CHAPTER XIX

REGULATING THE MULTINATIONAL

In the portfolio investment area just examined, nations have relatively similar goals—no nation wants to encourage fraud. But, as the transnational investment takes the different form of direct corporate investment, room for disputes becomes much greater. The home and host nations will have significantly different interests and may also have significantly different philosophies. This chapter briefly explores some of the potential conflicts. It begins by looking at basic conceptual issues–including the economic basis for multinational investment; explores a selection of host- and home-state responses–including a selection of actual conflicts; considers the heightened jurisdictional risk that multinationals encounter; and then reviews international efforts to avoid or resolve these conflicts.

A. INTRODUCTION

1. Conceptual Issues

When examined closely, the multinational firm is a rather peculiar entity. Basic corporate law doctrine gives separate legal status to the entity as a juridical "person," and serial incorporation in the "home" state of its headquarters and various "host" states of its subsidiaries and affiliates further complicates the "personality" of the multinational.[1] Add to this situation the effect of the typical limited liability accorded to each corporate unit within the overall enterprise, and we end up with a collective "person" that seems to escape comprehensive supervision of its activities. In addition, since multinationals are often relatively large economic enterprises, critics typically evince a visceral attitude towards them.[2] Of course, from the perspective of the multinational itself, its individual corporate units are vulnerable to the uncoordinated and potentially conflicting demands of the various jurisdictions within which it operates. We end up, then, with two fundamental problems of the multinational: (*i*) the problem of the possible

1. A classic, if perhaps simplistic, expression of this view is offered by Deltev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 740-43 (1969), comparing the "legal theory of independent corporate units," with the "economic interdependence" of those units.

2. For example, Aguirre states: "Only the economies of the United States, Germany, Italy, the United Kingdom, Japan, France and the Netherlands are larger than General Motors." Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social And Cultural Rights*, 35 CAL. W. INT'L L.J. 53, 55 (2004), citing Global Policy Forum, *Comparison of Revenues Among States and TNCs*, at http:// www.globalpolicy.org/socecon/tncs/tncstat2.htm (May 10, 2000). Yet equating "revenue" of a multinational with the size of the "economy" of a state is unlikely to be a very accurate basis for comparison of the economic power of each. Put simply, a multinational cannot unilaterally increase its revenue, while a state can. Furthermore, in terms of economic "size," revenue analysis does not reflect the economic value of the state's capital assets, territorial control or human capital, nor does it account for the economic value of the state's monopoly over legislating and rule-making. *Cf., e.g.*, Mary Jacoby, *EU Gives Microsoft Deadline to Comply*, WALL ST. J. EUROPE, Mar. 21, 2005, at A1, col. 5 (reporting that EU regulators are considering possible fines of $5 million per day for Microsoft failure to comply with antitrust orders).

inadequacy of any one *national* jurisdiction to regulate the activities of the multinational; and, (*ii*) the jurisdictional risks encountered by the multinational in operating under more than one legal system.

Terminology. As with the body of non-public international law variously referred to as "private international law," "transnational business law," and other terms,[3] there are various ways in which firms involved in international business have been characterized–"multinational" or "transnational" corporations or "enterprises," or some combination thereof being the most prevalent. These terms are often referred to by such acronyms as MNCs, MNEs, TNCs or TNEs.[4] For the sake of convenience, we refer to these firms simply as "multinationals" or "MNs."

2. The Economics of Multinational Investment

In international investment two polar strategies can be discerned. In one, the savers of one economy invest on a net basis in assets of another economy, typically through international loans, bonds, and portfolio investment. In the other, a firm opens a branch or subsidiary in another nation. The former of these is generally explainable by macroeconomic considerations. In the case of the latter, however, there is often cross-investment (*e.g.*, the U.S. auto industry investing in Europe while the parallel European industry is investing in the United States) so that explanations have to look to the theory of the firm.

The net investment situation, already explored in Chapter XVII, is exemplified by OPEC investments in the Eurodollar market and the banks' parallel investment in developing nations. To the extent that the banks are following economic considerations here, they are helping move capital from the Middle East, where its economic rate of return (as reflected in the interest rate) was low, to other economies, where its economic rate of return would he higher. Because of differences in economic opportunities to use capital, the marginal return on capital varies from place to place, and capital will flow to the place where its return is highest. By tariffs or currency adjustments, a nation may be able to influence that rate of return to modify the flow of capital. Although these factors alone do not explain cross-investment, note that portfolio diversification can explain some such cross-investment. It is reasonable for European investors, facing currency-exchange risks, to want to place some of their assets in dollars, which pose a different foreign exchange risk, while U.S. investors, for the same reason, place some of their assets in foreign currencies.

The direct investment situation is more complex. In general, one would expect a local firm to do better than a foreign-controlled firm. Putting the question a little more sharply: why can't a French firm, in France, using capital borrowed from the United States, always out-compete a U.S. firm that has to pay the same amount for its capital but is probably never able to understand French operations as well as the local firm? And, going still further, in a reflection of Chapter I's product-cycle analysis, why can't a U.S. firm obtain the greatest economic return in applying its new technology to the

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3. *Cf.* Chapter I, *supra* at ▬ n.▬ (discussing terminology).

4. *See* PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 12-15 (1995) (discussing history and content of terminology); Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law: An Introduction*, in MENNO T. KAMMINGA & SAMAN ZIA-ZARIFI (eds.), LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 1, 1-4 (2000) (comparing varying usages of terminology).

French market by licensing that technology to a French firm that understands the market?

The answer to these questions lies in a quasi-monopoly or in an economy of integration that is not fully reflected in the usual licensing arrangements. If the local economy does not yet have the trained entrepreneurs and staff needed for the project, then foreign direct investment is likely to be essential. If the technology is evolving so rapidly that management arrangements are a more practical way to transfer it than are a series of separately negotiated contracts, then the administratively integrated operation has a comparative advantage that explains its emergence and survival. If economies of scale transcend the market available in any single nation, efficiency may lead to the IBM or automotive industry pattern, where different production steps (*e.g.*, those for computer chips or transmissions or assembly) are carried out in different nations, each on a scale intended to meet a multinational or global market. And there are other economies of integration that are less defensible economically. The rnultinational (MN), with its well-understood credit rating, may be more easily able to raise new capital than its local competitor. Or the extractive MN may be able to take advantage of tax breaks in ways unavailable to a less vertically integrated operation.

What is clear is that the evolution of the multinational corporation is, in practically every case, closely coupled with some form of market power. The areas in which MNs and international investment have become most important are the extractive industries (where market power and tax advantages are especially relevant), the manufacturing industries (where economies of scale have gone beyond the nation), and the high-technology, oligopolistic industries such as pharmaceuticals, chemicals, and electronics. Although MNs do play a role in relatively special situations such as international commodity trading in, say, sugar or bananas, there are relatively few in the more competitive parts of the agricultural or textile industries. The economic genesis of the MN raises many of the same questions as does the antitrust issue of international vertical integration.

As everywhere, there are tax considerations.[5] Although the details are beyond the scope of this book, foreign branches of U.S. firms are directly taxed by the host nation and taxed currently by the United States, subject to the foreign tax credit–a credit calculated by a formula designed to provide at least partial recognition of the income taxes paid the foreign government. In a subsidiary arrangement, however, the foreign subsidiary's earnings are generally not taxed by the United States until dividends are paid to the parent, arid the foreign tax credit then becomes available. In exceptional cases, such as the "controlled foreign corporation," designed to restrict use of foreign corporations for tax deferral, a dividend will be deemed distributed. In the general case, however, a firm is able to defer taxes by leaving profit in foreign subsidiaries.

These arrangements under the Internal Revenue Code, already complex, are complicated by tax treaties, which sometimes establish special limits on withholding and the like. Hence, one finds the elaborate networks of subsidiaries in tax haven nations.

B. NATIONAL JURISDICTION AND

5. For additional information on the international tax area, in addition to the primary sources, see WILLIAM GIFFORD & WILLIAM P. STRENG, INTERNATIONAL TAX PLANNING (2d ed. 1979); D. TILLINGHAST, TAX ASPECTS OF INTERNATIONAL TRANSACTIONS (2d ed. 1984); Bart S. Fisher, *The Multinationals and the Crisis in United States Trade and Investment Policy*, 53 B.U.L.Q. 308 (1973); Bart S. Fisher, *The Multinationals at Bay: The Foreign Taxation Provision of the Tax Reduction Act of 1975*, 10 J. INT'L L. & ECON. 61 (1975).

MULTINATIONAL ACTIVITIES

1. Host State Regulation

There are many reasons why host nations regulate foreign investment–all the reasons why they regulate domestic investment, along with some special ones. Foreign investment often seems both a real and a psychological infringement on sovereignty. Note how strongly the United States has reacted to a little OPEC investment and then consider the situation of Canada, in which over 50 percent of many industries (and much more in some industries) is foreign (mostly U.S.) owned. Moreover, there are special concerns that the foreign firm will operate without adequate consultation or to the detriment of local interests in such areas as labor policy or willingness to create export revenues for the host nation. At the same time, foreign investment is often seen as a way of bringing technology and employment to the local economy. Nations thus have a variety of laws dealing with foreign investment. Some seek to attract it, as through tax holidays and special privileges like those that U.S. cities and states use to attract industry. Some, in contrast, seek to regulate it. These may control the areas of investment, for example, to keep foreign investment out of sensitive areas like telecommunications or the media; they may control the terms of investment, as through restricting rates at which profits may be expropriated; or they may protect specific local concerns such as that of labor. One of the most important examples, which reflects a major developing world tradition and with which you are already familiar, is Andean Pact Decision 24 (Selected Documents Supplement). For a quite different approach, consider the following excerpt, which demonstrates Canada's effort to gain increased control over an economy so open to its powerful neighbor. The Foreign Investment Review Act was repealed in the summer of 1985 by the Investment Canada Act, 1985 c.20 (June 30, 1985).

FOREIGN INVESTMENT REVIEW ACT

21-22 Eliz. 2 c.46, 1973-1974 [repealed]

An Act to provide for the review and assessment of acquisitions of control of Canadian business enterprises by certain persons and of the establishment of new businesses in Canada by certain persons. . . .

PURPOSE OF ACT

2.(l) This Act is enacted by the Parliament of Canada in recognition by Parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern, and that it is therefore expedient to establish a means by which measures may be taken under the authority of Parliament to ensure that, in so far as is practicable after the enactment of this Act, control of Canadian business enterprises may be acquired by persons other than Canadians, and new businesses may be established in Canada by persons, other than Canadians, who are not already carrying on business in Canada or whose new businesses in Canada would be unrelated to the businesses already being carried on by them in Canada, only if it has been assessed that the acquisition of control of those enterprises or the establishment of those new businesses,

as the case may be, by those persons is or is likely to be of significant benefit to Canada, having regard to all of the factors to be taken into account under this Act fbr that purpose.

(2) In assessing, for the purposes of this Act, whether any acquisition of control of a Canadian business enterprise or the establishment of any new business in Canada is or is likely to be of significant benefit to Canada, the factors to be taken into account are as follows:

(a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;

(b) the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;

(c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and

(e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.

NOTES

1. Within the North American region, Canadian investment policy–like that of the United States and Mexico–is now subject to the requirements of the North American Free Trade Agreement (NAFTA). NAFTA investment rules are discussed in § D, *infra*.

2. One European approach to the challenge of the multinationals was the European Commission's "Proposal on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures in Particular Transnational Undertakings,"[1] commonly referred to as "the Vredeling directive" after the Commissioner for Social Affairs at the time, which sought to give European Economic Community labor unions an improved bargaining position in dealing with MNs. In a draft of the proposal, presented to the Council of the European Community on October 24, 1980, the situation confronting European labor unions and its remedy were described as follows:

> 1. As a result of changes in the structure of undertakings, the procedures for consulting and disclosing information to employees are often no longer consistent with these new structures. Whereas firms have become more complex in that they have grown or expanded their operations by setting up subsidiaries or establishments in a given country, or even in several foreign countries, their employees continue to be informed and consulted only at local level (shop, works or sector of activity).
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> 2. It therefore follows that decisions which may have serious repercussions for employees at local level may well have been considered and taken at a much higher level (in the same country or even abroad). Even local employers may he ignorant of the motives behind such decisions. Generally speaking, disclosure of information to employees is still

1. 1980 O.J. (297).

confined to the affairs of the local business entity, with the result that the workers concerned are only able to obtain a partial or even incorrect picture of the affairs of the concern as a whole.

3. Recent events have merely confirmed that this situation has particularly serious implications for the employees of firms operating in several countries, since the application of labour law (and even more so the law relating to employees' representative bodies) is usually confined to the territory of a given country. The powers of these bodies, like those of the trade unions, do not normally extend beyond national frontiers. Thus, the procedures by which employees in a given country are informed or consulted only have effect within the legal framework of that country, only benefit the employees in that State and generally only relate to activities carried out in that State when they are not confined to a particular subsidiary or establishment.

Provision should be made for additional information to be supplied to employers in each Member State relating to their company's transnational operations so that they can provide their employees with a clear and complete picture of the activities and performance of the concern as a whole *in the various countries in which it is established.* There is also a need for provisions that would enable employees' representatives to approach management at the level of the decision-making centre in another country where this management alone is in a position to inform and consult them in accordance with the provisions of the directive.

4. Similar information and consultation problems can arise in undertakings operating exclusively at national level when procedures for informing and consulting employees are inconsistent with the structure of the entity whose decisions affect their interests, for instance when a firm expands its business operations by opening a number of establishments in one country and the bodies representing its employees continue to operate only at the level of the individual shop, works or establishment. However, a more common situation is that where a dominant undertaking may have several subsidiaries in the same country while the bodies representing its employees are not organized at the highest level. There is a need for provisions to enable the managers of these establishments or subsidiaries to inform and consult their employees in the proper manner even where the decision affecting their interests is taken not by them but by management at a higher level. Employees' representatives should also be allowed to approach the central management if it alone is in a position to inform and consult them in accordance with the provisions of the Directive.

In a Community in which national economies are closely interlinked and in which undertakings are undergoing structural changes by availing themselves of the right of establishment guaranteed by the EEC Treaty, it is essential that all undertakings with a sizeable workforce and a relatively complex structure, in particular those operating on a transnational basis, should have the same rights and the same responsibilities.

A legal framework for the disclosure of information to and consultation with employees will therefore constitute a stepping-stone to the creation of a uniform operating environment for all undertakings in the Community. The current economic climate, which has necessitated far-reaching arid difficult structural changes in industry and has had very serious social repercussions, highlights the importance of a Community initiative in this field. Against this background, the requirement that all firms should inform and consult their employees on the basis of their overall operations assumes particular importance.

Furthermore, it should be remembered that all the Member States already have information and consultation procedures of their own, although the legal nature of these arrangements and their effectiveness in practice vary from one country to the next. A Community instrument should not interfere with existing systems which have already gone part of the way towards solving the problem. Procedures already put in place by national legislation or on a voluntary basis, for example those modelled on the OECD guidelines [discussed in Part D. *infra*], should–where possible–be integrated into the Community

system. These arrangements should also be flexible enough to take account of systems based on agreements between the two sides of industry and those that have force of law.

The same objectives as those enshrined in international instruments that are not legally binding, such as the OECD guidelines and the ILO Tripartite Declaration, will be followed with regard to the activities of transnational firms, but they will be achieved in a Community context by means of methods appropriate to the Community's peculiar circumstances and needs.

The initial 1980 draft regulation of the Vredeling proposal drew severe criticism from business interests, and particularly from U.S. business interests. Objections included fears that the regulation would be extraterritorial in its effect on foreign management of European subsidiaries, that local management would be undercut by a "by-pass" provision permitting labor to go over the heads of local management to reach more senior foreign officials on occasion, and that confidential information might be revealed. The opposition was particularly effective during consultations before the European Parliament, and the draft regulation was renegotiated within the Community and managed to secure the approval of the European Parliament in 1982. The succeeding Social Affairs Commissioner, Ivor Richard, approved the revised version of the draft directive in June 1983.[2] However, during the recession following the 1979 oil crisis, lobbying by employer groups from outside the EC, particularly the United States and Japan, stopped the draft directive's progress, although Commissioner Richard publicly stated at the time that the idea behind the draft directive was not dead and would resurface.[3]

Finally, On September 22, 1994, the E.U. Council of Ministers approved the so-called European Works Council Directive, a directive "on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees."[4] The directive applies to firms that employ at least one thousand persons in the E.U. and the European Economic Area Member States and that employ one hundred and fifty persons or more in each of at least two Member States, excluding the United Kingdom. On September 22, 1996, a three-year period began during which EU member states were required to implement, subject to Commission review of the operation of the directive.[5]

COUNCIL DIRECTIVE 94/45/EC OF 22 SEPTEMBER 1994

O.J. 1994 L 254/64 (30 Sept. 1994)

On the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

SECTION I GENERAL

2. 1983 O.J. (217).

3. *See* Mark Hall, *Beyond Recognition? Employee Representation and EU Law*, 25 Indus. L.J. 15, 24 (1996) (discussing developments).

4. Council Directive 94/45, 1994 O.J. (L 254) 64.

5. *Id*. art. 11, 14-15.

Article 1 Objective

1. The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.

2. To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Article 5(1), with the purpose of informing and consulting employees under the terms, in the manner and with the effects laid down in this Directive.

3. Notwithstanding paragraph 2, where a Community-scale group of undertakings within the meaning of Article 2(1)(c) comprises one or more undertakings or groups of undertakings which are Community-scale undertakings or Community-scale groups of undertakings within the meaning of Article 2(1)(a) or (c), a European Works Council shall be established at the level of the group unless the agreements referred to in Article 6 provide otherwise.

4. Unless a wider scope is provided for in the agreements referred to in Article 6, the powers and competence of European Works Councils and the scope of information and consultation procedures established to achieve the purpose specified in paragraph 1 shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States. . . .

Article 2 Definitions

1. For the purposes of this Directive:

(a) 'Community-scale undertaking' means any undertaking with at least 1000 employees within the Member States and at least 150 employees in each of at least two Member States

(b) 'group of undertakings' means a controlling undertaking and its controlled undertakings

(c) 'Community-scale group of undertakings' means a group of undertakings with the following characteristics:

– at least 1000 employees within the Member States,

– at least two group undertakings in different Member States, and

– at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State

(d) 'employees' representatives' means the employees' representatives provided for by national law and/or practice

(e) 'central management' means the central management of the Community-scale undertaking or, in the case of a Community-scale group of undertakings, of the controlling undertaking

(f) 'consultation' means the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management

(g) 'European Works Council' means the council established in accordance with Article 1 (2) or the provisions of the Annex, with the purpose of informing and consulting employees

(h) 'special negotiating body' means the body established in accordance with Article 5 (2) to negotiate with the central management regarding the establishment of a European Works Council or a procedure for informing and consulting employees in accordance with Article 1 (2).

2. For the purposes of this Directive, the prescribed thresholds for the size of the workforce shall be based on the average number of employees, including part-time employees, employed during the previous two years calculated according to national legislation and/or practice.

Article 3 Definition of 'controlling undertaking'

1. For the purposes of this Directive, 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking ('the controlled undertaking') by virtue, for example, of ownership, financial participation or the rules which govern it.

2. The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when, in relation to another undertaking directly or indirectly:

(a) holds a majority of that undertaking's subscribed capital or

(b) controls a majority of the votes attached to that undertaking's issued share capital or

(c) can appoint more than half of the members of that undertaking's administrative, management or supervisory body.

3. For the purposes of paragraph 2, a controlling undertaking's rights as regards voting and appointment shall include the rights of any other controlled undertaking and those of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other controlled undertaking.

4. Notwithstanding paragraphs 1 and 2, an undertaking shall not be deemed to be a 'controlling undertaking' with respect to another undertaking in which it has holdings where the former undertaking is a company referred to in Article 3(5)(a) or (c) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.[6]

5. A dominant influence shall not be presumed to be exercised solely by virtue of the fact that an office holder is exercising his functions, according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

6. The law applicable in order to determine whether an undertaking is a 'controlling undertaking' shall be the law of the Member State which governs that undertaking.

Where the law governing that undertaking is not that of a Member State, the law applicable shall be the law of the Member State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated.

7. Where, in the case of a conflict of laws in the application of paragraph 2, two or more undertakings from a group satisfy one or more of the criteria laid down in that paragraph, the undertaking which satisfies the criterion laid down in point (c) thereof shall be regarded as the controlling undertaking, without prejudice to proof that another undertaking is able to exercise a dominant influence.

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6. O.J. 1989 L 395/1 (30 Dec. 1989).

SECTION II ESTABLISHMENT OF A EUROPEAN WORKS COUNCIL OR AN EMPLOYEE INFORMATION AND CONSULTATION PROCEDURE

Article 4 Responsibility for the establishment of a European Works Council or an employee information and consultation procedure

1. The central management shall be responsible for creating the conditions and means necessary for the setting up of a European Works Council or an information and consultation procedure, as provided for in Article 1(2), in a Community-scale undertaking and a Community-scale group of undertakings.

2. Where the central management is not situated in a Member State, the central management's representative agent in a Member State, to be designated if necessary, shall take on the responsibility referred to in paragraph 1.

In the absence of such a representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State shall take on the responsibility referred to in paragraph 1.

3. For the purposes of this Directive, the representative or representatives or, in the absence of any such representatives, the management referred to in the second subparagraph of paragraph 2, shall be regarded as the central management.

Article 5 Special negotiating body

1. In order to achieve the objective in Article 1(1), the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

2. For this purpose, a special negotiating body shall be established in accordance with the following guidelines:

(a) The Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories.

Member States shall provide that employees in undertakings and/or establishments in which there are no employees' representatives through no fault of their own, have the right to elect or appoint members of the special negotiating body.

The second subparagraph shall be without prejudice to national legislation and/or practice laying down thresholds for the establishment of employee representation bodies.

(b) The special negotiating body shall have a minimum of three and a maximum of 17 members.

(c) In these elections or appointments, it must be ensured:

– firstly, that each Member State in which the Community-scale undertaking has one or more establishments or in which the Community-scale group of undertakings has the controlling undertaking or one or more controlled undertakings is represented by one member,

– secondly, that there are supplementary members in proportion to the number of employees working in the establishments, the controlling undertaking or the controlled undertakings as laid down by the legislation of the Member State within the territory of which the central management is situated.

(d) The central management and local management shall be informed of the

composition of the special negotiating body.

3. The special negotiating body shall have the task of determining, with the central management, by written agreement, the scope, composition, functions, and term of office of the European Works Council(s) or the arrangements for implementing a procedure for the information and consultation of employees.

4. With a view to the conclusion of an agreement in accordance with Article 6, the central management shall convene a meeting with the special negotiating body. It shall inform the local managements accordingly.

For the purpose of the negotiations, the special negotiating body may be assisted by experts of its choice.

5. The special negotiating body may decide, by at least two-thirds of the votes, not to open negotiations in accordance with paragraph 4, or to terminate the negotiations already opened.

Such a decision shall stop the procedure to conclude the agreement referred to in Article 6. Where such a decision has been taken, the provisions in the Annex shall not apply.

A new request to convene the special negotiating body may be made at the earliest two years after the abovementioned decision unless the parties concerned lay down a shorter period.

6. Any expenses relating to the negotiations referred to in paragraphs 3 and 4 shall be borne by the central management so as to enable the special negotiating body to carry out its task in an appropriate manner.

In compliance with this principle, Member States may lay down budgetary rules regarding the operation of the special negotiating body. They may in particular limit the funding to cover one expert only.

Article 6 Content of the agreement

1. The central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees provided for in Article 1(1).

2. Without prejudice to the autonomy of the parties, the agreement referred to in paragraph 1 between the central management and the special negotiating body shall determine:

(a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement

(b) the composition of the European Works Council, the number of members, the allocation of seats and the term of office

(c) the functions and the procedure for information and consultation of the European Works Council

(d) the venue, frequency and duration of meetings of the European Works Council

(e) the financial and material resources to be allocated to the European Works Council

(f) the duration of the agreement and the procedure for its renegotiation.

3. The central management and the special negotiating body may decide, in writing, to establish one or more information and consultation procedures instead of a European Works Council.

The agreement must stipulate by what method the employees' representatives shall

have the right to meet to discuss the information conveyed to them.

This information shall relate in particular to transnational questions which significantly affect workers' interests.

4. The agreements referred to in paragraphs 2 and 3 shall not, unless provision is made otherwise therein, be subject to the subsidiary requirements of the Annex.

5. For the purposes of concluding the agreements referred to in paragraphs 2 and 3, the special negotiating body shall act by a majority of its members.

Article 7 Subsidiary requirements

1. In order to achieve the objective in Article 1(1), the subsidiary requirements laid down by the legislation of the Member State in which the central management is situated shall apply:

– where the central management and the special negotiating body so decide, or

– where the central management refuses to commence negotiations within six months of the request referred to in Article 5(1), or

– where, after three years from the date of this request, they are unable to conclude an agreement as laid down in Article 6 and the special negotiating body has not taken the decision provided for in Article 5 (5).

2. The subsidiary requirements referred to in paragraph 1 as adopted in the legislation of the Member States must satisfy the provisions set out in the Annex.

SECTION III MISCELLANEOUS PROVISIONS

Article 8 Confidential information

1. Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorized to reveal any information which has expressly been provided to them in confidence.

The same shall apply to employees' representatives in the framework of an information and consultation procedure.

This obligation shall continue to apply, wherever the persons referred to in the first and second subparagraphs are, even after the expiry of their terms of office.

2. Each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the central management situated in its territory is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them.

A Member State may make such dispensation subject to prior administrative or judicial authorization.

3. Each Member State may lay down particular provisions for the central management of undertakings in its territory which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions, on condition that, at the date of adoption of this Directive such particular provisions already exist in the national legislation.

Article 9 Operation of European Works Council and information and consultation procedure for workers

The central management and the European Works Council shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations.

The same shall apply to cooperation between the central management and employees' representatives in the framework of an information and consultation procedure for workers.

Article 10 Protection of employees' representatives

Members of special negotiating bodies, members of European Works Councils and employees' representatives exercising their functions under the procedure referred to in Article 6(3) shall, in the exercise of their functions, enjoy the same protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment.

This shall apply in particular to attendance at meetings of special negotiating bodies or European Works Councils or any other meetings within the framework of the agreement referred to in Article 6(3), and the payment of wages for members who are on the staff of the Community-scale undertaking or the Community-scale group of undertakings for the period of absence necessary for the performance of their duties.

Article 11 Compliance with this Directive

1. Each Member State shall ensure that the management of establishments of a Community-scale undertaking and the management of undertakings which form part of a Community-scale group of undertakings which are situated within its territory and their employees' representatives or, as the case may be, employees abide by the obligations laid down by this Directive, regardless of whether or not the central management is situated within its territory.

2. Member States shall ensure that the information on the number of employees referred to in Article 2(1)(a) and (c) is made available by undertakings at the request of the parties concerned by the application of this Directive.

3. Member States shall provide for appropriate measures in the event of failure to comply with this Directive in particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

4. Where Member States apply Article 8, they shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the central management requires confidentiality or does not give information in accordance with that Article.

Such procedures may include procedures designed to protect the confidentiality of the information in question.

Article 12 Link between this Directive and other provisions

1. This Directive shall apply without prejudice to measures taken pursuant to Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies,[7] and to Council Directive

7. O.J. 1975 L48/29 (22 Feb. 1975).

77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.[8]

2. This Directive shall be without prejudice to employees' existing rights to information and consultation under national law.

Article 13 Agreements in force

1. Without prejudice to paragraph 2, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which, on the date laid down in Article 14(1) for the implementation of this Directive or the date of its transposition in the Member State in question, where this is earlier than the abovementioned date, there is already an agreement, covering the entire workforce, providing for the transnational information and consultation of employees.

2. When the agreements referred to in paragraph 1 expire, the parties to those agreements may decide jointly to renew them.

Where this is not the case, the provisions of this Directive shall apply.

Article 14 Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 22 September 1996 or shall ensure by that date at the latest that management and labour introduce the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 15 Review by the Commission

Not later than 22 September 1999, the Commission shall, in consultation with the Member States and with management and labour at European level, review its operation and, in particular examine whether the workforce size thresholds are appropriate with a view to proposing suitable amendments to the Council, where necessary. . . .

NOTES AND QUESTIONS

1. Consider Articles 1 to 13 and 27-37 of the Andean Pact's Decision 24 (Selected Documents Supplement). What is their likely intention? Will they actually achieve it?

2. Under what circumstances is it wise to have a special regime for foreign investment, rather than simply to make sure that foreign investors follow local law?

3. Should laws like these follow the Most-Favored-Nation principle–or would it be wise, for example, for Canada to treat U.S. and French investment differently, or for a

8. O.J. 1977 61/26 (5 Mar. 1977).

developing nation to treat OPEC and developed world investment differently?

4. In what areas might you be particularly concerned about foreign investments into the United States? Defense issues? Agricultural land ownership (reporting required under 7 U.S.C. §§ 3501-3508)? TV station control? (*See Noe v. FCC*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959)).

5. Should Fourteenth Amendment principles that have led to a number of fairly broad protections for individual resident aliens be applied as well for the protection of foreign investors?

6. Suppose you wanted to create a special regime to favor and encourage the foreign investor in the United States? What would you do?

7. In whatever package of tax holidays and concessions you develop in response to the previous question, how much would you fear competition from other investment-hungry nations? How does the situation differ from that of local U.S. governments bidding for a new industry?

8. If a developing nation grants a tax holiday to a subsidiary of a U.S. firm, should the benefit of the foreign tax credit be reduced accordingly?

9. Note that, in practice, Canada's Foreign Investment Review Act (FIRA), which had gone on to create an administrative review (and possible veto) procedure for those investment transactions found to be within the act, was often interpreted as authorizing the Canadian government to impose conditions on the specific investment. If you had been the minister of industry, trade, and commerce, what kinds of conditions would you have considered?

10. Would such conditions violate the GATT? (In 1982, the United States government announced that it would initiate a GATT Art. XXJII claim on this point.)

11. Should the Canadian Act have been applicable to a U.S. sale of a Canadian business by one U.S. firm to another? For an affirmative answer, see *Dow Jones & Co. v. Attorney-General of Canada*, 113 D.L.R.3d 395 (1980). Does this extension of jurisdiction infringe U.S. rights? As a Canadian minister, what principles would you find relevant in reviewing such a transaction?

12. What is the purpose of the Works Council directive? (*See* art. 1.) In light of that purpose, what is the role of a "European works council" (art. 1(2), 4)? What is the role of a "special negotiating body (art. 5)?

13. Considerable Corp., incorporated under the laws of Delaware, has a Belgian subsidiary, which has branches in France and Germany, and another subsidiary in the United Kingdom. Considerable employs 1,100 persons throughout its European operations. What are its responsibilities under the Works Council directive? (*See, e.g.*, art.4, 6.) Do you need any other information in order to answer the question? (*See* art. 2(1), 3.) What if Considerable refuses to negotiate with its European employees in accordance with the directive? (*See* art. 7.)

14. Considerable Corp. has generally expanded its operations worldwide by an aggressive program of acquisitions of existing, profitable businesses in its lines of products and services. It does keep existing management of current subsidiaries informed of possible acquisitions of competing businesses within the subsidiaries' geographic markets. Considerable considers this information confidential, and it does not want to disclose such information to employees of its current European subsidiaries. Will it be allowed to maintain confidentiality under the Works Council directive? (*See* art. 8, 11(4).)

15. What parts of the Works Council directive are most likely to be offensive to foreign firms? The secrecy provisions? The duty to negotiate? The duty to inform and

consult at all?

16. How much does the Works Council directive actually help labor in Europe?

17. Review articles 4 and 11 of the Works Council directive. Assume that the employee works council of Considerable's German subsidiary has requested information from the German subsidiary on the average number of employees and their distribution within the EU member states, on Considerable's European undertakings and establishments, on the structure of the company or group of companies, and the names of the employees' representation bodies and their representatives, so that it may establish a European Works Council pursuant to the directive. Management of the German subsidiary has refused because the information is not in its possession. It has been provided by Considerable Corp. only to the Belgian subsidiary, and neither Considerable nor the Belgian subsidiary have agreed to provide the information to the German subsidiary. Does the employee works council have a right to the information under the directive? In answering this question, consider the following case.

BETRIEBSRAT DER FIRMA ADS ANKER GMBH v. ADS ANKER GMBH

Judgment of the European Court of Justice (Sixth Chamber) of 15 July 2004,
3 C.M.L.R. 14, Celex No. 601J0349, Case C-349/01

1. By order of 24 July 2001, received at the Court on 17 September 2001, the Arbeitsgericht (Labour Court) Bielefeld referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 4 and 11 of Council Directive 94/45/EC of 22 September 1994 . . . ("the Directive").

2. Those questions were raised in proceedings between Betriebsrat der Firma ADS Anker GmbH (works council of the company ADS Anker GmbH, "the works council") and the company ADS Anker GmbH ("ADS Anker") concerning the refusal by the latter to accommodate the works council's request to be provided with certain information with a view to establishing a European Works Council.

Legal framework

Community legislation

3. According to the 11th recital in the preamble to the Directive:

> ... appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings [or Community-scale groups of undertakings] are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed.

4. The 12th recital in the preamble to the Directive provides that "... in order to guarantee that the employees of undertakings or groups of undertakings operating in two or more Member States are properly informed and consulted, it is necessary to set up European Works Councils or to create other suitable procedures for the transnational information and consultation of employees".

5. The 13th recital in the preamble to the Directive reads as follows:

> ... it is accordingly necessary to have a definition of the concept of controlling undertaking relating solely to this Directive and not prejudging definitions of the concepts of group or control which might be adopted in texts to be drafted in the future.

6. The 14th recital in the preamble to the Directive provides:

> ... the mechanisms for informing and consulting employees in such undertakings or groups must encompass all of the establishments or, as the case may be, the group's undertakings located within the Member States, regardless of whether the undertaking or the group's controlling undertaking has its central management inside or outside the territory of the Member States.

[The Court then quotes articles 1, 2(1)(a)-(e) and 3(1)-(2) of the Directive.]

10. Article 3(6) of the Directive provides that the "law applicable in order to determine whether an undertaking is a 'controlling undertaking' shall be the law of the Member State which governs that undertaking."

[The Court then quotes articles 4(1)-(3) and 5(1)-(2) of the Directive.]

13. Article 6(1) of the Directive provides that the central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees provided for in Article 1(1).

[The Court then quotes article 11(1)-(3) of the Directive.]

15. Article 14(1) of the Directive required Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 22 September 1996 or to ensure by that date at the latest that management and labour introduce the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by the Directive. They were required immediately to inform the Commission thereof.

National legislation

16. The Directive was transposed into German law by the Gesetz uber Europaische Betriebsrate (Law on European Works Councils) of 28 October 1996 (BGBl. 1996 I, p. 1548, "the EBRG").

17. Under Paragraph 2(1) of the EBRG that Law applies to Community-scale undertakings having their seat in German territory and to Community-scale groups of undertakings where the controlling undertaking has its seat in German territory.

18. Under Paragraph 2(2) of the EBRG:

> Where the central management is not situated in a Member State but there is local delegated management for the undertakings or establishments situated in the Member States, this Law shall apply as from the time that local delegated management is established in German territory. In the absence of local delegated management, this Law shall apply in cases where the local management designates an establishment or undertaking as being its representative in German territory. If no representative is designated, this Law shall apply as from the time at which the establishment or undertaking which employs the largest number of employees, as compared with the undertaking's other establishments or the group's other undertakings present in the Member States, is established in German territory. The foregoing examples shall be deemed to be equivalent to central management.

19. Paragraph 3(2) of the EBRG defines "Community-scale group of undertakings" in a manner similar to Article 2(1)(c) of the Directive.

20. Paragraph 5 of the EBRG, which was adopted in order to transpose Article 11 of the Directive, provides:

> 1. The central management must give to the employees' representatives, upon request, information on the average number of employees and the distribution of these within the Member States, on the undertakings and establishments and on the structure of the company or group of companies.
>
> 2. A works council or a central works council may exercise the right granted in subparagraph 1 against the local management of the establishment or undertaking; the latter shall be required to obtain from the central management the information and documents necessary to provide the particulars requested.

21. Paragraph 6 of the EBRG defines "controlling undertaking" in a manner similar to Article 3 of the Directive.

Main proceedings and questions referred for a preliminary ruling

22. . . . ADS Anker, an undertaking established in Germany, is part of a Community-scale group of undertakings within the meaning of Article 2(1)(c) of the Directive ("the Anker group").

23. The company Anker BV, established in the Netherlands, holds all of the shares in ADS Anker and other undertakings belonging to the Anker group, established in Sweden, Norway, Denmark, Finland, the United Kingdom, the Netherlands, Austria, France, Belgium and Hungary. Anker Systems GmbH, the parent company of Anker BV, is established outside the territory of the Member States, in Switzerland.

24. . . . [T]he Anker group undertaking with the largest number of employees in a Member State for the purposes of the second subparagraph of Article 4(2) of the Directive is the undertaking RIVA, established in the United Kingdom. That company employs approximately 1000 workers and was acquired by Anker BV at the end of 1999.

25. . . . [T]he central management of the group is either the undertaking RIVA, which can be considered as being the deemed central management under the second subparagraph of Article 4(2) or under Article 4(3) of the Directive, or Anker BV, which is the central management of the controlling undertaking for the purposes of Article 2(1)(e) and Article 3(1) of the Directive.

26. Neither a European Works Council nor a procedure for informing and consulting employees has been established within the Anker group.

27. The works council of ADS Anker requested the latter, pursuant to Paragraph 5(2) of the EBRG, to provide it with the information laid down in Paragraph 5(1) of the ERBG and the names of the employees' representation bodies and their representatives able to participate, on behalf of the employees of the undertakings or of undertakings controlled by them, in the establishment of a European Works Council.

28. ADS Anker replied that it was not able to accommodate that request because both the parent company, Anker BV, and the parent company of the group, Anker Systems GmbH, refused to provide the information requested. It added that the EBRG does not provide for a right to information which may be relied on as against other undertakings established in other Member States.

29. Following the refusal of its request for information, the works council brought proceedings before the Arbeitsgericht Bielefeld.

30. The Arbeitsgericht Bielefeld found that the employer cannot merely tell the works council to obtain the information it seeks by conducting its own research in the company registers or in other sources. The central management is itself responsible for creating the conditions necessary for the establishment of a European Works Council or a procedure for the purposes of informing and consulting employees.

31. The national court also refers to ADS Anker's argument that it was not able to provide the information requested because both Anker BV and the parent company Anker Systems GmbH refuse to provide the information needed by the employees.

32. The Arbeitsgericht Bielefeld held that, since the EBRG is a national law, its scope of application can cover only German territory and it does not impose an obligation on undertakings in the group which are established outside Germany to provide certain information to undertakings established in German territory.

33. The national court goes on to state, however, that the employer's argument that it was not able to provide the information requested by the employees cannot succeed if, under the legislative measures in place in other Member States to transpose the Directive, the employer can oblige central management established in another Member State to provide the necessary information to undertakings in the group which are established in German territory.

34. It notes, however, that the Directive does not contain any express provision on such a horizontal right for an undertaking in the group to obtain information from the central management established in another Member State.

35. As it took the view that the outcome of the dispute pending before it depended on an interpretation of the Directive, the Arbeitsgericht Bielefeld decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

> 1. Is it a requirement of... Directive 94/45/EC..., in particular Articles 4 and 11 thereof, that an undertaking established in the United Kingdom, which is regarded as the central management under the second paragraph of Article 4(2) and Article 4(3) of the Directive, or an undertaking established in ... the Netherlands, which constitutes the central management of the controlling undertaking under Article 2(1)(e) and Article 3(1) of the Directive, is obliged to provide another undertaking resident in ... Germany belonging to the same group of undertakings with information on undertakings and establishments belonging to the group of undertakings and on their legal form and representation arrangements and the average total number of employees and their distribution across the Member States and the undertakings?
>
> 2. If the Court of Justice answers the first question in the affirmative: does the obligation to provide information also encompass the names of the employees' representation bodies and their representatives who are to participate, on behalf of the employees of the undertaking or the undertakings controlled by it, in the establishment of a European Works Council?

Questions referred for a preliminary ruling

. . .

Findings of the Court

45. According to the 11th recital in the preamble and Article 1(2) of the Directive, its purpose is to ensure that the employees of Community-scale undertakings or groups of Community-scale undertakings are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they work.

46. As is clear from its general scheme, transnational informing and consulting of employees under the Directive are essentially to be ensured by means of a system of

negotiations between the central management and the workers' representatives (*Bofrost*, [[2001] ECR I-2579,] paragraph 29, and Case C-440/00 *Kuhne & Nagel*, [2004] ECR I-0000, paragraph 40).

47. In that connection, a European Works Council or a procedure for the purposes of informing and consulting employees is established in each Community-scale undertaking and each Community-scale group of undertakings when a request to that effect is made in accordance with the procedure set out in Article 5(1) of the Directive.

48. Under that provision of the Directive, in the case of a Community-scale group of undertakings, the central management, on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States, must initiate negotiations for the establishment of such a European Works Council.

49. Under Article 6(1) of the Directive, the special negotiating body, which is an employee representation body established pursuant to Article 5(2) of the Directive, and the central management must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for setting up a European Works Council.

50. The Court has already stated that, if the Directive is to serve a useful purpose, it is essential that the employees concerned be guaranteed access to information enabling them to determine whether they have the right to demand the opening of negotiations between central management and the employees' representatives, such a right to information constituting an essential prerequisite for determining whether a Community-scale undertaking or group of undertakings exists, which is itself a condition precedent for the setting up of a European Works Council or of a transnational procedure for informing and consulting employees (*Bofrost*, paragraphs 32 and 33, and *Kuhne & Nagel*, paragraph 46).

51. As regards, first, the setting up of such a council, the central management must, in accordance with Article 4(1) of the Directive, create the conditions and means necessary for the setting up of such a council. That responsibility includes an obligation to supply the employees' representatives with the information essential to the opening of negotiations for establishing a European Works Council (see Kuhne & Nagel, paragraphs 49 and 51).

52. Central management is the central management of the controlling undertaking, namely the undertaking which can exercise a dominant influence over all the other controlled undertakings of the group within the meaning of Article 3(1) and (2) of the Directive. It is that undertaking which, by virtue of its dominant influence, can request and oblige the other undertakings in the group to provide it with the information essential for opening negotiations in order to enable it to communicate that information to the representatives (see also, to that effect, *Kuhne & Nagel*, paragraphs 52 and 54).

53. Moreover, in order to guarantee attainment of its objective pertaining to employees' rights to have access to that information, the Directive even provides that, where the central management is situated outside the territory of the Member States, the responsibility conferred on it by Article 4(1) of the Directive is to be assumed, pursuant to the first and second subparagraphs, respectively, of Article 4(2), by either the representative agent of the central management in one of the Member States or, in the absence of such a representative, by the central management of the establishment or group undertaking employing the greatest number of employees in a Member State, that is, by the deemed central management.

54. In order to ensure that the Directive serves a useful purpose, the other undertakings belonging to the group and located in the Member States are under an

obligation to assist the deemed central management in fulfilling the main obligation referred to in Article 4(1) of the Directive. The corollary of the deemed central management's right to receive essential information is an obligation on the part of the management of each of the other undertakings belonging to the group to supply the deemed central management with the information concerned where it is in possession of the information or is in a position to obtain it (*Kuhne & Nagel*, paragraph 59).

55. In the present case, the essential question which arises is whether the central management or the deemed central management is also obliged under the Directive to supply information which is essential in order to open negotiations to set up a European Works Council to a controlled undertaking within the group, the request for information in question having been presented by the employees' representatives to that controlled undertaking, and whether such an undertaking is entitled under the Directive to require that that information be supplied to it.

56. It is clear from both the purpose and the general scheme of the Directive that the obligations by which the central management or the deemed central management is bound under Article 4(1) of the Directive must be interpreted as encompassing both the obligation to supply directly to the employees' representatives information which is essential for the opening of negotiations to set up a European Works Council and the obligation to supply that information to employees' representatives through their undertaking in the group to which those representatives submitted a request for information in the first place.

57. Any other interpretation of the obligations by which the central management or the deemed central management is bound under Article 4(1) of the Directive would be liable to undermine the useful purpose of the Directive referred to by the Court in *Bofrost* and *Kuhne & Nagel*, cited above.

58. The Directive seeks to impose obligations on all undertakings in the group intended to facilitate the setting up of European Works Councils (see, to that effect, *Bofrost*, paragraphs 31 and 35). As the Court has already held, it is implicit in the Directive's purpose that the obligations which it lays down are to be fulfilled in such a way as to enable the workers concerned, or their representatives, to have access to the information which is necessary if they are to be able to determine whether or not they are entitled to request the opening of negotiations (*Bofrost*, paragraph 38).

59. A restrictive interpretation of the obligation laid down in Article 4(1) of the Directive, to the effect that that provision would apply only to situations where employees' representatives submit requests for information directly to the central management or the deemed central management, would place an unjustified limitation on the application and scope of that provision, and indeed of the Directive, and might even discourage employees from exercising the rights conferred on them by the Directive.

60. Accordingly, Article 4(1) of the Directive lays down both the obligation to supply directly to employees' representatives certain information with a view to setting up a European Works Council and the obligation to supply them with that information through the undertaking in the group which received a request to that effect from its employees' representatives.

61. In addition, under Article 14(1) of the Directive, the Member States must take all the necessary steps in order to be able at all times to guarantee the results imposed by the Directive. Under Article 11(3) of the Directive, they must provide for appropriate measures in the event of failure to comply with the Directive and, in particular, they must ensure that adequate administrative or judicial procedures are available to enable

the obligations deriving from the Directive to be enforced. It follows from the purpose of the Directive that the Member States must take all the measures necessary to ensure that the obligations deriving from Articles 4(1) and 11 of the Directive are fully performed (see, to that effect, *Kuhne & Nagel*, paragraph 61).

62. With regard to the nature of the information which the central management or the deemed central management is bound to supply by virtue of that obligation to supply information, it should first be borne in mind that Article 11(2) of the Directive imposes an express obligation on Member States to ensure that the information on the number of employees referred to in Article 2(1)(a) and (c) is made available by undertakings at the request of the parties concerned by the application of the Directive.

63. Next, where the management of the other undertakings belonging to the group is located in the Member States, there is an obligation to supply the deemed central management with the information essential to the opening of negotiations for the establishment of a European Works Council where it is in possession of the information or is in a position to obtain it (*Kuhne & Nagel*, paragraphs 64 and 69).

64. Finally, as evidenced by paragraph 58 of this judgment, it is implicit in the Directive's purpose that the obligations which it lays down are to be fulfilled in such a way as to enable the workers concerned, or their representatives, to have access to the information which is necessary for them to be able to determine whether or not they are entitled to request the opening of negotiations and, where relevant, to make that request in due form (*Bofrost*, paragraph 38).

65. It follows that the provision of information on the group's companies and establishments, their legal form and representational structure, the average total number of employees and their distribution across the Member States, may be requested in so far as that information is essential for the opening of the negotiations referred to in Article 5(1) of the Directive for the establishment of a European Works Council (see, to that effect, *Kuhne & Nagel*, paragraph 70). The same holds true for information on the names of the employees' representation bodies and their representatives required to participate, on behalf of the employees of the undertakings or of undertakings controlled by them, in the establishment of a European Works Council.

66. It is for the national courts to ascertain, on the basis of all the evidence before them, whether the information requested is essential for opening the negotiations referred to in Article 5(1) of the Directive.

67. In the light of the foregoing, the questions referred should be answered as follows: Article 4(1) and Article 11 of the Directive must be interpreted as meaning that Member States are required to impose on undertakings established within their territory and constituting the central management of a Community-scale group of undertakings for the purposes of Article 2(1)(e) and Article 3(1) of the Directive, or the deemed central management under the second subparagraph of Article 4(2), the obligation to supply to another undertaking in the same group established in another Member State the information requested from it by its employees' representatives, where that information is not in the possession of that other undertaking and it is essential for opening negotiations for the setting up of a European Works Council. ...

2. Home State Regulation

On occasion home states also impose special regulations on their firms' foreign branches and subsidiaries. These can range from the regulation implicit in the international sections of the tax code, through details of bookkeeping (a very important

part of the Foreign Corrupt Practices Act), and efforts to shape the effects of the firm's investment on the state's balance of payments. Some of these rules can create severe complications, either for the competitive position of the foreign subsidiary or for political relations between home and host states.

Of the range of such rules and conflicts, three will be considered here in detail: those of employment regulation; those of extraterritorial export regulations; those of franchise regulations (and the associated vertical antitrust issue generally). In addition, we shall refer to the rules embodied in the Foreign Corrupt Practices Act (FCPA).[1] These examples are representative of many possible conflicts but are chosen for their subject matter variety. They are also chosen to exemplify different dispute resolution procedures. In the first case, a U.S. court decided on its own extraterritorial authority; in the second, a dispute was ultimately resolved by diplomatic means; and, in the third situation, arbitration is frequently preferred to litigation.

a. Employment Regulation

Probably the most common problem for the MN is that of labor regulation–a problem already exemplified in the Works Council directive proposal just examined. Consider the following case as an example of policy conflict (the case was reversed on the grounds that the practice involved did not amount to discrimination within the meaning of Title VII, but it offers the clearest available exposition of the problem).

BRYANT AND LILLIBRIDGE v. INTERNATIONAL SCHOOLS SERVICES, INC.

502 F. Supp. 472 (D.N.J. 1980), *reversed*, 675 F.2d 562 (3d Cir. 1982)

DEBEVOISE, J.

I. Parties and Proceedings

Plaintiffs in these consolidated actions, Theresa 0. Lillibridge and Dotti D. Jernigan Bryant, instituted suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII"). Plaintiffs charge that the practice of defendant, International Schools Services, Inc. ("ISS"), of awarding to its overseas teachers two kinds of employment contracts having substantially different compensation and benefit provisions constituted unlawful discrimination against plaintiffs on the basis of sex.

ISS is a private, non-profit corporation organized under the laws of the District of Columbia, with its headquarters in Princeton, New Jersey. ISS works by contract with overseas governments or corporations to operate schools for children of American employees overseas. The services it provides are educational consulting, school operation, education staffing, purchasing, procurement and financial management.

The case was tried without a jury, and decision was reserved. This opinion constitutes this Court's findings of fact and conclusions of law.

II. Findings of Fact

A. The ISS Contracts

The American School in Isfahan, one of the schools ISS operated, was established in 1973, pursuant to a contract between ISS and Bell Helicopter. The contracts which Bell Helicopter and other companies performed for the Iranian government required the

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1. 15 U.S.C. §§78dd-1 *et seq*. *See generally* Chapter XIII, § A., *supra* (examining FCPA).

presence of the companies' employees overseas in Iran. These employees brought their families. It was ISS's responsibility, under its contract, to establish a school and employ and supervise the staff of the school where the children of these employees would be educated. ISS initially contracted with Bell Helicopter to operate the American School; for 1976 and thereafter, ISS contracted directly with the Iranian government to operate the school.

The school term for the American School ran from September of one year through June of the next year, and the staff went on annual leave for the summer months. The American School operated until January 6, 1979, when it was permanently closed due to the revolution in Iran which began in late 1978.

All of the staff at the American School were compensated according to the same base salary scale, which varied depending upon (1) teaching experience and (2) educational achievement. The base salary scale is not an issue in this case. . . .

Teachers at the American School taught under two kinds of contracts–local-hire contracts and ISS-sponsored contracts. Regardless of the kind of contract, the duties of the teachers did not differ. Persons who had ISS-sponsored contracts received additional allowances.

The extra benefits paid under the ISS-sponsored contracts were comparable to extra benefits which business corporations under contract with the Iranian government paid to United States citizens they recruited to work in Iran. ISS specifically patterned its benefits upon those provided by Bell Helicopter.

Teachers having ISS-sponsored contracts were hired in the United States and in Isfahan; teachers having local-hire contracts were hired only in Isfahan.

B. Bryant's Employment by ISS

Bryant was married to Marc Jernigan in 1974 and was an elementary school teacher by profession. She expected to accompany her husband to Iran, where he was to be employed by Grumman. She learned of ISS from a Grumman employee and wrote to ISS at Princeton, New Jersey, informing it of her expected arrival in Isfahan, Iran, in October 1975. ISS sent her application forms, which she completed and returned in early May, 1975. Receiving no response, Bryant made inquiry by letter dated July 30, 1975, again addressing her letter to ISS at Princeton. On September 22, 1975, ISS replied, stating that all positions were filled and advising her to communicate with the School superintendent upon her arrival in Isfahan.

When Bryant arrived in Isfahan in November, 1975, a Grumman employee introduced her to Michael White, the principal of the American School's Middle School. He already had her resume and hired her forthwith as a substitute teacher, paid on a daily basis. In April 1976, ISS hired Bryant on a full-time basis and entered into a local-hire contract with her. The contract recited that Bryant was entitled to participate in the benefit program attached to the letter agreement. There was no attachment to the letter agreement. She was not informed of the fact that there were two kinds of contract, nor was she given a copy of the School's personnel manual.

While she was a substitute teacher she had heard of certain allowances being paid to some of the teachers.

After her employment under a local-hire contract commenced, Bryant asked the American School's assistant superintendent, Ralph Englesby, whether she would receive these allowances. He replied in the negative and, during the course of their discussion, informed her, "You can sue for them."

At a faculty meeting at the end of the 1975-76 school year which Bryant attended, Dr. Howard Wire, Superintendent of the American School, was asked about the disparity

between payments under local-hire contracts and ISS-sponsored contracts. Apparently there was a discussion of an EEOC case entitled *Michele Dick v. Telemedia,* in which a woman married to a man who worked in Iran was awarded damages for unpaid benefits on the grounds that she, as a married woman, had suffered from discriminatory treatment vis-a-vis married men. Dr. Wire defended ISS's policy of awarding contracts with different benefits. Asked by one of the women if it wouldn't be smart to go to the United States to sue ISS, Dr. Wire stated that "I wouldn't do so if I were you while you and your husband are employed here." . . .

Both before commencement of this action and during the course of this litigation ISS has articulated several different bases for distinguishing between persons receiving ISS-sponsored contracts and persons receiving local-hire contracts. It is abundantly clear that ISS did not succeed in perfecting its rationale until the closing phases of this law suit. However, even though ISS never clearly expressed what it was doing either to itself or to others, the evidence suggests that in fact ISS's criterion for awarding contracts was a subjective one, namely, whether the teacher came to Iran and remained there for the primary purpose of teaching at the American School or whether the teacher came to Iran and remained there primarily for some other purpose. In the former situation the teacher was awarded an ISS-sponsored contract and in the latter situation the teacher was awarded a local-hire contract.

ISS decided what was the teacher's primary purpose for coming to or remaining in Iran on the basis of whether the teacher's spouse was employed by Bell Helicopter or Grumman or perhaps some other American company in Iran. Such employment by the spouse would lead ISS to conclude that the would-be teacher and her/his spouse were induced to come to Iran by the spouse's employment and that, presumably, the couple was already receiving benefits comparable to the ones offered by ISS to attract teachers to Iran.

Bryant and Lillibridge claim that ISS's method of awarding two types of contracts discriminated against them on the basis of sex, in violation of Title VII. Specifically, they maintain that the benefits policy resulted in disparate treatment and/or had a disparate impact on them–married females whose spouses were not employed by ISS.

ISS maintains that its benefits policy was applied equally to males and females and therefore could not result in disparate treatment. Moreover, ISS maintains that its policy did not have a disparate impact on females. . . .

IV. Extraterritorial Application of Title VII

ISS urges that Title VII does not apply extraterritorially and that, therefore, the Court lacks subject matter jurisdiction. ISS advances the following reasons in support of its position:

First, as in the case of the National Labor Relations Act, 29 U.S.C. §141 *et seq*., Title VII contains no clear affirmative expression setting forth the territorial jurisdiction of the Act. The National Labor Relations Act does not apply outside the territorial jurisdiction of the United States, RCA OMS, Inc., 202 N.L.R.B. 228 (1973); GTE Automatic Electric, Inc., 226 N.L.R.B. 1222 (1976). ISS concludes that by analogy Title VII should be given the same limited construction.

Second, prior to the enactment of Title VII various other labor laws were narrowly construed to preclude extraterritorial application. *Foley Bros., Inc. v. Filardo,* 336 U.S. 281 (1949); *Benz v. Cornpania Naviera Hidalgo,* 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional,* 372 U.S. 10 (1963). ISS argues that it would be illogical to think that Congress would grant EEOC the same investigatory powers as it granted to the NLRB and, at the same time, give EEOC greater territorial jurisdiction unless Congress

specifically so provided.

Third, ISS contends that § 206(d) of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq*. (commonly known as the Equal Pay Act), should be read *in pari materia* with Title VII. The Equal Pay Act does not apply outside the territorial jurisdiction of the United States, 29 U.S.C. §213(f), and, again, ISS argues that it would be illogical to think that Congress meant to limit the jurisdiction of the Equal Pay Act and not Title VII when the two are to be read in harmony with one another.

Fourth, ISS asserts that given the sensitive nature of international affairs, to apply Title VII extraterritorially without an affirmative Congressional expression to do so is unwarranted.

Fifth, ISS seeks comfort from the recent case of *Rossi v. Brown*, 24 E.P.D. ¶31,238 (D.C. Cir. 1980).[2] The issue in the *Rossi* case was whether an agreement with the Republic of the Philippines constituted a treaty, which would form the basis for permissible discrimination against the plaintiff Section 106 of Public Law No. 92-l29[3] prohibited discrimination against United States citizens in the employment of civilian personnel on United States military bases overseas unless such discrimination is permitted by treaty. ISS stated, in a letter memorandum to the Court, "Title VII was intended to offer protection against discrimination to civilian applicants and employees of the military. . . . It has been so construed in *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978), *cert. den.*, 439 U.S. 986 (1978), *reh'g den.*, 439 U.S. 1135 (1979).... Given the application of Title VII to civilian employees of the Armed Services, the existence of Section 106 of Public Law No. 92-129, and its legislative history, make no sense *unless* it were intended by Congress that Title VII *not* apply extraterritorially."

The short answer to all of ISS's arguments against giving extraterritorial effect to Title VII is that Congress has spoken on the subject and that a fair interpretation of the statutory language leads to the conclusion that Title VII is to be given extraterritorial effect.

The question whether an act applies extraterritorially is a matter of statutory construction, for it is well settled that Congress has the power to extend the reach of its laws to American citizens outside the geographical boundaries of the United States, *Foley Bros. v. Filardo*, *supra*; *Blackmer v. United States*, 284 U.S. 421 (1932). The provision of Title VII exempting certain entities, 42 U.S.C. §2000e-1, provides in pertinent part:

> This subchapter shall not apply to an employer with respect to the employment of *aliens outside any* State, or to a religious corporation. . . . (Emphasis added.)

By negative implication, since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to non-aliens, *i.e*., American citizens, outside of any state by an employer otherwise covered by the Act. *Love v. Pullman Co.*, 12 E.P.D. ¶11,225 (D. Cob. 1976).

The *Love* case dealt with the extent to which Canadian porters (aliens) were protected

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2. This case was ultimately resolved against the plaintiff on quite different statutory construction grounds. *Weinberger v. Rossi*, 456 U.S. 25 (l982)—Eds.

3. § 106 of Pub. L. 92-129 provided:

> Unless provided by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

by Title VII arid concluded that when such porters operated in the United States they were entitled to relief. In a footnote, the Court explained:

> This discussion assumes that the porters in Montreal were not American citizens. American citizens who were employed by Pullman in Canada are entitled to full relief without any subtraction. This conclusion rests on the negative inference of § 702 of the Civil Rights Act of 1964. 42 U.S.C. §2000e-1. Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state in an industry affecting commerce by an employer otherwise covered under the act. Nothing in the legislative history addresses this specific point, but neither is it contra-indicated. Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964. Our research has revealed no cases directly in point. An additional support for this interpretation comes from the international or extraterritorial application of the antitrust laws. *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690 (1962). *Id.* at n.4.

Thus, I conclude that Title VII has extraterritorial effect and was applicable to ISS's employment practices in Iran. . . .

VIII. "Act of State" and "Foreign Compulsion" Defenses

ISS asserts that its policies and practices in awarding contracts to teachers at the American School in Isfahan were immunized from attack on Title VII grounds by the act of state doctrine and by the defense of foreign compulsion. The act of state doctrine precludes inquiry into the validity of a foreign sovereign's act and requires American courts to respect private claims based on the contention that the damaging act of another nation violates American law. *Mannington Mills, Inc. v. Congoleum Corp*., 595 F.2d 1287, 1292-1293 (3d Cir. 1979). The foreign compulsion defense, developed in the context of antitrust litigation, shields from liability the acts of parties carried out in obedience to the mandate of a foreign government, *Interamerican Refining Corp. v. Texaco Maracaibo, Inc*., 307 F. Supp. 1291, 1296 (D. Del. 1970).

It is ISS's contention that the conduct which lies at the heart of plaintiff's claims was mandated by Iranian authorities, that the insistence by these authorities that ISS not pay benefits to teachers which would duplicate benefits being received by the teachers' spouses constituted an act of state and the basis of the defense of foreign compulsion.

Long before it entered into a contractual relationship with the Iranian government, ISS allocated its ISS-sponsored contracts and its local-hire contracts on the basis of the primary purpose which motivated its employees to come to or remain in Iran. Continuation of this policy after ISS began contracting with the Iranian government instead of Bell Helicopter insured compliance with the government's requirement that there be no double payments of benefits to spouses working in Iran for companies under contract with the Iranian government. Inasmuch as I have concluded that ISS's policy in this regard did not violate Title VII, there is no need to decide whether this requirement of the Iranian authorities who negotiated the contract with ISS rose to the level of an act of state.

It was not the policy against payment of double benefits or the primary purpose basis for awarding contracts which I found violated Title VII; I found that ISS violated Title VII by failing to advise persons hired locally of its basis for awarding contracts and by determining an employee's primary purpose for being or remaining in Iran by means of criteria which had the effect of dis criminating against married women. There was nothing in Iranian law and there were no requirements of the Iranian authorities which compelled ISS to conceal its policies from persons hired locally, or to base its

determination of primary purpose on the employment status of its teachers' spouses. Those were actions and policies of ISS and neither reflected sovereign decisions of the Iranian government nor were compelled by the Iranian government. Thus those actions and policies are not protected by the act of state doctrine or the defense of foreign compulsion. *Mannington Mills, Inc. v. Congoleum Corp*., *supra*, at 1293; *Timberlane Lbr. Co. v. Bank of America, NT. & S.A.*, 549 F.2d 597, 608 (9th Cir. 1976).

NOTES AND QUESTIONS

1. What is the point in distinguishing between employment of U.S. citizens abroad and employment of foreign nationals abroad?

2. How would the case have come out if the government of Iran had prohibited all employment of women as teachers within Iran?

3. Is the opinion really responsive to *Timberlane?* Should it be? For a good discussion of the area, see Kirschner, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 LAB. L.J. 394 (1983).

4. Taking this case as a general example, how should the following analogous cases come out?

(a) Discrimination against a U.S. citizen abroad, in possible violation of the Age Discrimination in Employment Act of 1967? *See Cleary v. United States Lines*, 728 F.2d 607 (3d Cir. 1984) (the lower court opinion at 555 F. Supp. 1251 (D.N.J. 1983) is also helpful); *Zahourek v. Arthur Young & Co.*, 567 F.Supp. 1453 (D. Colo. 1983); *Linsky v. Heidelberg Eastern*, 470 F. Supp. 1181 (E.D.N.Y. 1979).

(b) Possible Title VII discrimination against a U.S. citizen abroad due to local law excluding women from certain heavy jobs?

(c) Possible Title VII discrimination against a U.S. national due to local law prohibiting the employment of Jewish people in the nation?

(d) Application of a code of conduct in opposition to South Africa's apartheid policy? *See* Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 L. & POLY. INTL. BUS. 427 (1983).

(e) Possible violation of U.S. minimum wage laws? Assuming you come out differently on this one, how would you explain the difference? Where would you come out on safety rules? Pension rights? Labor union rules?

5. How would you advise a company caught in the middle in one of these situations? Must it suspend operations in the foreign nation?

6. What about the reciprocal case? Suppose a Japanese subsidiary in the United States is alleged to discriminate against women in executive positions in the United States, reflecting a pattern of predominantly male executives in the home branches in Japan? *See Sumitomo Shoji America v. Avagliano*, 457 U.S. 176 (1982); Note, *International Law—Employment Discrimination*, 13 GA. J. INTL. & COMP. L. 159 (1983).

7. When is it fair to apply U.S. law *both* to U.S. subsidiaries of foreign firms and foreign subsidiaries of U.S. firms?

b. The Export Administration Act and the Gas Pipeline Case

The United States has on a number of occasions sought to apply its law to foreign activities of U.S. corporations. You have already seen examples in the antitrust area, and in Chapter XIII, § B, *supra*. The most politically controversial examples have arisen

from regulations under the Export Administration Act. Executive action has gone beyond the direct export context, to attempt to reach foreign operations of firms affiliated with the United States. A controversy that shows the legal arguments and problems quite clearly is that surrounding the United States effort in 1982 to discourage Soviet construction of a pipeline to transport natural gas to Western Europe. The United States feared that this pipeline would make Western Europe dependent on Soviet gas and directed that foreign subsidiaries of U.S. firms, as well as certain foreign firms using U.S. technology, should not export relevant materials to the Soviet Union. A number of European subsidiaries had already entered contracts to export such materials.

As demonstrated in the first excerpt below, Europe resisted this exercise of U.S. jurisdiction. There were even court cases in Europe dealing with the firm caught between conflicting demands. The second excerpt, *Fruehauf*, exemplifies these cases but arose from an earlier similar conflict and deals more fundamentally with the issues than do the later cases. Finally, as shown in the last excerpt of the group, a speech by President Reagan, the gas pipeline conflict was settled politically.

EUROPEAN COMMUNITIES: COMMENTS ON THE U.S. REGULATIONS CONCERNING TRADE WITH THE U.S.S.R.

21 1.L.M. 891 (1982)

I. Introduction

1. On June 22, 1982, the Department of Commerce, at the direction of President Reagan and pursuant to Section 6 of the Export Administration Act, amended Sections 376.12, 379.8 and 385.2 of the Export Administration Regulations. These amendments amounted to an expansion of the existing U.S. controls on the export and re-export of goods and technical data relating to oil and gas exploration, exploitation, transmission and refinement.

The European Community believes that the U.S. regulations as amended contain sweeping extensions of U.S. jurisdiction which are unlawful under international law. Moreover, the new Regulations and the way in which they affect contracts in course of performance seems to run counter to criteria of the Export Administration Act and also to certain principles of U.S. public law.

2. The main thrust of the Regulations may be summarized as follows:

First of all, persons within a third country may not re-export machinery for the exploration, production, transmission or refinement of oil and natural gas, or components thereof, if it is of U.S. origin, without permission of the U.S. Government.

Moreover, any person subject to the jurisdiction of the United States[1] is required to get prior written authorization by the Office of Export Administration for export or re-export to the U.S.S.R. of non-U.S. goods and technical data related to oil and gas exploration, production, transmission and refinement.

Finally, no person in the U.S. *or in a foreign countiy* may export or re-export to the U.S.S.R. foreign products directly derived from U.S. technical data relating to

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1. Now defined as (i) Any person wherever located who is a citizen or resident of the United States; (ii) any person actually within the United States; (iii) any corporation organized under the laws of the United States; or (iv) any partnership, association, corporation or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (I), (ii) or (iii).

machinery etc. utilized for the exploration, production or transmission or refinement of petroleum or natural gas or commodities produced in plants based on such U.S. technical data.

This prohibition applies in three alternative situations, namely:

– if a written assurance was required under the U.S. export regulations when the data were exported;

– if any person subject to the jurisdiction of the U.S.A. receives royalties or other compensation for, or has licensed, the use of the technical data concerned, regardless of when the data were exported from the U.S.;

– if the recipient of the U.S. technical data has agreed (in the licensing agreement or other contracts) to abide by U.S. export control regulations.

3. The following comments will discuss *firstly* the international legal aspects of the U.S. measures, including (a) the generally recognized bases on which jurisdiction can be founded in international law and (b) other bases of jurisdiction which might be invoked by the U.S. Government; *secondly* the rules and principles as laid down in U.S. law, in particular the Export Administration Act, and as applied by U.S. Courts, which would seem to be at variance with the Amendments of June 22, 1982.

II. The Amendments under International Law

A. Generally Accepted Bases of Jurisdiction in International Law

4. The U.S. measures as they apply in the present case are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of U.S. nationality in respect of their conduct outside the United States and particularly the handling of property and technical data of these companies not within the United States.

They seek to impose on non-U.S. companies the restriction of U.S. law by threatening them with discriminatory sanctions in the field of trade which are inconsistent with the normal commercial practice established between the U.S. and the E.C.

In this way the Amendments of June 22, 1982, run counter to the two generally accepted bases of jurisdiction in international law; the territoriality and the nationality principles.[2]

5. The *territoriality principle* (*i.e.* the notion that a state should restrict its rule-making in principle to persons and goods within its territory and that an organization like the European Community should restrict the applicability of its rules to the territory to which the Treaty setting it up applies) is a fundamental notion of international law, in particular insofar as it concerns the regulation of the social and economic activity in a state. The principle that each state–and *mutatis mutandis* the Community insofar as powers have been transferred to it–has the right freely to organize and develop its social and economic system has been confirmed many times in international fora. The American measures clearly infringe the principle of territoriality, since they purport to regulate the activities of companies in the E.C., not under the territorial competence of the U.S.

6. The *nationality principle* (*i.e.* the prescription of rules for nationals, wherever they are) cannot serve as a basis for the extension of U.S. jurisdiction resulting from the Amendments, *i.e.* (1) over companies incorporated in E.C. Member States on the basis of some corporate link (parent-subsidiary) or personal link (*e.g.* shareholding) to the

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2. *See* Restatement (2d) of the Foreign Relations Law of the U.S. (1972), paras. 17 and 30 respectively.

U.S.; (ii) over companies incorporated in E.C. Member States, either because they have a tie to a U.S.-incorporated company, subsidiary or other "U.S. controlled" company through a licencing agreement, royalty payments, or payment of other compensation, or because they have bought certain goods originating in the U.S.

7. *ad (i)* The Amendments in two places purport to subject to U.S. jurisdiction companies, wherever organized or doing business, which are subsidiaries of U.S. companies or under the control of U.S. citizens, U.S. residents or even persons actually within the U.S. This implies that the United States is seeking to impose its corporate nationality on companies of which the great majority are incorporated and have their registered office elsewhere, notably in E.C. Member States.

Such action is not in conformity with recognized principles of international law. In the *Barcelona Traction Case*, the International Court of Justice declared that two traditional criteria for determining the nationality of companies; *i.e*. the place of incorporation and the place of the registered office of the company concerned, had been "confirmed by long practice and by numerous international instruments". The Court also scrutinized other tests of corporate nationality, but concluded that these had riot found general acceptance. The Court consequently placed primary emphasis on the traditional place of incorporation and the registered office in deciding the case in point. This decision was taken within the framework of the doctrine of diplomatic protection, but reflects a general principle of international law.

8. *ad (ii)* The notion inherent in the subjection to U.S. jurisdiction of companies with no tie to the U.S. whatsoever, except for a technological link to a U.S. company, or through possession of U.S. origin goods, can only be that this technology or such goods should somehow be considered as unalterably "American" (even though many of the patents involved are registered in the Member States of the European Community). This sterns the only possible explanation for the U.S. Regulations given the fact that national security is not at stake here.

Goods and technology do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them.

10. The practical impact of the Amendments to the Export Administration Regulations is that E.C. companies are pressed into service to carry out U.S. trade policy towards the U.S.S.R., even though these companies are incorporated and have their registered office within the community which has its own trade policy towards the U.S.S.R.

The public policy ("*ordre public*") of the European Community and of its Member States is thus purportedly replaced by U.S. public policy which European companies are forced to carry out within the E.C., if they are not to lose export privileges in the U.S. or to face other sanctions. This is an unacceptable interference in the affairs of the European Community.

11. Furthermore, it is reprehensible that present U.S. Regulations encourage non-U.S. companies to submit "voluntarily" to this kind of mobilization for U.S. purposes.

III. The Amendments Under U.S. Law

A. U.S. Reactions to Measures Similar to the June 22 Amendments

15. If a foreign country were to take measures like the June 22 Amendments, it is doubtful whether they would be in conformity with U.S. law and they would therefore probably not be recognized and enforced by U.S. courts.

The kind of mobilization of E.C. companies for U.S. purposes to which the Community objects was subject to strong American reactions and legislative counter-

measures, when U.S. companies were similarly mobilized for the foreign policy purposes of other states.

The anti-foreign-boycott provisions of Section 8 of the Export Administration Act are testimony to that. In the same way as the U.S. could not accept that its companies were turned into instruments of the foreign policy of other nations, the E.C. cannot accept that its companies must follow another trade policy than its own within its own territorial jurisdiction.

It is noteworthy that the anti-boycott provisions of the Export Administration Act can be invoked in response to a boycott that takes a less direct form than the June 22 Amendments, namely a boycott which merely tries to dissuade persons from dealing with a third country by refusing to trade with such persons. An export restriction patterned on the June 22 Amendments, in contrast, would directly prohibit a person from dealing with a particular country under the threat of government-imposed penalties. Therefore, the latest Amendments would appear to be even more far-reaching than a boycott which might give rise to the application of the anti-boycott provisions. . . .

This being the reaction of the U.S. legislator and judiciary to foreign measures comparable to its own measures of June 22, the U.S. Government should not have inflicted these measures on the E.C. companies concerned in the virtual knowledge that these measures would be regarded as unlawful arid ineffective by public authorities in the E.C.

B. Conflicts of Jurisdiction and Accommodation of Interest

17. In cases where the conflicting exercise of jurisdiction to prescribe leads to conflicts of enforcement jurisdiction between states, each state, according to para. 40 of the Restatement (2d) Foreign Relations Law of the U.S., is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction. In this connection the following factors should be considered:

> (a) vital national interests of each of the states;
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person;
>
> (c) the extent to which the required conduct is to take place in the territory of the other state;
>
> (d) the nationality of the other person.

18. Over the past years various U.S. Courts of Appeal have pronounced themselves in favour of this "balancing of interests" approach.

In the case of the *Timberlane Co. v. Bank of America*, Judge Choy suggested that comity demanded an evaluation and balancing of relevant factors, and continued: "The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties, and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or afflict American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad."

A similar approach was followed in *Mannington Mills* and is set out in paragraph 40 of the Second Restatement.

19. Although this "balancing of interest" approach applies in the first place to courts,

there are good reasons why the U.S. Government should exercise such restraint already at the rule-making stage.

23. Whatever approach is adopted by the U.S. Government in balancing U.S. interests against the interests of the European Community, the following considerations have been neglected.

– The interest of the European Community in regulating the foreign trade of the nationals of the Member States in the territory to which the Community Treaties apply is paramount over any foreign policy purposes that a third country may have.

– The conduct required by the Amendments is to take place largely in territory to which the E.G Treaties apply and not in U.S. territory.

– The nationality and other ties of many persons whose conduct is purportedly regulated by the June 22 Amendments link them primarily to E.C. Member States and not to the U.S.

– There are justified expectations on the part of E.C. companies which are seriously hurt by the U.S. measures.

C. Criteria under Section 6(b) of the Export Administration Act

24. It can hardly be claimed that the U.S. measures satisfy the criteria laid down in the Export Administration Act, and therefore it is doubtful whether the restrictions are properly applied in terms of U.S. law. Criterion I refers to the probability that the controls will achieve the intended foreign policy purposes. Soviet Authorities have clearly stated their intention to deliver gas to Western Europe as scheduled, and there is little reason to doubt their ability to do so, even without American or European equipment since the existing Soviet pipeline system already has sufficient spare capacity, at least to cover the requirements of the early phases of the programme of deliveries, If the pipeline is built with Soviet technology and the gas flows on time, these U.S. export controls are at best ineffectual, and may well be self-defeating, as instruments of foreign policy.

25. Criterion 3 requires that the reaction of other countries to the imposition or expansion of such export controls be taken into account. In view of the extra-territorial application, and retroactive effect of the U.S. measures, the European Community cannot fail to denounce the measure as unlawful under international law; and in view of their damaging economic and political consequences, has already protested in the strongest terms.

26. Criterion 4 requires consideration of the effects of the proposed controls on the export performance of the United States. Here again, confirmation of the U.S. measures despite criterion 4 would involve complete disregard for damaging effects not only immediately, but also in the longer term, owing to the grave doubts that are bound to arise in the future about the U.S. as a reliable supplier of equipment under contract, or as a reliable partner in technology-licensing arrangements. This danger has already been pointed out to the President of the United States by the U.S. Chamber of Commerce.

D. Compensation for Damage Resulting from U.S. Measures

27. The U.S. measures inasmuch as they refer to exports from countries outside the U.S. are all the more objectionable, as they affect contracts that were free from restrictions imposed by the U.S. Authorities at the time of their conclusion.

The main contractors of the Siberian pipeline, a number of major subcontractors and suppliers as well as other exporters, will suffer substantial economic and financial losses for which no compensation is provided. For many sub-contractors who for the most part have nothing to do with American goods or technology for gas transport, the practical consequences of the Amendments will be particularly severe and may actually force

them out of business. Lay-offs of a considerable number of workers will result in any case from the Amendments.

28. The idea that compensation is due in case private property or existing contracts are seriously affected by government action is also familiar in the U.S. legal system. If [the] US. Government takes private property by eminent domain it has to compensate the owner. The Supreme Court has indicated many times that if regulatory legislation virtually deprives a person of the complete use and enjoyment of his property the law of eminent domain applies.

Justice Brandeis has written: "It is true that the police power embraces regulations designed to promote public convenience or the general welfare. . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."[3] It is self-evident that for European contractors and sub-contractors within the E.C. the cost imposed upon them by the Amendments does not bear a reasonable relation to the advantage of furthering American export policy.

RAOUL MASSARDY ET AUTRES, SOC. FRUEHAUF-FRANCE v. ME. SOLVET ET Soc. ANON. DES AUTOMOBILES BERLIET

Cour d'appel de Paris (14e Ch.), (85) II *Gazette du Palais* 86 (1965)

Ruling on the timely appeal by William Grace, Alex Ananyos, the Fruehauf Corporation, S.A., Richard Cronan, and R.-D. Rowan against a decision rendered on 16 February 1965 by the president of the Tribunal de Commerce of Corbeil-Essones, and together with appellant's submissions of March 5 and April 2, those of appellees Raoul Massardy, Georges Massardy, and Paul Godhille of April 1, of intervenor Automobiles Berliet, &A., on April 1, and finally of Solvet, receiver and also an intervenor, of April 3, 1965;

Considering that Fruehauf-France, S.A. was founded in 1946 with its headquarters *(siege)* at Ris-Orangis (Seine-et-Oise) with the object of building trailers, semi-trailers, and merchandise under the Fruehauf mark in France for export;

Considering that its social capital, currently fixed at 7,500,000 Francs, is divided into 150,000 shares of which 2/3 are held by a group of shareholders residing in the United States and 1/3 by French shareholders;

Considering that its Board *(Conseil d'administration)* was, until recently, composed similarly, being under the presidency of Raoul Massardy, the Director General, and including on one hand the five appellants, with the Fruehauf Corporation (whose *seige* is in Detroit and not at Ris-Orangis as was indicated by error in the appeal papers) represented by its permanent delegate Richard Cronan, and on the other hand the three French appellees;

Considering that on December 24, 1964, Automobiles Berliet placed with Fruehauf-France a 1,785,310 Franc order for sixty Fruehauf 25- and 40-ton semitrailers and sixty Pacific tractors, which were to be delivered beginning February 15, 1965 and were destined for export to the People's Republic of China;

Considering that on January 12, 1965, in New York, Alex Aranyos, President of Fruehauf International, which appears to coordinate the relations of the various Fruehauf

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3. *NashviIIe C. and St. L. Ry. v. Walters*, 294 U.S. 405, 429 (1935).

corporations, told Francois Godbille, the Assistant Director General of Fruehauf-France, that United States authorities had started an investigation of this sale which was against its regulations, and added that, "we are under order to suspend performance of this contract unless we have a license from the Department of the Treasury, which, it has told us, would not be in accord with current policy;"

Considering that Francois Godbille argued that Fruehauf-France's future would be compromised by the cancellation of such an important order that involved merchandise designed and manufactured in France, whose prefinancing had been arranged by a specialized French credit source, and that could be equally well furnished by competing enterprises;

But considering that on January 28, 1965, Francois Godhille received a telegram containing the following language: "We hereby formally order you to cancel the contract and to reduce the possible losses to the minimum;"

Considering that on February 11, 1965, Raoul Massardy asked Paul Berliet if it would be possible to agree to rescind the contract in light of the moral and material harm "to our American friends" that would arise from its performance; and that the next day Berliet replied that he did not see any way to accept such a recission and would hold Fruehauf-France fully responsible for any direct or indirect damages that might be caused by its default;

Considering that on February 13, 1965, Raoul Massardy submitted a letter of resignation as President-Director General, because of these difficulties which set him in opposition to the majority of the Board and because of the gravity of the situation for Fruehauf-France, and that the three French directors applied to the President of the Tribunal de Commerce of Corbeil, who authorized them to summon the five American directors before him for the purpose of appointing a receiver *(mandataire de justice)* to direct the corporation lbr a set period, to complete orders in progress, and to call a meeting of the shareholders at an appropriate time;

Considering that this summons was delivered to the appellants on February 15, 1965, who, the same day, held a Board meeting in order to name a director, a President-Director General, and an Assistant Director General;

Considering that on February 16, 1965, the President of the Tribunal de Commerce, noting essentially that Fruehauf-France had no legal organs of management and that failure to carry out its commitments would put its existence in peril, appointed Solvet as receiver *(administrateur provisoire),* for a period of three months or until otherwise ordered, with the responsibility to manage the assets and the liabilities of said corporation and in particular to carry out orders in progress;

Considering further that on February 18, 1965, the Board, meeting without appellees, took note of Raoul Massardy's resignation, named Pierre Chérét as director and President-Director General, and continued Francois Godbille in his position as Assistant Director General; and that on March 4, 1965, the appellees summoned appellants before the Tribunal de Commerce of Corbeil to have these actions voided;

Considering that appellant American directors argued to the court that the judge lacked jurisdiction in the absence of emergency and that he could not, without prejudice to the parent interfere in the management of a corporation to impose the views of the minority shareholders on the majority;

Considering that appellees who support the confirmation of the order in question have summoned as intervenors Automobiles Berliet S.A., who left the issue to justice while asking to protect its position in the event that the balance of the order were not delivered on time in accordance with the contract, and Solvet, who asked the court to decide as it

chose on the appeal on the merits but to supply a certificate of its decision;

Considering that, in principle, there is no emergency power to substitute, even temporarily, a receiver for the decision-making organs of a corporation, that this rule can be overridden only in exceptional circumstances when, for example, the normal functioning of the corporation can no longer be assured, it is threatened by ruin, or its management is manifestly hindered by grave dissension among those involved, and that the issue of whether there is enough urgency to confer jurisdiction can thus not be examined without considering the cogency of the relief sought;

Considering that in the case at hand, the judge erred in relying upon the absence of management of Fruehauf-France, for in fact the corporation continued to have a full, regularly named Board, capable of replacing the resigning President-Director General, who was in fact replaced on February IS, 1965. only five days after his resignation, regardless of the criticisms that appellees today make of this appointment in court;

But considering that the evidence introduced during the discussion and not seriously contravened reveals not only the evident importance to Fruehauf-France of performing this contract with Societe Berliet, its principal customer who obtains about 40% of its exports from it, hut above all the catastrophic consequences which would have occurred at the promised delivery time, and would still follow today from the cancellation of the contract, because the buyer would apparently be able to recover full reparation from its supplier for its commercial losses, estimated at more than 5,000,000 Francs following upon the rupture of its negotiations with China;

Considering that these consequences, whose cost neither Fruehauf Corporation nor Fruehauf-International have offered to cover, would be of such a character as definitively to ruin Fruehauf-France's financial equilibrium and moral credit and cause its disappearance and the layoff of more than 600 workers; that these circumstances establish the urgency and the legal basis for the protective measures anticipated, considering that in order to name a receiver, the judge acting in an emergency must consider social interests in preference to personal interests of particular partners, even if they are in the majority, and further, that it is in no way clear that this appointment is contrary to the real interests of the appellants;

Considering always that the general instructions given to the receiver should not impose on him actions where he alone is in a position to evaluate the corporation's viewpoint in an individual case;

Considering that in the absence of new issues, the court has no power to prolong Solvet's authority beyond the time set by the lower court judge nor to anticipate calling a shareholders' meeting;

For these reasons,–holds the appeal and the interventions receivable; –rejects the appeal and sustains the interventions; –gives the intervenor the certificates requested; –conflrms the order of February 16, 1965 in so far as it names Solvet a receiver of Fruehauf-France for a period of three months with the duty of managing the corporation's assets and liabilities; –directs Grace, Aranyos, Fruehauf-corporation, Cronan, and Rowen, to pay the expenses of the hearing, the appeal and the interventions, with the proper amounts awarded to Bonnet, Gamier, and Naret, as lawyers, upon their legal application.

Excerpts from two paragraphs of the Avocat-General's (Nepveu) statement deserve quotation:

> Here, certainly, American capital holds the majority position. In pure capitalist doctrine, it is the master of the situation and its decisions are orders. However, we are in

France in a period of fundamental change of the national economy. Banking credits or credit facilities exist as a result of the intellectual potential of the transaction; French banks currently play a primordial role in this credit. Local personnel, of whom there are many at Fruehauf-France, contribute also to the importance of this transaction, whose difficulties risk creating a certain perturbation in a key industry of the national economy. All these are also social interests that must be protected.

What justifies your intervention? It is the defense and protection of the organistn named Fruehauf-France, which operates in France, where it plays an important productive role with these 650 employees threatened with unemployment, with the support of important French banks, notably of the Banque de France.

PRESIDENT RONALD REAGAN, EAST-WEST TRADE RELATIONS AND THE SOVIET PIPELINE SANCTIONS [3]

83 Dept. State Bull. 28 (1983)

Since taking office, I have emphasized to our allies the importance of our economic as well as our political relationship with the Soviet Union. In July of 1981 at the economic summit meeting in Ottawa, Canada, I expressed to the heads of state of the other major Western countries and Japan my belief that we could not continue conducting business as we had. I suggested that we forge a new set of rules for economic relations with the Soviet Union which would put our security concerns foremost. I wasn't successful at that time in getting agreement on a common policy.

Then, in December of 1981, the Polish Government, at Soviet instigation, imposed martial law on the Polish people and outlawed the Solidarity union. This action showed graphically that our hopes for moderation in Soviet behavior were not likely to be fulfilled.

In response to that action, I imposed an embargo on selected oil and gas equipment to demonstrate our strong opposition to such actions and to penalize this sector of the Soviet economy which relies heavily on high technology, much of it from the United States. In June of this year I extended our embargo to include not only U.S. companies and their products but subsidiaries of U.S. companies abroad and on foreign licensees of U.S. companies.

It's no secret that our allies don't agree with this action. We stepped up our consultations with them in an effort to forge an enduring, realistic, and security-minded economic policy toward the Soviet Union. These consultations have gone on over a period of months.

I'm pleased today to announce that the industrialized democracies have this morning reached substantial agreement on a plan of action. The understanding we've reached demonstrates that the Western alliance is fundamentally united and intends to give consideration to strategic issues when making decisions on trade with the U.S.S.R.

As a result, we have agreed not to engage in trade arrangements which contribute to the military or strategic advantage of the U.S.S.R. or serve to aid preferentially the heavily militarized Soviet economy. In putting these principles into practice, we will give priority attention to trade in high technology products, including those used in oil and gas production. We will also undertake an urgent study of Western energy alternatives, as well as the question of dependence on energy imports from the Soviet Union.

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3. President Reagan's radio address to the nation on November 13, 1982.

In addition, we've agreed on the following immediate actions,

First, each partner has affirmed that no new contracts for the purchase of Soviet natural gas will be signed or approved during the course of our study of alternative Western sources of energy.

Second, we and our partners will strengthen controls on the transfer of strategic items to the Soviet Union.

Third, we will establish without delay procedures for monitoring financial relations with the Soviet Union and will work to harmonize our export credit policies.

The understanding we and our partners have reached and the actions we are taking reflect our mutual determination to overcome differences and strengthen our cohesion. I believe this new agreement is a victory for all the allies. It puts in place a much needed policy in the economic area to complement our policies in the security area.

As I mentioned a moment ago, the United States imposed sanctions against the Soviet Union in order to demonstrate that their policies of oppression would entail substantial costs. Now that we've achieved an agreement with our allies which provides for stronger and more effective measures, there is no further need for these sanctions, and I am lifting them today.

QUESTIONS

1. Legally, how does the position of the United States in the gas pipeline sanctions differ from that in its antiboycott legislation?[1]

2. In light of *Fruehauf* ,how would you advise a European subsidiary of a U.S. firm caught in the middle in the gas pipeline situation?

3. How well reasoned do you find the *Fruehauf* analysis?

4. The United States and Europe reached a negotiated settlement in the pipeline case. What approaches would you suggest for avoiding similar problems in the future?

5. Would you support revision of the Export Administration Act so as to ban the U.S. government from actions that affect contracts already in force? Limitations on such actions were included in the Export Administration Act renewal that passed Congress in mid-1985 (§ 108(*l*), Pub. L. No. 99-64, (1985)).

6. Is the Works Council directive consistent with the positions expressed in the European Communities' pipeline memorandum?

c. Franchise and Vertical Antitrust Law

The economics of vertical relationships and integration is often very difficult to analyze in antitrust terms. The analysis generally turns on foreclosure–if a company acquires a major supplier, for example, it may deprive other firms of the opportunity to compete for sales to it. Whether competition will be decreased depends, however, on whether the firm has competitive power and whether it is in any way able to increase that power by the acquisition (a concept many economists would deny). Moreover, there may be several reasonably competitive patterns–camera brands, for example, competing against one another, with essentially all brands sold in the same stores, while autos compete with just a few brands per store and the quality of the store makes up part of the product that is sold.

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1. On the antiboycott legislation, see Chapter XIII, § B., *supra,* at ▬-▬.

There are only a few international antitrust cases, however, that illuminate the comparative advantage of the multinational corporation–for example, in which a U.S. firm might argue that its competitor's arrangement with a foreign licensee or foreign supplier gives the competitor an advantage that violates the antitrust laws. Presumably, there would be no serious argument unless the firm involved had a near monopoly in one of the markets, perhaps attempting to use control over a foreign source of supply to gain control over the U.S. market. For one of the few examples, see *Calnetics v. Volkswagen of America*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976).

The franchise area provides a different kind of insight into vertical relationships. Here, the typical conflict is between two entities in the vertical distribution chain, and the risk is that the larger may take advantage of the smaller. As a result, most nations give franchise operators and distributors special protection against their suppliers. The pattern varies from nation to nation in many civil law nations it is nearly impossible to terminate an agency or distribution relationship without incurring substantial liabilities. United States laws are somewhat more restrained, as exemplified by the Auto Dealers' Day in Court Act (15 U.S.C. §1222):

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce . . . and shall recover the damages by him sustained . . . by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, that in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

Because they must work together on a continuing basis, dealers and manufacturers rarely sue each other except after termination of the arrangement. Conflicts are worked out–under the possibility that the franchise will not be renewed. Usually there is a lawsuit only if that threat is exercised, and the law suit will include claims under statutes like those just quoted as well as antitrust claims. The dealer may argue, for example, that it was being forced out so the manufacturer could take over the franchise or that the manufacturer was using its power over the dealer to require it to buy associated products at unfair prices. And reflecting the desire to work out problems on a less adversarial basis–but also effectively transferring jurisdiction to resolve disputes–franchise agreements often include arbitration clauses.

QUESTIONS

1. Do you think that arbitration is better than use of the courts in an international franchise context? What are the pros and cons? Which is likely to be more responsive to differences in national views of franchise and antitrust law? For discussion see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., 473 U.S. 614 (1985).

2. Your client is a small foreign manufacturer that has been supplying widgets to a national U.S. retailer. The retailer acquires your client's competitor, and cuts your client out. What would you do? How would your answer depend on whether or not there was an arbitration clause?

3. Is there any argument that a nation would violate the GATT if it imposed its franchise rules in a way that severely complicated life for foreign sellers?

4. How might you attempt to coordinate regulation in the bankruptcy area, where

courts in one or several nations seek to distribute assets held in one or several nations to creditors in one or several nations according to priority rules that may differ from nation to nation? *See* Bankruptcy Reform Act of 1978, §304; *Israel-British Bank (London) v. FDIC*, 536 F2d 509 (2d Cir, 1976), *cert. denied sub nom. Bank of the Commonwealth v. Israel-British Bank (London)*, 429 U.S. 978 (1976); *Banque dc Financement v. First National Bank of Boston*, 568 F.2d 911 (2d Cit. 1977).

5. In resolving these international jurisdictional issues, when is the act of state approach best? The international law jurisdictional test approach? The *Timberlane* approach?

6. How do you think the U.S. Supreme Court would decide a *Fruehauf*-type case of a foreign-owned firm in the United States faced with a foreign directive to breach a contract?

d. Foreign Corrupt Practices Act

Review the material on the FCPA contained in Chapter XIII, § A, *supra*, and particularly § A.5. Then consider the questions that follow.

QUESTIONS

1. Do the OECD Convention and the European Convention simply codify, at a multilateral level, the prohibitions of the FCPA? Or do the scope and objectives of each of these conventions differ from the FCPA? What, if anything, do they add to the U.S. policy embodied in the FCPA?

2. Home states of MNs might support a multilateral effort such as that found in each of these conventions for a variety of reasons–less unfair competition for home-state MNs from other MNs, less corrupting behavior in host-state markets, a relatively more level playing field, and so forth. Why if at all would host states, whose officials presumably are the beneficiaries of official bribery, support such multilateral efforts against corrupt practices? More competitive prices for multinational goods and services? Less corruption and government waste and inefficiency over time?

3. Assume that the chief financial officer of Considerable Corp., a Delaware corporation with a branch in Nusquam, has made payments to Nusquami government officials to reduce customs duties and taxes on goods that Considerable was importing into Nusquam. Would these actions violate the FCPA? The OECD Convention? The European Convention? *Cf. United States v. Kay*, 200 F.Supp.2d 681 (S.D.Tex.2002).

4. MacGuffin, Considerable's principal shareholder and chief executive officer, made payments to a senior Nusquami trade official to obtain business for Considerable. MacGuffin claims that the payments were made to "facilitate performance of a routine governmental action by the official." Is this a viable defense under the FCPA? The OECD Convention? The European Convention? *Cf. United States v. Giffen*, 326 F.Supp.2d 497 (S.D.N.Y.2004).

C. JURISDICTIONAL RISK AND THE MULTINATIONAL

Despite their seeming economic power, MNs are often subject to serious jurisdiction risk, competing legal directives of a variety of interested states–the MN's home state, of course, but also the various host states in which the MN operates. *Fruehauf* and the Soviet gas pipeline incident are examples of situations in which the MN may find itself subject to conflicting home- and host-state laws. This typical dilemma has been complicated by two developments: the increasing importance of international regulation of commerce, and private litigation targeting MNs.

NOTES AND QUESTIONS

1. *Impact of International Regulatory Law on MNs*. In certain narrowly defined areas, there are already multilateral obligations or legal regimes in place that have a direct impact on the activities of multinationals. One obvious example is the WTO system itself, including the GATT,[1] the GATS,[2] and the TRIPS.[3] Other examples would be anti-corruption measures,[4] and environmental regulation.[5] These regimes apply to the multinational only to the extent that international consensus exists, of course. In the case of the draft Multilateral Agreement on Investment (MAI),[6] the failure of international consensus leaves multinationals subject to the varying regulatory policies and applicable laws of individual states.

2. *MNs and Human Rights Law and Policy*. Normally, we think of human rights law and policy to be matters of public international law, imposing obligations on states, rather than private parties. Nevertheless, contemporary judicial decisions, treaty interpretations, and commentators have sometimes identified obligations of private actors under international human rights law.[7] The basic argument in this regard links the behavior of multinationals to that of state actors that are themselves clearly subject to the public international law regime of international human rights,[8] and considers that the traditional approach of state obligation for human rights is trivialized if account is not taken of MN behavior.[9] Indeed, in 2002 a U.N. Working Group on multinationals criticized the current market-based international economic system for reducing the role of individual governments in development and preventing the effective realization of economic, social and cultural rights in the developing world, due to the significant influence of multinationals over development policy.[10] The Working Group's report em-

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1. In particular, the impact of antidumping rules and countervailing duties against subsidies under GATT art. VI may have an impact on international pricing of exported goods. *See* Chapters V-VI, *supra* (concerning antidumping and countervailing duties respectively).

2. On the impact of the GATS on transborder services, see Chapter XIV, *supra*, at ▬-▬.

3. On the impact of the TRIPS, see Chapter XV, *supra at* at ▬-▬; Chapter XVI, *supra at* at ▬-▬.

4. See, e.g., United Nations Convention Against Corruption, U.N. GAOR, 58th Sess., Supp. No. 49, U.N. Doc. A/Res/58/4 (2003). For discussion of international prohibition of bribery, see Chapter 13, § A, *supra*.

5. *See, e.g.*, Skogly, *Economic and Social Human Rights*, *supra* at 247 (discussing international environmental regulation).

6. *See* § D, *infra*, at ▬ (discussing draft MAI).

7. *See, e.g.*, Daniel Aguirre, *Multinational Corporations, supra*; Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 51 (1992).

8. Thus, Aguirre argues that multinationals "have considerable influence on [economic, social and cultural rights] through their control over governmental economic and social policy." Daniel Aguirre, *Multinational Corporations*, 35 CAL. W. INT'L L.J. at 54.

9. *Id.*; Sigrun I. Skogly, *Economic and Social Human Rights, Private Actors and International Obligations*, in MICHAEL K. ADDO (ed.), HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 239, 246 (1999).

10. *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations*, U.N. ESCOR Hum. Rts. Comm., Subcomm. on the Promotion and Protection of Hum. Rts., 54th Sess., U.N. Doc. E/CN.4/Sub.2/2002/13 (2002).

phasized that multinationals are

> driven essentially by profit, use[] the smallest number of workers possible, move[] from jurisdiction to jurisdiction with relative ease, import[] labour to the detriment of local labour, and [do] not always take into account the social needs of the country in which they [are] operating.[11]

3. Is it feasible to expect multinationals to promote respect for human rights in host countries? Might such efforts be viewed as inappropriate and intrusive by the host government? One scholar has argued that multinationals are in fact in a unique position to promote economic, social and cultural rights:

> While there is no doubt the diplomacy and influence of the international community is fundamental to changing corrupt regimes, [multinationals] are in a unique position to promote change and persuade governments to abide by their human rights obligations. [Multinationals] can and should exert positive influences such as increasing employment, increasing available capital, technology, knowledge, improved management and positive contributions to labour relations and administration. The standards [multinationals] bring to developing nations should be higher than the incumbent ones.
>
> [Multinationals] can further pressure the governments of such nations by threatening to withdraw their operations. The world has witnessed this powerful negotiation technique as many nations have been forced to alter national policy making in order to privatise, deregulate, create tax incentives, lower operating costs and provide an international system conducive to corporate profit maximisation, and to be more "competitive." If governments and established developed world democracies fail to comply with corporate demands, they risk the withdrawal of corporate activity, which has become increasingly mobile. This results in increased unemployment and economic woes, which can mean political suicide. In this way, corporations and their benefactors have demonstrated their immense ability to influence and even control nations and the international community. With this sort of power, capable of altering the world's economic and political systems, it must be possible to promote human rights in general.
>
> In particular, the promotion of [economic, social and cultural rights] is within the [multinationals'] reach. They are present on the ground in developing nations' communities and engaged with the people who live there. The [multinationals] are often extracting massive profits either from natural or human resources. In this situation, an obvious moral duty exists to reinvest some of these profits in order to construct a decent life for the local communities. Also, local governments are often unable or unwilling to invest in [economic, social and cultural rights], which are the foundation of stability. The [multinational] is therefore often the only entity able to contribute to this stability building process resulting from the realisation of [these rights].

Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social And Cultural Rights*, 35 CAL. W. INT'L L.J. 53, 64-65 (2004) (footnotes omitted).

4. Suppose that Considerable Corporation, incorporated under the laws of Delaware, directed its subsidiary, Considerate Company, to undertake the kind of program suggested by Aguirre to promote human rights in Nusquam, a developing host country in which Considerate was operating. Would Considerable be vulnerable to legal challenge from its shareholders for engaging in *ultra vires* acts beyond its legal authority? Would corporate resources expended on such a program be considered a waste of

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11. *Id*., Agenda Item 4 at 5.

corporate assets?[12] There is a significant body of case law and commentary on the social responsibility of corporations that seems to suggest that this program would not necessarily be beyond the permissible scope of a corporation's authorized activities, so long as the corporation could establish a legitimate business justification for its actions.[13] What sort of justification could you offer in Considerable's defense?[14]

5. *Civil Liability of Multinationals related to International Law*. A possible emerging trend in the case law alleging liability of multinationals under the Alien Tort Claims Act, 28 U.S.C. §§ 1346 *et seq*. for their complicity in violations of international law.[15] In reviewing the following cases, consider: how great is the litigation risk, and what steps might a multinational undertake to deal with the risk?

DOE v. UNOCAL CORP.

248 F.3d 915 (9th Cir. 2001)

PAEZ, District Judge.

I

Introduction

Doe plaintiffs, farmers from the Tenasserim region of Burma, bring this class action against defendants Unocal Corporation ("Unocal"), individuals John Imle and Roger C. Beach, who are, respectively, the President and Chairman/Chief Executive Officer of Unocal, and Total S.A. ("Total"), a French corporation. Plaintiffs allege that the State Law and Order Restoration Council ("SLORC") is a military junta that seized control in Burma (now known also as Myanmar) in 1988, and that the Myanma Oil and Gas Enterprise ("MOGE") is a state-owned company controlled by SLORC that produces and sells energy products. Plaintiffs seek injunctive, declaratory and compensatory relief for alleged international human rights violations perpetrated by defendants in furtherance of defendants Unocal, Total and MOGE's joint venture, the Yadana gas pipeline project.

Plaintiffs contend that defendants are building both offshore drilling stations to extract natural gas from the Andaman Sea and a port and pipeline to transport the gas through the Tenasserim region of Burma and into Thailand. According to plaintiffs' complaint, defendants, through the SLORC military, intelligence and/or police forces, have used and continue to use violence and intimidation to relocate whole villages and force farmers living in the area of the proposed pipeline to work on the pipeline and pipeline-related infrastructure. Plaintiffs allege defendants' conduct has caused plaintiffs to suffer death of family members, assault, rape and other torture, forced labor, and the loss of their homes, in violation of California law, federal law and customary international law. Plaintiffs seek to represent a class numbering in the tens of thousands. . . .

In addition, plaintiffs seek damages on their own behalf, based on allegations of (1) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); (2)

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12. –corp-cite–

13. –corp-cite–

14. *See* Daniel Aguirre, *Multinational Corporations*, 35 CAL. W. INT'L L.J. at 77-80, (suggesting business case for corporate investment in human rights to foster political stability, and to avoid risk of "boycotts, damage to [corporate] reputation, or even lawsuits in extreme cases").

15. For discussion of this possible trend, see Jenny B. Davis, *Old Law Bares Its Teeth: Alien Tort Claims Act Bites International Firms*, 89 A.B.A. J. 20 (2003); Laura Bowersett, Note, *Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments*, 11 TRANSNAT'L LAW. 361 (1998).

forced labor; (3) crimes against humanity; (4) torture; (5) violence against women; (6) arbitrary arrest and detention; (7) cruel, inhuman, or degrading treatment; (8) wrongful death; (9) battery; (10) false imprisonment; (11) assault; (12) intentional infliction of emotional distress; (13) negligent infliction of emotional distress; (14) negligence per se; (15) conversion; (16) negligent hiring; (17) negligent supervision; (18) violation of California Business & Professions Code § 17200. By their nineteenth claim for relief, plaintiffs seek injunctive and declaratory relief. The Court previously granted the Unocal defendants' motion to strike plaintiffs' fifteenth claim for conversion.

Pending before the Court is the Motion of Defendant Total S.A. to Dismiss for Lack of Personal Jurisdiction. . . . At the initial hearing on the Motion on January 12, 1998, the Court granted plaintiffs' request for jurisdictional discovery with respect to general jurisdiction and ordered the parties to meet and confer to create a discovery plan. In the course of jurisdictional discovery, Total provided plaintiffs with over 500 pages of documents and produced five witnesses for deposition: (1) Alain-Marc Irissou (Total's General Counsel); (2) Dominique Mounier (chief in-house legal counsel for Hutchinson, S.A. ("HSA"), a Total subsidiary based in Paris); (3) Herve Oberreiner (Executive Vice-President of Total America, Inc. ("TAI"), a direct U.S. subsidiary of Total); (4) John Powell (the Controller for TAI); and (5) Thomas Popma (Controller of Hutchinson Corporation ("HC"), a Total indirect subsidiary in Grand Rapids, Michigan). . . . Following discovery and supplemental briefing, the Court again heard oral argument on the Motion on August 18, 1998.

On August 28, 1998, the Court directed the parties to submit further briefing as to whether

> Total's subsidiary holding companies in California, or Total's subsidiary holding companies in the United States with substantial California contacts, act as Total's agents by selectively acquiring and holding operating companies in specific niches in which Total has significant market share worldwide. . . .

Upon consideration of the parties' papers submitted in conjunction with the motion, including all supplemental briefs, declarations and supporting documentation and the oral arguments of counsel, for the reasons explained below, the Motion is GRANTED. . . . [P]laintiffs have not shown that this Court has personal jurisdiction over Total.

II

Discussion

. . .

1. Rule 4(k)(2)

By virtue of the 1993 Amendments to Fed.R.Civ.P. 4, Rule 4(k)(2) provides that

> [i]f the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

The Advisory Committee notes reiterate that the provision applies only when "a federal claim is made against a defendant not subject to the jurisdiction of any single state."

Rule 4(k)(2) provides no basis for jurisdiction based on Total's direct contacts. Total

has no contacts of its own with the United States beyond listing its stock on various exchanges and promoting sales of stock in the United States. Plaintiffs have cited no authority for the proposition that such contacts suffice to establish personal jurisdiction, and the Court is not persuaded that Congress intended for the courts to assert jurisdiction under Rule 4(k)(2) whenever a corporation lists its stock on a United States exchange.

Total's remaining potential contacts with the United States are based on the activities of its subsidiaries. If Total's subsidiaries' contacts were imputed to Total, however, several states would have jurisdiction over Total, and Rule 4(k)(2) would not apply. In fact, plaintiffs' counsel stated at oral argument on August 18, 1998 that because they believe Total is subject to personal jurisdiction in several states under the alter ego and agency doctrines, they need not rely on their earlier contention that the Court should exercise personal jurisdiction over Total pursuant to Rule 4(k)(2).

. . .

3. Rule 4(k)(1)(A) and California's Long-Arm Statute

Where the federal statute or rule on which an action is premised does not authorize service to obtain jurisdiction over a defendant, the starting point is the forum state's long-arm statute. Fed.R.Civ.P. 4(k)(1)(A). California's long-arm statute extends jurisdiction to the limits of due process. *See* Cal.Code of Civ. Pro. § 410.10.

Constitutional due process concerns are satisfied when a nonresident defendant has "certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional conceptions of fair play and substantial justice." *International Shoe Co. v. State of Washington,* 326 U.S. 310, 316 (1945). Where a defendant deliberately engages in significant activities within a state, purposely availing itself of the privilege of conducting business there, it is presumptively reasonable to require that defendant "submit to the burdens of litigation in that forum as well." *Burger King v. Rudzewicz,* 471 U.S. 462, 475-76 (1985). In such instances, "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 474 (citing *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295 (1980)).

Applying the "minimum contacts" analysis, a court may obtain either general or specific jurisdiction over a defendant. If the defendant's activities in the forum are substantial, continuous and systematic, general jurisdiction is available; in other words, the foreign defendant is subject to suit even on matters unrelated to his or her contacts to the forum. *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 446 (1952). A court may exercise specific jurisdiction over a foreign defendant if his or her less substantial contacts with the forum give rise to the cause of action before the court. The question is "whether the cause of action arises out of or has a substantial connection with that activity." *Hanson v. Denckla,* 357 U.S. 235, 250-253 (1958).

The Ninth Circuit has established a three-part test to evaluate the nature and quality of a defendant's contacts so as to determine the availability of specific jurisdiction:

> (1) The nonresident defendant must do some act or consummate some transaction within the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
>
> (2) The claim must be one which arises out of or results from the defendant's forum-related activities.
>
> (3) Exercise of jurisdiction must be reasonable.

Gordy v. Daily News, L.P., 95 F.3d 829, 831-32 (9th Cir.1996). Incorporating the standards set forth in *Burger King*, the Ninth Circuit has expounded upon the requirements for purposeful availment, noting that purposeful direction of some act having effect in the forum constitutes sufficient contact to exert jurisdiction, and that a lesser showing of contacts with the forum may be sufficient if considerations of reasonableness so require. *Haisten*, 784 F.2d at 1397.

a) Specific Jurisdiction

Plaintiffs have not made out a prima facie case that the Court has specific jurisdiction over Total by virtue of its various contracts with Unocal regarding the Yadana pipeline project. Nor have plaintiffs presented sufficient evidence to warrant additional jurisdictional discovery on the issue of specific jurisdiction.

(i) Purposeful Availment

Purposeful availment, which satisfies the first part of the Ninth Circuit test, requires a finding that the defendant "[has] performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir.1990) (quoting *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir.1988)). However, " 'an individual's contract with an out-of-state party alone [cannot] automatically establish sufficient minimum contacts' to support personal jurisdiction." *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 816 n. 9 (9th Cir.1988) (quoting *Burger King*, 471 U.S. at 478).

In *Burger King*, the Supreme Court explained:

> [W]e have emphasized the need for a "highly realistic" approach that recognizes that "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." [ ] It is these factors-prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing-that must be evaluated in determining whether the defendant purposefully established minimum contacts with the forum.

Burger King, 471 U.S. at 478-79 (citations omitted). The requirement of purposeful availment "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts or of the unilateral activity of another party of a third person." *Id.*

Total's contractual relations with Unocal do not constitute purposeful availment of the benefits and protections of California law. Total presents evidence (1) that it entered into those contracts either by fax and telephone or via meetings in Asia, France and Bermuda; (2) that the law governing the contracts is the law of England, Bermuda or Burma; (3) that the oil in the pipeline will go to Thailand, and possibly to Burma, not to the U.S.; and (4) that the contracts all relate to the pipeline in Burma and have nothing to do with California. Plaintiffs' evidence is simply insufficient to satisfy the standard in the Ninth Circuit. *See McGlinchy*, 845 F.2d at 816 (finding contacts insufficient to constitute purposeful availment where (1) contract was negotiated in England; (2) contract made no reference to U.S. as place for resolution of disputes; and (3) no authorized agents were alleged to performed any part of the contract in California).

(ii) Relation between Claims and Contacts

To determine whether a claim arises out of forum-related activities, courts apply a "but for" test. *Ballard*, 65 F.3d at 1500. Here, the Court considers whether plaintiffs' claims would have arisen but for Total's contacts with California. *See id.*

Plaintiffs present no evidence, and it seems impossible that they would uncover any, suggesting that the pipeline project would not have gone forward without Total's dealings with Unocal. As Total points out, it is far from under-capitalized. Moreover, Total agreed to take on the Yadana project before seeking bids from potential partners. Consequently, it appears from the evidence presented to date that Unocal's negotiations with Total and MOGE were not necessary to the initiation of the project. Consequently, there is no evidence that Total would not have gone forward with the project but for its negotiations, agreements and consultations with Unocal in California.

(iii) Reasonableness

The bare existence of minimum contacts is not sufficient to allow a court to exercise personal jurisdiction over a defendant. The third step of the Ninth Circuit test requires a finding that assertion of jurisdiction is reasonable. In other words, once the court concludes that a defendant purposefully established minimum contacts with a forum state, and that the claims at issue arise from those contacts, the court must determine whether the assertion of personal jurisdiction would comport with traditional notions of "fair play and substantial justice." *International Shoe,* 326 U.S. at 326.

Plaintiff's evidence is insufficient to establish either purposeful availment or a but-for relationship between Total or its subsidiaries' contractual relations with Unocal in the forum and plaintiffs' claims. Plaintiffs therefore fail to establish specific jurisdiction, and the Court need not reach the third prong of the specific jurisdiction test. Consequently, the Court need not consider the Republic of France's amicus brief for purposes of the inquiry into specific jurisdiction.

b) General Jurisdiction

Due process is satisfied "when in personam jurisdiction is asserted over a nonresident corporate defendant that has 'certain minimum contacts' with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 (1984) (quoting *International Shoe,* 326 U.S. at 326). "The Supreme Court has bifurcated this due process determination into two inquiries, requiring, first, that the defendant have the requisite contacts with the forum state to render it subject to the forum's jurisdiction, and second, that the assertion of jurisdiction be reasonable." *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.,* 1 F.3d 848, 851 (9th Cir.1993) (citing *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 107 (1987)). Where, as here, the defendant's alleged contacts are through its corporate subsidiaries, the Court must engage in a preliminary inquiry to determine whether the subsidiaries contacts are properly attributed to the defendant.

(i) Attributing Contacts of Subsidiaries to the Parent Corporation

The existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum. *Transure, Inc. v. Marsh and McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir.1985). As the Supreme Court recently explained in the context of assessing corporate separateness for purposes of liability:

> [I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts. [ ] This recognition that the corporate personalities remain distinct has its corollary in the well established principle of corporate law that directors and officers holding positions with a parent and its subsidiary can and do "change hats" to represent the two corporations separately, despite their common ownership. [ ]

United States v. Bestfoods, 524 U.S. 51, 69 (1998) (internal marks and citations omitted). In considering a parent corporation's potential liability under CERCLA, the Supreme Court distinguished "a parental officer's oversight of a subsidiary from such an officer's control over the operation of the subsidiary's facility." *Id.* at 1889. In so doing, the Supreme Court articulated a generally applicable principle that a parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is "consistent with the parent's investor status." *Id.* Appropriate parental involvement includes: "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures[.]" *Id.*

Nonetheless; "if the parent and subsidiary are not really separate entities, or one acts as an agent of the other, the local subsidiary's contacts with the forum may be imputed to the foreign parent corporation." *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C.Cir.1996). An alter ego or agency relationship is typified by parental control of the subsidiary's internal affairs or daily operations. *See Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir.1980).[2]

(a) Alter Ego

To demonstrate that the parent and subsidiary are "not really separate entities" and satisfy the alter ego exception to the general rule that a subsidiary and the parent are separate entities, the plaintiff must make out a prima facie case "(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice." *American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir.1996) (citations omitted). The first prong of this test has alternately been stated as requiring a showing that the parent controls the subsidiary "to such a degree as to render the latter the mere instrumentality of the former." *Calvert v. Huckins*, 875 F.Supp. 674, 678 (E.D.Cal.1995).

For example, where a parent corporation uses its subsidiary "as a marketing conduit" and attempts to shield itself from liability based on its subsidiaries' activities, piercing the corporate veil is appropriate and the alter-ego test is satisfied. *Cf. United States v. Toyota Motor Corp.*, 561 F.Supp. 354, 359 (C.D.Cal.1983). That test is also satisfied where the record indicates that the parent dictates "[e]very facet [of the subsidiary's] business-from broad policy decisions to routine matters of day-to-day operation [.]" *Rollins Burdick Hunter of Southern California, Inc. v. Alexander & Alexander Services, Inc.*, 206 Cal.App.3d 1, 11, 253 Cal.Rptr. 338 (2d Dist.1988). Similarly, under California law, "inadequate capitalization of a subsidiary may alone be a basis for holding the parent corporation liable for the acts of the subsidiary." *Slottow v. American Cas. Co. of Reading, Pennsylvania*, 10 F.3d 1355, 1360 (9th Cir.1993).

Plaintiffs argue that several of Total's California subsidiaries and United States subsidiaries with California contacts are alter egos of Total. Plaintiffs do not, and based on the evidence could not, seriously contend that Total is the alter ego of its numerous operating subsidiaries in the United States. Plaintiffs present no evidence that Total is involved in the day-to-day operations of its sub-subsidiaries. *See Apex Oil Co. v. DiMauro*, 744 F.Supp. 53, 58 (S.D.N.Y.1990) (quoting *Bellomo v. Pennsylvania Life Co.*, 488 F.Supp. 744, 745 (S.D.N.Y.1980), and holding proper inquiry for alter ego

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2. While the Court follows the alter ego and agency tests as articulated by the Ninth Circuit, the Court notes the useful discussion of alter ego as merger and agency as attribution in *In re Telectronics Pacing Systems, Inc.*, 953 F.Supp. 909 (S.D.Ohio 1997).

liability is whether parent exercised day-to-day control of subsidiaries).

Rather, plaintiffs argue that Total is the alter ego of several of its subsidiary holding companies based on Total's (1) involvement in its subsidiaries' acquisitions, divestments and capital expenditures; (2) formulation of general business policies and strategies applicable to its subsidiaries, including specialization in particular areas of commerce; (3) provision of loans and other types of financing to subsidiaries; (4) maintenance of overlapping directors and officers with its subsidiaries; and (5) alleged undercapitalization of holding company subsidiaries. A parent corporation may be directly involved in financing and macro-management of its subsidiaries, however, without exposing itself to a charge that each subsidiary is merely its alter ego. *See Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459-60 (2d Cir.1995) (no alter ego liability where parental approval required for leases, major capital expenditures and the sale of the subsidiary's assets); *Joiner v. Ryder Sys.*, 966 F.Supp. 1478, 1485 (C.D.Ill.1996) (no alter ego liability where parent approved subsidiaries' acquisitions and capital budget); *Akzona, Inc. v. E.I. Du Pont De Nemours and Co.*, 607 F.Supp. 227, 238 (D.Del.1984) (blurring corporate separateness in language of annual report, overlap of boards of directors, parental approval of large capital expenditures, and parental guaranty of third-party loans to subsidiary insufficient to establish alter ego relationship); *In re Hillsborough Holdings Corp.*, 166 B.R. 461, 473-74 (Bankr.M.D.Fla.1994) (proper for parent to provide all financing to a subsidiary), *aff'd* 176 B.R. 223 (M.D.Fla.1994).

First, the Court notes that plaintiffs' evidence actually indicates that Total's U.S. subsidiaries are adequately capitalized to maintain their holdings, despite the fact that the subsidiary holding companies must obtain approval and financing from Total (or its French subsidiary Hutchinson, S.A.) for new acquisitions. Plaintiffs' argument that subsidiary holding companies are undercapitalized for their intended business of acquiring new operational subsidiaries improperly assumes that a holding company is a sham corporation whenever it has only enough capital to protect its existing holdings. Plaintiffs provide no authority for that proposition.

Plaintiffs next assert that Total improperly controls the flow of money to its subsidiaries. Evidence that a parent provides interest free loans without observing corporate formalities by documenting those loans with promissory notes supports a finding that the parent is the subsidiary's alter ego. *Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc.*, 736 F.2d 516, 524 (9th Cir.1984). Here, although plaintiffs present evidence of numerous loans from Total to its subsidiaries, the evidence indicates that the loans are interest-bearing and that Total has maintained the corporate formalities by properly documenting its loans and capital contributions to its subsidiaries.

Likewise, references in the parent's annual report to subsidiaries or chains of subsidiaries as divisions of the parent company do not establish the existence of an alter ego relationship. *See Fletcher*, 68 F.3d at 1459-60 (references to subsidiary as "division" of Kodak not equivalent to evidence that two companies operated as "single economic entity"); *Akzona*, 607 F.Supp. at 238 (language of annual report and employee testimony describing subsidiaries as divisions of parent not sufficient, even in conjunction with other evidence, to establish alter ego relationship).

Plaintiffs present a wealth of evidence in support of their opposition to the Motion, but their evidence does not suggest such a unity of interest and ownership between Total and its subsidiaries that their separate corporate personalities no longer exist. *See American Telephone & Telegraph Co.*, 94 F.3d at 591. In a case presenting similar questions, the Ninth Circuit found no alter ego relationship was created where the parent

company guaranteed loans for the subsidiary, reviewed and approved major decisions, placed several of its directors on the subsidiary's board, and was closely involved in the subsidiary's pricing decisions. *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir.1980), cited in *AT & T*, 94 F.3d at 591. Plaintiffs' evidence here establishes only that Total is an active parent corporation involved directly in decision-making about its subsidiaries' holdings. Because Total and its subsidiaries observe all of the corporate formalities necessary to maintain corporate separateness, the first prong of the alter ego test is not satisfied, and the Court need not address the equities.

(b) Agency

The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are "sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir.1994) (quoting *Wells Fargo*, 556 F.2d at 423). In *Chan*, the Ninth Circuit approved the decision of a Pennsylvania district court and found it appropriate to attribute the subsidiary's contacts to the parent. 39 F.3d at 1405 n. 9 (following *Gallagher v. Mazda Motor of America, Inc.*, 781 F.Supp. 1079, 1083-84 (E.D.Pa.1992)). Rejecting the German corporate defendant's argument that "courts cannot look to the activities of an affiliated corporation for purposes of determining whether its parent corporation was 'doing business' in a state[,]" the *Chan* court explained that "courts have permitted the imputation of contacts where the subsidiary was 'either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself.' " *Id.* (quoting *Gallagher*, 781 F.Supp. at 1083).

As the *Gallagher* court articulated this rule, if a subsidiary performs functions that the parent would otherwise have to perform, the subsidiary then functions as "merely the incorporated department of its parent." 781 F.Supp. at 1084. Consequently, "[t]he question to ask is not whether the American subsidiaries can formally accept orders for their parent, but rather whether, in the truest sense, the subsidiaries' presence substitutes for the presence of the parent." *Id.* (quoting *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F.Supp. 1322, 1342 (E.D.N.Y.1981)).

The *Gallagher* court distinguished an agency relationship between a parent and its subsidiary from that of a holding company and its subsidiary, explaining that in the case of a holding company the parent could simply hold another type of subsidiary, in which case imputing the subsidiaries' jurisdictional contacts to the parent would be improper. *Id.* at 1085 (citing *Bellomo*, 488 F.Supp. at 746). Similarly, the New York district court in *Bellomo* held that:

> [w]here a holding company is nothing more than an investment mechanism[, *i.e.*,] a device for diversifying risk through corporate acquisitions[,] the subsidiaries conduct business not as its agents but as its investments. The business of the parent is the business of investment, and that business is carried out entirely at the parent level. Where, on the other hand, the subsidiaries are created by the parent, for tax or corporate finance purposes, there is no basis for distinguishing between the business of the parent and the business of the subsidiaries.

488 F.Supp. at 746 (holding foreign insurance company was "super-corporation" engaged in underwriting and selling insurance policies through its subsidiaries). *But see*

Arch v. American Tobacco Co., Inc., 984 F.Supp. 830, 840 (E.D.Pa.1997) (holding subsidiary involved in manufacturing, marketing, selling and distributing cigarettes was not parent company's agent under *Gallagher* test because the parent holding company could simply have held another type of subsidiary).

Here, plaintiffs do not make out a prima facie case that Total's operational subsidiaries in California are its agents for purposes of personal jurisdiction. There is no evidence that in the absence of Total's California subsidiaries involved in petrochemical and chemical operations, Total would conduct and control those operations. Plaintiffs recite a number of facts about Total's subsidiaries from Total's annual reports; however, as the *Calvert* court explained, "consolidating the activities of a subsidiary into the parent's reports is a common business practice." 875 F.Supp. at 678. Total stated in its 1995 annual report that its "US unit," Total Petroleum, Inc., would enable it to expand its marketing network and produce higher value-added specialty products in the United States. That statement is not enough, however, to justify the conclusion that Total would perform the activities of its U.S. operational subsidiaries were they unavailable to act as its "representative."

Plaintiffs' contention that Total's holding company subsidiaries with substantial and continuous contacts in California are Total's agents raises a more interesting question. In *Chan,* the Ninth Circuit considered agency in the context of an operational subsidiary. 39 F.3d at 1404-06. Relying on the district court's opinion in *Bellomo,* plaintiffs contend that Total is a "super-corporation" similar to the corporate defendant in *Bellomo.* As plaintiffs emphasize, Total is a multinational energy corporation that holds extensive business interests in the United States through subsidiary holding companies. Our attention, however, is directed at two subsidiary holding companies based in California, Hutchinson Seal Corporation ("HSC") and C.S. Acquisitions, Inc. ("CSAI"). These two holding companies were to hold the stock of several California operating companies. Although the Court was concerned that Total's indirect subsidiary holding companies were actively involved in finding operating companies to add to Total's business portfolio, Total has shown that HSC and CSAI have not played any role in finding companies to acquire in California or the United States, or in effectuating any such acquisitions. *See* Mounier and Davis Declarations. Indeed, neither HSC nor CSAI has any employees.

As noted above in connection with plaintiffs' alter ego argument, the fact that Total indirectly owns or holds the stock of HSC and CSAI does not, without more, convert these two corporations into general agents for Total for jurisdictional purposes under the Ninth Circuit's agency test articulated in *Wells Fargo* and *Chan.* At an irreducible minimum, the general agency test requires that the agent perform some service or engage in some meaningful activity in the forum state on behalf of its principal such that its "presence substitutes for presence of the principal." *Gallagher,* 781 F.Supp. at 1084. The Court agrees with Total that "neither HSC nor CSAI perform any services or activities for Total. They merely hold assets nothing more." . . . Further, the Court also agrees with Total, as noted by its counsel at the August 28, 1998 hearing, that in the absence of the two California subsidiary holding companies, Total could simply hold the stock of its California operating companies directly as a foreign corporation. Moreover, as a multinational energy company, Total could establish other subsidiary holding companies located in some other state or country to hold the stock of the operating companies located in California. Under these circumstances, it simply can not be said that CSAI or HSC are Total's general agents for jurisdictional purposes.

Although plaintiffs' argument is based on *Bellomo,* the Court is not persuaded that it

should follow the *Bellomo* court's analysis here. In *Bellomo,* the defendant insurance company, Pennsylvania Life, "engaged primarily in underwriting and selling a variety of insurance policies through several subsidiaries [in the forum state]." 488 F.Supp. at 747. The *Bellomo* court characterized Pennsylvania Life, which was a holding company, as a "super-corporation" and not a mere investor in other businesses. Taking their clue from *Bellomo,* plaintiffs argue that Total's world wide holdings and its stated corporate policy of investing in selected niche markets through acquisitions of businesses that further that strategy, show that Total is a "super-corporation" that conducts its energy related businesses through selectively acquired operating companies. By maintaining control of the operating companies through its subsidiary holding companies, plaintiffs argue that the subsidiary companies should be treated as Total's general agents in California for purposes of establishing personal jurisdiction over Total. As noted above, however, the record does not support plaintiffs' contention that Total directly controls the day-to-day activities of the California operating or holding companies. The fact that Total may indirectly control or supervise its subsidiaries, does not lead the Court to a different conclusion.

In sum, the Court finds that plaintiffs have not met their burden of showing that Total's subsidiaries with substantial California contacts should be treated as Total's general agents for jurisdictional purposes under the agency doctrine adopted by the Ninth Circuit in *Wells Fargo* and *Chan.* Because the Court has concluded that Total does not have sufficient contacts with California, the Court need not reach the final prong of the general jurisdictional analysis-whether the exercise of jurisdiction over Total would be reasonable. *See Asahi Metal Industry Co., Ltd. v. Superior Court,* 480 U.S. 102, 113 (1987). . . .

JOTA v. TEXACO, INC.

157 F.3d 153 (2d Cir. 1998)

JON O. NEWMAN, Circuit Judge:

This appeal poses important issues concerning the appropriateness of a United States forum for litigation in which a foreign government is significantly interested. Issues of forum non conveniens, comity, and indispensable party all arise in an unusual context in that the foreign country, the Republic of Ecuador, initially expressed vigorous opposition to the maintenance of this litigation in a United States Court and now, after a change in the government, just as vigorously urges that the litigation proceed here. Two sets of putative class action plaintiffs who sued Texaco Inc. ("Texaco") appeal from the judgments of the District Court for the Southern District of New York (Jed S. Rakoff, District Judge), entered on November 13, 1996, and August 13, 1997, respectively. The Court dismissed both actions on the grounds of (i) forum non conveniens, (ii) international comity, and (iii) failure to join an indispensable party. The Republic of Ecuador and its state-owned corporation, PetroEcuador (together, the "Republic"), appeal from the Court's August 12, 1997, denial of their post-judgment motion to intervene, in order to cure their failure to be joined; one set of plaintiffs also appeals from the contemporaneous denial of its post-judgment motion for reconsideration.

We hold that dismissal on the ground of forum non conveniens was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador and that the dismissal on this ground inappropriately rested entirely on adoption of another district

court's weighing of the relevant factors in litigation that is arguably distinguishable. We similarly hold that dismissal on the ground of comity was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador. We also hold that the District Court's reasoning regarding the plaintiffs' failure to join an indispensable party sufficed only to support dismissing so much of the complaint as sought to enjoin activities currently under the Republic's control. Finally, we note that upon the remand that is required as a consequence of our rulings, it will be appropriate for the District Court to reconsider the issues before it in light of Ecuador's changed litigating position. Accordingly, we vacate the judgments and remand for further consideration.

Background

Understanding the issues requires a detailed outline of the procedural history of the litigation.

1. The Complaints

This case involves consolidated appeals from two actions filed on behalf of two putative classes. In one action, *Aguinda v. Texaco Inc.*, Dkt. No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. April 11, 1994), certain residents of the Oriente region of Ecuador–primarily members of indigenous tribes--sued Texaco for environmental and personal injuries that allegedly resulted from Texaco's exploitation of the region's oil fields. In the other action, *Ashanga v. Texaco Inc.*, S.D.N.Y. Dkt. No. 94 Civ. 9266, certain residents of Peru, who live downstream from Ecuador's Oriente region, assert similar injuries resulting from these activities.

Both complaints allege that Texaco polluted the rain forests and rivers in Ecuador and Peru during oil exploitation activities in Ecuador between 1964 and 1992. In particular, they allege that Texaco improperly dumped large quantities of toxic by-products of the drilling process into the local rivers, contrary to prevailing industry practice of pumping these substances back into the emptied wells. Additionally, they allege that Texaco used other improper means of eliminating toxic substances, such as burning them, dumping them directly into landfills, and spreading them on the local dirt roads. They also allege that the Trans-Ecuadoran Pipeline, constructed by Texaco, has leaked large quantities of petroleum into the environment. The named plaintiffs allege that they and their families have experienced various physical injuries, including poisoning and the development of pre-cancerous growths.

The complaints sought money damages under theories of negligence, public nuisance, private nuisance, strict liability, "medical monitoring," trespass, civil conspiracy, and violations actionable under the Alien Tort Act, 28 U.S.C. § 1350 ("ATA"). The plaintiffs also sought "equitable relief to remedy the contamination and spoliation of their properties, water supplies and environment."[2]

2. Texaco's Motion to Dismiss

In December 1993, Texaco moved to dismiss on the grounds of (i) failure to join an indispensable party–the Republic of Ecuador, (ii) international comity, and (iii) forum non conveniens. Inherent in all three defenses was the close participation of the Ecuadoran government in the activities for which Texaco was sought to be held liable.

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2. Though the complaints make only a general demand for equitable relief, the plaintiffs clarified their demand somewhat during discovery. The relief they seek includes the following: undertaking or financing environmental cleanup, to include access to potable water and hunting and fishing grounds, renovating or closing the Trans-Ecuadoran Pipeline, creation of an environmental monitoring fund, formulating standards to govern future Texaco oil development, creation of a medical monitoring fund, an injunction restraining Texaco from entering into activities that run a high risk of environmental or human injuries, and restitution.

Elaborating its grounds for dismissal, Texaco submitted an affidavit by the president of a Texaco subsidiary, averring the following facts. Texaco had participated in oil drilling in Ecuador exclusively through its fourth-level subsidiary, Texaco Petroleum Company ("TexPet"). Beginning in 1965, TexPet operated a petroleum concession for a consortium ("the Consortium") owned in equal shares by TexPet and Gulf Oil.[3] Oil was first discovered in the Oriente in 1969, and was extracted thereafter by the Consortium. In 1974, the Ecuadoran government, through its state-owned oil agency, currently known as PetroEcuador, obtained a 25 percent share of the Consortium. By 1992, PetroEcuador had become the sole owner of the Consortium.[4]

In addition to evidence presented by Texaco suggesting that the Republic had been heavily involved in the drilling operations and had eventually become the sole operator, Texaco submitted a copy of a letter written by Ecuador's ambassador to the United States and addressed to the United States Department of State. In that letter, Ambassador Edgar Teran asserted that the Republic considered this action (as well as a similar case brought by other plaintiffs in the Southern District of Texas, *Sequihua v. Texaco, Inc.*, 847 F.Supp. 61 (S.D.Tex. 1994), an affront to Ecuador's national sovereignty). Ambassador Teran stated that Ecuador had a paramount interest in formulating its own environmental and industrial policies, and that Ecuador's courts were open to adjudicate such disputes.

3. District Court's Initial Decision

In an order filed in April 1994, the District Court . . . reserved decision on Texaco's motion. *See Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y.1994). The Court acknowledged that forum non conveniens dismissal might be appropriate as to the claims seeking money damages. Judge Broderick reasoned that "[d]isputes over class membership, determination of individualized or common damages, and the need for large amounts of testimony with interpreters, perhaps often in local dialects, would make effective adjudication in New York problematic at best." . . . However, he stated, any dismissal on this ground would be contingent on Texaco's first agreeing to submit to personal jurisdiction in the courts of Ecuador. The Court further suggested that even if Texaco filed such a stipulation, the Court might retain jurisdiction over the injunctive portions of the action.

The Court also reserved decision as to dismissal on the basis of international comity, but noted that there appeared to be no conflict between the laws of Ecuador and the United States. Finally, the Court declined to consider dismissal for failure to join Ecuador and PetroEcuador, reasoning that the parties had yet to develop a sufficient record.

4. District Court's Grant of Texaco's Motion to Dismiss

Following Judge Broderick's death, the case was reassigned, ultimately to Judge Rakoff. After a significant period of discovery, Texaco renewed its motion to dismiss. Counsel for the Republic submitted an amicus brief, supporting Texaco's motion to dismiss, once again informing the Court that the Republic objected to United States jurisdiction over the case. That brief was accompanied by an affidavit to the same effect signed by Ambassador Teran, again expressing the Republic's position.

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3. TexPet's ownership interest was initially held through its subsidiary, Texaco de Petroleos del Ecuador C.A. ("TPE"). However, in 1973, TexPet directly acquired TPE's interest in the Consortium.

4. In 1974, TexPet and Gulf each owned 37.5 percent shares. In 1976, PetroEcuador acquired Gulf's interest, thereby obtaining a majority stake. TexPet continued to operate the Trans-Ecuadoran Pipeline–a Consortium enterprise–until October 1989, when PetroEcuador assumed that responsibility. TexPet continued to operate the Consortium's drilling operations until July 1990, when PetroEcuador also took over that function. Finally, in June 1992, TexPet surrendered all its interests in the Consortium, leaving it wholly owned by PetroEcuador.

In response, the plaintiffs submitted three documents signed by representatives of the Ecuadoran National Congress, indicating their support for the plaintiffs' action. In one, the President of the Congress and four committee "presidents" wrote to Ecuador's President and Foreign Minister expressing their "concern" over the position that Ambassador Teran had taken. They stated that "[i]n our judgment the Ecuadorian government should not intervene in the development of this trial, much less show bias openly in a way that benefits the interests of the Texaco company." In the second document, Dr. Isauro Puente Davila, a legislator who served as the President of the Special Permanent Commission on Environmental Defense, issued an "official announcement" that

> only the adjudication of jurisdiction in the claim filed by Ecuadorians ... in a federal court of N.Y. against the Texaco Company, will bring to those affected the possibility of finding just treatment and a solution to the serious situation that they are going through....

In the third document, Dr. Puente wrote Judge Rakoff and enclosed a resolution of the Special Permanent Commission on Environmental Defense supporting the litigation. This resolution was stamped with the seal of the "General Secretaryship of the National Congress."

In November 1996, the District Court granted Texaco's motion to dismiss, as it related to the *Aguinda* plaintiffs. *See* [*Aguinda*] *v. Texaco, Inc.*, 945 F.Supp. 625 (S.D.N.Y.1996). Judge Rakoff stated that he found persuasive the forum non conveniens and international comity holdings made by the Southern District of Texas in the *Sequihua* litigation. *See Sequihua v. Texaco, Inc.*, 847 F.Supp. 61 (S.D.Tex.1994). "[T]he Court finds itself obliged to dismiss this action on the same grounds of international comity and forum non conveniens so well stated in *Sequihua*, to which this Court can add little." *Aguinda*, 945 F.Supp. at 627.

The Court also dismissed for the "independently-sufficient reason" of failure to join indispensable parties, namely, PetroEcuador and the Republic of Ecuador. *See id.* Judge Rakoff reasoned that without these parties, it would be impossible to achieve the extensive equitable relief sought by the plaintiffs:

> In the absence of Petroecuador and the Republic of Ecuador, any order of this Court granting any material part of the Ecuador-directed equitable relief demanded by plaintiffs would be unenforceable on its face, prejudicial to both present and absent parties, and an open invitation to an international political debacle.

Id. at 628.

Judgment was entered in the *Aguinda* case on November 13, 1996. The Court directed the parties in the *Ashanga* case to submit memoranda of law as to whether that case should be controlled by the dismissal in *Aguinda.*

5. District Court's Denial of Motions (i) to Reconsider Judgment and (ii) to Intervene

The plaintiffs in the *Aguinda* action moved for reconsideration, representing that the Republic was now willing to participate in that action as an intervenor. Thereafter, the Republic filed a motion to intervene. In an affidavit accompanying that motion, Ecuador's Attorney General stated that he was "summariz[ing] the official judicial position of the Republic of Ecuador," and concluded that

> [t]he intervention ... does not under any concept damage the sovereignty of the Republic of Ecuador, instead it looks to protect the interests of the indigenous citizens of the

> Ecuadorian Amazon who were seriously affected by the environmental contamination attributed to the defendant company....

In March 1997, the District Court ruled that the Republic's motion to intervene was not sufficiently precise. Plaintiffs' counsel had represented that due to an Ecuadoran election, and a subsequent change of administration, the Republic was now willing to waive sovereign immunity and consent to the jurisdiction of the District Court. However, the Court ruled, the intervention motion filed by the Republic had not "expressly and unequivocally state[d] that [it] was prepared to waive sovereign immunity." The Court requested that the Republic

> provide fresh written assurances ... that the Republic of Ecuador, if it still desires to intervene in this law suit, is expressly prepared to waive sovereign immunity and submit fully to the jurisdiction of this Court (including jurisdiction over any counterclaims and cross-claims that may be filed against Ecuador in connection with this action).

In response, the Attorney General of Ecuador again wrote the District Court, but stopped short of agreeing to the conditions required by the Court. The Attorney General explained that "Ecuador ratifies it[s] participation in this lawsuit in support of said persons in order to procure the necessary indemnization in order to alleviate the environmental damages caused by Texaco." While the Attorney General agreed, somewhat obliquely, to "allot the entire value of the indemnization to the projects and works of remediation which might be necessary," he made clear that the Republic did not agree to waive its sovereign immunity defense as to any claims made by parties other than the *Aguinda* plaintiffs. Thus, the Republic appeared unwilling to defend claims presented either by Texaco or by the *Ashanga* plaintiffs.

In August 1997, the District Court denied both the *Aguinda* plaintiffs' motion for reconsideration and the Republic's motion to intervene. *See Aguinda v. Texaco, Inc.*, 175 F.R.D. 50 (S.D.N.Y.1997). The Court characterized the Republic's motion as "patently, and prejudicially, untimely." *Id.* at 51. In Judge Rakoff's view, Ecuador had not shown any reason why the Court should consider its post-judgment change of position in now supporting the Court's jurisdiction over the case. Additionally, the Court ruled that Ecuador was not entitled to place limitations on its participation in the case, and would have to be willing to subject itself to possible counterclaims and cross-claims in order to intervene.

Thereafter, on August 13, 1997, the Court entered judgment dismissing the complaint in the *Ashanga* case.

Discussion

The *Aguinda* and *Ashanga* plaintiffs appeal from the dismissal of their complaints, and the *Aguinda* plaintiffs also appeal from the denial of their motion for reconsideration. The Republic of Ecuador appeals from the denial of its motion to intervene. The plaintiffs-appellants challenge each of the three grounds on which the District Court dismissed their action: (1) forum non conveniens, (2) international comity, and (3) failure to join an indispensable party.

1. Forum Non Conveniens

The forum non conveniens doctrine allows dismissal only where the court determines that "an alternative forum is available, because application of the doctrine 'presupposes at least two forums in which the defendant is amenable to process.' " *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 292 (2d Cir.1996) (quoting *Gulf Oil Corp. v. Gilbert,*

330 U.S. 501, 506-07 (1947)). "Through a discretionary inquiry, the court determines where litigation will be most convenient and will serve the ends of justice." *PT United Can Co. v. Crown Cork & Seal Co.,* 138 F.3d 65, 73 (2d Cir.1998). "[I]n order to grant a motion to dismiss for forum non conveniens, a court must satisfy itself [among other things] that the litigation may be conducted elsewhere against all defendants." *Id.*

The District Court incorporated the forum non conveniens holding of *Sequihua,* and appellants contend that *Sequihua* was inapposite. In particular, the appellants argue that the only defendant in the present case, Texaco, is not subject to suit in Ecuador. Texaco's only response is that TexPet is subject to suit in Ecuadoran courts, and is both a defendant and a plaintiff in various actions currently pending in that jurisdiction. But Texaco does not dispute that Texaco itself is not amenable to suit in Ecuador.

Accordingly, dismissal for forum non conveniens is not appropriate, at least absent a commitment by Texaco to submit to the jurisdiction of the Ecuadoran courts for purposes of this action. *Cf. In re Union Carbide Corp. Gas Plant Disaster,* 809 F.2d 195, 203-04 (2d Cir.1987) (affirming dismissal for forum non conveniens that was conditioned upon defendant's consent to personal jurisdiction in India; such conditions "are not unusual and have been imposed in numerous cases where the foreign court would not provide an adequate alternative in the absence of such a condition").

On remand, in addition to requiring Texaco's consent to Ecuadoran jurisdiction, the District Court should independently reweigh the factors relevant to a forum non conveniens dismissal, rather than simply rely on *Sequihua.* The plaintiffs have identified several distinctions between that case and the present one. In particular, they argue that the instant case involves a claim pursuant to the ATA, and that to dismiss the present case would frustrate Congress's intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations.[6] Additionally, the plaintiffs argue that they–unlike the *Sequihua* plaintiffs–are challenging only decisions made by Texaco *within the United States,* and that the necessary documents and witnesses are thus much more readily accessible in a United States forum. Though we express no view on these distinctions, the District Court should consider them upon reconsideration of the forum non conveniens issue. We leave to the District Court the procedural decision as to whether (i) to initially ascertain Texaco's willingness to submit to jurisdiction in Ecuador and, if such willingness is indicated, then balance the forum non conveniens factors, *cf. Panama Processes, S.A. v. Cities Service Co.,* 650 F.2d 408, 411 (2d Cir.1981) (defendant offered to submit to foreign jurisdiction before court assessed forum non conveniens factors) or (ii) to make the balance first and, if the factors favor a forum non conveniens dismissal, condition such dismissal on Texaco's submission to jurisdiction in Ecuador.

2. Comity

International comity is " 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.' " *Pravin Banker Associates, Ltd. v. Banco Popular Del Peru,* 109 F.3d 850, 854 (2d Cir.1997) (quoting *Hilton v. Guyot,* 159 U.S. 113, 164 (1895)). Under the principles of comity, United

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6. We express no view on whether the plaintiffs have alleged conduct by Texaco that violates the law of nations, whether an ATA suit for environmental misconduct, alleged to violate the law of nations, may be brought against a non-governmental entity under the ATA, or how the forum non conveniens balance for ATA claims is to be struck when alien plaintiffs select a United States forum for a suit against a domestic corporation. *Cf. Kadic v. Karadzic,* 70 F.3d 232, 241-44, 250 (2d Cir.1995) (upholding jurisdiction over ATA claim against individual for alleged violations of law of nations involving genocide, war crimes, and violations of humanitarian law, and rejecting forum non conveniens defense in suit against individual alien).

States courts "ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States." *Id.* This doctrine "is best understood as a guide where the issues to be resolved are entangled in international relations." *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1047 (2d Cir.1996). The District Court's dismissal on the ground of international comity is reviewed for abuse of discretion. *See Pravin*, 109 F.3d at 856.

In dismissing the complaints in this litigation on the ground of comity, the District Court explicitly adopted the comity considerations articulated by the District Court in *Sequihua* in dismissing a similar case. *See Sequihua*, 847 F.Supp. at 63. Applying the factors set forth in Restatement (3d) of Foreign Relations § 403 (1986), the Court in *Sequihua* had concluded that "the challenged activity and the alleged harm occurred entirely in Ecuador"; that the conduct at issue was regulated by the Republic and "exercise of jurisdiction by this Court would interfere with Ecuador's sovereign right to control its own environment and resources"; and that "the Republic of Ecuador has expressed its strenuous objections to the exercise of jurisdiction by this Court." *Id.*

When a court dismisses on the ground of comity, it should normally consider whether an adequate forum exists in the objecting nation and whether the defendant sought to be sued in the United States forum is subject to or has consented to the assertion of jurisdiction against it in the foreign forum. That is the approach usually taken with a dismissal on the ground of forum non conveniens, as we noted in Part 1, and it is equally pertinent to dismissal on the ground of comity. Though extreme cases might be imagined where a foreign sovereign's interests were so legitimately affronted by the conduct of litigation in a United States forum that dismissal is warranted without regard to the defendant's amenability to suit in an adequate foreign forum, this case presents no such circumstances.

With the comity issue remanded for lack of conditioning dismissal on Texaco's consent to jurisdiction in Ecuador, it will then be appropriate for the District Court to reconsider the merits of the comity issue in light of Ecuador's changed litigating position. When the District Court dismissed on the ground of comity in reliance on the *Sequihua* decision, that decision was almost directly on point. Most significantly, the Republic had repeatedly written the District Court arguing that this case implicated Ecuador's sovereign interests and should not be decided in a United States court. When the Republic changed its position following the entry of judgment–not only embracing the District Court's jurisdiction, but agreeing to participate, at least to some extent–the District Court reconsidered only the Rule 19 basis for dismissal, but did not revisit its determination that comity provided an independently sufficient ground for dismissal. Yet at that point the relevance of *Sequihua*, on which the Court had entirely relied, had been substantially eroded.

Ecuador contends that dismissal on the ground of comity is not warranted because it now supports the litigation of this lawsuit in a United States forum, contrary to its earlier opposition. The extent to which a court should consider the changed position of a sovereign nation in a case in which direct review has not been completed is an issue rarely encountered. Competing considerations are implicated. On the one hand, the interests in the orderly conduct of litigation and in the finality of judgments valid when rendered weigh in favor of holding a nation to the litigating position it asserted prior to the entry of judgment. On the other hand, inherent in the concept of comity is the desirability of having the courts of one nation accord deference to the official position of a foreign state, at least when that position is expressed on matters concerning actions

of the foreign state taken within or with respect to its own territory. Of course, consideration of a nation's altered litigating stance cannot justify an altered outcome that would unduly prejudice a party that had acted in reliance on a judgment entered in light of the nation's original position or would result in a significant waste of judicial resources by renewing litigation fully tried.

. . . This case must be remanded in any event because of our rulings with respect to the dismissal on the ground of forum non conveniens, comity, and failure to join an indispensable party. Upon remand, it will be appropriate for the District Court to give renewed consideration to the comity issue in light of all the then current circumstances, including Ecuador's position with regard to the maintenance of this litigation in a United States forum.

3. Failure to Join Indispensable Party

The appellants contend that the Republic is not an indispensable party, or alternatively, that the Republic's motion to intervene should have been granted, thus leaving no indispensable party omitted. We review dismissal for failure to join an indispensable party under the abuse of discretion standard. *See Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 75 (2d Cir.1984); Fed.R.Civ.P. 19(b) (authorizing district court to "determine whether in equity and good conscience" the action should be dismissed for inability to join indispensable party).

. . . The plaintiffs argue that this rationale sufficed, at most, to allow the dismissal of certain equitable claims requiring the Republic's participation, and that, under this rationale, the District Court should have allowed the legal claims and the remaining equitable claims to stand. We agree. . . .

Since some aspects of the equitable relief sought by the plaintiffs would have required substantial participation by the Ecuadoran government, which at an earlier stage had resisted joinder, the District Court had discretion to dismiss some portions of the plaintiffs' complaint. But since much of the relief sought could be fully provided by Texaco without any participation by Ecuador, dismissal of the entire complaint ... exceeds that discretion. . . .

b. Denial of Ecuador's Post-Judgment Motion to Intervene

The *Aguinda* plaintiffs and Ecuador contend that the District Court should have granted the Republic's post-judgment motion to intervene. Had the Court done so, they argue, it then should have reinstated all claims against Texaco, since Ecuador would no longer be an absent party.

The District Court denied Ecuador's motion to intervene on two grounds. First, the Court found that the motion was untimely and that granting late intervention would prejudice Texaco. Second, the Court ruled that Ecuador had not fully waived its sovereign immunity. . . .

. . . Since the case is being remanded because of our rulings on forum non conveniens, comity, and indispensable party, Ecuador's motion to intervene will also be available for reconsideration. The motion will still be late, but it might not be prejudicially so. Furthermore, though Ecuador's previously asserted position on waiver of sovereign immunity justified the earlier denial of intervention, Ecuador will have the opportunity to revise its position if it is so inclined. Upon the resumption of litigation in the District Court, Ecuador should promptly advise the District Judge what would be its role and what claims it proposes to make if permitted to intervene, and whether it proposes to retain in the litigation any aspect of its sovereign immunity. The District Court should then reassess Ecuador's motion to intervene in the light of all the current circumstances.

WIWA v. ROYAL DUTCH PETROLEUM CO.

226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001)

LEVAL, Judge:

This case concerns the application of *forum non conveniens* doctrine to suits under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, involving claimed abuses of the international law of human rights. Plaintiffs are three Nigerian emigres, and a woman identified only as Jane Doe to protect her safety, who allege that they (or in some cases their deceased next of kin) suffered grave human rights abuses at the hands of the Nigerian authorities. Defendants Royal Dutch Petroleum Company ("Royal Dutch") and Shell Transport and Trading Co., P.L.C. ("Shell Transport") are business corporations, incorporated in the Netherlands and the United Kingdom respectively, that are alleged to have directly or indirectly participated in or directed these abuses. The district court (Wood, *J.*) dismissed the action for *forum non conveniens* after determining that England is an adequate alternative forum and that a balancing of public interest and private interest factors make the British forum preferable. Plaintiffs appeal, arguing, inter alia, that the district court erred in not affording sufficient weight to the plaintiffs' choice of forum and to the interests of the United States in providing a forum for the adjudication of claims of abuse of international human rights. Defendants contend that, regardless of the propriety of a dismissal based on *forum non conveniens*, the court lacked personal jurisdiction over them. We hold that the district court properly exercised jurisdiction over the defendants. As to the dismissal for *forum non conveniens*, we reverse.

Background

A. Allegations of the Complaint

Defendant Royal Dutch is a holding company incorporated and headquartered in the Netherlands. Defendant Shell Transport is a holding company incorporated and headquartered in England. The two defendants jointly control and operate the Royal Dutch/Shell Group, a vast, international, vertically integrated network of affiliated but formally independent oil and gas companies. Among these affiliated companies is Shell Petroleum Development Company of Nigeria, Ltd. ("Shell Nigeria"), a wholly-owned Nigerian subsidiary of the defendants that engages in extensive oil exploration and development activity in the Ogoni region of Nigeria.

The amended complaint ("the complaint") alleges that plaintiffs and their next of kin (hereafter collectively referred to as "Plaintiffs") were imprisoned, tortured, and killed by the Nigerian government in violation of the law of nations at the instigation of the defendants, in reprisal for their political opposition to the defendants' oil exploration activities. According to the complaint, Shell Nigeria coercively appropriated land for oil development without adequate compensation, and caused substantial pollution of the air and water in the homeland of the Ogoni people. A protest movement arose among the Ogoni. Ken Saro-Wiwa was an opposition leader and President of the Movement for the Survival of the Ogoni People (MSOP); John Kpuinen was a leader of the MSOP's youth wing.

Allegedly, Shell Nigeria recruited the Nigerian police and military to attack local villages and suppress the organized opposition to its development activity. Saro-Wiwa and Kpuinen were repeatedly arrested, detained and tortured by the Nigerian government because of their leadership roles in the protest movement. In 1995, Saro-Wiwa and Kpuinen were hanged, along with other Ogoni leaders, after being convicted of murder

by a special military tribunal. Allegedly, they were convicted on fabricated evidence solely to silence political criticism and were not afforded the legal protections required by international law. The complaint further alleges that plaintiff Owens Wiwa (Saro-Wiwa's brother) was illegally detained by Nigerian authorities, that plaintiff Jane Doe was beaten and shot by the Nigerian military in a raid upon her village, and that Saro-Wiwa's family-including Ken Saro-Wiwa's 74-year-old mother-were beaten by Nigerian officials while attending his trial.

According to the complaint, while these abuses were carried out by the Nigerian government and military, they were instigated, orchestrated, planned, and facilitated by Shell Nigeria under the direction of the defendants. The Royal Dutch/Shell Group allegedly provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages, procured at least some of these attacks, participated in the fabrication of murder charges against Saro-Wiwa and Kpuinen, and bribed witnesses to give false testimony against them.

B. Facts Relating to Jurisdiction in New York

1. Defendants' New York Stock Exchange Listings and Sundry Activities

Neither of the defendants has extensive direct contacts with New York. Both companies list their shares, either directly or indirectly,[2] on the New York Stock Exchange. They conduct activities in New York incident to this listing, including the preparation of filings for the Securities and Exchange Commission (SEC) and the employment of transfer agents and depositories for their shares. Royal Dutch also maintains an Internet site, accessible in New York. They have participated in at least one lawsuit in New York as defendants, without contesting jurisdiction. They have for many years retained New York counsel.

Defendants own subsidiary companies that do business in the United States, including Shell Petroleum Inc. (SPI), a Delaware corporation. SPI in turn owns all the shares of Shell Oil Company (Shell Oil), the well-known oil and gas concern. Shell Oil has extensive operations in New York and is undisputedly subject to the jurisdiction of the New York courts.

2. Defendants' Maintenance of an Investor Relations Office in New York City

The defendants also maintain an Investor Relations Office in New York City, administered by James Grapsi, whose title is "Manager of Investor Relations." The office is nominally a part of Shell Oil. However, all of its functions involve facilitating the relations of the parent holding companies, the defendants Royal Dutch and Shell Transport, with the investment community. The expenses of the office (consisting primarily of rent and salaries) are directly paid in the first instance by Shell Oil, but Shell Oil is reimbursed by the defendants, who therefore bear the full expense of the office. Those expenses average about $45,000 per month, or about $500,000 per year. The Investor Relations Office's duties involve fielding inquiries from investors and potential investors in Royal Dutch and Shell Transport, mailing information about the defendants to thousands of individuals and entities throughout the United States, and organizing meetings between officials of the defendants and investors, potential investors, and financial analysts. Each year the Investor Relations Office organizes about six such sessions and schedules them for various financial centers throughout the United States, including New York. Grapsi manages these functions out of a New York

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2. Shares of Royal Dutch are traded directly on the New York Stock Exchange. Shell Transport's shares are traded indirectly in the United States; investors may purchase American Depository Receipts (ADR's) for shares of Shell, rather than shares themselves.

City office located in the Southern District of New York, and characteristically seeks the defendants' approval before scheduling meetings and making other similar decisions.

C. Proceedings Below

. . . The amended complaint seeks damages under the ATCA, the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, international law and treaties, Nigerian law, and various state law torts. More specifically, the complaint alleges that the defendants are liable for summary execution; crimes against humanity; torture; cruel, inhuman, and degrading treatment; arbitrary arrest and detention; violations of the rights to life, liberty, security of the person, and peaceful assembly and association; wrongful death; assault and battery; intentional and negligent infliction of emotional distress; and conspiracy. It is not entirely clear whether the liability of the defendants is predicated on their own actions, on a theory of responsibility for the actions of their subsidiary Shell Nigeria, or on a combination of both. . . .

Plaintiffs moved for reconsideration in light of this court's decision in *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). By order dated January 20, 1999, Judge Wood granted their motion, to the extent of conditioning dismissal on the defendants' commitment to consent to service of process in England, comply with all discovery orders, pay any judgment rendered in England, waive a security bond, and waive a statute of limitations defense if an action is begun in England within one year of the conclusion of these proceedings, which conditions defendants accepted. Otherwise the motion was denied.

Discussion

A. Personal Jurisdiction

Under the Federal Rules of Civil Procedure, a court may exercise jurisdiction over any defendant "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located," Fed.R.Civ.P. 4(k)(1)(a), provided of course that such an exercise of jurisdiction comports with the Fifth Amendment's Due Process Clause. The question is therefore whether the defendants may be subjected to the jurisdiction of the courts of the State of New York.

Before the court below, plaintiffs offered multiple theories as to why New York could properly exercise personal jurisdiction over the defendants. While the Magistrate Judge rejected all of these theories, the district court held that, under prevailing law, the activities of the Investor Relations Office on the defendants' behalf in New York were both attributable to the defendants and sufficient to confer jurisdiction. On appeal, defendants make four arguments: (1) these activities are not attributable to the defendants for jurisdictional purposes; (2) these New York activities cannot be considered in the jurisdictional calculus because they are merely "incidental" to a stock market listing and are jurisdictionally inconsequential as a matter of law; (3) the Investor Relations activities are legally insufficient to confer general jurisdiction; and (4) exercising jurisdiction over the defendants would violate the fairness requirement of the Due Process Clause. For the reasons discussed below, we reject each of these contentions and hold that the defendants are subject to personal jurisdiction in the Southern District of New York.[4]

(1) The Agency Analysis.

Under New York law, a foreign corporation is subject to general personal jurisdiction

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4. Because we hold that jurisdiction is properly exercised over the defendants on the basis of the activities of the Investor Relations Office, we do not reach any of the other jurisdictional issues raised by the plaintiffs. We express no views on the merits of any of their alternative arguments.

in New York if it is "doing business" in the state. *See* N.Y. C.P.L.R. § 301 (codifying caselaw that incorporates "doing business" standard); *see also Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir.1985). "[A] corporation is 'doing business' and is therefore 'present' in New York and subject to personal jurisdiction with respect to any cause of action, related or unrelated to the New York contacts, if it does business in New York 'not occasionally or casually, but with a fair measure of permanence and continuity.' " *Id.* (quoting *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915 (1917)). In order to establish that this standard is met, a plaintiff must show that a defendant engaged in "continuous, permanent, and substantial activity in New York." *Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir.1990).

The continuous presence and substantial activities that satisfy the requirement of doing business do not necessarily need to be conducted by the foreign corporation itself. In certain circumstances, jurisdiction has been predicated upon activities performed in New York for a foreign corporation by an agent. Under well-established New York law, a court of New York may assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available. *See, e.g., Frummer v. Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533, 537, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967) (finding jurisdiction over foreign hotel chain based on the activities of affiliated reservations service); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir.1967) (applying *Frummer* to find jurisdiction over tour operator based on the activities of affiliated travel agent). To come within the rule, a plaintiff need demonstrate neither a formal agency agreement, *see, e.g., New York Marine Managers, Inc. v. M.V. "Topor-1"*, 716 F.Supp. 783, 785 (S.D.N.Y.1989), nor that the defendant exercised direct control over its putative agent, *see, e.g., Palmieri v. Estefan*, 793 F.Supp. 1182, 1194 (S.D.N.Y.1992). The agent must be primarily employed by the defendant and not engaged in similar services for other clients. *See, e.g., Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 481, 176 N.Y.S.2d 318, 151 N.E.2d 874 (1958) (holding that independent contractors with many clients are not considered agents of their individual clients for jurisdictional purposes).

Both Magistrate Judge Pitman and Judge Wood found that Grapsi and the Investor Relations Office were agents of the defendants for jurisdictional purposes. We agree. While nominally a part of Shell Oil, Grapsi and the Investor Relations Office devoted one hundred percent of their time to the defendants' business. Their sole business function was to perform investor relations services on the defendants' behalf. The defendants fully funded the expenses of the Investor Relations Office (including salary, rent, electricity, mailing costs, etc.), and Grapsi sought the defendants' approval on important decisions. . . .

(2) The Nature of the Activities of the Investor Relations Office.

The defendants contend their Investor Relations Office is an activity that is "incidental" to their listing on the New York Stock Exchange. They cite to a long stream of caselaw reaching back over a century that they argue precludes courts from considering activity "incidental" to stock market listings when evaluating whether a corporation is doing business in the state of New York. We agree that the prevailing caselaw accords foreign corporations substantial latitude to list their securities on New York-based stock exchanges and to take the steps necessary to facilitate those listings

(such as making SEC filings and designating a depository for their shares) without thereby subjecting themselves to New York jurisdiction for unrelated occurrences. *See, e.g., Celi v. Canadian Occidental Petroleum Ltd.,* 804 F.Supp. 465, 468 (E.D.N.Y.1992); *Fowble v. Chesapeake & Ohio Ry. Co.,* 16 F.2d 504, 505 (S.D.N.Y.1926); *Clews v. Woodstock Iron Co.,* 44 F. 31, 32 (S.D.N.Y.1890); *Freeman v. Bean,* 266 N.Y. 657, 657-58, 195 N.E. 368 (1935). However, defendants misread the scope of the existing caselaw when they argue that all contacts related to stock exchange listings are stripped of jurisdictional significance.

To begin with, it is not that activities necessary to maintain a stock exchange listing do not count, but rather that, without more, they are insufficient to confer jurisdiction. *See, e.g., Pomeroy v. Hocking Valley Ry. Co.,* 218 N.Y. 530, 536, 113 N.E. 504 (1916) ("The payment, too, of dividends and the transfer of stock while perhaps not sufficient of themselves to constitute the transaction of business ..., doubtless are of some importance in connection with other facts."); *Fowble,* 16 F.2d at 505 (such contacts are "of some importance in determining whether the corporation [i]s doing business in the state, although such facts may not be sufficient in itself to constitute such doing of business"). Other cases in this line imply a similar result when they suggest that jurisdiction is not available over a corporation whose *only* contacts with the forum are listings on the New York stock exchanges and ancillary arrangements involving the distribution of their shares. *See, e.g., Grossman v. Sapphire Petroleums Ltd.,* 195 N.Y.S.2d 851, 852-53 (N.Y.Sup.1959).

The Investor Relations Office conducts a broader range of activities on the defendants' behalf than those described in the cited cases as merely "incidental" to the stock exchange listing. These activities, which range from fielding inquiries from investors and potential investors to organizing meetings between defendants' officials and investors, potential investors, and financial analysts, do not properly come within the rule upon which the defendants rely. The defendants' Investor Relations program results not from legal or logistical requirements incumbent upon corporations that list their shares on the New York Stock Exchange, but from the defendants' discretionary determination to invest substantial sums of money in cultivating their relationship with the New York capital markets. It appears the location of the office in New York City has far more to do with the importance of New York as a center of capital markets than with the proximity of the New York Stock Exchange. A company can perfectly well maintain a listing on the New York (or any other) Stock Exchange without maintaining an office nearby to cultivate relations with investors.

In summary, the large body of caselaw the defendants point to at most stands for the proposition that, absent other substantial contacts, a company is not "doing business" in New York merely by taking ancillary steps in support of its listing on a New York exchange. The activities chargeable to the defendants go well beyond this minimum. We conclude that the activities of the Investor Relations Office go beyond the range of activities that have been held insufficient to subject foreign corporations to the jurisdiction of New York courts.

(3) The Sufficiency of Contacts

The defendants further contend that the activities of the Investor Relations Office are quantitatively insufficient to confer jurisdiction. *See Landoil,* 918 F.2d at 1043 (requiring "continuous, permanent and substantial activity") (quoting Weinstein, Korn & Miller, *New York Civil Practice,* ¶ 301.16, at 3-32). We find no merit to this contention. Where, as here, plaintiffs' claim is not related to defendants' contacts with New York, so that jurisdiction is properly characterized as "general," plaintiffs must

demonstrate "the defendant's 'continuous and systematic general business contacts.' " *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir.1996) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). Defendants' contacts constitute "a continuous and systematic general business" presence in New York and therefore satisfy the minimum contacts portion of a due process analysis.

Citing to a string of cases holding that solicitation of business plus minimal additional contacts satisfies Section 301, Judge Wood characterized the activities of the Investor Relations Office as satisfying the test of "solicitation plus." The defendants dispute this characterization, arguing that Grapsi did not perform "solicitation" because he did not offer to buy or sell any stock in the corporation. As Judge Wood noted, however, a finding of "solicitation" in the jurisdictional context does not necessarily require "solicitation" in the sense of an offer of contract. Rather, the central question is whether the defendant (or its agent) behaved in such a way so as to encourage others to spend money (or otherwise act) in a manner that would benefit the defendant. *Cf., e.g., Landoil*, 918 F.2d at 1044 (trips to New York to service existing accounts constitutes "solicitation"). Judge Wood's characterization of the Investor Relations Office's activities as "solicitation" appears to be a sound interpolation of pre-existing precedent into a new factual context.

However, we need not rely upon such a characterization to support general jurisdiction in this case, because even without relying on the "solicitation plus" formulation, the activities of the Investor Relations Office meet the "doing business" standard. In assessing whether jurisdiction lies against a foreign corporation, both this court and the New York courts have focused on a traditional set of indicia: for example, whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests. *See, e.g., Hoffritz for Cutlery*, 763 F.2d at 58; *Frummer*, 19 N.Y.2d at 537, 281 N.Y.S.2d 41, 227 N.E.2d 851. The Investor Relations Office, whose activities are attributable to the defendants under the *Frummer* analysis, meets each of these tests. It constitutes a substantial "physical corporate presence" in the State, permanently dedicated to promoting the defendants' interests. *Artemide SpA v. Grandlite Design & Mfg. Co.*, 672 F.Supp. 698, 703 (S.D.N.Y.1987); *see also, e.g., Lane v. Vacation Charters, Ltd.*, 750 F.Supp. 120, 125 (S.D.N.Y.1990) ("Perhaps the most important factor needed for a finding of jurisdiction under CPLR § 301 is the in-state presence of employees engaged in business activity."); *cf. Landoil*, 918 F.2d at 1045 n. 10 (noting that while periodic business trips to New York to solicit business did not confer jurisdiction, "renting a hotel room ... on a systematic and regular basis might be the functional equivalent of an office in New York and therefore might be sufficient to establish presence within the state"). We agree with Judge Wood that the continuous presence of the Investor Relations program in New York City is sufficient to confer jurisdiction.

(4) Fairness

Finally, the defendants argue that it would violate the fairness requirement of the Due Process Clause for a New York court to exercise jurisdiction over them. Again, we disagree.

Personal jurisdiction may be exercised only when (1) the State's laws authorize service of process upon the defendant and (2) an assertion of jurisdiction under the circumstances of the case comports with the requirements of due process. *See, e.g.,*

Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 240 (2d Cir.1999). The required due process inquiry itself has two parts: whether a defendant has "minimum contacts" with the forum state and whether the assertion of jurisdiction comports with "traditional notions of fair play and substantial justice-that is whether ... [the exercise of jurisdiction] is reasonable under the circumstances of a particular case." *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1027 (2d Cir.1997) (internal quotations omitted).

As noted above, the defendants' contacts go well beyond the minimal. As a general rule, in making the constitutional analysis once a plaintiff has made a "threshold showing" of minimum contacts, the defendant must come forward with a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Robertson-Ceco Corp.*, 84 F.3d at 568 (internal quotations omitted). The defendants have not made any such compelling showing here.

While it is true that certain factors normally used to assess the reasonableness of subjection to jurisdiction do favor the defendants (they are foreign corporations that face something of a burden if they litigate here, and the events in question did not occur in New York), litigation in New York City would not represent any great inconvenience to the defendants. The defendants control a vast, wealthy, and far-flung business empire which operates in most parts of the globe. They have a physical presence in the forum state, have access to enormous resources, face little or no language barrier, have litigated in this country on previous occasions, have a four-decade long relationship with one of the nation's leading law firms, and are the parent companies of one of America's largest corporations, which has a very significant presence in New York. New York City, furthermore, where the trial would be held, is a major world capital which offers central location, easy access, and extensive facilities of all kinds. We conclude that the inconvenience to the defendants involved in litigating in New York City would not be great and that nothing in the Due Process Clause precludes New York from exercising jurisdiction over the defendants.

B. Forum Non Conveniens

Plaintiffs appeal from the decision of the district court to dismiss for *forum non conveniens.* The grant or denial of a motion to dismiss for *forum non conveniens* is generally committed to the district court's discretion. *See, e.g., Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir.1996). The deference accorded to a district court's discretion, however, presupposes that the court used the correct standards prescribed by the governing rule of law. *See Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 144-45 (2d Cir.2000) (quoting *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir.1991)). We believe that, as a matter of law, in balancing the competing interests, the district court did not accord proper significance to a choice of forum by lawful U.S. resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations. . . .

On appeal, plaintiffs . . . dispute the adequacy of a British forum, because three doctrines of English law–double actionability, transmissibility, and the act of state doctrine–would potentially bar a British court from reaching the subject matter of this dispute. As the parties' experts describe the British law, the doctrine of double accountability states that, with limited exceptions, torts committed in other countries are actionable in England only if they would be actionable under both English law and the

law of the country in which the act was committed.[6] The doctrine of transmissibility holds that the question whether a decedent's claims transfer to his survivors is determined by the law of the decedent's nation.[7] The act of state doctrine bars, on comity grounds, the consideration of certain claims arising out of the official actions of foreign governments.[8]

At oral argument in this court, the defendants undertook not to invoke either double actionability or transmissibility to block the plaintiffs' claims in a British court. The defendant made no such undertaking concerning the act of state doctrine. It is not clear in any event what significance to accord to such undertakings. As the policies underlying the act of state doctrine are grounded not in the rights of the parties but in comity among nations, a court may well follow the doctrine regardless whether it was advanced by the party to be benefitted. Also, as to double actionability and transmissibility, the British courts might well follow British law to determine whether an action lies and whether the plaintiff has standing to bring it, regardless whether the defendant raised an argument based on these doctrines. . . .

We need not resolve these issues. We regard the British courts as exemplary in their fairness and commitment to the rule of law. Furthermore, we assume *arguendo* that there are no rules of British law that would prevent a British court from reaching the merits. We believe the order of dismissal must nonetheless be reversed as the defendants have not established . . . that the pertinent factors tilt sufficiently strongly in favor of trial in the foreign forum.

In our view, the district court failed to give weight to three significant considerations that favor retaining jurisdiction for trial: (1) a United States resident plaintiff's choice of forum, (2) the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights, and (3) the factors that led the district court to dismiss in favor of a British forum were not particularly compelling. For the reasons developed below, we believe that they are outweighed by the considerations favoring exercise of the court's jurisdiction. . . .

In *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir.1998), we recognized the plaintiff's argument that "to dismiss ... [a claim pursuant to the ATCA under *forum non conveniens*] would frustrate Congress's intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations." We expressed "no view" on the question but directed the District Court to consider the issue on remand. *Id.* In this case, the issue is again advanced (in slightly different form, as *Jota* did not involve torture and the defendants in this case are not domestic entities).

Dismissal on grounds of *forum non conveniens* can represent a huge setback in a plaintiff's efforts to seek reparations for acts of torture. Although a *forum non conveniens* dismissal by definition presupposes the existence of another forum where the suit may be brought, *see Jota*, 157 F.3d at 158-59, dismissal nonetheless requires the

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6. On the doctrine of double actionability, the parties refer primarily to *Phillips v. Eyre*, 1870 L.R. 6 Q.B. 1, and Dicey & Morris, *Conflict of Laws* 1480 *et seq.* (12th ed.1993).

7. On transmissibility, the parties refer to Dicey & Morris, *supra* note 6, at 1521.

8. The parties cite to numerous sources discussing the contours of the act of state doctrine. *See, e.g., Luthor v. Sagor* 1921 3 K.B. 532, 548; *Buttes Gas and Oil Co. v. Hammer (Nos. 2 & 3)*, 1981 3 All ER 616; Dicey & Morris, *supra* note 6, at 108-11, 996-97; Dame Rosalyn Higgins, *Problems & Process* 212 (1994). Subsequent to the briefing in this case, the House of Lords decided the twin appeals arising out of the arrest of Chilean Senator and former General Augusto Pinochet. The parties submitted a copy of that decision and letter briefs debating its meaning. *See generally Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* and *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (House of Lords Mar. 24, 1999) (appeals from divisional courts of the Queen's Bench Division).

plaintiff to start over in the courts of another nation, which will generally at least require the plaintiff to obtain new counsel, as well as perhaps a new residence. . . .

In our view, however, the defendants have offered only minimal considerations in support of an English forum. This is not a case like *Piper* where there is an obviously better suited foreign forum for the adjudication of the dispute. *See Piper*, 454 U.S. at 238-39, 102 S.Ct. 252 (dismissal of case so that it could be litigated in Scotland, site of plane crash). Nor does it involve substantial physical evidence that is difficult or expensive to transport. *Cf., e.g., id.* at 242-43, 102 S.Ct. 252 (plane crash in Scotland); *In re Union Carbide*, 809 F.2d 195 (environmental disaster in India). For any nonparty witnesses, the inconvenience of a trial in New York is not significantly more pronounced than the inconvenience of a trial in England. . . .

We therefore remand to the district court for further proceedings. Because the district court dismissed for *forum non conveniens*, it never considered the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.[15] We remand for consideration of that motion.

NOTE AND QUESTIONS

Voluntary guidelines or codes of conduct such as the International Labor Organization's Tripartite Declaration[1] and the OECD Guidelines[2] have existed for decades, with little impact. Occasionally, individual multinationals have created internal codes of conduct. A working group of the U.N. Sub-Commission for the Promotion and Protection of Human Rights has tried to develop more specifically articulated human rights "norms" for non-state economic actors. The Sub-Commission indicated that the norms "do not create new legal obligations," but instead "simply codify and distill existing obligations under international law as they apply to companies."[3] Excerpts from the norms appear below. To what extent do these clarify the responsibility of Considerable Corp. and its subsidiary Considerate Co. in their business activities with in Nusquam? What would Considerable and/or Considerate have to do to comply with the Norms?

NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS

U.N. Comm. on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 Aug. 2003)

A. General obligations

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15. Defendants also urged below that the Netherlands was an adequate alternative forum and more convenient than the United States. Although the district court did not rule on the defendants' request for dismissal in favor of a Dutch forum, we need not remand for consideration of this question, because dismissal in favor of trial in the Netherlands would share the disadvantages that have led us to reject the dismissal in favor of trial in England.

1. International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977), available at http://www.ilo.org/public/english/standards/norm/sources/mne.htm.

2. Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* 21 (2000), available at http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html.

3. Report of the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Hum. Rts. Comm., 60th Sess., Agenda Item 16, at 1 (2004).

1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

B. Right to equal opportunity and non-discriminatory treatment

2. Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age - except for children, who may be given greater protection - or other status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups.

C. Right to security of persons

3. Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

4. Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

D. Rights of workers

5. Transnational corporations and other business enterprises shall not use forced or compulsory labour as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

6. Transnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

7. Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law.

8. Transnational corporations and other business enterprises shall provide workers with remuneration that ensures an adequate standard of living for them and their families. Such remuneration shall take due account of their needs for adequate living conditions with a view towards progressive improvement.

9. Transnational corporations and other business enterprises shall ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes as provided in national legislation and the relevant conventions of the International Labour Organization.

E. Respect for national sovereignty and human rights

10. Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.

11. Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization. Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights. They shall further seek to ensure that the goods and services they provide will not be used to abuse human rights.

12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

F. Obligations with regard to consumer protection

13. Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.

G. Obligations with regard to environmental protection

14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

H. General provisions of implementation

15. As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

16. Transnational corporations and other business enterprises shall be subject to

periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non-governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other business enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.

17. States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.

18. Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

19. Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law, nor shall they be construed as diminishing, restricting, or adversely affecting more protective human rights norms, nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights.

I. Definitions

20. The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.

21. The phrase "other business enterprise" includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.

22. The term "stakeholder" includes stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. The term "stakeholder" shall be interpreted functionally in the light of the objectives of these Norms and include indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation or business enterprise. In addition to parties directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations or other business enterprises such as consumer groups, customers, Governments, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations, and others.

23. The phrases "human rights" and "international human rights" include civil,

cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.

QUESTION

Host country liability for activities of multinationals operating within its jurisdiction. Complicity obviously may run in two directions–the multinational may be complicit with the host country in the latter's human rights violation, but the host country may be considered complicit in the actions of the multinational. Assume that Considerate, incorporated under the laws of Nusquam and operating an industrial plant there, maintains dangerous conditions that may be responsible for a series of deaths and life-threatening health problems for among the plant workers. Apparently in an effort to ensure that the plant continues to provide employment in the province in which it is located, the Nusquami Ministry of Justice has prevented health inspectors from the Ministry of Health from opening an investigation concerning Considerate's plant. Under what circumstances might Nusquam be held responsible for the activities of a multinational operating within its territory? Consider the following cases.

VELASQUEZ RODRIGUEZ v. HONDURAS

Inter-American Court of Human Rights (ser. C) No. 4, (1988),
available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm

[According to a petition filed with the Inter-American Commission on Human Rights and supplementary information received subsequently, Manfredo Velasquez Rodríguez, a student at the National Autonomous University of Honduras, "was violently detained without a warrant for his arrest by members of the National Office of Investigations (DNI) and G-2 of the Armed Forces of Honduras." According to the petitioners, several eyewitnesses reported that Manfredo Velasquez and others were detained and taken to the cells of Public Security Forces Station No. 2 located in the Barrio E1 Manchen of Tegucigalpa, where he was "accused of alleged political crimes and subjected to harsh interrogation and cruel torture." The petition added that Manfredo Velásquez was later moved to the First Infantry Battalion, where the interrogation continued, but that the police and security forces denied that he had been detained.

[After transmitting the relevant parts of the petition to the Honduran Government, the Commission on various occasions requested information on the matter. The Commission received no reply. It pointed out to the Government "that such acts are most serious violations of the right to life (Art. 4) and the right to personal liberty (Art. 7) of the American Convention."

[The Government later requested reconsideration on the grounds that domestic remedies had not been exhausted, that the National Office of Investigations had no knowledge of the whereabouts of Manfredo Velásquez, that the Government was making every effort to find him, and that there were rumors that Manfredo Velásquez was "with Salvadoran guerrilla groups." In the course of its decision, the InterAmerican Court addressed the question of the Honduran Government's responsibility, under the circumstances presented by the facts of the case, for the criminal acts of private persons.]

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

178. In the instant case, the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to carry out an investigation into the disappearance of Manfredo Velásquez, and of the fulfillment of its duties to pay compensation and punish those responsible, as set out in Article 1(1) of the Convention.

179. As the Court has verified above, the failure of the judicial system to act upon the writs brought before various tribunals in the instant case has been proven. Not one writ of habeas corpus was processed. No judge had access to the places where Manfredo Velasquez might have been detained. The criminal complaint was dismissed.

180. Nor did the organs of the Executive Branch carry out a serious investigation to establish the fate of Manfredo Velasquez. There was no investigation of public allegations of a practice of disappearances nor a determination of whether Manfredo Velásquez had been a victim of that practice. The Commission's requests for information were ignored to the point that the Commission had to presume, under Article 42 of its Regulations, that the allegations were true. The offer of an investigation in accord with Resolution 30/83 of the Commission resulted in an investigation by the Armed Forces,

the same body accused of direct responsibility for the disappearances. This raises grave questions regarding the seriousness of the investigation. The Government often resorted to asking relatives of the victims to present conclusive proof of their allegations even though those allegations, because they involved crimes against the person, should have been investigated on the Government's own initiative in fulfillment of the State's duty to ensure public order. This is especially true when the allegations refer to a practice carried out within the Armed Forces, which, because of its nature, is not subject to private investigations. No proceeding was initiated to establish responsibility for the disappearance of Manfredo Velásquez and apply punishment under internal law. All of the above leads to the conclusion that the Honduran authorities did not take effective action to ensure respect for human rights within the jurisdiction of that State as required by Article 1(1) of the Convention.

181. The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.

182. The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.

183. The Court notes that the legal order of Honduras does not authorize such acts and that internal law defines them as crimes. The Court also recognizes that not all levels of the Government of Honduras were necessarily aware of those acts, nor is there any evidence that such acts were the result of official orders. Nevertheless, those circumstances are irrelevant for the purposes of establishing whether Honduras is responsible under international law for the violations of human rights perpetrated within the practice of disappearances.

184. According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred.

185. The Court, therefore, concludes that the facts found in this proceeding show that the State of Honduras is responsible for the involuntary disappearance of Angel Manfredo Velásquez Rodríguez. Thus, Honduras has violated Articles 7, 5 and 4 of the Convention.

186. As a result of the disappearance, Manfredo Velasquez was the victim of an arbitrary detention, which deprived him of his physical liberty without legal cause and without a determination of the lawfulness of his detention by a judge or competent tribunal. Those acts directly violate the right to personal liberty recognized by Article 7 of the Convention . . . and are a violation imputable to Honduras of the duties to respect and ensure that right under Article 1(1).

187. The disappearance of Manfredo Velásquez violates the right to personal integrity

recognized by Article 5 of the Convention. . . . First, the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee under Article 5(1) and 5(2) to treatment respectful of his dignity. Second, although it has not been directly shown that Manfredo Velásquez was physically tortured, his kidnapping and imprisonment by governmental authorities, who have been shown to subject detainees to indignities, cruelty and torture, constitute a failure of Honduras to fulfill the duty imposed by Article 1(1) to ensure the rights under Article 5(1) and 5(2) of the Convention. The guarantee of physical integrity and the right of detainees to treatment respectful of their human dignity require States Parties to take reasonable steps to prevent situations which are truly harmful to the rights protected.

188. The above reasoning is applicable to the right to life recognized by Article 4 of the Convention. . . . The context in which the disappearance of Manfredo Velasquez occurred and the lack of knowledge seven years later about his fate create a reasonable presumption that he was killed. Even if there is a minimal margin of doubt in this respect, it must be presumed that his fate was decided by authorities who systematically executed detainees without trial and concealed their bodies in order to avoid punishment. This, together with the failure to investigate, is a violation by Honduras of a legal duty under Article 1(1) of the Convention to ensure the rights recognized by Article 4(1). That duty is to ensure to every person subject to its jurisdiction the inviolability of the right to life and the right not to have one's life taken arbitrarily. These rights imply an obligation on the part of States Parties to take reasonable steps to prevent situations that could result in the violation of that right.

SOCIAL & ECONOMIC RIGHTS ACTION CENTRE v. NIGERIA

Decision Regarding Communication No. 155/96, African Commission on Human & Peoples' Rights, Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13-27 October 2001.

1. The Communication[, Comm. No. 155/96 (Oct. 2001),] alleges that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.

2. The Communication alleges that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.

3. The Communication alleges that the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies. The Communication contains a memo from the Rivers State Internal Security Task Force, calling for "ruthless military operations".

4. The Communication alleges that the Government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The Government has withheld from Ogoni Communities information on the dangers created by oil activities. Ogoni Communities have not been involved in the decisions affecting the development of Ogoniland.

5. The Government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni Communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders.

6. The Communication alleges that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.

7. The Communication alleges that in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air-force, and the navy, armed with armoured tanks and other sophisticated weapons. In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-type methods and the calibre of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces. The complete failure of the Government of Nigeria to investigate these attacks, let alone punish the perpetrators, further implicates the Nigerian authorities.

8. The Nigerian Army has admitted its role in the ruthless operations which have left thousands of villagers homeless. The admission is recorded in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which has devoted itself to the suppression of the Ogoni campaign. One such memo calls for "ruthless military operations" and "wasting operations coupled with psychological tactics of displacement". At a public meeting recorded on video, Major Okuntimo, head of the Task Force, described the repeated invasion of Ogoni villages by his troops, how unarmed villagers running from the troops were shot from behind, and the homes of suspected MOSOP activists were ransacked and destroyed. He stated his commitment to rid the communities of members and supporters of MOSOP.

9. The Communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni Communities.

10. The communication alleges violations of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter. . . .

35. . . . Only the exhaustion of local remedies requires close scrutiny.

36. Article 56(5) requires that local remedies, if any, be exhausted, unless these are unduly prolonged.

37. One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels. Where a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not arise. Similarly, if the right is not well provided for, there cannot be effective remedies, or any remedies at all.

38. Another rationale for the exhaustion requirement is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. . . . The exhaustion of domestic remedies requirement should be properly understood as ensuring that the State concerned has ample opportunity to remedy the situation of which applicants complain. It is not necessary here to recount the international attention that Ogoniland has received to argue that the Nigerian government has had ample notice and, over the past several decades, more than sufficient opportunity to give domestic remedies. . . .

40. The present communication does not contain any information on domestic court actions brought by the Complainants to halt the violations alleged. However, the Commission on numerous occasions brought this complaint to the attention of the government at the time but no response was made to the Commission's requests. In such cases the Commission has held that in the absence of a substantive response from the Respondent State it must decide on the facts provided by the Complainants and treat them as given. . . .

41. The Commission takes cognisance of the fact that the Federal Republic of Nigeria has incorporated the African Charter on Human and Peoples' Rights into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including those violations alleged by the Complainants. However, the Commission is aware that at the time of submitting this communication, the then Military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts and thus depriving the people in Nigeria of the right to seek redress in the courts for acts of government that violate their fundamental human rights. In such instances, and as in the instant communication, the Commission is of the view that no adequate domestic remedies are existent. . . .

42. It should also be noted that the new government in their Note Verbale . . . admitted to the violations committed then by stating, "there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area".

43. The present Communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter for Human and Peoples' Rights. Before we venture into the inquiry whether the Government of Nigeria has violated the said rights as alleged in the Complaint, it would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves.

44. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of

convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.[2]

45. At a primary level, the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.[3] With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

46. At a secondary level, the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

47. The last layer of obligation requires the State to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).

48. Thus States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights, for instance, under Article 2(1), stipulates exemplarily that States "*undertake to take steps…by all appropriate means, including particularly the adoption of legislative measures.*" Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties. Whether the government of Nigeria has, by its conduct, violated the provisions of the African Charter as claimed by the Complainants is examined here below. . . .

50. The Complainants allege that the Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfill the minimum duties required by these rights. This, the Complainants allege, the government has done by:

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2. See generally, Asbjørn Eide, "Economic, Social and Cultural Rights As Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (Eds.) *Economic, Social, and Cultural Right: A Textbook* (1995) PP. 21-40.

3. Krzysztof Drzewicki, "Internationalization of Human Rights and Their Juridization" in Raija Hanski and Markku Suksi (Eds.), Second Revised Edition, *An Introduction to the International Protection of Human Rights: A Textbook* (1999), p. 31.

– Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population,

– Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage,

– Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations.

Article 16 of the African Charter reads:

"(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
(2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

Article 24 of the African Charter reads:

"All peoples shall have the right to a general satisfactory environment favourable to their development."

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."[7]

52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.[8]

53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and

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7. Human Rights in the Twenty first Century: A Global Challenge Edited by Kathleen E. Mahoney and Paul Mahoney. Article by Alexander Kiss " Concept and Possible Implications of the Right to Environment at page 553.

8. *See* Scott Leckie " the Right to Housing " in Economic, social and cultural rights (ed) Eide, Krause and Rosas, Martinus Nijhoff Publishers 1995.

social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities. . . .

55. The Complainants also allege a violation of Article 21 of the African Charter by the government of Nigeria. The Complainants allege that the Military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland. The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21. . . .

57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties (*See Union des Jeunes Avocats /Chad*). This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velàsquez Rodríguez v. Honduras*. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in *X and Y v. Netherlands*.[12] In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

58. The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter. . . .

D. POSSIBLE INTERNATIONAL RESOLUTIONS

Procedural and jurisdictional approaches can resolve some of the types of disputes featured in the preceding sections. Sometimes, however, it is necessary to deal directly with substance, and there is a growing effort to achieve *multilateral* codes of conduct to govern *multinational* corporate behavior. These are being pursued in quantity in a number of international fora, particularly the United Nations. The typical pattern has been for developing nations to seek a code much along the lines of Andean Pact Decision No. 24. The developed nations, particularly the United States, have resisted

12. 91 ECHR (1985) (Ser. A) at 32.

this direction. Sometimes they have emphasized the importance of foreign investment as a method of economic development; sometimes they have simply sought to weaken proposals for a code. In contrast, however, the United States, under competitive pressure from its Foreign Corrupt Practices Act, did seek international agreement against corruption.

In spite of these tensions, there have been some agreements; the OECD Guidelines, reproduced in the Selected Documents Supplement, are among the most important. The ECONOMIST article that follows is intended to describe the political context of the Guidelines. As shown in the succeeding excerpt, they have also been the basis for new kinds of dispute settlement. Other examples include the 1977 International Labor Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the 1980 UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, reproduced in the Selected Documents Supplement, and the pending U.N. Code of Conduct for Transnational Corporations (UN Doc. E/C. lO/1983/c/2 (1983), *reprinted in* 22 LL.M. 177 (1983). *See also* Draft Code of Conduct on Transnational Corporations, 23 LL.M. 616 (1984).

MULTINATIONAL MUMMERY

The Economist, June 26, 1976, at 61

The New OECD Code of Conduct for Multinational Companies Is Unnecessarily Weak

With trumpet and drums, the rich countries grouped in the Organisation for Economic Co-operation and Development this week brought out their code of conduct for multinational companies. It is the outcome of some twenty years' thinking, on and off–mainly off–but all it deserved was a tin whistle.

The drafts of the code that were circulating last winter were mild enough. They said firmly that the code was to be a voluntary one. This is sensible. Many third world countries would like the code that the United Nations plans to draw up (by early 1978, it hopes) to be legally enforceable. But there is no prospect the rich countries will agree–and without their agreement, any code will merely spell out, probably in extreme terms, things that any country is free individually to pass into law tomorrow morning if it wishes. The OECD drafts, again unlike those that the tougher members of the third world are hoping for, were also sensible in not seeking to lay down such fierce standards that the multinational goose would simply decide to lay its eggs at home, But these early OECD drafts nonetheless set a respectable standard of conduct for the multinationals; one that good companies would meet fairly easily, but that could well worry some not so good.

In contrast the code that ministers approved at the OECD meeting in Paris this week had been systematically bowdlerised to make observance easier. The trade unions of the OECD countries were already unhappy at the scant attention paid to their views in the early drafts; the best thing they could find to say for the final version (and the Nordic unions were unhappy even to say this) was that it was a first step to something tougher.

The changes of substance were not all significant. The spirit they were made in is. Three examples of that spirit, and one could cite a great many more:

- Even the implication that a concentration of economic power could (not must, just perhaps sometimes could), in itself, be too great has been excised.
- Multinationals were asked, in the earlier drafts, to observe labour-relations standards at

least as favourable as those of "good local" employers–as most, in fact, do. This has become "comparable" employers: *i.e.*, if your competitors are bastards go ahead and be one too?

• The multinationals are still asked to supply more information than most do today. But this request has been toned down with special care.

The one section that has been notably strengthened is the one on bribery–a subject of special concern to the United States, Indeed Mr. Kissinger in Paris repeated an earlier proposal that the United Nations should promptly set to work on a binding agreement on the issue–with some other Kissinger proposals, a useful smokescreen for the fact that the chief foot dragger over the whole OECD code has been the American government (with some Trojan-horse help recently from the AFL-CIO, which in March rejoined the OECD's trade-union advisory committee). But don't blame America alone: under its wing, the British and West German governments, ever so keen on corporate responsibility and disclosure at home, also found it convenient to appease their own multinationals, as, more naturally, did the Japanese. But for the Nordic governments, with the voice of' Sweden and backing from the Dutch, the code's last plastic teeth would have been drawn.

A good thing too, many respectable multinationals would say. Many of their good friends, including this newspaper, must disagree. If you don't want silly codes, miles in advance of the real world, then don't provide ammunition for these who do by taking the (nonmandatory) teeth out of sensible codes which are just that little bit ahead of some people's practice that sensible codes ought to be.

SMITH, BADGER REVISITED: IMPLICATIONS FOR THE IMPLEMENTATION OF THE TRANSFER OF TECHNOLOGY CODE

1 INT'L TAX & BUS. LAW. 117, 125-130 (1983)

II. The Badger Case

The Badger case[40] has been called an "historic precedent" in that it was the first time the [OECD] Guidelines were successfully invoked and their implementation machinery effectively utilized against an MNE [Multinational Enterprise] operating in an OECD member country. The case arose in January, 1977, when Badger, Inc., an American MNE headquartered in Cambridge. Massachusetts and owned by Raytheon, Inc., ordered the closure of its Belgian subsidiary, Badger Belgium N.V. The subsidiary did not supply adequate notice of the closing to its employees, and its assets were insufficient to satisfy the termination payments to which the employees were entitled tinder Belgian law. The employees could have drawn upon a fund financed by employer's contributions to satisfy a substantial part of their claims. However, their belief that the U.S. parent had manipulated Badger's income to induce its bankruptcy persuaded them to forego payment from the fund and to insist as a matter of principle that Badger International make good the shortfall. The employees felt that to do otherwise would be to allow a financially robust MNE to rely on the legal technicality of separate incorporation to shift its social and moral obligations to the Belgian community. When

40. See generallv R. BLANPAIN, THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES at 51-132 (1977).

Badger Inter national refused to supplement its subsidiary's assets in order to accommodate the staff termination indemnities, the employee's union contacted TUAC (Trade Union Advisory Committee—a labor group associated with the OECD) with a view to invoking the Guidelines.

The question raised by the Badger case was whether a parent corporation was obliged by virtue of the Guidelines to pay that part of the severance indemnities which its wholly owned and controlled subsidiary could not meet and which it was not required to pay under the law of either the host or home countries. Badger International contended that the obligation under the Guidelines to mitigate the adverse effects caused by the closure of an enterprise applied only to the local entity and not to the multinational as a unit. This position brought directly into question the scope of the Guidelines and the proper interpretation of paragraph B of their Introduction.

TUAC played an active role in attempting to settle the Badger case outside the OECD framework, and when that failed, in guiding the case through the OECD consultation procedures to a favorable outcome. Despite this shift in tactics, TUAC's objective to effect a negotiated settlement amid mounting pressure on Badger remained constant. Outside the OECD, TUAC's attempt to resolve the dispute involved coordinated activities at the national level among representatives of labor, management, and the Belgian Government, at the bilateral level between the Belgian and U.S. Governments, and at the international level through the involvement of foreign trade unions, the international trade union movement, and Badger International's management. Although efforts at these levels failed to produce a settlement, they nonetheless had a cumulative effect that facilitated resolution of the dispute once resort to the OECD became unavoidable.

At the bilateral level, TUAC appealed directly to the Belgian and U.S. Governments. The Belgian Government's involvement in the case was the key to the employee's success, and will be examined below. As part of its approach to the U.S. Government, TUAC asked the Belgian Prime Minister to try to persuade the U.S. Government to cooperate. TUAC calculated that the Badger case's potential repercussions would be perceived in Washington as jeopardizing American interests in maintaining a liberal investment climate in Europe, and therefore as warranting action. Although the U.S. Government was responsible for encouraging American MNEs to comply with the Guidelines, its earlier insistence on the voluntary nature of the Guidelines foreclosed the possibility of its active intervention. Thus, while the State Department went so far as to suggest that Badger reconsider its position in the light of the Guidelines, in the end the Government "could hardly do more than play an informative role." The U.S. Government had apparently determined that America's broader interest in preserving a tranquil investment environment in Europe was best served by maintaining a low profile in the dispute.

A second course of action attempted to force Badger to settle by focusing trade union pressure on the company's affiliates operating in Europe. TUAC's ties to its constituent unions and to the International Trade union movement ensured the necessary trade union backing outside Belgium. TUAC urged its member unions in Britain and Denmark, where Badger affiliates resided, to intervene on behalf of their fellow workers in Belgium. The Dutch unions, for instance, were asked to adopt the position that Badger, The Hague was implicated in Badger's violation of the Guidelines due to the dependency of the Antwerp affiliate on The Hague office. It followed that Badger, The Hague shared responsibility with the American parent to pay the indemnity owed the dismissed Belgian employees. TUAC also coordinated with the World Confederation of Labor

whose representative took the case to the American Embassy in Bmssels while its Federation of Non-Manual Workers informed Badger headquarters of the Federation's view on the social obligations of Badger International in regard to the severance pay. In the end, trade union pressure was sufficient to bring about a meeting with Badger's management on February 21, 1977, but it was not enough to compel the multinational to change its position.

Having made little headway in settling the dispute through these conventional means, the unions decided to resort to th.e OECD consultation procedures. The Secretary General of TUAC introduced the Badger case to CIME [Committee on International Investment and Multinational Enterprise–a management group associated with the OECD] in a note of March 24, 1977 that reviewed the facts and the efforts that had been made to effect a solution. The Secretary General emphasized the significance of Badger as a test case for the credibility and future effectiveness of the Guidelines. He noted that "[a]s a result of developments in the Badger case, the Belgian trade unions and political authorities, as well as the employers' organizations and foreign enterprises in Belgium, are confronted with a situation, that directly challenges the authority of the OECD and its Member Governments." He warned that the absence of tangible results would be seen by Belgian public opinion "as an attack on the legislation and current practice regarding employment and labor relations in Belgium" and as a loophole in the OECD Guidelines and consultation procedures.

The OECD consultation mechanism was officially triggered by the Belgian Ambassador to the OECD in his request on March 18 for an exchange of views concerning the interpretation of the sections of the Guidelines relevant to the Badger case. At the ensuing CIME meeting on March 31, 1977, the Belgian Government's view that the parent company was under a duty to assist the local entity in observing its obligations was amplified by Professor Dr. M. Eyskens, the Belgian Secretary of State for Regional Economic Development. His presence at the meeting underlined the importance attached to the proceedings by the Belgian government. Following Dr. Eyskens' presentation, the Committee held a discussion in which twelve countries participated. The Committee accepted the Belgian Government's version of the facts and used it as an illustration to facilitate examination and clarification of the Guidelines' text. In view of its mandate, CIME tried not to focus on the merits of the case or pass upon the conduct of the parties to the dispute. The Committee's conclusions were not immediately and formally released as an official opinion. Instead, their dissemination was left largely to the Belgian Government, which moved quickly to press its interpretation of events on the media. A month after the CIME consultation, the conclusions drawn from the debate by the Belgian Government were published in the OECD Observer, the Organization's monthly magazine. It was not until the publication of the 1979 CIME review report to the OECD Council that the official views of the Committee regarding the Badger case were made known. By this time, the outcome of the meeting had already been profusely hailed by the Belgian news media "as a moral condemnation of the Badger company.

CIME's conclusions amounted to an endorsement of the Belgian Government's position, and can be reduced for present purposes to three propositions. First, "[t]o the extent that parent companies actually exercise control over the activities of their subsidiaries they have a responsibility for the observance of the Guidelines by those subsidiaries." Second, "multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant for both." Third, the question of the responsibility of parent companies for certain financial

obligations of their subsidiaries "as a matter of good management practice . . . consistent with observance of the Guidelines, could arise in special circumstances," particularly in those "relating to important changes in the operations of a firm and the cooperation as to the mitigation of resulting adverse effects." In other words, the Guidelines may place moral obligations on a parent company that exceed what is strictly required by law. Based on the outcome of the CIME consultation, meetings among representatives of the Belgian Government, Badger's international management, and the unions took place under the chairmanship of Secretary of State Eyskens. The meetings ended in a negotiated settlement favorable to the former Badger employees. . . .

NOTES AND QUESTIONS

1. Does the OECD Code face any of the more difficult issues posed by the Vredeling proposal and the Works Council directive that eventually replaced it?

2. Was Canada's FIRA consistent with it? What about the U.S. position in the Soviet gas pipeline dispute?

3. Has CIME effectively become an international court? How relevant were the Code's principles to the resolution of the Badger controversy? The fundamental appeal of the workers' position? The availability of the CIME?

4. How important is the difference between "binding" and "voluntary" guidelines?

5. Note that the OECD and U.N. contexts are not the only places in which components of an effective code of conduct might be negotiated. What approaches and forums might you consider for the following:

a. Coordination issues that lead to awkward conflicts but are fundamentally neutral as between the firm and governments–examples include harmonization of accounting principles;

b. Issues in which a government can take advantage of and possibly hurt other nations–*e.g.*, child labor laws, "pollution havens," or perhaps bank secrecy havens;

c. Issues in which the regulator's personal interest may be opposed to his or her nation's public interest–*e.g.*, anti-corruption rules;

d. Issues in which global optimization and the short-term interests of specific nations may be really in conflict–*e.g.*, industrial policy, efforts to prevent runaway shops;

e. Issues of the political role of multinationals, such as the possible adverse effects on democracy that are frequently alleged by critics.

6. In a joint venture, local and foreign entities join in the firm's legal control and sometimes its practical control. When is this approach likely to be helpful in avoiding or resolving disputes?

7. In what ways does the effective statelessness of some MNs make dispute settlement easier or harder?

8. Now, what would be the possibility and the wisdom of requiring those subsidiaries of U.S. firms operating in South Africa to live up to specified labor standards? In what ways is this approach better or worse than prohibiting the firms from operating in South Africa?

9. *Draft Multilateral Agreement on Investment*. Regulation of transborder investment has been the missing feature in international trade law since the beginning of the post-

war GATT period.[1] The Uruguay Round did not produce an investment agreement, although several annexed WTO agreements did include measures that were relevant to investment, such as the Agreement on Trade-Related Investment Measures ("TRIMs"), the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), and the General Agreement on Trade in Services ("GATS").[2] Still "a large gap in the network of regulatory measures governing the world economy"[3] could have been filled by a multilateral agreement dealing specifically with international investment. The OECD initiated negotiations on a proposed Multilateral Agreement on Investment (MAI) in 1995. By May 1998, the OECD had failed to produce a final draft, and on 4 December 1998 it announced that MAI negotiations were no longer taking place.[4]

10. *NAFTA.* In 1994 the North American Free Trade Agreement (NAFTA) entered into force.[5] NAFTA created a free trade area, eliminating tariffs on trade in goods between participants in the area, but it also embraces an extensive range of important issues concerning investment activities across member state borders.[6] These provisions include coverage of investment and investment disputes in Chapter 11; trade in services in Chapter 12; and, member state regulation of financial services in Chapter 14. Provisions of Chapter 11 are selectively incorporated into Chapter 14. While Chapter 12 applies generally to services, imposing national treatment and most favored nation (MFN) obligations on trade in services between NAFTA member states, it excludes *financial* services from its scope. These are covered primarily by Chapter 14. Chapter 11 includes provisions for binding arbitration of investment disputes between a host NAFTA member state and an investing NAFTA country resident that is a national of another NAFTA member state. By its own terms, Chapter 11 "does not apply to measures adopted or maintained by a [member state] to the extent that they are covered by Chapter Fourteen. . . ."[7] However, Chapter 14 itself expressly incorporates by reference articles 1109 through 1111, 1113 and 1114, and makes them "a part of" Chapter 14.[8] These incorporated provisions require free and undelayed transfers relating to investments;[9] establish minimum legal standards for expropriations[10] and special formalities and information requirements;[11] permit denial of NAFTA investment protections in certain cases where investors of a non-member state own or control an enterprise that is itself an investor of a member state;[12] and, clarify the environmental regulatory authority of the member states with respect to "any measure otherwise consistent with" Chapter 11.[13] Chapter 14 also incorporates by reference the dispute settlement provisions of Chapter 11,[14] but "solely for breaches" by a member state of the

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1. *See* Samuel K. B. Asante, *International Law and Investments*, in MOHAMMED BEDJAOUI (ed.), INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 667-90 (1991).

2. *See generally* Pierre Sauvéé, *Qs and As on Trade, Investment and the WTO*, 31 J. WORLD TRADE 55 (1997).

3. Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of The Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731, 732 (1998).

4. OECD, *Informal Consultations on International Investment*, SG/COM/NEWS(98)114.

5. North American Free Trade Agreement (NAFTA), Dec. 8, 1993, 107 Stat. 2057, 32 INT'L LEGAL MAT. 289, 605 (1993) [hereinafter NAFTA].

6. *Cf.* Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391 (1993) (analyzing NAFTA coverage beyond traditional trade issues).

7. NAFTA, art. 1101, ¶ 3.

8. *Id*., art 1401, ¶ 2.

9. *Id*., art. 1109.

10. *Id*., art. 1110.

11. *Id*., art. 1111.

12. *Id*., art. 1113.

13. *Id*., art. 1114.

14. *Id*., arts. 1115-1138.

other incorporated provisions of Chapter 11 discussed previously.[15] Strictly speaking, then, Chapter 11 does not itself apply to investment activity with respect to financial services enterprises.

11. *NAFTA Chapter 11 in action*. Chapter 11 proceedings have attracted a fair amount of criticism. Staff and Lewis have observed:

> Critics in the United States and Canada complain the loudest that Chapter 11 threatens sovereignty, arguing that Chapter 11 actions threaten present signatory state regulations and chill future signatory state regulatory initiatives.[116] However, . . . U.S. and Canadian investors have brought the majority of Chapter 11 cases.[117] Five cases brought under Chapter 11 exemplify this perceived threat to sovereignty. . . .
>
> Chapter 11 critics cite *Metalclad* as an example of Chapter 11's interference with state sovereignty, particularly with respect to environmental regulation.[144] However, one critic notes that *Metalclad* may merely question which level of government has the ability to impose environmental regulations.[145]

Marcia J. Staff & Christine W. Lewis, *Arbitration under NAFTA Chapter 11: Past, Present, and Future*, 25 HOUS. J. INT'L L. 301, 318-319, 322 (2003). As represented by the excerpts from *Metalclad, infra*, do you think that the application of Chapter 11 to investment disputes "threatens sovereignty," or does it simply give a necessary level of procedural and substantive protection to foreign direct investment?

METALCLAD CORP. v. UNITED MEXICAN STATES

International Centre For Settlement of Investment Disputes (AdditionalFacility), Case No. Arb(AF)/97/1 (Aug. 30, 2000), *reprinted in*, 40 I.L.M. 36 (2001)

I. Introduction

1. This dispute arises out of the activities of the Claimant, Metalclad Corporation (hereinafter "Metalclad"), in the Mexican Municipality of Guadalcazar (hereinafter "Guadalcazar"), located in the Mexican State of San Luis Potosi (hereinafter "SLP"). Metalclad alleges that Respondent, the United Mexican States (hereinafter "Mexico"), through its local governments of SLP and Guadalcazar, interfered with its development and operation of a hazardous waste landfill. Metalclad claims that this interference is a violation of the Chapter Eleven investment provisions of the North American Free Trade Agreement (hereinafter "NAFTA"). In particular, Metalclad alleges violations of (i) NAFTA, Article 1105, which required each Party to NAFTA to "accord to investments of investors of another Party treatment in accordance with international law, including

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15. *Id*., art. 1401, ¶ 2.

116. *See, e.g.*, Harry W. Arthurs, *The State We're in: Legal Education in Canada's New Political Economy*, 20 WINDSOR Y.B. ACCESS TO JUST. 35, 40 (2001) (arguing that Chapter 11 is the most notorious example of an unwritten neoliberal constitution that prioritizes trade above all other considerations); Murray Dobbin, *Mulroney Baloney*, at http://www.pl.net/8politics/ baloney.html (posted July 16, 2001) (arguing that Chapter 11 is too broad by allowing companies to challenge governmental decision-making); . . . Public Citizen, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy: Lessons for Fast Track and the Free Trade Area of the Americas*, at http:// www.citizen.org/publications/release.cfm?IDW7076 [hereinafter Bankrupting Democracy] (arguing that Chapter 11 gives corporations too much power at the expense of environmental and other regulations).

117. U.S. and Canadian investors brought twenty-six of the twenty-eight cases cited. . . . Only two cases have resulted in payments to investors--both of whom were from the United States. . . .

144. *See, e.g.*, . . . Public Citizen, supra note 116, at 10-14.

145. [Terri L. Lilley, *Keeping NAFTA "Green" for Investors and the Environment*, 75 S. CAL. L. REV. 727], 733 [(2002)].

fair and equitable treatment and full protection and security"; and (ii) NAFTA, Article 1110, which provides that "no Party to NAFTA may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6". Mexico denies these allegations.

II. The Parties

A. The Claimant

2. Metalclad is an enterprise of the United States of America, incorporated under the laws of Delaware. Eco-Metalclad Corporation (hereinafter "ECO") is an enterprise of the United States of America, incorporated under the laws of Utah. Eco is wholly-owned by Metalclad, and owns 100% of the shares in Ecosistemas Nacionales, S.A. de C.V. (hereinafter "ECONSA), a Mexican corporation. In 1993, ECONSA purchased the Mexican company Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. (hereinafter "COTERIN") with a view to the acquisition, development and operation of the latter's hazardous waste transfer station and landfill in the valley of La Pedrera, located in Guadalcazar. COTERIN is the owner of record of the landfill property as well as the permits and licenses which are at the base of this dispute.

3. COTERIN is the "enterprise" on behalf of which Metalclad has, as an "investor of a Party", submitted a claim to arbitration under NAFTA, Article 1117. . . .

B. The Respondent

5. The Respondent is the Government of the United Mexican States. . . .

V. Facts and Allegations

A. The Facilities at Issue

28. In 1990 the federal government of Mexico authorized COTERIN to construct and operate a transfer station for hazardous waste in La Pedrera, a valley located in Guadalcazar in SLP. The site has an area of 814 hectares and lies 100 kilometers northeast of the capital city of SLP, separated from it by the Sierra Guadalcazar mountain range, 70 kilometers from the city of Guadalcazar. Approximately 800 people live within ten kilometers of the site.

29. On January 23, 1993, the National Ecological Institute (hereinafter "INE"), an independent sub-agency of the federal Secretariat of the Mexican Environment, National Resources and Fishing (hereinafter "SEMARNAP"), granted COTERIN a federal permit to construct a hazardous waste landfill in La Pedrera (hereinafter "the landfill").

B. Metalclad's Purchase of the Site and its Landfill Permits

30. Three months after the issuance of the federal construction permit, on April 23, 1993, Metalclad Entered into a 6-month option agreement to purchase COTERIN together with its permits, in order to build the hazardous waste landfill.

31. Shortly thereafter, on May 11, 1993, the government of SLP granted COTERIN a state land use permit to construct the landfill. The permit was issued subject to the condition that the project adapt to the specifications and technical requirements indicated by the corresponding authorities, and accompanied by the General Statement that the license did not prejudge the rights or ownership of the applicant and did not authorize works, constructions or the functioning of business or activities.

32. One month later, on June 11 1993, Metalclad met with Governor of SLP to discuss the project. Metalclad asserts that at this meeting it obtained the Governor's support for the project. In fact, the Governor acknowledged at the hearing that a

reasonable person might expect that the Governor would support the project if studies confirmed the site as suitable or feasible and if the environmental impact was consistent with Mexican standards.

33. Metalclad further asserts that it was told by the President of the INE and the General Director of the Mexican Secretariat of Urban Development and Ecology (hereinafter "SEDUE")[3] that all necessary permits for the landfill had been issued with the exception of the federal permit for operation of the landfill. A witness statement submitted by the President of the INE suggests that a hazardous waste landfill could be built if all permits required by the corresponding federal and state laws have been acquired.

34. Metalclad also asserts that the General Director of SEDUE told Metalclad that the responsibility for obtaining project support in the state and local community lay with the federal government.

35. On August 10, 1993, the INE granted COTERIN the federal permit for operation of the landfill. On September 10, 1993, Metalclad exercised its option and purchased COTERIN, the landfill site and the associated permits.

36. Metalclad asserts it would not have exercised its COTERIN purchase option but for the apparent approval and support of the project by federal and state officials.

C. Construction of the Hazardous Waste Landfill

37. Metalclad asserts that shortly after its purchase of COTERIN, the Governor of SLP embarked on a public campaign to denounce and prevent the operation of the landfill.

38. Metalclad further asserts, however, that in April 1994, after months of negotiation, Metalclad believed that it had secured SLP's agreement to support the project. Consequently, in May 1994, after receiving an eighteen-month extension of the previously issued federal construction permit from the INE, Metalclad began construction of the landfill. Mexico denies the SLP's agreement or support had ever been obtained.

39. Metalclad further maintains that construction continued openly and without interruption through October 1994. Federal officials and state representatives inspected the construction site during this period, and Metalclad provided federal and state officials with written status reports of its progress.

40. On October 26, 1994, when the Municipality ordered the cessation of all building activities due to the absence of a municipal construction permit, construction was abruptly terminated.

41. Metalclad asserts that it was once again told by federal officials that it had all the authority necessary to construct and operate the landfill; that federal officials said it should apply for the municipal construction permit to facilitate an amicable relationship with the Municipality; that federal officials assured it that the Municipality would issue the permit as a matter of course; and that the Municipality lacked any basis for denying the construction permit. Mexico denies that any federal officials represented that a municipal permit was not required, and affirmatively states that a permit was required and that Metalclad knew, or should have known, that the permit was required.

42. On November 15, 1994, Metalclad resumed construction and submitted an application for a municipal construction permit.

43. On January 31, 1995, the INE granted Metalclad an additional federal construc-

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3. SEDUE is the predecessor organization to SEMARNAP.

tion permit to construct the final disposition cell for hazardous waste and other complimentary structures such as the landfill's administration building and laboratory.

44. In February 1995, the Autonomous University of SLP (hereinafter "UASLP") issued a study confirming earlier findings that, although the landfill site raised some concerns, with proper engineering it was geographically suitable for a hazardous waste landfill. In March 1995, the Mexican Federal Attorney's Office for the Protection of the Environment (hereinafter "PROFEPA"), an independent sub-agency of SEMARNAP, conducted an audit of the site and also concluded that, with proper engineering and operation, the landfill site was geographically suitable for a hazardous waste landfill.

D. Metalclad is Prevented from Operating the Landfill

45. Metalclad completed construction of the landfill in March 1995. On March 10, 1995, Metalclad held an "open house," or "inauguration," of the landfill which was attended by a number of dignitaries from the United State and from Mexico's federal, state and local governments.

46. Demonstrators impeded the "inauguration," blocked the exit and entry of buses carrying guests and workers, and employed tactics of intimidation against Metalclad. Metalclad asserts that the demonstration was organized at least in part by the Mexican state and local governments, and that state troopers assisted in blocking traffic into and out of the site. Metalclad was thenceforth effectively prevented from opening the landfill.

47. After months of negotiation, on November 25, 1995, Metalclad and Mexico, through two of SEMARNAP's independent sub-agencies (the INE and PROFEPA), entered into an agreement that provided for and allowed operation of the landfill (hereinafter "the Convenio")

48. The Convenio stated that an environmental audit of the site was carried out from December, 1994 through March, 1995; that the purpose of the audit was to check the project's compliance with the laws and regulations; to check the project's plans for prevention of and attention to emergencies; and to study the project's existing conditions, control proceedings, maintenance, operation, personnel training and mechanisms to respond to environmental emergencies. The Convenio also stated that, as the audit detected certain deficiencies, Metalclad was required to submit an action plan to correct them; that Metalclad did indeed submit an action plan including a corresponding site remediation plan; and that Metalclad agreed to carry out the work and activities set forth in the action plan, including those in the corresponding plan of remediation. These plans required that remediation and commercial operation should take place simultaneously within the first three years of the landfill's operation. The Convenio provided for a five year term of operation for the landfill, renewable by the INE and PROFEPA. In addition to requiring remediation, the Convenio stated that Metaclad would designate 34 hectares of its property as a buffer zone for the conservation of endemic species. The Convenio also required PROFEPA to create a Technical-Scientific Committee to monitor the remediation and required that representatives of the INE, the National Autonomous University of Mexico and the UASLP be invited to participate in that committee. A Citizen Supervision Committee was to be created. Metaclad was to contribute two new pesos per ton of waste toward social works in Guadalcazar and give a 10% discount for the treatment and final disposition of hazardous waste generated in SLP. Metaclad would also provide one day per week of free medical advice for the inhabitants of Guadalcazar through Metaclad's qualified medical personnel, employ manual labor from within Guadalcazar, and give preference to the inhabitants of Guadalcazar for technical training. Metaclad would also consult with government authorities on matters

remediation and hazardous waste, and provide two courses per year on the management of hazardous waste to personnel of the public, federal, state and municipal sectors, as well as social and private sectors.

49. Metaclad asserts that SLP was invited to participate in the process of negotiating the Convenio, but that SLP declined. The Governor of SLP denounced the Convenio shortly after it was publicly announced.

50. On December 5, 1995, thirteen months after Metalclad's application for the municipal construction permit was filed, the application was denied. In doing this, the Municipality recalled its decision to deny a construction permit to COTERIN in October 1991 and January 1992 and noted the "impropriety" of Metalclad's construction of the landfill prior to receiving a municipal construction permit.

51. There is no indication that the Municipality gave any consideration to the construction of the landfill and the efforts at the operation during the thirteen months during which the application was pending.

52. Metaclad has pointed out that there was no evidence of inadequacy of performance by Metaclad of any legal obligation, nor any showing that Metalclad violated the terms of any federal or state permit; that there was no evidence that the Municipality gave any consideration to the recently completed environmental reports indicating that the site was in fact suitable for a hazardous waste landfill; that there was no evidence that the site, as constructed, failed to meet specific construction requirements; that there was no evidence that the Municipality ever required or issued a municipal construction permit for any other construction project in Guadalcazar; and that there was no evidence that there was an established administrative process with respect to municipal construction permits in the Muncicpality of Guadalcazar.

53. Mexico asserts that Metaclad was aware through due diligence that a municipal permit might be necessary on the basis of the case of COTERIN (1991, 1992), and other past precedents for various projects in SLP.

54. Metaclad was not notified of the Town Council meeting where the permit application was discussed and rejected, nor was Metaclad given any opportunity to participate in that process. Metaclad's request for reconsideration of the denial of the permit was rejected.

55. In December 1995, shortly following the Municipality's rejection of Metaclad's permit application, the Municipality filed an administrative complaint with SEMARNAP challenging the Convenio. SEMARNAP denied the Municipality's complaint.

56. On January 31, 1996, the Municipality filed an amparo proceeding in the Mexican courts challenging SEMARNAP's dismissal of its Convenio complaint. An injunction was issued and Metaclad was barred from conducting any hazardous waste landfill operations. The amparo was finally dismissed, and the injunction lifted, in May 1999.

57. On February 8, 1996, the INE granted Metaclad an additional permit authorizing the expansion of the landfill capacity from 36,000 tons per year to 360,000 tons per year.

58. From May 1996 through December 1996, Metaclad and the State of SLP attempted to resolve their issues with respect to the operation of the landfill. These efforts failed and, on January 2, 1997, Metaclad initiated the present arbitral proceeding against the Government of Mexico under Chapter Eleven of the NAFTA.

59. On September 23, 1997, three days before the expiry of his term, the Governor issued an Ecological Decree declaring a Natural Area for the protection of rare cactus. The Natural Area encompasses the area of the landfill. Metaclad relies in part on this Ecological Decree as an additional element in its claim of expropriation, maintaining that the decree effectively and permanently precluded the operation of landfill.

60. Metaclad also alleges, on the basis of reports by Mexican media, that the Governor of SLP stated, that the Ecological Decree "definitely cancelled any possiblilty that exists of opening the industrial waste landfill of La Pedrera".

61. Metacald also asserts that a high level SLP official, with respect to the Ecological Decree and as reported by Mexican media, "expressed confidence in closing in this way, all possibilty for the United States firm Metaclad to operate its landfill in this zone, independently of the future outcome of its claim before the Arbitral Tribunals of the NAFTA treaty."

62. The landfill remains dormant. Metacalad has not sold transferred any portion of it.

63. Mexico denies each of these media accounts as they relate to the Ecological Decree.

64. Mexico also maintains that consideration of the Ecological Decree is outside the jurisdiction of the Tribunal because the Decree was enacted after the filing of the Notice of Intent of Arbitration. More particularly, Mexico argues that NAFTA, Article 1119, entitled "Notice of Intent to Submit a Claim", precludes claims for breaches that have not yet occurred, relying on the language in that Article which states that:

> "The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before a claim is submitted, which notice shall specify:
>
> * * *
>
> (b) The provisions of [the NAFTA] alleged to have been breached and any other relevant provisions.
> (c) The issues and factual basis for the claim."

Mexico further invokes NAFTA, Article 1120 which requires that six months elapse between the events giving rise to a claim and the submission of the claim. On the basis of these two Articles, Mexico argues that a claimant must ensure its claim is ripe at the time it is filed. At the same time, Mexico does not exclude the possibilty that amendments to a claim may be made. Rather, Mexico initially asserted that in order to ensure fairness and clarity, amendment of a claim or the presentation of an ancillary claim within Article 48 of the Additional Facility Rules should be the subject of a formal application and the required amendment should be stated clearly. Later, Mexico adjusted its position in its post-hearing brief in which it argues that Section B of Chapter Eleven does not contemplate the amendment of ripened claims to include post-claim events. Mexico contends that Section B of Chapter Eleven modifies the Additional Facility Rule as regards the amendment of claims and the filing of ancillary claims, making Article 48 of the additional Facility Rules inapplicable.

65. Metalclad's position is that Mexico's analysis of Articles 1119 and 1120 is artificial, and that the six month rule merely sets forth an initial rule for claim eligibility designed to foster exhaustion of pre-arbitral methods of dispute resolution. In support of its position, Metalclad invokes NAFTA, Article 1118, which provides that disputing parties should first attempt to settle a claim through consultation or negotiation. Metalclad further adduces policy reasons in support of its right to base its claim on acts occurring after submission of its Notice of Claim. First, Metalclad argues that policies related to the administration of justice support its position. In particular, it argues that an inability to rely on post-Notice of Claim acts would deprive parties of redress concerning a period during which a State might be most inclined to disregard its treaty

obligations. Second, Metalclad argues that requiring a claimant to forego or defer the airing of subsequent, related, breaches would be inconsistent with NAFTA's stated aim of creating effective procedures for the resolution of its disputes. Such an interpretation, Metalclad suggests, would create serious inefficiencies by requiring the claimant to bring related actions seriatim and that those actions would be subject to res judicata principles to a Claimant's detriment. Metalclad also argues that injustice would result because claimants will choose, for financial and other reasons, not to start a fresh NAFTA action and tribunals would be unable to consider acts of bad faith occurring during the arbitration. Third, Metalclad maintains that its view is consistent with the ICSID Arbitral Tribunal's broad jurisdiction. Metalclad points out that the texts mentioned in NAFTA, Article 1120, allow for amendment of claims and cites Article 48 of the Rules as allowing for incidental or additional claims provided that such claims are within the scope of the arbitration agreement of the parties. Metalclad concludes that the policies underlying NAFTA, Articles 1119 and 1120, are fulfilled once the appropriate periods have passed prior to submission of the claim and that the Respondent is not prejudiced by the amendments, provided that they are made no later than the Claimant's Reply and that the Respondent is permitted a Rejoinder.

66. The Tribunal accepts Mexico's contention that a case may not be initiated on the basis of an anticipated breach. However, the Tribunal cannot accept Mexico's interpretation and application of the time limits set out in NAFTA. Metalclad properly submitted its claim under the Additional Facility Rules as provided under NAFTA, Article 1120. Article 1120(2) provides that the arbitration rules under which the claim is submitted shall govern the arbitration except to the extent modified by Section B of Chapter Eleven. Article 48(1) of the Rules clearly states that a party may present an incidental or additional claim provided that the ancillary claim is within the scope of the arbitration agreement of the parties.

67. The Tribunal does not agree with Mexico's post-hearing position that Section B of Chapter Eleven modifies Article 48 of the Rules. The Tribunal believes it was not the intent of the drafters of NAFTA, Articles 1119 and 1120, to limit the jurisdiction of a Tribunal under Chapter Eleven in this way. Rather, the Tribunal prefers Mexico's position, as stated in its Rejoinder, that construes NAFTA Chapter Eleven, Section B, and Article 48 of the Rules as permitting amendments to previously submitted claims and consideration of facts and events occurring subsequent to the submission of a Notice of Claim, particularly where the facts and events arise out of and/or are directly related to the original claim. A contrary holding would require a claimant to file multiple subsequent and related actions and would lead to inefficiency and inequity.

68. The Tribunal agrees with Mexico that the process regarding amendments to claims must be one that ensures fairness and clarity. Article 48(2) of the Rules ensures such fairness by requiring that any ancillary claim be presented not later than the Claimant's Reply. In this matter, Metalclad presented information relating to the Ecological Decree and its intent to rely on the Ecological Decree as early as its Memorial. Mexico subsequently filed its Counter-Memorial and Rejoinder. The Ecological Decree directly relates to the property and investment at issue, and Mexico has had ample notice and opportunity to address issues relating to that Decree.

69. The Tribunal thus finds that, although the Ecological Decree was issued subsequent to Metalclad's submission of its claim, issues relating to it were presented by Metalclad in a timely manner and consistently with the principles of fairness and clarity. Mexico has had ample opportunity to respond and has suffered no prejudice. The Tribunal therefore holds that consideration of the Ecological Decree is within its

jurisdiction but, as will be seen, does not attach to it controlling importance.

VI. Applicable Law

70. A Tribunal established pursuant to NAFTA Chapter Eleven, Section B must decide the issues in dispute in accordance with NAFTA and applicable rules of International law. (NAFTA Article 1131(1)). In addition, NAFTA Article 102(2) provides that the Agreement must be interpreted and applied in the light of its stated objectives and in accordance with applicable rules of international law. These objectives specifically include transparency and the substantial increase in investment opportunities in the territories of the Parties. (NAFTA Article 102(1)(c)). The Vienna Convention on the Law of Treaties, Article 31(1) provides that a treaty is to 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 the light of the treaty's object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty. (Id., Article 31(2)(a)). There shall also be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties. (Id., Article 31(3)). Every treaty in force is binding upon the parties to it and must be performed by them in good faith. (Id., Article 26). A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty. (Id., Article 27).

71. The Parties to NAFTA specifically agreed to "ENSURE a predictable commercial framework for business planning and investment." (NAFTA Preamble, para. 6 (emphasis in original)). NAFTA further requires that "[e]ach Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them." Id., Article 1802.1.

VII. The Tribunal's Decision

72. Metalclad contends that Mexico, through its local governments of SLP and Guadalcazar, interfered with and precluded its operation of the landfill. Metalclad alleges that this interference is a violation of Articles 1105 and 1110 of Chapter Eleven of the investment provisions of NAFTA.

A. Responsibility for the conduct of state and local governments

73. A threshold question is whether Mexico is internationally responsible for the acts of SLP and Guadalcazar. The issue was largely disposed of by Mexico in paragraph 233 of its post-hearing submission, which stated that "[Mexico] did not plead that the acts of the Municipality were not covered by NAFTA. [Mexico] was, and remains, prepared to proceed on the assumption that the normal rule of state responsibility applies; that is, that the Respondent can be internationally responsible for the acts of state organs at all three levels of government." Parties to that Agreement must ensure that all necessary measures are taken in order to give effect to the provisions of the Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments." (NAFTA Article 105) A reference to a state or province includes local governments of that state or province. (NAFTA Article 201(2)) The exemptions from the requirements of Articles 1105 and 1110 laid down in Article 1108(1) do not extend to states or local governments. This approach accords fully with the established position in customary international law. This has been clearly stated in Article 10 of the draft articles on state responsibility adopted by the International Law Commission of the United Nations in 1975 which, though currently still under

consideration, may nonetheless be regarded as an accurate restatement of the present law: "The conduct of an organ of a State, of a territorial government entity or of an entity empowered to exercise elements of the Governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity." (Yearbook of the International Law Commission, 1975, Vol. ii, p. 61)

B. NAFTA, Article 1105: Fair and Equitable Treatment

74. NAFTA Article 1105(1) provides that "each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." For the reasons set out below, the Tribunal finds that Metalclad's investment was not accorded fair and equitable treatment in accordance with international law, and that Mexico has violated NAFTA Article 1105(1).

75. An underlying objective of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives. (NAFTA Article 102(1))

76. Prominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" (NAFTA Article 102(1)). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.

77. Metalclad acquired COTERIN for the sole purpose of developing and operating a hazardous waste landfill in the valley of La Pedrera, in Guadalcazar, SLP.

78. The Government of Mexico issued a federal construction and operating permits for the landfill prior to Metalclad's purchase of COTERIN, and the Government of SLP likewise issued a state operating permit which implied its political support for the landfill project.

79. A central point in this case has been whether, in addition to the above-mentioned permits, a municipal permit for the construction of a hazardous waste landfill was required.

80. When Metalclad inquired, prior to its purchase of COTERIN, as to the necessity for municipal permits, federal officials assured it that it had all that was needed to undertake the landfill project. Indeed, following Metalclad's acquisition of COTERIN, the federal government extended the federal construction permit for eighteen months.

81. As presented and confirmed by Metalclad's expert on Mexican law, the authority of the municipality extends only to the administration of the construction permit, " ... to grant licenses and permits for constructions and to participate in the creation and administration of ecological reserve zones ... ". (Mexican Const. Art. 115, Fraction V). However, Mexico's experts on constitutional law expressed a different view.

82. Mexico's General Ecology Law of 1988 (hereinafter "LGEEPA") expressly grants to the Federation the power to authorize construction and operation of hazardous waste

landfills. Article 5 of the LGEEPA provides that the powers of the Federation extend to:

> V. [t]he regulation and control of activities considered to be highly hazardous, and of the generation, handling and final disposal of hazardous materials and wastes for the environments of ecosystems, as well as for the preservation of natural resources, in accordance with [the] Law, other applicable ordinances and their regulatory provisions.

83. LGEEPA also limits the environmental powers of the municipality to issues relating to non-hazardous waste. Specifically, Article 8 of the LGEEPA grants municipalities the power in accordance with the provisions of the law and local laws to apply:

> [l]egal provisions in matters of prevention and control of the effects on the environment caused by generation, transportation, storage, handling treatment and final disposal of solid industrial wastes which are not considered to be hazardous in accordance with the provisions of Article 137 of [the 1988] law. . . .

84. The same law also limits state environmental powers to those not expressly attributed to the federal government. Id., Article 7.

85. Metalclad was led to believe, and did believe, that the federal and state permits allowed for the construction and operation of the landfill. Metalclad argues that in all hazardous waste matters, the Municipality has no authority. However, Mexico argues that constitutionally and lawfully the Municipality has the authority to issue construction permits.

86. Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site.

87. Relying on the representations of the federal government, Metalclad started constructing the landfill, and did this openly and continuously, and with the full knowledge of the federal, state, and municipal governments, until the municipal "Stop Work Order" on October 26, 1994. The basis of this order was said to have been Metalclad's failure to obtain a municipal construction permit.

88. In addition, Metalclad asserted that federal officials told it that if it submitted an application for a municipal construction permit, the Municipality would have no legal basis for denying the permit and that it would be issued as a matter of course. The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.

89. Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill. In following the advice of these officials, and filing the municipal permit application on November 15, 1994, Metalclad was merely acting prudently and in the full expectation that the permit would be granted.

90. On December 5, 1995, thirteen months after the submission of Metalclad's application–during which time Metalclad continued its open and obvious investment activity–the Municipality denied Metalclad's application for a construction permit. The denial was issued well after construction was virtually complete and immediately following the announcement of the Convenio providing for the operation of the landfill.

91. Moreover, the permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear.

92. The Town Council denied the permit for reasons which included, but may not have been limited to, the opposition of the local population, the fact that construction had already begun when the application was submitted, the denial of the permit to COTERIN in December 1991 and January 1992, and the ecological concerns regarding the environmental effect and impact on the site and surrounding communities. None of the reasons included a reference to any problems associated with the physical construction of the landfill or to any physical defects therein.

93. The Tribunal therefore finds that the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility.

94. Moreover, the Tribunal cannot disregard the fact that immediately after the Municipality's denial of the permit it filed an administrative complaint with SEMARNAP challenging the Convenio. The Tribunal infers from this that the Municipality lacked confidence in its right to deny permission for the landfill solely on the basis of the absence of a municipal construction permit.

95. SEMARNAP dismissed the challenge for lack of standing, which the Municipality promptly challenged by filing an amparo action. An injunction was issued, and the landfill was barred from operation through 1999.

96. In 1997 SLP re-entered the scene and issued an Ecological Decree in 1997 which effectively and permanently prevented the use by Metalclad of its investment.

97. The actions of the Municipality following its denial of the municipal construction permit, coupled with the procedural and substantive deficiencies of the denial, support the Tribunal's finding, for the reasons stated above, that the Municipality's insistence upon and denial of the construction permit in this instance was improper.[4]

98. This conclusion is not affected by NAFTA Article 1114, which permits a Party to ensure that investment activity is undertaken in a manner sensitive to environmental concerns. The conclusion of the Convenio and the issuance of the federal permits show clearly that Mexico was satisfied that this project was consistent with, and sensitive to, its environmental concerns.

99. Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.

100. Moreover, the acts of the State and the Municipality–and therefore the acts of

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4. The question of turning to NAFTA before exhausting local remedies was examined by the parties. However, Mexico does not insist that local remedies must be exhausted. Mexico's position is correct in light of NAFTA Article 1121(2)(b) which provides that a disputing investor may submit a claim under NAFTA Article 1117 if both the investor and the enterprise waive their rights to initiate or continue before any administrative tribunal or court under the law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in NAFTA Article 1117.

Mexico–fail to comply with or adhere to the requirements of NAFTA, Article 1105(1) that each Party accord to investments of investors of another Party treatment in accordance with the international law, including fair and equitable treatment. This is so particularly in light of the governing principle that internal law (such as the Municipality's stated permit requirements) does not justify failure to perform a treaty. (Vienna Convention on the Law of Treaties, Arts. 26, 27.)

101. The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.

C. NAFTA, Article 1110: Expropriation

102. NAFTA Article 1110 provides that "[n]o party shall directly or indirectly ... expropriate an investment ... or take a measure tantamount to ... expropriation ... except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation ...." "A measure" is defined in Article 201(1) as including "any law, regulation, procedure, requirement or practice."

103. Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

104. By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).

105. The Tribunal holds that the exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government. This finding is consistent with the testimony of the Secretary of SEMARNAP and, as stated above, is consistent with the express language of the LGEEPA.

106. As determined earlier (see above, para 92), the Municipality denied the local construction permit in part because of the Municipality's perception of the adverse environmental effects of the hazardous waste landfill and the geological unsuitability of the landfill site. In so doing, the Municipality acted outside its authority. As stated above, the Municipality's denial of the construction permit without any basis in the proposed physical construction or any defect in the site, and extended by its subsequent administrative and judicial actions regarding the Convenio, effectively and unlawfully prevented the Claimant's operation of the landfill.

107. These measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation.

108. The present case resembles in a number of pertinent respects that of *Biloune, et al. v. Ghana Investment Centre, et al.*, 95 I.L.R. 183, 207-10 (1993) (Judge Schwebel, President; Wallace and Leigh, Arbitrators). In that case, a private investor was renovating and expanding a resort restaurant in Ghana. As with Metalclad, the investor, basing itself on the representations of a government affiliated entity, began construction

before applying for a building permit. As with Metalclad, a stop work order was issued after a substantial amount of work had been completed. The order was based on the absence of a building permit. An application was submitted, but although it was not expressly denied, a permit was never issued. The Tribunal found that an indirect expropriation had taken place because the totality of the circumstances had the effect of causing the irreparable cessation of work on the project. The Tribunal paid particular regard to the investor's justified reliance on the government's representations regarding the permit, the fact that government authorities knew of the construction for more than one year before issuing the stop work order, the fact that permits had not been required for other projects and the fact that no procedure was in place for dealing with building permit applications. Although the decision in *Biloune* does not bind this Tribunal, it is a persuasive authority and the Tribunal is in agreement with its analysis and its conclusion.

109. Although not strictly necessary for its conclusion, the Tribunal also identifies as a further ground for a finding of expropriation the Ecological Decree issued by the Governor of SLP on September 20, 1997. The Decree covers an area of 188,758 hectares within the "Real de Guadalcazar" that includes the landfill site, and created therein an ecological preserve. This Decree had the effect of barring forever the operation of the landfill.

110. The Tribunal is not persuaded by Mexico's representation to the contrary. The Ninth Article, for instance, forbids any work inconsistent with the Ecological Decree's management program. The management program is defined by the Fifth Article as one of diagnosing the ecological problems of the cacti reserve and of ensuring its ecological preservation. In addition, the Fourteenth Article of the Decree forbids any conduct that might involve the discharge of polluting agents on the reserve soil, subsoil, running water or water deposits and prohibits the undertaking of any potentially polluting activities. The Fifteenth Article of the Ecological Decree also forbids any activity requiring permits or licenses unless such activity is related to the exploration, extraction or utilization of natural resources.

111. The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.

112. In conclusion, the Tribunal holds that Mexico has indirectly expropriated Metalclad's investment without providing compensation to Metalclad for the expropriation. Mexico has violated Article 1110 of the NAFTA.

VIII. Quantification of Damages or Compensation

. . .

118. NAFTA, Article 1135(1)(a), provides for the award of monetary damages and applicable interest where a Party is found to have violated a Chapter Eleven provision. With respect to expropriation, NAFTA, Article 1110(2), specifically requires compensation to be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. This paragraph further states that "the valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value." . . .

122. . . . [F]air market value is best arrived at in this case by reference to Metalclad's actual investment in the project. Thus, in *Phelps Dodge Corp. v. Iran* (10 Iran-U.S.

C.T.R. 121 (1986)), the Iran-U.S. Claims Tribunal concluded that the value of the expropriated property was the value of claimant's investment in that property. In reaching this conclusion, the Tribunal considered that the property's future profits were so dependent on as yet unobtained preferential treatment from the government that any prediction of them would be entirely speculative. (*Id*. at 132-33.) Similarly, in the *Biloune* case . . . , the Tribunal concluded that the value of the expropriated property was the value of the claimant's investment in that property. While the Tribunal recognized the validity of the principle that lost profits should be considered in the valuation of expropriated property, the Tribunal did not award lost profits because the claimants could not provide any realistic estimate of them. In that case, as in the present one, the expropriation occurred when the project was not in operation and had yet to generate revenue. (*Biloune*, 95 I.L.R. at 228-229). The award to Metalclad of the cost of its investment in the landfill is consistent with the principles set forth in *Chorzow Factory* (Claim for Indemnity) (Merits), Germany v. Poland, P.C.I.J. Series A., No. 17 (1928) at p. 47, namely, that where the state has acted contrary to its obligations, any award to the claimant should, as far as is possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed (the *status quo ante*). . . .

126. Some of the subsequent costs claimed by Metalclad involve what has been termed "bundling." "Bundling" is an accounting concept where the expenses related to different projects are aggregated and allocated to another project. Metalclad has claimed as costs related to the development at La Pedrera earlier costs incurred on certain other sites in Mexico. While not taking any decision in principle regarding the concept of bundling as it may be applicable to other situations (for example in the oil industry where the costs in relation to a "dry hole" may in part be allocated to the cost of exploring for and developing a successful well), the Tribunal does not consider it appropriate to apply the concept in the present case. The Tribunal has reduced accordingly the sum payable by the Government of Mexico. . . .

127. The question remains of the future status of the landfill site, legal title to which at present rests with COTERIN. Clearly, COTERIN's substantive interest in the property will come to an end when it receives payment under this award. COTERIN must, therefore, relinquish as from that moment all claim, title and interest in the site. The fact that the site may require remediation has been borne in mind by the Tribunal and allowance has been made for this in the calculation of the sum payable by the Government of Mexico. . . .

128. The question arises whether any interest is payable on the amount of the compensation. In providing in Article1135(1) that a Tribunal may award "monetary damages and any applicable interest," NAFTA clearly contemplates the inclusion of interest in an award. On the basis of a review of the authorities, the tribunal in *Asian Agricultural Products v. Sri Lanka* (4 ICSID Reports 245) held that "interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged (*ibid*., p. 294, para. 114). The Tribunal sees no reason to depart from this view. As has been shown above, Mexico's international responsibility is founded upon an accumulation of a number of factors. In the circumstances, the Tribunal considers that of the various possible dates at which it might be possible to fix the engagement of Mexico's responsibility, it is reasonable to select the date on which the Municipality of Guadalcazar wrongly denied Metalclad's application for a construction permit. The Tribunal therefore concludes that interest should be awarded from that date until the date 45 days from that on which this

Award is made. So as to restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place, interest has been calculated at 6% p.a., compounded annually. . . .

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