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LIFTING THE VEILS OF EQUITY IN MARITIME ENTITLEMENTS:
EQUIDISTANCE WITH PROPORTIONALITY AROUND THE ISLANDS

PHAEDON JOHN KOZYRIS*

I. INTRODUCTION

The modern maritime entitlements over vast oceanic spaces over
the continental shelf and over the exclusive economic zone have
produced sharp disagreements among neighboring nations about their
delimitation, the definition of their borders, many of which remain
unresolved. Economic interests are only part of the picture. The rest is
nationalistic pride of the mine and the thine.

For almost half a century international law has been striving to
develop a fair and predictable regime of delimitation through two major
multilateral, if not global, treaties1. One would have expected the
process to be easy. The basis of entitlement has been clear and
undisputed from day one: extended territorial sovereignty and
appurtenance results from adjacency to a coast. What is left is only the
quasi-ministerial task of charting lines on the map by means of some
identifiable and workable methods. Yet it is only now, after many
decades of international adjudication and arbitration,2 and after the

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1261, in force since November 16, 1994 [hereafter UNCLOS]. Separate articles provide
for entitlement and for delimitation both in the Geneva Convention (articles 1 and 6), and
in and UNCLOS (articles 55-71, 76-82 and 74, 83).

2. See generally Anglo-French Continental Shelf Arbitration, 16 I.L.M. 54 (1977)
[hereinafter Anglo-French Arbitration]; Case Concerning the Continental Shelf (Tunisia
v. Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Feb. 24) [hereinafter Tunisia-Libya]; Case
Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v.
U.S.), 1984 I.C.J. 246 (Oct.ober 12) [hereinafter Gulf of Maine]; Delimitation of the Marit-
time Boundary Between Guinea and Guinea-Bissau, 24 I.L.M. 267 (1985) [hereinafter
Guinea-Guinea/Bissau]; Case Concerning The Continental Shelf (Libyan Arab Jamahiriya
v. Malta) 1985 I.C.J. 13 (June 3) [hereinafter Libya-Malta]; Court of Arbitration for the
Delimitation of Maritime Areas Between Canada and France (St. Pierre and Miquelon),
31 I.L.M. 1145 (1992) [hereinafter St. Pierre & Miquelon]; Case Concerning Maritime De-
conclusion of numerous agreements in particular regions, that an
intelligible regime of delimitation is starting to gel.

The blame for this delay and confusion lies mainly with the North
Sea Continental Shelf Cases [hereinafter "North Sea"]3. In the first
delimitation adjudication in 1969, the ICJ [hereinafter "ICJ"],
uncomfortable with the apparent dominance of equidistance, took a
wrong doctrinal turn and set sail upon the uncharted waters of an
elusive equity. In this uncertain environment, another wrong doctrinal
turn came later, mostly in some writings, in deciding the question of
whether islands were to be treated somehow differently than
mainlands. These doctrinal turns have haunted the delimitation
process ever since. The actual borders in the cases already decided,
while on balance reasonable, were drawn despite rather than because of
them.

While the literature on these maritime zones, including the
equitable quest4 and the island question,5 is immense,6 this article

limitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38
(June 14) [hereinafter Jan Mayen] (important cases decided after North Sea Continental
Shelf Cases).

(Feb. 20) [hereinafter North Sea].

4. See, M.D. Blecher, Equitable Delimitation of Continental Shelf, 73 AM. J. INT’L
L. 60 (1979); Vladimir-Djuro Degan, Equitable Principles in Maritime Delimitations, in 2
ESSAYS IN HONOR OF ROBERT AGO 107 - 137 (1987); Robert Jennings, Equity and
Equitable Principles, in 1986 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27; Barbara
Kwiatkowska, The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary
Delimitation and Its Impact on the International Law of the Sea, in FORTY YEARS
INTERNATIONAL COURT OF JUSTICE: JURISDICTION, EQUITY AND EQUALITY 119 (A. Bloed &
P. van Dijk eds., 1988) [hereinafter Kwiatkowska, Forty Years]; T. Rothpeffer, Equity in
the North Sea Continental Shelf Cases, 42 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET.
81, 84 - 86 (1972); Paul Bravender-Coye, The Emerging Legal Principles and Equitable
Criteria Governing the Delimitation of Maritime Boundaries Between States, 19 OCEAN
DEV. & INT’L L. 171 (1988); Barbara Kwiatkowska, Equitable Maritime Boundary
Delimitation, as Exemplified in the Work of the International Court of Justice During the
Presidency of Sir Robert Yewdall Jennings and Beyond, 28 OCEAN DEV. & INT’L L. 91
(1997) [hereinafter Kwiatkowska, Jennings]; Ruth Lapidoth, Equity in International Law,
22 ISR. L. REV. 161 (1987); Elihu Lauterbach, Equity, Evasion, Equivocation and
Evolution in International Law, AM. BRANCH INT’L L. ASS’N, PROC. & COMM. REP. 33
(1977 - 78). Two recent books on international equity cover the maritime dimension in
rather general terms: MASAIRO MIYOSHI, CONSIDERATIONS OF EQUITY IN THE
SETTLEMENT OF TERRITORIAL AND BOUNDARY DISPUTES (1993) [hereinafter MIYOSHI]; and
CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW (1993) [hereinafter ROSSI].

5. We even find major monographs dedicated exclusively to the issues raised by the
presence of islands such as HIRAN W. JAYEWARDENE, THE REGIME OF ISLANDS IN
INTERNATIONAL LAW (1988) [hereinafter JAYEWARDENE]. Most of the major pieces, how-
ever, antedate St. Pierre & Miquelon and Jan Mayen; the key pieces, however, addressed
the island question more fully and in the most acute context will inform the present arti-
updates the implications of the two most recent and important cases, *St.Pierre & Miquelon* and *Jan Mayen*. Its most significant novelty, however, lies in lifting the veils of the purported marine equity to show that after *North Sea*, through a negative sorting out process, the courts have been able to reach sensible outcomes by accommodating the equitable qualms about equidistance through the concept of proportionality of zones to coastal lengths, and that, therefore, the doctrinal imbroglio created by *North Sea* should finally be laid to rest. Particular attention will be paid to specific solutions, including the mechanics of how to calculate weights and sizes and how to decide where and how much to cut and readjust. Finally, this article will closely examine how all of these considerations play out in the context of islands, and will focus on some practical issues where further clarification may be needed.

II. THE GENEALOGY OF EQUITY IN MARITIME DELIMITATIONS: PARTING THE NORTH SEA

A. The Concerns About the Equidistance-Special Circumstances Formula and the Turn Toward Equity

In *North Sea*, a divided ICJ boldly played down the role of the...
manageable rule of equidistance as the natural law of the continental shelf, a rule which had been incorporated in Article 6 of the Geneva Convention, modified by the exception of special circumstances. To be sure, the ICJ recognized its virtues as a convenient method capable of being employed in almost all circumstances, and stressed that no other method has the same combination of practical convenience and certainty of application. However, its utility had to be evaluated each time, at least in cases of adjacent coasts, under the applicable equitable principles, in view of all relevant circumstances, in order to reach reasonable results.

It is not an exaggeration to compare the birth of this marine equity in North Sea to Athena springing from the head of Zeus without much gestation. Any conceivable precedent was thin and opaque. Article 6 of the Geneva Convention, with equidistance as its centerpiece, resulted from a lengthy and laborious process by the International Law Commission, and met with world-wide approval, or at least acquiescence. There had not even been a thought of putting into the general rule a criterion such as equitable principles because it could not produce a line on a map. Indeed, the ICJ itself recognized in North Sea that in the pre-Convention proposals a workable methodology had been viewed as an essential prerequisite of delimitation. Nevertheless, the majority focused selectively on a few concerns expressed during the deliberations, and on the possibility of reservations, interpreted the

8. Examples of such circumstances were the exceptional configuration of the coast, as well as the presence of small islands or navigable channels. It is apparent that these examples originated in the traditional law of the territorial sea, where it had been recognized that the median line could be diverted to preserve the unity of a navigable channel (thalweg), to ignore uninhabited rocks or islets, or to respect straight baselines or adjustments in the general direction of the coast. See II Y.B. INT'L L. COMM'n 216, 300 (1953). Such circumstances would operate less forcefully under the regime of the continental shelf, which does not impose full sovereignty rights and where national security and navigational considerations are not the main issue.
10. For a summary of this process, see Evans, supra note 6, at 8-15, and ROBERT D. HODGSON & ROBERT SMITH, BOUNDARIES OF THE ECONOMIC ZONE IN THE LAW OF THE SEA: CONFERENCE OUTCOMES AND PROBLEMS OF IMPLEMENTATION 183-85 (1977). See also Etienne Grisel, The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases, 64 AM. J. INT'L L. 562, 570-573. According to Lauterpacht, "It appears that the basis of the Court's approach [that such delimitations must be established by reference to equitable principles] is a single sentence in a report of a committee of experts [cartographers] nominated by the International Law Commission in 1953 to provide... technical assistance." Lauterpacht, supra note 4, at 35.
special circumstances exception as originating in equity,\textsuperscript{13} and jumped to the conclusion that some undefined equitable principles have always underlain the regime of the continental shelf, seeking inspiration directly from them. The main support for this was supposed to be the Truman Proclamation of 1945 [hereinafter "Declaration"],\textsuperscript{14} where the United States [hereinafter "U.S."] had extended its continental shelf to 200 miles, and had declared that the boundaries with the neighboring states would be determined on the basis of equitable principles. However, this blanket unilateral reference to unspecified principles in the Declaration had been little more that a gesture of reassurance to the international community that this novel major appropriation of the open seas will respect the legitimate rights of other states on the basis of equality.\textsuperscript{15}

A good number of the judges in the ICJ expressed their dismay over this adventure into a process with no discernible practical choices in sight.\textsuperscript{16} Many commentators have also criticized this process.\textsuperscript{17}

\textsuperscript{13} North Sea, 1969 I.C.J. 3, para. 55.

\textsuperscript{14} Id. paras. 47, 86. See Proc. No. 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea-bed of the Continental Shelf, Sept. 28, 1945, 10 Fed. Reg. 12303, 3 C.F.R. 1943-48, Comp., p. 67. See also id. Ammoun, J., separate opinion, para. 39 for some additional examples. On the evolution of the policy of the United States, see WHITEMAN, 4 DIG. INT'L L. 752 (1946).

\textsuperscript{15} Incidentally, the international significance of the Truman Proclamation is quite limited, since its main purpose was internal, that is to draw a line between federal and state jurisdiction in this field. See WOLFGANG FRIEDMAN ET AL., INTERNATIONAL LAW: CASES AND MATERIAL 558 (1969); see also Elizabeth M. Borgese, Boom, Doom and Gloom Over the Oceans, 11 S. DIEGO L. REV. 543 (1974).

\textsuperscript{16} Judge Tanaka deplored the use of nebulous criteria such as equity or equitableness, which just beg the question. The rule of law and not anarchy must prevail. North Sea, 1969 I.C.J. 3, at 172, 185, 195-96. He, as most of the dissenters, favored equidistance, which is "practical, appropriate, objective and clear," reflecting proximity, propinquity and contiguity, indeed inherent in the very concept of the continental shelf and teleologically deducible from it, leading to just and equitable apportionment." Id. at 180-182, 186. He was not persuaded that coastal irregularities produce legally-recognizable distortions. Id. at 186-89. Judge Koretzky was concerned about the vagueness, subjectiveness and arbitrariness of the term, going beyond the restricted connotation given to it in the common law countries. The Court should not be addressing questions of a political nature. Id. at 165-70. Equidistance is the direct and inevitable consequence of the premises of the continental shelf right. Id. at 158-161. Judge Sorensen expressed concern that equity breeds uncertainty in "a field where legal certainty is in the interest not only of the international community in general, but also -on balance- of the states directly concerned." Id. at 257. For inequity we need a separate standard of evaluation Id. at 255. Cf. Ammoun, J., separate opinion, at 32 (stating that "the Judgment arrives at the obvious truth that it is necessary to be just, and does not give much indication to the parties, each of whom considers that its own position is equitable.")
However lacking in authentication, was this recourse to equity in North Sea at least wise like Athena and helpful in resolving disputes fairly? The ICJ cited three basic ideas for the delimitation of the continental shelf: (1) negotiate in good faith to reach an agreement; (2) do not encroach on natural prolongation; and (3) apply equitable principles, taking all circumstances into account and employing appropriate methods, including equidistance, in order to arrive at a reasonable result. The duty to negotiate does not provide much guidance on content and outcome and the ICJ’s attachment to natural prolongation proved to be futile as will be discussed later. Will the third idea of equitable principles, relevant circumstances and reasonable results work?

B. The Difficulties with the Equitable Doctrine of North Sea

1. A Good Beginning: Staying with Equity-Within-the-Law

North Sea started out correctly by providing the proper framework of the applicable law. The ICJ was indeed committed to the idea that the most fundamental of all rules of law relating to the continental shelf was that the entitlement of each state was an extension of its territorial sovereignty over land, existing inherently and by virtue of its coastline. A state without a coast has no continental shelf. Thus, the ICJ disclaimed any intention of using delimitation to produce just and equitable shares by a wholesale refashioning of nature or to remedy natural inequalities. Marine equity did not implicate either abstract justice or results . In other words, the ICJ unequivocally limited itself to equity within the law, disclaiming any recourse to equity as fountainhead of the law, or as the source of just results directly rather than through positive law. Equity within the law denotes a method of effectuating the law necessitated by the priority of first principles over rules, and by the impossibility of

19. Id. para. 90.  
20. Id. para. 19.  
21. Id. para. 91.  
22. Id. paras. 18-19, 39, 91.  
23. Id. para. 85. See also para. 32 (Ammoun, J., separate opinion).  
24. Id. para. 88. Cf. para. 84.
LIFTING THE VEILS OF EQUITY

anticipating a total solution for every conceivable situation because of the complexity of facts and the generality of rules.

North Sea was on solid ground by distancing itself from any form of equity without the law. No international tribunal has ever asserted general authority to use equity on its own to make law, or to contradict the positive law. Many commentators have eloquently exposed the perversions of instant, instinctive judicial justice, no matter how well-intentioned, and they need no belaboring here. The practice of visceral jurisprudence is particularly objectionable in international adjudication, where states zealously protect their sovereignty. No central government is entrusted with a general police power and armed with an executive branch. The tribunals have no general jurisdiction to remedy the ills of society, but are under a strict obligation not to make policy, but only to apply the existing law within the narrow terms of the submission of the dispute before them. In this environment, equity cannot be a roguish thing measured by the chancellor's foot.

The most authoritative international text on treaty interpretation, the Vienna Convention on the Law of Treaties [hereinafter the “Vienna

25. The ICJ even avoids referring to any equitable power praeter legem, i.e. merely to supplement and fill in the gaps of the law, let alone contra legem. It is also clear that whatever international equity may be relevant, it has never taken the coloration of mercy, or a similar notion of benevolence. On the other hand, international law itself admits, under the rubric of autonomy of the parties, broad authority to contending parties to avoid its permissive, substantive norms and select criteria which may be extra-legal, e.g., the relative interests, needs and aspirations of the parties or quasi-legal, and/or to bypass its adjudicatory procedures and submit their dispute to an agreed-upon process. Article 38 (2) of the Statute of the International Court of Justice recognizes that the Court has ex aequo et bono power based on prorogation, although it has not as yet exercised it for failure of submissions. The reasons for such action may vary: considerations of expediency, when coupled with trust in the wisdom and impartiality of the decision maker, may support a speedy, informal process; mediation and reconciliation without adversarial argumentation may be deemed more suitable to the preservation of long-term relationships; or even the law on a particular point may not be sufficiently developed and articulated as yet, and the dispute cannot be postponed. In terms of format, an equitable decision of this type may contain only an operative part of just results perceived directly, or it may also include the reasoning that led to it. The necessity for this kind of a process is even greater in international than in domestic law, both because of the greater gaps within it, and because of the failure of most states to accept generally the compulsory jurisdiction of international tribunals, leaving negotiation as the only other alternative when international law appears to favor one of the parties.


27. THE TABLE TALK OF JOHN SELDON 61 (Samuel Harvey Reynolds ed., 1892).
2. Trouble Starts: How Can Equity-Within-the-Law Help Here?

(a) The Need for Particularization

The ICJ was aware that the mere invocation of equity was not enough and that a particularization and a practical approach were necessary:

[I]t is a truism to say that the determination must be equitable;...it would...be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case.30

For this task, the long history of equity within-the-law could have helped. Such equity, which goes at least as far back as Aristotle, has influenced legal practice through the Roman praetors and the English chancellors for many centuries, and has found its way into the modern codifications. In operation, it appears within positive law in the form at the one end of overriding general principles and at the other of particularizing interpretations, respectively preceding and following the formal, strict and general rules. Another main function of such equity is procedural, aiming to devise remedies giving fuller effect to the norms of positive law.


29. Of course, it is possible for nations to transfer international-law-making powers to international organizations, as was done to a very limited extent with the United Nations. In recent years, a noble but controversial and inconclusive attempt to construct a new economic order, pursued mostly through the U.N. General Assembly, has invoked some equity in the international distribution of wealth. At this stage, however, such equity has not taken a concrete form, but remains an aspirational and abstract goal of states seeking to create advantageous relations in the future through multilateral agreement. See generally Ian Brownlie, Legal Status of Natural Resources in International Law (Some Aspects), in 162 HAGUE COLLECTED COURSES 245, 245-318 (1980); MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 127; ROSSI, supra note 4, at 199-204. See also M.W. Janis, The Ambiguity of Equity in International Law, 9 BROOKLYN J. INT'L LAW 16, 16-22 (1983).

A similar invocation at a comparable level of futurism has been included in the U.N. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Nov. 12, 1979, U.N. Doc. A/34/664, 18 I.L.M. 1434 (equitable sharing in the benefits derived from outer space resources giving special consideration to the interests and needs of developing countries). See also Convention on International Liability for Damage Caused by Space Objects, 66 AM. J. INT'L L. 702 (1972).

Translating these intangible qualities into working tools of the legal process, however, remains a most difficult process. The primary danger is that equity will be transformed from a Panacea to a Pandora: the gods would have given her a box containing not only all the gifts of the world, flexibility and fairness, but also the winds of its destruction through variability and arbitrariness, the two implacable enemies of justice through law. In other words, the invocation of equity within the law is not equivalent to a talismanic incantation to be followed by whatever outcome a court wants to adopt. On the contrary, it must be accompanied by a detailed, reasoned explanation, available for scrutiny, of why a literal application of a rule is excessive, insufficient or inconsistent by reference to its purpose or comes into conflict with an identifiable overriding principle, coupled in each instance with a justification of the proposed deviation or supplementation as the best rectification of the perceived defect. In addition, any creative remedy must be justified as a better technique of effectuating the purpose of the law.

The problems of using equity in international dispute resolution have been noted in the masterful study of C. Wilfred Jenks, who reviewed arbitral practice and cautioned that equity's role was qualified by four limiting factors. First, equity has been applied in claims cases related primarily to loss and damage incurred by private persons who are desirous of financial compensation rather than to the larger issues which may arise in the course of international adjudication. Second, there have been serious ambiguities relating to interpretation and to hierarchy between equity and the other sources of international law. Third, the actual performance of tribunals whose mandates included reference to equity has been less than satisfactory. Fourth, it is not clear whether and how particular decisions did in fact apply equity. 31

Against this background, the ICJ in North Sea was required to proceed cautiously to devise a delimitation formula which was consistent with the continental shelf positive right as the ICJ perceived it. Given the prevalence of equidistance, the ICJ had to explain why the exceptional adjustment through the special circumstances window was insufficient to take care of any equitable concerns. The combination of a presumptive rule with a qualified exception is quite common in legal texts, subject to standard methods of interpretation. 32


32. See Anglo-French Arbitration, 16 I.L.M. 54, para. 126, pointing out that under
Unfortunately, this was not done in any systematic, principled and articulate way. We must not hesitate to criticize the ICJ for this failure, which has burdened the delimitation process ever since. Let us take up the three equitable considerations, principles, circumstances and results, proposed by the ICJ in *North Sea* separately, starting with equitable principles.

(b) What Equitable Principles?

The idea that there are some fundamental maxims within a legal system which may qualify positive legal rights is well established. More to the point, it would appear that international law itself incorporates such principles either inherently or through the general principles of law of nations. Indeed, we do sometimes find references to customary international law, the burden of proof of the existence and importance of "special circumstances" lies on their proponent (Briggs, J., separate declaration). The distinction is important and supports the primary status of equidistance.

33. In Roman law, the effects of fraud, duress and mistake in transactions were negated through equitable principles. These principles also included notions such that voluntary transactions should be interpreted and implemented in good faith, and the intention of the parties should prevail even if there are irregularities as to form (doctrine of bonitary ownership and enforcement of the *fideicommissum*); that unjust enrichment must be reversed; that a condition of *rebus sic standibus* should be implied in bargains; and that unconscionably unequal bargains should not be enforced (doctrine of *laesio enormis*). See Peter Stein, *Equitable Principles in Roman Law*, in *EQUITY IN THE WORLD'S LEGAL SYSTEMS* 75 (1973).

The prevailing terminology in the Roman, and later in the Germanic, legal systems quite often avoided the word "equity" in these contexts, referring instead to "the general principles of law." A typical and central example of such principle is the notion *dolus omnia currumpit* (fraud corrupts all), which tempers the strict norms of *pacta sunt servanda* (promises must be kept), and *caveat emptor* (let the buyer beware). By and large, modern continental legislators have enacted most of these innovations into positive law, and even have incorporated and expanded the foundational principles themselves, e.g. through the doctrine of "abuse of right," within the codes, especially the Civil Codes and the Codes of Civil Procedure, so that now not only is their legitimacy beyond question, but also the reconciliation between the spirit and the letter of the law has become mandatory.

It is these general principles that were at the heart of equity practice in England over the centuries, and were later exported to the four corners of the Anglo-American world. Indeed, there are striking parallels between the principles of Roman *aequitas* and those of English equity. To the preceding enumeration, the clearer protection in English Equity of reliance interests through the concept of estoppel and the crystallization of various maxims such the clean hands doctrine, the reciprocity notion articulated under the tenant of discussion of "he who seeks equity must do equity" and the like. For a fuller discussion of the operation of equitable principles in both systems, see Ralph A. Newman, *Equity in Comparative Law*, 17 INT'L & COMP. L.Q. 807, 807-48 (1968). See generally Ralph A. Newman, *Equity in the Law of the United States*, in *EQUITY IN THE WORLD'S LEGAL SYSTEMS* 82-109 (1973).
equitable maxims and to doctrines such as estoppel, unjust enrichment, clean hands, laches, non-contradiction, and prevalence of substance over form. Equity's *locus classicus* in international law is the celebrated separate opinion of Judge Manley Hudson in *Diversion of Water from the River Meuse*,\(^{34}\) where he referred to the hardly controversial principle of equality between the parties, and where he applied the equitable doctrine of clean hands (or 'he who seeks equity must do equity') to reject the Dutch claim.\(^{35}\) The task of the ICJ in *North Sea* on this issue, therefore, was to name, to defend and to apply any equitable principles or maxims relevant to delimitations. Quite appropriately, the ICJ in fact did consider the possibility of using of estoppel against Germany, but found that there was no factual support for it.\(^{36}\) The only other equitable principle that qualified and that the ICJ considered was "equality." The ICJ referred to the obvious notion that equal things should be treated equally, but at this level of generality this meant little more than that equal coasts should get equal shares of shelf. This begged the questions of what makes one coast equal to another, and of how this equality is to be implemented in drawing the lines. The ICJ gave a major clue by treating equidistance as appropriate for states with opposite coasts because basically it produces an "equal division of the particular area involved."\(^{37}\) What then made the results of equidistance unequal in adjacencies? Since equality cannot operate in a vacuum, it was then incumbent on the ICJ to identify those features of the coast (the source of the right) that were relevant to delimitation, and that distinguished opposite from adjacent coasts. This meant that a prior particularizing interpretation of the continental shelf right was needed. In other words, a second-level equitable operation had to be conducted.

That equitable principles by themselves offered no help here should come as no surprise. Their typical function is to limit the excessive or inappropriate exercise of already existing rights, not to define and to delineate them in the first place.\(^{38}\) The basic irrelevance of free-range

\(^{34}\) *Diversion of Water from the Meuse* (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 76-78 (June 28).

\(^{35}\) The clean-hands principle surfaced later in decisions such as Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 393-394 (June 27) (Judge Schwebel dissenting). A similar kind of equity surfaces in international arbitration, where the *compromis* sometimes refers the conjunctive or disjunctive to "justice," "equity," "public law," "good faith," or even "international law" or the "law of the nations." For examples, see MIYOSHI, supra note 4, at 21-70.


\(^{37}\) *Id.* paras. 57, 79-80.

\(^{38}\) While "equity" in general is not recognized as a formal source of international law, and has been deliberately excluded from Article 38(1)(c) of the Statute of the International Court of Justice, we do encounter in the cases some references to the general
equitable principles in maritime delimitations has now been confirmed by UNCLOS. The formula that eventually found its way into Articles 74(1) and 83(1) speaks of delimitations:

on the basis of international law, as referred to in Article 38 of the

maxims of equitable nature. For an overview, see Mark W. Janis, *Equity in International Law*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 109 (1992). See also Rothpfeffer, *supra* note 4, at 82-87; Oscar Schachter, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 49-65 (1991); Michael Akehurst, *Equity and General Principles of Law*, 25 *INT'L & COMP. L.Q.* 801, 808-825 (1976); Mark W. Janis, *The Ambiguity of Equity in International Law*, 9 *BROOK. J. INT'L L.* 7, 8-13 (1983); and Lapidoth, *supra* note 4, *passim*. For an admiring view, see Louis B. Sohn, *The Role of Equity in the Jurisprudence of the International Court of Justice*, in *MELANGES GEORGES PERRIN* 303-312 (B. Dutoit & E. Grisel eds., 1984). Whether such maxims have already become part of customary international law or keep finding their way into international law through the gate of the general principles recognized by the nations of the world is an interesting theoretical question with little practical consequence here. Another such question is whether these maxims trace their roots to the venerable common law (and Roman law) tradition of equity. While this ancestry is historically more than obvious, it is technically correct to say that the search for them is not confined to such tradition. See Rossi, *supra* note 4, at 121-124.

Sections 102 and 903 of the recent *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987) contain some typically ambiguous language on these theoretical issues. Section 102, Sources of International Law, Comment (m) reads as follows:

*Equity as a general principle.* Reference to principles of equity, in the sense of what is fair and just, is common to major legal systems, and equity has been accepted as a principle of international law in several contexts [giving, however, only the example of maritime delimitations]. That principle is not to be confused with references to "equity"... in traditional Anglo-American jurisprudence... .


Reporters’ Note 9 to 102 recognizes, however, that: "The principle of equity is frequently invoked in discourse between states but there are few references to equity as a legal principle in international judicial decisions" [citing only the Fisheries Jurisdiction Case of 1974 and the maritime delimitations]." In addition, in Reporters’ Note 9 to 903, it is stated that a decision *ex aequo et bono:* should be distinguished from application by the Court of the basic principles of equity that are part of customary international law... . In two cases related to maritime boundaries [Tunisia-Libya and Libya-Malta], the Court was authorized by the parties to apply, and did apply, equitable principles.

This language raises more questions than it answers. Is there one principle of equity or many principles of equity? Beyond the "fair and just" truism, are there any special characteristics of equity as to content and function? Indeed, is there any difference between legal and equitable principles? Is party agreement required for the application of equitable principles? Be that as it may, there is little doubt that certain general maxims, whether labeled "legal" or "equitable," do apply in international adjudication. What is important here is to get an understanding of the nature and scope of these principles or maxims and of their function within international law.
International ICJ of Justice, in order to achieve an equitable solution.

Thus, the high winds\(^9\) of equitable principles, that risked mistaking "obscurity for profundity,"\(^{40}\) blew away.

(c) What Relevant Circumstances and Reasonable Results?

Perhaps the next considerations, relevant circumstances and reasonable results, can help particularize our interpretation by identifying those particular features of the coasts that matter so that equality has something to measure and to calculate.

Aristotle was the first major philosopher to propose and to explain how this type of particularizing equitable process works. The notion of equity (epeikeia) as an enemy or an antagonist of the law is alien to Aristotle. Equity is not better than the law, but only better law.\(^{41}\) Equity goes beyond the words of the statute only to make redress of its imperfection traceable to its generality,\(^{42}\) which is inevitable because it is virtually impossible to draft a text which will anticipate all potential sets of facts.\(^{43}\) Equity only puts the law on the intended track; it does not correct it.\(^{44}\) The exercise of discretion is perverted where it leads to deliberate departures from the law, and to the substitution of unmediated intuitions. The ideal statute should aim to cover everything, leaving as little discretion as possible to those who apply it.\(^{45}\) Thus, Aristotle views the judges not as creators of substantive law through equity, but only as procedural effectuators of pre-existing norms.

Aristotle falls back to his famous doctrine of teleological interpretation on the crucial question of how to make the transition from the generality and incompleteness of the law to the appropriate specific rule and to a reasonable result. The rule is but an instrument for the implementation of a purpose. Its spirit may be discovered by

\(^{39}\) St. Pierre & Miquelon, 31 I.L.M. at 1212, para. 36 (Weil, J., dissenting opinion).
\(^{40}\) Jan Mayen, 1993 I.C.J. at 139, (Shahabuddeen, J., separate opinion).
\(^{42}\) \textit{Id.} at 27.
\(^{44}\) Aristotle-Politics, supra note 43, at 12-13, 22, 26. \textit{See also} Aristotle-Rhetoric, supra note 43.
focusing "not on the statute but on the legislator; not on the words but on the mind of the legislator; not on the act but on the intention; not on the part but on the whole." This search for purpose and for context does not stop at the specific statute (equity of the statute), but extends to the legal system as a whole.

Aristotelian teleology opened the door beyond the letter of the rules to the overall requirement of crafting specific remedies in order to give the purpose of the law its fullest effectuation. This was at the heart of subsequent equitable practice. Aristotelian epieikeia and the Roman and Anglo-American practice point the way to the proper uses of equity within international law. No lesser authority than Hugo Grotius thought of equity in the same spirit.

The Vienna Convention uses a similar process in treaty interpretation. Article 31.1 provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

Article 31.2 defines context very narrowly to cover prior related language and action by the parties, and Article 31.3-4 gives weight to subsequent actions and expressed intentions of the parties as well as to

46. Aristotle-Ethics, supra note 41, at E. 1374b. 11-15.
47. The Roman classical aequitas codified into a jus honorarium the extraordinary remedies developed through the praetorian formulae. The rigidity and technicality of the jus civile, which recognized only one form of legis actio, was moderated by the judicial creation of additional remedies. These were either supplementary and more convenient, (specific performance and additional remedies to recover possession), or novel, (enforcing the possessory rights not only of an owner but also of a pledge-creditor), or even creative (recognizing the rights of legatees under an informal will as against the heirs in intestacy). See H.F. Jolowicz, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 98 (1952). See also Sir Henry Maine, ANCIENT LAW 618-22 (1931).
In all these instances, the extraordinary remedy was intended to give effect either to the purpose of the related rule or to reflect certain principles that permeated the entire legal system. In England, as concerns remedies, the rigidity of the writs and forms of action was moderated by the availability of a host of forms of relief, (specific performance, rescission, reformation, restitution, constructive trust, accounting) including orders which restrained the person, such as injunctions and mandates, rather than remedies that were enforceable only against property. See HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 3-45 (13th ed. 1985); and J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 83-100 (2d ed. 1979), for an overview regarding legal remedies.

48. The letter of the law must be adjusted to reflect its purpose when it becomes defective in application because of its generality:

For since all cases can neither be foreseen nor expressed, there is necessity for some liberty for excepting cases which he who has spoken would except if he were present. But this is not to be done rashly; (for that would be for the interpreter to determine the acts of another); but on sufficient indications.

HUGO GROTIIUS, DE JURE BELLI ET PACIS, BOOK TWO, ch. xvi, para. 26 (1901).
the relevant rules of international law (broader context). Other than plain meaning and context, this language at most imports good faith and teleology, but does not give free-wheeling authority to resort to some form of generic justice or equity.

In this spirit, before a feature of the coast can be characterized as relevant, and before a result can be qualified as reasonable, they must be connected to the source of the right, the coastal extension of territorial sovereignty. Likewise, the sole ultimate requirement in UNCLOS of an equitable solution suggests again that any particular rules should not be applied blindly ignoring or contradicting the basic concept and purpose of the related maritime rights.49

In delimitations, it bears repeating that we are dealing with a limited, geography-based, property-type right existing *ab initio* and *ipso facto*. The sole issue is appurtenance to a coast. Any form of distributive justice has no place here, and the invocation of some magical equity is hardly useful. Occasionally, we also see the exercise of some remedial discretion in determining the amount of damages or reasonable compensation for claims of loss or nationalization.50

(d) Equidistance Versus Natural Prolongation, Natural Resources and Coastal Length

The ICJ in *North Sea* identified three items which could have qualified as potentially relevant objective features of the coast, and therefore could be treated as relevant circumstances: 1) undersea continuation of the land mass (natural prolongation, especially geology and geomorphology); 2) the location of natural resources; and 3) length of the coastal front. In the abstract, all of these features could have been evaluated in equity as against the distance from the coastline criterion, which undergirds equidistance, in terms of the essence and purpose of the continental shelf right. In the concrete case factual matrix of *North Sea*, however, it was quite apparent that only the coastal length factor had to be weighed against equidistance. Indeed, the only concern of the ICJ was that under equidistance, Germany, a state with a sea frontage comparable in length to that of the two adjacent states,51 would get a much smaller and grossly

49. The term 'reasonable' result used in North Sea is more apt than 'equitable' solution as it suggests more clearly the instrumental function of testing the outcome against the purpose and nature of the right, rather than evaluating it under some external or subjective criteria. *But see* North Sea, 1969 I.C.J. 3, at 36 (Ammoun, J., separate opinion) (criticizing this resort to the morally neutral notion of 'reasonable').


51. Rossi, *supra* note 5, at 89, 91, 98.
disproportionate share because of its concavity. This is because simple distance automatically magnifies the slightest irregularity of the coastline in adjacent delimitations. The greater the irregularity and the greater the distance the more unreasonable the results. This exaggeration of the consequences of geography created distortions leading to inequity. Thus, the ICJ was persuaded that the surface-distance-proximity approach did not fully incarnate here the legitimate projections of the coast. It is these distortions that should be corrected by searching for a reasonable result, taking into account the relevant circumstances. The coast-length proportionality correction would have completely taken care of the ICJ’s concerns, and there was no need to refer to anything else. But the majority insisted on addressing all three considerations, and most of the North Sea opinion is in the nature of dicta, and confusing dicta at that.

First, the ICJ’s fixation on an undefined concept of natural prolongation created considerable ambiguity in an area where guidelines were needed. Furthermore, treating natural prolongation as a separate consideration outside the equitable formula, thus suggesting a two-track approach, added another burdensome layer to the process. Second, the reference to the unity of the deposits of the shelf to avoid prejudicial or wasteful exploitation of straddling resources as something to negotiate about, maked good practical sense. However, it was accompanied by an ambiguous statement suggesting that where

52. See for example, Thomas M. Frank & Dennis M. Sughrue, The International Role of Equity-as-Fairness, 81 GEO. L.J. 563, 576-580 (1993); Paul Reuter, Quelques reflections sur l’équité en droit international, 15 REV. BELGE DR. INT’L 165, 174-75 (1980), for the view that proportionality is the only legacy of North Sea.
54. Id. Germany had produced a chart showing that a 100-mile straight coast, which under equidistance normally would have received five times as much continental shelf as a parallel, equally straight coast of 20 miles to 200 miles, would lose close to 1/3 of it (about 6,000 square miles) if the latter coast had just a five mile protruding headland. North Sea Continental Shelf Cases (Ger. v. Den./Neth.) 1993 I.C.J. Pleadings 2, 29.
56. See id. paras. 39-43 (discussing the not always clear distinction between ‘adjacency’ and ‘proximity’).
57. Id. para. 90.
58. Some of the judges held even stronger and clearer views about this being the key corrective factor to equidistance. See id. para. 15 (Morelli, J., dissenting) (stating that a ‘remarkable disproportion’ between length of coastline and continental shelf share is of a ‘gravely inequitable nature’); id. para. 4 (Bustamante y Rivero, J., separate opinion) (wishing that proportionality be treated not just as a factor but as an obligatory principle, and he would have also counted as part of the shelf the seabed under the territorial sea). See id. at 92 (Nervo, J., separate opinion); see id. paras. 43, 51, 56 (Ammoun, J., separate opinion).
59. Id. para. 85.
60. Id. para. 97.
61. North Sea, 1969 I.C.J. 3, para. 97; see also id. paras. 94, 95, 101(a)-(d).
the areas appertaining to the parties where resources are located overlap, failing agreement, either such areas must be divided equally or they must be jointly explored, especially to preserve the unity of a deposit. Some judges disagreed, denying that the location of seabed resources has anything to do with the lines of demarcation; this is generally supported by state practice. Now the voluntary joint exploration of straddling deposits presents no problems. The alternative language about equal division, however, certainly cannot mean that when there are deposits anywhere in the overlapping areas, they should be divided in such a way as to attribute them in shares equal in size. If that were the case, a tiny island facing a large landmass would get up to half of the deposits and possible shelf, which is a reductio ad absurdum. The plausible way to read this contextually is to connect it to the ICJ’s commitment to natural prolongation. Where natural prolongations overlap and where resources are located within this overlap, they should be divided equally. Third, by understating the importance and the sufficiency of the coast-length proportionality adjustment, which would have taken care completely of its concerns in the case, the ICJ was led to overstate the shortcomings of equidistance and thus justify letting loose the genie of equity tout court. Fourth, the suggestion that there was no limit to the potentially relevant considerations in such a concrete field of law generated doubts on whether we were not turning to abstract and distributive justice after all, despite loud disclaimers, rather than applying the standard interpretive particularization that was really needed.

Backing out of the commitment to a futile search for natural prolongation was relatively easy and painless for the courts, and does not deserve much comment. However, finding the way out of the doctrinal imbroglio generated by the high-sounding but diverting

62. Id. paras. 99, 101 (c)(1-2), see also id. para. 101(d)(2) (identifying natural resources as a factor to be taken into account).

63. The location of natural resources is in principle irrelevant unless ‘decisive circumstances’ require otherwise. They are a ‘disturbing factor to the detriment of equity’. Id. para. 5 (Bustamante y Rivero, J., separate opinion). Submarine resources are irrelevant. Taking these resources into account in the drawing of boundaries would amount to an apportionment of the shelf, not its delimitation. Id. para. 53 (Ammoun, J., separate opinion). See also id. at 168 (Koretsky, J., dissenting opinion).

64. Barbara Kwiatkowska, Economic and Environmental Consideration in Maritime Boundary Delimitations, in IMB. 75, 106-07. (1993)[hereinafter Kwiatkowska].

65. See Bletcher, supra note 5, at 65. For examples of related state practice, see Kwiatkowska, supra note 64, at 86-96.

66. See Ammoun, J., separate opinion, North Sea, 169 I.C.J. 3, para. 51 and Koretzky, J., dissenting opinion, Id. para. 168. Cf. Gulf of Maine, 1984 I.C.J. 246, para. 195 and Munkman at 91. Only Jessup, J. argued expressly in favor of the general ‘principle’ of joint exploitation not only of resources extending across a boundary line but also of those lying in still undelimitated areas. Id. para. 82 (Jessup, J., separate opinion).
references to equity has proven extraordinarily difficult. Indeed, the best that has been accomplished even to the present day is not express disavowal but simple shrinkage of equitable discussion to the vanishing point. In the next sections, I will first give samples of the misbegotten equitable doctrine of the post-North Sea cases. Then I will show how the courts were generally successful over time and place in overcoming it. Finally, through the interpretive particularization of an already defined and strict regime of continental shelf and exclusive zone, I will convert the concepts into lines on the map. Equidistance reemerged as the dominant method in fact, if not in law, and all competing considerations other the length of the coastal fronts were rejected on short order. State practice by and large followed a similar path.

III. STRUGGLING WITH EQUITABLE DOCTRINE IN THE DELIMITATION CASES AFTER NORTH SEA

In the seven important cases following the North Sea adjudication, culminating with St. Pierre & Miquelon and Jan Mayen, the courts persisted in the unequivocal rejection of any intention to refashion geography, to share resources or to depart from the coastal front. At the same time, the pattern of ritualistically proclaiming the importance of equitable principles and of relevant circumstances, and of pursuing equitable results within the law, or any combination thereof, continued. The connection, however, between these doctrinal positions and the outcomes was anything but clear. Let us focus now on the equitable doctrine of these cases.

Eight years after North Sea, in the Anglo-French Arbitration, the ICJ, invoking relevant circumstances and equitable principles, repeated the proposition that "an equitable delimitation...cannot have as its object simply the awarding of an 'equitable' share... to each Party," thus at least suggesting that it was applying only equity within the law. The ICJ made certain statements that sounded too close to 'I know inequity when I see it,' without connecting them to the

68. Id. para. 78.
69. See also para. 245.
70. "[I]t is manifest from a mere glance at the map that... the Channel Islands region presents particular features and problems.... [Therefore] the equities in the region [must be balanced]." Id. paras. 180, 187.

For serious criticism of the equitable doctrine of the Court, see Brownlie, supra note 29, at 287:

[The equitable principles of the Court] amount to no more than a bundle of highly impressionistic ideas about the 'distorting effect', so-called, of islands. Employed in this way, 'equitable principles' became merely faint indication of the reasoning, or the unreasoned premises, on which judicial discretion can be excused....
eventual outcome. Later in *Tunisia-Libya*, the ICJ had been invited "to take account of equitable principles and the relevant circumstances which characterize the area, as well as the recent trends admitted at the Third Conference of the Law of the Sea."\textsuperscript{71} Under this *carte blanche*, the ICJ majority, consisting of seven of the thirteen judges, made some vague statements about the cardinal importance of equitable principles,\textsuperscript{72} and about the legal concept of equity being a direct emanation of the idea of justice, binding on the ICJ as a general principle directly applicable, but emptying it of content by disassociating it from the Roman-English tradition.\textsuperscript{73} The ICJ continued on this inconclusive track with the statement that, under equity, "a court may choose among several possible interpretations of law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice."\textsuperscript{74} But is this not the task of every court applying all law anyway? Furthermore, how can we give meaning to the requirements of justice and the circumstances of the case here except by reference to the preexisting context and the purpose of the law of maritime rights and delimitations? What do we add or gain by calling this process equitable? The ICJ ultimately purported to apply equitable principles seeking equitable results.\textsuperscript{75} But how do the principles relate to the results? Well, here is what has been aptly called by a noted publicist a startling conclusion\textsuperscript{76}:

The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution.\textsuperscript{77}

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\textsuperscript{71} Tunisia-Libya, 1982 I.C.J. 18, at 21. See, however, the cautious treatment of this broad mandate by the Court. \textit{Id.} para. 24.

\textsuperscript{72} \textit{Id.} para. 44.

\textsuperscript{73} \textit{Id.} para. 71.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.} para. 70.


\textsuperscript{77} Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahirya), 1982
Does all of this tell us how to find out whether a result is equitable? Can it be equitable if it does not derive from equitable principles? Conversely, is it possible for equitable principles to produce inequitable results? Well, the ICJ concluded later:

[I]t is clear that what is reasonable and equitable must depend on its particular circumstances. There can be no doubt that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances which characterize the area.78

The relevant considerations must be balanced up.79 Wait a minute! Are we not back at square one? How do we know through equity what circumstances are relevant and how much they weigh?80 Dissenting Judges Oda, Gros and Evensen questioned the meaningful applicability of such equity in the case. Judge Gros pointed out that North Sea provided not only a goal, "equitable delimitation...which intrinsically is merely to pose the problem without providing the solution," but also the rules and methods for reaching it,81 and criticized the ICJ for contenting itself "with some generalities on the equidistance method without giving the reasons why it would unquestionably 'lead to inequity.'"82 Indeed, "this lack of a systematic search for the equitable has produced a result the equity of which remains to be proved."83 Only the "presence in the area...of geographical features, the effect of which is disproportionate to their relevance" should be taken into account.84 Judge Evensen quoted Maitland to the effect that "equity came not to destroy the law but to fulfil it."85 In other words, you cannot use equity unless there is prior law: "equity principles cannot operate in a void...[In North Sea and the Anglo-French Arbitration] the

I.C.J. 18, para. 70.
78. Id. para. 72.
79. Id. para. 71.
80. In his separate opinion in Jan Mayen Judge Weeramantry tried to give an example of an equitable result: equidistance when there is a vast difference in the length of the coasts. para. 34. See also paras. 35-42. This should instead serve as a perfect example of why this kind of terminology and distinction is unhelpful. Both from the coast and length of the coast may be relevant considerations in the delimitation of the continental shelf, deriving from its very definition. To the extent that they produce different results and must be balanced up. What does this have to do with equitable principles not producing equitable results? The confusion inherent in the Weeramantry approach become more apparent in another of his passages, "The stress upon the need for an equitable solution and the rejection of any solution which, though reached in accordance with equity, is inequitable, is thus one which has philosophical support." Id. para. 109.
82. Id. para. 11.
83. Id.
84. Id. para. 13.
85. Id. para. 12 (Evensen, J., dissenting opinion).
equidistance principle was applied as a juridical starting point for the application of equity." 86 Judge Oda characterized the equitable references as amounting to a truism, to the "principle of non-principle," leading to a line not supported by any considerations. 87

*Gulf of Maine* comes next, involving the single boundary of the continental shelf and the fishery zone between Canada and the United States [hereinafter U.S.]. 88 The U.S. argued natural prolongation and historical fishing, distinguishing also between primary and secondary coasts. Canada proposed instead equitable equidistance, excluding certain U.S. coasts, acquiescence and economic repercussions. The Chamber basically rejected all of these contentions, 89 but could find nothing specific in international law effectuating the equitable criteria and methods. 90 For example, the principle that "delimitation must be effected by agreement or recourse to a third-party" produces no answers. 91 Well, then, where are we going to find some guidance? Perhaps in the prior cases and in the literature. But the Chamber was committed to the idea that "each specific case is, in the final analysis, different from all the others... it is monotypic." 92

At the same time, while there has been no systematic definition of the relevant equitable criteria, here are some examples: (a) the land dominates the sea; (b) equal division of the areas of overlap; (c) non-encroachment and no cut-off; (d) proportionality to the length of coast lines; (e) preservation of vital existing fishing patterns; (f) optimum conservation and management of living resources; and (g) lines which reduce the potential for future disputes. 93

One thing is immediately apparent. There is no connection between these criteria and what is known as equity. Their content is different from that of the traditional equitable principles, and their function is neither to override nor to remedy the unintended effects of a rigid rule. Indeed, they constitute mere attempted particularizations of the concepts of the maritime zones in question. Incidentally, the

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90. Id. paras. 81, 110-111.
91. Id. paras. 90, 112.
93. Id. paras. 110, 157. It is interesting to note that the Chamber treated equidistance not as a principle but only as a method implementing the first two of these principles. Id. paras. 159, 178.
Chamber recognized real equitable principles in the discussion of estoppel, acquiescence and *modus vivendi*. Judge Gros was quite eloquent in his doctrinal challenge to this equitable weathervane.

Coming to the equitable solution, the Chamber suggested that the method itself is not equitable, but solely instrumental. The examples of method included (a) median line, (b) lateral equidistance, (c) line perpendicular to the coast where the territories meet, (d) line perpendicular to the general direction of the coast, (e) boundary prolonging the existing division of territorial waters, and (f) boundary prolonging the direction of the final segment of the land boundary or of its overall direction. Thus, contrary to *Libya-Tunisia*, the equitable solution has no meaning of its own, but only effectuates the relevant criteria. The solution was also subjected to an ultimate test of not being radically inequitable, meaning "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned." We may again wonder whether anything was gained by using the equitable label. The Chamber then turned to the old chestnut of looking to the facts and circumstances of each case. This sounds fine, but what does it mean that "the equitableness [of a criterion] can only be assessed in relation to the circumstances of each case, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases?" It is all well and good if it refers to the obvious fact

94. *Id.* para. 152.
95. *Id.* para. 199. See generally *id.* paras. 159, 191.
96. *Id.* para. 159.
97. *Id.* para. 158. See generally *id.* para. 81.
99. *Id.* para. 158.
that the same criterion may produce different outcomes in different circumstances, and if the Chamber had in mind such truisms as, for example, that short coasts generate shorter shelves than longer coasts or that a criterion that deals with islands is irrelevant in an island-free delimitation. But we must raise an eyebrow if the idea is that the very same criterion, for example, proportionality or even more specific ones such as 'the land dominates the sea' is sometimes equitable and sometimes not. Such statements would not only be implausible but also circuitous and question-begging. Obviously, we would then need another set of standards to help us decide what makes a particular criterion equitable in a particular context. It is also disturbing that the Chamber, in the same spirit of doctrinal escape, emphasized that maritime delimitations are monotypical, which "preclude[s] the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law giving specific provisions for subjects like those just mentioned."101

In Guinea-Guinea/Bissau, two neighboring African states submitted to arbitration the delimitation of their three maritime zones by a single line. Natural prolongation,102 old treaties,103 economic factors and security104 were conceded or found irrelevant. The submission called for the application of international law, and it was agreed that the key objective was to find an equitable solution.105 How can this be achieved? This can be achieved by recourse to "factors and methods based on considerations of law."106 Which ones? The Tribunal merely emphasized that each case of delimitation is a unicum, and referred to the "characteristics peculiar to the region."107

In Libya-Malta, the standard was the "rules and principles of international law."108 Libya argued that this means equitable principles, relevant circumstances and equitable results which in this case led to natural prolongation and reasonable proportionality to coastlines.109 Malta countered with "international law in order to achieve an equitable solution," which in this case translated to equidistance.110

In terms of doctrine, this is a landmark case because the ICJ finally...
began the process of extrication from the morass of equitable theory. In the same breadth, however, in some memorable phrases, the ICJ transcended them and stressed the need both for predictability and for reasoned decision-making, thus rehabilitating the importance of recognizable principles of general application and raising doubts about the uniqueness of each case and the possibility of seeking equity through ad hoc results. The ICJ also rejected the notion that: "[T]here is no legal limit to the considerations [which may be taken into account]. . . . it is evident that only those that are pertinent to the institution of the continental shelf . . . will qualify for inclusion." Some of the other judges also strongly supported these views. Some judges even held the opinion that the majority did not go far enough. The decision was accompanied by voluminous separate and dissenting opinions and declarations. Finally, the ICJ made clear that these so-called maritime equitable principles are mostly negative, saying no more than do not mess with geography: do not refashion geography, do not compensate for the inequalities of (objective) nature, do not engage in distributive justice, and do not encroach on another's shelf. Furthermore, the equality of states does not mean equal shares of shelf, and neither natural prolongation nor economic factors count.

The impact of the redescription of the issues in Libya-Malta in

111. Id. paras. 26-29.
112. Id. para. 45.
113. Id. paras. 45-46, 76.
114. Id. para. 48.
115. "The judicial task is to make the law more determinable by objective criteria, and thus make more predictable to potential parties . . . . Facts and circumstances to be taken into consideration must be as objective an intelligible as possible." Id. para. 114 (Mosler, J., dissenting opinion.). Judge Oda suggested that referring to equitable principles, equitable results and relevant circumstances 'merely amounts to an uninformative rearrangement of the terms of the . . . question." Equity "at most . . . can be held to proscribe the frame of mind in which the negotiators should approach their task." Id. para. 33 (Oda, J., dissenting opinion). Marine Equity is not a means of pursuing world social justice. Id. para. 66. Judges Rouda, Bejaoui, and de Arechaga, had the following reflections in their separate opinions on the 'praetorian subjectivism" of the equity in maritime delimitations: '[The] "fundamental norm" . . . of the equitable result . . . is as uninformative as it is all embracing. . . . [E]quity. . . . though a highly respective legal concept is inequitably measured with a "human" yardstick . . . and remains mysterious." Id. para. 37. On the other hand, Judge Sette-Camara, in a separate opinion, was not uncomfortable with this "over conceptualization of the application of principles." Id. at 63.
116. Seventeen judges sat on the case. Six judges wrote or supported separate opinions, three judges filed dissenting opinions and there was one declaration. Thus, the main opinion reflected the views of the plurality of the Court.
117. Id. para. 46.
118. Id. para. 54.
119. Id. para. 25.
terms of the maritime rights themselves rather than in equitable verbiage has been felt in the two major subsequent cases of *St.Pierre-Miquelon* and *Jan Mayen*, where the majority opinions barely use the "E" word beyond a decorative function. In *St.Pierre & Miquelon*, the composite fundamental norm of equitable principles or criteria, relevant circumstances and equitable results was mentioned,¹²⁰ only to be soon forgotten, the ICJ making clear that "[g]eographical features are at the heart of the delimitation process,"¹²¹ and are proceeding to specific applications.

On the heels of *St.Pierre-Miquelon* came *Jan Mayen*, with a similar dilemma of a tiny island claiming a vast segment of the ocean as its shelf and fishery zone against a massive opposing mainland. The ICJ adopted a modified median line. Did equity provide any guidelines? We will look in vain in the majority opinion for any real equitable discussion. Indeed, the single reference that qualifies is a quote from *Libya-Malta* stating that only pertinent considerations count which, coupled with a promise to consult the practice of states and the cases, suggests that free-wheeling equity must be reigned in to avoid arbitrariness and to strengthen predictability.¹²² The basic approach of the ICJ was merely to add the equitable label to whatever factual factors were chosen on their own merits. Judge Schwebel articulated an even more jaundiced view of equity, and expressed concern that the ICJ used the equitable labels at will to divide certain fishing resources in a manner as supportable as any of its alternatives. The anti-equity language in his separate opinion is quite potent:

> [I]f what is equitable is as variable as the weather of the Hague, then this innovation [equal access to certain areas] may be seen as, and may be, as defensible and desirable as another... the obscure measure of adjustment of the median line between Libya and Malta appears to have had the benefit of inspiration, if divine, then from Roman gods... the authority to seek an equitable solution by the application of a law whose principles remain largely undefined affords the ICJ an exceptional measure of judicial discretion... the ICJ

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¹²¹ *Id.* para. 24. Judge Weil, in a dissenting opinion, criticized the Tribunal for adopting a position amounting to "I know an equitable result when I see it" which is contrary to the principles and corrective equity of *Libya-Malta*, *Anglo-French Arbitration* and *North Sea*. In his view, the Result her constituted an injustice committed in the name of equity. *Id.* paras. 29-30. His apparent substitute principle of drawing a line far enough to assure "a sufficient maritime territory" and not too close to "threaten sovereign interests" is, however, vulnerable to a similar charge.
¹²³ *Id.* at 120. See also Judge Oda's dissent, *id.* paras. 1, 90-100.
¹²⁴ *Id.* at 125.
¹²⁵ *Id.* at 128.
leavens its Judgment with a large infusion of equitable ferment... and so concocts a conclusion which does not lend itself to dissection or, for that matter, dissent.\(^{126}\)

On the other hand, in Judge Weeramantry's separate opinion in *Jan Mayen* we are exposed to the lengthiest yet most judicial elaboration of equitable doctrine. This constitutes a challenge that must be addressed.\(^{127}\) That opinion is mostly a learned treatise on equity in general, as well as in international law and in maritime delimitations, exploring in detail its historical and conceptual dimensions. The question that needs to be answered, however, is whether this doctrinal discussion had anything to do with the issues of the case. The approach of Judge Weeramantry was more or less the following. First, he cited the multiple equitable labels used by the ICJ in the past to embellish its particular choices.\(^{128}\) But there was no examination of whether the label affected the choice of what was relevant and where to draw the line.\(^{129}\) Second, he called equity the creative force which animates the life of international law, citing the concept of international mandates and trusts, good faith, *pacta sunt servanda*, *ius cogens*, *unjust enrichment*, *rebus sic standibus*, abuse of rights,\(^{130}\) prescription, reciprocity, equality in court,\(^{131}\) estoppel, fairness, reasonableness,\(^{132}\) use of one's property as not to harm others,\(^{133}\) as well as the *audi alteram partem* rule,\(^{134}\) and the notions that equity looks to the intent rather than to the form, and that a person must not act contrary to his own representation on the faith of which others have acted.\(^{135}\) However, do these lofty concepts give us any guidance on how to address the main controversies on the drawing of maritime boundaries? Third, he tried to distinguish maritime equity from absolute equity and *ex aequo et bono*, but only at the level of rhetoric.\(^{136}\) Particularly disturbing is his proposition that relevant circumstances means all conceivable factors unless a rule of law excludes them,\(^{137}\) rather than the other way around. Fourth, he

\(^{126}\) *Id.*

\(^{127}\) Judge Ajibola also separately engaged in an abstract dithyramb for equity. *Id.* at 280-314.

\(^{128}\) *Id.* paras. 60, 62-65, 68, 70, 75, 87, and 90-92.

\(^{129}\) *Id.* para. 5-10.

\(^{130}\) *Id.* paras. 16-17.

\(^{131}\) *Id.* para. 84.

\(^{132}\) *Id.* para. 110.

\(^{133}\) *Id.* para. 145.

\(^{134}\) *Id.* para. 25.

\(^{135}\) *Id.* para. 48.

\(^{136}\) *Id.* paras. 20, 52-64.

\(^{137}\) *Id.* para. 26. However we find a contrary statement in para. 150: "The decision whether a matter has relevance or not would naturally be dependent also on any applicable rules of law, for, the equity the Court is here using is not Equity not equity contra le-
repeated in many places that not only equitable principles but also equitable procedures and results are important. Fine, but which ones are relevant here, why, and how do they work? Fifth, he cautioned against viewing equity in the Roman and Anglo-American tradition as corrective of the insufficiencies and rigidities of the law, and viewed it rather as a general principle. But and if we detach it from this tradition, not only do we diminish its international function but we also empty it of content. While we cannot fail to admire Judge Weeramantry's erudition and concern, we must not forget the dangers to justice posed by indeterminate, subjective concepts and processes. These dangers are all the more real if they are combined with the notion of instinctive distributive justice under various guises, with which Judge Weeramantry flirted despite ambiguous disclaimers.

The crystallization over time of the elements of the maritime zones within their own frame of reference enables us to describe and to implement the rights directly and with greater precision, which will both encourage submissions to adjudication and facilitate the task of the judges. The factors named by Judge Weeramantry, such as proportionality to coast lengths, equidistance, security, population, economic need, prior conduct of states etc., are best dealt with on their own terms. The equitable icing adds little, if anything.

In conclusion, it took more than a quarter century of mostly wasted effort to realize that there was not much equity out there, and that the boundaries of the continental shelf should be delimited directly on the basis of internal criteria through a logical and teleological interpretive particularizing process. At most, equity provided an umbrella of

\[gum.\]

138. *Id.* paras. 43-51. *But see id.* paras. 133-135.

139. Examples:

- [The] additional juristic basis for checking a result for its equity or inequity comes from the "sense of injustice" which has an ancient history in the philosophy of jurisprudence (para. 41);
- [as] principles relating to an equitable sharing of resources become more urgently required, this route for the entry of equity will perhaps assume increasing importance in developing the law of the sea (para. 85);
- [a]lthough justice by its very nature is incapable of comprehensive formulation, injustice by its very nature is often a matter of instant detection (para. 105); equitable... sharing of resources... is playing an increasingly important international role, ( paras. 118-120); the relevant considerations cannot be limited to the purely geographic or 'geophysical' ( paras. 185, 210) and population or economic factors may be taken into account even if changeable ( paras. 150, 211-219).

140. *See, e.g. id.* para. 60 (equity not *ex aequo et bono*); *id.* para. 62 (we should not disregard the letter for the spirit of the law); para. 121 ("equity in the sense of distributive justice and redistribution of wealth in not involved in [this] case").
justification and a time lag for the courts to search for a consensus on the components of the maritime zones and on the factors which teleologically and practically were more consistent with the underlying maritime rights. This process explored the implications of geographical appurtenance without filtering them through some magical equitable potion. UNCLOS restored the primacy of positive international law, and preserved equity only in the exceptional form of a test of the ultimate solution, thus placing it in the Aristotelian teleological mold.

IV. THE CURRENT SCENE IN DELIMITATIONS - BACK TO THE FUTURE OF EQUIDISTANCE WITH OR AGAINST PROPORTIONALITY

Starting with a brief resume of the current status of what was rejected and what has been preserved, I will focus mainly on the specifics of how and where to adjust, the old monster equidistance, the white knight of equity, to the requirements of proportionality which have not yet been explored sufficiently in the literature. I will then consider how all of this affects the position of islands, and especially how it plays itself out in the Aegean.

A. Clearing Up the Debris: The Rejections

1. No to Factors Unrelated to Coastal Geography

In the spirit of equity within the law, the cases progressively limited the delimitation factors first to geography and then only to coastal geography. As aptly put by a leading commentator:

The black letter of the law, however, has not been swallowed up in the black hole of equity. The jurisprudence has winnowed and shed light upon the circumstances relevant to delimitation. The legal basis of title remains central to the idea of an equitable result. Geography retains - or rather, has regained - its primacy over all other factors. And natural boundary concepts have been laid to rest, probably for all time.141

A state without a coast has neither continental shelf nor exclusive economic zone. A coastal state standing alone and without a neighbor within 200 miles is entitled to the entire shelf and zone. All coasts count the same: there are no primary or secondary ones. States with equal coastal geography receive equal shares.

141. Leonard Legault & Blair Hankey, Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation, in INTERNATIONAL MARITIME BOUNDARIES, supra note 4, at 203, 206 [hereinafter Legault & Hankey].
This conception led to the unequivocal rejection of the following non-geographical considerations:

(a) Demographic, social or general economic factors, which, in any event, are ephemeral and changeable.\textsuperscript{142}

\textsuperscript{142} There was no reference to these factors in North Sea or the Anglo-French Arbitration. In Tunisia-Libya, variable economic factors such as poverty and need were rejected. Tunisia-Libya, 1982 I.C.J. 18, paras. 106-107. In Judge Oda's view, such issues as well as the size of the population involve "global resource policies, or basic problems of world politics which not only could not have been solved by the judicial organ of the world community, but stray well beyond equity as a norm of law into the realm of social organization". \textit{Id.} para. 157 (dissenting opinion). With the "catastrophic consequences" proviso (para. 237), Gulf of Maine also supports the proposition that economic, social etc. considerations are irrelevant. Gulf of Maine, 1984 I.J.J. 246, paras. 59, 157, 196, 234-238. In Libya-Malta, relevant circumstances did not include economic factors such as the absence of energy resources, developing requirements and fishing activity. Libya-Malta, 1985 I.C.J. 13, para. 50. To the same effect see Guinea/ Guinea-Bissau, 24 I.L.M. 267, paras. 122-123. In St. Pierre & Miquelon, the separate agreements on fisheries among the parties had taken care of the issue of access to them eliminating the issue of "catastrophic consequences" (Pierre & Miquelon, 31 I.L.M. 1145, paras. 85-87) and the economic dependence and needs were not otherwise to be taken into account. \textit{Id.} para. 83. Cf. Judge Weil (dissenting opinion): "It goes without saying that a maritime delimitation line cannot be dictated by the concern to apportion resources... In short, the boundary is where it is and the resources are where they are." \textit{Id.} para. 34. Particular socio-economic and cultural factors and the size of the populations were excluded from the relevant considerations in Jan Mayen. Jan Mayen, 1993 I.C.J. 38, para. 79-80.

On the other hand, Judge Weeramantry considered as "juristically untenable and not in conformity with the flexibility of equity... the general proposition that population of economy are irrelevant because... they may change with time". \textit{Id.} para. 211 (separate opinion). \textit{See also id.} paras. 212-219. For a similar view, \textit{see id.} para. 14 (Judge Fischer dissenting).

For a comprehensive and accurate review of these issues, see Derek W. Bowett, \textit{The Economic Factor in Maritime Delimitation Cases}, in \textit{ESSAYS IN HONOR OF ROBERT AGO}, \textit{supra} note 5, at 45. Kwiatkowska's doubts on this reflect her strong doctrinal preference for resorting to economic and social considerations \textit{de lege ferenda}. She delphically states:

\[\text{The inclusion of economic consideration into circumstances relevant to maritime delimitation (to an extent broader than the courts so far admit)}\ldots\text{is advocated in this chapter on the basis of the assumption that the courts' present restrictive approach may be subject to evolution toward the latter, more liberal, approach. Would that assumption prove incorrect, there still seems to exist an additional, unstated alternative. In particular, the possibility could not with certainty be excluded that, in spite of a formal rejection of the relevance of economic factors, the courts do and will continue to take such factors into account in the delimitation process. Such assumption would seem to be supported by the difference between the courts' role in making the law and the court's role in applying the law.}\]

Kwiatkowska, \textit{supra} note 5, at 106-107.

On the other hand, considerations of distributive justice rather than the delineation of the seaward projection of coasts are reflected in the UNCLOS regime of sharing certain resources within the exclusive economic zone and on the ocean floor. The Convention imposes significant "equitable access" obligations on coastal states for the benefit of certain
(b) Historical practice and usage, with the exception of the "catastrophic-repercussions-historical-dependence" proviso for fishing.

The emphasis on coastal geography further led to the equally clear rejection of the following non-coastal considerations:

(c) The size, shape or depth of the land territory behind the coast.

other states with respect to certain surplus living resources within their exclusive economic zone. See FRANCISCO ORREGO VICUNA, THE EXCLUSIVE ECONOMIC ZONE 49-69 (1989), for a detailed study of this access right. While such "sharing" obviously opens the door to considerable discretion, the use of the equitable label does not constitute an invitation for the decision makers to develop their own intuitions. The Convention takes a major step toward specificity by identifying the key economic and geographical criteria of distribution. Similarly and in a related field, the Convention on the Non-Navigational Uses of Watercourses (U.N. Doc. A/42/10 (1987)) seeks to regulate the distribution of a scarce resource, directing that international watercourse systems in state territories shall be used in an equitable and reasonable manner. The relevant criteria are then identified with specificity: geographic, hydrographic, climatic factors, social and economic needs, existing and potential uses, conservation, protection, development and economy, the availability of alternatives, etc. For a description of the scheme of the Convention, see Stephen C. McCaffrey, The Law of International Water Courses: Some Recent Developments and Unanswered Questions, 17 DENV. J. INT'L L. & POLY 505 (1989). It is debatable whether the equitable label used in these contexts is helpful. This sharing reflects adjustments in the exercise within a defined area of an indivisible joint, although not identical, right, while maritime delimitations draw the lines that separate divisible rights. While it might be argued that the equitable characterization is more apt where the legislative motivation is distributive of resources rather than merely definitional of geographic appurtenance, the reference to predetermined and identified, albeit broad, criteria suggests that we are again dealing with particularizing interpretations consistent with the logic and purpose of the related regimes and that a more direct approach is indicated.

143. Gulf of Maine, 1984 I.C.J. 246, para. 237. Cf. Jan Mayen, 1993 I.C.J. 38, paras. 73-78. For the comparable views of Oda, J., see para. 98 of his separate opinion. 144. There was no reference to these factors either in North Sea, or in the Anglo-French Arbitration. North Sea, 1969 I.C.J. 3; Anglo-French Arbitration, 16 I.L.M. 54. In Tunisia-Libya, the Court did examine historical factors but only in the context of past conduct of the parties on a theory of estoppel and gave some incidental weight to them. Tunisia-Libya, 1982 I.C.J. 18, paras. 81-102, 105, 116-21. In Gulf of Maine, the Chamber considered the historical development of the land boundary between the two countries as irrelevant. Gulf of Maine, 1984 I.C.J. 246, para. 42. In Guinea/Guinea-Bissau, the Tribunal made partial use of a treaty-based "southern limit" as the line in support of the conduct of the parties and its coincidence with the land boundary. Guinea/Guinea-Bissau, 24 I.L.M. 267, paras. 105-06. In Jan Mayen, the Court concluded that the conduct of the parties in other delimitations between them had not established a binding precedent. Jan Mayen, 1993 I.C.J. 38, paras. 82-86. It should be pointed out that we are discussing here only continental shelf and exclusive zone delimitations. The role of historic rights, however limited, in territorial and archipelagic waters is another matter.

145. There was no reference to these factors in North Sea or the Anglo-French
(d) Whether the coastal land territory is entirely surrounded by water (island), or whether it belongs to a landmass (mainland). This last topic will be explored in-depth in a subsequent section.

2. No to Physical Natural Prolongation

The second seminal determination was to abandon the idea of the physical natural prolongation for the continental shelf and, by extension, the exclusive economic zone. Thus, the characteristics of the ocean floor, such as geomorphology and geology, nature of the sea-bed and the subsoil, direction and angle of the slope, and the character of the water column, such as depth and content, have been treated as irrelevant. As a consequence, where distance counted, it was measured not on the seabed, but on the surface of the water. In the Anglo-French Arbitration, the ICJ downgraded the natural prolongation idea and put the emphasis on geography rather than on geology or geomorphology.146 In Tunisia-Libya, the parties, reading North Sea as basically a natural prolongation case, equated equity with prolongation which, however, they interpreted differently.147 The ICJ disagreed with this approach, sounding the death-knell for natural prolongation by treating it not as a physical fact but as a legal concept, as a label for all the other relevant considerations.148 This continued in Libya-Malta,149 and it is safe to assume that natural prolongation belongs to the past. A noted publicist has characterized natural prolongation as an "unfortunate device" and a "pure figment of the ICJ's imagination."150 The joint delimitation of continental shelf and exclusive economic zone, if not the absorption of the former by the latter in subsequent cases, and the measurement of the lines uniformly on the surface of the water have sealed the fate of natural prolongation.

Arbitration. In Guinea/Guinea-Bissau, the Tribunal rejected any test of proportionality to the respective landmasses. Id. at 118-120. In Libya-Malta, relevant geography did not include the size of the landmass behind the coast. Id. para. 49.


147. Tunisia-Libya, 1982 I.C.J. 18, para. 39. Judge de Arechaga criticized this approach, taking the position that "equitable principles have pride of place and apply from the start to the whole area subject to delimitation and not just to marginal or overlapping segments of that area." Id. paras. 13-17 (de Arechaga, J., separate opinion).

148. Anglo-French Arbitration, 16 I.L.M. 54, paras. 40-61, 66-68. See also the separate opinion of Judge de Arechaga, where the concept of the continental shelf is fully disassociated from any geological or geomorphological facts. Id. paras. 37-64 (de Arechaga, J., separate opinion).


B. The Preservations and Refinements

1. The Rehabilitation of Equidistance

Distance from the coast on the surface of the water has re-emerged as the dominant consideration, with equidistance as the primary implementing equality rule. \(^{151}\) A full review of all the cases will become quite repetitive, so only some highlights will be pointed out in the notes.\(^{152}\) In the text, it suffices to refer to the boost that equidistance received in the last case, Jan Mayen. The ICJ determined that the median line occupies an important place in the practice of states. In addition, the ICJ determined that, in opposite coast situations, it "produces, in most geographical circumstances, an equitable result." It began the delimitation with a provisional single median line as "entirely appropriate."\(^{153}\) It also warned against resorting to an open-ended list of special or relevant circumstances to undermine consistency and predictability,\(^{154}\) and examined the fishery zone in the same vein.\(^{155}\)

Confirmed by its overwhelming prevalence in state practice,\(^{156}\) equidistance reflects acceptance of the inherently equal and equitable nature of the median line, treated in fact and often in law as the appropriate line, especially the starting line, subject to some adjustment for proportionality of shares to coast lengths. While it is a natural for opposite coasts, it will not produce distorting effects in adjacencies either if the respective coastlines are streamlined in terms of relevance, direction, configuration and projection.

It is important to stress at this point that the verbal distinctions between high-level, primary (sole, obligatory, final) equidistance, and

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\(^{152}\) See Politakis, supra note 151, at 95.

\(^{153}\) Jan Mayen, supra note 2, paras. 49-53, 56, 64-65 (citing North Sea, supra note 3, paras. 57-58 and Libya-Malta, supra note 2, para. 82); see e.g., Politakis, supra note 151, at 16-17.

\(^{154}\) Jan Mayen, 1993 I.C.J. 38, paras. 57-58.

\(^{155}\) Id. paras. 47, 53, 71, 90. Oda, J., explained in detail his opposition to treating the fishing zone under the standards applicable to the exclusive zone. Id. paras. 6-23 (Oda, J., dissenting opinion).

\(^{156}\) See e.g., Charney, Progress, supra note 64, at 245; Legault & Hankey, supra note 141, at 221.
lowly, secondary equidistance (provisional, possible) have now lost most of their significance since the elimination of most of its competitors makes its dislocation virtually impossible. Furthermore, the theoretical discussions about its classification as a norm, a principle, a method, a consideration, a factor or even a technique are largely inconsequential. Under whatever name and form, when it stands alone its message is quite clear: other things being equal, the equality of the shares derives from the equality of the distances. The only significant reasons for deviation revolve around the disproportionality issue to which we will now turn.

2. The Intermediation of Proportionality to Avert Gross Disparities Between Zones and Lengths of Coastlines

In international law, the concept of proportionality as an aspect of equality has played a very limited role. Basically, it has been used only to implement the remedial notion that action taken to effectuate a right or power must not be excessive. Typical examples involve proportionality in the use of force and in the restriction of human rights.157

Its emergence as the principal instrument to contain the potential inequitable results of equidistance in making the final cuts of the pie of the continental shelf and the exclusive economic zone, reflects not so much the application of principle as the recognition that a substantive factor other than distance from a coast on the water, namely the length of such coast, should also be taken into consideration. In other words, it is not the commitment to proportionality but the recognition of the relevance of the coastal length that explains this development.

The concern about gross disproportionality of shelves to coastlines was there from the very beginning. In North Sea, its role was pivotal in underwriting the concavity argument.158 A reasonable degree of proportionality between shelves and lengths is a reasonable result dictated by equitable principles.159 Most of the judges who dissented or who wrote separate opinions were equally, if not more, concerned about this problem of disproportion.160

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157. See Higgins, supra note 17, at 230-236.
158. North Sea, 1969 I.C.J. 3, paras. 87, 91, 98. The exact language of the majority opinion at paragraph 91 deserves to be quoted: "What is unacceptable in this instance is that a State should enjoy continental shelf rights different from those of its neighbors merely [because of the convex or concave form of the coastline] although those coastlines are comparable in length."
159. Id. paras. 89, 90, and 98. See Legault & Hankey, supra note 141, at 217.
160. 1. Bustamante Y Rivero:
[T]he conclusion is inescapable that the State which has a longer coastline will have a more extensive shelf. The Judgment . . . men-
The need to avoid unreasonable disproportionality was instrumental in configuring the outcomes reached in the cases after North Sea. In the Anglo-French Arbitration, the ICJ stressed that "proportionality... is clearly inherent in the notion of a delimitation in accordance with equitable principles."\(^{161}\) While proportionality may not be relevant in all contexts,\(^{162}\) and is not an independent source of rights,\(^{163}\) the disproportionate effects of a considerable projection of an attenuated portion of the coast must be abated.\(^{164}\)

Both parties in Tunisia-Libya referred to a "reasonable degree of proportionality... between... shelf... and length of... coast."\(^{165}\) The ICJ added that it is "indeed required by the fundamental principle of ensuring an equitable delimitation between the states concerned,"\(^{166}\) and gave it certain weight in assessing the equitableness of the lines drawn on the basis of other criteria. Proportionality was also recognized in some of the other opinions. Concurring Judge de Arechaga accepted it in the form of a "test to be applied ex post facto... not a relevant circumstance or independent factor in itself."\(^{167}\) For Judge Oda, equidistance was equitable because it satisfied the requirement of proportionality.\(^{168}\) On the other hand, Judge Gros took the position that the ICJ went too far because proportionality is only the verifying factor, and not

\(^{161}\) Anglo-French Arbitration, 16 I.L.M. 54, paras. 98-99; see id. paras. 99, 250.
\(^{162}\) Id. para. 99.
\(^{163}\) Id. paras. 101, 250.
\(^{164}\) Id. para. 249.
\(^{165}\) Tunisia-Libya, 1982 I.C.J. 18, para. 37.
\(^{166}\) Id. para. 103.
\(^{167}\) Id. para. 117.
\(^{168}\) Id. para. 176.
even a method.\textsuperscript{169}

In Gulf of Maine, the Chamber employed as a principal method an equal-division geographical approach reflecting the same consideration as equidistance,\textsuperscript{170} but also made corrections in all sectors based on the auxiliary criterion of proportionality to the length of the respective coastlines.\textsuperscript{171} In the first segment, the Chamber sought to avoid the disproportionally distorting effect of certain rocks and low-tide elevations under equidistance, as well impractical zig-zaggings.\textsuperscript{172} In the central area, it took a look at the Gulf, and concluded that it was "obvious that the length of the coasts belonging to the United States...is considerably greater than that of the coasts belonging to Canada,"\textsuperscript{173} considered this difference notable, and gave it some weight as a special circumstance.\textsuperscript{174} Not to recognize this circumstance of undeniable importance would be a denial of the obvious.\textsuperscript{175} The Chamber then totally corrected the median line only in this short segment to reflect exactly the proportionality ratio in the entire area. The shift also had some indirect effect on the third segment,\textsuperscript{176} with significant impact on the division of Georges Bank, the apple of discord.

Nevertheless, the Chamber did not justify this last consequences as a proportionality adjustment, but only as a reflection of the general geography.\textsuperscript{177} The division of the overlapping areas in the triple-line-delimitation case of Guinea/Guinea-Bissau was complicated both by treaties,\textsuperscript{178} and by the determination of the Tribunal to place it within the context of past and future delimitations with the other neighboring states.\textsuperscript{179} Still, the Tribunal determined that the coasts of the parties were about the same length, and considered whether the line, constructed on other grounds, required adjustment for reason of proportionality to the length of the coastlines. The answer was in the negative since the division ended up equal.\textsuperscript{180}

A major portion of the opinion in \textit{Libya-Malta} is devoted to an elaborate discussion of the factor of proportionality, which arises from the equitable principle that nature must be respected.\textsuperscript{181} First, the ICJ

\begin{itemize}
\item \textsuperscript{169} Id. para. 17.
\item \textsuperscript{170} Gulf of Maine, 1984 I.C.J. 246, paras. 178, 188, 201, 210, 212.
\item \textsuperscript{171} Id. para. 185.
\item \textsuperscript{172} Id. paras. 202, 209, 213.
\item \textsuperscript{173} Id. para. 184.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id. para. 218.
\item \textsuperscript{176} Gulf of Maine, 1984 I.C.J. 246, paras.223-26.
\item \textsuperscript{177} Id. para. 226.
\item \textsuperscript{178} Guinea/Guinea-Bissau, 24 I.L.M. 267, para. 106.
\item \textsuperscript{179} Id. paras.108-09.
\item \textsuperscript{180} Id. para. 120.
\item \textsuperscript{181} Libya-Malta, 1985 I.C.J. 13, paras. 55-57.
\end{itemize}
rejected Libya's far-reaching and novel proposition that proportionality be used as independent criterion, thus leaving it in an auxiliary status.\textsuperscript{182} However, the ICJ suggested that where disproportion is very great, as here, proportionality may be employed not only at the end to test the result obtained on other grounds, but also in the initial stage of seeking the overall methodology.\textsuperscript{183} It is, however, significant that a good number of judges questioned the relevance of proportionality altogether, especially in this context.\textsuperscript{184} In \textit{St.Pierre & Miquelon}, the ICJ made positive reference to proportionality,\textsuperscript{185} but rejected the notion that the ratio of coastal lengths should itself be determinative of the respective areas,\textsuperscript{186} and sought its own solution in the form of concrete lines, apparently taking into account proportionality, but without quantified particularization.\textsuperscript{187} On the other hand, Judge Weil, in his dissenting opinion, attacked proportionality as providing a sham equity in situations where it might operate blindly and mechanistically on largely arbitrary data. At most, only a great disparity counts and only as one relevant circumstance and a \textit{a posteriori}.\textsuperscript{188} An important contribution of this case to the doctrine of proportionality is that it did not accept the Canadian contention that "particular segments of a coast may have an increased or diminished projection, depending on their length. The extent of the seaward projection will depend, in every case, on the geographical circumstances..."\textsuperscript{189} In other words, a mile of coast is a mile of coast, whether it is part of a long or a short coast, and whatever the ratio of the competing coasts.

Finally, \textit{Jan Mayen}, as the last word from the ICJ on the subject, deserves our careful attention:

\begin{itemize}
  \item \textsuperscript{182} \textit{Id.} para. 58 .
  \item \textsuperscript{183} \textit{Id.} paras. 66-67. See Judges Ruda, Bedjaoui and de Arechaga, who also stressed the great importance of proportionality. \textit{Id.} paras. 20-34.
  \item \textsuperscript{184} In his dissenting opinion, Judge Oda both disputed the use of proportionality in the initial stage and questioned its applicability in a situation of opposite coasts where no major distorting circumstances, for example, concavity were involved. In addition, he attacked the failure of the Court to particularize and explain the application. \textit{Id.} paras. 13-28 (Oda, J., dissenting opinion). In his dissenting opinion, Judge Valticos cautioned that the proportionality factor should not be used in opposite situations not involving any abnormalities. He also wondered whether it was possible to quantify it without relying on subjective judgments. \textit{Id.} paras.19-22 (Valticos, J., dissenting opinion). Judges Mosler and Schwebel were even more unequivocally against proportionality here, arguing that the difference in the length of the coasts was already reflected in the way they projected into this large area. \textit{Id.} at pp. 112, 173-75 (Mosler & Schwebel, J's., dissenting opinions).
  \item \textsuperscript{185} \textit{St. Pierre & Miquelon}, 31 I.L.M. 1145, para. 45.
  \item \textsuperscript{186} \textit{Id.} para. 63 (citing Libya-Malta, 1985 I.C.J. 13, paras. 58, 66).
  \item \textsuperscript{187} \textit{Id.} paras. 60-65 .
  \item \textsuperscript{188} \textit{Id.} paras. 20-23 (Weil, J., dissenting opinion).
  \item \textsuperscript{189} \textit{Id.} para. 45.
\end{itemize}
The law does not require a delimitation based upon an endeavor to share out an area of overlap on the basis of comparative figures for the length of the coastal fronts and the areas generated by them.\textsuperscript{190}

The ICJ also rejected the notion that proportionality requires a direct and mathematical application of ratios.\textsuperscript{191} But when the shares are "so disproportionate...it has been found necessary to take this circumstance into account in order to ensure an equitable solution."\textsuperscript{192} Indeed, the first and main Jan Mayen rule was that equidistance and proportionality appeared only as a moderating factor to test the results reached under other geographical methods. In view of the nine-to-one ratio of lengths, the median line was moved somewhat toward Jan Mayen.\textsuperscript{193} Some judges who were committed to the primacy of equidistance considered proportionality as too indeterminate and subjective to be of much help.\textsuperscript{194}

The ascendancy of proportionality as a corrective equitable factor of equidistance has been noticed and generally applauded by commentators,\textsuperscript{195} but not without some dissent, mostly resulting from its indeterminacy.\textsuperscript{196} The practical significance of the distinction between proportionality operating at the initial stage of delimitation, and proportionality being used only as a final test of a result reached under other methods is not as important as it sounds. This is so because only gross disproportion counts, and the adjustment will be similar regardless of stage.

3. How About the Location of Natural Resources, Non-Encroachment and No-Cut-Offs?

Before consecrating the marriage of equidistance with proportionality as monogamous and pursuing its practical applications, we should consider whether any other factors may still play some equitable role.

\textsuperscript{190} Jan Mayen, 1993 I.C.J. 38, para. 64. The primacy of equidistance both as leading to equitable results and as reflecting the practice of states is emphasized in paras. 64-65. \textit{Id.}

\textsuperscript{191} \textit{Id.} para. 69.

\textsuperscript{192} \textit{Id.} para. 65.

\textsuperscript{193} \textit{Id.} paras. 65-69. Some writers viewed the minor movement as downgrading 'to the vanishing point' the 'tyranny of coastal ratios.' See, e.g., Politakis, \textit{supra} note 153, at 1.

\textsuperscript{194} \textit{See} id. at pp. 3-11 (Schwebel, J., separate opinion).

\textsuperscript{195} \textit{See} e.g. Legault & Hankey, \textit{supra} note 141, at 217-221; Charney, \textit{Progress}, \textit{supra} note 6, at 241-243. \textit{See also} O'CONNELL, \textit{supra} note 5, at 724.

\textsuperscript{196} \textit{See} HIGGINS, \textit{supra} note 17, at 230 and 236
(a) Natural Resources

The entire logic and system of the maritime zones, based on territorial appurtenance and coastal geography and excluding distributive justice and other economic factors, suggest that the resources fall where they may. What about the situation, however, where the geographic boundary line is to be adjusted in response to a non-precise localizing criterion, such as proportionality to the length of the coastlines? Since the decisionmaker enjoys a degree of flexibility in deciding where to cut,\textsuperscript{197} may the location of resources be given some weight? In what way?

As explained previously, the technical preservation of the unity of resources proposed in North Sea through joint exploration or other means of avoiding waste makes good sense where they straddle the natural boundary. With the now extinct factor of natural prolongation which undergirded it,\textsuperscript{198} at most this factor may still have some analogical applicability only in situations where the ICJ, under the current theories of identifying an overlap, (i.e. proportionality or avoidance of catastrophic repercussions), has some flexibility to adjust the line drawn within the fringe area. In the post-North Sea cases, there were some references to this factor. But the ICJ only explicitly took this factor into account in the last case, Jan Mayen,\textsuperscript{199} where it relied on proportionality to divide a certain area on Jan Mayen's side of the equidistance line. Within that area, the ICJ divided Zones 2 and 3 two-to-one. But the ICJ split the comparatively smaller Zone 1, which contained most of high stakes of the dispute, the capelin, on the basis of a median line to provide Greenland equitable access to that resource.\textsuperscript{200} Some judges severely criticized this for its obscurity and apparent arbitrariness. Judge Oda wondered whether we compare the interests of all Danish versus all Norwegian fishermen. Why limit this...

\textsuperscript{197} See Jan Mayen, 1993 I.C.J. 38, para. 90.
\textsuperscript{198} See supra text accompanying notes 62 et seq.
\textsuperscript{199} See Malcom Evans, Less Than an Ocean Apart: The St. Pierre and Miquelon and Jan Mayen Islands and the Delimitation of Maritime Zones, INT'L & COMP. L.J. 678, 692-693, [hereinafter Evans]. In Tunisia-Libya, the Court left open the possibility that the location of existing oil wells may be an element to be taken into account to achieve an equitable result. Id. para. 107. This, however, can be explained in terms of the prior action and conduct of the parties. In Gulf of Maine, the case where the fishing grounds of Georges Bank were clearly at the heart of the dispute, the Court excluded such location as a relevant factor of delimitation. Id. para. 232. See also para. 237. Cf. Gros, J. dissenting opinion, para. 48. The way that it adjusted the line for proportionality, especially its outer-zone projection, however, may be interpreted as sensitive to its impact on resources. In Libya-Malta, we find a vague dictum to the effect that natural resources in the shelf might constitute a relevant circumstance to be reasonably considered. Id. para. 50, citing North Sea, 1969 I.C.J. 3, para.101 (D2).
\textsuperscript{200} Jan Mayen, 1993 I.C.J. 38, paras. 91-92.
consideration only to a small part of the area? Why equal division? Judge Schwebel was stunned by this apparent intrusion of distributive justice, and was quite sarcastic in his opposition:

While the ICJ may be commended for the simplicity of its conclusion, a principled consistency with its earlier case-law is less conspicuous. ...[I]n this, the most critical holding of the Judgment on the real assets at stake, the ICJ jettisons what its case-law, and the accepted customary law of the question, have provided [cites and quotes from past cases].

It is in this context that Judge Schwebel made reference to the equitable being as predictable as the weather in the Hague! Judge Fischer was also critical of the introduction of this new type of median line, arguing in the other direction that economic considerations supported an even larger share for Greenland. A limited reading of this action in Jan Mayen would consider it as a variant of the catastrophic repercussions theme of radical inequity relating to fisheries as articulated first in Gulf of Maine. A more plausible and geographical interpretation would focus on the fact that these resources were on the fringes of the equidistance-cum-proportionality line, and were divided on the theory that, in that narrow range, when in doubt, cut in half.

All of this boils down to the conclusion that in principle the location of natural resources in the shelf or economic zone is irrelevant to their delimitation, subject to the catastrophic repercussions proviso. When, however, resources happen to be located on or about the equidistance-cum-proportionality line, there is some judicial discretion to adjust the line to reflect the internal considerations of delimitation overall. This, of course, excludes either equal shares, as such, or shares out of a hat. In case of doubt, however, an equal split would not be inappropriate.

201. Id. paras. 92-95.
202. Id. at 118. (Schwebel, J, separate opinion).
203. Id. paras. 15, 21 (Fischer, J., dissenting opinion)
204. Gulf of Maine, 1984 I.C.J. 246, para. 75. See e.g., Jan Mayen, supra note 2; KWIAKTOWSKA, Jennings, supra note 45, at 105-06. Professor Charney criticized the Court for the reference to population which may be misunderstood to revive the socio-economic factors. Jonathan I. Charney, Panel, The Law of the Sea: Recent Delimitation Cases, AM. SOC. INT'L L. PROC. 1, 13, 17 (1993). See also Charney, Progress, supra note 4, at 237-39. Such factors had been specifically repudiated by the Court. Gulf of Maine, supra note 2, paras. 79-80
(b) Non-Encroachment and No-Cut-Offs (Security?)

Our first observation must point out the question-begging, if not tautological, nature of both these considerations, casually mentioned in some of the cases. Indeed, non-encroachment appears merely to state a legal conclusion, that one should not cross into areas that already belong to another. It does not address the question of what belongs to whom. It was used for the first time in North Sea in exactly that sense: thou shall not intrude into another's prolongation, with nature providing the boundary. The demise of natural prolongation has taken the wind out of the sails of this derivative idea of non-encroachment. It has persisted, however, in the form of the related but not identical notion of no-cut-off. Unlike non-encroachment, which is aimed at intrusion into one's own, the no-cut-off idea reflects a connection concept: it is intended to prevent interference with access. It stands to reason that such a concept argues primarily for the unity of allocated shares, and, where proportionality adjustments are being made, the technique e.g. of 'equiratio', gives it maximum effect. The references to no-cut-off suggest also two other possible but problematical uses.

First, we do find language in some cases to the effect that the boundary should not be drawn too close to the shores of a state. But this begs the question since, by definition, assuming that equidistance or a similar geometrical method has been used, the same line is equally close to the shores of the other state. Indeed, St. Pierre & Miquelon recognized that a cut-off is the typical and unavoidable consequence of drawing lines between competing seaward projections. If only certain projections, for example frontal or primary projectors versus radial or secondary projectors, are preferred as a matter of law will this cut-off notion assume a meaning of its own. But these distinctions have been decisively rejected. A related but much narrower idea would give

206. See Bernard H. Oxman, Political, Strategic and Historical Consideration, in IMB 3, 22-30 (1993), for the state practice of occasional mutually-beneficial readjustment of the boundaries to that effect.

207. See infra notes 269-272 and accompanying text.


priority, in proportionality adjustments, to a port over a rocky promontory.\textsuperscript{211} Perhaps this no-cut-off notion is not merely a geographical construct, and a quite problematic one at that, but is connected to considerations of national security. This is suggested in \textit{Libya-Malta},\textsuperscript{212} \textit{Guinea/Guinea-Bissau},\textsuperscript{213} and \textit{Jan Mayen},\textsuperscript{214} where the emphasis was given to lines being drawn far enough off the coasts of the parties. However, here again it is quite likely that the security needs of one state are reciprocated by those of the other so that the end result is again the median line. Furthermore, the extension of the territorial sea up to twelve miles and the perfection of the modern means of detection as well as of warfare make the security argument rather obsolete.

Second, no-cut-off may be deemed to refer to access to the high seas from the zones of each of the competing states.\textsuperscript{215} The problem with this possible interpretation is not only that it may be inconsistent with both equidistance and proportionality, but depending on geography that makes little sense in terms of the nature of the maritime rights at issue. Indeed, neither the continental shelf nor the exclusive economic zone rights allow the state to interfere with navigation and passage of any kind, so that access to other areas is assured no matter where these delimitation lines are drawn.

\textbf{(c) Conclusion}

While there have been some incidental references in cases and in literature to the location of natural resources, to non-encroachment and to no-cut-offs, these factors have not been given much weight. Indeed they have never operated by themselves. It is only where an adjustment of the line is to be made for other reasons that they may derivatively play a tangential role. At most, within the realm of making

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{211} See, e.g., Anglo-French Arbitration, 16 I.L.M. 54, para. 244; Tunisia-Libya, 1982 I.C.J. 18, para. 75 (de Arechaga, J., separate opinion). \textit{See also} St. Pierre & Miquelon, 31 I.L.M. 1145, para. 29 (Weil, J., dissenting opinion). In Libya-Malta, Judges Ruda, Bedjaoui and de Arechaga, expressed the view that in situations affected by the coastal projections of third states, the projection of the two delimiting states should not be radial, in the shape of a trapezium, but frontal, in order to avoid cut-offs. \textit{Libya-Malta}, 1985 I.C.J. 13, paras. 2, 4-15. (Ruda, J., Bedjaoui J., and de Arechaga, J., separate opinions). This limited practical suggestion does not detract from the force of the basic principle of equal treatment of all coasts and projections.
\item \textsuperscript{212} \textit{Libya-Malta}, 1985 I.C.J. 13, para. 51.
\item \textsuperscript{213} \textit{Guinea/Guinea-Bissau}, 24 I.L.M. 267, para. 124.
\item \textsuperscript{214} \textit{Jan Mayen}, 1993 I.C.J. 38, para. 81.
\item \textsuperscript{215} Indeed, the objective of preventing cut-offs supports the position that, even where the size of the zones of each party is quite different, each zone should touch the median line. For example, in North Sea, Germany wanted its slice extended all the way to the point where it met the median line with the opposite states of England and Norway. \textit{North Sea}, 1969 I.C.J. 3, para. 15. In the final negotiation, this claim was honored.
\end{enumerate}
\end{footnotesize}
proportionality adjustments, a court may exercise some remedial discretion to adjust the line drawn in a manner that preserves and allocates straddling resources according to the internal shelf-zone criteria; and that prefers the geographical unity of shares and frontal projections and links with the median line or with the open seas or with significant localities, which should satisfy any external legitimate security considerations.

C. Synthesizing Equidistance with Coast-Length Proportionality

Once equidistance is placed on the surgical table to make cuts are to harmonize it equitably with coastal lengths and to take in any tangential considerations, the considerations of how much and where to slice require both quantification and some organizing principles. A major problem in synthesizing the two methods is that either by itself can, by and large, produce a total delimitation, so that some type of balancing and prioritizing between them becomes necessary. Another problem relates to the different quality of these two methods. Equidistance as a geometric method is rather concrete. The discretion in selecting basepoints and drawing baselines is manageable. On the other hand, the operation of proportionality is less reducible to sizes and lines. In *St. Pierre & Miquelon*, Judge Weil spoke eloquently of "the uncertainties and dangers of the proportionality test in its quantified form." Is the length of the coasts to be measured following the slightest sinuosities and the deepest indentations, or is it to be measured according to more or less arbitrary general directions? What are the contours of the relevant area? These operations have "this in common with love or Spanish inns: each finds in them what he brings to them." The courts have been meandering through various techniques, raising concerns that the lines are being drawn impressionistically, if not randomly. For example, in the relatively straightforward opposite-coasts *Libya-Malta* case, which ended up in a moderate adjustment of the median line, the majority appeared to be jumping to its conclusions, no fewer than nine judges filed separate or dissenting opinions or declarations. In another simple geographical situation, *Jan Mayen*, ten of the fifteen judges on the ICJ filed separate or dissenting opinions or declarations!

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216. See Legault & Hankey, *supra* note 141, at 206.
1. Determining Relative Importance and Weights

(a) Priority of Equidistance

The first thing that stands out is that reasonable proportionality to coast length is not equal in rank to equidistance. No case used it as the sole, the initial or even the provisional method. In no case was the outcome due primarily to it. It appears in no treaty or comparable text. Its principal function has been to test the result obtained through some other method or at most to qualify the application of such other method. Furthermore, the negative emphasis on disproportion, rather than on proportionality, as such, and the requirement of some magnitude, if not grossness, together with the qualification of reasonableness, suggest that this factor is of the safety-valve type, intended to moderate only serious offenses to the equality principle.

(b) Opposite v. Adjacent Coasts

A second distinction is that proportionality fades in opposite, versus adjacent, coast delimitations. This differentiation is obvious when we compare how proportionality was used in *Libya-Malta* and *Jan Mayen* with its role in the mixed contexts of *Tunisia-Libya*, *Gulf of Maine* and *St.Pierre & Miquelon*.

(c) Third-State Claims and External Projections

Where the delimitation does not cover the entire area within the

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218. *To take into account the extent of the respective coasts... is... mainly... a means of checking whether a provisional delimitation established initially on the basis of other criteria... satisfactory...*[Gulf of Maine, 1984 I.C.J. 246, para. 185]*.

219. *See e.g., North Sea, 1969 I.C.J. 3, paras. 57-58; Anglo-French Arbitration, 16 I.L.M. 54, paras. 99, 182; Gulf of Maine, 1984 I.C.J. 246, para. 197. In its first case dealing exclusively with opposite coasts, the International Court of Justice reiterated this primacy of the median line and commenced the delimitation on this basis before making any adjustments. Libya-Malta, 1985 I.C.J. 13, para. 62. The dissenting judges would have made no adjustments for proportionality, unless there was abnormal configuration of the relevant coasts, *id*. para. 19 (Valticos, J., dissenting opinion); criticizing the 'unspecified impressions of equitableness,' *id*. para. 120 (Mosler, J., dissenting opinion); emphasizing that 'it is doubtful whether the test of proportionality has any place in the delimitation between purely opposite states,' *id*. para. 184 (Schwebel, J., dissenting opinion). *See also Bowett, supra* note 6, at 164*.*
200-mile radius, due to the potential claims of third states in the region, such Italy in Libya-Malta, the ratio of coast to zones may arguably be beyond reasonable calculability. In addition, where some coasts also project outside or beyond the delimitation area, it may become necessary to determine how much they are already being used up or partially satisfied. There are some hints in some separate opinions in Jan Mayen that the more the coasts are satisfied elsewhere, the lesser the necessity is of adjusting for disproportionality.

(d) Determining and Quantifying Gross Disproportion and Making Corrections

Starting with opposite-coast situations in chronological order, the result in the Anglo-French Arbitration is very difficult to quantify. The mainland coasts were comparable in length and dominated the delimitation, and over 90% of the total space would have been allocated the same way under either proportionality or equidistance. The Channel Islands would have more than doubled their allotted share under equidistance, but would probably have received less if proportionality were the only factor. Comparable figures come out of the Atlantic region. The ICJ endorsed a localizing approach in that proportionality "does not relate to the total partition of the area of shelf among the coastal States concerned, its role being rather that of a criterion to assess the distorting effect of particular geographical features," and made the related cuts in the areas of the shorter shores, those of the islands.

In the more recent opposite-coast cases, the grossness calculations and the sizes of the corrections are easier to decipher, and are more precise. In Libya-Malta, pure proportionality would have produced a Libyan share eight times larger than that of Malta, while under equidistance the shares would have been comparable in size. Thus, the grossness factor was about eight. The ICJ first shifted the median line to some extent in the direction of Malta, and then tested the outcome for reasonable proportionality, rejecting any predetermined arithmetical ratio and concluding that no further reduction was appropriate because, under "a broad assessment of the equitableness of the result," there was no evident disproportion.

While this entire

220. Libya-Malta, 1985 I.C.J. 13, para. 74. See also id. para. 15 (Judge Oda dissenting opinion).
221. See Jan Mayen, 1993 I.C.J. 38, para. 92 (Oda, J., separate opinion); id. at 142 (Shahabuddeen, J., separate opinion).
223. Id. para. 250.
224. Libya-Malta, 1985 I.C.J. 13, paras. 74-75. Judges Ruda, Bedjaoui and de Arechaga wanted the line to move up a bit further, in essence giving Malta a three-quarters
process was affected both by the proximity of the Northern littoral of the Mediterranean (Italy) and the intrusion of potential claims of third states, and while the ICJ's explanations about the dimension of the shift were not very revealing, Malta ended up with roughly three quarters of what it would have had in the delimitation area without this shift. The ratio of shares to coast lengths in the delimited area ended at roughly three to one, so that a disproportion of more than two to one was apparently found acceptable. In other words, equidistance was given more than twice the weight of proportionality.

In Jan Mayen, under equidistance the shares of the overlap would have been comparable whereas the coast-length ratios were slightly over nine to one. Such substantial disproportion called for some correction by moving the median line to ensure an equitable solution. Since the coast of Greenland received extra satisfaction elsewhere in the form of about two-thirds of one-quarter of the area outside the overlap, the grossness factor was roughly over seven, comparable to the one in Libya-Malta. On that basis, Denmark claimed the full 200 miles of the 254 miles between them. The ICJ rejected
that claim and divided the area on the Jan Mayen side of the median line, treated as disputed, apparently for proportionality, first one to two. Another small segment was then added to the Greenland part in zone one to equalize access to the fishing resources. Thus, a total disproportion of the magnitude of at least three to one was tolerated. In terms of this difference in results, it is fair to conclude that equidistance weighed at least twice as much as proportionality.

Turning to the adjacencies or composite situations, in North Sea equidistance would have produced a German share one-third the size of the others, with the coastlines being comparable in length. The ICJ considered this split inequitable. Germany argued for a share larger by about 65%, still lagging considerably in total area. Following negotiations, Germany ended up with an even lesser share by roughly one third. In rounded figures, a grossness factor of close to two prevailed. The other cases were factually more complex, and the division of the delimitation area into sectors enabled the courts both to differentiate between opposite and adjacent areas, and to locate the corrections in distortion areas, even though typically the proportionality ex post test operated in a total fashion (i.e. to verify the equitableness of the entire shares allocated to the parties). This selective location approach also makes the incorporation of the tangential considerations related to division of natural resources and no cut-offs possible. In Tunisia-Libya, the dividing lines which awarded approximately 60% of the entire sea-bed to Tunisia and 40% to Libya were found to satisfy the proportionality test where the coast lengths stood in the approximate ratios of 69:31 along the actual coastlines, and 66:34 across the coastal fronts. The only correction to the median line that was not related to historical or to past-conduct reasons occurred in the opposite-coast segment, by giving the Kerkennah Islands half effect. Without it, the Tunisian share would have increased by less than 10%. The Tunisian island of Jerba, located closer to the coast and ignored in drawing the baselines, was treated as if it were a promontory attached to the coast and was given comparable effect under proportionality. In these circumstances, it is virtually impossible to quantify a grossness factor. If, as is apparently the case, the ICJ was thinking only of the lengths of the opposite-coast segments, the correction is consistent with the magnitudes tolerated in the other cases.

In Gulf of Maine, the Chamber had started using in all three segments a process which basically drew median lines. Only in one

segment did it engage in an empirical, common-sense kind of proportionality adjustment exactly in the total coastal ratio of 1:1.32. A look at the map shows that the effect of the correction was felt mostly in the outer region and that, in total terms, it added less than 10% to the total United States share. The Chamber did not consider what the total share ratios would have been before and after the correction. Guinea/Guinea-Bissau ended up with equal shares for equal lengths under a special kind of median line, so there was no disproportion to be accounted for. In St. Pierre & Miquelon, the relevant coasts stood in the ratio of over 15:1, and, under a rough equidistance, the grossness factor came close to four. In one of the two sectors, a reasonable and equitable zone for the islands met "to some degree the reasonable expectations of France." It extended to the end of the contiguous zone (24 miles) up to the median line, and operated close to equidistance for about half the frontage. In the other sector, where the narrow coast of the islands faced the open sea, a 188-mile frontal projection of the islands beyond the territorial sea was recognized in parallel with Newfoundland. The radial projections of both were prevented in order to avoid a cut-off effect. In the remaining small segment of the easterly projection of St. Pierre, the line was fixed at 12 miles without explanation or discussion. The ICJ finally examined the lines under both the catastrophic-repercussions-radical-inequity and the coast-length-disproportionality tests, and found them satisfactory. The ratio of the shares came to about 16.4:1, thus certainly showing no disproportion to the 15.3:1 coastal length ratio. In total figures, the islands received about one quarter of their shares under equidistance. Thus, the ICJ relied principally on proportionality in drawing the lines. The ICJ hinted, however, that if only the opposite coasts counted, the correction would have been different.

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238. St. Pierre & Miquelon, 31 I.L.M. at 1162, para. 33. Judge Gotlieb, in a dissenting opinion, disagreed with the measurements, claiming a minimum 21.4:1 ratio. He complained that the Court did not use the same degree of generalization for the coasts of each party. Canada used 12 straight lines to reach 514.4 miles for its own coasts, for an average line of 42.9 miles, whereas the Court used three lines to measure the coast of the islands for an average line of 9.95 miles. Breaking up the Canadian coast the same way would have pushed up the Canadian figure. Id. paras. 8-17 (Gotlieb, J., dissenting opinion). It was generally agreed that measuring along all sinuosities was not proper. Id. para. 12.

239. Id. para. 69.

240. Id. paras. 70-71. Judge Weil, in a dissenting opinion, strongly opposed the distinction between frontal and radial projections. In his view, this strange concept has no support either in state practice or in the cases. The outer limits of maritime jurisdiction are commonly determined by the "arcs of circle method" on a given radius in all directions. Id. paras. 11-14.

241. Id. para. 71. Judge Weil wondered why an additional 12-miles zone was not recognized on the same basis as in the first sector. Id. para. 7 (Weil, J., dissenting opinion).

242. Id. paras. 72-73.
These quantifications of grossness and correction may appear somewhat brusque and simplistic, and may reflect more the outcome of the cases than the doctrine, but they have decent explanatory power. While any proposed figures may be challenged in a musical-chairs fashion, the real question is whether it makes better sense to affix some numbers on the slices of the pie and debate and defend them, than to rely on chance and intuition.

By way of conclusion, the cases by and large support the proposition that, given the priority and equitableness of equidistance, the disproportion is not gross and needs no correction unless the result between coasts and shares obtained under equidistance in the particular region or sector is in excess of twice the coastal ratios in that region or sector. All of the cases except St.Pierre & Miquelon can be cited for at least that number. The fact that the French mainland was too far to reinforce the claims of the islands may be part of the explanation in St.Pierre & Miquelon. In any event, the later case of Jan Mayen, with the ICJ behind it, gave substantially more weight to equidistance than to proportionality in a similar situation. An auxiliary proposition is that even where a correction must be made, it is limited in that it does not seek to bring the ratio down to the non-grossness level but only to moderate it. Another important point is that the sectorization practices adopted by the courts enable them, in a micro-geographic context, to localize a disproportionality at the initial stage, and to correct it only there within the above parameters, as was done, for example, in the Anglo-French Arbitration. Of course, this does not preempt the ultimate use of the proportionality test for the total picture. Finally, it would seem that the greater the distance between the competing coasts, and therefore the more room to spare, the heavier the weight of the proportionality factor.²⁴³ It should be remembered that the ICJ’s concern about equidistance in North Sea centered on the magnification of its effect in the outer regions. This is also reflected in the different standards for the territorial sea under UNCLOS.

²⁴³. For example, in Libya-Malta, the shift was facilitated by the great distance between the coasts. Libya-Malta, 1985 I.C.J. 13, para. 73. Judge Mbaye, in a separate opinion, took issue with this. Id. at 100-102. See also Schwebel, J., dissenting opinion, at 182. On the other hand Judge Valticos' separate opinion agreed with the majority. Id. para. 23.
2. The Mechanics of Adjusting Equidistance for Disproportionality and Other Factors

(a) Establishing and Streamlining the Relevant Maritime Fronts and Defining Their Projections

Recognizing the maritime front as the sole source of right is a crucial, but only a first step toward boundary demarcation. The relevant coast needs to be identified in terms of abutting on and facing toward the area to be delimited. While this process is highly outcome-determinative, in all cases except St. Pierre & Miquelon there had been no major consequential disagreement on which coasts counted.

Next, choices must be made as to how the fronts project onto the maritime spaces. Appurtenance calls for the allocation of the maritime zones to the states in front of whose territory they lie. The frontal projection of the coasts does not mean that they project only or preferentially in the direction perpendicular to the general direction of the maritime front. The basic rule is that every coastal front, regardless of its length and orientation, projects equally in all directions up to 200 miles. The U.S. argument in Gulf of Maine that primary coasts project more than secondary ones, or should be otherwise preferred, was rejected by the Chamber, and has not resurfaced. In St. Pierre & Miquelon, the ICJ was equally unreceptive of the notion that shorter coasts have diminished projections than longer ones under relative reach. But in making adjustments for other reasons such as proportionality, frontal projections may be preferred over radial ones in certain sectors, for example, on a 'cut off' rationale, as was done in that case.

(b) Pursuing the Details of Adjustment for Proportionality


Judge Weil's doubts in St. Pierre & Miquelon on the math of proportionality, which incidentally undermine its very validity, are eloquent, albeit exaggerated:

How is [the] length [of the coasts] to be measured: by allowing for the slightest sinuosity and calculating the perimeters of the deepest

indentations and the longest promontories, or by following a general direction that is more or less simplified and thus necessarily arbitrary? And how should the contours, and hence the size, of the relevant area be defined?  

However, without some such math we are chasing rainbows. Judge Weil identified the two key proportionality issues. One, how do we measure the coastal length? Two, what counts as a 'share' of the shelf? More particularly, does the share also include the sea-bed and the water column of the territorial sea and the internal waters?

Streamlining the coasts starts, if possible, with the establishment of their general direction, and then of various basepoints at key locations, joining them by drawing straight baselines, often divided into sectors. This is particularly evident in the drawing of the median line. The waters inside the baselines are treated as internal.

In North Sea, the ICJ assumed that "the length of [the] coast [will be] measured in the general direction of the coastline" for

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246. Id. para. 24. For his attack on 'the arithmetical equity of coastlines and areas' as 'blind and mechanistic proportionality' see id. para. 21.

247. See North Sea, 1969 I.C.J. 3, paras. 89, 91, 98; Anglo-French Arbitration, 16 I.L.M. 54, at 251; Tunisia-Libya, 1982 I.C.J. 18, paras. 76, 93, 120 and paras. 77-102 (Arechaga, J., separate opinion); Guinea/Guinea-Bissau, 24 I.L.M. 287, paras. 97-98 (giving the islands full effect in determining the crucial "coastal configuration and orientation"); Libya-Malta, 1985 I.C.J. 13, para. 70. See also Jan Mayen, 1993 I.C.J. 38, para. 61.

It should be pointed out that establishing the general direction of the coast does not necessarily mean that the dividing line must be parallel to it and even less to the abutting land frontier. In Gulf of Maine, the Chamber rejected perpendicularity to the direction of the coast where the two territories met or to the general direction of the coast, on the ground that they were useful in drawing the dividing line only where the territories of the two countries "lie successively along a more or less rectilinear coast, for a certain distance at least." Gulf of Maine, 1984 I.C.J. 246, paras. 175-76. However, it did draw perpendiculars in certain limited contexts.


Article 7 of UNCLOS provides for the discretionary deployment of straight baselines, from which the breadth of the territorial sea is measured, across the general direction of the coast, where the coastline is deeply indented or there is a fringe of islands in its immediate vicinity. The system, however, has been used more broadly. Most states of the world, with the significant exception of the United States of America, Japan and Greece, use basepoints to draw straight baselines, and typically also the breadth of the continental shelf and the exclusive zone are measured from the same baselines. See Jayewardene, supra note 6, at 43-79, for the use of straight baselines regarding islands.

249. As stated in North Sea, "[Where the median line is used], the establishment of one or more baselines... can play a useful part in eliminating or diminishing the distortions that might result [from coastal anomalies]." North Sea, 1969 I.C.J. 3, para. 98.
proportionality purposes. This suggests straightening in front of the sinuosities, but not necessarily with straight baselines. Tunisia-Libya is the first case where the inclusion of the other waters in the calculation of the size of the shares would have made a big difference, in this instance against Tunisia. Here we find in the opinions significant references to both of these issues. While conceding that the continental shelf, in the legal sense, does not include the sea-bed areas below territorial and internal waters, the ICJ noted that the coastal state does enjoy sovereign rights for the purpose of exploiting their natural resources. Since, for proportionality purposes, the lengths of the coasts were measured in full and not along straight baselines, it was also appropriate to include those additional areas in the shares. The only absolute requirement of equity is that one should compare like with like. The ICJ undercut the cogency of its approach, however, by emphasizing that this inclusion was not strictly required by international law but was legitimized by the 'relevant circumstances' in the case, including the fact that the parties here had not been calculating their own related waters in the same way and in similar configurations. The ICJ measured the length of the coastlines once along straight lines following the coast, but apparently technically not straight baselines and once apparently along the sinuosities, coming up with comparable results: 31:69 and 34:66. In the end, the ICJ compared these extended lengths with the extended shares and found them satisfactory.

In Gulf of Maine, the Chamber added up the total relevant coastlines of Canada and the United States as measured along the coastal fronts in straight lines in a number of segments, not following all their sinuosities. A major issue was how to measure the coasts of the Canadian Bay of Fundy, whose wide mouth fronted on the Gulf. The Chamber counted it as part of the Gulf up to the point where it narrowed, so that it contained only maritime areas lying no more than

250. Id. para. 101(D)3.
251. Id. para. 104. Judge de Arechaga agreed in a separate opinion, "[that not to include those areas] would be to commit the sin of formalism; to allow that form of inequity which the Romans called subtilitas, that is to say, an exaggerated adherence to the strict letter of the law when equity demands a broader approach for the purposes of comparison." (Valticos, J., separate opinion). Id. para. 120. On the other hand, Judge Evensen was quite critical, especially of the inclusion in the shares of the internal low-depth waters. Id. para. 23. Including the territorial waters in the calculation had originally been suggested by Judge Bustamante y Rivero. (Bustamante y Rivero, J., separate opinion) Id. para. 4.
252. Id. para. 103.
254. Id. para. 131.
255. Id. para. 221.
12 miles from the coast. Consequently, its coast up to that point, plus a line across the mouth of the Bay there, was included in the proportionality calculus. This inclusion had materially favorable consequences for Canada. The Bay added only 7% to the entire sea area but apparently increased the length of the Canadian coast by 93%. The straightening of the coastal fronts was adumbrated in Libya-Malta's perception that proportionality requires that "coasts which are broadly comparable ought not to be treated differently because of a technical quirk of a particular method of tracing the course of a boundary line." The coasts were measured in straight lines to produce the figures of 194 and 24 miles.

In St.Pierre & Miquelon, the ICJ measured the respective coasts "by segments, according to their lines of general direction," not following their sinuosities which would have favored Canada. Judge Gotlieb took the ICJ to task for relying on longer line segments for Canada and shorter ones for the islands, thus reducing the disparity in the ratios; and Judge Weil referred to the elusive and arbitrary ways of measuring lengths and shares to challenge proportionality altogether. With regard to the size of the shares awarded, the ICJ relied on experts who calculated the relevant area, which was allocated 16.4:1 to Canada. Finally, in Jan Mayen the measurement of the relatively straight and parallel coastlines did not present a problem.

While there is some ambiguity on how to calculate the lengths of lines, and especially the size of shares, for purposes of the

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257. [T]he fact that the two coasts opposite each other on the Bay of Fundy are both Canadian is not a reason to disregard the fact that the Bay is part of the Gulf of Maine, nor a reason to take only one of these coasts into account for the purpose of calculating the length of the Canadian coasts in the delimitation area. There is no justification for the idea that if a fairly substantial bay opening on to a broader gulf is to be regarded as part of it, its shores must not belong all to the same State. Id. para. 221.
258. Id. at 356 (Schwebel, J., separate opinion). Schwebel argued that the Chamber should have considered the fact that in the past Canada had claimed that the entire Bay contained 'internal waters.' Furthermore, the Chamber was accused of being inconsistent by not making the same fine distinction in calculating the length of the inner coast of the Massachusetts Bay. Gulf of Maine, 1984 I.C.J. 246, paras. 354-55.
259. Id. para. 56.
260. Id. para. 68.
261. Id. paras. 8-17 (Gotlieb, J., separate opinion).
262. Id. paras. 8-17 (Gotlieb, J., separate opinion).
263. Id. para. 24 (Weil, J., dissenting opinion).
264. Id. para. 93. Judge Gotlieb challenged in great detail the Court's position on what constituted the relevant area. Id. paras. 34-37 (Gotlieb, J., dissenting opinion).
265. Jan Mayen, 1993 I.C.J. 38, paras. 89-93
proportionality calculus, a couple of things stand out as sensible and grounded in the cases. First and foremost, there must be congruity between the criteria that determine lengths and those that define shares. If territorial and even internal sea areas are included in the shares, then the coast lines that generate them should also be included in the lengths, and vice-versa. On the merits, the explanation offered in *Tunisia-Libya*, the only case that dealt explicitly with issue, of why the territorial and internal waters may be included in the size of the shares is sketchy and unconvincing. The definition of the shelf and the exclusive zone could not be clearer: areas "beyond . . . the territorial sea."\(^{266}\) Internal waters are defined as those "on the landward side of the baseline of the territorial sea."\(^{267}\) By what logic are those spaces to be counted in determining the size of the shelf and zone shares? To be sure, the coastal state has exploitation rights in these sea-beds and water columns. But these rights not only arise from a different source, but they have different content: they are not shelf and exclusive zone rights, and they trigger the exercise of higher or full sovereignty. Furthermore, the sovereignty over these waters preceded by centuries the recognition of the new rights to extended maritime spaces. Thus, the titles differ in all important respects. The only community is factual: they all relate to areas under the surface of the water. This should not suffice to justify penalizing a state for the geography of its coasts. Second, the coastlines may be divided into sectors and/or be measured in segments, reflecting the directions of the front and reducing indentation, with localized straightening, to avoid disparities between the shares of territorial belts and the shelves. Indeed, we find here perhaps the kernel of an idea that could prove quite useful as a surrogate in taking account the length of the fronts. Assuming that we use the same standards and methods for establishing the territorial belts and for minimizing the internal waters, a reasonable test of proportionality should be that the median line has produced shelf and exclusive zone areas which are not grossly out of line with the total ratio of territorial belts. In any event, whatever approach is chosen should apply in a neutral fashion, equally and consistently to the coasts and shares of all parties.

(ii) Where to Draw the Lines: Symmetry?

*Jan Mayen* addressed the issue of symmetry in some detail. To explain why a small segment of the line was moved in a different manner than the others, the ICJ stated:

So far as the continental shelf is concerned, there is no requirement

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\(^{266}\) UNCLOS, arts. 55, 76.  
\(^{267}\) *Id.* art. 8.
that the line be shifted eastwards consistently throughout its length: if other considerations might point to another form of adjustment, to adopt it would be within the measure of discretion conferred on the ICJ by the need to arrive at an equitable result. For the fishery zones, equitable access to the resources of the southern part of the area of the overlapping claims has to be assured by a substantial adjustment or shifting of the median line provisionally drawn in that region.\textsuperscript{268}

This now confirms what was implicit in all important cases, that the line need not be moved equally along its entire length and that varying approaches can be used in different sectors, taking into account, if and as appropriate, whether the shelf and/or the zone is delimited, and taking into account tangential considerations such as location of natural resources, non-encroachment and no cut-offs. Within each sector, however, the tendency is to move in a consistent manner. Total symmetry is not present where some reduced effect or enclaving is attributed to some coasts, such as in \textit{St.Pierre & Miquelon}. On another issue, we may even detect a preference for adjusting in favor of frontal versus radial projections, although the nature of the projection does not affect the dimensions of the calculation.

The availability of judicial remedial discretion in line-drawing does not mean, however, that it should be exercised arbitrarily or at random. It should be presumed that, in the absence of any articulated and sufficient factors justifying a departure, symmetry should be the rule as more consistent both with the notion of appurtenance based on distance and with neutrality.

(iii) Where to Draw the Lines: Why Not Equi-Ratio?

Practical wisdom requires an effort for the unity of shares and the avoidance of odd shapes or zig-zag lines. Furthermore, if there is one field in which an equitable solution is most useful and consecrated, it is in the fashioning of flexible remedies for concrete needs. The asymmetrical and protruding mushroom shape of the French zones in \textit{St.Pierre & Miquelon} makes little sense. To be sure, the ICJ wanted to demonstrate that islands have full rights by giving them some 200-mile zones. The differentiation of methods by sectors, here semi-enclaving, there equidistancing, is also within reason. But why not devise some technique to construct zones that make geographical sense?

One sensible method for synthesizing equidistance and proportionality is equiratio, developed by a Dutch hydrographer,\textsuperscript{269}

\textsuperscript{268} Jan Mayen, 1993 I.C.J. 38, para. 90.
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which works both where a small island faces a massive nearby coast, such as in St. Pierre & Miquelon, and in difficult adjacent state delimitations. In the former situation, equidistance normally creates a parabola which keeps opening as we move backward toward the open sea. Under equiratio, the 1/1 equidistance parabola can be replaced by an ellipse maintaining a constant ratio of distances from the nearest points of the baselines, the dimensions of which can be changed according to a scale, such as 9/10, 4/5, or 7/10, to reflect a proportionality correction. Another way of describing equiratio is to state that the distance part of equi-distance is transformed from 1:1 to 9:10, for example. Applying this technique to Libya-Malta, a .74/1 equiratio would have produced a line very close to the one constructed by the ICJ, which can be interpreted as giving the proportionality factor a 25% weight. A 9/10 equiratio comes close to explaining the outcome in North Sea, as finally negotiated, and in Libya-Tunisia, giving full weight to the islands. The beauty of equiratio is threefold. First, it helps us bring out to the open and explain what the courts did both in terms of quantification and of where the lines were drawn. Thus, we are on the way of constructing guidelines for future boundaries. Second, it largely by-passes the confusing and unprincipled apparent discrimination against islands while it does a better job in effectuating the rationale behind those attempted distinctions. Third, it provides a model for drawing viable and sensible lines, especially curved, oval ones, around islands, with or without enclaving, avoiding rather grotesque shapes such as the one in St. Pierre & Miquelon. When additional considerations must be taken into account, appropriate deviations may be made ex post.

V. SPECIAL ISSUE: THE STATUS OF ISLAND COASTAL FRONTS

The second doctrinal wrong turn in delimitations, largely due to the confusion generated by the first one, the escape to equity, concerns the treatment of islands. Here, we are confronted with what appears as a major and irreconcilable contradiction. On the one hand, the international treaties and the cases uniformly recognize the equal status and rights of all coastal territory, including that of islands. On the other hand, we find in some cases what appears to be the short-
changing of minor or small islands through lesser effect, movement back or enclaving. State practice reflects similar results. Is there perhaps some equitable way of reconciling these two positions?

At the outset, one is hard put even to articulate a logical or policy reason for why the extent to which a particular territory of the coastal state is surrounded by water should be relevant in determining its continental shelf and economic zone rights. Remember, these rights derive from, and depend solely on, appurtenance on the territory having a coastal front. All islands have coastal fronts. These coastal fronts face equally toward the areas to be delimited. Of course, depending on the respective coastal fronts, the shares of islands, like the shares of other territory, may be different (that is larger or smaller) than those of a particular mainland or of another island. For example, even under equidistance, the share of Jan Mayen came to about only one-half the size of the share of Greenland. This was unrelated to the island-mainland characterization. Is there any other basis for the lesser treatment of island coastal fronts? Why should it matter whether, for example, Malta is separated by sea from or is connected to the northern littoral?

In addition, setting islands apart creates serious practical problems of administration. To begin with, what is an island? The major continents of the earth are technically islands. Should Malta be classified as island but Cyprus or Great Britain or Greenland or Australia not? Should a promontory surrounded 90% by water be treated in a similar way?274 Another difficult problem is whether all, or only some, islands should be diminished. If only some should be, which ones, why, in what way and how much? In other words, are some islands more equal than others?275 In particular, should it matter whether an island, but not other territory, is politically independent?276

274. See Anglo-French Arbitration, 16 I.L.M. 54, para. 244.
275. The wide shelf areas with plenty of islands which exist in many places on earth, also indicate that it would be a very difficult task in practice to establish criteria for distinguishing between islands entitled to a shelf of their own and other islands. Lars Delin, Shall Islands Be Taken Into Account When Drawing the Median Line According to Article 6 of the Convention on the Continental Shelf?, 41 NORDS. INT. RET. 205, 208 (1971).
276. The references to political independence appear inconclusive. In the Anglo-French Arbitration, the Court stated that the Channel Islands "only as islands of the United Kingdom, not as semi-independent States," Anglo-French Arbitration, 16 I.L.M. 54, para. 186, have "their own entitlement to continental shelf separate from the United Kingdom." Id. para. 190. In Libya-Malta, Malta's argument that as an 'island State' it had some sort of special status was rejected. Libya-Malta, 1985 I.C.J. 13, para. 53. See Bowett, supra note 6, at 133-34, for a discussion on the ambiguities of Anglo-French Arbitration and Libya-Malta. The most unequivocal statements against different treatment appear in St. Pierre & Miquelon:

In the view of this Court there are no grounds for contending that the extent of the maritime rights of an island depends on its political
After so many adjudications and settlements over a long period, most of which involved islands, and with the help of so many relevant texts, the time is ripe to move beyond the *ad hoc* indeterminacy of impressionism. It is time to search for the rhyme and reason of any special rules applicable to islands, as well as, some method of carrying them out. Many future delimitations involve islands in complicated geographical patterns, and some guidelines are desperately needed. The literature on this topic is a bit dated, as it was written mostly before *St. Pierre & Miquelon* and *Jan Mayen*, the major island cases, and it tends to be mostly descriptive. For lack of a better explanation, some commentators sought the reason for the different treatment of islands in their location, in how close they were to the coasts of their own versus the other states. Is this the right path?

**A. The Conventions**

First, both Article 1 of the *Geneva Convention* and Article 121.2 of UNCLOS solemnly recognize that islands enjoy equal status and equal continental shelf and exclusive zone maritime rights with any other configuration of territory.

This position received a boost when all attempts by delegates from certain nations at the Third UN Law of the Sea Conference, which produced UNCLOS, to reduce, circumscribe, and even eliminate, in

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status. No distinction in this respect is made by Article 121, paragraph 2 of the 1982 Convention on the Law of the Sea or by the corresponding provisions of the 1958 Conventions . . . .


However, non-independence may affect the mechanics of drawing the lines since the inclusion of an island, as of any other non-independent territory, in an overall delimitation may have an impact, for example, reflecting considerations of proportionality to the total coast lengths. It should also be mentioned here that the past debates, especially in UN contexts, on the special status of islands under "foreign" control located near the coasts of states freed from colonial domination, which remain in any event inconclusive, have no impact on the general issue of island maritime entitlements. See SYMONS, *supra* note 6, at 57-60

**277.** Compare, Charney, *Progress,* *supra* note 4, at 256, n. 153, stating that: There are grounds to demur [to Judge Weeramantry's argument in *Jan Mayen* that it is too early for conveyance toward more determinative law]. In the last 50 years, there have been more separate international adjudications and arbitrations on this subject of public international law than any other. Furthermore, approximately one-third of the potential maritime boundaries have already been settled by agreement or otherwise. If now is too early, when would it be time?

certain contexts, island rights were resoundingly rejected. These proposals focused primarily on location and the more drastic ones would have eliminated *tout court* the entitlements of islands situated closer to another state:

Islands which are situated on the continental shelf of another state, or which on the basis of their geographical location affect the normal continental shelf or EEZ of another state shall have no economic zone or continental shelf of their own.  

Turkey had also made a separate complex proposal eliminating the rights of smaller islands providing that an island:

situated in the economic zone or the continental shelf of other States shall have no economic zone or continental shelf of its own if it does not contain at the least one tenth of the land area and population of the State to which it belongs.

A subsequent proposal, which addressed the broader category of non-adjacent islands but which was more limited in scope and reach, provided that the maritime spaces of such islands:

shall be delimited on the basis of relevant factors taking into account equitable criteria. . . . These equitable criteria should normally relate to (a) the size of these normally formed areas of land (b) their geographical configuration and their geological and geomorphological structure (c) the needs and interests of the population living thereon (d) the living conditions which prevent a permanent settlement of population (e) whether these islands are situated within, or in the proximity of, the maritime space of another state (f) whether, due to their situation far from the coasts, they may influence the equity of the delimitation.' (emphasis added).

Note that all of these criteria (size, geomorphology, needs and interests of population, living conditions, and even location as such) have been either explicitly rejected, or have not been taken into consideration in the prior cases. This stance is even more clearly reflected in the subsequent cases. UNCLOS did not even include any provisions that qualified the maritime rights of islands in the context of

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279. See generally SYMMONS, supra note 6, at 94-100 (discussing the early phases). These early proposals were intended to promote national interests rather than to reflect an *opinio juris* and not one of them was incorporated in or affected in any way the final text of UNCLOS. KARL, supra note 6, at 645. It is also to be remembered that Iranian and Italian proposals in the negotiations leading to the Geneva Convention to discount islands were heavily defeated in 1953.

280. A/CONF.62/c.2/L 96 (proposed by nine states).

281. Id. at L.55 (Article 3.2).

282. Id. at L.62, Rev. 1.
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a semi-enclosed sea.\textsuperscript{283} This decisive and generalized defeat of all these qualifications also established, beyond doubt, especially after the demise of the natural prolongation concept, that islands as such situated near another state are not themselves just special circumstances sitting on such state's shelf.\textsuperscript{284} Rather, they have full entitlements either on their own, or in conjunction with other territory fronting on the delimitation area.

\textit{B. The Cases and the Commentators}

Beside the texts of the Conventions, we find in the cases many authoritative, unequivocal assertions that islands have the same rights as any other territory.\textsuperscript{285} Indeed, we cannot find a single unambiguous judicial statement qualifying or reducing the entitlements of islands as such. This suggests that Article 121.2 of UNCLOS codifies customary international law.

Why, then, in many cases and in a good number of state settlements do we find in certain islands' situations diminished shelves and zones below the equidistance reduction, drawn without much explanation beyond the notion that 'I know equity when I see it'? Is there some logic, some principle, or some practical wisdom underlying this differentiation beside an \textit{a priori} lesser entitlement of islands as such? Is proportionality perhaps the explanation for these situations?

Many commentators did not seriously pursue that explanation. One reason was that courts and states have been hesitant to give that much explicit weight to proportionality. The other reason was that many

\textsuperscript{283} As had been proposed by Turkey (A/CONF.62/C.2/L.55) and this despite the fact that UNCLOS recognizes the concept of an "enclosed or semi-enclosed" sea (Part IX, Article 122-123) and provides for certain duties of cooperation and coordination of the littoral states. Incidentally, the irrelevance of that concept in boundary formation is reflected in Libya-Malta where the International Court of Justice referred to the entire Mediterranean as being a "semi-enclosed sea" and still applied the same general criteria of delimitation. \textit{Id.} para. 47. This, of course, does not mean that, where proportionality adjustments are being made in tight quarters, the radial projections of shorter coasts may be where the cuts are to be made. \textit{Cf.} Evans, \textit{supra} note 199, at 686.

\textsuperscript{284} As explained by Judge Schwebel in his separate opinion in Jan Mayen: The acceptance of islands as a special circumstance in the travaux preparatoires (of the Geneva Convention) plainly refers to islands whose situation or size or other characteristics may constitute a special circumstance in a delimitation between two other coasts; an island was not conceived to be of itself a special circumstance which affects its own coastal projections. That concept is so bizarre that naturally it finds no expression in the intentions of those who drafted the 1958 Convention.

Jan Mayen, 1993 I.C.J. 38, at 121-23. \textit{See also} Karl, \textit{supra} note 6, at 651

\textsuperscript{285} This position was recognized early in no lesser case than North Sea, 1969 I.C.J. 3, para. 57; \textit{see also} JAYEWARDENE, \textit{supra} note 6, at 344.
commentators mentally focused on the model of two mainland states, *first* dividing maritime spaces of less than 400 total miles between their coasts, *then* adding islands on the map to see what effect they would have on the delimitation. In that context, it is easy to understand why the island distance criterion became relevant, and why it made sense to classify the islands into three categories: islands close to their own mainland, islands straddling the median line, and islands closer to the other state's mainland. The rhetoric associated with this locational approach proceeded to label islands as being on the wrong side of the median line, or deflecting it excessively or distorting the geographical situation. Once this characterization is accepted, it sounds sensible that such islands should be pushed back to their proper place.286

It seems to me that this approach not only reflects false assumptions, but fails to guide us toward a method for the resulting adjustments. The idea of islands being at the wrong place or on the wrong side assumes that we have predetermined where the right side lies. Perhaps the Creator, or nature, first generated the mainlands and endowed them with their entitlements, and then mistakenly, or at least inadvertently, cast the islands where they do not belong. With equal plausibility we could argue the reverse, that after the sea came the islands and the continents constitute misplaced latecomers. The absurdity of this distinction is only further strengthened by the fact that it does not take size into account, so that an island would come second even where its coast is longer than that of the mainland. It is apparent that this approach not only begs the question, but violates the cardinal rule of delimitation, that geography should not be refashioned.

The second, fatal, flaw of this explanation is that it tells us nothing about how much and where the island shares should be diminished. We need a measuring rod to determine how much deflection of the normal line is excessive or distortive, as well as a technique of correction. (How much lesser effect (a half, a third?), and how (e.g. movement back?) and when is partial or full enclaving justified instead, and of what size?) Excessiveness or distortion presuppose that we know what is proper and normal. As explained earlier, most of the typical characteristics of a piece of territory, including an island, such as landmass, population, economic need and political status have been eclipsed as relevant factors. The distance-to-its-own-versus-to another-mainland idea which underlies the wrong place argument not only lacks legal authentication

286. This approach was cultivated especially by Karl, *supra* note 6, at 651, 654-63 and Pazarci, *supra* note 6, at 92, 246, 257, 327, 336. It has also been elaborated by JAYEWARDENE, *supra* note 6, at 349-70. The latter author refined the classification, creating seven categories of islands: coastal, offshore, offlying, right-side, astride the median line, wrong-side and detached. *Id.* at 366-70.
but also it is difficult to manage.  

It follows that where the 200-mile radius from a mainland, or for that matter from another island with competing claims, extends to shelf or to exclusive zone waters behind a distant island, all sides of such island facing toward the same areas should count. There is no such thing as a natural back side of a distant island. As the competing mainland coast is counted first to share the in-between space with the inner side of the island, and then again to share in full the outer space with the external side of the island, all sides of the island constitute relevant coasts. The concerns expressed about islands projecting in more directions than mainlands, especially straight ones, and thus a mile of an island coast getting more mileage than a mainland mile,

287. Karl's approach, including the basepoint dimension, is to recognize genuine shelf rights only to islands lying close to their own mainland, to independent insular states and to distant islands on the wrong side. Karl, supra note 6, at 654-61 and at 669, n. 108. This bundling not only brings in the questionable factor of independence but leads to the paradox that far off distant islands fare better than such islands within 400 miles of their mainland! As for the remaining islands, Karl further subdivides them into 'substantial' ones (more or less 25% of the territory of the state) and the rest, and short changes the rest by providing for them only territorial waters, giving the benefit of the proportionality factor only to substantial islands. Id. at 662-64. The Karl approach is not plausible either in its classifications or in its outcomes. See also Jayewardene, supra note 6.

288. While the cases contain little explicit language on this issue, mostly because it did not really matter in most contexts, there is nothing to suggest a different approach. In the Anglo-French Arbitration, as well as in Gulf of Maine, the length of the coasts of the islands was insignificant and the proportionality adjustment was very gross. It would appear that the treatment of the coastal front of the islands in St. Pierre & Miquelon is consistent with the position taken in the text. Indeed, the Court included in the proportionality measurements all sides of the French islands except those that fronted on the area charted by the 1972 territorial sea delimitation agreement between the two countries. By the same token, however, the Canadian coasts facing the same area were equally excluded. St. Pierre & Miquelon, 31 I.L.M. 1145, paras. 30-33; cf. paras. 8-25 (Gotlieb, J., dissenting opinion).

This issue has also escaped the attention of the publicists. Karl is not sufficiently explicit: on the one hand, he agrees that the "measure of an island's size for the purpose of delimitation is... the length of [its] coastline," and clarifies in his footnote that we count "the amount of coastline that borders the area to be delimited," suggesting a total measurement. Karl, supra note 6, at 663, n. 86. On the other hand, he adds that "the maximum length of an island would be an appropriate measure of the length of the island's coastline," id., and it is not clear that he includes all sides facing the delimitation areas in his mathematical calculations for the Aegean.

Of course, when the overlapping claims do not extend to the sea areas 'behind' an island or group of islands, as happened, for example, in Jan Mayen, Libya-Malta, and Guinea/Guinea-Bissau, we count only the front side of the island, plus the lateral sides as appropriate. While, for the Aegean, Karl apparently takes in only the northern coastline of the Greek island of Crete, this is justifiable since the other side of Crete does not border on the area under delimitation. Id. at 671-72, n.116

289. Pazarci has been arguing that it is inequitable for an island to project in four directions when the mainland projects in fewer, maybe only one. Pazarci, supra note 6, at 289-90, 307-08.
are taken care of by the proportionality adjustment, as will be explained below.

In the opposite situation, where an island is situated along its own mainland, foreclosing the latter's projection to the outer area, and where the water space between them is less than the internal waters plus the double breadth of the territorial sea, that is less than 24 miles from the baselines, both inner coasts should not count for shelf and exclusive zone purposes, and the external side of the island should constitute the relevant maritime front.\textsuperscript{290} The same logic applies within a group of islands, as was recognized in \textit{Guinea/Guinea-Bissau}. In the Bijagos Archipelago, the nearest island was two miles from its mainland, the furthest island was 37 miles away, and no two islands were further apart than five miles. Without the islands, the length of the coasts would have been 128-154.\textsuperscript{291} Counting the perimeter of each would have transformed the shorter coast into a much longer one. The Tribunal took into account only the outer perimeter of the group.\textsuperscript{292} This is sensible since the coast of a group of islands should not be considered to be longer than if the water space between them was land.

An evaluation of the outcomes in the cases and of most settlements shows that the island-distance criterion lacks explanatory power. The adjudicated boundaries which appear to disfavor islands are reflective of two quite unexceptional ideas: first, the natural diminution of the shares of shorter shores under equidistance,\textsuperscript{293} and second, the further correction for gross disproportionality to total coastal fronts. This produces moves of islands back, or downgrades in establishing base points for the total shelf and zone, or half-enclaves or even total enclaves in proper circumstances, for example, with small, minor islands far off their main coast. All these particularizations, when properly executed, are not inconsistent with the full rights of islands to the maximum limit of 200 miles in all directions of all coastal fronts. A more particularized analysis of the cases indeed supports the \textit{proportionality-adjustment} explanation.

In the \textit{Anglo-French Arbitration}, where the whole thing started, the ICJ accepted the position that islands have full continental shelf rights.\textsuperscript{294} However, the presence of these islands, by virtue of their particular geographical circumstances, led to modification of the strict

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{290} In Tunisia-Libya, there was no question that only the front of the Kerkennahs counted and this is consistent with the position reflected in the text. Tunisia-Libya, 1982 I.C.J. 18. Cf. Gulf of Maine, 1984 I.C.J. at 269-70, 335-36, paras. 31, 221.
\item \textsuperscript{291} Guinea/Guinea-Bissau, 24 I.L.M. 267, para. 95(b).
\item \textsuperscript{292} \textit{Id.} para. 97.
\item \textsuperscript{293} \textit{See, e.g.,} Jan Mayen, 1993 I.C.J. 38, at 174-75 (Shahabuddeen, J., separate opinion); \textit{Id.} at para. 92 (Oda, J., separate opinion).
\item \textsuperscript{294} Anglo-French Arbitration, 16 I.L.M. 54, paras. 158, 190-94.
\end{enumerate}
\end{footnotesize}
equidistance line, which would have given most of the Channel shelf and an inordinate portion of the near-Atlantic shelf to Great Britain. The reasoning is rather clear: reduced effect to the islands was only the result of an adjustment to correct disproportionality to coast lengths equitably. The references to the islands being detached from their mainland and on the wrong side of the median line related to the creation of a radical distortion of the boundary, not to their being islands. Indeed, the ICJ would have treated the Scilly Isles the same way had they been a promontory. The source of the distortion was the perception that the shares of the shelf should not be manifestly disproportionate to the length of the relevant coastlines, which were comparable in this case. Enclaving or half-effect for islands is just an adjustment technique applicable to shorter coastlines. For the Channel Islands, enclaving was just the practical solution. If they had been closer to Great Britain, or if they stretched out one after another long distances from the mainland, another technique would have been to divert the course of the mid-Channel median line toward France. Alternatively, if there had been more space in the area, the islands could have received the benefits of equidistance, compensating France by shifting the line in the other regions in its favor under a total adjustment approach. In the Atlantic region, with more space to

296. *Id.* paras. 99-100.
297. *Id.* para. 199.
298. *Id.* paras. 244, 250.
299. The Court referred to the ‘equality of the two States in their geographical relation to the continental shelf of the Channel’ with coast lengths of about 300 miles each, to the disturbance by the islands of the ‘balance of the geographical circumstances’ and to the ‘substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic,... prima facie a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses this inequity.’ *Id.* at paras. 181, 195, 183, 196. For the near-Atlantic region, the logic was the same. *Id.* paras. 243-244.
300. The Court was apparently also aided in its approach of enclaving the Channel islands by the perception that Great Britain had agreed with the notion that there were two separate delimitations, not one total. Consequently, it treated the island question in a three-way manner as if Great Britain itself was claiming against the islands, in which case the concept of enclaving would have been meaningless, but the shortness of the shores of the islands would have counted heavily against them when measured against the opposite French coast. *Id.* paras. 190, 201-02. France’s proportionality argument also envisaged the possibility of treating the islands in a similar ‘micro-geographical’ way on the basis both of the actual lengths of the coasts and of the maritime facades. *Id.* para. 166.
301. Anglo-French Arbitration, 16 I.L.M. 54, para. 199; see also *id.* para. 177
302. The Court suggested that this approach was appropriate for situations such as
spare, there was only a half-effect proportionality correction,\textsuperscript{303} to offset the fact that the Scilly Islands projected the English coast twice as far into the ocean as the corresponding French island of Ushant.\textsuperscript{304} Two islands played a role in \textit{Tunisia-Libya}: the Kerkennahs and Jerba. Their status as islands did not remove them from consideration as claimants to the maritime areas.\textsuperscript{305} The ICJ concluded, however, that using a median line approach amounted to giving the islands too much weight, as this approach straightened the coastline seaward fully in front of the Kerkennahs, which were located close to their own state, (thus adding a big chunk of ocean space to Tunisia's share,\textsuperscript{306}) and made the waters behind them internal waters.\textsuperscript{307} While the ICJ did not elaborate on what created this excessiveness, the context points to proportionality. To correct it, the ICJ drew two coastal lines, one giving these islands full effect, and another ignoring them. The ICJ then cut the resulting area in half,\textsuperscript{308} thus notionally moving them half-way back toward the coast.\textsuperscript{309} With regards to the Tunisian island of Jerba, the ICJ gave it full effect, as if it were a promontory, but concluded that the other factors in the first sector overrode its projection, as they also did certain other projections of the mainland.\textsuperscript{310}

Two minor questions relating to islands arose in \textit{Gulf of Maine}. In the segment where the proportionality adjustment was to be made, the Chamber recognized that Seal Island, a small island near the Canadian St. Pierre and Miquelon where the abundant oceanic spaces left room for compensatory adjustment. \textit{Id.} para. 200. It is an interesting question whether the actual St. Pierre & Miquelon decision, rendered much later, can be explained in those terms.

303. \textit{Id.} para. 249.
304. \textit{Id.} para. 251.
307. \textit{Id.} para. 128.
308. \textit{Id.} paras. 128-129.
309. Even this limited reduction of the rights of the Kerkennahs was controversial. Three judges disagreed, but a fourth judge would give them no effect at all. Judge Gros disputed the presence of disproportionality and castigated the Court because "in sum, the Tunisian coastline was effaced . . . as if some geographical features did not exist . . . . This is a perfect example of trying to unmake geography." \textit{Id.} paras. 14-15. According to Judge Evensen, giving half-effect to these islands, whose size approaches that of Malta and which form an archipelago, without an explanation about 'excessiveness,' violates the equitable principle of not refashioning nature. \textit{Id.} paras. 17, 19. Judge Schwebel also criticized the lack of explanation of the notion of 'excessive weight.' \textit{Id.} at 99. On the other hand, Judge Oda was wedded to the notion of straightening the coastlines before applying equidistance moderated with proportionality, calculated in the general direction of the coast. \textit{Id.} paras.169-72, 179, 183-87.
310. \textit{Id.} paras. 79, 131.
coast, was entitled to full maritime rights but refused to locate basepoints on it because "it would be excessive to treat the coastline of Nova Scotia as transferred south-westwards [forward] by the whole of the distance between [it] and that coast." The solution, quite generous in result, was to give the island half-effect for a transverse displacement of the median line. The U.S. island of Nantucket fell outside the delimitation area, as the ICJ did not use strict equidistance, but rather drew a median line following the general direction of the Massachusetts coast parallel to Nova Scotia. However, since the parties had already agreed that Nantucket was to be used as the farthest U.S. point in drawing the closing line that separated the inner and outer Gulf, its location shifted that line in the direction of Canada. Thus, its indirect impact was significant.

The Tribunal in Guinea/Guinea-Bissau had to deal with three categories of islands. First, it had to contend with the islands close to the coast of Guinea-Bissau. Second, it had to deal with the Bijagos Islands Archipelago of Guinea-Bissau, consisting of many islands within two to 37 miles of the coast and five miles of each other. Within this inner region, the ICJ treated all of the water as territorial. Both sets of islands were treated as mainlands for purposes of determining the crucial "coastal configuration and orientation," and "the general direction of the entire coastline of the country," and therefore, the coastal projection and the drawing of baselines. In addition, their seaward projection (but not their entire perimeter, since they were treated like promontories) was counted in determining the length of the coastlines. This treatment of the Bijagos alone added 20% to the Guinea-Bissau coast length, and brought it to the same level as that of Guinea. The third category consisted of a few islands scattered in shallow waters closer to Guinea, the most important one being the Guinean island of Alcatraz. The Tribunal recognized their maritime rights. Using equidistance and a southern limit line derived from a treaty, the Tribunal considered Alcatraz, which was located only 2.25 miles on the right side of that line, as a factor of delimitation on its own.

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312. Id.
316. Id. para. 97.
317. Id.
318. Id. para. 95.
319. Id.
and gave it territorial waters of 12 miles extending above the line. As this shifted the entire line for a considerable length, its effect on the delimitation of the shelf and exclusive zone exceeded by far the 12-mile limit.

In Libya-Malta, the parties had already agreed that "the entitlement to continental shelf is the same for an island as for mainland." This equality means that their coasts are subject to the same adjustments for distortions, such as disproportionality of shares to coastal lengths. It was this factor, in the context of the proximity to the northern littoral of the Mediterranean, that justified shifting the median line northward.

If there ever was a case where a couple of small islands standing very close to a massive mainland, and without any geographical support from their own mainland, arrogantly claimed equal treatment, it was St. Pierre & Miquelon! Yet, the ICJ rejected the idea that their share was to be reduced because they were purportedly superimposed on the Canadian continental shelf, or because they were not independent. By the way, Newfoundland itself is as much of an island as St. Pierre and Miquelon! No, islands should not be enclaved within their territorial sea; and yes, they have the potential of generating full 200-mile zones. No, the location of potential hydrocarbon resources has no bearing on this delimitation. Judge Weil applauded this treatment of islands which, in his view, abandons the impossible and internally contradictory theory of special geographical circumstances and constitutes, therefore, a milestone. With this case, any doubts about the equal treatment of islands have been laid to rest.

Finally, in Jan Mayen, Denmark had not even argued that Jan Mayen, which is basically an uninhabited island resembling a rock, had

320. Libya-Malta, 1985 I.C.J. 13, para. 52. The Court recognized, however, the possibility that the coasts of an independent states, be it an island or other kind of territory, may have a different relationship to the neighboring coasts than the same coasts if they belonged to the same state.

321. Cf. Judge Oda's view that the effect of "narrow promontories of peninsulas or even of islands" might be mitigated in "settling the basepoints on coastlines." Id. para. 68. See also id. para. 70.


323. Id. para. 52.

324. Id. para. 68. On the lack of precision of the term 'enclave' see also the point made by Gotlieb, J., dissenting opinion, that even if France had won on equidistance, the entire French zone would have been 'enclaved', i.e. contained within an outer Canadian zone. Id. para. 38 (Gotlieb, J., dissenting opinion).

325. Id. para. 48-52. See also Id. paras. 89-91. Cf. Id. para. 34 (Weil, J., dissenting opinion).

326. Id. para. 74.

327. Id. paras. 89-91. Cf. Id. para. 34 (Weil, J., dissenting opinion).

328. Id. paras. 46-48 (Weil, J., dissenting opinion). See also Id. paras. 18-19.
no entitlement to a continental shelf or fishery zone of its own, possibly even within the exception of Article 121.3 of UNCLOS. Its position was only that it can only be accorded partial effect. The rejection of this contention by the ICJ deserves a full quote:

The coast of Jan Mayen, no less than that of eastern Greenland, generates potential title to the maritime areas recognized by customary law, i.e. in principle up to a limit of 200 miles from its baselines. To attribute to Norway merely the residual area left after giving full effect to the eastern coast of Greenland, would run wholly counter to the rights of Jan Mayen and also to the demands of equity. Jan Mayen rejected even the terminology of islands receiving partial effect. It is quite remarkable that no judge in Jan Mayen took the position that islands, as such, should be treated differently than other kinds of territory. Judge Adjibola quoted Vattel to the effect that:

"A dwarf is no less of a man than a giant. A small Republic is no less of a State than the most powerful Kingdom". . . . Thus however small the Island of Jan Mayen may be, this cannot affect its rights under international law with respect to the issue of entitlement and the non-encroachment principle. . . . since Jan Mayen is acknowledged to be an island, it is entitled to the considerations that would normally be attached to other land territory."  

Judge Schwebel reminded us that an island in itself cannot be a special circumstance with limited coastal projections: "That concept is so bizarre that naturally it finds no expression in the intentions of those who drafted the 1958 [Geneva] Convention."

While the negotiated settlements do not contain as many clues on their reasoning and motivation, and sometimes are affected by political considerations and bargaining with trade-offs and concessions, they

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329. _Id._ at para. 70. _See also_ paras. 60, 80
330. _Id._ at 292, 300(Ajibola, J., separate opinion).
331. _Id._ at 123 (Schwebel, J., separate opinion).
332. Negotiated settlements as such, even when they fall into certain patterns, absent an _opinio juris sive necessitatis_ or at least _opinio aequitatis_, do not establish norms of international law because they often reflect other considerations. According to the editor of the massive study of more than 130 maritime boundary delimitation settlements sponsored by the American Society of International Law, the results of which are reported in the IMB volumes:

To no one's surprise, few patterns of state practice and _opinio juris_ have emerged from these settlements. While the augmented access to this information of foreign offices, courts and other tribunal may encourage the development of new law, at present the international judgments and awards have the leading oar in these murky waters.

Charney, _Progress, supra_ note 6, at 228-29.
A striking example of the potential discrepancy between adjudication and negotiation is provided by the Jan Mayen story itself. In the negotiated settlement between Jan Mayen
are, overall, consistent with this jurisprudence.

C. Conclusion

The message is clear: islands as such enjoy equal status with any other land configurations. In every instance where an island was somehow given lesser effect, or status below equidistance, a proportionality adjustment was being made. In no case was an island of comparable coastal dimensions with a mainland treated differently. The share of every island, however, like that of any other coastal territory, is affected by applicable considerations in the general geographical context.

VI. CONCLUSION

The equitable storm unleashed by North Sea upon maritime delimitations is proving to be more like a tempest in a teapot. At that early juncture, with enormous ocean stakes up for grabs, and with divergent state interests, the ICJ wanted to preserve some flexibility in searching for principles, methods and factors other than equidistance, leaving some space for a more complex notion of natural prolongation, and giving some weight to the length of the coastal frontage. This quasi-heretical stance needed some heavy-duty protective juridical cover, and the respectable and suitably open-ended notion of equity lent its wings.

But genuine equity had very little to do with the dilemmas that were addressed in drawing the boundaries of the continental shelf and of the exclusive economic zone. Despite their ritual invocation, no recognizable equitable principles emerged in the delimitations. Equitable maxims which inform, and sometimes override, the specific rules of the law, such as the doctrines of clean hands, estoppel, acquiescence, and unjust enrichment, or corrections for mistake, undue influence and fraud, or notions that substance prevails over form and that rights should be pursued diligently or at least should not be

(Norway) and Iceland, the latter received the entire 200-mile zone toward Jan Mayen. In the Jan Mayen case, Denmark sought to invoke this precedent against Jan Mayen on the theory that it constitutes relevant conduct of the parties on what is equitable. Norway argued that the agreement represented a 'political concession'. Jan Mayen, 1993 I.C.J. 38, paras. 82-84. The Court rejected the Danish position, stating that, "in the context of relations governed by treaties, it is always for the parties concerned to decide, by agreement, in what conditions their mutual relations can best be balanced." Id. para. 86. In the eventual decision under international law, Greenland, despite its size and coastline, received substantially less than 200 miles. See also Judge Shahabuddeen's separate opinion, id. paras. 18-20; Libya-Malta, 1985 I.C.J. 13, para. 44
exercised in an abusive manner, which have made a dent in international law, have no relevance to the delimitation issues. The search for equitable results proved equally elusive. The typical equitable flexible remedies such as personal injunctions (including specific performance), or adequate financial compensation, are beside the point. The courts displayed little imagination where the remedial aspect of equity could have helped to produce viable zones rather than geographical aberrations, such as the St.Pierre & Miquelon mushroom pie. The general interpretative mandate that equal circumstances should be treated equally, and that the relevant factors should receive their proportionate weight, presupposes that the equality and relevance of the circumstances and factors are supplied by some identifiable source. The courts, however, made clear that this source could not be abstract equity or distributive justice or refashioning of geography or just shares. Furthermore, despite some language suggesting otherwise, the courts did not espouse a theory equivalent to abstract justice, that is ad hoc solutions to unique geographical situations, to be perceived through some form of unmediated and intuitive meditation over multiple considerations and incommensurable circumstances. Indeed, there are few subjects in human knowledge where the variety of circumstances is more easily catalogued, classified and organized than geography, especially the types of coastlines and their seaward extensions. In this field, principled and predictable guidelines are feasible and desirable. In other words, equity of the type produced by the Chancellor’s foot or, more fittingly here, the mermaid’s tail, was least needed.

This brought the courts back in a circle to square one. The source of the equity of delimitations were the regimes of the continental shelf and exclusive zone themselves. Such regimes had to be explored and defined directly and internally, and the equitable label was at best superfluous and confusing. Only standard logical and teleological interpretation, i.e. conforming the maritime boundaries to the rationale of the law of continental shelf and exclusive economic zone, was needed. Such rationale was clear enough: geographical extension of land sovereignty over appertaining seabeds and water columns. Methodologically, however, the escape to equity produced great confusion. To suggest without more that equidistance, which is based on the very notion of equality, produces distortions which lead to inequitable solutions borders on the apocryphal; to say that it leads to inequitable results because it does not take into account all relevant circumstances calls for the ouija board! After a quarter century of refinement through seven major cases, a large number of delimitation agreements, a comprehensive new global treaty on the law of the sea, and extensive commentaries by publicists, the regime of continental shelf and exclusive economic zone boundaries has reached maturity and no longer needs the equity blanket. Virtually all potentially relevant
factors and considerations have been tried out in variegated settings; most were rejected. The darling on North Sea, natural prolongation, did not float. Economic, social, political, demographic justice, and even geology and geography other than the coastal front were ruled out. This negative clearance did not touch equidistance, whose role remained major, in fact, and whose practical and equitable virtues became increasingly recognized. Only one significant competitor of equidistance has emerged during this maturation period: the reasonable proportionality of shares to the length of the relevant coastlines. Equidistance already reflects proportionality both in that it allocates shares proportionate to distances from the coast, and that shorter coasts typically have lesser projections. However, some further adjustments may become necessary. Furthermore, even under a fixed geometrical method such as equidistance, the coastal front needs to be identified and streamlined. Proportionality does not replace or compete with equidistance on the same plane, but rather operates to moderate its results if, and to the extent that, geometrical method produces a gross disproportion between the share of continental shelf or exclusive economic zone allotted and the length of the coastline on which the claim is based. The mechanics of correcting disproportionality have not, as yet, been worked out adequately. A very rough and oversimplified quantification of the results suggests a formula between two-to-one and three-to-one equidistance-proportionality.

It is also important to mention that the reasonable proportionality factor opens up the field for some discretionary, non-symmetrical readjustment of lines, which enables the courts to take care of two nagging problems in this field. First, the treatment of islands: proportionality makes it possible to look through the distinctions between full, half or lesser effect or enclaving or semi-enclaving of islands, which produce discrimination fundamentally inconsistent with the equal rights of islands, and give all islands full effect but draw lines closer to them in order to make the total shares correspond more to total coast lengths. Second, such tangential factors as no-cut-off, security and the location of resources: while equidistance normally takes care of these ideas, some rare situations may arise needing specialized attention. Furthermore, the non-symmetrical adjustments of shares through proportionality may be made in a manner that preserves their unity and corresponds to the applicable criteria of sharing, either geographical or reflecting the need to avoid catastrophic consequences. A method called equiratio may make the adjustments more intelligible and intelligent.
CIVIL AND POLITICAL SANCTIONS AS AN ACCOUNTABILITY MECHANISM FOR MASSIVE VIOLATIONS OF HUMAN RIGHTS

VED P. NANDA*

I. INTRODUCTION

Civil and political sanctions applied on an individual basis and with due process for the defendant serve an important function as one of the accountability mechanisms available to redress massive violations of human rights. I start from the premise that, as a matter of policy, there must be accountability and no political tradeoffs which result in the sacrifice of justice at the altar of perceived but illusory peace, for the dichotomy is false, as justice is a prerequisite for obtaining a peace that is to endure.

The existing legal framework, notwithstanding several gaps and weaknesses, suffices to reach the *jus cogens* violations—war crimes, crimes against humanity, genocide and torture—and other egregious and heinous human rights violations as well. However, both national and international implementation and enforcement mechanisms are inadequate and ineffective, and several recommendations have been offered to remedy the situation.

Any discussion on the goals of the sanctioning process has to address the four pertinent perspectives—those of the victim, the defen-

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*Vice Provost, Evans University Professor, and Director, International Legal Studies Program, University of Denver. I wish to express my deep appreciation to Professor Cherif Bassiouni and the International Institute of Higher Studies in Criminal Sciences for hosting the important conference on "Reining In Impunity for International Crimes and Serious Violations of Fundamental Human Rights" in Siracusa in September 1997 and for bringing together such an illustrious group of scholars and activists committed in the cause of human rights.

2. The development of international human rights norms in the post-UN era, both conventional norms and customary international law norms, is indeed impressive. The major difficulty is with lack of effective implementation.

3. See generally IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 203-205 (Naomi Roht-Arriaza ed., 1995) (hereinafter IMPUNITY AND HUMAN RIGHTS); Accountability for International Crimes, 59 L. & CONTEMP. PROBS. No. 4 (Autumn 1996) (a special symposium issue on the subject with several recommendations from several authors to remedy the situation).
dant, the society which has gone through the trauma in question, and the world order. Based upon several perspectives, including those of the New Haven School,\(^4\) Professor Michael Reisman has recently synthesized the "fundamental sanctioning goals for the protection, restoration, and improvement of public order" into seven specific goal programs—1) prevention of public order violations, 2) suspension of the occurring public order violations, 3) deterrence of potential public order violations, 4) a restoration of public order, 5) correction of the behavior that generates public order violations, 6) rehabilitation of victims and 7) reconstruction to remove conditions likely to generate public order violations.\(^5\)

The criminal sanctioning process, both national and international, the inquiry and truth commissions, and the mechanisms to provide compensation and reparation to the victims advance these goals of prevention, deterrence and restoration, among others, of public order. These processes also provide redress to victims and contribute toward their rehabilitation, healing and reconciliation, and the creation of a climate and culture which actively discourage such violations in the future.

II. HISTORICAL CONTEXT

It is worth noting that the role of civil and political sanctions, that is, non-criminal sanctions, is not a new one for addressing war crimes and other egregious violations of human rights. After World War II, several European countries extensively used civil and political sanctions, in addition to criminal sanctions, against those who had collaborated with the Nazis and the fascists. To illustrate, in France, more than 11,000 alleged collaborators with the Vichy regime received some form of sanction for their wartime activities and nearly 1,000 politicians, 6,000 teachers and 500 diplomats were removed from office.\(^6\) Judges in the occupied territories who had executed the Nazi plans enthusiastically were also purged from their positions both in the public and private sectors.\(^7\) All 569 members of the National Parliament who

\(^4\) I had the privilege to study and work with the founders of the New Haven School, Professors McDougal and Lasswell, at Yale Law School.


\(^7\) See Novick, supra note 5, at 87.
had voted in favor of delegating constituent power to Marshal Petain on July 10, 1940, were purged from serving in any political office.8

Italian authorities similarly dismissed nearly 2,000 government employees for their wartime activities.9 However, these were temporary dismissals:

Judicial applications of the purge decrees and a final amnesty adopted in February 1948 resulted in the fact that most of the 1,879 civil servants who had been dismissed... and the 671 who had been compulsorily retired were reinstated. Similarly, the whole process of confiscating the illicit gains of fascist profiteers and of purging compromised business leaders came close to naught.10

In Holland, several Dutch who had joined German-sponsored military and police organizations were deprived of their Dutch citizenship.11 In Denmark several alleged collaborators lost political and civil rights in a separate proceeding following criminal prosecution.12 And in Belgium, all those who, without being guilty, cannot be called innocent, will, on a simple notification of the public prosecutor, lose their vote, their right to engage in certain professions, and so on. Those who feel they have been unjustly penalized can appeal to the tribunals unless their cases have already been examined by the commissions. Those who are thus penalized will be able to request their rehabilitation and the recovery of their rights in ten years' time.13

In Germany, attempts at denazification were made under Allied control by prosecution not only of leading war criminals but also of those who had enthusiastically supported the Nazi ideology. But these were only short-term purges and there was no long term ineligibility attached, as it has been observed that "most of the collaborationist elite, in administration, justice, education, the economy, remained in or reentered positions held under the Nazi regime."14

In Japan, the Allies attempted to purge those who had been "active exponents of militarism and militant nationalism."15 However, soon af-
ter Japan regained its sovereignty, the Japanese government reversed the process with pardons and by 1952 only 8,710 out of the 202,000 originally purged or provisionally purged were still under that sanction.\textsuperscript{16}

The final case briefly mentioned here is that of Greece after the seven-year rule by the military junta from 1967 to 1974. The civilian government under Constantin Karamanlis immediately dismissed all general secretaries of the ministries and all prefects who held positions of power under the junta.\textsuperscript{17} Further action was taken to dismiss those who held power under the junta in all agencies, organizations, and corporations operating under public law.\textsuperscript{18} Thus, in a few months 108,000 civil servants and other officials were dismissed, transferred, or disciplined.\textsuperscript{19} Furthermore, Karamanlis' civilian government began selectively retiring and transferring senior military officials who had been part of the old regime.\textsuperscript{20}

III. CURRENT DEVELOPMENTS

Current developments discussed here include those in El Salvador and those in the former Soviet bloc countries, and involve dismissals or exclusions from elected or appointed office.

A. \textit{El Salvador}\textsuperscript{21}

Under the peace accords two commissions were appointed, the Truth Commission and the Ad Hoc Commission. The Truth Commission was designed to investigate serious allegations of serious acts of violence and make any recommendations and take any measures necessary to prevent their repetition, while the Ad Hoc Commission was aimed at cleansing the military. The three members of the Truth Commission, appointed by the U.N. Secretary General, were all non-Salvadorans. In contrast, the three members of the Ad Hoc Commission, also appointed by the Secretary General, were all Salvadorans.

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\item \textsuperscript{16} \textit{Authoritarianism}, supra note 10, at 199.
\item \textsuperscript{16} \textit{Id.} at 202.
\item \textsuperscript{17} Harry Psomiades, \textit{Greece: From the Colonels' Rule to Democracy}, in \textit{Legacies of Authoritarianism}, supra note 9, at 251, 255.
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} See generally \textit{Impunity and Human Rights}, supra note 2; \textit{Americas Watch, El Salvador: Accountability and Human Rights} (1993); \textit{Lawyers Committee for Human Rights, El Salvador's Negotiated Revolution: Prospects for Legal Reform} (1993).
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The Ad Hoc Commission was to hear the parties concerned and its recommendations were confined to the transfer or discharge of military officers. The Commission was able to "avail itself of information from any source which it consider[ed] reliable." It recommended the transfer or discharge of 102 active-duty officers. After initial resistance by El Salvador's President Alfredo Christiani to carrying out the Commission's recommendations, eventually the government implemented them, including the removal of the defense minister, General René Emilio Ponce. Thus, the Commission was able to cleanse the army, reaching the highest level of command.

B. The Former Soviet Bloc Countries

In many countries under the former Soviet Bloc, lustration, or disqualification of those formerly in power, of the agents of the secret police and their informers, and civil servants, has been the common form of mechanism of accountability and acknowledgment, which may include the loss of civil and political rights. Although, in general, this form of sanctions may accompany a criminal conviction, in most Eastern and Central European countries lustration is in lieu of criminal prosecution.

1. Czechoslovakia (the Czech and Slovak Federal Republics)

Czechoslovakia adopted a stringent lustration code after the Parliament appointed a Commission of 20 of its members to investigate the November 17, 1989, incident in which many Czech students were injured and beaten under the old regime. This was the incident, in fact, that sparked Czechoslovakia's revolution. It was found, after the Commission had been in existence for a few months, that half of its members had previously collaborated with the Czech secret service.

Under the Czech lustration law, former Communist officials and collaborators with the secret police were banned from:

22. AMERICAS WATCH, supra note 21, at 8.
23. The word "lustration" is derived from the Latin *lustrara*, meaning "to put light on" or illuminate. It also is said to be derived from *lustrum*, described as a purifying sacrifice carried on every five years in Imperial Rome, or the Latin *lustratio*, which means purification by sacrifice or purging. See Accountability for State-Sponsored Human Rights Abuses in Eastern Europe ad the Soviet Union, 12 B.C. THIRD WORLD L.J. 241, 244 n.12 (1992) (remarks of Vojtech Cepl, Vice Dean and Professor of Law at Charles University, Prague).
25. See id. at 244.
holding positions in the state administration at both the federal and the republican levels; the Czechoslovak Army (the rank of colonel and higher); the federal Security and Information Service; the federal intelligence agency; the federal Police; the Office of the President; the Office of the Federal Assembly; the Office of the Czech National Council; the Office of the Slovak National Council; the offices of the federal, Czech and Slovak governments; the offices of the federal and republican Constitutional Courts; the offices of the federal republican Supreme Courts; and the Presidium of the Czechoslovak Academy of Sciences; ... top positions in Czechoslovak, Czech and Slovak radio and television; ... the Czechoslovak Press Agency; ... top management positions in enterprises and banks owned by the state; ... to top academic positions at colleges and universities; ... and to judges and prosecutors.\textsuperscript{26}

Professor Cepl includes among the features of the lustration act passed by the then Czech and Slovak National Assembly on October 4, 1991,\textsuperscript{27} that every citizen may apply to a special office for the results of his/her lustration and receive a paper stating whether he or she was registered as a collaborator. This paper is a requisite for applying for employment in positions such as those listed above. Those who do not agree with the results of their lustration can seek a court review of the findings. Those who hold any position for which lustration is required must provide a copy of the paper detailing the results of their lustration or must otherwise relinquish their jobs.\textsuperscript{28} The bar on holding a range of positions remains in effect up to the year 2000.

In November 1992, the Constitutional Court upheld the constitutionality of the law, although it struck down a "potential candidates for collaboration" category contained in the law.\textsuperscript{29} The law has been criticized on the ground that:

\[\text{It is partially based on a presumption of guilt rather than of innocence; that is, the burden is on people in certain government positions to prove they did not work for the secret police or were not Communist officials. Moreover, by barring entire categories of people, such as former Communist officials, from holding certain positions, the law espouses the principle of collective guilt. ... Finally, the law does not distinguish between various degrees of guilt. Former secret police officials will be treated no more severely than people who were coerced into}\]


\textsuperscript{28} Cepl, \textit{supra note 23}, at 245.

\textsuperscript{29} See Gibney, \textit{supra note 12}, at 124.
collaborating with or informing for the secret police.\textsuperscript{30}

In July 1993, the Czech Parliament passed the "Law on the Illegitimacy of and Resistance to the Communist Regime." The law declared the former Communist Party "illegitimate" and "criminal," and abolished the statute of limitations for ideologically motivated crimes committed between February 1948 and December 1989. In December 1993, the Czech Constitutional Court upheld the law.\textsuperscript{31}

2. Other Eastern and Central European Countries

Hungary adopted a lustration law in March 1994,\textsuperscript{32} under which nearly 12,000 high-ranking officials, including members of Parliament, ambassadors, army commanders, chiefs of police, managers of state-owned banks, judges, and deans, were subject to a screening process. The purpose was to determine whether they had collaborated with the former Secret Police.

After the Constitutional Court struck down several provisions on the ground that they were vague and arbitrary, Parliament enacted a new law in July 1996, under which all persons born before February 14, 1972, must be screened before taking an oath before Parliament or the President. The purpose is to determine whether the official worked for the internal state security service. If so, the person will be asked to resign within 30 days. In 1997, several deputies were investigated under the law to determine whether they had collaborated with the former secret police.

In Poland, amendments to the law on lustration entered into force on August 3, 1997.\textsuperscript{33} Under the law a Lustration Court was established to examine those who collaborated with the secret police. The law provides for the screening and vetting of people who seek public office to ensure that they had not collaborated with the former secret services. Those affected include candidates for office and top officials.

The Lustration Court's task is to verify the high officials' declarations regarding their collaboration or lack thereof with the former secret police. Those screened have the right to counsel and to appeal the Court's decision. A person giving false statements is to be banned from public office for 10 years.\textsuperscript{34}

In Bulgaria, attempts to pass lustration laws began in 1992 and the Constitutional Court upheld the Law on the Temporary Introduction of

\textsuperscript{30} Pehe, \textit{supra} note 27, at 8, \textit{cited in} Gibney, \textit{supra} note 11, at 124 n. 204.

\textsuperscript{31} See Ellis, \textit{supra} note 24, at 178.

\textsuperscript{32} See generally id., at 178-79.

\textsuperscript{33} See id. at 186-87.

\textsuperscript{34} Constitution Watch, 6 E. EURO. CONST. REV. 22 (1997), \textit{cited in id.} at 187.
Additional Requirements for Members of the Executive Bodies of the Scientific Organizations and the Higher Certifying Commission, under which screening of all persons seeking positions in the executive bodies of scientific organizations is required. The burden of proof is on the candidate to show that s/he was not ranking members of the Communist Party.\footnote{See generally id. at 182-83.}

Similarly, in Albania the lustration law, the Law on the Verification of the Moral Character of Officials and Other Persons Connected with the Defense of the Democratic State,\footnote{No. 8043, Nov. 30, 1995, cited in id. at 180, n.26. See generally id. at 180-82.} was adopted by Parliament in 1995. Under the law, the government is authorized to examine former secret police files, and a candidate cannot run for office without clearance of the newly created Special Verification Commission. The administrative procedure for clearance is seen as long and cumbersome,\footnote{Constitution Watch, 5 E. EURO. CONST. REV. 2,3 (Winter 1996), cited in id. at 181 n.33.} and lacking in adequate due process for prospective candidates.\footnote{See id. at 181, n.36.}

The Baltics,\footnote{See generally id. at 184-86.} Romania,\footnote{See generally id. at 187-88.} Russia,\footnote{See generally id. at 188-89.} Ukraine,\footnote{See generally id. at 189-90.} Belarus,\footnote{See generally id. at 190.} and Central Asian Republics\footnote{See generally id. at 190.} have also attempted to address the excesses of the Communist era by legislative measures, including attempts at civil and political sanctions.

IV. CONCLUSION

The role of civil and political sanctions is to ensure accountability and to exclude from public office and positions of influence those who are found to have committed egregious violations and abuses and also to prevent them from holding positions of influence even in the private sector, such as banking executives and school teachers. Democratic societies must have a right and the means to rid from positions of responsibility, power or influence those who have committed abuses and serious violations, as high military officials and law enforcement officers.

This is a sound accountability mechanism, for it sends a salutary signal to victims in particular and society in general that those responsible for excesses, egregious violations and abuses will not stay in office. It helps the healing process. If a prosecutor, for example, who abused
the process, is not allowed to stay in office, this lends credibility to the new government's voice.

This process, however, has to be undertaken on an individual basis. A blanket exclusion of all who belonged to a party or of those whose names are found on some files seen by those now in power smacks of imposing collective guilt. If this results in administrative purges the executive in power could be simply indulging in a new abuse and an effort by those in power to consolidate it. Due process protections must be ensured. There must be a right to appeal, and there must be transparency. The process must be formal and proceedings open.

A critical appraisal of the Lustration Law of Czechoslovakia, the first such experiment in recent years, aptly illustrates the flaws:

Despite the initial high hopes, Lustration does not seem to have fulfilled all of its stated aims. On the one hand, it has prevented some former communist officials and State collaborators from acquiring positions of current political and economic influence. On the other hand, it has also fostered an atmosphere of political instability in which scandals often took precedence over more important legislation. Nor, it seems, has lustration necessarily allayed the public's suspicions that former communist officials and State collaborators continue to exert political and economic influence and to reap the same benefits as were afforded the communist regime.45

The role of the International Criminal Court, once it is established, pertaining to civil and political sanctions by member states presents a difficult issue. Is there room, for example, for the ICC to prosecute those cases where there are also administrative civil sanctions, for these do not amount to impunity?

We must ensure that administrative vetting, civil and political sanctions are not arbitrary, nor politically motivated, but are applied fairly and serve the public order goals that I discussed at the outset.

International lawyers have not paid adequate attention to the subject of civil and political sanctions, unlike that of criminal sanctions, to address massive human rights abuses. Thus, the forthcoming initiative of the U.S. Institute of Peace to conduct in-depth research in this area is most welcome.

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POST TRUSTEESHIP ENVIRONMENTAL ACCOUNTABILITY: CASE OF PCB CONTAMINATION ON THE MARSHALL ISLANDS

HYUN S. LEE*

I. INTRODUCTION

At the conclusion of World War II, the newly formed United Nations sought to aid in the autonomous development of the newly liberated peoples in Africa and Micronesia. This entailed the establishment of a system of trusteeship states to be administered by members of the United Nations until the beneficiaries of these trusts were ready to take the reins of governance into their own hands. Along with the development of autonomous systems of government, the trustees also sought to aid in the trust territories' economic development. In doing so, the trustees were basically given free reign in administering the trust territories.

Tragically, this lack of accountability for their actions in the trust territories led to a number of haphazard environmental practices among the trustees. Subsequently, the former trust territories were left with a number of ecological disasters to deal with. Economically unable to deal with these issues by themselves, the governments of the former trust territories requested that those who created these situations be accountable. However, they were often faced with a great deal of resistance by the former trustees.

A number of these ecological issues were raised by the former trustee states with the trustees. None of these suits have actually been re-

* Washington College of Law, American University 1997, JD; University of Washington School of Law, LLM. I would like to thank my family for their support since the beginning. I want to extend my profound thanks to: Professor Daniel Bodansky and Greg Hicks of the University of Washington School of Law for mentoring me through the LLM that resulted in this paper; to Bob Thiel and Andrea Mathis for peer reviewing my paper; Norm Lovelace and Holly Barker for their factual and technical assistance without whom I would have been utterly confused on the facts of what occurred; Sally Dalzell for giving me the sense of purpose and faith in the law to begin to pursue a career in environmental law; Jessie Cantor and Juni Luyombya for being there as good friends and valued colleagues; and to my friend Jodie Allen for her kind and unflattering support dutin the final stages of this paper and beyond.
solved through an adjudication which would have established some sort of legal precedent on the matter. Rather, the parties have all negotiated settlements wherein the former trust territories contract away rights to further claims against the trustees. In light of the non-resolution of some of these issues, the question still exists as to whether a fiduciary relationship exists between the trustees and the former trust territories such that they are liable for ecological harm.

In 1986, the United States terminated its trustee relationship with its former trust territories by entering into the Compact of Free Association. Presently, the former portion Trust Territory of the Pacific Islands consisting of the Marshall Islands are an independent country, the Republic of the Marshall Islands. While it still retains close ties with the United States, the Republic of the Marshall Islands is an autonomous state. However, the environmental consequences of the trusteeship era still linger. The United States has agreed to compensate the RMI for the harm caused to the various atolls by atomic testing during the Cold War. Another ecological threat still remains, the more subtle threat of PCB contamination. PCB's represent a more subtle, but also harmful threat, to the people of the Republic of the Marshall Islands. It is uncertain whether the RMI can afford to pay for this clean up on their own. To its credit, the United States has cleaned up one of these PCB sites, it has not accepted legal accountability. Thus, the issue still remains whether former trustees owe a duty to their former trusts to clean up for past contamination.

II. HISTORICAL BACKGROUND

The Republic of the Marshall Islands is located in the South Pacific Ocean in the region known as Micronesia. The Marshall Islands consist of approximately "thirty-four coral islands and atolls with a total land area of approximately 180 square kilometers and a population of about 43,000." It has been speculated that the Micronesian region of the Pacific Ocean was settled by human inhabitants some time between 3,000 and 5,000 B.C. Spain claimed Micronesia in 1565. This year marked a pivotal point in Micronesia history. The Europeans who first colonized Micronesia entered the venture with the mentality that they were civilizing ignorant savages. This mind-set prevailed in Spanish coloni-

2. *Id.* at 100.
3. *Id.*
4. The sixteenth century theologian and jurist Francisco de Vitoria stated that: [a]lthough the aborigines in question are . . . not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims . . . . It
alism until the end of the Spanish Empire. It can be argued to have survived even through the days of the League of Nation Mandate System and the United Nations Trusteeship System. From the date that Europeans arrived there, the Micronesian islands and its peoples would be traded back and forth from one empire to another.

By the nineteenth century, Micronesia would be visited by maritime traders from around the world.\textsuperscript{5} It was during the era of steam ship travel that Micronesia really became the focus of imperialist attention. This was the era where Alfred Thayer Mahan's theories of maritime empires based on re-fueling stations spread throughout the world came to life. Micronesia represented a crucial link between Europe, the Americas and Asia. This was also the time when the German Empire and the British Empire began to dispute Spain's claims to Micronesia.\textsuperscript{6} The lands and peoples of Micronesia were never perceived by Europe-

might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns and might even give them new lords so long as this was clearly for their benefit. I say there would be some force in this contention; for if they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay our sovereigns would be bound to take it, just as if the natives were infants.


5. Zorn, supra note 1, at 100.
6. Britain was not overly anxious to acquire new colonies but could not at the same time permit the unopposed expansion of German influence in what was now perceived to be a vital area of the globe. A compromise had to be reached and at a Conference in Berlin in 1886 the two empires drew an arbitrary line dividing the Pacific into two great spheres of influence-the British and the German. The map drawer, who may have never seen [the region he was demarcating], ran his pen through the little stretch of 250 kilometers of water which separated Nauru from its nearest neighbor . . . .There was nothing unusual in such map drawing activities. The great powers had grown accustomed to the idea that the rest of the world was there to be divided up for their own benefit. Portions of the world had been carved up before and this was the era when the great partition of Africa took place at the Congress of Berlin in 1885 and that continent was cut into portions shared out among the colonial powers. The welfare of the people populating the areas through which the fine pen of the cartographer ran was certainly not the most important consideration in the exercise.

ans thought of as independent nations with living and breathing human inhabitants with unique cultural assets worth preserving, but merely as strategic assets on a global chess board. Even in the nineteenth century, there was still the Eurocentric racist notion that had engrained itself into international law that only "only European states were fully sovereign[; and] Non European states [ ] existed outside the realm of the law and thus could not legally oppose the sovereign will of the European states." Given this mind set, it is not surprising the attitude of the European conquerors who conquered Micronesia, and then traded the land and the people as though they were chattel.

After Spain lost the "Spanish American War" to the United States, it sold its possessions in Micronesia to the German Empire for $4.5 million in 1886. German occupation of Micronesian Islands only lasted until World War I. Once World War I began, Japan declared war on Germany and annexed German possessions in Micronesia, including the Marshall Islands. At the end of World War I, the League of Nations created a system of mandates out of the former territories of the German and Ottoman Empires.

The League of Nations established a number of basic principles to guide its members in the administration of the Mandate Territories. One of the most fundamental of the guiding principles of the League of Nations was that the administrators of a Mandate were in the position of maintaining a trust. In Article XXII of the Covenant of the League of Nations it proclaimed,

[t]o those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

Thus those members of the League of Nations that accepted a Mandate made a covenant with each other and the inhabitants of the Mandate that the interests of the inhabitants of the Mandate were to be considered a sacred trust. The League of Nations Mandate System, where states entrusted with a Mandatory were to act on behalf of the

7. Anghe, supra note 4, at 493-94 (citing THOMAS LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 1 (1895)).
10. HEINE, supra note 8, at 14.
11. LEAGUE OF NATIONS COVENANT art. 22, para. 1.
League of Nations, was the first time that international accountability was implemented.\(^\text{12}\)

The League of Nations divided the former German and Ottoman territories into three classes of Mandates: Class A Mandates,\(^\text{13}\) Class B Mandates\(^\text{14}\) and Class C Mandates.\(^\text{15}\) In 1920, Japan was granted the Class C Mandate of the "former German Pacific Islands," including the Marshall Islands.\(^\text{16}\) Under the Japanese mandate, the Marshall Islands were subjected to intense economic development as a result of large-scale Japanese immigration.\(^\text{17}\) By 1935, Japan had begun constructing military bases on its Class C Mandates.\(^\text{18}\) Subsequently, by the beginning of World War II when Japan left the League of Nations, the majority of the population in the Marshall Islands Class C Mandate was Japanese.\(^\text{19}\)

Believing the December 7, 1941 surprise attack on Pearl Harbor had been launched from the Marshall Islands, the United States entered World War II "determined that Micronesia would never again pose a security threat to the United States."\(^\text{20}\) After a long and bloody engagement in the Pacific, the United States ended World War II with the detonation two nuclear bombs over Hiroshima and Nagasaki. At the end of the hostilities, the United States replaced the Japanese Empire's military presence in Micronesia as the regional power. On a global scale, the United States had a tremendous amount of influence in shaping the post war global reality. Subsequently, the United States made it a priority to neutralize Micronesia as a strategic threat to the United States.

At the end of World War II, the United Nations replaced the League of Nations. It replaced the League of Nations Mandate System

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13. Class A Mandates consisted of former Turkish territories (Lebanon, Transjordan, Syria, Iraq and Palestine) which were autonomous but subject to assistance by a mandatory power "until such time as they are able to stand alone." Francis B. Sayre, Legal Problems Arising from the United Nations Trusteeship System, 42 AM. J. INT'L. L. 263, 264 (1948) (citing LEAGUE OF NATIONS COVENANT art. 22, para. 4).
14. Class B Mandates were former German territories in Central Africa "not yet ready for self government."\(^\text{Id.}\) at 264.
15. Class C Mandates included South West African as well as all of the German Pacific colonies: those territories which the Allies doubted would ever be able to stand alone.\(^\text{Id.}\) (citing LEAGUE OF NATIONS COVENANT art. 22, para 6).
17. \textit{Id.} at 4.
18. \textit{Id.}
19. \textit{Id.}
20. \textit{Id.} (citing JOHN MCNEIL, THE STRATEGIC TRUST TERRITORY IN INTERNATIONAL LAW 25 (1976)).
with the International Trusteeship System. As in the League of Na-
tions Covenant, the nation states that accepted a UN Trusteeship ac-
cepted a sacred trust to promote the well being of the inhabitants of the
Trust. It recognized the need to respect the cultures of the peoples of
the Trusts. The U.N. Charter recognizes that the interests of the in-
habitants of the newly created Trust territories are "paramount." It
also requires the members of the United Nations who accept the Trus-
teeship responsibility to acknowledge the acceptance of a "sacred trust
obligation" whose beneficiaries are the Trust Territory's inhabitants.
This system should have been the means to achieve the noble aspiration
of self determination originally articulated in the League of Nations.
The United Nations Trusteeship System should have served to give life
to the noble spirit of the United Nations Charter and to create an ave-
nue to achieve those noble aspirations articulated decades before in the
League of Nations.

In light of the newly emerging Cold War and the heavy price paid
in World War II, national security and strategic interests prevailed in-
stead. Within the United Nations Charter, there was a provision that
permitted the creation of "Strategic Trusts."21 "The administering
authority of a strategic trust was able to exercise more control over the
territory than a non-strategic trust. The Trusteeship Agreement that
the United States negotiated with the United Nations Security Council
allowed the United States to deploy its military forces in Micronesia,
establish military bases, and to close off areas for security
purposes."22 This device granted the Trustee a great deal of latitude in the admin-
istration of the Trust Territory.23

The terms of the Trusteeship and the Strategic Trust would be gov-
erned by the individual Trusteeship Agreement. In its relationship
with the Marshall Islands, the United States had extensive powers in adminstering the Trusts.24 Article 3 of the Trusteeship Agreement

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21. "There may be designated, in any trusteeship agreement, a strategic area or areas
which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43." U.N.
CHARTER art. 82.


23. As the U. N. CHARTER states:
   It shall be the duty of the administering authority to ensure that the trust
territory shall play its part in the maintenance of international peace and se-
curity. To this end the administering authority may make use of volunteer
forces, facilities, and assistance from the trust territory in carrying out the
obligations towards the Security Council undertaken in this regard by the
administering authority, as well as for local defense and the maintenance of
law and order within the trust territory.

U.N. CHARTER art. 84.

24. In discharging its obligations under Article 76(a) and Article 84 of the Char-
stated that,

[t]he administering authority shall have full powers of administration, legislation and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modification which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.\textsuperscript{25}

The United States had ultimate authority over the terms of the agreement in that it had to approve any modifications to the Trusteeship agreement.\textsuperscript{26} In the end, the United States had near complete dominion over how it would administer the Trust territories placed in its care. The United States had the entire area comprising the Marshall Islands, the Carolina islands and the Marianas, composing an area of 846 square miles designated a "Strategic Trust."\textsuperscript{27} The United States used several atolls in the Marshall Islands as "Ground Zero" for thermonuclear detonation experimentation. The very first of these hydrogen bomb experiments took place on Bikini Atoll in the Marshall Islands in 1946.\textsuperscript{28} The experiments that took place in 1946 were referred to as "Operation Crossroads."\textsuperscript{29} The following year on December 2,
1947, the Atomic Energy Commission announced that Enewetak Atoll would be the "proving ground" for future atomic weapons tests.\textsuperscript{30} The Atomic Energy Commission justified its choice of Enewetak Atoll and the resettlement of its inhabitants, on the basis that it had the fewest inhabitants and "it [was] isolated and there [were] hundreds of miles of open seas in the direction in which winds might carry radioactive particles."\textsuperscript{31} Operation Crossroads forced the evacuation of the Bikinians from their ancestral homes to Kili Island.\textsuperscript{32}

In 1954, the Marshallese people made an urgent plea to the United Nations to stop the next round of hydrogen bomb experiments. In their petition, the Marshallese people described the subject of their petition as a "Complaint regarding the explosion of lethal weapons within our home islands."\textsuperscript{33} In this petition, the Marshallese emphatically stated that:

\begin{quote}
[W]e, the Marshallese people feel that we must follow the dictates of our consciences to bring forth this urgent plea to the United Nations, which has pledged itself to safeguard the life, liberty and the general
\end{quote}

weeks after the Able test. The bomb was suspended at a depth of 90 feet below the Bikini lagoon surface. Once detonated, the explosion created an enormous dome of water that rose nearly a mile into the sky. The explosion also created an underwater shockwave and gigantic waves that caused severe damage to many target ships and the islands . . . . Despite warnings, the Baker test went ahead as scheduled. As [predicted, [sic] all target ship, as well as the Bikini lagoon, were heavily contaminated by radioactive materials.


\textsuperscript{31} Margolis, \textit{supra} note 27, at 631.


\textsuperscript{33} Petition from the Marshalese People concerning the Pacific Islands, U.N. Doc. No. T/Pet.10/28 (1954)[hereinafter Petition].
well being of the people of the Trust Territory, of which the Marshallese people are a part.

The Marshallese people are not only fearful of the danger to their persons from these deadly weapons in case of another miscalculation, but they are also very concerned for the increasing number of people who are being removed from their land.

Land means a great deal to the Marshallese. It means more than just a place where you can plant your food crops and build your houses; or a place where you can bury your dead. It is the very life of the people. Take away their land and their spirits go also.

The Marshall Islands are all low coral atolls with land area where food plants can be cultivated quite limited, even for today's population of about eleven-thousand people. But the population is growing rapidly; the time when this number will be doubled is not far off.

The Japanese had taken away the best portions of the following atolls; Jaluit, Kwajalein, Enewetak, Mills, Malcelap and Wetje to be fortified as part of their preparation for the last war, World War II. So far, only Imedj Island on Jaluit Atoll has been returned to its former owners.

For security reasons, Kwajalein Island is being kept for the military use. Bikini and Enewetak were taken away for atomic bomb tests and their inhabitants were moved to Kili Island and Ujelang Atoll respectively. Because Rongelab and Uterik are now radio-active, their inhabitants are being kept on Kwajalein for an indeterminate length of time. 'Where next?' is the big question which looms large in all of our minds.\textsuperscript{34}

Tragically, the hydrogen bomb experiments continued. Subsequently, the Marshallese islands of Rongelap and Utrik were irradiated and its people were deprived of their ancestral homes. Beginning in the late 50's, the Micronesians began to exercise some influence on the administration of the Trust Territories. The Congress of the Marshall Islands created in 1949, was reorganized into a new unicameral legislature in 1958, giving special seats to the traditional chiefs known as Iroij laplap.\textsuperscript{35} In 1965, the Congress of Micronesia was established as a territory wide bicameral legislative body.\textsuperscript{36} In 1967, it established the Political Status Commission to negotiate with the United States about

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} Zorn, \textit{supra} note 1, at 100.

\textsuperscript{36} \textit{Id.}
administration of the Trust Territory. This resulted in the establishment by the Nijitela (the Marshallese Legislature) of their own separate Political Status Commission to negotiate with the United States about the administration of the Marshall Islands.

The first substantive steps towards Marshallese independence began in 1977 with the convening of the Marshall Islands Constitutional Convention. This led to the Hilo Principles in 1978, establishing free association as the basis for future relations with the United States. The Marshallese eventually adopted their own Constitution in 1979. The principles of free association established in 1978 led to fruition in 1982 with the signing of the Compact of Free Association, ending the Trust territory relationship between the United States and Micronesia.

Presently, the days of the Trusteeship System are over. The Marshallese have a nation of their own, the Republic of the Marshall Islands. Their relationship with the United States is one of "free association," governed by the Compact of Free Association. With the ratification of this document, almost forty years of U.S. administration of the Marshall Islands as a Trust Territory ended. Although the official Trust relationship between the United States and the Marshallese is over, the legacy of the past still lingers today. To its credit, the United States has accepted financial accountability for some of its actions in the past.

III. THE PROBLEM OF PCB CONTAMINATION

A. The Leaking Transformers

During the Trust administration, the United States Department of

37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. Cf. Territories and Insular Possessions, 48 USC 1681 (1998), et seq.
43. The Compact of Free Association set forth in title II of this joint resolution between the United States and the Government of the Marshall Islands of the Palau is hereby approved, and Congress hereby consents to the subsidiary agreements as set forth... on April 9, 1986, as they relate to such Government. Subject to the provisions of this joint resolution, the resident is authorized to agree, in accordance with section 411 of the Compact, to an effective date for and thereafter to implement such Compact, having taken into account any procedures with respect for termination of the Trusteeship Agreement.

Id. at Title I, § 101.
Defense and the Department of Interior, the two agencies mandated by the United States government with the administration of the Marshall Islands, brought electrical transformers to the Marshall Islands to develop a power system.\textsuperscript{44} Polychlorinated Biphenyls (PCBs) were used in transformers as insulation because of their longevity, their durability, non flammable nature and stability.\textsuperscript{45} Under United States law, as of 1977 PCB's were no longer permitted to be imported or manufactured in the United States.\textsuperscript{46} When these, PCB carrying, transformers were brought to the Marshall Islands is unclear. However, the threat they represented to the Marshallese people was.

Some of these hazardous transformers were buried and abandoned on atolls in the Marshall Islands.\textsuperscript{47} A number of the sites where used transformers had been abandoned were discovered to be leaking PCBs into the soil and water.\textsuperscript{48} It is unclear how many of these PCB sites exist undiscovered. A number of transformer sites were found on Jauit, Ebi, Enewetak and Bikini Atoll, with the largest being on Majuro.\textsuperscript{49} The E.P.A. tested the soil these transformer sites for P.C.B. contamination. The results varied from no PCB contamination of the soil to some PCB contamination of the soil.\textsuperscript{50} The sizes of the PCB carrying transformers varied from smaller 30 to 50 gallon containers to larger 1,000 gallon containers.\textsuperscript{51} Consequently, the magnitude of contamination or potential for contamination varied from site to site. At one site in Jaluit, the E.P.A. dealt with the problem of PCB contamination using a method of treatment known as cement fixation, where cement was poured into the soil to immobilize future PCB seepage movement.\textsuperscript{52} At a site in Majuro, the PCB concentration was not terribly high but action was still required. Thus, E.P.A. capped the contaminated site with a 40 by

\begin{itemize}
\item \textsuperscript{44} Marshall Islands Seek Superfund Money to Clean Up PCBs Left by US Government, BNA INT'L ENVT'L DAILY, Sept. 8, 1993. [hereinafter Marshall Islands].
\item \textsuperscript{45} THEO COLBURN ET AL., OUR STOLEN FUTURE 89 (1996).
\item \textsuperscript{46} 15 U.S.C. § 2605 2(A) & (C) (1998).
\item \textsuperscript{47} Marshall Islands Seek Superfund money to Clean Up PCBs Left by U.S. Government, BNA INT'L ENVIRONMENTAL DAILY (Sept. 8, 1993).
\item \textsuperscript{48} Telephone Interview with Holly Barker, Spokeswoman, Embassy of the Republic of the Marshall Islands [hereinafter Barker].
\item \textsuperscript{49} Telephone Interview with Norm Lovelace, Director, Pacific Insular Area Programs, U.S. Environmental Protection Agency, Region IX [hereinafter Lovelace].
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\end{itemize}
Generally, any transformer at a PCB site that had a concentration of higher than 500 parts per million of PCB in it was treated and shipped off island to the United States for disposal at a licensed disposal facility. Throughout the clean up process of the known transformer sites, the E.P.A. encountered administrative difficulties in that a number of the problematic transformers had been from one site to another. Subsequently, the E.P.A. had to re-identify and reassess the site before beginning the removal process.

Unlike the long and complex process involved in a standard Superfund clean up, the E.P.A. was able to move relatively quickly by designating the clean up as an emergency removal. Throughout the clean up process, the E.P.A. consulted with the government of the RMI in a cooperative agreement. The first major transformer sites were cleaned up by the United States Environmental Protection Agency. According to Norm Lovelace of E.P.A. Region IX, this was done as a good faith measure, not as a legal obligation. One of the reasons for the relatively quick and efficient clean up of these PCB contaminated sites was the informal, but personal, relationships between the various actors from the Marshallsean government and the United States. By avoiding the various formalities in official proceedings, the people involved were able to devote important time and resources to cleaning up the PCB contamination. The United States E.P.A. has also taken measures to instruct local authorities on how to deal with future clean ups. However, the issue of liability in the context of future disposal of newly discovered PCB contamination is still unresolved. Holly Barker, a spokesperson from the Republic of the Marshall Islands Embassy in Washington, D.C., stated that new leaking transformers are uncovered after every major storm blows through the islands. Another batch of transformers was discovered recently on Kawajalein Atoll. Thus, the problem of PCB contamination still exists as a very real threat to the human environment in the Marshall Islands.

53. Id.
54. Id.
55. Id.
57. Lovelace, supra note 49.
58. Telephone Interview with Jorelik Tibon, Republic of the Marshall Islands Environmental Protection Agency.
59. Lovelace, supra note 49.
60. Barker, supra note 48.
61. Id.
62. Id.
63. Id.
64. Id.
B. The Harm Caused by PCBs

The true potential for harm the presence of these abandoned transformers represent to the Marshallese people cannot be understood without some understanding of the nature of PCB's. PCB's, while harmful in nature, do not kill instantaneously like cyanide. Rather, their effects are felt in a more subtle and less easily detectable manner. Dioxins, such as PCB's:

[A]ffect the thyroid system in diverse, complex, and as yet incompletely understood ways. Some analyses indicate they may mimic or block normal hormone action perhaps by binding to the thyroid receptor. Other data suggest they may even increase the number of receptors present to receive the hormone signals. They also seem to act particularly on T4, the form of thyroid hormone that is critical to prenatal brain development.65

As a hormone mimic or block, PCB's will disrupt biological development at a cellular level. Normally:

[h]ormones and their receptors fit together with a "lock and key" mechanism. Under normal conditions, a natural hormone binds to its receptor and activates genes in [a cell's] nucleus to produce the appropriate biological response. Hormone mimics can also bind to the receptor and induce a response, but prevent natural hormones from attaching to the receptor. Certain synthetic chemicals released into the environment can behave like hormone mimics and hormone blockers, contributing to disruption of cellular activity. The compound that out-numbers or completely out competes for receptor sites determine the response by the cell.66

Thus a hormone mimicker or blocker will manifest itself in the form of damaged reproductive systems, altered nervous system and brains, and impaired immune systems.67

The threat of PCB's is not isolated to the disruption of cellular development. Rather, as one of the most persistent of dioxins, it has a tendency to effect an entire eco system. PCBs move up through the food chain, beginning in soil that is absorbed by plants then consumed by a herbivore that is then eaten by an organism higher on the food chain and eventually working its way to human consumption. By the time it is consumed by a human being, the concentration level of PCB in the fat cells will have increased dramatically.

65. Colborn, supra note 45, at 187.
66. Id. at 72.
67. See id. at 172.
During its trip up the food chain, each organism acquired through consumption all the PCBs stored in the fat cells of its meal. Subsequently, PCBs will manifest themselves in the soil, the ground water, the surface waters, the vegetation, the animal life and human life wherever it is present. In a small ecosystem such as the atolls of the Marshall Islands, where there is little escape for this persistent substance, the level of exposure concentration in the environment will be higher. Thus, the Marshallese will be subject to more exposure pathways through which PCBs can enter their bodies. Therefore, a more thorough remediation will have to be effected in contaminated areas.

Until a remediation takes place those lands that have absorbed the leaking transformer PCBs will be potentially harmful to human health. Thus, the Marshallese will be deprived of the use of land that is particularly valuable given the small amount of land that comprises their nation. The Marshallese recognize that their population is growing and that this will be problematic in light of the geographic reality that the Republic of the Marshall Islands is made up of a number of small atolls. As articulated in their 1954 petition to the U.N.,

[...] and means a great deal to the Marshallese. It means more than just a place where you can plant your food crops and build your houses; or a place where you can bury your dead... It is the very life of the people. Take away their land and their spirits go also.

The PCB contamination of their lands will not only physically impair the ability to efficiently utilize their lands, depriving them of valuable land that could be used for farming or housing, but it may also strike at the heart of their culture. To people who have lived on small delicate atolls dating back thousands of years, the deprivation of the use of certain lands may have significantly detrimental cultural effects.

The potential for harm from these PCB leaking transformers is clear. The source of this pollution is also clear. These transformers were brought to the Marshall Islands by the United States to develop a power system on the islands. There was no malevolent intent on the part of the United States in this action. In all likelihood, the United States was acting quite benevolently in aiding in the development of an energy infrastructure on the Marshall Islands. However, the fact of the matter is that in the process of developing this energy infrastructure, the United States government left behind a number of transformers that have leaked their hazardous contents. While the United States

68. See id. at 87-109.
69. Petition, supra note 33.
Government has taken measures to clean up the first PCB site, it has acknowledged no liability. It has also been speculated that there are other sites in the Marshall Islands with aging transformers that may begin or have already started to leak their hazardous contents into the soil or waters of the Marshall Islands. The question that remains to be resolved is whether there is a future duty on the part of the United States government that brought these transformers to the Marshall Islands, or by any of the other Trustees who polluted the Trust they were administering, to rehabilitate their former Trust. Answering this question will entail an examination of the provisions of the UN Charter establishing the Trusteeship System, the terms of the Trusteeship Agreement between the United States and the UN Security Council, other international agreements such as the Stockholm Declaration and the UNCED Declarations, International Custom and actions that may be the basis for establishing a new custom of international affairs.

IV. INTERNATIONAL LAW

A. International Environmental Law

The general body of International environmental law is unclear on whether liability attaches to a state that causes injury to another state through past actions that are not violations of international law nor international custom. Generally, most international environmental agreements are prospective in nature. They seek to prevent present and future environmental harm. All discussions of international environmental harm and liability begin with the Trail Smelter case between the United States and Canada. The Trail Smelter Arbitration involved claims brought by the United States against Canada for damage to U.S. residents' property by sulfur dioxide emissions from a Canadian smelting operation in British Columbia. The Trail Smelter Arbitration tribunal ruled that:

[under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.]

This ruling became, what is known today, as the "Polluter Pays"

71. Id. at 1965.
principle in international environmental law. Some international legal scholars have suggested that the Trail Smelter Arbitration ruling stands for the proposition that liability should not be based on fault, but something closer to strict liability.\textsuperscript{72}

\subsection*{B. Strict Liability Based Regime}

International agreements have established the imposition of absolute liability for harm resulting from certain activities such as space activities.\textsuperscript{73} The Convention on International Liability for Damage Caused by Space Objects provides that "[a] launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."\textsuperscript{74} This imposition of absolute liability is rooted in the traditional notion that parties engaging in potentially ultra hazardous activities should be absolutely liable for any harm. It stands as recognition that with the great advances in technology within the last fifty years, human beings have begun to engage in activities that entail the use of materials that are more potentially harmful and volatile.\textsuperscript{75} Applied to the facts of the PCB contamination on the Marshall Islands, the importation of transformers for the purpose of developing a power system for the Marshallese cannot reasonably be considered an ultra hazardous activity that would carry strict liability consequences with it.

\subsection*{C. Wrongfulness Based Liability Regime}

The World Commission on Environment and Development has advocated a liability scheme based on wrongfulness rather than one based on strict liability.\textsuperscript{76} In Article 21 of the Brundtland Report, it states that "[a] state is responsible under international law for a breach of an international obligation relating to the use of a natural resources or the prevention or abatement of an environmental interference."\textsuperscript{77} Under this wrongfulness based approach, the responsible state would

\begin{footnotesize}


\textsuperscript{74} Id. art II.

\textsuperscript{75} O'Keefe, supra note 72, at 187-89.

\textsuperscript{76} Id. at 192.

\textsuperscript{77} Id. at 191 (quoting WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, EXPERTS GROUP ON ENVIRONMENTAL LAW REPORT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT, LEGAL PRINCIPLES AND RECOMMENDATIONS 32 (1986)).
\end{footnotesize}
be required to, "a. cease the internationally wrongful act; b. as far as possible re-establish the situation which would have existed if the internationally wrongful act had not taken place; c. provide compensation for the harm which results from the internationally wrongful act; d. where appropriate, give satisfaction for the internationally wrongful act." 78

Applied to the facts surrounding the PCB contamination of the Marshall Islands, it is uncertain whether, at the time of their importation, the United States was even aware of the potential harm that PCBs could cause. Nor is it clear whether anyone knew at the time of the importation of the transformers that PCBs were a toxic substance. It is entirely possible that the transformers were perceived as being beneficial goods that were being imported for the benefit of the Marshallese. Therefore, it is uncertain, based on the scientific knowledge at the time, whether the United States could be found to have been negligent in importing the PCB carrying substances into the Marshall Islands. Thus, a reasonable argument could be formulated that the United States did not act negligently in importing PCB laden transformers to the Trust Territories and cannot be found liable under a wrongfulness based liability scheme.

Therefore, it is unlikely that the United States could be held liable for the clean up of the PCB contamination of the Marshall Islands based on a strictly state to state analysis of transboundary environmental harm.

In the case of the Marshall Islands and the other former Trust Territories of the Pacific Islands, there was not a state to state relationship between them and the United States. Rather, it was a special one in which the United States, due to its position as a pre-eminent world power, enjoyed special privileges in its administration of the Trust Territory of the Pacific Islands. In this relationship, the inhabitants of the Trust Territory were dependent on the United States as the administrator of the trust to act in good faith. The United Nations Charter which created the International Trusteeship System and granted the United States the administration of the former Japanese Mandated Islands, also imposed a fiduciary duty upon the United States to administer the trust for the ultimate benefit of these inhabitants. In administering the trust territory, the United States had full powers of administration, legislation and jurisdiction. 79 As a result of the unequal nature of this relationship, it can be argued that the fiduciary obligation imposed a higher standard and longer enduring duty of care upon the United States in its administration of its Trust Territories.

78. Id.
79. Convention, supra note 24, art. III.
A. The International Trusteeship System

The United Nations International Trusteeship System was created to replace the former League of Nations Mandate System. The International Trusteeship System was one in which member states of the United Nations were entrusted with the administration of territories inhabited by people who had not achieved self-governance. In Article 73 of the United Nations Charter, "the member states who assumed the responsibility of administering a trust acknowledged was a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of the territories...") The roots of this principle of the sacred trust can be traced to the writings of Edmund Burke 1783 where he stated that the trusteeship principle in colonialism was one in which there must be a degree of accountability by the trustees for their actions. This regulatory element of colonialism was also embedded in the League of Nations Mandate System where it stated that "there should be applied the principle that the well-being and development of peoples [colonies and territories of the defeated nations from World War I not yet able to govern themselves] for a sacred trust of civilization." The notion of this sacred trust was one of the cornerstones of the International Trusteeship System.

The International Trusteeship System was established by the United Nations to administer and supervise those territories placed under the system by individual agreement. The "basic objectives" of the International Trusteeship System echoed those Purposes of the United Nations stated in Article I. The "basic objectives" of the International Trusteeship System were:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peo-

80. U.N. CHARTER art. 73.
81. U.N. CHARTER art. 73.
82. TOUSSAINT, supra note 12, at 6 (citing HANSARD, PARLIAMENTARY HISTORY vol. 123 (1783)).
83. Id. at 10 (1956) (quoting LEAGUE OF NATIONS COVENANT art. 22, para. 2).
84. U.N. CHARTER art. 75.
85. U.N. CHARTER art. 76.
ples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions [in the trusteeship agreements].

In looking at the express language of Article 76, it appears that the objectives of the International trusteeship System was to primarily benefit the international community rather than the Trust territories' inhabitants. However, when looked at from the broader perspective of Chapter XI and Chapter XII, including the article 73 provisions on "Non Self Governing territories," it becomes apparent that the well being of the inhabitants of the trust territories is indeed a priority.

B. Comparison to League of Nations Mandate System

Unlike the League of Nations Mandate System, the Trusteeship System was not limited by geography nor to defeated parties of the most recent war. The International Trusteeship System had a broader scope of parties that could be placed underneath its supervision than its predecessor, the League of Nations Mandate system. Whereas the League of Nations Mandate System applied to former territories of defeated states from World War I and those peoples not able to govern themselves, the International Trusteeship System had a much broader scope. Under the International Trusteeship System, trust territories could be territories held under a mandate, territories formerly belonging to defeated states of World War II and states voluntarily placed under the trusteeship by the administering state. The International Trusteeship could not accept as a trust territory a nation already a member of the United Nations. The terms under which the territory

86. Id.
87. TOUSSAINT, supra note 12, at 55.
88. Id. at 53.
89. Id. at 3.
90. LEAGUE OF NATIONS COVENANT art. 22.
91. U.N. CHARTER art. 77, para. 1.
92. U.N. CHARTER art. 78.
would be placed under the International Trusteeship System and how it would be administered were to be specified in the individual Trusteeship Agreements.\footnote{93}

\section{C. The Trusteeship Agreements}

The Trusteeship Agreements were to specify "the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory."\footnote{94} The terms of the Trusteeship Agreement were to be agreed upon "by the states directly concerned, including the mandatory power in the case of territories held under Mandate," and approved by the United Nations Security Council and General Assembly.\footnote{95} In essence, the Trusteeship Agreement was to be the legal foundation for the administering authority's administration of the trust territory.\footnote{96} However, should a conflict arise between the individual trusteeship agreement and the United Nations Charter, the terms of the Charter will prevail.\footnote{97}

Within each trusteeship agreement, the administering authority may designate a strategic area(s) that could include "part or all of the trust territory."\footnote{98} The terms of the trusteeship agreement leading to the designation of the strategic trust were to be approved by the United Nations Security Council.\footnote{99} The basic objectives of article 76 of the United Nations Charter referring to the International Trusteeship System were applicable to strategic trusts as well.\footnote{100} Under article 84 of the United Nations Charter, the administering authority had the duty to ensure that the trust territory was to contribute to the maintenance of international peace and security.\footnote{101} This entailed the authorization of the administering authority to "make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority."\footnote{102} The designation of a strategic area permitted the administering authority broader discretion in the administration of the trust territory.

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\footnote{93}{U.N. CHARTER art. 77, para. 2.}
\footnote{94}{U.N. CHARTER art. 81.}
\footnote{95}{U.N. CHARTER art. 79.}
\footnote{96}{TOUSSAINT, supra note 12, at 95.}
\footnote{97}{U.N. CHARTER art. 103.}
\footnote{98}{U.N. CHARTER art. 82.}
\footnote{99}{U.N. CHARTER art. 83.}
\footnote{100}{Id.}
\footnote{101}{Id.}
\footnote{102}{Id.}
\end{flushright}
D. The Role of the Trusteeship Council

The United Nations Trusteeship Council was the primary mechanism to assist the United Nations General Assembly in the supervision of the administering of the trust territories.\textsuperscript{103} The Trusteeship Council was to consist of member states administering trusts, the fifteen permanent members of the Security Council and members of the United Nations elected to the council.\textsuperscript{104} The elected members of the Trusteeship Council were to act as a balancing factor to ensure an equal number of UN member states that were administering trusts and not administering trusts were represented on the Trusteeship Council.\textsuperscript{105}

One of the major functions of the Trusteeship Council was to "formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory."\textsuperscript{106} In carrying out this function to evaluate the administering authority's administration of the trust territory, the Trusteeship Council was to consider reports submitted by the administering authority; accept petitions and examine them in consultation with the administering authority; provide for periodic to the respective trust territories at times agreed upon with the administering authority; and take these and other actions in conformity with the terms of the trusteeship agreements.\textsuperscript{107}

In that respect, the UN Trusteeship Council can be contrasted with the League of Nations Mandate System which did not avail itself of inspections of mandates because it would offend the sovereignty of the administering authority.\textsuperscript{108} Thus the UN Trusteeship Council served as an information intermediary between interested parties and the U.N. General Assembly. Based on the information collected and submitted under Article 87, the Trusteeship Council was to submit recommendations to the U.N. General Assembly.\textsuperscript{109} In this role, the Trusteeship Council limited to making non binding recommendations to members.\textsuperscript{110} Subsequently, the effectiveness of the UN Trusteeship Council was reliant upon the good faith practices of the administering authorities.\textsuperscript{111}

\textsuperscript{103} U.N. CHARTER art. 85.
\textsuperscript{104} U.N. CHARTER art. 86.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} U.N. CHARTER art. 87.
\textsuperscript{108} TOUSSAINT, supra note 12, at 180.
\textsuperscript{109} Id. at 152.
\textsuperscript{110} Id. at 174.
\textsuperscript{111} Id.
VI. STATE OF LAW DURING THE TRUSTEESHIP

Pursuant to Article Three of the "Trusteeship Agreement for the Former Japanese Mandated Islands," "[t]he Administering authority shall have full powers of administration, legislation and jurisdiction over the Territory."\(^{112}\) Although officially sovereignty lay elsewhere, this Trusteeship Agreement had the practical effect of granting the United States sovereign authority over the trust territory.\(^{113}\) By designating the Trust Territory a Strategic Trust, the United States was responsible to the Security Council, where the United States had veto power, for its administration of the Trust Territory.\(^{114}\)

The United States agency mandated with administering the Trust Territory of the Pacific Islands was the United States Department of Interior.\(^{115}\) The executive authority in the Trust Territory was vested in the High Commissioner who was appointed by the President with advice and consent of the Senate.\(^{116}\) Legislative authority was vested in the Congress of Micronesia who were elected by the citizens of the Trust territory.\(^{117}\) However the Congress of Micronesia was curtailed in its legislative authority in that it could not enact legislation that was "inconsistent with the laws of the United States applicable to the trust Territory, treaties or international agreements of the United states, Executive Orders of the President or orders of the Secretary of Interior."\(^{118}\) Furthermore, any legislation enacted by the Congress of Micronesia could be vetoed by the High Commissioner. However this veto could be overridden by two thirds of the majority of both houses of the Congress of Micronesia (Senate and House of Representatives), subject to the ultimate veto of the United States Secretary of Interior.\(^{119}\)

Although the United States exercised direct control of areas of regulation such as foreign affairs, "the daily administration of the islands has largely shifted into the hands of the local government. The Territory operates under its own comprehensive legal code. Inhabitants of the islands are citizens of the Territory, not of the United States."\(^{120}\) However, other Courts have found that as a result of its veto authority, "the United States exercises a maximum degree of control which is inconsistent

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112. Convention, supra note 24, art. III.
114. Id. (citing U.N. CHARTER art. 27).
115. Id. (construing Exec. Order No. 11021, 27 Fed. Reg. 4409 (1962)).
116. Id. at 655 (quoting 48 U.S.C. § 1681 (a) (Supp. 1973)).
117. Id. (citing Department of Interior Order No. 2918, pt. III §§ 1,2,5,7 and 8 (Dec. 27, 1968)).
118. Id. (citing Department of Interior Order No. 2918, pt. III §§ 2 (Dec. 27, 1968)).
119. Id. (citing Department of Interior Order No. 2918, pt. III § 13 (Dec. 27, 1968)).
with the assertion that the Trust territory is a foreign country... there does not appear to have been any significant delegation of authority to the citizens of the Trust Territory."121

While the Trust Territory did have its own legislature that enacted its own legislation. This was subject to U.S. approval. Although the United States exercised full powers of administration, legislation and jurisdiction over the Trust Territory,122 federal legislation did not automatically apply there.123 Congress was required to "manifest an intention to include the Trust Territory within the coverage of a given statute before the courts will apply its provisions to claims arising there."124 A number of U.S. laws have been ruled to have applicability in the Trust Territories through the definition of the term "State"125 and "United States"126 to include the Trust Territory of the Pacific Islands. In these statutes, the act specifically includes the Trust territory of the Pacific Islands as being within the scope of the legislation. Thus, certain U.S. laws do have extraterritorial application in regulating U.S. activities abroad. However, it is unclear whether U.S. environmental regulatory standards applied to the disposal of the PCB leaking transformers in the Marshall islands. While the Solid Waste Disposal Act does not include the former Trust territories within its definition "states,"127 the Toxic Substances Control Act does include "any other territory or possession of the United States"128 within its definition of "State." The Comprehensive Environmental Response Compensation and Liability Act also includes "any other territory or possession over which the United states has jurisdiction" within its scope.129 Thus it can be argued that the former trust territories fall within the scope of the statute through its use of the "any other territory" language.

The RMI has argued that section 105 (h) of the Energy Policy Act of 1992 mandates the United States use money from the Superfund to clean up the PCB contamination there. Section 105 (h) of the Energy Policy Act states that "the programs and services of the Environmental protection Agency regarding PCBS shall, to the extent applicable, as

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122. Convention, supra note 24, art. III.
124. Id.
appropriate, and in accordance with applicable laws be construed to be made available to such islands."\textsuperscript{130} Since the enactment of this provision, the United States Environmental Protection Agency has cleaned up a number of the PCB sites using Superfund money. The United States has stated that the remediation of the PCB sites was not an acceptance of liability, but merely acts of good neighborliness.

VII. FIDUCIARY DUTIES OF THE INTERNATIONAL TRUSTEESHIP'S

Article 75 of the United Nations Charter established the International Trusteeship System mandated with the development of the trust territories.\textsuperscript{131} The major objectives of the International Trusteeship System were "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self government or independence."\textsuperscript{132} The U.N. Charter required the members that accepted the administration of a trust to recognize that "the interests of the inhabitants of these territories are paramount"\textsuperscript{133} and to accept that responsibility as "a sacred trust the obligation [of which] to promote to the utmost...the well-being of the inhabitants of these territories."\textsuperscript{134} Thus the United States as the administrator of the former Trust Territory of the Pacific Islands, of which the Republic of the Marshall Islands was formerly a member, accepted the obligation to promote the interests of the Marshallese. This principle was never in dispute.

Unlike the Former League of Nations Mandates which were to be administered as integral portions of the controlling state, implying a lesser duty to the Mandate's inhabitants,\textsuperscript{135} article 73 of the UN Charter obligates the Trustee to make the interests of the inhabitants of the Trust Territory paramount.\textsuperscript{136} This obligation is clearly indicative of the existence of a fiduciary duty of loyalty between the administering trustee to the inhabitants of the trust territory.\textsuperscript{137}

The existence of a fiduciary duty commands the trustee to "act for the benefit of the other while subordinating one's personal interest."\textsuperscript{138}

\textsuperscript{131} U.N. CHARTER art. 75.
\textsuperscript{132} U.N. CHARTER art. 76.
\textsuperscript{133} U.N. CHARTER art. 73.
\textsuperscript{134} Id.
\textsuperscript{136} Reyes, supra note 135, at 37(citing U.N. CHARTER art. 73).
\textsuperscript{137} Id. at 39.
\textsuperscript{138} Id. at 35 (citing BLACK'S LAW DICTIONARY 626 (6th ed. 1990)).
This duty commands the trustee "not [to] exert or pressure on the beneficiary, [not] deal with the subject matter of the trust as to benefit himself or prejudice the beneficiary, or take advantage of the relationship." Thus, the United States was bound by this fiduciary duty in its administration of the Trust Territory of the Pacific Islands. Despite the permissibility provided for in the UN Charter articles establishing Strategic Trusts, the United States was clearly acting outside the scope of its duty by detonating hydrogen bombs on the trust itself, irradiating it and making it unusable for some time. However, it is unclear whether the fiduciary duty extends so far as to require the trustee to rehabilitate lands contaminated during the trust administration after the trust has been terminated.

In resolving this issue, it will be useful to look at how other legal systems view a trust in establishing the parameters of a trustee's duties. Legal cultures such as "the civil law, the Judaeo-Christian tradition, Islamic law, socialist law, African customary law and the non-theistic traditions of Asia and South Asia," have recognized that each generation is a trustee or steward of the natural environment for the benefit of generations yet unborn. Under United States law, the Ninth Circuit ruled that the inhabitants of a trust can sue to enforce their treaty rights. During the trusteeship period, the Trusteeship Agreements clearly created substantive rights and duties.

VIII. TRUSTS

A. U.S. Trusts

1. Commonlaw Trusts

Under U.S. commonlaw principles, a fiduciary relationship is one in which a party entrusted with property is legally bound to maintain property for the benefit of another. In a trusteeship there is the settlor who intentionally created trust, the trustee is the maintainer of the

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139. Id. (citing BLACK'S LAW DICTIONARY 626 (6th ed. 1990)).
140. U.N. CHARTER arts. 83-84.
141. WEERAMANTRY, supra note 6, at 338 (citing E.B. WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 18-19 (1989)).
142. Id.
143. People of Saipan v. U.S. Dep't. of Interior, 502 F.2d 90, 96 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975).
trust, the trust property itself and the beneficiary for whose benefit the trust property is held by the trustee. The beneficiary is required to place a great deal of trust in the trustee because the trustee has greater control over the trust than the beneficiary. Consequently, the trustee owes a duty of loyalty to the beneficiary wherein he must act with strict honesty and must act solely in the interests of the beneficiary when maintaining the trust.

2. U.S. Trust Relationship with Native American Peoples

Historically, the United States has exercised a trusteeship relationship with the Native American peoples of North America. This relationship has been characterized as one in which a "domestic dependent nations" exists within the boundaries of a sovereign state. All native peoples in the United States, including those in Hawaii and Alaska suffered a "common loss of land and resources to an immigrant majority population with colonialist impulses." In the relationship between the United States and the Cherokee Nation, the Cherokee were placed under the protection of the United States which also had the exclusive right to regulate trade with them and "manag[ed] all their affairs as [it] thought proper." It is a relationship in which the Cherokee are "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands [by foreign nations], or to form a political connection with them, would be considered by all as an invasion of [United States] territory." It has been characterized by Chief Justice Marshall of the U.S. Supreme Court in 1831 as one that "resembles that of ward to his guardian." The trust relationship between the Native American peoples and the United States is one in which the United States provides has a fiduciary duty to "protect the tribes' property, treaty rights and way of life." This trust relationship is one of the fundamental principles underlying the relations between the United States and the Native American peoples. It represents an enforceable legal acknowledgment by

146. Id. at §1.1.
147. Id. at §1.2.
148. Id. at §1.2.
149. Id. at § 95, at 340.
152. Cherokee Nation, 30 U.S. at 17.
153. Id.
154. Id.
155. Woods, supra note 151, at 735.
156. See id. at 743.
the United states that it has taken what once belonged to the Native American peoples and now agrees to protect what they still retain.\textsuperscript{157} It stands as a judicially created doctrine and "stands independent of treaties and inures to the benefit of all tribes, treaty and non treaty alike."\textsuperscript{158} It binds federal agencies to deal with the tribes in "the most exacting fiduciary standards" when carrying out their various statutory mandates.\textsuperscript{159} Federal agencies are bound not to, "abrogate or extinguish the trust relationship, or violate the treaty rights, though courts still allow Congress such plenary power. Absent a direct conflict between an applicable statutory provision and the trust responsibility, a federal agency must implement its program in a manner that protects tribal lands and resources."\textsuperscript{160}

Within the United States, the trusteeship relationship between the United States and the Native American peoples is an enforceable one with substantive obligations. Tragically, the United States government has been unable to significantly deter the ecological degradation that has severely damaged tribal lands and resources to such a degree that it is uncertain whether these cultures will ever be able to recover from this harm.\textsuperscript{161} Looking at the Northwestern United States as an example, mismanagement of the Columbia River by the state and federal government have led to the devastation of the salmon population and the subsequent desolation of the fisheries for which the local Native American peoples were dependent on for their economic and cultural survival. In that respect, the United States can be said to have failed in its trusteeship obligations to "protect tribal lands, resources and native way of life from the intrusions of the majority society."\textsuperscript{162} Applied to the principles of commonlaw trusts, the United States can reasonably be argued to have been negligent in its management of the body of the trust.

B. The Civil Law System

Under the Civil Law System, which has its roots in Ancient Roman


\textsuperscript{158} \textit{Id.} at 742.

\textsuperscript{159} \textit{Id.} at 743 (quoting Seminole Nation, 316 U.S. at 297; Pyramid Lake Paiute Tribe of Indians, 354 F. Supp at 256).

\textsuperscript{160} \textit{Id.} at 744.

\textsuperscript{161} \textit{Id.} at 745.

\textsuperscript{162} \textit{Id.} at 742.
Law, there exists the mandatum. In a mandatum, there is a mandatory, who like a trustee, "is entrusted with the goods of a principal and is under a legal duty to account faithfully and honestly in regard to his custody of those goods." Another similarity to the modern trust is that "the mandatory . . . may not benefit from the mandate except to the extent that [the terms of the mandate] specifically entitles him to such advantage." Within the French legal system, where there is no distinction legal and equitable estates, the closest legal device to the common law trust is the tutelle. A tutelle is a legal institution used to provide an unemancipated child who has lost both parents with a tuteur (guardian or tutor). The tutelle who is entrusted with custody of the unemancipated child "is responsible for the child's maintenance, education, estate and all 'acts of law.'" Unlike a common law trust, the tutelle has a built in oversight component referred to as a conseil de famille (family council).

C. Non European Legal Systems

Besides the European legal societies, other legal cultures have also embraced devices similar to the common law trust. In each of these trust like devices there is a recognition that individual actions do not take place in a complete vacuum and thus consideration must be given to one's actions on the greater whole.

In Islamic law, there is a trust like device known as the wakf. The historical roots of the wakf are said to date back to Mohammad when he mandated his followers to "[i]m mobilize [their property] in such a way that it cannot be sold or made the subject of gift or inheritance, and distribute the revenues among the poor." Subsequently, wakfs are used to maintain public charities or "side step the strict scheme of succession prescribed by the Shari'a that often left a testator unable to make the adequate provisions for his surviving family." In a wakf, the "mutawalli" acts in a similar fashion to the common law trustee "to take charge of the property, maintain it, pay taxes and collect rent, but he cannot alienate the land." Hindu law also places a high value on the

163. See Weeramantry, supra note 6, at 151.
164. Id.
165. Id.
166. Leslie, supra note 144, at 11.
167. Id. at 411 (citing Maurice Sheldon Amos, Amos and Walton's Introduction to French Law 82 (1963)).
168. Id. at 411 (citing Amos, supra note 167, at 84).
169. Id. (citing Amos, supra note 167).
170. Id. at 413 (citing 6 International Encyclopedia of Comparative Law 109 (R. David et al eds., 1972)).
171. Leslie, supra note 144, at 413.
172. Id.
maintenance of trusts. Violations of trusts in Hindu legal culture called for the severest of sanctions and punishments.\textsuperscript{173} In African customary law, the chief acted as trustee over the land that his people dwelled on.\textsuperscript{174} Moreover, the chief "could not alienate any part of the tribal territory without the consent or [sic] the people nor could he even make grants or perpetual loans without the approval of the public assembly."\textsuperscript{175}

Thus, there is evidence that the enforceability of a trust, or legal devices that are akin to commonlaw trusts, is something that has been accepted and implemented in several legal cultures. There is a definite recognition that a party entrusted with a trust has a strong and substantive duty to the beneficiaries of that trust. Moreover, violations of the duty to that trust are severely punished in some legal cultures. It is apparent that the fiduciary relationship exists between the current trustee and the beneficiary. However, it is unclear whether a fiduciary relationship exists between the trustee of a trust and the descendants of the beneficiaries of the trust. In the case of the PCB contamination in the Marshall Islands, it can be argued that the abandonment of the transformers was, not a violation of the fiduciary duty in a self dealing sense, but an example of mismanagement of the trust. Thus, it can be argued that equity demands that the obligations of the trustee cannot terminate until the body of the trust is rehabilitated to a condition before the contamination that resulted from the trustee's administration.

\section*{IX. INTERNATIONAL EQUITY ARGUMENTS}

It can be argued that as a matter of intergenerational equity, the United States's duties should be extended to entail the clean up of the PCB contamination. Intergenerational equity is a principle developed by Edith Weiss Brown in "the Conservation of Equality Principle." It states that:

\begin{quote}
\begin{center}
\textit{[\textit{e\textit{a}}\textit{ch generation should maintain the quality of the planet so that it is passed on in no worse condition than the generation received it, and each generation is entitled to an environmental quality comparable to that enjoyed by previous generations.}}\textsuperscript{176}\end{center}
\end{quote}

In the case of the Marshall Islands, the United States should have

\begin{footnotesize}
\begin{enumerate}
\item[173.] See Weeramantry, \textit{supra} note 6, at 152.
\item[174.] \textit{Id.} at 151.
\item[175.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
maintained the quality of the trust so that when it was returned to the Marshallese, they would be able to enjoy a comparable degree of environmental quality to that of their ancestors. In this case, they could not. First, the United States had irradiated a number of the Marshallese atolls during the hydrogen bomb experiments in the 50's and second, because of the abandonment of PCB leaking transformers on the atolls. In the latter case, the United States should be required to take action, pursuant to its acceptance of the sacred trust, to remediate the PCB contaminated lands.

The harm done to the Marshall Islands by the PCB leaking transformers of such a nature that it is uncertain whether the Marshallese will ever be able to use those lands as they once had. Moreover, it is uncertain whether those Marshallese who have absorbed PCBs into their bodies will ever be the same. The greater tragedy is that the biological impacts of the PCBs will not be felt by the generation that first absorbed into their bodies, but the following generation. Thus, it is to them, this faceless next generation, that the United States owes a duty to rehabilitate the ancestral lands of the Marshallese people.

The existence of this duty to the following generations of the beneficiaries of the trust has been stated and echoed implicitly in several international agreements. In 1972 the United Nations declared in Principle One of the Stockholm Declaration on the Human Environment that, "[m]an has the fundamental right to freedom, equality and adequate conditions of life, an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."177

The United States is bound by the Stockholm Declaration’s language requiring parties "to protect and improve the environment for present and future generations."178 By denying its responsibility to rehabilitate the PCB contaminated lands, the United States will have failed in its duty as a steward to the next generation of Marshallese.

X. INTERNATIONAL DEVELOPMENTS

More recently, similar sentiments were expressed at the United Nations Conference on Environment and Development ("UNCED") in Rio de Janeiro, Brazil in 1992. More specifically, one of the key provisions of UNCED was expressed in Principle 2 where states agreed to ensure that "activities within their jurisdiction or control do not cause
damage to the environment of other States.” 179 In this case, the United States government brought the transformers to the Trust Territory with the intention of developing an energy infrastructure there. It is unclear whether they were brought to the Trust Territory at a time when people were aware of the harm that PCBs caused. It is apparent that the transformers were brought to the Trust territory for the benefit of the local population. The area of contention can properly be focused on the disposal of the transformers after their use. Apparently, a number of these were simply abandoned and have been discovered only within the last decade. It is the Trust Territory government’s disposal practices with these transformers that have led to the potential problems the Marshallese and other former Trust Territory nations may face. The decision to bring the transformers to the Marshall Islands was clearly within the jurisdiction of the United States government. Furthermore, the United States was the generator and the arranger for the delivery of these problematic substances to the Marshall Islands. Were these activities to have taken place in the United States with the same resulting harm, the United States government, or the agency in charge of these activities, would have been liable for the costs of clean up under section 120 on Federal facilities liability of the Comprehensive Environmental Response Compensation and Liability Act. 180 At the time some of these problematic transformers were brought to the Marshall Islands, no official action by the Trust Territory government could have occurred without some degree of approval from the United States Department of Interior. Therefore, the United States can be argued to be legally obligated to rehabilitate those PCB contaminated lands. As a matter of equity, the United States, as the former steward of those islands, can be said to have a continuing duty to return those islands to its people in the state they were in before the trusteeship began. Thus, the fiduciary obligations of the trusteeship should endure until those contaminated lands are rehabilitated.

The International Court of Justice has acknowledged the existence of equity as a legal concept and that it “is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it.” 181 Therefore, future generations may be able to point a finger at the period of administration under the partner governments as a period when the rights of generations of [Marshallese] were jeopardised [sic] for the sake of the immediate advantage of the trustees.” 182 Thus, it can be argued that the United States should be

181. See WEERAMANTRY, supra note 6, at 338.
182. Id.
required to rehabilitate the PCB contaminated lands as a matter of equ-uity.

XI. INTERNATIONAL CUSTOM

A. General

It remains to be seen whether there is a basis in customary law to obligate the United States to rehabilitate these lands. The first steps in the establishment of international legal precedent where former Trustees accept accountability for ecological harm done to the Trust Territory during the Trusteeship period may have been established in the 1986 Compact of Free Associations Provisions on the hydrogen bomb experiments of the 50's and in the recent Australia-Nauru Settlement. In determining whether these acts do indeed establish international legal precedent, requires an examination of whether there is

a point of legislative or expository behavior [that] crystallize[s] into a customary rule which states feel bound to follow themselves and which they wish to see applied to other states. This involves the recognition that a state is acquiescing in the practice (state practice) and has accepted the particular practice on the basis of a legal obligation (opinio juris) and not merely of comity or goodwill to other states.183

Furthermore, there is a requirement of repetition of act for there to be a basis for the establishment of custom.184 However this notion has begun to change and the emphasis on repetition has shifted to "the number of states taking part in a practice."185 Thus acknowledging that:

[the number of state taking part in a practice is much more important than the number of separate acts of which the practice is composed, or the time over which it is spread; a single act involving fifty States provides stronger proof that a custom is accepted by the international community than ten separate acts involving ten separate pairs of States.186

185. Id.
186. Id.
B. The Beginning of Custom with the Nuclear Settlement

The very first steps in the establishment of a body of international customary law that requires trustees to be accountable for ecological harm during their stewardship may have been taken with the Compact of Free Association between the United States and the inhabitants of the former trust territories. While the Marshallese may never be put back in the situation had the United States never detonated hydrogen bombs on their lands, the United States has made an attempt to financially compensate them for past harm. In Section 177 of the Compact of Free Association, it states that:

[T]he Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946 and August 18, 1958.\textsuperscript{187}

In doing so, the United States agreed to establish a multi million dollar fund to pay financial compensation to those parties who claimed injury as a result of the nuclear testing program.\textsuperscript{188} Furthermore, the United States agreed, at the request of the Government of the Marshall Islands, "to provide special medical care and logistical support thereto for the remaining 174 members of the population of Rongelap and Utrik who were exposed to radiation resulting from "Bravo" test."\textsuperscript{189} In the specific case of Rongelap, the United States has agreed to, "take such steps (if any) as may be necessary to overcome the effects of such fallout [from a 1954 thermonuclear test] on the habitability of Rongelap Island, and to restore Rongelap Island, if necessary, so that it can be safely be inhabited."\textsuperscript{190} However, section 177(i)(1) does begin with the phrase "because the Rongelap people remain unconvinced that it is safe to continue to live on Rongelap Island,"\textsuperscript{191} and every required action is a

\textsuperscript{187} Id. at § 177.
\textsuperscript{188} In approving the Compact, the Congress understands and intends that the peoples of Bikini, Eniwetak, Rongelap, and Utrik, who were affected by the United States nuclear weapons testing program in the Marshall Islands, will receive the amounts of $75,000,000 (Bikini); $48,750,000 (Eniwetak), $37,500,000 (Rongelap) and $22,500,000 (Utrik), respectively, which amounts shall be paid out of proceeds from the funds established [under other articles of the Compact of Free association].
\textsuperscript{189} Id. at § 177(a).
\textsuperscript{190} Id. at § 177(b)(1)
\textsuperscript{191} Id. at § 177 (i)(1).
qualified one (contingent on a review of findings of habitability), there appears to be a patronizing air to the language of this specific provision to the Marshallese living on Rongelap. Ultimately, the United States has accepted some measure of accountability for the harm done and has taken steps to begin to remediate the situation.

C. Nauru v. Australia Settlement

Recently, the Island nation of the Republic of Nauru brought a lawsuit against Australia claiming that "it suffered damage as a result of Australia's violation of its rights under both the relevant United Nations Trusteeship provisions and several general principles of international law including self-determination, permanent sovereignty over natural resources, and abuse of rights." One of Nauru's greatest natural resources was an abundant supply of rich phosphate deposits. Due to its value as a fertilizer, Australia mined out approximately one third of the island during its administration of Nauru as a U.N. Trusteeship.

The primary focus of the Republic of Nauru's suit against Australia was that it "had suffered loss first as a result of the failure of the partner governments [Great Britain, New Zealand and Australia] to rehabilitate the lands mined prior to [the date when Nauru gained control over the phosphate mining industry], and second because of the manner in which the phosphates had been exploited." More specifically, the Republic of Nauru asserted that Australia first, "abused its authority over the territory and people of Nauru;" second, "Australia violated the solemn duties of a predecessor state that is entrusted with the task of administering or preparing a territory whose title is to be transferred;" and "[f]inally, . . . Australia violated customary international law principles prohibiting unjust enrichment." In its claim for relief, the Republic of Nauru "requests that the ICJ adjudge and declare that Australia has incurred an international legal responsibility and is bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered."

Australia responded to the Republic of Nauru's claims with a num-

192. Anghie, supra note 4, at 445-446.
193. Id. at 446.
194. Id.
195. Id. at 453 (citing Memorial of Nauru (Nauru v. Austl.), 1990 I.C.J. 89, 309 (Apr. 1990)).
196. Id. at 462.
197. Id.
198. Id. at 463.
199. Id. (quoting Memorial of Nauru (Nauru v. Austl.), 1989 I.C.J. 32 (May 19) (Application Instituting Proceedings)).
ber of assertions. As a matter of jurisdiction Australia asserted that only the UN general assembly and Trusteeship council were competent to rule on the case and the ICJ lacked jurisdiction to hear the matter. As to the merits of the case, Australia's official responses to the Republic of Nauru's claims on the matter could not be disclosed to the public until the case had reached that phase of the adjudication. However, based on public statements made by Australia on the matter of rehabilitation, it can be discerned that their official position was "that the phosphate agreement Nauruans the economic benefit of the phosphate industry, that the partner governments gave up their mining concession without compensation, and that as a result, Nauruans had a means to provide for rehabilitation."

In 1993 Australia and the Republic of Nauru settled their claims before the International Court of Justice could rule on the matter. It is of significant interest to note that the International Court of Justice ruled that it did have jurisdiction to hear the case. Subsequently, it can then be argued that the International Court of justice may also have jurisdiction to hear a similar case in the context of toxic contamination brought by former Trust Territories of the Pacific Islands against the United States. While *Nauru v. Australia* was a case involving self dealing on the part of the administering authority and thus distinguishable from the case of the PCB contamination of the Marshall Islands, both suits sought ecological rehabilitation of lands harmed during the trusteeship period. Had the *Nauru v. Australia* case been actually litigated, historic legal precedent may have been established on the subject of post trusteeship environmental liability.

In the settlement agreement between Australia and Nauru over Australia's phosphate mining, Australia, "agreed to pay Nauru $107 million (Australian) 'in an effort to assist the Republic of Nauru in its preparations for post phosphate future.' However the Settlement Agreement explicitly states that the settlement payments are 'made without prejudice to Australia's long-standing position that bears no re-

200. *Id.* at 464.
201. *Id.*
202. *Id.* (citing Australian Dep't of Foreign Affairs and Trade, *Nauru: International Court of Justice Action Against Australia Backgrounder*, 13 AUSTL. Y.B. INT'L L. 409, 410 (1992)).
204. A brief look at the island [of Nauru] shows that pre-independence mining left much of the island covered with former strip-mining sites. Because of the nature of phosphate mining, these sites are not simply open pits, but rather fields of rock pinnacles standing several meters high, making the mined portions of the island unusable for virtually anything. Leslie, *supra* note 144, at 415.
sponsibility for the rehabilitation of the phosphate lands."

Despite the presence of this "no responsibility" provision, the agreement can be viewed "as a tacit acknowledgment of some responsibility by Australia for the massive environmental and economic damage perpetrated on the island of Nauru." This settlement alone may not signal the emergence of a new trend in international customary law, but in the context of other agreements it may. In light of the U.S. Compact of Free Association in regards to nuclear rehabilitation of hydrogen bomb experiment lands there does appear to be a growing, albeit a reluctant, trend for former Trustees to take responsibility for their actions.

XII. CONCLUSION

Typically, the former Trustees have negotiated settlements with the inhabitants of the former trusts. It can be reasonably argued that this is done out of fear that if the merits of the case were litigated, the case might result in official international legal precedent that officially obligates Trustees to take responsibility for their past acts. Presently, the former Trustees are attempting to pre-empt this type of precedent by negotiating settlements with waivers of liability provisions in them. However, the truth of the matter is quite apparent. The former Trustees are remediating the ecological harm done under their administration out of a sense of apprehension of litigation and the potential establishment of legal precedent. Thus, this is a trend in and of itself. It is a new trend where the negotiation of settlements entailing voluntary remediation is indeed the beginning of a custom of former trustees accepting some accountability for ecological harm. This may be the basis for an argument requiring the United States to rehabilitate newly discovered PCB contaminated lands.

Further strengthening this argument, the express text of the U.N. Charter and the Trusteeship Agreement with the United Nations clearly state the existence of a trust relationship. The trusts were created to help the inhabitants of the former Mandate territories, not as a justification to exploit them. History has shown that a number of the trustees exploited their trusts for their own economic or strategic benefit. In this case, the transformers were brought to the Marshall Islands to help the development of the Marshallese. However, the unintended residue of energy development has been toxic PCB contamination of the soil and waters, thus making some of the lands unusable. Until the PCB contaminated lands are rehabilitated, the Marshallese will be deprived of lands that were of reasonable use before the trusteeship be-

205. Reyes, supra note 135, at 32.
206. Id.
gan. Thus the clear language of the UN Charter, the Trusteeship Agreements are proof of the existence of a fiduciary relationship and equity demands that this relationship cannot end until the harm caused during the trust is repaired.
A COMPARATIVE ANALYSIS OF THE ISRAELI AND ARAB WATER LAW TRADITIONS AND INSIGHTS FOR MODERN WATER SHARING AGREEMENTS

MÉLANNE ANDROMECCA CIVIC*

INTRODUCTION

Rules of water use among early Jewish tribes date back as far as 3000 B.C.E. when Semetic groups settled at Ur in Mesopotamia.¹ Water,² a natural resource critical to all life and to human, social, economic, and industrial development, is scarce in the arid Middle East. The main sources of freshwater in this region include the Jordan and Yarmouk Rivers, and a number of underground aquifers, all of which have had to be shared by various communities with different religious, cultural and, in modern times, national identities. Yet, as stated by scholar Leif Ohlsson, "A river does not know any boundaries,"³ and a river or other water source that flows through public or private property or crosses Israeli, Jordanian, Syrian, Lebanese or Egyptian borders must somehow be shared by all users.

Modern water law in Israel,⁴ specifically, and in the Middle East, generally, addresses competing interest among users and usage, and more recently, among nations. It is the result of centuries of local customs and multiple political, religious and historical influences, includ-

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¹ See Dr. M. Virshubski, Israel (Israel), UNITED NATIONS FOOD AND AGRICULTURE ORGANIZATION, SURVEY OF WATER LAW IN SELECTED EUROPEAN COUNTRIES at 87, U.N. Doc. /_ / (1974) [hereinafter Virshubski, Israel, Israel].

² The term “water” will refer to freshwater, not sea water, including water from naturally occurring sources such as lakes, rivers and streams, as well as man-made conduits, including wells and reservoirs.


⁴ Modern Israel or the State of Israel will refer to all land over which the government of the State of Israel exerts political control, including, at the present time, the Golan Heights, West Bank and Gaza Strip. "Israel" refers generally to the geographic area first settled during the Jewish Royal Period, 1020-586 B.C.E.
ing the ancient Jewish and Islamic religious and social laws, the laws of the Greco-Roman Empires, the Ottoman Empire and colonial Mandatory rule, and most recently, international principles of apportionment. Even where the Roman, and later the British empires ruled over the region, water law remained closer to the traditional Jewish and Islamic doctrines—most notably honoring a communal approach to water use, and close community or state control over water resources—than to the laws of the conquerors.5

This article examines the evolution of water law in Israel, and compares it to the development of Arab water law. First, it presents a discussion on water law of the ancient religious systems: Jewish law of the Talmud,6 and Islamic law of the Holy Koran.7 Next, it reviews water regulation under Ottoman rule when the Mejelle Code, a unified legal system, was enforced over the entire Middle East region. The article proceeds with a discussion of the impact on Israeli and Arab water law under British Mandatory rule. Finally, it examines the develop-


Three major water rights systems may be identified throughout history: the riparian rights doctrine, prior appropriation, and a shared community or administrative control approach. See L. TECLAFF, WATER LAW IN HISTORICAL PERSPECTIVE 6 (1985) [hereinafter TECLAFF, HISTORICAL PERSPECTIVE].

Israel water law has never recognized riparian rights doctrine, characteristic of the Roman and then the British systems, as well as followed in a modified form in the eastern states of the United States, which provides that water rights stem from land ownership or occupation. The owner or occupier of land has the right to use water flowing on or abutting his land without need for licensing or other form of consent from the community or other authority. The allowable use extends to all domestic purposes without regard to the effect on other riparians. Beyond this, use for irrigation or industrial purposes is limited so far as it must not impair the quality of water flow (the water level), or the quality of the water (including pollution, salinization, and siltration), to the other riparians. See CAPONERA, PRINCIPLES, supra, at 82. Israel water law also has never recognized prior appropriation water rights principles, which observe a first in time theory of property rights. According to prior appropriation doctrine, one who arrives first, and makes beneficial use of a water source, acquires a superior right to use against all subsequent potential uses. See TECLAFF, HISTORICAL PERSPECTIVE, supra at 22. The right is retained so long as the original use, or uses, continue. Id. Prior appropriation is prevalent in the western United States of America. In 1872, California codified the procedure by which water could be appropriated. Id. at 20.

6. The Talmud was written and compiled during the 6th through 3rd centuries B.C.E. in Palestine and Babylonia. See Hirsch, Water Legislation, supra note 5, at 170. The Talmud generally refers to the body of oral Jewish Law including commentaries and scholarly discussions. E.N. DORFF, JEWISH LAW AND MODERN IDEOLOGY 149 (1970).

7. The Koran is believed by the Moslem people to be the embodiment of divine law. N. Ellison, A Symposium on Muslim Law, 22 GEO. WASH. L. REV 1, 1 (1953).
ment of national water systems in the modern State of Israel and, as a means of comparison with a modern Moslem nation, the Hashemite Kingdom of Jordan.  

As an initial note, the historical legal systems discussed in this article exert no legal authority either in the modern State of Israel or the modern Kingdom of Jordan. As part of the historical tradition of these nations, they remain relevant to law and custom at the local level, as well as to the legal and cultural perspective of the modern inhabitants. Finally, this author argues that water law development in Israel, and in the Arab countries bordering Israel, share a common historical theme. The legal and cultural perspectives of water ownership, use and regulation common to Israel and its neighbors, and distinctive to this region, may and should contribute in a positive and productive way to discussions on the present conflicts concerning the equitable division and sharing of water among the Middle East nations.

THE ANCIENT WATER LAW REGIMES

Certain fundamental similarities exist between the water rights and duties described in the religious law of both Judaism and Islam. Principally, both communities conceive of water as a gift of God’s creation, belonging to all members of the community. Access to water, at least for the purpose of human sustenance, is considered to be a right of all persons, within and without the community, and whether on private or publicly held property.

Jewish Water Law

Jewish religious and civil law is documented and commented upon in the Talmud, including rules on water rights and priorities of usage. Jewish water law flourished from approximately 930 B.C.E. through 332 B.C.E, the beginning of the Greco-Roman Empires. During this period, the first centralized municipal water supply management sys-

8. Jordan borders Israel along Israel’s eastern border.
9. These include the laws of the Talmud, the Koran, the Mejelle Code of the Ottoman Empire, and Mandatory Rule. See discussion infra Parts I and II.
10. See generally CAPONERA, PRINCIPLES, supra note 5; Hirsch, Water Legislation, supra note 5; and Moslem Water Laws, supra note 5.
11. See generally CAPONERA, PRINCIPLES, supra note 5; Hirsch, Water Legislation, supra note 5; and Moslem Water Laws, supra note 5.
12. Jewish water law here refers to the laws set out principally in the Talmud, as distinct from water law in the modern state of Israel.
14. See Virshubski, supra note 1, at 87.
15. Around 930 B.C.E., the Nation of Israel split into the Kingdom of Israel in the
Jewish law and legal principles, to the extent that they did not conflict with the laws of their conquerors, continued to be followed during the Greco-Roman, and successive conquests, until the institution of the Mejelle Code under the Ottoman Empire.

The fundamental Talmudic water law established that water was the common right of all people: "Rivers and Streams forming springs, these belong to every man." Thus, all naturally occurring bodies of water, whether located on or adjoining private property, or whether flowing from one village to another, were the right of all—not just of the private property owner or of the community members. This scheme permitted no legal interest to exclude another from water use, although it recognized a system of priorities of use.

Jewish law established a descending order of priority for certain types of water usage, and for villagers versus non-community members, or outsiders. At the top of the hierarchy was the "Right of Thirst"—no person could be denied the right to quench his thirst, regardless of whether he was a member of the community or whether the water was on public or private land. Use by outsiders could be restricted, however, until the needs critical to the life of community members were satisfied. Thus, villagers' drinking use attained priority over outsiders' satisfying their thirst, and then villagers' irrigation and livestock needs came before community outsiders' watering their animals: "A spring owned by the people of the city: their lives and the lives of others—their lives take precedence over those of others; their beasts and the beasts of others—their beasts take precedence over the beasts of others..."

Lower on the water use hierarchy, the community's non-life sustaining, casual water use had priority over outsiders' casual use, but...
was subjugated to outsiders’ life-sustaining needs. Thus, the community’s laundering needs would be satisfied before those of outsiders, but an outsider could drink or water his animals before the community could use water for laundering: "[T]heir laundering and the laundering of others — their laundering takes precedence over the laundering of others; the lives of others and their laundering — the lives of others takes precedence over their laundering."  

Similarly, riparian landowners retained no right to exclude others from the reasonable use of the water of rivers and streams flowing through their property or wells located on their property, although, the owner of the land did maintain a right of compensation for access across his land, and for use of the water: "And the children of Israel said unto Him, 'We will go by the highway and if I and my cattle drink of thy water, then I will pay for it only, without doing anything else, go through on my feet.'"  

Among several landowners upon whose property a natural source of water flowed, priority of right to use the water varied according to locality. Thus, in Palestine, the upper riparian landowner had priority over lower riparians, and the landowner whose land was located nearest to a well had prior rights to the other riparians. In Babylon, priority was determined principally on the basis of who could most easily make use of the water source.  

The owner of private property likewise had a legal property interest in any man-made water conduits or holding devices. The landowner had a right to restrict, but not to exclude, the use of wells, springs, or underground water sources. The owner of the land which was located closest to an underground source feeding a well had priority of use over all others. He also had the responsibility for maintaining the well, but all riparian landowners using the well had a duty to assist him.  

Thus, under Talmudic law, water use could be regulated by the community, or the private landowner, upon whose property water flowed or springs formed. A system of priorities was established, but in

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26. Id. See also Caponera, Principles, supra note 5, at 25.  
27. See Caponera, Principles, supra note 5, at 22.  
29. See Caponera, Principles, supra note 5, at 22; see also Hirsch, Water Legislation, supra note 5.  
30. See Teclaff, Historical Perspective, supra note 5, at 56; see also E. Kally, Water and Peace 23 (1993).  
32. See Caponera, Principles, supra note 5, at 22; see also A. Hirsch, International Rivers in the Middle East 153 (1957) [hereinafter Hirsch, International Rivers].  
34. See Hirsch, International Rivers, supra note 32 (citing Talmud Balvi).
no case did the property interest give the community or the landowner a complete right to exclude. Water use for human sustenance was available to all people from all sources. This perspective of water as a communal resource is mirrored in Islamic religious law and later, in modified form, in Arab and Ottoman civil law.

Traditional Islamic Water Law

The Koran conceived of water as a gift from God, and commentaries to the Koran, similar to Jewish Talmudic law, established a right of all men to use water, including a right to drink, to water one's animals, and a right to irrigate one's land, within a system establishing certain priorities of usage and user.

Sharing water was considered a holy duty. Like Talmudic law, both Sunni and Shi'ite law recognize a Right of Thirst, and denying water was considered to be an offense against God: "Anyone who gives water to a living creature will be rewarded. ... To the man who refuses his surplus water, Allah will say: 'Today I refuse thee my favo[r], just as thou refused the surplus of something that thou hadst not made thyself.'" Like Jewish law, Islam law held that all natural sources of water, including lakes and streams, belonged to all people. Top priority was given to water for drinking purposes, then for domestic purposes, including watering one's animals, and then for other uses. Upper riparians and upstream users had priority over lower riparians and downstream users.

While Jewish law allowed compensation for use of water located on private property, Islamic law prohibited any transaction that resembled the selling or buying of water. This prohibition apparently applied only to natural water sources. Ownership rights to artificial ground water sources were granted under Islamic law. Sunni doctrine allowed for one who dug a well or constructed a conduit through which water could flow, whether on his own property or on unoccupied land, to have an ownership interest in the water, an exclusive right for irrigation

35. See CAPONERA, PRINCIPLES, supra note 5, at 70.
36. See the Holy Koran 21:30, cited in CAPONERA, PRINCIPLES, supra note 5, at 70.
37. See CAPONERA, PRINCIPLES, supra note 5, at 70.
38. Sunnis follow an orthodox interpretation of Islam while Shi'ites are sectarian. See Hirsch, Water Legislation, supra note 5, at 173.
40. See id. at 70.
42. "It would seem that the Prophet Mohammed declared that water ... should be the common entitlement of all Moslems and to prevent any attempt to appropriate water he prohibited the selling of it." Hirsch, Water Legislation, supra note 5, at 173 (citing Moslem Water Laws, supra note 5, at 17).
Still, surplus water was to be made available to the community for public use. Shi'ite doctrine awarded an exclusive irrigation right to the landowner with no public right to surplus. In no case however, under Sunni or Shi'ite law, did an owner of an artificial water source have the right to deny a living being water to quench his thirst.

WATER LAW UNDER OTTOMAN RULE AND THE MEJELLE CODE

Ottoman Rule, 1300 C.E. – 1922, imposed a highly centralized and powerful political system on a formerly decentralized and localized region. Jewish communities, as non-Muslim minorities within the Ottoman Empire, maintained a certain degree of autonomy as regards religious law and internal affairs, but were not permitted to hold any public office, including the position of water officer. The early code of the Ottoman Empire integrated Moslem religious law with decrees and ordinances issued by the Turkish Sultans. A first series of legal reforms took place in 1839. The second period of reform resulted in the Mejelle Code, drafted between 1870 and 1876.

The Mejelle Code, while it adapted and secularized the law in three significant ways, retained earlier principles of traditional Islamic water law. First, the communal right of all persons to water, fundamental to the ancient legal systems, was codified, albeit in modified form: "Water, grass and fire are free to be used by all. In these three things mankind are partners." The strong and centralized leadership of the Ottoman empire defined the sovereign as the living embodiment of the community; therefore, community ownership was one and the same as ownership by the sovereign. The sovereign retained all rights to all water sources, and private rights were acquired only by grant from the government. All water resources, even water on private property and from man-made wells, was subject to government regulation and control.

The Mejelle Code, like the Talmudic and Koranic laws, maintained

43. See CAPONERA, PRINCIPLES, supra note 5, at 74.
47. See CAPONERA, PRINCIPLES, supra note 5, at 36.
48. Id.
49. Id.
50. "The Mejelle was not intended to supersede the early authorities." Jassonides v. Kyprioti, 7 CYPRUS L. REV. 83, quoted in Herbert J. Liebesny, Impact of Western Law in the Countries of the Near East, 22 GEO. WASH. L. REV. 127, 131 (1953).
that all members of the community had the right of access, in instances of private necessity, to use water on private property for personal and domestic use.\footnote{52} During times of public necessity, all sources of water, including privately-owned water sources, were taken for public use.\footnote{53} Like ancient Islamic law, the Mejelle Code prohibited the sale of water by private individuals.\footnote{54} Water rights were awarded by the state by a Water Commission and registered in a Land Registry.\footnote{55}

Second, a concept of reasonable use emerged. While all members of the community had equal right to use the water of rivers and lakes, an individual user was not permitted to impair the rights of others to use the water, or to affect the quantity or quality of the water.\footnote{56} The Water Commission had the authority to determine reasonable use among competing claims.\footnote{57}

Third, although with some modifications, the hierarchy of priority fundamentally remained much the same as under the ancient systems. Water for drinking and for watering one's animals had first priority.\footnote{58} Article 1268, however, permitted a private landowner to exclude persons from obtaining drinking water from a natural stream or well located on private property, except if no other public water sources were available.\footnote{59} Like Talmudic law, the person entering private property was responsible for any damage caused to the property, or to the well or water conduit.\footnote{60}

Irrigation was an important part of the Ottoman Empire development, expansion and wealth, and the Mejelle Code treated irrigation rights and priorities of use comprehensively. Priority was determined generally on the basis of one's physical proximity to the water source. Whomever was located nearest to the water source had the right to take first.\footnote{61} As between two persons in equally close proximity to a water source, the first to arrive had priority.\footnote{62} Finally, landowners on higher ground had priority over users on lower ground, with no reasonable use restriction protecting the downstream landowners.\footnote{63}

The Mejelle Code had a lasting influence on water law in Israel and

\footnote{52. See \textit{Caponera, Principles}, supra note 5, at 72.}
\footnote{53. See \textit{Hirsch, Water Legislation}, supra note 5, at 175.}
\footnote{54. Article 1234 of the Mejelle Code, cited in \textit{Moslem Water Laws}, supra note 5, at 37.}
\footnote{55. \textit{Id}.}
\footnote{56. See \textit{Caponera, Principles}, supra note 5, at 72.}
\footnote{57. \textit{Id}.}
\footnote{58. See \textit{Moslem Water Laws}, supra note 5, at 38.}
\footnote{59. MEJELLE CODE art. 1268, cited in \textit{Moslem Water Laws}, supra note 5, at 38.}
\footnote{60. \textit{Id}.}
\footnote{61. See \textit{Caponera, Principles}, supra note 5, at 73.}
\footnote{62. \textit{Id}. Thus, an element common to the later prior appropriation doctrine existed, but only as a qualification of the physical proximity principle.}
\footnote{63. See \textit{Caponera, Principles}, supra note 5, at 73.}
throughout the Middle East region long after the fall of the Ottoman Empire. Under the British Mandate, the Mejelle Code, in part, remained on the books. The Code continued to influence local concepts of water rights and duties throughout the Mandate and into the modern era. Most significantly, a theory of state ownership of water resources emerged which was to continue through the Mandatory period and become a legal cornerstone of the water code of the independent State of Israel.

**BRITISH MANDATE WATER LAW IN ISRAEL**

Under British Mandate, a hodge-podge of rules consisting of sections of the Mejelle code and local customary law, took the place of a coherent national water law system. Consequently, little distinguishes the period of British Mandate rule as far as water regulation or water development policy is concerned.

It was not until 1940, in response to the marked increase in Jewish settlement in Israel, that the British Mandatory government made its first declaration of water policy and asserted the Crown’s dominion over all sources of water within Israel, including water on, under, or abutting public or private lands. Article 16E of the amended Palestine Order in Council provided that: "[T]he waters of all rivers, streams and springs and of all lakes and other natural collections of still water in Palestine shall be vested in the High Commissioner." Despite the dominion asserted over the area’s water resources, no legislation was passed under Article 16E to give effect to the Order in Council; water regulation and devel-

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65. British Mandate was established in 1922 by Resolution of the League of Nations and lasted until Israeli independence on May 15, 1948. The British also exerted Mandatory Rule over Trans-Jordan until the establishment of the Hashemite Kingdom of Jordan in 1949. See DANTE A. CAPONERA, *WATER LAWS IN SELECTED EUROPEAN COUNTRIES* 88 (1975) [hereinafter EUROPEAN WATER LAWS].
66. "The law governing the use of water . . . is not only inadequate but also very confused." DOREEN WARRINER, *LAND AND POVERTY IN THE MIDDLE EAST* 73 (1948).
67. See KALLY, *supra* note 5, at 5.
69. *Id.*
70. *Id.*
71. The Article was never "gazetted." See Hirsch, *Water Legislation, supra* note 5, at 179 (citing HAIM HALPERIN, *WATER LAW IN ISRAEL* 13 (1956)).
opment was left largely to the local law and customary principles. The policy statement of Article 16E, however, was utilized by the successor government of the independent State of Israel.

WATER LEGISLATION IN THE MODERN PERIOD

The modern era of water law began after World War II with the establishment of the independent State of Israel in 1948 and the Hashemite Kingdom of Jordan in 1949. The newly independent countries of the Middle East then enacted national water codes and created national water regulatory bodies.

Water Law in the Modern State of Israel

Even prior to Israel's independence, May 15, 1948, regional water development plans were underway by Jewish settlers. Upon establishment of the State of Israel, in 1948, the new government invoked the earlier King's Order in Council of 1940 to assert state ownership over all water resources and establish a national water distribution and development policy. Like the water law of ancient times, which conceived of water as belonging to the entire community, modern law declares water to be a right of all people of Israel, and states that water resources belong to all members of the community at large. In 1959, Israel's legislative body, the Knesset, enacted a nation-wide water management code and created a national water authority. All water resources are subject to the control of the state and to judicial supervision, and the complex water management system determines distribution, planning and development at the national, regional, and local levels. This article reviews water management at the national level only.

At the national level, the Minister of Agriculture is in charge of water-related legislation, as well as the execution of water laws. The Water Board is an advisory body to the Minister of Agriculture, and it is through the Board that the public participates in national water policy.

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73. Virshubski, *supra* note 1, at 88.
74. *Id.*
78. These include all above ground and underground currents or accumulations of water, and all natural and man-made accumulations, including even drainage and sewage water. *Israel Statute no. 288* cited in Teclaff, *Historical Perspective*, supra note 5, at 56-57.
79. See Teclaff, *Historical Perspective*, supra note 5, at 56.
80. See Virshubski, *supra* note 1, at 103.
The Board consists of thirty-nine members, of which two-thirds are representatives of the public, and one-third are government representatives, including one representative of the Jewish Agency. The Planning Commission, a body appointed by the Minister of Agriculture, designs large-scale water supply systems.

The Water Commission is a subdivision of the Ministry of Agriculture and executes the day-to-day decisions of water management. The Commission issues water use licenses, keeps records of water rights, oversees and enforces compliance with licensing terms, and collects data on water use and planning needs.

All private use of water, including use by a landowner of water located on his private property, requires approval by the state by means of a system of permits and licenses issued by the Water Commissioner. Private ownership of water, whether naturally existing or man-made, is not recognized under Israeli law, and thus riparian landowners possess no rights superior to the general public to use or restrict access to water on, or touching, their land. The right of an individual licensee to water use, duly recognized by the state, is a legally protected property interest which is enforceable against third parties.

The Water Commissioner has the discretion to cancel or modify licenses for reasons of public need, and to declare a rationing area. The creation of a rationing area automatically reconverts all licensed use to state ownership, and subjects water use strict distribution rules. Decisions of the Water Commissioner on licensing, water use, distribution, and rationing are enforced by means of judiciary review and through the Tribunal for Water Affairs, established as the body of final appeal. All decisions are documented in a public water register.

The Water Law of 1959 establishes a hierarchy of priorities of types of use. Like Talmudic law, at the top of the hierarchy is domestic use, principally, water for drinking purposes. This is followed by agricultural use, and then industrial and other uses. The Water Commissioner, in exercising his discretionary authority to issue water use li-
licenses, is required to consider the following criteria: existing licensed water rights, the abundance or scarcity of water in the region, the most beneficial use possible, and other needs of the particular locality that may be affected.\textsuperscript{91}

Thus, the modern State of Israel maintains complete control over its water resources, and decides and enforces priorities of use over all water sources and supplies by means of a system of permits and regulations. State ownership is perceived as representative of the communal right to water, a legacy of the traditional Talmud and Ottoman influences.

*Water Law in the Hashemite Kingdom of Jordan*

Jordan followed the traditional law of the Koran until the 19\textsuperscript{th} century when it was supplanted by the Mejelle Code. From 1922 through 1949, the British exerted Mandatory Rule over the area. During the past forty-eight years, a national civil code has replaced the Mejelle Code, and has integrated some of the principles of traditional and Ottoman Empire Moslem law.

All water resources in the modern Kingdom of Jordan are under state regulation by the Natural Resources Authority.\textsuperscript{92} The Natural Resources Authority is a non-representative governmental body whose president is the nation's Prime Minister, and whose Board of Directors consists of the heads of relevant Ministries including, among others, Agriculture, Interior and National Economy.\textsuperscript{93} It is a planning, legislative, executive, administrative, and judicial body. The Natural Resources Authority issues, enforces, and reviews permits for water use.

Consistent with ancient Moslem law, naturally occurring bodies of water, including lakes, rivers and streams, are considered to belong to the community,\textsuperscript{94} as does water to which no private right has been claimed and registered. Reservoirs and other man-made bodies of water, unless located on private property, are also considered community property.\textsuperscript{95}

A private landowner acquires ownership rights to water on his land as part of his land ownership, as long as the water has been registered along with registration of the land.\textsuperscript{96} This property interest in the wa-
Permits, issued by the Natural Resources Authority, are required for all uses other than personal and ordinary irrigation use. No pre-established priority of water use exists. The Natural Resources Authority will consider the circumstances of the area and the competing beneficial uses, with a tendency to favor traditional priorities of use, including personal and agricultural, followed by industrial and other uses.

Thus, water regulation in Jordan is centralized, strictly regulated, and most closely resembles the law under Ottoman Empire rule. The sovereign controls all water resources on behalf of the community, and water on public lands is considered to belong to the community. Distinct from the traditional law of the Koran and the law of the Mejelle Code, however, a private ownership right to naturally occurring water resources, not only to artificial ground water sources, is recognized as linked to, albeit still distinct from, private land ownership.

CONCLUSION

As seen from the above discussion, the ancient laws of the Talmud and the Koran, the laws of Ottoman and Mandatory Rule, and even the modern water regimes, contain certain fundamental similarities as regards water regulation, priorities of use and sharing. Certainly, the geographic and hydraulic conditions of the region, the exigency of water scarcity, and the existence of different religious and ethnic groups living side by side, necessitated an approach to water regulation that was not consistent with the laws that emerged from European conditions. Additionally, early water development in the Middles East was principally a local process, and therefore, more directly influenced by the customary or traditional principles of the local cultures, than by the centralized government control of the Greco-Roman, Ottoman or British periods. Thus, certain fundamental principles of water use and development remained constant from ancient to modern times and

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97. Law No. 40, 1952, on Settlement of Land and Water Rights, art. 8.5, cited in Masina, supra note 94.
98. This includes drinking, domestic, and household needs, not exceeding an official limit.
99. This constitutes use within the established limits of an Irrigation Area. See Masina, supra note 94, at 102.
100. Id. at 103-04.
among ancient Jewish and Moslem traditions.

The Distinctive principles of water regulation that have flowed, so to speak, from one legal system to the next in this region include, most significantly, the concept of a community right to water – that water is a thing which is shared and not owned – a gift from God to all people. This principle is prevalent, as we have seen, in both the Jewish and Moslem ancient law systems. This community right to water was translated into state ownership of water resources from the time of the Ottoman Empire and continues to this day in the modern State of Israel. State control over water may have marked a formidable change in the ancient principle of community water rights, except that state ownership, as established, is the embodiment of the original communal right.102 Thus, the traditional view of water as a communal resource not only prevails, but establishes a fundamental common link between the modern Israeli and the modern Arab nations’ views of water rights and water ownership.

In light of this fundamental, historical and enduring link between the Israeli and Arab views of water use and sharing, an argument can be made that transboundary water sharing negotiation between Israel and its Arab neighbors should also follow this communal approach on an expansively regional level.

Israel and Jordan have already made significant steps in the bilateral recognition of a shared responsibility, if not a shared right, to water and their natural resources. The 1994 Treaty of Peace,103 signed by Israel and Jordan, directly addresses the allocation of transboundary water resources.104 Article Six agrees to an equitable apportionment scheme as detailed in Annex II of the Treaty.105 Annex II outlines the allocation of waters of the Yarmouk and Jordan Rivers, as well as water from other sources. Annex II also establishes a Joint Water Committee106 as an implementing body of the program of action described in the

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102. See THE MEJELLE ch. IV, § 1, art. 1234, supra note 51. British Mandatory Rule maintained this principle of water law and the modern State of Israel institutionalized this principle.


104. See id. at Annex II, art. VI.

105. Jordan concedes that Israel may pump an additional 20 MCM from the Yarmouk River during the winter period in return for Israel conceding to transfer 20 MCM to Jordan from the Jordan River during the summer period. See id. at Annex II, art. I, paras. 1b, 2a. Additionally, both countries agree to work together to find alternative water sources of drinking water for Jordan. See id. at Annex II, art. I, para. 3.

106. See id. at Annex II, art. VII, para. 1. The Committee is to be comprised of three members from each country, see id., and cooperation is to be advanced by means of distinct sub-committees representing northern versus southern regions within each country. See id. at Annex II, art. VII, para. 3. The Committee’s purpose is to oversee water allocation, see id. at
Annex. The parties agree to transfer information, to conduct joint research and development, and to act together in alleviating water shortages, developing existing and new water resources, and in preventing the contamination of shared water resources.

Additionally, the 1995 Agreement on Cooperation in Environmental Protection and Nature Conservation Between Israel and Jordan recognizes and addresses environmental concerns common to the two nations. Article I articulates the spirit of cooperation upon which the agreement is based:

The parties shall cooperate in the fields of environmental protection and conservation of natural resources on the basis of equality, reciprocity and mutual benefit. . . . They shall take the necessary measures, both jointly and individually, to protect the environment, and prevent environmental risks . . . in particular those that may affect or cause damage to . . . natural resources . . . in the region.

Article Five outlines various programs of cooperation including the exchange of information, the sharing of scientific and scholarly data, and the promotion of joint scientific, technical research, and joint development projects. Notably, Article Ten provides for the establishment of a Joint Committee on Environmental Protection and Natural Resources Conservation to meet bimonthly, alternatively in Israel and Jordan. The Joint Committee will propose new projects, as well as monitor existing projects and the performance of both parties under this agreement.

These agreements authorize a mutually agreeable allocation of water, and joint protection of natural resources, including water. They mark very significant, and highly visible, steps forward for two nations that have been in a longstanding state of military aggression over terri-

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Annex II, art. VII, para 1, storage, see id. at Annex II, art. II, water quality protection, see id. at Annex II, art. III, as well as information transfers and data sharing. See id. at Annex II, art. VI, para. 1.

107. See id. art. VI, para. 4d.
108. See id. art. VI, para. 4a.
109. See id. art. VI, para. 4b.
111. Id. art. I, paras. 1, 2.
112. See id. art. V, para. 3.
113. See id. art. V, paras. 2, 3.
114. See id. art. V, para. 4.
115. See id. art. X.
116. Id.
tory and control of transboundary water sources. Another step forward along this positive course could be to view transboundary water sharing in a new light, and yet from a perspective as ancient as Judaism and Islam, and as historically well-established, drawing upon their common heritage of a communal view of water rights and water use. This perspective would open water sharing schemes to the regional rather than predominantly national level. As it has been stated, "[t]he only natural unit for river management is . . . the river basin in its entirety." Recognizing and utilizing this common historical heritage could contribute to advancing not only water apportionment negotiation, but also to creating a genuine and lasting peace in the Middle East.

117. In 1964, for example, Syria and Jordan began the construction of a dam to divert the flow of the Yarmouk, Baniyas and Jordan Rivers. See Stephan McCaffrey, Water, Politics and International Law, in WATER IN CRISIS: A GUIDE TO THE WORLD'S FRESH WATER RESOURCES 25 (Peter H. Gleick, ed. 1993). The dam would have prevented Israel from carrying out its national water distribution plan. See MASAHIRO MURAKAMI, MANAGING WATER FOR PEACE IN THE MIDDLE EAST 296 (1995). Israel bombed and destroyed the dam before construction was complete, and in 1967 occupied the Golan Heights, the West Bank, and the Gaza Strip. See id. at 297. Through this occupation, Israel increased control from a mere 10 km tract of land along the Yarmouk to half the length of the river. See id.

118. Ohlsson, supra note 3, at 5.

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.

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"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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Mr. Peabody's coal train 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 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 "Hopiis 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 Counsel, 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 (6th ed. 1990) devoted 3 entire columns to definitions for the word. Id.
power is central to the work and myths\textsuperscript{3} 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.\textsuperscript{4}

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...."\textsuperscript{5} Professor Werhane has articulated a six-question protocol for analyzing the social responsibility of a set of activities on the part of multinational corporations.\textsuperscript{6} One of the fears repeatedly voiced about transnational corporations ("TNCs")\textsuperscript{7} is that

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).


7. In this article, we prefer to use the term "transnational corporation" rather than
they may prove to be above the law.\textsuperscript{8} 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.\textsuperscript{9}

Supposedly fifteen transnational corporations are engaged in logging in Mexico.\textsuperscript{10} 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."\textsuperscript{11} Somehow, we do not find it that simple. In some ways, injecting millions of dollars into a dirt-poor,\textsuperscript{12} corrupt,\textsuperscript{13} and violence-saturated State\textsuperscript{14} 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." \textit{Id.} at 54 (1995); see also, e.g., George Soros, \textit{The Capitalist Threat}, ATLANTIC MONTHLY, Feb. 1997, at 45.

9. See Zimarowski, \textit{A Primer on Power Balancing Under the National Labor Relations Act}, 23 U. MICH. J.L. REFORM 47, 52 (1989). \textit{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.


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, \textit{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.\textsuperscript{15}

\textsuperscript{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." \textit{Id.} Further, Ross shared his opinion that "to deal with Figueroa in millions of dollars is to intervene in Mexican politics." \textit{Id.}

\textsuperscript{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. \ldots .\textsuperscript{14} The 1995 edition of the \textit{Catalago 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, \textit{supra} note 12, at 23.
A Chronology.

What do Council, Idaho, International Falls, Minnesota, and Papalana, 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.\(^\text{16}\) BCC meanwhile enjoyed near record profits in 1995\(^\text{17}\). 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.\(^\text{18}\)

\(^\text{16}\) 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).

\(^\text{17}\) 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).

\(^\text{18}\) 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 ares, 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?" 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." 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. Besides on the theme of jobs or 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.

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, Mike Crapo, Larry Craig and Dirk Kempthorne who surf the crest 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.]"

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 103rd 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\(^{26}\) pulled out his big stick and attempted to

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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.\textsuperscript{27} 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 \textit{Minneapolis Star-Tribune} to get it to refuse to publish a paid advertisement from the Minnesota AFL-CIO.\textsuperscript{28} This refusal prompted a news conference and picketing by the AFL-CIO.\textsuperscript{29} Wherever 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.\textsuperscript{30} 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.\textsuperscript{31}

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.\textsuperscript{32} Did BCC violate the Foreign Corrupt Practices Act by slipping cash to then Governor Ruben Figuerro? Who are the undisclosed principals in the holding company that owns the mills in Guerrero?\textsuperscript{33} Could it include

\begin{itemize}
  \item \textsuperscript{27} Interview with John Ross (June 6, 1996), supra, note 15.
  \item \textsuperscript{28} \textit{Unions Picket Star-Tribune Over Boise Ad}, \textit{The Union Advocate}, Aug. 21, 1989.
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} See supra text accompanying note 21 for a brief synopsis of BCC origins.
  \item \textsuperscript{31} Interview by William Wines of Todd Hill, MBA, research assistant, in Boise, Idaho (November 19, 1996).
  \item \textsuperscript{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. Some Idahoans are backward and proud of it; their paragon of success is multi-billionaire J. R. Simplot, 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. Incidentally, "old J.R." — as Simplot is sometimes known in Boise — increased his holdings in BCC by approximately 30 million dollars in December, 1995.

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 in Guererro, 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 Guererro 14 (Apr. 1997) (unpublished manuscript on file with author).


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).


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.\textsuperscript{38} 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.\textsuperscript{39} 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." \textsuperscript{40} 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.\textsuperscript{41} BCC prevailed and Harrington said of the strike: "We viewed it as who was going to run the mill." \textsuperscript{42}

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.\textsuperscript{43} It then unilaterally implemented its proposed contract terms.\textsuperscript{44}

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.\textsuperscript{45} 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.\textsuperscript{46}

The people who live in International Falls, Minnesota take their

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\item[38.] Paul Beebe, Boise Cascade's Labor Woes Raise Question of Bias; Boise Cascade: Latest Labor Woes are Extention 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." \textit{Id.}
\item[39.] Wines and Learned, \textit{supra} note 5, at 216.
\item[40.] \textit{See id.}
\item[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, \textit{supra} note 38, at E1, E4.
\item[42.] \textit{Id.}
\item[43.] \textit{Id.}
\item[44.] \textit{Id.}
\item[45.] Wines & Learned, \textit{supra} note 5, at 206-07.
\end{itemize}
\end{footnotesize}
families, their religion, and their unionism seriously.\textsuperscript{47} 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.\textsuperscript{48} 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\textsuperscript{49} 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.\textsuperscript{50} 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.\textsuperscript{51}

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

\textsuperscript{47} See Dave Hage, \textit{BE&K Troubles With State Unions Part of Wider War}, STAR-TRIB., Aug. 6, 1989, at A12, \textit{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." \textit{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, \textit{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).

\textsuperscript{48} See Wines & Learned, \textit{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. \textit{Id.}

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

\textsuperscript{50} See Wines & Learned, \textit{supra} note 5, at 207.

\textsuperscript{51} See \textit{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. . . .

Eventually, BE&K elected to cancel the union subcontractors for failure to perform and replaced them with non-union subcontractors. 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. 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. The damages were estimated to be $1.3 million. 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.

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. . . ." 58 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. . . ." 59 Ironically, Miller who claimed the moral high ground left BCC suddenly less than nine months later "to pursue personal interests." 60 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. . . ." 61

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. 62

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 Papanoa, 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 Papanoa mill site. BCC had opened another mill further down the coast in Guerrero, according to local sources, at year's end.

"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.
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. 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. 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..." 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..." 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..."

Parrish's declaration of environmental parity strikes us as counterintuitive 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

64. The Star-News, 1996.
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.69

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.70 Prior to the massacre, the OCSS, founded in early 1994 to represent poor compensinos, 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 1967.71 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

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. There followed clumsy attempts by the government to cover up the massacre accompanied by threats to both witnesses and victims.

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. 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. On August 1, 1996, guerrillas attacked a Mexican Army convoy less than 10 miles from Papanoa, the site of BCC's mill.

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 10th of May, and the confiscation of a truck loaded with wood, property of Epifanio Rodriguez, Friday the 12th, according to Benigno 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 Guererro, Mexico: Environmental Impacts of Logging & Political Turmoil iii (unpublished manuscript on file with authors).
claiming that it was either ignorant of the social and environmental consequences of logging in the region or was indifferent to it.

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.

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.

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. Apparently, BCC's Wild West style corporate

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).
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. 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. 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, 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 mbf, on September 18, 1997 - the third time it was offered for sale. Report of Timber Sale, US Department of Agriculture Forest Service, 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 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.
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. 84

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. 85 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... 86

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." 87 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

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. 88 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..." 89 However, the amount of timber that has been offered for sale in southern Idaho forests would suggest otherwise. 90 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.\textsuperscript{91}

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... So 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. . . ."\textsuperscript{92}

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 . . . ."\textsuperscript{93}

In an article published in \textit{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 . . . .\textsuperscript{94}

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. . . ."

\textsuperscript{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).

\textsuperscript{92.} Carnopis, \textit{supra} note 65, at 1.

\textsuperscript{93.} Ross, \textit{supra} note 76, at 22.

\textsuperscript{94.} International Lending and Resources Development in Mexico: Can Environmental Quality be Assured? \textit{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. 96

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, Papanoa, and Cocopa, where 187 local workers are employed at rates ranging from $1 to $1.25 per hour when converted to U.S. rates." 97 "It sounds very low, but to those folks it is very welcome,' Bartels said...." 98 Yet, El Financiero Internation Edition in a story on logging Guerrero's forests stated that the base pay at the BCC mill in Papanoa is $4.75 dollars a day. 99 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." 100 And, yet, BCC denies heatedly that it is in Mexico to take advantage of low labor costs. 101 Sierra, the magazine of the Sierra Club, stood by its story when challenged. 102

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

95. Id. at
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.
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."103 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."104

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."105 After all, as Ross pointed out in interviews and in print, BCC had just leased the production facilities for five years.106 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."107 Rumors had been circulating in Guerrero that the Papanoa mill would shut down and not reopen after the rainy season.108 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. . ."109 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-
ously argued that the primary purpose for being of a corporation is to provide meaningful employment to its workers. In Guerrero, Mexican laborers turn in 10 hour days in a mill lacking rudimentary safety equipment for less than five dollars per day. BCC's "rip and run" approach to logging in lesser developed nations (LDN's) 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. 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 scarves 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.

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. 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. . . .

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

[Problems 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.]

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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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. 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

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. 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. 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.

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

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 quotes 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. 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.\footnote{121. See Edmond Cahn, The Moral Decision: Right and Wrong in the Light of American Law (New Midland ed. 1981) (1955).} \footnote{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. 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. 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. This has also happened recently in response to the

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.\textsuperscript{126}

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.\textsuperscript{127}

Another basis for jurisdiction, the "effects doctrine," has not achieved general acceptance in customary international law.\textsuperscript{128} 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.\textsuperscript{129} 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.\textsuperscript{130}

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;


\textsuperscript{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].

\textsuperscript{128} Id.

\textsuperscript{129} The Supreme Court's most recent statement on the extraterritorial reach of antitrust 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 (1st Cir. 1997).

\textsuperscript{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.\(^{131}\)

Categories 1 & 2\(^{132}\) 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. In #2, this competitiveness problem also applies in foreign markets as to all commercial activities. Government action in sphere #3\(^{134}\) 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\textsuperscript{135} can be expected to draw strong opposition from trading partners.\textsuperscript{136} 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.\textsuperscript{137}

*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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.138

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. 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. 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.

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.\textsuperscript{142} 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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\textsuperscript{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. \textit{U.S. trading partners reach tuna-dolphin agreement}, 2, No. 5 \textbf{BRIDGES \textit{Weekly Trade Digest News (\textsc{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.
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\(^{143}\) or the Caribbean Basin

\(^{143}\) For instance, so far in 1997, the USTR has initiated GSP eligibility reviews for
Recruitment Act, or subsidized investment insurance through the Overseas Private Investment Corporation or the Multilateral Investment Guarantee Agency is made conditional 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. Mayanmar is currently under GSP denial for the use of forced labor in road and irrigation works construction and other military projects. 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.

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 if 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. 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. Notable among

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).


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/RED(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\textsuperscript{150} and the Marine Mammal Protection Act under which the US has banned importation of both dolphin unfriendly tuna and turtle unfriendly shrimp.\textsuperscript{151}

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.\textsuperscript{152} 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.\textsuperscript{153} 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 environmental authority, is unlikely.\textsuperscript{154}

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.\textsuperscript{155}


\textsuperscript{150} Recent press over imports from China made by prison labor highlights the difficulty of enforcing this ban. \textit{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).

\textsuperscript{151} See supra note 141.


\textsuperscript{155} See \textit{Mexico Approves Union at Taiwan-Owned Firm}, \textit{J. OF COM.}, Apr. 18, 1997, available in 1997 WL 8547444; Belo Horizonte, \textit{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. 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. 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.

As a result, the ILO, established in 1919, has been given a new lease on life. 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-
tent with US law and practice. 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. 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.

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. 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. This mechanism would verify the application of core conventions in signatory countries, whether having ratified them or not. 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
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. 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. Labor standards were first raised by the US in April of 1997, in the review of Fiji 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 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).
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.\textsuperscript{171} 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.\textsuperscript{172}

Finally, like many companies, BCC has its own "Standards of Business Conduct."\textsuperscript{173} These standards cover employee compliance with laws and regulations regarding health and safety, equal opportunity

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


\textsuperscript{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.\textsuperscript{174} 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.\textsuperscript{175} 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.\textsuperscript{176} 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.\textsuperscript{177}

\textit{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-

\textsuperscript{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. \textit{Id.}

\textsuperscript{175} See, e.g., Rick Wartzman, \textit{Nature or Nurture? Study Blames Ethical Lapses on Corporate Goals}, \textit{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." \textit{Id.}


\textsuperscript{177} \textit{Id.}

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 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.

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 1998.180 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.

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.

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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 backroom 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."183

**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...
bodies. 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. 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. 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

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 politicos 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. 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. 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. 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. 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."

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.


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 subcontractors 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; 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., Uamduai 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 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).

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

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).

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.)

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." 

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-


195A 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." 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. 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.)

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." 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-

197. Soja, supra note 195, at 125.
198. Id. at 186-87.
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."200

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."201 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 juridical framework exists, and since international economic competition supercedes domestic environmental protection, Ekins calls for "environmentally orientated trade restrictions."202 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.203

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.204 The same is true for labor standards, human rights and the

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."

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." 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."

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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.


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." This may explain why the so-called "mainstream" environmental groups that are national in scope often fail to promote such alternatives.

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 10th, 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.  

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."210  

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-

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.  

sity administrators when it suits their purposes. These groups can be "purposely stimulated to provide much needed administrative rationality."212 Furthermore, through public hearings required by the Administrative Procedures Act,213 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.214 Any final or real environmental problem solving must address reduced consumption and waste of natural resources and not merely the shifting of environmental burdens.215

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\textsuperscript{216} 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."\textsuperscript{217}

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.\textsuperscript{218} One writer

\textsuperscript{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.

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

\textsuperscript{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.219 We are thus being forced to rethink this relationship and the nature of citizenship in the modern society.220

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-

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."221 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."222

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."223 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.224 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.225 As one writer noted many years ago, economics without compassion is merely "a highly developed form of violence."226 The father of modern economics knew that

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224. 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 19th 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 pro-
ductive free market if, and only if, that force was contained by human
sympathy, competitive forces, and legal regulation. There might yet
be time for many of us to revisit the fundamental principles of econom-
ics, restrain our fondness for mathematical modeling, and search out
the moral roots of political economics and the general welfare that
drive legal regulation of markets.

The vision of the problems global society may face if substantial re-
form 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 subcontrac-
tors 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 al-
ready 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.

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.
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 regenera-
tive 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.