United States, the combination of market forces expressed through commercial treaties with Europe, and the legal foundation already in place in favor of property rights and individual autonomy, together created a social system primed for the recognition of rights in a new form of "property." Things such as good will were assigned social and economic value in society and it was only a question of time before protection was extended to other forms of intangible goods. Whether the emphasis was placed on "rights," or "liberty," or "property," the socio-economic ethos was eminently receptive to the idea of proprietary interests in the fruits of creative endeavor. The impetus behind the TRIPS, an American initiative, is thus not to encourage creativity and innovation, but rather to protect a particular conception of property privileges across national borders.[41] The agreement, simply put, promotes national economic interests and social values in the legitimizing form of treaty law.

By *situating* intellectual property at the core of international trade regulation, by *making* intellectual property the subject of international trade rules, and by *premising* membership and participation in the multilateral trade system on the adoption of a global model of intellectual property protection, intellectual property law has, for the first time, been "internationalized." That is, intellectual property has adopted a universal mode which all countries must adopt in order to benefit from the re-ordered basis of the international economy.

It is important, before proceeding further, to distinguish between what in this article will be referred to as the "internationalization of intellectual property," and the international aspects of intellectual property protection. "Internationalization" refers to the universal mode or "global model" of intellectual property law made mandatory by the provisions of the TRIPS agreement. Under this model countries who previously did not offer protection for intellectual property in the forms recognized in European and American legal systems must now enact substantive laws to conform to this model. In addition, some countries must create entirely new structures, ranging from courts to copyright and patent offices, to administer these new laws. Finally, these countries must develop an intellectual property jurisprudence substantially similar to what currently exists in the United States and Europe in order to nurture the success of their new intellectual property laws.

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of reach for the vast majority of the population in these countries, the relative ease and low cost of counterfeiting, and the penetration of European and American cultural goods in these societies.

41. For good reading on intellectual property in the international trade system, *see* Wolfhard, *supra* note 33; Gadbaw, *supra* note 14; Leaffer, *supra* note 13.

The international aspects of intellectual property protection, on the other hand, addresses the scope of international *protection* of intellectual goods. The focus here is on the nondiscriminatory treatment of foreign works. The Berne Convention for the Protection of Literary and Artistic Works[42] and the Universal Copyright Convention[43] are the principal international instruments for the international protection of copyright. The Paris Convention for the Protection of Industrial Property[44] regulates the international protection of patents. Each of these treaties is administered by international institutions affiliated with the U.N system.[45]

Some major differences between the internationalization of intellectual property and the international protection of intellectual property must be kept in mind. First, the former establishes substantive rules for the protection of intellectual property while the latter simply delineates a minimum floor or scope of protection for intellectual property. Put differently, the TRIPS agreement prescribes both what must be protected and how, while the Berne, UCC, and Paris Act focus more on elements of protection. All of the agreements establish minimum standards of protection; the TRIPS however raises the floor and provides more substantive rules as well as procedures for enforcement and sanctions. Second, the former is premised solely on economic considerations, while the latter incorporates elements of the natural rights philosophy, recognizing inherent value in the act of creating.[46] Third, the former is a condition for participation in multilateral trade relationships while the latter is not conditioned on anything, but rather is the product of a certain level of real consensus.[47] Non-membership in any of the treaties does not necessarily

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42. Berne Convention for the Protection of Literary and Artistic Works, Sept.9, 1886, *revised*, Paris (July 24, 1971), *reprinted in* American Intellectual Property Law Association, Worldwide Protection of Intellectual Property (1984) [hereinafter Berne Convention].

43. The Universal Copyright Convention of September 6, 1952, revised in Paris, July 24, 1971. Reproduced in NORDEMANN ET AL., INTERNATIONAL COPYRIGHT: COMMENTARY (1990).

44. The Paris Convention for the Protection of Industrial Property 1883, *revised*, Stockholm (1967), *reprinted in* AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, WORLDWIDE PROTECTION OF INTELLECTUAL PROPERTY (1984) [hereinafter PARIS CONVENTION].

45. The Berne Convention and the Paris Convention are both administered by the World Intellectual Property Organization (WIPO). WIPO is an intergovernmental organization, established in 1967 as a successor institution to the United International Bureaux for the Protection of Intellectual Property (BIRPI). It became one of the specialized agencies of the United Nations in 1974. The United Nations Economic and Social Council (UNESCO), a U.N. agency, is responsible for administering the Universal Copyright Convention (UCC).

46. The Berne Convention, for example, protects moral rights which the TRIPS expressly excludes. Moral rights are rights which protect the relationship between an author and the work. "Any author, whether he writes, paints or composes, embodies some part of himself — his thoughts, ideas, sentiments and feelings — in his work, and this gives rise to an interest as deserving of protection as any of the other personal interests protected by the institutions of positive law . . .;" "[T]he author then enjoys an exclusive right by the sole act of creating." *See* RICKETSON, *supra* note 26 at 456; Andre Lucas and Robert Plaisant, *France*, in NIMMER AND GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE 10 (1988).

47. At least as between members who participated in its formation. For a detailed history reflecting the negotiation and compromise that resulted in the Berne Convention, *see*

result in political ostracism[48] nor denial of material benefits;[49] the goals of the latter may be accomplished through bilateral agreements, thus making the multilateral agreement unnecessary if a country deems that a bilateral approach is more feasible or more prudent for its well being.[50] The institution which implements the former, i.e. the World Trade Organization, may make substantive "law" as a result of the dispute resolution system it is charged with utilizing.[51] The institutions[52] which implement the latter, on the other hand, do not have any formal dispute resolution mandate and do not have independent authority to make law in the judicial sense. These institutions may only be involved, if at all, in dispute settlement at the request of two contracting parties. For the treaties administered by the World Intellectual Property Organization,[53] explicit provision is made for the jurisdiction of the International Court of Justice over conflicts involving the interpretation or application of the treaties.[54]

Finally, another important difference between the internationalization of intellectual property and the international aspects of intellectual property lies in the structure of the institutions which administer these treaties. Significant differences exist, both in terms of their scope of responsibility, in their processes of dispute settlement, and in the binding nature of their decisions. As mentioned earlier, one of the key functions of the WTO is dispute resolution.[55] With particular regards to intellectual property disputes, a Council for the TRIPS agreement was established under the WTO Charter.[56] The TRIPS Council is responsible for monitoring the operation of the TRIPS agreement and compliance by con-

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RICKETSON, *supra* note 26, at 233.

48. The U.S. for example, refused to join the Berne Convention for many years without any significant problems. Even its recent accession in 1989 is questionable in terms of full compliance with minimum Berne standards. *See* RICKETSON, *supra* note 26, at 233; J.C. Ginsburg & J.M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUMBIA-VLA J. L. & ARTS 1 (1988).

49. Except of course, for whatever was lost by the fact of nonmembership.

50. The U.S. and many other countries favored a bilateral approach for many years preceding the Berne. *See* RICKETSON, *supra* note 26, at 25-30. Bilateral agreements on intellectual property are still used today, in addition to the multilateral agreements. *See, e.g.*, Memorandum of Understanding On The Protection of Intellectual Property, Jan. 17, 1992, 34 I.L.M. 676. For an insightful overview of these agreements, *see* William Alford, *Perspective on China: Pressuring the Pirate*, L.A. TIMES, Jan. 12, 1992, at M5.

51. *See* GATT, *supra* note 4, at Art. XXIII.

52. The World Intellectual Property Organization (WIPO) and the United Nations Economic and Scientific Organization (UNESCO) respectively.

53. *See*, STATES PARTIES TO THE CONVENTION ESTABLISHING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION AND THE TREATIES ADMINISTERED BY WIPO AND STATE MEMBERS OF THE GOVERNING BODIES AND COMMITTEES OF WIPO (Status on May 1, 1993), *WIPO Document 423(E)*.

54. Art. 33 of the Paris Act of the Berne Convention makes acceptance of the jurisdiction of the International Court of Justice optional by means of a reservation to that effect by a member country at the time of ratification or accession to the Convention. *See* Berne Convention, *supra* note 42, at Art. 33(2).

55. *See* WTO Charter, *supra* note 4.

56. *See id.*

tracting parties.[57] Disputes arising under the agreement are governed by the central dispute resolution process of the WTO.[58] Very briefly, under this process, disputing countries are required to consult with each other with an intent on resolving the dispute. If after 60 days the dispute remains unresolved, a complaining party may request the establishment of a dispute resolution panel.[59] The panel hears oral arguments and reviews written submissions of both parties. A panel report containing detailed conclusions and the panel's legal analysis is submitted to the disputing parties for comments. The final panel report is then submitted to the dispute settlement body (DSB) and must be adopted by the body at the second meeting on which the report is placed on the agenda. Any party to the dispute may appeal to the appellate body.[60] The implementation of the panel or appellate report recommendations, whichever is adopted, is monitored by the DSB to ensure that the offending member complies with GATT rules. In the event of non-compliance the prevailing party is entitled either to compensation or to request authority to suspend concessions made to the offending party.[61]

This elaborate structure is duplicated in form or substance neither under the Paris or Berne Conventions nor under the UCC. The activities of the World Intellectual Property Organization are limited to the coordination and promotion of intellectual property protection in various countries. The "overall objectives of WIPO are to maintain and increase respect for intellectual property throughout the world, in order to favor industrial and cultural development. . . ."[62] The internationalization of intellectual property provides a more rigid framework and perhaps, consequently, promises more consistency and coherency under this new system.

In summary, the merger of intellectual property with the multilateral trading system has ushered in a new era for international aspects of intellectual property protection. The protection of intellectual property through trade accomplishes several important things:

1. easier international *monitoring* through the institutional apparatus of the World Trade Organization;

2. the increased *nationalization* of intellectual goods, by which private (individual) rights have essentially been transformed into public

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57. *Id.*

58. *See* Art. 64(1) of the TRIPS Agreement. *See also* WTO Charter, *supra* note 4.

59. Under the Dispute Settlement Understanding, the WTO Secretariat is responsible for recommending panel members. Where disputing parties do not agree with the recommendations, the GATT Director-General is authorized to appoint the panel in consultation with the Dispute Resolution Body (DSB) and other relevant committees or council. *See* JACKSON ET AL., *supra* note 2, at 342.

60. *See* Understanding on Rules and Procedures Governing The Settlement of Disputes, Annex 2, World Trade ORganization Agreement.

61. *See id.* For more details, *see* JACKSON ET AL., *supra* note 2, at 340-346.

62. BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY, WIPO PUBLICATION, 40 (1988).

(state) rights;[63]

3. the *internationalization* of intellectual property, by which countries who desire to be a part of the liberal trading system are required to enact laws to comply with the TRIPS agreement and as a result

4. the *creation* and *establishment* of a global system of intellectual property protection.

III. CREATIVITY IN THE THIRD WORLD

> Nothing is more common than the assertion that men do not purposely invent in the lower civilisations, that they simply follow the leading strings and the mandates of nature. The savage, it is said, does not invent, he simply borrows his clothing from the animals, his house from the trees and caverns, his food from many sources. He is an out-and-out imitator. But [t]he race or people that did not lay at least one dressed stone on this stately edifice (of nature) cannot possibly have survived.[64]

This section will examine various fundamental differences in the philosophies underlying systems for protecting creative endeavor in the Third World. As mentioned earlier, the term "Third World" as employed in this article is inclusive of indigenous groups which have not attained formal statehood but who are recognized both in the national and international sphere as having a distinct political, cultural, and social identity within a formal state. Such groups include Native Americans and aboriginal groups, and other indigenous or "traditional" societies.

At the outset, this section does not examine the integration of developing countries into the international intellectual property system,[65] nor the concerns of developing countries about the intellectual property sys-

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63. Under the WTO only contracting parties (limited to sovereign states) may bring claims for dispute resolution. The multilateral trade system does not recognize private parties. As such states stand in the shoes of their citizens to press for redress over intellectual property infringement. This transformation of a private right is not new to the multilateral trade system, neither is it new in dealing with international intellectual property issues. Under U.S. trade laws for example, the United States Trade Representative is authorized to undertake a wide variety of measures against countries identified as denying adequate and effective protection of intellectual property. *See* Trade Act of 1974, 19 U.S.C.S. § 2242, § 2901 (1993). The legitimate reach of this power is questionable in a post-Uruguay round era.

64. Mason, *supra*, note 24 at 19, 23 (1895).

65. Most developing countries were subject to the principal intellectual property treaties (with the exception of the UCC) by virtue of their status as colonies of sovereign states who ratified these treaties. After attaining political independence most of these ex-colonies acceded to the treaties in their new status as independent sovereign entities. I have examined elsewhere the reasons surrounding developing country ratification of these treaties and the process of integrating these countries into the international system. *See* Ruth L. Gana, PROBLEMS AND PROSPECTS FOR INTERNATIONAL COPYRIGHT AT THE CLOSE OF THE TWENTIETH CENTURY: LESSONS FOR THE UNITED STATES (S.J.D. Dissertation, Harvard Law School (unpublished manuscript on file with the author)) (1995).

tem as a whole.[66] Rather, this section examines indigenous attitudes regarding creative ability and the forms of protection offered through the norms which underlie social, political, and legal organization in these societies. For effective discussion, two related and longstanding themes about creativity and its protection in the Third World are addressed. The first is a myth which holds that creative activity is non-existent in Third World countries. The second is an assumption, perhaps originating from the myth, that intellectual property laws do not exist in these countries.[67] I suggest that the real issue behind these two themes is that the attitudes and rules governing the protection and dissemination of the fruits of creative endeavor in Third World societies do not mirror those which exist in western industrial post-modern societies. Finally, this section questions another assumption that the chosen forms[68] of protection for intellectual property in these societies are objective or scientific models which inhere somehow in the nature of creativity and so must be adopted by all who wish to protect and encourage creative activity.

A. *Has Creativity Died in the Third World?*

As stated earlier, the prevailing wisdom of Anglo-American jurisprudence justifying intellectual property laws is that such laws are a *neces-*

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66. During the development era, a veritable amount of literature was produced by development economists, classical economists, political scientists, and scholars from other disciplines about the role of intellectual property laws in the development process. Development scholars argued endlessly about the negative effects of patents in particular, on economic development, and technology transfer. The major arguments centered on the effect of the patent grant on indigenous creativity. By granting a seventeen year monopoly on a process or machinery, independent inventors of the same product or machinery could not legally use or develop the machine or process. In addition, improvements to licensed technology were contractually assigned to the licensor as a precondition for, or term of the licensing agreement. Arguments also focused on the role of multinational corporations in hindering the exposure of local employees to technology utilized by the firm. These arguments, and the literature on technology transfer to the developing world, the phenomena of technological dependency and the effect of the international intellectual property system continue to abound today. *See, e.g.*, CHARLES GOULET, THE UNCERTAIN PROMISE, VALUE CONFLICTS IN TECHNOLOGY TRANSFER (1977) (2 ed. 1989).; A.Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 63 DUKE L.J. 831 (1987).

67. *See, e.g.*, Kirsten Peterson, *Recent Intellectual Property Trends In Developing Countries*, 33 HARVARD INTERNATIONAL LAW JOURNAL, 277 (1992); Brent W. Sadler, Note, *Intellectual Property Protection Through International Trade*, 14 HOUSTON JOURNAL OF INTERNATIONAL LAW 393 (1992); Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L.R. 89 (1993); *Marshall A. Leaffer, Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L.R. 273 (1991). I think it would be a fair appraisal to say that much of the existing literature on intellectual property in developing countries assumes this fact, including literature by scholars from developing countries.

68. That is, patents, copyrights and trade secrets, together with the various requirements on which their validity is based, e.g. a copyright must be an "original expression," "fixed," 17 U.S.C.S. § 102(a) (1994); a patent must be a "new" idea, reduced to a working form, and the inventor must have been the first to invent it (at least under U.S. law) 35 U.S.C. § 101 (1981).

sary prerequisite for creativity.[69] The argument is not that creative activity will not take place at all without intellectual property laws which give a property right in the fruits of creative energy, but rather, that such activity will be minimal[70] and industrial growth will be constrained.[71] As a result, the enactment of intellectual property laws has been linked to economic development, growth, and prosperity.[72] Failure to enact intellectual property laws, some literature suggests, results in economic stagnation, the inefficient use of scarce resources, technological backwardness, and general economic malaise.[73] Further, the absence of intellectual property laws discourages indigenous creativity and innovation.[74] It is with this claim, and more specifically, the inference that creative activity does not

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69. Virtually every article one picks up on intellectual property echoes this justification. I mentioned earlier that the premise of this reasoning is an economic theory: "By defining the parameters for the use of scarce resources and assigning the associated rewards and costs, the prevailing system of property rights establishes incentives . . . for investment, production and exchange. Since property rights define the behavioral norms for the assignment and use of resources, it is possible to predict how differences in property rights affect economic activity." Rapp & Rozek, *supra* note 27, at 77.

70. *See* Meiners & Staaf, *supra* note 26, at 911, 913.

71. The strongest testament against this argument is the recent transformation of countries of such as South Korea, Taiwan, Hong Kong, and Singapore. These countries have become efficient producers of technology goods and, thus, have come to occupy positions of strategic importance in modern international economic relations. The gains made by these countries certainly are not due solely or even largely to intellectual property laws. Rather, these countries and others economies such as that of India and more recently China, embarked upon economic and political reforms which encouraged domestic innovation and competitiveness by developing R & D infrastructure which improved local capacity to absorb technical and scientific knowledge. In addition, export oriented strategies were implemented in countries such as Korea and India, combined with investment in education and R & D and general liberalization of foreign investment regulation. *See generally* AGMON & VON GLINOW, TECHNOLOGY TRANSFER IN INTERNATIONAL BUSINESS (1991); JOSEPH M. GRICCO, BETWEEN DEPENDENCY AND AUTONOMY, INDIA'S EXPERIENCE WITH THE INTERNATIONAL COMPUTER INDUSTRY (1984).

72. This argument has been around for sometime and indeed is to be found among the development literature I mentioned earlier. For contemporary advocates of this thesis, *see* Richard T. Rapp and Richard P. Rozek, *supra* note 27. *See* ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT (1990); Edwin Mansfield, *Intellectual Property Rights, Technological Change, and Economic Growth*, in INTELLECTUAL PROPERTY RIGHTS AND CAPITAL FORMATION IN THE NEXT DECADE (Charles E. Walker & Mark A. Bloomfield eds., 1988).

But cf. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1954); A. Plant, *The Economic Theory Concerning Patents for Inventions*, 1 ECONOMIC 67, 67-95 (1934); Stephen Bryer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281 (1970); A. Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMIC 167 (1934). All arguing that the award of copyrights and patents is unnecessary to stimulate or encourage creative activity.

73. SHERWOOD, *supra* note 72; Mansfield, *supra* note 72; *see also* Rapp & Rozek, *supra* note 27.

74. In addition to other literature, WIPO publications tend to take this position. *See, e.g.*, BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY, *supra* note 62, at 43: "Without a national industrial property system and, more particularly, a patent system, it will be difficult for a country to stimulate and protect the results of indigenous innovation." *Id.*

exist in the Third World as a consequence of weak or non-existent intellectual property laws[75] that issue is taken in this section[76] with discussion limited to the context of copyrights, the most recent bone of contention between developed countries and the Third World.[77]

The subject matter of copyright protection is creative expression.[78] Copyright protects the expression of an idea and not the idea itself,[79] the latter being the purview of patent law.[80] In order to be copyrightable, an expression must be original and fixed.[81] These elements constitute the core of formal requirements for copyright-ability in most legal systems today.[82]

Creative expression has been a part of human experience ever since Adam "named" the animals and, later, Eve in the garden of Eden.[83] The essence of communication, whether in language, prose, song, or symbol, requires some modicum of creativity and forms the core of every society,

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75. *Id.; see also* Gutterman, *supra* note 67, at 55, 59.

76. The title for this paper was a question I had long been grappling with since my "baptism" in this area of study. The perennial question of piracy, and the implications that the Third World stole what it could not create were troublesome to me. More troublesome however, was the implication that resistance to intellectual property laws, or the refusal to enact particular forms and of intellectual property laws, were persistent because there was nothing to *protect* in the Third World. I began my research by asking the question, is there no creativity in the Third World?

77. I have also chosen to limit my discussion to copyrights because of the discernible difference between creativity and innovation. *See* Kline & Rosenberg, *supra* note 26. The difference currently is of no legal import per se, but it has some implications for my broader thesis.

78. *See* 17 U.S.C.A., § 102(a) (1994).

79. *See* Baker v. Selden, 101 U.S. 99 (1879); Mazer v. Stein, 347 U.S 201, 217 (1954). The idea/expression dichotomy in copyright law is a fundamental, but troublesome, doctrine in copyright law particularly in the area of new technologies. *See, e.g.*, Computer Assoc. Int'l v. Altai Inc., 982 F.2d. 693 (2d Cir. 1992). "Drawing the line between idea and expression is a tricky business." *Id.* at 704; Whelan Assoc. Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3d Cir. 1986); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983); Peter Pan Fabrics Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." *Id.* at 489. The idea/expression dichotomy is codified in 17 U.S.C. § 102(b).

80. *See Baker*, 101 U.S. at 102.

81. *See* 17 U.S.C. § 102(a) (1994). The fixation requirement for copyright protection requires a work of authorship to be fixed in a tangible medium of expression from which the work can be perceived, reproduced or otherwise communicated. This requirement which is also incorporated in the Berne Convention, and now the TRIPS agreement, is problematic for many indigenous societies which do not maintain forms of literary expression. For example, many African societies and Native American societies have oral traditions. The contemporary norms of copyright law preclude the representation of the vast wealth of oral literature existing in these societies, in the copyright system as a result of this fixation requirement.

82. This uniformity in part, reflects the international consensus expressed in the treaties governing copyright. *See, e.g.*, Art. 2, Berne Convention; Art. I, Universal Copyright Convention.

83. *See* Genesis 2:19-23.

regardless of its stage of development. Indeed, any cursory study of history or anthropology will reveal that every society at any stage of development invented, created, and developed *sui generis* products necessary to sustain the life and well being of the society. These products were both mechanical, such as farming tools, and expressive, such as music, arts, and literature. The same holds true for the Third World and the continued vitality of creative expression is undeniable.[84] From songs to dances, artistic designs, paintings, sculptures, herbal and other medicinal formulas, and folktales, the list of protectable subject matter emanating from Third World societies is endless. These products are often located in western market economies as goods for sale or as objects of educational benefit in museums.

In addition to the manifestation of creativity in material objects, creative expression in Third World societies often takes place in the context of specific cultural institutions which are responsible for accumulating and preserving the history and heritage of the society. Creative expression through the famous "talking drums" of Yoruba tradition is but one example of this phenomena.[85] In a great number of African societies, oral literature remains a significant form of creative expression. While the validity of the term "oral literature" has been debated by anthropologists, historians, and ethnologists,[86] it seems clear that societies not restricted to printed expression, indeed those whose intellectual and creative experiences have not been formed around Gutenberg's press nor defined by printed works fall completely outside the sphere of copyright norms. Consequently, creativity in indigenous societies of most Third World countries do not "fit" the model for copyright protection which has captured the landscape of international economic relations in this era.

The critical point to note about recognizing creativity in the Third World is that forms of recognition and protection are a function of, and deeply embedded in, the institutions and underlying norms of social organization. In one sense, this is no different from the forms of protection for intellectual goods in the developed world. The individualism on which property rights are based and the nature of commodification which is central to liberal market economies are reflected clearly in modern intellectual property laws.

As far back as Biblical times, these goods which are now the subject matter of intellectual property were not protected in the forms and categories of patents, copyrights, trademarks, or trade secrets.[87] Indeed, it was

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84. *See, e.g.*, KARIN BARBER, THE POPULAR ARTS IN AFRICA (1986).

85. *See* BARBER AND FASIAS, DISCOURSE AND ITS DISGUISES: THE INTERPRETATION OF AFRICAN ORAL TEXTS (1989).

86. On this matter, and on the subject of the use and power of oral literature in social and political organization in African society, *see* VAIL & WHITE, *supra* note 20.

87. A trade secret protects information, such as "a formula, pattern, compilation, program, device, method, technique or process" which generates independent economic value. UNIFORM TRADE SECRETS ACT, § 1(4) (1985). To be protectable, a secret must not be known

not until the era of Kings in ancient Israel that material reward was given for the results of creative effort.[88] Yet, creativity and its fruits existed, and in abundance!

During the reign of King Solomon,[89] intellectual endeavor and skill expressed in literary and artistic works was recognized, protected, and rewarded.[90] In the process of building the Temple,[91] Solomon requested woodcarvers from the King of Tyre after acknowledging their superior skill in the art of carving.[92] Solomon hired Hiram of Tyre, who was "filled with wisdom, understanding and skill to work (engrave) with bronze."[93] The Sidonians, a people recognized for their great carving skills, were also hired to carve designs and sculptures for the Temple.[94] The elaborate engravings of Hiram and the sculptures of the Sidonians certainly constitute protectable subject matter under modern copyright laws.[95] These works and the individual artists were, however, not "protected" in the form copyright law today provides. Apart from the fact that duplication of the Temple design was nearly impossible,[96] creative ability in this society was attributed to God who inspired these artists and gave the skill which was used in the creation of the products.[97] Similarly, the Pima-Papago Native American tribe distinguished "picked up songs" (learned from other tribes or white settlers) from "dreamt songs" (obtained from spirits) and "songs given in the beginning" (in a sense, natural songs).[98] In this understanding of "authorship," like that of ancient Israel, the individual was not recognized as the source of the created work. The idea of Hiram "owning" the Temple engravings or the Sidonians "owning" the

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and there must be reasonable efforts made by the claimant to maintain its secrecy. *Id.*

88. Solomon paid wages for the work of the Sidonians. He also gave Hiram twenty thousand cors of wheat and twenty cors of pressed oil each year until the Temple was completed. *See* 1 Kings 5:6,11.

89. 961 B.C. - 922 B.C.

90. *See* 1 Kings 5:6.

91. *See* 1 Kings 5:5.

92. 1 Kings 5:6.

93. I Kings 7:13,14; *see also* 2 Chronicles 2:14.

94. It is interesting to note that a similar arrangement is valid under contemporary intellectual property law. Under the "work for hire" doctrine, an employer is regarding as the lawful owner of a product created or invented by an employee during the course of employment. *See* 17 U.S.C.S. § 101(1) (1981); *see also* Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

95. *See* 17 U.S.C.S. § 102(a)(5) (1994) (recognizing pictorial, graphic, and sculptural works as copyrightable subject matter). *See* Mazer v. Stein, 347 U.S. 201 (1954); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

96. *See* I Kings 7: 15-43.

97. *See, e.g.*, Exodus 31:1-6: "Then the Lord spoke to Moses saying, 'See I have called by name Bezaleel, the son of Uri, the son of Hur, of the tribe of Judah. And I have filled him with the Spirit of God, in wisdom, in understanding, in knowledge, and in all manner of workmanship. And I, indeed I, have appointed with him Aholiab the son of Ahisamach, of the tribe of Dan; and I have put wisdom in the hearts of all who are gifted artisans, that they may make all that I have commanded you.' *Id.*

98. HAROLD E. DRIVER, THE INDIANS OF NORTH AMERICA 221 (1962).

woodcarvings would have been unthinkable; indeed, it would have been tantamount to a claim by Moses of ownership of the ten commandments (which, incidentally, also qualify as copyrightable subject matter).[99] The forms of intellectual goods recognized in this Biblical example (sculptures and engravings) were first protected in the United States under the Copyright Act of 1909.[100]

Under Moses' leadership, elaborate rules existed governing the use and ownership of a new process or formula. For example, use of anointing oil, in ways or for purposes other than those prescribed, was prohibited by law,[101] and sanctions for violation were clearly spelled out.[102] The norms which governed recognition of creative effort were rooted in the nature of the theocracy under which ancient Israel, at the time, was governed. Not surprisingly, the primary reason for protection was ecclesiastical with the goal of preserving the sanctity or purity of a process or product in obedience to a holy command. This "controlling" feature in copyright has a long history. For example, it was evident in England during the nineteenth century when controlling the press was essential to the government's decision to grant a stationer's copyright.[103] In order to maintain purity of text, censorship was also a dominant feature of copyright law in Imperial China.[104] Additionally, while China led the world in the invention of printing[105] and several other significant technological advances, China, until very recently did not protect creativity in the forms expected by prevailing western jurisprudence.[106]

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99. Actually, even much more than the wood carvings or Temple designs, the ten commandments are clearly copyrightable subject matter. The four main requirements of copyright — copyrightable subject matter (the commandments are literary work), originality (who would doubt this?), fixation (written on tablets of stone), authorship and ownership (who would claim it? This wouldn't be a problem as Moses had the rights "transferred" to him on Mount Sinai!). *See generally* Exodus 20:1-17; 34:1. Obviously, the term of copyright protection would have expired by now.

100. *See* U.S. STAT. AT LARGE, VOL. 1, 124 (1789). The Act originally extended copyright protection to "authors of books, maps and charts"). *Id.* Sec. 1. Through a series of amendments however, the scope of copyright protection was expanded to include among other things, artistic works and sculpture. Thus by 1903, courts recognized copyrightable subject matter in a variety of products which were expressive of creative effort in a literary or artistic sense. *See, e.g.*, Bleisten v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (recognizing copyright in chromolithographs).

101. *See generally* Exodus Chapter 30.

102. *Id.*

103. *See* L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 21-22 (1987); *see generally* AUBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA (photo. reprint 1973) (1960).

104. *See* William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 3, 11-18 (1993).

105. Block printing was invented in China in the 6th century and paper was invented around A.D. 105. *See* NORBERT WIENER, INVENTION: THE CARE AND FEEDING OF IDEAS 47 (1993).

106. Alford, *supra* note 104, at 6-7.

Intangible property was recognized by all Native American groups.[107] Examples of such goods include familiar objects of modern intellectual property law such as songs, dances, formulas, as well as less familiar types of intellectual property such as myths, membership in sibs and sodalities, and magic formulas.[108] The type of property recognized included the right to participate in ceremonies, the right to wear certain insignia and the right to perform a particular dance.[109] In terms of protection for processes, knowledge of herbal medicines developed through a process of time and training was guarded by the institution of native doctors.[110] Other kinds of specialized knowledge, such as new hunting methods or other skills, were taught to the community or to selected members of the group.

There is some sense in intellectual property literature that once the development concerns are substantially resolved,[111] intellectual property issues will "fit" in the developing world structure. This approach ignores the fact that local perceptions of intangible goods, in particular goods which result from creative activity, and local values which shape a system of protection for these goods have never been seriously considered in the context of the North-South debate over intellectual property protection. Substantive intellectual property doctrine has played an ancillary role in this debate, with the issue framed, primarily, in ideological terms.[112] Scholarship from both sides tends to focus exclusively on the economic impact of protecting intellectual property rights.[113] However, there is nothing conclusive available in the economic literature about the effect of intellectual property rights;[114] yet, there is nothing that takes into account indigenous perceptions of intangible goods and indigenous approaches to intellectual property protection. These may very well have more of a significant impact on the success of intellectual property protection in developing countries.

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107. *See* DRIVER, *supra* note 98, at 263.

108. *Id.*

109. *Id.* at 264.

110. *Id.* at 219.

111. These concerns include technological "backwardness," huge national debt, poverty, illiteracy, and political instability.

112. The ideology of intellectual property, quite distinct from its philosophy, has also been a point of conflict between developed and developing countries. During the development era, scholarship from a "Third World perspective" regarded intellectual property and scientific knowledge in general as "the common heritage of mankind." This view held that preventing access to the fruits of modern science was wrong and ought not to be enforced within an international system premised on equality. Western European countries as well as the United States rejected this position, maintaining that science and technology were the result of investment and labor. As such, the fruits of invention belong to the creators and not, to "humanity."

113. Oddi, *supra* note 66; VAITSOS, *supra* note 36.

114. Some scholars have concluded that it is simply impossible to determine exactly, whether, how, and why intellectual property systems are indispensable to a society.

B. *Elements of Laws and Norms Concerning The Regulation and Protection of Creative Efforts In Indigenous Societies*

Recognition and protection of intellectual goods in indigenous societies differs substantially from the modern treatment of intellectual property in industrialized nations.

A first cause of the differences in treatment of intellectual property is that forms of property ownership in these societies are different. Many indigenous societies are not organized around individuals as such but around a clan or other extended unit.[115] As such, "ownership" means something different from its accepted conception in Anglo-American law. Property in most western societies consists of a bundle of rights. The most important of these rights are the right to absolute possession, the right to exclude others from use, and the right to dispose of the property as one wishes. Virtually all forms of property in western societies are defined in relation to these rights; the most important right being the right to exclude.[116] This absolutist conception of property in Anglo-American law was transferred wholesale into the domain of intellectual goods.[117]

Exclusive individual ownership of goods, however, is not a scientific principle of social existence. Exclusive ownership was, for example, a rare feature of social organization in some Native American tribes.[118] Notwithstanding this fact, however, all Native American groups recognized ownership rights in intangible property,[119] including some objects familiar to modern intellectual property laws such as songs, dances, and formulas,[120] as well as less familiar ones, such as myths, membership in sibs, sodalities, and magic formulas.[121] Among the Mesa-Indians of North America, rights in intangible goods as well as other goods included the right to be recognized as "owner," but not the right to exclude others from use.[122]

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115. It is important not to confuse the clan or hamlet with the broader society as a whole. Perhaps a helpful analogy is once again the Biblical nation of Israel. There are twelve tribes which together comprised this political unit. *See* Exodus 1:1-4. Each tribe, however, was identified by specific rules, specific histories, and in some cases, specific sub-cultures.

116. *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1927). "The essence of private property is always the right to exclude." *Id.*

117. In INS v. Associated Press, *supra* note 79, at 246. Justice Holmes and Brandeis maintained a vigorous dissent to the court's decision to diminish the absolutist conception of property when it related to property in news. Property could not be "quasi" the justices maintained. The distinguishing feature of property was its absolute nature. *Id*; *see also* HORWITZ, *supra* note 29.

118. *See* DRIVER, *supra* note 98.

119. *Id.*

120. Protected under copyright law and trade secret law respectively. *See* 17 U.S.C. § 102 (1994); Uniform Trade Secrets Act § 1(4) (1985).

121. *See* Rennard Strickland, *Implementing the National Policy of Understanding Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZONA ST. L.J. 175, 184 (1992).

122. *See* DRIVER, *supra* note 98.

Even where individual ownership was possible within certain Native American groups, such ownership was limited to specific categories of goods.[123] For example, Native Americans along the Northwestern coast of North America recognize private ownership, in the exclusive sense, of fishing, trapping, and wild plant gathering rights.[124] "Ownership" according to this group of Native Americans was really a form of stewardship, wherein an owner in title was recognized, but the refusal to bar other members of the society from using the product was not permitted.[125]

Another important feature of "ownership" of intangible goods in certain Native American groups is that tribal laws often restrict the right to dispose of the good.[126] Typically, this restriction was limited to disposition to non-members of the group. In addition, sometimes one was permitted to exclude members of the clan from using or making a good which was the subject of an ownership claim, but very often the owner could not assert these rights against family members.[127] Finally, it is important to note that ownership is a function of the system of rights distribution. In some Native American groups, exclusive "ownership" rights could be earned, such as a right to sing a bear song, to participate in a traditional ceremony, or to take on a certain name.[128]

A second cause of difference in intellectual property treatment in Third World countries lies in the purpose of protection. Whereas the stated underlying purpose of Anglo-American intellectual property law is to encourage creative endeavor, protection of creative endeavor in Third World societies is purposely used to achieve a myriad of social, political, and economic goals. Thus, in Imperial China, unauthorized copying was forbidden out of concern for the ways in which various commodities were identified (i.e. a form of trademark law), in an attempt to maintain the purity of classic texts[129] as well as to fulfill the censorship function mentioned earlier. Concern for public order or morals[130] also led to outlawing of reproduction and dissemination of "devilish books and talk," to preserve the supremacy of certain literary and to prevent the spread of

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123. *Id.* at 251.

124. *Id.*

125. *Id.*

126. Thus, for example, one of the key elements of the Native Graves Protection and Repatriation Act (1990) (NAGPRA) is that the concept of "ownership" or "right of possession" is cast in the Native American cultural context. *See* Strickland, *supra* note 121, at 180; *see also* Rennard Strickland & Kathy Supernaw, *Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage*, 46 ARK. L. REV., 161, 165 (1993).

127. *Id.*

128. See DRIVER, *supra* note 98.

129. Alford, *supra* note 104, at 11.

130. While the protection or preservation of public order and morals is not a central feature of most Western copyright laws, exceptions do exist for government interference with the rights of individual authors when it is necessary for the public interest. A similar provision exists under the Berne Convention. *See* Berne Convention, *supra* note 42, at Art. 17.

works that would denigrate imperial authority.[131]

For many indigenous societies, protection exists to protect the sanctity of a process or idea, to preserve cultural patrimony and in particular, to preserve the sacredness of an object, or to preserve the sacredness of meaning. In the recent case of *Milpurrurru v. Indofurn Pty Ltd.*,[132] the applicant and other well-known and internationally recognized Aboriginal artists brought an action for copyright infringement under the Australian Copyright Act of 1968 against a company, Indofurn, and its three directors, who were selling rugs bearing unauthorized copies of various paintings by the applicants. The company had imported carpets from Vietnam which bore imprints of the works of the various artists. The carpet designs were substantial reproductions of various paintings which the applicants had authorized for use by the Australian National Art Gallery (ANAG) and the Australian Information Service (AIS). The ANAG and AIS had issued posters of these paintings from which the reproductions had been made. The applicants had not approved the reproduction of their work on carpets. By importing carpets which infringed protectable works and which the respondents should have known were infringing works, the respondents were deemed to have infringed the copyright of the Aboriginal artists. The applicants sought damages and an order from the Court for respondents to deliver up the infringing carpets.[133]

The case indicates that the Aboriginal artists in question were concerned about the accuracy of the depictions of the paintings on the infringing carpets. The Court noted that the paintings "concerned creation stories of spiritual and sacred significance to the artist," and that it also had "deep cultural and religious significance to Aboriginal people."[134] In the Court's words, "[A]ccuracy in the portrayal of the story is of great importance. Inaccuracy, or error in the *faithful* reproduction of painting, can cause deep offence to those familiar with the dreaming."[135]

The language of the Court suggests that even the most careful reproduction of a work of art will not avoid harm to the community represented in the art and to those to whom the art speaks. Art in such a society is not only about creativity, it is about community. In this society, the preservation of sacredness and sanctity, as in the case of Israel and the anointing tabernacle oil,[136] is prescribed by the law that recognizes the property. Similarly, with Native American art, particularly among the Pueblan Indians, the preservation of sacredness is a significant function

131. Alford, *supra* note 104, at 12-13.

132. Milpurrurru v. Indofurn Pty Ltd., Federal Court of Australia, 13 December 1994, (reported in 17(3) EUR. INTELL. PROP. REV., March 1995, at D-61).

133. This is a remedy recognized in almost all copyright laws, and was recently included as an element of the global model for copyright under the TRIPS agreement. *See* Trips Agreement, *supra* note 10, at Art. 46, Part III.

134. *Id.*

135. *Id.* (Emphasis added).

136. *Id.*

of protecting art forms. As one scholar has noted:

> Understanding the sacredness of the art objects of a holistic people requires a holistic view . . . . [P]rinciples such as holistic integration of life within art, are held in common among Native Americans . . . . These works provide a multi-faceted window through which to glimpse and better understand the religion and lifeways . . . that made them and continue, in most instances to make them.[137]

A third cause of the differences in intellectual property treatment in the Third World is that the theory of creation or creativity is different. Under Aboriginal law, for example, "the right to create paintings and other works depicting creation stories and stories of the dreaming resides in the traditional owners (or custodians) of the stories or images."[138] This right is vested exclusively but jointly in the custodians as prescribed by Aboriginal law and custom. In the same sense, under ancient Israel's theocratic rule, creativity was recognized as a gift from God, thus limiting the extent to which its fruits could be commodified.[139]

A fourth cause of the differences in intellectual property treatment in indigenous societies is that the value ascribed to creative expression is jointly held by the group as a whole.[140] This value is not material as such, thus reflecting the non-commodifiability of certain goods in these cultures. Under Aboriginal law for example, the right to create paintings and other works about creation is vested in a group of custodians who are responsible for determining "whether the stories and images may be used in a painting, who may create the painting, to whom the painting may be published, and the terms on which it may be reproduced."[141] By maintaining such a structured form for administering the right to create, the Aboriginals are able to guard the value of the meaning of the painting to their society. The Australian Court in *Milpurrurru* recognized the personal and cultural distress that the infringing carpets had caused to the Aboriginal community, noting that the losses, "which were a reflection of the aboriginal cultural environment in which the artists reside," could be accounted for in giving award damages.[142]

Among Native American groups of the Northwest coast, art is used "as a language of social power, creating images that connote aristocratic perogatives."[143] The objects of western intellectual property, such as songs, formulas, drawings, dances, and emblems are, in these groups, methods for acquiring power, visible expressions of power, or even sacred

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137. Strickland, *supra* note 121, at 182.

138. *Milpurrurru*, *supra* note 132, at D-61-62.

139. For example, it was forbidden for the anointing oil to be reproduced by any individual, the punishment being ostracism. *See* Exodus 30:32. Similarly, the composition of the perfume Moses was instructed to make could not be reproduced. *See* Exodus 30:37.

140. *See* Strickland & Supernaw, *supra* note 126, at 165.

141. Cohen, *supra* note 116.

142. *Id.*

143. Strickland, *supra* note 121, at 182.

objects.[144] As Professor Strickland points out:

> Western classification systems are out of touch with the American Indian world-view. Indeed, even the terms art, art work . . . as non-Indians use them, embody concepts foreign to Native American societies. Among many Indian peoples, all man-made objects are grouped together and referred to as that-which-has-been-made. The distinction between aesthetic objects, sacred objects, functional objects, public objects and commercial objects simply does not exist.[145] In a holistic society, there are no such lines.[146]

Finally, a fifth cause of differences in recognition and protection of intellectual property between indigenous societies and industrialized nations is that the organizing principles of these societies are so different as to affect the very idea of what is considered the appropriate subject of private ownership. Most Third World societies are organized around a social unit which extends certainly beyond the individual and, in most cases, beyond the nuclear family. The forms and very definition of ownership are thus crafted in a way opposite to property conceptions of western legal and economic structures central to the development of private and public law.[147] What is representative of intellectual property laws in these societies are thus, not surprisingly, nothing like their western counterparts.

There is one important similarity between the protection of creative endeavor under western intellectual property laws and in indigenous societies. Both aim, ultimately, to enhance public welfare by protecting the fruits of creative effort. Given the value ascribed to creativity in many indigenous societies, it seems obvious that the protection of the fruits of creative energy is essential to the well being, to the sense of identity, and to the preservation of cultural patrimony that is so vital to the viability of these groups. Similarly, the enhancement of public welfare has long been the asserted purpose of intellectual property law in Anglo-American jurisprudence.[148] The divergent forms that these laws take on in indigenous societies and in the western hemisphere is the strongest testimony of the fundamentally different philosophical tenets which underlie these systems. Above all, the fact that creativity remains a vital part of life and

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144. *Id.* at 184-185.

145. *Id.* at 184. The distinction between functional objects and aesthetic objects is particularly important in copyright law. Under the utilitarian function exception, copyright protection does not extend to works whose artistic features are not distinguishable from its utilitarian dimensions. "Such works are not copyrightable regardless of the fact that they may be "aesthetically satisfying and valuable.' " H.R. 5668, 94th Cong., 2d Sess. (1976). *See* Carol Barnhart Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985).

146. Strickland, *supra* note 121, at 184.

147. *See* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325 (1980).

148. *See Mazer*, *supra* note 79, at 219. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare." *Id.*.

that it holds such powerful leverage and meaning in these societies tells the rest of the world that creativity is not only alive, but that it is also central to the social, political, and economic welfare of indigenous societies.[149]

IV. THIRD WORLD CREATIVITY AND THE INTERNATIONALIZATION OF INTELLECTUAL PROPERTY

Prior to the TRIPS agreement, intellectual property had significant international dimensions. Technological advances during the nineteenth century made the reproduction of literary works relatively cheap, and thus created a demand for the works of authors and artists. International piracy emerged as a significant problem which led to the negotiation of two principal international agreements on intellectual property, namely, the Berne Convention for the Protection of Literary and Artistic Works[150] and the Paris Convention for the Protection of Industrial Property.[151]

These two treaties neither created international patent or copyright rights nor established substantive law in these areas. Rather, the Berne Convention reflected an attempt to create rights, at the international level, for individual authors as their works moved through channels of commerce from country to country.[152] Similarly, as suggested by the events during its incipient stages, the Paris Convention arose out of a desire to provide protection for foreign *works* whereby nations agreed to recognize and protect the rights of foreign artists within their own domestic borders.[153] The issue, then, for international patent and international copyright protection was not the absence of similar domestic laws but

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149. *See* Strickland, *supra* note 121, at 181-189; *see also* BARBER, *supra* note 84, at 28-45.

150. Berne Convention, *supra* note 42.

151. Paris Convention, *supra* note 44.

152. *See* RICKETSON, *supra* note 26.

153. The origins of the Paris Convention may be traced back to a temporary law enacted by the Austria-Hungarian Empire in 1873, to encourage inventors to participate in an international exhibition of inventions to be held in Vienna. The unwillingness of inventors to participate because of fear that inventions would be duplicated and ideas stolen led to the law which provided special protection for foreign exhibitors and their inventions for the duration of the exhibition. By this time however, domestic patent systems existed in most European states. In 1873, the same year of the international exhibition, a Congress was convened in Vienna with the objective of examining the possibilities for a more effective and useful international system for protecting patented works. In 1878 an International Congress on Industrial Property was convened as a follow up to the earlier Vienna Congress, with the purpose of determining the basis of uniform legislation in the field of industrial property. A proposal for an international union was prepared and sent to other governments together with an invitation to attend an international conference in 1880. The 1880 conference adopted a draft Convention, parts of which is still incorporated in the Paris Convention today. Finally, in 1883, a new conference convened in Paris to adopt and sign a final draft of the 1880 Congress. This was the Paris Convention for the Protection of Industrial Property. It has since been revised several times, the most popular revision being the Stokholm revision of 1967. *See generally* BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY, *supra* note 62, at 49-50.

rather the refusal to extend domestic protection under the law to the works of foreigners.[154] Both treaties built upon concepts of copyright and patent laws[155] similar to what already existed in the countries represented as well as that which conformed to the general philosophies of the time. Professor Ricketson points out that, in the area of copyright,

> "[a]lthough the legal theories underlying copyright protection differ from country to country, the origins of this form of protection in each country were strikingly similar: the grant of exclusive printing rights or privileges which were made to printers and publishers soon after the introduction of printing in Europe in the late fifteenth and early sixteenth centuries."[156]

The concern for providing adequate protection of foreign works resulted in a national treatment principle as the central requirement of the international treaties. The national treatment principle meant that treatment of foreign authors and their works would be no less favorable than treatment afforded to the nationals of the protecting country.[157] This effectively put a stop to the discriminatory treatment of foreign works. Thus, the Berne Convention and the Paris Convention did not create substantive law for member states; further, they also did not impose new law on the member states. Rather, they reflected, to a large extent, a consensus reached among the states which was legitimated by the existence of a similar system within their respective domestic countries.

The TRIPS agreement[158] makes the protection of intellectual goods in the forms and categories recognized in western cultures a mandatory requirement for nations within the multilateral trading system. TRIPS requires countries to protect copyrights and related rights,[159] patents (including utility and process patents),[160] trademarks,[161] industrial designs,[162] layout-designs of integrated circuits,[163] and trade secrets.[164] Part

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154. *See* RICKETSON, *supra* note 26, at 5-19.

155. This should not be surprising as these countries shared to some degree, a similarity in political structures. The arts have always been a significant part of European culture and life. It is thus not surprising that these principal treaties have their roots in Europe, but also, that they were informed by European conceptions of what constitutes civilized society. Thus in the 1858 Brussels Conference on Literary and Artistic Property an outline of what would constitute elements of a universal copyright law was prepared by the Congress, which was of the opinion "that the principle of international recognition of the property of authors in their literary and artistic works should be enshrined in the legislation of all *civilised* peoples." *Id.*

156. RICKETSON, *supra* note 26, at 3.

157. The principle of national treatment is a standard feature of most trade and intellectual property treaties.

158. TRIPS Agreement, *supra* note 10, at 209-237.

159. *Id.* at § 1, Art. 9-14.

160. *Id.* at § 5, Art. 27-34.

161. *Id.* at § 2, Art. 15-21.

162. *Id.* at § 4, Art. 25-26.

163. *Id.* at § 6, Art. 35-37.

164. *Id.* at § 7, Art. 39.

II of the agreement requires nations to comply with the substantive provisions of the Berne Convention[165] with the exception of the moral rights provision.[166] This includes nations which may not have acceded to the Berne Convention. The requirement essentially erodes any possibility that a nation might independently negotiate its own accession to the Berne Convention, which has always been a possibility under the international aspects of intellectual property protection. Computer programs are to be protected as literary works for which the Berne Convention does not yet explicitly provide. The agreement lays a basis for rental rights,[167] defines what kinds of marks must be protected,[168] and provides for minimum rights of all rights holders.[169] Similar provisions are also made for industrial designs.[170] Finally, in the area of patents, the agreement establishes the scope of patentable subject matter,[171] defines the rights a patent must confer on its owner,[172] and outlines the conditions for granting a patent application.[173] Significantly, the agreement requires a twenty year protection period for all inventions, products, and processes, in virtually every area of technology.[174] This is a broader right than that which is currently recognized under the Paris Convention.[175]

Part III of the Agreement sets out the obligations of contracting members to ensure that the rights of domestic and foreign authors and inventors are effectively enforceable within the local legal system.[176] The treaty does not require the establishment of a separate system of enforcement but establishes civil and administrative procedures and remedies with which the contracting members must comply.[177] Remedies spelled out in the text include damages, injunctions, imprisonment, fines, and the right of judicial authorities to order the destruction or disposal of the infringing goods.[178] The agreement also requires that judicial authorities have the power to order prompt provisional measures and that criminal penalties and procedures be provided in the case of wilful infringements in a commercial transaction.[179]

Finally, the agreement includes a phase-in time period for countries at various stages of development to implement legislation to bring their

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165. *Id.* at Art. 9.
166. *Id.*
167. *Id.* at Art. 11.
168. *Id.* at Art. 15(1).
169. *Id.* at Art. 1.
170. *Id.* at Arts. 1, 25.
171. *Id.* at Art. 27.
172. *Id.* at Art. 28.
173. *Id.* at Art. 29.
174. *Id.* at Arts. 33, 34.
175. The agreement raises the level and scope of protection for all categories of intellectual property.
176. *TRIPS* Agreement, supra note 10, at Art. 41, 42.
177. *Id.* at § 2.
178. *Id.*
179. *Id.* at Art. 35, 61.

respective local laws and judicial systems into conformity with the agreement.[180]

The TRIPS agreement at best prioritizes intellectual property, and at worst, imposes a model assumed to be objectively the "right form" of intellectual property protection. This "form" has all the elements of western property concepts, including exclusive ownership, the right to limit use, and the ownership right of control over the propertized good.

How do Native American or Aboriginal conceptions of intellectual goods fare under this system? What place does the "holistic world view" of Native American peoples play in this model? Is there any possibility that indigenous laws protecting creativity will have room to assert themselves in a system based on this foreign model of intellectual property protection? For example, will an Aboriginal, wanting to sell a painting depicting the dreaming which he has been given the right to create by the community leaders, be able to assert against the group a right to distribute that painting in channels of commerce? Can an art object which is not considered alienable by a Native American group, yet which is created by an individual member of the group, be alienable by such a member because copyright law recognizes the member as the "author" giving this individual an exclusive right to dispose of it? Above all, how will intellectual goods, which have significant spiritual and cultural meaning to these peoples, be affected by the commodification which undergirds the internationalization of intellectual property?

The ramifications of these questions touch on the thesis of this article, but cannot be fully addressed here. Suffice it to remark that the current international framework does not supply encouraging answers. Unfortunately, the burden will once again fall on indigenous peoples to establish mechanisms which will protect their laws and preserve their sense of meaning. History suggests, however, that these groups ultimately face, in the absence of laws which recognize and serve in their interests,[181] the translation and thus death of objects and values which undergird their creativity under the current multilateral framework.[182] As Strickland observes:

> Many non-Indians have a problem in the cultural translation of Native works. A non-Indian viewer of a Hopi figure, a Tlingit mask, or a Shoshone-painted hide translates the object into the familiar framework of his own culture. In doing so he confronts the same distortion

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180. *Id.*

181. Virtually all international treaties recognize the needs of developing countries and, at least on paper, attempt to make some special provisions for them; the TRIPS agreement is no exception. Without going in to the merits of these "special" provisions, it is important to note that a system, which at once globalizes a model and yet provides for a mechanism for assimilating differences, is at best palliative and at worst deceiving. A truly multilateral agreement must both recognize and serve the interests of all parties, however fragile that consensus may be.

182. Strickland, *supra* note 121, at 185.

> as the English-speaking reader of a translated Cherokee lovesong. The song, translated into English, has its syntax transposed, verb tenses approximated, and inflections altered. No longer a linguistic reflection of its maker, the song becomes a carnival mirror, distorting the delicate thought patterns of its creator's culture. The non-Indian's perception of Native American objects requires a similar translation. *The visual arts, and the verbal arts, demand a holistic context.* It is simply not possible to judge the meaning of a sacred object from a viewpoint and value structure outside the culture itself.[183]

V. SOME IMPLICATIONS

It is quite clear that one of the central motivations behind the TRIPS agreement was to target enforceability of foreign intellectual property rights in developing countries. As such, the global model of intellectual property protection imposed by the agreement is not a reflection of the need to encourage creativity or to promote the public welfare. Rather, the chief aim of the agreement is to secure from these countries and societies the full monopoly benefits that western intellectual property laws offer. The implications of these strategic moves are many, the most important of which are discussed below.

The need to maintain incentives to encourage creative activity is limited, in many respects, to western market democracies. These democracies revolve, in large part, around individual autonomy and liberty, notwithstanding the greater social loss of nonmaterial value that individualism tends to breed. The successful commodification of intellectual goods can only be achieved in a society which embraces this sort of rugged individualism. Until indigenous societies reach this point, the international community may have to come to terms with a persistent level of piracy in international trade.[184] Piracy, however, cannot simply be explained mechanically in economic terms based on the reasoning that poverty necessitates the availability of cheap products.[185] For many of these societies, the difficulty in introducing western copyright principles is that these principles attempt to overturn social values which are centuries old.[186] The laws protecting intellectual goods in these societies simply reflect fundamental notions of what the society considers to be the appropriate subject of exclusive ownership. The duplication of literary work is thus, for example, not perceived as stealing but as making a good thing accessible to the general public.[187] Knowledge in many indigenous socie-

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183. *Id.*

184. One should note that piracy is not limited to Third World societies/developing countries. A fair amount of piracy exists in Europe and the United States as well.

185. *See, e.g.*, Remarks by Donald Westmore, *Economic Development in the Third World: What Can Be Expected From the Uruguay Round?*, A.S.I.L. Proceedings, April 8-11, 1987.

186. *See, e.g.*, WILLIAM ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995).

187. For example, China. *Id.*

ties is not perceived as something that can be commodified or objectified through law. It is impossible to ignore such fundamental conceptions in these communities.

In addition to responding to a persistent level of piracy, the internationalization of intellectual property also suggests that there is some way to objectively measure protection of intellectual property. By not taking into account the possibility of alternative forms of protection, the TRIPS agreement, as did its predecessor treaties,[188] presupposes that "all civilized nations" will and must recognize this global model of intellectual property protection.[189] By mandating this model, governments in developing countries are faced with the difficult job of destroying, or at least attempting to destroy, native conceptions about life and living and about what constitutes an ordered society. The allocation of material value to goods, and the way in which this value is expressed, is grounded firmly in the history of the evolution of a people. The internationalization of intellectual property threatens to undermine, if not totally destroy, the values that indigenous systems ascribe to intellectual property and the manner in which they allocate rights to intellectual goods.

What the internationalization of intellectual property implies, ultimately, is that there is only one way to participate in the international economy and that is by playing in accordance with prescribed rules, regardless of its impact on a group of peoples. It is a message that is not unfamiliar in the history of world affairs, and yet it is a message which, so history informs us, has caused devastation of unimagined proportions to human society. The next few years will reveal just how far native peoples, indigenous groups, and developing countries will fare in the preservation of their cultural patrimony and in their ability to determine the identity of their group in an increasingly hostile international economic environment.

VI. CONCLUSIONS

There is still much to be said about intellectual property and its coronation as the defining element of international economic regulation. For the purposes of this article, however, only the implications of a system which denies legitimacy and which threatens the viability of anything opposed to it, is important. Third World creativity, regardless of how it is to be protected, must be recognized not only as a matter of law but as a matter of life within the various communities. Perhaps an innovation versus creativity distinction mentioned earlier in the article will prove useful in helping to fashion a system which offers Third World creativity an op-

188. The Berne Convention and the Universal Copyright Convention.

189. Native Americans were "encouraged" in a similar manner to "engage in the industrious pursuits of agriculture and civilized life" by adopting property laws similar to those recognized at common law. *See* RENNARD STRICKLAND, FIRE AND SPIRITS 51, 237-238 (1975), *quoted in* Strickland & Supernaw, *supra* note 126, at 103.

portunity to be protected on terms necessary to ensure its continued viability.[190] Innovation, undoubtedly, holds benefits for all societies, although surely it is unnecessary for every society to re-invent the wheel. On the other hand, some societies may invent better wheels, better at least, to suit their specific needs as a community.[191] Innovation, however, does not come without costs. The present form of protecting innovation incurs particular social costs in Third World societies; costs which are destructive to the accepted values and principles of their social and political organization. It is critical for developing countries, as well as for all groups of people recognized as forming a distinct ethnic/political entity, that social costs of protecting innovation and creativity be properly linked to their specific political, social, and cultural contexts. In this regard, different legal rules may emerge for innovation, rules which fairly represent the large amounts of capital expended by multinational corporations and which will also perhaps take into account the years of effort and resources a community may have invested in perfecting, for example, an herbal drug through the work of traditional native doctors.[192]

The TRIPS agreement represents an attempt to protect certain forms of creative activity (i.e., innovation) in specific ways which have proved beneficial to corporatized, post-modern economies. As one scholar has observed:

> postmodernity is distinguished by a dramatic restructuring of capitalism in the post war period, a reconstruction of labor and capital markets, the displacement of production relations to non-metropolitan regions, the consolidation of mass communications in corporate conglomerates, and the pervasive penetration of electronic media and information technologies. Such processes have coalesced in the Western world societies oriented towards consumption. Consumption is managed by the mass media's capacity to convey imagery and information across vast areas to ensure a production of demand. Goods are increasingly sold by harnessing symbols, and the proliferation of mass media imagery means that we increasingly occupy a "cultural" world of signs and signifiers that have no traditional meanings within social communities or organic traditions.[193]

However one interprets the TRIPS Agreement it is important that

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190. *See supra* note 26.

191. *See* GEORGE BASALLA, THE EVOLUTION OF TECHNOLOGY 7-14 (1988). One of the longstanding criticisms of the international patent system has been the way the system blocks specialized inventions once the idea of, for example, the wheel, has been patented elsewhere in the world.

192. *See* Stephen R. King, *The Source of Our Cures*, 43 CULTURAL SURVIVAL Q. 19, 23 (1991) (noting that the antimalarial drug known as guinine was first used by Indians). *See generally* Kirsten Peterson, *Recent Intellectual Property Trends in Developing Countries*, 33 HARV. INT'L L.J. 277 (1992) (discussing in some detail the importance indigenous native healers in discovering new sources of treatment for modern ills).

193. Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1860, 1862-1863 (1991).

the current implications to non-Western societies of the internationalization of intellectual property not be ignored.

Minimizing Reverse Engineering: Sample Language For Dual United States and European Union Software Licenses

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I. INTRODUCTION

It is standard practice in the computer software industry for programmers to acquire a copyrighted copy of a competitor's code and to dissect it to discover its underlying ideas.[1] This process, known as "reverse engineering," has been defined by the United States Supreme Court as "starting with the known product and working backward to divine the process which aided in its development or manufacture."[2] In the European Union (EU), the analogous concept of "decompilation" is defined by the European Software Copyright Directive as "the reproduction of the code and translation of its form . . . to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs."[3]

Reverse engineering has been held to be legal in both the U.S. and the EU. The U.S. Supreme Court, following the concept established by the framers of the Constitution of balancing the public availability of ideas with the need for protection of a creator's product, found reverse engineering to be legal under limited circumstances.[4] It is permitted where it provides access to the underlying ideas in unpatented or otherwise unprotected items in the public domain.[5] Lower courts have also

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1. Programmers do this by disassembling the program. That is "dumping" (or copying the software code into computer memory) and analyzing it with flow charts and line by line code comparisons. *See generally*, E.F. Johnson Co. v. Uniden Corp. of Am., 623 F. Supp. 1485, 1501-02 n.17 (D. Minn. 1985).

2. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974).

3. The European Software Directive at art. 6, as implemented by each country [hereinafter *Software Directive*]. "The European Software Directive," as of September 24, 1993, compiled by Clifford Chance, London England.

4. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989).

5. Bonito Boats, 489 U.S. at 157, *citing* Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

held[6] that "based on the policies underlying the Copyright Act," reverse engineering of a copyrighted software program is, as a matter of law, a fair use of the work if the person seeking the understanding has a legitimate reason for doing so, and reverse engineering provides the only means of access to the unprotected elements of the work. In the EU, this "only means of access" language is pertinent to the decompilation concept specifically authorized in the European Software Directive, since the Directive only allows "indispensable" decompilation.[7]

What is neither clear from U.S. decisions nor from the European Software Directive is what happens if reverse engineering/decompilation is not the only means of access to the unprotected information desired and, therefore, not indispensable. What are the rules, for example, when a developer of original software voluntarily provides relevant portions or the entire source code to parties desiring it? Can reverse engineering be prohibited or limited by a restrictive clause in a license, sales contract, or shrinkwrap agreement?

For software developers, answers to these questions are of critical importance because of the significant economic costs associated with the possibility of unlimited reverse engineering — a concept which developers tend to view as "legal theft" of their work. Each program usually represents significant investment of personal, creative effort, time, and often millions of dollars in research and development. Obsolescence of their product by a competitor's reverse engineered product, before they can recover their investment, discourages further development.

Reverse engineering can have a world-wide impact, as nearly fifty percent of all copyrighted computer products created in the U.S. are exported.[8] Patent, copyright, trade secret, and other intellectual property protection afforded to those products in the United States do not necessarily follow the products beyond our borders.[9] Even if such protection is arranged in the recipient country, the protection afforded may not be deemed sufficient, since, it is believed, "reverse engineering" is legal to a greater extent in the EU and elsewhere.[10] Markets established by distributors and value-added resellers (VARs) can thus be undermined when ex-employees or other nationals reverse engineer an imported product and then develop a competitive "local" product that appeals to the nationalistic concerns of the recipient country and may be less expensive.

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6. Sega Enterprises v. Accolade, Inc., 977 F.2d 1510, 1518 (9th Cir. 1992)

7. *Software Directive*, *supra* note 3, at art. 6.

8. Discerned from author's review of the annual reports of the top 50 computer companies in the U.S.

9. *See* specific provisions in the Paris Convention for the Protection of Industrial Property (1883, as amended until 1979), the Patent Cooperation Treaty of June 19, 1970, the Universal Copyright Convention (as revised at Paris on 24 July 1971), and the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 24 July 1971). *See also* Trade-Related Aspects of Intellectual Property Rights (TRIPs) in the General Agreement on Tariffs and Trade as implemented by Congress December 1, 1994.

10. *Software Directive*, *supra* note 3.

To protect themselves, software developers continuously seek ways to a) legally prohibit or limit the reverse engineering of their copyrighted product in the U.S. and abroad; b) protect their intellectual property claims; and c) place themselves in the best possible legal position to argue a claim if their product is reverse engineered and an infringing software product is created.

The purpose of this article is to identify the actions that software developers can take both within the United States and the European Union markets to accomplish these three goals. The article then provides suggestions for software licenses that, in an infringement case, will likely withstand both the tests of reverse engineering established by current U.S. statutes and case law and by the European Software Directive.

Section II of the paper gives an overview of the history of software protection and the significant current statutes and case law controlling reverse engineering in the United States. Section III considers the legality of limiting reverse engineering in contracts, licenses, and agreements in the United States. Section IV compares and contrasts this legal environment to that advanced by the European Software Directive. Section V provides suggestions to implement maximum legal protection for software programs that provides companies with as close as possible to a "single contract" for all sales, domestically and within the European Union. Section VI concludes the article.

II. U.S. SOFTWARE PROTECTION — PAST AND PRESENT

In the U.S., creative efforts are protected by intellectual property law,[11] contract law, and, to some extent, tort law. Each provides specific aspects or levels of protection that should be considered by software developers to achieve their three goals in protecting their computer programs.

A. *Pre-Copyright Software Protection — Contract and Trade Secret Law*

During the early years of the computer industry, from the first machines through the 1970's, computer systems were large, requiring full air-conditioned rooms, and the software necessary to run them usually accompanied the hardware. Software was thus acquired in face-to-face, individually negotiated transactions.[12] The contracts covering the sales and lease of the hardware customarily included confidentiality clauses that protected the ideas, logic, and engineering embodied in the software.[13]

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11. This article will concentrate primarily on the applicability of patent, copyright, and trade secret law. Trademark and misappropriation law may also be applicable and should be explored.

12. Ronald L. Johnston & Allen R. Grogan, *Trade Secret Protection for Mass Distributed Software*, 4 THE COMPUTER LAWYER (forthcoming 1994-95).

13. *Id.* at 4.

Contract and trade secret laws, therefore, were the principal forms of software protection during these years. No one really knew what protection patent, copyright, or other intellectual property law might provide for software.[14] As the industry has matured, so has the relevance of many areas of intellectual property, especially as they relate to reverse engineering.

B. *Patents*

For programmers and other inventors, patents offer the highest level of protection from reverse engineering or any other form of copying or use. Patents guarantee the holder the exclusive right to make, use, and sell the invention for 17 years, essentially providing a monopoly on the product during that time.

Section 101 of the U.S. Patent Act[15] made patents available to "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, . . . subject to the conditions and requirements of this title."[16] As with all patents, the pivotal requirements were that the discovery be novel, non-obvious, and useful.[17]

To be "novel," all elements of the item must not have been previously patented, described in a printed publication, known by others, or used by others before it was invented by the patent applicant anywhere in the world.[18] Since early computer programs were mainly mathematical operations, they did not pass this statutory subject matter test. In addition, nearly all of the electronic and mathematical elements that caused the programs to work were "known or used by others in this country . . . before the invention"[19] of computers and were well described in printed publications prior to the development of any specific software program. Most computers and software were thus found to be unpatentable.

An invention must also be "non-obvious." This requires that the operation of an invention, product, or process not be readily deducible to persons skilled in the craft or significantly reflected in the "prior art" of the industry. Again, computers and their related software generally could not pass this test.

Finally, the invention must be "useful," to qualify for a patent. While computers and software passed this third test, they remained unpatentable since they could not pass all three tests. Additionally, the cost and time delays to receive a patent were found to be unrealistic for the dynamic, rapidly changing nature of the software industry where items

14. *Id.* at 5.
15. 35 U.S.C. §§ 1-376 (1984).
16. *Id.* at § 101.
17. *Id.*
18. *Id.* at §§ 102 and 103.
19. *Id.* at § 102(a).

risked becoming obsolete before a patent was granted.

Beginning in 1969, the Court of Customs and Patent Appeals (C.C.P.A.) began to reverse the Patent Office and to compel the issuance of software patents. A number of patents on computer programs were then readily issued from 1969 to 1972. But in 1972, the U.S. Supreme Court reversed the C.C.P.A. and blocked the issuance of a patent on a software program.[20] From 1972 to 1981, most computer programs were not patented, including the initial spreadsheets and other significant software developments.[21]

This began changing in the early eighties. In 1980, the C.C.P.A. was renamed the United States Court of Appeals for the Federal Circuit and was given exclusive appellate jurisdiction over all patent-related appeals and attached collateral issues. In 1981, the Supreme Court reconsidered a software patent in *Diamond v. Diehr*,[22] and authorized the grant of a software/hardware patent. The internal processes of many software programs are still not sufficiently "inventive" to be patentable, and the time/cost concerns remain; however, where a program can be patented, the significant protection provided by the Patent Act makes it clearly the protection of choice for computer software, both in the U.S. and in Europe.[23] It should, therefore, be the first avenue of protection considered by a software developer.

C. *Copyright*

Works that are original, but not necessarily novel or utilitarian, can be protected under copyright law. The Copyright Act of 1976[24] provides certain "exclusive rights" to authors for their unique expression of perhaps otherwise well-known ideas. Thus, while the electronics and mathematics behind software programs are well-known, the unique manner in which they are used by programmers has traditionally made copyright law the best means of protection for software.

Prior to 1980, computer software was not specifically covered by the copyright law. But in 1980, Congress amended the Copyright Act of 1976 to explicitly include computer programs in the definitions section of the copyright law,[25] making it officially available as the preeminent protection for software.[26] Computers had shrunk in size and software was broadly

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20. Gottschalk v. Benson, 409 U.S. 63 (1972).

21. PETER B. MAGGS ET AL., COMPUTER LAW 185-186 (1992).

22. Diamond v. Diehr, 450 U.S. 175 (1981).

23. Johnston & Grogan, *supra* note 12, at 5.

24. 17 U.S.C. §§ 101-810 (1988 & Supp. IV 1992).

25. 17 U.S.C. § 101 (1988 & Supp. IV 1992).

26. In Apple Computer, Inc. v. Formula Int'l Inc., 725 F.2d 521, 525 (9th Cir. 1984), the Court stated that the statutory language, read together with the 1979 Final Report 1 of the National Commission on New Technological Uses of Copyrighted Works (CONTU REPORT), leads inexorably to the conclusion that the copyright in a computer program extends to the object code version of the program.

distributed on diskettes as part of the personal computer revolution.[27] Since software was no longer acquired in face-to-face transactions, "shrinkwrap" license agreements were the common form of software licensing.[28]

By the time of the 1980 Amendment, Congress had also abolished the "publication" limitation and provided that copyright protection attached the instant the work was fixed in a "tangible medium."[29] While Congress did not provide explicit protection or rights for computer software prior to 1980, it included such protection in the category of "literary works,"[30] one of the seven explicit categories of works of authorship granted copyright protection.[31] Thus, the 1976 Copyright Act granted software the same rights granted to books and other writings.[32] Courts also found some software generated displays to be protected as audiovisual works, another explicit category of the Copyright Act.[33]

With a copyright, a computer software developer obtains at least five exclusive rights related to the software program. The developer may do or authorize any of the following:

(1) make copies of the work;

(2) prepare derivative works based upon the copyrighted work;

(3) distribute copies of the copyrighted work to the public by sale or

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27. Johnston & Grogan, *supra* note 12, at 5.

28. *Id.*

29. 17 U.S.C. § 102. Section 102 of the Copyright Act of 1976 states that: "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.* The "originality" requirement is met if the work required some degree of effort on the part of the author. No judgment about the artistic merit of the work is necessary. In all copyrighted works, what is protected is not the "idea," but rather the specific "expression" of the idea.

Publication, however, remains important today because it affects copyright holder's rights set by the "notice", "registration", and "deposit" requirements of copyrights set forth in Chapter 4 of the U.S. Copyright Act of 1976. *Id.* at §§ 401-412.

"Notice" of the copyright, usually a "c" within a circle, must appear on all copies of the work once it is published or the copyright protection may be lost. "Registration" of a copyright within the U.S. Copyright Office is optional, but is required before an author can sue for copyright infringement. While a copyright owner may register after learning of infringement and then file suit, certain remedies will be limited so that it is always in an author's best interest to register his/her copyright. This is easy to do since, unlike a patent which costs thousands of dollars to obtain, registration of a copyright costs $20.00. Once a work is published, the author must "deposit" two copies in the Library of Congress within three months after publication. *Id.*

30. *Id.*

31. *Id.* Section 102 lists the seven categories of "works of authorship" as: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings. *Id.*

32. John T. Soma et al., *Software Interoperability and Reverse Engineering*, 20 RUTGERS COMP. & TECH. L.J. 189, 203 (1994).

33. *See, e.g.*, Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir. 1982).

other transfer of ownership, by rental, by lease, or by lending;

(4) publicly perform literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and

(5) display the copyrighted work publicly. [34]

These rights exist for the lifetime of the software developer plus fifty years after death. During that time, the developer may transfer or license the copyright just like any other personal property. Licensing of a copyright allows others to use the work upon a payment of a specific amount of "royalty." To protect the software developers, transfer and license agreements include a statutory right of termination which may be exercised during a five year period beginning at the end of thirty-five years from the date of the grant.[35]

1. Exceptions to the "Rights" of Copyright Owners

Exceptions to these rights exist for certain uses of a work by educational or charitable institutions or libraries, public access, fair use,[36] and limited uses by the software owner.[37] It is not a copyright infringement, for example, for the owner of a copy of a computer program to make one archival copy of the program, or to make adaptions, enhancements, or modifications to a particular copy of the program for use by the owner.[38] The copier, however, may not transfer these adaptions without the authorization of the copyright holder.[39]

Of these exceptions, the "public access" and "fair use" exceptions play crucial parts in the legality and extent of reverse engineering.

a. The "Public Access Exception" to Copyright

In most copyright cases, beginning with *Baker v. Selden*[40] in 1879 and continuing through *Mazer v. Stein*,[41] *Sony Corp. v. Universal City Studies, Inc.*,[42] and *Feist Publications, Inc. v. Rural Tel. Serv. Co.*,[43] courts have followed federal public policy and favored free access by the public to the underlying ideas and functions of a work rather than tighter

34. 17 U.S.C. § 106 (1988 & Supp. IV 1992).

35. *Id.* at §§ 201(d), 202, 204(a), 205(a),(d), and 302(a).

36. *Id.* at § 106.

37. *Id.* at § 117(2).

38. *Id.*

39. *See* Foresight Resources Corp. v. Pfortmiller, 719 F. Supp. 1006, 1010 (D. Kan. 1989) (defendant enjoined from selling enhancements of plaintiff's products to other entities); *Sega*, 977 F.2d at 1520 ("Section 117 does not purport to protect a user who disassembles object code, converts it from assembly into source code, and makes printouts and photocopies of the refined source code version"). *Id.*

40. Baker v. Selden, 101 U.S. 99 (1879).

41. Mazer v. Stein, 347 U.S. 201 (1954).

42. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

43. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

protection of creative expression. This concept is a major rationale for approval of reverse engineering.

In 1992, two important "reverse engineering" cases from the Ninth Circuit, *Atari Games Corp. v. Nintendo of Am., Inc.*[44] and *Sega Enter. Ltd. v. Accolade, Inc.*,[45] were decided at the same time and addressed these four items. In both cases, the defendant companies reverse engineered the plaintiffs' software to develop non-infringing, compatible end products — computer game cartridges that worked on the hardware game consoles of the plaintiff companies.

In *Atari*, the Federal Circuit held that the Copyright Act permits an individual in rightful possession of a copy of a work "to undertake necessary efforts to understand the work's ideas, processes and methods of operation."[46] This permission "appears in the fair use exception"[47] to copyright exclusivity. Citing *Bonito Boats*, the *Atari* court stated that an author cannot restrict access and "acquire patent-like protection by putting an idea, process, or method of operation in an unintelligible format and asserting copyright infringement against those who try to understand that idea, process, or method of operation."[48] The Court explained that to protect "processes or methods of operation, a creator must look to patent laws."[49] The court also added that "the Copyright Act permits an individual in rightful possession of a copy of a work to undertake necessary efforts to understand the work's ideas, processes and methods of operation."[50] The Court thus held that interim copies for reverse engineering are a fair use exception to copyright infringement.[51]

Like *Atari*, the *Sega* Court concluded that "where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly [reverse engineering] is a fair use of the copyrighted work as a matter of law."[52]

Two recent infringement cases indicate the extreme importance of the *Atari* and *Sega* decisions. In *MAI v. Peak*,[53] the Court of Appeals for the Ninth Circuit ruled that an independent service organization (ISO) made an infringing copy of a copyrighted computer program when the program was transferred to the computer's random access memory (RAM) for maintenance diagnosis. The Court of Appeals further held

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44. Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832 (Fed. Cir. 1992).

45. Sega Enter. Ltd. v. Accolade, Inc., 785 F. Supp. 1392 (N.D. Cal. 1992), *aff'd in part, rev'd in part*, 977 F.2d 1510 (9th Cir. 1992).

46. *Atari*, 975 F.2d at 842 (stating that the purpose and policy of the copyright law is to encourage "authors to share their creative works with society.") *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Atari*, 975 F.2d at 843.

52. *Sega*, 785 F. Supp. at 1527-28.

53. MAI Systems Corp. v. Peak Computer Inc., 991 F.2d 511 (9th Cir. 1993).

that this was not fair use based on the commercial nature of the intended use, the use of the entire copyrighted work, and the substantial market impact of the use. Finally inarguably the most controversial aspect of the entire case, the Court of Appeals, in a footnote, ruled that the licensee of the software was not an "owner" under the Copyright Act and could, therefore, be limited by license provisions as to third party access to the computer program, even for maintenance purposes. This reasoning was substantially followed in *Advanced v. MAI.*[54] Further, the District Court found no illegal tying arrangement between the computer program and maintenance services.

Commentary on these two cases has indicated that they may create an avenue by which the copyright owner of a computer program could create a monopoly for maintenance of that program without violating antitrust laws.[55] Thus, the only commercially feasible way an ISO could compete with the copyright owner may be to design a competing product by means of clean room reverse engineering based on the *Atari* and *Sega* fair use analysis.

b. The "Fair Use Exception" to Copyright

For certain socially-beneficial uses, such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,[56] the copying of copyrighted works is considered legal so long as the use does not deprive the copyright owner of appropriate rights and economic rewards. These are known as "fair use" of the copyrighted works and are a major exception to an author's exclusive rights to reproduce a copyrighted work or to create a derivative work.[57]

Software users, in particular, are affected by this exception because they 1) must copy the object code of a copyrighted program into their computer's memory to run the program;[58] 2) may copy the program in order to access its underlying ideas, as permitted by public policy; and 3) may create an interim copy and modify parts of the original copyrighted

54. Advanced Computer Services of Michigan Inc. v. MAI Systems Corp., 845 F.Supp 356 (E.D. Va. 1994).

55. *See, e.g.*, Michael E. Johnson, *The Uncertain Future of Computer Software Users' Rights in the Aftermath of MAI Systems*, 44 DUKE L.J. 327 (1994).

56. 17 U.S.C. § 107 (1988 & Supp. IV 1992).

57. *Id.*

58. One unique aspect of computer software programs is that they are not readable by humans while they are in their "object code" format of 1's and 0's. To be read by humans, the software must be in "source code" or "word" format. This requires copying the targeted software and translating it from object code to source code. While this (act of) copying violates the copyright prohibition against copying, the courts have held that this form of interim copying is a "fair use" exception to copyright infringement. Atari, Sega, Galoob, Foresight, and NEC effectively overturn the interim copy analysis in Hubco and Walt Disney Prods. v. Filmation Assocs. (holding that the Copyright Act prohibits the creation of interim copies).

program to create compatible programs.[59]

Courts have generally ignored these "interim copies" in copyright infringement actions as a necessary part of the computer process. Instead, the courts have focused on a comparison of the end products, as a whole, to determine if the resulting end-product is so similar to the original software program that it "infringes" on the original copyright. The courts have similarly considered the use of the end-product to determine if it qualifies as a "fair use" under the "fair use exception."[60] The key information from these cases for software developers is that they should not focus on restricting reverse engineering of their products but rather should seek to understand the criteria the courts use in evaluating these two areas so that they may comply with them in their licenses and use them to place themselves in the best possible legal position to win if their software is infringed.

(1) Comparison of End-Products - A Two-Part Test

(a) Substantial Similarity

Since unauthorized copying is often difficult to detect or to prove and since "reverse engineered" software programs can result in unique programs that are independent expressions of an idea but can still perform the same tasks or functions as the original program, courts apply the "substantial similarity" standard to evaluate the end-products of reverse engineered programs. This standard is not clearly defined and often depends on the opinion of the trier of fact. Illegal copying, however, unquestionably occurs when 1) the entire structure of the original work is duplicated in some detail; 2) specific portions are copied verbatim; 3) both works contain common errors; or 4) both works contain the original programmer's "marks" — non-functional identifiers incorporated into the code by programmers specifically to discern later copying.

In all reverse engineering cases, the resulting end product must be sufficiently different from the original product so that it is clear that only the "unprotected underlying ideas," not the original programmer's specific expression, were used. Where the "expression" of the same "idea" is sufficiently dissimilar in the two programs, the courts will find no infringement.[61] Where the resulting end-product, however, is too similar to the original copyrighted work, it will be considered an infringement.

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59. *Id.* at §§ 106, 117.

60. E.F. Johnson Co. v. Uniden Corp. of Am., 623 F. Supp. 1485 (D. Minn. 1985), Midway Mfg. Co. v. Artic Int'l, Inc., 547 F. Supp. 999 (N.D. Ill. 1982), Williams v. Arndt, 626 F. Supp. 571 (D. Mass. 1985), Hubco Data Prods. Corp. v. Management Assistance Inc., 219 U.S.P.Q. (BNA) 450 (D. Idaho 1983), and Telerate Sys., Inc. v. Caro, 689 F. Supp. 221 (S.D.N.Y. 1988). In all of these cases, the court found infringing end products and held against the defendant even though reverse engineering had occurred.

61. NEC Corp. v. Intel Corp., 10 U.S.P.Q.2d (BNA) 1177, 1184 (N.D. Cal. 1989).

(b) Access

Since it is also possible for two programmers to develop very similar software programs, even though they worked independently of one another and had no information from reverse engineering, the courts also require that a second criteria of "access" to the original copyrighted work be proven before copyright infringement is found. Substantially similar programs can exist even if no access is found, such as with "clean rooms,"[62] but if all or part of the works are identical or the degree of similarity is overwhelming, "access" will be presumed. "Intent" is not required for copyright infringement. Illustrations of this test can be seen in *E.F. Johnson,*[63] *Midway,*[64] and *Hubco.*[65]

It should be noted that even user manuals are scrutinized by this test. In *Williams,*[66] the defendant wrote a program for commodities market predictions that implemented a method described in the plaintiff's copyrighted manual.[67] The Court held that the defendant's resulting software was a mere translation of the manual's plain English into computer language and thus violated plaintiff's copyright as a derivative work, and, citing 17 U.S.C. § 101 (1988), held that a 'derivative work' is a work based upon one or more preexisting works, such as a translation. This decision is important for software developers because the manual that accompanies a vendor's software often describes many details of the vendor's software. The manual is thus a frequent source of compatibility information for those evaluating possible software copyright infringement.

(2) Fair Use Evaluation

To determine if a software program's "use" is "fair" as defined by the "fair use exception to copyright," courts use the following four-factor test:

> (a) the purpose and character of the defendant's use, ("intended use"), including whether such use is of a commercial nature or is for nonprofit educational purposes;

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62. "Clean room" describes the procedure of developing software by a person or group of persons who have no access to the original, protected program but rather writes its own code using only functional specifications, or other unprotected elements, given to him by others from the original program. So long as that person can prove that its work was not contaminated by access to any of the protected elements in the original work, no infringement will be found. *See* Milton R. Wessel, *Introductory Comment on the Arizona State University Last Frontier Conference on Copyright Protection of Computer Software*, 30 JURIMETRICS J. 1, 23 (1989).

63. E.F. Johnson, 623 F. Supp. at 1485.

64. Midway Mfg. Co., 547 F. Supp. at 1014.

65. Hubco, 219 U.S.P.Q. (BNA) at 452. *But cf.* Foresight Resources Corp. v. Pfortmiller, 719 F. Supp. 1006 (D. Kan 1989).

66. Williams, 626 F. Supp. at 579.

67. Soma, *supra* note 32, at 207, *citing* Williams, 626 F. Supp. at 574.

(b) the nature of the copyrighted work;
(c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(d) the effect the defendant's use will have on the potential market for or value of the copyrighted work.[68]

If, based on an analysis of these four factors, the "use" of the copy is determined to be "fair," then the "fair use" exception applies, and the copy does not infringe the copyright.[69] If this exception is not established, infringement of the copyrighted work is found. For this reason, "fair use" is a defense to claims of copyright infringement. The *Sega* court also ruled that all four factors, not just a few, must always be considered to determine whether a particular use constitutes a fair use.[70]

2. Remedies for Infringement

If infringement is found, possible remedies include 1) injunctive relief, in which the copyright owner may enjoin the infringing use or sales;[71] 2) monetary relief, in which a copyright owner may recover damages, attorneys fees plus the defendant's profits or "statutory damages" from between $500 and $20,000 as directed by the court;[72] 3) impoundment, seizure and destruction of all unauthorized copies;[73] and 4) criminal sanctions against the infringer, including imprisonment if the motive for the copying was commercial advantage or financial gain.[74]

3. Summary

In deciding copyright cases, the courts have established a set of parameters that define the legality of reverse engineering to 1) access; 2) intended use; 3) use only of the underlying ideas of the original product, not the unique expression provided by the author or programmer,[75] determined by "the amount and substantiality" of the original product used in

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68. 17 U.S.C. § 107 (1988 & Supp. IV 1992).

69. *Id.* at § 501(a). "Infringement" is defined as a violation of any of the exclusive rights of the copyright owner.

70. Sega, 977 F.2d at 1521-27. The Sega analysis of these four factors should be noted by software developers. Further, the market impact analysis of Harper & Row, 471 U.S. at 562, *Sony*, 464 U.S. at 451, and Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 969 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1582 (1993), should be explored.

71. 17 U.S.C. § 502(a) (1988).

72. *Id.* at § 504, 505.

73. *Id.* at § 503.

74. 17 U.S.C.A. § 506 (1984).

75. The Copyright Act does not extend to the ideas underlying a work or to the functional or factual aspects of the work. 17 U.S.C. § 102(b). "In determining whether a product feature is functional, a court may consider a number of factors, including — but not limited to — 'the availability of alternative designs: and whether a particular design results from comparatively simple or cheap method of manufacture.' " Sega, 785 F.Supp at 1531, *citing* Clamp Mfg. Co. v. Enco Mfg. Co., Inc., 870 F.2d 512, 516 (9th Cir.), *cert. denied*, 493 U.S. 872 (1989).

the reverse engineered product; 4) interim copies are, generally, considered legal "fair use" so long as they are not distributed or sold[76], and the resulting end product is not "substantially similar" to the original product;[77] and 5) the resulting software does not negatively impact the potential market of the original product. These are the key elements that software developers, interested in protecting their work product and positioning themselves for the strongest possible claim in an infringement cases, must include in their licensing agreements.

D. *Trade Secret*

A product such as a computer program may not be sufficiently unique or inventive enough to qualify for a patent. It may, however, still have economic value, so long as its underlying secrets are not generally known by others. If so, the product may qualify for protection under the Uniform Trade Secrets Act (UTSA).[78] The UTSA defines a trade secret as "any information that derives economic value from not being generally known by others" and "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[79] Generally, a trade secret has value because it provides its owner with a competitive advantage.

A trade secret may, however, be a poor option for software developers. Unlike a patent which protects an invention for 20 years, a trade secret is valid only so long as the secret remains a secret. In this manner, trade secret law provides "far weaker protection in many respects than the patent law."[80]

Second, and most important in the reverse engineering context, the public at large remains "free to discover and exploit the trade secret through reverse engineering of products in the public domain or by independent creation"[81] during the time the trade secret is still a secret. Trade secret protection does not cover any unpatented information that is in the public domain because "secrets" are not considered to be "public" or in the public domain. State and federal trade secret laws protect only material that is confidential and does not conflict with the *Policy of Free Copyability* that applies to material in the public domain.

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76. Bly v. Banbury Books, Inc., 638 F. Supp. 983 (E.D. Pa. 1986) (holding that the defendant used the interim copy for commercial gain).

77. This standard was set in See v. Durang, a non-software, basic copyright case where the plaintiff author claimed that the defendant's play was based on a draft script written by the plaintiff. Rather than looking at the interim copies or process used to write the play, the court compared the two plays (end products) as a whole and found no infringement of expression. Where the interim copies do not meet the two-prong standard, and are held to be technically illegal, they are subject to standard royalty payments or statutory damages. *See* Soma, *supra* note 32, at 212. The non-infringing end products do not need to be licensed from the plaintiff.

78. The Uniform Trade Secrets Act with 1985 Amendments, §§ 1-12.

79. *Id.* at §§ 1(4)(i), (ii).

80. Kewanee Oil Co., 416 U.S. at 489-90.

81. *Id.* at 490.

Third, trade secrets also appear to be contrary to the public policy of making information widely available, since it encourages people to keep their inventions secret. Nonetheless, the Supreme Court held in *Aronson v. Quick Point Pencil Co.*[82] that trade secret law is not inconsistent with or pre-empted by public policy or patent law because, by definition, trade secrets are not in the public domain.

Fourth, trade secrets are governed by state law, and thus the states are free to regulate it "in any manner not inconsistent with federal law."[83] Thus, trade secret laws vary throughout the states.

Fifth, trade secrets can be "stolen" by "friends" of those who learn of the secrets legitimately, with the consent of the owner, but then use the secret to compete with the owner. Trade secrets can also be stolen by "strangers" who learn of the secret in an illegal or improper manner that successfully overwhelms the owner's reasonable efforts to keep the matter confidential.[84] To be protected under trade secret law, the owner of an alleged trade secret must take "reasonable steps" to preserve the secrecy of the item.[85] Absolute secrecy is not required.

Sixth, trade secret protection does not cover the innocent use of stolen secrets. This occurs when a party uses the secret without knowing that the secret has been stolen or misappropriated. In those cases, the "innocent user" is not liable to the owner until the innocent user becomes aware that the material is a trade secret.[86] This may have special significance for software released on networks such as the Internet or on electronic bulletin boards.

Despite these apparent shortcomings, it is widely recognized today that "probably the single most important 'product' eligible for trade se-

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82. Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979).

83. *Id.* at 262.

84. Uniform Trade Secrets Act with 1985 Amendments, §1(2). Note, for theft of trade secret by "strangers", no federal criminal law exists at this time, but approximately 20 states have statutes prohibiting such activity. To protect secrets filed with the Federal Government, an exception to the Freedom of Information Act (FOIA) permits the government to refuse to reveal the trade secrets. If a government agency inadvertently releases the trade secret, the owner of the secret, with some statutory basis for a claim of confidentiality, may file suit under the Administrative Procedure Act to enjoin the disclosure.

85. *Id.* at §1(4)(ii). "Reasonable steps" may include: 1) contractually imposing an "explicit duty of confidentiality" on any person with whom the secret is shared through the use of "non-disclosure" and "non-compete" agreements with business investors, product partners, and employees; or 2) by an "implied duty of confidentiality" if the relationship between the parties warrants. Of particular importance to software developers, is that if a party in such a relationship uses the secret to his own advantage or reveals it to another, the trade secret owner will be able to secure judicial relief — usually through tort law.

86. *See, e.g.*, Computer Print Systems, Inc. v. Lewis, 422 A.2d 148, 155-56 (Pa. Supp. 1980) (innocent recipient became aware, in course of dealing with owner, that plaintiff's former officer had not been authorized to make the duplicate software program); Components for Research, Inc. v. Isolation Products, Inc., 241 Cal. App.2d 726 (1966) (defendant directors put on notice, thus entitling plaintiff to injunctive relief against both the directors and the corporation on whose board they sat).

cret protection is computer software."[87] The unpublished holding in *Stac Electronics v. Microsoft Corp*[88] "placed this issue on the agenda of companies throughout the computer industry."[89] *Stac* represents the first determination that the source code of a widely distributed computer program is protectable under the trade secret laws, winning one of the largest verdicts ever in a trade secret case.[90] Attorneys reviewing the case believe that "what some in the computer industry have advocated should be permissible reverse engineering is precisely what one jury concluded constitutes "willful and malicious misappropriation."[91] The reviewers concluded that:

> . . . the combination of practical and legal restrictions on access to the ideas and engineering reflected in the source code . . . provides a basis for trade secret protection. As long as the owner of the software takes industry standard measures . . . and is diligent in the prosecution of its rights, trade secret protection may be available unless or until such information in fact becomes generally known . . . . At a minimum, trade secret law may afford software developers the valuable head start against competitors that the trade secret laws were designed to protect.[92]

III. THE LEGALITY OF CONTRACT OR LICENSE CLAUSES RESTRICTING REVERSE ENGINEERING

Most reverse engineering cases focus on the acts of the defendants. However, defendants may also raise defenses that focus on the acts of the plaintiff.[93] One such defense, if the technology is legally protected by trade secret and copyright, is copyright misuse. Under misuse, a court will consider whether a copyright holder is illegally extending copyright protection through a contract or license which contains a clause that restricts reverse engineering of the copyrighted material. The Fourth Circuit recently decided a series of cases on this issue and held that such clauses are illegal extensions. But because of the extreme facts in each case, as discussed below, these rulings may or may not be adopted elsewhere.

In *Lasercomb Am., Inc. v. Reynolds*, the plaintiff produced software for designing dyes to make boxes.[94] The company then distributed the

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87. Johnston & Grogan, *supra* note 12, at 7, *citing* Computer Print Systems, Inc. v. Lewis, 422 A.2d 148 (Pa. Sup. 1980); Components for Research, Inc. v. Isolation Products, Inc., 241 Cal. App.2d 726 (1966).

88. Stac Electronics v. Microsoft Corporation, 1994 U.S. App., Lexis 18042 (1994).

89. Johnston and Grolan, *supra* note 12, at 1.

90. *Id.* at 2 (noting that pursuant to the settlement agreement between the parties, all orders, verdicts and judgments in the case have been vacated).

91. *See* Uniform Trade Secrets Act with 1985 Amendments, § 3(b). "If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a)." *Id.*

92. Johnston & Grolan, *supra* note 12, at 3-4.

93. Soma, *supra* note 32, at 223.

94. Lasercomb Am., Inc. v. Reynolds, 911 F.2d 930, 971 (4th Cir. 1990).

software under a license that contained a noncompetition clause which restricted the licensee from developing his own dye-making software or assisting others in developing such software for a period of ninety-nine years.[95] The defendant, Reynolds, did not sign the license agreement, but obtained a copy of the software which he reverse engineered to remove certain safeguards and then sold infringing copies of the software.[96] Lasercomb sued for copyright infringement and Reynolds pled copyright misuse as a defense.[97] The District Court rejected the copyright misuse defense, but the Fourth Circuit reversed, citing public policy[98] to uphold the copyright use defense. The Fourth Circuit further refused to enforce *Lasercomb's* copyright,[99] viewing the ninety-nine year noncompetition clause as an "anticompetitive restraint" that sought to "control competition" beyond the level granted by copyright law.[100] The court was unswayed by the fact that Reynolds was not harmed by the clause.

In *PRC Realty Systems Inc. v. National Ass'n of Realtors*,[101] an unpublished opinion, the plaintiff licensed software that allowed access to real estate multiple listing information. PRC's license included a clause requiring the licensee to exert its best efforts to also promote the multilisting publishing business.[102] The National Association of Realtors licensed the PRC software and then independently developed a desktop publishing system that allowed licensees of PRC's software to publish in-house multiple listings on a laser printer.[103] PRC sued for breach of contract and copyright infringement.[104] The district court held for PRC, but the Fourth Circuit reversed, emphasizing the public policy concerns articulated in *Lasercomb*.The Fourth Circuit stated in its "best efforts" clause, PRC attempted "to use its copyright as a hammer to crush all future development of an independent idea by [the defendant], or any other licensee."[105] It thus refused to continue an injunction enforcing the contract, but did uphold one count for breach of contract based on the fact that the defendant made non-exclusive license arrangements with parties other than PRC.[106]

Courts have upheld such clauses, however, where the license clause is not overreaching. In *Telerate Sys., Inc. v. Caro*,[107] for example, Telerate

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95. *Id.* at 972.
96. *Id.* at 971.
97. *Id.*
98. The Court adopted the equitable public policy approach of Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 494 (1942), to uphold the copyright use defense.
99. Lasercomb, 911 F.2d at 979.
100. *Id.* at 978.
101. PRC Realty Systems Inc. v. National Ass'n of Realtors, 766 F. Supp. 453, 456 (E.D. Va. 1991), *aff'd*, No. 91-1125, 91-1143, 1992 WL 183682 (4th Cir. 1992) (per curiam).
102. *Id.*
103. *Id.*
104. *Id.* at 458.
105. *Id.*
106. *Id.*
107. Telerate Sys., Inc. v. Caro, 689 F. Supp. 221 (S.D.N.Y. 1988).

developed a financial database, marketed as both a higher priced, standard personal computer-based software, and a lease-based special terminal which carried the right to access the database at a lower fee. Defendant Caro developed an alternative access software package that ran on any PC and allowed a Telerate customer to purchase Telerate's database-access rights at the lower leased-terminal rate, disconnect the terminal and still access the database.[108] Caro's software provided several desirable access improvements,[109] but also caused some performance problems for a number of Telerate's customers.[110] The Court found that Caro's reverse engineering of Telerate's software to develop the package likely violated various contract provisions[111] and granted Telerate's motion for a preliminary injunction finding a likelihood that Caro's software infringed Telerate's database copyrights when it copied data from the database.[112]

If a court finds one or more terms of a contract impermissible, the court will normally eliminate only the offending portions of the contract and enforce the rest.[113] In a court of equity, however, the court could void the entire contract under the "doctrine of unclean hands."[114] In *Atari*, the Court specifically required that a party seeking an injunction seek equity with clean hands. This was a significant factor in the outcome of the case, which permitted the reverse engineering of Atari's product because Atari was found to have had "unclean hands" after it made false statements to the Patent, Trademark, and Copyright Office.[115]

The equitable defense of unclean hands requires misconduct by the plaintiff, relevant to the issues before the court, that directly harms the defendant.[116] However, no injury to the defendant is required in cases of fraud, misrepresentation, or other unconscionable conduct since that conduct is illegal, unfair, and against public policy.[117]

Thus, a copyright or patent holder, in a contract that attempts to impose restrictions beyond the protection provided by copyright and patent law or in conflict with antitrust laws, may be considered to have unclean hands and lose all protection.[118] This can include any attempt to withhold "ideas" from the public because doing so imposes patent-like protection on software without meeting the rigorous requirements of pat-

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108. *Id.* at 224.

109. *Id.*

110. *Id.* at 225.

111. *Id.* at 226.

112. *Id.* at 240.

113. Soma, *supra* note 32, at 224, *citing* Somerset Importers, Ltd. v. Continental Vintners, 790 F.2d 775, 781-82 (9th Cir. 1986); Quiller v. Barclays American/Credit, Inc., 764 F.2d 1400, 1403 (11th Cir. 1985) (dissenting opinion), *cert. denied*, 476 U.S. 1124 (1986).

114. Atari, 975 F.2d at 846.

115. *Id.*

116. *Id.* at 846-47.

117. *See, e.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948).

118. *See* Jere M. Webb & Lawrence A. Locke, *Intellectual Property Misuse: Developments in the Misuse Doctrine*, 4 HARV. J. L. & TECH. 257, 257-58 (1991).

entability. It is therefore unfair and inconsistent with the purpose and policy of copyright law. A copyright may also imply market power and thus open antitrust issues.[119] Similarly, the practice of "tying," or the requirement that a purchaser of one patented or copyrighted product also purchase a non-protected product or service, would be considered to cause "unclean hands" since the practice violates antitrust law.[120]

However, a license that does not impose restrictions beyond the protection provided by copyright and patent law may be considered legal. Software developers should therefore utilize these protections to preserve important legal coverage of their products.

IV. THE EUROPEAN SOFTWARE DIRECTIVE

A. *Similarities of European Software Copyright Law to U.S. Copyright Law*

The objectives, rights, and restrictions of the European Union regarding software copyrights parallel most of those in the U.S.. In the preamble to its original proposal for a European Directive on the Legal Protection of Computer Programs, submitted to the European Council on January 5, 1989, the European Commission noted that "the size and growth of the computer industry is such that its importance in the economy of the Community cannot be overemphasized" and that "unless a legal environment is created which affords a degree of protection against the unauthorized reproduction of computer programs . . . comparable to that given to works such as books and films, research and investment in that vital industry will be stifled."[121] The objectives of the Commission's proposal for the Software Directive therefore were:

> a. to promote the free circulation of computer software within the Community and allow industry to take advantage of the single market by harmonizing the national laws of the Member States relating to the use and reproduction of computer software; and
> b. to prevent the unlawful copying of computer software, or 'computer piracy,' within the Community by ensuring an adequate level of protection for those who create computer software.[122]

The final version of the Software Directive,[123] adopted by the European Council on May 14, 1991, reads as follows:

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119. *See* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

120. In 1988, Congress passed the Patent Misuse Reform Act, 35 U.S.C. § 271(d)(5), which requires that before misuse will be found for tying, a patent owner must have market power in the relevant market for the patented product on which a license or sale is conditioned. If so, a "rule of reason" analysis must be presented for tying activity. Copyright misuse analysis follows that of patent misuse. Lasercomb, 911 F.2d at 977.

121. Preamble, "European Directive on the Legal Protection of Computer Programs," submitted by the European Commission to the European Council on January 5, 1989.

122. *Id.*

123. *Software Directive*, *supra* note 3.

1. "A logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware" to enable full use of computers' intended function.[124]

2. "This functional interconnection and interaction is generally known as 'interoperability'; whereas such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged."[125]

3. Further, "in accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive."[126]

4. Copyright law provides authors the exclusive right to do or to authorize the making of copies or derivative works, and/or the distribution of their copyrighted work[127] for the life of the author plus 50 years after his death or the death of the last surviving author in cases of multiple authors.[128]

5. "In the absence of specific contractual provisions," lawful acquirers of computer programs may make [interim] copies of the program, where necessary a) to run the program in accordance with its intended purpose, including error correction;[129] b) to make a back-up copy;[130] and c) to "observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program,"[131] "provided that these acts do not infringe the copyright in the program."[132]

6. Decompilation or "reverse engineering" of software code and the translation of its form are permitted by authorized persons, with certain restrictions.[133]

B. *Differences Between European Software Copyright Law and U.S. Copyright Law*

The main differences between European and U.S. copyright laws are as follows:

1) The EU limits the need for access to the underlying ideas as those needed for "interoperability," while access is unclear under *Sega* and

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124. *Id.* at Recital 10.
125. *Id.* at Recital 12.
126. *Id.* at Recital 14.
127. *Id.* at art. 4.
128. *Id.* at art. 8 and Recital 25.
129. *Id.* at art. 5.1 and Recitals 17 and 18.
130. *Id.* at art. 5.2.
131. *Id.* at. art. 5.3.
132. *Id.* at Recital 19.
133. *Id.* at art. 6.1(a) and Recitals 21 and 22.

Nintendo.

2) The Directive limits the "fair practice exceptions" to an author's exclusive rights[134] to those which "make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together."[135] It further states that "this exception may not be used in a way which prejudices the legitimate interests of the rightholder or the normal exploitation of the program."[136]

3) The Directive limits decompilation or "reverse engineering" of software code and the translation of its form to those circumstances where reverse engineering is indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs.[137]

4) An authorized user may "observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program" only if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.[138] This effectively limits access to the underlying ideas only through the "black box" of normal use of the program — not the more in-depth dumping, flow-charting, and rigorous analysis allowed in the U.S.

5) This process also requires adequate disclosure by the user.[139]

6) The Directive also recognizes the "dominate reseller" provisions of articles 85 and 86 of the European Treaty.[140]

7) Infringement of the exclusive rights of the author are defined as the "unauthorized reproduction, translation, adaptation or transformation of the form of the code *in which a copy of a computer program has been made available.*"[141]

The publication of this proposal resulted in one of the largest controversies ever experienced in the EU over a Directive. The concern focused mainly on the conditions under which a computer program could be reverse engineered and copied for profit. The Europeans, as did software-knowledgeable persons in the U.S., recognized that some copying is necessary to run a program, but they also sought to protect the creative efforts of the programmers to encourage further development.

C. *Importance of the Similarities and Differences Between European*

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134. *Id.* at Recital 22.
135. *Id.* at Recital 24.
136. *Id.* at Recital 24.
137. *Id.* at art. 6(1), (2) and Recitals 21 and 22.
138. *Id.* at art. 5.3.
139. *Id.* at art. 5.2.
140. *Id.* at Recital 27.
141. *Id.* at Recital 20 (emphasis added).

Software Law and U.S. Law to Software Developers

Software developers have legal protection in the EU that is similar to the protection in the U.S. If carefully drafted, the same or similar license contracts can often be used for customers in both continents. If anything, the European Directive appears to provide greater protection for software developers than the U.S. since the Directive seems to limit a users "access to the underlying ideas" to the "black box" approach to reverse engineering. That is, reverse engineering using decompilation for interoperability is only permitted if indispensable to obtain the underlying ideas. It can thus be argued that if a software developer makes the source code available to the user, infringement may be found if the user reverse engineers the code since such action would not be indispensable. This is significant for companies with unique software products, which for marketing purposes may be better off releasing the source code and encouraging compatibility and licensing in this manner. A product with major yearly revisions would be an example of such a strategy.[142]

The only major limitations to these European protections are that the Directive recognizes the "dominate reseller" provisions of articles 85 and 86 of the European Treaty, and these protections have not been widely tested in the courts. The various national statutes are quite new and almost no case law exists in this area. Thus, while the statutes provide critical protection and guidance to software developers in licensing their software, the developers should be aware that this is still a new and unsettled area of the law.

V. SAMPLE LANGUAGE FOR SOFTWARE LICENSES

Software developers seeking to protect their product from unlimited reverse engineering and to strengthen their legal position in a product infringement case should implement the following action items:[143]

1. Software developers cannot completely prohibit reverse engineering of their programs, since public policy requires access to all unprotected information in the public domain. Software developers can, however, proactively provide access to the information under a license that both limits certain activities and contractually obligates the user/licensee to honor the information accessed as a trade secret.

2. Case law indicates that contract or license clauses which limit re-

142. The Directive also makes clear that patents, trade secret, trademark and other intellectual property and contract laws are also available to the software developer. The full scope of patents issued in the U.S. and Europe for software, however, is still undecided, and a somewhat guarded attitude about the issuance of software patents remains in both constituencies.

143. Software developers should apply for a patent on the product since patents provide the strongest intellectual property protection. Historically, patents have not been granted in the U.S. to software, but since Diehr, they are becoming increasingly more of an option. The situation in Europe remains guarded and uncertain.

verse engineering are legal so long as the language of the clause does not exceed the authority granted under copyright and other laws. Software developers, therefore, should include a clause prohibiting reverse engineering in their license. Sega did not do so and appears to have lost certain claims due to this omission. In Europe, however, caution should be observed in including a reverse engineering prohibition without a thorough Article 85 and 86 analysis.

3. The license requires the user to state its intent on reverse engineering, and appropriate notice. In *Sega*, the Court required that the defendant have a "legitimate interest" in or "reason for" gaining access to the reverse engineered information.

> a. If the user's interest is to develop a compatible, interoperable product that benefits software developers by providing added market recognition and product sales, reverse engineering should be encouraged or appropriate source code should be provided.
> b. If the user's interest is to develop a competing product, such an interest is legal and cannot be restricted. In *Sega*, the Court stated that "public policy plus the authorization of section 117(1) [is] not limited [only] to [the] use intended by [the] copyright owner."[144] The information gained from this statement in *Sega*, however, provides the software developer with important "notice" and establishes the "access" element for a possible later infringement case. The plaintiff, then, need only show that the reverse engineered product is "substantially similar" to the original product and that the resulting product negatively impacts the potential market of the original product.
> c. If the user states one intent but carries out another, the software developer has stronger breach of contract, misappropriation, trade secret theft, and/or "unclean hands" arguments.

4. Write the license to convey that everything needed for the user's "legitimate," intended purpose is provided. In *Sega*, the Court stated that reverse engineering of a copyrighted software program was "fair use" because it was the only means of gaining access to the unprotected aspects of the program; the European Software Directive allows decompilation only when indispensable to achieving interoperability. However, if the developer of the original software voluntarily provides the object and source code to the party desiring it, this leaves no opportunity for the user to later claim that reverse engineering was necessary or indispensable to gain access or that the copyright owner was using the code or the contract to "hide information as in a patent." In drafting the license, software developers should be certain to avoid words that indicate ambiguity, such as "sample programs" or "all needed to do a specific task." The wording of the clause must satisfy U.S. public policy which requires that all unprotected ideas in the public domain are available. To convey compliance with public policy, developers should offer to provide any additional information that the users discover as lacking for their intended purpose.

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144. Sega, 977 F.2d at 1520 n.6.

This offer, of course, must be accompanied by a *caveat* that allows the software developers to use commercial discretion in providing the additional information so as not to overwhelm their staff. The users may still access the information through reverse engineering, but the time and expense required to do so may discourage some users from doing so.

5. Clearly define "interoperability" in the definitions section of the contract. Doing so will avoid misunderstandings and establish "mutual intent" between two skilled persons in the field.

6. Note in the license that while verbatim interim copies of copyrighted material are permitted as a "fair use exception," they are not to be sold or distributed.

7. Take all necessary and "reasonable" steps to protect your trade secret rights, including provisions in the license to protect trade secret rights. These may include restricted use and/or confidentiality agreements. If the user then reveals the secret, a breach of contract and/or misappropriation claim can be made by the software developer. Sega did not do this, which contributed to its loss.

8. Be certain to maintain "clean hands."

9. Track the market for the product involved and maintain an accurate, detailed historical record. This will facilitate clear documentation of the impact of competitive products and of the value of trade secrets.

10. In negotiating and signing the contract, use persons skilled in reverse engineering who understand the contractual restrictions. This will strengthen contractual evidence if problems arise later.

VI. CONCLUSION

It is evident from the U.S. Constitution, subsequent U.S. statutes and case law, and the European Software Directive, that the U.S. and European Union are seeking to provide a balance between providing access to unprotected ideas to benefit the public and providing sufficient protection to software developers to encourage them to continue producing innovative products. Reverse engineering is permitted under certain circumstances in the U.S. and within the European Union, but software developers still maintain a number of well-supported options to achieve their three goals of a) legally prohibiting or limiting the reverse engineering of their product, b) protecting their state law trade secret and other intellectual property claims, and c) placing themselves in the best possible legal position to argue a claim if their product is reverse engineered and an infringing software product is created.

The initial step in claiming these options is the protection of the product under a license that should be able to withstand a test based on current U.S. and European law. Concepts for such a license are provided in the above sample license.

The defendant in a U.S. infringement case challenging this approach, would likely argue the Fourth Circuit holding that the limiting clauses in

the license are illegal. The plaintiff, on the other hand, would likely argue the Ninth Circuit "fair use" parameters, contract law, and intellectual property defenses of misappropriation, trade secret, and clean hands. If the plaintiff can write the license to win even just one of these claims, that is enough to prevail for infringement protection. This is also known as the "one strike and you're out!" aspect of intellectual property law. The final determination of the validity of these concepts, both in the U.S. and the European Union, however, must wait for a test case addressing these issues.

In the World, But Not *of* it: Japanese Companies Exploiting the U.S. Civil Rights Law

KIYOKO KAMIO KNAPP*

> . . . Japan is a nation which has pursued commerce to the ends of the earth, yet cannot shed its age-old mistrust of what lies beyond its shores.
>
> — Jared Taylor.[1]

I. INTRODUCTION

A *kimono*-clad Oriental woman carries a torch of liberty on the front cover of the October 9, 1989, issue of *Newsweek* magazine. The illustration accompanies the headline *Japan Invades Hollywood.*[2] The magazine article depicts Japan's purchase of a "piece of America's soul,"[3] referring to Sony's 3.4 billion-dollar takeover of Columbia Pictures Entertainment.[4] To the majority of Americans surveyed in that article, Japan's economic power posed a greater threat than the military power of the then Soviet Union.[5]

Japan has built itself as one of the world's economic leaders. Between 1979 and 1990, annual Japanese investment in the U.S. skyrocketed nearly eighty-fold, from 257 million to 19.9 billion dollars.[6] Major Japa-

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* I was born in Japan and lived there for 24 years before moving to the United States. In this article, I base some of the general descriptions of the Japanese personnel management on my own experiences and observations while living in Japan.

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

1. JARAD TAYLOR, THE SHADOWS OF THE RISING SUN: A CRITICAL VIEW OF THE "JAPANESE MIRACLE" 257 (1983).

2. In the translated version of the Newsweek magazine sold in Japan, the same headline read: Sony *Shingeki* [Sony *Advances* (against Hollywood)] (emphasis added). Hiroshi Ando, 57 NICHIBEI JYOHO MASATSU [JAPAN-U.S. INFORMATION FRICTION] (1991).

3. *Japan Goes Hollywood,* NEWSWEEK, October 9, 1989, at 62.

4. *Id. See also Japan Corporate Takeovers Abroad Hit 404 in 1989,* L.A. TIMES, January 11, 1990, at 3 (reporting that the number of mergers and acquisitions involving Japanese corporations at home and abroad in 1989 totaled 659, valued at $212 billion).

5. *Japan Goes Hollywood, supra* note 3.

6. Eileen M. Mullen, *Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law,* 45 STAN. L. REV. 687, 729 n.13 (1993), *citing* Bureau of Economic Analysis, U.S. Department of Commerce, *U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1985,* 66

nese firms have achieved a significant portion of their investment in the United States by establishing branches and subsidiaries.[7] Accordingly, in 1989, the number of Americans working for Japanese companies amounted to 500,000.[8] This has triggered a rise in discrimination charges Americans have asserted against their Japanese employers.[9] Plaintiffs

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SURV. CURRENT BUS. at 50, tbl. 5 (May 1986) and Bureau of Economic Analysis, U.S. Department of Commerce, *U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1991*, 72 SURV. CURRENT BUS. at 72, tbl. 4 (May 1992). Political economist Pat Choate reported that, as of 1990, the Japanese own $285 billion of America's direct and portfolio assets, control more than $329 billion of U.S. banking assets (a 14% share of the U.S. market), possess more real estate holdings in the U.S. than the members of the European Community (EC) combined, and trade up to 25% of the daily volume on the New York Stock Exchange. PAT CHOATE, AGENTS OF INFLUENCE at Introduction (1990). Furthermore, the Greenlining Coalition, a California organization composed of minority groups and consumers, provided the following information on Japanese direct investment in August, 1991: "Matsushita Electronic alone has an annual revenue of $44 billion, more than 12 times that of Walt Disney Studios;" "Japanese companies control a quarter of all American motion picture production;" "[o]ver the last two years, the top 10 major Japanese investors have bought more than $23 billion in American companies . . . ." Lantos Hearings, *infra* note 30, at 329.

7. Robert Abraham, *Limitations on the Right of Japanese Employers to Select Employees of Their Choice under the Treaty of Friendship, Commerce and Navigation*, 6 AM. U. J. INT'L L. & POL'Y 475 (1991). For a historical background of Japanese foreign investment, *see* Tomoko Hamada, *Under the Silk Banner: The Japanese Company and Its Overseas Managers*, *in* JAPANESE SOCIAL ORGANIZATION 135, 136-139 (Takie Sugiyama Lebra, ed., 1992). For a discussion of Japan's foreign trade, *see generally* EDWIN O. REISCHAUER, THE JAPANESE TODAY 370-80 (1988); *see also* JON WORONOFF, JAPAN AS ANYTHING-BUT-NUMBER ONE 206 (1991) (noting that "[u]nlike Europe and America, where trade followed the flag, Japan's flag followed trade"). Ronald Morse, Executive Vice President of Economic Strategy Institute, explains that about 40% of total Japanese direct investments are located in the U.S., of which 35% are in real estate. Lantos Hearings, *infra* note 30, at 177-78. Many of the companies actively involved in foreign direct investment are classified as high-technology firms, automobile makers, chemical firms, and machinery manufacturers. Hamada, *supra*, at 138. Japanese firms also often enter foreign markets through mergers and acquisitions. *Id.* *See also* Gita Khadiri, *The Effect of the United States-Japan Treaty of Friendship, Commerce and Navigation on Japanese Investment in United States Real Estate*, 4 AM. U. J. INT'L L. & POL'Y, 591, 596-98 (discussing recent Japanese investment in United States real estate); Jeffrey M. Lavine, *Foreign Investment in Japan: Understanding the Japanese System and its Legal and Cultural Barriers to Entry*, 9 B. U. INT'L L.J. 149 (1991) (exploring the evolution of the Japanese legal system and its interplay in creating foreign investment barriers).

8. Delineated by geography, the figure represents 100,000 in California, 42,000 in New York, 38,000 in Illinois, 35,000 in Ohio, and 30,000 in Hawaii. PITFALLS FOR JAPANESE EMPLOYEES IN THE UNITED STATES at i (William J. Kilberg et. al., eds., 1993) [hereinafter PITFALLS].

9. For a detailed analysis of two landmark cases involving employment discrimination by Japanese multinational firms, *see infra* sections IV. A. (2) & (3) (discussing Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982) and Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991)). Other cases against Japanese employers include Nghiem v. NEC Electronics, Inc., 25 F.3d 1437 (9th Cir. 1994) (involving a U.S. citizen of Vietnamese heritage claiming wrongful termination and race discrimination); Papaila v. Uniden America Corp., 840 F.Supp. 440 (N.D. Tex. 1994) (involving a breach of employment contract as well as discrimination based on race, national origin, and age); Fitzgibbon v. Sanyo Securities America, Inc., No. 92 Civ. 2818 (RPP), 1994 WL 281928 (S.D.N.Y. June 22, 1994) (involving

have mainly claimed violation of Title VII of the Civil Rights Act of 1964,[10] which bans discrimination on the basis of race, color, religion, sex, or national origin.[11]

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claims of, among others, national origin and age discrimination, infliction of emotional distress, and breach of contract); Bagnell v. Komatsu Dresser Co., 838 F.Supp. 1279 (1993) (N.D. Ill.) (involving a discharged employee asserting national origin discrimination); Blaise-Williams v. Sumitomo Bank Ltd., 189 A.D.2d 584, 592 N.Y.S.2d 41 (1993) (involving a bank employee claiming that she was passed over for promotion based on her race, sex, color, or national origin); Goyette v. DCA Advertising Inc., 828 F.Supp. 227 (S.D.N.Y. 1993) (involving claim of unlawful discharge based on their national origin); EEOC v. Recruit U.S.A, Inc., 939 F.2d 746 (9th Cir. 1991) (involving a Japanese company's use of an internal coding system to screen out job applicants by race, gender, and age); Yap v. Sumitomo Corp. of America, No. 88 Civ. 700 (LBS), 1991 WL 29112 (S.D.N.Y., Feb. 22, 1991) (involving claim that defendant "discriminated in favor of Japanese nationals in staffing management positions"); Walsh v. Eagle Wings Industries, Inc., No.89-2052, 1991 WL 90906 (C.D. Ill., Jan. 17, 1991) (involving claim arising over the company's refusal to give the American plaintiff the same relocation benefits as those given to Japanese employees and disallowing him to enter language classes comparable to those offered to Japanese employees); Adames v. Mitsubishi Bank, Ltd. 751 F.Supp. 1548 (E.D.N.Y. 1990) (challenging discrimination on the basis of race, descent, ancestry, and ethnic characteristics including a "dual staff system" which adversely affected non-Oriental employees); Van Abrahams v. Pioneer Electronics U.S.A Inc., No. CV 88-7868-RSWL, 1989 WL 225579 (C.D.Cal. June 21, 1989) (involving national origin discrimination); Kelly v. TYK Refractories Co., 860 F.2d 1188 (3rd Cir. 1988) (involving wrongful discharge, breach of contract, intentional infliction of emotional distress, etc.); EEOC v. Japan Air Lines Co. Ltd., No.79 CIV. 1625 (MGC), 1986 WL 14290 (S.D.N.Y. Dec. 11, 1986) (involving age discrimination against management employees between the ages of 40 and 65 who were terminated); Toshiba America Inc., v. Simmons, 104 A.D.2d 649, 480 N.Y.S.2d 28 (1984) (involving an employee counterclaiming for damages for wrongful discharge against the employer filing an action for money had and received); Spiess v. C. Itoh & Co. (America), Inc. 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984) (involving an employees alleging discrimination in managerial promotions and other benefits); Porto v. Canon, U.S.A., Inc. 28 Fair Empl. Prac. Cas. 1679 (BNA) (N.D.Ill. 1981) (involving a challenge to the firm's establishment of a an employment system which limited the opportunities of non-Japanese employees as well as his discharge based on national origin); Fujita v. Sumitomo Bank of California, 70 F.R.D. 406 (N.D. Cal. 1975) (involving female bank employees alleging gender discrimination). *See also* McDuffie v. Nissei Sangyo America, Ltd., 989 F.2d 493 (4th Cir. 1993); Bermingham v. Sony Corp. of America, Inc., 820 F.Supp. 834 (1992); Blom v. N.G.K. Spark Plugs (U.S.A.), Inc., 3 Cal.App.4th 382, 4 Cal.Rptr.2d 139 (1992); Ross v. Nikko Sec. Co. Int'l, 133 F.R.D. 96 (S.D.N.Y. 1990); Shiseido Cosmetics (America) Ltd. v. State Human Rights Appeal Board, 72 A.D.2d 711, 421 N.Y.S.2d 589 (1979).

10. 42 U.S.C. §§ 2000e to 2000e-17 (1988). The Act provides:

> It shall be an unlawful employment practice for an employer
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> (2) to limit, segregate, or classify his employees or applicants in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Id. at § 2000e-2(a).

11. Other federal antidiscrimination laws include the following: §1981 of the Civil Rights Act of 1866, 42 U.S.C. §1981 (1988); §1983 of the Civil Rights Act of 1871, 42 U.S.C.

This body of litigation has sparked a debate among observers. Some critics view racism and sexism as byproducts of Japan's direct foreign investment.[12] On the other hand, some assert that anti-Japanese sentiment,[13] fueled by bilateral trade friction, has painted an overly harsh picture of Japan's economic expansion.[14]

Notwithstanding the debate, Japanese multinational firms must strive to minimize the risk of discrimination suits by adopting defensive strategies.[15] At the heart of the U.S. civil rights laws is the principle of fairness to individuals.[16] Operating in the nation of immigrants, Japanese multinational firms must understand and appreciate America's commitment to individual dignity.[17] Most importantly, employers should adopt a personnel policy which evaluates employees by their intrinsic merit.

Not only international criticism but also social changes in Japan have

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§1983 (1988); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34 (1988); Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12112-12213 (1988); Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206 (1988); Civil Rights Act of 1991, 42 U.S.C.A. §2000e-1(c)(2) (West Supp. 1991); Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C.A. §1324B (West Supp. 1991). These laws are supplemented by state and local fair employment laws. This article focuses on Title VII of the Civil Rights Act of 1964.

12. *See generally* William H. Lash III, *Unwelcome Imports: Racism, Sexism, and Foreign Investment*, MICH. J. INT'L L. 1 (1991). The same author also testified about discriminatory practices by Japanese multinational firms at a Congressional hearing, which will be discussed in later sections. *See* Lantos Hearings, *infra* note 30, at 394-406. Studies reveal mounting criticism against similar problems with Japanese firms in Great Britain, France, and Germany as well. *Tomasz Mroczkowski & Richard G. Linowes, Inside the Japanese Corporation Abroad: Views of American Professionals*, 23 MGMT. JAPAN 28 (1990).

13. *See infra* section III. B.

14. Individuals of this viewpoint argue that some American firms engage in similar discriminatory practices. Interview with Terry Morrison, Human Resources Consultant for Japanese corporations in Portland, Oregon (March 25, 1994). For a complete discussion of employment discrimination charges from the Japanese perspective, *see infra* section III. A.

15. Tsuyoshi Ohishi & Naoto Sasaki, *How to Operate a Business in International Communities*, 26 MGMT. JAPAN 3, 5 (1993) (observing that few Japanese companies have forged policies on international management).

16. *See e.g.* Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5-12 (1976) (discussing rationales for opposing discrimination); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (Title VII purports to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees"). As sociologist Robert Bellah wrote, "[i]ndividualism lies at the very core of American culture." Abraham, *supra* note 7, at 480 (*citing* ROBERT BELLAH, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 142 (1985)).

17. EEOC chairman Evan Kemp discussed how workforce equality should be enforced by foreign and domestic employers: "the single best way . . . is to make the people who make the personnel decisions aware that they must hire in compliance with our Federal, State, and local statutes that prohibit job discrimination." Lantos Hearings, *infra* note 30, at 71. Tatsuo Inoue emphasizes Japan's need to "seek a more balanced approach in accommodating the tension between communitarianism and individualism." Tatsuo Inoue, *The Poverty of Rights-Blind Communality: Looking through the Window of Japan*, 1993 B.Y.U. L. REV. 517, 520 (1993).

bolstered the argument for such a merit system.[18] The prolonged recession[19] is now forcing many firms to depart from established norms such as lifetime employment and seniority-based wages.[20] The traditional values of Japanese corporate culture collide with the trends demanding a lasting change in the domestic labor market.[21] Revitalization of the Japanese economy requires effective allocation of human resources to maximize individual strengths.[22] Thus, creating a work environment based on respect of diversity represents a task that Japan must fulfill both at home and abroad.[23] Playing a vital role in the world economy, Japan must confront

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18. Numerous writings have recently covered the subject on challenges facing Japanese corporate management. *See generally* ROCHELLE KOPP, THE RICE-PAPER CEILING: BREAKING THROUGH JAPANESE CORPORATE CULTURE 221-32 (1994); KOICHI HORI, NIJYU-ISSEIKI NO KIGYO SYSTEM [THE CORPORATE STRUCTURE FOR THE 21ST CENTURY] (1993); IWAO NAKATANI, NIHON KIGYO FUKATTSU NO JYOKEN [WHAT IT TAKES TO REBUILD JAPANESE CORPORATIONS] (1993); KAWARU NIHON GATA KOYO [JAPAN'S CHANGING EMPLOYMENT SYSTEM] (Akira Takanashi ed., 1994) [hereinafter Kawaru Nihon], RYO HATO, POSUTO SHUSHIN KOYO [POST-LIFETIME EMPLOYMENT] (1994); Takamitsu Sawa & Yoko Ishikura, *Okina Henka-ga Hajimaru: Ikinokoreru Hito-wa Dareda [Big Change Taking Place: Who will Survive?]*, NIKKEI WOMAN, Oct. 1994, at 68-69; Shintaro Hori, *Fixing Japan's White-Collar Economy: A Personal View, Nov.-Dec.*, HARV. BUS. REV. 157 (1991). Jiro Ushio, Chairman of Ushio Inc., a maker of industrial lamps and optical electronics, emphasizes that the three areas which need to be improved are "the excessively employee-oriented Japanese-style management system that guarantees lifetime employment and ties promotions and wages to the seniority system; industrial rules that overemphasize cooperation between government and business; and the system of cross-shareholdings between companies." Osamu Katayama, *Back to the Drawing Board*, 39 LOOK JAPAN 4, 11-12 (1993). Koichi Hori, President of the Boston Consulting Group, asserts that true globalization should begin within Japan. If only foreign branches and subsidiaries of Japanese firms force themselves to become "globalized" simply by hiring more locals, some cultural barriers will still remain between Japanese expatriates and local staff. This, Hori says, is a natural consequence of the vastly different values underlying Japanese and American-style management: the former based on seniority and the latter on individual qualifications. Thus, Japanese employers should adopt a merit system in order to create globally acceptable corporate culture. *See* HORI, *supra*, at 237-78. One scholar opines that Japanese society on the whole needs a "moral reorientation which places a greater emphasis on individual rights." Inoue, *supra* note 17, at 545.

19. For a discussion of the rise of the Japanese yen and its adverse effect on Japan's export-oriented economy, *see infra* section V. A. *See also* Paul Blustein, *Learning to Expect Trouble Instead of a Bubble; Long-Term Problems Slow Economic Recovery*, WASH. POST, Apr. 17, 1994, at H1.

20. *See generally* Yamamoto Harumi, *The Lifetime Employment System*, 40 JAPAN Q. (1993); Thomasz Mcrozkowski & Masao Hanaoka, *Continuity and Change in Japanese Management*, *in* JAPANESE BUS. 271-87 (Subhash Durlabhji & Norton E. Marks, eds., 1993). *See also* NAKATANI, *supra* note 18, at 12-23 (discussing the current recession in Japan and the challenges it presents to the Japanese employment system).

21. For a general description of Japanese business management, *see* JAPAN: A COUNTRY STUDY 115, 116-17, 216-18 (Ronald E. Dolan & Robert L. Worden, eds., 5th ed. 1992). For a comparative analysis of business management in Japan and the U.S., *see, e.g.*, Mullen, *supra* note 6, at 744-58; Abraham, *supra* note 7, at 479-84; Marcia J. Cavens, *Japanese Labor Relations and Legal Implications of Their Possible Use in the United States*, 5 N.W. J. INT'L L. & BUS. 585 (1983).

22. *See* KOPP, *supra* note 18, at 51 (emphasizing globalization of human resources as "the only way for Japanese companies to insure their international competitiveness").

23. According to Ronald A. Morse, Japanese society will benefit from the pursuit of the

the challenge of building global companies that are not only "*in* the world," but also "*of* it."[24]

This article analyzes employment discrimination by Japanese firms in the U.S. and recommends integration of diverse individuals into the core labor force as an essential element of global management. Numerous scholarly articles have explored issues related to the availability of affirmative defenses[25] for Japanese employers facing discrimination charges.[26]

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issues relating to discrimination by Japanese corporations in the U.S. Lantos Hearings, *infra* note 30, at 173.

24. Mroczkowski & Linowes, *supra* note 12, at 30 (1990). Jared Taylor also uses the expression "in the world, but not of it" to refer to Japanese people. TAYLOR, *supra* note 1, at 91. Edwin Reischauer assigns building meaningful relationships with other peoples as the greatest single obstacle the Japanese face today. REISCHAUER, *supra* note 7, at 408. He further explains that Japan must become a fully cooperative member of the international community by abandoning its sense of uniqueness. *Id.* at 410. *See alsò* HORI, *supra* note 18, at 24 (describing that the world is sending a message to Japan, urging to contribute to global society); Emma Louise Young, *in* JAPAN: A COUNTRY STUDY 55 (Frederica M. Bunge, ed., 1983) (explaining that the nation's economic success has motivated Japanese people to engage in "considerable soul searching" about its role in the world); Paul Lansing & Tamra Domeyer, *Japan's Attempt at Internationalization and its Lack of Sensitivity to Minority Status*, 22 CAL. W. INT'L L. J. 135, 137 (1991) (stating that Japan needs to cooperate with the rest of the world, proving its sincere effort to conform); Lantos Hearings, *infra* note 30, at 174 (containing the following statement by Ronald Morse: "Now that Japan is not isolated from the world, and if they are going to prove themselves as good citizens globally, the responsibility will be on the Japanese side, in Japan, to be able to really come up to the standard of international employment practices and other types of behavior").

25. An affirmative defense can be defined as "[a] response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." BLACK'S LAW DICTIONARY 60 (6th ed. 1990). For a discussion of the affirmative defenses applicable to Japanese corporations in employment discrimination cases, *see infra* section IV.

26. *See e.g.* Mark B. Schaffer, *The Implications of Japanese Culture on Employment Discrimination Laws in the United States*, 16 HOUSTON J. INT'L L. 343 (1993); Jeffrey J. Mayer, *A Critical Analysis of Judicial Attempts to Reconcile the United States-Japan Friendship, Commerce and Navigation Treaty with Title VII*, 13 NW. J. INT'L L. & BUS. 328 (1992); Michael S. Kimm, *Domestic Employees and Title VII Versus Foreign Employers and "FCN" Treaties: A 21st Century Perspective*, 9 B.U. INT'L L.J. 95 (1991); Madelene C. Amendola, *American Citizens as Second Class Employees: The Permissible Discrimination*, 5 CONN. J. INT'L L. 625 (1990); Dana Marie Crom, *Clash of the Cultures: U.S. Japan-Treaty of Friendship, Title VII, and Women in Management*, 3 TRANSNAT'L L. 337 (1990); Gary Singh, *Japanese Employment Practices under American Law*, 2 INT'L LEGAL PERSP. (1990); Matthew Orebic, *Japanese Companies on United States Soil: Treaty Privileges vs. Title VII Restraints*, 9 HASTINGS INT'L & COMP. L. REV. 377 (1986); Barbara A. Ritomsky & Robert M. Jarvis, *Doing Business in America: The Unfinished Work of Sumitomo Shoji America, Inc. v. Avagliano*, 27 HARV. INT'L L.J. (1986); Nobuhisa Ishizuka, *Subsidiary Assertion of Foreign Parent Corporation Rights under Commercial Treaties to Hire Employees "Of Their Choice"*, 86 COLUM. L. REV. 139 (1986); Paul Lansing & Laura Palmer, *Sumitomo Shoji v. Avagliano: Sayonara to Japanese Employment Practices in Conflict with Title VII*, 28 ST. LOIS U. L.J. 153 (1984); Francine McNulty, *Employment Rights of Japanese-America Joint Ventures in the United States under the U.S.-Japan Treaty of Friendship, Commerce and Navigation*, 16 LAW & POL'Y INT'L BUS. 1225 (1984); Note, *Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 MICH. L. REV. 237 (1984); Stacey M. Rostner, *Beyond The FCN*

This article, however, focuses on limitations to those defenses and discusses what steps should be taken in order to keep problems from erupting.

II. PATTERNS OF EMPLOYMENT DISCRIMINATION BY JAPANESE FIRMS IN THE UNITED STATES

In today's global age, various forms of employment discrimination,[27] as well as cars and televisions, have transcended Japan's national border.[28] Through its economic activities in the U.S., Japanese multinational firms have introduced their employment practices to the American public. Some of these practices clash with U.S. civil rights laws and social norms.[29] Deep concerns over the Japanese corporate behavior finally forced Congress to confront the issue; in 1991, the Employment and Housing Subcommittee of the House Committee on Government Operations held three hearings entitled Employment Discrimination by Japanese-Owned Companies in the United States led by Rep. Tom Lantos (D-California).[30] The Subcommittee heard testimonies from aggrieved em-

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Treaty: Japanese Multinationals under Title VII, 51 FORDHAM L. REV. 871 (1983); John Bruce Lewis & Bruce L. Ottley, *Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based upon Sumitomo Shoji*, 44 OHIO ST. L.J. 45 (1983).

27. Japan has made little concerted effort to promote workforce equality. Various forms of job discrimination have prevailed, because "Japanese corporate society has traditionally been a society based on rank, class, and discrimination." Uchihashi Katsuto, *Downsizing, Japanese Style*, 21 JAPAN ECHO 47, 48 (comparing lack of attempt to combat discrimination in Japan with the U.S. approach to fair employment practices).

28. *See* Kenneth B. Noble, *A Clash of Styles: Japanese Companies in U.S. Under Fire for Cultural Bias*, N.Y. TIMES, Jan. 25, 1988 at A16 (discussing discrimination charges against Japanese firms in California, the nation's primary legal battleground, largely due to the concentration of American executives working for Asian-controlled electronics businesses in the San Francisco Bay area). The Equal Employment Opportunity Commission (EEOC) has expressed its growing concern for bias suits involving multinational firms in general. Lairold M. Street, who has worked with the International Trade Commission and is currently employed by the EEOC, suggests that this concern stems from expansion of economic activities by foreign-owned firms: statistics in 1989 indicated that 130 foreign firms chose the greater Washington D.C. area to conduct business in the U.S. This, Street says, is a five-fold increase from a decade ago. Lairold M. Street, *Helping Japanese Firms Cope with Employee Benefits and U.S. Labor and Employment Laws*, 35 HOWARD L.J. 381, 382 (1992). *See also* KOPP, *supra* note 18.

29. Most notably, the primacy of group harmony emphasized by Japanese firms conflicts with individualistic values held by Americans. Ohishi & Sasaki, *supra* note 15, at 4. *See also* James R. Lincoln, *Employee Work Attitudes and Management Practice in the U.S. and Japan: Evidence from a Large Comparative Survey*, Cal. Mgmt. Rev. 89 (Fall 1988) (discussing how work attitudes are different in Japan and in the U.S. based on a survey on 106 factories and their 8,302 employees in the U.S. (central Indiana) and Japan (Kanagawa Prefecture)); Abraham, *supra* note 7, at 479-484 (examining the differences between Japanese and American business practices).

30. These hearings were held on July 23, August 8, and September 24 of 1991. Alleged discriminatory practices ranged from disparaging comments to exclusion of Americans from the decision-making process. Employment Discrimination by Japanese-Owned Companies in the United States: Hearings Before the Subcomm. on Employment and Housing of the House Comm. on Government Operations, House of Representatives, 102d Cong., 1st Sess.

ployees, Japanese employers, the Equal Employment Opportunity Commission[31] officials, and labor specialists. One witness characterized discrimination by her former Japanese employer as institutional as opposed to individualized discrimination.[32] Chairman Lantos emphatically stated that U.S. citizens, who work for Japanese firms, are crying out in anguish as second-class citizens in their own nation.[33] The Lantos Hearings shed light on "what has been a significant undercurrent in much of the debate over Japanese investment:" "how American employees are faring at Japanese firms."[34]

Some of the witnesses at the Lantos Hearings have also initiated lawsuits under Title VII. The U.S. took up the challenge of eradicating job discrimination when Congress enacted the Civil Rihgts Act in 1964. Title VII prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, religion, sex, or national origin.[35] It embodies the universally held principles of fairness and equality in American society. The Fifth Circuit has, for instance, construed Title VII as reflecting an "assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but

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(1991) [hereinafter Lantos Hearings]. In his opening statement at the first hearing, Rep. Lantos stated as follows: "The Japanese have modernized some old plants, built new factories, and created many new jobs for American workers. As a Nation, we welcome Japanese investment, but we cannot and will not allow Japanese companies in the process to flout our values and principles or violate our labor, civil rights, and nondiscrimination laws." *Id.* at 1. Journalist Kishi Nagami documented critical part of these hearings in his book for a Japanese audience. He asserted that the hearings had captured little media attention in Japan. Thus, Nagami concludes, few Japanese recognize that the discrimination issues even exist. NAGAMI KISHI, UTTAERARERU ZAIBEI NIHON KIGYO [EMPLOYMENT DISCRIMINATION CASES BY JAPANESE-OWNED COMPANIES IN THE UNITED STATES] 1-3 (1992).

31. The Equal Employment Opportunity Commission [hereinafter EEOC] consists of five Presidentially-appointed members. This agency is in charge of processing employment discrimination charges under Title VII of the Civil Rights Act [hereinafter Title VII]. *See* 42 U.S.C. §2000e-4 (1988).

32. Lantos Hearings, *supra* note 30, at 46 (Susan Minshukin, former employee of Nikko Securities, basing this distinction on her own work experience at Merrill Lynch and Nikko. The former had a number of male sales assistants, whereas the latter filled such "helper" jobs with women). Judy Teller shares her observation as follows: " . . . in American corporations, it's at least conceded that [gender discrimination] is a no-no. Men may believe that women should be kept barefoot, pregnant and on the edge of town, but it's not acceptable, legally or in social terms, to behave that way. Within the context of Japanese corporation, it seems to me . . . there is a tradition of subordinate positions for women." *Id.* at 45.

33. Lantos further stated: "I think we are opening up an ugly chapter in United States-Japan relations." He added that this chapter will not be closed until Japanese firms end its discriminatory practices against Americans. *Id.* at 42. *See also* REISCHAUER, *supra* note 7, at 395-400 (describing racist attitudes among the Japanese as a reflection of a "we-they" dichotomy). Nagami Kishi presumes that some sanctions may be given in the future to Japanese corporations which violate the U.S. civil rights laws. They may include restrictions of the visas granted to Japanese managerial employees rotated from parent companies (currently 80,000 visas per year) and exclusion of the Japanese from the jobs with the U.S. government. KISHI, SUPRA note 30, at 235.

34. KOPP, *supra* note 18, at 20.

35. For the relevant provisions, *see supra* note 10.

. . . would enable individuals to develop as individuals."[36] Title VII has given litigants a useful tool in regulating employers' outward behavior influenced by arbitrary generalizations of particular groups.[37]

By violating the letter and the spirit of Title VII, "the cornerstone, as well as touchstone of employment discrimination law,"[38] Japanese employers have failed to honor America's commitment to workforce equality. This section analyzes the general patterns of employment discrimination by Japanese firms in the United States based on the testimonies at the Lantos Hearings as well as case law.

A. *Discrimination in Recruitment and Hiring*

Recruitment and hiring have posed a major challenge to Japanese multinational firms.[39] A recent Japan Society poll reveals that nearly one third of the surveyed U.S. affiliates of Japanese firms have received complaints of discrimination in their hiring and promotion practices.[40]

In general, Japanese employers abroad hire a disproportionately low percentage of Americans for upper-level management.[41] They systemati-

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36. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386-387 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971) (emphasis added).

37. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (emphasizing Congressional intent to combat overt discrimination, "the most obvious evil").

38. EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS 15 (Mack A. Player et al., eds., 1990).

39. WILLIAM C. BYHAM, SHOGUN MANAGEMENT 151 (1993). "Just consider the sheer number of differences in education, skill levels, culture, and expectations between the Japanese and North Americans." *Id.*

40. KOPP, *supra* note 18, at 22 (*citing* DANIEL BOB AND SRI INTERNATIONAL, JAPANESE COMPANIES IN AMERICAN COMMUNITIES 41 (1990)).

41. In their 1990 article, Mroczkowski and Linowes, both Professors of Business Administration at American University, wrote that more than one million non-Japanese employees work for Japanese companies worldwide. Nonetheless, a study by Japan's Ministry of International Trade and Industry revealed that these companies typically fill staff management positions with Japanese expatriates: "Of the top officials at Japanese owned subsidiaries abroad, 45.4% had been transferred from the home office against 17.3% for foreign-owned subsidiaries in Japan." Mroczkowski & Linowes, *supra* note 12, at 28. Associate Professor Schon Beechler of Columbia Business School explains: "Japanese companies are still using more than double the percentage of expatriates in their foreign affiliates than is typical of Western multinationals." Anne G. Perkins, *Japanese Multinationals: The Hiring of Expatriates Persists*, HARV. BUS. REV. 72 (Sept./Oct. 1994). Lewis Steel, a civil rights attorney who has handled a series of discrimination cases against Japanese employers, observes that some Japanese parent companies send over employees even for the lowest level of management. Among these firms, Japanese nationals occupy 30-40% of the entire workforce. Lantos Hearings, supra note 30, at 159. Judy Teller concluded, through her own experiences and observations at DCA Advertising (a wholly owned subsidiary of a Japanese advertisement company), that national origin and gender, rather than merit and dedication, constitute determining factors in an employee's future. Lantos Hearings, *supra* note 30, at 25 (explaining that American law, belief, and custom have been trampled). *See also* HORI, *supra* note 18, at 228-29 (1993) (discussing the low percentage of local employees assigned to managerial or executive positions at Japanese multinational firms); NAKATANI, *supra* note 18, at 42 (stating that virtually no Japanese firms in the U.S. would even consider the possi-

cally reserve managerial or executive positions for Japanese nationals rotated from parent companies.[42] Due to the sheer number of Japanese expatriates,[43] their values dominate corporate culture.[44] These values

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bility of promoting American managers to presidents or chief executive officers); Lansing & Palmer, *supra* note 26, at 165-66 (explaining that Japanese firms intend to facilitate a better understanding of the overall business operation through rotation of executives from one subsidiary to another). Few Japanese companies, both at home and abroad, hire foreigners as regular employees. John Shook, the first foreign employee of Toyota Motor Corporation in Japan made the following statement: "The whole company infrastructure is set up for the Japanese . . . we don't fit. If the company gets serious about hiring more foreigners, things will have to change." ROBERT M. MARCH, WORKING FOR A JAPANESE COMPANY: MANAGING RELATIONSHIPS IN A MULTICULTURAL ORGANIZATION 16 (1992). Typically, local staff play an extremely limited role in the business operation, isolated from the firm's decision-making process. Lantos Hearings, *supra* note 30, at 156-71 (containing a written statement by Lewis Steel, a civil rights attorney who has dealt with Japanese firms). Japanese employers often hire foreigners simply for their linguistic skills. A 1988 survey shows that three out of four foreign employees of Japanese firms are hired for international activities, and one in five for language skills. MARCH, SUPRA note 41, at 113. "Foreigners working for Japanese companies in Japan often feel frustrated by their limited duties, such as checking English texts for grammar or entertaining foreign visitors." This manifests the common perception among Japanese employers that foreigners will stay with the company only temporarily. At the same time, the employees' lack of Japanese-speaking skills may be another contributing factor. *Id.* at 114. They often hire locals merely as temporary contract workers. *Id.* at 115. Robert March refers to these foreign employees as second-class, "disposable" citizens. He also introduces the case of Denis Pawley, who was the top-ranking manager at Mazda USA in Flat Rock, Michigan. Pawley resigned in three years, convinced that he would never be given meaningful authority. March points out that Pawley erroneously expected to become a top executive in Mazda, because Japanese auto companies consider it essential for their global strategies to keep Japanese nationals in control. *Id.* at 164-65.

42. These companies value frequent rotation of managers, including overseas assignments, as a way to develop and maintain organizational flexibility. One American manager criticizes temporal overseas assignments of Japanese managers. He calls this common practice a "revolving door of executives," which makes it difficult for local staff to keep up with business operations. BYHAM, *supra* note 39, at 17. Likewise, another observer discusses rotation of managers as a source of discontinuity and a lack of direction among the local staff. Mullen, *supra* note 6, at 778. Virtually all rotating managers are men. Lantos Hearings, *supra* note 30, at 160.

43. Tomoko Hamada observes a steady increase of Japanese businessmen accepting transfers to overseas assignments. In 1986 alone, for instance, 58,951 Japanese transferred to foreign branches or subsidiaries. Hamada further notes: "[A]lready about two million Japanese businessmen and their families have been transplanted into foreign countries by Japanese companies. About a quarter million come to the United States." Hamada, *supra* note 7, at 136. The Japanese Ministry of International Trade and Industry (MITI) explained: "[T]he ability of Japanese investors to dispatch executive employees from Japan to manage and control their overseas subsidiaries is of the greatest importance and indeed is a basic prerequisite for the successful management of their overseas business activities." Amicus Brief of MITI at 5, Sumitomo Shoji America Inc. v. Avagliano, 457 U.S. 176 (1982). *See also* KAORU KOBAYASHI, THE MOST MISUNDERSTOOD COUNTRY 99 (1984) (discussing job rotation as a common method for Japanese firms to train managers to become generalists rather than specialists).

44. Mroczkowski & Linowes, *supra* note 12, at 29. One author discusses his observation of the staffing pattern at Mitsubishi International Corporation, a New York subsidiary of Mitsubishi Shoji, a major Japanese trading company. Although Americans comprise 75% of its employees, most of them engage in menial tasks as assistants for Japanese expatriates.

include "strong control from headquarters and a mentality that makes a clear distinction between insiders and outsiders — between Japanese at the core of the firm and foreigners at the periphery."[45]

For example, *Yap v. Sumitomo Corp. of America*[46] arose over such a rotation system. Defendant (SCOA) is the wholly-owned American subsidiary of a major Japanese trading company, Sumitomo Shoji Kaisha, Ltd.[47] SCOA systematically assigned Japanese males rotated from the parent company to managerial positions.[48] Non-Japanese plaintiffs

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He further notes a similar practice at Toyota in the U.S.: while Americans occupy the majority of executive positions, they only maintain inflated titles. As in the previous example, expatriates retain the real decision-making power. HORI, *supra* note 18, at 228-29. One observer describes a "dual administrative structure" typical in manufacturing and trading companies: "Japanese at the top, coordinating with Tokyo head office and making decisions, and local staff below responsible for operations." MARCH, *supra* note 41, at 115. "Japanese companies like to control overseas operations closely, and many Japanese managers admit that Tokyo gives them little freedom to act autonomously . . . . [M]ajor and minor policy decisions often are made at headquarters." BYHAM, *supra* note 39, at 91. Statistical surveys in the U.S., Europe, and the Asia-Pacific region have affirmed ethnic homogeneity of Japanese management from a comparative perspective as well. "[C]lose to 70% of middle/senior managers in Japanese firms abroad are Japanese, a marked contrast to American and European multinationals abroad, where only 10% of the same group come from the home country. As for the CEOs of overseas subsidiaries, virtually 100% are home country (i.e., Japanese) nationals in the Japanese case, contrasted to 75% being home country nationals with European subsidiaries, and 50% with U.S. subsidiaries abroad." MARCH, *supra* note 41, at 163.

45. This observation is based on a report by the Japan Economic Institute, funded by the Japanese Foreign Ministry. MARCH, *supra* note 41, at 118-19. The Japanese refer to subsidiaries as ko-gaisha (child company) in relation to oya-gaisha (parent company). These terms suggest "the existence of a familial relationship of control and dependency." Bulova Watch Co. v. K. Hattori & Co., 508 F.Supp. 1322, 1339 (E.D.N.Y. 1981) (*citing* K. HAITANI, THE JAPANESE ECONOMIC SYSTEM: AN INSTITUTIONAL OVERVIEW 126 (1976)). John Horton, Manager of Administration at Toyota Technical Center U.S.A., Inc. explains the dual management structure he has observed at the company: non-Japanese employees with allegedly management responsibilities must report to a parallel Japanese national manager. Lantos Hearings, *supra* note 30, at 191. Likewise, Judy Teller and Russel Goyette point to the practice of operating with a double standard by their former employer, DCA Advertising: one for the Japanese and the other for Americans. *Id.* at 24 & 31. Teller explained: "It was actually the stated policy of Japanese management that they could not treat the two groups alike." *Id.* at 24. Attorney Lewis Steel has observed a three-tiered structure in Japanese multinational firms: rotating staff from parent companies dominating the managerial positions, local male employees in the middle, and women at the bottom. *Id.* at 159. "With some notable exceptions such as Sony and Nissan, centralized control from Tokyo and reliance on Japanese managers to enforce it is still the pattern among many Japanese corporations." Mroczkowski & Linowes, *supra* note 12, at 28 (1990). Tomoko Hamada agrees with this view and asserts that "the Japanese firms" approach to mutinationalization derives from and is an extension of the interorganizational alliance between relational dynamics of the parent firm and its subsidiaries in Japan." Hamada, *supra* note 7, at 139. *See also* Perkins, *supra* note 41 (observing heavy reliance by Japanese firms on expatriates who can communicate with headquarters "through a common language, culture, and way of thinking").

46. Yap v. Sumitomo Corp. of America, No. 88 Civ. 700 (LBS), 1991 WL 29112 (S.D.N.Y. Feb. 22, 1991).

47. *Id.* at *1.

48. *Id.*

claimed discrimination on the basis of national origin in hiring, promotion, and compensation policies.[49] The U.S. District Court for the Southern District of New York approved a proposed consent decree which aimed at the greater use of the local staff in the senior management group. The decree committed SCOA, among others, to provide a variety of programs such as on-the-job training, career counseling, and management training sessions.[50]

A practice revealed in *EEOC v. Recruit U.S.A., Inc.*[51] provides a vivid and well-documented example of discriminatory hiring. In this case, Recruit, a Japanese job placement agency in California, used a code system to maintain a job candidate pool accommodating its clients' ages, as well as their racial, ethnic, and gender preferences.[52] Recruit used common names to denote race and gender;[53] for instance, the phrase Talk to Adam when coding a request by an employer seeking male applicants and Talk to Eve for female applicants.[54] IBM Japan, one of Recruit's clients,

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49. *Id.*

50. *Id.* at *3.

51. EEOC v. Recruit U.S.A., Inc., 939 F.2d 746 (9th Cir. 1991).

52. *Id.* at 748 n.1; Lantos Hearings, *supra* note 30, at 43 (a statement by Paul Schmidtberger that anywhere from 5 to 10 per 100 applications would be of "incorrect race" while more than that would be of "incorrect gender").

53. Recruit U.S.A., Inc., 939 F.2d., at 748 n.1; Lantos Hearings, *supra* note 30, at 7. Former Recruit employee Paul Schmidtberger stated that the firm's screening process would have forced him to screen out his own application despite his qualifications, including degrees from Yale University and Stanford Law School and fluency in Japanese. Lantos Hearings, *supra* note 30, at 42. Fumihiro Sasaki, Sub-Chief of the Legal Department at Recruit U.S.A., Inc. (hereinafter Recruit) views the firm's settlement with the EEOC as a mere compromise. Most of all, Recruit was concerned for publicized charges of its alleged discriminatory practices. KISHI, *supra* note 30, at 130-36. On April 26, 1989, and May 2, 1989, the San Francisco Chronicle published two articles, one on the company's coding system and the other on the internal memorandum indicating IBM Japan's request for excluding non-Oriental applicants. These articles were based on information provided by former employees, including Paul Schmidtberger, who testified at a Lantos Hearing. By the time of his resignation, Schmidtberger had obtained corporate documents regarding Recruit's charges. He refused to return them despite the company's plea and submitted them to the EEOC. Lantos Hearings, *supra* note 30, at 42. On May 26, 1989, shortly after the San Francisco Chronicle published the articles, R. Gaull Silberman of the EEOC charged Recruit with violation of Title VII and the Age Discrimination in Employment Act. The EEOC then obtained preliminary injunction prohibiting the company from destroying or removing the records beyond territorial discriminatory practices. At the appellate level, Recruit challenged this injunctive relief; it claimed that the EEOC violated Title VII's confidentiality provisions by issuing a press release and lifting the seal on the complaint and appended charges. The Ninth Circuit however, justified the EEOC's act, considering substantial public interest involved. *See* EEOC v. Recruit U.S.A., Inc., 939 F.2d 746 (9th Cir. 1991). In an interview with a Japanese journalist, Fumihiro Sasaki of Recruit expressed his discontent with the outcome of the case. Sasaki explained: "Because Schmidtberger was unsatisfied with his salary, he left the job, stealing a substantial amount of internal documents, and revealed them at the Lantos Hearing. We found it difficult to defend ourselves, because the court focused on the discrimination issues instead of violation of confidentiality provisions." KISHI, *supra* note 30, at 131.

54. Similarly, Recruit used "Talk to Haruo" for Japanese men; "Talk to Mariko" for

explicitly stated its preferences for job candidates: "Foreigners are no good"; "White people, black people, no; but second generation Japanese or others of Asian descent, OK."[55] For Meiko Securities, another client, Recruit ordered a candidate pool with a male to female ratio of four to one.[56] The settlement with the EEOC required the company to establish a $100,000 fund to be distributed among victims of discrimination and to provide training seminars which educate Japanese managers coming to the U.S. about American antidiscrimination laws.[57]

To take another example, the Daiichi Kangyo Bank in California, which possesses the world's largest banking assets,[58] allegedly conducted racially-motivated hiring. Karl Joachim Biniarz, former president and manager of the Bank's San Diego branch, testified about an instruction he had received from a Japanese senior executive: to have a "proper profile," meaning "no women or blacks," for a loan officer position.[59]

Moreover, Robert Cole and Donald Deskins researched site selection patterns by Japanese auto manufacturers in the U.S.[60] Questions arose over hiring practices by Honda of America Manufacturing Inc. at its manufacturing facilities in Marysville, Ohio. In 1977, Honda established its original hiring radius as twenty miles.[61] Consequently, merely 2.8% of Honda's workforce consisted of blacks although blacks accounted for 10.5% of the population at the Marysvile site.[62] In 1984, then EEOC

Japanese women; "Maria" for Hispanic women; and "Maryanne" for black women. The code was further used to accommodate employers' age preferences. For instance, "Suite 20 through 35" meant age twenty to thirty-five. Recruit U.S.A., Inc., 939 F.2d.at 748, n.1; Lantos Hearings, *supra* note 30, at 7.

55. This memorandum written in Japanese, "IBM Project Confirmation," was submitted to the Lantos Committee along with Paul Schmidtberger's statement. Paul Schmidtberger testified that the memo was taped to the wall of the Recruit office. Lantos Hearings, *supra* note 30, at 8.

56. *Id.* at 9.

57. *Id.* at 2.

58. The Greenlining Coalition notes that among the world's 20 largest banks listed in the American Banker, the top six are Japanese, and seven of the top 10 are Japanese. The top six banks and their asset size from the previous year are as follows: (1) Dai-ichi Kangyo Bank ($428.2 billion); (2) Sumitomo Bank Ltd. ($409.2 billion); (3) Mitsui Taiyo Kobe Bank Ltd. ($408.8 billion); (4) Sanwa Bank Ltd. ($402.7 billion); (5) Fuji Bank Ltd. ($399.5 billion); and (6) Mitsubishi Bank Ltd. ($391.5 billion). Lantos Hearings, *supra* note 30, at 328.

59. According to Biniarz, after the Bank fired two Filipino-American employees, a Japanese official said that Filipinos tend to be lazy. Biniarz claims that he himself was involuntarily terminated. *Id.* at 201-203.

60. Robert E. Cole & Donald R. Deskins, Jr., *Racial Factors in Site Location and Employment Patterns of Japanese Auto Firms in America*, 31 CAL. MGMT. REV. 9 (1988).

61. For its decision to choose the Marysvile site, Honda of America pointed to several reasons, such as active encouragement from the state of Ohio and superior access to the interstate highway system. Lantos Hearings, *supra* note 30, at 127-28. The company enlarged its hiring radius to 30 miles in 1986 and even further in 1987. *Id.* at 128.

62. Cole & Deskins, *supra* note 60, at 15. EEOC Chairman Evan Kemp discussed a geographical factor that may have affected hiring practices by Japanese employers. Japanese multinational firms would be expected to locate where tax and wage rates remain relatively low; many of minority groups are, however, located where tax and wage rates are high.

Chairman Clarance Thomas filed a charge against Honda for discrimination against women and blacks in hiring and promotion and against non-Japanese in engineering positions.[63] Refusing to accept the charges, Honda officials had repeated talks with the EEOC for four years.[64] At last, on March 24, 1988, Honda agreed to give 370 blacks and women a total of six million dollars in back pay.[65] In response to the EEOC charge, Honda evaluated its hiring patterns and began what it calls "corrective hiring."[66]

Cole and Deskins also published an article which analyzed the more general tendency of Japanese manufacturers to select areas with a low black population.[67] For this purpose, they cited an interview with Dennis

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Lantos Hearings, *supra* note 30, at 64.

63. *Id.* at 128 & 134.

64. Kunio Iwamoto, former Vice President of Honda who dealt with this case, insists that the firm's choice of the hiring radius was not intended to exclude certain applicants. Iwamoto speaks with confidence of Honda's equal employment opportunity policy which he says the company adopted long before the EEOC's charge was filed. He explains that the firm was hoping to help reduce a high unemployment rate within that radius by hiring as many locals as possible. In fact, Iwamoto says, Honda received about 30,000 applications constantly. KISHI, *supra* note 30, at 138-142.

65. Cole & Deskins, *supra* note 60, at 9 (*citing* Micel McQueen & Joseph White, *Blacks, Women at Honda Unit Win Back Pay*, WALL ST. J., March 24, 1988).

66. Lantos Hearings, *supra* note 30, at 134. Instead of simply expanding the hiring radius, Honda adopted a new policy of recruiting from a larger area including the neighboring counties. In addition, the company implemented and carried out five new policies: (1) to place newspaper advertisements stating that Honda does not discriminate; (2) to ask minority organizations to recommend prospective employees; (3) to conduct career guidance at colleges for blacks throughout the U.S.; (4) to educate Honda managers on the U.S. antidiscrimination laws and civil rights issues; and (5) to emphasize the importance of equal employment opportunity to all workers through President's speeches and so forth. KISHI, *supra* note 30, at 140. Iwamoto sees the company's settlement as a mere compromise. Iwamoto made the following statement in his interview with Nagami Kishi, a management specialist who surveyed employment discrimination cases against Japanese firms in the U.S.: "Since we expanded to the U.S. in 1959, we have operated our business, based on our attorneys' advice. In fact, we were confident that our company had taken root in American society . . . [h]owever, the EEOC expected greater social responsibility from us because of our rapid growth and prominence." *Id.* at 142. At a Lantos Hearing, Honda emphasized its effort to promote women and blacks by reporting an increase of women and blacks in what they call "production associates:" "From March 1984 to March 1988 employment of female production associates rose from 12.5% to 25.8%; and black production associates from 1.2% to 2.8%." Nonetheless, Lantos questioned the company's definition of "associates," which proved to be production line workers or assembly line workers. In fact, in Honda's upper-level management, 7% were women and there was only one black (out of about 150). Lantos Hearings, *supra* note 30, at 135. Based on his interview, Robert March introduces the following information on the "ostensible" behavior of Japanese managers at Honda in Marysville:

"[t]he Japanese in Marysville put more emphasis on communal living Japanese-style and reinforcing their common links with one another, than on adjusting to the new environment . . . [w]ouldn't it be nice to be back home? They would say to each other when relaxing. Having farewell parties (*sobetsukai*) and singing karaoke together seemed to be the things they talked about most, or had written about." MARCH, *supra* note 41, at 201.

67. Cole & Deskins, *supra* note 60, at 13.

Des Rosiers, who had performed several site studies for Japanese auto companies.[68] These employers, Des Rosiers says, scrutinize profiles of the community extensively "by ethnic background, by religious background, [and] by professional makeup."[69]

Likewise, it has been discovered that Japanese investors in the U.S. receive detailed census tract information from the Japan External Trade Organization (JETRO).[70] One JETRO publication was found to recommend California to site plants because of its higher Asian population, a potential source of "high quality" human resources.[71]

B. *Discrimination in Assignment and Promotion*

At Japanese multinational firms, local employees often find themselves trapped in job duties with minimal delegated authority.[72] The Greenlining Coalition, a California organization composed of minority groups and consumers, criticized the hiring pattern at the Mitsui Taiyo Kobe Bank, a bank with an asset base of $408.8 billion.[73] In its 1990 Annual Report, all 103 members of Board of Directors are Japanese males.[74] The twenty-two Advisory Board members and fourteen key or "Senior Managing Directors" are all Japanese males who are at least fifty-eight years old. Moreover, the top ninety-seven management persons are all Japanese males. The Coalition discussed the adverse impact of such homogeneous workforce in California, a state of diverse individuals including 13.5 million people of color and 8.35 million white women.[75]

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68. *Id.* at 17 (*citing* Doug Williamson, *Japanese Bias Comes to Light in Hiring Plans,* WINDSOR STAR SPECIAL RPT.: JOBS 2000, October 29, 1987, at 14).

69. Japanese employers try to find out, for instance, a ratio of accountants to farmers in the area. Also, the employers prefer a high German content, due to their positive stereotypes about Germans, such as having a good work ethic. *Id.* at 17-18.

70. *Id.* at 18. Established in 1958 by the Japanese Ministry of International Trade and Industry, JETRO performs a broad array of activities, such as import promotion and liaison between small businesses in Japan and their foreign counterparts. Dick K. Nanto, *in* JAPAN: A COUNTRY STUDY 203 (Frederica M. Bunge, ed., 1981).

71. Cole & Deskins, *supra* note 60, at 18.

72. Lantos Hearings, *supra* note 30, at 158-62. At Nissan America, Japanese managers "assist in the planning and checking of department activities, with the American staff carrying out and adjusting day-to-day operations." MARCH, *supra* note 41, at 17-18 (*citing* The International Herald Tribune, May 24, 1990). Lawyer Lewis Steel describes a three-tiered structure he has observed within those firms: Japanese nationals rotated from parent companies dominating the managerial positions, "even down to the lowest level of management;" locally-hired men at the middle level with limited chance for promotion; and women at the bottom, providing support services. Lantos Hearings, *supra* note 30, at 158-62. Chet Mackentire, former employee of Ricoh, explains that Japanese nationals occupied virtually all the firm's division heads throughout the U.S. Company representatives pointed to two reasons: "One, each division has profit and loss responsibility to the mother company in Japan; and two, they need division heads who they can rely on." *Id.* at 209.

73. *Id.* at 331.

74. *Id.* at 328.

75. *Id.* at 329. "As a result [of its discriminatory practices], Mitsui's all Japanese male control from Tokyo is unable to understand the marketing, lending and service needs of

In *Adames v. Mitsubishi Bank*,[76] four women sued their former employer, Mitsubishi Bank's New York Office (Mitsubishi), alleging discrimination based on their non-Oriental status. Plaintiffs asserted that they were hired as analysts but were actually confined in positions as administrative assistants.[77] Mistubishi maintained a "dual staff system," including rotating staff (executive and managerial employees from the head office in Japan on assignments of limited duration) and local staff (individuals who were hired locally). Plaintiffs described the gap between these two as one which "significantly impeded the ability of local staff at all levels to achieve promotions or salary increases."[78] Only twenty officer positions were allocated to local staff, as compared to fifty-five officer positions to rotating staff; of the twenty officers among local staff, only one involved a position higher than the first level of assistant manager; moreover, of the top nineteen positions, eighteen were held by Japanese rotating staff.[79] The court denied Mitsubishi's motion for summary judgment.

Some employers give inflated job titles to local employees while forcing them to report to a Japanese "shadow manager" who retains the decision-making power.[80] The Daiichi-Kangyo Bank, for instance, gave "no authority whatsoever" to a former vice president and manager of its San Diego office without receiving approval from a Japanese expatriate through the head office in Los Angeles.[81]

Furthermore, at Toyota Technical Center (TTC), John Horton, a middle management employee of ten and a half years, alleged a discriminatory barrier at the firm.[82] TTC's top management denied Horton's promotion twice in 1990 despite the exemplary performance appraisals he

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America's most diverse business culture and California's 700 billion-dollar economy." *Id.* at 331. The Coalition compares Mitsui's discriminatory hiring pattern with fair employment practice at the Bank of Tokyo's Union Bank, another Japanese bank located in California. Union Bank has successfully promoted its comprehensive equal employment opportunity policy since 1988. The Coalition commends the Bank's effort in achieving its goal that women and people of color will occupy 60% of the new senior management appointments. *Id.* at 330.

76. Adames v. Mitsubishi Bank, Ltd., 751 F. Supp. 1548 (E.D.N.Y. 1990).

77. *Id.* at 1551-51.

78. *Id.* at 1552.

79. The Bank did not contest these figures. However, it denied that any specific positions were allocated to the rotating staff. *Id.*

80. MARCH, *supra* note 41, at 165. *See also* Lantos Hearings, *supra* note 30, at 161 (noting that business transactions by local staff are often subject to approval by Japanese employees even if they possess limited knowledge or skills in that particular field); *id.* at 168 (observing that some Japanese firms refer to clerical employees as officials and managers to make it appear that they ensure fair employment).

81. Lantos Hearings, *supra* note 30, at 201-2.

82. Horton's job title is manager of administration. Horton is in charge of purchasing, import and export, and facilities. He calls himself "one of only very few Americans at the management level although none of [them] has advanced beyond middle management." Approximately 20 employees above middle management are all Japanese citizens although, in Horton's view, some of them are less qualified than the U.S. citizens in middle management positions. *Id.* at 188-89.

had received on a constant basis.[83] On both occasions, he observed that the positions went to Japanese nationals while no consideration was given to Americans.[84] Horton calls TTC a rotating training ground for Japanese expatriates which prevents qualified Americans from advancing.[85]

C. *Discrimination in Salary and Compensation*

Some have questioned a disparity in salary and compensation between Japanese and American employees. Judy Teller, former employee of DCA Advertising (DCA), a wholly owned subsidiary of Dentsu Inc., a Tokyo-based advertising and communications company, alleged that DCA provided material benefits exclusively for its Japanese employees.[86] These included "cars, generous housing allowances, tuition for their children, [and] a double bonus system by which they were rewarded for the same work efforts."[87] Moreover, Teller said, for Japanese expatriates, the firm incurred expenses for a university English immersion program of several months.[88] In contrast, for American employees studying Japanese, DCA only paid up to half tuition for once-a-week language classes, the actual amount depending on the grade received.[89] Notwithstanding lack of educational opportunities, the company massively dismissed Americans, claiming their positions required fluency in Japanese.[90]

The Sanwa Bank, the world's fifth largest bank and the twelfth largest corporation in the world ranked by assets, allegedly reimbursed part of tuition for employees attending graduate school when they maintained a rating of two or better.[91] John L. Piechota, an American worker with the highest rating, was expressly denied this benefit. Yukio Harada, his manager, told him it was because "the Japanese have a job for life and Americans don't."[92] Harada even canceled Piechota's technical seminars that had been approved and paid for; in contrast, Harada had constantly allowed the Japanese in similar positions to take such seminars.[93]

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83. *Id.* at 189-190.

84. *Id.* at 189.

85. *Id.* at 190 (noting TTC's periodical implementation of "new levels of authority to insert between Horton's position and that of upper management so as to exclude [him and other Americans] from competitive promotions and advancements").

86. *Id.* at 24.

87. *Id.* at 24. Typically, salaries for Japanese employees include benefits such as housing, commuting, family, pension, health plan, and the like. MARCH, *supra* note 41, at 112.

88. Lantos Hearings, *supra* note 30, at 24.

89. *Id.*

90. *Id.* Teller further testified about the existence of double standards at DCA: one for Japanese and the other for Americans. She added, "It was actually the stated policy of Japanese management that they could not treat the two groups alike, and the difference was patent in the way the two groups were treated." *Id.*

91. *Id.* at 213.

92. Under this policy, the company entirely reimbursed Kimisuke Fujimoto's education at Stanford University. *Id.*

93. *Id.* at 218.

D. *Exclusion from the Decision-Making Process*

Some American employees have allegedly been excluded from their companies' communications and decision-making network.[94] John Horton, a manager fluent in Japanese, asserted that his employer, TTC, ordered him not to speak Japanese in the workplace.[95] The firm also prohibited Japanese employees from speaking their language in his presence. Horton argues that these rules were intended to exclude him from "contact with all but a select group of company officials."[96]

Similarly, some Japanese managers prevent American workers from participating in after-work and weekend gatherings, where they exchange vital business information.[97] Both Nikko Securities and DCA Advertising held those meetings exclusively for Japanese employees.[98] At DCA, when an American employee suggested including local staff in those functions, he was expressly told that they were reserved for the Japanese.[99] Piechota, former employee of Sanwa Bank, criticized weekly gatherings at a California branch, which whites, blacks, or Hispanics were prohibited from attending.[100] The participants, exclusively Japanese nationals, often made important decisions at these meetings.[101]

E. *Discrimination in Dismissal*

Goyette v. DCA Advertising Inc.[102] arose over the discharge of twenty-three employees in September, 1990. At DCA Advertising,[103] twenty-two of the discharged employees were Americans; one of them was a Japanese woman who had expressed her intent to retire.[104] Plaintiffs alleged discrimination based on national origin discrimination. The court granted plaintiffs' motion for summary judgment with respect to the Title VII intentional discrimination claim.[105] DCA's president, Toshio Naito,

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94. A study affirms that Japanese managers are rarely active in improving communications between Japanese and American employees; they often fail to encourage language study or to organize social activities including both Japanese and Americans. MARCH, *supra* note 41, at 97.

95. Lantos Hearings, *supra* note 30, at 196.

96. *Id.*

97. *See* BUHAM, *supra* note 39, at 17; Lincoln, *supra* note 29, at 94, 96 (introducing a result of a comparative survey that Japanese employees are far more likely than Americans to socialize after work).

98. Lantos Hearings, *supra* note 30, at 19 & 25.

99. *Id.* at 25.

100. *Id.* at 213.

101. *Id.* (noting that whites, blacks, or Hispanics were prohibited to attend these meetings).

102. Goyette v. DCA Advertising, Inc. 828 F. Supp. 227 (S.D.N.Y. 1993).

103. DCA Advertising is a wholly-owned subsidiary of a Japanese advertising agency. *Id.*

104. *Id.* at 229.

105. "Retention by Japanese employer's executives indicating intent to discriminate against American employees of subsidiary of Japanese corporation, reassignment of duties to Japanese employees, and additional benefits provided to Japanese expatriates and Japa-

had told Russell Goyette, former Vice President and one of the Americans fired: "We have to treat Americans and Japanese differently. We have to favor the Japanese."[106] Another plaintiff, Judith Teller, asserted that the firm dismissed many qualified and productive Americans while guaranteeing the jobs of the Japanese, some of whom were "clearly unqualified."[107]

Examples of age discrimination are also plentiful. In July 1990, Sanwa Bank California fired white, black, and Hispanic workers over the age of forty; in contrast, it fired neither Japanese nationals nor Orientals. Piechota claims that he was "physically removed from the property under escort."[108] Evidence clearly indicated that the discharge was not due to economic reasons.[109] Similarly, in *Kelly v. TYK Refractories Co.*,[110] the Third Circuit discussed, among other claims, wrongful discharge and reversed an award of summary judgment for TYK. Plaintiff served as the Chief Operating Officer and Executive Vice-President of TYK, a wholly owned subsidiary of a Tokyo-based trading company. TYK allegedly gave Kelly a discriminatory instruction: to discharge older employees and to replace them with younger Japanese males.[111]

Lastly, Ricoh Corp., under its employee reduction plan of one hundred people, exclusively laid off Americans in February, 1990.[112] Nancy Cosgrove, one of the employees laid off, summarized her observation of Ricoh as follows: the firm had provided the "perfect environment for covert, insidious discrimination," which was "fraught with double standards

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nese-Americans created factual issues precluding reason for discharges-reduction in force to cut losses-was pretext for discrimination on basis of national origin and whether legitimate motives played role in discharges." *Id.* at 228.

106. This quote derives from Naito's response to Goyette, who complained about discharge to Naito and asked him for alternative employment with the company's affiliate. *Id.* at 230.

107. In March of 1990, Teller received a performance review by Kiyoshi Eguchi, DCA's general manager. Her overall work was rated four or "exceeds standards" on a scale of one to five. *Id.* at 231. DCA retained Japanese employees in Teller's department although they were arguably less qualified than Teller. For instance, it retained Hiroaki Yamada, a Japanese expatriate, who was considered incompetent. *Id.* Also, evidence suggests that Goyette was qualified for his position. *Id.* at 233. *See also* Lantos Hearings, *supra* note 30, at 25 (Judith Teller discussing an example of a Japanese employee who spent a year in his private New York office "reading the newspaper and that was his activity, at full pay, approximately $100,000 per year . . .").

108. Lantos Hearings, *supra* note 30, at 214. Piechota had received the highest rating possible in his performance review. He also claims that he put in 938 hours of authorized but uncompensated overtime in two years. *Id.* at 212.

109. According to a 1990 annual report, the Bank's profits more than doubled from the previous year, which was a record high since the Bank was formed in 1972. The same report also shows an increase of stockholder equity by 19%. Furthermore, its parent company, Sanwa Bank Ltd., had the highest profits in its history as well as the second highest profits of any other bank in Japan. Lantos Hearings, *supra* note 30, at 214.

110. Kelly v. TYK Refractories Co., 860 F.2d 1188 (3rd Cir. 1988).

111. *Id.* at 1190.

112. Lantos Hearings, *supra* note 30, at 41.

for Japanese personnel, Americans, men and women."[113]

F. *Sex Discrimination*

Japanese firms typically assign their female employees to clerical or administrative positions with little chance for promotion.[114] As civil rights attorney Lewis Steel has observed, college-educated women may find themselves trapped in what he calls a glorified secretarial role, although performing vital aspects of business transactions, they are generally referred to as secretaries and paid accordingly.[115]

In *Avagliano v. Sumitomo Shoji America, Inc.*,[116] a landmark case which will be analyzed in a later section of this article, female secretaries of a wholly owned Japanese subsidiary challenged the firm's practice of reserving managerial posts for male Japanese nationals.

Also, at Nikko Securities, only one thirty-forth of the managerial posts was held by a woman.[117] Susan Minshkin, former employee of Nikko, testified about various forms, both overt and subtle, of gender discrimination.[118] Minshkin was hired as an administrative assistant, the entry level professional position for college graduates; those positions were entirely composed of women.[119] On the other hand, a man whose qualifications were nearly identical to Minshkin's was hired as a sales trainee, a higher level position.[120] The company also required seven years of work before promoting women to the level of assistant vice president, the lowest officer level; it required less than two years for men.[121] The company

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113. Nancy Cosgrove, one of the employees laid off, points to the following as the reasons for her discharge: her filing complaint with the Division of Civil Rights; her litigation against Ricoh; and her decreased workload due to her pregnancy. *Id.*

114. *Id.* at 158. Today 37% of managers in the U.S. are women; the comparable figure in Japan is 2%. BYHAM, *supra* note 39, at 176-78. For a discussion of gender discrimination in Japan and the limited effect of the Equal Employment Opportunity Law, *see generally* Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. (forthcoming May 1995).

115. Steel further notes a recent increase of Asian-born (mainly from Japan, Korea, and the Philippines) female employees hired by Japanese firms. In his view, this practice reflects employers' belief that Asian women are much less likely to protest unfair treatment than Caucasian women. Lantos Hearings, *supra* note 30, at 162.

116. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982).

117. Lantos Hearings, *supra* note 30, at 140. *See also* Ross v. Nikko Sec., 53 Fair Empl. Prac. Cas. (BNA) 1121 (S.D.N.Y. 1990). However, Nikko Securities (hereinafter "Nikko") justified this disproportionate figure as simply the results of the hiring. Evan Steward, General Counsel of Nikko, emphasized the firm's effort in active hiring and promoting women. Tom Lantos nevertheless expressed his skepticism about this statement, pointing to the statistical disparity between men and women at the managerial level. Lantos Hearings, *supra* note 30, at 140.

118. Lantos Hearing, *supra* note 30, at 18-20.

119. *Id.* at 18.

120. He also received a higher rate of pay than any of the other women who had already been promoted two levels above him and others with equal qualifications, including women who were employed as administrative assistants and secretaries. *Id.*

121. *Id.* at 19.

required all women, including professionals, to fill in for the receptionist during the lunch break; no men were required to do the same.[122] Minshkin further alleged that "[s]ingle women were frequently asked about their future marriage plan, on one hand as encouragement to marriage, on the other to assess when the women would be leaving the company."[123]

III. DISCRIMINATION CHARGES FROM THE JAPANESE PERSPECTIVE

A. *Claims of Bias Suits*

Some observers, both Japanese and Americans, have equated mounting criticism against Japanese employment practices with racism. For instance, some challenge what they call an anti-Japan policy advocated by the Clinton administration; according to their view, this policy has forced the EEOC to scrutinize and focus public attention on hiring practices by Japanese firms.[124] One Japanese scholar expresses a similar view in his observation of the Lantos Hearings; Professor Yoshihiro Tsurumi of Baruch College, City University of New York, called the hearings "a witch-hunt inquisition" which was "one-sided and isolated tales of woe" from "disgruntled individuals."[125]

Testifying before the Lantos Committee, the EEOC Chairman Evan Kemp refused to declare Japanese employers more discriminatory than their U.S. counterparts.[126] In 1990, the EEOC received nearly 60,000 discrimination charges;[127] among this figure, the Commission identified 115 charges against 35 Japanese firms in the U.S.[128] Kemp described the number of charges and lawsuits against Japanese employers as an "extremely small universe," cautioning the risk of drawing a specific conclu-

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122. *Id.* at 18.

123. *Id.* at 19.

124. *Zaibei Nikkei Kigyo Ijime ga Hajimaru? [Japanese-Firm Bashing Has Begun in the U.S.?]*, SANDEI MAINICHI, June 12, 1994, at 120-21. Kilbert, Tallent, and Agawa, lawyers and co-editors of the book entitled Pitfalls for Japanese Employers in the United States, expressly stated that so-called Japan bashing was the true motive behind the Lantos Hearings. PITFALLS, *supra* note 8, at iii.

125. KOPP, *supra* note 18, at 19 (*citing* Yoshihiro Tsurumi, The Ghost of McCarthyism Haunts Japanese Firms, PACIFIC BASIN Q. 15 (Summer/Fall 1991)).

126. In response to the Committee's request, Kemp presented some statistical evidence regarding employment practice by Japanese companies in the U.S. At the beginning of his testimony, however, Kemp explained the EEOC's reluctance to review particular employers for closer scrutiny based on national origin. Doing so, he said, conflicts the EEOC's mission "to enforce the laws against job discrimination fairly and even handedly without regard to the factors that we tell employers to ignore, including national origin." Lantos Hearings, *supra* note 30, at 63-71. *See also* KISHI, *supra* note 30, at 107-14 (providing general information on the EEOC's functions).

127. There were precisely 59,426 charges. Lantos Hearings, *supra* note 30, at 65.

128. Among the charges against Japanese employers, 37% alleged race discrimination, 34% sex discrimination, 29% age discrimination, and 14% national origin discrimination. *Id.*

sion.[129] Furthermore, referring to Recruit's illegal use of codes to screen out minorities,[130] Kemp pointed to about three hundred charges currently filed against American companies, which have also used codes on job order forms.[131]

In their study on minority hiring by Honda Motor Company,[132] Cole and Deskins noted that Japanese auto manufacturers are not more discriminatory than the U.S. counterparts. According to them, the practices by Japanese employers are more visible because they are inexperienced in disguising such practices and have no reservations talking about race.[133]

Rochelle Kopp, Principal of Japan Intercultural Consulting, agrees that lawsuits involving Japanese multinational firms often invite more media coverage than they deserve, "simply because they involve Japanese firms."[134] Kopp points out that some plaintiffs may see their Japanese employers as "deep-pocketed and vulnerable" and thus bring frivolous lawsuits.[135] She further introduces a comment made by some defense lawyers for Japanese firms: "many of [our] courtroom opponents are extortionists who threaten to whip the jury into a Japan-bashing frenzy if they aren't offered a handsome settlement."[136]

In fact, some courts have flatly rejected plaintiffs' discrimination claims and granted summary judgments for Japanese corporate defendants. *Walsh v. Eagle Wings Industries, Inc.*[137] provides one example in which the court found each of the allegations wholly unsupported. The defendant (hereinafter "EWI") is a wholly-owned subsidiary of a Japanese corporation. Walsh's allegations against EWI included the firm's refusal to give him the same relocation benefits as those given to Japanese employees, refusal to allow him to take language classes comparable to those offered to Japanese employees, and providing company-sponsored outings solely to Japanese employees.[138] The U.S. District Court for Central District of Illinois found none of these claims factually supported and granted a summary judgment accordingly. For instance, written docu-

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129. Nevertheless, Kemp discussed some general observations on Japanese companies. For instance, he testified that Japanese companies tend to hire a higher percentage of Asian or Pacific Islanders than other companies. The EEOC found that Asians and Pacific Islanders accounted for 13% of the workforce at Japanese firms, compared to 2.6% of all other companies surveyed. *Id.* at 64. Other authors cited Kemp's testimony, stating: "This testimony must have disappointed the Lantos Committee which originally aimed at Japan basing." PITFALLS, *supra* note 8, at iii.

130. For a summary of this case, *see supra* notes 51-57 and accompanying text.

131. Kemp added that litigation is pending against some American employers in North Carolina and New York. Lantos Hearings, *supra* note 30, at 71.

132. *See supra* note 60.

133. Lansing & Domeyer, *supra* note 24, at 153 (*citing* Cole & Deskins, *supra* note 60, at 18).

134. KOPP, *supra* note 18, at 21.

135. *Id.* at 241.

136. *Id.* (*citing* Mark Thompson, *Japan Inc. on Trial*, Cal. Lawyer 44 (May 1989).

137. Walsh v. Eagle Wings Industries, Inc., No.89-2052, 1991 WL 90906 (C.D.Ill. 1991).

138. *Id.* at *1.

ments revealed that the relocation policy for Japanese employees was indeed more restrictive than the one given to Walsh.[139] Likewise, Walsh was "unable to adduce even the slightest proof" that company had sponsored recreation and excursion trips exclusively for its Japanese employees.[140] The court found it undisputed that EWI had offered such activities for all employees and Walsh had never been refused admission.[141] Walsh, however, assumed that he had been excluded, simply because he had seen only Japanese participants or because he had seen a sign advertising the trips in Japanese.[142]

Similarly, in *Bagnell v. Komatsu Dresser Co.*,[143] the U.S. District Court for the Northern District of Illinois condemned the terminated American employee's attempt to "portray a well-orchestrated conspiracy to remove him because of his U.S. origin and to replace him with a Japanese person."[144] Confronted with the discrimination charge, Komatsu Dresser (KD) based its reason for firing Bangnell on his expense account falsifications on numerous occasions.[145] Bagnell's job as a sales manager had constantly kept him on the road and required him to keep records of the expenses incurred so that he could be reimbursed by KD.[146] The questionable practices ranged from "padded expenses (such as a receipt altered to reflect an amount more than six times the actual charge)" to "double submission of the same receipt, as though two separate charges were involved."[147] The court agreed that these repeated inaccuracies qualified as a legitimate good faith reason for the termination.[148] Bagnell further failed to establish that the same degree of deception would have been tolerated in non-American employees.[149] The court was not reluctant to express its frustration when it stated: "[i]t would take pages to address each of the gossamer strands from which Bagnell seeks to weave his imaginary conspirational web. In candor, the trip is simply not worth it."[150] Accordingly, the court granted summary judgment for KD.[151]

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139. *Id.* at *3.

140. *Id.*

141. *Id.*

142. *Id.*

143. Bangnell v. Komatsu Dresser Co., 838 F.Supp. 1279 (N.D.Ill. 1993).

144. *Id.* at 1288-89.

145. *Id.* at 1284.

146. *Id.* at 1281.

147. *Id.* at 1284. In one instance, Bagnell reported an expense of $95.00 from the Marriott Windows, Columbus, Ohio. The hotel, however, faxed a copy of a receipt for two breakfast buffets at a cost of $14.70. The company was also concerned about other instances "where service establishment identification had been torn off, dates had been altered and a $91.59 charge had been reported for drinks at a golf outing that Grzelak (who was in attendance) did not recollect Bagnell purchasing." *Id.* at 1281-82.

148. *Id.* at 1284.

149. *Id.* at 1288-89.

150. *Id.* at 1289. The court further stated: "[n]othing indicates that anything was at work other than a desire to rid the company of an employee . . . who had . . . proved in his boss' judgment to be cheating regularly on his expense account." *Id.* at 1290. Moreover, the court rejected Bagnell's allegation that KD had breached his employment contract in dis-

These two cases cannot be the sole depiction of bias suits against Japanese corporations. Nonetheless, they do suggest the possibility that some Americans may attempt to fabricate a race or national origin discrimination theory against their Japanese employers.

B. *Anti-Japanese Sentiment in the U.S.*

Among the American public, feelings of resentment against the Japanese have grown stronger as the trade deficit mounts.[152] Consequently, some Americans may hold an overly hostile view of vigorous economic activities by Japanese investors.[153] The following tragedy highlighted growing tensions between Japan and the United States: in 1982, two laid-off auto workers (a father and his stepson) in Detroit, Michigan, expressed their frustration toward the Japanese when they brutally murdered Vincent Chen, a Chinese American.[154] Ronald Ebens, the father, yelled at Chin, "It's because of you . . . that we're out of work." As one author noted, the killers "transferred blame not only from the Japanese government to the Japanese people, not only from the Japanese people to United States citizens of Japanese descent, but finally from Japanese Americans to anyone unlucky enough to bear Asian features."[155]

The hostility, often known as Japan-bashing, further intensified during the late 1980s.[156] In 1987, the Harvard Business Review published an article entitled *Only Retaliation Will Open Up Japan* in an "almost war-like tone:"[157] "To hit the deficit where it hurts us most, we need a target rifle, not a shotgun."[158] In the same year, Japan faced a "political

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charging him. The company's employee handbook cautions that it does not constitute a contract. Also, the handbook clearly articulates its policy that "falsification of company records subjects an employee to termination without notice." *Id.* at 1291.

151. *Id.* at 1291.

152. Katayama, *supra* note 18, at 8 (noting that Japan's trade surplus with the rest of the world exceeded $100 billion in 1992); Ronald C. Brown, *The Faces of Japanese Labor Relations in Japan and the U.S. and the Emerging Legal Issues under U.S. Labor Laws*, 15 SYR. J. INT'L & COMP. L. 231, 232 (1989) (discussing political, economical, social, and legal effects of Japan's high trade deficit, which amounted to $60 billion in 1987). *See also* Mullen, *supra* note 6, at 756-57 (providing various examples of how Americans have harbored negative views of the Japanese).

153. In 1992, the U.S. bilateral trade deficit with Japan amounted to $49 billion. In the same year, Japan's trade surplus with other nations exceeded $100 billion. Katayama, *supra* note 18, at 8. One observer commented: "Americans tend to ignore the fact that Britain has more money invested in the United States and Canada controls 26 percent of all foreign owned real estate compared to 15 percent control rate for Japan. However, when these countries are investing in the United States, we do not say too much; it is only when Japan enters the picture that Americans start to get riled up." Lansing & Domeyer, *supra* note 24, at 154.

154. U.S. v. Ebens, 800 F.2d 1422 (6th Cir. 1986).

155. Note, *Racial Violence against Asian Americans*, 106 HARV. L. REV. 1926, 1928 (1993).

156. TOKOMO HAMADA, AMERICAN ENTERPRISE IN JAPAN 2 (1991).

157. *Id.*

158. *Id.* (citing Robert T. Green & Trina L. Larsen, *Only Retaliation Will Open Up*

firestorm" in the U.S: Japan's breach of an international agreement was revealed.[159] Japan's Toshiba Machine Company had sold prohibited military technology to the then Soviet Union; this had enabled the Soviets to build submarines with quiet propellers, undetectable by acoustic devices the U.S. had strategically placed on the ocean floor.[160] The estimated cost of damages done to the U.S. exceeded thirty billion dollars.[161] An anti-Japan movement spread in various forms, ranging from banning the sale of Toshiba products to smashing a Toshiba cassette player with sledgehammers on the grounds of the Capitol.[162]

As these incidents suggest, the current anti-Japanese atmosphere gives Japanese firms even more compelling reasons to prevent discrimination charges.[163] Experts predict a continued rise in Title VII litigation against Japanese firms.[164] In general, explosion of litigation has plagued both domestic and foreign employers across the United States; the number of discrimination suits has skyrocketed by more than twenty-two times over the past two decades.[165] In addition, a survey by the Japanese Ministry of Labor reveals that fifty-seven percent of 331 Japanese firms operating in the U.S. possibly face discrimination suits.[166] Over seventy percent of the surveyed firms have urged the Ministry for advice on "how to avoid 'unnecessary' trouble."[167] In other words, these employers themselves are now acutely aware of the need to implement defensive strategies to insulate themselves against discrimination charges. Also importantly, American jurors in transnational litigation may be culturally inclined to distrust Japanese corporate defendants. For all these reasons,

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Japan, HARV. BUS. REV. 6:22-28 (Nov./Dec. 1987)).

159. Along with Toshiba, Norway's Kongsberg Vaapernfabrikk as well sold the same kind of technology to Soviet. CHOATE, *supra* note 6, at 7.

160. "These Soviet submarines, loaded with multiple-warhead missiles, can now creep undetected so close to the U.S. coast that they could destroy most of America's strategic arsenal before it could be launched." *Id.*

161. *Id.*

162. *Id.*

163. Street, *supra* note 28, at 387 & 401.

164. The factors behind the expected rise include the following: a greater number of Americans working for Japanese companies; deterioration of economy; increase of layoffs and discharge by Japanese companies; strained Japan-U.S. relationship; increase of labor disputes in American society as a whole; media attention focused on business operations by large Japanese corporations in the U.S. PITFALLS, *supra* note 8, at iii.

165. Jay Finegan's article explores employment litigation as an epidemic in American society. Finegan notes that the number of current discrimination suits account for an estimated one-fifth of all civil suits filed in U.S. courts. Jay Finegan, *Law and Disorder*, INC. 64 (Apr. 1994). The Newsweek magazine reports a sudden increase of sexual harassment complaints filed with the Equal Employment Opportunity Commission: from 6,883 in fiscal year 1991 to more than 12,000 in 1993. "Money doled out to settle EEOC claims nearly doubled as well, from $12.7 million in 1992 to $25.2 million last year." Seena Nayyar & Susan Miller, *Making It Easier to Strike Back*, NEWSWEEK, Sept. 12, 1994, at 50.

166. MARCH, *supra* note 41, at 118 (*citing Trouble Ahead*, WALL ST. J., Aug. 29, 1989, at 1).

167. *Id.*

the employers should direct their efforts toward implementing preventive strategies.

IV. TITLE VII DEFENSES FOR JAPANESE FIRMS

This section explores two primary defenses that Japanese firms have asserted against discrimination charges, points out the limited scope of these defenses and further emphasizes the necessity of adopting a new employment policy intended to prevent disputes.

A. *Friendship, Commerce, and Navigation Treaty*

1. Conflict between the FCN Treaty and Title VII

Some Japanese firms have invoked their Title VII immunity under the Treaty of Friendship, Commerce, and Navigation.[168] The U.S. and Japan signed this commercial agreement in 1953 with an aim to "give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms."[169] Article VIII(1) of the FCN Treaty provides: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."[170] This provision gives employers of both nations hiring discretion to facilitate the staffing of overseas business operations.[171] Some Japanese firms have asserted that the Treaty gives them hiring preference for Japanese nationals within the managerial ranks. However, such a hiring pattern inevitably results in discrimination on the basis of national origin, which is expressly prohibited by Title VII.[172] This apparent conflict between the Treaty provision and Title VII has sparked

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168. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063 [hereinafter FCN Treaty]. Since World War II, the U.S. signed friendship treaties with more than two dozen nations. Abraham, *supra* note 7, at 485.

169. Sumitomo Shoji America, Inc. v. Avigliano v. 457 U.S. 176, 185-86 (1982). The Supreme Court further described the purpose of the FCN Treaty as "not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage." *Id.* at 187-88.

170. FCN Treaty, *supra* note 168, at art. VIII(1), at 2070.

171. Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d. 552, 554-55 (2nd Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

172. Title VII distinguishes citizenship from national origin and bans only discrimination based on the latter. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (distinguishing national origin discrimination from citizenship discrimination). In Japan, however, citizenship is virtually synonymous with national origin; those of Japanese origin make up ninety-nine per cent of the nation's population. David T. Wilson, *Foreign Owned Subsidiaries and National Origin Discrimination: Can Federal Employment Discrimination Law and Employer Choice Provisions be Reconciled?* 10 ARIZ. J. INT'L & COMP. L. 507, 526 (1993) (*citing* JAPAN: A COUNTRY STUDY 90 (Ronald E. Dolan & Robert L. Worden, eds., 5th ed. 1992). *See also* Cary B. Samowitz, *Title VII, United States Citizenship, and American National Origin*, 60 N.Y.U. L. REV. 245 (1985).

a debate among numerous legal scholars.[173] Difficulty in resolving this conflict partly stems from the historical fact that the Treaty was ratified in 1953, before the enactment of Title VII. Title VII neither refers to the FCN Treaty nor expressly indicates whether it encompasses foreign employers in the U.S. The existing U.S. civil rights laws fail to provide a stable framework for reconciling two competing interests: promoting foreign investment by allowing investors certain hiring discretion, as opposed to adhering to America's uncompromising commitment to civil rights.[174] In other words, the U.S. legislation has yet to confront the challenge posed by globalization of the workforce.[175] In her recently published book, Rochelle Kopp, Principal of Japan Intercultural Consulting, explains the ambiguity surrounding the applicability of U.S. discrimination laws in the international arena:

> Future cases will undoubtedly explore arcane legal issues raised by the conflict between this international treaty and domestic civil rights laws . . . . Clearly American (and international) law hasn't caught up with the challenges posed by international personnel policies that extend across borders and affect employers of more than one nationality.[176]

2. Sumitomo Shoji America, Inc. v. Avagliano

In *Sumitomo Shoji America Inc. v. Avagliano*, [177] the Supreme Court considered whether the Treaty privilege extended to the Sumitomo America, a wholly owned subsidiary of a Japanese trading company. Here female secretarial employees brought a class action against Sumitomo America, alleging sex and national origin discrimination.[178] They claimed that the firm had reserved its upper-level managerial positions mainly for Japanese men.[179] The Second Circuit agreed to provide Sumitomo America with the Treaty defense in hiring Japanese nationals for the key

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173. Many articles have explored the availability of Article VIII(1) defense to Japanese multinational firms. *See supra* note 26.

174. Mullen, *supra* note 6, at 780-82. *See also* Orebic, *supra* note 26, at 406 (concluding that the resolution of the conflict between the Treaty provision and Title VII depends on a balancing of the two policies).

175. Mullen, *supra* note 6, at 782 (suggesting one possible approach of negotiating bilateral or multi-lateral Equal Employment Opportunity agreements).

176. KOPP, SUPRA note 18, at 243. *See also* Mullen, *supra* note 6, at 782 (concluding that "American antidiscrimination law must be adapted to address the multidimensional nature of the EEO charges involving foreign-owned corporations"); Rosner, *supra* note 26, at 894 (stating that "[t]he employment practices of Japanese subsidiaries present a case of first impression in the employment discrimination field).

177. Sumitomo, 457 U.S. 176. Sumitomo is called *sogo shysha* in Japanese, meaning a general trading company. *Sogo shyosha* represents one of the most typical forms of Japanese multinational firms vigorously conducting overseas business activities. Lansing & Palmer, *supra* note 26 (stating that these firms may distribute 20,000 individual items and maintain resident offices in as many as 100 foreign nations).

178. Avigliano, 638 F.2d. 552.

179. *Id.* at 553.

positions.[180] The Supreme Court reversed the decision;[181] in its analysis, the Court viewed Sumitomo America, a subsidiary incorporated under the New York laws, as a U.S. company subject to Title VII.[182] It further distinguished a locally incorporated subsidiary from a branch of a foreign corporation. However, the Court did not address whether an American subsidiary may properly invoke the Treaty defense when the parent company dictates the subsidiary's alleged discriminatory conduct.[183]

3. Fortino v. Quasar Co.

The *Fortino*[184] case addressed the availability of the Treaty defense to an American subsidiary of a Japanese firm, as opposed to a wholly owned Japanese subsidiary incorporated in the U.S. as in the *Sumitomo* case. This case arose over dismissal of three American managerial employees by Quasar, an un-incorporated division of Matsushita Electric Corporation of America. Under Title VII, plaintiffs alleged discrimination on basis of their non-Oriental origin.[185] In 1990, the U.S. District Court rendered verdict for plaintiffs and awarded them 2.5 million dollars in damages. In reversing this decision, the Seventh Circuit explored what it viewed as the most essential question: whether the employer, an American subsidiary of a Japanese firm, may assert its parent's privilege under the FCN Treaty as a Title VII defense.[186] The court expressly chose to consider the applicability of the FCN Treaty although Quasar did not raise the issue in the district court.[187] The Seventh Circuit justified its decision to do so "for the sake of international comity, amity, and commerce."[188] It then held that the parent's Treaty-based immunity does

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180. *Id.* at 558.

181. Sumitomo, 457 U.S. at 182.

182. *Id.* at 182-83 (stating that "[b]oth the Ministry of Foreign Affairs of Japan and the United States Department of State agree that a United States corporation, even when wholly owned by a Japanese company, is not a company of Japan under the Treaty and is therefore not covered by Article VIII(1)"). Ronald Brown summarizes the ultimate result of the Sumitomo case as follows:

> Some five years later, a settlement in this case was announced where the employer agreed to allocate nearly $3 million over three years to train, promote, and pay its female workers in the United States. The settlement agreement also requires that women be placed in 23-25 percent of the management and sales positions. The company attorney is quoted as saying there is no admission of liability and the agreement reflects a decision to 'Americanize' its U.S. offices as part of a 'world-wide localization' of its subsidiaries.

Brown, *supra* note 152, at 250 (*citing* 10 D.L.R.(BNA) A-7, A-8 (Jan. 15, 1987)).

183. Sumitomo, 457 U.S. at 189-90 n.19.

184. Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991).

185. Fortino, 950 F.2d at 399.

186. FCN Treaty, *supra* note 168.

187. Fortino, 950 F.2d at 391.

188. Plaintiffs requested the appellate court not to consider the treaty issue, because the defendant had failed to raise it to the district judge. The Seventh Circuit rejected this requested and explained as follows: "Ordinarily we will not consider a point that was not raised in the district court, but we can do so, . . . and, for the sake of international comity,

reach Fortino, and discrimination in favor of Japanese nationals by the latter is not actionable.[189] In so deciding, the court emphasized significant control the parent had asserted over Fortino's business operations.[190] Some American scholars have criticized this decision as unfairly exempting Japanese multinational firms from Title VII liability.[191]

4. Lessons for Employers

Prudent Japanese employers should not rely on the FCN Treaty defense for the following reasons.[192] First, since the Fortino decision was not

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amity, and commerce, we should do so when we are asked to consider the bearing of a major treaty with a major power and principal ally of the United States." *Id.*

189. In its amicus brief, the EEOC expressed its view that Quasar is a division of an American corporation, and, therefore, they have no right to ignore U.S. discrimination laws. Lantos Hearings, *supra* note 30, at 71.

190. In 1994, the U.S. District Court for the Northern District of Texas expressly adopted the Fortino rationale in upholding the validity of the FCN Treaty defense asserted by Uniden America (hereinafter "Uniden"), an American subsidiary of a Japanese corporation in an employment discrimination case. Uniden asserted that it had a right, under the FCN Treaty, to discriminate against the American plaintiff on the basis of his race and national origin. Papaila v. Uniden America Corp., 840 F.Supp. 440, 443 (N.D. Tex. 1994). Uniden is a subsidiary of Uniden Japan, a Japanese corporation headquartered in Tokyo which manufactures and sells electronic equipment. *Id.* at 444. The court found the Fortino reasoning persuasive and allowed Uniden to assert the Treaty right of its parent corporation in Tokyo. *Id.* at 446.

191. *See generally* Donald D. Jackson, *Titling the Playing Field: Japan's Unwarranted Advantage under the Civil Rights Act of 1991 and Fortino v. Quasar Co.*, 28 TEX. INT'L. L.J. 391 (1993); Steven J. Lewengrub, *Seventh Circuit Allows American Subsidiary to Avoid Title VII Liability by Asserting FCN Treaty Rights of Japanese Parent — American Employees Treated as Second Class Citizens — Court Cites Reciprocal Benefits for American Firms Operating Abroad-Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991)*, 22 GA. J. INT'L. & COMP. L. 527 (1992); Wilson, *supra* note 172, at 535-542. Imura, then Chief Executive Officer of Quasar, disagrees with the view that the Treaty provision gave the firm an unfair advantage. Instead, he stresses that the source of ultimate victory was Quasar's genuine attempt to resolve cross-cultural misunderstandings at trial. Imura points out, for instance, that the firm successfully denied the trial court's finding that Quasar substantially increased salaries of Japanese executives while discharging American executives. Plaintiffs' allegation derived from Quasar's adjustment of a salary structure for its Japanese employees in accordance with factors such as: "1) whether the employee lives in an apartment or owns a home; 2) the size of the employee's family; and 3) whether the employee's children attend public or private schools." At the appellate level, Quasar explained the general rule: foreign subsidiaries of Japanese companies often pay housing and education allowances to meet the needs of their expatriates. The company further proved that the American subsidiaries in Japan as well, including IBM Japan, observe the same practice for their employees sent from parent companies in the U.S. Likewise, Quasar asserted that it had discharged some Japanese employees as well, contrary to the district court's finding. These explanations, Imura says, helped resolve some misunderstanding. Also, Imura describes in detail how he decided to appeal the case despite the corporate attorney's strong objection and how he prepared for the appeal by carefully examining relevant documents and interviewing employees. This investigation convinced him that no discrimination had occurred. Kishi, *supra* note 30, at 160.

192. *See, e.g.*, Abraham, *supra* note 7, at 478 (stating that " . . . it is nonetheless more prudent for the Japanese employer to forego the protection of the Treaty, and make em-

appealed,[193] the Supreme Court has left open the question of whether an American subsidiary may invoke the Treaty rights of its Japanese parent company.[194] Additionally, other courts may refuse to broadly construe the parent's Treaty immunity. The EEOC has taken the position that it disagrees with the Fortino holding: "because Quasar is a division of an American corporation, . . . [the company should have] no right to ignore [U.S.] discrimination laws."[195]

Second, the Treaty exemption is restrictive in its scope; it applies only to upper-level positions limited to "accountants, other technical experts, executive personnel, attorneys, agents and other specialists."[196]

Third, even if the court does agree to grant the Treaty-based immunity, companies may still incur substantial legal defense costs.[197] Even at the preliminary stage, where the discrimination claims are filed with the EEOC or a state agency, the estimated defense costs already range from five thousand to twenty thousand dollars.[198] Entire proceedings may also force companies to consume a large number of hours and to lose productive use of staff.[199] The administrative costs of implementing preventive strategies may far outweigh the potential legal defense costs.[200]

Finally, any charges of discrimination, irrespective of their merits, could impair the company's public image.[201] Given the fear of Japan's economic power, allegations against Japanese investors may capture more public attention.[202] Thus, to minimize the risk of litigation, companies should install comprehensive strategies in creating a working environment which stresses fairness and openness.[203]

U.S. courts have articulated Title VII's goal as combating employment discrimination, which is "one of the most deplorable forms of discrimination" in American society because "it deals not with just an indi-

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ployment decisions on the unassailable criterion of employee qualifications").

193. Mullen, *supra* note 6, at 761 (*citing* Stephen G. Hirsch, *Meet the New Boss*, LEGAL TIMES, May 11, 1992, at 25, 27 (special supplement: The Pacific Rim)).

194. The Supreme Court expressly stated: "[W]e also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent." Sumitomo, 457 U.S. at 189-90 n.19.

195. Lantos Hearings, *supra* note 30, at 71.

196. FCN Treaty, *supra* note 168, at art. VIII(1).

197. Finegan, *supra* note 165, at 68.

198. *Id.*

199. *Id.*

200. *See, e.g.*, CALLAGHAN & COMPANY, EQUAL EMPLOYMENT COMPENSATION MANUAL, Pt. II, §2.03 (1983).

201. *Id.* at 68.

202. *See supra* section III. A.

203. Finegan, *supra* note 165, at 71-72 (*citing* human-resources expert Marlene Porter, who has successfully prevented her employer, the Community Bank of Homestead in Miami, from being sued by its employees. During her twelve-year tenure, the Bank terminated about 200 employees; yet, none has filed a suit). The article stresses the importance of reducing the likelihood of potential litigation by introducing actual defensive policies adopted by the Bank.

vidual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family with a job or profession for which he qualifies or chooses."[204] Japanese multinational firms should honor moral and legal beliefs prevailing in their host nation. Their failure to harmonize with U.S. culture confines Japanese investors into their standing as foreign outsiders in the U.S.[205] Thus, they should make sincere effort to integrate more local talent into the core labor force. The expanded role of local employees will not only satisfy the firms' duty to comply with the U.S. civil rights laws; it will also contribute to promoting direct foreign investment.[206] Additionally, by providing local communities with more career opportunities, the company can create a positive impression and gain social acceptance for its economic expansion.

B. *Bona Fide Occupational Qualification*

1. Scope of the BFOQ Exemption

Title VII permits intentional discrimination on the basis of religion, sex, or national origin when those practices are reasonably necessary for the proper operation of the business.[207] In other words, defendants must

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204. Hardin v. Stynchcomb, 691 F.2d 1364, 1369 (11th Cir. 1982) (*quoting* Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970)). *See also* Rowe v. Gen. Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972); Torres v. Wisconsin Dept. of Health and Social Services, 859 F.2d 1523, 1526-27 (7th Cir. 1986). One scholar describes the essential role of work in both individual and social life as follows:

> "The individual person is dignified by work; the community is enriched by work. Society stands condemned by failure to provide meaningful work . . . work helps us become more fully human . . . Productive work will remain incomprehensible, or, at most, an ineffable and unattainable dream for the majority of the earth's population."

David L. Gregory, *Catholic Labor Theory and The Transformation of Work*, 45 WASH. & LEE L. REV. 119, 129-30 (1988).

205. KOPP, *supra* note 18, at 48.

206. One observer considers it "costly and politically risky" for multinational firms to depend entirely on their home-country nationals. KOPP, *supra* note 18, at 49.

207. 42 U.S.C. §2000(e)-2(e). This section reads:

> "[I]t shall not be an unlawful employment practice for an employer to hire and employ . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."

Id. The statutory BFOQ defense is distinguished from a judicially created "business necessity" defense. A BFOQ is a defense to intentional discrimination ("disparate treatment"). On the other hand, the business necessity defense is asserted in cases attacking employment practices which are neutral on its face but adversely impact protected groups under Title VII ("disparate impact"). Under this theory, discriminatory motive is unnecessary to establish a prima facie case of discrimination. To defend against a disparate impact charge, the employer must prove that the practice in question "[bears] a demonstrable relationship to successful performance of the jobs for which it was used." Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding against the use of testing and educational requirements, which operated to disqualify black applicants at a substantially higher rate than white applicants). In essence, both the BFOQ and business necessity require that employers articu-

provide a reasonable justification for their discriminatory conduct. To satisfy that burden, employers must prove that " 'the essence' of [their] business operation would be undermined" without challenged conduct.[208] Also, they must prove a reasonable basis for their belief that "all or substantially all" members of the excluded class cannot perform the essential job duties safely and efficiently.[209] The BFOQ defense is asserted most often in the context of gender discrimination.[210]

Traditionally, the BFOQ defense is construed narrowly. *Dothard v. Rawlinson*[211] exemplifies one of the rare circumstances where the defendant survived the heightened judicial scrutiny typical in a BFOQ analysis. The Supreme Court upheld the employer's refusal to hire women as correctional counselors in an all-male, maximum security prison. Being a male qualified as a BFOQ, because the job required close physical proximity to inmates, and the environment of violence and disorganization would pose a serious risk of threat not only to women but also to other guards and inmates.[212] Other circumstances where the BFOQ defense may prevail include "the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman to that religion . . . ."[213]

Notwithstanding the general rule, however, the Second Circuit has agreed to expand the scope of the BFOQ analysis in cases involving Japanese firms. "[A]s applied to a Japanese company enjoying rights under Article VIII of the [FCN] Treaty, [the BFOQ] must be construed in a manner that will give due weight to the Treaty rights . . . ."[214] To justify national origin discrimination under this analysis, employers bear the burden of showing the requirement of any of the following skills:

1. Japanese linguistic and cultural skills;

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late a legitimate business purpose for challenged conduct. One scholar considers the BFOQ defense more stringent than business necessity, which "encompasses considerations beyond a narrow focus on job performance, such as workplace safety, societal concerns for environmental protection . . . ." Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 11 (1991) (*citing* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984) and Wright v. Olin Corp., 697 F.2d 1172, 190 n.26 (4th Cir. 1982)). This article discusses the BFOQ defense exclusively.

208. Diaz v. Pan American World Airways Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

209. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

210. *See, e.g.*, International Union, UAW v. Johnson Controls Inc., 499 U.S. 187 (1991); Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982); Fesel v. Masonic Home of Del., Inc., 447 F.Supp. 1346 (D.Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

211. Dothard v. Rawlinson, 433 U.S. 321 (1977).

212. *Id.* at 335.

213. Wilson v. Southwest Airlines Co., 517 F.Supp. 292, 297 (N.D. Tex. 1981) (*citing* the Interpretative Memorandum of Title VII submitted by the Senate Floor Managers of the Civil Rights Bill 1110 Cong. Rec. 7212 (1964)).

214. Sumitomo, 638 F.2d at 559.

> 2. knowledge of Japanese products, markets, customs, and business practices;
> 3. familiarity with. . .the parent enterprise in Japan; and
> 4. acceptability to those with whom the company . . . does business.[215]

Adames v. Mitsubishi Bank[216] provides one example in which a Japanese firm argued that understanding of the Japanese language and culture was reasonably necessary to their business practices. In this case, which was summarized earlier,[217] the defendant claimed a legitimate business purpose for reserving most senior management positions for rotating Japanese staff.[218] The Bank's chief manager explained: "[K]nowledge of Japanese business practices and management style . . . and the ability to read, write, and speak the language, are all essential skills for many positions."[219] Nevertheless, the manager later acknowledged his uncertainty as to whether knowledge of Japanese business practices is an absolute prerequisite to joining the rotating staff.[220] Patricia Gaiton, former manager responsible for personnel affairs, stated that the Bank had made little effort, if any, to create promotional opportunities for local staff.[221] Plaintiffs also claimed that the requirement of the Japanese language and skills requirements operated as a pretext. For this argument, they explained that the Bank's services mainly involved providing primary lending for American-based and other non-Japanese corporations.[222] They then asserted that the nature of the business required familiarity with U.S. banking practices and laws, rather than Japanese custom and language.[223] The court held that the Bank failed to articulate a legitimate business reason for its allegedly discriminatory act.[224]

2. Lessons for Employers

The *Sumitomo* court's expansion of the BFOQ analysis[225] should not be read as an automatic assurance that Japanese firms may oversee the substantive fairness of their job qualifications. Undoubtedly, courts will refuse to give an unwarranted advantage to foreign companies which require linguistic or cultural skills as a pretext to exclude Americans. In contrast to immutable characteristics, such as gender, knowledge of the Japanese language and culture can be possessed or acquired by people of

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215. *Id.*
216. This case arose over alleged discrimination based on race, descent, ancestry, and ethnic characteristics. Adames v. Mitsubishi Bank, 751 F. Supp. 1548 (E.D.N.Y. 1990).
217. *See supra* section II. B.
218. Adames, 751 F.Supp. at 1553.
219. *Id.*
220. *Id.*
221. *Id.* at 1553.
222. *Id.* at 1554.
223. *Id.*
224. *Id.* at 1561.
225. *See supra* note 216 and accompanying text.

non-Japanese origin.[226]

Thus, to establish a legitimate justification, employers must articulate the validity of the qualifications through the use of concrete job descriptions.[227] For instance, certain positions may dictate that the job applicants possess a complete command of the language, because the essential job duties involve intricate bilingual transactions. In preparing job classifications, it remains insufficient for the employers to simply throw in phrases such as "fluency in Japanese;" it can be read as merely the perceived need for the language skill. Instead, the description should specify the expected degree of proficiency. One example would be: "ability to speak Japanese sufficiently to conduct complex business negotiations with native speakers." Likewise, if the position only requires basic conversational skills, it may suffice to say: "at least two years of college-level study with a minimum 3.0 grade-point average."

Equally important, employers should clarify the content of the job duties which require the linguistic skills. For instance, what is the frequency of communications between the American subsidiary and its Japanese parent company? Are those communications done orally or in writing? Alternatively, does the job require serving Japanese clients, who do not speak English?

Moreover, employers should provide a language program or tuition reimbursement to help American employees acquire the requisite language skills.[228] Such effort will bolster the argument that the language requirement derives from genuine business concerns.[229]

While preparing job descriptions, companies should also delete any subjective employment criteria such as loyalty and team spirit. In general, Japanese employers place greater emphasis on employees' attitude,[230]

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226. Abraham, *supra* note 7, at 506.

227. S. Prakash Sethi & Carl Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?* 4 EMP. REL. L.J. 485, 518-19 (1979).

228. MASATU NO NAKA NO AMERICA SHINSHUTSU: NUHON KIGYO NO RISUKU KANRI TO SHAKAI KOKEN [Official English title: TRANSCENDING TRADE FRICTIONS, JAPANESE-OWNED BUSINESSES IN THE U.S., RISKS, SOCIAL CONTRIBUTIONS], 66-67 (Tokyo Marine and Fire Insurance Co., Ltd., ed. 1992) [hereinafter MASATU].

229. *See* KOPP, *supra* note 18, at 69. In a survey on over 400 large Japanese firms, Professor Hideki Yoshihara of Kobe University noted that 81% of the respondents pointed to personality (trustworthiness, etc.) as a desirable characteristic for locally hired managers for international business operations. *Id.* at 76.

230. One researcher found a "good attitude" the most important quality Japanese managers want in administrative or junior executive staff members. MARCH, *supra* note 41, at 120. *See also* TAYLOR, *supra* note 1, at 125-26 (noting the important role of attitude in Japanese society). Yoshitaka Sajima, general manager of corporate planning for Mitui & Company, suggested the essential role of interpersonal skills in Japanese corporations when he commented that "[e]ven the top M.B.A. from Harvard or Stanford, a very capable, aggressive person, might not be a good employee for us. He might destroy the harmony of our system." Mullen, *supra* note 6, at 746-47 (*citing* Tamar Lewin, *Sex Bias or Clash of Cultures*, N.Y. TIMES, Apr. 8, 1982, at D1, D6).

rather than their concrete skills.[231] Some of them may perceive that the personal skills would qualify under the cultural skills in the BFOQ analysis. However, because measurement of these "skills" dictates wholly subjective value judgment, they will probably be subject to more rigid scrutiny than the language requirement. The court will not sustain arguments which only reinforce common stereotypes: "Japanese nationals are more likely to exhibit corporate loyalty than Americans" or "raised in society based on collectivism, Japanese nationals can work better in a group than Americans." Employers should set forth more objective criteria which accurately reflect job-related skills.

Finally, the concept underlying the BFOQ defense can help Japanese employers implement a merit system. As noted above, the BFOQ is an affirmative defense, which employers assert against allegations of discrimination. Nonetheless, at a preventive stage, employers can use a BFOQ analysis effectively as a means of self-assessment; in hiring and promotion, employers should critically evaluate the validity of their practices in terms of whether they could qualify, if challenged, under the scope of the BFOQ exemption. For that purpose, the two-step BFOQ analysis, which was discussed earlier, will prove helpful.[232] This process should remind employers to focus on job-related factors in their decision-making process. It is a process of evaluating a job candidate on the basis of his or her actual capabilities; the individual's gender or national origin, for instance, should play no role unless such traits are necessary to fulfill the job duties. Thus, the BFOQ analysis can serve as a foundation upon which Japan builds a merit system, one vital element of an egalitarian workplace.

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231. Due to emphasis on personal skills rather than technical skills, the recruitment and hiring process by Japanese firms tend to be highly subjective in nature. *See* Mullen, *supra* note 6, at 750. Some critics have observed the same kind of subjective hiring among Japanese employers overseas. An exercise in the "Access to Success" Overseas Manager Program, run by the Management Services Center in Japan, made clear that Japanese managers prioritize superficial qualities in job interviews. In this exercise, videotaping of three simulated interviews revealed that Japanese managers, as compared to American managers, place less emphasis on candidates' abilities to perform the job, past work experience, or motivation; instead, they are influenced by candidates' physical appearance or conversational skills. BYHAM, *supra* note 39, at 167. The subjective screening process also becomes apparent as it pertains to the questions generally asked during job interviews. For example: "Do you consider yourself a cooperative person;" "have you had any problems in interpersonal relationships;" "what do you think about dating;" "what do you usually talk about with your friends;" "do you consider yourself organized?" KOBUNSHA, MENSETSU SHIKEN: 100-MON, 300-TO [JOB INTERVIEWS: 100 QUESTIONS AND 300 ANSWERS] (1994). Another book, written specifically for female job seekers, contains a section entitled Typical interview questions for women, including the following examples: "Do you have a boyfriend? If so, do you plan to marry him;" "how often do you take the time to talk with your parents? Do you get along better with your mother, or your father?" The book further explains that recruiters' main concern is to evaluate candidates' personalities; particularly for non-managerial positions, recruiters tend to ask more subjective questions than those directly related to work. JOSHI-GAKUSEI NO TAME NO SHUSHOKU BESTO RESSUN [JOB HUNTING INFORMATION FOR FEMALE STUDENTS] 130-31 ((Norio Yoshida, ed., 1994).

232. *See supra* notes 208-209 and accompanying text for the two-step BFOQ analysis.

V. MOVING TOWARD A MERIT SYSTEM

A. *Japan's Economic Crisis and its Effect on Management*

Pursuit of workforce equality will necessitate a fundamental change at the core of Japanese corporate culture.[233] In her article on Japan's Equal Employment Opportunity Law, Loraine Parkinson argues that full attainment of equality in Japan would be impossible unless it results from an institutional change — from a group to an individual orientation.[234] Nevertheless, Parkinson cautions that "[d]ecades could pass before the new structure is functioning at an efficiency level equivalent to that of the old."[235] Because of this, she adds, the economic loss in the meantime would be great enough to hurt the Japanese economy.[236] One should note, however, that Parkinson's article was published in 1989, before the economic crisis Japan is now facing. Contrary to Parkinson's assertion, today's economic condition is more likely to compel employers to adopt a new approach to management. Most importantly, they should pursue hiring and promotion based on job-related qualifications of individuals.[237]

Japanese-style management remained unchallenged, at least domestically, while Japan still prided itself as an economic superpower.[238] The people praised their own employment system as the source of the nation's prosperity.[239] Indeed, the postwar years observed a boost of the Gross National Product per person by sixty times.[240]

Today, however, Japan is suffering the longest and severest economic slump since World War II.[241] Since February, 1993, the sharp rise of the

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233. *See, e.g.*, Loraine Parkinson, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604, 629 (1989) (noting that a switch to the merit system is widely believed to be necessary for attainment of gender equality in Japan).

234. *Id.* at 630.

235. *Id.*

236. *Id.*

237. Abraham, *supra* note 7, at 500-502 (discussing that this policy would allow Japanese employers to retain those with necessary skills while avoiding the citizenship requirement as a pretexual reason for intentional discrimination).

238. "In the past, Japanese-style management was the corporate tool for survival. It was at its finest when it pulled the country through the oil crises of the 1970s and the high-yen slump of the late 1980s." Katayama, *supra* note 18, at 6.

239. *Id.* (noting that "no one saw the need to change a system that was clearly working" during the high growth period). *See also* Louise do Rosario, *Out with the Oldies: Japan's Recession Takes Toll on "Lifetime" Employment*, FAR EAST. ECON. REV., Apr. 22, 1993, at 74 (stating that Japanese white-collar workers had "little to complain about . . . before the current economic crisis. . . . they were rewarded with promotions and salaries for their long working hours").

240. Before the war, Japan's Gross National Product was one-twentieth of its U.S. counterpart. Today it exceeds the latter by 120%. Hato, *supra* note 18, at 33.

241. "The growth rate has repeatedly fallen short of the government's forecasts; consumer spending, which accounts for 65% of gross national product, has been sluggish: and capital spending, which accounts for another 20%, has also been slow." Takeuchi Yasuo,

Japanese yen has gravely impaired the nation's export-oriented economy.[242] It has become apparent that Japan can no longer "stay drunk on the wine of postwar success."[243] Public anxiety has mounted as to whether the nation's economy can regain its vigor.[244]

The collapse of the bubble economy has forced Japanese firms to critically evaluate their employment system. As one observer described, Japanese employers have "suddenly awoken to the fact that many aspects of their time-honored personnel management methods . . . have become handicaps rather than assets."[245] Recently, numerous observers have stressed the need to reassess the value system at the core of traditional labor practices.[246] They have argued that purely monetary strategies alone remain insufficient to overcome the economic crisis.

In February, 1992, Sony chairperson Akio Morita cautioned that "Japanese-style management [was] reaching the end of its usefulness."[247] Jiro Ushio, chairperson of Ushio Inc., a manufacturer of industrial lamps and optical electronic, predicts that individualism, low growth, and globalization will destroy Japanese-style management within ten years.[248] On August 6, 1994, *Asahi Shimbun*, a major newspaper in Japan, reported the following survey results on the Japanese labor practices: among 354 companies, sixty-two percent agreed that lifetime employment must be re-examined; ninety-seven percent said the same for the seniority system.[249]

The Troubled Economy, 21 JAPAN ECHO 2 (1994).

242. Yamamoto, *supra* note 20, at 386. In January 1994, Eijiro Hata, Japan's minister of international trade and industry, explained the adverse impact of the strong yen as follows: "[F]or each one yen increment of the Japanese yen against the dollar, Japan's auto industry suffers a fifteen percent loss in pretax profits; electronics companies lose nearly nine percent." Jathon Sapsford, *Japan Inc.'s Earnings Slump Continues for the Fourth Consecutive Fiscal Year*, WALL ST. J., May 11, 1994, at A11. *See generally Re-Engineering the New U.S. Export to Japan*, JAPAN-AM. DIG. 33 (May/June 1994). Osamu Katayama notes Japan's inability to pull itself out of the recession as it did in the 1970s and 1980s by "increasing productivity and quality to make its products more competitive internationally." Katayama, *supra* note 18, at 11. Harumi Yamamoto express the similar view. For a significant impact of Japan's weak economy on traditional Japanese-style management, *see* Yamamoto, *supra* note 20 at 386.

243. Katayama, *supra* note 18, at 13.

244. *Id. See also* Inoki Takenori, *Prescribing Medicine for a Global Recession*, 21 JAPAN ECHO 6, 9 (1994).

245. "[L]ifetime employment, seniority-based promotion and compensation, and avoidance of layoffs" exemplify these aspects. KOPP, *supra* note 18, at 224.

246. *See supra* note 18. *See generally* Yoichiro Hamabe, *Inadvertent Support of Traditional Employment Practices: Impediments to the Internationalization of Japanese Employment Law*, 12 U.C.L.A. PAC. BASIN L.J. 306 (1994).

247. Katayama, *supra* note 18, at 4.

248. *Id.* at 13.

249. *Minaosu-beki Nihon Koyo Shisutemu-wa [The Japanese Employment System that Must Be Re-examined]*, ASAHI SHIMBUN [ASAHI NEWS], Aug. 6, 1994, at 10. 58% responded that lifetime employment may be maintained as long as it is modified to some extent. As desirable modification, 88.3% intended to implement a hybrid system tailored to accommodate both long-term and mobile employees. *Id.*

In sum, international criticism does not serve as the sole motivating factor for Japanese companies in adopting a new personnel policy. This section explores changes in the current Japanese labor market and demonstrates how creation of a merit system can provide the fuel of revitalizing economy.[250]

B. *Collapse of Lifetime Employment and Seniority System*

Lifetime employment and seniority-based wages have long constituted the core of Japanese business management. Under the traditional system, employers make hiring decisions based on personnel requirements rather than the need to fill a certain job or function.[251] They hire fresh graduates annually and retain them until mandatory retirement of sixty. Using a broad array of motivational tools such as pep talks, boot camps, calisthenics, and company slogans, employers take every step possible to instill values such as duty and group loyalty into their workers.[252] Seniority-based wage structures exemplify another motivational tool of heightening a team spirit.[253] Firms determine salaries in accordance with the length of employee's service so that they may eliminate a sense of competition among workers.[254]

Given the current state of economy, these time-honored practices are losing their appeal.[255] Excess labor,[256] which includes loyal but incompetent workers on the payroll, may cut into efficiently.[257] Companies tend to view their mid-level managers as "overpaid, unproductive and nonessential."[258] As a result, more firms are now attempting to trim costs by im-

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250. Sawa & Ishikura, *supra* note 18, at 69.

251. NIPPON STEEL HUMAN RESOURCES DEVELOPMENT, NIPPON: THE LAND AND ITS PEOPLE 137 (1988).

252. BYHAM, *supra* note 39, at 47 (1993); Lincoln, *supra* note 29, at 99.

253. By coupling permanent employment with seniority compensation, the seniority system encourages loyalty and identification with the company's goals. Lincoln, *supra* note 29, at 93.

254. This established custom aims to eliminate a sense of competition among workers and to foster corporate loyalty. *Id.*

255. One observer cautions, however, that most people are concerned only with temporary solutions to the current management deficiency; he stresses the importance of changing the entire labor structure from a long-term perspective. HATO, *supra* note 18, at 61. Another observer notes that it is too unrealistic to believe that lifetime employment will completely disappear. KAWARU NIHON, *supra* note 18, at 202.

256. One expert estimates that Japan has at least 5 to 6 million redundant workers. He also discusses cancellation of outstanding job offers by 114 firms to new university graduates in the winter of 1992 to 1993. HORI, *supra* note 18, at 163.

257. Brown, *supra* note 152, at 239; Katayama, *supra* note 18, at 11-12; Sawa & Ishikura, *supra* note 18. The traditional lifetime employment system would "act as an ameliorating counterforce" against unemployment: "If a company no longer needs workers for some particular line of activity, it will always seek to train those displaced for some other form of work in the company, and even when it faces an overall surplus of labor, it may seek to keep workers occupied in make-work activities until natural attrition has eliminated the surplus." REISCHAUER, *supra* note 7, at 325.

258. Rosario, *supra* note 239.

plementing early retirement. For the same reason, demotion and layoffs have become more common.[259] Furthermore, some companies have pushed redundant employees aside to a so-called window desk, "where they practically are an outcast and do nothing."[260]

Honda Motors adopted a policy of automatically discharging employees around age fifty-five.[261] As of 1991, about forty percent of large Japanese companies, especially financial or insurance firms, have adopted similar policies.[262] In August 1992, President Hiroshi Sato of TDK, the world's largest manufacturer of magnetic tapes, directed fifty of his senior managers to "stand by at home;" TDK agreed to pay ninety percent of their salaries until retirement age as compensation for not working.[263] Also, in January 1993, Pioneer Electric Corp., a leading manufacturer of audio and video equipment, forced its thirty-five managers in their fifties to choose either early retirement or dismissal.[264] Capturing national attention, the news profoundly disturbed the public mind.[265]

A Ministry of Labor survey indicates the age applicable for early retirement plans as follows: 49 or younger (20.9 percent); early fifties (40.3 percent); late fifties (28.7 percent).[266] The survey goes on to suggest that companies with 5,000 or more employees tend to target younger employees: 49 or younger (30.5 percent); early fifties (47.5 percent); late fifties (21.2 percent).[267] In July, 1993, journalist Osamu Katayama reported the following statistical survey by Nikko Research Center: the current recession has subjected 1.1 million workers to "in-house unemployment," as described above.[268] This created dismay among middle-managers who

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259. NEC Corp., for instance, chose to maintain its redundant human resources by revising the job descriptions of some 1,300 of its 6,000 managers and rotating them from supervisory positions to so-called in-house specialists working with subordinates. Yamamoto, *supra* note 20, at 384; *Is Future Bleak for Middle Managers?*, JAPAN-AM. DIG. 31 (May/June 1994) [hereinafter *Is Future Bleak*]. *See also* Hamada, *supra* note 7, at 135 & 141 (discussing a gap between a myth and reality: for many, lifetime employment is "more of a dream than a reasonable expectation" for many Japanese today); HORI, *supra* note 18, at 163 (observing a steady increase of layoffs since 1992 and estimating that the unemployment rate will rise to over 10% from the current level of under 2.5%).

260. *Is Future Bleak*, *supra* note 259. *See also* Uchihashi, *supra* note 27, at 47 (explaining how Japanese companies in general have coped with the current economic slump by "thinning out the ranks of middle management, whether by outright dismissals or, more frequently, by such indirect methods as demoting employees, pressuring them to take early retirement, or making life unbearable for them in the workplace").

261. *Is Future Bleak*, *supra* note 259.

262. KAWARU NIHON, *supra* note 18, at 55-56.

263. HORI, *supra* note 18, at 157.

264. Yamamoto, *supra* note 20, at 382; HORI, *supra* note 18, at 163-64 (also discussing examples of voluntary retirement programs implemented by two companies: Yamaha and ALPS Electric).

265. Yamamoto, *supra* note 20, at 382.

266. KAWARU NIHON, *supra* note 18, at 55-56.

267. *Id.*

268. Katayama, *supra* note 18, at 12.

have devoted their lives to the companies.[269] In the emerging skill-based work environment,[270] the majority of middle mangers, who are generalists rather than specialists, inevitably face the toughest challenge.[271]

An organization of Japanese labor lawyers protested serious human rights violations facing discharged or demoted employees.[272] In February, 1993, the organization launched a two-day "employment restructuring hotline" in three cities.[273] The attorneys consulted employees who needed legal advice regarding layoffs, demotion, internal transfers, early retirement, and various other tactics the companies had adopted to cope with the recession. For two days, the telephone kept ringing non-stop. The lawyers accepted a total of 502 cases but predicted that twice as many people had actually called in. Many calls came from managerial employees in their forties and fifties; the majority of them worked for large corporations.

One case involved alleged practice by a fifty-one year-old manager of a large musical instrument manufacturer; the company forced him to retire after having him spend seven months in a dark basement room with no work assignment.[274] In another case, a forty-four year-old manager of a computer software company was transferred to a subsidiary in the countryside.[275] This subsidiary was designed for employees whom the company expected to retire soon. Once transferred, he and other managerial employees were taken to a forest, where they were assigned the task of cutting trees, totally unrelated to the companies' software business. They were forced to retire after much humiliation. This company forced more than 3,000 employees to retire in several months.

In April, 1993, the lawyers' organization made a special request to the Ministry of Labor to enforce fair treatment of senior employees.[276] Disgruntled middle managers have launched the Tokyo Managers' Union

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269. *Is Future Bleak, supra* note 259, at 31. Kunio Miyazato, Koyo Chyosei Hottolaine Kara [From the Employment Restructuring Hotline], No. 1308 RODO HORITSU JYUNPO [LABOR LAW NEWS] 4 (1993) [hereinafter Restructuring Hotline].

270. For a discussion of the growing need for employees with technical skills or knowledge, *see infra* V. D.

271. KAWARU NIHON, *supra* note 18, at 145. *See also* Rosario, *supra* note 239, at 74 (explaining that companies tend to view mid-level managers as "overpaid, unproductive and nonessential").

272. Many employers have justified their unreasonable treatment of workers as a strategy to cope with the recession. They have often ignored their duty imposed by the Labor Standards Law. The Labor Standards Law provides general guidelines regarding labor contracts, wages, work hours, etc. Rodo Kijun Ho [Labor Standards Law], Law No. 49 (1947). One critic describes this situation by using the expression: "[Japanese] labor law stands still at the entrance gate." Restructuing Hotline, *supra* note 269, at 4-5.

273. *Id.; Is Future Bleak, supra* note 259, at 31.

274. *Id.*

275. *Id.*

276. Nihon Rodo Bengodan [Japan Labor Law Attorneys Association], Koyo Chyosei ni Kansuru Yobosyo [Prevention of Employment Restructuring], No. 1310, RODO HORITSU JYUNPO [LABOR LAW NEWS] 21-23 (1993).

(TMU).[277] TMU's request to the Ministry of Labor to be acknowledged as a legitimate labor union has been jeopardized; employers have tried hard to "stop the movement before it becomes a menace."[278]

As well as lifetime employment, the seniority system is gradually disappearing; more companies are now willing to pay individually negotiated salaries.[279] As noted above, Japanese firms originally valued the seniority system as an effective way to eliminate a sense of competition among workers and to heighten company loyalty.[280] This custom, long advocated by labor unions, is now giving way to the merit system.[281] As of spring, 1993, 10.4 percent of the surveyed employers have implemented the new salary structure based on individual salary negotiation; thirty percent intended to adopt it in the future.[282] A well-publicized policy launched by Honda Motor Co., Ltd. in 1992 allows managerial employees to negotiate annual salary with the company based on the individual's qualifications and performance.[283] In 1993, Fujitsu Ltd. adopted a similar arrangement.[284] Honda and Fujitsu are considered the first to adopt the practice of individually negotiated salaries throughout the managerial hierarchy.[285]

C. *Increase in Job Mobility*

The gradual decline of lifetime employment derives from changing labor consciousness as well. The increase in job mobility reflects the rise of individualism among younger generations in Japan.[286] A survey result

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277. *Is Future Bleak*, *supra* note 259, at 31.

278. *Id.*

279. *See generally* Rodo-Sho [Ministry of Labor], Rodo Hakusho Hakusho [White Paper on Labor] 246-52 (1994); Katayama, *supra* note 18, at 12. According to a study at the Institute of Business Research at Daito Bunka University in Japan, the majority of the personnel managers from the surveyed companies agreed that the seniority system needs gradual but substantial modifications. Mroczkowki & Hanaoka, *supra* note 20, at 280.

280. JAPAN TRAVEL BUREAU, SALARYMAN IN JAPAN 42-43 (1986).

281. *Id.*

282. KAWARU NIHON, *supra* note 18, at 107.

283. *Id.* at 106-107; HORI, *supra* note 18, at 164 (noting that Honda's program initially included about 4,500 middle managers, nearly 15% of its total workforce).

284. Yamamoto, *supra* note 20, at 386.

285. In the past, only a small number of employers, such as Sony Corp., some department stores, and general merchandisers, based annual compensation on systems other than solely on the length of service. Nonetheless, Honda and Fujitsu are "the first to apply the practice of American-style individual salary negotiation systematically throughout the managerial hierarchy." *Id.* Shintaro Hori introduces some other examples of recent personnel actions by major Japanese firms: (1) Japan Air Lines plans to reduce its staff through voluntary retirement, hiring freezes, and one-year paid-absence programs; (2) IBM Japan initiated a voluntary-retirement program for employees over the age 50 by offering a 50% increase in the lump sum received at retirement (average, approximately 15 million yen on average) and outplacement until age 65 at one of IBM's affiliated companies; (3) Mitui Mining and Smelting plans to eliminate 300 employees (6% of its total work force) through transfers to affiliated companies and cut management salaries by an undisclosed amount. HORI, *supra* note 18, at 167 (1993).

286. *See* HORI, *supra* note 18, at 39-42 (noting that senior managers should learn the value of individualism from their subordinates). *See also* Lincoln, *supra* note 29, at 89.

affirms their tendency to share "American-style values of leisure, consumption, and affluence."[287] Consequently, younger people tend to perceive work as a means of self-expression.[288] Their primary goal is to realize their individual potential, not to devote their life to one company.[289] This shift in labor consciousness emerged around 1984, when the Gross National Product per person exceeded 10,000 dollars. No longer viewed as an act of betrayal, switching jobs has gained greater social acceptance.[290]

A Ministry of Labor survey reveals a substantial increase in the number of people who have switched jobs during the last several years: in 1985, 2,245,000 workers have changed their jobs, whereas 3,248,000 workers have done so in 1991.[291] As of 1993, 22.2 percent of university graduates and 44.2 percent of high school graduates have switched jobs.[292] Job mobility has increased particularly in large corporations, where lifetime employment was once the norm.[293]

In another notable development, employers as well have changed their attitude toward lifetime employment. In 1991, only thirty percent of the surveyed companies intended to hire mainly from among new graduates; twenty percent to hire from among those with previous work experience; and fifty percent to hire from a mixed pool.[294] In five years since 1985, Sumitomo Trust Bank has hired 159 persons with a wide array of previous work experience, such as finance (thirty-six persons), manufacturing (thirty persons), construction/real estate (thirty persons), software computers (twenty-two persons), trade (nine persons), and the mass media (six persons).[295] This diversity in backgrounds is noteworthy, in light of the conservative attitudes prevailing among Japanese banks.[296] The greater emphasis on personal autonomy will increase the need to create a flexible work environment.

D. *Demand for Professionals*

Japanese firms have long valued generalists who live up to the essential part of their managerial philosophy: to develop flexibility by ac-

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287. Lincoln, *supra* note 29, at 93.

288. HATO, *supra* note 18, at 46-48.

289. REISCHAUER, *supra* note 7, at 326 (discussing less loyalty and commitment among younger workers, who reject the paternalistic nature of traditional management and "crave more freedom in their personal lives"). Not only young people but also senior-level employees are now more interested in switching jobs in order to maximize their potential. Among the managers and professionals surveyed by Nippon Manpower, a Japanese human resource development company, 75% of the respondents declared their interest in entertaining a lucrative offer from a headhunter. Mroczkowski & Hanaoka, *supra* note 20, at 284.

290. Changing Jobs Becoming More Popular, 36 JAPAN REPT. 5 (1990).

291. KAWARU NIHON, *supra* note 18, at 55-56.

292. *Id.* at 55-75.

293. *Id.*

294. *Id.* at 55-69.

295. HATO, *supra* note 18, at 135-38.

296. *Id.*

cepting a wide range of tasks in order to understand various aspects of the organization.[297] Nonetheless, current trends in Japanese management clearly suggest employers' need to seek individuals with concrete skills.[298] In general, the growth of service and high-tech industries has significantly increased the need for trained professionals, while rendering company-specific, wide-ranging skills less useful.[299] Japanese firms are now facing the challenge of shifting their focus on manufacturing to more creative activities, including planning, design, and development of products.[300]

In the course of postwar economic development, Japan simply aimed at overcoming poverty by relying on its manufacturing industries.[301] In those days, diligence of blue-collar workers, measured by long hours worked, served as the core of Japanese economy. Today, however, more emphasis is placed on so-called process management, "the process of decision-making and product-development itself."[302] In this context, sole reliance on workers whose only virtues are diligence or loyalty can hamper the corporate development.[303]

Critics have asserted that the weakness of Japanese service-sector jobs partly stems from disrespect of individuality.[304] Japan's traditional labor pool composed of its homogeneous population[305] may only suppress

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297. Coral Snodgrass, who studied many Japanese corporations, assert that this individual flexibility arises "because the Japanese organization itself is so inflexible." BYHAM, *supra* note 39, at 14 (*citing* Coral Snodgrass and J. Grant, *Cultural Influences on Strategic Planning and Control Systems*, 4 ADVANCES IN STRATEGIC MGMT. 205-28 (1986)). *See also* NAKATANI, *supra* note 18, at 4 (observing that many specialists, who had failed to exhibit sufficient flexibility to perform a wide variety of tasks, were forced to leave companies).

298. HORI, *supra* note 18, at 205-207.

299. HAMADA, *supra* note 156 at 58; HORI, *supra* note 18, at 100; NAKATANI, *supra* note 18, at 87-91 and 216-22.

300. Among companies surveyed by the Ministry of Labor in 1992, 52.9% responded that they expected an increase of positions requiring high-level technical knowledge or skills. Rodo-Sho [Ministry of Labor], Rodo Hakusho [White Paper on Labor] 155-56, 192-201 (1993). Shintaro Hori, who has consulted to numerous Japanese firms on business strategies, explains that Japanese corporations must reconsider their functional priorities: "[Japanese companies] must focus on improving the productivity and innovativeness of white-collar workers with the same level of commitment and vigor they directed at becoming highly productive quality and customer-oriented manufacturers." HORI, *supra* note 18, at 158. *See also* Ushio Jiro & Noguchi Yukio, *Reforming Japan's "War-Footing" Economic System*, 21 JAPAN ECHO 13, 18 (1994) (explaining the need to "shift from a production-oriented to a consumption-oriented economy").

301. *See* Katayama, *supra* note 18, at 13. For a discussion of Japan's postwar economic development, *see generally* REISCHAUER, *supra* note 7, at 309-19.

302. Katayama, *supra* note 18, at 13. *See also* Yamamoto, *supra* note 20, at 386 (foreseeing companies' need to rely more heavily on "creative activities, such as planning, design, and development to survive").

303. Yamamoto, *supra* note 20, at 386.

304. Sawa & Ishikura, *supra* note 18. Japanese firms, while emphasizing individuals as components of a team, pay little attention to specialized skills. WILLIAM OUCHI, THEORY Z 76 (1981) (discussing a lower degree of professionalism in Japanese corporations).

305. *See* KOPP, *supra* note 18, at 223-24 (explaining that Japanese traditional management, which encourages passivity, conformity, and conservatism, can no longer help the na-

creativity needed to boost the business.[306] Therefore, companies should strive to build a workforce composed of diverse values and skills,[307] which challenges talented employees to contribute innovative ideas.[308] The seniority system, which creates a "false equality that overemphasizes harmony," is less likely to motivate employees to maximize their individual potential.[309]

Other trends as well bolster the argument for the merit system. The rising number of temporary and contract employees suggests a greater demand for professionals for immediate use.[310] The number of temporary workers has increased by about 4.5 times, from 145,000 in 1986 to 654,000 in 1992.[311] Similarly, contract employees have increased from 7.9% in 1987 to 18.9 percent in 1993.[312] Also, more firms are beginning to use Western-style headhunters to fill their managerial and technical staff.[313] In January, 1994, Toyota Motor Corp. announced its plan to hire automobile designers under one-year contracts and with merit-based annual salaries.[314] Explaining its decision to turn away from lifetime employment, Toyota' statement read: "[a]s the business conditions surrounding Japanese corporations underwent radical change, however, it was inevitable that the rigid organizational structure of the past would impose limits on corporate growth."[315] As the Wall Street Journal reported, this decision by Toyota, one of the most conservative firms in Japan, will profoundly affect on Japanese labor practices.[316] Major corporations are now opting for midcareer recruitment, which enables them to hire talented employees for narrowly defined roles.[317]

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tion's economy as Japanese business shifts its focus from "cost leadership to innovation and high value-added products").

306. Sawa & Ishikura, *supra* note 18.

307. *See, e.g.*, Yamamoto, *supra* note 20, at 386; HORI, *supra* note 18, at 42-43 & 211-12; Sawa & Ishikura, *supra* note 18, at 69 (noting that individuals, as well as corporations, should change their attitude toward jobs; in choosing jobs, they should focus more on what they truly want to do).

308. Katayama, *supra* note 18, at 13.

309. *Id.*

310. KAWARU NIHON, *supra* note 18, at 55-69. Mroczkowski and Hanaoka introduce some examples of new hiring practices among Japanese firms. Nikko Securities, for instance, hire foreign exchange traders at high salaries on a contract basis. The career path for these contract employees is entirely separate from the traditional lifetime employment track; their salaries and career prospects are based on their performance. Mroczkowski & Hanaoka, *supra* note 20, at 283-84.

311. *Id.*

312. *Id.*

313. Mroczkowski & Hanaoka, *supra* note 20, at 286; HATO, *supra* note 18, at 58.

314. Michael Williams, *Toyota Creates Work Contracts Challenging Lifetime-Job System*, WALL ST. J., Jan. 24, 1994, at A8.

315. *Id.*

316. *Id.*

317. HATO, *supra* note 18, at 133-34. Sumitomo Gomu Kogyo Company's "job request system," which was adopted in 1990, exemplifies such a trend: the firm allows its newly hired employees, after three months of orientational training, to select three sections they hope to work for. The rate of a person being assigned to the position of his or her first

E. *Anticipation of Labor Shortages*

The rapidly aging population of Japan, coupled with a declining birth rate, will also profoundly affect the nation's labor market.[318] Presently, the Japanese population's aging rate is highest in the world.[319] In 1992, the Ministry of Labor reported that people over the age of sixty-five accounted for 12.6 percent of the entire population.[320] Among this group, the number of people over the age of seventy-five has sharply increased.[321] Furthermore, the Ministry of Welfare estimates that the number of the elderly will reach 6,000,000[322] by the year 2,000.[323] This means that Japan will have the highest percentage of the elderly in the world.[324] Furthermore, according to the Institute of Population Problems, Japan's birth rate, which was 1.57 children per woman in 1989, is expected to decrease to 1.32 children per woman by 1996.[325]

The shrinking labor force will necessitate the greater use of older, experienced workers as additional labor resources.[326] Older workers themselves are hoping to remain in the workforce longer, as shown in the following survey by the Prime Minister's Office. Among the surveyed workers, 23.2 percent and 57.1 percent expressed their desire to work until age sixty and sixty-five respectively.[327] Among males in their fifties, nearing their mandatory retirement age of sixty, as high as 68.8 percent hoped to work until age sixty-five. This figure rose to 91.2 percent among males between age sixty and sixty-four.

Currently, some employers may see demotion and layoffs, which automatically eliminate older workers, as an inevitable strategy to cope with the economic crisis. However, one major advantage of hiring older employees lies in cutting down costs on training young and inexperienced

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choice amounts to 80%. The rate equals 100% if the persons assigned to the positions of their third choice are included. This type of personnel policy is still considered extremely rare in Japan. *Id.* Hato discusses other examples of "revolutionary hiring" recently adopted by some major companies including Sony and Japan Air Lines. *Id.* at 128-34.

318. The Japanese population is aging at the world's highest rate. Rodo-Sho [Ministry of Labor], Fujin Rodo Hakushyo [White Paper on Women's Labor] 40 (1992). In June 1990, the Ministry of Labor raised the minimum retirement age for 55 to 60. After the age of 60, employers may rehire workers on a commissioned basis. Akwi Seo, *Work Keeps Them Healthy*, 37 LOOK JAPAN (1991).

319. Fujin Rodo Hakushyo, *supra* note 318, at 40.

320. *Id.*

321. *Id.* at 41.

322. Japan has a population of 120.75 million.

323. Fujin Rodo Hakushyo, *supra* note 318, at 41.

324. Sodei Takao, *Family in an Age of Working Women*, 9 JAPAN ECHO 95, 102 (1982) (concluding that women's role in the labor force should increase in the aging society).

325. Japan Information Center, *Experts Think Japan's Low Birthrate Could Decline Further*, 37 JAPAN REP. 2 (1991).

326. *See* Uchihashi, *supra* note 23, at 49 (stating Japan's need to pass a law against age discrimination, because "it is wrong to deny [elderly workers] their seniority rights on the grounds that their present abilities are unequal to their past contribution").

327. KAWARU NIHON, *supra* note 18, at 211-12.

workers.[328] From a long-term perspective, the Japanese employment system should be restructured to meet the needs of the anticipated labor shortage.

VI. PROTECTIVE MEASURES AGAINST DISCRIMINATION CHARGES

The rise of employment disputes involving Japanese firms in the U.S. should alert the employers to formulate human resource policies as a vital part of global management.[329] This section offers suggestions on what steps companies should take in order to avoid conflict.[330]

First, the Japanese firm should retain a lawyer capable of offering practical legal advice based on his or her solid understanding of the U.S. and Japan cultures and business practices.[331] Legal knowledge alone will remain inadequate to deal with possible clash of two fundamentally different cultures.[332] The attorney should assist the company in implementing various strategies to minimize the risk of litigation. For instance, he or she should be able to help prepare written documents on various aspects of employment such as work regulations, fringe benefits, and sexual harassment policies.[333]

Second, the attorney should provide an educational program to acquaint Japanese managers with U.S. antidiscrimination laws. This program should cover both theoretical aspects of the laws and case studies based on suits against Japanese or other multinational firms in the U.S. In addition, interviewing skills workshops can help recruiters learn what constitute impermissible questions at job interviews.[334] Managers rotating from Japan should be required to undergo such training prior to departure. The company should create methods to evaluate their level of understanding after participation.[335] This helps ensure that the managers arrive in the U.S., truly informed. Likewise, the employer should offer seminars for both Japanese and American employees, designed to enhance their cross-cultural understanding and to develop interpersonal

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328. *Id.* at 166.

329. One observer emphasizes human resources management as playing the most critical role in the success of a Japanese corporation. Japanese businesses heavily relied on production in the 1960s and 70s and on marketing in 1980s. Japanese economy today, however, should shift its focus from goods to people. HATO, *supra* note 18, at 110-14.

330. *See generally* MARY GREENWOOD, HIRING, SUPERVISING AND FIRING EMPLOYEES: AN EMPLOYER'S GUIDE TO DISCRIMINATION LAWS (1987); PITFALLS, *supra* note 8.

331. PITFALLS, *supra* note 8, at 6-7.

332. Schaffer, *supra* note 26, at 399 (suggesting the appropriate role for American attorneys advising Japanese multinational corporations).

333. PITFALLS, *supra* note 8, at 6-7.

334. Finegan, *supra* note 165, at 69.

335. Equally important, the company should carefully evaluate candidates for overseas assignment in terms of their fluency in English, cross-cultural experience, communication skills, the ability to work through conflicts, and so on. The company should also consider assigning Japanese employees to foreign branches and subsidiaries, preferably for longer than five years.

skills in the multinational workplace.[336] Such training can build itself on interactive sessions, which include activities such as role plays, exercises, and group discussions.[337] Nonetheless, gaining intercultural understanding has to be a long, ongoing process.[338] Thus, the company should encourage their employees to work through conflicts and misunderstanding, bridging cultural gaps through learning-by-doing.[339] On a more informal basis, the company should sponsor social activities encouraging participation from all workers. To cultivate harmonious work relations based on trust, it is vital to make Americans feel part of the company.[340]

Third, the company should provide a well-defined job description for each position.[341] The description should be both accurate and detailed, including job duties, requisite skills, knowledge, education, and experience. Publishing such information enables the company to articulate objective standards in hiring and promotion. At the same time, it gives the employer the opportunity to evaluate its own employment criteria.

Fourth, supervisors should be required to document all important actions. Written records can be of great value in case any dispute arises. For newly hired employees, the company should provide a handbook on personnel policies, including a list of conduct that may lead to termination.[342] Equally important, the company should adopt a procedure to review and update documents systematically. This gives the employer the opportunity to assure that the corporate policies are proper in light of

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336. More than one-third of the 578 companies surveyed by the Olsten Corporation reported the increasing need for employees with multicultural communication skills. Robert Hayles, Vice President of Cultural Diversity for Grand Metropolitan Food Sector, explained that companies must get an "everyday understanding of whom diversity involves, what diversity is, and why diversity is necessary." WARREN GORHAM LAMONT, WHAT YOU NEED TO KNOW ABOUT MANAGING DIVERSITY 10 (1992). Shelly Lieberman, Multicultural and Cross-Cultural Consultant and Director of Educational Outreach and Marketing, discusses potential benefits from a diversity training program, intended to nurture sensitivity and understanding of cultural differences: (1) growth in previously unexplored marketplaces; (2) redevelopment of markets that were not sensitively managed due to a lack of understanding of communities served; (3) improved employee relations; (4) wider range of problem-solving skills; (5) better allocation and utilization of human resources; (6) better vendor relationship; and (7) increased productivity. *Id.* at 26.

337. *Id.* at 34-36.

338. *Id.* at 31.

339. *See, e.g.*, KOPP, *supra* note 18, at 25 (stating that "[s]mall matters frequently escalate into major misunderstandings that pit Japanese and locally hired employees against each other").

340. As one way to achieving this goal, the company as a whole should actively participate in the local community affairs through philanthropic activities. This tactic will also help enhance the corporate image in the community. MASATU, *supra* note 228 (emphasizing the importance of social contributions by corporations and introducing examples from various multinational corporations).

341. Typically, Japanese companies prepare job descriptions for department managers, but not for individual employees. *Id.* at 75-77. *See also* HORI, *supra* note 18, at 184 (stressing the need for clarification of individual responsibility).

342. Finegan, *supra* note 165, at 70.

furthering the goal of equal employment opportunity.[343]

Fifth, the company should make every effort to facilitate effective communication between management and employees. For instance, Japanese supervisors should straightforwardly communicate to the employees the result of performance appraisals.[344] Avoidance of open confrontation constitutes a common element of Japanese culture. Bosses often remain reluctant to inform their subordinates, in a direct and forthright way, of any problems that need to be corrected. To preserve congenial working relationships, they may use inference[345] or give their feedback informally by "[surrounding] employees in an atmosphere of daily advice and admonitions."[346] Lack of direct communication may, however, cause some misunderstanding on the part of American employees.[347] Therefore, the company should also create opportunities to receive employees' comments on work conditions. Such opportunities may take various forms ranging from individual conferences to opinion surveys.

Sixth, all forms of internal communications should be carried out in English, when possible. This rule should apply to written materials, such as personnel policies, company memos, and notices on the bulletin board. Documents in Japanese, even if accompanied by English translations, may cause mistrust among American employees.[348] For the same reason, all company meetings should be conducted in English. Akihiko Maruyama, who was in charge of human resources management at Tokyo Marine and Fire Insurance Company in New York, stresses this point from his own experiences and observations.[349] Maruyama explains that some Americans feel being excluded from decision-making when Japanese managers speak Japanese to each other, even in informal discussions.[350]

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343. PITFALLS, *supra* note 8, at 32-35.

344. HORI, *supra* note 18, at 187-88. The company should also articulate the method and standards of evaluation.

345. To avoid sharp conflict of views, the Japanese often rely on nonverbal communication. REISCHAUER, *supra* note 7, at 136.

346. BYHAM, *supra* note 39, at 12.

347. Also, at the job interview, Japanese employers should refrain from making comments out of courtesy such as, "We hope you will be able to stay with us as long as possible." Such an ambiguous statement may create a false impression that the company guarantees lifetime employment. KISHI, *supra* note 30. In Fitzgibbon v. Sanyo Securities America,Inc., a discharged American employee asserted his receipt of the Japanese employer's oral and written assurances of lifetime employment. For instance, plaintiff submitted a handwritten statement on a loan application that "employment will be a sort of lifetime employment." The court rejected this argument, because a reasonable person would not recognize this statement as an express limitation upon the employer's right to terminate at will. Fitzgibbon v. Sanyo Securities America, Inc., No. 92 Civ. 2818 (RPP), 1994 WL 281928, at *6 (S.D.N.Y. June 22, 1994).

348. Finegan, *supra* note 165.

349. KISHI, *supra* note 30, at 184-85.

350. *Id.* The following discrimination suit against a Japanese company provides one example. In this case, an American plaintiff claimed, among other things, that his employer had sponsored recreational activities exclusively for its Japanese employees. The court found that the company, in fact, provided the activities for all employees. Partly because he

Seventh, the company should establish an internal procedure, which responds to complaints, conducts a thorough investigation to determine whether any discrimination has occurred, and if it has, to take corrective action.[351] The officers involved in this process should consist of both Japanese and Americans.

Finally, the company should carefully evaluate the racial and ethnic composition of its work force, ensuring adequate representation of the local population. The amount of autonomy given to local staff can largely determine the degree of the firm's globalization.[352] From a more practical viewpoint, heavy reliance on expatriates deprives Japanese companies of the opportunity to use valuable human resources; aided by their knowledge of the local conditions, American managers can greatly enhance business operations.[353]

VII. CREATION OF A THIRD-CULTURE BUSINESS ENVIRONMENT

To fulfill their duty to comply with the U.S. civil rights laws, Japanese firms must curtail various aspects of their traditional employment practices. Nonetheless, this curtailment does not mean that the companies must replace their entire management structure with its U.S. counterpart. Americans may, in fact, find certain aspects of Japanese-style management admirable.[354]

Ronald A. Morse, Executive Vice President of the Economic Strategy Institute, discusses underlying values supporting Japan's economic performance, such as loyalty and teamwork; he then concludes that there is no reason to condemn these values as long as they do not manifest themselves in unfair employment practices.[355] Professor Brown at the University of Hawaii School of Law points out that joint employer-employee consultation committees, flexible job descriptions, and attempts at cooperation rather than conflict to resolve disputes find greater use in the American workplace.[356] He further introduces an effort by the G.M-

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had seen a sign advertising excursion trips in Japanese, the plaintiff assumed that the company had excluded him. Walsh v. Eagle Wings Industries, Inc., No.89-2052, 1991 WL 90906 (C.D.Ill. 1991), at *3.

351. EQ. EMPL. COMPL. MAN., Pt.II section 2.03-2.09 (1983).

352. Mroczkowski & Linowes, *supra* note 12, at 28.

353. BYHAM, *supra* note 39, at 214.

354. Brown, *supra* note 152, at 239-40.

355. Lantos Hearings, *supra* note 30, at 180-81 (observing that "the Japanese educational system and the corporate training programs prepare an excellent and effective workforce for Japanese business").

356. Brown, *supra* note 152, at 239-40. Some U.S. manufacturers of Japanese origin have successfully adopted certain aspects of Japanese-style management. For instance, Kyocera in San Diego has implemented a "Honor Employee System", which offers privileges to employees who have reported to work on time and have not been absent for six months in a row. Other examples include: "the self-disciplined, small, autonomous group method; 30-minute morning communication meetings; pep talks; bottom-up suggestion system meetings, and group competition bonus systems." KOBAYASHI, *supra* note 43, at 94-95. Based on a comparative survey, James Lincoln discusses what specific aspects of Japanese-style man-

Toyota joint venture in California, and the G.M. Saturn project, as well as numerous projects in the steel and manufacturing industries to learn from Japan's success; they have "taken great strides in devising management and labor relations approaches and contract provisions which seek to replace confrontation with cooperation."[357]

In his book on Japanese management, *Theory Z*, William Ouchi questions a potentially destructive aspect of excessive individualism at the core of competitive American workplaces.[358] Predominance of self-assertion over group conformity creates a society where "each person is at war with the other."[359] Characterized by a high degree of specialization, American-style management tends to promote a hierarchical culture; professionals are glorified while those without high-level skills remain unappreciated. In contrast, Japanese companies have used a variety of methods of building team spirit by eliminating a sense of competition among all workers.[360] Ouchi compares individualism asserted by Americans with collectivism emphasized by the Japanese.[361] He then advocates the latter as better suited to modern industrial production and industrial life.[362]

William Byham, who wrote a book entitled Shogun Management based on experiences of more than two hundred U.S. and Canadian managers working for Japanese companies, suggests that the shared challenge facing Japan and the U.S. is to create a third-culture business environment that integrates the strengths of both management-styles.[363]

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agement practices produce company commitment and job satisfaction in Japan and in the U.S. The following is an excerpt from the survey results: (1) long-term employment and/age seniority grading (positive in both countries); (2) cohesive work groups (positive in both countries); (3) dense supervision; close supervisor-subordinate contact (positive in Japan; negative in U.S.); (4) "tall," finely-layered hierarchies (negative in both countries; but contributes to management-labor consensus in Japan); (5) formal centralization/de facto decentralization of decision-making (positive in both countries); (6) quality circle participation (positive in both countries); (7) unions (enterprise-specific in Japan; industry-occupation specific in the U.S.) (weak negative to null in Japan; strongly negative in U.S.) Lincoln, *supra* note 29, at 103.

357. Brown, *supra* note 152, at 239-40.

358. OUCHI, *supra* note 304.

359. Western philosophers and sociologists, including Plato, Hobbes, and B.F. Skinner, have asserted that "individual freedom exists only when people willingly subordinate their self-interests to the social interest." OUCHI, *supra* note 304, at 65.

360. Partly for the purpose of eliminating a sense of competition among workers, Japanese firms have deliberately avoided drawing a clear line between white and blue-collar positions. Edwin Reischauer explains the company's paternalistic interest in both groups: "They usually wear the same work jackets and hats in the plant and eat in the same company restaurants. Cheap company housing may be provided to both groups, and a great deal of company indoctrination is included in the initial in-service training for both." REISCHAUER, *supra* note 7, at 324.

361. OUCHI, *supra* note 304, at 66.

362. *Id.*

363. For this purpose, the author presented experiences of more than 200 U.S. and Canadian managers working for Japanese companies and a small number of Japanese managers. BYHAM, *supra* note 39, at vii.

Thus, Japanese multinational firms assume dual responsibilities: first, to implement human resource strategies, based on the American model, in order to build a work environment that integrates voices and experiences of diverse individuals; and second, to help American workers see themselves as part of a team working together in the pursuit of the common goal.[364] An illustration of an integrated organization by Robert Wallace of Wallace III & Associates, a management consulting firm, suggests a goal that Japanese multinational firms should aim for:

> "[An integrated organization] looks at people as a mosaic in a stained glass window. The uniqueness of each individual piece is clear, and this uniqueness creates the beauty of the mosaic when the sun shines through. Individuals feel included and welcome to an organization if their uniqueness is valued and honored at the workplace. These workers are also more productive."[365]

It is time for Japanese companies to learn and appreciate the beauty of the mosaic. Playing a vital role in the international business community, Japanese employers assume the responsibility to develop respect of the individual in the workplace while maintaining a sense of collective responsibility.[366]

VIII. CONCLUSION

Japanese multinational firms have long endeavored to triumph in the world marketplace. Nonetheless, they have yet to gain standing as good corporate citizens in the global community. Their employment practices often clash with America's commitment to redress job inequalities through Title VII. The rise of discrimination suits should alert Japanese employers to confront and reject the forced homogeneity of their workforce. They should recognize the ultimate source of victory in litigation: a workplace that fully integrates[367] the strengths of diverse individuals.[368] Adoption of a merit system would serve as a catalyst for attainment

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364. For a discussion on how to make teamwork effective in the corporate setting, *see generally* Jon R. Katzenbach & Douglas K. Smith, *The Discipline of Teams*, HARV. BUS. REV. 111-20 (1993).

365. LAMONT, *supra* note 336, at 23 (discussing integration, as opposed to assimilation).

366. One scholar explains the inevitable link between individualism and communality as follows: "It is our sense of our own individual dignity that leads us to appreciate the same worth of the individuality of other persons." Inoue, *supra* note 17, at 548.

367. One should distinguish integration, meaning "to bring together as parts, into a whole" from assimilation, meaning "to make alike." LAMONT, *supra* note 336, at 23 (relying on the definition in Webster's Dictionary). American society has traditionally linked the concept of assimilation with the melting pot metaphor, "where ethnic and racial differences were standardized into a kind of American puree." This notion contradicts the goal of managing diversity: to enable every member of the group to retain and maximize his or her individual potential. R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirmative Diversity*, HARV. BUS. REV. 107, 112 (Mar./Apr. 1990).

368. Creating a multicultural work environment has posed a new challenge for U.S. domestic corporations as well. The visible increase in the number of women and minorities in the U.S. labor force has bolstered the need to promote diversity management as a corpo-

of that goal.

The transition is inevitable even without the legally imposed duty under Title VII. In Japan as well, the decline of lifetime employment and the seniority system has necessitated a qualifications-based personnel policy. Japanese firms must strive to create a work environment reflecting a broad array of backgrounds and perspectives. Lasting changes must take place from within. Only with such changes will Japan have embarked on the journey to true globalization.

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rate policy. An America That Works, a policy statement issued by the Committee for Economic Development (an independent research and educational organization for over 225 business executives and educators) contains the following information: blacks, Hispanics, and Asians will comprise more than half of the net labor force growth between 1988 and 2000; 81.4 percent of women between the ages of 25 and 54 will be participating in the workforce in 2000. LAMONT, *supra* note 336, at 7-8. R. Roosevelt Thomas, Jr., Assistant Professor at the Harvard Business School and Executive Director of the American Institute for Managing Diversity, Inc., at Atlanta's Morehourse College, also emphasizes the growing need for employers to take advantage of a multicultural workforce. Thomas introduces examples of diversity management by Avon, Corning, Digital, Procter & Gable. Thomas, *supra* note 367.

Recent Developments

The Extradition of International Criminals: A Changing Perspective

THOMAS F. MUTHER, JR., EDITOR-IN-CHIEF

I. BACKGROUND

On September 5, 1995, Gary Lauck, the infamous neo-nazi publisher and supplier of xenophobic and anti-semitic literature, was taken into custody by German police for violating several of that country's anti-nazi criminal laws.[1] This, by itself, is not a surprising occurrence given Germany's recent crackdown on neo-nazi activity within its borders.[2] However, this arrest was not typical. First, Lauck is a U.S., not German, citizen, residing near Lincoln, Nebraska. Secondly, he has not set foot in Germany for nearly twenty years. How is it, then, that a person can face trial in Germany when he is neither a citizen of, nor present in, that country?

The answer, while complicated in its political detail, is a simple one. Lauck, for the last twenty years, was the most infamous producer and distributor of neo-nazi material in the world.[3] From his base in Nebraska, the "Farm Belt Führer" has earned a reputation of being the most dangerous neo-nazi propagandist alive.[4] His books, magazines, and swastika adorned contraband were smuggled into Europe through many secret

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1. Gary Lauck, *Supplier of Nazi Material, Is Extradited to Germany*, THE WEEK IN GERMANY, Sept. 8, 1995, *available in* LEXIS, Nexis Library, News File.

2. Since 1994, eleven neo-nazi groups have been banned, with their leaders sentenced to jail time and monetary fines. Dominick Wichmann, *Dealing with a Conscience of Shame; Don't Be Lulled Into Complacency by the Leaderless Neo-Nazi movement*, CHIC. TRIB., Sept. 28, 1995, at A1. For a description of the criminal investigation of two of these organizations, *see* Mary Williams Walsh, *Germany Bans 2 Neo-Nazi Groups*, LOS ANGELES TIMES, Feb. 25, 1995, at 5. For a detailed account of hate crimes in Germany, *see generally* PAUL HOCKENOS, FREE TO HATE (1993).

3. The Bulletin of the National Socialist German Workers Party Overseas Organization, Lauck's main publication, is published in ten languages and circulated throughout the U.S. and Europe. *Internet Used as Tool for Neo-Nazi Propaganda*, NATIONAL PUBLIC RADIO, May 1995, *available in* WESTLAW, 1995 WL 2915974.

4. *Text of ADL Report The Skinhead International; A Worldwide Survey of Neo-Nazi Skinheads*, U.S. NEWSWIRE, June 28, 1995, at 105 [hereinafter *ADL Report*].

channels, making their detection by German officials, as Lauck himself brags, virtually impossible.[5] He avoided apprehension by remaining in the United States, where "under the First Amendment, his nazi activities are as legal as they are illegal in Germany."[6] This has been a sore spot in German-U.S. relations for the last two decades. Eckart Wertebach, head of Germany's domestic intelligence agency, stated "time and again we have talked to our American friends, but they tell us there is no way within the American legal system to stop [Nazi propaganda] production."[7]

For this reason, Lauck has successfully avoided the scrutiny of German police, that is, until his recent arrest in Hundige, Denmark. Under the weight of a German sponsored international arrest warrant,[8] Denmark agreed to take Lauck into custody and, after several months of extradition hearings, turned him over to German officials.[9] During his six months confinement in Denmark, Lauck's extradition hearing proceeded to the Danish Supreme Court, where he was denied relief on the grounds that his activities were illegal in both Denmark and Germany.[10] In Germany, Lauck faces up to five years in prison for "distributing illegal propaganda and Nazi symbols, incitement, encouraging racial hatred, and belonging to a criminal group."[11]

II. EXTRADITION: LAW OR POLICY?

The process of extradition is simply defined as the surrendering of a criminal or accused criminal by one sovereign to another.[12] Throughout its existence, extradition has fluctuated between the blurry line separat-

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5. Andrew Stern, *American Neo-Nazi is prolific Propaganda Publisher*, REUTERS WORLD SERVICE, Jan. 6, 1994, *available in* LEXIS, Nexis Library, News File.

6. Scott Canon, *Nebraska Neo-Nazi's Work Creates Friction Between U.S., Germany*, DALLAS MORNING NEWS, Jan. 30, 1994, at A1. "Extremists' speech 'however despicable, is rightly protected by the constitution.' " Louis Freeh, U.S. FBI director, *quoted in*, Marc Fisher & Steve Coll, *Farm-Belt Hitler Sows Seed of Hate; The US is Finally Realizing the Threat Posed by Groups Sending Neo-Nazi Propaganda Abroad*, THE GUARDIAN, May 13, 1995, at pg. 12.

7. *Id.* "I have great respect for the American system . . . [b]ut its effects on us have been catastrophic." Heinrich Sippel, Federal Office for the Protection of the Constitution (Germany), *quoted in*, Thom Shanker, *U.S. Hands Tied in Neo-Nazi Fight; Nebraska Man Spreading Propaganda to Germany*, THE TIMES, December 22, 1993, at A16.

8. Germany, through INTERPOL, distributed arrest warrants to fifteen European countries where Lauck was thought to have supporters. *American Neo-Nazi Arrested in Europe*, CHIC. TRIB., March 24, 1995, at 3. Likewise, Lauck's arrest was coordinated by a police raid of 80 apartments throughout Germany, confiscating weapons and neo-nazi propaganda. *Id.*

9. Wichmann, *supra* note 2, at 17.

10. Jan M. Olsen, *Extradition to Germany Cleared for U.S. Neo-Nazi*, ASSOCIATED PRESS, August 25, 1995, *available in* LEXIS, Nexis Library, News File.

11. *American Neo-Nazi Arrested in Europe*, CHIC. TRIB., March 24, 1995, at 3.

12. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 1 (1974).

ing international law and diplomacy.[13] Extradition agreements originally grew out of peace and alliance treaties, where the return of one sovereign's criminals was a sign of friendship and co-operation, not duty.[14] However, from this informal beginning independent extradition treaties grew to a legal significance where states became reluctant to grant extradition in the absence of a formal treaty.[15] With the predominance of formalized treaties also came the enlightened attempts at protecting not only the sovereign interests of the states, but the rights of the individual as well.

As the last decade of the twentieth century unfolds, it is becoming exceptionally clear, however, that the legal framework defining extradition has become more of a burden in today's atmosphere of international crime, leaving individual countries the task of finding ways around the treaties that were once so important. From the apex of international law, extradition has once again sunk to the nebulous region between law and policy. Despite earlier efforts at codifying basic legal principles with which to govern extradition, the international community has chosen to keep its application discretionary.

III. THE EUROPEAN CONVENTION ON EXTRADITION

As mentioned above, most countries require formal extradition treaties to allow the surrendering of persons to a requesting state.[16] Germany and Denmark are both parties to the Council of Europe's European Convention on Extradition (ECE).[17] The ECE is the most successful multilateral treaty of its kind, accounting for more extraditions than any other.[18] This treaty supersedes other bilateral treaties,[19] however, leaving them as supplementary to the broader ECE.[20] In form, the ECE follows an orthodox pattern, although liberalizing the earlier bilateral treaties on which it

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13. I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971). "The whole history of extradition has been little more than a reflection of the political relations between the states in question. Van den Wijngaert, *The Political Offense Exception to Extradition: Defining the Issues and Searching a Feasible Alternative*, REVUE BELGE DE DROIT INT'LE 740, 745-46 (1993), *citing* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 6 (1987).

14. *Id.* at 6.

15. *Id.* at 24-25. The question as to whether any customary international law on extradition exists has been a long standing and yet unresolved legal debate.

16. Some countries do not require treaties to be in force for extradition to possible. For example, France and Switzerland statutorily provide for extradition where no treaty exists. GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 26 (1991). Common law countries are more likely to require more formalistic treaty obligations. *Id.*

17. European Convention on Extradition, December 13, 1957, UNTS 5146 [hereinafter ECE]. The Federal Republic of Germany, the original signor to the convention, was replaced by Germany in 1991.

18. GILBERT, *supra* note 16, at 21. By the end of 1990, twenty-one states had ratified the ECE.

19. ECE, *supra* note 17, at art. 28.

20. GILBERT, *supra* note 16, at 22.

is based.[21] One of the principle goals of the ECE is to assist in the "achiev[ment] of greater unity between its members . . . [c]onsidering the acceptance of uniform rules with regard to extradition [a]s likely to assist th[is] work . . . ."[22] Despite the legal framework of the ECE, as well as the stated intentions of its member countries, Lauck's extradition to Germany illuminates the devaluation of an international legal extradition standard.

A. *Reciprocity*

Reciprocity, the notion that one sovereign will surrender fugitives so long as its own requests for fugitives will be honored,[23] is one of the fundamental bases on which extradition is possible. While the text of the ECE does not specifically address reciprocity, it can be inferred from the preamble's reference to greater cooperation, along with the nature of treaties in general, that reciprocity is assumably met by simple ratification. In the past, the concept of reciprocity has been thought to limit the objectives of extradition by giving states a legal opportunity to refuse extradition. Many view extradition, even without reciprocity, as a benefit, stating that the best interests of both countries are to return criminals. Not only does the requesting party benefit by being given the opportunity to punish those who violate its laws, but the requested party also benefits by not having to house another country's criminals.[24] For this reason, reciprocity has become a blanket concern, arising either where no treaty exists, or where one requesting party to a treaty is consistently refused extradition by the requested party.

B. *Double Criminality*

Article 2 of the ECE provides that "extradition shall be granted in respect of offenses punishable under the laws of the requesting party and of the requested party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty."[25] The types of crime for which extradition is available are limited to crimes that carry a potential sentence of one year incarceration or more.[26] Double criminality, like reciprocity, has become a burden to

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21. I.A. Shearer, *The Current Framework of International Extradition: A Brief Study of Regional Arrangements and Multilateral Treaties in* 2 M. CHERIF BASSIOUNI & VED P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 326 (1973).

22. ECE, *supra* note 17, at preamble

23. BASSIOUNI, *supra* note 12, at 8.

24. Parry, 6 BRITISH DIGEST INT'L L. 805-806 (1965), *cited in* Gilbert, supra note 16, at 26. "No State could desire that its territory should become a place of refuge for the malefactors of other countries." SHEARER, supra note 13, at 29.

25. ECE, *supra* note 17, at art. 2.

26. The ECE's eliminative approach is in sharp contrast to the more traditional enumerative one, which required treaties to list all the extraditable offenses. This represents the common trend in most bilateral and multilateral extradition treaties. GILBERT, *supra* note 16, at 38.

states which are trying to extradite criminals under their laws. What has arisen in many instances is a willingness to create general categories into which crimes can be classified, thus avoiding the classic statutory language comparisons which made it difficult to meet double criminality requirements in the past. This section of the treaty seems to have been wholly disregarded by the Danish court in allowing the extradition of Lauck to Germany.

Because of its history, German criminal law has developed many prohibitions against outward manifestations of racial hatred. For instance, Germany's Penal Code provides for incarceration for the production, showing, or distribution of specific writings to those under eighteen.[27] While many loopholes exist in German law affording limited protection to neo-nazi groups, it is the most developed legal attempt at preventing racially motivated activity in the world.[28] Denmark, on the other hand, is much more like the United States in its protection of neo-nazi groups under the ideals of freedom of expression. While stat. 266(b) of the Danish Penal Code makes it a crime to utter racist remarks, the punishment imposed by that law does not exceed one year and, therefore, does not fall within the category of crimes extraditable to Germany.[29] This was tested by the failed 1988 German extradition attempt of Thies Christophersen, who fled to Denmark from Germany to escape incarceration.[30] He was allowed to stay in Denmark on grounds of freedom of expression. However, art. 266(b) was amended this spring, giving it teeth by increasing the punishment of these crimes to two years.[31] This increased sentence would allow extradition under the ECE. However, this law was amended after Lauck's extradition hearing had already begun. There is little doubt that if Lauck was arrested today, his extradition would not violate international treaty obligations. However, barring retroactivity of the statute, double criminality was not present in Lauck's case. While Lauck's actions may have been illegal in two states, the disparity in punishments would not allow extradition.

With the increase of new crimes in the international arena, double criminality has become an unwelcome barrier to extradition.[32] For this

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27. STRAFGESETZBUCH [Penal Code] art. 130, *reprinted in* Juliane Wetzel, *The Judicial Treatment of Incitement against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany in* UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 83 (Louis Greenspan & Cyrill Levitt eds., 1993).

28. Charles Lewis Nier, *Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the U.S. and Germany*, 13 DICK. J. INT'L L. 241, 279 (1995).

29. "I think the most [jail time] anybody ever got [under 266(b)] in Denmark was 60 days," Elmquist, Head of the Danish Parliamentary Justice Committee, *quoted in* Walsh, *supra* note 2, at 1.

30. *Id.*

31. *Id.*

32. Jonathan O. Hafen, Comment, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 B.Y.U. L. REV. 191, 191 (1992).

reason, more general notions of crime have become acceptable as meeting the double criminality requirement, no longer relying on the similarity of statutory language. More than just a solution to a temporary problem of double criminality, Lauck's surrendering represents the willingness of countries to ignore internationally recognized standards in dealing with international criminals.

C. *Political Offenses*

Article 3 of the ECE provides:

> [e]xtradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.[33]

The designed effect of this article is "[to] mix inseparably the humanitarian concerns for the fugitive on the one hand and on the other the politically motivated unwillingness of the requested state to get involved in the international political affairs of the requesting state."[34] Likewise, extradition has traditionally focused on returning political prisoners; only later in its history did states adopt the liberalist notion of protection against political offenses.[35] While each country has a different definition of political offense, most systems include not only pure crimes, such as treason and espionage, but also relative offenses which involve common crimes.[36]

This factor, while theoretically large in the scope of neo-nazi activity, has played a surprisingly small role in any of the extradition proceedings thus far. This, in large part, has to do with a statutory interpretation excluding hate groups, such as skinheads and neo-nazis, from the realm of legitimate party politics.[37] German courts have consistently labelled these activities as non-political, requiring neo-nazi groups to show that they have sufficient seriousness in their efforts to influence the political climate of the Bundestag.[38] This approach, however, underestimates the influence of far-right extremism in European and American political systems.[39] Simply stated, the political offense exception does not apply to

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33. ECE, *supra* note 17, at art. 3.

34. Die Auslieferungsausnahme Bei Politischen Delikten (1983); English summary, pp. 377-81, *cited in* GILBERT, *supra* note 16, at 113.

35. 2 BASSIOUNI & NANDA, *supra* note 21, at 312; Nancy P. Kelly, Comment, *The Political Offense Exception to Extradition: Protecting the Right of Rebellion in an Era of International Political Violence*, 66 OR. L. REV. 405, 405 (1987).

36. Different countries view relative political offenses more or less favorably in light of extradition. *See* Kelly, *supra* note 35, at 405-407.

37. "Although willing to connect with far-right [political] parties, the Skinheads themselves reject the parliamentary road to power. Rather, they aim to achieve their goals through destabilizing society through the direct application of violence and intimidation. *ADL Report*, *supra* note 4, at 4.

38. Walsh, *supra* note 2, at 7.

39. For an exhaustive account of neo-nazi political activity throughout the world, *see generally* PETER MERKL & LEONARD WEINGBERG, ENCOUNTERS WITH THE CONTEMPORARY

Lauck because the charges brought against him were non-political in that they focused primarily on the racist, not political, elements of the crime.

Another policy reason why this concept was not a major issue is that a recent trend has been to eliminate the political offense exception entirely.[40] One of the most dramatic changes in extradition law is the attempt to repeal the political offense exception entirely, given its ability to offer defenses for international terrorism and hate crimes. This tendency is even stronger among the ECE countries, where the predominant view is that in democratic states, criminal activity is not necessary to effect political change.[41]

D. *Speciality*

Speciality, the doctrine that a fugitive shall only be tried in the requesting state for the crimes for which he was surrendered,[42] is another aspect of extradition law which has fallen to the wayside in the hopes of promoting efficient extradition policies. Although this principle is accepted by all states as part of the rules of extradition,[43] it is the aspect most commonly offended by requesting parties.[44] Article 14 of the ECE provides:

> A person who has been extradited shall not be proceeded against . . . for any offense committed prior to his surrender . . . nor shall he be for any other reason restricted in his personal freedom, except . . . (a)When the party which surrendered him consents, [so long as] the offense for which it is requested is itself subject to extradition in accordance with the provisions of the convention.[45]

This is a broad exception, showing that speciality, rather than trying to protect the rights of the person, is in actuality a tool for insuring smooth relations among countries. However, even consent is only permissible when the other offenses would be extraditable. Thus, in conjunction with the double criminality requirement, it would appear that if the fugitive is charged with more than one crime in the requesting country, then only those crimes that are criminal in the requested country could be charged. In Lauck's case, the Danish statute covers only those crimes which stem from racist utterances. Germany's prosecutorial power would be seriously limited if the ECE were to be followed.

RADICAL RIGHT (1993).

40. *Justice Ministers Hope to Drop Concept of Political Crime in Europe*, EUROPEAN SOCIAL POLICY, April 14, 1994, *available in* LEXIS, NEXIS Library, News File.

41. *Id.*

42. BASSIOUNI, *supra* note 12, at 108.

43. GILBERT, *supra* note 16, at 106.

44. Kenneth Levitt, *International Extradition, The Principle of Speciality, and Effective Treaty Enforcement*, 76 MINN. L. REV. 1017, 1018 (1992).

45. ECE, *supra* note 17, at art. 14.

IV. THE EXTRADITION OF LAUCK

With this overview of the extradition law under the ECE, it is apparent that Denmark's extradition of Lauck may exemplify a new trend in extradition which, if carried to its logical conclusion, would suggest that extradition has returned to solely a diplomatic concern, merely keeping its legal facade as a means of justification.

The extradition of Gary Lauck has shown the sacrifice of international law in the guise of good policy. The neo-nazi threat, especially in Europe, has risen to a level of public outrage. Denmark, who has amended its neo-nazi laws to reflect greater concern for the issue, had both domestic and international pressure to hand-over Lauck to the German authorities. However, in so doing, the German and Danish governments have weakened the authority international law can play in unifying the region. While increased cooperation in the prevention and punishment of neo-nazis should be applauded as a legitimate goal, the inability to utilize legal means in which to do it creates both regret and concern in the author. By reverting extradition to the level of diplomatic relations, the door is flung open to reap the uncertainty of political climate. This is particularly troubling in its far-reaching implications. Both international terrorism and drug trafficking are crimes which threaten the security of the world community. For the most part, the response to these crimes has been directed through legal channels.[46] By forming new laws or revitalizing pre-existing laws, the world community is given both a mandate and direction in which to coordinate its efforts to prevent these threats.

Sovereigns must likewise push extradition law forward by promoting new treaties and agreements which codify a general agreement on the terms and objectives of the world community for two reasons. First, in order for countries to rely upon international criminal law, the terms and restrictions of extradition must be known to all parties. Second, the individuals rights must be protected from overly anxious attempts at expedient extradition. In an era of instantaneous international communications and daily travel, it is unwise to leave the citizen of the world to be exposed to the conflicting laws of every nation on earth without clear standards of extradition.

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46. *See, e.g.*, Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, G.A. Res. 3166, 28 U.N. GAOR Supp. (No. 30) 146, U.N. Doc. A/9030 (1974); U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted by consensus Dec. 19, 1988, 28 I.L.M. 493 (1989).

Proposition 187: The United States May Be Jeopardizing its International Treaty Obligations

SANDRA L. JAMISON

"Ethnic and racial conflict, it seems evident, will now replace the conflict of ideologies as the explosive issue of our times"[1]

INTRODUCTION

California's Proposition 187 sends a strong signal to United States treaty partners: "Shut the borders, we are no longer interested." Even in an era of international interdependence, nations are increasingly closing off their borders to immigrants and minority ethnic groups — the United States is no different. The recent California legislation, Proposition 187, excludes immigrants from education, medical care and social service benefits provided to its own citizens. Certain international treaty provisions, however, guarantee that non-citizens have a right to a minimum level of education, health service, and freedom from cruel and unusual punishment. Should California's voters have the right to influence future relations between the United States and its treaty partners?

This comment argues that the United States will jeopardize its international treaty obligations if California's Proposition 187 takes effect. The Federal District Court in California placed an injunction on this legislation until such time as the court rules on Proposition 187's constitutionality. The Ninth Circuit Court of Appeals affirmed this injunction. The first section of the comment describes the Proposition 187 legislation and its status in the court system. The second section describes how this legislation would effect the following United States treaties: 1) the International Covenant on Civil and Political Rights;[2] 2) the Convention on the Rights of the Child;[3] and 3) the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment.[4] The conclusion urges the United States to fulfill its international commitments and ban future isolationist legislation such as Proposition 187.

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1. ARTHUR M. SCHLESINGER, THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 10 (1992).

2. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter Covenant].

3. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (entered into force Sept. 2, 1990).

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 [hereinafter Convention Against Torture].

I. PROPOSITION 187: AN *EX POST FACTO* REMEDY TO A STATE'S FINANCIAL TROUBLES

California's state budget has been in deficit throughout the 1990s, leading to cutbacks in various sectors of public spending. Education, health care services, and welfare payments have been downsized in attempts to regain solvency. Both undocumented and legal immigrants have been targeted by conservative California lawmakers and citizens as the scapegoats and perpetrators of this problem.

California's governor, Pete Wilson, launched the "Save Our State" campaign to quell public outrage over expenditures benefitting alleged non-tax paying aliens. In his opinion, undocumented aliens who are denied access to California's public benefits will "self-deport,"[5] and cure the state of its unwanted economic burden. His conservative rhetoric has spawned a new populist movement in California to rid the state of its unfortunate Achilles heel, the undocumented alien.

On November 8, 1994, 59% of California's voters passed the Proposition 187 legislation.[6] This legislation not only denies all public benefits to undocumented aliens in California, but places the onus on school administrators and health care providers to seek adequate documentation of U.S. citizenship from many legal foreign citizens.[7] In effect, a Rodriguez, Nguyen or Wong can anticipate greater scrutiny in California's public schools and health care facilities than a Smith. Is this the future of America's great "melting pot?"

The Provisions of Proposition 187

The Preamble to the legislation states that the "People of California find . . . [t]hat they have suffered and are suffering economic hardship . . . personal injury and damage caused" by the presence of undocumented immigrants."[8] Proposition 187 then sets forth three restrictive provisions which violate the United States international treaty obligations: 1) education; 2) medical treatment; and 3) social services.

First, Proposition 187 prohibits undocumented aliens from attending any public elementary, secondary, or post-secondary school.[9] To enforce this measure, school administrators are required to investigate the immigration status of their students and their families,[10]to deny undocu-

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5. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 149 (1994).

6. Keith Bradsher et al., *The 1994 Elections: State by State*, N.Y. TIMES, Nov. 10, 1994, at B11.

7. Ron K. Unz, *Sinking Our State*, REASON, Nov., 1994, at 46.

8. CALIFORNIA SECRETARY of STATE, CALIFORNIA BALLOT PAMPHLET 91 (Nov. 8, 1994) [hereinafter CALIFORNIA BALLOT PAMPHLET].

9. *Id.* at 91-92.

10. Minty Siu Chung, *Proposition 187: A Beginner's Tour Through a Recurring Nightmare*, 1 U.C. DAVIS J. INT'L L. & POL'Y 267, 285-286 (1995).

mented students access to the schools, and to report such students to the appropriate authorities. In essence, school administrators act as agents for the Immigration and Naturalization Service (INS). This measure unfortunately places greater scrutiny on those students with a non-Anglo Saxon appearance, as school administrators may examine only those most likely to be undocumented aliens in the interests of time.

Second, Proposition 187 denies non-emergency health care services at publicly-funded clinics until such time as adequate proof of legal immigration status is provided.[11] The definition of a health care facility under this legislation is extremely broad, however, covering *any* in-patient or out-patient facility which diagnoses, prevents or treats physical or mental health illness, including convalescent and *rehabilitative* centers.[12] This provision would encompass undocumented aliens serving time in a prison or other correctional facility.[13]

Further, Proposition 187 excludes undocumented aliens from any other public services available in California, including AFDC, state supplemental SSI benefits, and food assistance programs, among others.[14]

Status of the Legislation in the Court System

Several individuals have challenged particular sections of Proposition 187 in the Federal Courts of California on the bases of constitutionality[15] and federal preemptive status.[16] In *Gregorio T. v. Wilson*, Judge Mariana R. Pfaelzer, District Judge for the United States District Court for the Central District of California, issued a preliminary injunction against several portions of Proposition 187 finding them violative of the United States Constitution.[17] The Ninth Circuit Court of Appeals affirmed this preliminary injunction holding that the lower court did not abuse its discretion in applying the appropriate legal standard.[18]

In a separate legal action involving many of the same parties to *Gregorio T. v. Wilson*, District Judge Jensen denied a challenge to venue in the federal courts by Defendant Wilson and transferred the action to the United States District Court for the Central District of California.[19] The

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11. CALIFORNIA BALLOT PAMPHLET, *supra* note 8, at 91-92.

12. *Id.*

13. Chung, *supra* note 10, at 289.

14. CALIFORNIA BALLOT PAMPHLET, *supra* note 8, at 92; Chung, *supra* note 10, at 292.

15. Barbara Nesbet and Sherilyn K. Sellgren, *California's Proposition 187: A Painful History Repeats Itself*, 1 U.C. DAVIS J. INT'L L. & POL'Y 153, 168-169 (1995).

16. Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 208-209 (1995).

17. Gregorio T. v. Wilson, No. CV-94-7652-MRP (D. Ca., date) (order granting preliminary injunction); *aff'd*, No. 95-55186, No. 95-55188, No. 95-55191, No. 95-55192, 1995 U.S. App. LEXIS 17044, at 1 (9th Cir. July 5, 1995).

18. Gregorio T. Wilson, No. 95-55186, No. 95-55188, No. 95-55191, No. 95-55192, 1995 U.S. App. LEXIS 17044, at 4-5.

19. Wilson v. City of San Jose, No. C-95-0633-DLJ, 1995 WL 241452, at 1, 6 (N.D. Cal. Apr. 14, 1995).

judge held that there was a sufficient federal question to warrant federal court jurisdiction.[20]

At present,[21] there have been no definitive rulings on the constitutionality and other legal challenges to Proposition 187. The defendants are currently enjoined from implementing the legislation pending a final judicial decision.

II. INTERNATIONAL TREATIES

The provisions of Proposition 187 relating to education, health care, and social services violate the United States treaty obligations laid out in the International Covenant on Civil and Political Rights,[22] the Convention on the Rights of the Child,[23] and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[24]

The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights was drafted in New York on December 16, 1966, and entered into force on March 23, 1976.[25] The United States became a party to this treaty on September 8, 1992.[26] The Covenant provides, in pertinent part that:

> [a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, *birth or other status*.[27]

On the broadest level, this Covenant denounces any law which discriminates on the basis of national or social origin. Clearly a policy which denies basic necessities to persons merely on the basis of national origin and immigration status violates this provision.

The drafters of the Covenant did recognize the possibility that a nation in crisis may need some latitude in compliance with these measures. As such, Article 4 was drafted to read:

> [i]n time of public emergency which threatens the life of the nation and *the existence of which is officially proclaimed* . . . the States Parties to the present Covenant may take measures derogating from their

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20. *Id.* at 6.
21. October 1, 1995.
22. Covenant, *supra* note 2.
23. Convention on the Rights of the Child, *supra* note 3.
24. Convention Against Torture, *supra* note 4.
25. UNITED STATES DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1995 363 (1995) (hereinafter TREATIES IN FORCE).
26. *Id.*
27. Covenant, *supra* note 2, art. 26, at 179 (emphasis added).

> obligations . . . provided that such measures are *not inconsistent with their other obligations under international law* and do not involve discrimination solely on the ground of race, colour, language, religion or social origin.[28]

Recognizing that "national origin" was explicitly excluded from the laundry list at the bottom of this article, only if Proposition 187 meets the following requirements will the exception apply: 1) it was enacted due to a "public emergency" threatening the "life of the nation;" 2) which is "officially proclaimed;" and 3) it is not violative of other obligations under international law. Without satisfying these elements, California's "economic hardship"[29] plea will not suffice.

First, there is no evidence that the life of the United States is in jeopardy. Governor Wilson of California has only declared that *his* state is under siege in the "Save Our State Campaign." Second, the Covenant specifically requires that a nation's government officially recognize a public emergency. The United States President has not done so, and has been less than supportive of California's legislation. Article 4 also requires any state invoking this exception to "inform the other States . . . through the intermediary of the Secretary-General of the United Nations."[30] This has not been done.

Finally, Proposition 187, as described more fully below, violates several other international obligations of the United States, including the recently signed Convention on the Rights of the Child. For these reasons, the exception to the International Covenant on Civil and Political Rights will not apply in this case.

Convention on the Rights of the Child

The Convention on the Rights of the Child was adopted by the United Nations General Assembly on November 20, 1989.[31] The United States signed the Convention on February 16, 1995, pledging to join the other 169 countries worldwide who had already signed and ratified the Convention.[32] Congress must still ratify the treaty for it to become binding U.S. Law.[33]

The Convention on the Rights of the Child states that refugee children or those seeking refugee status shall "receive appropriate protection and humanitarian assistance in the enjoyment of" rights under this Convention and other international human rights instruments.[34] On a general level, this provision appears to single out refugee children as a group

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28. *Id.* art. 4, at 174 (emphasis added).
29. CALIFORNIA BALLOT PAMPHLET, *supra* note 8, preamble, at 91.
30. Covenant, *supra* note 2, art. 4, at 174.
31. Convention on the Rights of the Child, *supra* note 3.
32. *U.S. Joins Convention Protecting Children*, UPI, Feb. 16. 1995, *available in* LEXIS, CUR. NEWS Library, Upi File.
33. Convention on the Rights of the Child, *supra* note 3.
34. *Id.* art. 22, at 1464.

which should receive special attention under the laws of any nation in which such children reside.

The Convention on the Rights of the Child has several articles relating specifically to the programs which Proposition 187 targets: education (Articles 28 and 29), medical treatment (Article 24), and social security (Article 26). Recognizing the right of the child to education, this Convention requires states to "make primary education compulsory and available free to all."[35] It further sets forth guidelines for the content of such primary education and provisions for refugee access to higher education.[36]

In Article 24, the Convention on the Rights of the Child mandates that states "shall strive to ensure that no child is deprived of his or her right of access to . . . health care services."[37] It also requires states to "ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care."[38]

Finally, this Convention also states:

> States Parties shall recognize *for every child the right to benefit from social security*, including social insurance, and shall take the necessary measures to achieve *the full realization of this right in accordance with their national law* . . . [t]he benefits should . . . be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child . . . .[39]

Clearly, the Convention on the Rights of the Child not only prohibits, but condemns, the denial of education, health care and social service benefits to any children, irrespective of their nationality or refugee status or that of their parents. Further, Proposition 187 denies the children of illegal immigrants these three basic needs solely on the basis that their parents have sought refuge in the United States. It violates both the spirit and the letter of this Convention to punish children accordingly.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was completed on December 10, 1984, and entered into force on June 26, 1987.[40] The United States became a party to the Convention on November 20, 1994.[41] Under this Convention, the term "torture" is used to describe:

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35. *Id.* art. 28, at 1467.
36. *Id.*
37. *Id.* art. 24, at 1465.
38. *Id.*
39. Convention on the Rights of the Child, *supra* note 3, at art. 26, 28 ICM 1466 (emphasis added).
40. TREATIES IN FORCE, *supra* note 25, at 433.
41. *Id.*

> *any act* by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for such purposes as . . . *punishing him for an act he or a third person has committed* or is suspected of having committed.[42]

The following elements classify the provisions of Proposition 187 legislation as "torture:" 1) severe pain or suffering; 2) intentional infliction; and 3) punishment for an act he/she or a third person has committed or is suspected of having committed. First, the deprivation of essential medical treatment is a cruel treatment or punishment which, under certain circumstances, may lead to death and or permanent injury (severe pain or suffering). Second, as a codified instrument of California state policy, this denial of health care refuses treatment to any individual, provided that he/she cannot provide adequate proof of lawful resident status. As no other factors are taken into account, this broad-based policy constitutes an intentional infliction of such treatment on these persons.

Finally, the sole purpose of Proposition 187 legislation is to punish immigrants for an unlawful entry into the United States by denying benefits. Even Governor Wilson has expressed his desire to see resident aliens "self-deport."[43] As stated earlier, California's definition of a health care facility includes those located in rehabilitative centers.[44] Once sentenced to a correctional facility, immigrant inmates have no alternative access to health care facilities not governed by this legislation. As such, Proposition 187 prohibits these individuals from seeking any medical attention whatsoever, as they are not permitted to leave the confines of the rehabilitative center or receive care at the medical facilities present. Further, those law-abiding children outside of the correctional facilities are denied medical treatment for acts that their parents (third persons) committed, namely crossing the United States borders. There is no question that California's legislation is intended as punishment for illegal and undocumented aliens.

Once satisfied that Proposition 187 constitutes "torture" in the manner envisioned by the drafters and parties of this Convention, "no exceptional circumstances whatsoever, whether . . . internal political instability or any other public emergency" can justify such tortuous treatment.[45] Accordingly, California's plea to "Save Our State" does not excuse its policy towards immigrants.

CONCLUSION

California has placed the United States treaty obligations in jeopardy. Not only do its provisions violate several key international treaties and agreements currently in place, but it threatens to alienate the United

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42. Convention Against Torture, *supra* note 4, art. 1, at 1027, 1028 (emphasis added).
43. Spiro, *supra* note 5, at 149.
44. CALIFORNIA BALLOT PAMPHLET, *supra* note 8, at 91-92.
45. Convention Against Torture, *supra* note 4, art. 2, at 1028.

States from current and future treaty or trading partners. In the wake of the NAFTA agreements, California's attempts to punish Mexican nationals on United States territory will pose a hurdle to future amicable relations. In turn, such restrictive policies taken by one state could spark "in-kind" retaliatory acts against United States citizens both travelling abroad and in need of medical attention.

For these reasons, the California District Courts should be applauded for placing an injunction against Proposition 187. This injunction, however, only buys time. Proposition 187, if it takes effect, will have a devastating impact on the United States' role and reputation as a world leader. California's Federal Court Judges must nip isolationist legislation in the bud: one state's citizens can not seal the fate of the United States' foreign relations.

Book Reviews

Constitutional Options for a Democratic South Africa

REVIEWED BY DR. ACHIM D. KÖDDERMANN*

MOTALA, ZIYAD; CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA; Howard University Press, Washington, D.C. (1994); $39.95; ISBN 0-88258-187-2; 276 pp. (hardcover).

This volume begins with a descriptive analysis of the unjust South African political and social relations under the system of apartheid. It moves to a discussion of the new constitution which should bring a newer and more just South Africa. The author resists the temptation to get lost in unbounded academic optimism and instead presents a careful analysis of the causes which have led to and perpetuated the unjust system. This timely book may help to reverse the trend toward unexamined optimism which currently exists in South African politics.

First, the author provides a short analysis of the philosophical origins of liberal constitutions and of the implied meanings of democracy, federalism and past liberal experiences in post-colonial African states. After a description of African failures, Motala demonstrates how Western approaches to the South African constitutional problems are inadequate. In particular, these approaches fail to take into account that a mediating, politically neutral judiciary does not exist in South Africa. The author appears to adopt the classical position against legal positivism, claiming that politically installed "legal" procedures do not guarantee the existence of a "Rechtsstaat" in the true sense of the word. Motala's descriptive study of the inherently conservative classical South African legal system, favoring a political *status quo*, leads him to conclude that South Africa is in a situation comparable to post-World War II Germany. How could former positivist servants of Nazi law become loyal followers and cornerstones of a new democratic system?

The options for South Africa range from the radical solution of replacing each and every judge to the pacifist compromise of retaining the

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entire judicial system in the hope that a new constitution will solve this problem. The author rejects both extremes with the implicit argument that a legal order has to function to guarantee order, and by stating that the dangers of a "vague constitution (such as the United States)" could be overcome with a new and more precise Bill of Rights. However, the supreme authority of either a non-trained or non-trusted judiciary forces the author to discard the Anglo-American constitutional model. Using U.S. Supreme Court Justice Felix Frankfurter as a reference, Motala claims that the vigilance of the people over their political and judicial representatives is the sole efficient defense of the public good. This political statement, which could be seen as an interpretation of Aristotle's definition of man as a "political animal," leads the author to the Anglo-Germanic political model of courts of specific jurisdiction. Such specialized tribunals would be beneficial for South Africa because the highest legal positions available do not have to be filled by trained career judges. Furthermore, Motala envisions these judges as representative of all political forces in parliament.

This argument is weakened by its assumption of a stable political system. The West German and French models have been based on a relatively stable political system, which has yet to be established in South Africa. Whereas the post-war German legal system benefitted from stability under allied supervision, this is not likely to be repeated in South Africa today. Motala's assumption that the South African system could circumvent the stability problem overlooks the fact that all German parties had to accept a common, democratic ground before being permitted to enter the democratic system. Accordingly, the Neo-Nazi and Communist parties were excluded. A similar democratic foundation among the different social, tribal, and political forces is not in sight in South Africa. The Socialist-Marxist view, which Motala describes very well, prescribing all powers of the state to merge, seems to underline Motala's plan to merge politics with the judiciary by means of specialized courts. Motala's optimistic view that "the judicial function would be performed in terms of the values of the larger society" is questionable.

More promising, however, is his claim that the popular court structures at the lower level could be copied from Mozambique and other former Portuguese colonies. Here, the author realizes the implied danger of control by one-party governments in the Marxist tradition. With direct community involvement and simplified legal procedures, a new system of local responsibility could arise and help to solidify the democratic movement. As such, the democratic "virtues" could be experienced by South Africans and appreciated so as to form a democratic tradition.

However, the final conclusion of the book, espousing a "unitary form of the state," which emphasizes integration and national identity, could conflict with such local movements. Focusing on regularity as a necessary tool for a functional legal system seems to minimize the likelihood that local participatory structures will develop. It is not surprising that the author feels an urge to reintegrate the only *pro forma* independent home-

lands into a greater and unified South Africa. However, the true balance of power in the German system is probably less a function of its legislature and more a result of the *de facto* division of powers between relatively independent regional states and the central government. Implementing a similar federal structure in South Africa would go beyond the proposed and limited structural division desired for administrative purposes.

In respect to attempts to cut across racial and ethnic boundaries in South Africa, the Bosnian civil war comes to mind. Can we really risk putting people together who do not feel that they belong together? The French could be taken as a counter- example to successful integration. It should not be forgotten, however, that France was "created" by a form of inner-colonization which left no space for cultural or ethnic independence of its minorities, i.e. the Bretons and Occitans.

Motala's volume closes with a laudable proposal that a new South African constitution contain a core of individual rights, including labor rights, supported by far-reaching welfare rights akin to the German social "welfare constitution" of the state. Of special interest is Motala's warning against "strongman" rule and elite decision-making, both of which appear difficult to reconcile with two-chamber legislature politics. These could coexist provided that the "functional elites or the professional core" of the second chamber are viewed as representatives of the people. At this point, a federal constitution may be an appropriate tool to help overcome the potential for elitist and dictatorial tendencies.

Motala also makes an interesting suggestion that the terms of all public officers be limited. From a U.S. perspective, this system may appear tempting. Term limitations, however, may not allow the prospective officers to accumulate sufficient expertise in the allotted five-year period of time. Further, an inability to be re-elected may not cure the problem of irresponsible political behavior. The widely-praised Swiss example of rotating presidencies is properly rejected by the author. The possibility of poor political accountability in the executive branch alone is apparent. However, making the executive accountable to the legislature could, in effect, help to prevent the flaws, such as state bureaucracy, corruption and poor human rights, in the political systems of many African countries.

It could be argued that the perception of corruption depends largely on the eyes and conventions of the beholder. What appears to be corrupt for a Western, independent mind might be seen as an ethically-mandated fulfillment of clan or familial obligations in a non-Western system. Again, such problems could be alleviated by a federal structure.

The final analysis of constitutional options for South Africa is perhaps the most important. The comparison of Soviet Communism and liberal constitutionalism leads us to a compromise that is not simply a copy of continental European options. The central role of fundamental human rights, like the right to life, is perceived to be embedded in socioeconomic

and cultural rights. The author emphasizes that without the recognition of fundamental social and economic rights, stability and democratic development will fail in South Africa. He is willing, however, to enshrine a basic core of inviolable individual rights into the South African political system. Both principles have to be balanced. The historical liberal tradition which absolutely guarantees private property is, therefore, "not a viable option for a future South Africa."

Consequently, the author must refute the option of a plural paradigm which leaves the choice of rules to each segment of the population, because "its constitutional prescriptions would mean freezing the economic and social disparities in the population." In the epilogue, Motala requests a redistribution of land formerly taken from black owners so as to unfreeze of the economic *status quo*. Motala does realize that "the demand for a strong government in a new South Africa is not synonymous with unrestricted government."

Motala's final suggestion is a compromise, drawing "from the strengths of major traditions while rejecting what is not appropriate to the new South African order." One could only wish that some genuinely African tribal legal traditions will be included in a future analysis. It should also be noted that the praised social welfare models in Germany and Sweden have faced recent political challenges as well.

Notwithstanding, this book remains highly relevant for its description of the interim constitution in South Africa and the prospects for the future. Even after the negotiation of a permanent constitution, which started after the 1994 elections, the volume raises interesting constitutional questions not only regarding South Africa, but regarding all emerging democratic systems. This timely publication serves as a useful guidebook for a democratic South Africa.

Africa, Human Rights and the Global System: The Political Economy of Human Rights in a Changing World

REVIEWED BY JAMES B. WOLF*

AFRICA, HUMAN RIGHTS, AND THE GLOBAL SYSTEM: THE POLITICAL ECONOMY OF HUMAN RIGHTS IN A CHANGING WORLD; Edited by Eileen McCarthy-Arnolds, David R. Penna and Debra Joy Cruz Sobrepeña; Greenwood Press, Westport, Connecticut (1994); ISBN 0-313-29007-5; 272 pp. (hardcover) Topical Bibliography.

This collection examines the status of human rights in sub-saharan Africa. Human rights, the way people are treated by their governments and the economic systems imposed by their governments, should be of the greatest concern to all human beings. Unfortunately, in this era, as in many preceding eras, concern seldom translates into action. Human rights often become secondary to pragmatic political and economic conditions. Provided that economic conditions are healthy and the political landscape is safe and quasi-democratic, human rights may be part of the national and international agenda. If these conditions do not exist, the protection of human rights has a low priority and a generally dismal outlook. That is the case in many of the fifty African states. The essays in this collection provide a sad commentary on the prospects for improving freedom and human conditions for the African peoples by the turn of the twenty-first century.

I was a participant in the conference entitled "Africa and Global Human Rights" from which this collection emerged. I was struck then and am more impressed now by the way in which teaching and publication by one individual can so positively influence a school of intellectual inquiry. George W. Shepherd, Jr., of the Graduate School of International Studies of the University of Denver, was honored by his present and former students with a symposium. Edward Hawley, long an associate of Shephard's, and editor of the influential journal *Africa Today*, was a well deserved co-honoree. Both men had distinguished themselves by their pursuits, in person and in their publications, in matters of human rights and human dignity in Africa.

The editors have selected a dozen papers from that conference for this book. As the title suggests, the scope is enormous, perhaps too ambitious, but certainly a worthwhile endeavor. This publication indeed honors the humane concerns of Shephard and Hawley.

The collection is divided into four sections: Human Rights Philoso-

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phy and Action, International Response, State Response, and Historical Approaches. These divisions provide order to the diverse topics discussed at the conference. The selected papers range in scope from philosophical analyses of human rights by Emannuel Kant and Franz Fanon to West African regional responses to civil rights abuses and, in particular, the development of one-party dictatorships in Kenya and Nigeria. The cumulative effect is disheartening for human rights advocates. Whether one reads about the lessons of Non-Governmental International Organizations (NGOs) in war-torn Ethiopia, the manipulation of political reform in Jerry Rawling's Ghana, or how World Bank and IMF-imposed Structural Adjustment Programs actually stifled human rights progress, the trend is discouraging.

Despite attempts by several authors to portray a positive image of human rights development in Africa, the overall impression is one of repeated failures and shortcomings. For example, at the conclusion of Baffour Agyeman-Duah's essay entitled *Global Transformation and Democratic Reforms in Ghana*, the author first documents certain compromises to democratic reform made by the central government in Ghana. The author concludes, however, by stating on a positive note:

> After decades of authoritarian rule, any measure taken by the elites to increase political competition and allow for mass political rights, such as the freedom of expression and association, should be a welcome relief.

Although Baffour takes western financial institutions to task for their Structural Adjustment Programs, he ultimately indicates that *any* sign of improvement in human rights protection is worthy of merit.

George Hauser also appears optimistic in his essay. He states, "[t]he problem of stability, economic justice, and a decent standard of health and education will not be achieved easily. But we should be grateful for hopeful signs." Further, Maralyn McMorrow, by means of Kantian analysis, places the African struggle to protect human rights into a global perspective. She states that, "all persons will not be accorded full respect and moral freedom until rich and poor states agree to and enact measures to vanquish absolute poverty and its accompanying deprivation." Both a Kantian universal analysis and McMorrow's utopian suggestion appear far removed from the African reality at the end of the twentieth century.

Ved Nanda's essay narrows the scope, as he finds cause for hope in the West African ECOWAS regional response to the Liberian civil war. He concludes that the West African military action was necessary to halt the "egregious violations of human rights." In Nanda's opinion, the situation existing in Liberia prior to the arrival of the West African force was so anarchistic as to override the principle of non-intervention.

Although the collection focuses on the status of human rights in the independent African states, the role and influence of the western industrial states is neither overlooked nor underestimated. In a comprehensive historical survey, William DeMars examines the activities—including

both failures and successes—of western non-governmental relief organizations operating in the Ethiopian civil strife during the early 1980s. In one of his conclusions, he credits several of the NGOs with publicizing both the illegitimacy of the political regime and the plight of the victims of war and famine. Similarly, the essays on Nigerian human rights violations in the Babangida regime and the curtailment of human rights in the African university system evidence a causal relationship stemming from the Structural Adjustment Programs. In these essays, one senses that the imposition of Western values on Africa, even for altruistic reasons, can lead to manipulation by political leaders to the detriment of local and academic communities.

In the final essay, Nana Kusi Appeá Bussia, Jr., concludes that human rights are "basically about limited, participatory government, about the relationship between the ruled and the rulers." Unlike others in the collection, he relates contemporary human rights abuses to both precolonial peoples and forms of government. He further shows how culturally insensitive colonial powers negatively affected today's Africa by combining unlike groups with differing political histories and institutions. The new class of politicians learned to monopolize state power as a method of obtaining personal economic and political power. The result, according to Bussia, was "the politicization of ethnicity, which results in rights violations."

In the long run, responsibility for the state of human rights in Africa is split. The colonial legacy was not a workable model for human rights, as African leaders attempted to imitate and take advantage of political power to subvert democratic concerns. As the editors indicate in their introduction,

> Political and economic rights are related (not prioritized), and both are needed to create a stable human rights environment. At the same time, neither of these types of rights is achievable in the face of an unjust international order, and therefore, solidarity rights that recognize the relationship between individuals and groups in different societies must be realized.

This worthwhile collection of essays by concerned and committed scholars ask hard questions about the state of human rights in present day Africa. Their diverse topics are linked by a common concern over limitations on economic and political freedom in Africa of the 1990s. Only the essay by David R. Penna, on political rights and personal security in Botswana, comes across to this reader with an overall positive and hopeful analysis. The most telling criticism of this collection is only that it is written by men and women so committed to the expansion of human rights in Africa that the barriers which they document make fundamental human rights appear unrealistic at present. It is better to be aware than to be ignorant: this book will certainly make you aware.

Book Notes

BEE, RONALD J., NUCLEAR PROLIFERATION: THE POST-COLD-WAR CHALLENGE, Foreign Policy Association Headline Series, Foreign Policy Association, New York, NY (1995). ($5.95); ISBN 0-87124-160-9; 72 pp. (pbk).

Each issue of the Foreign Policy Association's Headline Series aims at "every serious reader, specialized or not, who takes an interest in the subject." While the specialized reader may find Mr. Bee's resource book on Nuclear Proliferation rudimental, as a whole, this volume reaches its target through a serious and thought-provoking discussion of an otherwise arcane subject. *Nuclear Proliferation* offers a topographical map delineating the issues arising from the nuclear threat, the institutions established to confront those issues, and the state of the debate in the post-Cold War era.

Mr. Bee finds three nuclear races at work since the detonation at Alamogordo: 1) the World War II race between United States and Germany; 2) the Cold War competition between the U.S. and the U.S.S.R., with Britain, France and China playing a smaller, albeit no less significant, part; and 3) the efforts to place nuclear weapons and their proliferation under the auspices of some international regime, ignited by the Cold War controversy.

The first two sections of the book recount the early years of the nuclear era and the questions left for resolution in modern-day international relations. Of the factors driving the nuclear age, fear, says Bee, supplies the crucial psychological motive. This fear encourages countries to develop nuclear systems at both the international level and the state level.

Enter the Nonproliferation Regime, focusing on supply-side, "denial" policies. The Nuclear Nonproliferation Treaty (NPT) articulates the policy design for the lid on a nuclear pandorabox. The IAEA functions as the authority to effectuate that lid, facilitating the transfer of civilian nuclear technology and verifying compliance with NPT provisions. In keeping abreast of technological advances, the Zangger Committee maintains a list of materials and equipment designed for non-weapons use, but with military applications subject to IAEA safeguards. Agreements such as the Treaty of Rarotonga and the ABM Treaty stem horizonal (weapons denial beyond existing nuclear states) and vertical (weapons reduction within existing stockpiles) proliferation.

The fourth section describes areas of potential strain on nonprolifer-

ation. "Hot spots," such as the former Soviet Republics, the Middle Eastern countries, and South Asian nations such as India, pose a threat to the nonproliferation movement. Bee discusses U.S. attempts to implement a "dual containment" policy in the hopes of averting a spread of nuclear weapons to both Iran and Iraq. What sets Bee's discussion apart from simple reporting is his combination of personal viewpoints with those of other scholars, practitioners and policy makers. In this manner, the reader is left with a feel for the complexity of the issues and the boundaries of the debate.

What are the limits to stemming proliferation? As mentioned above, the book only obliquely examines the Regime's effectiveness. Thus far, the Regime's health has been bolstered by several successes, such as the resolution of Argentina's and Brazil's nuclear differences and their accession to the NPT. Yet Bee points out that despite the presence of the NPT, South Africa has developed a nuclear capacity, states such as Italy and Japan have developed the ability to produce weapons within a relatively short period of time, and the former Soviet Union may allow weapons-grade plutonium to travel across borders in exchange for sorely-needed hard currency.

The final section addresses these difficulties through a discussion of the Clinton Administration's nonproliferation policy goals. These include: a strengthening of existing nonproliferation norms and agreements; trouble-shooting; domestic-export control regulations tailored toward nonproliferation and commercial objectives; and, military objectives, including the doctrine of "counterproliferation" should the nonproliferation trend reverse. This section also offers problems with and criticisms of each of these goals.

This user-friendly resource includes a map charting the global spread of nuclear weapons to present day, a summary reference of the NPT, a glossary, and an annotated reading list. As worldwide events progress, the book's greatest strength will lie in its particular applicability to the post-Cold War nuclear proliferation concerns. These cover policy-polemics, such as nuclear testing and a test ban treaty, implications of the have/have-not problem, and security concerns from control of nuclear materials — all are issues likely to endure and perhaps outstrip the rapid pace of technology.

Marco Madriz

CUMINGS, BRUCE, DIVIDED KOREA: UNITED FUTURE?; Foreign Policy Association, New York, NY (Spring 1995); ($5.95); ISBN 0-87124-164; 88 pp. (softcover).

Cumings believes that it is imperative for Americans to understand the past and present role of the United States in Korea and to learn about the history of the "two Koreas." In the absence of such knowledge,

Cumings argues that Americans can not fully appreciate the ongoing danger of war in Korea.

Divided Korea: United Future? takes a chronological approach to Korean history. It first briefly describes each of the past dynasties in Korea with its respective doctrinal belief. The book then discusses the influence of Japan over Korea. In particular, Cumings describes how Korea's politics, economics, and national identity have been affected since Japan established Korea as a protectorate in 1905. Cumings then describes the American influence on Korean affairs in the post-World War II era, including attempts to reunify Korea and extraneous actions which may have actually further divided Korea.

The book shifts to the post-Korean War era in the next section, including the Kwangju rebellion in May of 1980 and Korea's movement toward Democratic politics at the end of the Chun regime in June of 1987. Cumings analyzes political developments in both South Korea and North Korea. He describes four political constants in South Korean politics before turning to the more difficult question of North Korea. Because North Korea's political system can be very complex to understand, Cumings attempts to demystify the system with an historical analysis.

The underlying theme of North and South Korean differences is echoed in the next section of the book as Cumings contrasts the two Korean economies. For example, South Korea is described as an internationally-based and export-led system, whereas North Korea is depicted as a self-reliant and heavy-industry based system. Cumings cites to hidden similarities in the two economic systems however, and applauds their comparative economic successes.

The final section of the book addresses the Korean relationship to the world, including South Korea's pursuits of active diplomacy toward China, the Soviet Union, and various Eastern European countries. This final section also examines the relations between the two Koreas over the years, and those between the U.S. and the DPRK (North Korea), which has often teetered on the brink of war.

Cumings is hopeful that a strong U.S. presence in the peace-keeping forces in Korea will ensue. Although this book is not intended as a detailed study of Korea, Cumings provides the reader with a solid and interesting overview of the two Koreas.

Tatiana Palova

KRAUSS, ELLIS S., JAPAN'S DEMOCRACY: HOW MUCH CHANGE?; Foreign Policy Association Headline Series, Foreign Policy Association, New York, NY (1995); ($5.95); ISBN 0-87125-163-3; 79 pp. (pbk).

Japan's Democracy: How Much Change? provides a thorough, yet concise, summary of Japan's brief democratic history. Krauss begins his

analysis of Japanese democracy with a focus on the American Occupation period from 1945-1952. According to Krauss, the twin aims of the American Occupation were democratization and demilitarization. He suggests that the Americans pursued both aims with equal vigor and were quickly able to build and support a stable democratic system that has had lasting benefit for the Japanese people.

Krauss next turns his attention to Japanese democracy in the post-occupation period. Specifically, Krauss discusses the period leading up to the 1980s and the "transformation of 1993-94." In the former period, Krauss delves into such important issues as human rights, political protest, minority discrimination, unequal treatment of women, crime and the structure of Japan's electoral system. Krauss does a particularly good job of both clarifying and explaining the confusing world of Japanese party politics; a world that is rife with nepotism, corruption and "pork" projects. The discussion is well-organized and presents a detailed analysis of the complexity of Japanese politics in a way readily understood by both scholars and laymen alike.

Krauss's discussion of "pork" politics and corruption serves as a useful and natural transition into the last substantive chapter, wherein Krauss catalogs Japan's latest political scandals and opportunistic party realignments. To Krauss, corruption and bureaucratic stagnation are some of the many problems that confront the modern Japanese democratic system.

Overall, the book is a very useful synopsis of Japanese democratic history. While admittedly brief, the book does, however, provide a broad conceptual guide for those interested in Japanese politics.

Scott Huyler

MAGRAW, DANIEL, NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS; American Bar Association, U.S.A. (1995); ($75.00); ISBN 0-89707-961-2; 759 pp. (softcover).

This volume is a useful desk-reference for any attorney involved in the NAFTA-Environmental debates. The author begins by defining the parameters of the NAFTA and Environmental controversies. The creation of NAFTA brought to the forefront many environmental concerns in the United States. A main concern was the possible effects on United States environmental laws and trade related provisions in international agreements. This concern translated into fears of harmonization, pollution havens and environmentally damaging growth.

Magraw goes on to state how "harmonization," or compatibility of environmental standards, within a trade area can benefit health, the environment, and trade. Many, however, believe that within a free trade area standards would be reduced to the "least common denominator" or that regulations would be prohibited from exceeding international standards.

Pollution havens are areas with low environmental standards or enforcement, attracting extensive industrial development. This idea parallels environmentally damaging growth. The general fear was that development would increase dramatically quicker than an environmental protection infrastructure could be created. However, not all the expected effects on the environment from the establishment of a free trade area were negative.

Others, Magraw points out, believed that more efficient pollution prevention and clean-up methods would result from increased communication and information flow between companies. Further, it was expected that more resources would be available for the protection of the environment, especially in Mexico. Objectors to this view have asserted that a free trade agreement would not result in an equitable distribution of wealth to the Mexican population. Without an increase in economic resources, environmental problems in Mexico would not be addressed.

Magraw discusses another key aspect of environmental concerns - dispute settlement mechanisms. Dispute settlement processes in trade regimes are considered anti-environmental. Structures are usually created by trade experts who have little or no environmental expertise. Trade negotiations are also considered lacking environmentally sensitive negotiators. Furthermore, these mechanisms do not allow for public input, eliminating public awareness of the trade impact on the environment.

To address these concerns, the Bush Administration created a negotiating framework which provided a dual-track approach for discussions on the environment. Concern relating to the trade of goods and services would be considered within the text of NAFTA. Issues relating to increased investment and population along the United States-Mexico border would be addressed through cooperative activities. It was envisioned that these activities would result in bilateral and trilateral efforts.

One important resulting document under the Bush Administration was the Integrated Environmental Plan. The Plan was created through the joint effort of United States Environmental Protection Agency and the Mexican Secretaria de Desarrollo Urbano y Ecologia. It was released by President Bush in February 1992. Other agreements never came to fruition during the Bush Administration.

This dual approach was adopted by the Clinton Administration. Clinton had stated during his presidential campaign that his support for NAFTA rested on the adoption of adequate labor and environmental safeguard agreements. As a result, substantial agreements were reached outside of the NAFTA document.

The text of NAFTA also contains environmentally sensitive provisions. The preamble includes statements committing the countries to "promote sustainable development" and "strengthen the development and enforcement of environmental laws and regulations." Countries are also asked to act in a "manner consistent with environmental protection and conservation."

Domestic laws in the United States are protected in NAFTA by: ensuring the United States can choose its own level of protection, which may be higher than international standards; allowing standards to exist absent scientific certainty; and, permitting states and counties to adopt higher standards than federal or international levels. Provisions within the text also address concerns of pollution havens, international environmental and trade agreements, and dispute settlement.

Part One of this book provides an overview and introduction to understanding the NAFTA agreement and related documents. In addition to the subject matter mentioned above, the author explains the political motivations behind the creation of the North American Agreement on Environmental Cooperation, the Border Environment Cooperation Commission, the North American Development Bank, and environmental provisions in the NAFTA text. The functions of each are fully examined and explained. Each of these documents are reprinted in Part Two.

Part Two, which focuses on intergovernmental documents, also includes the trilateral press release by the countries environmental representatives. This document is important in understanding the United States motivation in reaching an agreement on the environment. In particular, the press release helped gain the support of the National Wildlife Federation for NAFTA.

The last two sections of the book analyze U.S. government documents and other documents released by environmental and non-governmental organizations. Magraw examines the role that these documents have played in the evolution of NAFTA and their political importance.

The book highlights the environmental elements of NAFTA and the process that led to their development. The underlying premise is that NAFTA represents an unprecedented attempt to deal with environmental concerns in the development of trade regimes. The creation of a sustainable development framework encompasses a balance between trade and the environment, which includes not only economic, environmental and social considerations, but also democratic decision-making. Taken as a whole, this author clearly articulates how NAFTA can provide a successful development framework which is essential for a constructive dialogue to emerge between developing and developed nations.

Dawn McKnight

MCGLENN, NANCY E. & SARKEES, MEREDITH REID, THE STATUS OF WOMEN IN FOREIGN POLICY, Foreign Policy Association Headline Series, Foreign Policy Association, New York, NY (1995). ($5.95); ISBN 0-87124-165-X; 72 pp. (pbk).

This book provides a good overview of the changing role women play in U.S. foreign policy. The authors paint a picture of the ways in which women have been historically excluded in the realm of foreign policy. The

authors also discuss the realities faced by women who have been able to break into this world. These authors end with an optimistic yet cautious outlook on the future of women in this field. Although this overview is brief, it is extremely valuable in the information it provides. The authors provide a concise, understandable source containing a large number of useful statistics.

They begin by showing how women have been historically excluded from the U.S. foreign policy establishment. In particular, societal views about the roles and capabilities of women contributed to this exclusion. Since women were supposed to be homemakers, it was assumed that they neither understood nor cared to learn about foreign policy and its concerns.

The authors then examine the past and current practices of the State Department, the Defense Department, the National Security Council, and the relevant Congressional Committees. In all of these institutions, fewer women than men have been hired. This continues today with women comprising less than 35% of those employed even in the junior ranks of the foreign service. When women are hired, they are generally in the lower ranks and in the clerical sections. Those who do reach higher levels still face a "glass ceiling," preventing them from reaching the upper echelons of the decision-making circles. Also, women at all levels frequently complain of sexual harassment problems.

The authors do, however, recognize that circumstances are changing. They note differences in attitudes for both men and women between generations. Older men are much less likely to consider women competent than younger men. Similarly, older women were less likely in their days to aggressively plan and pursue a career in foreign policy than their younger counter-parts.

The authors conclude by suggesting ways in which women can increase their presence and influence in the foreign policy arena. For example, women should educate themselves by continuing to seek post-graduate degrees. Women must also continue to seek foreign policy employment, since only through persistence will women's capabilities be recognized. As a final note, women must support and assist each other; this can be done by creating and maintaining organizations and networks.

Gail Buhler