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ENVIRONMENTAL ASPECTS OF MAQUILADORA OPERATIONS: A NOTE OF CAUTION FOR U.S. PARENT CORPORATIONS

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I. INTRODUCTION

As the morning sun rises over the city of Matamoros, thousands of workers scramble to catch the *peseras*, or buses, which carry workers back and forth from their homes to their jobs at the 89 maquiladoras[1] which dot the city. In an area of the country which is desperately in need of jobs for its huge population of unemployed,[2] maquila jobs are precious commodities. Jobs at area maquiladoras put food on the table for thousands of families.

The 89 maquiladoras located in Matamoros,[3] and the 1472 maquiladoras located along the Mexican side of the nearly 2000 mile long United States/Mexican border,[4] are part of a Mexican governmental plan to promote foreign investment of both capital and technology in a region which traditionally has been nonindustrialized and has suffered from gross underemployment.

The maquiladora program began in 1965 with the Border Industrialization Program (BIP).[5] The program currently is regulated by the 1989 Presidential Decree for the Promotion and Operation of the In-Bond Export Industry.[6] A maquiladora operation involves the duty-

1. A "maquiladora" refers to a processing or assembly plant located in Mexico which typically receives component parts or raw materials in-bond from a United States or other non-Mexican parent corporation for assembly or processing into a finished or semi-finished state for export. "Maquiladora" stems from the Spanish word "maquila," meaning the toll of grain or flour paid to the miller or lord of a manor for the grinding of grain. Now the term "maquila" refers to the labor and services provided, while a "maquiladora" is the actual production plant. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAWYER 223 n.1 (1989) [hereinafter *Maquiladoras*].

2. The Dallas Morning News, Jan. 29, 1989, at 1.

3. *Monthly Score Board*, 5 TWIN PLANT NEWS, May 1990, at 72 [hereinafter TWIN PLANT NEWS].

4. *Id.* This number does not include the more than 300 maquiladora plants located within the interior of Mexico.

5. Hunt, *Industrial Development on the Mexican Border*, BUS. REV., Feb. 1970, at 5.

6. Decree for the Development and Operation of the In-Bond Export Industry, D. O., December 22, 1989, *reprinted in* MEXICAN FOREIGN TRADE INSTITUTE, MEXICO: ITS IN-

free importation of raw materials or component parts for assembly or processing into finished or semi-finished goods for export.[7] Typically, a United States corporation will incorporate a wholly-owned Mexican subsidiary company to carry out its maquiladora operations in Mexico. The United States parent will enter into a contract with its Mexican maquila company under the terms of which the maquiladora operation will carry out the assembly or processing operation for the parent for a fee. Typically, all equipment, machinery, component parts and raw materials used by the maquiladora in connection with its operations will be owned by the parent corporation and imported into Mexico for use by the maquiladora on a temporary basis. The maquiladora is a company organized and existing under Mexican law and which may be wholly-owned by foreigners.[8] All aspects of the maquiladora operation are governed by Mexican law. United States law only comes into play in regard to daily operations to the extent that items are exported from the United States for use in the maquiladora plant or are to be imported into the United States after assembly or processing in Mexico.

United States and other non-Mexican companies have established maquiladora operations in Mexico primarily to take advantage of (i) low minimum wages, (ii) ease of access and reduced transportation costs to primary markets (as opposed to other low minimum wage countries), and (iii) duty-free entry of machinery, equipment, raw materials and component parts used in connection with the assembly or production process.[9] Due in part to a recent liberalization of foreign investment policy and intellectual property law as well as to increased minimum wages in Far Eastern manufacturing locations, Mexico has seen an increased interest in maquiladoras.

In 1989, the 1785 maquiladora plants operating under the maquiladora program employed 482,492 workers.[10] Most of the maquila plants are located just south of the United States border although a few, with government encouragement, have established themselves in the interior of the country. Income generated by these companies to-

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BOND INDUSTRY, YOUR INVESTMENT OPPORTUNITY (1989) [hereinafter Decree for In-Bond Industry].

7. *Id.*

8. Reglamento de la Ley para Promover la Inversion Mexicana y Regular la Inversion Extranjera, D.O., May 16, 1989 [hereinafter Foreign Investment Law].

9. *See Maquiladoras, supra* note 1, at 229 n.39.

10. TWIN PLANT NEWS, *supra* note 3, at 73.

taled about $2.3 billion United States in 1988 and an estimated $2.85 billion United States in 1990.[11] "Maquiladoras benefit the Mexican economy by increasing employment, producing foreign exchange, and improving local management skills."[12] The recently enacted Decree for In-Bond Industry will further encourage the growth of this important economic sector by permitting the infusion of capital through foreign investment.

Critics of the maquiladora program assert that maquilas represent the worst aspects of United States industry — exploiting poor Mexicans and turning Mexico into a United States chemical waste dump.[13] Some detractors allege that among the motivations for locating a manufacturing facility in Mexico is the absence of meaningful laws regulating environmental and worker safety and the lack of enforcement of the laws and regulations that exist. Such lack of regulation and enforcement, critics say, allows many maquiladora companies to engage in practices in which they would dare not engage in the United States, such as the improper transportation, storage, use and disposal of hazardous or toxic materials or wastes. News reports of illegal disposal activities and other abuses might lead some to believe that engaging in such activities is not only commonplace, but not a serious matter for concern.

This article examines the status of various Mexican laws and regulations addressing environmental concerns as they relate to maquiladora operations in Mexico and the current political climate as it relates to the meaningful enforcement of such laws and regulations. It also explores the potential liability of United States parent corporations for the "environmental sins" of a Mexican maquiladora subsidiary under laws in both Mexico and the United States.

II. MEXICAN ENFORCEMENT OF ENVIRONMENTAL LEGISLATION

A. *Mexican Environmental Legislation — An Overview*

In comparison to United States environmental legislation, Mexican

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11. *250 New Plants in 89*, AMAC REPORT, July-Aug. 1989, at 19.

12. *United States - Mexico Industrial Integration Today and Tomorrow* (Dec. 1989) (unpublished final report of the 1989 Woodlands Conference on file with HOUSTON JOURNAL OF INTERNATIONAL LAW) *cited in* Comment, *Mexico's 1989 Foreign Investment Regulations: A Significant Step Forward, But Is It Enough?*, 12 HOUS. J. INT'L L. 361 (1990).

13. *Today Show: Interview with Jorge Castañeda*, (NBC television broadcast at 33, Sept. 6, 1990) (transcript on file at St. Mary's Law Journal).

environmental laws are direct and to the point. Under Mexico's civil law system, there is little jurisprudence or case law to blur an otherwise strict line. Civil law systems require legislation or codes to enunciate the entire body of a nation's laws. Common law concepts such as precedent and case law have little or no effect on the formation of law in a civil law system. Thus, Mexican and United States legal concepts are not always parallel and attempting to interpret one system with the norms of the other can produce both frustration and anomalous results. In addition, Mexican code sections are frequently concise and broadly written allowing for wide latitude in judicial interpretation without the corresponding opportunity to have argument or interpretation preserved through published precedent.

As discussed *infra*,[14] United States corporations with Mexican subsidiaries are subject to enforcement of both Mexican and United States environmental laws.[15] While the Environmental Protection

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14. *See infra* notes 102-110 and accompanying text.

15. Enforcement of United States-Mexican binational environmental agreements, applicable to entities in both countries, has been expressly designated to the Environmental Protection Agency in the United States and the Secretariat of Urban Development and Ecology in Mexico with the accompanying mandate to implement the agreements in a coordinated and cooperative manner. *See, e.g.*, Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area effective February 16, 1984, arts. 1, 2, 3, 6 & 8 [hereinafter ECA] Article 1 of the Environmental Cooperation Agreement provides:

> The United States of America and the United Mexican States, hereinafter referred to as the Parties, agree to cooperate in the field of environmental protection in the border area on the bases of equality, reciprocity and mutual benefit. The objectives of the present Agreement are to establish the basis for cooperation between the Parties for the protection, improvement and conservation of the environment and the problems which affect it, as well as to agree on necessary measures to prevent and control pollution in the border area, and to provide the framework for development of a system of notification for emergency situations. Such objectives shall be pursued without prejudice to the cooperation which the Parties may agree to undertake outside the border area.

Article 2 of the Environmental Cooperation Agreement provides:

> The Parties undertake, to the fullest extent practical, to adopt the appropriate measures to prevent, reduce and eliminate sources of pollution in their respective territory which affect the border area of the other. Additionally, the Parties shall cooperate in the solution of the environmental problems of mutual concern in the border area, in accordance with the provisions of this Agreement.

Article 3 of the Environmental Cooperation Agreement provides:

> Pursuant to this Agreement, the Parties may conclude specific arrangements for the solution of common problems in the border area, which may be annexed thereto. Similarly, the Parties may also agree upon annexes to this Agreement on technical matters.

Article 6 of the Environmental Cooperation Agreement provides:

> To implement this Agreement, the Parties shall consider and, as appropriate, pursue in a

Agency (EPA) is the enforcement agency for United States environmental legislation, enforcement of Mexican environmental laws is carried out by the Secretariat of Urban Development and Ecology (SEDUE). Together with other organizations interested in promoting environmental concerns in the border area,[16] these two agencies have the primary responsibility for overseeing the burgeoning maquiladora industry's impact on the border ecosystem.[17] As United States corporate subsidiaries, these maquiladora plants may also incur liability in violation of Mexican legislation and may thus subject their parent corporations to assessment of damages.

Mexican environmental laws spell out the potential liability for non-compliance with such laws. Currently, a maximum of approximately $80,000.00 United States in damages can be assessed for a first

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coordinated manner practical, legal, institutional and technical measures for protecting the quality of the environment in the border area. Forms of cooperation may include: coordination of national programs; scientific and educational exchanges; environmental monitoring; environmental impact assessment; and periodic exchanges of information and data on likely sources of pollution in their respective territory which may produce environmentally polluting incidents, as defined in an annex to this Agreement.

Article 8 of the Environmental Cooperation Agreement provides:

> Each Party designates a national coordinator whose principal functions will be to coordinate and monitor implementation of this Agreement, make recommendations to the Parties, and organize the annual meetings referred to in Article 10, and the meetings of the experts referred to in Article 11. Additional responsibilities of the national coordinators may be agreed to in an annex to this Agreement. In the case of the United States of America the national coordinator shall be the Environmental Protection Agency, and in the case of Mexico it shall be the Secretaria de Desarrollo Urbano y Ecologia through the Subsecretaria de Ecologia.

See also United States Dep't of State, *United States and Mexico Agree to Cooperate in the Solution of Environmental Problems in the Border Area*, Press Release No. 313 (Aug. 19, 1983).

16. These organizations include non-governmental bodies, such as the privately financed Border Ecology Project and the supranational International Boundary and Water Commission, created in 1889 and granted both administrative and judicial powers, as well as governmental bodies including the Secretariat of Agriculture and Water Resources and the Ministry of Foreign Relations in Mexico and the State Department, Geological Survey, the Bureau of Reclamation and others in the United States. *See* Note, *The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands*, 19 CORNELL INT'L L.J. 87, 104-11, 125-27 (1986) (contains summary of Mexican and United States environmental laws and a description of related environmental institutions).

17. In 1988 the Texas-Chihuahua border area was a vital economic force with 23,000 Texas jobs linked to maquilas. The maquiladoras in the area were part of an industry that had a 30% increase in 1987 alone and provided foreign revenues to Mexico in an amount second only to the Mexican petroleum industry. TEX. DEP'T OF COM., *Texas and Maquiladoras: Romancing the Girl Next Door*, RESULTS, May 1988, at 1 (cited in *Maquiladoras*, supra note 1, at 224 n.4).

time violation,[18] and criminal liability may be imposed upon responsible managers.[19]

At first glance these sanctions may appear *de minimis* to a large United States parent corporation. Environmental considerations must not be underestimated, however, due to potential tort liability against both the maquiladora company and its United States parent corporation. One must also take into consideration the influence of the EPA and of United States laws on SEDUE and the rapidly evolving Mexican regulatory scheme. An appraisal of current Mexican environmental laws in a vacuum could potentially cost a maquiladora and its parent company hundreds of millions of dollars.

Environmental law is a politically sensitive issue world-wide. With advanced research on issues such as the greenhouse effect, world leaders have recognized environmental protection as an international rather than national issue.[20] This international perspective is likely to lead to substantial reform of environmental laws, especially in some of the less environmentally advanced countries such as Mexico.[21] While such reform may take years to develop, because of the lasting effects of environmental pollution, future regulations could, and most likely

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18. *See* General Law of Ecological Equilibrium and Environmental Protection, D.O. Jan. 28, 1988, at tit. 6, ch. IV, art. 171, ¶ I [hereinafter General Law]. "A fine in the equivalent of twenty to twenty thousand days of the general minimum wage" may be imposed. *Id.* As of January 1, 1991, the daily non-skilled minimum wage in the Federal District was 11,900 pesos per day. D.O. Nov. 15, 1990.

19. *Id.* at tit. 6, ch. VI, art. 184.

20. *See generally* United Nations Conference on the Human Environment: Final Documents, 1972, U.N. Doc. A/Conf. 48/14 & corr. 1, pt. 1, ch. 1 *reprinted in* 11 I.L.M. 1416 (1972); Stockholm Declaration on the Human Environment, U.N. Doc. A/Conf. 48/14 & corr. 1 (1972) *reprinted in* 11 I.L.M. 1420 (1972); Helsinki Rules on the Uses of Waters of International Rivers, International Law Association (London, Aug. 20, 1966) *reprinted in part in* J. BARNES & D. JOHNSTON, THE INTERNATIONAL LAW OF POLLUTION 77-80 (1974); REPORT OF A PANEL OF EXPERTS OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, *Environment and Development* (The Fournet Report) (International Coalition No. 856, 1972); Leonard & Morrell, *Emergence of Environmental Concern in Developing Countries: A Political Perspective*, 17 STAN. J. INT'L L. 281-312 (1981).

21. While Mexico has a very strong interest in promoting the growth of the maquiladora industry, its commitment to environmental protection is particularly strong among third world nations, as evidenced by what one commentator calls "one of the world's most impressive legal regimes for environmental protection and control for virtually every aspect of the environmental crisis." JUERGENSMEYER & BLIZZARD, *Legal Aspects of Environmental Control in Mexico: An Analysis of Mexico's New Environmental Law*, in POLLUTION AND INT'L BOUNDARIES 101, 115 (A. Utton ed. 1973).

will, impose liability in the future for present day actions.[22] Therefore, United States subsidiaries abroad must keep an eye on environmental trends internationally when developing their procedure for current waste disposal.[23]

As a corollary, a United States parent corporation also must consider United States environmental laws and regulations as guidelines when developing procedures for waste disposal in Mexico. The EPA has worked hand-in-hand with SEDUE in the initial implementation of SEDUE regulations.[24] It is reasonable to assume that the EPA's current practices will continue to affect SEDUE.[25]

In a more immediate sense, a United States parent corporation must consider both Mexican and United States tort laws in assessing its environmental liability. This is because of the potential for damages in the United States caused by operations in Mexico, the inherently transboundary nature of environmental pollutants, the potential for the exercise of long-arm jurisdiction over what is essentially a United States company, and the broad range of civil code, statutory, and common-law legal requirements which may be imposed by courts in both countries.

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22. *See* General Law, *supra* note 18, art. 15, sec. IV (regarding requirements to take protective action to safeguard environment for future operations).

23. *See infra* notes 102 - 110 and accompanying text.

24. For example, under the Joint United States-Mexico Contingency Plan for Accidental Releases of Hazardous Substances Along the Border, signed Jan. 29, 1988 (unpublished doc.), the EPA and SEDUE maintain a 24-hour hotline and emergency response plan for both waste discharges and hazardous chemical product releases, referring Mexican source discharges to SEDUE and United States source discharges to EPA. *Maquiladoras*, *supra* note 1, at 242. Mexico's 1982 Federal Laws for Protection of the Environment defined pollution as any alteration of the natural environment, a concept which is consistent with United States notions of pollution constituting a change in quality rather than in human use of resources. Such Federal laws further contained provisions which were strikingly similar to the United States National Environmental Policy Act, 42 U.S.C. § 4321-70 (1982), requiring governmental agencies to avoid environmental injury when taking action. Note, *The Environmental Cooperation Agreement Between Mexico And The United States: A Response To The Pollution Problems of The Borderlands*, 19 CORNELL INT'L L.J. 87, 105 n.88 (1986).

25. *See generally* ECA, *supra* note 15, at 102-04 for the proposition that Mexico shares many of the United States's environmental concepts and regulatory schemes (including some of the world's most stringent municipal environmental legislation). Mexico's poverty does not afford interest in, or implementation of, environmental protection at the level of the United States. This is ironically offset at the border where United States border towns typically are economically depressed while the corresponding Mexican border cities are generally growing economically. This marriage of economies and ecologies has resulted in a close working relationship between the EPA and SEDUE along the border and may result in the continued influence of the EPA on SEDUE's practices.

In Mexico, the regulatory function is exercised through permit and license requirements. Most authorizations, once issued, are subject to periodic reports on changes and status. Discrepancies that are detected by the authorities will be investigated and corrective action ordered; in some cases fines, or even imprisonment, may be imposed. The party against whom administrative action is taken may defend against such action in administrative proceedings and, after an adverse administrative ruling, may appeal.[26] Once administrative procedures are exhausted, agency decisions may be appealed to the courts.[27]

The Mexican legal system, in summary, depends heavily on administrative agencies and is steeped in the civil law tradition. Notarization of documents is often necessary to give them validity. For example, grants of powers of attorney authorizing a representative to act for a corporation in court, which must be entered of record, must be notarized. State and federal jurisdictions are clearly defined, as are the authorities pertaining to each. Environmental policy in Mexico, as implemented by current law, reflects both traditional centralism and the tentative movement toward decentralization and redistribution of authority.[28]

In 1988, Mexico adopted a new comprehensive environmental law to replace former legislation deemed inadequate to meet the environmental crisis occurring because of rapid industrial expansion in many areas.[29] Mexico has had environmental laws on the books since 1971.[30] In 1982, an attempt was made to up-date former law with a more general statute,[31] but the new law which was hastily drafted had little force. The regulations adopted under the original 1971 statute remained untouched,[32] although the Lopez Portillo administration

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26. Mexico observes the concept of due process. *See e.g.*, CONST. art. 14. Most administrative remedies are set forth in the relevant law in a manner essentially similar to Title VI of the General Law.

27. CONST. art. 107.

28. *See generally* General Law, *supra* note 18; *see also infra* notes 66-67 and accompanying text.

29. *Id.*

30. Federal Law to Prevent and Control Environmental Pollution, D.O., March 12, 1971.

31. Federal Environmental Protection Law, D.O., January 11, 1982.

32. Regulations for Prevention and Control of Air Pollution Originated from Emission of Smoke and Dust, D.O., September 17, 1971; Regulations for Prevention and Control of Water Pollution, D.O., March 29, 1973.

did adopt new regulations regarding noise pollution[33] and ocean pollution.[34]

The new law, the General Law of Ecological Equilibrium and Environmental Protection (the General Law), outlines Mexico's environmental policy.[35] The General Law assigns administrative responsibility,[36] allocates jurisdictional authority among federal, state and local governments,[37] and provides a framework for protecting environmental integrity through regulation of traditional environmental media, such as air, water, and hazardous waste.[38]

The General Law adopts the model of conservation through rational use. The principles on which policy is based are set forth in the General Law.[39] Mexico views ecosystems as belonging to the national community,[40] and recognizes that "all persons have the right to enjoy a healthy environment."[41] With this right comes responsibility; everyone is deemed responsible for environmental protection,[42] which refers not only to present conditions but also to assuring that resources are conserved for future generations.[43]

The General Law also requires that "ecosystems and their elements must be used in a manner that assure optimum sustained productivity compatible with their equilibrium and integrity."[44] Violations of the General Law's provisions or of the provisions of its implementing legislation are enforceable at different levels in Mexico's judicial system.

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33. Regulations for Protection on the Environment Against Pollution Originating from Emission of Noise, D.O., December 6, 1982.

34. Regulations to Prevent and Control Sea Pollution due to Dumping Waste and Other Materials, D.O., January 23, 1979.

35. General Law, *supra* note 18, at tit. 1, ch. IV.

36. *Id.* at tit. 1, ch. III.

37. *Id.* at tit. 1, ch. II.

38. *Id.* at tit. 1, ch. IV.

39. *Id.*

40. *Id.* at tit. 1, ch. IV, art. 15, § I.

41. *Id.* at tit. 1, ch. IV, art. 15, § XI.

42. *Id.* at tit. 1, ch. IV, art. 15, § III.

43. *Id.* at tit. 1, ch. IV, art. 15, § IV.

44. *Id.* at tit. 1, ch. IV, art. 15, § II. An annotated legal history of the relevant law in Mexico can be outlined as follows:

I. Former legal framework:

- A. The Federal Law to Prevent and Control Environmental Pollution (March 12, 1971)
- B. The Federal Environmental Protection Law (January 11, 1982)
- C. Regulations
  1. Regulations for Prevention and Control of Atmospheric Pollution Caused by Emission of Smoke and Dust (September 17, 1971)

B. *The Mexican Judicial System*

The Mexican judicial system is similar to that of the United States in some of its structural aspects and dissimilar in other regards. In

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2. Regulations to Prevent and Control Pollution of Waters (March 29, 1973)
3. Regulations to Prevent and Control Environmental Pollution Caused by Noise Emissions (January 2, 1976)

D. Other related laws
1. Federal Health Law
2. Federal Water Law
3. General Law of Human Settlements

II. Current legal framework:

A. Recognition of environmental priority in National Plan, 1982-1988
B. Environmental issues given constitutional status
C. Adoption of General Law of Ecological Equilibrium and Environmental Protection (January 22, 1988)
D. Development of regulatory scheme (January 22, 1988 to present; ongoing)
E. Emphasis appearing in National Plan, 1989-1995

III. Significant Provisions:

A. Distribution of authority for implementation
B. Federal design regarding subject matter and territorial jurisdiction
C. Chapter on hazardous waste/materials
D. Provision for ecological technical standards and criteria
E. Recognition of need to balance development/environmental concerns/planned use of natural resources
F. Expanded public participation and education

IV. Environmental Impact Regulations (June 7, 1988)

A. Requirement to file
1. An Environmental Impact Statement must be filed prior to undertaking any activity related to construction or site modification that potentially will affect ecological equilibrium or environmental quality.
2. Legal provisions
a. Law, Arts. 28, 29
b. Regulations, Art. 5

B. Kinds of environmental impact statements
1. Preventive notice
a. Filed when no significant impact expected
b. Form described in Article 8 of the Regulations
2. General
a. Information to be provided on the "Environmental Impact Statement General Form"
b. Information described in Art. 10 of the Regulations
3. Intermediate
a. To be filed upon SEDUE's request for further information
b. Information described in Arts. 11 of the Regulations
4. Specific
a. A complete environmental impact statement defining all details, risks, risk minimization, corrective action and emergency plans, etc.

the event a United States corporation would find itself haled into court in Mexico due to the acts of its subsidiary, it would have to defend itself within the system described below.

The Mexican judicial system consists of both a federal and state court system[45] with subject matter jurisdiction divided into federal and state matters.[46] Following trial, and upon judgment being entered, appeals from state court decisions are filed before the State Supreme Judicial Court.[47] Further appeal is available to the full Supreme Judicial Court.[48]

If procedural irregularities are claimed, an appeal (called an indi-

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b. Information described in Arts. 12 of the Regulations

C. Preparation
Persons engaged in preparing environmental impact statements must be authorized to do so by SEDUE (Except for Preventive Notices)

V. Air Pollution Regulations (November 25, 1988)

A. Divide functions among federal, state and local authorities
B. A distinction made between fixed and mobile sources, and regulations applicable to each
C. Provide for reporting requirements on emissions
D. Specificity provided by ecological technical standards

VI. Hazardous Waste Regulations (November 25, 1988)

A. Definition of hazardous waste, as well as other relevant concepts
B. Issues addressed
1. Registrations and reports
2. General standards for storage, packing and labeling
3. Transportation monitoring and paper trail
C. Ecological Technical Standards (NTEs). Referred to in both the Law and the Regulations, the NTEs provide the technical information needed to comply with the legal provisions.

VII. Warehousing of Hazardous Materials or Waste

A. Applicable law
1. Hazardous Waste Regulations, especially Chapter III
2. *See generally* the Law, Title IV, Chapters III and IV; and Article 151
B. General Standards to date
1. Definitions (*See* the Law, Art. 3; the Regulations on Hazardous Waste, Art. 9; and related definitions)
2. Since warehousing is considered "management," authorization must be obtained from SEDUE. As part of the application, the following must be submitted:
a. A training program for personnel who will be handling hazardous materials
b. Documentation on qualification of the person responsible for handling
c. A contingency program in the event of accident

45. CONST. arts. 41, 94; *see also* the General Constitutions of each state.
46. *Id.* arts. 104, 133.
47. *See generally* C.F.P.C. (Federal Civil Procedure Code).
48. *Id.*

rect *amparo*, or petition for constitutional relief against the judgment of the State Supreme Judicial Court) is available from the State Supreme Judicial Court to the Federal District Court.[49] The Federal District Court also acts as a trial court in federal matters and as an appeals court for federal administrative rulings.[50] Although the word "appeals" is used in both Mexico and the United States, different meanings apply in the two systems. In the precedent oriented common law system of the United States an appeal may lead to a change in the laws. Because codes in the code system may only be changed by legislative action, appeals in Mexico result not in changes to law but in interpretation of code sections, the use of which is then mandatory upon certain judges in future similar cases.

Substantive errors claimed in a State Supreme Judicial Court ruling can be appealed at the federal circuit court level.[51] The State Supreme Judicial Court appeal is heard by a panel of federal circuit court judges, called a Collegial Circuit Court.[52] Appeal of a substantive issue, called direct *amparo*, seeks constitutional relief for violation of a substantive right.[53]

If a petitioner wins a direct *amparo* suit, the judgment does not invalidate the substantive law at issue: it simply prevents enforcement of the law against the petitioner.[54] Further, there is no class action available in Mexico. *Amparo* appeals result in mandatory interpretations through two processes. First, where five Collegial Circuit Court decisions regarding a similar issue are handed down in uninterrupted order, the interpretation given to the code sections applicable to that issue is mandatory for all state, federal and district courts, and circuit judges sitting alone. Second, where a conflict in interpretations appears between two different Collegial Circuit Court decisions dealing with the same issue, an appeal to the Supreme Judicial Court will result in a decision as to which interpretation is correct and, therefore, binding in all courts henceforth.[55]

Tort liability in Mexico is restricted by statute. The Federal District Civil Code (which governs in all federal cases) and the State Civil

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49. CONST. arts. 103, 104, 105, 107; Amparo Law, art. 114.
50. CONST. arts. 94, 104, 107.
51. *Id.*
52. Procedural Law of the Federal Judiciary, art. 11.
53. *Id.*
54. Amparo Law, art. 76.
55. CONST. art 107, § XIII; Amparo Law, arts. 192, 193.

Codes (which govern all state cases and do not differ substantially from the federal code) recognize what are called *daños* and *perjuicios*.[56] The former are provable actual damages such as out of pocket expenses; the latter are provable lost earnings. Concepts such as mental anguish or loss of consortium are not cognizable in a Mexican court action unless they can be quantified (e.g., psychiatric expenses).[57] Further, the injury claimed must be the direct and proximate cause of the damage. Punitive damages are not available at all.

While United States courts have separate requirements for in personam and subject matter jurisdiction, Mexican law implies in personam jurisdiction in the codes which primarily address subject matter jurisdiction. Thus, under Mexican rules of civil procedure, in personam jurisdiction over a foreign entity in a tort action is governed by several different code sections and provides for tacit[58] or express[59] submission to a court of competent jurisdiction.[60] Jurisdiction is determined by subject matter, amount in controversy, degree of offense, and territory,[61] the latter being the only waivable jurisdictional requirement.[62]

Judges in the place named by a contract for performance of a contractual obligation, or where injury occurred, are competent to hear the matter.[63] Similarly, in an action involving real estate or the lease of equipment, judges in the location of the property may hear the case.[64] These jurisdictional rules apply only where the parties have not already submitted themselves to a given jurisdiction.

Most law is administered and enforced by Mexican administrative agencies on both the state and federal levels for matters within their respective jurisdictions.[65] In recent years, the federal government has

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56. *See* C.C.D.F., arts. 2107, 2108, 2109, 2110 (Federal District Civil Code).

57. C.C.D.F. art. 1916, 1916 bis. The concept called *daños morales*, seeks to remedy injuries such as damage to "physical aspect" and "private life." Proof of this injury is difficult, and awards are rare.

58. C.F.P.C., tit. 2, ch. I., art. 23.

59. *Id.*

60. C.F.P.C. arts. 23, 24. Note that the instant discussion does not reach the problem of forcing a recalcitrant defendant to appear nor of judgment enforcement in Mexican courts.

61. *Id.* art. 23.

62. *Id.*

63. *Id.* ch. II, art. 24, II.

64. *Id.* ch. II, art. 24, III.

65. At the federal level, numerous regulations and resolutions define who can do what

been engaged in a decentralization effort, but decentralization largely means that the federal government exercises its authority through regional offices rather than through the delegation of responsibility to the state or local governments. Environmental legislation is one area where the law expressly delegates authority to state and local government,[66] although the federal government retains authority until such time as there is local action.[67]

C. *Causes Of Action Under Environmental Statutes And The Federal District Civil Code*

1. Parties

Potential plaintiffs in an environmental tort action brought in Mexico against a maquiladora or its parent corporation could be either a Mexican citizen or company or a United States citizen or company. Each of these parties could proceed only by way of claiming an injury proscribed by one or more of the provisions in the Federal District Civil Code or an applicable state code. Individual plaintiffs could be a maquiladora employee, a person related to a deceased employee, or someone who sustains either personal or property damage.

Claims against the United States parent arising out of actions by its maquiladora subsidiary may also come from either Mexican or United States governmental bodies acting in administrative enforcement actions pursuant to legislation of their respective countries. Such bodies may include the United States or Mexican governments, the EPA or SEDUE acting on behalf of the government, a state or local government environmental agency, or, in the United States, a state or local agency located in the state where the parent corporation is domiciled.

Mexican law allows for the possibility of the introduction of foreign corporations as party defendants. The earlier discussion of in personam jurisdiction suggests that there are many contexts in which a foreign parent corporation could be made subject to Mexican jurisdic-

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and to what extent, beginning with the Internal Regulations for each cabinet level agency. Periodically, an agency will publish a Resolution delegating certain authorities to its regional offices. A regional office can act only with regard to its assigned jurisdiction and on authority expressly delegated to it. States may enter into agreements with the federal government to share responsibility in a given area, as may municipalities with states. CONST. art. 116, § VI.

66. *See generally* General Law, *supra* note 18, tit. 1, ch. II.

67. General Law, *supra* note 18, Transitory Article 2.

tion, such as in connection with contractual obligations, real estate transactions or tort actions. However, as of this date, nothing has been published regarding the resolution of any case in which such a party was a defendant. The letter of the law affords jurisdiction; but the interpretation of the code remains open.

Choice of law questions likely will be a part of any transborder litigation and will inevitably arise where a Mexican plaintiff is a party before United States courts.[68] However, United States corporations could be haled into court in Mexico to answer for actions taken by a subsidiary. This article therefore addresses the potential for liability of a United States parent corporate defendant under both Mexican and United States law.

2. Theories Of Liability Under Mexican Law

There are two general sources in Mexican law which could supply grounds for environmental lawsuits: environmental statutes themselves and various civil code sections imposing responsibility upon users and owners of hazardous objects, materials and wastes. It is important to distinguish between the last two items mentioned.[69]

a. Environmental Statutes

The cornerstone of Mexico's federal legislation in environmental matters is the General Law of Ecological Equilibrium and Environmental Protection.[70] This law authorizes SEDUE to act as an enforcement agency[71] and gives SEDUE the responsibility to do so[72] by

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68. *See infra* Part III, notes 148 - 159 and accompanying text for a discussion of choice of law questions.

69. While import and export of hazardous wastes and materials are monitored, tracking involves distinguishing between hazardous wastes — which are always hazardous materials — and hazardous materials - which are not all hazardous wastes. *Maquiladoras*, *supra* note 1, at 239. Hazardous waste disposal, together with traditional waste treatment, is an area in which both nations have coordinated efforts, as in the binational waste treatment plant operated to serve Nogales, Arizona and Nogales, Sonora. ECA, *supra* note 15, at 95-96. Both the United States and Mexico require that hazardous waste be properly disposed of. If generated in the United States, it must be disposed of in accordance with United States regulations if not reclaimed, recycled or reused. 40 C.F.R. §§ 261.1, 261.2, 261.6 (1987). Similar requirements exist for disposal, reclamation, recycling or use in Mexico of hazardous waste generated by raw materials imported from the United States and, failing this, such waste must be shipped back to the United States. Decree for In-Bond Industry, *supra* note 6.

70. *See General Law*, *supra* note 18.

71. *Id.* tit. 1, ch. III, arts. 8, 9 (A) & (C), 111, 119.

72. *Id.* tit. 1, ch. IV, art. 15, § III.

representing the Mexican government in actions brought pursuant to the General Law.[73] SEDUE therefore has a mandate to protect the ecological equilibrium, defined as "the interdependent relationship between elements forming the environment that makes possible the existence, transformation, and development of man and other living things."[74]

Statutory causes of action may be brought by government representatives based on several series of implementing laws issued in recent years and known as ecological technical standards. These are defined as the instruments for implementing ecological policy, or

> the conjunction of scientific or technological rules issued by SEDUE that establish the requirements, specifications, conditions, procedures, parameters and permissible limits that must be observed in development or activities or use and benefit of products which cause, or might cause, ecological imbalance or damage to the environment, and, further that integrate principles, criteria, policy and strategy on the subject.[75]

These standards supplement the "Regulations for Prevention and Control of Air Pollution," the "Regulations for Prevention and Control of Water Pollution," the "Regulations for Protection of the Environment from Pollution Arising from Noise," the "Regulations to Prevent and Control Ocean Pollution from Dumping of Waste and Other Materials," and the "Decree Relating to Import or Export of Hazardous Materials." Finally, the public is encouraged to report "any fact, act or omission . . . that produces ecological imbalance or injury to the environment . . . ."[76] Sanctions for noncompliance with the General Law are of two kinds: administrative and criminal. Fines of up to 20,000 times the daily non-skilled minimum wage (as of January 1, 1991, 11,900 pesos per day) in the Federal District (approximately $80,000 U.S. based upon an exchange rate of 2,970 pesos to the dollar), temporary or permanent, full or partial plant closure, and administrative arrest of responsible parties for up to 36 hours are allowed under the legislation.[77] In serious violations the company's permits to operate may be revoked.[78] Violators are given a time frame in which they must remedy the violation. If there is a failure to do so,

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73. *Id.* tit. 1, art. 15, § XI.
74. *Id.* tit. 1, ch. I, art. 3, § XI.
75. *Id.* tit. 1, ch. V, art. 36, § VI.
76. *Id.* tit. 6, ch. VI, art. 189.
77. *Id.* tit. 6, ch. IV, art. 171.
78. *Id.* tit. 6, art. 172.

additional fines may be levied following that date, but only up to a total of two times the maximum fine imposed under current readings of the law's requirement.[79]

State and local authorities may also impose sanctions under applicable state law.[80] Such sanctions are imposed pursuant to coordination agreements between the Federal District and the States authorized by Article 7 of the General Law.[81]

A term of three months to six years imprisonment may also be imposed together with a fine of 100 to 1,000 times the daily non-skilled minimum wage in the Federal District for unauthorized hazardous activities "which cause or may cause serious injury to public health, ecosystems, or their elements."[82] If the same occurs in a population center, three more years sentence may be imposed and 20,000 days wages assessed.[83] The same range of penalties is authorized for acts relating to hazardous materials or wastes;[84] air pollution;[85] water pollution;[86] and noise, vibration, thermal energy or light pollution.[87]

To date, the language of the General Law has been construed to allow for imposition of a fixed sum penalty which is levied on a one-time basis following an initial finding of liability. It appears that the language may also be construed, however, to allow for imposition of fines for *each additional day* on which the violation continues to occur up to the highest fine authorized.[88] Three factors could conceivably provide a basis for such a reading of that language: interest in envi-

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79. *Id.* tit. 6, art. 171.
80. *Id.*
81. *Id.* tit. 6, art. 7.
82. *Id.* tit. 6, art. 184.
83. *Id.*
84. *Id.*
85. *Id.* tit. 6, art. 185.
86. *Id.* tit. 6, art. 186.
87. *Id.* tit. 6, art. 187.
88. No cases yet exist giving such a construction to the terms of the clause at issue. However, as indicated at *supra* note 55 and accompanying text, should five separate cases raise the issue on appeal and result in the imposition of stiffer penalties through a stricter construction of the statute, the substantive law will change. Although there has been no indication of such sentiments on the part of Mexican judges to date, several factors could cause judges to be inclined towards such a construction. First, there is the recognition that such penalties have been successfully used in the United States. Second, fears that a tougher approach regarding illegal waste disposal might quell the growing United States corporate interest in establishing maquiladoras have not been realized. Finally, there is a growing recognition that clean up costs which are currently being absorbed by the Mexican economy may often be more easily borne by the United States parent corporation.

ronmental protection on both sides of the border is an increasing priority; SEDUE's infrastructure, experience, and legal basis for enforcement continues to expand; and a trend towards coordinated efforts between EPA and SEDUE is apparently helping to "give teeth" to legislation in both countries.

b. Other Code Bases for Liability

Mexico's provisions would also allow an individual to recover from an environmental tort-feasor on theories similar to those available under United States law. Generally, under the Mexican Civil Code, a person or legal entity having a legal duty, a generally recognized obligation (similar to the duty to act as a reasonable person), or control over an inherently dangerous object or substance, may be held liable for harm that is directly caused to a claimant by virtue of an act or omission or of possession of the dangerous object or substance.[89]

Specifically, the Federal District Civil Code provides compensation for *daños* and *perjuicios*[90] based upon the concept of making the plaintiff whole by returning the situation to its original state, and, if that is not possible, by monetary compensation alone.[91] This concept applies to both physical and nonphysical harm as well as to contractual and extra contractual duties owed.[92] The plaintiff may elect[93] restoration to original condition or monetary compensation, and a judge determines the amount to be awarded based upon what rights are at issue, the degree of responsibility and the economic situation of the defendant, together with other relevant circumstances.[94]

Forms of intentional tort, negligence, and strict liability are recognized. In the present context, knowing violations of the General Law

89. *See generally* C.C.D.F. arts. 1913, 1915, 1916, 1917, 1918, 1926, 1931, 1932.

90. *See supra* notes 56 & 57 and accompanying text for definitions of these terms.

91. C.C.D.F. arts. 1915, 1916. Note that the concept of making the plaintiff whole in Mexico is juxtaposed with that of mere monetary compensation, so that, for example, were one's home destroyed by a negligently caused fire, the defendant could be ordered to have the home rebuilt in lieu of repaying the value of the home. The plaintiff is made whole by having the situation returned to the state it was in prior to the injury. Thus, in many cases, awards vary, not only based upon the economic situation of the defendant but also upon that of the plaintiff.

92. *Id.*

93. In fact, while the plaintiff is given the right to choose by this code section, the words "if possible" in regards to making the plaintiff whole, in effect have led to abrogation of that right in favor of giving the judge the power to make the decision regarding remedy.

94. C.C.D.F. arts. 1915, 1916.

would be treated as intentional torts, with the notions of fraud or intent to deceive being closely linked for purposes of imposing liability. Negligence is also recognized, as well as its component concepts of risk and in-fact injury, and is imputable to the possessor of an object or substance through the mechanism of causation.

Legal entities are specifically made imputedly liable for harm caused by their agents,[95] employers for acts of their employees,[96] and building owners for, among other things, substances or equipment that burns or explodes, noxious smoke, gas or materials, sewer emissions and water encroachments.[97] Groups causing a single injury may be held jointly liable.[98]

Furthermore, similar to strict liability, entities may be held liable for harm directly caused by the use of dangerous mechanisms, instruments, apparatus or substances which are hazardous because of their speed of operation, their natural explosive or inflammable qualities, the electrical current they conduct, or for similar reasons.[99] The possessor of such may be held liable even when such objects or substances have not been handled illegally as long as causation is established.[100] However, where such an object or substance is not in fact in use by either the plaintiff or the defendant, and injury still occurs, no cause of action exists.[101]

3. Trends In Enforcement

As the number of ecological technical standards has increased and SEDUE's experience in enforcement has grown, the earlier, somewhat sporadic contact between the EPA and SEDUE has begun to increase as well.[102] Current examples of cooperative efforts include the Ecological Waybill or manifest required by SEDUE to document hazardous materials being exported out of Mexico and the corresponding documents required for tracking the same waste for EPA purposes

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95. *Id.* art. 1918.
96. *Id.* art. 1926.
97. *Id.* art. 1931, 1932.
98. *Id.* art. 1917.
99. *Id.* art. 1913.
100. *Id.*
101. *Id.* art. 1914.
102. For example, see ECA, *supra* note 15, at 135-36, discussing three joint EPA-SEDUE workgroups (consisting of technical experts) which addressed a wide range of issues and tracked specific border pollution problems involving water quality, hazardous materials and waste management, and air quality.

when it is brought into the United States[103] A Joint Contingency Plan and Joint Response Team, established to deal with hazardous substance spills in the border area has proven to be an effective and streamlined mechanism for resolving problems.[104] Neither the EPA nor SEDUE are required to have their joint decisions or actions taken at coordination meetings in environmental matters approved by their respective foreign affairs offices and, as such, they have freedom to cooperate. Both agencies appear to be taking great advantage of this freedom.[105]

Earlier attempts at cooperation perhaps have been dampened by disparate agendas in the United States and in Mexico. Differing levels of economic development, of actual authority delegated to state and local entities, and of regulatory development, together with an historical lack of trust and Mexico's conflicting internal needs to attract industry and still protect its environment, have contributed to the failure to coordinate enforcement at the border.[106]

However, at least one commentator has seen an "institutional shift toward the environmental agencies" by both the Mexican and United States governments.[107] Reliance upon "frequent contact between lower-level officials with expertise in environmental affairs" who are better equipped to resolve the technical and interrelated resource issues will provide a practical road to closer cooperation and enforcement.[108]

The consequence of such cooperation for parent company liability is, of course, that the possibility for both imposition of liability and for larger awards or fines is increased. As regards the issue of what forum will be the final forum in which a case is heard, both state and

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103. Annex III to the 1983 United States - Mexico Agreement to Cooperate in the Solution of Environmental Problems in the Border Area (Aug 14, 1983) *reprinted in* 22 I.L.M. 1025 (1983), provides that both nations must require, "to the extent practicable, that its domestic laws and regulations are enforced with respect to transborder shipments of hazardous waste and hazardous substances" and shall cooperate in monitoring and spotchecking transboundary shipments. Annex III is quoted in *Maquiladoras*, *supra* note 1, at 236.

104. *Maquiladoras*, *supra* note 1, at 235.

105. ECA, *supra* note 15, at 131. The ability to take reciprocal and cooperative action under the Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, *see supra* note 103, extends to cost and benefit allocation between the two countries. One example is a demand for hazardous waste control by one nation in return for sewage management by the other. ECA, *supra* note 15, at 125.

106. *Id.* at 102-09.

107. *Id.* at 131.

108. *Id.*

national interests will play a strong role.[109] The significant differences between the limited damages available in Mexican courts and the potentially unlimited damages attainable in United States courts are factors which will be considered not only by many United States courts but also by potential plaintiffs on both sides of the border.

However, as Mexico's interest in the relationship between damage awards and maintenance or clean-up costs grows, and as Mexico takes an increasingly larger role as host to United States industrial concerns within its territory,[110] both individual and governmental challengers may seek to have United States parent corporations held accountable for costs incurred through environmentally damaging actions of Mexican subsidiaries. Such forces will provide incentives to construe existing Mexican legislation as broadly as possible and thus use larger awards and penalties than are now available for the dual purposes of compensation and deterrence.

D. *Enforcement Of Mexican Judgments In United States*

Assuming that a judgment has been rendered by a Mexican court against the United States parent corporation, the judgment creditor may need to enforce such judgment against the United States parent in the United States. The Uniform Foreign Money-Judgments Recognition Act[111] ("Recognition Act") enacted in Texas serves as an example of state level foreign judgment legislation and provides Texas courts with a statutory basis upon which to enforce foreign judgments. Section 36.004 of the Recognition Act specifically states:

> Except as provided by Section 36.005, a foreign country judgment that is filed with notice given as provided by this chapter, that meets the requirements of Section 36.002, and that is not refused recognition under Section 36.044 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The judgment is enforceable in the same manner as a judgment of a sister state that is

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109. *See infra* notes 148-161 and accompanying text for a discussion of the practical and political motivations behind decisions in choice of law issues.

110. *Cifras Hablan, La Industria Maquiladora en Mexico Registro*, AMAC REPORT, July-Aug., 1989, at 17 (maquilas had an 18% growth rate in 1989, earned $828.5 million U.S., imported $2,087.5 million U.S. of materials, and paid $611.1 million U.S. in value-added taxes in period from January to March 1989 alone).

111. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-.044 (Vernon 1986).

entitled to full faith and credit.[112]

Prior to amendments to the Recognition Act made in 1989, several cases held the Recognition Act to be unconstitutional because it did not expressly set forth a procedure by which a judgment debtor could assert statutory criteria for nonrecognition of a foreign judgment.[113] However, the recent Texas Supreme Court opinion in *Don Docksteader Motors, Ltd. v. Patal Enters., Ltd.*, recognized the legislature's amendments for asserting nonrecognition grounds and summarized two methods for enforcement of a foreign country money judgment pursuant to the Recognition Act:

> One such means is the statutory "short cut" set forth in the Enforcement Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 35.003-.005 (Vernon 1986); the second means is the bringing of a common-law action to enforce a judgment.[114]

Thus, the Recognition Act in conjunction with the Uniform Enforcement of Foreign Judgments Act ("Enforcement Act") allows a foreign country money judgment to be enforceable to the same extent as the judgment of a sister state.[115]

In *Hunt v. BP Exploration Co. (Libya) Ltd.*, a federal court applied the Texas Recognition Act in the enforcement of an English judgment because the plaintiff failed both to rebut the prima facie case and to establish nonreciprocity between England and Texas.[116] The *Hunt* court relied on the United States Supreme Court decision of *Hilton v. Guyot* which established the standard for the recognition of foreign judgments:

> When an action is brought in a court of this country by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend

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112. *Id.* at § 36.004 (Supp. 1990) (amended by Acts 1989, 71st Leg., ch. 402, section 1, eff. June 14, 1989).

113. *See* Don Docksteader Motors, Ltd. v. Patal Enters., Ltd., 776 S.W.2d 726, 728 (Tex. App.—Corpus Christi 1989), *rev'd*, 794 S.W.2d 760 (Tex. 1990); Plastics Engineering Inc. v. Diamond Plastics Corp., 764 S.W.2d 924, 924 (Tex. App.—Amarillo 1989, no writ); Detamore v. Sullivan, 731 S.W.2d 122, 122 (Tex. App.—Houston [14th Dist.] 1987, no writ).

114. *Don Docksteader Motors, Ltd.*, 794 S.W.2d at 761.

115. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-.008 (Vernon 1986).

116. 580 F. Supp. 304, 310 (N.D. Tex. 1984).

> against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown impeaching the judgment, as by showing that it was affected by fraud or prejudice or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.[117]

In fact, the *Hunt* court equated the Texas Recognition Act as a codification of the *Hilton* decision.[118]

However, the same federal court also relied on the *Hilton* principle of comity to limit the acceptance of foreign country judgments when such judgments offend public policy. In *Overseas Inns S.A.P.A. v. United States*,[119] the court held that foreign judgments which affirmatively contravene the fundamental public policy of a particular forum, such as a judgment diminishing federal income taxes owed to the IRS, need not be given effect in this country. Thus, a foreign country money judgment may be enforceable to the same extent as the judgment of a sister state, but such a judgment must also sufficiently avoid the several factors listed in the Texas Recognition Act as grounds for nonrecognition.[120]

III. Parent Liability In The United States For Environmental Damages In Mexico

A. *Amenability Of United States Parent To Suit In United States*

1. Parent Company Liability

Typically, a United States corporation will incorporate a wholly-owned Mexican subsidiary company to carry out its maquila operations in Mexico. The United States parent will enter into a contract with its Mexican maquila company under the terms of which the maquila operation will carry out the assembly or processing operation for the parent for a fee. Typically, all equipment, machinery, component parts and raw materials used by the maquiladora in connection with its operations will be owned by the parent corporation and imported into Mexico for use by the maquiladora on a temporary basis.

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117. Hilton v. Guyot, 159 U.S. 113, 113 (1895).
118. *Hunt*, 580 F. Supp. at 308.
119. 685 F. Supp. 968, 972 (N.D. Tex. 1988).
120. Tex. Civ. Prac. & Rem. Code Ann. § 36.005 (Vernon 1986).

The maquila company is, in effect, a cost center for the parent corporation.

In view of the very nature of the maquiladora process, it then follows that the Mexican maquiladora company may have few if any tangible assets against which either the Mexican government or an injured party may assess civil penalties, damages or clean-up costs. As with actions by the Environmental Protection Agency, the real effect of Mexican enforcement actions or personal injury actions may be minimal unless the complaining party is able to reach the United States parent corporation.

Traditional corporate law principles in the United States limit the shareholder's exposure for corporate debts and other liabilities to the value of the investment made in the stock of the corporation. The parent corporation normally cannot be held liable unless the complainant can show (i) that the corporate veil should be disregarded or "pierced," or (ii) that the parent corporation directly caused the damage or violated a duty owed to the complainant.

a. Piercing the Corporate Veil

The law relating to disregard of the corporate entity, or piercing the corporate veil, is not uniform throughout the United States and many different terms are used to describe an action seeking to hold the parent liable for the acts of the subsidiary.[121] Courts holding a parent liable may refer to a subsidiary as being a "mere instrumentality" or "alter ego" of the parent, may look for an agency relationship between the corporations, or may refer to "piercing the corporate veil."[122]

Texas courts have held that a corporate entity may be disregarded when the corporation is used to perpetrate fraud, to evade an existing legal obligation, to achieve or perpetrate a monopoly, to protect a crime, to justify a wrong, to circumvent a statute, and when one corporation exists as a mere tool or business conduit of another corpora-

121. Lubrizol Corp. v. Cardinal Const. Co., 868 F.2d 767, 769-71 (5th Cir. 1989).

122. Courts have commented regarding the confusion in this area. *See e.g.*, Japan Petroleum Co. v. Ashland Oil, 456 F. Supp. 831, 839 (D. Del. 1978); National Bond Fin. Co. v. GMC, 238 F. Supp. 248, 255-56 (W.D. Mo. 1964), *aff'd*, 341 F.2d 1022 (8th Cir. 1965); Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (1926) (Judge Cardozo discussed problem of relation between parent and subsidiary corporation as being enveloped in "mists of metaphor").

tion.[123] Federal common law in this area emerges from the general principle that "the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime."[124]

It should be noted in this regard, however, that courts traditionally have not been anxious to disregard the corporate form since the limited liability afforded by the corporate form is one of the primary reasons for which the law of corporations was created.[125] The party seeking to hold the parent corporation liable will bear the burden of proof and the central factual issue will be control.[126] A subsidiary corporation will not become the agent of its parent merely because it holds the majority of the voting stock of the subsidiary[127] or because the two corporations have common officers and directors.[128] Nor will the fact that the parent finances the operations of the subsidiary be "sufficient to support a finding that the subsidiary is a mere agent or instrumentality of the parent."[129] All of these factors and others, however, may be considered in determining whether the combination of circumstances indicates such a relationship.[130]

Although there are no reported cases to date in which a plaintiff has sought specifically to pierce the corporate veil of a Mexican maquila company, there have been numerous cases reported involving foreign plaintiffs seeking to impose liability upon United States parent corporations. For example, in *Fitz-Patrick v. Commonwealth Oil Co.*, the court considered a suit for royalties due from an assignment of a Haitian petroleum concession by Fitz-Patrick to Commonwealth Oil. Commonwealth had caused a wholly-owned Haitian subsidiary to be

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123. *See* Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986); Tachalet Int'l Inc. v. Nowik, 787 S.W.2d 101, 106 (Tex. App.—Dallas 1990 no writ); Wheat v. Delcourt, 708 S.W.2d 897, 899 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); Torregrossa v. Szelc, 603 S.W.2d 803, 804 (Tex. 1980); Minchen v. Van Trease, 425 S.W.2d 435, 437-38 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd, n.r.e.).

124. American Bell Inc. v. Federation of Tel. Workers, 736 F.2d 879, 886 (3d Cir. 1984) (*quoting* Zubik v. Zubik, 384 F.2d 267, 272 (3d Cir. 1967)).

125. Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973).

126. *See* Japan Petroleum Co. v. Ashland Oil, 456 F. Supp. 831, 839 (D. Del. 1978).

127. *Id.* at 840.

128. *See* Pacific Can Co. v. Hewes, 95 F.2d 42, 46 (9th Cir. 1938).

129. *Japan Petroleum Co.*, 456 F. Supp. at 841.

130. *Id.*

organized in order to secure the consent of the Haitian government to the assignment of the concession. The complaint alleged that the subsidiary had been organized only for the purpose of carrying out the contract between Fitz-Patrick and the Haitian government, and the beneficial ownership of the concession actually belonged to Commonwealth. In addition, Commonwealth had represented itself as the owner of the concession. The court concluded that the complaint sufficiently alleged that the subsidiary was the instrumentality of the plaintiff, and that the question should be resolved by a trial on the merits.[131]

b. Direct Liability of Parent

Courts have also looked beyond the subsidiary and found its parent corporation directly liable for injuries caused to employees of the subsidiary where the parent has assumed duties of the subsidiary by an affirmative undertaking. In *Johnson v. Abbe Engineering Co.*, the safety manager of the parent corporation was responsible for review and approval of the broad spectrum of safety practices and procedures at the parent's subsidiaries. The subsidiary relied upon the parent's safety personnel for accident prevention and safety training and followed any recommendations made concerning safety at the subsidiary's plant. The plaintiff, who was injured in an explosion at the plant while following the prescribed safety procedures, sought to hold the parent corporation responsible for his injuries based upon the rubric incorporated in Restatement (Second) of Torts § 324A (1966), which provides for the liability to third persons for the negligent performance of an undertaking. The Fifth Circuit upheld the lower court's finding that, having undertaken the subsidiary's duty to protect its employees, the plaintiff's harm was the result of the parent's breach of that duty.[132]

In contrast, however, no liability was assessed against the parent corporation in *Muniz v. National Can Corporation*.[133] The plaintiff there brought suit against the parent, National Can Corporation (NCC), seeking recovery for damages he sustained while employed by its subsidiary National Can Puerto Rico, Inc. (NCPR). The district court entered judgment for NCC, the parent, concluding that the duty

131. Fitz-Patrick v. Commonwealth Oil Co., 285 F.2d 726, 730 (5th Cir. 1960).
132. Johnson v. Abbe Eng'g Co., 749 F.2d 1131, 1133 (5th Cir. 1984).
133. 737 F.2d 145, 150 (1st Cir. 1984).

and control of safety matters at the subsidiary's plant was in the hands of the subsidiary, and that NCC was not liable because it had assumed no duty to the plaintiff.[134]

As with the actions seeking to disregard the corporate entity, the success of actions seeking to impose direct liability upon a parent corporation will necessarily depend upon the facts and circumstances involved.

c. Liability of Parent Under CERCLA and RCRA

The United States Congress responded to the problem of finding solvent parties to bear astronomical clean-up costs by passing the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)[135] and the Resource Conservation and Recovery Act (RCRA).[136] Both acts impose strict liability upon responsible parties to fund clean-up costs. Recent court cases have construed such acts as imposing liability upon parent corporations both directly and derivatively by piercing the corporate veil and have even imposed direct liability upon officers and shareholders of corporations in certain instances.[137]

CERCLA imposes liability for clean-up costs on "owners or operators" of unsafe disposal facilities,[138] generators of hazardous substances sent to such facilities,[139] and transporters of hazardous substances who selected such facilities.[140]

In *United States of America v. Kayser-Roth Corp., Inc.*,[141] the First Circuit affirmed a lower court's holding that a parent corporation could be held directly liable as an operator for CERCLA purposes after the subsidiary dissolved, notwithstanding the parent's contention that it was blameless for the spill. In *Idaho v. Bunker Hill Co.*,[142]

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134. *Id.* at 149.

135. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified in part at 42 U.S.C. §§ 9601-57 (1982)).

136. 42 U.S.C. §§ 6901-87 (1976).

137. *See* Chadd & Satinover, *Liabilities of Corporate Shareholders for Hazardous Waste Activities of Subsidiaries*, 2 TOXICS L. REV. 573 (1987); *see also* Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 999-1003 (1986).

138. 42 U.S.C. § 9607(a)(1)-(2) (1988).

139. 42 U.S.C. § 9607(a)(3) (1988).

140. 42 U.S.C. § 9607(a)(4) (1988).

141. 910 F.2d 24 (1st Cir. 1990).

142. 635 F. Supp. 665 (D. Idaho 1986).

the court held that the parent company was liable as the "owner or operator" under CERCLA based upon the interest the parent held in the subsidiary and the active participation by the parent in the management of the subsidiary. The court stated that the parent was in a position to make decisions, and implement actions to prevent and abate the damage caused by the hazardous waste disposal.[143]

Other courts have not been so anxious to find direct liability based upon such a broad interpretation of "owner or operator."[144] In *Joslyn Manufacturing Co. v. T.L. James & Co.*,[145] the Fifth Circuit refused to interpret "owners or operators" as including the parent company of an offending wholly-owned subsidiary. Instead the court analyzed the facts based on more traditional corporate law principles and decided that the facts did not justify piercing the corporate veil.[146]

There is, therefore, some support for holding corporate parents liable for the "environmental sins" of their subsidiaries. Scholars have argued, in fact, that to do otherwise imposes the risks associated with the operation of a facility using or otherwise involved with hazardous wastes and materials on those in the least capable position of preventing harm from such hazardous substances — the government and/or those suffering damage.[147] Although those cases imposing direct or indirect liability under CERCLA and RCRA are not applicable to violations by maquila companies in Mexico, they do show a willingness of United States courts — particularly federal courts — to closely scrutinize the parent-subsidiary relationship in determining ultimate liability for an environmental harm. In view of this, courts may be more willing to allow injured plaintiffs to impose liability upon the United States corporate parent of a maquila operation.

2. Conflicts Of Laws

A threshold question for determining whether or not a parent corporation will be held responsible for its subsidiary's liabilities is, of course, the choice of law to be applied. United States district courts in diversity actions must apply the conflicts rules of the state in which

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143. *Id.* at 672.

144. *See* Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988).

145. 893 F.2d 80 (5th Cir. 1990).

146. Id. at 83-84.

147. *See, e.g.*, Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 986 (1986).

the court sits to determine what law should be applied.[148]

The Restatement (Second) of Conflicts of Laws provides that the relationship between a principal and agent will be determined by the law of the state which has the most significant relationship to the parties and the transaction at issue.[149] Similarly, the rights and liabilities of parties in a tort action are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the event and parties involved.[150]

In *Gutierrez v. Collins*, the Texas Supreme Court adopted the most significant relationship methodology used by the *Restatement* for tort choice of law issues.[151] In 1984, the Texas Supreme Court extended the use of that methodology to all choice of law cases, except for contract cases in which the parties have agreed to a valid choice of law clause.[152] In *Duncan v. Cessna Aircraft Company*, the court applied the general principles set forth in section 6 of the *Restatement* to determine the applicable law.[153]

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148. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Prashker v. Beech Aircraft Corp., 258 F.2d 602, 605 (3d Cir. 1958). Also note that the discussion herein assumes jurisdiction of the forum court over the parties to the action. *See generally* note 149 *infra* and accompanying text.

149. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971).

150. *Id.* § 145. Section 145(2) provides that contacts to be taken into account in determining the applicable law include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

151. *See* Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979); *see also* Total Oilfield Servs., Inc. v. Garcia, 711 S.W.2d 237, 239 (Tex. 1986); Osborn v. Kinnington, 787 S.W.2d 417, 419 (Tex. App.—El Paso 1990, writ denied); Perry v. Aggregate Plant Prod., 786 S.W.2d 21, 23 (Tex. App.—San Antonio 1990, writ denied).

152. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984).

153. *Id.* Section 6 of the *Restatement* provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law 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,
  (f) certainty, predictability and uniformity of result, and

In any action seeking to hold the United States parent responsible for the environmental wrongs of its maquila subsidiary, Texas courts and federal district courts applying Texas choice of law rules would use the most significant relationship approach to determine which substantive law would apply to all of the issues involved, including disregard of the corporate entity, liability for damages and the amount and nature of damages recoverable.

It is interesting to note that in *Gutierrez*, the Texas Supreme Court also held that the dissimilarity doctrine would no longer be a recognized defense.[154] The dissimilarity doctrine is a "jurisdictional rule requiring a forum court to dismiss suits when the conflict-of-laws rules demand application of a foreign law that differs substantially from the law of the forum."[155] Prior to *Gutierrez*, Texas courts uniformly refused to entertain actions in negligence, products liability and conversion that arose in Mexico, primarily relying upon the 1896 Texas Supreme Court case of *Mexican National Railway Co. v. Jackson*.[156] The *Jackson* court refused to enforce Mexican law based upon notions of practicality, fairness, and public policy. The court identified practical problem of obtaining translations of Mexican statutes and judicial opinions, the incorrect translation of which by Texas courts might be unfair to the parties. Finally, the Court believed that several features of the Mexican laws were so dissimilar to the laws of Texas that their enforcement would violate Texas public policy.[157]

The *Gutierrez* Court noted that most of the reasons noted in *Jackson* for not applying Mexican law are no longer relevant. Specifically, translations were easily obtainable and the comprehension and application of such laws by a Texas court was not a legitimate concern.[158] The Court also recognized that Mexican tort laws had changed significantly since the *Jackson* case and that, although Mexican tort laws still differ in several respects from the laws of Texas, "there is nothing in the substance of these laws inimical to good morals, natural justice,

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(g) ease in the determination and application of the law to be applied. Restatement (Second) of Laws § 6 (1971).

154. *See Gutierrez*, 583 S.W.2d at 322.

155. *See* Note, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico—A Modern Evaluation*, 55 TEX. L. REV. 1281, 1281 (1977).

156. 89 Tex. 107, 33 S.W. 857 (1896).

157. *See* Gutierrez v. Collins, 583 S.W.2d 312, 319-20 (Tex. 1979).

158. *Id.* at 321.

or the general interests of the citizens of this state."[159]

3. Forum Non Conveniens

One of the primary reasons an injured Mexican plaintiff or the Mexican government would seek to bring suit in the United States as opposed to Mexico might be the lack of jurisdiction over the United States parent corporation by Mexican courts. For this reason, injured foreign plaintiffs frequently bring suit in state court or federal district court in the state in which the parent is located. Federal courts may exercise diversity jurisdiction over suits between citizens of a state or citizens or subjects of a foreign state.[160] Other factors which might motivate a Mexican plaintiff to forego the geographically more convenient Mexican forum for a seemingly less convenient United States forum might include contingent fee representation, extensive discovery, more favorable substantive law (including choice of law), the significantly greater scope and amount of recoverable damages (due in large part to jury assessment), relatively prompt trial settings, possibility of class actions and liberal joinder rules.[161]

In an attempt to avoid such suit, a United States parent corporation

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159. *Id.* at 322.

160. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); *see also* Melville v. American Home Assurance Co., 584 F.2d 1306, 1308 (3d Cir. 1978). Note, however, that even if the plaintiff is able to get jurisdiction over the United States parent corporation in federal district court, the plaintiff must also "state a claim upon which relief can be granted" pursuant to Fed. R. Civ. P. 12(b)(6). *See, e.g.*, Conservation Council of W. Aust., Inc. v. Aluminum Co. of Am. (ALCOA), 518 F. Supp. 270, 271-72 (W.D. Pa. 1981) in which a nonprofit organization developed to promote environmental conservation in Australia brought suit seeking to halt refining and mining operations in Australia. The plaintiff sought to invoke the assistance of United States courts because it had neither standing to sue nor a cause of action for the acts complained of under Australian law. *Id.* The court noted that the plaintiff was clearly attempting to litigate environmental issues by invocation of United States antitrust claims. *Id.* at 279. Alluding to the story in Greek mythology of the Palladium, a Trojan statue of the goddess Pallas Athena, the court noted that:

> Plaintiff, an Australian conservation group, seeks from this court a Palladium for the Darling Range of Western Australia. Unable to obtain one in the country from which it comes, plaintiff has traveled to the United States in an unprecedented attempt to have a United States court sit in judgment on mining and refinery activities taking place entirely within the foreign country from which plaintiff comes and whose allegedly deleterious effects on that foreign nation's environment plaintiff opposes.

Id. at 271. The court dismissed the action stating that "even if this court had subject matter jurisdiction under 28 U.S.C. § 1331 or 28 U.S.C. § 1337, we would dismiss plaintiff's Complaint because it fails to state a claim upon which relief can be granted." *Id.* at 281.

161. Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 196-204 (1985).

which is sued in a United States court, be it state or federal district, may seek to have the case dismissed on the basis of *forum non conveniens*.[162] Simply stated, the principle of *forum non conveniens* is convenience. A court may resist imposition upon its jurisdiction, even when jurisdiction is authorized by the letter of a general venue statute, where trial in the plaintiff's chosen forum would impose a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice of forum.[163] *Gulf Oil Corporation v. Gilbert* involved a claim arising from an explosion of gasoline during delivery to the plaintiff's warehouse in Lynchburg, Virginia. The plaintiff sued Gulf Oil, a Pennsylvania corporation, in New York and Gulf sought to dismiss the case on the ground that Virginia would offer a more convenient forum. The district court granted the motion, but the second circuit reversed. In upholding the district court's dismissal of the case, the Supreme Court stated that the doctrine should be applied only after the court has considered the private interests of the litigants, the relative ease of access to the sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining the attendance of willing witnesses, the possibility of viewing the premises, the advantages and the obstacles to a fair trial, and the enforceability of any obtained judgment.[164] The Court stated:

> It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.[165]

Multi-national corporations frequently use the *forum non conveniens* doctrine as a defensive tool when sued by a foreign plaintiff in a United States court. In *Piper Aircraft Co. v. Reyno*, the Supreme Court addressed the application of the doctrine to international cases.[166] There the representative of the estates of several citizens and residents of Scotland who were killed in an airplane crash in Scotland

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162. *See infra* notes 178 - 192 and accompanying text for discussion of availability of *forum non conveniens* in wrongful death actions in Texas.

163. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

164. *Id.* at 508.

165. *Id.*

166. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238 (1981).

instituted a wrongful-death action against the company that manufactured the airplane in Pennsylvania and the company that manufactured the airplane's propellers in Ohio. At the time of the crash, the plane was registered in Great Britain and was owned and operated by companies organized in the United Kingdom. The pilot and all of the decedents' heirs and next of kin were Scottish subjects and citizens, and the investigation of the accident was conducted by British authorities. The plaintiff admitted that the suit was filed in the courts of the United States because the laws of the United States regarding liability and capacity to sue were more favorable and damages were also more favorable to their position than those of Scotland.[167]

The court noted the usual deference to be accorded a plaintiff's choice of forum, but added that such a presumption would apply with less force when the plaintiff was foreign.[168] The court upheld the district court's finding that an adequate alternative forum existed in Scotland and held that a possible change in law unfavorable to the plaintiff resulting from a dismissal could not justify denial of the motion. Only where the alternative forum was so clearly inadequate and unsatisfactory as to provide no remedy at all could this consideration receive substantial weight. Although the Court recognized that moving the case to Scotland would involve some inconvenience to the plaintiffs, since the case involved possible liability for acts committed in the United States related to the design of the engine and aircraft, the district court concluded that, on balance, Scotland had a greater interest in the outcome of the litigation than did Pennsylvania and so agreed with the dismissal.[169]

The *Piper Aircraft* case points out one interesting aspect of the use by United States corporations of the *forum non conveniens* doctrine as a defensive tool to avoid suit in the United States by a foreign plaintiff — the United States corporation finds itself in the position of arguing that a foreign forum is not only adequate but more convenient and appropriate than the local United States court. This interesting position was highlighted in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*.[170] In *Bhopal*, Union Carbide In-

167. *Id.* at 240.

168. *Id.* at 242.

169. *Id.* at 242.

170. 634 F. Supp. 842, 845 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir. 1987).

dia Limited (UCIL) operated a chemical plant in the city of Bhopal, India, in which it manufactured pesticides. On the night of December 2-3, 1984, the plant leaked toxic gases in substantial quantities which killed an estimated 2,100 persons and injured over 200,000 more. UCIL was incorporated in India in 1934 and, at the time of the disaster, 50.9% of its stock was owned by Union Carbide Corporation (UCC), a New York corporation.

Shortly after the disaster, a flurry of lawsuits were filed in various United States federal courts on behalf of Indian claimants. The cases eventually were consolidated before the Southern District of New York. The Indian government thereafter enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act (Bhopal Act) granting the government the exclusive right to represent the victims in India and elsewhere. Pursuant to the Bhopal Act, the Government of India filed a complaint with the District Court for the Southern District of New York setting forth claims for relief similar to those contained in the consolidated complaint of the individual plaintiffs. The district court established a plaintiffs' Executive Committee representing the individual plaintiffs and including an attorney representing the Government of India.[171] The district court granted UCC's motion to dismiss for *forum non conveniens* but conditioned such dismissal upon UCC consenting to submit to the jurisdiction of the courts of India and waiving the statute of limitations as a defense.[172]

In this case, UCC found itself in the somewhat interesting position of arguing the adequacy of the Indian legal system, whereas the plaintiffs, citizens of India, joined by the Indian Government, argued the reverse.[173] The district court engaged in a thorough analysis of the

171. *In re* Union Carbide Corp. Gas Plant Disaster At Bhopal, India in Dec., 1984, 809 F.2d 195, 198 (2d Cir. 1987).

172. *In re Union Carbide Corp.*, 634 F. Supp. at 867. The district court also conditioned the dismissal upon UCC's agreement (i) to satisfy any judgment rendered by an Indian court (assuming conformity with minimal requirements of due process) and (ii) to accept discovery under the model of the United States Federal Rules of Civil Procedure. *Id.* Upon appeal, the Second Circuit modified the district court's order by deleting these two conditions. *In re Union Carbide Corp.*, 809 F.2d at 205. It should be noted, however, that such modification was based upon the imposition of such conditions to the particular case and the manner in which the conditions were imposed, and not upon the appropriateness of such types of conditions generally. *Id.*

173. *Union Carbide Corp.*, 809 F.2d at 201. The Indian Government reversed its position on appeal after all but a few of the 200,000 plaintiffs revoked their authorizations of American counsel to represent them, substituting the Indian Government instead. *Id.*

private and public interest considerations set forth in *Gulf Oil*. UCC argued, among other things, that almost all records relating to liability were located in Bhopal, key witnesses were Indian nationals who resided in India, that language difficulties would hinder the district court in handling the matter and that the cost of transporting witnesses and conducting discovery would be greatly increased if the matter were to be litigated in the United States. In connection with the public interest concerns, UCC argued that administrative difficulties of litigating such a case in the United States would be far greater than comparable difficulties which might be encountered in India. The district court concluded: "[t]he Indian interest in creating standards of care, enforcing them or even extending them, and of protecting its citizens from ill-use is significantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology."[174]

The *Bhopal* case also points out another potentially dangerous consequence for United States corporations seeking to use *forum non conveniens* as a defensive tool. Federal courts granting motions to dismiss on *forum non conveniens* grounds may require the movant to consent not only to the jurisdiction of the foreign court but also to other conditions similar to those imposed by the district court, such as making available documents or witnesses,[175] consenting to pay judgments, and agreeing to waive statute of limitations defenses.[176] As Allin C. Seward III points out,

> [i]t should not escape attention, however, that foreign plaintiffs gain a major procedural advantage, given the present state of the law, simply by starting their case in a U.S. court against the U.S. parent company, even when they know the case may well go back to their home jurisdiction on forum grounds. They thus pierce a "procedural corporate veil" (though not, obviously, establishing parent company liability on the merits) and force the foreign parent to submit to the jurisdiction of a

174. *In re Union Carbide Corp.*, 634 F. Supp. at 865.

175. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 n.25 (1981) (suggesting that district courts can condition dismissal upon a defendant's agreeing to provide all relevant records); Ali v. Offshore Co., 753 F.2d 1327, 1334 n.16 (5th Cir. 1985).

176. *See, e.g.*, DeMelo v. Lederle Labs., 801 F.2d 1058, 1061 (8th Cir. 1986); Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 611 (6th Cir. 1984); Harrison v. Wyeth Laboratories Div. of Am. Home Products, 510 F. Supp. 1, 6 (E.D. Pa. 1980), *aff'd per curiam*, 676 F.2d 685 (3d Cir. 1982).

foreign court that could otherwise not reach it.[177]

Therefore the availability of the *forum non conveniens* "defense" may be of little practical consequence.

4. Impact Of Texas Wrongful Death Statute

The effectiveness of *forum non conveniens* to avoid suit in the state of Texas has been further limited by the recent and controversial Texas Supreme Court case of *Dow Chem. Co. v. Alfaro*.[178] There the court held that the statutory right to enforce a personal injury or wrongful death claim in Texas courts precludes a trial court from dismissing such action on the basis of *forum non conveniens*.[179]

The basis for the court's decision is Section 71.031 of the Texas Civil Practice and Remedies Code, which provides:

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
>
> (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
>
> (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.
>
> (b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.
>
> (c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.[180]

A majority of the nine justices of the court agreed that *forum non*

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177. Seward, *After Bhopal: Implications for Parent Co. Liability*, 21 INT'L LAW 695, 704 n.25 (1987).

178. 786 S.W.2d 674 (Tex. 1990). In *Dow Chem.*, suit was brought by Costa Rican residents who alleged that, while working for Standard Fruit on a banana plantation in Costa Rica, they were injured as a result of handling DBCP, a pesticide manufactured and furnished to Standard Fruit by Dow and Shell Oil Company. The trial court found that it had jurisdiction but dismissed on *forum non conveniens* grounds. *Id.* at 675. The trial court's dismissal was reversed and remanded by the court of appeals and the Supreme Court affirmed the judgment of the court of appeals. *Id.* at 674, 679.

179. *Id.* at 679.

180. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

conveniens is a valuable tool in the administration of justice, but concluded that the doctrine was unavailable "because the Texas legislature statutorily abolished the doctrine of *forum non conveniens* by enacting the predecessors of section 71.031."[181] The focal point of the disagreement on statutory construction between the majority and the dissent is the majority's interpretation of the language "may be enforced in the courts of this state" as obligatory. The dissent would hold that the "may" language empowers a trial court to decline to exercise jurisdiction when factors supporting a plea of *forum non conveniens* are established. Although the majority opinion addressed only the issue of statutory interpretation, the concurring and dissenting opinions highlighted a fundamental disagreement regarding the public policy considerations involved in allowing *vel non* dismissal on a plea of *forum non conveniens*.

Justice Doggett, in his concurring opinion, stated that the doctrine of *forum non conveniens* is without merit both as a matter of law and of public policy.[182] He argued that a *forum non conveniens* dismissal is often a complete victory for the defendant, because the limited financial recovery in many foreign countries makes litigation of the matter financially impracticable. He further argued that abolition of *forum non conveniens* would "further important public policy considerations by providing a check on the conduct of multinational corporations."[183] By sustaining pleas of *forum non conveniens*, he argued, multinational corporations are encouraged to adhere to a double standard of conduct when operating abroad as compared to domestically. He quoted one commentator:

> The lack of stringent environmental regulations and worker safety standards abroad and the relaxed enforcement of such laws in industries using hazardous processes provide little incentive for [multinational corporations] to protect the safety of workers, to obtain liability insurance to guard against the hazard of product defects or toxic tort exposure, or to take precautions to minimize pollution to the environment. *This double standard has caused catastrophic damages to the environment and to human lives.* [184]

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181. *Dow Chem.*, 786 S.W.2d at 679 (Hightower, J., concurring).

182. *Id.* at 682 (Doggett, J., concurring).

183. *Id.* at 688.

184. *Id.* (*quoting* Note, *Exporting Hazardous Industries: Should American Standards Apply?*, 20 INT'L L. & POL. 777, 780-81 (1988)) (emphasis added) (footnotes omitted).

Justice Doggett argued that United States multinational corporations will continue to endanger the environment and human life until the economic consequences of such activities are such that it is no longer profitable to operate in this manner. Noting that the tort laws of many third world countries are not yet developed, he reasoned that dismissal of a case against a United States multinational corporation often takes away the most effective restriction against corporate misconduct.[185] In conclusion, Justice Doggett reasoned that:

> The parochial perspective embodied in the doctrine of forum non conveniens enables corporations to evade legal control merely because they are transnational. This perspective ignores the reality that actions of our corporations affecting those abroad will also affect Texans. . . . In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed to repeat itself for decades to come.[186]

Justice Gonzalez, dissenting, expressed concern that the practical implication of the majority holding will be to make Texas "an irresistible forum for all mass disaster lawsuits. 'Bhopal'-type litigation, with little or no connection to Texas will *add* to our already crowded dockets, forcing our residents to wait in the corridors of our courthouses while foreign causes of action are tried."[187] Justice Cook, dissenting, noted that "[t]he plaintiffs proceed as though obtaining jurisdiction in Texas automatically confers upon them the benefits of Texas substantive law as well. . . . There is a strong possibility that a choice of law analysis will result in the application of Costa Rican law. If so, what then is Texas' interest in adjudicating a foreign claim by foreign plaintiffs?"[188] Justice Hecht, dissenting, questioned "why the American justice system should undertake to punish American corporations more severely for their actions in a foreign country than that country does."[189]

One particularly disturbing aspect of the *Dow Chemical* holding is that, since the availability of *forum non conveniens* has consistently

185. *Id.* at 689.
186. *Id.*
187. *Id.* at 690 (Gonzalez, J., dissenting) (footnotes deleted) (emphasis in original).
188. *Id.* at 701 (Cook, J., dissenting).
189. *Id.* at 707 n.11 (Hecht, J., dissenting).

been considered a matter of procedure,[190] a wrongful death action brought in federal district court sitting in Texas might well be dismissed for *forum non conveniens* while the same action brought in Texas state court would not be dismissible on such grounds. Therefore, a corporate defendant sued in a Texas state court which has no basis for removal to federal court will be at a disadvantage to corporate defendants sued in federal court or which are successful in removing to federal court.

Another disturbing aspect of the *Dow Chemical* holding is its effect when applied in conjunction with a recent Texas Supreme Court decision involving the exercise of personal jurisdiction over nonresident defendants. The traditional test enunciated by Texas courts for jurisdiction required not only a showing of a defendant's purposeful acts in the state but also that the cause of action arose from those acts in the state so that the assumption of jurisdiction would not offend traditional notions of fair play and substantial justice. Pursuant to the recent Texas Supreme Court case of *Schlobohm v. Schapiro*, Texas courts may now exercise personal jurisdiction over a defendant despite the absence of *any* connection between the state of Texas and the acts or events giving rise to the lawsuit.[191]

This recent clarification of the "arising under" factor in the personal jurisdiction analysis, together with the elimination of *forum non conveniens*, virtually guarantees that lawsuits having no connection with the state of Texas will occupy Texas courts. These recent Texas

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190. *See* Missouri Southern Ry. v. Mayfield, 340 U.S. 1, 3 (1950) "According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine [of forum non conveniens] for all causes of action begun in its courts." *Id.*; McNutt v. Teledyne Indus. Inc., 693 S.W.2d 666, 668 (Tex. App.—Dallas 1985, writ dism'd). "Texas recognizes the equitable doctrine of forum non conveniens as an equitable and a procedural rule which does not determine jurisdiction, but only determines that the jurisdiction which exists shall not be exercised where another forum, also having jurisdiction, is better able to act." *Id.*; *see also In re* Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1159 (5th Cir. 1987)(en banc) (federal court sitting in diversity is required to apply federal "procedural" law of forum non conveniens), *vacated and remanded*, 490 U.S. 1032 (1989) (reviewing issue under Warsaw Convention), *en banc opinion reinstated*, 883 F.2d 17 (5th Cir. 1989) (reinstated on all issues other than damages); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985) (forum non conveniens is "procedural" for *Erie* doctrine choice of law purposes). *Cf.* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988)(federal courts sitting in diversity should apply 28 U.S.C. § 1404 [transfer for convenience] analysis to issue of whether contractual choice of venue clause should control).

191. *See* Schlobohm v. Schapiro, 784 S.W.2d 355, 358 (Tex. 1990) (jurisdiction may also arise from continuing and systematic contacts of defendant with Texas, even if cause of action does not arise from specific contact).

Supreme Court cases also virtually guarantee that industrious plaintiffs' attorneys will seek to spread the word that injured plaintiffs are welcome in Texas courts.[192]

IV. CONCLUSION

Both the Mexican government and individual Mexican citizens are taking a greater interest in the protection, improvement and conservation of the environment and the problems which affect it.[193] Moreover, Mexican and United States environmental enforcement agencies are stepping up coordination and integration of activity, particularly at the border where most maquiladoras are located.

As the Mexican regulatory framework becomes more and more sophisticated, and as the agency entrusted with its implementation and enforcement becomes more experienced, maquiladoras will continue to be required to adhere to increasingly stringent rules governing their activities. Failure to abide by such rules and regulations may result in fines, plant closings, revocation of permits and even criminal sanctions.

Of additional, if not equal, importance is the potential liability for

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192. *Dow Chemical Co.*, 786 S.W.2d at 690 n.2 (Gonzalez, J. dissenting) (citations omitted). "For example, in July 1988, there was an oil rig disaster in Scotland. A Texas lawyer went to Scotland, held a press conference, and wrote letters to victims or their families. He advised them that they had a good chance of trying their cases in Texas where awards would be much higher than elsewhere." *See generally* Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno, supra* note 161 at 193, for a discussion of why foreign plaintiffs might seek to sue in the United States and of efforts by United States plaintiff's attorneys to persuade foreign plaintiffs to do so.

193. Environmental groups, which really began to develop in Mexico during the administration of President Miguel de la Madrid Hurtado, are playing an ever increasing role in the formation of governmental policy in the current administration. Environmental policy has become a major topic for discussion in the media. With articulate advocates such as Feliciano Bejarano, a prominent Mexican artist and founding member of the Grupo de Cien environmental group, Mexico's environmental groups have successfully influenced governmental policy on a number of matters. For example, the Grupo de Cien was prominent in its criticism of the Laguna Verde nuclear plant in the state of Veracruz, the long delay in firing of which cost the government $65 million (U.S.) by conservative estimates. The Grupo de Cien has more recently been involved in a campaign against the damming of the Umacintra river on the Guatemala border, which joint Mexico-Guatemala project has been temporarily postponed by the two governments. *See* Mumme, *Mexico's Environment Under Salinas: Institutionalizing Policy Reform*, 3 REVIEW OF LATIN AMERICAN STUDIES (1989) (forthcoming). The growth, diversity and increasing visibility of Mexico's environmental groups will insure that environmental concerns remain on the political agenda. Environmental issues have become, to a large extent, political issues — issues which will require not only political rhetoric but action.

clean-up costs and civil damages under both United States and Mexican tort law. Such liability may attach not only to the Mexican maquila company and its managers but also to its United States parent corporation, either directly or derivatively. In view of the recent trend of some United States courts which seek to provide "a check on the conduct of multinational corporations,"[194] United States parent corporations might very well find their environmentally injurious conduct adjudged not only according to Mexican standards but according to United States standards of conduct in front of United States juries. Thus, United States parent corporations should, if not already adhering to cautionary and reasonable environmental guidelines, ensure that their Mexican subsidiaries comply with applicable regulations in order to protect their business interests on both sides of the border.

194. *See supra* note 179-80 and accompanying text.