

2005

## Conflict of Laws Analyses for the Era of Free Trade

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### Recommended Citation

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# CONFLICT OF LAWS ANALYSES FOR THE ERA OF FREE TRADE

ANDREW J. WALKER\*

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## I. INTRODUCTION

This article is about precedent developing in the United States in cases in which courts must balance Mexican interests with domestic interests. Written with the benefit of one decade of precedent developed after the implementation of the North American Free Trade Agreement ("NAFTA"), this article is meant to help foster the development of a framework for a more stable legal system that fosters predictability, efficiency, and fairness in international litigation.

A judicial decision-making process is a series of value judgments. The increase in transactions with foreign parties and foreign components in the wake of NAFTA is having a direct effect on the legal systems of its member countries because it internationalizes the scope of the value judgments made by domestic judges. As trade liberalization and advances in communication and transportation allow market forces to bring Mexico, the United States, and Canada closer together, legal authorities in each country must perform more analyses that reconcile their legal systems with the legal systems of their trading partners.<sup>1</sup>

Within academia, comparative studies of Mexican law and treatises of Mexican law are designed to help reconcile Mexican law with foreign bodies of law.<sup>2</sup> This article is not a treatise or study of foreign law. It is a discussion designed to help attorneys develop legal arguments when faced with international legal conflicts. Each

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1. The United States federal court system regularly balances bodies of law that differ from common law sources. *See, e.g.*, *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618 (8th Cir. 2001) (holding Louisiana law governed action under Arkansas choice of law rule); *Henkels & McCoy Int'l, Inc. v. Puerto Rico Tel. Co.*, No. 80C-MR-33, 1980 Del. Super. LEXIS 139 (Dec. 16, 1980) (determining Puerto Rican law should apply to facts presented but that the forum for its application should be in a Delaware court); *Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999) (applying Acoma tribal law).

2. *See, e.g.*, National Law Center for Inter-American Free Trade Publications, *Harmonization of the Secured Financing Laws of the NAFTA Partners: Focus on Mexico* (1995); Margarita Trevino Balli & David S. Coale, *Torts and Divorce: A Comparison of Texas and the Mexican Federal District*, 11 CONN. J. INT'L L. 29, 54 (1995); Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L.J. 1059 (1994). For the latest study of Mexican law for U.S. practitioners, see STEPHEN ZAMORA ET AL., *MEXICAN LAW* (2004).

argument presented in this article is part of a process of conflict and accommodation. Due to the proximity of Mexico, specific legal questions raised in the United States that involved international friction are often first raised in disputes involving Mexico prior to being raised more widely.<sup>3</sup> These cases are important because, as the number of connections between the United States and Mexico grows, there will be more cases that give rise to issues that, as the world's economy expands, will ultimately involve many more countries.

The broader relationship between the United States and Mexico is significant because of the positions each country maintains as economic leaders—the United States of the developed world, and Mexico of the developing world. The relationship between these two states exemplifies how countries with very different cultures, and with histories of conflict, can develop better relations through private investment and the many individual interactions that such relations require. This article is limited to this relationship because it provides a broad enough view into relevant legal analyses that there is ample perspective to serve as a basis for useful discussion.

The resolution of conflicts that come up in these private interactions is a balancing process in which comity is obviously a necessary norm. Respect for governing systems that overlap with our own, and a willingness to defer to the acts and decisions of other sovereigns, requires an evenhanded consideration of our differences with foreign legal systems that does not detract from the expectations we have of our own domestic legal systems. Comity, while not a framework, is necessary cooperation that, with the widening of international relationships amongst individual entities, must be respected within the analyses that make up any legal framework that favors predictable and equitable results.

NAFTA provides some predictability and equity by granting national treatment, with some exceptions, for imported goods and for

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3. See, e.g., *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (upholding findings that U.S. citizen committed unfair trade practices under U.S. trademark law for violations that occurred in Mexico, and providing primary authority for the extra-territorial application of U.S. law); see also *Ramirez & Feraud Chile Co. v. Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. Cal. 1956), *aff'd per curiam*, 245 F.2d 874 (9th Cir. 1957), *cert. denied*, 355 U.S. 927 (1958) (determining that the court had jurisdiction in equity over scheme to export products with plaintiff's label into the United States because it did not interfere with Mexican sovereignty).

investments and services as diverse as banking, brokerage, insurance, law and transportation.<sup>4</sup> NAFTA provides unbiased and transparent administrative procedures<sup>5</sup> encourages private arbitration,<sup>6</sup> and allows for the creation of dispute resolution panels specifically designed to resolve the conflicts that come up between the legal regimes of member states.<sup>7</sup> However, these procedures, with the exception of options that encourage private arbitration, are designed for interstate disputes between sovereigns rather than private litigation.<sup>8</sup> The development of a framework that favors predictable and equitable results in private litigation, therefore, goes far beyond the administrative procedures of NAFTA. The role of courts in the United States in developing such a framework by applying common legal analyses is the topic of this article.<sup>9</sup>

This framework is a series of decisions that require the balancing of foreign and domestic interests. Courts may offset divergent interests with measures such as staying a proceeding in the United

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4. North American Free Trade Agreement, Dec. 17, 1992, art. 1201, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA].

5. See *id.* ch. 11 (providing for binding arbitration against national governments for claims by investors for monetary damages); *id.* ch. 18 (requiring open access for parties to transparent judicial proceedings that ensure due process of law); *id.* ch. 19 (regarding anti-dumping and countervailing duty disputes); *id.* ch. 20 (setting out general dispute settlement procedures within NAFTA, and permissibility of private arbitration). The administrative procedures provided under NAFTA are evolving into a new body of law of their own. See Patricia Isela Hansen, *Judicialization and Globalization in the North American Free Trade Agreement*, 38 TEX. INT'L L.J. 389, 490-91 (2003).

6. NAFTA, *supra* note 4, art. 2022.

7. See *id.* chs. 19-20.

8. See *id.* art. 2020 (providing for public referrals from judicial or administrative proceedings); *id.* art. 2021 ("No Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement."); *id.* art. 2022 (encouraging arbitration and other forms of alternative dispute resolution as a means to resolve private party disputes under NAFTA).

9. A similar article could describe how conflict of laws and private international law principles in Mexican law could be used to best develop a framework that encourages predictable and equitable results in cases involving parties from Mexico's NAFTA partners. This article, however, is limited to legal analyses of U.S. case-law involving Mexican parties. See ZAMORA ET AL., *supra* note 2, at 676-99 (providing a detailed introduction to conflict of laws in Mexico).

States while a suit involving the same parties proceeds in a foreign country,<sup>10</sup> or by enforcing foreign judgments.<sup>11</sup> This article looks at

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10. See, e.g., *In re Kmart Corp.*, 285 B.R. 679 (Bankr. N.D. Ill. 2002) (enjoining parties from asserting any findings of fact, conclusions of law, or judgment that may be entered in a case in the United States against a debtor with intertwined interests in dispute who was protected by a stay of further proceedings pending judicial action in Mexico); cf. *Mora v. McDonald's Corp.*, No. 96-C5957, 1997 U.S. Dist. LEXIS 2565, at \*4-\*6, \*18 (N.D. Ill. Mar. 6, 1997) (dismissing under *forum non conveniens* doctrine while four suits were pending in Mexico in which claims could be raised).

11. See, e.g., *Sw. Livestock & Trucking Co. v. Ramon*, 169 F.3d 317 (5th Cir. 1999). In this case, the Fifth Circuit reversed a district court's decision to not recognize a Mexican judgment that was upheld by the Supreme Court of Mexico. *Id.* The district court had disapproved of interest rates imposed by the Mexican court's judgment, and applied state law under diversity jurisdiction which permitted the court to refuse to recognize a foreign judgment on public policy grounds. *Id.* at 319. The Fifth Circuit reversed the decision, but not before the unpredictability of the district court's decision raised concerns about negative effects on trade. See Lauretta Drake, *Stop the Madness! Procedural and Practical Defenses to Avoid Inconsistent Cross-Border Judgments Between Texas and Mexico*, 9 J. TRANSNAT'L L. & POL'Y 209, 213 (1999) (propounding that *Southwest Livestock* created an uncertainty in enforcing cross-border legal decisions); see also J. Noelle Hicks, *Facilitating International Trade*, 28 BROOK. J. INT'L L. 155 (2002) (proposing that the enforcement of foreign judgments in the United States should be federalized and exploring the public policy exception for enforcement in the United States). But see *Compania Mexicana Rediodifusora v. Spann*, 41 F. Supp. 907 (N.D. Tex. 1941), *aff'd*, 131 F.2d 609 (5th Cir. 1942) (finding no reason to implement a public policy exception under law of same jurisdiction for collection of attorney's fees in Mexican lawsuit). The United States and Mexico each profess liberal policies with respect to foreign judgments in most situations. See generally Uniform Foreign Money Judgments Recognition Act, 13 U.L.A. 263 (1986) (setting forth liberal policies for accepting foreign judgments). The Uniform Foreign Money Judgments Recognition Act is currently accepted in thirty states, the District of Columbia and the Virgin Islands. See Uniform Law Commissioners, A Few Facts About the Uniform Foreign Money Judgments Recognition Act (listing current status of acceptance of the Act), available at [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-ufmjra.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ufmjra.asp); RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 481-486 (1987) (generally paralleling relevant provisions within the Uniform Foreign Money Judgments Recognition Act); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971) ("A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States."); *Codigo Federal de Procedimientos Civiles* [Mexican Federal Code of Civil Procedure] arts. 564-77; ZAMORA ET AL., *supra* note 2, at 695-99 (setting forth steps necessary to get a foreign judgment enforced in Mexico); Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 NW. J. INT'L L. & BUS. 376, 388 (1994). But see Roger R. Evans, *Enforcement of*

legal analyses broader than these two examples, which can be raised in a wider variety of cases.<sup>12</sup> It discusses them in the context of how actors in the U.S. legal system balance litigants' interests in lawsuits with international elements and the legal regimes that may govern them.

This discussion is written with an eye towards the European Union, but is meant to stand as a contrast to the law developing in the European Union. The European model of legal integration, though inappropriate in North America,<sup>13</sup> is relevant enough to this discussion to warrant brief attention, as Western Europe's transfer from balkanization to interdependent prosperity, and Eastern Europe's transfer into a freer and more prosperous region, share

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*U.S. Judgments in Mexico: Illusion or Reality?*, 64 TEX. B.J. 139 (2001) (finding no instance of a Mexican court recognizing and enforcing a U.S. judgment). The United States does not have any treaties regarding enforcement of U.S. judgments abroad, largely because of the United States' unique way of determining the amount of punitive damages. Judgment recognition treaties are beyond the scope of this article. However, a judgment recognition treaty with Mexico or Canada could pave the way for more stable international procedures for judgment recognition. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 11.8 (4th ed. 2001) (discussing recognition of U.S. judgments abroad).

12. Many of the cases that directly reflect the integration now taking place are not business disputes. See, e.g., *Donlann v. Maggurn*, 55 P.3d 74 (Ariz. Ct. App. 2002) (holding, in family law dispute, the trial court properly applied Mexican law to determine the validity of a marriage).

13. A European style unification of the Canadian, U.S. and Mexican legal systems into one legal system would be inappropriate because it would require the forfeiture of centuries of dispute resolution, scholarship, and domestic integration of competing legal institutions within each country. It would also present a break with cultural expectations at the bases of each system, and a major disruption in the governance of complicated trade networks within each country that are much larger than the trade that exists within individual European countries. Cf. Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B.C. INT'L & COMP. L. REV. 2, 5-8 (1998) (characterizing NAFTA as being "many steps behind the EU example" because it does not allow private parties direct access to supranational authorities). Rather than endorsing a model that it designed for European needs, this article is based on the concept that increased interactions encouraged under NAFTA introduce foreign concepts that may be evaluated on a case by case basis that will encourage reforms when necessary, but without offending or destabilizing domestic sensibilities. See generally Stephen Zamora, *The Americanization of Mexican Law: Non-trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391 (1993) (discussing NAFTA's effect on encouraging reforms in Mexico).

many of the same challenges and dividends with the NAFTA trading partners in their development as a trade block.

The European Union permits supranational authorities to adopt measures that harmonize laws, regulations and administrative activities of its individual states when there is an impact on the internal European market or there are proscribed obligations on private entities to act within specific expectations.<sup>14</sup> This is a centralized process of making specific laws to be applied the same way in different jurisdictions, as opposed to a process of balancing needs and interests of different jurisdictions at the same rate that parties come into conflict.<sup>15</sup> The few elements of legal unification that are developing in North America are small parts of a larger process of the integration of national economies.<sup>16</sup> The analyses discussed in this article are broader, and merely require the

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14. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, arts. 88, 256 O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

15. See H. Patrick Glenn, *Conflicting Laws in a Common Market? The NAFTA Experiment*, 76 CHI.-KENT L. REV. 1789, 1790-97 (2001) (comparing the E.U. legal system to the needs of the NAFTA trade block). Member States of the European Union are prohibited from permitting procedures that conflict with supranational measures designed to prevent arbitrary discrimination or restrictions on trade. See EC TREATY, *supra* note 14, arts. 94-95. A supranational court has wide jurisdiction with exclusive authority to review most conflicts that come between national and supranational authorities. *Id.* art. 95.

16. See, e.g., Lisa C. Thompson & William J. Thompson, *The ISO 9000 Quality Standards: Will they Constitute a Technical Barrier to Free Trade Under the NAFTA and the WTO?*, 14 ARIZ. J. INT'L & COMP. L. 155 (1995) (legal unification developing by way of the contracting demands or bid specifications of private transactions by some North American parties). Legal unification is also developing as a component of specific areas contemplated by independent commissions created under NAFTA. See NAFTA, *supra* note 4, chs. 9-10 (outlining the provisions of the labor and environmental side agreements). These examples in the United States are far more limited than the European model, however, because they are examples of the unification of legal standards within a broader model for balancing private and public interests on a case by case basis in a common law legal system, or as in the case of independent commissions under NAFTA, specialized regimes of limited scope, and not broad unifications of any legal systems themselves. Legal standards are much more simply unified than legal systems. The unification of legal standards amounts to little more than the normalization of specifications, such as the infusion of the metric system into U.S. commerce. Legal systems reflect cultural diversity and the value that diversity adds to the economy of a democratic country. It is for this reason that differing legal systems are not so simply normalized.



application of domestic law<sup>17</sup> (including the application of domestic law to private international disputes) to create an international governing structure without creating a separate international law.<sup>18</sup>

This discussion also draws upon Texas law. Since Texas separated from Mexico, its judges have addressed a wider diversity of questions of Mexican law than any other jurisdiction outside of Mexico.<sup>19</sup> Texas kept a Mexican-style civil law system for all of its law, except for criminal law, until 1840.<sup>20</sup> The subsequent

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17. Although the model that is centralizing government in Europe into a unified legal system would not fit well in the North American context, the unification of certain legal regimes, such as banking or insurance regulation or the recognition of foreign judgments, into a limited patchwork of regulations, or even general rules that would govern the jurisdictional and forum selection questions discussed in this article, could provide parties to international transactions the predictability they need to efficiently conduct business across the U.S.-Mexico border, without sacrificing minimal due process guarantees. This article, however, is limited to the development of an international governing structure with the law that is currently available to U.S. courts.

18. See Zamora, *supra* note 13, at 406-09 (contrasting legal integration in Europe and North America). A strong argument can be made that the primary bases for the differences between Europe and North America are historical. While North America has seen its share of warfare and discord, and has changed over time, it has been relatively stable. Particularly in the last eighty years, North America has been spared the radical political shifts, extreme political polarizations, and fanatical nationalism that color the last two hundred years of European history. Europe also has a history of repeated contact between legal systems through commerce and political alliances that has no parallel in North America.

19. See Andrew Walker, *Mexican Law and the Texas Courts*, 55 BAYLOR L. REV. 225, 228-30 (2003) (listing cases in which Texas courts have discussed issues of Mexican law in areas as varied as business transactions, family law, torts, estate law, oil and gas law, water law, insurance regulations, labor law, criminal law, and laws regulating municipal governments); see also Joseph Webb McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24, 26-34 (1959) (discussing Mexican influence on Texas pleadings, fusion of law and equity, venue laws, arbitration laws and probate procedure); Gerald Ashford, *Jacksonian Liberation and Spanish Law in Early Texas*, 52 SW. HIST. Q. 1 (1953); George C. Butte, *Early Development of Law and Equity in Texas*, 26 YALE L.J. 699, 706 (1917).

20. See 2 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822-1897* 177-78, *repealed and reenacted*, TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2001); see also *Miller v. Letzerich*, 49 S.W.2d 404, 407-08 (Tex. 1932) (explaining that all statutes in force between 1836 and 1840 are construed in light of Mexican law, and all contracts and grants of land made between 1836 and 1840 are interpreted according to the civil law in effect at the time of their execution).

willingness and unwillingness by Texas courts to apply Mexican law beyond areas explicitly adopted into the Texas canon reflect changing perspectives of Mexico, its culture, society and political system and changing perspectives about civil law and the adaptation of the common law system to Mexican authority that remain important as questions of Mexican law are raised in other jurisdictions.

Most of the study of the legal integration of the United States with Mexico, however, is a matter of private international law, and therefore largely a study of conflict of laws. In the United States, conflict of laws rules are almost entirely judge-made.<sup>21</sup> The United States has the most extensive conflict of laws rules in the NAFTA trade block, having long been forced to develop rules for selecting the law to apply in cases that span state lines.<sup>22</sup> Conflict of laws theories in the United States are well encapsulated into treatises for practitioners,<sup>23</sup> however there is no model code for the integration that is taking place in U.S. courts. There are only prior experiences, studies of prior conflicts and accommodations, and analyses and criticisms of judicial processes. For this reason, this article includes several examples from the Texan experience.

After this introduction, this article is divided into four sections. Part II discusses jurisdictional analyses in cases involving Mexican parties. Part III provides a look at the doctrine of *forum non conveniens* as it applies to cases with Mexican components. Part IV discusses choice of law analyses that raise the possibility of applying

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21. Cf. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991) (calling for Congress to enact a statute or series of statutes declaring federal choice of law rules for categories of disputes that arise frequently in multistate contexts). *But see* Alameda Films, S.A. de C.V. v. Authors Rights Restoration Corp., 331 F.3d 472 (5th Cir. 2003) (dictating choice of law analysis by international treaty); Robert A. Leflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951 (1977); Symeon Symeonides, *Louisiana Conflicts Law: Two "Surprises"*, 54 LA. L. REV. 497 (1994) (discussing codification of Louisiana conflict of laws rules).

22. See generally William Tetley, *A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective vs. Distributive Justice)*, 38 COLUM. J. TRANSNAT'L L. 299 (1999) (providing an historical review of conflict of laws in the United States from the perspective of a NAFTA partner).

23. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

Mexican law.<sup>24</sup> Part V argues that the analyses discussed in Parts II, III and IV are important because of their precedential value in the coming era of freer trade and more globalized economic relationships.

Parts II, III, and IV are meant to sketch some of the edges of the framework that U.S. courts provide international litigants when they apply basic analyses. The discussions in this article are written as the U.S. judicial system begins to receive larger waves of post-NAFTA litigation, and are meant to serve as a starting place for litigants who are developing arguments that will require courts to analyze international legal issues in private disputes. This article discusses a variety of cases, but reaches its greatest detail in an opinion from the U.S. District Court in Laredo, Texas written to address the case *Bremer-Gutierrez v. 3Com*. This opinion, although largely unknown, is a useful basis for discussion because it addresses a fact scenario that raises many of the issues that underlie this article.

## II. JURISDICTIONAL ANALYSES

The first opportunity for a court to make value judgments, whether or not it is in a common law jurisdiction, is in its determination of whether or not it has jurisdiction to hear a case. A U.S. court, without

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24. There are other legal analyses that require significant balancing between the legal systems of different countries. *See, e.g.,* West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir. 1987) (analyzing securities litigation under Act of State Doctrine after the 1994 Peso crisis); *see also* Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634 (5th Cir. 1994) (interpreting the Inter-American Convention on Letters of Rogatory); Mora v. McDonald's Corp., No. 96-C5957, 1997 U.S. Dist. LEXIS 2565, at \*14-\*18 (N.D. Ill. Mar. 6, 1997) (dismissing case on the basis of Federal Rules of Civil Procedure 19(b), determining that the infeasibility of joining an interested Mexican party due to the court's lack of diversity jurisdiction after joinder of the Mexican party warrants dismissal); Grupo Protexa S.A. v. All Am. Marine Slip, 856 F. Supp. 868, 883-84 (D.N.J. 1993) (determining whether Act of State Doctrine applied to maritime dispute arising out of sinking of ship in international waters within Mexico's exclusive economic zone); Terrazas v. Donohue, 227 S.W. 206, 206-10 (Tex. Civ. App. 1921) (providing an early analysis similar to the Act of State Doctrine, under the laws of war during the Mexican Revolution), *aff'd*, 274 S.W. 396 (Tex. 1925). This article, however, is limited to jurisdictional, *forum non conveniens*, and choice of law analyses because they are the most common doctrines that are brought before U.S. courts when hearing a case that includes possible litigants who are private parties from Mexico.

the limitations of international integration or harmonization that exist in Europe, must be very careful before it exercises personal jurisdiction over a Mexican party. Besides the possible offense to the expectations of foreign sovereigns, the harmful consequences that may result if a court exercises its jurisdiction beyond its authority are to the parties before the court if a stretch of a court's jurisdiction denies a litigant due process of law.

The analysis necessary to determine whether a foreign party has not received due process of law is discussed below. This section presents this application generally, and in two specific contexts. The first of these areas is the interpretation of Rule 4(k)(2) of the Federal Rules of Civil Procedure. This rule governs due process guarantees for parties from foreign countries who have contacts in the United States as a whole, in situations in which a basis for the exercise of judicial authority does not exist in any one jurisdiction within the United States.<sup>25</sup> The second is the issue of "jurisdiction by necessity." This type of jurisdiction could be possible in situations in which a suit cannot go forward without the exercise of jurisdiction over a third party, and the court does not have a separate basis for jurisdiction over this party.<sup>26</sup> This section will address these two issues, as well as more general jurisdictional issues, through an examination of cases that expose how the value judgments at the basis of jurisdictional analyses affect the balancing of the United States and Mexican legal systems.

The basic analysis by which a court tests whether it may exercise jurisdiction is well settled, and almost compels a rote rendition of its requirements.<sup>27</sup> The exercise of personal jurisdiction over a Mexican

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25. See FED. R. CIV. P. 4(k)(2).

26. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419 n.13 (1984).

27. This is a "minimum contacts" analysis. It is not, however, the only possible minimum contacts analysis for the determination of jurisdiction over a Mexican party in the United States. See, e.g., *In re Jacobo Xacur et al.*, 216 B.R. 187, 193-94 (Bankr. S.D. Tex. 1997) (exercising jurisdiction over large bankruptcy proceeding after 1994 peso devaluation involving over \$50 million in debt to several Mexican and U.S. banks based on a standard minimum contacts analysis, as well as 11 U.S.C. § 109 (2000), which provides, "that a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor [subject to jurisdiction in a bankruptcy court in the United States]").

party (or any foreign party) violates the Due Process Clause<sup>28</sup> unless two criteria are met. First, the Mexican party must have purposefully availed itself of the benefits and protections of the forum state by establishing minimum contacts with that forum state.<sup>29</sup> Secondly, the exercise of jurisdiction over the Mexican party must not offend "traditional notions of fair play and substantial justice."<sup>30</sup> The "minimum contacts" prong of this inquiry is divided into contacts that give rise to "specific" personal jurisdiction and those that give rise to "general" personal jurisdiction.<sup>31</sup> Specific jurisdiction is appropriate when the Mexican party's contacts with the forum state arise from, or are directly related to, the cause of action.<sup>32</sup> General jurisdiction will attach even if the Mexican party's contacts with the forum state are not directly related to the cause of action, so long as these contacts are both "continuous and systematic."<sup>33</sup> If a Mexican party has sufficient contacts with the forum, a court then considers whether the fairness criteria of the inquiry are satisfied.<sup>34</sup> The factors considered in a fairness inquiry that includes a Mexican party are: (1) the burden upon the Mexican party; (2) the interests of the forum state; (3) the plaintiff's interest in securing relief; (4) the international judicial system's interest in obtaining the most efficient

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28. See U.S. CONST. amend. XIV, § 1 ("[N]o State shall . . . deprive any person of life, liberty, or property without due process of law.").

29. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

30. *Id.*

31. *Id.*

32. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414.

33. *Id.* at 415; see *Felch v. Transportes Lar-Mex, S.A. de C.V.*, 92 F.3d 320 (5th Cir. 1996) (holding there were insufficient contacts to bring Mexican defendant into U.S. court for tort that occurred in Mexico and was not directly related to stream of commerce).

34. See *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 105 (1987) (providing a fairness analysis for a party from a foreign country after determining that minimum contacts do not exist). But see *id.* at 110 (Stevens, J., plurality opinion) (concurring in the judgment of the court on the basis that a review of a foreign party's contacts with the forum is unnecessary because a determination that jurisdiction exists would be "unreasonable and unfair").

resolution of controversies; and (5) the shared interest of the United States and Mexico in furthering fundamental substantive policies.<sup>35</sup>

The U.S. Supreme Court cautions that “[t]he unique burdens placed upon one who must defend itself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.”<sup>36</sup> The border Mexico shares with the United States and the extensive contact that exists between Mexico and the United States create an environment where it is more likely that minimum contacts will exist and where “fair play and substantial justice” will not be offended by the exercise of jurisdiction. Nonetheless, there is considerable added expense and difficulty for a party from any foreign country who must defend itself in a U.S. court. If a Mexican party does not directly receive benefits from its contacts in the United States, basic equitable notions would dispel the exercise of jurisdiction over that party, particularly if its contacts are small in number or significance.

#### A. MEXICAN CONTACTS AND UNITED STATES FAIRNESS

An extreme example of the sort of inconvenience the Supreme Court cautioned against is exemplified by a pre-NAFTA dispute between a Mexican shipyard and a U.S. ship owner and its insurance

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35. *See id.* But *see* *Juarez v. UPS de Mexico, S.A. de C.V.*, 933 S.W.2d 281 (Tex. App. 1996) (indicating in dicta that there was a reasonable basis for minimum contacts for Mexican party, but determining that minimum contacts analysis was unnecessary because suit against Mexican party within factual scenario would fail to comport with traditional notions of fair play and substantial justice). Texas law more explicitly forces courts to address value judgments as the basis of the balancing process when an international dispute requires a jurisdictional analysis. Texas law places the following factors before a court for consideration in addition to the constitutional requirements listed above: (1) the unique burdens placed upon the defendant who must defend itself in a foreign legal system; and (2) the procedural and substantive policies of other nations whose interests are affected as well as the foreign government's interest in its foreign relation policies. *See Transportes Aereos de Coahuila v. Falcon*, 5 S.W.3d 712, 720 (Tex. App. 1999) (holding it unnecessary for Court to complete minimum contacts analysis because due process analysis of traditional notions of fair play and substantial justice, and additional requirements under Texas law for foreign defendants, mandate dismissal for want of jurisdiction).

36. *Asahi*, 480 U.S. at 114.

company, regarding liability over the sinking of a ship in Alaskan territorial waters. In *Insurance Co. of North America v. Marina Salina Cruz*, a U.S. company took a ship to a shipyard on the southern Pacific coast of Mexico in order to modify it to catch crabs for commercial sale.<sup>37</sup> After the modifications were made, the U.S. company took the ship to Alaska where the ship sank off one of the Aleutian Islands.<sup>38</sup> The U.S. company and its insurance company brought an action against the Mexican shipyard in an Alaskan court.<sup>39</sup>

The shipyard, which was a public entity that did some private contracting, brought a motion to dismiss based on lack of personal jurisdiction, sovereign immunity, and *forum non conveniens*.<sup>40</sup> The district court denied the motion.<sup>41</sup> On appeal, the Ninth Circuit held that the district court lacked personal jurisdiction over the Mexican shipyard because it was unreasonable to expect the appellant to defend an action in Alaska based on repairs made by a shipyard in Mexico.<sup>42</sup> The court determined that the Alaskan district court did not have jurisdiction over the Mexican shipyard because: the shipyard had not solicited business and had no other purposeful link to Alaska; it was unforeseeable that it would face suit in Alaska; the burden of defending a case in Alaska was great; Alaska's public interest in the case did not outweigh the defendant's private interests; and finally a Mexican forum was available and would result in the most efficient resolution to the case.<sup>43</sup>

The possible significance of a burden upon a Mexican party such as the Salina Cruz Marina often may be enough to prevent a court from exercising jurisdiction. However, the remaining four prongs of the jurisdictional analysis have the potential to mitigate in favor of

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37. *Ins. Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1269 (9th Cir. 1981).

38. *Id.*

39. *Id.*

40. *Id.* Sovereign immunity applies to only a limited percentage of international transactions, and is not addressed in the article.

41. *Id.*

42. *Id.* at 1270.

43. *Id.* at 1270-74.

finding jurisdiction; in particular, the prongs that require a court to consider the international judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the United States and Mexico in furthering fundamental substantive policies.<sup>44</sup> These two prongs are at the heart of a court's balancing process because they force a court to consider the best way to effect the efficient resolution of shared substantive policy. This consideration requires recognition of the need to develop a predictable framework to equitably and efficiently manage conflicts wrought by bi-national economic growth.

#### B. RULE 4(K)(2)

The development of a predictable framework to equitably and efficiently manage conflicts wrought by bi-national economic growth is particularly visible through the application of Federal Rule of Civil Procedure 4(k)(2). This rule directly relates to increased global trade; it allows federal courts to exercise jurisdiction over foreign parties who enjoy the benefits of contacts spread across the United States without any substantial concentration of contacts in a specific jurisdiction. It states:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.<sup>45</sup>

*Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.* provides an example of the application of Rule 4(k)(2) within the context of balancing U.S. jurisdiction with Mexican claims.<sup>46</sup> Both parties to this suit were contractors for services necessary to survey and inspect underwater oil and gas pipelines owned by the Mexican

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44. See *Asahi Metal Indust. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113 (1987).

45. FED. R. CIV. P. 4(k)(2).

46. *Submersible Sys., Inc. v. Perforadora Cent.*, 249 F.3d 413 (5th Cir. 2001).



national oil company submerged in Mexican territorial waters.<sup>47</sup> The plaintiff, Submersible Systems ("Submersible"), was from the United States, and the defendant, Perforadora Central ("Perforadora") was from Mexico.<sup>48</sup> Both parties to the lawsuit terminated the services they were providing to a third party, Quantum Ingenieros, S.A. de C.V., after Quantum did not pay for the services both parties had provided.<sup>49</sup> Perforadora then brought to shore, from a worksite entirely in Mexican waters, to a port on the Mexican mainland, a boat containing equipment allegedly owned by Submersible.<sup>50</sup> Perforadora claimed an interest in Submersible's equipment, seeking to aver this claim with the argument that these chattels were owned by a third party debtor, and seized the equipment, allegedly to get the third party to pay its debt.<sup>51</sup> The equipment remained in an open yard where, over a period of time, it was exposed to the elements and destroyed.<sup>52</sup>

Submersible pursued a case in a Mexican court against Perforadora. It then abandoned the Mexican proceeding to file a suit in Mississippi alleging conversion, claiming admiralty and diversity jurisdiction existed over the Mexican company, seeking to attach an unrelated drilling rig that belonged to Perforadora that was located in a shipyard in Pascagoula, Mississippi.<sup>53</sup>

Perforadora's contacts in the United States included a bank account in Houston and sending employees to a conference in Houston every year.<sup>54</sup> It also had purchased spare parts and vessels in the United States, and its vessels had occasionally called on U.S. ports.<sup>55</sup> The district court determined that jurisdiction existed, in admiralty, stretching the possible minimum contacts for general jurisdiction to meet the constitutional standard, in order to rule that

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47. *Id.* at 415-17.

48. *Id.* at 415-16.

49. *Id.* at 416.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 416-17.

54. *Id.* at 420-21.

55. *Id.*

the nature of Perforadora's contacts satisfied Rule 4(k)(2) and, therefore, subjected it to suit in Mississippi.<sup>56</sup>

This case provides a good basis for discussion because, like future cases that will develop as business transactions bring Mexican parties and U.S. parties into closer interactions, it is unlikely that the parties to this suit decided to work together. The parties came together in the regular course of business with a third party who hired them both as independent contractors.<sup>57</sup> Although not completely a fortuitous contact, there was less opportunity for them to independently draft a forum selection clause or any other clause that could provide the predictability normally planned for by parties to an international transaction.

While Perforadora's contact did avail the Mexican company of the benefits and protections of being in the United States, it is not contact that could be a basis for specific jurisdiction or general jurisdiction over the Mexican company in an unrelated lawsuit, either in Mississippi or the United States as a whole.<sup>58</sup> All of the alleged acts in this suit took place in a single foreign jurisdiction where the plaintiff had chosen to go to conduct business.<sup>59</sup> The district court's decision to exercise jurisdiction, until reversed by the Fifth Circuit, was an exaggerated stretch of a court's jurisdiction that demonstrates the extent to which imprudent judicial action can amplify international legal conflicts.<sup>60</sup> The appellate decision had the effect of balancing the interests of the legal systems of the United States and Mexico because it determined that there was no adequate basis for jurisdiction in the United States.<sup>61</sup>

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56. See *Submersible Sys., Inc. v. Perforadora Cent.*, No. 1:98CV251GR, 1999 WL 33456914 (S.D. Miss), *rev'd*, 249 F.3d 413 (5th Cir. 2001).

57. *Submersible Sys., Inc.*, 249 F.3d at 416.

58. Cf. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-17 (holding that acts of purchasing equipment in a forum and traveling to the same forum on related business, with no additional contact with the forum state, is not sufficient to confer personal jurisdiction when the plaintiff's cause of action does not arise out of those activities).

59. *Submersible Sys., Inc.*, 249 F.3d at 416.

60. The district court went so far as to rule that Mississippi provided the most convenient forum for this suit. *Id.* at 417.

61. See *id.* at 422.

### C. TRUCKS CROSSING THE BORDER: UNPREDICTABLE ANALYSES AND COMMON FACT SCENARIOS

Unlike *Submersible Systems*, the majority of the cases that will develop during the post-NAFTA expansion of U.S.-Mexico interactions will not involve the maritime questions or new laws such as Rule 4(k)(2). Most cases will involve more common legal analyses, and will involve land-based interactions. For example, *Transportacion Especial Autorizada, S.A. de C.V. v. Seguros Comercial America, S.A. de C.V.*<sup>62</sup> is a case with a common fact scenario that requires a minimum contacts analysis, but from which the court drew a result that would have been extremely unlikely without the increase in land-based traffic that has grown due to NAFTA.

In *Seguros Comercial*, a Texas appellate court was presented with a dispute between two Mexican companies regarding alleged negligence and breach of a contract, which dealt with goods that came into the Mexican stream of commerce as part of the growth directly spurred by NAFTA.<sup>63</sup> The court faced a question of whether it had jurisdiction over a Mexican freight carrier who transported, between Mexican cities, freight from the United States. By exercising jurisdiction, the court recognized the foreseeability that freight carriers, as part of an international network, will be sued in the United States, reasoning at the basis of its decision to exercise jurisdiction that the "the North American Free Trade Agreement has resulted in growing commercial interdependence between Texas and Mexico."<sup>64</sup>

With this basis, the determination was made easier because, although *Transportacion Especial* did not take custody of the merchandise until it was in Mexico, it had issued a bill of lading to ship the merchandise from within the United States.<sup>65</sup> It issued the bill of lading to transport 184 cases of video equipment and

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62. 978 S.W.2d 716 (Tex. App. 1998).

63. See *id.* at 718.

64. *Id.* at 721-22.

65. *Id.* at 720.

electronics from Austin, Texas to Mexico City.<sup>66</sup> Several other carriers moved this merchandise, under the contract issued by Transportacion Especial, from Austin to Nuevo Laredo, Mexico.<sup>67</sup> Transportacion Especial shipped the freight from Nuevo Laredo to Mexico City.<sup>68</sup> When the shipment arrived in Mexico City, the owner discovered that some of the merchandise was missing, and filed a claim for the loss with its Mexican insurance company, Seguros Comercial.<sup>69</sup> Seguros Comercial paid the claim to the owner of the merchandise and brought suit in state court in Austin against Transportacion Especial and Texas Forwarding Corporation, a U.S.-based company.<sup>70</sup>

Texas Forwarding served as an agent for a Mexican customs broker.<sup>71</sup> Texas Forwarding received the merchandise in Laredo, then verified, inspected, and classified it for import into Mexico, then delivered it to a local freight carrier in Laredo, who was not a party to the suit, but did take the merchandise from Texas Forwarding's custody to Transportacion Especial's place of business in Nuevo Laredo.<sup>72</sup>

This chain of transactions fit within a bi-national scheme that would not have occurred without a growing demand for Transportacion Especial's services by parties in the United States, sought out in the regular course of its business. The court decided that specific jurisdiction existed, and made the additional determination that minimum contacts existed for the exercise of general jurisdiction as well, then determined that its exercise of jurisdiction did not offend traditional notions of fair play and substantial justice.<sup>73</sup>

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66. *Id.* at 718.

67. *Id.*

68. *Id.*

69. *Id.* at 718-19.

70. *Id.* at 719.

71. *Id.*

72. *Id.*

73. *Id.* at 721 (taking into account the quality, nature, and extent of Transportacion Especial's business in Texas). *But see* Floyd J. Harkness Co. v. Habermann, 60 Cal. App. 3d 696, 697-98 (1976) (determining there is no interest

The court appeared to recognize that this application of jurisdiction over two foreign parties in an international dispute anchored by interactions in Mexico was expansive, by including in its opinion dicta explaining why it had specific as well as general jurisdiction over *Transportacion Especial*.<sup>74</sup> This was perhaps an effort to show a need for regulation in the United States, and was at least an effort to show the benefits that this foreign party received by availing itself towards the United States and some of the effects of these benefits. Most notably, the court noted that half of the defendant's business was derived from imports crossing into Mexico from Texas.<sup>75</sup> Other dicta included a long list of *Transportacion Especial*'s contacts in the United States.<sup>76</sup>

The most recent Supreme Court authority states that merely placing merchandise into the stream of commerce without further availment of the forum is not always enough action for a court to exercise jurisdiction.<sup>77</sup> However, this authority is tenuous because it is based on a plurality opinion, and is not followed in the Fifth Circuit, which has a long border with Mexico and significant

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for California in exercising jurisdiction in a pre-NAFTA case alleging breach of contract in which a Mexican defendant entered into a business relationship with a party from California, but did not physically enter the United States other than alleged forays at the U.S. border in Arizona for alleged events pertinent to the underlying transaction and travel to California for a small percentage of the events pertinent to the underlying transaction).

74. *Seguros Comercial*, 978 S.W.2d at 720.

75. *Id.*

76. *See id.* (listing *Transportacion Especial*'s contacts to include: 1) receipt of over 150 payments from a company in Austin for shipments originating in Texas and continued business with four or five other Texas carriers for similar numbers of shipments; 2) insurance in Texas covering *Transportacion Especial*'s trucks traveling within twenty-five miles of the international border; 3) traffic tickets issued to the defendant's drivers while in Texas on business for the defendant; 4) trailer interchange agreements with ten to twelve trucking companies in Texas; 5) a bank account with South Texas National Bank in Laredo used for the purpose of paying expenses incurred in Texas and depositing income paid to *Transportacion Especial* in U.S. dollars received from its Texas customers; 6) *Transportacion Especial*'s mail being forwarded from an address in Laredo to Mexico; and 7) travel to Texas to solicit business from Texas companies).

77. *See Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 110-12 (1987) (additional factors other than placing products into the stream of commerce are necessary for a court to exercise jurisdiction over a foreign party).

maritime ties to Mexico.<sup>78</sup> The Fifth Circuit will find jurisdiction when a party merely places goods into the stream of commerce.<sup>79</sup>

However, even in the Fifth Circuit, the authority available is not always easily applicable to the flow of goods across the Mexican border. For example, *Arkwright Mutual Insurance Company v. Transportes de Nuevo Laredo, S.A. de C.V.*,<sup>80</sup> is a case from a federal district court in the Fifth Circuit with facts very similar to *Seguros Comercial*. However, in *Arkwright*, the court refused to exercise jurisdiction over a Mexican freight carrier without documenting careful review of the placement of goods in the stream of commerce (or a direct effect within the stream of commerce by a transporter of goods) to determine whether the Mexican freight company had minimum contacts in the jurisdiction.<sup>81</sup>

In *Arkwright*, a U.S. insurance company brought suit against a Mexican transport company and a U.S. transport company for negligence and breach of contract after a shipment of ten pallets of machinery components and parts arrived in damaged condition after having been loaded in good condition.<sup>82</sup> The goods were initially shipped from Puebla, Mexico to Nuevo Laredo, Mexico, then through Laredo, Texas to their ultimate destination in South Carolina.<sup>83</sup> The Mexican transport company shipped the freight underlying the dispute from Puebla to Nuevo Laredo, and, as in *Seguros Comercial*, the Mexican Transport Company did not cross into the United States.<sup>84</sup> A local transport company brought the

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78. See *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989), *cert. denied*, *Jugometal Enters. for Imp. & Exp. of Ores & Metals v. Irving*, 493 U.S. 823 (1989) ("Because the [Supreme] Court's splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue, we continue to gauge [the nonresident defendant]'s contacts with Texas by the stream of commerce standard as described in *World-Wide Volkswagen* and embraced in this circuit.").

79. See *id.*

80. 879 F. Supp. 699 (S.D. Tex. 1994).

81. See *id.* at 700-01.

82. *Id.* at 699-700.

83. *Id.*

84. *Id.* at 700.

shipment across the border from the Mexican transport company to a U.S. transport company, and was not a party to the suit.<sup>85</sup>

Unlike the record developed about the Mexican transport company in *Seguros Comercial*, the record developed about the Mexican transport company in this case provided fewer contacts with the United States.<sup>86</sup> However, these contacts did include evidence that forty percent of the transport company's cargo was shipped into the United States.<sup>87</sup> The analysis, while recognizing the importance of this large percentage of the carrier's business, neglected additional recognition of the broader imprint of NAFTA-spurred growth on the flow of Mexican commerce into the stream of commerce in this country. The court instead concentrated its attention on the Mexican party's physical contacts in the United States, and relied on a pre-NAFTA Fifth Circuit case regarding imports of a defendant's finished products into the United States.<sup>88</sup>

In the current business environment, in which products are partially built in more than one country, courts must analyze the extent to which a party's actions within this environment affect the stream of commerce. The growing stretch of foreign trade into this country, particularly trade with parties from countries with which there are frequent contacts, demands a more stable legal basis. When conflicts arise in transactions that cross national borders, litigants cannot allow courts to ignore basic jurisdictional issues. Litigants must accurately present the organization of the ordinary flow of interactions vital to completion of a transaction in the NAFTA-based economy. Only then can one make arguments about the effects within the stream of commerce that may warrant the exercise of

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85. *Id.*

86. *See id.* (explaining that the company provided no services in the United States, had no bank account in the United States, had no traffic violations in the United States, had no mail forwarded from the United States, and did not solicit business in the United States).

87. *Id.*

88. *See id.* at 701 (citing *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987) (conducting a pre-NAFTA and pre-Rule 4(k)(2) jurisdictional analysis, determining that jurisdiction did not exist, in which stream of commerce led products into marketplace in one U.S. state, but defendant's contacts were in two U.S. states)).

jurisdiction or other arguments that expose the legal system's relationship to the structures of ordinary commerce.

#### D. "JURISDICTION BY NECESSITY"

Another problem *Arkwright* and *Seguros Comercial* expose is that without a single forum to hear a suit against defendants from multiple jurisdictions, there is the risk that courts in separate countries could hand down contrary judgments.<sup>89</sup> In an absence of analyses in both countries' courts that put a heavy weight on international comity, a court could resolve a dispute in which there are defendants, who together cannot be sued in any single forum by determining that there is "jurisdiction by necessity."<sup>90</sup>

The possibility that jurisdiction exists under this theory has been explicitly hypothesized by the Supreme Court, but, at the same time, explicitly left unaddressed by the Court.<sup>91</sup> Before exercising its jurisdiction under this theory, a court would have to look to the nature of the relationships amongst the parties, the relative strength and size of the parties, and the reasonable expectations of the parties in order to balance all relevant interests.

The U.S. District Court for the Southern District of California faced a situation that provides a basis for discussion of jurisdiction by necessity in *Meridian Seafood Products, Inc. v. Fianzas Monterrey, S.A.*<sup>92</sup> In *Meridian Seafood*, plaintiff Meridian Seafood Products, a California seafood company, regularly conducted business in Mexico, and purchased shrimp from Mexican

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89. This assumes that the parties did not circumvent this problem by including a choice of forum clause in their contract, or by contracting with a Mexican party that had very clearly availed itself to the United States.

90. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419 n.13 (1984).

91. See *id.* ("As an alternative to traditional minimum-contacts analysis, respondents suggest [that jurisdiction can exist] under a doctrine of 'jurisdiction by necessity . . . .' We conclude, however, that respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum . . . . We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.")

92. 149 F. Supp. 2d 1234 (S.D. Cal. 2002).



fisherman.<sup>93</sup> The fishermen could not always deliver the shrimp or refund prepayment by the plaintiff, so the plaintiff purchased sureties on the shrimp contracts from a Mexican surety company.<sup>94</sup> The U.S.-based Meridian Seafood could not get a surety from within the United States because the Mexican fishermen, as citizens of Mexico working in Mexico, could not contract with a foreign surety company under Mexican law.<sup>95</sup> The Mexican surety company did not conduct business in California, was not licensed in California, and did not maintain offices or have employees in California.<sup>96</sup> The agreement to purchase sureties took place in Mexico, and most, if not all, of the conduct and transactions in the case occurred in Mexico.<sup>97</sup> The Mexican surety company did not pay all of the claims for which Meridian Seafood sought payment.<sup>98</sup> Meridian Seafood then filed a suit against the Mexican surety company in the United States, claiming breach of contract, bad faith, and fraud.<sup>99</sup>

The surety company was regulated under Mexico's Federal Act of Bonding Institutions.<sup>100</sup> This law requires all parties seeking a surety in Mexico to contract with a Mexican bonding institution.<sup>101</sup> This law also requires that all rights and obligations of all parties to the bond, including the validity of debt owed by the obligor to the beneficiary,

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93. *Id.* at 1236.

94. *Id.*

95. *Id.*

96. *Id.* at 1236-37.

97. *Id.*

98. *Id.* at 1236, 1239.

99. *Id.* at 1236.

100. *Id.*; see *Ley Federal de Instituciones de Fianzas* [Federal Law of Bonding Institutions] ("L.F.I.F.").

101. See L.F.I.F. art. 4 (prohibiting Mexican corporations from contracting for guarantees from foreign companies). Under NAFTA, Mexico made reservations limiting a private foreign entity to 49% of paid capital and 30% of non-voting paid capital of bonding institutions. See NAFTA, *supra* note 4, chs. 11, 14 (regulating cross-border transactions involving investments and financial institutions); see also Bradley Condon, *Smoke and Mirrors: A Comparative Analysis of WTO and NAFTA Provisions Affecting the International Expansion of Insurance Firms in North America*, 8 CONN. INS. L.J. 97, 125 (2001/2002) (examining NAFTA reservations in the context of international insurance industry).

must be resolved in the same action.<sup>102</sup> Therefore, all beneficiaries that make claims on bonds must do so under the same procedures within the same cause of action.<sup>103</sup> The Mexican law does this by creating a regulatory scheme in which an administrative program processes all disputes governing bonds and sets forth the rules governing lawsuits against bonding institutions.<sup>104</sup> This regime requires an obligor to be joined in a lawsuit because a judgment in favor of the beneficiary that validates the obligor's debt to the beneficiary is enforceable in a Mexican subrogation action against the obligor, within the same action.<sup>105</sup> This insures due process of law for all parties to a transaction that involves a surety.

In *Meridian Seafood*, the U.S. District Court for the Southern District of California recognized a compelling need for Mexican law to be applied to the facts before the court, even though the applicable Mexican regulatory scheme required that the court join additional parties to the suit.<sup>106</sup> The additional parties, obligors to the surety company, were individual fisherman who lived and worked in Mexico.<sup>107</sup> There was no record that any of the fishermen had any contacts with the United States other than putting their fish into the stream of commerce.<sup>108</sup> There is no international treaty that harmonizes Mexican surety regulations with U.S. law.

Therefore, even if the surety company could provide Meridian Seafood with appropriate compensation for their alleged loss, and the court had a basis for jurisdiction over the surety company, it would have been virtually impossible for the court to join all of the Mexican fishermen. If the court had nonetheless exercised jurisdiction over the surety company without the fisherman, the company could have

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102. L.F.I.F. art. 93.

103. *Id.*

104. *Id.* pmbl., arts. 1, 94.

105. *Id.* arts. 118, 122.

106. *Meridian Seafood Prods., Inc. v. Fianzas Monterrey, S.A.*, 149 F. Supp. 2d 1234, 1238 (S.D. Cal. 2002). Such a situation could not come up within the European Union, where there are more unified regulatory regimes and clear jurisdictional rules for E.U. member countries.

107. *Id.* at 1236.

108. *Id.* at 1239.

faced a U.S. court ruling that the underlying debt to the beneficiary is valid, and an opposite ruling in Mexico, leaving the company no recourse if it were to seek to recover from the obligors the money the U.S. court ordered it to pay to the beneficiary.<sup>109</sup> The Mexican regime prevents this result because it joins all of the parties in one lawsuit.<sup>110</sup>

The court rejected a result with such an unbalanced foundation, in effect requiring Meridian Seafood either to pursue its claims in Mexico, or simply not to do business in Mexico with Mexican parties. Although the fishermen were needed for the court to apply Mexican law, they were not subjected to the court's jurisdiction. The court instead determined that it did have jurisdiction over the surety company then sent the case to Mexico under the theory of *forum non conveniens*.<sup>111</sup>

### III. FORUM NON CONVENIENS

#### A. THE APPLICATION OF *FORUM NON CONVENIENS*

*Forum non conveniens* is a general concept borrowed from the admiralty concept that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized" for application in non-admiralty cases.<sup>112</sup> A *forum non conveniens* analysis is only available when a court has jurisdiction to hear a case.<sup>113</sup> An action may be dismissed for *forum non conveniens* where jurisdiction

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109. Cf. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 114 (1987) (holding no jurisdiction existed in a case involving a Japanese third-party, attempting to satisfy a claim by a Taiwanese defendant, after the Taiwanese defendant settled the case with the U.S. plaintiff).

110. Under these facts, there would more likely be jurisdiction by necessity in Mexico in its single-suit system, rather than cause to exercise jurisdiction by necessity over all of the Mexican fisherman. Cf. *Wichita Fed. Sav. & Loan Ass'n v. Landmark Group, Inc.*, 674 F. Supp. 321, 326 (D. Kan. 1987) (ruling defendants who engage in highly regulated activities are more likely to have the necessary minimum contacts required to litigate in a foreign forum because of the foreseeability of regulation and the nature of activities that are highly regulated).

111. *Meridian Seafood*, 149 F. Supp. 2d at 1239-40.

112. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

113. *Id.* at 504.

exists, the defendant proves the existence of an adequate alternative forum, and certain public and private interest factors favor dismissal.<sup>114</sup> A *forum non conveniens* analysis is appropriate only when there is an adequate forum available elsewhere to hear the case.<sup>115</sup> Factors a court may look to in a *forum non conveniens* analysis include public interest factors, which may have nothing to do with the defendant to a suit.<sup>116</sup> Exceptions to the *forum non conveniens* doctrine are rare.<sup>117</sup>

In *Gulf Oil Corp. v. Gilbert*, the Supreme Court explained that a plaintiff's choice of forum should rarely be disturbed, and listed criteria to consider in a *forum non conveniens* analysis.<sup>118</sup> These criteria include the private interest of the litigant; the relative ease of access to sources of proof; the availability of compulsory process for

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114. *Id.*; see *Mora v. McDonald's Corp.*, No. 96-C5957, 1997 U.S. Dist. LEXIS 2565, at \*14-\*18 (N.D. Ill. Mar. 6, 1997) (dismissing case under doctrine of *forum non conveniens* and stressing strength of Mexican law and procedure by stating that "[c]ourts have repeatedly held that Mexico is an 'adequate forum' supporting *forum non conveniens* dismissals"). While this article is about improvements to the U.S. legal system, deficiencies in the Mexican legal system should be noted. Mexico clearly has a legal system adequate for a *forum non conveniens* analysis. However, it suffers from political influences within legal institutions, the concentration of power in individuals rather than the dispersal of power through equitable legal structures, a corporatist view of society in which laws and power relate to groups rather than individuals, and machinery of state that serve more as succions of wealth than as neutral entities. See generally ALVARO VARGAS LLOSA, *LIBERTY FOR LATIN AMERICA: HOW TO UNDO FIVE HUNDRED YEARS OF STATE OPPRESSION* (2005) (providing an overview of law, power and economics in Latin America).

115. *Gulf Oil Corp.*, 330 U.S. at 506-07.

116. *But see Seguros Comercial Am. S.A. de C.V. v. Am. President Lines*, 910 F. Supp. 1235 (S.D. Tex. 1995) (dictum) (asserting that the weighing of public interest factors is not necessary when private interest factors allow for *forum non conveniens* dismissal).

117. *But see generally Moyer v. Rederi*, 645 F. Supp. 620 (S.D. Fla. 1986) (determining that facts presented a maritime incident within the realm of the Death on the High Seas Act in a suit against cruise line that hired an independent contractor to teach scuba in Mexican territorial waters, directly offshore, in which student had fatal heart attack while in scuba class, but did not die until on Mexican soil). A *forum non conveniens* analysis could easily be inapplicable in a suit involving a Mexican party in less unusual maritime cases. See, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443, 450 (1994) (holding *forum non conveniens* not available in maritime matters in the Louisiana state court).

118. 330 U.S. at 508-09.

attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; the possibility of viewing of premises, if viewing would be appropriate to the action; and "all other practical problems that make trial of a case easy, expeditious and inexpensive [in order to] weigh [the] relative advantages and obstacles to [a] fair trial."<sup>119</sup> The Court also listed public interest factors for a court to take into account, including: administrative difficulties for courts when litigation is piled up in congested centers instead of being handled at its origin; the burden of jury duty on the people of a community that has no relation to the litigation; local interest in having localized controversies decided at home; and, the burden of problems in conflict of laws, and in applying foreign law.<sup>120</sup>

#### B. AMBIGUITY AND APPLICATION, PRE-NAFTA AND POST-NAFTA

A case that is dismissed on the basis of *forum non conveniens* has a more predictable analysis than a case that is dismissed on the basis of a jurisdictional analysis, because it does not include the amorphous "fair play and substantial justice" standard. Nonetheless, like any vessel for the value judgments in a court's decision-making process, if this analysis is not tempered with caution and foresight, it can bring undue unpredictability to cases with Mexican components.

The case *Mizokami Bros. of Arizona, Inc. v. Baychem Corp.*,<sup>121</sup> provides an example of the application of a *forum non conveniens* analysis to a lawsuit against a U.S. party who was allegedly associated with a Mexican transaction. This case moved between several courts in the United States and Mexico. The analysis by the first U.S. court to hear this case provides a good contrast to the analysis in *Meridian Seafood* because it applies jurisdictional analyses to two other defendants who, although they had different connections in the suit, were alleged to be responsible for the same acts.

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119. *Id.*

120. *Id.*

121. 556 F.2d 975 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

This case also provides an example of repeated applications of the same *forum non conveniens* analysis, from the perspectives of four different courts in the United States, with similar analyses, each with the same ultimate conclusion. This case filtered through two federal district courts and two federal appellate courts in the United States, all of which directed the case to the Mexican courts. On three occasions the Mexican courts also refused to hear this case.<sup>122</sup> The case ultimately ended, back again in the United States, where a court determined that the applicable statute of limitations had run.<sup>123</sup>

The facts underlying these analyses are as follows: an American importer of Mexican-grown produce sustained losses when U.S. Customs did not allow a shipment of peppers to cross into the United States because they were contaminated with chemical residues in violation of U.S. law.<sup>124</sup> The importer sustained a three million dollar loss when the peppers were impounded and the Food and Drug Administration placed an embargo on further shipments of the crop.<sup>125</sup> The importer brought suit in Arizona against the German patent owner of the chemical, and two of the patent owner's subsidiary companies: the chemical's manufacturer, Baychem, from Missouri, and the party that sold the chemical, who was from Mexico.<sup>126</sup> The plaintiff contended that Baychem, through its parent company and the Mexican subsidiary, marketed the chemical to farmers despite the manufacturer's knowledge that the farmers intended to export the produce to the United States, where the chemical was not approved for use.<sup>127</sup>

The underlying contract to purchase the chemicals took place in Mexico.<sup>128</sup> The only contact alleged in Arizona was the allegation

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122. *Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 798 F.2d 1196, 1197 (8th Cir. 1986). During the many years that this litigation lasted, Baychem changed its name to Mobay.

123. *Id.* at 1198.

124. *Baychem*, 556 F.2d at 976.

125. *Mobay Chem. Corp.*, 798 F.2d at 1197.

126. *Baychem*, 556 F.2d at 976-77.

127. *Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 714 (8th Cir. 1981).

128. *Baychem*, 556 F.2d at 977.

that the defendants knew or should have known that the chemicals would be on produce that entered Arizona.<sup>129</sup> This case occurred long before NAFTA expanded trade networks across the Mexican border and increased the strength of arguments about the fairness and justice of the exercise of jurisdiction over Mexican parties who rely on the flow of commerce into and out of the United States. As well, this argument was made before the Supreme Court's 1980 ruling that merely placing items into the stream of commerce can be a basis for jurisdiction (and before this ruling was later narrowed).<sup>130</sup> Today, after these changes in the law and the economy, this allegation would still be a challenging starting point for a lawsuit in the United States.

The Ninth Circuit affirmed the district court's ruling under the jurisdictional analysis required by law.<sup>131</sup> It affirmed the dismissal of the suit against the German party and the Mexican party for lack of jurisdiction, concentrating on the fact that the effect on commerce was the only contact the Mexican party to the transaction had in Arizona.<sup>132</sup> With this basis, the court then explained that the remaining defendant was a Missouri-based business with corporate offices in Delaware that had no business in Arizona related to this transaction, and had a connection to the alleged misrepresentations made to the transaction in Mexico that the court characterized as "not clearly defined," dismissing the case against this party under the theory of *forum non conveniens*.<sup>133</sup>

The plaintiff then refiled its suit in Missouri, where there was a stronger basis for the exercise of jurisdiction over *Baychem*.<sup>134</sup> The

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129. *Id.*

130. This opinion was written in 1977, three years before the Supreme Court provided clear authority about the relationship between the stream of commerce and the exercise of jurisdiction in *World-Wide Volkswagen Corp. v. Woodson* and later provided authority to restrict this theory. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (applying the stream of commerce theory); see also *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987) (restricting in a plurality opinion the stream of commerce theory).

131. *Baychem*, 556 F.2d at 977-78.

132. *Id.*

133. *Id.*

134. *Mizokami Bros. of Ariz. v. Mobay Chem. Corp.*, 483 F. Supp. 201, 204-07 (W.D. Mo. 1980). As noted above, defendant Baychem had changed its name to Mobay.

district court declined to exercise jurisdiction on the broad basis of *res judicata*, and, in the alternative, on the merits of its own *forum non conveniens* analysis.<sup>135</sup> The Eighth Circuit affirmed this decision on the basis of its own *forum non conveniens* analysis, ruling that there were no grounds for any determination that there was claim preclusion or issue preclusion because the Arizona court did not address the possibility of transferring the decision and did not analyze the convenience of a Missouri forum.<sup>136</sup>

The Eighth Circuit's decision required the lower court to determine the availability of a U.S. forum other than Arizona or Missouri.<sup>137</sup> Then, if only a Mexican forum were available, it required that the Missouri court hear the case if the Mexican courts refused to hear the case after the defendant made certain waivers, including submitting to the jurisdiction of the Mexican court, making its witnesses and discovery available in Mexico, and agreeing to satisfy any judgment by a Mexican court.<sup>138</sup>

The conclusion by each of the four courts that heard the *forum non conveniens* motion is supported by the fact that the events underlying this suit took place in Mexico, between Mexican parties with little contact to the United States outside of the stream of commerce, and Mexican law provided a forum and applicable law that regulated the contract and the chemicals. Beyond these contacts with Mexico, the conclusion is supported by the fact that the plaintiff was relying on Mexican law to pursue its claim.<sup>139</sup> The U.S. plaintiff chose to make a purchase, in Mexico, from one of the Mexican parties to a Mexican contract, then to import the subject matter of the Mexican contract with the Mexican peppers it imported into the United States, then to rely on Mexican law in its claim against a non-Mexican party allegedly associated with the Mexican contract, then to expect this claim to be heard in the U.S. courts.<sup>140</sup>

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135. *Id.* at 203-07.

136. *Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 715-19 (8th Cir. 1981).

137. *Id.* at 719.

138. *Id.*

139. *Id.* at 718.

140. *See id.*



The repeated application of *forum non conveniens* analyses in this chain of cases has been critized as an example of litigation sprawled from the potential "vagaries and inconsistencies" of the law governing *forum non conveniens* analyses.<sup>141</sup> However, any plaintiff would be hard-pressed to seek a forum in the United States under these circumstances. If the plaintiff had simply filed this case in Mexico, where each of the four courts agreed that the case belonged, or had drafted a basic choice of forum and choice of law clause in its contract, with clarity as to all of the parties' contacts with the chosen law and forum, the time and expense of this case would never have taken place.<sup>142</sup>

A post-NAFTA Fifth Circuit case, *Seguros Comercial Americas S.A. de C.V. v. American President Lines*,<sup>143</sup> provides a more straightforward example of an analysis that balances the overlap of the United States and Mexican legal systems in the regulation of larger transactions after the impetus of global trade spurred by NAFTA. This case is clearer than *Baychem* because the acts underlying the injury at the basis of this case were not alleged to be the acts of a party from outside of Mexico and because the suit was not filed in multiple jurisdictions within the United States. It also provides a shorter *forum non conveniens* analysis, ruling that an analysis of the private interest factors alone, without the public interest factors,

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141. See David W. Robinson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion"*, 29 TEX. INT'L L. REV. 353, 365-66 (1994) (criticizing the time it took for this case to go forward, and the ultimate result for the plaintiff, and blaming these results on "vagaries and inconsistencies in the doctrine of *forum non conveniens*" instead of the plaintiff's tactical choices).

142. Cf. *Albany Ins. Co. v. Banco Mexicano*, No. 98-9531, 1999 U.S. App. LEXIS 14987 (2d Cir. July 2, 1999) (enforcing forum selection clause in a suit over rights to certain purchase transactions for Mexican coffee beans between a U.S. insurance company and a Mexican bank); *Argonaut P'ship, L.P. v. Bankers Tr. Co.*, No. 96 Civ. 1970, 96 Civ. 2222, 1997 U.S. Dist. LEXIS 1092 (S.D.N.Y. Feb. 4, 1997) (enforcing forum selection clause in investors' suit against a Mexican corporation for breach of contract, negligence, breach of implied duty of good faith, and breach of fiduciary duty over Mexican defendant's *forum non conveniens* argument), *aff'd*, *Argonaut P'ship, L.P. v. Grupo Sidek, S.A. de C.V.*, 141 F.3d 1151 (2d Cir. 1998).

143. 910 F. Supp. 1235 (S.D. Tex. 1995).

could warrant dismissal.<sup>144</sup> The court nonetheless analyzed both sets of facts, and provided no explanation for this dictum.

*Seguros Comercial* involved a dispute over a shipment of shoes that were shipped through the United States from Indonesia to Mexico, and then lost when bandits stole the shipment on a Mexican highway.<sup>145</sup> The court first looked to the Mexican law presented to it to determine that an adequate forum was available in Mexico.<sup>146</sup> It then analyzed the private and public interest factors set out in *Gulf Oil Corp.* to determine whether the Mexican forum was appropriate under the facts presented.<sup>147</sup>

The court determined that the access to sources of proof was centered in Mexico because the events were alleged to have taken place in Mexico, testimony from expert witnesses about the applicable law would likely be from Mexico, and the necessary documentation to prove the claim existed in Mexico, the United States and the Far East.<sup>148</sup> It then noted that most of the witnesses were from Mexico, and that the defendant had guaranteed that it would make all of its witnesses, including those from outside of Mexico, available for trial.<sup>149</sup> The court explained that most of the evidence would be in Spanish and require translation if presented in the United States, and that the defendant had agreed to the enforceability of a Mexican judgment, if obtained.<sup>150</sup>

After its dictum that only one set of interest factors may be a basis for dismissal, the court discussed the burden this case would have on its docket, the localized nature of the robbery underlying the suit, and noted that the case would have limited precedential impact because the court would be applying Mexican law.<sup>151</sup> The court explained that Mexican law would best be interpreted by a Mexican tribunal, and

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144. *Id.* at 1249.

145. *Id.* at 1238.

146. *Id.* at 1244-46.

147. *Id.* at 1246-50.

148. *Id.* at 1247.

149. *Id.* at 1247-48.

150. *Id.* at 1248.

151. *Id.*

that it would not be fair to burden the local community by ordering jurors to resolve a case for Mexican commercial and transportation practices regarding cargo lost in Mexico.<sup>152</sup>

As well, this case, unlike many of the cases discussed in this article, involved a foreign party bringing suit in the United States, where it may have hoped that a U.S. judge or jury would provide a remedy different from what it would receive in its home country, even if a court applied a foreign body of law. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, the foreign plaintiff's choice deserved less deference.<sup>153</sup>

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152. *Id.* at 1249.

153. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981) (limitation on foreign plaintiff's choice of forum in *forum non conveniens* analysis because the point of the inquiry is to ensure that a forum is convenient); Gonzalez v. Chrysler Corp., 301 F.3d 377, 380-84 (5th Cir. 2002) (applying law from *Piper Aircraft* to a similar fact scenario involving Mexican plaintiffs); *see also* Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665 (5th Cir. 2003) (concluding that Mexico was a more convenient forum in which to litigate dispute because all decedents were Mexican citizens, and the subject matter to the suit was manufactured, purchased, and maintained in Mexico); Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139 (E.D. Tex. 1992) (concluding that Mexico was the most convenient forum to litigate the Mexicana Airlines disaster in Mexico City when the evidence and the flight investigation was in Mexico, Mexican law provided a cause of action substantially similar to the cause of action before the court, Mexico had an adequate forum and a substantial interest in the resolution of the case, and there was pending litigation in Mexico City about similar claims arising from the same disaster; and also noting that this case was one of several cases filed in the United States after this disaster, all of which were dismissed on the basis of *forum non conveniens*); *cf.* Becker v. Club las Velas, No. 94 Civ. 2412, 1995 U.S. Dist. LEXIS 6101 (S.D.N.Y. May 5, 1995) (concluding that Mexico was the most convenient forum to litigate a personal injury suit arising out of an accident at a Cancun resort where the only documented connections to the United States were the plaintiffs' domicile, the location of the plaintiffs' medical records, and the residence of the singer Lionel Ritchie who was alleged to have been at the scene of the accident, and in which the court determined that almost every factor, including the comparative interests of the United States and Mexico, favored the foreign forum).

*C. BREMER-GUTIERREZ V. 3COM: FORUM NON CONVENIENS*  
ANALYSES WHEN A SIMILAR CAUSE OF ACTION  
DOES NOT EXIST IN MEXICO

Balancing becomes more difficult in a *forum non conveniens* analysis when a comparable cause of action does not exist in Mexico. In such situations, a court should be forced to make value judgments about whether the differences between U.S. and Mexican law warrant a suit in the United States. If a court does so when an entire cause of action has taken place in Mexico, it is choosing to allow a cause of action to proceed in an area where Mexico has chosen not to regulate. This action should only be taken when a cause of action transcends the Mexican border into the United States or has a substantial effect on a party who has a reasonable expectation that law from the United States will shelter him.

The basis for a court's analysis when faced with these issues can be broken into three parts. First, a court must determine whether the foreign country can provide an adequate forum to hear the case. Second, a court should determine whether the foreign forum has a cause of action substantially similar to the claim before the U.S. court. Finally, if there is no similar cause of action in the foreign country, the U.S. court should determine whether the United States has a substantial enough interest in applying a law over a foreign party for a cause of action that does not exist in the foreign country.<sup>154</sup> This final part necessitates attention to the reasonable expectations of the parties to the suit.

The first and second prongs in this analysis are the most simple because, as in any *forum non conveniens* analysis, Mexico has a sophisticated canon of laws,<sup>155</sup> a court system in which to hear cases,<sup>156</sup> and numerous capable attorneys available to provide U.S.

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154. Cf. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 281 (1952) (applying U.S. intellectual property law to activities occurring in Mexico by a U.S. citizen, due to effects on sales in the United States).

155. See generally JORGE A. VARGAS, *MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS* (1998).

156. See, e.g., Jorge Cicero, *International Law in Mexican Courts*, 30 VAND. J. TRANSNAT'L L. 1035 (1997) (discussing the workings of the Mexican legal system in context of the domestic application of international law); Eduardo Martinez, *The New Environment of Insolvency in Mexico*, 17 CONN. J. INT'L L. 75, 76 (2001)

counsel with the applicable law to compare to U.S. law, and, if necessary, who can argue this law on behalf of a party in a Mexican forum. If a court exercises jurisdiction when there is a Mexican forum available to hear a case, the court risks a negative result, particularly if there is a public interest at stake.<sup>157</sup>

Criminal conspiracy cases in which criminal acts in Mexico are planned in the United States, but are not completed, provide the clearest examples of when a U.S. court should exercise jurisdiction over a party for acts that transcend the Mexican border.<sup>158</sup> In such cases there is no possible *forum non conveniens* analysis because there is no alternative forum in Mexico, but there is a significant interest in both the United States and Mexico to prosecute the actors involved. Tort cases that allege acts that affect national interests on

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(new system of bankruptcy courts in Mexico are designed to lessen corruption). *But see generally* Eric Coufal, *Commercial Arbitration Gains Favor in Mexico in Aftermath of NAFTA Treaty*, 50 DISP. RESOL. J. 70 (1995) (increased reliance on arbitration in Mexico due to problems within the Mexican judicial system); Michael C. Taylor, *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N.M. L. REV. 141 (1997) (discussing weaknesses in the Mexican judicial system).

157. *Cf. Grupo Protexa S.A. v. All Am. Marine Slip*, 856 F. Supp. 868, 883-84 (D.N.J. 1993) (proceeding in U.S. court with a case that required court to interpret an insurance contract regarding coverage of a shipwreck in international waters within Mexico's exclusive economic zone, despite public outcry in Mexico about the wreck which prompted a criminal investigation by Mexican officials, and arguments that under the Act of State Doctrine the case should not proceed). A Mexican forum is the only forum available when Mexican law does not recognize foreign judgments, such as in cases involving Mexican real estate where there are no assets that can be attached abroad. *See* Código Federal de Procedimientos Civiles [Mexican Federal Code of Civil Procedure] art. 568 (granting "exclusive jurisdiction" to Mexican courts involving real property in Mexico). A litigant could force an interesting balancing question on a court by including real property in a cross-border dispute that he or she would prefer heard in a Mexican court. *See* CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] 121(II) (Mex.) (providing the *lex loci delicti* rule for real and personal property). Mexico's law regarding real property provides for extensive individual rights, but asserts a national interest above all individual rights, claiming ultimate ownership rights in all real property. *See id.* art. 27; *see also* ZAMORA, *supra* note 2, at 483-503 (providing a detailed introduction to property rights under Mexican law).

158. *See, e.g.,* *People v. Burt*, 45 Cal. 2d 311 (1955) (discussing thwarted conspiracy to commit extortion while in Mexico).

both sides of the border are similar to trans-border criminal cases,<sup>159</sup> and are particularly relevant when an alleged tort may be preventable but for the difference in legal structures in the United States and Mexico.

*Bremer-Gutierrez v. 3Com*<sup>160</sup> raises these issues. In this case, a Mexican plaintiff alleged that a tort took place in the midst of a sophisticated business relationship between parties from more than one sovereign.<sup>161</sup> It is a difficult case to balance because the alleged tort may not have taken place if the relationships in this case did not transcend the U.S.-Mexico border, and because the alleged tort relies upon the manipulation of differences between the two countries' laws in order to be completed.

The defendant, 3Com, has offices around the world, including offices in Mexico and corporate offices in the United States.<sup>162</sup> The plaintiff, Bremer-Gutierrez, is an individual from the Mexican State of Nuevo Leon.<sup>163</sup> Bremer-Gutierrez alleged that 3Com is a California corporation who sought to make him pay for a debt allegedly owed by a third party, also from Mexico.<sup>164</sup> The third party entity, Bremer-Gutierrez's employer, received goods from 3Com in Laredo, Texas. In order to get Bremer-Gutierrez to pay the third party's alleged debt, 3Com allegedly went to Mexico and instigated

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159. Compare *Alvarez-Machain v. United States*, 331 F.3d 604, 632-35 (9th Cir. 2003) (applying U.S. law in suit seeking damages under U.S. Alien Tort Claims Act and Federal Tort Claims Act for the kidnapping of a Mexican national by Mexican civilians in Mexico at the behest of U.S. law enforcement), with *Rodriguez v. State*, 146 S.W.3d 674 (Tex. Crim. App. 2004) (exercising jurisdiction under Texas Penal Code for capital murder where a witness in separate organized crime case was kidnapped in the United States and then murdered in Mexico).

160. No. L-02-CV-11, slip op. (S.D. Tex. May 23, 2003), *aff'd*, No. 03-4098, 2004 U.S. App. LEXIS 4613 (5th Cir. Mar. 10, 2004).

161. *Id.* at 3-4.

162. See 3Com, Corporate Information, [http://www.3com.com/corpinfo/en\\_US/index.html](http://www.3com.com/corpinfo/en_US/index.html) (last visited Sept. 18, 2005) (providing a corporate overview of 3Com).

163. *Bremer-Gutierrez*, No. L-02-CV-11, slip op. at 1.

164. *Id.*

criminal proceedings there.<sup>165</sup> In doing so, the company sought to have Bremer-Gutierrez arrested.<sup>166</sup>

Bremer-Gutierrez filed suit in the District Court for the Southern District of Texas, seeking damages under California or Texas law for malicious prosecution.<sup>167</sup> Thus the court was required to carefully balance the differences between the legal systems. After the court determined it had jurisdiction to hear the case under diversity jurisdiction, it rejected plaintiff's *forum non conveniens* argument, and dismissed the case on the grounds that Nuevo Leon law does not specifically recognize the tort of malicious prosecution.<sup>168</sup>

From Bremer-Gutierrez's point of view, the district court acted in favor of a U.S. party in a suit that violated the rights of a Mexican party, while ignoring the needs of the bi-national legal system and refusing to apply U.S. law to a tortious scheme that was hatched in the United States. The Mexican plaintiff left Mexico for Texas in order to escape imprisonment in Mexico, and then was left without a forum to present a case against the U.S. defendant who allegedly planned a tortious scheme that could not have been completed without entering Mexico. No bi-national legal arrangement would allow a U.S. party to manipulate the differences in the two countries' legal systems by hatching a malicious prosecution tort in one country while completing it under the color of the other country's law. The simple defense to this allegation is that Bremer-Gutierrez had no expectation that he could rely on U.S. law, and that he instead must rely on the law of Nuevo Leon, a body of law with its own law enforcement mechanisms, regardless of whether it provides for civil causes of action for malicious prosecution.<sup>169</sup>

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165. *Id.* at 3.

166. *Id.* at 1. Parallel criminal and civil proceedings are not uncommon in Mexico, even when the civil litigation is taking place in the United States. See Carlos R. Soltero & Amy Clark-Meachum, *The Common Law of Mexican Law in Texas Courts*, 26 HOUS. J. INT'L L. 119, 160 (2003) (discussing criminal law issues in the context of the application of Mexican law in U.S. courts).

167. *Bremer-Gutierrez*, No. L-02-CV-11, slip op. at 1-2.

168. *Id.* at 5-7.

169. Of course, if 3Com were acting entirely in Mexico, the entire scheme would be far less international in nature as would the parties' expectations.

Under the three-part analysis suggested above,<sup>170</sup> the court's *forum non conveniens* analysis could have been clearer. In order to do so, the court would first have to make a formal determination that Mexico could provide an adequate forum to hear the case. Second, in the Mexican forum, the cause of action must have at least basic similarities with the claim before the U.S. court because the applicable law could not possibly have the purpose of collecting false debts. Third, if the Mexican law were sufficiently dissimilar, the court would have to make a determination as to whether the United States has a substantial enough interest in applying its law.

Bremer-Gutierrez's burden is challenging because most of the damages occurred in Mexico to an alien who sued under law from a state of the United States.<sup>171</sup> He should have the burden of showing the effect this tort has on international trade, the U.S. economy, or U.S. interests, such as maintaining positive relations with foreign countries, as well as the burden of explaining his own expectations. The court could make a judgment in favor of either party under this analysis. Without review of these facts, there is a less stable analysis, and a legal system in which parties are more likely to attempt tortious acts. This case is discussed in more detail in Part IV, Choice of Law Analyses.

## IV. CHOICE OF LAW ANALYSES

### A. VALUE JUDGMENTS AND BALANCING ACTS

A choice of law analysis is the process by which a court determines which body of law to apply to a specific fact scenario. *Forum non conveniens* analyses often require choice of law analyses because, as in each of the cases discussed in the section above, the ability to apply a foreign body of law is an element of a *forum non*

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170. See *supra* note 154 and accompanying text.

171. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) (limiting foreign plaintiff's choice of forum in *forum non conveniens* analysis because the point of the inquiry is to ensure that a forum is convenient); cf. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (allowing tort claims in U.S. federal courts that allege violations of the "law of nations"). Malicious prosecution is not considered a violation of the law of nations.



*conveniens* analysis. This section of this article attempts to provide some insight into how to balance the value judgments at the basis of a choice of law analysis by discussing decisions that exemplify how federal courts have ruled, and by comparing some of these decisions with Texas decisions that handled similar value judgments. This discussion will start with relatively simple decisions in which an entire fact scenario takes place within one jurisdiction, and will work its way to more complex cross-border transactions, including the *Bremer-Gutierrez* opinion, discussed in the preceding section.

The effect of the choice of law issue in a *forum non conveniens* analysis, such as in *Bremer-Gutierrez*, like a jurisdictional analysis, such as in the discussion of jurisdiction by necessity presented in *Meridian Seafood*,<sup>172</sup> often makes a choice of law analysis outcome-determinative. A discussion of a choice of law analysis, like the review of *forum non conveniens* and jurisdictional rules above, is therefore little more than a shell for a discussion of value judgments made in the name of a policy or philosophical decisions.<sup>173</sup>

Each shell for discussion about the extent to which another sovereign's law ought to matter is colored by history. Courts shoulder the history of their jurisdictions when litigants explicitly rely on precedent, and implicitly when litigants refuse to challenge precedent or raise issues that reflect changing circumstances. For example, the Texas Supreme Court moved from a history of adapting Mexican law and fusing it into the Texas canon to instituting a simple method for the rejection of Mexican law when it adopted the dissimilarity doctrine to a case with Mexican components.<sup>174</sup> Under this shell for discussion of foreign law, courts simply decided whether they could determine what the foreign law was, and then whether the applicable foreign law differed so greatly from the law applied in the jurisdiction of the analyzing court that the law of the

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172. See *supra* notes 92-111 and accompanying text.

173. See Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 500 (2000).

174. *Mexican Nat'l Ry. Co. v. Jackson*, 33 S.W. 857, 860 (Tex. 1896); see Walker, *supra* note 19, at 231 (discussing *Mexican Nat'l Ry. Co. v. Jackson* in the context of the history of the application of Mexican law in Texas).

foreign jurisdiction could not properly be applied.<sup>175</sup> Translations of Mexican law and experts in Mexican law are now more available,<sup>176</sup> and the Texas judiciary has adapted to changing circumstances by abnegating any further use of the dissimilarity doctrine.<sup>177</sup>

Any conflict of laws question, however modern or abandoned, comes down to whether in the name of justice, a court may interfere in another sovereign's affairs or if a foreign sovereign's affairs are so intertwined with the case that a court must apply the foreign sovereign's law. A careful analysis reviews all of the possible factors to come to a resolution that meets the needs of any given situation.<sup>178</sup>

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175. *See* *Tex. & Pac. Ry. Co. v. Richards*, 4 S.W. 627, 628-29 (Tex. 1887) (explaining the dissimilarity doctrine in the first application of the doctrine by the Texas Supreme Court). In *Mexican Nat'l Ry. Co.*, an American employee of a U.S. corporation was injured while doing business in Mexico and alleged negligence on the part of the company. The court simply noted its inexperience with the Mexican legal system and its lack of access to translations of Mexican materials, and then determined that Mexican law was too different to be interpreted or enforceable by the Texas courts, dismissing the case. 33 S.W. at 857, 860-62.

176. This has been a slow evolution, but as early as 1963, a federal court stated:

A good lawyer or law professor from Mexico could have been produced at practically the same expense [as a law librarian from out of state, untrained in Mexican law] and a deposition of one of them would have cost considerably less . . . . Where the testimony of [a purported expert in Mexican law] is not expressly accepted and no Mexican statute on the subject was admitted in evidence, it will be considered that there is an absence of proof on the [issue presented].

*Bostrom v. Seguros Tepeyac*, 225 F. Supp. 222, 230-31 (N.D. Tex. 1963).

177. *Gutierrez v. Collins*, 583 S.W.2d 312, 318-22 (Tex. 1979) (incorporating factors from the Restatement (Second) of Conflict of Laws § 145 into Texas law in a personal injury suit between two Texan parties who interacted solely in Mexico and explicitly disavowing the dissimilarity doctrine). *See* *Long Distance Int'l, Inc. v. Telefonos de Mexico*, 49 S.W.3d 347, 351-54 (Tex. 2001) (applying Mexican telecommunication law in the Texas Supreme Court, district court and mid-level appellate court, implicitly recognizing Mexico's right to regulate its industry as it sees fit). *Compare* *Raskin v. Allison*, 57 P.3d 30 (Kan. Ct. App. 2002) (applying *lex loci delicti* rule to a suit between Kansas parties involving personal injury that took place in Mexico), *with* *Submersible Sys., Inc. v. Perforadora Cent.*, 249 F.3d 413, 414 (5th Cir. 2001) (reversing anachronistic choice of law analysis by a district court that starkly rejected an application of Mexican law).

178. *See, e.g.*, *Bauer v. Club Med Sales, Inc.*, No. C-95-1637, 1996 U.S. Dist. LEXIS 21826, at \*9-\*18 (N.D. Cal. May 22, 1996) (using depeage to apply Mexican law to conduct-regulation issues, and California law to loss-distribution issues).

There is little doctrinal guidance that could possibly answer these questions. There is instead a laundry list of value judgments at the basis of the necessary legal analysis. These values include: paying appropriate deference to the law-making power of other sovereigns; being unbiased; producing uniform results; providing certainty, predictability, simplicity, and ease of use; taking into account the policies underlying conflicting rules and the degree to which the concerned states are attached to those policies; protecting justified expectations; permitting courts to choose what they think is the better of the conflicting laws; and allowing courts to reach the result they think is fair and just for the case as a whole.<sup>179</sup>

### B. *LEX LOCI MEX*: FACT SCENARIOS IN MEXICO

Cases involving Mexican tort law are a good place to start a discussion of conflict of laws cases and the value judgments at their bases. This is because Mexican tort law is almost always more defendant-friendly than tort law in the United States<sup>180</sup> and most tort cases occur entirely, or almost entirely, within one jurisdiction.

For example, in *Spinozzi v. ITT Sheraton Corp.*<sup>181</sup> an Illinois plaintiff, in response to a Mexican defendant's targeted advertisements in Illinois, decided to vacation in the defendant's hotel in Acapulco.<sup>182</sup> He fell into a maintenance pit on hotel grounds and was seriously injured.<sup>183</sup> The plaintiff was contributorily negligent and therefore could not recover under Mexico's contributory negligence rule, but could recover under Illinois' comparative negligence rule.<sup>184</sup> Under the conflict of laws rules of the forum, the plaintiff argued that Illinois was the state with the most significant relationship to the injury because the defendant's

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179. Southerland, *supra* note 173, at 455-56 (internal citations omitted) (highlighting the subjectivity inherent in approaching choice-of-law decisions).

180. *But see* Gardner v. Best W. Int'l Inc., 929 S.W.2d 474, 479-82 (Tex. App. 1996). In this case, a U.S. plaintiff was suing under the law of the Mexican State of Quintana Roo, alleging liability in Cancun hotel negligence case. *Id.*

181. 174 F.3d 842 (7th Cir. 1999).

182. *Id.* at 843-44.

183. *Id.* at 843.

184. *Id.* at 844.

solicitation of the plaintiff took place in Illinois and Illinois was the domicile of the plaintiff.<sup>185</sup>

The court saw no reason to interfere with Mexican domestic affairs, explaining that a plaintiff cannot expect to travel “carrying his domiciliary law with him, like a turtle’s house, to every foreign country he visit[s].”<sup>186</sup> Switching metaphors, the court continued, that Illinois plaintiffs cannot expect to be “cocooned in Illinois law, like citizens of imperial states in the era of colonialism who were granted extraterritorial privileges.”<sup>187</sup> The court supported this conclusion, reasoning that “to supplant Mexican law by Illinois tort law would disserve the general welfare because it would mean that Mexican safety standards (insofar as they are influenced by tort suits) were being set by people having little stake in those standards.”<sup>188</sup> The court provides the conclusion:

[I]f law can be assumed to be generally responsive to the values and preferences of the people who live in the community that formulated the law, the law of the place of the accident can be expected to reflect the values and preferences of the people most likely to be involved in accidents—can be expected, in other words, to be responsive and responsible law, law that internalizes the costs and benefits of the people affected by it.<sup>189</sup>

Similarly, in *Abogados v. AT&T, Inc.*, a suit for tortious interference with a contract, the Ninth Circuit declined to get

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185. *Id.*

186. *Id.*; cf. *Esser v. McIntire*, 661 N.E.2d 1138 (Ill. 1996) (applying Illinois law to a fact scenario involving a small group of individuals, including the plaintiff and the defendant, who, while in Illinois, planned a trip to defendant’s villa in Acapulco, Mexico then went to defendant’s Acapulco villa where plaintiff alleged that an accident took place due to defendant’s negligence).

187. *Spinozzi*, 174 F.3d at 846. Compare *id.*, with *Vicarra v. Roldan*, 925 S.W.2d 89, 92 (Tex. App. 1996) (stating that Mexico’s policy interest in limiting tort recovery is to protect its residents from “excessive liability claims” and reversing district court’s decision not to apply Mexican law).

188. *Spinozzi*, 174 F.3d at 845.

189. *Id.*; cf. *Tubos de Acero de Mexico v. Am. Int’l Inv. Corp.*, 292 F.3d 471, 488-90 (5th Cir. 2002) (holding that punitive damages were unavailable because the applicable law was from either Louisiana or Mexico, and neither jurisdiction allowed punitive damages).

involved with Mexican affairs.<sup>190</sup> As in *Spinozzi*, all of the alleged tortious conduct took place in Mexico, but unlike *Spinozzi*, the Mexican law in *Abogados* provided for a cause of action that could not be raised because the statute of limitations had run.<sup>191</sup> The court rejected as “nonsensical” the plaintiff’s argument that “Mexico has no interest in regulating conduct that affects contracts made in Mexico”<sup>192</sup> and describes the applicability of Mexican tort law when a tort is entirely in Mexico, although litigated in a U.S. court, as the primary factor for the “determination of the scope” of the substantive law to be applied.<sup>193</sup>

Neither the choice of law analysis in *Abogados* nor in *Spinozzi* is controversial. These are easy cases because the issues involved deal with conduct regulation in which both the conduct and the resulting injury occurred in the same jurisdiction. In these situations, it is not difficult to show evenhanded consideration for the differences amongst legal systems because only one legal system is implicated.<sup>194</sup> The courts must only apply the foreign law correctly, as they would be expected to if it were domestic law.

This has been done with success, but sometimes requires a detailed look into Mexican law. For example, in *Curley v. AMR Corp.*,<sup>195</sup> a U.S. plaintiff brought suit against a U.S. airline company for negligence and false imprisonment, for alleged acts that occurred in Mexican airspace, and later on the ground in Mexican territory.<sup>196</sup> The plaintiff claimed that the defendant had released him into the custody of Mexican law enforcement authorities for possession of marijuana without first adequately investigating the matter.<sup>197</sup> The

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190. 223 F.3d 932 (9th Cir. 2000).

191. *See id.* at 933.

192. *Id.* at 935.

193. *Id.* at 935-36.

194. *Cf. Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 381-82 (5th Cir. 2002) (applying a *forum non conveniens* analysis with respect to an alleged inadequacy of Mexican tort law, and determining that “[i]t would be inappropriate—even patronizing—for us to denounce [limitations on damages in child death cases] by holding that Mexico provides an inadequate forum for Mexican tort victims”).

195. 153 F.3d 5 (2d Cir. 1998).

196. *Id.* at 10.

197. *Id.*

Mexican authorities found no marijuana or other contraband on the plaintiff after an extensive search.<sup>198</sup>

The district court granted the airline company's motion for summary judgment on the basis of New York law.<sup>199</sup> The Second Circuit determined that a conflict existed and applied the "interests analysis" choice of law approach of the jurisdiction with the applicable choice of law analysis.<sup>200</sup> In doing so, the court determined that because the alleged acts occurred entirely within Mexico and that Mexico had a greater interest in resolving the suit, the applicable law from Mexico would apply.<sup>201</sup> The Mexican law is significantly different than the New York law applied by the district court, because the Mexican law is based on a civil code that is designed to provide a body of general principles under which a court determines whether a tort was committed.<sup>202</sup> The court compared the specific elements of the New York law to the general principles set forth in the applicable Mexican law, and applied the Mexican law.<sup>203</sup> The court determined that the airline acted in strict compliance with the specific regulatory requirements governing the conduct and operation of aircraft in Mexican airspace and, therefore, did not stray from the general requirements of Mexican tort law.<sup>204</sup> On this basis, the court then affirmed the summary judgment.<sup>205</sup>

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198. *See id.* at 9-10 (describing the search by Mexican officials, which included: making the plaintiff undress completely, laughing at the plaintiff, threatening him with incarceration, and pointing a loaded rifle at the plaintiff's genitals).

199. *Id.* at 10-11.

200. *Id.* at 12-15. *See generally* *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (federal court sitting in diversity applies the choice of law analysis of the jurisdiction for which it sits).

201. *Curly*, 153 F.3d at 12-15.

202. *See id.* at 14 (citing Mexican Civil Code, art. 1910 (Abraham Eckstein & Enrique Zepeda Trujillo trans., 1996)) (quoting the general language of the Mexican law raised in the case, which states that "[w]hoever, by acting illicitly or against the good customs and habits, causes damage to another shall be obligated to compensate him unless he can prove that the damage was caused as a result of the fault or inexcusable negligence of the victim"). *See generally* Soltero & Clark-Meachum, *supra* note 166, at 139-47 (providing an overview of Mexican tort law).

203. *Curly*, 153 F.3d at 13-15.

204. *See id.* at 15-16 (explaining that the Mexican federal government has exclusive jurisdiction over issues concerning the "inspection, supervision and control of civil air navigation, [including] all civil aircraft in Mexican territory or

### C. THE APPLICATION OF MEXICAN LAW WITHIN THE UNITED STATES

An opinion that particularly exemplifies judicial balancing of Mexican law within the U.S. legal system is the 2003 case *Alameda Films S.A. de C.V. v. Authors Rights Restoration Corp.*<sup>206</sup> This opinion applies Mexican copyright law to the sale of old Mexican movies in the United States.<sup>207</sup> The trial court and the appellate court applied Mexican law without a choice of law analysis because they were obliged to by international treaty.<sup>208</sup> This case is significant because it is an example of successful balancing of the U.S. and Mexican legal systems as something that can be done with high levels of sophistication after the value judgments of a choice of law analysis are made.

The plaintiffs consisted of twenty-four Mexican film production companies, and the defendants were four entities that distributed films in which the plaintiffs claimed property interests.<sup>209</sup> The films in dispute were eighty-eight films that the plaintiffs had produced and released in Mexico during the Mexican "golden age" of cinema.<sup>210</sup> Until 1989, the United States had an isolationist regime in the field of copyright law.<sup>211</sup> By remaining outside the international

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which fly over it" and affirming that the United States has recognized this through international convention and treaty).

205. *Id.* at 16.

206. 331 F.3d 472 (5th Cir. 2003).

207. This subject matter is significant in the context of this discussion not for its impact on the development of Mexican popular culture but rather as an example of the basis of a dispute that could only come up in an era of wide social integration between the United States and Mexico; never before have there been significant markets for merchants who sell nostalgic images of Mexican popular culture to U.S. consumers.

208. *See Alameda Films S.A. de C.V.*, 331 F.3d at 477-78 (applying the Mexican legal definition of "authors" pursuant to the Uruguay Round Agreement Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994)).

209. *Id.* at 474.

210. *Id.* at 475.

211. *See William Patry, Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 385 (2000).

copyright regimes, the United States avoided choice of law problems; there was only U.S. domestic copyright law.<sup>212</sup>

The United States followed its media into Latin America and recognized the growing amount of Spanish language intellectual property in the United States when it signed the Uruguay Round Agreements Act of the General Assessment in Tariffs and Trade ("GATT") in 1994.<sup>213</sup> GATT provides a more harmonized regime, taking the issue of whether a choice of law question exists away from the discretion of a court. Section 104A of its implementation requires that for foreign works previously in the public domain in the United States due to failure to comply with formalities of U.S. copyright law, the copyright to these works is restored pursuant to the intellectual property laws of the foreign state from which they came.<sup>214</sup> The district court and the reviewing appellate court therefore rested their decisions on readings of the copyright provisions of the 1928 Mexican Civil Code and the applicable amendments to this code.<sup>215</sup> Both courts determined that the Mexican Civil Code protected eighty-one of the films, leaving seven of the films in the public domain, unprotected by the Mexican Civil Code.<sup>216</sup>

#### D. FALSE CONFLICTS, TRUE CONFLICTS, AND *BREMER-GUTIERREZ* REVISITED

Cases that are more difficult are those that not only have a choice of law analysis at their base, as in *Curley*, and also have sophisticated questions of Mexican law, as in *Alameda Films*, but also, unlike the tort cases discussed above, transcend the U.S.-Mexico border. This transcendence complicates the value judgments necessary to make a

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212. *Id.*; see 17 U.S.C. § 301 (1978).

213. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 101(2)(b), 108 Stat. 4809 (1994).

214. See 17 U.S.C. § 104A (2000) (resulting in the automatic restoration of the copyrights of foreign works which had previously been in the public domain in the United States).

215. *Alameda Films S.A. de C.V.*, 331 F.3d at 478 (citing *Codigo Civil para el Distrito Federal* arts. 1, 197 (1928); *Ley Federal de Derecho de Autor* art. 60 (1947); *Ley Federal de Derecho de Autor* art. 60 (1956); and *Ley Federal de Derecho de Autor* art. 59 (1963)).

216. *Id.* at 476-82.



choice of law analysis and raises the likelihood that a U.S. court should interfere in Mexican affairs.

A court could try to avoid some of the value judgments necessary to balance competing interests by determining that a false conflict exists between the applicable law from the United States and the applicable Mexican law. However, the determination of whether a false conflict exists is itself a value judgment at the basis of the balancing process. In this value judgment, a court avoids choosing between competing laws by inquiring into the purposes of laws.

A true conflict exists when a court faces an unavoidable conclusion that there is a conflict between the laws of each jurisdiction pertaining to the issues raised in a case, and, after a review of all of the factors present in a case, including the public policies behind the laws from separate jurisdictions, the court determines that the foreign law furthers the policy of a competing state.<sup>217</sup> A false conflict may therefore exist if the laws being analyzed are essentially the same, or when the application of either jurisdiction's law would lead the court to the same result.<sup>218</sup> Since a truly disinterested forum is rare, when there is a false conflict, a court is left to apply its own law.<sup>219</sup>

For example, in *Curley*, there was no difference in the effect of the application of Mexican law to the alleged tort because both the law from the United States and the law from Mexico warranted a summary judgment.<sup>220</sup> However, there could be variances in the policies behind each country's laws because each country defines its torts differently. U.S. jurisdictions usually have judge-made law with very specific requirements, and Mexican jurisdictions have broad, code-based law designed to encompass a wide variety of situations, such that the application of each body of law is different.<sup>221</sup>

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217. See generally BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963) (origin of false conflict-true conflict dichotomy).

218. See *id.*

219. See *id.*

220. 143 F.3d at 14-16.

221. *Id.* at 13 (citing Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L.J. 1059, 1095 (1994)) (describing Mexican civil law system).

Even if Mexico does not have an interest in its policy of having broad categories of tortious behavior rather than a multitude of specifically defined torts, or have any other policy interest that was violated, the facts did not infringe upon any policy behind the applicable law from the United States.<sup>222</sup> However the court defined the conflict under a false conflict theory, there was no ultimate difference in the law's effect, whatever the policies behind each jurisdiction's law, and the analysis the court chooses to make (or not make) of these policies.

In *Bremer-Gutierrez v. 3Com Corp.*, the court determined that the U.S. forum was the most convenient forum, and there was the possibility a false conflict existed.<sup>223</sup> The *Bremer-Gutierrez* court then concluded, however, that because the state of Nuevo Leon does not have a specific tort that provides a cause of action for malicious prosecution, the action should be dismissed.<sup>224</sup> As in *Curley*, the applicable Mexican law was a generally worded civil code with underlying policies regarding a multitude of specific acts. If the court were to determine that these policies include a policy against malicious prosecution, there would be a false conflict; however, the *Bremer-Gutierrez* court did not attempt this analysis.<sup>225</sup>

The court in *Curley* stressed the importance of making every possible effort to determine the content of foreign law, stating, "[w]e urge district courts to invoke the flexible provisions of [Federal Rules of Civil Procedure] Rule 44.1 to determine issues relating to

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222. Cf. *Hurtado v. Superior Ct. of Sacramento County*, 11 Cal. 3d 574, 581 (1974) (citing BRAINERD CURRIE, *SELECTED ESSAYS ON CONFLICT OF LAWS* (1963)) (discussing, in a jurisdiction which regularly uses a false conflict analysis, whether California law or law from Mexican State of Zacatecas applies to a wrongful death case, and determining that Zacatecas had no interest in applying its limitation of damages in wrongful death actions to nonresident defendants or in denying "full recovery" to its resident plaintiffs).

223. *Bremer-Gutierrez v. 3Com*, No. L-02-CV-11, slip op. at 4 (S.D. Tex. May 23, 2003), *aff'd*, No. 03-4098, 2004 U.S. App. LEXIS 4613 (5th Cir. Mar. 10, 2004).

224. *Id.* at 5.

225. Cf. *Submersible Sys., Inc. v. Perforadora Cent.*, No. 1:98CV251GR, 1999 WL 33456914, at \*8 (S.D. Miss.), *rev'd*, 249 F.3d 413 (5th Cir. 2001) (applying substantive maritime law in suit for conversion after conclusory assertion that Mexico does not have adequate forum for conversion suit).

the law of foreign nations.”<sup>226</sup> Rule 44.1 states that in the interpretation of foreign law, a court may refer to “any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”<sup>227</sup> In *Bremer-Gutierrez*, the need to pursue the relevant Mexican law was even more important because of the recommendation of the Restatement (Second) of Conflict of Laws that disputes involving malicious prosecution be settled according to the law of the jurisdiction where the alleged malicious prosecution took place.<sup>228</sup> In *Bremer-Gutierrez*, the district court simply cited this section of the Restatement without a full analysis of the Mexican law.<sup>229</sup>

Beyond whether the tort law of Nuevo Leon conflicts with the tort law of the applicable U.S. law, the criminal law of Nuevo Leon may also be based upon the policy of preventing malicious prosecutions. Whether a jurisdiction expresses a policy through its public criminal apparatus or through the prosecution of private suits does not change the fact that the jurisdiction has policies to analyze. The organization of a foreign country’s law should have little effect on the steps taken to determine its underlying policies.

If there is a false conflict, the legal systems are already balanced. The court should then apply the law of the forum.<sup>230</sup> This would be particularly necessary if the court were to determine that there is only a public cause of action under Nuevo Leon law. This possibility is another factor that was not addressed by the court. The U.S. Supreme

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226. *Curley*, 153 F.3d at 13.

227. FED. R. CIV. P. 44.1; see 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2444 (3d ed. 1995) (reviewing foreign law in federal courts).

228. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 155.

229. *Bremer-Gutierrez v. 3Com*, No. L-02-CV-11, slip op. at 6 (S.D. Tex. May 23, 2003), *aff’d*, No. 03-4098, 2004 U.S. App. LEXIS 4613 (5th Cir. Mar. 10, 2004). Compare *id.*, with *Nunez v. Hunter Fan Co.*, 920 F. Supp. 716 (S.D. Tex. 1996) (reviewing relevant U.S. and Mexican law in a wrongful termination case between a U.S. plaintiff recruited in the United States to work in the U.S. defendant’s factory in Mexico, analyzing the two countries’ laws under the Restatement (Second) of Conflict of Laws § 196, governing contracts for the rendition of services, after citing case from Texas Supreme Court that cites § 196 with approval).

230. *Hurtado v. Superior Ct. of Sacramento County*, 11 Cal. 3d 574, 581 (1974).

Court has explained in the context of a discussion of a *forum non conveniens* analysis, that when the remedy provided by the law of an alternative forum "is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight."<sup>231</sup> Foreseeing situations similar to that faced by the district court in *Bremer-Gutierrez*, the Supreme Court added, "in rare circumstances . . . dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."<sup>232</sup>

However, if the court was to determine that a true conflict exists, there are additional decisions that are also at the core of the balancing process. Under the applicable choice of law analysis in *Bremer-Gutierrez*,<sup>233</sup> a court looks to the following six factors: (1) the needs of the interstate and international systems, (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, including certainty, predictability and uniformity of result, and (6) ease in the determination and application of the law to be applied.<sup>234</sup> In a tort case, under the same body of law, the contacts in each jurisdiction a court studies when applying these factors include: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered.<sup>235</sup>

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231. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (citing *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445 (Del. 1978)) (refusing to dismiss, where there was no generally codified Ecuadorian legal remedy for the unjust enrichment and tort claims asserted).

232. *Id.*

233. Courts sitting in diversity apply the state law of the forum in order to prevent inconsistent application of the law. *See Caton v. Leach Corp.*, 896 F.2d 939, 942 (5th Cir. 1990) (applying choice of law analysis of the forum state); *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 74-77 (applying state law to diversity suit).

234. *Gutierrez v. Collins*, 583 S.W.2d 312, 318-19 (Tex. 1979); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

235. *Gutierrez*, 583 S.W.2d at 319; *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.<sup>236</sup>

Under the final four factors, *Bremer-Gutierrez v. 3Com* is a bi-national case. Aside from the injury in this case, which could have bi-national implications for the plaintiff but predominately existed in Mexico, the facts of this scenario hinge upon the international border between the parties. The relationship in this case was centered in the United States, in Mexico, and at the border on the U.S. side. The goods were transferred from the U.S. party to the Mexican party in Texas, where they were shipped for distribution in Mexico.<sup>237</sup> Most importantly, the elements of the tort spanned the international border because the intent element allegedly started in the United States, unless a 3Com representative acted independently in Mexico, without consulting the corporate office in the United States, and pursued the plaintiff in Mexico.<sup>238</sup> The rest of the elements were clearly instigated and completed in Mexico.

The six factors under the applicable choice of law analysis could mitigate towards the application of Nuevo Leon law or law from the United States. Whatever determination a court ultimately makes when faced with such an analysis, the increases in cross-border transactions and in their effects demand governance by a predictable and equitable rule of law. If a court squarely addresses this need, it will lessen the chance of the creation of extraterritorial privileges for parties from both countries.

The relevant policies of the forum are expressed by the definition of malicious conduct in the applicable U.S. law,<sup>239</sup> and the fact that

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236. *Gutierrez*, 583 S.W.2d at 319.

237. *Bremer-Gutierrez v. 3Com*, No. L-02-CV-11, slip op. at 3-4 (S.D. Tex. May 23, 2003), *aff'd*, No. 03-4098, 2004 U.S. App. LEXIS 4613 (5th Cir. Mar. 10, 2004).

238. According to the 3Com website, but not the court's opinion, 3Com has an office in the State of Nuevo Leon. If the intent element were wholly Mexican, the analysis would not be bi-national, and would be more similar to the tort cases discussed above.

239. *Bremer-Gutierrez* argued that the law of the forum under the applicable choice of law analysis is California law, or, in the alternative, Texas law. See 5 WITKIN SUM. CAL. LAW TORTS 418 (noting that malicious conduct is defined at common law in California); Tex. Civ. Prac. & Rem. Code § 41.001(7) (explaining that malicious conduct is defined by statute in Texas).

the U.S. forum provides a medium for private suits for malicious conduct in the forum state.<sup>240</sup> An inability to protect plaintiffs from abuses in suits with foreign defendants could fail to adequately protect the justified expectations of Mexican parties doing business with U.S. parties, as well as any U.S. party that runs the same risk while in Mexico.

This failing, even in situations that are partially foreign in nature, when not accounted for elsewhere, detract from the certainty and predictability of cross-border transactions and creates nefarious opportunities for parties whose transactions transcend an international border and who want to manipulate the differences in the legal systems of different countries, including their methods for insuring due process of law. The violation of Mexican law alleged was, at a minimum, an essential step in the course of business completed partially in the United States and partially abroad.<sup>241</sup> Such acts shed their foreign character if they become part of an unlawful scheme within the stream of international commerce that has a substantial effect in the United States.<sup>242</sup> The North American legal systems, with their non-harmonized reviews of disputes, must adapt their analyses to such disjointed edges of their legal systems.<sup>243</sup>

The *Bremer-Gutierrez* opinion reads as if the judge saw this case as no more than raw forum shopping. It determines that Nuevo Leon law should apply, then states that Nuevo Leon has no cause of action for malicious prosecution, and, as if the forum was truly

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240. See, e.g., *Cedars-Sinai Med. Ctr. v. Super. Ct.*, 206 Cal. App. 3d 414 (1988) (discussing private suit for allegations of malicious prosecution); *Ellis County State Bank v. Keever*, 888 S.W.2d 790 (Tex. 1994) (same).

241. Cf. *Banco de La Lacuna v. Escobar*, 237 N.Y.S. 267 (1929) (refusing to exercise jurisdiction over allegation of tortious conduct by one Mexican national against another Mexican national for acts which occurred entirely within Mexico, had a significant effect on Mexican national affairs but not in the United States, and that was allegedly connected to the forum through the expatriation of money to the United States).

242. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952).

243. In Europe, there is a more harmonized regime, but this harmonization is not complete. For a comparison of some conflict of laws issues in Europe and the United States, see Christian Kersting, *Corporate Choice of Law – A Comparison of United States and European Systems and a Proposal for a European Directive*, 28 BROOK. J. INT'L L. 1 (2002).

disinterested, dismisses the case.<sup>244</sup> In doing so, the court stated, “[a]llowing the doctrine of *forum non conveniens* to dictate the choice-of-law would unduly countervail Texas Supreme Court precedent requiring the application of [the applicable choice of law analysis].”<sup>245</sup>

This logic changes a non sequitor into a circular fallacy. It ignores either the effect of a choice of law analysis on a *forum non conveniens* analysis or the importance of including a choice of law analysis in a *forum non conveniens* analysis, effectively rejecting either the basis or the consequences of its own analysis. This elusion is a rationalization that permits the court to omit analysis of issues that impact both legal analyses, most particularly, the impossibility of pursuing a private cause of action for malicious prosecution under the Nuevo Leon law provided to the court.<sup>246</sup>

A similar case from the state courts of Texas provides an interesting precedent involving a similar clash between law from a jurisdiction in the United States and the law from a jurisdiction in Mexico in which a court came to a similar result. In *Banco de Mexico, Sucursal en Nuevo Laredo, Tamaulipas, Mexico v. Da Camara*, a U.S. automobile dealer brought a cause of action for conversion against a Mexican bank for money the U.S. automobile dealer had invested in a vehicle the bank took without the dealer’s consent.<sup>247</sup> The car dealer had relinquished possession of the vehicle to a private individual on a payment plan and held a lien against the vehicle.<sup>248</sup> The individual possessing the vehicle then used the same vehicle as collateral to buy more time to pay a debt to a Mexican bank.<sup>249</sup> The Mexican bank later forcibly repossessed the vehicle.<sup>250</sup>

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244. *Bremer-Gutierrez v. 3Com*, No. L-02-CV-11, slip op. at 7 (S.D. Tex. May 23, 2003), *aff’d*, No. 03-4098, 2004 U.S. App. LEXIS 4613 (5th Cir. Mar. 10, 2004).

245. *Id.* at 6-7.

246. *See* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981); *supra* notes 230-32 and accompanying text (explaining that a court may apply law of forum when no private cause of action exists in applicable forum).

247. 55 S.W.2d 631, 632 (Tex. Civ. App. 1932).

248. *Id.*

249. *Id.*

250. *Id.*

The U.S. automobile dealer then sought to seize the value of his losses from a U.S. bank where the Mexican bank had funds deposited, and brought suit alleging conversion.<sup>251</sup>

As in *Bremer-Gutierrez*, there was no specific cause of action for the tort alleged in the body of Mexican law presented to the court under the grounds the car dealer had pled.<sup>252</sup> The court cited the dissimilarity doctrine as reason not to look more deeply into the Mexican law.<sup>253</sup> The reviewing court determined that the repossession of the vehicle was a matter between Mexican parties regarding a transaction that took place in Mexico, instructed the automobile dealer that he could seek redress in the Mexican judicial system, and dismissed the case for want of jurisdiction.<sup>254</sup>

*Da Camara* was a lawsuit appealed from state court in Laredo, Texas seventy-three years ago, based on a cross-border transaction in which the court recognized the need to apply Mexican law, and decided that it had no controlling Mexican law to apply. *Bremer-Gutierrez* is a contemporary lawsuit appealed from a federal court in Laredo, Texas based on a cross-border transaction in which the court recognized the need to apply Mexican law and decided that it had no controlling Mexican law to apply. In each case, the courts recognized that their non-Mexican tribunal was an appropriate forum for the dispute at hand. In each case, the presiding court dismissed the suit, the first based formally on now discredited dissimilarity grounds, the second on value judgments under the cover of a choice of law analysis that, without further investigation into the law and the circumstances of its application, amounts to no more than the same discredited doctrine. It appears from the ruling in *Bremer-Gutierrez* that the federal courts risk being stuck within the insularity that characterized the decisions made by Texas courts seven decades ago.<sup>255</sup>

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251. *Id.*

252. *Id.*

253. *Id.*; see Mexican Nat'l Ry. Co. v. Jackson, 33 S.W. 857, 860 (Tex. 1896); *supra* note 175 and accompanying text (explaining dissimilarity doctrine).

254. *Da Camara*, 55 S.W.2d at 632.

255. Disappointingly, the Fifth Circuit did not give this case the attention or discussion it deserves, and merely affirmed the district court's opinion in a short unpublished opinion that ignores the comity necessary to balance the interests held



## E. DETERMINING THE FACTS

Despite the basis that appears anachronistic that the Fifth Circuit relied upon in upholding *Bremer-Gutierrez*, obviously there has been significant transformation in both federal law and Texas law since the first decades of the twentieth century. Also, of course, it is usually not necessary to interfere with Mexican affairs or to apply Mexican law in most fact scenarios. However, if a court is not correct in its factual determinations, it will apply distorted legal analyses as well.

For example, the district court that heard the *Bremer-Gutierrez* case did not clearly document (or perhaps determine) the facts before it about exactly where the entire alleged tort took place, whether or not 3Com acted from its Nuevo Leon office, or the relationship of 3Com's Nuevo Leon office to 3Com offices in the United States. There is no discussion of the closeness of the relationship between Bremer-Gutierrez and his employer, potential singularity of these two parties, and the law that would be applied to make this determination. All of these unknown factors could radically bring about changes in the analysis required of the court.

A comparison of the 2001 federal case *In re Jackson National Life Insurance Co. Premium Litigation v. Jackson National Life Insurance Co.*<sup>256</sup> and the 1929 Texas case *Home Insurance Co. v. Dick*<sup>257</sup> also exemplifies the need for litigants to make the facts of their cases clear to courts. These cases also do so in the context of the development of a bi-national legal structure to protect private parties who conduct business across the U.S.-Mexico border. Both cases involve similar analyses of Mexican law and similar rejections of Mexican law, based on similar factual determinations. This section discusses these two cases, and compares them with another

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by both Mexico and the United States in developing a stable and predictable legal system, leaving the state of the law much as it stood seven decades ago. The opinion reads in full, "We have reviewed the record, studied the briefs, and heard oral argument in this case. It is clear to us that the district court committed no error and we affirm its judgment for the reasons given in its able opinion." No. 03-4098, 2004 U.S. App. LEXIS 4613 (5th Cir. Mar. 10, 2004).

256. 156 F. Supp. 2d 846 (W.D. Mich. 2001).

257. 15 S.W.2d 1028 (Tex. Comm'n App. 1929) (judgm't adopted), *rev'd*, 281 U.S. 397 (1930).

older Texas case in order to stress the importance of correct factual determinations.

The suit in *Home Insurance Co.* was the result of a fire that destroyed and sank a ship in the harbor of Tampico, Mexico.<sup>258</sup> It is an example of raw forum shopping: Mexico had a viable legal regime available to the plaintiff, but the statute of limitations, as stipulated under the applicable Mexican law, would have prevented the plaintiff from winning his case in Mexico.<sup>259</sup> The plaintiff therefore brought suit in Texas against his insurance company, a Mexican corporation that did no business in the state of Texas.<sup>260</sup> The court had jurisdiction by way of garnishment by ancillary writs issued against a New York insurance company with agents in Texas that had contracted with the Mexican insurance company to assume part of the duty to the plaintiff in the underlying case.<sup>261</sup> The Texas courts determined that the Mexican law, regarding the enforcement of a contract made and performed in Mexico, violated a Texas statute that prohibited stipulations in contracts to limit statutes of limitations, ruling that for this reason Texas law applied instead of Mexican law.<sup>262</sup> The U.S. Supreme Court reversed, ruling a state cannot preempt contracts not made or performable within its jurisdiction.<sup>263</sup> Ergo, there was no destabilization of international commerce.

In *Jackson National Life Insurance*, a group of Mexican parties sued an insurance company from the United States.<sup>264</sup> The plaintiffs had bought insurance policies from the defendant.<sup>265</sup> The plaintiffs, from their domiciles in Mexico, sued in the United States in order to attempt to rescind insurance contracts by relying on Mexican insurance regulations.<sup>266</sup> The plaintiffs based their suit on the

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258. *Id.* at 1029.

259. *Id.* at 1030.

260. *Id.*

261. *Id.* at 1029.

262. *Id.* at 1030-31.

263. *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930).

264. 156 F. Supp. 2d 846, 848 (W.D. Mich. 2001).

265. *Id.*

266. *Id.*

argument that they were entitled to rescind the insurance contracts because the underlying life insurance policies were not enforceable under Mexican law.<sup>267</sup> The court determined that the contract was made and performable in the United States, and neither made nor performable in Mexico.<sup>268</sup> The court reasoned that the contract, at least on its face, showed that there was no initial connection between the parties and Mexico, and that there was no factual showing that at the time the contract was entered the subject matter of the contract was going to be connected with Mexico.<sup>269</sup>

The court applied the "most significant relation" choice of law analysis of the state with the applicable choice of law analysis,<sup>270</sup> and concluded that the most significant relationship between the parties and the subject matter was with the forum state.<sup>271</sup> The court based this conclusion on the factual determination that the parties to the contract had no expectation that they would try to enforce the insurance policy in Mexico at the time they entered into the contracts.<sup>272</sup>

In *Home Insurance Co.*, the parties apparently did not raise the issue of whether there was an expectation that the contract would be enforced in Texas at the time of contracting, although the plaintiff did move to Texas after the fire on his ship.<sup>273</sup> If either court was not correct in the factual determination that the parties in the case before it had not shown the expectation that the material elements of the underlying contract would not transcend the international border and potentially invalidate the underlying contract, there would be a bi-national system whose stabilization could need maintenance, and a potential rationale for the application of Mexican law would arise.

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267. *Id.* at 848-49.

268. *Id.*

269. *Id.* at 848-55.

270. This case was the product of multi-district litigation, and the transferor court was from Texas. Therefore the choice of law analysis was the analysis provided by Texas law. *Id.* at 849.

271. *Id.* at 851-55.

272. *Id.* at 859.

273. 15 S.W.2d 1028, 1030 (Tex. Comm'n App. 1929) (judgm't adopted), *rev'd*, 281 U.S. 397 (1930).

This would particularly be true if the goal of the Mexican licensing regulations or the Texas regulation of statutes of limitations were to protect against the effects of the underlying facts of each case.

Lawyers must therefore clearly present the facts of their cases. Otherwise, any number of factual decisions, isolated from the value judgments necessary to determine whether to interfere within a foreign sovereign's affairs, may change the result of a decision. A long forgotten Texas case with similar facts to *Jackson National Life Insurance* illustrates this potential. In the 1929 case *National Life & Accident Insurance Co. v. Smith*, a Tennessee insurance company had sold numerous insurance policies to Mexican parties, in Mexico, that were invalid under Mexican law because the insurance agent was not licensed in Mexico.<sup>274</sup> The insurance company sued numerous policyholders and their attorney to enjoin the prosecution of various suits in which the policyholders had sought to recover premiums that they had paid on a weekly basis to the insurance company.<sup>275</sup>

Under a Texas statute brought before the court, a life insurance policy that by its terms does not become a completed contract until payment for its first premium is to be construed as a contract made in the state where the first premium is paid and the policy delivered, even if the contract states that the contract is made in another jurisdiction.<sup>276</sup> A jury made the factual determination that payment on the first premium was in Texas.<sup>277</sup> On appeal the reviewing court, in order to reach a separate conclusion, made the determination that the insurance company fraudulently made the contracts, based on evidence in the record that the insurance company had knowledge of the applicable Mexican law that relieved it of all risk at the time it entered the contract.<sup>278</sup> If these findings were not made, the outcome of the case would have fallen along the same lines as the outcome of

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274. 20 S.W.2d 142, 146 (Tex. Civ. App. 1929).

275. *Id.* at 142-43.

276. *Id.* at 146.

277. *Id.* at 144.

278. *See id.* at 145-46 (detailing purposeful solicitation of insurance contracts so that they would be governed under Mexican law); *cf.* *Am. Nat'l Ins. Co. v. Smith*, 13 S.W.2d 720, 723 (Tex. Civ. App. 1929) (deeming insurance policies void because insurance company was not licensed in Mexico).

*Jackson National Life Insurance*, or along similar lines to the ultimate conclusion before the U.S. Supreme Court in *Home Insurance Co.*, and, at least in the eyes of the U.S. courts, the insurance company would have lived up to its responsibility.

## V. CONCLUSION

The U.S. courts become a component of a legal network that stretches far beyond the borders of the United States when fact scenarios give rise to litigation about international jurisdictional, *forum non conveniens*, and conflict of laws analyses. The cases presented in this article illustrate the flexibility litigants have at the crowded intersection between jurisdiction, commerce, private expectations, and substantive law. These cases demonstrate that, absent an unusually clear fact scenario such as that raised by the Baychem chemical cases, the value judgments implicit in the analyses required by law make it virtually impossible for courts to apply the necessary analyses with uniformity of results.<sup>279</sup>

The conclusion is simple: when U.S. courts do not effectively balance domestic interests with foreign expectations, the rule of law is weaker, and the resultant losses are a lower quality of life and a weaker economy. Only the European Union's current expansion into Eastern Europe rivals the dramatic social and economic effect of the interplay of national economies and international geography in the NAFTA trade block.<sup>280</sup> As the world economy grows and integrates,

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279. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 325 (1945) (Black, J. concurring) (pointing out the subjectivity and elasticity of jurisdictional analysis set out in majority opinion of *International Shoe*); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (explaining that there can be no uniform application of *forum non conveniens* analyses, and that such determinations are fact-specific and must be left to the sound discretion of the trial judge absent an abuse of discretion); Southerland, *supra* note 173, at 455-56 (internal citations omitted) (discussing the subjectivity inherent in approaching choice-of-law decisions).

280. According to the U.S. Embassy in Mexico, in 2001, U.S.-Mexico trade amounted to \$232,941,600,000, and Mexico's exports to the United States and Canada increased 225% between 1993 and 2002. See United States Embassy in Mexico, *The U.S. and Mexico at a Glance* (stating that in 1970, the Mexican immigrant population in the United States was less than 800,000, compared to nearly eight million in 2000), at <http://www.usembassy-mexico.gov/eataglance1.htm#immigration> (last visited Jan. 20, 2005); see also STEVEN A.

parties from more countries will interact with parties from the United States, and more cases will present legal analyses that will challenge traditional legal theories and require courts to balance a broader range of individual expectations.

History teaches us that no economic philosophy or legal theory will totally erase the boundaries we put between us. The historian Fernand Braudel provides a three-volume history of civilization and capitalism between the fifteenth and eighteenth centuries with analyses of social structures from around the world. Braudel builds from the foundation of a detailed study of day-to-day life to an economic and social history of the world on the grandest scale, a description of the experiences of millions of actors within the collective experience of history.<sup>281</sup> In doing so, Braudel integrates the vitality of human life with the theoretical bases of economics.

The law may hold analogous integrations. Legal and economic structures, when permitted to serve as the arbitrators and organizers of human experience, hold together the fabric of any history, large or small. However, the world will never be as organized as it is diverse. Consequently, there exist borders and differences and, even as countries open up their economies, freedom is never absolute. The fabric of history in a diverse world, if freedom is valued, is therefore patched together through interactions in which individuals cross borders, have disputes, and resolve disputes.

Legal history, like economic history, is told and precedents are set through large numbers of small acts repeatedly done, and continually evolving over time. A fourth volume to Braudel's history would have to recognize the freedom that is permitted by the economic

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CAMAROTA, CENTER FOR IMMIGRATION STUDIES, IMMIGRATION FROM MEXICO: ASSESSING THE IMPACT ON THE UNITED STATES 5 (July 2001).

281. FERNAND BRAUDEL, *THE STRUCTURES OF EVERYDAY LIFE* (Sian Reynolds trans. 1981); FERNAND BRAUDEL, *THE WHEELS OF COMMERCE* (Sian Reynolds trans. 1981); FERNAND BRAUDEL, *THE PERSPECTIVE OF THE WORLD* (Sian Reynolds trans. 1981) (detailing an encyclopedically broad history of the world through economic structures rather than through battles or politics or personalities, asking how modernity and capitalism emerged, but not providing firm conclusions).

liberalization taking place today.<sup>282</sup> The history of the coming era will be developed through case-by-case analyses of actors within this economy guided by legal actors capable of sophisticated decisions that effectively balance the differences between legal systems. In our common law legal system, precedent has developed at a pace that keeps up with the wide patterns of behavior studied by an anthropologist, historian or sociologist. Hence, our governance has adapted to various social structures and regulated the transactions and conflicts within our communities. Today, with increased communication and transportation capabilities, and free countries opening up to the less free, the structures of everyday life are expanding into new frameworks, unprecedented in size, sophistication and diversity.

For Mexico, free trade provides an opportunity for reform never presented on such a broad scale. For the United States, our domestic legal system has become a primary conduit through which the next volume of world history will flow. Our legal system must also adapt in order to provide a framework for free markets to grow. The historians and social scientists can wait, but in our legal system, today's precedent is tomorrow's law. Every jurisdictional analysis, every *forum non-conveniens* analysis, and every choice of law analysis, whether published or unpublished, logical or illogical, balanced or unbalanced, structures our legal system.<sup>283</sup> Whether we

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282. Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998) (applying economic analyses based on individual freedom in discussions of extremely diverse areas of the law).

283. Perception matters. A Mexican party is not going to respect U.S. courts if they appear to favor U.S. parties. For example, from a Mexican point of view, the district court in *Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V.*, protected a U.S. plaintiff to the detriment of a Mexican defendant and the needs of the bi-national legal system. 249 F.3d 413, 420 (5th Cir. 2001). In another example from the Mexican point of view, the district court in *Bremer-Gutierrez* may have avoided the protection of a Mexican plaintiff and the needs of the bi-national system. See *Bremer-Gutierrez v. 3Com*, No. L-02-CV-11, slip op. (S.D. Tex. May 23, 2003), *aff'd*, No. 03-4098, 2004 U.S. App. LEXIS 4613 (5th Cir. Mar. 10, 2004). Such rulings, without broader perspectives in the value judgments at their bases, do not stabilize the courts' role in international disputes. If a U.S. party does not like the possible result of a judicial decision, it may best specify the law and forum it wants in a contract. If a party wants a zero percent chance of proceeding under Mexican law, or in a Mexican forum, then it must limit its actions accordingly.

are litigating the domestic sale of old Mexican films, oil contractors in the Gulf of Mexico, crab fishing in the Aleutian Islands, or a slip and fall injury in Acapulco, we are strengthening the framework of an international legal system or allowing it to deteriorate.