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Private Enforcement of NAFTA Environmental Standards through Transnational Mass Tort Litigation: The Role of United States Courts in the Age of Free Trade Symposium - The Environment and the United States-Mexico Border - Comment.

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COMMENTS

PRIVATE ENFORCEMENT OF NAFTA ENVIRONMENTAL STANDARDS THROUGH TRANSNATIONAL MASS TORT LITIGATION: THE ROLE OF UNITED STATES COURTS IN THE AGE OF FREE TRADE

MICHAEL SANG H. CHO

"Mexican Suit Filed in Bexar County, Texas"

[A class action lawsuit alleging illegal dumping of toxic waste was filed in a Bexar County district court Friday by sixty residents of Matamoros, Mexico against Alpha Oil Company and Beta Corporation. The named plaintiff, José Hernandez, claims that one of his children suffered birth defects as a result of toxic dumping by Alpha Oil and Beta. Hernandez was employed by Alpha Oil from 1990 until his recent discharge in 1994. All other plaintiffs in the suit are workers, or relatives of workers, at either Alpha Oil or Beta.

Alpha Oil is a $3 billion United States corporation conducting oil-drilling operations in twenty-four Texas counties. Alpha Oil also operates a chemical processing plant in California and owns subsidiaries in Mexico, Chile, and Southeast Asia. Alpha Oil's chemical plant in Matamoros began operations in 1973 and currently employs 1,500 workers. Beta Corporation, a large, Japanese electronics conglomerate, began manufacturing plastic parts in Matamoros in 1985, and employs over 500 workers. Beta also operates a large distribution center in Bexar County, employing over 150 workers.

Jane Bolívar, attorney for the plaintiffs, alleges that both companies have illegally dumped toxic waste for the past ten years, thereby causing Matamoros residents to suffer numerous physical impairments. Bolívar also alleges that the Hernandezes and several other families had "anencephaly babies"—children born with a fatal birth defect. James Bowley, a spokesman for Alpha Oil, denied any illegal dumping by Alpha and pointedly stated: "A Texas lawsuit is big business." Beta declined comment, but attorneys for Beta announced plans to remove the case to federal court.

Hernandez's lawsuit is the first environmental class action suit filed by Mexican nationals in the United States since the passage of NAFTA in 1994. John Williams, of the lobbying group Texans for Tort Reform Com-

mittee, stated that "we are witnessing the wholesale import of foreign lawsuits into Texas. Our out-of-control legal system and greedy lawyers will fill our courts with foreigners unless the people of Texas wake up and take action."][1]

I. INTRODUCTION

The hypothetical newspaper story above depicts an environmental class action suit filed by Mexican workers and their families from Matamoros, a city located across the border from Brownsville, Texas.[2] Most wage earners in the fictional-plaintiff Hernandez's neighborhood are employed by maquiladora industries; they earn, on average, about four dollars per day.[3]

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1. José Hernandez, Alpha Oil Corporation, and Beta Corporation are fictional characters; however, they are intended to represent real workers, residents, and foreign corporations in Matamoros, Mexico. As far as the author is aware, no environmental tort class actions have been filed in United States courts by Mexican workers or residents against transnational corporations. This fictional newspaper story also reports the reaction of "Texans for Tort Reform," another fictional organization, but is not intended to represent a position of any real "tort reform" movement in Texas. *See generally* John MacCormack, *Law South of the Nueces*, SAN ANTONIO EXPRESS-NEWS, Jan. 7, 1996, at L1 (labeling foreign plaintiffs' toxic pesticide case as "banana case," and tying need for tort reform in Texas to perceived threat of flood of foreign lawsuits).

2. *See* Malissa H. McKeith, *The Environment and Free Trade: Meeting Halfway at the Mexican Border*, 10 UCLA PAC. BASIN L.J. 183, 184 (1991) (explaining workings and economic significance of Mexico's maquiladora program). The maquiladora program is also known as the Mexican In-Bond or Twin-Plant Industrial Program. *Id.* "Maquiladora" refers to a processing or assembly plant located in Mexico that receives parts and raw materials duty-free from foreign parent corporations, and produces finished or semi-finished goods for export. Elizabeth C. Rose, Comment, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223, 223–24 (1989). The Mexican government initiated the maquiladora program in 1965 to attract foreign investment into Mexico. *See* Daniel I. Basurto González & Elaine F. Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 660–61 (1991) (discussing initiation of Border Industrialization Program by Mexican government). The main impetus for the program was the United States' cancellation of the Bracero Program, which, since 1942, allowed Mexican males to migrate to the United States for temporary agricultural work. *See* Kathryn Kopinak, *The Maquiladorization of the Mexican Economy* (discussing initial limitation of program to Northern Mexico), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 141, 141–43 (1993). From a purely economic point of view, the program is successful—1,954 factories were established as maquiladoras, employing about 500,000 people even before the signing of NAFTA. *Id.* at 141-42; *see also* Santos Gomez, Comment, *Environmental Risks Related to the Maquiladora Industry and the Likely Environmental Impact of NAFTA*, 6 LA RAZA L.J. 174, 178–82 (1993) (explaining evolution of maquiladora program).

3. *See* Bob Davis, *Two Years Later, the Promises Used to Sell NAFTA Haven't Come True, but Its Foes Were Wrong, Too*, WALL ST. J., Oct. 26, 1995, at A24 (reporting income

Typical houses in Hernandez's neighborhood have one-room, dirt floors and lack electricity, running water, or sewerage facilities.[4] Visible toxic waste dumps, created by the local maquiladora industries, surround residential areas.[5] Over the years, a few residents have complained about toxic dumping activities to Mexican authorities, but nothing has changed.[6] Many residents suffer from chronic headaches and slurring of speech which, they suspect, result from long-term exposure to toxic chemicals.[7] Because of their poverty, however, many border residents cannot seek medical treatment. In recent years, quite a few mothers in border neighborhoods reported giving birth to still-born babies.[8]

The fictional plaintiffs, Hernandez and his family, represent thousands of real-life maquiladora workers and residents. Many of the maquiladora

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of Mexican worker employed by Zenith as $26 per week). With every peso devaluation, Mexican workers' wages drop further in value. *Id.*

4. *See id.* (describing poor living conditions in shanty town of Reynosa, near Matamoros); *see also* Sloan Rappoport, Comment, *NAFTA and the Petrochemical Industry: A Disastrous Combination for Life at the U.S.-Mexico Border*, 11 DICK. J. INT'L L. 579, 579-80 (1993) (describing living conditions in one colonia town in Matamoros, Mexico).

5. *See* James E. Garcia, *Trade Casts Light on Environment*, AUSTIN AMERICAN-STATESMAN, Sept. 30, 1991, at A1, A4 (reporting plight of Ernestina Sanchez and her family, who suffered from toxic waste dumped by Retzloff Chemical Company).

6. *See id.* (reporting how Sanchez and her family's complaints have been ignored by Mexican authorities).

7. *Cf.* Diane Lindquist, *Toxic Legacy: Polluter Leaves Faint Tracks; but U.S. Mexican Officials Follow Trail into "Uncharted Waters,"* SAN DIEGO UNION-TRIB., Apr. 6, 1993, at C1 (discussing health problems of maquiladora workers routinely exposed to toxic chemicals). Petrochemical solvents such as xylene are easily absorbed through respiratory, gastrointestinal, or dermal routes and, upon absorption, produce various effects on the central nervous system, including headaches and fatigue. Lawrence W. Elzinga, *Renal Toxicity of Xylene*, 261 JAMA 2258, 2258–60 (1989) (studying effects of xylene on United States workers who have undergone low levels of exposure).

8. *See* Gaynell Terrell, *Tragic Puzzle Grips Families on the Border*, HOUSTON POST, May 17, 1992, at A1, A19 (describing high incidences of birth defects in border communities). Anencephaly is a fatal birth defect which causes babies to be born with either incomplete or missing brains and skulls. *Id.*; *see also* James Pinkerton, *Activists Denounce NAFTA; Group Says Pact Lacks Safeguards*, HOUSTON CHRON., Oct. 17, 1992, at A30 (reporting incidences of anencephaly among children of maquiladora workers along border caused by toxic substances). Increasing scientific data points to petrochemical toxins such as xylene as likely causes of anencephaly. Gaynell Terrell, *Tragic Puzzle Grips Families on the Border*, HOUSTON POST, May 17, 1992, at A1, A19. These incidences coincide with high levels of petrochemicals in the Rio Grande River and on land near maquiladoras in Matamoros. *See id.* (finding that quantities of petrochemical toxins discovered in maquiladora regions were thousands of times higher than United States EPA standards allow). TNCs are the main producers of toxic petrochemicals in the maquiladora region. *See* Joseph LaDou, *Deadly Migration: Hazardous Industries' Flight to the Third World*, 94 TECH. REV. 46, 50 (1991) (reporting that maquiladora industry generates more than 20 million tons of hazardous waste each year, and that large portion of such waste is dumped into streams, rivers, air, or ground).

residents migrated from other parts of Mexico in hopes of finding a better future on the border.[9] Maquiladora residents, however, are poor and politically powerless.[10] Since the passage of the North American Free Trade Agreement (NAFTA),[11] Hernandez and his family are referred to as "NAFTA nationals,"[12] whom politicians once proclaimed the future beneficiaries of "free trade."[13] The politicians' proclamation seems sadly deceptive, however, when one examines the effects of free trade on Hernandez, and thousands like him.

Maquiladoras are manufacturing facilities along the United States-Mexico border operated by transnational corporations (TNCs).[14] The ar-

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9. *Cf.* Bob Davis, *Two Years Later, the Promises Used to Sell NAFTA Haven't Come True, but Its Foes Were Wrong, Too*, WALL ST. J., Oct. 26, 1995, at A24 (reporting how relatives came from other parts of Mexico to join crowded home of Maria Luna, assembly worker at maquiladora factory).

10. *See* Adolfo A. Zinser, *Authoritarianism and North American Free Trade: The Debate in Mexico* (discussing political repression, government control of media, electoral fraud, corruption in Mexico, and scant attention given to suffering of maquiladora residents by United States government and media), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 205, 211-12 (1993). Mario Vargas Llosa, Peru's leading writer and former political candidate, has called the Mexican regime "the perfect dictatorship." *Id.* at 212.

11. North American Free Trade Agreement, *drafted* Aug. 12, 1992, *revised* Sept. 6, 1992, U.S.-Mex.-Can., 32 I.L.M. 289 (pts. 1-3) & 32 I.L.M. 605 (pts. 4-8 & annexes) (entered into force Jan. 1, 1994) [hereinafter NAFTA]. NAFTA was a historical, economic-integration agreement that completed the formation of the North American Trade Block and set the stage for eventual formation of the American Free Trade Block, which will ultimately incorporate the other nations of Central and South America. *See* Ricardo Grinspun & Maxwell A. Cameron, *The Political Economy of North American Integration: Diverse Perspectives, Converging Criticisms* (analyzing NAFTA in broader context of formation of regional trade block encompassing all nations of Latin America), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 3, 16 (1993).

12. *See* Robert Housman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593, 622 (1993) (defining "NAFTA nationals" as citizens of NAFTA member countries with plausible interests in furthering free trade).

13. *See* Bob Davis, *Two Years Later, the Promises Used to Sell NAFTA Haven't Come True, but Its Foes Were Wrong, Too*, WALL ST. J., Oct. 26, 1995, at A24 (noting that NAFTA proponents promised increased wealth and purchasing power for Mexican citizens which would, in turn, lead to more United States exports and new jobs in the United States). Two years later, despite a 30% increase in trade between the two nations, devaluation of the peso has destroyed Mexican citizens' buying power. *Id.*

14. *See* KWAMENA ACQUAAH, INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS: THE NEW REALITY 46-48 (1986) (discussing different definitions of transnational corporation). TNCs are defined as "economic enterprises—finance, service, manufacturing, extractive, technology, and food and agriculture—that are headquartered in industrialized countries and pursue business activities in one or more foreign countries." *Id.* at 48. The United States Senate Finance Committee defines "TNC" as "all firms—industrial, service, and financial—doing international business of all types, within a myriad

rival of NAFTA meant that TNCs were free to move capital and operations across the United States-Mexico border at will.[15] Under NAFTA, goods produced by Hernandez and his fellow maquiladora workers move across the border unhindered by tariffs or cumbersome customs procedures.[16] However, Hernandez and his family are neither free to travel across the border, nor free to seek employment in the United States.[17]

The NAFTA debate in the United States raised public awareness of environmental problems in border regions.[18] However, maquiladora

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of organizational structures." SENATE COMM. ON FINANCE, 93D CONG., 1ST SESS., IMPLICATIONS OF MULTINATIONAL FIRMS FOR WORLD TRADE AND INVESTMENT AND FOR U.S. TRADE AND LABOR 83 (Comm. Print 1973). TNCs that have set up or are setting up operations along the United States-Mexico border include IBM, General Electric, Motorola, Ford, Chrysler, General Motors, RCA, United Technologies, ITT, Eastman Kodak, Zenith, Sony, Mitsubishi, Hitachi, Yazaki, and TDK, as well as numerous European companies. *Id.*

15. *See* David A. Gantz, *Resolution of Investment Disputes Under the North American Free Trade Agreement,* 10 ARIZ. J. INT'L & COMP. L. 335, 341 (1993) (discussing foreign investment protection under NAFTA). NAFTA protects foreign investment by ensuring signatories: (1) that they will be treated as if they were of the same nation as other signatories; (2) most-favored-nation treatment; and (3) treatment meeting minimum standards of international law in the event local treatment does not meet such standards. NAFTA, *supra* note 11, ch. 11, art. 1, 32 I.L.M. at 411; *see* John A. Maher, *The North American Free Trade Agreement: Engaged to Be Engaged?*, 11 DICK. J. INT'L L. 553, 562 (1993) (stating that NAFTA eliminates restrictions on transfer or repatriation of profits or capital paybacks).

16. *See* Rebecca R. Bannister, *The Mexican Market and NAFTA*, 17 U. PUGET SOUND L. REV. 533, 545 (1994) (reporting that NAFTA "will eliminate tariffs on industrial and agricultural goods made or grown" in three member countries); John A. Maher, *The North American Free Trade Agreement: Engaged to Be Engaged?*, 11 DICK. J. INT'L L. 553, 559 (1993) (stating that under NAFTA, all tariffs among member nations are to be dropped in differing timetables within next 5 to 10 years and observing that about half of all Mexican tariffs are to be dropped immediately).

17. *See* Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 941 (1994) (noting NAFTA authorizes signatory countries to restrict immigration, to limit foreign employment, and to take increased border security measures); *see also* Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime,* 40 AM. J. COMP. L. 917, 926 (1992) (contrasting NAFTA's sole emphasis on free movement of goods and capital with EC model, which allows free movement of persons).

18. *See* James E. Garcia, *Border River Laden with Wastes,* AUSTIN AMERICAN-STATESMAN, Sept. 29, 1991, at A1 (describing pollution problem in Rio Grande River). A 1988 report by the University of Texas Health Science Center in San Antonio noted that hepatitis rates among residents of Colonias near San Elizario are at least five times the United States average. *Id.* Thirty-five percent of 8-year-old children in the Colonias suffer from hepatitis, and ninety percent of 35-year-old adults contract hepatitis during their lifetimes. *Id.* Other pollution hot spots identified in the border region are: (1) Ciudad Juárez/ El Paso, where La Agua Negra, an open canal running 100 yards south of the Rio Grande, carries roughly 30 million gallons of untreated industrial and domestic sewage daily, and

workers and residents have lived with environmental degradation and its adverse health effects since long before the NAFTA environmental debate in the United States began.[19] Nonetheless, with the passage of NAFTA, increased trade and the burgeoning industries along the border are likely to exacerbate already serious environmental problems.

This Comment asks whether Hernandez and his family should be free to choose a United States court as a forum for tort actions against polluters or, more appropriately, whether United States courts should honor foreign plaintiffs' choice of fora. The question of a foreign plaintiff's freedom to choose a jurisdiction in which to sue for injuries resulting from environmental pollution is complicated by questions of public policy and forum non conveniens considerations. Indeed, courts must weigh the interests of the United States government and citizens in resolving claims arising from injuries suffered by Mexican plaintiffs in Mexico. This Comment argues that forum non conveniens factors, while currently vague and manipulable, still dictate that United States courts have a sufficient interest in transnational mass tort litigation to allow foreign plaintiffs access to United States courts. In addition, as trade and commerce are increasingly globalized, failing to allow foreign plaintiffs access to United States courts would be a tragic social injustice and an economic mistake.

At base, this Comment calls for United States courts to redefine their role in the age of free trade and economic integration. Part II discusses the nature of TNCs and their influence on the NAFTA process, in addi-

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later mixes with river water used to irrigate crops; (2) Ciudad Acuña/Del Rio, where Amistad Dam, which retains water for irrigation during droughts, exacerbates pollution downstream; (3) Nuevo Laredo/Laredo, where 20 to 25 million gallons of untreated domestic and industrial sewage are dumped each day into the Rio Grande River; (4) Zapata, where Falcon Lake residents worry that pollution upstream could harm fishing and tourism; (5) the Lower Rio Grande Valley, where unincorporated communities lacking water and sewerage service are polluting groundwater; (6) Matamoros/Brownsville, where domestic and industrial waste is washing down open canals and sewage lines toward wetlands to the southeast, eventually running into the Gulf of Mexico. *Id.* at A18.

19. *See* James E. Garcia, *Trade Casts Light on Environment*, AUSTIN AMERICAN-STATESMAN, Sept. 30, 1991, at A1 (reporting story of Irineo and Ernestina Sanchez, who have experienced and documented their troubles with illegal toxic waste dumping in the border region by Retzloff Chemical plant). Despite 10 years of continuous illegal dumping and the Sanchez's efforts to correct and make known such behavior, their story made it into United States newspapers only during the 1991 debate surrounding NAFTA. *Id.* Unfortunately, workers and residents of the maquiladoras—the main victims of environmental abuses—do not carry much weight in the political discourse of the United States, and their plight rarely made headlines in the North American media before the NAFTA debate. *See* Adolfo A. Zinser, *Authoritarianism and North American Free Trade* (noting that Mexico is only remaining single-party authoritarian system that escapes serious recrimination by western community despite persistent human rights violations), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 205, 211 (1993).

tion to providing an overview of NAFTA and parallel agreements' provisions on the environment. Part II also discusses the imbalance of power between polluters and victims. Part III reviews the current variations of United States forum non conveniens doctrine and discusses how such variations reflect conflicting ideas of globalism and xenophobia. Part IV discusses the application of the forum non conveniens doctrine to Hernandez's environmental tort action. Part V analyzes choice of law rules as applied to Hernandez's tort action, evaluating the possible impact of such rules on the forum access issue.

II. POLLUTERS, VICTIMS, AND FREE TRADE

To understand NAFTA's failure to effectively address environmental standards in maquiladora regions,[20] the primary goals and motivation behind the passage of NAFTA must be explored. NAFTA was created to promote the free flow of capital, services, and goods in the North American market.[21] The result was the formation of the largest regional free-trade bloc in the world.[22] NAFTA was also partly conceived as a strategic response to the creation of the European Trade Block and the Asian Yen Trade Block.[23] To many United States policy-makers, trade integration with Mexico was a critical first step toward the eventual formation of a regional economic union stretching from Alaska to Tierra del Fuego.[24]

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20. *See* Daniel D. Coughlin, Comment, *The North American Agreement on Environmental Cooperation: A Summary and Discussion*, 2 MO. ENVTL. L. & POL'Y REV. 93, 106 (1994) (discussing inadequacy of both NAFTA and its supplemental agreements in dealing with enforcement of environmental laws and clean up).

21. *See* Donald Lambro, *NAFTA's Winning Combination*, WASH. TIMES, Nov. 22, 1993, at A17 (praising passage of NAFTA as reaffirmation of free trade principles).

22. *See* William A. Orme, Jr., *Myths Versus Facts: The Whole Truths About the Half Truths*, 72 FOREIGN AFF. 2, 3-4 (1993) (discussing macroeconomic impact of NAFTA). Even before NAFTA, the signing of the United States-Canada Free Trade Agreement in 1988 led to the creation of a $6 trillion market by 1990. *Id.* NAFTA brought Mexico, the United States' third largest trading partner, into the fold and created the world's richest market, comprising 360 million people, with a total value of $6.2 trillion. *Id.*

23. *See* Ricardo Grinspun & Maxwell A. Cameron, *The Political Economy of North American Integration: Diverse Perspectives, Converging Criticisms* (stating that NAFTA is strategic response by United States to increasing economic threat arising from Unified Europe and more assertive Japan), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 3, 16 (1993). The United States' interest in Latin America coincided with the relative decline of the United States' economic power in the world for the last two decades. *Id.* The emergence of the other regional trade blocks also concerned United States policy makers. *See* Michael S. Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 261 n.18 (1992) (discussing influence of other trade blocks on formation of NAFTA).

24. *See* Ricardo Grinspun & Maxwell A. Cameron, *The Political Economy of North American Integration: Diverse Perspectives, Converging Criticisms* (asserting that ideologi-

A. *Free Trade and Transnational Corporations*

Under the free-market ideology embodied in NAFTA, transnational corporations occupy the paramount role of promoting national and international economic growth and development.[25] TNCs are the chief vehicle for transnational transfers of capital and technology, and are the main investors in new technologies.[26] Pure free-market ideology also dictates that governments remove any barriers to the market's workings.[27] Through free-trade agreements and the elimination of barriers to TNCs' cross-border activities, United States policy-makers hope to maximize the competitiveness of TNCs by providing optimum operational flexibility.[28] Policy-makers believe that prosperity and higher profits for TNCs will, in turn, promote economic efficiency, increase the variety and quality of products, and generally enhance society's well-being.[29]

The economic impact of TNCs is immense and widespread; the main competitors in the world market today are TNCs, rather than nation-states. Indeed, TNCs are no longer identified primarily with any one

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cal drive behind free trade movement is formation of trade block from Alaska to Tierra del Fuego, Argentina), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 3, 16 (1993).

25. *See* Bruce W. Wilkinson, *Trade Liberalization, the Market Ideology, and Morality: Have We a Sustainable System?* (discussing free-trade ideology and governmental support for TNCs), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 27, 29-30 (1993); *see also* KWAMENA ACQUAAH, INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS: THE NEW REALITY 43 (1986) (discussing TNCs' vast control over world economies).

26. *See* Peter Enderwick, *Some Economics of Service-Sector Multinational Enterprises* (noting veritable domination of international trade by TNCs), *in* MULTINATIONAL SERVICE FIRMS 3, 3 (Peter Enderwick ed., 1989).

27. *See* Ricardo Grinspun & Maxwell A. Cameron, *The Political Economy of North American Integration: Diverse Perspectives, Converging Criticisms* (explaining free-market ideology's emphasis on market forces and minimal governmental role), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 3, 21 n.7 (1993). *But cf.* Bruce W. Wilkinson, *Trade Liberalization, the Market Ideology, and Morality: Have We a Sustainable System?* (pointing out how governments often intervene to protect TNCs' interests while preaching virtues of minimal government to public), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 27, 29 (1993). Often, governmental actions are taken to institute "international agreements protecting patents and copyrights for longer periods," which greatly enhance the profits of TNCs at the expense of consumers. *Id.* at 29.

28. *See* Kenichi Ohmae, *Rise of the Region State*, 72 FOREIGN AFF. 78, 84–86 (1993) (arguing that removal of trade barriers creates vibrant regional economic zones by attracting infusion of TNCs capital and concentration of industrial development).

29. *See* Richard S. Newfarmer, *Multinationals and Marketplace Magic in the 1980s* (noting free market supporters' emphasis on private sector activity for development, with TNCs leading such efforts), *in* THE MULTINATIONAL CORPORATION IN THE 1980S, at 162, 162 (Charles P. Kindleberger & David B. Audretsche eds., 1984).

country.[30] Nor is the nationality of TNCs often relevant.[31] In struggling for international hegemony, a typical TNC adopts a corporate mantra focusing not just on whether a reasonable return on capital is made, but also on whether the corporation is growing as quickly, or earning as high a profit rate, as competitors.[32] Unfortunately, the TNCs' quest for profits along the United States-Mexico border has led to many of the regions' environmental problems.[33]

B. *Free Trade and the Victims of Pollution*

In contrast to the power and influence of TNCs, victims of the TNCs' environmental abuses in maquiladora regions are poor and politically powerless.[34] Often, environmental critics and citizens who complain

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30. *See* Peter Morici, *Export Our Way to Prosperity*, 101 FOREIGN POL'Y 3, 10 (1995) (explaining that some TNCs in United States are moving technical jobs to other countries, such as Hong Kong, India, Philippines, and Singapore); *Korean Firm Gets Zenith Stake*, WALL ST. J., Nov. 8, 1995, at A10 (reporting purchase of 58% stake in Zenith by LG Group of South Korea).

31. *Cf.* Amity Shlaes, *Does German Business Need Germany?*, WALL ST. J., Oct. 24, 1995, at A23 (quoting BMW executive in Germany as saying that when pressures of national tax and labor laws get too high, BMW will leave country). The migration of German industries to Sweden prompted a Swedish politician to say, "In another 10 years, Germany will be us." *Id.* Many TNCs adopt super-national characteristics, owing allegiance to no country at certain times and yet enjoying the support of their home governments. KWAMENA ACQUAAH, INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS: THE NEW REALITY 47 (1986).

32. *See* Bruce W. Wilkinson, *Trade Liberalization, the Market Ideology, and Morality: Have We a Sustainable System?* (noting emphasis placed on profit-making by TNCs), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 27, 29 (1993). Many TNCs' compensation schemes for their top managers are tied to the profits and value of their stocks. *See id.* at 29-31 (pointing out shareholders' main goal as maximizing investment and deriding modern day corporate culture).

33. *See* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/GGD-92-113, U.S.-MEXICO TRADE: ASSESSMENT OF MEXICO'S ENVIRONMENTAL CONTROLS FOR NEW COMPANIES 2 (1992) (reporting that TNCs contributed significantly to border pollution). The General Accounting Office (GAO) conducted an audit of six new maquiladora plants owned by United States companies and found that none complied with applicable environmental laws. *Id.* at 3. The GAO also expressed concern that TNC-owned plants are not properly disposing of hazardous waste. *Id.* Other scholars have substantiated the GAO report, indicating that TNCs' operations are major generators of both hazardous waste and border pollution. *See* Roberto A. Sanchez, *Health and Environmental Risks of the Maquiladora in Mexicali*, 30 NAT. RES. J. 163, 184 (1990) (presenting empirical data on generation of hazardous waste materials by TNCs' plants in maquiladora region and noting lack of evidence that these plants ship hazardous waste back to country of origin or otherwise properly dispose of their hazardous waste).

34. *See* Adolfo A. Zinser, *Authoritarianism and North American Free Trade: The Debate in Mexico* (stating that "whereas the United States and Canada are open societies where dissent can be articulately expressed and tolerated, Mexico is an authoritarian re-

about the pollution problems in their neighborhoods along the border are harassed or intimidated by those fearing disruption of free trade.[35] Similarly, political pressures often work to silence the Mexican media.[36] In fact, the Mexican public's participation in the NAFTA negotiation process was almost nonexistent.[37] Considering the significant effect of NAFTA on the lives of Mexican citizens, the absence of their voices in the NAFTA negotiation process is a striking reminder of the power dis-

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gime plagued with abuses and inequalities"), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 205, 207 (1993).

35. *See Perspective on Mexico: The Silence of the Labs*, L.A. TIMES, July 1, 1993, at B7 (reporting arbitrary firings, intimidation, and reduction of funding as means by which government attempts to silence Mexican environmental advocates). The article cites the 1992 closure of the Center for Ecodevelopment, one of the leading environmental institutions in Mexico, which employed 35 researchers. *Id.* Carmen Hernandez de Vasquez, a former director of the civil-protection agency for Tijuana, was summarily fired for persistently investigating a toxic waste site owned by a United States firm. *Id.* It was eventually determined that as much as $20 million would be needed to clean up the site. *Id.*

36. *See* Judith A. Hellman, *Mexican Perception of Free Trade: Support and Opposition to NAFTA* (describing limitations on freedom of expression and control over press in Mexico), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 193, 194 (1993). The Mexican government monopolizes newsprint and provides direct "subsidies" to "registered" journalists in order to control the media. *Id.*; *see* Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 220 (1993) (reporting government's widespread censorship of Mexican television). Direct intimidation of independent journalists has been reported as well. *See* David Schrieberg, *Deal Gone Bad Led to Mexican Journalist's Slaying*, SACRAMENTO BEE, Dec. 2, 1992, at A12 (reporting government's pressure tactics against journalists in Mexico).

37. *See* Adolfo A. Zinser, *Authoritarianism and North American Free Trade: The Debate in Mexico* (contrasting open debate on NAFTA in United States with absence of national debate in Mexico), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 205, 207 (1993). Zinser further reported that "[t]he Mexican government has given NAFTA negotiations the equivalent status of a national security affair, keeping information almost a state secret, preventing any meaningful public debate, maintaining a close vigilance on its opponents, and transmitting only general propaganda messages to the public." *Id.* Mexican critics of NAFTA were denounced and called enemies of the nation by top officials. *Id.* at 209; *see* Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 392-93 (1994) (discussing failure of Mexican government to release environmental review to Mexican public and fact that much of Mexico's NAFTA environmental information was "imported" from Canada and United States); *cf.* Judith A. Hellman, *Mexican Perceptions of Free Trade: Support and Opposition to NAFTA* (discussing lack of reliable data to estimate Mexican popular support for NAFTA), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 193, 194 (1993).

crepancy between polluters of the environment and their primary victims.[38]

C. *Free Trade and Applicable Environmental Provisions*

A close analysis of NAFTA and the supplemental environmental agreements reveal little concern for the interests of maquiladora residents.[39] Instead, drafters placed emphasis on securing government commitments for developing environmental infrastructures along the border, preventing erosion of existing national and international standards, and creating financial resources for environmental conservation measures.[40]

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38. *Cf.* KWAMENA ACQUAAH, INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS: THE NEW REALITY 66-71 (1986) (describing three main avenues of political manipulation by TNCs to sway national and international rules in their favor).

39. *See* Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 941–48 (1994) (attributing lack of provision for citizens' cross-border mobility in NAFTA to rise of xenophobia, nativism, and environmental and labor groups' bias against non-European nations).

40. *See Protecting the Environment in North American Free Trade Agreement Negotiations: Hearing Before the Subcomm. On Regulation, Business Opportunities, and Energy of the House Comm. On Small Business*, 102d Cong., 1st Sess. 34–36 (1991) (statement of Peter M. Emerson, Senior Economist, Environmental Defense Fund) (suggesting implementation of border-use tax, value-added tax directed at industry, or sale of government-backed bonds to create funds to secure proper investment in environmental issues). Overall, environmental groups' main focus in the debate was on influencing governmental policies regarding investment in environmental infrastructure facilities, conservation of natural resources, implementation of environmentally sustainable growth policies, and clean-up of existing pollution. *See id.* (discussing concerns about erosion of domestic standards on environment through multinational agreements, lack of specific plan to fix current pollution problems along border, and need to prevent further degradation of environment through expanding industrial development); Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment,* 30 STAN. J. INT'L L. 379, 383-85 (1994) (stating that public interest in NAFTA focused on larger trade-policy issues). Some groups unsuccessfully sought the preparation of a NAFTA environmental impact statement (EIS) before its ratification. *See* Public Citizen v. Office of the United States Trade Representatives, 970 F.2d 916, 923 (D.C. Cir. 1992) (ruling that EIS was not required prior to NAFTA ratification because international trade agreement does not constitute "final agency action" within meaning of Administrative Procedure Act). Even though their attempt was unsuccessful, the environmental groups' goal in requesting an EIS—minimizing adverse impacts of economic development on the environment through government intervention—still remains viable. *See* James A. Funt, Comment, *The North American Free Trade Agreement and the Integrated Environmental Border Plan: Feasible Solutions to U.S.-Mexico Border Pollution?*, 12 TEMP. ENVTL. L. & TECH. J. 77, 94–99 (1993) (advocating continuing effort to remedy environmental harm caused by increased economic activities).

1. NAFTA Environmental Provisions

The preamble to NAFTA proclaims that the goals of the agreement are the harmonious development and expansion of world trade in "a manner consistent with environmental protection and conservation," the promotion of "sustainable development," and strengthening the development and enforcement of environmental laws and regulations.[41] NAFTA also contains a provision dealing with concerns of "capital flight" to Mexico due to an artificial competitive advantage created by Mexico's lax enforcement of environmental standards.[42] In addition, United States and Canadian negotiators wanted to prevent NAFTA from being used to weaken existing local and national environmental laws and other environmental agreements among member countries.[43] In the end, NAFTA's environmental provisions were the product of compromise between environmental groups, seeking an active government role in protecting environment, and TNCs, wishing to remove all trade barriers to cross-border operations.[44]

Although NAFTA's environmental goals set important precedents for future free-trade agreements by attempting to reconcile economic development and environmental protection in a multinational context, NAFTA is notably silent on victims' rights to freely choose the forum in which to seek redress directly from primary, identifiable polluters.[45] NAFTA's silence as to victim's redress is significant.[46] After all, if TNCs

41. NAFTA, *supra* note 11, pmbl., 32 I.L.M. at 297.

42. *Id.* ch. 1, art. 1114, 32 I.L.M. at 642. Article 1114 provides that it is "inappropriate" to relax each nation's domestic health, safety, or environmental standards or derogate from such standards in order to encourage or expand transnational capital investments in their respective countries. *Id.*

43. *See id.* ch. 7, art. 3, 32 I.L.M. at 386–92 (instituting various standard principles and mechanisms to prevent downward harmonization of each nation's environmental standards).

44. *See* Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implication for Environmental Cooperation, Trade Policy, and American Treaty Making*, 8 TEMP. INT'L & COMP. L.J. 257, 257–58 (1994) (analyzing process of political compromise embodied in President Clinton's "fast track" strategy of environmental negotiation). President Clinton wanted environmental groups' support without jeopardizing the support of the business community. *Id.*

45. *See* Michael S. Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 264 (1992) (asserting that NAFTA is largely silent on environmental issues); *see also* Sloan Rappoport, Comment, *NAFTA and the Petrochemical Industry: A Disastrous Combination for Life at the U.S.-Mexico Border*, 11 DICK. J. INT'L L. 579, 586–87 (1993) (noting how strained balance between free trade and environment explains why NAFTA failed to provide any "explicit" environmental protection provisions).

46. *See* Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 940–41 (1994) (pointing out that

are free to move operations across the border to commit egregious violations of environmental rules, victims of environmental pollution should be free to file lawsuits across the border as well. In other words, "free trade" should not mean that TNCs are "free" from potential tort liability because of another country's comparatively weak legal system.[47] Furthermore, considering the inherent "deterrent effect" of private tort actions against future abusers, NAFTA's silence on the issue of cross-border private tort actions may be an unfortunate forfeiture of one of the most effective tools of enforcement.[48] Instead, the environmental goals set forth in NAFTA clearly focus on governmental actions and fail to provide a meaningful forum for direct, cross-border private enforcement actions by victims in maquiladora regions.[49]

2. Environmental Side Agreement Provisions

The "government-to-government dispute resolution" scheme established in NAFTA came under severe criticism because of its failure to provide greater public participation in trade disputes.[50] The drafters of

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NAFTA does not deal with victims' rights or cross-border movement of people). During the NAFTA negotiation process, environmental critics of NAFTA allied themselves with strong anti-immigration and xenophobic labor groups. *See id.* at 945-49 (reporting Federation for American Immigration Reform's (FAIR) connection to environmental groups with whom they jointly opposed NAFTA).

47. *See* Sloan Rappoport, Comment, *NAFTA and the Petrochemical Industry: A Disastrous Combination for Life at the U.S.-Mexico Border*, 11 DICK. J. INT'L L. 579, 589-92 (1993) (describing Mexican environmental agency's ineffective enforcement activities due to budget and political constraints); Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 214-20 (1993) (explaining why Mexican legal system fails to enforce environmental standards).

48. *Cf.* Stanley M. Spracker et al., *Environmental Protection and International Trade: NAFTA As a Means of Eliminating Environmental Contamination As a Competitive Advantage,* 5 GEO. INT'L ENVTL. L. REV. 669, 677–78 (1993) (asserting that NAFTA's failure to provide any enforceable rights in its text, except for mere language of disapproving lax enforcement of environmental laws, will frustrate environmental protection efforts); Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 129 (1994) (illustrating NAFTA's failure to provide for adequate enforcement of environmental standards).

49. *See* Carl F. Schwenker, *Protecting the Environment and U.S. Competitiveness in the Era of Free Trade: A Proposal*, 71 TEX. L. REV. 1355, 1360 (1993) (acknowledging that NAFTA's environmental treatment is limited to upholding past and future governmental treaties). The difficulty with such limited treatment lies in the fact that treaties are directed at the government, rather than at individual TNCs which pollute. *Id.*

50. *See* NAFTA, *supra* note 11, ch. 1, arts. 2012.1(b), 2017.4, 32 I.L.M. at 696, 697 (providing that negotiations would be confidential, thereby effectively excluding public input on environmental issues); *see also* Robert Housman, *The North American Free Trade*

NAFTA, in their zeal to accommodate TNCs' interests and with their exclusive focus on government actions, failed to incorporate the public's interests in accessing information and participation in the resolution of environmental disputes.[51] Facing criticism for such omissions, the Clinton Administration initiated a "supplemental agreement" on the environment and, as a result, the North American Agreement on Environmental Cooperation (Environmental Side Agreement)[52] was completed in 1993. The Environmental Side Agreement reiterated NAFTA's environmental goals and sought to provide added mechanisms to ensure each government's effective enforcement of environmental laws.[53]

However, the Environmental Side Agreement's most significant improvement is the agreement to provide "citizens' access" to judicial and administrative procedures for enforcement of environmental laws.[54] Similarly, the Environmental Side Agreement's "private access" provision provides that "[p]rivate access to remedies shall include rights, in accordance with the Party's law, such as: (a) to sue another person under that Party's jurisdiction for damages; (b) to seek sanctions or remedies such as monetary penalties, [and] emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations."[55] If the language of this provision were interpreted as providing Mexican citizens—or NAFTA nationals—access to United States administrative, quasi-judicial, or judicial proceedings against tortfeasors, then the Environmental Side Agreement could have an important effect on United States courts' power to exert jurisdiction over transnational mass tort liti-

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Agreement's Lessons for Reconciling Trade and the Environment, 30 STAN. J. INT'L L. 379, 409-10 (1994) (criticizing NAFTA's exclusion of public in its dispute resolution scheme).

51. *See* David A. Wirth, *The Uneasy Interface Between Domestic and International Environmental Law*, 9 AM. U. J. INT'L L. & POL'Y 171, 172-73 (1993) (criticizing poor representation of public interests in international treaty-making process). Many bedrock principles of the United States' environmental laws—notice to the public, an opportunity to be heard, and judicial review—are ignored in international agreements such as NAFTA. *Id.*

52. North American Agreement on Environmental Cooperation, *opened for signature* Sept. 9, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 (entered into force Jan. 1, 1994) [hereinafter Environmental Side Agreement].

53. *Id.* pt. 1, art. 1, 32 I.L.M. at 1483.

54. *Id.* pt. 1, arts. 5–6, 32 I.L.M. at 1483–84. Although this provision requires each government to guarantee the rights of citizens to petition their governments to enforce laws, it is not clear whether this provision actually guarantees citizens' standing in domestic courts to secure enforcement. Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 414 (1994).

55. Environmental Side Agreement, *supra* note 52, pt. 1, art. 6, 32 I.L.M. at 1484.

gation.[56] As of yet, however, no United States court has entertained arguments from NAFTA nationals claiming access under this provision.[57]

If the Environmental Side Agreement's private-access provision does not guarantee such access, the provision's only significance is as an express reiteration by the member governments of the basic principle that a person has a right to seek compensation for harm inflicted by a wrongdoer.[58] The potential victims of an environmental tort in the United States or Canada already enjoy such rights in the courts of their respective countries. But the problem for Mexican citizens lies in the fact that the Mexican legal system, in practice, precludes any meaningful recovery by poor, politically powerless victims—such as the hypothetical Hernandez family—against powerful TNCs.[59] Therefore, the Environmental Side Agreement's private-access provision might turn out to be a hollow

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56. *Cf.* Joel A. Gallob, *The Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85, 90-94 (1991) (discussing implications of similar interpretation of citizen suit provisions in United States-Canadian trade agreement). Such an interpretation faces a couple of difficult challenges. *See* Sarah M. Vogel, *The Effects of NAFTA upon North Dakota State Law*, 70 N.D. L. REV. 485, 490–92 (1994) (explaining major hurdles to finding citizen suit provisions in NAFTA and other international agreements, such as preemption by state laws). For example, a Mexican national such as Hernandez would have to show "[a] legally recognized interest" under United States law before he can claim a guaranteed right of access to a United States forum. *See* Environmental Side Agreement, *supra* note 52, pt. 1, art. 6, 32 I.L.M. at 1484 (restricting private remedies to those "persons with a legally recognized interest under its law" and in accordance with the violating party's law). Furthermore, debate on this issue has focused on whether United States federal and state laws would be preempted by NAFTA provisions. *See* Sarah M. Vogel, *The Effects of NAFTA upon North Dakota State Law*, 70 N.D. L. REV. 485, 487–90 (1994) (discussing possible nullification of state laws under NAFTA and other international agreements).

57. Recent searches of LEXIS and Westlaw revealed no cases filed by Mexican nationals claiming access to United States courts under the Environmental Side Agreement's private-access provision.

58. *See* Robert Housman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593, 598 (1993) (discussing theoretical possibilities of Environmental Side Agreement's private-access clause).

59. *See* Robert W. Benson, *The Threat of Trade, the Failure of Politics and Law, and the Need for Direct Citizen Action in the Global Environmental Crisis*, 15 LOY. L.A. INT'L & COMP. L.J. 1, 14-15 (1992) (discussing inadequacy of tort law in foreign countries—including Mexico—as means of upholding environmental standards); Sloan Rappoport, Comment, *NAFTA and the Petrochemical Industry: A Disastrous Combination for Life at the U.S.-Mexico Border*, 11 DICK. J. INT'L L. 579, 598 (1993) (citing Mexican courts' lack of strength and government's political favoritism toward petrochemical industry as reasons why Mexican judicial system would not provide adequate remedy).

proclamation of victims' rights which does not substantially change the status quo.[60]

In addition to the private-access provision, the Environmental Side Agreement created a trilateral Commission for Environmental Cooperation (CEC).[61] The primary goal of the CEC is to handle potential disputes between parties claiming inadequate enforcement of NAFTA signatories' environmental laws.[62] The dispute resolution procedure under the CEC, however, does not expressly provide for public participation.[63] Rather, the dispute proceedings are to be conducted in closed meetings between government appointees.[64] Again, it is apparent that

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60. *Cf.* Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 262 (1994) (stating that private-access clause in Environmental Side Agreement provides "no substantive obligations" for signatory governments and criticizing cautious approach to judicial remedies).

61. Environmental Side Agreement, *supra* note 52, pt. 2, art. 8, 32 I.L.M. at 1485. This continent-wide institution is intended to complement existing bilateral environmental institutions in North America. Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 413 (1994). Environmental ministers from the three member countries head the CEC, sitting as the governing Council of Ministers. *Id.* An independent Secretariat serving an Executive Director conducts the day-to-day affairs of the CEC. *Id.* The CEC also provides for a Joint Public Advisory Committee, composed of five nongovernmental persons from each country, which will be called upon for input and advice. *Id.*; *see also* Environmental Side Agreement, *supra* note 52, pt. 2, arts. 9, 11, 16, 32 I.L.M. at 1485–89 (setting up CEC regime, listing its membership, and describing its functions).

62. *See* Environmental Side Agreement, *supra* note 52, pt. 2, art. 10-33, 32 I.L.M. at 1486-92 (describing CEC'S duties and parameters of CEC's authority). When an allegation arises as to a member government's derogation from their environmental laws, the CEC may be called upon to provide information and recommendations for possible avoidance of the dispute. Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 414-15 (1994). The CEC, by two-thirds vote of its members, can form an arbitral panel to review all the information and prepare a report to the interested member governments. *Id.* at 415–16. Based on this initial report, the member governments are encouraged to resolve the matter themselves by implementing a corrective "action plan." *Id.* at 416. If this arbitration process fails, the panel may impose its own action plan and, if such a plan is not honored, levy a "monetary enforcement assessment" against the government found to have failed to enforce its laws. *Id.*

63. *See* Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 417-18 (1994) (noting that CEC has discretion to make public factual record prepared by Secretariat); Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 135 (1994) (stating that there is no guarantee public will ever see factual records of CEC proceedings).

64. Environmental Side Agreement, *supra* note 52, pt. 2, art. 8, 32 I.L.M. at 1485.

"enlightened bureaucrats" are entrusted with policing each government's actions, with no opportunity for public scrutiny.[65]

3. Other Binational Environmental Agreements

In addition to NAFTA and the Environmental Side Agreement, the United States and Mexico entered into the United States-Mexico Border Environment Cooperation Agreement (BECC/NADBank Agreement)[66] in 1993. The BECC/NADBank Agreement's main purpose is to facilitate development of environmental infrastructures along the border.[67] The BECC/NADBank Agreement established two new institutions dedicated to solving environmental problems along the border: the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADBank).[68] BECC's main function is to coordinate local and state governments across the border in joint efforts to facilitate infrastructural developments such as sewage treatment plants.[69] To further such infrastructural developments, BECC is authorized to certify projects for NADBank funding.[70] NADBank was established to supply additional financing to infrastructure projects that may reduce the negative impact of prior unregulated and concentrated economic activity in

65. *See* Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 417–18 (1994) (pointing out fundamental weaknesses of CEC's government-to-government dispute resolution scheme, including fact that public plays no role in any proceeding); Frona M. Powell, *Environmental Protection in International Trade Agreements: The Role of Public Participation in the Aftermath of the NAFTA*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 109, 111 (1995) (noting that Sierra Club opposed Environmental Side Agreement because of its long and complicated enforcement procedure and lack of public input). *See generally* Daniel D. Coughlin, Comment, *The North American Agreement on Environmental Cooperation: A Summary and Discussion*, 2 MO. ENVTL. L. & POL'Y REV. 93, 106 (1994) (concluding that Environmental Side Agreement largely abstained from addressing border region's pollution problem).

66. Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16, 18, 1993, U.S.-Mex., 32 I.L.M. 1545 [hereinafter BECC/NADBank Agreement].

67. *See* Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 419-20 (1994) (stating that BECC/NADBank Agreement is intended to perpetuate environmental infrastructure development).

68. BECC/NADBank Agreement, *supra* note 66, ch. 1, art. 1, § 2, 32 I.L.M. at 1545.

69. *Id.*

70. *Id.* ch. 1, art. 2, § 3, 32 I.L.M. at 1549-50.

the border region.[71] NADBank was designed to be capitalized and governed equally by the United States and Mexico.[72]

Although these binational efforts arose from a clear recognition of the severity of environmental problems in the border region and the urgent need for action, they are far from adequate.[73] Considering the estimated $20 billion in clean-up costs needed to rectify the border's existing environmental problems, the small amount of funds allocated belies each government's commitment to addressing the problems.[74] In addition, the plans have only called for the development of "long term, revenue-generating" projects, such as sewage treatment plants, and have not seriously dealt with other urgent issues which do not generate revenues, such as cleaning up toxic hot spots.[75] Therefore, even the most direct and serious attempts to deal with border environmental issues have failed to provide more than a symbolic show of commitment by each government.[76]

D. *What Remains for the Victims?*

NAFTA, the Environmental Side Agreement, and the BECC/NADBank Agreement illustrate the inherent difficulty of taking a mul-

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71. *See* Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 420 (1994) (describing role of NADBank as additional avenue of national government assistance for border region). The total estimated amount of financing for environmental projects in the border region is $7-8 billion. *Id.* However, serious doubt exists as to the long-term viability of NADBank. *See* Lucy Conger, *Can NAFTA Reinvent Development Banking?*, INST. INVESTOR, Mar. 1994, at 63 (expressing doubt as to effectiveness of NADBank unless proponents of lending institution establish firm structure and financing plan).

72. *See* BECC/NADBank Agreement, *supra* note 66, ch. 2, art. 2., § 2, 32 I.L.M. at 1557, 1564 (describing capitalization requirements of NADBank and outlining functions and powers of NADBank board).

73. *See* James Bailey, *Free Trade and the Environment—Can NAFTA Reconcile the Irreconcilable?*, 8 AM. U. J. INT'L L. & POL'Y 839, 871–72 (1993) (discussing inescapable weaknesses of Border Plan such as lack of any binding legal force and deficiencies of vision and funding); *cf.* Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 126–27 (1994) (explaining chronology and failure of binational environmental agreements between Mexico and United States to deal with border pollution issues).

74. *See* Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 421 (1994) (pointing out relatively small amount of funding allocated for NADBank in light of infrastructural needs in border region).

75. BECC/NADBank Agreement, *supra* note 66, ch. 1, art. 1, § 2, 32 I.L.M. at 1545.

76. *See* Robert W. Benson, *Free Trade As an Extremist Ideology: The Case of NAFTA*, 17 U. PUGET SOUND L. REV. 555, 564-70 (1994) (criticizing NAFTA's and supplemental agreements' treatment of environmental issues and lack of funding for environmental cleanup).

tinational approach to international environmental issues.[77] The most that governments can do to deal with the cumulative impact of pollution is throw tax dollars at the problem, thereby creating inefficient, politically influenced, national and international bureaucracies.[78] In the meantime, victims of pollution will continue to suffer under the shadow of the current "free trade mania," and will remain largely ignored in the celebration of the future prosperity that NAFTA promises.[79] Such victims of environmental pollution can expect comparatively little redress from Mexican tort law. Attempts to bring suit in the United States will also face difficulty, especially in light of TNCs' inevitable pleas for forum non conveniens dismissal.

III. Forum Non Conveniens Today

Notwithstanding the lack of a multinational approach to protecting the victims of environmental pollution in maquiladora regions, victims could bring tort actions directly against polluters in both state and federal courts in the United States. An example of how potential cross-border environmental tort actions might work is illustrated by the hypothetical lawsuit filed by the hypothetical plaintiff, José Hernandez. For Hernandez's suit to proceed against Alpha Oil and Beta Corporation, however, he must establish that a United States court may exercise personal jurisdiction over the defendants and that venue is proper.[80] Considering

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77. *See* Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 Tex. Int'l L.J. 123, 126–27 (1994) (asserting that environmental agreements between United States and Mexico are mere agreements to agree).

78. *See* Robert W. Benson, *Free Trade As an Extremist Ideology: The Case of NAFTA*, 17 U. Puget Sound L. Rev. 555, 570 (1994) (pointing out that NAFTA's solution to environmental problems is spending public's tax money, rather than requiring polluters to pay for their actions); Colin Crawford, *Some Thoughts on the North American Free Trade Agreement, Political Stability and Environmental Equity*, 20 Brook. J. Int'l L. 585, 612-13 (1995) (explaining how discretion to spend public funds given to CEC's international bureaucrats will render meaningful enforcement impossible).

79. *See* Robert W. Benson, *Free Trade As an Extremist Ideology: The Case of NAFTA*, 17 U. Puget Sound L. Rev. 555, 570 (1994) (concluding that poor workers of Mexico will continue to pay environmental costs of free trade).

80. *See* Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 108-09 (1987) (stating that Due Process Clause of 14th Amendment limits exertion of personal jurisdiction over nonresident defendants); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (holding that "Due Process Clause protects an individual's liberty interest in not being subject to binding judgements of a forum with which he has established no meaningful 'contacts, ties, or relations'"). Unlike personal jurisdiction requirements, the venue requirement flows from statutory, rather than constitutional sources. Stephen C. Yeazell et al., Civil Procedure 180 (3d ed. 1992). The federal venue statute mandates that a suit be brought in the district "where any defendant resides" or "where a substantial part of the events or

that both Alpha Oil and Beta Corporation conduct extensive business in Texas, establishing personal jurisdiction and venue should be relatively easy.[81] However, Hernandez's action might still be dismissed under the doctrine of forum non conveniens.[82]

Designed to further the convenience of litigants and the ends of justice, forum non conveniens refers to the power of a court, exercising discretion, to decline jurisdiction over a matter more appropriately brought and tried in another forum.[83] Exercising equitable powers, courts consider factors such as ease of access to proof and the burden of travel for wit-

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omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)-(b) (1993 & Supp. 1996). Corporations reside in any district in which they are subject to personal jurisdiction. *Id.* § 1391(c). States have their own venue statutes which employ one or more of the following tests: (1) where the cause of action, or part thereof, arose or accrued; (2) where the defendant resides; (3) where the defendant is doing business; (4) where the defendant has an office, place of business, agent, representative, or where an agent or officer of the defendant resides; (5) where the plaintiff resides; (6) where the plaintiff is doing business; (7) where the defendant may be found; (8) where the defendant may be summoned or served; and (9) in the county designated in the plaintiff's complaint. STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 184 (3d ed. 1992). The most common provision used today seems to situate venue based on the residence of the defendant. *Id.*

81. *See Asahi Metal Indus.*, 480 U.S. at 108 (holding that defendant's purposeful establishment of minimum contact with forum state is sufficient to establish personal jurisdiction); *Burger King Corp.*, 471 U.S. at 475 (holding that minimum contacts must have basis in some act by which defendant "purposefully avails" itself of privilege of conducting activities in forum state, thus invoking benefits and protection of its laws); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (holding that defendant's acts within forum should be sufficient to constitute purposeful availment of protection and benefits of forum state's laws). The primary inquiry in determining whether a United States court has personal jurisdiction over Alpha Oil and Beta would be whether they purposefully and intentionally availed themselves of the forum's law by conducting their activities within its borders. *See* Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 482-84 (1993) (explaining current test for personal jurisdiction). The determination of the proper venue will most likely depend on Alpha Oil's and Beta's residences as defined in the venue statue. *See* 28 U.S.C. §§ 1391(a)(1), (b)(1), (c) (1993 & Supp. 1996) (defining "residence" of corporation as any district in which corporation is subject to personal jurisdiction).

82. *Cf.* Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 423 (1932) (Brandeis, J., concurring) (commenting that "[c]ourts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal"); STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 185 (3d ed. 1992) (stating that both state and federal courts possess power to decline jurisdiction); David Boyce, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond* Reyno, 64 TEX. L. REV. 193, 205 (1985) (stating that courts can resist imposition of jurisdiction by invoking forum non conveniens doctrine); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine,* 133 U. PA. L. REV. 781, 782 (1985) (stating that forum non conveniens dismissal is predicated on jurisdiction and venue being properly established).

83. BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

nesses in declining to hear a case under the forum non conveniens doctrine.[84]

However, application of the forum non conveniens doctrine in United States courts has been inconsistent.[85] The doctrine of forum non conveniens has evolved along conflicting doctrinal paths, leading to inconsistent outcomes between federal and state courts, which has prompted many defendants to indulge in reverse forum shopping by removing cases to federal court.[86] Before discussing the effects of the forum non conveniens doctrine on Hernandez's case, the current status of the doctrine in both United States federal and state courts must be examined.

A. *Federal Courts and Forum Non Conveniens*

The United States Supreme Court first established the two-step federal test for forum non conveniens dismissal in *Gulf Oil Corp. v. Gilbert*.[87] First, a court must find that at least one other adequate "alternative forum" exists.[88] Second, the court must decide whether the present or al-

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84. *Id.*

85. *See* Allen R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985) (noting United States courts' inconsistent application of forum non conveniens doctrine).

86. *Compare* Stangvik v. Shiley, Inc., 819 P.2d 14, 17–19 (Cal. 1991) (adopting federal forum non conveniens standard) *with* Myers v. Boeing Co., 794 P.2d 1272, 1281 (Wash. 1990) (en banc) (rejecting federal forum non conveniens standard). Louisiana explicitly refused to adopt forum non conveniens in 1967. Trahan v. Phoenix Ins. Co., 200 So. 2d 118, 120 (La. Ct. App. 1967). Texas temporarily abolished forum non conveniens for personal injury and wrongful death cases. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 675-80 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991). Even though the Texas Legislature reinstituted the forum non conveniens doctrine in 1993, the revised statute still retains a few exceptions that preclude application of forum non conveniens. TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.031(a), 71.051(a) (Vernon 1986 & Supp. 1996). Therefore, even if Hernandez and his co-plaintiffs brought their action in Texas state court, Alpha Oil and Beta would try to remove the case to federal district court in order to take advantage of a more liberal grant of forum non conveniens dismissal. *Cf. Castro Alfaro*, 786 S.W.2d at 682 n.4 (describing how defendants Dow and Shell tried to remove case to federal court even though no basis for federal jurisdiction existed); Laurel E. Miller, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1387-88 (1991) (describing how discrepancy between federal and state courts' application of forum non conveniens creates battle to remove cases from state to federal courts). Both Alpha Oil and Beta may remove Hernandez's action from state to federal court provided the federal district court has original jurisdiction over Hernandez's case, and no defendant is a citizen of Texas. *See* 28 U.S.C. § 1441 (1994) (listing requirements to be met before removal is granted).

87. 330 U.S. 501, 506–09 (1947).

88. *See Gilbert*, 330 U.S. at 506-07 (stating that forum non conveniens doctrine envisions at least two fora where defendant is amenable to process). However, *Gilbert* did not explicitly require that the alternative forum be "adequate," but rather that the defendant

ternative forum would best serve the "public interest" and the parties' "private interests."[89] Relevant private interest factors are the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive."[90] These factors reveal that the efficiency or convenience of litigation for the parties carries the most importance in the *Gilbert* Court's private-interest analysis.[91] According to *Gilbert*, relevant public interest factors include: the administrative difficulties flowing from court congestion; the local interest in deciding controversies at home; the interest in trying a diversity case in a forum that is at home with the law that must govern the action; avoiding unnecessary conflicts of law problems, or problems of applying foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.[92]

About thirty-five years after the *Gilbert* decision, in *Piper Aircraft Co. v. Reyno*,[93] the Supreme Court addressed the application of the forum non conveniens doctrine in cases involving plaintiffs from foreign nations.[94] In *Reyno*, the representative of the estates of five Scottish citizens brought wrongful-death actions in a Pennsylvania federal district court against Piper Aircraft Company, the manufacturer of an airplane that crashed in Scotland.[95] The district court dismissed the case under the forum non conveniens doctrine, but the United States Court of Appeals for the Third Circuit reversed, holding that an unfavorable change in substantive law might bar forum non conveniens dismissal.[96]

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be "amenable to process" in the alternative forum. *Id.* The alternative forum in *Gilbert* was another court in the United States, rather than a foreign country. *Id.* at 503. Therefore, analyses of adequacy criteria other than "amenability to the service of process" might have been unnecessary. *See* David Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond* Reyno, 64 TEX. L. REV. 193, 206 (1985) (stating that consideration of specific criteria for adequacy of another forum was not necessary in *Gilbert*).

89. *Gilbert*, 330 U.S. at 506-09.

90. *Id.* at 508.

91. *See* Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 486 (1993) (equating "private interest" factors with "convenience" criteria).

92. *Gilbert,* 330 U.S. at 508-09.

93. 454 U.S. 235 (1981).

94. *Reyno*, 454 U.S. at 246-47.

95. *Id.*

96. *See* Piper Aircraft Co. v. Reyno, 630 F.2d 149, 163–64 (3d Cir. 1980) (finding that forum non conveniens dismissal should be barred if it would lead to change in substantive law), *rev'd*, 454 U.S. 235, 247 (1981).

The Supreme Court not only explicitly rejected the Third Circuit's rationale,[97] but also warned of the dangerous flow of transnational litigation into the United States by foreign plaintiffs merely shopping for more favorable substantive law.[98] The *Reyno* Court also indicated that it would not give the usual deference to a plaintiff's forum choice when the plaintiff is a foreign national.[99] Nonetheless, the Court recognized that a viable alternative forum should exist before transnational cases are dismissed on forum non conveniens grounds:

> Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.[100]

The federal forum non conveniens doctrine, as developed in *Gilbert* and *Reyno*, vests trial courts with a great deal of discretion, and institutes

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97. *See Reyno*, 454 U.S. at 247 (holding that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry").

98. *See Reyno*, 454 U.S. at 252 n.18 (listing advantages of United States forum over foreign forum, including: (1) availability of strict liability law; (2) choice of 50 different jurisdictions; (3) availability of jury trial; (4) availability of contingency-fee arrangement; and (5) more extensive discovery rule); *see also id.* at 256-57 n.24 (stating that "the deference accorded a plaintiff's choice of forum has never been intended to guarantee that the plaintiff will be able to select the law that will govern the case"); Linda J. Silberman, *Development in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 502–03 (1993) (noting attraction of United States forum to many foreign plaintiffs).

99. *See Reyno*, 454 U.S. at 256 (stating that "[b]ecause the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference").

100. *Id.* at 254. In fact, the Court stated that the existence of an "adequate alternative forum" is required before the application of the *Gilbert* balancing test. *Id.* at 254-55 n.22. The Court gave two extreme scenarios as examples of what is meant by "inadequate alternative forum." *Id.* First, it stated that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute," such as when the alternative forum fails to recognize the cause of action. *Id.* Second, dismissal is inappropriate if the alternative forum might not hear the case at all, thereby precluding the plaintiffs' suit. *Id.* (citing Phoenix Canada Oil Co. v. Texaco, 78 F.R.D. 445 (D. Del. 1978)). At the time of forum non conveniens adjudication in *Phoenix Canada Oil Co. v. Texaco*, the military of the alternative forum had assumed the power of the executive and legislative branches and, therefore, the trial court held that the alternative forum was inadequate. 78 F.R.D. at 455; *see also* David Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond* Reyno, 64 TEX. L. REV. 193, 210-11 (1985) (discussing minimum standard of adequacy as established by *Reyno* Court).

a limited standard of review for appellate courts.[101] This combination has resulted in inconsistent applications of the doctrine by individual trial judges.[102] Increasingly, however, federal district courts have used the forum non conveniens doctrine to dismiss transnational cases brought by foreign plaintiffs.[103] Thus, after the *Reyno* decision, federal courts appear more receptive to forum non conveniens dismissal in cases involving United States defendants, especially when all the plaintiffs are foreign citizens.[104] Therefore, Hernandez and the other fictional plaintiffs may have a better chance of recovery bringing suit in state court.

B. *State Forum Non Conveniens Doctrine*

The *Reyno* and *Gilbert* decisions delineate federal forum non conveniens law and do not necessarily control the operation of the doctrine in state courts.[105] Nonetheless, more than thirty states have adopted the

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101. *See* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal For a Uniform Standard*, 28 TEX. INT'L L.J. 501, 517–18 (1993) (identifying discretion afforded trial judges, and limited review on appeal, of federal forum non conveniens doctrine).

102. *See* William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1670–77 (1992) (noting arbitrary outcomes of trial courts' forum non conveniens rulings); *see also* Garrett J. Fitzpatrick, Reyno: *Its Progeny and Its Effects on Aviation Litigation*, 48 J. AIR L. & COM. 539, 548-57 (1983) (reviewing different outcomes of six foreign airplane cases after *Reyno* decision); Maria A. Mazzola, Note, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of* Reyno, 6 FORDHAM INT'L L.J. 577, 582 (1983) (stating that "judicial resistance to dismissal on forum non conveniens grounds" has led to arbitrary applications of *Reyno* principles).

103. *See* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 831 (1985) (reporting three-fold increase of federal forum non conveniens dismissals during 10 years following *Reyno* decision).

104. *See* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 940 (1990) (stating that foreign suits are more likely to be brought in state courts because of expansive application of forum non conveniens in federal courts). The more extensive use of forum non conveniens in federal courts does not mean that foreign plaintiffs' suits will be always dismissed. *See* Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628, 643 (3d Cir. 1989) (vacating district court's decision to dismiss on forum non conveniens grounds); Lacey v. Cessna Aircraft Co., 862 F.2d 38, 49 (3d Cir. 1988) (reversing forum non conveniens dismissal of claim arising from plane crash in British Columbia).

105. *See* Myers v. Boeing Co., 794 P.2d 1272, 1280 (Wash. 1990) (en banc) (stating that *Reyno* does not bind states, but is merely persuasive authority); *id.* at 1276 (noting that *Gilbert* expressly refused to establish bright line rule when selecting forum, opting instead to balance factors). *But see* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard,* 28 TEX. INT'L L.J. 501, 518 n.81 (1993) (arguing that federal forum non conveniens law should control state courts in cases involving foreign plaintiffs because in-

federal standards set by *Gilbert* and *Reyno*.[106] A few state courts, however, have formulated their own forum non conveniens standards while some states have rejected the doctrine altogether.[107] This Comment examines the forum non conveniens doctrines of Texas, California, and Washington to illustrate the differing approaches among the states.

1. Texas Courts

The experience of Texas courts in recent years illuminates the different, and often polarized, application of the forum non conveniens doctrine.[108] In 1990, the Texas Supreme Court in *Dow Chemical Co. v. Castro Alfaro*[109] held that the forum non conveniens doctrine would not bar personal injury or wrongful death lawsuits filed in Texas courts by citizens of countries that maintain equal treaty rights with the United States.[110] In *Castro Alfaro*, Costa Rican banana plantation workers suffering various forms of physical impairment after exposure to dibromochloropropane (DBCP) sued Dow Chemical, the manufacturer of DBCP.[111] Although

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terests of foreign states are appropriate subject for treatment pursuant to federal common law).

106. *See* Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 482 (1993) (discussing adoption of standards by various states); *see also* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950–51 (1990) (describing wide variations of state courts' acceptance of *Reyno* standard).

107. *See* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 951 (1990) (stating that some state courts have rejected or curtailed forum non conveniens doctrine). Florida has more limited application of the doctrine than do the federal courts. Oboussier-Lowe v. Kuehne & Nagel, 531 So. 2d 249, 250 (Fla. Dist. Ct. App. 1988). Florida courts will entertain a motion for forum non conveniens dismissal only if both the plaintiff and the defendant are nonresidents, and the cause of action arose outside of Florida. Houston v. Caldwell, 359 So. 2d 858, 859-60 (Fla. 1978), *overruled by* Kinney System, Inc. v. Continental Ins. Co., No. 84329 (Fla. Jan. 25, 1996), 1996 WL 26554 (Fla.). Montana and West Virginia have rejected the forum non conveniens doctrine in Federal Employer's Liability Act (FELA) cases and have left the doctrine's existence an open question in other types of cases. Burlington N. R.R. v. District Court, 746 P.2d 1077, 1078-81 (Mont. 1987); Labella v. Burlington N., Inc., 595 P.2d 1184, 1186-87 (Mont. 1979); Gardner v. Norfolk & W. Ry., 372 S.E. 2d 786, 793 (W. Va. 1988), *cert. denied*, 489 U.S. 1132 (1989).

108. *See* Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 488–89 (1993) (stating that judicial debate in *Castro Alfaro* and controversy following decision presented microcosm of differing views on forum non conveniens doctrine).

109. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991).

110. *Castro Alfaro*, 786 S.W.2d at 679.

111. *Id.* at 675.

DBCP is banned in the United States, Dow Chemical nevertheless exported the chemical to Costa Rica for use in banana plantations.[112] In rejecting forum non conveniens dismissal, the Texas Supreme Court relied on a Texas statute which provided that an action for damages for the death or personal injury of a foreign citizen "may be enforced in the courts of [Texas] if the [nation of which the foreign plaintiff is a citizen] has equal treaty rights with the United States on behalf of its citizens."[113]

Although the case revolved around statutory interpretation, intense debate on the court revealed two polarized views of the role of United States courts in an increasingly integrated world. The majority in *Castro Alfaro* based its decision on legislative intent, historical analysis of the relevant statute's predecessors, and previous forum non conveniens case law in Texas.[114] However, Justice Doggett's concurring opinion offered the strongest ideological attack on the forum non conveniens doctrine.[115] Noting that Dow Chemical operated one of its largest plants in Texas and conducted extensive operations in the state, Justice Doggett criticized the fallacy of Dow's argument that Costa Rica would be the most "convenient" forum in which to try the case.[116] According to Justice Doggett, the real reason that TNCs favor the forum non conveniens doctrine is the practically "outcome determinative effect" of a forum non conveniens dismissal, rather than the proffered foundations of the doctrine—"fundamental fairness and sensible and effective judicial administration."[117] One cannot help picturing the "Kafkaesque" scenario of Dow's attorneys discussing the convenience of Costa Rican witnesses when it was readily apparent that no witnesses would have been called to testify if Dow had its way.[118] Indeed, according to Justice Doggett, the forum non conveniens doctrine is nothing but a procedural shield, "immunizing" TNCs

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112. *Id.* at 681. *Castro Alfaro* was a classic "dumping" case, in which United States chemical corporations sold domestically banned products to third world countries despite clear dangers to the health of workers and the environment. *Id.* at 689.

113. *Id.* at 682 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986)).

114. *Castro Alfaro*, 786 S.W.2d at 674-79.

115. *Id.* at 680-89 (Doggett, J., concurring).

116. *Id.* at 682 n.4.

117. *Id.* at 682. In fact, empirical studies have confirmed that most cases dismissed on forum non conveniens grounds are not refiled. *See* David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 409 (1987) (stating that "euphemistic vocabulary" covers up harsh reality that cases dismissed on forum non conveniens grounds are generally not refiled). Based on data collected between 1947 and 1984, the subsequent history on 55 personal injury cases and 30 commercial cases after their dismissal indicated that only one personal injury case and two commercial cases actually reached trial. *Id.* at 419.

118. *See Castro Alfaro*, 786 S.W.2d at 683 (Doggett, J., concurring) (describing irony of scene in which attorneys argue for convenience of witnesses who will never appear). As noted by Justice Doggett, the cost of one trip from Costa Rica to Houston to review docu-

from any liability for their conduct overseas.[119] Most significantly, Justice Doggett's opinion recognized the United States courts' expanding role in the era of the "global village"—a world where the United States public's interests are no longer confined to what occurs within the United States border.[120]

In marked contrast to Justice Doggett's concurrence, one of the four dissenting opinions in *Castro Alfaro* reflected the strong apprehension of many judges and legislatures, justified or not, of allowing the United States judicial system to become "the courthouse for the world."[121] Although the dissenting judges spent much of their discussion rebutting the majority's statutory analysis, their underlying concern seems to have been that Texas courts, by abolishing the forum non conveniens doctrine, would draw all kinds of litigation from around the world, thereby backlogging dockets and excluding local citizens from their own courts.[122] Justice Cook's dissent compared the Costa Rican plaintiffs to "turn-of-the-century wildcatters" who searched all over the United States until they "hit the pay-dirt."[123] Justice Hecht went even further, arguing that the majority's decision would attract foreign litigants to Texas, benefit only a few lawyers, and force Texans to pay the additional cost of so-called "foreign litigation."[124]

Considering the strength of the dissenters' rhetoric, it is not surprising that, following widespread local and national coverage of the decision, a strong business lobby mobilized against the *Castro Alfaro* decision.[125] Indeed, critics of the court's decision in *Castro Alfaro* predicted everything from relocation of businesses to mass layoffs.[126] Eventually, a 1993 statu-

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ments produced by Shell would exceed the maximum possible recovery in Costa Rica, which is $1,080. *Id.* at n.6.

119. *Id.* at 680–81.

120. *See id.* at 689 (discussing role of courts in holding TNCs accountable for their actions outside United States). The parochial perspective embodied in the doctrine no longer serves this nation's interest in a world where commercial markets and corresponding environmental impacts are global. *Id.*

121. *Id.* at 707 (Hecht, J., dissenting). Justice Hecht criticized the notion that Texas courts would stand alone in trying personal injury cases from around the world. *Id.*

122. *See Castro Alfaro*, 786 S.W.2d at 697 (Cook, J., dissenting) (noting fear that plaintiffs searching for most favorable forum will bring suit in Texas courts).

123. *Id.*

124. *Id.* at 707 (Hecht, J., dissenting).

125. *See* George Fleming & John Grayson, *Forum Non Conveniens: The Other Side of the Story*, 55 TEX. B.J. 808, 808-09 (1992) (describing business lobbyists' threat to move operations out of Texas because of *Castro Alfaro* decision).

126. *Id.*

tory amendment revived the forum non conveniens doctrine and constructively overruled *Castro Alfaro*.[127]

2. California Courts

The California courts' experience with forum non conveniens jurisprudence is quite different from that of Texas, and offers useful lessons as well.[128] Until the California Supreme Court's decision in *Stangvik v. Shiley, Inc.*,[129] most California state courts applied a quite different forum non conveniens standard than that articulated in *Reyno*.[130] Most significantly, unlike *Reyno*, California courts afforded due deference to a foreign plaintiff's choice of forum and considered the differences of substantive law between the United States and the alternative forum an important factor.[131] However, the California Supreme Court's *Stangvik* decision rejected lower-court precedents and adopted a test more aligned with the *Reyno* decision.[132]

The test adopted in *Stangvik* consists of a two-step analysis which first requires a determination of whether a "suitable alternative forum" ex-

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127. TEX. CIV. PRAC. & REM. CODE. ANN. § 71.051(a) (Vernon Supp. 1996). Texas retained, however, an exception which provides:

> This section does not apply if the personal injury or death that is the subject of the cause of action resulted from a violation of the laws of this state or of the United States, including but not limited to exposure to a substance referred to in Section 33.013(c)(3) that was transported out of this state or the United States in violation of the laws of this state or the United States.

Id. § 71.051(g). The substances referred to in § 71.051(g) include "hazardous chemicals, hazardous wastes, hazardous hydrocarbons, similarly harmful organic or mineral substances, hazardous radiation sources, and . . . similarly harmful substances." *Id.* § 33.013(c)(3).

128. *See* Karolyn King, Note, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1124-31 (1994) (stating that, unlike Texas courts which moved away from *Reyno* standards, California courts have moved in opposite direction by allowing judicial discretion in applying forum non conveniens doctrine).

129. 819 P.2d 14 (Cal. 1991).

130. *See* Holmes v. Syntex Lab., Inc., 156 Cal. App. 3d 372, 377–84 (Ct. App. 1984) (giving deference to foreign plaintiffs' choice of forum), *overruled by* Stangvik v. Shiley, Inc., 819 P.2d 14 (Cal. 1991); *see also* Corrigan v. Bjork Shiley Corp., 182 Cal. App. 3d 166, 172–80 (Ct. App. 1986) (giving due consideration to change of substantive laws between United States and foreign forum), *cert. dismissed*, 479 U.S. 1049 (1987), *and overruled by* Stangvik v. Shiley, Inc., 819 P.2d 14 (Cal. 1991).

131. *See* Karolyn King, Note, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1129-31 (1994) (stating that, prior to *Stangvik*, California decisions disfavored arbitrary geographic boundaries inherent in harsher *Reyno* standard and noting that California courts consider change in substantive law important factor).

132. *See Stangvik*, 819 P.2d at 18-22 (analyzing *Reyno* decision and adopting its standards).

ists.[133] If no suitable alternative forum exists, then the court must hear the case; however, if a suitable alternative forum does exist, the court must consider the convenience of the parties and the public's interest in maintaining the suit in California.[134] Following the *Reyno* guidelines, the *Stangvik* court held that the unavailability of specific remedies in the alternative forum, or any disparity of substantive law, should not be considered relevant in the balancing test, so long as "some remedy" exists.[135]

3. Washington Courts

In contrast with the California courts' adoption of the *Reyno* approach, a unanimous Washington Supreme Court in *Myers v. Boeing Co.*[136] expressly rejected the premise that less deference should be given to foreign plaintiffs' choice of forum.[137] The *Myers* case evolved out of the crash of a Boeing 747 in Japan that culminated in a lawsuit filed against Boeing by personal representatives of seventy-one Japanese, and eight non-Japanese, citizens in Washington state court.[138] Although the Washington Supreme Court upheld the trial court's dismissal on forum non conveniens grounds, it did so because the lower court properly balanced all the *Gilbert* factors by considering all relevant private and public interests in light of the deference given to a plaintiff's choice of forum.[139] In fact, the *Myers* court poignantly asked, "Why is it less reasonable to assume that a plaintiff from British Columbia, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit?"[140] The *Myers* court seems to have answered their own question by noting that xenophobia might be the true underlying influence.[141] Thus, in a bold diagnosis and rejection of current federal forum non conveniens standards, the *Myers* court lent strong moral support to Justice Doggett's hopeful proclamation in *Castro Alfaro*: "Fortunately Texans are not so provincial and narrow-minded . . . . Our citizenry recognizes that a wrong does not fade away because its immediate consequences are first felt far away rather than close to home."[142]

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133. *Id.* at 17.

134. *Id.*

135. *Id.*

136. 794 P.2d 1272 (Wash. 1990).

137. *Myers*, 794 P.2d at 1280–81.

138. *Id.* at 1274.

139. *Id.* at 1276–81.

140. *Id.* at 1281.

141. *See Myers*, 794 P.2d at 1281 (noting role of xenophobia in forum non conveniens determination).

142. *Castro Alfaro*, 786 S.W.2d at 680 (Doggett, J., concurring).

C. *Conflicting Visions*

A foreign plaintiff such as Jose Hernandez must recognize that different states emphasize different considerations in forum non conveniens analysis. Indeed, the separate experiences of the three highest courts in Texas, California, and Washington vividly illustrate the underlying tension facing United States courts in today's increasingly globalized world.[143] As the United States integrates commerce with its neighbors, provincial and xenophobic forces ask United States courts to erect higher judicial borders to exclude disputes arising out of TNCs' cross-border activities.[144] Such provincialism within the context of an increasingly integrated global economy results in inconsistent applications of the forum non conveniens doctrine as courts are pulled in opposite directions, each pointing toward conflicting visions of the courts' role in a rapidly shrinking world.

IV. FORUM NON CONVENIENS AND HERNANDEZ'S CROSS-BORDER SUIT

Keeping in mind the different standards under which courts apply the forum non conveniens doctrine, we return to our hypothetical plaintiff's class action suit filed in Texas. Forum non conveniens analysis must focus on whether Hernandez's action will pass the hurdle of the *Reyno* standard. If Hernandez's action satisfies the harsher *Reyno* standard, then it should also pass muster under more lenient state standards as well.[145]

A. *The Adequacy Requirement*

The first hurdle in the forum non conveniens analysis that Hernandez must surpass is the question of the adequacy of an alternative forum.

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143. *See* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 278 (1992).(explaining rise of nativism in America during times of national stress); *see also* Peter H. Schuck, *Introduction: Immigration Law and Policy in the 1990s*, 7 YALE L. & POL'Y REV. 1, 7 (1989) (stating that Americans display hostility toward foreigners during periods of high social anxiety). Nativism is defined as intense opposition to "foreign" elements which is rooted in ethnocentric judgements. JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 4 (2d ed. 1988).

144. *Cf.* Scott Sinclair, *NAFTA and U.S. Trade Policy: Implications for Canada and Mexico* (noting strong rise of isolationist and protectionist forces in America as corporations expand overseas), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 219, 219–20 (1993).

145. *See* Karolyn King, Note, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1124-31 (1994) (comparing states which adopted harsher *Reyno* standards to other states still employing more lenient standards or curtailed use of forum non conveniens doctrine).

Federal courts, as well as the state courts adopting the *Reyno* standard, require a showing that the alternative forum is "adequate" before entertaining the balancing test for dismissal under the forum non conveniens doctrine.[146] If the plaintiffs' only viable forum happens to be in the United States, then the court is required to hear the case.[147] Under the *Reyno* analysis, the other forum is not an adequate alternative when the remedy offered is "clearly unsatisfactory."[148] According to the example given by the Court, this clearly unsatisfactory category includes alternative fora that do not permit litigation of the subject matter in dispute.[149] It also includes an alternative forum such as Ecuador—as discussed in *Phoenix Canada Oil Co. v. Texaco, Inc.*[150]—where the military took over both the executive and legislative branches, leaving the independence of the judiciary in serious doubt.[151] Based on the two examples given by the Court, it seems that the alternative forum would not be considered inadequate unless it is likely to preclude the cause of action altogether.[152] Although the hypothetical case fits neither of the above situations neatly, Hernandez and his co-plaintiffs can argue that their environmental tort case will be practically "precluded" in Mexico, thereby avoiding forum non conveniens dismissal under *Reyno*.[153]

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146. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 (1981) (requiring existence of adequate alternative forum as condition precedent to forum non conveniens dismissal); *see also* Stangvik v. Shirley, Inc., 819 P.2d 14, 15 (Cal. 1991) (holding that suitable alternative forum should exist before allowing dismissal on forum non conveniens grounds).

147. *Reyno*, 454 U.S. at 254-55 n.22.

148. *Id.* The Court stated: "Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, . . . the district court may conclude that dismissal would not be in the interests of justice." *Id.* at 254.

149. *Id.* at 254 n.22.

150. 78 F.R.D. 445, 455 (D. Del. 1978).

151. *Phoenix Canada Oil Co.*, 78 F.R.D. at 455.

152. *See* Ahmed v. Boeing Co., 720 F.2d 224, 226 (1st Cir. 1983) (stating that *Reyno* Court's language concerning inadequacy of alternative forum suggests that exception which precludes dismissal if foreign forum's substantive law is different and basically unjust is narrow); *cf.* Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 890 (5th Cir. 1982) (stating that forum non conveniens doctrine is inapplicable to suits brought under United States antitrust laws because no equivalent action for antitrust violations exists outside United States), *cert. denied* 464 U.S. 961 (1983); *In re* Disaster at Riyadh Airport, Saudi Arabia, 540 F. Supp. 1141, 1145 (D.D.C. 1982) (holding that Saudi Arabia is adequate alternative forum despite possibility of smaller damage awards).

153. *Cf.* Fiorenza v. United States Steel Int'l, 311 F. Supp. 117, 120-21 (S.D.N.Y. 1969) (recognizing absence of contingency fee arrangements as one factor rendering Bahamas inadequate alternative forum); Odita v. Elder Dempster Lines, Ltd., 286 F. Supp. 547, 551 (S.D.N.Y. 1968) (holding that United Kingdom was inadequate alternative forum because plaintiff could not afford to pay attorney hourly rate and United Kingdom prohibited contingency fee arrangement); Bagarozy v. Meneghini, 131 N.E.2d 792, 796 (Ill. App. Ct. 1955) (discussing lack of adversarial proceedings in Italy as one of factors to be considered in

Unlike the United States, Mexico is a civil-law nation, and its courts rely mainly on the written text of Mexico's Constitution and codes.[154] As applied to Hernandez's case, the statutory limitations on tort liability under Mexican law make any possibility of recovery inadequate.[155] To begin with, class action suits are not available under Mexican law.[156] This means that Hernandez and his co-plaintiffs will have to break up the class and pursue their actions independently, each hiring their own lawyers, conducting individual discovery, and so on. The loss of the cost-saving advantages that a class action affords them, by itself, might be enough to deter Hernandez and his co-plaintiffs from even pursuing legal action in Mexico.[157] Furthermore, recovery in Mexico is limited to provable actual damages and lost earnings calculated by the plaintiff's peso-based salary.[158] Such a calculation of damages is inadequate given the plummeting

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inadequacy determination). Hernandez would have to demonstrate, however, that he would have no remedy at all if his claim is dismissed on forum non conveniens grounds. *See Reyno*, 454 U.S. at 254 (requiring alternative forum's remedy to be clearly unsatisfactory, rising to level of almost no remedy at all).

154. Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L.J. 1059, 1095 (1994). Mexican code provisions, unlike United States statutes, do not address specific problems, but provide only generalized principles of law. *Id.* Interpretative texts known as "*doctrina*" provide factual illustrations of applications of Mexican law in much the same way as the American Law Institute's Restatements. *Id.* The statutes that would govern Hernandez's tort claim in Mexico are contained in the Federal District Civil Code, which governs all federal cases, and the State Civil Code, which governs all state cases. Daniel I. Basurto González & Elaine F. Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 671-72 (1991).

155. *See* Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 215 (1993) (stating that limits on civil recovery in Mexico are tied to plaintiff's wages prior to injury); *see also* Karolyn King, Note, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1143 (1994) (noting virtual impossibility of average Mexican citizen to "gain access to Mexican legal system").

156. Daniel I. Basurto González & Elaine F. Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 671 (1991); Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 215 (1993).

157. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 678 (1979) (noting that class action lawsuits are often only means to justice for economically or socially disadvantaged groups).

158. *See* Boris Kozolchyk & Martin L. Ziontz, *A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the United States*, 7 ARIZ. J. INT'L & COMP. L. 1, 29–33 (1989) (detailing damage provisions of Mexico's Federal Civil Code). Based on Hernandez's weekly salary of $25, the maximum damages recoverable for his injury, even if Hernandez proves that he has suffered a permanent disability, would not

value of the peso as compared with the high cost of the inevitable medical care associated with injuries from exposure to highly toxic chemicals.[159] Mexican tort law also fails to recognize applicable punitive damages.[160] Thus, Hernandez's recovery, if any, is likely to be relatively small.

Despite the strong possibility of inconsequential damage awards in Mexico, a United States court might still view the Mexican legal system as affording "some remedy" sufficient for the "adequate alternative" analysis.[161] Such an inflexible and narrow construction of the *Reyno* adequacy standard excludes relevant fact and policy considerations.[162] Her-

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exceed $5000. *Id.* at 30. In addition, since his salary exceeds 25 pesos per day, he would not be able to add any other costs, such as future medical bills. *Id.* at 32.

159. *See id.* at 34 (discussing "absurdly unfair" cap on actual and pain and suffering damages in light of continuous peso devaluations).

160. *See id.* (noting that Mexican law does not recognize punitive damages, though "moral damages" are available in libel and slander actions).

161. *See Stangvik*, 819 P.2d at 19 n.5 (stating that "the fact that an alternative jurisdiction's law is less favorable to a litigant than the law of the forum should not be accorded any weight in deciding a motion for forum non conveniens provided, however, that some remedy is afforded"); *see also* Pain v. United Technologies Corp., 637 F.2d 775, 794 (D.C. Cir. 1980) (holding that difference in amount of recovery available in alternative forum is not relevant to forum non conveniens inquiry), *cert. denied*, 454 U.S. 1128 (1981). Some federal courts, on the other hand, place the burden of showing that an adequate alternative forum exists on defendants and require them to provide sufficient proof that a remedy is clearly available. *See, e.g.*, Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768-69 (9th Cir. 1991) (granting forum non conveniens dismissal since defendant met burden of showing adequate alternative forum); Schertenleib v. Traum, 589 F.2d 1156, 1160 (2d Cir. 1978) (stating that defendant bears burden of proving existence of adequate alternative forum); Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico, S.A., 528 F. Supp. 1337, 1342-43 (S.D.N.Y. 1982) (holding that burden of proving existence of adequate alternative forum is defendant's), *aff'd*, 727 F.2d 274 (2d Cir. 1984).

162. *See* Karolyn King, Note, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1141–44 (1994) (criticizing inflexible application of *Reyno* adequacy standard because it fails to take into account other policy goals, such as adequate compensation); *see also* Irish Nat'l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90, 91 (2d Cir. 1984) (noting that certain foreign jurisdictions' harsh monetary limitations on recovery often eliminate possibility of trial after dismissal from United States courts); Menendez Rodriguez v. Pan Am. Life Ins. Co., 311 F.2d 429, 433–34 (5th Cir. 1962) (reversing district court's forum non conveniens dismissal after being presented with plaintiff's significant financial, legal, and political handicap in alternative forum), *vacated on other grounds*, 376 U.S. 779 (1964); Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 683 (Tex. 1990) (noting that forum non conveniens dismissal is often outcome determinative in favor of defendants), *cert. denied*, 498 U.S. 1024 (1991); David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 409 (1987) (stating that "the courts have taken refuge in a euphemistic vocabulary, one that glosses over the harsh fact that such dismissal is outcome-determinative in a high percentage of the forum non conveniens cases"). In addition to adequate compensation, ten other policies—sometimes congruent, sometimes conflicting—underlie American tort law: (1) liability based on fault; (2) liability proportional to fault; (3) the cost of accidents

nandez's class action suit is based on an environmental tort claim. As with other environmental tort suits, the policy goals underlying Hernandez's class action should be to award meaningful compensation for any harm inflicted, and to prevent future abuses by Alpha Oil, Beta, and other similarly situated TNCs.[163] Therefore, the proper question regarding the adequacy issue should be whether an adjudication of Hernandez's claim in Mexico will adequately accomplish both compensation and deterrence. The answer to such an inquiry is clearly, "No."

Not only would an extremely low damage award fail to adequately compensate Hernandez and his co-plaintiffs, but they would probably be unable to secure legal counsel because of Mexico's lack of any statutorily provided contingency-fee arrangement.[164] Nor would the Matamoros residents' suits in Mexico deter TNCs from continuing their practices.[165]

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should be spread broadly; (4) the cost of accidents should be shifted to those best able to bear them; (5) those who benefit from dangerous activities should bear resulting losses; (6) tort law should foster predictability in human affairs; (7) tort law should facilitate economic growth and the pursuit of progress; (8) tort law should be administratively convenient and efficient, and should avoid intractable inquiries; (9) tort law should discourage the waste of resources; and (10) courts should accord due deference to co-equal branches of government. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 4-7 (1994).

163. *See* Karolyn King, Note, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1135-45 (1994) (pointing out tort laws' basic goals of compensation and deterrence). Apart from seeking compensation and deterrence, Hernandez and other residents have a paramount interest in having Alpha Oil and Beta clean up the toxic pollution that otherwise will continue to plague the area and cause future health problems. *See* Robert W. Benson, *Free Trade As an Extremist Ideology: The Case of NAFTA*, 17 U. PUGET SOUND L. REV. 555, 568 (1994) (advocating polluter-pays principle to stop continuing harm to residents of maquiladora region).

164. *See* Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 215 (1993) (pointing out lack of punitive damage awards, class actions, and contingent fee arrangement as critical defect for impecunious Mexican plaintiffs); *cf. Castro Alfaro*, 786 S.W.2d at 683 (Doggett, J., concurring) (noting practical impossibility of carrying on suit if dismissed on forum non conveniens grounds because of prohibition on contingency fee arrangement in Costa Rica). The absence of a contingency fee arrangement is often a critical factor discouraging the foreign plaintiff's action in the alternative forum. *See Fiorenza*, 311 F. Supp. at 120-21 (holding Bahamas to be inadequate alternative because of lack of contingency fee arrangement, among other reasons); *Odita*, 286 F. Supp. at 551 (holding United Kingdom to be inadequate alternative forum for impoverished plaintiff due to absence of contingency fee arrangement); *cf.* Macedo v. Boeing Co., 693 F.2d 683, 690 (7th Cir. 1982) (considering high filing fees and illegality of contingency fee arrangement as relevant factors in forum non conveniens analysis). In addition, in the event that their suits in Mexico are not successful, Hernandez and his fellow plaintiffs might be liable for Beta's and Alpha Oil's legal fees. *See* RUDOLPH B. SCHLESINGER, COMPARATIVE LAW 343–44 (4th ed. 1980) (discussing loser-pay-all system in civil-law countries).

165. *See* Elizabeth C. Rose, Comment, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223, 227 (1989) (discussing

In fact, it is doubtful whether Hernandez can bring Alpha Oil and Beta to the Mexican courts at all.[166] Like many other TNCs in the maquiladora region, both Alpha Oil and Beta operate in Mexico through their Mexican subsidiaries, which are often endowed with little assets of their own.[167] Undoubtedly, the companies would resist the Mexican courts' jurisdiction over them by shifting blame to their subsidiaries.[168] For Hernandez and his co-plaintiffs, such a maneuver coupled with the plaintiffs' lack of resources, would effectively preclude any compensation or deterrence altogether if their case were dismissed in a United States court.

Similarly, the present reality of lax enforcement of environmental regulations in Mexico does not promise much hope for the deterrence of toxic torts.[169] Apart from unreasonably restrictive limits on tort liability suits,

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high cost of toxic waste disposal and fact that many TNCs consider relocation to Mexico low-cost alternative because of limited liability for toxic spills).

166. *See* Daniel I. Basurto González & Elaine F. Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 673-74 (1991) (stating that although Mexican law theoretically allows filing of civil suits against foreign parent corporations in Mexico, no such case had yet been reported).

167. *Id.* at 682–83. Under the maquiladora program, TNCs minimize their exposure by investing very little in their Mexican subsidiaries. *Id.* Typically, Mexican subsidiaries own "little more than the building"—or sometimes not even that—and all equipment, components, or raw materials are owned by the parent TNCs and brought into Mexico for the use by their subsidiaries on a temporary basis. Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 217–18 (1993).

168. *See* Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 217 (1993) (pointing out that minimum investment in their own subsidiaries is effective means of shielding TNCs from tort liabilities or regulatory fines). Ironically, dismissal on forum non conveniens grounds ensures jurisdiction over a parent corporation in Mexico because most United States courts will make such dismissals conditioned upon the defendants' voluntary submission to the Mexican court's jurisdiction. *See In re* Union Carbide Corp., 809 F.2d 195, 195–97 (2d Cir.) (conditioning forum non conveniens dismissal on defendant's voluntary submission to Indian court's jurisdiction, application of United States discovery procedure, and guaranteed enforcement of Indian court's judgement), *cert. denied*, 484 U.S. 271 (1987); *see also* Daniel I. Basurto González & Elaine F. Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 690 (1991) (mentioning lack of jurisdiction over United States parent corporation by Mexican courts as one of primary reasons for bringing suit in United States).

169. *See* Tod Robberson, *Mexico's Environmental Dilemma*, WASH. POST., Apr. 4, 1993, at A36 (reporting violations of environmental law by thousands of small businesses in Mexico); Sloan Rappoport, Comment, *NAFTA and the Petrochemical Industry: A Disastrous Combination for Life at the U.S.-Mexico Border,* 11 DICK. J. INT'L L. 579, 580–90 (1993) (discussing financial and political constraints hindering effective enforcement of environmental laws in Mexico). During NAFTA's environmental debate, the Mexican government reorganized its environmental enforcement regime and created the Ministry of Social Development (SEDOSOL), which replaced the Secretariat of Urban and Ecological

Mexican law does not allow citizen suits as a means of enforcing environmental standards.[170] Instead, Mexicans must depend on administrative actions by an environmental enforcement agency that lacks sufficient funding, trained inspectors, and political independence.[171] More impor-

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Development (SEDUE). *Id.* at 589–90. However, the SEDOSOL suffered from the same chronic problems which plagued its predecessor: budget shortages, lack of trained inspectors, a closed political process, and lack of citizens' participation. *See* Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement,* 17 HASTINGS INT'L & COMP. L. REV. 207, 215–20 (1993) (listing weak administrative enforcement and closed political process as reasons rendering Mexican enforcement ineffective). *But cf. Mexico's Environmental Laws and Enforcement,* 2 No. 3 MEX. TRADE & L. REP. 9, 12 (1992) (analyzing increased number of inspections since 1982). Compared to the 1,209 inspections conducted between 1982 and 1984, 5,405 inspections took place throughout Mexico from 1988 to 1990, with three permanent closings, 980 partial or temporary closings, 29 relocations, 1,032 agreements negotiated for compliance scheduling, and 679 voluntary compliance agreements. *Id.* However, until 1991, Mexico had only 109 inspectors for the whole country. *Id.*

170. Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement,* 17 HASTINGS INT'L & COMP. L. REV. 207, 215 (1993). On the contrary, citizens' suits in the United States have been well received and widely used in enforcing environmental standards. *See* Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976) (holding that Clean Air Act expressly provides private right of action under citizen suit provision as means of enforcing environmental standards), *cert. denied,* 434 U.S. 902 (1977). *But cf.* Middlesex County Sewerage Auth. v. National Sea Clammers Assoc., 453 U.S. 1, 1–3 (1981) (holding that no implied private right of action exists under Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act of 1972); California v. Sierra Club, 451 U.S. 287, 287–88, 298 (1981) (holding that private right of action does not exist against federal and state officials under Rivers and Harbors Appropriation Act). In the United States, citizen groups are usually treated "as welcomed participants in the vindication of environmental interests." *See* Natural Resources Defense Council v. Train, 510 F.2d 692, 725 (D.C. Cir. 1974) (upholding citizens' private right of action under Clean Air Act); *see also* S. REP. NO. 414, 92d Cong., 2d Sess. 81 (1972) (noting that courts should realize that in bringing actions under citizen suit provision of Federal Water Pollution Control Act, citizens provide public service), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747. The Clean Air Act's citizen suit provision has been a model for other federal environmental legislation. William H. Timbers & David A. Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law,* 70 CORNELL L. REV. 403, 405 n.8 (1985). In the United States, citizens can also request a judicial review of administrative action against a federal party under the Clean Air Act and Federal Water Pollution Control Act. *See* William H. Timbers & David A. Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law,* 70 CORNELL L. REV. 403, 417 (1985) (distinguishing private right of action under federal statutes from actions for judicial review).

171. *See, e.g.,* Roberto A. Sanchez, *Health and Environmental Risks of the Maquiladora in Mexicali,* 30 NAT. RESOURCES J. 163, 176–80 (1990) (reporting lack of implementation of Mexico's Decree for Management of Toxic Residues due to lack of funding and political independence); Karolyn King, Note, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1142 (1994) (citing lack of monetary resources as reason why prosecution of Alco-Pacifico for illegal dumping in Mexico was

tantly, any sanctions by Mexican authorities would hardly be effective against TNCs because TNCs have largely shielded themselves behind their "shells"—Mexican subsidiaries and their local managers.[172] It becomes clear, then, that the alternative forum fails to meet the two main goals underlying Hernandez's action—compensation and deterrence. Therefore, even under the low-threshold "adequacy" requirement of *Reyno*, it would require a stretch of the definition of adequacy to assert that, by dismissing, the court is sending the case to an adequate or suitable alternative forum.[173]

B. *Private Interest Factors*

Even when an adequate alternative forum is found, the courts must balance the public and private interests at stake in the litigation. The main goal in balancing private interest factors is to promote fairness and convenience for the parties involved.[174] The private interests of litigants include: (1) the ease and cost of access to documents, evidence, and witnesses; (2) the enforceability of judgments; and (3) all other practical matters that make trial of a case expeditious and inexpensive for litigants.[175] Since the *Gilbert* decision, however, advances in modern transportation and communication technologies have rendered the private

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impossible); Sloan Rappoport, Comment, *NAFTA and the Petrochemical Industry: A Disastrous Combination for Life at the U.S.-Mexico Border*, 11 DICK. J. INT'L L. 579, 590 (1993) (discussing precarious position of Mexican environmental agency due to its lack of funds and political risk of taking strict measures); Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 216 (1993) (pointing out lax oversight by SEDUE of toxic waste shipments).

172. *See* Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 217–18 (1993) (noting lack of assets in TNCs' Mexican subsidiaries and local governments' collusion with TNCs to frustrate any meaningful enforcement). Since the mid-1980s, Mexican authorities have been reluctant to use fines—the maximum fine is $80,000—but have encouraged investment in pollution control systems. *See* Maryanne Foronjy, *Mexico and the North American Free Trade Agreement—Growing Clean?*, 4 FORDHAM ENVTL. L. REP. 211, 227 (1993) (indicating that focus of SEDUE shifted from penalties to pollution control).

173. *See* Steven Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391, 430–31 (1993) (discussing serious deficiencies in Mexican law regarding protection of workers). Such deficiencies include an ineffective judicial system and violence perpetrated against independent-minded workers. *Id.* at 431.

174. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 683-84 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991).

175. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (listing considerations used to determine private interests of litigants).

interest factors of modern TNCs largely irrelevant.[176] The marginal relevancy of such factors becomes especially pronounced when an alleged tort takes place in the maquiladora region within 100 miles of the southern United States border and the defendants conduct extensive business operations in Texas. When the litigation is conducted in a Texas court, the difficulty of access to evidence and witnesses in the maquiladora region would not be any greater than if the evidence or witnesses were found in Seattle or New York.[177] Certainly, as the doctrine is applied to defending TNCs in a cross-border tort case like Hernandez's, the very phrase "forum non conveniens" loses much of its relevance.[178]

In contrast to the relative convenience of a Texas forum, dismissal in favor of a Mexican forum would make it prohibitively inconvenient and expensive for the litigants to obtain evidence, conduct discovery, and interview witnesses from the United States. Considering the vast size and resources of both TNCs, Hernandez and his co-plaintiffs will surely face daunting obstacles in attempting to gather evidence.[179] Further, the potential damages recoverable under Mexican law would not justify expending such costs, even if Hernandez and his co-plaintiffs possessed adequate resources.[180] Therefore, private interest factors weigh heavily against dis-

176. *Castro Alfaro*, 786 S.W.2d at 684; *see* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (pointing out that modern transportation and communication have made it much less burdensome to be sued in jurisdiction where defendants conduct business activities); Calavo Growers of Cal. v. Belgium, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) (stating that jet travel and satellite communications have significantly altered meaning of "non conveniens"), *cert. denied*, 449 U.S. 1084 (1981).

177. *See* Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 NW. J. INT'L L. & BUS. 376, 378–93 (1994) (reporting that between 1978 and 1988, Mexico signed international agreements which facilitate cross-border gathering of evidence).

178. *See Castro Alfaro*, 786 S.W.2d at 684 (stating that forum non conveniens is misnomer in today's world).

179. *See* David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 418 (1987) (discussing detrimental effect of forum non conveniens dismissal on impecunious foreign plaintiffs); *see also* Karolyn King, Note, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1138 (1994) (pointing out that lack of contingency fee arrangement will have detrimental impact on Mexican plaintiffs).

180. *See Castro Alfaro*, 786 S.W.2d at 683 (Doggett, J., concurring) (noting high costs of travel to United States as compared with meager damage award available in foreign country).

missal.[181] After all, having their claims practically precluded would be the ultimate "inconvenience" for Hernandez and his co-plaintiffs.[182]

C. *Public Interest Factors*

1. Interest of the Forum

One of the strongest arguments for forum non conveniens dismissal that Hernandez and his co-plaintiffs must confront is the assertion that United States courts should not be forced to hear cases in which the interest of United States citizens is likely to be slight.[183] However, in cases such as Hernandez's cross-border environmental tort action, the United States citizens' interest in adjudication is substantial indeed.[184] When TNCs dump toxic waste illegally, adverse effects do not politely stop at the national border.[185] In addition to direct adverse health effects on United States citizens who reside in the border region and rely on shared, polluted natural resources,[186] United States taxpayers will eventually

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181. *See McGee*, 355 U.S. at 223 (holding that modern transportation makes it less burdensome for defendant who is sued in place where he conducts business); *Calavo Growers of Cal.*, 632 F.2d at 969 (holding that jet travel and satellite communications altered meaning of defendant's forum non conveniens argument).

182. *See* Karolyn King, Note, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1143 (1994) (stating that inability to prosecute suit in alternative forum is ultimate inconvenience).

183. *See* Piper Aircraft v. Reyno, 454 U.S. 235, 260 (1981) (holding that forum non conveniens dismissal was appropriate because American interest was insufficient to justify judicial resources and time); *In re* Union Carbide Gas Plant Disaster, 809 F.2d 195, 202 (2d Cir.) (stating that little deference is paid to plaintiffs' choice of forum when plaintiffs are foreign citizens), *cert. denied*, 484 U.S. 871 (1987).

184. *See* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 686 (Tex. 1990) (Doggett, J., concurring) (asserting that defendants' extensive Texas contacts justified interest of Texas in regulating defendants' conduct), *cert. denied*, 498 U.S. 1024 (1991). Justice Doggett also pointed out that "actions of our corporations affecting those abroad will also affect Texans." *Id.* at 689; *see* Maureen A. Bent, Note, *Exporting Hazardous Industries: Should American Standards Apply?*, 20 N.Y.U. J. INT'L L. & POL. 777, 781–84 (1988) (advocating application of American standards to conduct of multinational corporations operating in developing countries).

185. *See* James A. Funt, Comment, *The North American Free Trade Agreement and the Integrated Environmental Border Plan: Feasible Solutions to U.S.-Mexico Border Pollution?*, 12 TEMP. ENVTL. L. & TECH. J. 77, 85 (1993) (pointing out transient nature of border pollution); *cf.* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/T-RCED-93-55, PESTICIDES: STATUS OF FDA'S EFFORTS TO IMPROVE MONITORING AND ENFORCEMENT (1993) (statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division) (stating that importation of foods with illegal pesticide residues has been long-term U.S. problem).

186. *See* Richard Price, *Nightmare on the Border: What's Killing the People of Nogales, Arizona? Many Blame Toxic Waste from Mexico*, USA TODAY, Oct. 27, 1993, at A1, A2 (reporting cancer rate in Nogales, Arizona as five times higher than national aver-

bear the substantial burden of cleaning up toxic sites.[187] Furthermore, keeping in mind that certain industries relocate production to Mexico to avoid complying with strict regulatory rules in the United States,[188] the TNCs' practical immunity from any meaningful liability will only encourage such capital flight, which, in turn, will pressure United States workers to either lower their standards or lose their jobs.[189] Therefore, it is in the best interest of the United States public to ensure that TNCs—whether of United States or foreign origin—adhere to proper environmental standards.[190]

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age and discussing possible linkage with maquiladoras' contamination of air and water); *see also* James A. Funt, Comment, *The North American Free Trade Agreement and the Integrated Environmental Border Plan: Feasible Solutions to U.S.-Mexico Border Pollution?*, 12 TEMP. ENVTL. L. & TECH. J. 77, 85 (1993) (detailing cases of adverse health conditions of United States citizens who live on U.S-Mexico border); *cf.* Thomas O. McGarity, *Bhopal and the Export of Hazardous Technologies*, 20 TEX. INT'L L.J. 333, 334 (1985) (asserting that United States consumers of third world agricultural products also consume toxic pesticides used in farming, "thus completing a 'circle of poison'").

187. *See* Robert W. Benson, *Free Trade As an Extremist Ideology: The Case of NAFTA*, 17 U. PUGET SOUND L. REV. 555, 570 (1994) (stating that taxpayers will end up funding most of environmental clean up); Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 420–21 (1994) (noting that NADBank will be substantially funded by United States taxpayers); *see also* James A. Funt, Comment, *The North American Free Trade Agreement and the Integrated Environmental Border Plan: Feasible Solutions to U.S.-Mexico Border Pollution?*, 12 TEMP. ENVTL. L. & TECH. J. 77, 86 (1993) (illustrating how San Diego ended up subsidizing most of $192 million cost of building Mexican water treatment facilities in Tijuana).

188. *See* Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59, 61 (1994) (reporting NAFTA opponents' assertion that United States industries relocated due to lax environmental and labor regulations in Mexico as compared with United States).

189. *See* Robert Kreklewich, *North American Integration and Industrial Relations: Neoconservatism and Neo-Fordism?* (citing environmentally detrimental examples of "whipsawing" strategy of major United States automobile manufacturers), *in* THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE 261, 266-67 (1993). Whipsawing is an often used TNC negotiation strategy, by which TNCs pit plant against plant for survival. *Id.* First, TNCs will announce their plan to close a certain number of plants among their Canadian, Mexican, and United States operations. *Id.* Next, each plant is required to submit its bid to the parent corporation to produce the highest quality products at the lowest possible price to avoid closure. *Id.*

190. *See Castro Alfaro*, 786 S.W.2d at 687–89 (Doggett, J., concurring) (arguing that strong public policy considerations favor retaining jurisdiction over United States-based multinational corporations).

2. Convenience of the Forum

Another public interest factor that the court considering Hernandez's claim must contemplate in its forum non conveniens analysis is the convenience of the forum itself.[191] This factor includes due concern for the administrative difficulties of applying foreign law.[192] As for the administrative difficulties involved in handling a cross-border suit, no evidence suggests that Mexican plaintiffs' suits would pose any greater problem than domestic plaintiffs' suits. The United States and Mexico share a 2,000-mile border populated by highly integrated cultural, economic, and environmental communities.[193] Any documents or testimony in Spanish can be readily translated into English. If needed, legal scholars in the United States that are familiar with, or even trained in, Mexican law are available.[194] Indeed, transportation across the border is easier than between some regions within the United States.

3. Docket Backlog

Yet another public interest factor considered by courts in analyzing pleas for forum non conveniens dismissal concerns the fear that allowing trial of a particular case will open the flood gates to similar claims from foreign plaintiffs, thereby clogging the judiciary's docket. In his dissent in *Castro Alfaro*, Justice Gonzalez clearly articulated the xenophobic fear underlying the "docket backlog" argument—that foreigners will take over Texas courts, "forcing our residents to wait in the corridors of our courthouses while foreign causes of action are tried."[195] Implicit in this argument is the assumption that, somehow, forum non conveniens doctrine prevents a flood of foreign claimants trying to "hit pay dirt" in United States courts.[196] Still, states such as Louisiana explicitly reject the forum non conveniens doctrine, and apparently have failed to observe

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191. *See Reyno*, 454 U.S. at 259–60 (mentioning district court's lack of familiarity with Scottish law and possible confusion to jury as relevant public interest factors); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947) (stating that administrative ease is public interest factor).

192. *Reyno*, 454 U.S. at 241 n.6.

193. Santos Gomez, Comment, *Environmental Risks Related to the Maquiladora Industry and the Likely Environmental Impact of NAFTA*, 6 LA RAZA L.J. 174, 179 (1993); Karolyn King, Note, *Open Borders—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1113 (1994).

194. *See* Gutierrez v. Collins, 583 S.W.2d 312, 320 (Tex. 1979) (noting adequate access to translations of Mexican statutes, and stating that applying Mexican law in Texas courts has not been problematic); *cf.* Ochoa v. Evans, 498 S.W.2d 380, 387 (Tex. Civ. App.—El Paso 1970, no writ) (asserting that Texas courts are capable of interpreting Mexican Law).

195. *Castro Alfaro*, 786 S.W.2d at 690 (Gonzalez, J., dissenting).

196. *See id.* at 697 (Cook, J., dissenting) (noting that foreign plaintiff filed claims in several jurisdictions before finally settling in Texas).

any such "flooding" problems.[197] Nor did Texas experience any surge of foreign plaintiffs after the *Castro Alfaro* decision.[198] To the contrary, the extensive and arbitrary nature of forum non conveniens adjudication tends to make it a time consuming and wasteful process, thus *contributing* to the backlog problem rather than diminishing it.[199] Therefore, the "docket backlog" argument is inherently misguided.[200]

4. Judicial Comity

In the same context, the notion of judicial comity—United States courts' respect for Mexico's interest in having localized controversies decided in Mexico—should work in favor of retaining jurisdiction as well.[201] To begin, a private, Mexican environmental tort action is not a localized controversy limited to local Mexican interests; rather, it has direct and far-reaching effects on the United States as well.[202] Furthermore, Mexico's current economic and political reality cautions against an assumption that authorities will actively seek to rein in the polluting TNCs in the

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197. *Cf.* JOHN GOERDT ET AL., EXAMINING COURT DELAY: THE PACE OF LITIGATION IN 26 URBAN TRIAL COURTS, 1987, at 20, 22 (1989) (comparing median filing-to-disposition time between Boston—where forum non conveniens is used—and New Orleans—where forum non conveniens is not used—and finding that Boston courts are twice as congested as New Orleans courts).

198. *See* George Fleming & John Grayson, *The Other Side of the Story*, 55 TEX. B.J. 808, 808 (1992) (reporting that, despite dire warnings made by critics of *Castro Alfaro* decision, personal jurisdiction requirement has adequately safeguarded Texas courts against uncontrolled flow of foreign suits).

199. *See* David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 414, 426 (1987) (pointing out fallacy of docket congestion argument). As Justice Doggett noted:

> Making the place of trial turn on a largely imponderable exercise of judicial discretion is extremely costly. Even the strongest proponents of the most suitable forum approach concede that it is inappropriately time-consuming and wasteful for the parties to have to litigate in order to determine where they shall litigate. If forum non conveniens outcomes are not predictable, such litigation is bound to occur. . . . In terms of delay, expense, uncertainty, and a fundamental loss of judicial accountability, the most suitable version of forum non conveniens clearly costs more than it is worth.

Castro Alfaro, 786 S.W.2d at 687 (Doggett, J., concurring).

200. *See Castro Alfaro*, 786 S.W.2d at 682 n.4 (Doggett, J., concurring) (pointing out that it took three years after filing of lawsuit for defendants to obtain forum non conveniens dismissal).

201. *See id.* at 687 (stating that deference shown to interests of foreign forum is best achieved by rejecting forum non conveniens doctrine).

202. *See* Santos Gomez, Comment, *Environmental Risks Related to the Maquiladora Industry and the Likely Environmental Impact of NAFTA*, 6 LA RAZA L.J. 174, 179 (1993) (pointing out border residents' awareness of border environmental interdependence).

interest of Mexican citizens.[203] In fact, increased economic development in Mexico is largely dependent on the flow of transnational capital.[204] As a result, the Mexican government is lenient in its enforcement activities against TNCs.[205] Therefore, because environmental pollution in Mexico is not localized and past practices indicate little interest on the part of Mexican authorities in fashioning a localized response, United States courts may properly assert jurisdiction over transnational mass tort litigation without violating the notion of judicial comity.[206]

Given the criteria considered by courts in entertaining forum non conveniens claims—including public and private interest factors—forum non conveniens dismissal is simply inappropriate in transnational mass tort litigation. Blatant environmental pollution at the hands of TNCs located just beyond the United States-Mexico border cannot go unchecked. However, United States courts declining to dismiss such claims under the forum non conveniens doctrine must still hurdle choice of law questions, discussed below.

V. Choice of Law and "Private Access" Provisions

The choice of law issue presents an important challenge for the court faced with Hernandez's cross-border environmental tort action. Choice of law is not only relevant to a forum non conveniens analysis but, more importantly, will determine whether more favorable United States law will govern Hernandez's claim if he is allowed to proceed in the Texas

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203. *See* Joseph LaDou, *Deadly Migration: Hazardous Industries' Flight to the Third World*, 94 Tech. Rev. 46, 52 (1991) (discussing severe financial restraints on Mexico's environmental enforcement activities); Sloan Rappoport, Comment, *NAFTA and The Petrochemical Industry: A Disastrous Combination for Life at the U.S.-Mexico Border*, 11 Dick. J. Int'l L. 579, 590 (1993) (discussing both financial and political restraints on Mexican environmental agencies).

204. *See* Joseph LaDou, *Deadly Migration: Hazardous Industries' Flight to the Third World*, 94 Tech. Rev. 46, 49 (1991) (pointing out that $3 billion in revenue produced by maquiladora industries is second only to Mexico's oil and gas exports). TNC investment is the primary source of new jobs in Mexico. *Id.* at 49–50.

205. *See id.* at 52 (claiming that Mexican environmental agency risks having its budget reduced if it aggressively enforces environmental standards on maquiladoras); *see also* Sloan Rappoport, Comment, *NAFTA and the Petrochemical Industry: A Disastrous Combination for Life at the U.S.-Mexico Border*, 11 Dick. J. Int'l L. 579, 598 (1993) (pointing out that TNCs, knowing their leverage as job providers, often threaten to move to less aggressive localities if municipal governments actively demand compliance with proper labor and environmental standards).

206. *See Castro Alfaro*, 786 S.W.2d at 687 (Doggett, J., concurring) (relying on remarks of Hon. Michael D. Barnes for proposition that federal policy of comity helps avoid tension with third world, which considers itself "the industrial world's garbage can," largely due to lax governmental enforcement and developing countries' desire to attract potential employers).

court.[207] Moreover, the choice of law analysis will have important repercussions on interpretation of the "private access" provision in the Environmental Side Agreement and the revised Texas forum-access statute. Because our hypothetical plaintiff, Jose Hernandez, has brought suit in a Texas district court, Texas's choice of law rules must be analyzed to determine what law would govern Hernandez's suit.

A. *The Choice of Law Rule in Texas*

Klaxon v. Stentor Electrical Manufacturing Co.[208] requires federal courts to apply the choice of law rules of the state in which they sit.[209] As a result, the Texas choice of law standard will govern in both state and federal courts located in Texas.[210] For choice of law issues, the Texas Supreme Court in *Gutierrez v. Collins*[211] replaced the common-law doctrine of *lex loci delicti* with the modern "most significant relationship" test.[212] Therefore, the court facing Hernandez's claim will apply the most significant relationship test, focusing on various policy-oriented factors and the qualitative significance of the litigants' contacts with both Mexico

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207. *See* Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 493-94 (1993) (stating that weight given to choice of law in forum non conveniens determination varies from court to court and that some courts consider it significant); *see also* Daniel I. Basurto González & Elaine F. Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 689 (1991) (reporting that Texas abolished dissimilarity doctrine, and no longer dismisses suits because foreign law governs).

208. 313 U.S. 487 (1941).

209. *Klaxon*, 313 U.S. at 486. The *Klaxon* Court stated:

> The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based.

Id.

This principle applies even in a case when the state would not apply its own laws. *See* Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (holding that federal district court in Texas must follow finding of Texas state court that Cambodian law governs).

210. *Day & Zimmerman, Inc.*, 423 U.S. at 4.

211. 583 S.W.2d 312, 313 (Tex. 1979). The *Gutierrez* Court refused to automatically apply Mexican law simply because the cause of action arose in Mexico, but rather directed the lower court to apply the "most significant relationship" test to determine whether Mexican or Texas law should govern. *Id.* at 318.

212. *Id.* at 313. The lex loci delicti (law of the place of the wrong) test is a traditional conflicts of law test adopted in the Restatement (First) of Conflict of Laws. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934); LEA BRILMAYER, CONFLICTS OF LAW 17 (4th ed. 1995).

and Texas to determine which substantive law governs.[213] Before applying the most significant relationship test, however, a "true conflict" must exist between Mexican and Texas law. If the application of Texas law would not impair Mexican policy objectives, a false conflict exists, and a Texas court may apply its own substantive law.[214]

B. *What Law Should Govern Hernandez's Class Action?*

1. False Conflict?

Differences exist between Texas and Mexican law regarding environmental tort actions.[215] Despite such differences, both Texas and Mexico in theory share the common policy goals of compensating victims and deterring future wrongful actions.[216] If Texas applies its more generous substantive laws to Hernandez's claim, the governmental interests of Mexico would not be impaired. The environmental provisions of both NAFTA and the Environmental Side Agreement express a commitment

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213. *Gutierrez*, 583 S.W.2d at 318-19. Section 6(2) of the Restatement (Second) lists seven policy-oriented factors which should govern a choice of law analyses. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). Section 145(2) emphasizes that the qualitative, rather than quantitative, nature of contacts is determinative. *Id.* § 145(2).

214. *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 422 (Tex. 1984) (holding that if application of forum state's law would not impede policy objectives of foreign state, then forum law should apply). First, Texas courts will engage in the governmental interests analysis of each jurisdiction's laws, and if each jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law, the *Gutierrez* most significant relationship analysis will be applied to select the governing law. *Id.* at 420–22; *see also* Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991) (holding that if only one jurisdiction's governmental interests would be impaired by application of other state's law—but not vice-versa—court must apply law of state whose interests would be harmed if its law was not applied).

215. Boris Kozolchyk & Martin L. Ziontz, *A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the United States,* 7 ARIZ. J. INT'L & COMP. L. 1, 2–4 (1989).

216. *See* Daniel I. Basurto González & Elaine F. Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 671–72 (1991) (discussing strictly compensatory nature of Mexican tort damage codes); Boris Kozolchyk & Martin L. Ziontz, *A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the United States*, 7 ARIZ. J. INT'L & COMP. L. 1, 37 (1989) (pointing out traditional judicial reliance of Mexico on restitutionary compensation in measuring tort damages). The main policy goals of Mexican tort law of compensation for victims and deterrence are largely served by administrative actions of environmental agencies. *See* Malissa H. McKeith, *The Environment and Free Trade: Meeting Halfway at the Mexican Border*, 10 UCLA PAC. BASIN L.J. 183, 190–199 (1991) (focusing on Mexican environmental law and its environmental agency's role in deterring abuses).

to protecting citizens from environmental degradation.[217] Therefore, Mexico's professed governmental interest would not be impaired but, in fact, would be promoted by the application of more favorable Texas substantive laws to Hernandez's claim.[218]

Conversely, the application of weaker Mexican tort law would impair the governmental interest of Texas.[219] Texas has strong interests in deterring TNCs from polluting areas just beyond the geographical border and preventing TNCs from taking advantage of Mexico's lax tort liability system.[220] Indeed, the damaging effects of toxic waste dumping are not confined by arbitrary geographical boundaries. It follows, then, that the Texas court adjudicating Hernandez's claim faces a "false conflict" in deciding whether Texas or Mexican law will govern Hernandez's claim.[221]

2. Most Significant Relationship Test: Hernandez's Claim

Assuming, *arguendo*, that the Texas court finds a true conflict between Mexican and Texas law, the *Gutierrez* most significant relationship test would nonetheless favor Texas law. In applying the test, the court must determine whether Mexican or Texas law has the most significant relationship to the controversy and to the parties under the principles set forth in the Restatement (Second) of Conflict of Laws.[222] Relevant contacts include "the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centered."[223]

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217. Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 413 (1994).

218. *Mexico's Environmental Laws And Enforcement*, 2 NO. 3 MEX. TRADE & L. REP. 9 (1992). Despite recent enforcement activities, undue political influences hamper Mexican authorities' efforts. Richard Vaznaugh, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 215–19 (1993).

219. *See* Richard Vaznaugh, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 222–24 (1993) (stating that insignificant environmental protection mechanisms in Mexico contravene interests of United States).

220. *See id.* (advocating extraterritorial application of United States law over TNCs operating in maquiladora region).

221. *See* Guillory v. United States, 699 F.2d 781, 786 (5th Cir. 1983) (holding that no conflict exists when underlying purposes of laws of two potentially interested states are identical); *cf.* American Home Assur. v. Safeway Steel Prod., 743 S.W.2d 693, 698 (Tex. App.—Austin 1987, writ denied) (holding that false conflict exists with respect to policy construction issue because New York court would never employ its rules of construction to resolve issue at stake).

222. *Gutierrez*, 583 S.W.2d at 318-19.

223. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971).

Although the alleged injuries to Hernandez and his co-plaintiffs occurred in Mexico, the wrongful conduct of the defendants—including the decision to dispose of toxic waste illegally or negligently failing to supervise plants in Mexico—took place in Texas. Likewise, even though the plaintiffs reside in Mexico, the defendants are either a United States TNC or an independent subsidiary of a Japanese TNC. In addition, even though the plaintiffs were hired in Mexico, it is unclear where the employer-employee relationship is centered in light of the TNCs' "shell" operations in Mexico.[224] Most likely, the TNCs' managers who hired Hernandez and his co-plaintiffs do not reside in Matamoros, Mexico, but rather commute from Brownsville, Texas.[225] Under such circumstances, one might argue that the relationship between the litigants is centered in Texas, where all substantial decisions were made regarding the defendants' Mexican subsidiaries.[226] In addition, both Alpha Oil and Beta conduct extensive business in Texas and most, if not all, of their products produced in Matamoros enter the Texas stream of commerce.[227]

Once the relevant contacts are identified, their qualitative significance must be analyzed in the context of section 6(2) principles.[228] Such principles include:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,

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224. *See* Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 664 (1995) (explaining maquiladora's function as "satellite corporate shell" by which "dirtiest operations" of TNCs may be carried out).

225. *Cf.* Jerry Kammer, *Migration Transforms Nogales; Focus Evolves From Tourism to Manufacturing*, ARIZ. REPUBLIC, Nov. 12, 1995, at A13 (noting example of Nogales, Arizona, which is home to managers of maquiladora factories in Mexico who commute everyday across border).

226. *See* Indeck Power Equip. Co. v. Jefferson Smurfit Corp., 881 F. Supp. 338, 341 (N.D. Ill. 1995) (stating that determining where injury-causing act occurred is relevant consideration for "center of relationship" test under Restatement approach); Department of Corrections v. McGhee, 653 So. 2d 1091, 1092, (Fla. Dist. Ct. App. 1995) (holding that Florida law, rather than law of Mississippi where injury occurred, controlled issues of sovereign immunity and duty).

227. *See* Joel L. Silverman, *The "Giant Sucking Sound" Revisited: A Blueprint to Prevent Pollution Haven by Extending NAFTA's Unheralded "Eco-Dumping" Provisions to the New World Trade Organization*, 24 GA. J. INT'L & COMP. L. 347, 347 (1994) (pointing out that all of maquiladoras in Matamoros, Mexico export their manufactured goods).

228. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.[229]

In regard to the needs of the interstate and international systems, the intertwined economic and social interests of the United States and Mexico strongly favor holding TNCs accountable in United States courts for actions in the maquiladora regions.[230] The second factor—the relevant policies of the forum—includes Texas's goals of protecting its border environment from pollution and its workers from unfair competition.[231] Consequently, the second factor favors the application of United States law as well.

The third factor concerns "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue."[232] Mexico's interests or policy goals would not be impaired by applying United States law to non-Mexican defendants.[233] On the contrary, Mexico's interest in ensuring full compensation for its citizens would be promoted by the application of United States law.[234]

Regarding the fourth factor—the protection of justified expectations—it could be argued that both maquiladora workers and employers expect that Mexican law will govern claims arising from their relationships in Mexico.[235] However, such an argument overlooks the actual nature of the employer-employee relationship. TNCs are practically immune from any meaningful legal consequences for their actions in Mexico,[236] and they no doubt expect to benefit from the current legal framework. How-

229. *Id.* § 6(2).

230. *See* Richard Vaznaugh, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 224 (1993) (advocating extraterritorial application of United States law as way of "preserving international goodwill and trust").

231. *See id.* at 222–23 (listing protection of border environment and preventing unfair competition as essential to United States interests).

232. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

233. *But see* Browne v. McDonnell-Douglas Corp., 504 F. Supp. 514, 518–20 (N.D. Cal. 1980) (denying application of California law because of Yugoslavia's interest in "protecting foreign business firms engaged in trade with Yugoslavia against disproportionate liability for injuries caused by Yugoslav parties").

234. *See* Environmental Side Agreement, *supra* note 52, pt. 1, art. 6, 32 I.L.M. at 1484 (expressing member countries' commitment to providing remedies for private parties harmed by environmental abuse).

235. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 324 (1981) (mentioning justifiable expectations of parties as relevant factor in due process analysis in choice of law).

236. *See* Richard Vaznaugh, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 214–20 (1993) (explaining reasons for TNCs' near immunity from any serious legal liabilities in Mexico).

ever, such expectations are not "justifiable" simply because TNCs successfully lobbied the drafters of agreements such as NAFTA to prevent the inclusion of private access and environmental protection provisions.[237]

Furthermore, the fifth factor—the basic policies underlying the particular field of law—points toward the application of United States law because applying weaker Mexican law would contravene the basic policies of compensation and deterrence underlying environmental tort law in Texas.[238] The sixth factor—ease in the determination and application of the law to be applied—also favors application of United States law, since United States judges are most familiar with domestic law. Finally, the seventh factor—certainty, predictability, and uniformity of result—is important because of its impact on future corporate activities in the maquiladora region.[239] If TNCs are held accountable for actions in Mexico under United States law, deterrence of environmental abuses will be much more effective. In sum, when viewed in light of the policy concerns, the qualitative significance of the litigants' contacts should point toward application of Texas law to Hernandez's claim.

C. *Possible Repercussions?*

1. "Private Access to Remedies" Provision in the Environmental Side Agreement

A determination that Texas substantive law will govern cross-border environmental tort claims brought by maquiladora workers such as Hernandez may also influence interpretation of the Environmental Side Agreement's "private access" provision and the revised Texas forum non conveniens statute. The Environmental Side Agreement expressly enumerates member governments' duties to guarantee private access to remedies for persons with a "legally recognized interest" under the forum's law.[240] A legally recognized interest includes rights, in accordance with the forum's law, such as:

a) to sue another person under that Party's jurisdiction for damages;

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237. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1986) (stating that "a state has jurisdiction to prescribe law with respect to . . . activities, interests, status or relations of its nationals outside as well as within its territory").

238. *See* Dobson v. Camden, 705 F.2d 759, 760 (5th Cir. 1983) (deferring to dual policies of compensation and deterrence in determining damages for tort action).

239. *See* Richard Vaznaugh, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 225 (1993) (noting deterrence benefits of certainty and predictability arising from proven effectiveness of United States courts and laws in preventing environmental abuse).

240. Environmental Side Agreement, *supra* note 52, pt. 1, art. 6, 32 I.L.M. 1484.

> b) to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations;
> c) to request the competent authorities to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm; or
> d) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person under that Party's jurisdiction contrary to that Party's environmental laws and regulations or from tortious conduct.[241]

If the applicable substantive law in Hernandez's suit is Texas law, then this private access provision will allow Hernandez and his class members to sue for damages through United States administrative and judicial proceedings.[242]

The Environmental Side Agreement's private access provision, as applied to Hernandez and his co-plaintiffs, may also preempt the application of state and federal forum non conveniens doctrine to Hernandez's suit.[243] However, the Environmental Side Agreement's preemptive effect does not seem to trigger automatically. Instead, under the NAFTA Statement of Administrative Action[244] and the NAFTA Implementation Act,[245] an affirmative action by the federal government—either to legislate the uniform forum non conveniens law or invalidate state laws—is required to preempt state forum non conveniens rules.[246] Such federal affirmative action will effectively deter against environmental abuses in maquiladora regions by TNCs.[247]

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241. *Id.*

242. *Id.*

243. *See* Sarah M. Vogel, *The Effects of NAFTA Upon North Dakota State Law*, 70 N.D. L. REV. 485, 489-505 (1994) (discussing possible preemption of state laws that contradict NAFTA and side agreements).

244. NORTH AMERICAN FEE TRADE AGREEMENT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 159, 103d Cong., 1st Sess. 50 (1993). The Statement of Administrative Action is a document which, under section 1103 of the Omnibus Trade and Competitiveness Act of 1988, must accompany any trade agreement negotiated under the "fast-track" authority. 19 U.S.C. §§ 2902–2903(a)(3) (1988).

245. North American Free Trade Agreement Implementing Bill, H.R. DOC. NO. 159, 103d Cong., 1st Sess. 1 (1993).

246. *See* NORTH AMERICAN FREE TRADE AGREEMENT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 159, 103d Cong., 1st Sess. 50, 454 (1993) (denying automatic preemption of state laws); *see also* North American Free Trade Agreement Implementing Bill, H.R. DOC. NO. 159, 103d Cong., 1st Sess. 1, 13 (1993) (conditioning preemption of state laws upon federal action).

247. *See* Richard Vaznaugh, Note, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement,* 17 HASTINGS INT'L & COMP. L. REV.

2. Revised Texas Forum Non Conveniens Statute

Three years after the *Castro Alfaro* decision, the Texas Legislature revitalized forum non conveniens doctrine, constructively overruling *Castro Alfaro*.[248] The revised statute, however, includes an exception which states:

> This section does not apply if the personal injury or death that is the subject of the cause of action resulted from a violation of the laws of this state or of the United States, including but not limited to exposure to a substance referred to in Section 33.013(c)(3) that was transported out of this state or the United States in violation of the laws of this state or the United States.[249]

Once Texas law is determined to be the governing law of Hernandez's suit, allegations of illegal dumping of toxic waste against Alpha Oil and Beta would implicate violations of Texas environmental laws by both companies. Hernandez's allegations, therefore, constitute a cause of action resulting from "the laws of this state" under the revised Texas statute.[250] In addition, Hernandez and his co-plaintiffs would most likely allege willful, intentional disregard of environmental standards by both corporations' top United States managers. It is also possible that certain transfers of toxic materials from both corporations' United States operations to their subsidiaries in Matamoros were conducted improperly. At any rate, these allegations will place Hernandez's claims under the exception specified in the revised Texas statute, and thus remove the possibility of a forum non conveniens dismissal.

VI. CONCLUSION

NAFTA was only the first step toward an integrated, regional economic union. As a corollary effect of economic globalization, United States courts will inevitably face more cross-border suits brought by citizens of other nations engaged in trade with the United States. After all, it is only logical to expect more disputes to arise from areas where human and corporate activities are increasingly concentrated. This trend will only accelerate with the proposed expansion of NAFTA into other Latin American nations.

It is critical for courts to respond to this historical change. To be fair, it will not be an easy task. The reactionary forces of isolationism and xeno-

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207, 228-29 (1993) (advocating selective abolition of forum non conveniens to better effectuate United States law).

248. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (Vernon Supp. 1996).

249. *Id.* § 71.051(g).

250. *Id.* § 71.051(a).

phobia are gaining strength, creating powerful obstacles to logical discourse in all public institutions, including the judiciary. At the same time, however, it is increasingly apparent that the interests of United States workers and citizens are, more than ever, intertwined with the interests of thousands of person like José Hernandez and his family. Providing NAFTA nationals a meaningful forum for justice will be important not only for the sake of international justice, but also for the protection of the United States public's interests. It follows, then, that the United States courts should apply the forum non conveniens doctrine in an especially strict manner for cases brought by NAFTA nationals such as Hernandez.

Indeed, when United States courts face environmental tort claims brought by NAFTA nationals, the traditional forum non conveniens doctrine does not seem to fit or serve any meaningful policy goals. A better approach is the abolition of the forum non conveniens doctrine. Such an abolition would eliminate any ambiguity regarding the accessibility of the United States courts to exploited workers and residents of a "free trade partner country," and provide the most effective deterrence to future abuses and exploitation. In an age where national borders are practically removed for TNCs, but still remain a solid wall to the citizens of different nations, the "judicial border" of forum non conveniens erected against Hernandez and his class members not only loses its logical justifications, but also works against the interests of the United States public as well. When Hernandez, and victims like him, are allowed access to United States courts, the walls of practical immunity built around TNCs by NAFTA and other trade agreements will come down, and environmental standards will finally be effectively enforced.