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# The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico's Costa Grande and Elsewhere

## Keywords

Corporations, Law Reform, Environmental Law, International Law: History, Water Law

# THE CRITICAL NEED FOR LAW REFORM TO REGULATE THE ABUSIVE PRACTICES OF TRANSNATIONAL CORPORATIONS: THE ILLUSTRATIVE CASE OF BOISE CASCADE CORPORATION IN MEXICO'S COSTA GRANDE AND ELSEWHERE.

WILLIAM A. WINES\*

MARK A. BUCHANAN\*\*

DONALD J. SMITH\*\*\*

"And Daddy won't you take me back to Muhlenburg County  
Down by the Green River where Paradise lay?  
Well I'm sorry my son, but you're too late in asking

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\*\* Mark A. Buchanan formerly of the Faculty of Law, University of New South Wales, Sydney, Australia, was a visiting professor in the Department of Management and in the International Business Center at Boise State University when much of the work on this paper was done. LL.M., University of Illinois; J.D. University of Nebraska; and B.A., University of St. Thomas. His specialty is International Trade and Investment Law and he has been a Fulbright Scholar to China and Australia as well as teaching in Canada, the United States and Thailand. He assumes primary responsibility for Part II of the article.

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Mr. Peabody's coal train<sup>1</sup> has hauled it away.

...

"Then the coal company came with the World's largest shovel  
and they tortured the timber and stripped all the land.

Well, they dug for their coal till the land was forsaken,

Then they wrote it all down as the progress of man."

- "Paradise" by John Prine © 1971.

## PART I. BOISE CASCADE IN PERSPECTIVE.

### *Introduction.*

Power<sup>2</sup> is something we all understand and respect, but none more than timber barons and loggers. Whether dealing with chain saws or skidders, lobbyists or legislatures, loggers, timber barons, and lumber companies know, appreciate, and wield power. Power influences the timber industry just as it does labor relations, politics and many other areas of human affairs. But the concept of brute strength and raw

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1. Although this paper deals with Transnational Corporations in the context of global capitalism, the treatment of ethnic minorities inside the U.S.A. is not unlike the treatment of developing nations in what-used-to-be called the Third World. For instance, the Peabody Coal Company's treatment of the Navajo and Hopi nations in getting the rights to mine the coal deposits beneath the surface of Black Mesa, a great tableland of 3300 square miles spanning the reservations' boundary, has been documented several places. F. WATERS, MOUNTAIN DIALOGUES 125-31 (1981). Under a 35 year lease, the "Hopis would eventually receive an estimated \$14.5 million, the Navajos \$58.5 million, while the Peabody Coal Company profits would amount to about \$750 million." *Id.* at 125-26. To illustrate, the lease of the Hopi land to the Peabody Coal Company "was granted by the Department of the Interior without Congressional or public hearings. Neither the traditionalist leaders, nor the Hopi people, were generally informed of the terms of the contract. . ." *Id.* at 125. That Black Mesa was considered sacred by both tribes made no difference to the the Department of the Interior, then headed by Stewart Udall, a Mormon; or to John S. Boyton, a Salt Lake City lawyer and Mormon, who had been appointed by the B.I.A. to represent the Hopis; or to the head of the B.I.A.- controlled Hopi Tribal Council, Abbott Sekaquaptewa, another staunch Mormon. *id.* at 128. In a 1977 report, the Indian Law Resource Center in Washington, D.C., alleged that Mr. Boyton, the B.I.A. -approved legal counsel for the Hopi Tribal Council, was on the Peabody Coal Company payroll during the time it was strip-mining the Black Mesa, a gross conflict of interest. *See id.* at 131.

2. The term "power" (as a noun) has fourteen different definitions in a recent abridged dictionary. WEBSTER'S NEW WORLD DICTIONARY 1058 (1994). Synonyms listed for power include dominion, authority, command, and control. *Id.* In law, the term "power" seems to be even more prominent; BLACK'S LAW DICTIONARY 1169-71 (6<sup>th</sup> ed. 1990) devoted 3 entire columns to definitions for the word. *Id.*

power is central to the work and myths<sup>3</sup> of loggers in ways unlike most other occupations with the possible exceptions of mining, fire fighting, and police work; areas also associated with maleness and male dominance and, of course, violence.<sup>4</sup>

In 1991, we wrote "a better model is needed to describe ethical behavior, particularly when applied to the use of power to resolve conflict in cross-cultural situations. . . ."<sup>5</sup> Professor Werhane has articulated a six-question protocol for analyzing the social responsibility of a set of activities on the part of multinational corporations.<sup>6</sup> One of the fears repeatedly voiced about transnational corporations ("TNCs")<sup>7</sup> is that

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3. For our purposes, myth can be defined as "an intricate set of interlocking stories, rituals, rites, and customs that inform and give the pivotal sense of meaning and direction to a person, family, community or culture." C. KEEN & A. VALLEY FOX, *YOUR MYTHIC JOURNEY* xi (1989). In Western logging companies such as Boise Cascade, two sets of powerful myths converge: the Tales of Paul Bunyan and his Blue Ox Babe and the myths of the American West. Paul Bunyan, as everyone knows, was superhuman in size and strength and often solved his problems with the application of greater size and strength – although ingenuity also helped occasionally. Tales of Paul Bunyan were promoted commercially by lumber companies in the early years of the American Century. See ID Statesmen (Feb. 19, 1998) at 3D. Six historically Western values that emphasize power/violence are: "the doctrine of no duty to retreat; the imperative of personal self-redress; the homestead ethic; the ethic of individual enterprise; the Code of the West; and the ideology of vigilantism." MILNER ET AL., *THE OXFORD HISTORY OF THE AMERICAN WEST* 393 (1994). The Code of the West involves "honesty, courage, sensitive pride, stoic indifference to pain, and, above all, a violent vengefulness against insult." *Id.* at 395. See also A. C. Williams, *Influences of the Myths of the American West on Business Culture in the United States: An Interdisciplinary Exploration* (1997) (unpublished M.A. thesis, Boise State University) (on file with authors and Boise State University library).

4. See Walter Wink, *The Myth of Redemptive Violence*, in *ENGAGING THE POWERS* (1992), reprinted in *READINGS IN BUSINESS ETHICS AND SOCIAL RESPONSIBILITY* 41-45 (William Wines & Steven C. Anderson, eds., 1994). For a discussion of how myths instill values in human beings, see William A. Wines, *An Ethics Perspective on Economic Myths, Theories and Ideologies* (1996) (unpublished manuscript on file with authors) (presented to the Annual Meeting of the Pacific Northwest Academy of Legal Studies, Hotel Georgia, Vancouver, B.C., Canada on April 19, 1996). By analogy, the authors are suggesting that archetypal myths that are shared by entire industries inevitably become part of the corporate cultures of companies in those industries and help form a national identity by contributing to the nation's set of stories. See also BARBARA EHRENREICH, *BLOOD RITES: ORGANS AND HISTORY OF THE PASSIONS OF WAR* 216-24 (1997) (detailing American patriotism as a self-perpetuating form of war worship); DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* (1995); BARBARA G. WALTER, *THE CRONE: WOMEN OF AGE, WISDOM AND POWER* (1985) (detailing violence against women in chapter six).

5. William A. Wines & Kevin E. Learned, *Managing the External Environment: Boise Cascade and a Modern Tale of Two Cities*, in *CONTEMPORARY ISSUES IN BUSINESS AND POLITICS* 204 (Karen Paul, ed., 1991) [hereinafter Wines & Learned].

6. Patricia H. Werhane, *The Moral Responsibility of Multinational Corporations to be Socially Responsible*, in *CONTEMPORARY ISSUES IN BUSINESS ETHICS* 531, 535 (Joseph H. Desjardins & John J. McCall, eds., 3d ed. 1996).

7. In this article, we prefer to use the term "transnational corporation" rather than

they may prove to be above the law.<sup>8</sup> This article will look at that concern as well as attempt to apply the Werhane protocol to Boise Cascade Corporation's ("BCC") actions over time and in different locales. We will attempt to determine whether a practice and a pattern emerged in BCC dealings with labor, in the environment, and with communities in which it operates. We will also address power inequities in labor relations where some observers have suggested that the power equation is central.<sup>9</sup>

Supposedly fifteen transnational corporations are engaged in logging in Mexico.<sup>10</sup> Our selection of BCC as the subject of our inquiry does not imply nor is it meant to suggest that BCC is somehow better or worse in its foreign operations than any of its competitors. In fact, this piece is premised upon the assumption that in many, many respects BCC is representative of transnational corporations that are engaged in extractive industries around the world. A spokesman for BCC says it most simply: "Alls [sic] we do is go in and take out the logs."<sup>11</sup> Somehow, we do not find it that simple. In some ways, injecting millions of dollars into a dirt-poor,<sup>12</sup> corrupt,<sup>13</sup> and violence-saturated State<sup>14</sup> in

the older term "multi-national corporation" for several reasons. First, it is more accurate because the TNCs have risen above the reach of nation-states as the following materials will argue; and second, it is the mania of global capitalism's outdistancing all social institutions, law and customs that is at the heart of our concerns.

8. See, e.g., William Greider, *One World, Ready or Not: The Magic Logic of Global Capitalism* 11-16 (1997); David C. Korten, *When Corporations Rule the World: An Interview with David Korten*, MULTNAT'L MONITOR, Jan. 1, 1996. In one passage, Korten declares: "Corporations have emerged as the dominant governance institutions on the planet, with the largest among them reaching onto virtually every country in the world and exceeding most governments in size and power. Increasingly, it is the corporate interest more than the human interest that defines the policy agenda of states and international bodies, although this reality and its implications have gone largely unnoticed and unaddressed." *Id.* at 54 (1995); see also, e.g., George Soros, *The Capitalist Threat*, ATLANTIC MONTHLY, Feb. 1997, at 45.

9. See Zimarowski, *A Primer on Power Balancing Under the National Labor Relations Act*, 23 U. MICH. J.L. REFORM 47, 52 (1989). See also *infra* note 22 and accompanying text in which one observer (Woodhouse) pointed to BCC's resolution of labor conflicts by brute application of economic and political power seemingly indifferent to the human suffering inflicted upon workers or their communities.

10. See John Ross, *Treasure of the Costa Grande*, SIERRA July-Aug. 1996, at 22 [hereinafter Ross, *Treasure*].

11. Telephone interview by Brian Bell, Boise State University student researcher, with Doug Bartels, BCC Spokesman (Feb. 18, 1997).

12. The average wage in Guerrero places many of its people below the federally mandated daily minimum wage. The rate is different for different parts of Mexico; in 1991, the commission set the minimum for most of Guerrero at 9.92 new pesos per day. Yet 24.8% of the population earned less; and 15.7% reported no income at all. The new peso was worth less than 13 cents U.S. at the official exchange rate on February 20, 1997; thus, outside Acapulco, the minimum daily wage was \$1.28 U.S. In Acapulco, the official daily wage was set at approximately \$2.92. G. Tooman, *A Comparison of the Logging In-*

Mexico and then disclaiming all responsibility for the destruction and deaths that follow seems insensitive, irresponsible and morally indefensible.<sup>15</sup>

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dustry in Idaho, British Columbia and Guerro, Mexico: The Effects of Government Policy on the Industry 18 (Apr. 15, 1997) (unpublished manuscript on file with authors). Life in the *ejidos* (the rural sectors) is especially primitive. Charles Krause, a Public Broadcasting System correspondent stationed in Mexico, describes the situation in these words: "Just 50 miles from the beaches and sophistication of Acapulco, dirt roads lead to villages like Paso Real, which might as well be in another world or on another planet. No telephones here, no doctors, no hospital, no discos or tourists . . . nor even running water. Paso Real is the other Mexico foreigners rarely see: rural Mexico, where subsistence farming, drug trafficking, corruption, and political violence mix in what is often an explosive combination." *Id.* at 20.

13. "The Mexican government deserves some of the blame for creating an atmosphere where it is easier to operate businesses illegally than it is to obey the myriad laws with which a legal business must comply. In an effort to control the economy, the government now controls nearly every aspect of business. . . . The 1995 edition of the *Catalogo General de Obligaciones Empresariales* (General Catalog of Business Obligations) lists over 800 laws with which businesses must comply. Sadly, the ruling party, the Institutional Revolutionary Party, actually makes more money from bribes than it would from the legal purchase of permits and payment of fees. [citations omitted]" G.Tooman, *supra* note 12, at 23.

14. Guerro is one of thirty-two states that comprise the united Mexican States. An austerity plan and pledges of U.S. support saved Mexico's currency from collapse in early 1995; but in August 1996, the Popular Revolutionary Army guerrillas launched coordinated attacks on government positions. *See, e.g.,* WORLD ALMANAC 799 (1996). In the realm of violence, BCC's American employees were "not allowed off the sidewalk" for fear of kidnapping, a major industry in Guerro. There have been over 100 kidnappings in Guerro in the past three years. A. Waters, A Study of the Timber Industry in British Columbia, Idaho, and Guerro (Apr. 1997) (unpublished manuscript on file with authors) at 17. The annual per capita income in Mexico is about \$4,000, roughly 15% of that of Americans. On January 9, 1996, an FCO Travel Advisory warned travelers/tourists against traveling after dark, venturing off roads or frequenting isolated beaches "particularly in the states of Michoacan, Guerro, Oaxaca, Chiapas and Campeche" because of the risk of violence. A free-lance journalist interviewing a returning millwright for BCC asked about the threat of violence and was told: "We never traveled outside the hotel without armed guards." In March, authorities seized heroin paste with a U.S. street value exceeding \$4.1 million about 15 km from a Guerro logging site. LA JOURNADO, March 30, 1997. In June, the same newspaper headlined "In the mountains of Guerro, the threat of violence and armed narcotic traffickers is constant." LA JOURNADO, June 10, 1997. A recent traveler to Guerro reports that buses are robbed daily and that death squads have been active in the State. Claudio Beagarie, free-lance journalist, in Boise, Idaho (Sept. 3, 1997). On New Year's Day, 1997, a death squad of eight men with AK-47's and painted faces executed four men: two teachers in one village and two *campesinos* later in another village. On January 11, eight members of one family were killed from ambush by heavily armed men. All of the killings were in the State of Guerro. REPORTE (USA Independent Hispanic Weekly, No. 551) at 25.

15. Interview by William A. Wines with John Ross in Boise, Idaho (June 6, 1996). Ross declared that "ex-Governor Figueroa was expected to have a hard hand, especially since his predecessor was assassinated in office." *Id.* Further, Ross shared his opinion that "to deal with Figueroa in millions of dollars is to intervene in Mexican politics." *Id.*

*A Chronology.*

What do Council, Idaho, International Falls, Minnesota, and Papanoa, State of Guerrero, Mexico have in common? They have all experienced the arrogance and greed of BCC. In the Falls Council, unions were destroyed along with some temporary housing; an established mill was closed; and in Guerrero, the introduction of huge sums of money for timber further aggravated a destabilized countryside in which seventeen unarmed environmental protesters were shot dead in June 1995 and dozens of others have since disappeared, been executed or murdered.<sup>16</sup> BCC meanwhile enjoyed near record profits in 1995<sup>17</sup>. Although profits set record highs, employment in the timber industry in Idaho peaked in 1979 and has declined ever since, according to Idaho Department of Employment figures. The impact of increased mechanization coupled with mill closures has been devastating on the small mill towns.<sup>18</sup>

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16. According to Ross, by June 1996, ten more people had been murdered in Guerrero since the June 28, 1995 massacre at Aguas Blancas. Also, the number of people who have simply "disappeared" in the State of Guerrero is estimated at over 1,000. One former Army General admitted that over 400 people were disappeared between 1972 and 1979 when ex-Governor Figueroa's father was Governor. Interview by William A. Wines with John Ross in Boise, Idaho (June 6, 1996).

17. Boise Cascade reported net profits in calendar year 1995 of \$5.39 per share or \$351.8 million. BOISE CASCADE CORPORATION, 1995 ANNUAL REPORT 22 (1995).

18. See A. Waters, *supra* note 14, at 7, wherein the author states: "Council is not the first Boise Cascade sawmill to be dismantled and reassembled elsewhere. In the late 1970's, Boise Cascade bought the sawmill at Cambridge, Idaho and sold it to a company in the Philippines. As for closure of sawmills, Council was the latest. Other closures were McCall in 1978, Barber in 1980 and Emmett in 1982. Horseshoe Bend and Cascade are the only sawmills left in Idaho. They are not expected to remain open much longer." On October 23, 1995, only 10 days after announcing record profits for the third quarter of \$118.5 million, Boise Cascade laid off 253 people at the Horseshoe Bend, Emmett, and Cascade mills. *Id.* at 9. A spokesman for BCC said the layoffs would last until lumber prices improved and that further mill closures would depend on "how Congress treats the timber industry in its next round of environmental legislation." Julie Bailey, *Boise Cascade Open Sawmill in Mexico*, IDAHO STATESMAN, Nov. 25, 1995, at 11A, available in 1995 WL 1260165. According to an analyst with the Pacific Crest Securities in Portland, Oregon, the timber industry is moving towards greater consolidation, "as logging is spread over larger landscapes to reduce damage to fish and wildlife." *Timber Industry Future will be Rooted in Bigger Companies with More Capital*, OREGONIAN, Dec. 18, 1994, at 10B. Small mill operators can't compete with larger firms because they are unable to modernize and compete with timber industry giants. Since old-growth trees have been overlogged in the Pacific and Interior West, and since access to the remaining large trees is limited because they largely exist in roadless areas, the big companies have been forced to re-tool their operations to handle the smaller logs. The smaller companies, without the readily available investment capital, have not been in a position to modernize, and have thus been left with fewer cutting opportunities, being unequipped to handle the small logs. University of Wisconsin sociologist Bill Freudenburg, concluded that "Loss of timber jobs in the Pacific Northwest stems from overcutting rather than from measures to protect old-

In an attempt to avoid any public accounting, BCC has attempted to demonize the environmental movement, a journalist who explored the Mexican operation, and the Sierra Club. Remember Commodore Vanderbilt? "What do I care about the law? Haint I got the power?"<sup>19</sup> Welcome to the *Robber Barons*, Part II, with a polished veneer of civilization courtesy of a staff of public relations types and highly paid corporate lawyers. Enter the so-called "Spin Doctors;" otherwise, nothing much has changed in the sequel.

Why is BCC doing business in Mexico and preparing to do even more business in places like Chile, Malaysia, New Zealand and the former U.S.S.R.? The answer to that question varies with whom you ask. For the record, BCC says it is not after cheap labor but that timber supplies in the U.S. are inadequate for its needs. It blames environmentalists and restrictions on timber sales from federal lands and postures as a local Idaho business interested in the "Idaho way of life."<sup>20</sup> A large neon sign at the Boise Airport declares "Welcome to Our Home" from Boise Cascade Corporation: mildly humorous for a Delaware Corporation that has gone transnational.<sup>21</sup> Besides on the theme of jobs or

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growth timber and the northern spotted owl, according to newly presented research." *Overcutting costs more timber jobs than owl, study says*, IDAHO STATESMAN, Feb. 16, 1997, at 15A.

19. Matthew Josephson, *The Robber Barrons* 15 (1934).

20. Dr. Thomas Power, the chair of the Economic Department at the University of Montana, studied the effects of wildlands preservation, showing that the emerging economy in the Northern Rockies is leaving the extractive industries in the dust. Jobs created from tourism, recreation, services (including health, legal and other professions), and information have largely replaced the extractive industries. He found that within a seven week period the number of jobs created in this growing sector of the economy more than makes up for the loss of timber jobs. TOM POWER, ALLIANCE FOR THE ROCKIES, EXECUTIVE SUMMARY: THE TIMBER EMPLOYMENT IMPACT OF THE NORTHERN ROCKIES ECOSYSTEM PROTECTION ACT IN IDAHO, MONTANA, OREGON, WASHINGTON, AND WYOMING, SPECIAL REPORT NO. 3 (1992). A report, with Dr. Power as its main author and co-signed by 33 other economists, titled "Economic Well-Being and Environmental Protection in the Pacific Northwest" stated that "[a]llowing more environmental degradation in hopes of turning the economic clock to a previous era is more likely to threaten the region's future than improve it." *Report Links Economy with Strong Environment*, IDAHO STATESMAN, Jan. 4, 1997, at 1A. According to a study conducted for the Eastside Columbian Ecosystem Management Project, "Small timber dependent communities in the Columbian River Basin are generally adapting to changes in more constructive ways than towns based on farming and ranching, a University of Idaho study showed." *Timber Tenacity: Study Reveals Small Logging Towns Adopting to Change*, LEWISTON MORNING TRIB., Jan. 2, 1995 at 5A.

21. At the 1997 annual meeting of Boise Cascade shareholders, a motion to move the place of incorporation from Delaware back to Idaho was opposed by management and soundly defeated. *Boise Cascade Annual Meeting Showcases Management Power*, IDAHO STATESMAN, Apr. 19, 1997. The forerunner of BCC was the Boise Payette Lumber Company, incorporated on December 24, 1913 under the laws of the State of Idaho with an authorized capital of \$7 million. On April 23, 1931, the Boise Payette Lumber Company

environment, Idahoans have elected some of the most extreme anti-environmentalists in Congress: people such as Helen Chenoweth,<sup>22</sup> Mike Crapo,<sup>23</sup> Larry Craig,<sup>24</sup> and Dirk Kempthorne<sup>25</sup> who surf the crest

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of Delaware was incorporated in Delaware and took over all assets and liabilities of the Idaho corporation. See BOISE PAYETTE LUMBER COMPANY., REPORT TO STOCKHOLDERS (1947). Frederick E. Weyerhauser was Treasurer of the Original Board of Directors, elected on March 9, 1914. *Id.* Boise Cascade Corporation was formed in 1957 by the merger of the Boise Payette Lumber Company and the Cascade Lumber Company. See A. Waters, *supra* note 14, at 3.

22. A Sierra Club designation, awarded to Congresswoman Chenoweth. SIERRA, May-June 1996, at 28. "Chenoweth plays to the paranoia of the far-rightists by fanning their delusions about mysterious black helicopters supposedly used by federal Fish and Wildlife agents to enforce environmental laws in Idaho. The congressman also fears that environmental regulations are ushering in the one-world government long feared by the Birchers. Her evidence: the United Nations' designation of Yellowstone National Park as a world heritage site." *Id.* Congresswoman Chenoweth has recently proposed cutting down trees as a way of dealing with the so-called "greenhouse effect." This is but one example of her concern for the environment. Fredreka Schouten, *Chenoweth Backs Plan to Cut Trees to Clear Air: Idea Offered as Way to Prevent Global Warming*, IDAHO STATESMAN, Oct. 23, 1997, at 1A. During her first run for the House of Representatives in 1994, Congresswoman Chenoweth questioned whether salmon could be endangered because she could "still find salmon in cans on the shelves at Albertson's [grocery stores.]" Her recent fundraising letter declared that America's elite colleges (Wellesley, Brown, Yale, etc.) have taught young women that "marriage is slavery, faith in God a male-crafted prison, and abortion is a declaration of independence." Fredreka Schouten, *The Helen Chenoweth Factor*, IDAHO STATESMAN, Dec. 8, 1997, at 10A. A faxed biographical sketch from the Congresswoman's office lists among her accomplishments her "pivotal role in advancing legislation which establishes the concept of local management of resources, in saving the Purchaser Road Credits program from assault by Eastern legislators . . . , and in defending the concept of State sovereignty over its waters." See *infra* note 207 in which Boise Cascade's "take" from the Purchaser Road Credits program made it the second largest corporate welfare recipient in the program.

23. Representative Crapo is, perhaps, the least openly hostile to the environmental cause of the four Idaho representatives to Congress. That, considering his colleagues, is not high praise. A biographical sketch provided by the Congressman's office indicates that Crapo is in his third term as U.S. Representative from Idaho's second district after spending eight years in the Idaho State Senate. Crapo currently serves as co-chairman of the Congressional Beef Caucus, and is founding member of the Congressional Water Caucus. In the 103<sup>rd</sup> Congress, he served as the co-chairman of the Republican Task Force on Private Property Rights. Congressman Crapo graduated from Harvard's Law School in 1977 with honors, a distinction that makes him probably the most literate and the best educated of Idaho's contingent.

24. Larry Craig is the champion of so-called "salvage logging" in the Senate. He hails from a small cattle ranch in western Idaho and is opposed to any fee increases or limitations of the "rights" of cattlemen to graze cattle on public lands. Senator Craig proposed S. 391, a bill to establish a permanent timber salvage policy that would replace the 1995 salvage rider when it expired in 1996. S. 391, 104th Cong. (1995). The bill was defeated in part by opposition from Sierra Club and the Wilderness Society. The Washington Post called the timber salvage rider "arguably the worst piece of public lands legislation ever." Jessica Mathews, *Two Tasks for Congress*, WASH. POST, Sept. 6, 1996, at A15. Under it, 4.6 billion board feet of lumber were cut in 18 months. ALLIANCE FOR THE WILD ROCKIES, A REPORT ON THE TIMBER SALVAGE RIDER OF THE 104TH CONGRESS cited in NETWORKER

of timber, cattle and mining PAC campaign money.

On June 6, 1996, John Ross, poet, journalist, and prize-winning author, came to Boise, Idaho to present his findings in a talk entitled "Boise Cascade Corporation, Political Turmoil & Logging in Mexico's Sierra Madre." In a response that was unseemly as well as uncalled for, BCC's CEO George Harrad<sup>26</sup> pulled out his big stick and attempted to

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Spring 1997, at 5. A biographical sketch provided by the Senator's office indicates that "As a westerner and a former rancher, he plays a leading role in the formation of natural resource and energy policies, and has gained a national reputation as a stalwart against environmental extremism."

25. Senator Kempthorne was once student body president at the University of Idaho in Moscow [as was Senator Craig] and later mayor of the City of Boise. His administration as mayor flashed a large green light for unlimited development that has contributed to present infra-structure problems. Kempthorne's chief work in the Senate was an attempt to water-down the Endangered Species Act to pay reparations to landowners whose property rights were injured by protected species. Boise Cascade Corporation has been a large financial backer of Kempthorne throughout his public career. Officially reported contributions of the timber industry to the Idaho Congressional delegation from January, 1989 through June 1995 totalled \$169,800. Center for Responsive Politics, Contributions from Timber Industry to Idaho Delegation (Nov. 27, 1995) (unpublished manuscript on file with author). A biographical sketch faxed from the Senator's office indicates that "The Senator believes in staying close to the people of Idaho, and he maintains eight offices around the state." That grass roots touch should come in handy when Senator Kempthorne leaves the Senate to run for Governor of Idaho in November, 1998. Campaign contributions from the timber industry to Congress was also noted by the United Paperworkers International Union in a press release. In a special report, the union detailed "the political activity of the U.S. timber and paper industry. Analyzing political contributions, the union identified a highly partisan pattern of giving and increasing lobbying sophistication by an industry that is not often mentioned as a major Washington player." 'Union Probes Forest Industry's Politics: Investigation Finds Bundles to Western Republicans, Covert Lobbying', October 11, 1995.

26. G.J. Harad, Chairman and CEO, Boise Cascade Corporation, received salary of \$719,382 in 1996 and bonuses of \$129,941 for total compensation of \$849,323. That represented a salary increase of over 7% from 1995. *Top Executive Compensation*, IDAHO BUS. REV., Jan. 5, 1998, at 14. This figure is more than 715 times the projected annual earnings of the Papanoa mill workers, even using the unlikely but generous assumption that they could be employed for a full 50 weeks each year. See *infra* notes 87-92 and accompanying material. This assumption is unlikely due to the rainy season from June to October and the mud roads that become impassable, thereby causing a shortage of logs. CEO Harad and spouse are building a massive new home in the Boise Foothills near an up-scale development named Quail Hollow. The address is 4700 W. Quail Heights; and the site encompasses four acres which were leveled thereby eliminating a hilltop and creating a scar on the land visible for miles. The projected improvement is at 3105 feet of elevation which will allow the Harads to look down on the working class people in the valley. The gross square footage of the improvement is listed on the building permit as 12,277 and estimated cost is \$702,000 – not including the land. A local contractor said that the going rate for homes is \$75 per square foot; and homes in Quail Hollow run \$100 per square foot and up. "Low-balling" the cost of construction is not uncommon in Ada County since it keeps the building permit fee down. Harads paid \$4000 for the permit. Interview by William Wines with Jim Allen, Building Contractor, in Boise Idaho (Feb. 2, 1998).

silence all coverage of the event by local media as well as telephone the president of Boise State University in a futile attempt to get the talk canceled.<sup>27</sup> Such an approach is heavy-handed even by BCC standards and out of all proportion to what was happening. Yet, in 1989 when the dispute with the building trades at International Falls was really hot, BCC leaned on the *Minneapolis Star-Tribune* to get it to refuse to publish a paid advertisement from the Minnesota AFL-CIO.<sup>28</sup> This refusal prompted a news conference and picketing by the AFL-CIO.<sup>29</sup> Whenever BCC does business there seems to be an inevitable pattern and practice of use and abuse of its vast economic power.

In November 1996, our graduate research assistant (GA) attempted to get permission to access the BCC library and gather background information on the company's early history.<sup>30</sup> The GA first contacted the corporate librarian and asked if it would be possible to conduct research at the facility. In the past, BCC had been very cooperative in allowing students from Idaho universities research access to its library. The librarian indicated that she would have to look into this possibility and call him back. The GA left several voice messages for the librarian, but his calls were not returned. Three weeks passed and the GA initiated another contact with the librarian, who indicated that the GA would need to gain permission from the corporate legal department to use the BCC library, an odd arrangement; but he did. The legal department granted permission by phone, and the GA let the librarian know this. The librarian then indicated that she would have to check on this and call him back. On November 18th, the librarian left a message for the GA indicating that BCC was no longer allowing students to use the library and said that under no circumstance could he get historical data on BCC from them.<sup>31</sup>

BCC has "circled the wagons." Is BCC afraid someone might find something incriminating? Could there still be a smoking gun from the June 1995 Aguas Blancas massacre in the BCC archives? John Ross declared that his search had not turned up a smoking gun.<sup>32</sup> Did BCC violate the Foreign Corrupt Practices Act by slipping cash to then Governor Ruben Figuero? Who are the undisclosed principals in the holding company that owns the mills in Guerrero?<sup>33</sup> Could it include

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27. Interview with John Ross (June 6, 1996), *supra*, note 15.

28. *Unions Picket Star-Tribune Over Boise Ad*, THE UNION ADVOCATE, Aug. 21, 1989.

29. *Id.*

30. See *supra* text accompanying note 21 for a brief synopsis of BCC origins.

31. Interview by William Wines of Todd Hill, MBA, research assistant, in Boise, Idaho (November 19, 1996).

32. Stephen Stuebner, *Critic Raps B-C Mexican Operations*, THE STAR-NEWS, June 13, 1996, at 2.

33. "In February 1995, Boise Cascade was contacted by NDG, Inc., a company looking for a timber industry manufacturer that might be interested in a wood products venture

Mexican political powers? Such speculation may not be as far-fetched as it seems.

To analyze the possibilities, we need to examine the corporate culture in which senior BCC officers act and react and speculate on how that culture influences their attitudes and ideologies.

*Corporate Climate at BCC and Interactions with Local Citizens.*

BCC sits in an ultra-modern headquarters office on One Jefferson Square a few blocks west of the state capitol in Boise, Idaho, an intermountain right-to-work state that one political scientist compared to a third world country.<sup>34</sup> Some Idahoans are backward and proud of it; their paragon of success is multi-billionaire J. R. Simplot,<sup>35</sup> a crusty twentieth century captain of industry with an eighth grade education who made his fortune in the potato processing business through some legendary escapades, including activities that earned him a six-year ban from trading on the New York Mercantile Exchange and fines for federal income tax evasion.<sup>36</sup> Incidentally, "old J.R." — as Simplot is sometimes known in Boise — increased his holdings in BCC by approximately 30 million dollars in December, 1995.<sup>37</sup>

Labor strife is nothing new to BCC, and neither is a management style that has an "in-your-face" approach to labor relations. In 1978 in the Pacific Northwest, the Association of Western Pulp and Paper

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in Guerro, Mexico. Boise Cascade formed a wholly-owned subsidiary, Costa Grande Forest Products, which leases and operates a government-owned sawmill at Papanoa. It also built a lumber planing and drying facility at Cocopa and have an agreement to purchase the production from a government-owned sawmill at Tecpan. [citations omitted.]" A. Waters, *A Study of the Timber Industry in British Columbia, Idaho, and Guerro* 14 (Apr. 1997) (unpublished manuscript on file with author).

34. Gregory A. Raymond, *Idaho: A Third World Country?* (1986) (unpublished conference paper on file with authors).

35. Ironically, Jack Simplot was born in Iowa not Idaho. Simplot born January 4, 1909 near Dubuque, Iowa first moved to Idaho with his parents in 1911 but soon left for California and did not permanently settle in Idaho until J.R. was 13 years old. At 14 years of age, Simplot set out on his own and took his first job, sorting potatoes. HAROLD. R. BUNDERSON, *IDAHO ENTREPRENEURS: PROFILES IN BUSINESS* 10-14 (1992).

36. BUNDERSON, *supra* note 35, at 31-32. For an uncritical but informative essay on Simplot's contribution to potato agriculture and processing, see James W. Davis & Nikki Balch Stillwell, *J.R. Simplot Builds a Potato "Empire,"* in *ARISTOCRAT IN BURLAP: A HISTORY OF THE POTATO IN IDAHO* 62-84 (1977).

37. Paul Beebe, *Simplot Trust Buys Boise Cascade Stock*, *IDAHO STATESMAN*, Dec. 20, 1995, at 1a. The Simplot Trust acquired 820,000 shares of Boise Cascade between October 6 and December 11, 1995 to bring its total holdings to 3.17 million shares, representing 6.6 per cent of the outstanding BCC's common stock. Beebe indicated that "he [Simplot] was not trying to take over the company. Boise Cascade was simply a cheap investment, he said."

Workers struck BCC and other mills over economic issues.<sup>38</sup> For the first time in the modern era, BCC and several other producers continued to operate their mills. In 1980 in Rumsford, Maine, BCC took a strike over economic issues and continued to operate its mill.<sup>39</sup> Michael Harrington, Director of Labor Relations for BCC declared of this decision: "Labor has a right to strike. We have a right to operate our mill."<sup>40</sup> Four years later in DeRidder, Louisiana, BCC provoked a strike over work rules by bringing to the table an entirely new labor agenda and continued to operate during the strike.<sup>41</sup> BCC prevailed and Harrington said of the strike: "We viewed it as who was going to run the mill."<sup>42</sup>

In 1986 at the Rumsford, Maine facility, BCC took a hard-line position on work rules and pay for time not worked. After lengthy negotiations, the union struck, and BCC continued operations, warning strikers that they would be permanently replaced. BCC delivered on this threat and permanently replaced 346 workers, about one-third of the work force.<sup>43</sup> It then unilaterally implemented its proposed contract terms.<sup>44</sup>

Half a continent away from Boise lies the small town of International Falls, Minnesota. BCC owns the mill in that town, and the mill sits on the banks of the Rainy River that divides International Falls from Fort Frances, Ontario. In June, 1988, BCC announced it was going to build a \$525 million plant expansion in International Falls after using the threat of canceling the project as a club to get union contracts with nine unions that had bargained to impasse with BCC in 1985 and had been working without contracts in the interim.<sup>45</sup> This threat of economic devastation had turned brother against brother and divided families as the residents of the Falls tried to grasp the enormity of a BCC pull-out.<sup>46</sup>

The people who live in International Falls, Minnesota take their

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38. Paul Beebe, *Boise Cascade's Labor Woes Raise Question of Bias*; *Boise Cascade: Latest Labor Woes are Extension of 1978 Plan to Modernize Labor Accords*, IDAHO STATESMAN, Sept. 24, 1989, E1, E4. *Boise Cascade took the strike in an effort to "end what Chairman John Fery has said were years of concessions by the industry to labor unions."* *Id.*

39. *Wines and Learned, supra note 5*, at 216.

40. *See id.*

41. Mike Draper, executive director of the Western Council of Industrial Workers, said "Boise Cascade can be a very ruthless company to deal with." *Beebe, supra note 38*, at E1, E4.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Wines & Learned, supra note 5*, at 206-07.

46. Dan Gallagher, *Paper Mill Expansion Splits Town*, IDAHO STATESMAN, Sept. 10, 1989, at 1A.

families, their religion, and their unionism seriously.<sup>47</sup> Into the raw and angry climate of the Falls where the "cram-down" of the contracts had not been either forgiven or forgotten, BCC introduced another potentially incendiary element: the choice of BE & K Construction Company of Alabama as the general contractor on the massive expansion project.<sup>48</sup> This decision to use a competent but notoriously non-union, if not union busting, southern outfit to build one of the largest private construction projects in Minnesota State history<sup>49</sup> was little short of spitting in the Chalice at High Mass. Violence followed.

BE&K began the job in July, 1989 even though BCC top management knew that its choice for general contractor was unpopular and had already heard rumors of trouble if BCC proceeded.<sup>50</sup> Of the initial twenty subcontracts that BE&K let, eighteen were with union contractors. However, when non-union subcontractors began work at the same time, a wild cat strike by building tradesmen erupted. According to BCC, BE&K continued to work with the union subcontractors whose employees had walked off the job.<sup>51</sup>

Another observer wrote about the wildcat strike and its significance in these words:

[T]he wildcat strike had as its genuine architect the passions of the Iron Range building tradesmen who simply wanted to do 'something,' whether that 'something' was well-thought out and strategically sound or not. At any rate, whether deliberately or by being pushed through

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47. See Dave Hage, *BE&K Troubles With State Unions Part of Wider War*, STAR-TRIB., Aug. 6, 1989, at A12, available in 1989 WL 3808301. Hage states "The unions didn't waste any time declaring war once Boise announced its choice of BE&K last February. The United Brotherhood of Carpenters, which represents 60,000 paper mill workers as well as thousands of construction workers, has launched a national campaign against BE&K that includes bumper stickers, T-shirts, and a 13 minute videotape documentary on BE&K. *The Viking Bar, a union watering hole in International Falls, has been screening the video for patrons.*" *Id.* (emphasis added). In an earlier piece, we described I. Falls in the following terms: "International Falls prides itself on being the 'ice-box of the nation' in a state known for its union activism. In the Falls, almost everyone is organized. Democrats belong to the DFL (Democrat, Farm, Labor) Party." Wines & Learned, *supra* note 5, at 203. According to a participant in the picnic, BCC leased a local resort in the International Falls area for a day and threw a picnic with free champagne to celebrate its new "labor contract" in the summer of 1989 and "not one union member showed up." Telephone interview by William A. Wines with W.S. Scheela, Ph.D, an International Falls native and management professor, Minnesota State Universities (Oct. 6, 1989).

48. See Wines & Learned, *supra* note 5, at 207-08. BCC Officers knew BE & K would be unpopular in International Falls but cited figures they claimed showed that its bid was \$40 million below the lowest unionized general contractor, Fru-Con out of St. Louis, Mo. *Id.*

49. Larry Oakes, *Perpich Hopes Competitors Can Change Boise Stance*, MINNEAPOLIS-ST. PAUL STAR TRIB., Aug. 6, 1989, at 17A.

50. See Wines & Learned, *supra* note 5, at 207.

51. See *id.*

the back door, the Minnesota Building and Construction Trades Council had made its decision: the wildcat strike signaled that the dispute would take the form of distributive bargaining.

Distributive bargaining suggests that two parties have no overriding structure or common language by which conflict can be resolved by reason. Rather, power, sometimes raw, undisguised power, becomes the only valid syllogism. The relationship between the two parties becomes a zero-sum game, and in distributive bargaining's most extreme manifestations, give-and-take and compromise become impossible. Ideological polarization occurs, and coercion becomes the only tool by which the two parties influence each other. . . .<sup>52</sup>

Eventually, BE&K elected to cancel the union subcontractors for failure to perform and replaced them with non-union subcontractors.<sup>53</sup> On September 9, 1989, the situation in the Falls blew up and hundreds of people rioted over the use of sub-contractors on-union construction trades labor by BE&K.<sup>54</sup> The rioters overpowered the local police force, flipped cars over, and burned a temporary housing camp that BE&K had constructed for its workers — complete with barbed wire fencing and obviously inadequate security.<sup>55</sup> The damages were estimated to be \$1.3 million.<sup>56</sup> Throughout the wildcat strike and the other labor problems, the BCC mill employees operated the existing mill without interruption. Eventually, the new expansion was completed and came on line. Some former BCC workers served time for rioting, lost their jobs, and many continue to live in the Falls. Some of them commute hundreds of miles each way to jobs in the Twin City metro area and are only home on weekends.<sup>57</sup> Members of some families are still not on

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52. Michael V. Woodhouse, *Union Strategies to Prevent Non-Union Construction: The Case of International Falls, Minnesota* 35-36 (1990) (unpublished M.A. thesis, Oxford University) (on file with authors).

53. The dispute generated litigation that ended in a U.S. Supreme Court decision, *Nat'l Labor Relations Bd. v Town & Country Elec., Inc.*, 516 U.S. 85 (1995). In a rare review of a case involving the National Labor Relations Act, the court in an opinion by Mr. Justice Breyer held that the termination of an electrician by the employer for being a paid union organizer was an unfair labor practice.

54. *See* Wines & Learned, *supra* note 5, at 208.

55. *Union Flap Sparks Riot in Midwest*, IDAHO STATESMAN, Sept. 10, 1989, at 1A.

56. *Boise Protest Erupts Into Riot*, DAILY J., Sept. 11, 1989, at 1, 6-9. For sake of perspective, BCC recorded sales of \$4.3 billion in 1989 and posted record high profits of \$289.1 million for calendar year 1988. Jim Bowers, *Boise Cascade Sets Profit Record*, IDAHO STATESMAN, Feb. 23, 1989, at 1A. Thus, for less than 14% of its previous year's profits, Boise Cascade Corporation could have employed a unionized general contractor and avoided the bloody conflict and property destruction in Minnesota as well as the confrontation with then Minnesota Governor Rudy Perpich. Clearly, Yankee dollars took precedence over people and social welfare.

57. Ironically, a Boise Cascade Corporation publication entitled "Directions for Boise Cascade," dated June, 1988, summarizes the BCC mission statement and declares that

speaking terms as a result of the choices and positions they took in 1989.

In an interview at BCC Headquarters on February 1, 1990, Jon H. Miller, then President and Chief Operating Officer, said ". . .What we did [at International Falls] was legal as hell, morally right, logical, and what any businessman would do. . . ." <sup>58</sup> Moreover, Miller declared that BCC was not anti-union but believed in the free market theory of labor. "The economic power in a mill town [of the mill owner] is such that it's Boise Cascade's way or you can go pump gas. . . ." <sup>59</sup> Ironically, Miller who claimed the moral high ground left BCC suddenly less than nine months later "to pursue personal interests." <sup>60</sup> Even after Miller's departure, the issue of whether BCC is anti-union continues to be debated both in and out of the press. One carpenter's union official described BCC's top management as ". . .leaders in a willingness to break strikes" and BCC as a company embracing a "hard-line anti-union attitude. . . ." <sup>61</sup>

The latest labor conflict was a walk-out at the Salem, Oregon corrugated container plant where hourly workers struck to protest the breakdown of negotiations with BCC on April 21, 1997. More than one year after workers voted to be represented by Association of Western Pulp and Paper Workers based in Portland, the workers had not been able to negotiate a contract with the company. <sup>62</sup>

#### *Council, Idaho.*

In March, 1995, BCC closed its mill in Council, Idaho (pop. 831). In November, 1995, news reports indicated that the some of the equipment from the Council mill had been shipped to Papanao, a small town on the Coast of Guerrero, Mexico where BCC had leased an inactive saw mill. BCC plans to log millions of board feet of old-growth forests, over a five-year period, and ship the logs to its processing mill. In August, 1996, BCC purchased a new planer and had it shipped to the Papanao mill site. BCC had opened another mill further down the coast in Guerrero, according to local sources, at year's end.

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"Boise Cascade Strives to value the individual dignity, worth , and rights of employees and maintain the highest ethical standards in dealing with them." (copy in possession of authors).

58. Interview of Jon H. Miller, President and Chief Operating Officer, by Kevin E. Learned and William A. Wines, faculty at Boise State University, in Boise Idaho (Feb. 1, 1990).

59. *Id.*

60. IDAHO STATESMAN, Oct. 19, 1990, at 1A.

61. IDAHO STATESMAN, Sept. 24, 1989, at 1E.

62. James Sinks, Boise Cascade Workers Strike Oregon Stoppage May Idle Nampa Plant Too, IDAHO STATESMAN, Apr. 22, 1997, at 10B, *available in* 1997 WL 10199294.

Rumors continued to swirl during 1997 at the BCC mills in Cascade, Emmett, and Horseshoe Bend, Idaho and in LaGrande, Oregon that similar fates awaited those mills. Among characteristics that Emmett and LaGrande share with Council, Idaho are that the mills in all three places are unionized and that workers had rejected BCC contract offers in 1994.<sup>63</sup> The rejection of the BCC offers followed three straight years of financial losses. There seems to be a climate of distrust, at least among significant portions of those communities. In addition to the Council, Idaho mill, BCC has also closed its sawmills in Yakima, Washington and Joseph, Oregon — also citing shrinking timber supplies.<sup>64</sup> Let us turn to the situation in the State of Guerrero before generating any further analysis.

*State of Guerrero, Mexico.*

Richard Parrish, senior vice president of BCC's building products division, in a local interview, declared that "diminishing timber supplies, brought on in large part by the ground swell of endangered species designations, starting with the white spotted owl in 1992, is drying up local and regional supplies. . . ."<sup>65</sup> However, BCC did not close the Council mill last spring with the intention of moving it to Mexico; and the BCC move to Mexico does not foreshadow the inevitable end of timber operations in Idaho. All of these statements were designed to "set the record straight" according to Parrish who further declaimed that "the environmental watchdogs down south are just as diligent as they are in the United States. . . ."<sup>66</sup> But according to freelance journalist John Ross, who has lived and worked in Mexico for many years, environmental regulation varies a great deal between the two countries. In a recent article published in *Sierra Magazine*, Ross states "even at its most vigorous, environmental regulation in Costa Grande can be best described as lax. . . ."<sup>67</sup>

Parrish's declaration of environmental parity strikes us as counter-intuitive as well as incompatible with any knowledge of the different cultures in the two countries. In particular, it sounds disingenuous when one examines the events that led up to the BCC logging controversy. On June 28, 1995, two pickup trucks loaded with Mexican peasants were ambushed by state police at Aguas Blancas; this massacre

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63. *The Idaho Statesman*, 1994.

64. *The Star-News*, 1996.

65. Mark Carnopis, *Mexico Sawmill Said Just Global Strategy: Boise Cascade Says Company Looking for Timber Reserves, Not Cheap Labor*, *IDAHO BUS. REV.*, Jan. 1, 1996, at 1, available in 1996 WL 8420972.

66. *Id.*

67. Ross, *Treasure*, *supra* note 10, at 22.

did not "occur in a vacuum. . . ."68 The Minnesota Advocates' report declares "Guerrero is one of Mexico's bloodiest states. . . ." Even though this mountainous state is saturated with a "dangerous mixture. . ." of poverty, political violence, illegal drug trafficking, abusive police forces, and other elements, the Minnesota Human Rights group found that the Aguas Blancas massacre did not appear to be related in any way to armed insurrection activity.<sup>69</sup>

Rather, the report of the Minnesota investigation states that months of tension between the Governor Ruben Figueroa Alcocer and the OCSS (a Southern Sierra Peasant Organization) over the expropriation of timber on communal land erupted into the murderous assault on OCSS members that morning.<sup>70</sup> Prior to the massacre, the OCSS, founded in early 1994 to represent poor campesinos, had aggressively and sometimes illegally opposed logging. In one instance, it disabled a crane and in another, it hijacked a logging truck. Not all of its methods involved physical confrontation. On May 3, 1995, representatives of the OCSS met with Governor Figueroa in Tepetixla to press demands for agricultural supplies which had become hard to get as a result of the devaluation of the Peso in December 1994 and the ensuing economic crisis. The two sides reportedly reached agreement.

But on May 18th, just a little over two weeks later, the OCSS staged a demonstration in Atoyac de Alvarez to protest the governor's apparent default on the agreement, to denounce recent human rights violations, and to celebrate the anniversary of the guerrilla insurgency commenced by Lucio Cabanas in 1967.<sup>71</sup> Hundreds of OCSS members, some carrying machetes and others armed only with clubs, blockaded the city hall overnight and effectively held captive the municipal president. In the following weeks, more demonstrations were held and planned and one OCSS member "disappeared" from Atoyac de Alvarez. The OCSS complained of police surveillance of its office in Tepetixla, and the Governor reportedly met with various law enforcement personnel at the Governmental Palace on June 26 to make plans to stop another OCSS demonstration planned for Atoyac de Alvarez on June 28th.

The actual number of police agents present at the massacre is disputed; OCSS survivors claim the number is in the hundreds but the police claim only thirty agents were present. When the shooting ended, seventeen peasants were dead, twenty four peasants were wounded, and two policemen were hurt. The dead included men and women between the ages of 20 and 75 years; and the wounded included men and

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68. *Massacres in Mexico*, CITATION, at 4 (Minnesota Advocates for Human Rights 1995).

69. *Id.* at 4.

70. *Id.* at 5.

71. *Id.*

women between the ages of 17 and 73 years. Some of the dead were shot at point-blank range; some were shot in the back from a distance of under three feet. Only the police had firearms.<sup>72</sup> There followed clumsy attempts by the government to cover up the massacre accompanied by threats to both witnesses and victims.<sup>73</sup>

*John Ross Speaks in Boise, Idaho.*

John Ross, a journalist and author from Mexico City, traveled to Idaho's capitol city to address the deadly conflict over logging in the Guerrero region. According to Ross, BCC is logging in the vicinity of the June 1995 Aguas Blancas massacre, a massacre spurred by conflicts over logging.<sup>74</sup> As Ross sees it, BCC logging runs a high risk of intensifying the social tensions that have historically led to human rights abuses.

Ross visited BCC's mill in the state of Guerrero, Mexico, in February, 1996. He also researched and inspected the site of the June massacre of 17 civilians. The massacre, which took place after BCC had signed a contract with the now disgraced governor of Guerrero, demonstrated the explosive social conditions in the region and revealed that social conflict and political assassinations in Guerrero often spring from struggles over land and natural resources. Some of those executed had warrants for their arrest dated the day after the contract with BCC was signed.<sup>75</sup> On August 1, 1996, guerrillas attacked a Mexican Army convoy less than 10 miles from Papanoa, the site of BCC's mill.<sup>76</sup>

Holding a press conference and lecture, Ross took BCC to task,

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72. *Id.* at 9-32.

73. *Id.* at 15-21.

74. "In the months prior to the massacre, the OCSS had engaged in a dispute with local leaders in Tepetixla, involving the expropriation of timber on communal lands. The OCSS employed aggressive, and at times illegal methods to achieve its goals, such as disabling a crane and commandeering a timber-hauling truck." *Id.* at 5. "Two weeks later the logging was renewed and the first response of the farmers of the OCSS was to destroy two cranes belonging to the logging company, on the 10<sup>th</sup> of May, and the confiscation of a truck loaded with wood, property of Epifanio Rodriguez, Friday the 12<sup>th</sup>, according to Beningo Guzman, one of the representatives of the Organization." On the position of the OCSS: "It is the non-exploitation of the wood, because we see that with logging the water goes away, there are droughts, and also that when the wood is exploited, those who benefit are only a few, and for these reasons we don't harbor ambitions of exploiting the wood, not even if we were in power." "What they want is for us farmers to kill each other," says a leader of the OCSS about the wood problem. ACAPULCO WEEKLY, May 15-21, 1995.

75. Donald J. Smith, Boise Cascade Corporation in the State of Guerrero, Mexico: Environmental Impacts of Logging & Political Turmoil iii (unpublished manuscript on file with authors).

76. John Ross, Logging Guerrero's Forest: Bloodshed Casts Doubts on Boise Cascade Project, EL FINANCIERO INT'L, Feb. 26 -Mar. 3, 1996, at 11 [hereinafter Ross, Logging Guerrero's Forest].

claiming that it was either ignorant of the social and environmental consequences of logging in the region or was indifferent to it.<sup>77</sup> In either case, the company has displayed a lack of social responsibility, disregarding possible human rights implications for the people of Guerrero, Mexico. Ross' visit was sponsored by the Alliance for the Wild Rockies, the history department of Boise State University, and the Idaho Conservation League. His press conference, lecture and slide show before 150 people at Boise State University, threw BCC into a frenzy. BCC's strong arm tactics caused a public "blackout" of Ross' talk, demonstrating that one TNC can effectively suppress media coverage even in a state capital in the U.S.A., where the press is supposedly free and vigorous.

Ross' press conference was attended by three TV stations, the Associated Press, and a free lance writer. A fourth TV station, one that initially broke the story on BCC's Mexico logging operations, and the shipment of mill equipment from its closed mill in Council, Idaho, to Mexico, failed to show. This TV station, a few weeks after breaking the first story, also covered the Alliance's December, 1995, press conference, where Alliance for the Wild Rockies ("AWR") challenged BCC to come clean on its Mexico investment. The day following that press conference, BCC pulled all of its advertising from the station.<sup>78</sup>

The decision on the part of two of the three TV stations not to cover the issue on the nightly news may also be attributed to BCC's success at intimidation. The company went out of its way to discredit Ross and the Alliance in press releases and phone conversations, both singled out by the company for being "extremists." The Idaho Statesman Environmental Reporter, after a lengthy interview with Ross, also filed a news article. But the paper chose not to publish it. The AP apparently found the issue too complex, too controversial, or simply did not want to be hassled. This experience demonstrates the lengths to which BCC will go to discredit activists and to prevent critical views from being aired.<sup>79</sup>

That John Ross had struck a nerve with BCC, however, was beyond doubt. The president of the region's major timber company personally called the president of BSU to complain about the university's sponsorship of Ross' lecture.<sup>80</sup> Apparently, BCC's Wild West style corporate

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77. See BOISE WEEKLY, June 13-19, 1996, at 3.

78. Interview with Donald J. Smith, reporter and News Director of Channel 6 (KIVI-ABC), in Boise, Idaho (multiple dates between June and Dec. 1996).

79. Boise Cascade Corporation is a founding donor of the Center for the Defense of Free Enterprise, a think tank that provides direction to "Wise Use" Groups that oppose local efforts to protect the environment and encourage sustained yield usage. Anita Kerski, *Pulp, Paper and Power: How Industry Reshapes the Social Environment*, ECOLOGIST, July-Aug. 1995, at 148 [hereinafter Kerski].

80. *The Guerrero Connection*, BOISE WEEKLY, June 13, 1996, at 3.

culture lacks a wholesome respect for an open press, free speech, and a vital public sphere.

Yet, Ross' message is clear and precise. BCC has thrown itself into an area where logging exacerbates social tensions. While some within the local "ejidos" (the communal governing structure that controls regions of the forest) have conceded to the pressure of international capital and debt, others remain firm in their opposition to foreign logging operations. Many of the local farmers worry that logging leads to severe erosion and jeopardizes their dependence on water, as past logging has shown. Others watch with resentment as the locally processed timber and raw logs are exported north.

BCC is paying locals at the mill \$4.75 a day while mill workers from Montana and Idaho shuttle through on monthly stints, paid the equivalent of \$70,000 a year. Jumping on investment opportunities brought about by NAFTA, BCC has taken advantage of reforms in the Mexican Constitution made to accommodate NAFTA, opening the floodgates to foreign investment. As often happens in such situations, the results pit locals against one another, an outcome not unlike the conflicts orchestrated in the American Northwest by timber giants such as BCC.

In August, 1996, BCC, conceding that it intends to further downsize its Idaho operations, permanently laid off 40 of its mill workers, representing nearly 15 percent of its labor force in Idaho mills. BCC gave the same old and tired, but so far successful, explanation for the layoffs: a lack of federal timber due to environmentalist's appeals and lawsuits.<sup>81</sup> The company also complained about a lack of access to big trees. In Mexico, however, BCC finds a plentiful source, as they say, of "raw materials."

A week before the layoffs, and at a time when southwest Idaho's ponderosa forests suffer from over-logging, a timber sale put up for auction by the Boise National Forest went begging (the third in a row). The North Gold Green clear cut sale offered up old-growth ponderosa

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81. According to Dave VanDeGraff, Idaho Regional Timberlands Manager for Boise Cascade in Emmett, Idaho: "frivolous administrative appeals and lawsuits against the U.S. Forest Service programs" have reduced access to trees for companies like BCC. Dave VanDeGraff, *Extreme Environmentalism Often Occludes Path to Good Forest Science*, IDAHO STATESMAN, June 22, 1997, at 15A. However, some of the facts on the public record do not seem to completely support these assertions. For instance, between December 31, 1993 and March 31, 1995 (before the Salvage Logging rider to the Congressional Appropriations Bill), 3.3 billion board feet of timber were offered for sale on all National Forests; and less than one-third of these were appealed, including the 265 million board feet Boise River Wildfire Recovery Project. Out of the 1 billion board feet appealed, only 15 mmbf were delayed, Eighty-six million board feet were delayed due to litigation (about 2.6 percent of the total sales).

pine.<sup>82</sup> But BCC knows better. Why purchase some of the remaining old-growth in Idaho and risk bad publicity when it comes a lot cheaper in Mexico . . . and Russia, South America, etc., where environmental regulations and environmental activists are virtually non-existent.

Along with other TNC's and some government agencies, BCC perpetuates the myth that economic well-being is dependent on environmental abuses, and that environmental protections are too costly. It also seems committed to self-serving justifications for its conduct and conveniently absent-minded about hard-nosed business rationales that might inflame adverse public reactions. By shifting public attention away from the boom and bust, non-sustainable forestry favored by the Forest Service and timber industry,<sup>83</sup> the company successfully pits one sector of society and the economy against another, a strategy also at work in Mexico, where the results are even deadlier.

### SPIN ANALYSIS

Corporate Spin #1: BCC denies any relationship between the closure of its Council, Idaho mill and the opening of operations in Mexico.

In March of 1995, BCC closed its mill in Council, Idaho. The mill, which was equipped to handle only the largest logs being harvested was closed rather than being retooled to handle smaller logs. Coinciden-

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82. BCC did eventually buy the North Gold timber, 5.6 mmbf, on September 18, 1997 – the third time it was offered for sale. Report of Timber Sale, USDAFS, Sept. 18, 1997.

83. "Loggers are losing their jobs because of technological improvement. One person can cut in an hour what it took two people to cut in a day ten years ago. These jobs are temporary. The average timber job now only lasts 5 years (citation omitted). The forests are not being cut at a sustainable rate (citation omitted). These logging jobs are not sustainable." Michael T. Garrity, Research Fellow, Economics Department, University of Utah, *Economic Analysis of the Northern Rockies Ecosystem Protection Act 4* (1997) (unpublished manuscript on file with authors). At a global level, the world's forests are disappearing. In 1960, the world's national forests covered about 3750 million hectares. In 1990, this number had dropped to 3450 million hectares; and the projection for the year 2010 is 3250 million hectares. *Concerns on Shrinking Forests* (visited Mar. 11, 1997) <<http://www.canadas.net:80/wood/shrinkq.htm>>. Mexico is one of the areas in the world where forests are shrinking the fastest. Approximately 50 percent of the of the labor force is unemployed; and a majority of the employed work for wages inadequate to care for a family. U.S. Department of State, *Mexico Country Report on Human Rights Practices for 1996* (visited Mar. 12, 1997) <<http://www.usis.usemb.se/humanr97/mexico.html>>. A sawmill in Idaho laid off workers while modernizing its plant in 1995. These job losses occurred as local jobs increased. "Even with job losses at Potlatch Corp. in Lewiston, the Lewiston-Clarkson Valley had a net gain of 900 jobs this year through November, according to Douglas D. Tweedy of Lewiston, labor analyst for the Idaho Employment Department." "Potlatch management was quick to point out the company has invested \$15 million in the sawmill over the last five years, a sure sign it has faith that it can be a money maker. A new log-processing center at the sawmill, which apparently wasn't quite right for the job, was replaced again for about \$6 million." *Growth Amid Timber Turmoil*, LEWISTON MORNING TRIB., Sept. 25, 1995, at 1A.

tally, within a month of the Council mill's closure, BCC had signed an agreement to begin a major timber operation in Mexico where old-growth trees and cheap labor are readily available.

BCC maintains that there is no connection between the mill closure in Council and the mill opening in Mexico. The company defended its actions in the Idaho Business Review, where BCC Senior VP Richard Parrish stated in part:

Between last April and the end of the year [1995], Boise Cascade reached an agreement with a mill in Ixpata to supply logs and buy the lumber by a second work shift.

At the same time, the company signed an agreement with the Mexican government about leasing a government-owned mill in Papanoa that had shut down.<sup>84</sup>

The decision to go to Mexico and the decision to close Council were separable issues. We had never been to Mexico when we announced the closure of Council. In fact, by the time the mill closed, we still hadn't been in Mexico or had our first phone call."

The timing of the Mexico timber agreement and the subsequent events that have transpired since the closing of the Council, Idaho mill tell a different story. Two independent writers indicate that BCC's contacts in Guerrero were initiated at least as early as February 1995.<sup>85</sup> One month later, the Council mill was closed; and in April, BCC had publicly announced its contract with the state of Guerrero.

Last April 24, a brace of U.S. timber-company executives made the front page of El Sol de Acapulco, the state of Guerrero's most widely circulated newspaper. Along with Governor Ruben Figueroa, they were shown smiling as they signed the agreement that would bring BCC, one of the top wood-products producers in the United States, to Guerrero's Costa Grande, the conflictive, guerrilla-ridden stretch of coastline that winds between the luxury resorts of Zihuatanejo/Ixtapa and Acapulco. . . .<sup>86</sup>

Given this scenario, BCC's account of the initial contact and signing of the agreement with Guerrero strains credibility. The corporation's claims that "by the time the mill closed, we still had not been in Mexico or had our first phone call."<sup>87</sup> BCC would have us believe that it had not entered into negotiations for the lease of the Papanoa mill until after the Council mill closure in March, 1995, but that miraculously

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84. Carnopis, *supra* note 65, at 1.

85. See *supra* note 29 indicating NDG, Inc. contacted BCC in February 1995 and *supra* note 80 in which at least one anonymous source suggests contacts dating back to 1992. John Ross points to the February 1992 date.

86. Ross, *Treasure*, *supra* note 10.

87. Carnopis, *supra* note 65, at 15B.

BCC was able to seal the Mexican deal by April 24, 1995, a matter of only a few weeks.<sup>88</sup> Things do not move that fast in Mexico, as almost anyone who has been there will testify.

Corporate Spin #2: BCC says that it was forced to close the Council mill due to a shortage of timber in Idaho because of stringent environmental restrictions and the consequences of environmentalists appeals and lawsuits.

According to BCC, its aggressive international search for trees is simply a part of its global strategy and attributes the closure of its Council mill to "timber supply changes taking place in southern Idaho. . . ."<sup>89</sup> However, the amount of timber that has been offered for sale in southern Idaho forests would suggest otherwise.<sup>90</sup> There have been a number of below-cost timber sales offered by the Boise National Forest that BCC refused to bid on, and subsequently went unsold.

For example, the 1995 Boise River Wildfire Recovery Project originally projected the logging of 265 million board feet of timber. When this project, which had been covered by a single Environmental Impact Statement (EIS), was sold in a series of smaller auctions, only 203 million board feet were ultimately sold. The reduced volume of timber sold was due to the lack of interest in the timber; many of these sales went without a bidder when put up for auction. The 17 sales were often the result of non-competitive bids, i.e., only one company bid on the timber. BCC's refusal to bid-up these sales, or bid at all on some of them, undercuts the assertion that it cannot acquire the needed logs to sustain its Idaho operations. The Boise River Wildfire Recovery Project in the

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88. Interview by William A. Wines with John Ross in Boise, *Id.* (June 6, 1996). One of Ross's sources indicated that Boise Cascade management had "made decision to go [to Mexico] in February, 1995." even though this timeline has been repeatedly denied by all BCC spokespersons. One source with family in Guerrero and who for that reason insists on anonymity says that negotiations for BCC logging in the Costa Grande can be traced to initial contacts in calendar year 1992. *Id.*

89. Ross, *supra* note 76, at 11.

90. "The future of Boise Cascade's Idaho sawmills is in jeopardy. Chairman George Harad lays the blame squarely on Forest Service policies that he says have severely limited timber sales. I'm very concerned about the viability of our mills in Idaho. And it's certainly not based on concerns about the productivity of the work force or the skills that they bring. But the fact is that the U.S. Forest Service sales program has, in effect, been brought to a halt." *Chairman Says Company Might Have to Close Sawmills in Idaho*, IDAHO STATESMAN, June 6, 1997, at 10B (emphasis added).

However, Boise Cascade Corporation's claim that timber availability has dropped off or declined or been halted does not square with the data. According to U.S. Forest Service figures, timber harvest in the Boise National Forest from 1982 through 1989 averaged a yearly cut of 76.4 mmbf. From 1990 through 1996, the yearly cut average was 105.2 mmbf. From 1982 through 1989, the forest sold a yearly average of 62.6 mmbf. From 1990 through 1996, the forest sold a yearly average of 114.7 mmbf. In the Payette National Forests, twenty percent of the 1996 timber offerings went without a bidder.

Boise National Forest was the largest sale in Idaho's history.<sup>91</sup>

Also, a search of public records reveals that as of the end of calendar year 1996, BCC owned 154.9 million board feet of timber in the Boise and Payette National Forests alone that have yet to be logged. One of these sales that has not been harvested dates back to 1986. One wonders when the taxpayers can start charging storage?

Corporate Spin #3: BCC denies that its move to Mexico was to take advantage of the lack of environmental regulations in Mexico, compared to those in the U.S.

BCC Vice President John Parrish claimed that "the environmental watchdogs down south are just as diligent as they are in the United States . . . [S]o far, since we've been in Mexico, we've had to get 42 permits and we've been inspected twice, and everything's fine. I don't think that's a lot different then you'll find here. . . ."<sup>92</sup>

In Mexico, however, others disagree. Vice Minister of Natural Resources, Gonzalo Chapela stated: "I'm worried about the amount of wood this project will take out of the area . . . ." Homero Aridjis, director of the prestigious Mexican environmental organization "Group 100" believes "there is no control over the way our natural resources are being exploited. Permission is granted to these foreign corporations without environmental-impact studies. It's all being done silently — the trees are cut down silently and they are exported silently. No one knows anything; everything is hidden . . . ."<sup>93</sup>

In an article published in *Ecological Economics*, the authors stated:

[I]t is concluded that in spite of Mexican environmental legislation and MDBs' [Multinational Development Banks] environmental policies, a combination of legal and institutional factors make environmental analysis irrelevant for megaproject design and implementation in Mexico. Also, misconceptions of the role of EIAs [Environmental Impact Assessments] obstruct proper application of environmental analyses . . . .<sup>94</sup>

The authors went on to reveal that "given the way EIAs are being applied in Mexico, cancellation of projects on the basis of EIAs is unlikely . . . In reality, however, the Mexican bureaucracy maintains a reductionist and partisan view toward the environment that hampers environmental regulations and observance and efficiency. . . ."

91. According to Robert Wolf, a retired research analyst with the Congressional Research Service, the Boise River Wildfire Recovery Project amounted to at least \$15 million in below-cost. Robert Wolf, *Analysis of Boise River Fire Salvage* (August 1995) (unpublished paper, on file with authors).

92. Carnopis, *supra* note 65, at 1.

93. Ross, *supra* note 76, at 22.

94. International Lending and Resources Development in Mexico: Can Environmental Quality be Assured? *ECOLOGICAL ECONOMIST* NO. 5 (1992).

Furthermore, "[D]ecisions are frequently unrelated to the perceived needs of local communities or implementation differs completely from whatever was planned. . . ."95

Contrary to the claims of BCC, environmental regulations in Mexico are not as stringent as they are in the U.S.. If environmental policy and enforcement between the two countries is similar, then how could BCC reasonably expect to be able to clear cut old growth forests in Guerrero without facing environmental challenges every step of the way as it claims to be the case in the United States? Even if the laws were the same, the commitment to enforcement is significantly different. The entire budget in 1990 for environmental enforcement by the Secretariat of Urban Development and Ecology (SEDUE), the agency charged with enforcement for the entire country of Mexico, was less than six percent of the budget of the State of Texas for hazardous waste and water pollution cleanup.<sup>96</sup>

Corporate Spin #4: BCC denies that its move to Mexico was designed in part to take advantage of the significantly lower wage scale prevailing there, compared to the wages BCC must pay for labor in the United States.

According to a BCC spokesman, BCC "currently has production plants in Tecpan, Papanao, and Cocopa, where 187 local workers are employed at rates ranging from \$1 to \$1.25 per hour when converted to U.S. rates."<sup>97</sup> "It sounds very low, but to those folks it is very welcome," Bartels said. . . ."<sup>98</sup> Yet, *El Financiero Internation Edition* in a story on logging Guerrero's forests stated that the base pay at the BCC mill in Papanao is \$4.75 dollars a day.<sup>99</sup> Even the \$4.75 per day for a ten hour day is "well above the Mexican minimum wage, but barely a 30th of what Boise Cascade pays north of the border."<sup>100</sup> And, yet, BCC denies heatedly that it is in Mexico to take advantage of low labor costs.<sup>101</sup> *Sierra*, the magazine of the Sierra Club, stood by its story when challenged.<sup>102</sup>

Corporate Spin #5: BCC denies that its logging in the State of Guerrero is a "rip-and-run" operation. In an effort "to set the record

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95. *Id.* at

96. C. Price, *The Logging Industry: Environmental Laws, Environmental Issues* 14 (Apr. 14, 1997) (unpublished manuscript on file with authors) (citing J. Ward & G. T. Prickett, *Prospects for a Green Trade Agreement*, 11 ENV'T., May, 1992, at 2.).

97. David Goins, *Boise Cascade Sawmill In Mexico Gets Slow Start Due to Rain, Roads*, IDAHO BUS. REV., June 10, 1996, at 9A.

98. *Id.*

99. Ross, *supra* note 76, at 11.

100. Ross, *Treasure*, *supra* note 10, at 24.

101. Carnopis, *supra* note 87, at 1.

102. Richard B. Parrish, *Letter to the Editor: Boise in Guerrero*, SIERRA, Nov.-Dec., 1996, at 12.

straight," Richard Parrish, senior vice president of BCC's building products division said "[w]e hope we're there (Guerrero) for a long, long time. We have the wood bought, we think, for the next five years. But we're hoping for longer than that."<sup>103</sup> In a letter to the Sierra Club magazine, Mr. Parrish also declared "[w]e (at BCC) believe that our presence in Guerrero will be constructive by providing employment, training, wages, and technical assistance in an otherwise depressed local economy."<sup>104</sup>

As early as June 6, 1996, John Ross, who was thoroughly denounced by BCC spokesmen, claimed the Guerrero logging expansion by BCC "has all the earmarks of a rip-and-run operation."<sup>105</sup> After all, as Ross pointed out in interviews and in print, BCC had just leased the production facilities for five years.<sup>106</sup> In February, 1998, Doug Bartels, BCC Timber and Wood Products Division spokesman, disclosed in an interview with local media that "the company is considering closing its 2-year old lumber operation in Papanoa, Mexico due to lack of adequate timber supplies and market factors." Bartels said "[a] decision on the Mexican mill probably will be made this year."<sup>107</sup> Rumors had been circulating in Guerrero that the Papanoa mill would shut down and not reopen after the rainy season.<sup>108</sup> Ironically, lack of timber supplies was the reason BCC gave initially for closing the Council mill and going to Mexico in the first place.

### *ANALYSIS OF CORPORATE BEHAVIOR*

John Ross's article in Sierra Magazine provoked an unusual written response from BCC. In a letter over the signature of Richard B. Parrish, Senior Vice President, BCC demanded an apology from John Ross to "the people of Boise Cascade and the members of the Sierra Club. . ." for "his utter disregard for the truth. . ."<sup>109</sup> Ironically, the letter from Parrish mistakes some of Ross's points. The editor of Sierra Magazine stated that the magazine stood by Ross's report. An element of dark humor can be found in an assertion that BCC, whose own distortions are detailed here, might be owed an apology for disregard of truth.

One of the most respected business ethicists in the USA has seri-

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103. Carnopis, Mexico Sawmill said just global strategy? *ID. Bus. Rev.* (Jan. 1, 1996) at 1A and 15B.

104. Letters, *SIERRA* (Nov./Dec. 1996) at 12.

105. Interview with John Ross, in Boise Idaho (June 6, 1996) emphasis in original statement.

106. Ross, *Treasure of the Costa Grande*, *SIERRA*, July/Aug. 1996, at 22.

107. Steven Anderson, *BC to Upgrade Cascade Mill*, *ID Bus. Rev.* (Feb. 9, 1998) at 9A.

108. Telephone interview of Claudio Beagurie, January 29, 1998.

109. *Id.*

ously argued that the primary purpose for being of a corporation is to provide meaningful employment to its workers.<sup>110</sup> In Guerrero, Mexican laborers turn in 10 hour days in a mill lacking rudimentary safety equipment<sup>111</sup> for less than five dollars per day. BCC's "rip and run" approach to logging<sup>112</sup> in lesser developed nations (LDN's)<sup>113</sup> is also reflected in its attitudes towards labor unions and in its callous disregard for the damage its abuses of power cause in small communities.

A basic business ethics textbook states that we all have, at a minimum, three moral duties to third parties: (a) non-injury; (b) truthfulness; (c) fairness.<sup>114</sup> Let us examine some of BCC's dealings with others against the three-fold minimalist construct of good citizenship. In breaking the Pacific Northwest strike (1978), the Rumsford, Maine strike (1980), and the DeRidder, Louisiana strike (1884), BCC displayed an eagerness to flex its economic muscle. Again, at Rumsford (1986) and in International Falls (1988), threatening, coercing, and devastating small town labor forces was the order of the day. In 1989, not content with dictating labor contract terms to eight unions inside the mill, BCC wanted to "turn the knife" in the open wound by having BE&K run off the construction trade unions on the edge of Minnesota's Iron Range, historically a bastion of union strength. At the very least, this history displays a pattern and practice of abuse of economic power and indifference to either injuring others or being fair. The Miller interview in 1990 captures the essence of top management's arrogance and moral blindness. The silencing of the media echoes the strong-arming of the *Minneapolis Star-Tribune* in 1989. A mountain of evidence supports the allegation that BCC has made a habit of abusing its vast economic power.

Patricia H. Werhane, Dardin Chair in Business Ethics at the University of Virginia, developed the following six question protocol for determining the social responsibilities of a TNC's activities:

How can one test whether a particular set of activities is required,

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110. Norman E. Bowie, *Challenging the Egoistic Paradigm*, 1 BUS. ETHICS Q. 1, 19. Professor Bowie holds the Anderson Chair in Business Ethics at the University of Minnesota, Twin Cities Campus.

111. See Minnesota Advocates, *supra* note 70, at 6-7. Ross reported seeing Mexican workers at BCC mill in Papanoa working without hardhats, goggles or gloves around equipment with open gears and chains. Further, Ross said instead of face masks/breathing protection the Mexicans were wearing scarfs over their faces for the dust.

112. The lease of the mill in Papanoa is for a term of five (5) years. See Ross, *Treasure*, *supra* note 10, at 22.

113. Boise Cascade's wholly owned subsidiary, Costa Grande Forest Products, rents two state-owned sawmills (INOGRO). The first at Papanoa and the second at nearby Tecpan. See Ross, *Logging Guerrero's Forest*, *supra* note 76.

114. William H. Shaw, *Business Ethics* 290 (2d ed. 1996).

desirable, or questionable as part of multinational social responsibility? One might ask the following types of questions:

Is the set of activities necessary? "Necessity" is often defined as: what is needed in order to do business in that community. But, in order to justify engaging in allegedly socially responsible activities in a host country a multinational must consider two other provisos: is the activity necessary to redress harms created by the company and/or necessary because of the laws and expectations of that community.<sup>[citation deleted.]</sup> With these provisos one should ask:

Can the activity be carried out without interfering with the political sovereignty or social fabric of the host country?

If this activity requires social change, can it be carried out without social violence to the acceptable practices of that society? Or, more simply put, would such a set of activities be acceptable to dispassionate rational persons in that society, even when performed by "foreigners"?

Does this set of activities pass a "publicity" test? That is, can these activities be made public in the community in which they occur? Can they be made public internationally?

Does this set of activities coincide with, or not contradict, common sense moral principles by which the corporation operates in its home country?

Can such activities be conducted in cooperation with the host country or are there conflicts?

The sixth question is very important, because often one can engage in socially responsible activities (or avoid morally questionable ones) by making agreements with the host country. . . .<sup>115</sup>

Later in the same article, Professor Werhane observes that in some settings, *not* doing business is the morally superior choice:

[P]roblems of paternalism, political and social interference, threats to national sovereignty, and lack of expertise are such that the moral responsibility of a multinational corporation may be simply not to interfere or even not to do business in a particular milieu.<sup>116</sup>

In the case of BCC's decision to log old growth forest in Guerrero while shutting down the mills in Idaho, Washington, and Oregon, Werhane's advice seems particularly appropriate. Environmental degradation, aggravation of guerrilla warfare, and trashing the economies of Pacific Northwest communities can hardly be justified on a scale that is

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115. Patricia H. Werhane, *The Moral Responsibility of Multinational Corporations to be Socially Responsible*, quoted in JOSEPH R. DESJARDINS & JOHN J. MCCALL, *CONTEMPORARY ISSUES IN BUSINESS ETHICS* 535 (3d ed. 1996).

116. *Id.*

balanced only by a fistful of Yankee dollars. An issue that must be addressed by the global community is how to restrain abuses of economic power such as BCC has demonstrated in the USA and Mexico. Our analysis section will focus on the international aspects since these are the most challenging and most serious issues.

## PART II. REGULATING OR INFLUENCING CORPORATE BEHAVIOR IN A GLOBAL MARKET.

### *Introduction.*

An examination of BCC as a company that is assumed to be representative of not only its industry but to some degree of US multinationals raises several distinct issues. Labor rights and relations, environmental concerns, and human rights are among them. Some aspects of these issues involve legal considerations, some ethical and moral ones. BCC disputes criticism of the ethics of its corporate practices.<sup>117</sup> It contends that it has ceased some of its activities in the US and initiated others in Mexico, not to take advantage of cheaper labor and lesser environmental standards and lax enforcement, but because of inadequate timber supplies in the US and access to old growth timber in Mexico. It is clear that labor is cheaper and the environment less protected in Mexico and these advantages would have clearly been factored into any decision to exploit Mexican opportunities. In deference to BCC, these considerations however, may have been less significant, and perhaps substantially so, when compared to that of access to raw materials.

There are many factors that may effect international location and investment decisions. These include access to resources such as labor, raw materials, infrastructure and technology. Access to markets of products or services is also important, including the need to locate locally in order to avoid impenetrable or costly trade barriers. Several factors relate directly to various costs including labor, taxation, transportation and other utilities, and environmental and general government regulation. While costs are an important factor, it should be noted that the majority of foreign investment by US companies is in

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117. In a presentation before the International Business Organization at Boise State University, 18 March 1997, Terry R. Lock, Senior V.P International for BCC, depicted BCC as a highly ethical corporation in its domestic as well as international activities. He did acknowledge the difficulty of holding to such standards in the global marketplace while BCC was committed to doing so. He cited for example, BCC's decision to halt existing practices of its new paper products joint venture partner in the PRC. After extensive negotiations resulted in the venture in China, BCC learned that it had been the common practice of its new partner to offer kickbacks in order to secure sales. The practice was quickly ended as a result of BCC demands resulting in an immediate loss of 90% of sales, much of which has been since recovered without use of the practice.

Canada, the European Union and Japan, countries with equivalent or higher cost structures. Finally, the presence or absence of competition will also be a factor. In and of itself, basing decisions on any one or combination of these factors may be neither good, bad, nor condemnable.

This does not, however, allay the fears and suspicions that labor and environmental costs which would necessarily have been incurred in the US can and have been avoided by the relocation of activities to Mexico or elsewhere. BCC is not alone. There continues to be a substantial relocation of jobs to Mexico by US firms, some accompanied by or possibly occurring as a result of labor factors.<sup>118</sup> To be sure, to the extent that cost structures can be reduced, a firm will be more competitive. One view of corporate responsibility is that a firm exists to create jobs and make money for its investors; some circles dispute the former and some the latter.<sup>119</sup> If a firm is not competitive, it will do neither very well unless it enjoys captive or protected markets. The essence of globalization, however, is that markets are not to be protected.<sup>120</sup> Today, US firms whether competing domestically or internationally are subjected to often fierce competition from foreign firms, not only for inputs and markets but also for investment capital. In this environment, cost structures and return on investment become critical to success. To the extent then that US firms are governed by mandates or even voluntary additions to costs, they will be less competitive. In the domestic arena, if all competing firms are subject to the same regulatory costs, this is not a problem. However, even domestically, US firms may be competing against imports from foreign firms who are not in their home countries subject to similar levels of, for instance, labor and environmental costs. This is likewise a problem in international markets.

BCC's conduct and that of any TNC should be held up to the light of public scrutiny. Whether a firm's decision to locate or relocate in any given country or region is seen to be "legitimate" will depend on how a

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118. Early last year, Guess Inc., began moving a majority of its U.S. manufacturing to Mexico and other countries south of the border following NLRB findings of evidence of unfair labor practices. Guess' chairman and chief executive was quoted as saying that the shift was mainly a "commercial decision" to "stay competitive" and "lower costs." He also said the company saves \$1.50 to \$2.00 per garment by using foreign labor. Rhonda L. Rhundle, *Guess Shifts Apparel-Making to Mexico From Los Angeles Amid Labor Charges*, WALL ST. J., Jan. 14, 1997, at A2. As another example, "members of the International Union of Electrical Workers, stopped work yesterday to protest a steady shifting by the No. 1 auto maker's Delphi Automotive Systems parts-making unit of labor-intensive work to Mexico, where labor rates are lower." Gabriella Stern & Nichole M. Christian, *GM Workers Begin Strike At Parts Site*, WALL ST. J., May 14, 1997, at A3.

119. See, e.g., Bowie, *supra* note 110.

120. This opening up of markets and allowing the free flow of capital will have, and to some extent, already has had profound effects on societies. See, e.g., W. GREIDER, *ONE WORLD, READY OR NOT* 333-59 (1997).

society morally and legally defines the role of corporations. We may legally define certain standards and morally expect other ones.<sup>121</sup> If the latter are not met we may decide to replace them with legal standards to the extent such compulsion is possible and effective. Whether legal compulsion is possible or effective will depend in part upon the exercise of jurisdiction but it will also be affected by other constraints that a corporation sees itself as being subject to. A corporation may perceive, and perhaps rightly so in some cases, that its continued viability is determined more by the lower cost structures of its competition than by compliance with home country laws. While this may occur domestically, it is perhaps more possible when operating outside of the country. Corporate personnel may be willing and even anxious to meet not only legal but even higher moral standards in their conduct but in effect feel that they are forced by the realities of corporate finance to meet the competition at a lower cost level of behavior. This may also result in capital or business flight to other countries in order to avoid US regulation altogether, a problem equally as worrying as noncompliance. Therefore, government attempts to realize minimum standards in labor and the environment as well as other spheres of corporate activity must also effectively address issues of competitiveness in the global marketplace.

It is misleading to try to treat this entire area generically. Obviously, not only do firms compete against each other for market share. Workers compete against other workers, both in the same and other countries, for jobs; and countries, or states within countries, compete for investment and its attendant employment, technology and income generation. What is of primary concern herein is the efficacy of attempts by governments to pursue public policies directed at business in a world where national borders are increasingly less significant in defining corporate conduct due to the effects of globalization. It must also be understood that this is not only a US versus nations with lower standards problem. It is generally characterized, especially regarding labor and environmental issues, as developed or advanced countries versus less developed countries. However, even the US attracts substantial foreign investment from other developed countries' multinational corporations because of its relatively lower wage rates and less demanding workers rights provisions.<sup>122</sup>

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121. See Edmond Cahn, *The Moral Decision: Right and Wrong in the Light of American Law* (New Midland ed. 1981) (1955).

122. While European companies locate in the U.S. for a variety of the reasons listed previously, one factor is its less costly and more flexible labor market. See *Firm to Sell US Unit at Center of Labor Flap*, (visited June 3, 1997) <<http://www.joc.com>>, which highlights the fact that European laws do not allow for the permanent replacement of striking workers while it is possible in the U.S.

*Possible Spheres of Corporate Conduct and Direct Government Action.*

For corporate conduct not likely to be self-generated, regulation and enforcement are usually thought to be necessary. As discussed, such voluntariness might be lacking due either to lack of corporate moral imperative or, in spite of moral inclinations, due to overriding competitive concerns or constraints.<sup>123</sup> In some instances, competitiveness will not be lost but merely diminished. In such cases, it might be possible or encouraged that such corporations continue to hold to higher standards whether or not such efforts have the effect of raising the conduct of other corporate actors by offering competitive products with the attendant moral, if not economic, advantages.

However, it remains that to the extent that regulatory constraints impose new costs, e.g. taxes, or internalize previously externalized costs, e.g. labor or environmental standards, there will be a corresponding effect upon competitiveness. The degree of such effect will depend upon the extent to which any resulting productivity or market gains are not equivalent to such costs and to the extent that a significant number of competitors are not also subject to such costs.<sup>124</sup> Unilateral attempts to level the playing field by the regulatory imposition of such costs upon foreign corporations in turn raises the issue of jurisdiction. The US has regularly pushed the limits of its own jurisdiction. It has long been notorious for its extraterritorial reach in antitrust matters to the extent that many countries have often responded with their own defensive legislation to impede compliance with US legislation and procedures.<sup>125</sup> This has also happened recently in response to the

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123. David Korten, formerly of the Harvard Business School, argues that unless a corporation is either not subject to competition or is privately owned and very socially conscious, it is "virtually impossible to manage a corporation in a socially responsible way." It will either be driven out of the market by less responsible competitors, subjected to unfriendly takeover attempts or its management replaced by shareholder action seeking quicker and larger returns on investment. Korten, *supra* note 8, at 26.

124. While it is possible that certain imposed or voluntary standards can have positive productivity effects, for instance on worker morale and initiative or upon market share, e.g. "dolphin safe," for the large part the major problems exist in areas where the resultant "good" may be a predominantly public one where the firm is unable to capture sufficient amounts of the social gain in order to fully offset its costs. This is clearly the case with many environmental standards.

125. For instance, Australia enacted its Foreign Proceedings Act (1976) to prohibit cooperation with foreign antitrust proceedings unless it has been determined that the exercise of jurisdiction is consistent with international law, and its Foreign Antitrust Judgments Act (1979) to restrict the enforcement of foreign judgments if such jurisdiction has been exceeded and to allow a "clawback" judgment in Australia against any foreign firm receiving satisfaction in whole or in part of such a foreign judgment against an Australian firm. See generally JOHN H. JACKSON, WILLIAM J. DAVEY & A.O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1086-89 (1995).

Helms-Burton Law enacted by Congress in 1996.<sup>126</sup>

As it pertains to the area of commercial activity, jurisdiction under international law usually rests upon either or both of the two most accepted principles of territoriality and nationality. Territoriality would subject persons and things within a country's national territory to its rule-making authority. Under the nationality principle, US jurisdiction extends to US nationals, whether legal or natural persons, wherever they may be. Under this principle, however, it has been contested whether US jurisdiction applies to the conduct of foreign subsidiaries of US corporations and less so for non-controlling US shareholder interests in foreign corporations.<sup>127</sup>

Another basis for jurisdiction, the "effects doctrine," has not achieved general acceptance in customary international law.<sup>128</sup> This doctrine would bring conduct occurring outside the US but which causes direct, foreseeable and substantial effects within US territory under the jurisdiction of US authority.<sup>129</sup> The doctrine has been accepted by both the US and the EU but, as might be expected, it is more broadly interpreted and applied by the US.<sup>130</sup>

The scope of commercial activity that might be the target of US or other national legislation can be divided into several sectors. Activities can include trade in goods, trade in services, technology transfers, investment (both active and passive), and cross border movement of persons. For jurisdictional purposes, activity can also be divided as follows:

1. Activity within the US of US and Foreign Corporations;

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126. Canada, Mexico and the EU have all enacted counter statutes in response to Helms-Burton. See *EU to Allow Countersuits to Foil U.S. Anti-Cuban Law*, WALL ST. J., Oct. 29, 1996, at A18; John Urquhart, *Wall-Mart Pulls Cuban Pajamas from Canada*, WALL ST. J., Mar. 6, 1997, at A3.

127. See European Communities, Comments on the U.S. regulations concerning trade with the U.S.S.R., 21 I.L.M. 891, 893 (1982) [hereinafter EC Comments].

128. *Id.*

129. The Supreme Court's most recent statement on the extraterritorial reach of anti-trust law was in *Hartford Fire Ins. v. California*, 509 U.S. 764 (1993) where the Court deemed it "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 796. More recently, the First Circuit Court of Appeals extended Hartford to include criminal antitrust laws as well as civil actions. See *United States v. Nippon Paper Indus.*, 109 F.3d 1 (1<sup>st</sup> Cir. 1997).

130. In *Wood Pulp*, 1985 O.J. (L85) 1; Common Mkt. Rep. (CCH) 654 (1985), the European Court of Justice appeared to add the requirement that a defendant must participate in the implementation of the restrictive agreement, meaning actual activity within the EC, in addition to such implementation having effects within the EC. The ruling therefore fell short of the extent of jurisdiction exercised by U.S. courts. See Andrew N. Volmer and John Byron Sandage, *The Wood Pulp Case*, 23 INT'L LAW. 721 (Fall 1989).

2. Activity outside the US of US Corporations;

3. Activity outside the US of Foreign Corporations with direct economic effects within the US either upon: competitors, consumers or citizens generally;

4. Activity outside the US of Foreign Corporations with no direct economic effects within the US.<sup>131</sup>

Categories 1 & 2<sup>132</sup> present few problems of jurisdiction, though both, and particularly #2, present the usual difficulties of detection and enforcement. Both categories also present the problems of competitiveness. In #1, as regards trade in goods, competitiveness of US corporations *vis a vis* non-US corporations in US markets, can be effected where imports from foreign corporations are not subject to similar home-state cost requirements.<sup>133</sup> In #2, this competitiveness problem also applies in foreign markets as to all commercial activities. Government action in sphere #3<sup>134</sup> based upon the "effects" doctrine, will increasingly encroach upon sensitive issues of extraterritoriality, and correspondingly interference with the sovereignty of trading partners. Also in #3, as referred to above, where the US has applied regulations to US foreign subsidiaries which are nonetheless foreign legal entities, the nationality principle of jurisdiction has been contested. Finally, ab-

131. Activity outside the U.S. by U.S. corporations could also be divided into those activities with (Category 3) and those without (Category 4) direct economic effects within the U.S. Given the generally accepted jurisdiction over nationals of a country, however, regardless of location, such a distinction is not necessary in the present discussion.

132. Examples of legislation under category #2 include the taxation of income derived overseas by U.S. entities, the Foreign Corrupt Practices Act, and Title VII which prohibits discrimination by U.S. companies with regard to U.S. citizens under the Civil Rights Act of 1991. Title VII does not apply directly to foreign subsidiaries of U.S. companies but does hold the U.S. company itself responsible for conduct engaged in by any foreign corporation that it "controls," which may be satisfied by a holding of a 25% of stock ownership. Title VII Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1076-78. This category would also include the Clinton administration's recent ban on new US corporate investment in Myanmar (Burma) for its government's harsh treatment of its democratic opposition. See Eduardo LaChica and Paul M. Sherer, *White House Fires Financial Salvo At Junta in Burma*, WALL ST. J., Apr. 23, 1997. The sanctions were imposed in May, WALL ST. J., 5-21-97, page 1, column 1, and may have been effective at harming U.S. business interests but not at changing Myanmar's government policies. *Myanmar Sanctions Work*, J. OF COM., June 16, 1997, at 6A..

133. See *infra* text accompanying note 141.

134. This would include antitrust where anti-competitive behavior abroad effects consumers in the U.S. through import trade, as well as conduct effecting U.S. exporters injured in foreign markets. The extension to coverage of export trade with or without direct harm to US consumers was effectuated in 1992 by the Justice Department. The authors are unaware of any actions yet taken pursuant to the change. This category would also include product liability actions in the U.S. against foreign producers which are resolved under the "minimum contacts" test developed under the due process clause of the U.S. Constitution. For both areas, the focus is upon impacts upon persons or things which themselves are clearly within U.S. jurisdictional reach.

sent clear multilateral support and/or clearly defensible human rights or other *jus cogens* arguments, and often even with these arguments, unilateral action under #4<sup>135</sup> can be expected to draw strong opposition from trading partners.<sup>136</sup> In categories #3 and #4, situations involving U.S. controlling and non-controlling shareholding interests in foreign corporations are especially difficult to deal with and rife with potential jurisdictional conflict. This is increasingly true with the advances of globalization and its attendant corporate structures.<sup>137</sup>

### *Indirect U.S. Action.*

To the extent that one country or even several countries acting independently cannot accomplish desired corporate compliance due to problems of jurisdiction or due to reluctance resulting from perceived impacts upon national competitiveness, the better forums would be international ones aimed at restraining all or at least a critical mass of

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135. An example includes the administration's use in 1982 of authority under the Export Administration Act to regulate exports produced overseas by US subsidiaries that were bound for the Soviet Union in protest over its repression of the Solidarity movement in Poland. The EC responded that this was in excess of US jurisdiction as was the broader attempt to include less substantial links such as shareholding or licensing agreement. See EC Comments, *supra* note 127. In contrast, the Foreign Corrupt Practices Act does not on its face include US controlled subsidiaries incorporated elsewhere. 15 U.S.C. § 78dd-2 (1997). An example on the state level, would be the State of Massachusetts' government procurement ban regarding firms doing business in Burma, and potentially Indonesia. The EU initiated consultations in the WTO against the U.S. alleging this constitutes a violation of the Government Procurement Agreement negotiated under the WTO. See *A State's Foreign Policy: The Mass that Roared*, ECONOMIST, Feb. 8, 1997, at 32; WTO HOMEPAGE at <<http://www.wto.org>>. Finally, under the Helms-Burton Law, it is arguable whether "trafficking" within Cuba in property once nationalized by the Castro regime has a direct effect within the US even where US citizens have claims against Cuba relative to that property, placing it within this category.

136. The Helms-Burton Act has been unanimously condemned by major US trading partners in spite of US attempts to portray the central issue as pertaining to the fundamental principal of private property rights. An action in the WTO by the EU was suspended only after guarantees by the Clinton administration that EU companies would not be targeted by the legislation. See Bruce Barnard, *EU Approves Accord with U.S. Over Cuba, but Tensions Remain*, J. OF COM., Apr. 17, 1997, at 2A. The jurisdictional reach of Title VII, see *supra* note 132, seems a credible compromise solution in #4 situations. It is 1) tied to control which indicates the ability of a parent or shareholding company to effect corporate conduct and is a justifiable nexus for accountability; and 2) it is enforced only against the US parent or shareholding company resulting in a lesser extraterritorial impact.

137. For instance, Sun Microsystems recently announced plans to supply advanced encryption software from its overseas distributors to overseas customers. The software is licensed from a Russian supplier in which Sun holds a 10% interest. U.S. export controls prohibit the export of such products. The move illustrates not only corporate desire to meet customer demands and not lose to foreign competition but also the limits of governmental controls and jurisdiction. See David Bank, *Sun's Selling of Encryption To Skirt Policy*, WALL ST. J., May 19, 1997, at A3.

competitors. In these forums the US can attempt to encourage and/or coerce other governments to directly regulate corporate activity within their individual jurisdictions, whether or not such activity is reachable by US jurisdiction. This would include both unilateral U.S. action, e.g. granting favorable GSP tariff treatment in return for implementation of labor and environmental standards, and action within multilateral forums. Useable multilateral forums might be either directly coercive against target states where the resulting treaty or organization encompasses some sort of sanction powers, e.g. the World Trade Organization (WTO), or morally (indirectly) coercive where no sanctions are available, e.g. the International Labor Organization (ILO) for labor issues or various governmental and non-governmental organizations for human rights. The balance of this part of the essay will focus on US attempts to bring about a more level playing field internationally in the area of labor rights with some reference to initiatives in the environmental and other fields. U.S. government policies and actions might also be aimed at changing foreign government's behavior itself and not just how they regulate commercial activity, such as in the human rights area, however, this article will not focus on this use of US influence.

As one of the most potent sources of US leverage in international bargaining is control over access to US markets, a necessary preface to the following discussion is a brief review of GATT/WTO principles. The 1947 General Agreement on Tariffs and Trade (GATT) was an exercise of sovereignty that bound member countries to an obligation of nondiscrimination both as between similar products imported from different GATT members (most favored nation treatment or MFN) and as between similar domestic and imported foreign products (national treatment). Among the other "pillars" of GATT are a general prohibition of resort to quantitative restrictions, including zero quotas (bans), transparency with respect to domestic trade rules and processes, and a commitment to certain procedures of dispute resolution. These principles surround and further the central GATT activity of periodic negotiation of reciprocal reductions in tariffs and non-tariff barriers. In 1995, the GATT, following the eight year Uruguay Round negotiations, was absorbed under the umbrella of the new World Trade Organization (WTO) but maintained its essential characteristics with improved dispute resolution procedures. In addition, other economic sectors such as standards for trade in services and intellectual property protection were added to the WTO's scope applying principles similar to the GATT.

The GATT provides for various exceptions to its disciplines.<sup>138</sup>

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138. These include, among others, preferential tariff treatment between members of a free trade area, e.g. NAFTA, or customs union, e.g. the EU, and several general exceptions including actions necessary for the protection of human, animal and plant life and health and for the conservation of domestic resources.

However, the burden of proving the applicability of any exception used to justify otherwise GATT inconsistent behavior is on the member state claiming the exception. If GATT disciplines otherwise apply and an exception to them cannot be sustained, the discriminatory treatment of certain products for instance, if challenged in the WTO dispute resolution process, will be held to be in violation of GATT/WTO obligations. This will lead to either the voluntary cessation of such conduct or the freedom of injured complainant countries to respond with the removal of equivalent trade benefits.<sup>139</sup> As a result, attempts by the US or any WTO member country to reduce or close existing access to its markets must either fall outside of GATT/WTO application or be sustainable under one of the GATT exceptions. With regard to nondiscrimination, on the key threshold question of the applicability of MFN and national treatment obligations, the issue of the similarity of products is often critical.<sup>140</sup> If a rug made by the use of child labor bears no physical characteristics to distinguish it from any other rug, it cannot be treated differently absent the application of an exception to the nondiscrimination obligations. If imported paper is produced by environmentally unsustainable practices but such production does not render the paper physically distinguishable, it cannot be treated differently than paper produced through environmentally friendly processes. Similarly, if imported tuna is caught by use of dolphin killing purse seine nets, as it is the same as tuna caught with dolphin friendly techniques, it cannot be singled out for different treatment. This results in the inability of WTO members to discriminate on the basis of processes of production unless physical characteristics of the product are changed as a result and thus reduces the freedom to institute unilateral sanctions against products running afoul of domestically determined public policy standards, e.g. labor and environmental standards.<sup>141</sup>

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139. See generally WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.

140. The specific language is "like product", employed in Articles 1.1 (regarding MFN), 3.2 and 3.4. (regarding national treatment). The term is not defined except in the Anti-dumping Code, Art. 2.6, where it is "interpreted to mean a product which is identical, i.e. alike in all respects" or in the absence of such a product, one that "has characteristics closely resembling. . . ." This definition, and the understanding of the term in other contexts, such as MFN and national treatment, prohibits treating products or producers of those products differently unless a distinction between the products can be made on the basis of physical characteristics.

141. Therefore, while domestically, the US can regulate and control a) "products," e.g. safety and health standards for both domestic and imported products, and b) domestically occurring "processes," e.g. sustainable logging, pollution abatement, and labor standards, it cannot, under its WTO obligations, control processes used to produce imports in foreign countries, e.g. dolphin unfriendly tuna fishing, turtle unfriendly shrimping, clearcut lumber practices, and production of refrigerators with uncontained CFCs. While the US does continue to maintain certain indirect controls on foreign processes by way of controlling the access of resulting products to US markets, e.g. regarding dolphins and tuna caught

It should be stressed that GATT/WTO obligations do not directly prevent a country, such as the US, from acting in a manner inconsistent with such obligations. The US, for instance, currently maintains GATT inconsistent bans on tuna.<sup>142</sup> It does mean, however, that there is a price that attaches to such exercises of sovereignty, namely that countries denied market access benefits as a result of such practices may ultimately, through resort to WTO procedures, be allowed to retaliate with the removal of equivalent market access benefits enjoyed by US products. Due to the fact that the US has for a long time been one of the world's most accessible markets, this quite often hampers U.S. attempts to take action.

This reinforces the position that multilaterally agreed upon solutions consistent with or overriding GATT/WTO obligations, for controlling corporate behavior are again the better approach. It must be added that the clear trend is towards expanding the scope of internationally agreed solutions to trade and other problems, both through the WTO and other forums. The WTO, as mentioned, has substantially expanded the application of GATT principles to include trade in services, agricultural products and intellectual property. Current initiatives would see global agreements on investment barriers, competition policy, corruption and labor standards, though clearly not all of these are aimed at controlling corporate behavior.

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with purse seine nets, such controls have twice been held to be in violation of pre-WTO US GATT obligations. See *United States Restrictions on Imports of Tuna From Mexico*, 39th Supp. BISD 155 (1993); General Agreement On Tariffs & Trade: Dispute Settlement Panel Report On United States Restrictions On Imports Of Tuna 33 I.L.M. 839 (1994). While these two GATT panel decisions were never adopted by the body as a whole, they do establish strong precedent. The U.S. currently maintains import bans on shrimp harvested in the wild without the use of "turtle excluder devices." This is now the subject of a WTO dispute panel proceeding on a complaint by Thailand and others against the U.S. Given the different procedures under the WTO agreement as opposed to its weaker predecessor, the GATT, any panel report holding the U.S. attempt to control such production processes as a violation of WTO obligations will be binding. The panel decision is expected in late 1997. On the other hand, the US has threatened WTO action to oppose French barriers to US and Canadian fur goods where the animals have been caught by the use of leghold traps, also a "process" problem. *EU demands new talks on trapping*, 1, NO. 5 BRIDGES WEEKLY TRADE DIGEST NEWS (INT'L CENTRE FOR TRADE & DEVELOPMENT), Mar. 4, 1997, <<http://www.ictsd.org>>. In all these cases, the products themselves bear no physical characteristics indicating the manner of processing and hence are indistinguishable from other like products. It is this factor that, under the GATT/WTO agreements, prevents discrimination based upon the origin of the goods, the processes used to make them and their producers.

142. In February 1998, the US reached an agreement with 12 other countries under which it would lift its ban on tuna for any country that ratifies the new agreement. The agreement seeks to limit annual dolphin mortality incurred during tuna fishing in the Eastern Tropical Pacific Ocean. *U.S. trading partners reach tuna-dolphin agreement*, 2, No. 5 BRIDGES WEEKLY TRADE DIGEST (INT'L CENTRE FOR TRADE & DEVELOPMENT) Feb. 16, 1998, <<http://www.ictsd.org>>.

Efforts to "level" the playing field (influencing foreign corporations indirectly through encouragement or agreement among national governments to regulate them) include the following tools and/or forums:

*Unilateral*

Generalized System of Preferences (GSP) [US, EU and most developed countries]

Caribbean Basin Initiative (CBI) [US]

Overseas Private Investment Corporation (OPIC) [US] and Multilateral Investment Guarantee Agency (MIGA) [World Bank]

U.S. Trade Act of 1974, Section 301

Antidumping/countervailing duties

Unilateral imposition of sanctions based upon other statutory authority

*Multilateral*

North American Free Trade Agreement (NAFTA)

EU Social Charter

International Monetary Fund (IMF)

World Bank

World Trade Organization (WTO)

International Labour Organization (ILO)

*Other*

Voluntary codes of conduct

    multilateral

    domestic

    industry

    corporate

Labeling Schemes (e.g. "dolphin safe", "global social label")

As similarly reflected in the exercise of jurisdiction, the U.S., is far and away the most active in these areas. It has tied various preferential benefits, primarily directed at developing countries, to compliance with certain minimum labor standards. Access to lower tariffs through the US Generalized System of Preferences<sup>143</sup> or the Caribbean Basin

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143. For instance, so far in 1997, the USTR has initiated GSP eligibility reviews for

Recovery Act, or subsidized investment insurance through the Overseas Private Investment Corporation or the Multilateral Investment Guarantee Agency<sup>144</sup> is made conditional<sup>145</sup> upon the extension of "internationally recognized worker's rights" by the target country.

As of 1994, the EC has also conditioned its GSP benefits upon the absence of the use of forced labor and the export of goods made by prison labor. Myanmar is currently under GSP denial for the use of forced labor in road and irrigation works construction and other military projects.<sup>146</sup> In 1998, the EC GSP scheme will provide additional preferences to beneficiary countries adopting and applying the equivalent of ILO standards for specified worker's rights.<sup>147</sup>

Additionally, the US has added to its Section 301 trade weapon by recognizing the systematic denial of such rights as an unfair trade practice subject to countermeasures where US commerce is burdened or restricted irrespective of whether it would be justified under the GATT/WTO. There has been no action under this section to date with regard to worker's rights.<sup>148</sup> Also, by some analyses in theory but not yet attempted in practice, antidumping and countervailing duties might be applied to imports where those products are under-priced as a result of the non-inclusion of adequate labor or environment-related costs due to inadequately mandated or enforced standards.<sup>149</sup> Notable among

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Guatemala, Belarus and Swaziland due to allegations of worker's rights abuses. *Press Releases*, United States Trade Representatives Homepage (visited May 1997) <<http://www.ustr.gov/>>.

144. With regard to MIGA benefits, this is accomplished through the US implementing legislation where US agents are required to exert such pressure and influence as possible to deny benefits to countries not recognizing such rights. MIGA itself, as part of the World Bank institutions, does not tie the provision of insurance to respect for labor standards. 22 U.S.C. § 290k-2(1) (1994)

145. The "worker's rights" conditions are discretionary with the President who may waive them in regard to any country if he determines it to be in the national economic interest of the US. 19 U.S.C. § 2462(b) (1994).

146. Michael Vatikiotis, *Grim Reaping*, FAR E. ECON. REV., Feb. 8, 1996, at 48, available in LEXIS, Busfin Library, Abi File; William Barnes, *Burma on Knife Edge*, S. CHINA MORNING POST, Oct. 27, 1996, at 7, available in LEXIS, Topnws Library, Schina File.

147. These include freedom of association, collective bargaining and child labor. "The actual implementation of these incentives, as well as the level of the supplementary preferential margin, will depend on a 1997 Commission report on the results of work on trade and labour standards carried out in the ILO, the WTO, and the present OECD study." COM/DEELSA/TD(96)8, on OLIS: January, 19, 1996, para. 296 [hereinafter OECD Report].

148. Exec. Order No. 12661, 54 Fed. Reg. 779 (1988) [hereinafter Omnibus Trade and Competitiveness Act]. It is questionable in any event whether sanctions imposed under Section 301 for labor standards reasons would be consistent with GATT/WTO obligations if challenged under its dispute resolution procedures as there is no clearly applicable exception.

149. See Mark A. Buchanan, *The WTO and Labour Standards: A Marriage Made in*

other statutorily mandated sanctions is a ban on the importation of prison made goods<sup>150</sup> and the Marine Mammal Protection Act under which the US has banned importation of both dolphin unfriendly tuna and turtle unfriendly shrimp.<sup>151</sup>

The labor and environmental side agreements to NAFTA require each member country to enforce its own domestic labor and environmental laws. These agreements were specifically intended to discourage US businesses from moving to Mexico to take advantage of Mexico's lax enforcement of its labor and environmental laws but the effectiveness of these agreements is widely criticized.<sup>152</sup> Anticipated extension of NAFTA to other Latin American countries, notably Chile, has been held up by the expiration of the Clinton administration's fast track negotiating authority. The non-renewal of fast track authority has been due to the insistence on the part of the administration that such authority include the power to negotiate labor and environmental obligations as part of any new agreements. This has been strongly resisted by Republicans.<sup>153</sup> Democratic factions within the House led by Congressman Gephardt have resisted extension of NAFTA, and therefore fast track authority, and strongly resisted the grant of any fast track authority that did not make specific reference to labor and environmental issues. Furthermore, acceptance by unions, an important Clinton ally, of any fast track provision without labor and environment authority, is unlikely.<sup>154</sup>

Indications are that Clinton might be willing to risk alienation of the unions as well as some within his own party in return for being able to work toward the expansion of NAFTA.<sup>155</sup>

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*Singapore*, in THE ASIA-PACIFIC AND THE EXPANDING BORDERS OF THE WTO: IMPLICATIONS, CHALLENGES AND OPPORTUNITIES 190-92 (Mark A Buchanan ed., 1996) [hereinafter LABOUR STANDARDS].

150. Recent press over imports from China made by prison labor highlights the difficulty of enforcing this ban. J. OF COM. (May 23, 1997) <<http://www.joc.com>>. Restrictions on import of products of prison labor are permissible under GATT, Art. XX(e).

151. See *supra* note 141.

152. See *NAFTA Labor Accord Not Working Well*, 4, NO. 4 NAFTA AND INTER-AM. TRADE MONITOR, Feb. 21, 1997, <<http://www.sustain.org/bulletins>>. There has, however, recently been evidence that the Agreement is having some indirect effect. Tom Shorrock, *Mexico Approves Union at Taiwan-Owned Firm*, J. OF COM., Apr. 18, 1997, available in 1997 WL 8547444.

153. Helen Cooper, *Clinton Seeks More Leeway in Trade Pacts*, WALL ST. J., Apr. 1, 1997, at A3.

154. AFL-CIO, Green Groups Call for Stricter Conditions on Fast Track, INSIDE U.S. TRADE, Feb. 21, 1997.

155. See *Mexico Approves Union at Taiwan-Owned Firm*, J. OF COM., Apr. 18, 1997, available in 1997 WL 8547444; Belo Horizonte, *Pan-American Free Trade: Slow, but Ahead*, ECONOMIST, May 24, 1997 at 35, available in LEXIS, Busfin Library. The President has offered to accept fast track authority that allows labor and environmental issues

Impacting upon all other forums is the debate that has proceeded within the WTO. For many years, the U.S. has attempted to bring a trade and labor standards linkage into the world's leading trade association.<sup>156</sup> In December, 1996, at the first biannual Ministerial Meeting following the establishment of the WTO, the U.S. mounted a campaign to create a formal role for the institution in the enforcement of core labor standards.<sup>157</sup> This move envisioned the possible resort to trade sanctions where a country could show injury as a result of the disregard of core labor standards by exporting countries. The move was widely opposed by developing countries as well as by many developed countries as a protectionist attempt to remove comparative advantages in low cost labor and as an intrusion into their national sovereignty. The Ministerial Declaration that resulted from the meeting appears on its face to preclude the establishment of any formal linkage between trade and labor standards within the WTO framework and recognized the ILO as the appropriate forum for the discussion and for the formulation of appropriate responses.<sup>158</sup>

As a result, the ILO, established in 1919, has been given a new lease on life.<sup>159</sup> Long before the Singapore meeting, while doing credible work, it was regarded by many as a toothless tiger. US objections were generally twofold. First, ILO conventions were too numerous as well as too inflexible. The US, while maintaining that its own laws and labor regulations were consistent with recognized human and worker rights and even exceeded ILO standards, could ratify only a few of the ILO conventions, stating that many of the rest were in some part inconsis-

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to be dealt with in side agreements similar to the arrangement in NAFTA. Robert S. Greenberger, *Clinton to Delay Fast-Track Trade Bill Until Fall*, WALL ST. J., May 23, 1997, at A2. This however would not go well with Vice President Gore's presidential ambitions for 1998. *Id.* As of January, 1998, there were indications that the President might seek fast track authority to negotiate on sectoral-specific agreements and/or to drop NAFTA accessions from the authority sought. *Fast Track Maneuvers Continue*, 5, NO. 1 NAFTA AND INTER-AM. TRADE MONITOR, (Jan. 9, 1998) <<http://trade-news@igc.apc.org>>.

156. LABOUR STANDARDS, *supra* note 149, at 180-82.

157. Core labor standards are fairly well accepted to include freedom of association, rights to organize and collectively bargain, prohibition of child labor, forced labor and discrimination in employment.

158. The Declaration did, however, provide for the continued "collaboration" of the WTO and ILO secretariats, an ambiguous statement that appears to validate some WTO involvement in the future. *Ministerial Declaration* (visited Feb. 28, 1998) <<http://www.wto.org/>>.

159. "However, since the final Declaration of Singapore has turned over the whole question almost exclusively to the ILO, this particular debate [in the WTO] would now seem to be closed for the foreseeable future. So what exactly are we going to do?" *Address at the Conference on Social Policy and Economic Performance by Michael Hansenne, Director-General of the International Labour Organization* (Jan. 23, 1997) <<http://www.ilo.org/public/english/235press/speeches/dgams.htm>>.

tent with US law and practice.<sup>160</sup> Second, the ILO had no mechanism to hold even signatory countries to the standards required. The US sought greater accountability and therefore believed that the WTO would provide a more useful mechanism to directly link labor standards and trade sanctions.

As the debate within the context of the WTO escalated, the ILO began to deliberate on how it might meet the stated concerns and raise its game. The ILO Working Party on the Social Dimensions of the Liberalization of International Trade had been constituted in 1995 in part to examine the relationship between trade and labor standards. In 1996, it resolved to continue to monitor and interact with other international organizations working in the field and to examine the report of the OECD on trade and labor standards.<sup>161</sup> This OECD report was primarily focused on analyzing current economic data on the link between core labor standards, comparative advantage and impacts on employment and investment.<sup>162</sup>

Following the 1996 WTO Ministerial Meeting, the ILO has resolved to focus stepped up efforts begun in 1995 on increasing the number of signatories to the seven ILO Conventions relating to core labor standards.<sup>163</sup> An initiative taken up at the annual meeting of the ILO Governing Body in March, 1997, proposed the extension of the ILO's surveillance mechanism, currently authorized only in the area of freedom of association rights, to the other core labor standard conventions.<sup>164</sup> This mechanism would verify the application of core conventions in signatory countries, whether having ratified them or not.<sup>165</sup> As recognized by the ILO, these initiatives will test the sincerity of those nations who opposed WTO involvement claiming that the ILO was the appropriate

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160. Because of this, the US suffers from a credibility gap. It leads the ILO in drafting and signing conventions but then fails to lead the way in ratification. A similar credibility gap exists in the area of international environmental conventions. See Carmelo Ruiz, *WTO Singapore '96 Conference Report*, (Feb. 8, 1997) <<http://www.trade-strategy@igc.apc.org>>; see also Chakravarthi Raghavan, *Barking Up the Wrong Tree: Trade and Social Clause Links* (visited Feb. 28, 1998) <<http://www/twnside.org.sg/souths/twn/title/tree-ch.htm>>.

161. The ILO Working Party had released its own report on trade and labor standards but had failed to reach an internal consensus on how the issue should be dealt with. See *The Social Dimensions of the Liberalization of World Trade*, International Labour Office, GB.261.WP/SLD/1, Nov. 1994.

162. See OECD REPORT, *supra* note 147. The Report later failed to receive ministerial acceptance but was issued under the authority of the Secretariat.

163. Hansenne, *supra* note 159. The seven conventions relate to freedom of association, rights to organize and collective bargaining, prohibition of child and forced labor and discrimination in employment.

164. Michael Hansenne, *Report of the Director-General, The ILO, Standard Setting and Globalization*, (visited Feb. 8, 1997) <<http://www.ilo.org/public/english/10ilc/ilc85/dg-rep.htm>>.

165. *Id.*

forum.<sup>166</sup> They may also dissuade the US from pushing the issue in the WTO as long as the initiatives seem to be well received by other countries. If the ILO is not successful in gaining widespread acceptance of core labor standards, then a return to the WTO will depend upon the strength of sponsorship in the U.S., France, the U.K.<sup>167</sup> and elsewhere.

Another move has been separately taken by the U.S. within the WTO framework. The USTR has begun to raise labor standards as an issue within the Trade Policy Review Mechanism (TPRM). Under this procedure, the trade policies and practices of WTO member countries are periodically reviewed for consistency with WTO obligations.<sup>168</sup> Labor standards were first raised by the US in April of 1997, in the review of Fiji<sup>169</sup> and indications are that it will be raised by the U.S. whenever it is deemed appropriate. The TPRM is not intended to be an enforcement mechanism but does serve to highlight troublesome areas in the international forum.

### *Codes of Conduct.*

Corporate codes of conduct, although not a new phenomenon, have regained public attention lately. We examine them here only briefly due to their voluntary and non-binding nature. Voluntary codes of conduct, such as product labeling schemes, are often designed to address consumer demands for more product information as well as improved standards of business conduct. Codes exist somewhere between binding legislation and internal corporate guidelines. They carry varying degrees of public accountability, corporate commitment, and rarely sanctions.

Codes of conduct can also issue from international organizations, such as the United Nations Commission on Transnational Corporations Draft Code of Conduct on Transnational Corporations<sup>170</sup> and the OECD

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166. Hansenne, *supra* note 159.

167. At the same time that the US Administration appears to be cooling relative to the trade and labor standards linkage, Tony Blair, Britain's new Prime Minister, has indicated that signing on to the EU's Social Charter, a decidedly pro-worker agreement, will be a priority for the new government. George Melloan, *Tony and Bill: Oxford's Gift to the 21st Century*, WALL ST. J., Apr. 28, 1997, at A19. This could also indicate future U.K. support for a more global workers rights agreement.

168. While the TPRM's purpose is to "contribute to improved adherence . . . to [WTO] rules, disciplines and commitments," within which labor standards would not currently fall, the function of the mechanism is to evaluate "the full range" of a member's trade policies and practices and "their impacts" on the multilateral trading system. WTO Trade Policy Review Mechanism, Paragraph A(i).

169. *See, e.g.*, Review of Fiji: Concluding Remarks by the Chairperson, TPRB, Oct. 4, 1997, available in WTO Homepage, <<http://www.wto.org>>.

170. The UNCTAD Code has been in draft form since 1980. It was part of the move within the United Nations towards a new international economic order (NIEO) and

Guidelines for Multinational Enterprises.<sup>171</sup> They can exist on national levels, such as in the U.S., e.g., the Sullivan Principles, related to the anti-apartheid campaign in South Africa, the MacBride Principles for doing business in Northern Ireland, and the Macquiladora Principles for manufacturing processes across the Mexican border.

The Clinton Administration issued its voluntary Model Business Principles which encourage business in "upholding and promoting adherence to universal standards of human rights." The Principles relate to workers rights, the environment, corruption and fair competition. They specifically encourage U.S. companies to serve as models, influencing partners, suppliers and subcontractors, and to develop appropriate internal codes of conduct in supplement.

Codes sometimes are promulgated by industries. In April, 1997, a White House task force comprised of labor unions, human and consumer rights groups and apparel industry leaders, concluded a tentative draft of a code of conduct on workers rights and child labor. The code also addresses the issue of minimum wage and would apply to clothing firms and their contractors, whether producing in the U.S. or elsewhere. Companies adopting the code would be able to use a "no sweat[shop]" label on products. Substantial disagreement continues over implementation, enforcement and whether the code would call for a "living wage" rather than meeting each location's prevailing minimum wage. Enforcement options range from a newly created association to monitor compliance to internal audits. Actual monitoring of the hundreds of contractors in other countries will be very difficult. Companies signing the agreement include Nike, Phillips Van Huesen and Reebok, each of which have faced allegations of human and workers rights abuses in recent months.<sup>172</sup>

Finally, like many companies, BCC has its own "Standards of Business Conduct."<sup>173</sup> These standards cover employee compliance with laws and regulations regarding health and safety, equal opportunity

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gained little momentum outside of the Group of 77 countries. Perhaps its languish following the relative height of the NIEO movement reflects the simultaneous shift of economic leverage to capital interests.

171. The OECD Guidelines include statements of principle regarding MNE behavior in disclosure of information, competition, employment, environment and other areas.

172. See, e.g., Wendy Bounds & Hillary Stout, *Sweatshop Pact: Good Fit or Threadbare*, WALL ST. J., Apr. 10, 1997, at A2; *Apparel Groups Find Proper Fit On Labor Rights* (April 14, 1997) <<http://www.joc.com>>; *Dress Code: Stamping out Sweatshops*, ECONOMIST, Apr. 19, 1997.

173. Copy of Boise Cascade Corporation's Standards of Business Conduct (Mar. 21, 1997) (on file with authors and the Communications Department of Boise Cascade Corporation). The entire document is four (4) pages long and opens with this sentence: "Boise Cascade's policy is to conduct its business ethically and in compliance with all applicable laws of the United States and of each jurisdiction where it does business." *Id.* at 1.

and minimum wage, the environment, antitrust and foreign payments. Compliance, monitoring and enforcement are strictly internal affairs.<sup>174</sup> Some research suggests that corporate codes of conduct are frequently top-down documents designed primarily to protect the corporation if employees are caught committing white collar crimes.<sup>175</sup> We are not familiar with any research showing a causation effect between corporate codes of conduct and better ethical conduct on the part of either management or employees.

If a corporation needed a guide on how to act in a foreign country, it could do worse than study the Universal Declaration of Human Rights that was adopted by the United Nations General Assembly in 1948 and which became the basis for The International Bill of Human Rights, ratified by member nations in 1976.<sup>176</sup> In 1977, President Carter, on behalf of the United States, signed the two international covenants on human rights which, together with the Universal Declaration, make up the International Bill of Human Rights.<sup>177</sup>

#### *The Environment and other Developments.*

Similar, and in some cases more extensive, developments are taking place regarding international environmental issues. This includes the array of multinational environmental agreements such as the better known Convention on International Trade in Endangered Species (CITIES), the Basil Convention on Transboundary Movements of Haz-

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174. The Boise Cascade Standards are available from the Corporate Communications Department, Boise Cascade Corporate Headquarters, One Jefferson Square, Boise, Idaho 83702 U.S.A. *Id.*

175. *See, e.g.,* Rick Wartzman, *Nature or Nurture? Study Blames Ethical Lapses on Corporate Goals*, WALL ST. J., Oct. 9, 1987, at 27. The article states "A Washington State University survey of ethical codes at 202 Fortune 500 companies found that 75 percent fail to address the firm's role in civic and community affairs. In addition, three-quarters of the codes fail even to mention some or all of the following: consumer relations, environmental safety and product safety. By contrast, more than three-quarters of the codes deal with conflicts of interest - which can affect the bottom line." *Id.*

176. The following three instruments constitute the International Bill of Human Rights: Universal Declaration of Human Rights; International Covenant on Economic, Social, and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR). *See Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3<sup>rd</sup> Sess., U.N. Doc. A/810 (1948); *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21<sup>st</sup> Sess., U.N. Doc. A/6136 (1966); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21<sup>st</sup> Sess., U.N. Doc. A/6136 (1966).

177. ). *See Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3<sup>rd</sup> Sess., U.N. Doc. A/810 (1948); *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21<sup>st</sup> Sess., U.N. Doc. A/6136 (1966); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21<sup>st</sup> Sess., U.N. Doc. A/6136 (1966).

ardous Wastes, and the Montreal Protocol on Substances that Deplete the Ozone Layer. While the efficacy of these and other various international agreements is in dispute, the trend discussed above in respect of labor rights is similarly evident here. Recent events include the negotiation of a global warming treaty<sup>178</sup> and the call by Environment Ministers from 19 countries for a global convention on forest protection that would establish a worldwide regulatory framework applying to both developed and developing countries.<sup>179</sup>

Unrelated to labor or the environment but quite relevant to the discussion of government control of corporate conduct, is recent advances in the U.S. campaign against bribery. The U.S., of course, has pursued this to the full extent of its jurisdiction through the 1977 Foreign Corrupt Practices Act. However, the constraints of this Act have long been blamed for hindering U.S. competitiveness abroad as other countries do not seek to limit bribery by their corporations acting abroad and even facilitate it by allowing the deductibility of payments to foreign officials against income. In December of 1997, the 29 OECD member countries and 5 non-member countries signed a binding convention to criminalize the bribing of foreign officials with domestic implementation to be accomplished by the end of 1998.<sup>180</sup> Previously, at the request of the U.S., corruption had also been on the agenda of the 1996 WTO Ministerial Meeting in the closely related context of government procurement. The WTO members agreed to establish a working party to explore transparency in government procurement which could include the effects of corruption. A leveling of the playing field in this area is expected to benefit U.S. firms.<sup>181</sup>

In summary, while the US has clearly led in efforts to regulate corporate and commercial behavior both domestically and internationally, in an increasingly globalized economy such efforts run aground on issues of jurisdiction, competitiveness and capital flight. International solutions in international forums are needed. As a caveat, however, it must be understood that international forums are also being used in efforts to resist local control or regulation of corporate behavior.<sup>182</sup> To

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178. See, e.g., John J. Fialka, *Global Warming Treaty Faces Host of Political Clouds*, WALL ST. J., May, 27 1997, at A20.

179. *International Environmental Report*, BNA, 2 April 1997.

180. See, e.g., Paul J. Deveney, *34 Nations Sign Accord to End Bribery in Deals*, WALL ST. J., Dec. 18, 1997, at A16; see also, Nicholas Bray, *OECD Ministers Agree to Ban Bribery As Means for Companies to Win Business*, WALL ST. J., May 27, 1997, at A2.

181. William M. Daley, *The Battle Against Bribery*, WALL ST. J., Dec. 17, 1997, at A22.

182. For instance, one of the more recent initiatives in the OECD is the draft of the OECD Multilateral Agreement on Investment (MAI). *Multilateral Agreement on Investment*, OECD Doc. OCDE/GD(97) 114, (1997). Recent drafts are now available at <<http://www.oecd.org/da7/cmis/mai/negtext.htm>>. This agreement, which would be open for signature to both OECD and non-OECD countries (though none are invited to partici-

this extent, public policy processes are as apparent in these forums as in domestic ones and actual outcomes are dependent upon the relative power of various constituencies and interest groups. The battle is merely being extended to another level where the immediate parties are nations and where TNCs and non-government organizations are back-room players. This is perhaps only logical given the nature of globalization. However, some observers from the environmental side claim that in "every case brought before it to date, the WTO has ruled in favour of corporate interest, striking down national and sub-national legislation protecting the environment and public health at every turn."<sup>183</sup>

### PART III. SUMMARY OF POSSIBLE REFORM ALTERNATIVES.

Our examination of the manner in which TNC's operate, emphasizing BCC as prototypical and neither the best nor the worst, causes us to agree with David Korten's assessment: Corporations have emerged as the dominant force on the planet earth; and that it is the corporate interest rather than the human interest that increasingly defines the agenda of municipal corporations, nation-states, and international

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pate in its drafting), is aimed at investment protection and sets standards that protect traditional investor rights, prohibits discrimination (both through most favored nation and national treatment obligations), expropriation, investment incentives and performance requirements. It would also provide for direct action by investors against host countries through international arbitration or in domestic courts. Even in the US, the primary proponent of the agreement, it is recognized as having serious implications for sovereignty and will curtail the powers of both national and subnational governments. See *Multilateral Agreement on Investment: Potential Effects on State and Local Government*, Western Governor's Association Rep., (1997) <<http://www.westgov.org/wga/publicat/maiweb.htm>>. The draft treaty was originally scheduled for completion for the meeting of the OECD Ministers in May, 1997, but was extended to due to a "number of political issues: that had yet to be resolved. Frans Engering, *Keynote Address, available in Multilateral Agreement on Investment: State of Play*, at 10, OECD Doc. OCDE/GD(97) 114 (1997). The draft agreement does not currently contain any language imposing responsibilities on investors, for instance with regard to fair competition, treatment of workers or environmental protection. There has been some discussion of including references to the OECD Guidelines for Multinational Enterprises in the agreement's preamble but without changing their voluntary nature. See Barbara Griffiths, *The OECD Guidelines for Multinational Enterprises and Environment and Labour Issues, available in Multilateral Agreement on Investment: State of Play*, at 42-43, OECD Doc. OCDE/GD(97) 114 (1997). The WTO Ministerial Declaration following the December, 1996, WTO meeting resolved to establish a working group to study the relationship between trade and investment. The working group first met in June of 1997. The idea of an MAI, both within the OECD and the WTO, has been seriously challenged as adverse to developing county interests. See Bhagirath Lal Das, *A Critical Analysis of the Proposed Investment Treaty in the WTO, available in Third World Network*, <<http://www.twinside.org.sg/souths/twn/title/ana-ch.htm>>; *MAI Homepage of The Preamble Center for Public Policy* <<http://www.RTK.NET:80/preamble/mai/maihome.html>>.

183. Simon Retallack, *The WTO's Record So Far – Corporations: 3, Humanity and the Environment: 0*, *ECOLOGY*, Jul.-Aug. 1997, at 136.

bodies.<sup>184</sup> As William Greider suggested in metaphors, the storm is already upon us because the machinery of modern capitalism "driven by the imperatives of a global industrial revolution" is out of control and promises to spew forth vast changes that will "destabilize" political order in every corner of the planet.<sup>185</sup> Our assessment is that TNC's cannot be effectively regulated in their activities because the nation-states lack effective long-arm jurisdiction and that the international law mechanisms currently in place are ineffective.<sup>186</sup> Thus, without reform, we should expect capital to flow to countries where labor and natural resources are both abundant, cheap, and not protected by regulation from abuse or exploitation; or, as is the case in Mexico and most of Southeast Asia, capital will flow to countries where laws are on the books but are either unenforced or selectively enforced and where government officials are corrupt. The exporting of jobs and capital will cause other nation-states to provide tax breaks and amend environmental and labor laws so as to become "competitive," and all of these so-called reforms will be defended as required by the "forces of the marketplace." The race to the bottom will be on.

Firms that disregard the welfare of labor also seem to be quite capable of disregarding the health of the environment; the air we breathe and the water we drink. BCC has demonstrated a pattern and practice of abusing its vast economic powers in the pursuit of profits. This example suggests that current regulations of TNC's are inadequate and that some significant legal reforms are desperately needed. While we do not gainsay the problems of abuse of economic power within the USA, we believe that any triage-type analysis would mandate that international restraints be looked at as well.

An initial step might be to address the power imbalances currently existing between large corporations and labor. The literature in this

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184. See *supra* note 8.

185. Greider, *supra* note 8, at 11-12.

186. Frequently, the jobs versus environmental safeguard dichotomy urged on voters and consumers by the extractive industries is much too simplistic. The global economy is extremely complex and generates consequences far beyond the anticipated ones of current regulations. For example, the two-week shut-down of all the mills owned by Slocan Forest Products Ltd. Of Vancouver, B.C., Canada's biggest lumber producer, was prompted by the interaction of the quotas contained in the two-year-old Canada-U.S. softwood lumber agreement and a decline in Japanese housing starts touched off by an increase in the Japanese consumption tax. Since Japan is by far the biggest Asian market for North American softwood lumber, a softness in the Yen coupled with a sharp drop in housing starts sent a ripple across the Pacific causing producers from Chile to New Zealand to increase shipments to the U.S. The quotas on Canada caught the Canadian lumber industry in a bind that other lumber exporters did not face in a situation most likely completely unanticipated by the Pacific Northwest politicians that wanted to protect U.S. timber from Canadian import competition. See C.J. Chipello and D.E. Parkinson, *Lumber Price Rebound May Hinge on Japan*, WALL ST. J. (Feb. 17, 1998) at C1 and C19.

area even within the United States demonstrates that it is cost-effective to break labor unions by violating the National Labor Relations Act.<sup>187</sup> It is also cost-effective, probably far more so, to export jobs to Mexico in order to avoid meaningful environmental legislation. The Foreign Corrupt Practices Act (hereinafter FCPA) has been held to reach overseas and regulate corporate conduct.<sup>188</sup> Congress might consider extending such a long arm to environmental laws, labor laws, and anti-discrimination laws. It might make labor laws interactive with employment discrimination laws.<sup>189</sup> Thus, discrimination and Unfair Labor Practices might potentially be merged into a new category such as Illegal Labor and Employment Practices (ILEP). Penalties and enforcement budgets would need to be vastly increased to get the attention of the new breed of the Robber Barons that the merger binge of the 1980's and 1990's has spawned within the USA.<sup>190</sup> Whether one nation can possibly reach non-resident firms and whether it should make the attempt unilaterally are significant legal and political issues.

An extension of environmental quality standards for U.S. multinationals and their wholly owned subsidiaries would be another positive step in preventing the exporting of jobs to poorer countries that are at the mercy of TNC wealth. In reviewing the history of BCC, we are reminded of a judge's dictum made famous by H.L. Mencken: "Corporations have no pants to kick or soul to damn" and "by God, they ought to have both."<sup>191</sup>

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187. See, e.g., James B. Atleson, *Reflections on Labor, Power and Society*, 44 MD. L. REV. 841 (1985) (making the point that labor laws tend to keep a labor dispute localized by preventing secondary activity, etc. when frequently the employer is a local or national organization.) The history of BCC and its ability to use its vast economic powers to "cram down" a labor settlement over the objections of nine unions at International Falls mill also supports this conclusion. See *supra* text accompanying notes 9-34; see also, William A. Wines, *The Long March to Bildisco and the 1984 Bankruptcy Amendments: Establishment of a Limited Right to Reject Collective Bargaining Agreements*, 20 GONZ. L. REV. 187, 188-210 (1985) (documenting the power of corporations to legally and unilaterally reject labor contracts that were bargained under the NLRA is documented).

188. See *supra* notes 78-88 and accompanying text.

189. See, e.g., William A. Wines, *The Case of the Willmar Eight: Is Leviticus Still Good Law in Employment Discrimination?*, 6 HAMLINE L. REV. 214, 215-246 (suggesting reform based upon the outcome of the employment disputes at Citizens National Bank, Willmar, MN).

190. See, e.g., William A. Wines, *Title VII Interpretation and Enforcement In the Reagan Years (1980-1989): The Winding Road to The Civil Rights Act of 1991*, 77 MARQ L. REV. 647 (1994) (detailing the impact of budget reductions and policy shifts that virtually gave the green light to corporations to ignore employment discrimination laws during the decade of the eighties).

191. H.L. MENCKEN, A DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 223 (1942) (Mencken's reported quip has long historical roots). Sir Edward Coke in the Case of Sutton's Hospital (1613) declared that corporations cannot commit treason, nor be outlawed, or excommunicated, for they have no souls. Case of Sutton's Hospital 77 Eng. Rep. 960 (K.B. 1613).

There are rumors in Guerrero that BCC is already moving to construct a new mill with huge capacity. Such a mill would, if the rumors are anywhere near accurate, have capacity for many times the logs BCC has publicly been acknowledged to have authority to cut in the Costa Grande area. This invites speculation that BCC has much greater logging leases/options in Mexico or may be shipping logs from other sites in an effort to take advantage of the lax safety standards and extremely low wages in Mexico. Congress might enact a long-arm statute covering environmental abuses by U S Corporations, their subsidiaries, and sub-contractors anywhere on the planet. Treble damages plus actual costs and attorney fees would be a good start to encourage private Attorney Generals to bring individual actions to protect the impoverished of this planet from dealing away their children's inheritance and from polluting the air and water all living things need to survive.

This is not an appropriate place for an extended discussion of the details of such regulations, however, some sketching out of the nature of possible laws might provide the flavor of what we have in mind. Suffice it to say that Crimes Against the Earth (CATE's) should include clear-cutting and any other logging that is not at a sustainable level; eliminating wetlands that support waterfowl or provide significant flood plains; destroying spawning streams for trout and salmon; fishing on a non-sustainable yield basis;<sup>192</sup> and failure to restore the environment after any mining activity or toxic chemical spill. This does not begin to exhaust the possibilities but should demonstrate the scope of the legal reform we have in mind.

For a TNC such as BCC, it is only a small step from eliminating a laborer's livelihood to snuffing out biological life itself. The earth belongs to all of us, and we to it. The resources of this planet including the lives and health of its workers should not be sold to the highest bidder at fire sales necessitated by the poverty and corruption of some of its nations. Some will object to these proposals for law reform on the grounds that morality cannot be legislated. Others may object to what they see as draconian measures. We do not dispute the inability of law reform to promote morality or the vast sweep of these proposals. We would like the U.S. Congress to take the profits out of such abuses of power as have been practiced over the past two decades by the BCC.

A full scale review of possible reform measures is beyond the scope of this paper; our purpose here is to encourage vigorous public debate, intense media attention, and focused social science research on the coming storm. What alternatives might be explored? We would suggest

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192. One need only read about the fishing wars in the Gulf of Thailand to appreciate how near the edge of disaster this world's oceans have come. *See. e.g.,* Uamdau Noikorn, *Fishing rights in Burmese Waters to be Finalised Soon*, BANGKOK POST, June 22, 1997, at 2.

that the dichotomy between jobs and the health of the planet be deleted as an operative assumption — that the role of corporations be re-examined from a populist or progressive stance that vigorously insists on corporate accountability. After all, society existed for many centuries without business corporations. They were allowed to exist only because it was thought they might contribute to the improvement of the quality of life on this planet. Maybe that conclusion needs to be revisited. Perhaps, a people and planetary centered accounting system needs to be implemented so that human costs and other so-called externalities are reflected on the income sheets of corporations and reparations might be required.

At the very least, some attention needs to be paid to the flaws in the current attempts at global governing structures. Why does the United Nations seem to be ineffective when it addresses human welfare issues? What should be done to make the ILO more relevant to the lives of working people? Is there another way to impose sanctions for GATT violations and other trade misdeeds other than the self-defeating approach of countervailing tariffs? We should approach these issues with some sense of urgency. This will not be the last wave to sweep the planet in the coming twenty-first century. Other challenges lie ahead. Our political and social structures have not yet fully grasped the lessons of the nineteenth century and have not fully engaged the challenges of this century<sup>193</sup> but must be brought up to speed if misery on a global scale and bloody revolutions are to be averted. Paralleling the expansion of corporate economic domination is what one authority refers to as a "de facto world government."

It seems to me that several tendencies can be detected. One is the tendency towards centralization of power in high-level planning and decision-making institutions, as epitomized in the EU executive. More generally, as the international business press has pointed out, a 'de facto world government' is taking shape with its own institutions: the International Monetary Fund (IMF), World Bank, G-7, the General Agreements on Tariffs and Trade (GATT), et cetera. These are becoming the governing institutions of a 'new imperial age' (*Financial Times*).<sup>194</sup>

Edward W. Soja provides a description of transnational corporations and the reach of international capitalism. These factors, that

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193. Bruce Catton stated prophetically: "There is no twentieth-century culture; the twentieth century is simply a time of transition, and the noise of things collapsing is so loud that we are taking the prodigious step from the nineteenth century to the twenty-first century without a moment of calm in which we can see where we are going." BRUCE CATTON, *WAITING FOR THE MORNING TRAIN* 18-19 (1972).

194. Noam Chomsky: *Nationalism and the New World Order: An Interview by Takis Fotopoulos*, 2 *SOC'Y & NATURE* 1 (1994).

shed light analytically on BCC operations, are as follows:

One prevailing trend has been the increasing centralization and concentration of capital ownership, typified by the formation of huge corporate conglomerates combining diversified industrial production, finance, real estate, information processing, entertainment and other service activities.

Added to the corporate conglomeration of ownership has been a more technologically-based integration of diversified industrial, research, and service activities that similarly reallocates capital and labour into sprawling spatial systems of production linking centres of administrative power over capital investment to a constellation of parallel branches, subsidiaries, subcontracting firms, and specialized public and private services.

Linked to increased capital concentration and oligopoly has been a more pronounced internationalization and global involvement of productive and finance capital, sustained by new arrangements for credit and liquidity organized on a world scale.

The weakening of local controls and state regulation over an increasingly 'footloose' and mobile capital has contributed to an extraordinary global restructuring of industrial production.

In the USA and elsewhere, the accelerated geographical mobility of industrial and industry-related capital has triggered and intensified territorial competition, among government units for new investments (and for maintaining existing firms in place).<sup>195</sup>

All of the above have resulted in "[t]he self-perpetuating spiral of economic and ecological decline . . . rooted in a fundamental and growing contradiction between an imbalanced system of production, veering towards chaos, and an increasingly fragile biosphere. An abundance of scientific evidence suggests that the natural habitat, from oceans to rain forests to the atmosphere, cannot sustain for long a capitalist industrialism driven toward endless material expansion, generalized domination, and the conversion of human beings and nature into commodities." <sup>195A</sup>

According to the same observer, other consequences include the exclusion of 90 percent of the Earth's population from the material benefits of the globalizing economy, in which the "search for integrated mar-

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195. Edward W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* 185-86 (1989).

<sup>195A</sup> *Id.*

kets rooted in easy access to raw materials, cheap labor, and stable high-tech infrastructure is expected to give rise to nearly one billion affluent consumers by the year 2020; the rest will be consigned to underclass status."<sup>196</sup> The effects of this rapid and overwhelming evolution of a global economic and integrated system can be seen not only as it affects the sustainability of the biosphere but also to that of labor. The mobility of capital leads to "restructuring processes" that "derigidify long-established spatial divisions of labour at virtually every geographical scale," according to Soja.<sup>197</sup> He provides the following descriptive analysis:

Paralleling what has been happening at the global scale, the regional division of labour within countries has been changing more dramatically than it has over the past hundred years.

Accompanying these processes are major changes in the structure of urban labour markets. Deeper segmentation and fragmentation is occurring, with a more pronounced polarization of occupations between high pay/high skill and low pay low/skill workers, and an increasingly specialized residential segregation based on occupation, race, ethnicity, immigrant status, income, lifestyle, and other employment related variables.

Job growth tends to be concentrated in those sectors which can most easily avail themselves of comparatively cheap, weakly organized, and easily manipulated labour pools and which are thus better able to compete within an international market (or obtain significant protection against international competition from the local or national state.)<sup>198</sup>

Under these prevailing circumstances, "few governments seem willing to step forward, to take initiatives that might challenge corporate power, frighten capital markets, or undermine competitive advantage. Governments of diverse ideological labels, from Britain to China, from Italy to Brazil, remain captive to both the *logic* of transnational growth as well as the *ideology* of a self-correcting market."<sup>199</sup>

According to principles established in GATT, the best means to address environmental damages that transcend national boundaries is through domestic policies, rather than trade policies, for instance. But, as Paul Ekins points out, this approach is probably not politically feasible as long as it has serious negative implications for the competitive-

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196. Carl Boggs, *The New World Order and Social Movements*, 2 SOC'Y & NATURE 91, 96 (1994).

197. SOJA, *supra* note 195, at 125.

198. *Id.* at 186-87.

199. Boggs, *supra* note 196, at 124-25.

ness of domestic industry. Failure to protect domestic industry from competitors who do not do so would permit only the countries with the strongest economies to maintain domestic environmental protections, which would then be under "continual siege from [parties] concerned with international competitiveness."<sup>200</sup>

In effect, whether in Mexico or elsewhere in less developed countries, domestic environmental protections are unlikely due to the consequences for competition on the international level both in respect of exported products and services and in the attraction of foreign investment. Undoubtedly, such is the case with BCC and Mexico. One informed observer has called for "an environmental nationalism which can harness the legitimate anger against global capitalism to carry out the massive transformations necessary to create an environmentally sustainable civilization."<sup>201</sup> We believe that such a step would work only if accompanied by an international cooperative effort, such as in the WTO, that would both establish global environmental standards and share the necessary resources to make enforcement a reality. Note that this approach would couple nationalism with global cooperation rather than the global competition that now characterizes the race toward the bottom.

Since no international corporate juridicial framework exists, and since international economic competition supercedes domestic environmental protection, Ekins calls for "environmentally orientated trade restrictions."<sup>202</sup> The situation is all the worse in that domestic environmental (and labor) protections are hampered by the growing transcendence of such nation-states by a globalizing economy.<sup>203</sup>

Furthermore, nations, in seeking a comparative advantage on the international market, are pressured to reduce environmental protection or refrain from implementing or enforcing it in order to secure that advantage.<sup>204</sup> The same is true for labor standards, human rights and the

200. Paul Ekins, *The Future of the World Trade Organization: Proposals for Fair and Environmentally Sustainable Trade*, 3 *SOC'Y & NATURE* 57, 81 (1997).

201. ARRAN E. GARE, *POSTMODERNISM AND THE ENVIRONMENTAL CRISIS* 145 (1995). Gare makes this argument, in part, because he believes that "only by cultivating nationalist sentiments will it be possible to mobilize people to bear the costs of the struggle . . ." to regain control over their economies and their environments. *Id.*

202. EKINS, *supra* note 200, at 69.

203. As one authority notes: "[t]his transnational or global capital is able to explore and exploit commodity, financial, consumer, and labour markets all over the world with fewer territorial constraints (especially from direct state control) than ever before. As a result, purely domestic capital has been playing a decreasing role in the local and national economies of the advanced industrial countries as these economies increasingly internationalize." SOJA, *supra* note 195, at 185. For a dark vision of what the global economy will mean to U.S. workers, See Walter Russell Mean, *At Your Service: The New Global Economy Takes Your Order*, Mother Jones (March/April 1998) at 32-41.

204. For a brief application of Habermas' theory of the public sphere to the recovery of

gamut of controls on corporate and commercial behavior. The results include the unraveling of the prevailing theory of "comparative advantage," a trademark of international trade. Among other things, the theory of comparative advantage ignores environmental externalities, in which prices do not reflect the full social cost of production.

The theory also rests on the assumption that capital and labor remain immobile, producing for the country's advantage. "With free mobility of factors of production, comparative advantage becomes a much less relevant concept because factors from different countries will instead flow across borders according to the logic of absolute advantage or simple price competitiveness. Countries without such advantage will experience pressure on wage rates, working conditions, environmental regulations and anything else perceived to hinder competitiveness."<sup>205</sup>

Under such conditions, reform of the system of production, domestically and internationally, appears all the more insurmountable. The environmental movement has fallen drastically short, both nationally as well as internationally, in confronting these conditions and providing workable structures for the resolution of the various environmental crises on the planet. The movement has virtually missed the need to transform traditional liberal and democratic approaches to a new system in which "the source of legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is deliberation itself. . . . A legitimate decision does not represent the will of all, but is one that results from the deliberation of all."<sup>206</sup> Another writer claims that "action in the public sphere [should be] based more on the reworking of existing, mainstream settings and institutions than on the creation of counter-institutions on the one hand or protest groups and new social movements on the other."<sup>207</sup>

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grizzly bears, see Steven A. Primm, *A Pragmatic Approach to Grizzly Bear Conservation*, 10 CONSERVATION BIOLOGY (no. 4, August 1996) at 1030-32. Primm suggests that a third way must be found between reliance on either government or markets to offer solutions to conflicts over conservation of large predators. "The purpose of forming reason-based opinions in a non-governmental process is not to direct the affairs of government explicitly but to develop reasoned and less-conflictual [sic] demands for government actions." For an example of how things currently work in this arena, See Associated Press, *Commissioners Defy Federal Law, Pass Ordinance* dateline Challis, I.D., January 29, 1998 at 3:15 a.m. That AP news story details how the Custer County Commissioners passed an ordinance titled the "unacceptable Species Ordinance" that outlaws grizzly bears moving into Custer County, ID. A further resolution in support of this ordinance called for killing the federally protected grizzlies to keep them out of the county. (Copy of wire-service report in authors' possession).

205. *Id.* at 60.

206. B. Manin, *On Legitimacy and Political Deliberation*, in Jürgen Habermas, *Further Reflections on the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE 446 (Craig Calhoun ed., M.I.T. Press 1992).

207. Harry C. Boyte, *The Pragmatic Ends of Popular Politics*, in HABERMAS AND THE

According to another observer, there has been " a striking absence of alternative models and designs for macro restructuring processes that could give concrete shape to sustainable development — and to a fully democratized social order." Likewise, the same reporter notes that proponents of significant change are confronted by a system "that, for the most part, closes off real alternatives from serious discussion."<sup>208</sup> This may explain why the so-called "mainstream" environmental groups that are national in scope often fail to promote such alternatives.<sup>209</sup>

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PUBLIC SPHERE 353 (Craig Calhoun ed., M.I.T. Press 1992). Boyte continues with a call for the deliberative citizenry of Habermas in the following words: "development of a widespread sensibility and experience of citizen agency and authority, with the responsibilities and capacities those entail, is the key to any significant democratization of the everyday, large-scale, direct, and indirect relationships of the modern world. For this to occur, we need a different sort of political education, one especially attentive to the pragmatic foundations for a sustainable public sphere." *Id.* at 353.

208. Boggs, *supra* note 196, at 127. To illustrate one such model that has received this type of treatment: legislation before Congress called the Northern Rockies Ecosystem Protection Act would designate over 14 million acres of currently unprotected roadless land in the Northern Rocky Mountains as wilderness and establish two National Parks and provide for Wild and Scenic Rivers Protection while generating jobs for heavy equipment operators. These areas would be connected by biological corridors (over 4 million acres) composed of currently roadless areas. Such biological corridors or bridges, if you will, would permit migration and genetic interchange between currently isolated plants and animals, such as the Yellowstone grizzly bears that are not a genetically viable population. This and similar legislation would provide for recovery areas in which people would be employed to re-establish native vegetation, reduce erosion, close and re-vegetate unnecessary roads, and re-establish native fisheries. Such legislation would benefit not only the ecosystem but also the local peoples, some of whom have been hard hit by timber company layoffs, by providing jobs for heavy equipment operators, laborers, botanists and others. Funding for such recovery efforts could be derived from the savings realized by elimination of taxpayer subsidies for road building and below-cost timber sales. *See, e.g.,* A Bill Before Congress to Protect the Wild Rockies, H.R. 1425. C&S Note that Custer County (Idaho) commissioners passed an ordinance outlawing Grizzly Bears from moving there, in defiance of the federal government. *Morning News Report* (KOOL FM 104.3, Boise, Idaho, radio broadcast, Jan. 29, 1998). Enforcement apparently was not addressed in the "Unacceptable Species Ordinance" passed in Challis on Tuesday, January 27, 1998. (AP Wire Service).

Unfortunately, very rational proposals, such as H.R. 1425, have been obstructed by politics as usual wedded to maintaining non-sustainable resource uses. Successful legislation under current conditions can be achieved only by bills that are viewed as non-threatening to the status quo for timber and mineral extraction conglomerates that maintain a highly visible and effective lobbying presence in the Nation's Capitol. Clearly, Idaho's Congressional delegation is only one of several from the West who are motivated more by timber and mining industry needs than by environmental and species preservation concerns. Some (Rep. Hanson, R. Utah) would, for instance, log the National Parks if they had the votes. *See also* Chomsky, *supra* note 194, at 2 for similar discussion.

209. Even modest administrative reforms often fail in Congress. *See, e.g.,* Erin Kelly, *House Barely Misses Axing Federal Funds for Timber Roads*, IDAHO STATESMAN, July 12, 1997, at 4A. Late on July 10<sup>th</sup>, the U. S. House of Representatives rejected by two votes a bi-partisan effort by Reps. Joe Kennedy, D. Mass. And John Porter, R. Ill., to kill a \$41.5

Local and regional environmental groups often succeed in stimulating and expanding public debate. On the other side, some environmental groups simply defend "local space and identity, where these values are threatened by economic, political, and cultural incursions of all sorts." According to the same observer, these movements can be largely defensive. Actions may be:

designed to *avoid* the public sphere; they not only fear taking on the power structure, but change of any type. . . . Local 'knowledge' is a vital ingredient of this equation [strategic planning for both change and the use of political and economic power], but without strategic form it becomes dissipated in the manner of enclave consciousness. While dispersion seems appropriate to the postmodern mood of contemporary intellectuals and others, it works against the imperatives of political strategy and organizing, which is the terrain upon which the global crisis must be contested.<sup>210</sup>

More to the point and much more succinctly, one writer simply declared: "If market forces are global in scope, any effective political response has to be global."<sup>211</sup>

On the other hand, citizen participation can legitimize administrative rationality on the part of transnational firms and government bureaucracies, in the same way that faculty senates elected by a small percentage of the total faculty can be used for "faculty input" by univer-

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million federal road construction program in the public forests. This was the second time in two years that critics of the logging road program, which also includes a \$50 million program under which the U.S. Forest Service *gives* trees to timber companies for building logging roads, narrowly missed eliminating this subsidy. The American Forest & Paper Association defends the program on the ground that groups other than timber companies also use logging roads. From 1991-1997, Boise Cascade Corporation received \$19 million in road purchaser credits, making it the second largest corporate beneficiary under the program. HEADWATERS FOREST NEWS, Winter 1997-98, at 10.

In order to determine the further scope of taxpayer subsidies, and especially subsidies granted BCC, the authors studied six timber sales to Boise Cascade Corporation from the Boise National Forest over a six-month period in 1995 (May 22 to Nov.20). These six timber sales were subsidized by U.S. taxpayers to the tune of \$3,365,673. Put another way, taxpayers gave BCC over half a million dollars each time it bought trees to harvest in the Boise National Forest. These costs of corporate welfare include administration, sales planning, design, sales preparation, reforestation, county taxes, new roads, and road reconstruction. We believe these numbers are conservative. Our figures were obtained from the Boise National Forest through Freedom of Information Act requests. The analysis is based upon the same methodology used in a report by the General Accounting Office entitled "Forest Service Distribution of Timber Sales Receipts Fiscal Years 1992-94." G.A.O. REP. NO. 95-237FS (1995). In that report, the GAO found that over the three years studies that the U.S. Forest Service lost \$995 million in below-cost timber sales nationally. *Id.*

210. Boggs, *supra* note 196, at 113.

211. Nicholas Garnham, *The Media and the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE 372 (Craig Calhoun ed., M.I.T. Press 1992).

sity administrators when it suits their purposes. These groups can be "purposely stimulated to provide much needed administrative rationality."<sup>212</sup> Furthermore, through public hearings required by the Administrative Procedures Act,<sup>213</sup> a cloak of rational decision-making can be tailored thereby giving the appearance of legitimacy to proposed governmental actions masking transnational corporate interests. Even in opposition, citizens can unintentionally through their participation sanction governmental or business actions that have been functionally pre-selected or choreographed, in effect, by large power brokers.

To illustrate: a well-meaning environmental push for pollution controls over the local pulp mill to remove chlorine paper production that fouls air and waterways can be turned to corporate advantage by substituting one environmental abuse for another. For instance, the successful campaign for chlorine-free paper production might necessitate a massive plant modernization, a capital-intensive option available only to large conglomerates. In order to pay off the resulting heavy investment in high technology paper production, the conglomerate will then increase logging to allow it to run the modernized mill at maximum capacity. Reduction of chlorine paper production may then have the unintended, at least to the environmentalists, result of short-term deforestation of the area as the price of modernization.<sup>214</sup> Any final or real environmental problem solving must address reduced consumption and waste of natural resources and not merely the shifting of environmental burdens.<sup>215</sup>

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212. Harry C. Boyte, *The Backyard Revolution: Understanding the New Citizen Movement* 100-02 (1980).

213. 5 U.S.C. § 551 (1994).

214. Kerski, *supra* note 79, at 144.

215. "Thus, growth in capitalist relations is inevitably associated with growth in consumption of natural resources and production of waste . . ." Blair Sandler, *Grow or Die: Marxist Theories of Capitalism and the Environment*, 7 *RETHINKING MARXISM* 38, 40 (1994). For Sandler, advanced capitalist societies are successfully assimilating a form of "green" economics. As he sees it, the production of "ecologically friendly commodities" – designed to met the demands of consumers for products that lessen environmental consequences ("internalizing environmental externalities"), results in increased profits by creating and expanding into new markets to meet these demands. *Id.* at 49-51. Consequently, he refutes the argument that capitalism and its intrinsic need to increase commodity production in expanding the reach and penetration of markets, conflicts with biospheric limits. *Id.* at 48. Sandler refers to the move towards chlorine free paper as an example of such an assimilation of environmental demands into the productive capacities of capital. *Id.* at 38. However, Sandler fails to mention the shift of environmental impacts. e.g. removing chlorine from paper production to eliminate pollution by increasing, even if relatively temporary, logging to cover capital investments in technological modernization. While a "green environmental regime" may postpone the clash between capital growth and ecological limits, we view it unlikely that such a "regime" effectively, even in the short-term, eliminates this conflict. *Id.* at 44. Nor do we believe it likely, as Sandler asserts, that "The vast and far-reaching ecological reconstruction of material infra-

Similarly and also inadvertently, local environmental activism may lead to more centralized government. In western states such as Idaho<sup>216</sup> where the state legislature is funded by and zealously disposed to be solicitous of the welfare of the cattle, lumber and mining industries, environmental activists may turn in desperation to the national government where their concerns have a chance of being heard. Turning to the federal government, administrative agencies or courts for environmental relief will bring federal intervention and may necessitate a larger federal presence. The result, inevitably, in sagebrush rebellion territory will be an increased backlash from westerners who seek less federal control over their affairs. Unfortunately, the resulting debates over centralized versus decentralized government are too frequently shaped in simplistic and naive terms. Even though such debates are crucial to a society where environmental problems are democratic dilemmas, the environmental perspective "tends to be long on ecological critiques and polemic and short on understanding of the political process."<sup>217</sup>

A more sophisticated approach would, when delineating possible political change, look increasingly to "civil society" as the agent of such change and towards the revitalization of the public sphere on all levels (local, national, and international) as an essential element in such change.<sup>218</sup> One writer

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structure and production technologies" "will help constitute the next capitalist restructuring." *Id.* at 55. On the other hand, Sandler is correct in asserting the inherent limits to the ability of state regulations or market instruments to enforce restraints on economic effects on the biosphere. *Id.* at 55.

216. Idaho currently (January 1998) has the most Republican legislature of the 50 states; the GOP has a 6 to 1 majority in both houses and a Republican Governor, Phil Batt.

217. Daniel Press, *Democratic Dilemmas in the Age of Ecology: Trees and Toxics in the American West* 6 (1994).

218. "[T]he institutional core of 'civil society' is constituted by voluntary unions outside the realm of the state and the economy." Jurgen Habermas, *Further Reflections on the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE 453 (Craig Calhoun ed., M.I.T. Press 1992). The public sphere refers both to a theoretical and normative ideal and to practical actualities. As a theoretical ideal, the public sphere, for Habermas, generates the justification of norms through reasoned discourse and rational will formation. Practically speaking, the public sphere refers also to the institutionalized will of ever expanding public spheres, in which citizen participation is the motor that fuels authentic democratic processes. However, as Calhoun states, Habermas recognizes that "parties, parastatal agencies, and bureaucracies of all sorts must themselves be internally democratized and subjected to critical publicity." Craig Calhoun, *Introduction*, to HABERMAS AND THE PUBLIC SPHERE 1, 28 (Craig Calhoun ed., M.I.T. Press 1992). Recognizing that complex societies cannot do without markets and administrative bureaucracies, Habermas notes that with the integration of the economy with the state brings new conditions requiring a broadening of democratic constituencies. *Id.* at 1-42. However, rather than "vying for state power", democratic constituencies must instead direct state power. Yet obstacles

distinguishes the public sphere from both state and market and can thus pose the question of the threats to democracy and the public discourses upon which it depends coming both from the development of an oligopolistic capitalist market and from the development of the modern interventionist welfare state. . . . [T]he development of an increasingly integrated global market and centers of private economic power with global reach are steadily undermining the nation-state, and it is within the political structure of the nation-state that the question of citizenship and of the relationship between communication and politics has been traditionally posed.<sup>219</sup> We are thus being forced to rethink this relationship and the nature of citizenship in the modern society.<sup>220</sup>

### *Conclusion.*

In light of the above, how can government effectively regulate global corporate conduct in the face of increasing competitiveness and the highly mobile nature of capital? How do non-governmental organizations formulate proposals and design strategies for effective government action? The answer increasingly takes us beyond our borders and necessitates the agreement and cooperation of at least major U.S. trading partners.

The looming crisis of widespread ecological degradation poses ethical dilemmas that must be considered along with the legal and political issues. For instance, the extension of technological and industrial effects on nature bring with them "increased responsibility for the natu-

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confront such structural and institutional democracy, where no clear agent(s) e.g. social movements, exists for the democratization of society. *Id.* As Calhoun notes, "The public sphere becomes a setting for states and corporate actors to develop legitimacy not by responding appropriately to an independent and critical public but by seeking to instill in social actors motivations that conform to the needs of the overall system dominated by those states and corporate actors." *Id.*

219. This is not to deny the impact that large corporations are having within the nation-states. See, e.g., DONALD L. BARLETT & JAMES B. STEELE, *AMERICA: WHO REALLY PAYS THE TAXES?* 313 (1994), for a discussion of taxpayers subsidizing Northwestern Airlines after a huge "leveraged buy-out" that netted the chief architect "a personal fortune estimated at \$50 million . . ." The Northwestern Airlines deal is discussed in detail by Barlett and Steele and summarized in these words: "Corporate-takeover artists, who acquired an airline and transformed it from a moneymaker to a money loser, pit state against state to see which will finally hand over the most tax subsidies." *Id.* at 318. Minnesota beat out Louisiana with a controversial \$740 million package of tax breaks, government-backed loans, and cash in May 1991. *Id.* at 314. Between 1990 and the end of 1992, Northwest Airlines, the company that had racked up thirty-nine straight profitable years through 1988 under its prior owners, had run up \$1.7 billion in losses under its new ownership, the take-over artists that seized control in 1989. *Id.* at 312, 317.

220. Garnham, *supra* note 210, at 361-62; see also GARE, *supra* note 201; Boyte, *supra* note 206; Manin, *supra* note 205.

ral process set in motion by such intervention."<sup>221</sup> In other words, greater alterations of nature bring with them greater responsibility for coordinated actions to redress the consequences. The ecological consequences of our collective actions present problems in which solutions must address immense degrees of complexity. The complexity involved may exceed "biologically programmed thresholds of sense perception and the limits of our historically developed cognitive capacities, such as those for anticipated time, for personal identity, or for the extent to which moral responsibility can be attached to consequences of action."<sup>222</sup>

A British economist who spent decades living and working in the Indian sub-continent wrote that "[f]rom a Buddhist point of view, this [measuring economic health by production alone] is standing the truth on its head by considering goods as more important than people and consumption as more important than creative activity. It means shifting the emphasis from the worker to the product of work, that is, from the human to the sub-human, a surrender to the forces of evil."<sup>223</sup> We may need to resurrect such currently unfashionable notions of good and evil to discuss the current direction of global capitalism; it may be evil to allow legal fictions to dominate humankind and the planet.<sup>224</sup> Efficiency is not necessarily good; we need to talk about the goal towards which efficiency is taking us before we can or should praise it." Simplicity and non-violence are closely related.<sup>225</sup> As one writer noted many years ago, economics without compassion is merely "a highly developed form of violence."<sup>226</sup> The father of modern economics knew that

221. Jurgen Habermas, *Reply to My Critics*, in HABERMAS: CRITICAL DEBATES 247 (John B. Thompson & David Held eds., M.I.T. Press 1982).

222. Jurgen Habermas, *Introduction* to OBSERVATIONS ON "THE SPIRITUAL SITUATION OF THE AGE" 18 (M.I.T. Press 1984).

223. E. F. Schumacher, *Small is Beautiful: Economics as if People Mattered* 56 (1973).

224. *S.see, e.g.* GUSTAVUS MYERS, *HISTORY OF THE GREAT AMERICAN FORTUNES* 159-60 (1936), for a parallel discussion of the absence of moral condemnation over a century ago when "persons of the highest character" was the term used to describe New York City tenement owners in a Metropolitan Board of Health Report (1866). The author goes on to condemn the Astors and other slum landlords of the 19<sup>th</sup> century in these words: "it is not deliberate, premeditated murder which is meant, in the sense covered by statute, but that much more insidious kind ensuing from grinding exploitation; in herding human beings into habitations unfit even for animals which need air and sunshine, and then in stubbornly resisting any attempt to improve living conditions in these houses. In this respect, it cannot be too strongly pointed out, the Astors were in nowise different from the general run of landlords. Is it not murder when, compelled by want, people are forced to fester in squalid, germ-filled tenements, where the sunlight never enters and where disease finds a prolific breeding-place? Untold thousands went to their deaths in these unspeakable places. Yet, so far as the Law was concerned, the rents collected by the Astors, as well as other landlords, were honestly made." *Id.* at 165-66.

225. SCHUMACHER, *supra* note 222, at 58.

226. Matthew Fox, *A Spirituality Named Compassion and the Healing of the Global*

well enough. Adam Smith believed that self-interest could drive a productive free market if, and only if, that force was contained by human sympathy, competitive forces, and legal regulation.<sup>227</sup> There might yet be time for many of us to revisit the fundamental principles of economics, restrain our fondness for mathematical modeling, and search out the moral roots of political economics<sup>228</sup> and the general welfare that drive legal regulation of markets.

The vision of the problems global society may face if substantial reform is not forthcoming on a timely basis is dark, indeed. In the twenty-first century, the so-called "Killing Fields" might resemble shoe factories similar to those operated currently in Indonesia by subcontractors for Nike or the mines of South Africa or the sweatshops of Hong Kong or the forests of Mexico. The mania of global capitalism has already outdistanced all the social institutions, laws and customs that this century maintained or erected; now, the challenge is to reform or reinvent them before the Earth becomes virtually uninhabitable.<sup>229</sup>

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Village, Humpty Dumpty and Us 177 (1979).

227. See, e.g., James B. Zimarowski et al., *An Institutional Perspective on Law and Economics (Chicago Style) in the Context of United States Labor Law*, 35 ARIZ. L. REV. 397, 400-03 (1993).

228. Some economists seem to forget that Adam Smith was first and foremost a moral philosopher. His first book was the *THEORY OF MORAL SENTIMENTS* (1756), and this work forms the foundation upon which his economic theory rests. See, e.g., PATRICIA H. WERHANE, *ADAM SMITH AND HIS LEGACY FOR MODERN CAPITALISM* 7-15 (1991).

229. There are numerous Native American legends that one of the last creatures on the planet Earth will be Brother Coyote. See, e.g., WILLIAM BRIGHT, *A COYOTE READER* 175-76 (1993). In Navajo legend, Coyote is more than a trickster/hunter; Navajo folklore credits Coyote with several resurrections. KARL W. LUCKERT, *COYOTEWAY: A NAVAJO HOLYWAY HEALING CEREMONIAL* 11 (1979). The Coyote of Coyoteway takes the form of a deity that can punish or help the People. *Id.* We doubt that given the planet's regenerative capacities that mankind could make all life forms disappear, but we fear that without significant reform the Earth might come to resemble the end time legends of the Native Americans.

