ENVIRONMENTAL LAW INSTITUTE

STRENGTHENING U.S.-MEXICO TRANSBOUNDARY ENVIRONMENTAL ENFORCEMENT

Legal Strategies for Preventing the Use of the Border as a Shield Against Liability

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STRENGTHENING U.S.-MEXICO TRANSBOUNDARY ENVIRONMENTAL ENFORCEMENT

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Strengthening U.S.-Mexico Transboundary Environmental Enforcement:
Legal Strategies for Preventing the Use of the Border as a Shield Against Liability

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TABLE OF CONTENTS

PART ONE: INTRODUCTION....7

PART TWO: REPORT SUMMARY....13

PART THREE: ANALYSIS OF SELECTED LEGAL ISSUES:
Activity or Conduct in Mexico/Responsible Party in the United States....21

I. CIVIL ENVIRONMENTAL ENFORCEMENT IN MEXICO....22

A. Mexican Civil Legal Remedies for Addressing Environmental Harm....23
1. Statutory Enforcement Actions....23
2. Civil Action for Damages....24
B. Recognition and Enforcement of Mexican Judgments in the U.S....25
1. Substantive Law Governing Enforcement of Foreign Money Judgments in the U.S....26
2. Procedures for Filing to Enforce a Judgment....32
3. Summary and Observations....33

II U.S. ENFORCEMENT ACTION: CIVIL SUIT TO ENFORCE ENVIRONMENTAL LAWS AND REGULATIONS....34

A. Extraterritorial Application of U.S. Laws....35
1. Background....35
2. Avoiding or Overcoming the Presumption....36
3. Application of Environmental Statutes Extraterritorially....37
4. Summary and Observations....40

B. Obtaining Evidence Abroad....41
1. Access to Mexican Facilities for U.S. Inspectors....42
2. Obtaining Information from Mexican Governmental Agencies....42
3. Presenting Mexican Information in a U.S. Proceeding: Depositions....43

III U.S. ENFORCEMENT ACTION: PRIVATE TORT SUIT FOR PERSONAL OR PROPERTY INJURIES....45

A. Federal Subject-Matter Jurisdiction....46
1. Diversity Jurisdiction....46
2. Federal Question Jurisdiction....46

B. State Jurisdiction: The Local Action Rule....48

C. The *Forum Non Conveniens* Doctrine....49
1. Actions in Federal Court: Factors considered by the court....49
2. Actions in State Court: Factors considered by the court....54
3. Summary and Observations....56

D. Choice-of-Law Issues....57
1. Federal Common Law Governing Choice of Law....57
2. State Law Governing Choice of Law....58
3. Summary and Observations....60

PART FOUR: ANALYSIS OF SELECTED LEGAL ISSUES:
Activity or Conduct in U.S./Responsible Party in Mexico....61

I. Obtaining Personal Jurisdiction over Foreign Defendants....61
A. Establishing Personal Jurisdiction: Federal law....61
B. Establishing Personal Jurisdiction: State law....66
C. Summary and Observations....68

II. Obtaining Evidence Abroad....68
A. Production of Documents....68
B. Using U.S. Court's Power of Compulsion....69

III. Enforcement of U.S. Judgments in Mexican Courts....70
A. Substantive Requirements....70
B. Procedural Requirements....71

PART I: INTRODUCTION

The U.S.-Mexico border shares common air, rivers, and underground waters. It also supports a spiraling growth in population and rapidly growing level of industrial activity, stimulated in part by Mexico's *maquiladora*[1] program, the North American Free Trade Agreement (NAFTA), and the growing economic ties between U.S. and Mexico. Growth in pollution continues to outstrip the development of infrastructure and to pose enormous problems for regulatory programs on both sides of the border.

The United States and Mexico have made significant progress in controlling and reducing pollution in the border area through the construction of infrastructure, such as multi-million dollar projects for sewage collection and treatment, and the development of regulatory programs, such as programs for handling hazardous materials and waste. However, the effectiveness of each of these projects and programs depends on compliance. For example, sewage treatment plants will fail without compliance with standards for the pretreatment of industrial waste. Programs for handling hazardous materials and waste will fail without compliance by those companies that create, handle and dispose of the materials and wastes. As a result, enforcement—the set of actions that federal, state, tribal and local governments, non-governmental organizations, and others take to ensure compliance within the regulated community—is essential to the success of binational efforts to protect human health and the environment.

This report focuses on one particular problem in transboundary environmental enforcement—the use of the border as a shield against liability—and analyzes some of the key legal issues that must be considered in bringing civil enforcement actions to address this problem.

BACKGROUND: U.S., MEXICAN AND BINATIONAL ENFORCEMENT FRAMEWORKS

United States. In the U.S., federal, state, tribal and local governments, as well as private citizens have key roles to play in enforcement of federal and state environmental laws and regulations. In addition to the U.S. Environmental Protection Agency (EPA), significant environmental responsibilities in the federal government fall on the Department of the Interior, the Department of Agriculture and the Department of Justice. The enforcement work of the Customs Service, part of the U.S. Treasury, is of particular relevance in discussing environmental compliance in the U.S.-Mexico border region. In addition, the Department of State may play a role in individual enforcement cases.

EPA establishes and enforces most federal environmental standards and administers most environmental programs not related to natural resources, land management, or wildlife conservation. Every state has agencies responsible for environmental protection. State agencies implement and administer the laws, develop public education programs, and monitor compliance. They may set standards and guidelines that are as strict or stricter than federal standards. States typically have extensive powers to investigate, inspect, and bring administrative, civil, or criminal actions. In addition, EPA has delegated authority to many state agencies to implement and enforce federal programs under many environmental statutes, such as the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act and the Resource Conservation and Recovery Act. Typically, such federally authorized state programs carry out most of the permitting, inspection, monitoring and enforcement in the state. At the same time, federal law continues to be the ultimate source of authority for these programs, and EPA retains an important oversight function even where EPA has delegated authority to a state.

Non-governmental organizations (NGOs) have played an important role in the enforcement of environmental laws in the United States. The success

[1]The term *maquiladora* or *maquila* is used to describe a Mexican company that imports raw materials and equipment, assembles or processes the materials in Mexico, and then exports the finished product for further processing or sale. The materials and equipment enter Mexico under a bond, free of customs duties. Although they are incorporated in Mexico, *maquiladoras* may be up to 100 percent foreign owned, and must obtain special approval from the Mexican government for their operations. *See generally*, John E. Tarbox, *An Investor's Introduction to Mexico's Maquiladora Program*, 22 TEX. INT'L L. J. 109, 110 (1986); Aureliano Gonzalez Baz, "Manufacturing in Mexico: The Mexican In-Bond (Maquila) Program," *available at* http://www.udel.edu/leipzig/texts2/vox128.htm (last visited July 15, 2002).

of NGOs in this arena is due in part to the availability of compensation for prevailing plaintiffs and to laws such as the Freedom of Information Act,[2] which provide broad access to information. Most environmental statutes contain "citizen suit" provisions that enable NGOs or concerned citizens to bring legal actions to enforce environmental laws.[3] Importantly, these provisions include statutory language providing that attorneys' fees may be awarded when "appropriate." Under these provisions, citizen plaintiffs serve as "private attorneys general" in lawsuits designed to enforce environmental laws, and they are reimbursed by the defendant for their time and costs when they prevail.

Mexico. The primary federal agency in charge of environmental protection in Mexico is the Secretariat of Environment and Natural Resources *(Secretaría de Medio Ambiente y Recursos Naturales*, or SEMARNAT). SEMARNAT administers Mexico's principal federal environmental law, the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y Protección al Ambiente* or LGEEPA).[4] The LGEEPA covers a broad range of environmental issues, including ecological planning; environmental risk and impact assessment; protection of flora and fauna; and prevention and control of air, water, and soil pollution.[5] Generally, SEMARNAT is responsible for formulating national environmental policy, establishing standards, administering Natural Protected Areas, evaluating environmental impact statements, issuing permits and other authorizations for waste discharges and resource use, and carrying out scientific research related to environmental protection.[6] An affiliated entity within SEMARNAT, the Federal Attorney General for Environmental Protection (*Procuraduría Federal de Protección al Ambiente* or PROFEPA), was created in 1992 and is charged with enforcing environmental laws and regulations under the authority of the agency.[7] A separate agency, the Attorney General of the Republic (*Procuraduría General de la República* or PGR) is responsible for investigating and prosecuting federal environmental crimes.

The Federal District and all 31 Mexican states have enacted environmental laws modeled on the LGEEPA, for environmental matters that fall within state jurisdiction.[8] Responsibilities of the states include making state environmental policy; preventing and controlling air pollution from sources that are not within the jurisdiction of the federation; administering natural protected areas created by state and local law; regulating solid waste collection and disposal; preventing and controlling pollution of waters within the state's jurisdiction; enforcing national standards (*Normas Oficiales Mexicanos* or NOMs) established by the federal government; and evaluating environmental impacts of activities that are not expressly reserved to federal jurisdiction.[9] Federal law also provides for municipal jurisdiction in certain areas, such as air pollution and water pollution, but the precise role of the municipalities in these areas also depends on the delineation of authorities established by state law.[10]

Environmental NGOs in Mexico have become increasingly numerous and active in the past decade. The LGEEPA provides that any individual or group may report to PROFEPA, through a *denuncia popular* (popular complaint), any matter

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[2] 5 U.S.C. § 552 (1994).

[3] *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671 (1994); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (1994); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992 (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–9675 (1994); Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201–1328 (1994).

[4] The law was published in the Official Diary of the Federation *(Diario Oficial de la Federación)* on January 28, 1988, and has been amended on a number of occasions since then. Many of Mexico's federal laws can be viewed online at http://www.cddhcu.gob.mx/leyinfo.

[5] Other federal laws, such as the Water Law (Ley de Aguas Nacionales) and the Forestry Law (Ley Forestal) address specific environmental issues.

[6] *See* North American Commission for Environmental Cooperation, Summary of Environmental Law In North America (1995), *available at* http://www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law (last visited May 27, 2002).

[7] D.O., June 4, 1992.

[8] The distribution of jurisdiction over environmental protection functions is based in the Mexican Constitution and specified in the LGEEPA and other federal environmental laws. For a discussion of Mexican federal and state jurisdiction over environmental law generally, see Derecho Ambiental (José Juan González Márquez, ed., Universidad Autónoma Mexicana 1994). *See also* Environmental Law Institute, Decentralization of Environmental Protection in Mexico: An Overview of State and Local Laws and Institutions (1996), *available at* http://www.eli.org (last visited May 27, 2002). A December 2001 reform of the LGEEPA expanded the opportunities for federal delegation of authority over environmental matters through agreements with states and the Federal District. *See* Decree of the Mexican Congress Reforming the General Law of Ecological Equilibrium and Environmental Protection, D.O., December 31, 2001.

[9] L.G.E.E.P.A. art. 7.

[10] L.G.E.E.P.A. art. 8.

that could result in harm to the environment or natural resources, or that violates any environmental law or regulation.[11] Once a *denuncia* is brought, the agency has the responsibility to investigate the matter and make a finding regarding whether it will pursue the problem. The LGEEPA also provides the right to challenge any administrative act as violating environmental law or norms, through an administrative process known as the *recurso de revision*.[12]

Mexican law contains an additional vehicle for citizen involvement in enforcing environmental laws. The *amparo* suit is a legal action founded in the Mexican Constitution, in which individuals may seek damages for, or the suspension or annulment of, an act by a government authority that violates the individual's rights. An *amparo* suit may *not* be brought by an environmental organization on behalf of an affected group, or as a class action on behalf of many similarly situated individuals. Rather, it must be brought by an individual petitioner who can show that he or she has been affected directly and has suffered a harm caused by the official action.[13]

Bi-national Institutions. Transboundary enforcement is based on the domestic laws of each country. Nonetheless, there has been considerable cooperation on border environmental problems between the U.S. and Mexico over the past twenty-five years. In 1983, the two countries signed the Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area,[14] popularly known as the La Paz Agreement. Since then, the United States and Mexico have negotiated five annexes to the La Paz Agreement that address border pollution issues involving sewage treatment, movement of wastes, emergency responses to hazardous substance spills, and air pollution.

Based on the La Paz Agreement, U.S. EPA and Mexico's environmental agencies have jointly issued a series of environmental plans for the border region. The Integrated Border Environment Plan, issued in 1992, included commitments by each country to monitor and enforce their own environmental laws and identified ways for the two countries to improve coordination and cooperation. The U.S.-Mexico Border XXI Program, a five-year plan which began in 1996, built upon and broadened the 1992 plan to place greater emphasis on health and natural resource issues and enhanced environmental cooperation. Under the Border XXI program, nine binational workgroups were established to work on the issues of water; air; hazardous and solid waste; pollution prevention; contingency planning and emergency response; cooperative enforcement and compliance; environmental information resources; natural resources; and environmental health. A successor plan to Border XXI is currently in development.

The signing of the North American Free Trade Agreement also contributed to U.S.-Mexico cooperation on environmental matters. In 1993, the three NAFTA governments signed the North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America (NAAEC), which created the Commission for Environmental Cooperation (CEC). With a Council composed of the heads of each country's environmental agency, the CEC also consists of a Joint Advisory Committee and a Secretariat. To address a party's failure to enforce environmental laws, Part Five of the NAAEC created a dispute settlement process through which monetary assessments and sanctions can be imposed as a last resort. To invoke the dispute settlement process, a complaint must concern a party's persistent, systematic failure to enforce its laws, and the alleged failure must be trade-related or involve competing goods or services. Only NAFTA parties can initiate this NAAEC dispute settlement proceeding. Under Articles 14 and 15 of the NAAEC, however, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a party is failing to enforce its environmental law and may request that party to respond. The Secretariat currently has an active file of 12 citizen submissions and has prepared and issued three factual records, including one—Metales y Derivados—that

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[11] L.G.E.E.P.A. arts. 189-204.

[12] L.G.E.E.P.A. arts. 176, 180.

[13] *See generally* NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, SUMMARY OF ENVIRONMENTAL LAW IN NORTH AMERICA (1995), *available at* http://www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law (last visited May 27, 2002).

[14] Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Feb. 16, 1984, U.S.-Mex., TIAS 10827 [hereinafter La Paz Agreement].

concerns an abandoned *maquiladora* in the border area.[15]

THE NATURE OF THE PROBLEM

Manufacturing practices in the border area daily threaten the health of workers, local communities, and the environment. Thousands of tons of hazardous wastes and other toxic materials cross the border in both directions each year. The border that exists between the two countries has provided an opportunity for violators of environmental laws to flee in the face of enforcement action. Consider the following:

> The yard behind the smelter is piled high with slag. Some of it already has spilled through a fence, down the slope of the mesa, and into the yards of the residents below. In one corner are sixty or so 55-gallon drums. Many of the drums are rusted. Some have evidently leaked, staining the soil a dull yellow. Inspectors from PROFEPA sampled the drums and the soil last month. Laboratory analysis shows that the drums are filled with waste solvents and the soil is heavily contaminated with those solvents. The inspectors also sampled the slag, and found high levels of lead, cadmium, mercury and an assortment of other heavy metals.
>
> The facility has been stripped of anything valuable that could be carried away. The office is empty except for the trash on the floor. Two weeks ago, PROFEPA issued to the *maquiladora* an order requiring cleanup within ten days. On the eve of the order's deadline, the owners apparently fled across the border to the United States. The watchman stated that the owners filled two trucks with documents and equipment and left. They did not even close the front gate. When the workers arrived the next morning, even the managers did not know what had happened. Almost certainly, the owners, their assets and anything portable of value from the smelter, are now in the U.S.

While the scenario is hypothetical, problems very similar to these have occurred along the U.S.-Mexico border in recent years.[16] Other situations create similar problems. Truck loads of dangerous wastes may be shipped to Mexico for "recycling" and instead end up abandoned in an arroyo in the Sonora Desert. A truckload of hazardous waste may be shipped to the U.S. for disposal, but is found abandoned in an urban warehouse instead. Or a truck from a company in Mexico may spill its hazardous contents while in the U.S. The common thread is the potential for those responsible for creating these problems to use the border to shield themselves from the consequences of their actions.

PURPOSE OF THIS REPORT

U.S. and Mexican pollution control agencies are inventing new and innovative ways to make their domestic environmental laws meet the challenges presented by the border. This report is written for citizens and government officials in the U.S. and Mexico who seek to reduce the extent to which the U.S.-Mexican border can be utilized as a shield or barrier to the enforcement of U.S. and Mexican environmental laws. There are many extra-judicial and informal approaches to transboundary environmental problems, including education, technology transfer, and financial cooperation. The focus of this report is on key *legal* issues that arise when pursuing formal enforcement actions. Underlying the discussion of these issues is the recognition that cooperation and coordination between Mexican and U.S. officials are of critical importance in most transboundary enforcement efforts. By discussing relevant legal doctrines in the transboundary context, the report aims to help citizen and government enforcers on both sides of the border understand the potential avenues for effective environ-

[15] *See* Commission for Environmental Cooperation's web site, http://www.cec.org/citizen/index.cfm?varlan=english (last visited June 17, 2002).

In connection with the signing of NAFTA, the U.S. and Mexico also entered into an Agreement Concerning the Establishment of a Border Environmental Cooperation Commission and a North American Development Bank. The mission of these two institutions is to aid in the development and financing of environmental infrastructure projects in the border region. For additional information about the agreement, see the Commission for Environmental Cooperation's web site, http://www.cec.org/pubs_info_resources/law_treat_agree/transbound_agree/More.CFM?varlan=English&unique_no=40.

[16] *See, e.g.*, North American Commission on Environmental Cooperation, "Metales y Derivados: Citizen Submissions Up Close," *available at* http://www.cec.org/trio/stories/index.cfm?ed=7&ID=92&varlan=english (last visited: 7/31/02); Rachel Hays, "Long-awaited Toxic Cleanup OK'd for Alco Pacifico Site," 4 BorderLines 30 (Dec. 1996), *available at* http://www.us-mex.org/borderlines/1996/bl30/bl30tox.html (last visited July 31, 2002).

mental enforcement. The report also provides information that may be relevant to future policy initiatives in this area. For example, any future Mexican legislation addressing recovery of environmental cleanup costs would benefit from an understanding of how such a judgment could be enforced in the United States.

SCOPE OF THE REPORT

The report focuses on a number of different civil[17] legal issues that may arise in U.S. courts when these types of transboundary scenarios are the subject of formal government (or citizen) enforcement actions, or private lawsuits for damages. For example, citizen or government plaintiffs must establish personal jurisdiction and make sure that defendants are served properly with legal papers. Questions may arise as to which country provides the appropriate forum for a case and which country's laws should be applied. Transboundary cases also raise complexities in obtaining evidence. Moreover, in many cases—both in the U.S. and Mexico— the effectiveness of the enforcement strategy ultimately rests on the ability to enforce the judgment in the courts of the other country.

This report reviews the relevant statutory and case law in these areas. In so doing, the report provides background on some of the key legal obstacles that must be overcome in order to pursue a transboundary enforcement action. While the report seeks to outline the relevant aspects of the law, it does not intend to provide a full legal briefing of the issues; any party interested in bringing a case will need to engage in further research to determine how these and other legal issues will play out in the context of the particular case. The report can provide a road map to some of the issues, and can help enforcers consider the types of cases that are more likely to succeed.

The report does not address administrative and criminal enforcement options. Both of these avenues may present opportunities for addressing the types of transboundary problems discussed here. Some of the issues relating to these options are noted throughout the report. In addition, the report does not discuss in detail legal issues that arise in Mexican enforcement actions. In order to provide background for the discussion of U.S. enforcement issue, Part Three of the report sketches the remedies available under the Mexican legal system for pursuing transboundary environmental enforcement actions. Future research is warranted to analyze further the opportunities and constraints presented by the Mexican legal framework.

STRUCTURE OF THE REPORT

Following this Introduction, Part Two provides an overview of the legal issues presented in the report. That Part offers, in summary form, the observations from the legal research and analysis presented in Parts Three and Four.

Part Three presents legal issues that may arise in U.S. courts, in cases involving conduct in Mexico and responsible parties in the United States. The first section of Part Three begins with a summary of the legal remedies available under Mexican law for pursuing enforcement in such cases, and a discussion of a related legal issue in U.S. courts—the recognition and enforcement of Mexican judgments in the United States. Part Three then moves on to consider a variety of legal issues that may arise in connection with enforcement actions brought in the U.S. First, with respect to governmental (or citizen) actions to enforce environmental statutes, the report analyzes (1) the extraterritorial application of U.S. laws and (2) the legal framework for obtaining evidence abroad. Finally, Part Three addresses private tort lawsuits to recover damages, focusing on (1) federal and state subject-matter jurisdiction; (2) the *forum non conveniens* doctrine; and (3) whether Mexican or U.S. law governs the legal proceedings.

Part Four considers the reverse scenario: conduct in the U.S. and the responsible party in Mexico. This Part begins with a discussion of the requirements for obtaining personal jurisdiction, including the legal framework for service of process abroad. In addition, the report highlights the legal issues related to evidence gathering in such cases, and concludes with a summary of Mexican legal requirements for enforcing a U.S. judgment in these types of cases.

[17] In this report, the term "civil" reflects its usage in the United States, which follows the common law tradition. In the common law tradition, the accepted major classifications of law are civil and criminal, with administrative law a subcategory of civil law. Mexico follows the civil law tradition, which generally encompasses public law and private law. *See* JOHN MERRYMAN, THE CIVIL LAW TRADITION (2d ed. 1985). Administrative and criminal law fall within public law, while private law has two subcategories – civil law and commercial law. *Id.* at 68. Civil law "technically. . .includes only the law of persons (natural and legal), the family, inheritance, property, and obligations." *Id.*

PART TWO: SUMMARY OF LEGAL ISSUES

Transboundary environmental enforcement actions must go through a number of stages in order to be successfully initiated, investigated, adjudicated, and enforced. Each of these stages poses potential practical and legal issues that might result in the action being delayed, or even prevent it from going forward altogether. Some of these issues, such as personal jurisdiction, service of process, and enforcement of judgments, are common to both the U.S. and Mexican legal systems, though they may be handled somewhat differently in each country. Other issues are the result of legal doctrines or practical obstacles that are unique to one country or the other. Anticipating these procedural issues at the outset of an enforcement action can help maximize the probability of success on the merits.

A number of legal issues raised by transboundary enforcement are analyzed in detail in Part Three, which deals with activity in Mexico when the responsible party or parties are located in the U.S., and Part Four, which deals with activity in the U.S. when the responsible parties are located in Mexico. This Part summarizes the major issues raised and the analysis provided in those two chapters.

I. ACTIVITY OR CONDUCT IN MEXICO/RESPONSIBLE PARTY IN THE U.S.

There are a number of scenarios that may raise questions of the border being used as a "shield" to liability. Perhaps the most widely publicized involves owners of a *maquiladora* who have left Mexico for the U.S. after abandoning hazardous waste or causing other environmental damage. Similar questions may be raised in the case of a U.S.-owned *maquiladora* that is functioning, but that lacks the financial resources to adequately address its environmental liability. Or, a U.S. party may transport hazardous materials or wastes into Mexico and then dispose of them improperly. This report discusses a number of legal issues that are likely to arise in considering an enforcement action in such cases. The report focuses on "civil" enforcement as commonly understood in the United States—the pursuit of non-criminal judicial action to address environmental harm.

A. Civil Environmental Enforcement in Mexico

If a violation of environmental law or environmental damage occurs in Mexico, the first place to look for a legal solution would be Mexican law. In Mexico, as in the U.S., actions may be brought either to enforce the environmental statutes or to recover for personal or property damages. Even where the responsible party resides in or has fled to the United States, U.S. legal doctrine leaves open the possibility of enforcing a Mexican civil monetary judgment in U.S. courts. However, Mexican law places considerable legal and practical limitations on obtaining such a judgment in environmental cases, particularly with respect to the enforcement of Mexican environmental statutes.

Mexican Legal Remedies for Addressing Environmental Harm. Mexico's central federal environmental law, the LGEEPA, provides for administrative fines and the referral of cases for criminal prosecution, but does not establish specific monetary or other sanctions that can be obtained through the courts in non-criminal actions. The law does not appear to provide for taking administrative action against a party who does not reside in Mexico; thus if a party commits a violation of the LGEEPA and leaves Mexico before administrative action has been successfully undertaken, the primary enforcement option would be criminal prosecution and the difficult process of extradition. Other potential practical limitations associated with enforcement of the environmental statute are the government's inability to recover its costs for responding to environmental threats, and the absence of a mechanism for direct citizen enforcement in court.

Mexico's Federal Civil Code does establish a basis for parties to bring a legal action to recover

for injuries to their person or property, including recovery for non-physical damages and the possibility of strict liability for damage caused by certain hazardous substances. However, there are both substantive and procedural difficulties in bringing a successful civil suit in Mexico to address environmental damages, including the absence of class action suits, limitations on standing and difficulty in establishing proof of causation. Although it has not been a widely-used legal tool, a lawsuit under the Civil Code might potentially provide the Mexican government with an avenue for obtaining a monetary court judgment for environmental violations—where, for example, environmental damages occur to property or natural resources owned by the government itself.

Recognition and Enforcement of Mexican Judgments in the U.S. Assuming that a Mexican civil monetary judgment can be obtained, there is a substantial body of U.S. law suggesting that the judgment could be enforced in U.S. courts if certain conditions are met. There is no treaty, convention, or other agreement on enforcement of judgments to which both the United States and Mexico are parties. The precise legal test applied varies among the states, as do the procedures for obtaining recognition and enforcement of the foreign judgment. But in general, a Mexican judgment creditor will need to show that the Mexican court issuing the judgment had adequate personal and subject-matter jurisdiction over the matter; that the judgment is not contrary to public policy in the state where enforcement is sought; and that the judgment is compensatory, rather than punitive in nature.

As applied to environmental cases, this last factor poses perhaps the largest, or at least most novel, obstacle. For example, where the Mexican government obtained a money judgment in an environmental case, it would probably need to argue, first, that the judgment should not be considered "penal" simply because it was obtained by the government; and second, that the judgment itself is remedial in purpose and nature. U.S. courts have yet to address these arguments in the context of a foreign judgment in an environmental case. However, analogizing from cases that have involved enforcement of other kinds of foreign judgments, state enforcement of judgments from sister states, and U.S. government enforcement actions, courts might also accept these arguments in the context of a transboundary environmental case. One type of monetary judgment for environmental damages that is potentially available to Mexican government agencies under existing Mexican law—a "private" suit within a civil liability regime that emphasizes restoration to the status quo ante—could well fit within the U.S. legal framework for enforcement of foreign judgments. Other enforcement options—administrative orders imposing statutory fines or court orders establishing criminal penalties—present greater hurdles for U.S. recognition and enforcement.

B. U.S. Civil Suit to Enforce Environmental Laws and Regulations

Because the options for Mexican civil enforcement may be limited and U.S. enforcement of Mexican judgments is uncertain, and because environmental violations in Mexico may involve associated violations of U.S. law, this report largely focuses on direct recourse by government agencies and private parties to the U.S. legal system. In actions to enforce U.S. environmental laws and regulations, two key questions are (1) whether the statutes may be applied extraterritorially to reach activity on Mexican soil, and (2) how evidence may be obtained in Mexico for use in a legal proceeding in the United States.

Extraterritorial Application of U.S. Laws. Existing case law provides little direct support for the extraterritorial application of environmental laws, however the outcome in a particular matter will depend heavily on the facts of the case and the statutory provisions being enforced.

International law recognizes a number of grounds for the exercise of extraterritorial jurisdiction by a nation, including situations where the conduct at issue occurs within the country (even if the effects are felt exclusively abroad), or where conduct abroad has effects within the country. However, U.S. common law has created a "presumption against extraterritoriality" that must be overcome in such cases by evidence that Congress actually intended the relevant statute to apply outside of the United States. Federal courts have tended to find this intent generally in statutes regulating business relations, but not in environmental laws.

Nevertheless, the doctrine leaves room for arguing that individual environmental statutes should be interpreted as applying extraterritorially. Courts have gauged Congressional intent in the past by

accepting evidence of the express language of the statute in question; the purpose and structure of the statute; and the legislative history and administrative interpretations of the statute. With respect to cases involving conduct outside the United States, the U.S.-Mexico border region may provide the strongest context for pursuing such an argument, since environmental and public health impacts in the U.S. would likely be more direct. EPA has used at least one law in such circumstances, applying Superfund resources under the Comprehensive Environmental Response, Compensation and Liability Act to conduct soil sampling in Mexico and groundwater sampling in the United States. This sampling took place at Nogales Wash, which flows from Nogales, Sonora, through Nogales, Arizona. Another factor that might support such extraterritorial enforcement is the cooperation of the Mexican government in the underlying action and the absence of a comparable enforcement option in Mexico.

Obtaining Evidence in Mexico. For many U.S. enforcement cases involving conduct that occurred in Mexico, it will be necessary to obtain information located in Mexico—samples, records, or other information about facility operations and/or environmental damages. Cooperation between U.S. and Mexican authorities is essential, since U.S. agencies will need assistance in gathering this evidence. The broad framework for this cooperation was set by the 1983 La Paz Agreement, which established a bi-national mechanism for the coordination of environmental protection in the zone extending 100 kilometers along each side of the border. An annex to the Agreement specifically provides for "mutual assistance" to improve each country's ability to enforce its laws against transboundary shipments of hazardous waste or hazardous substances. Such assistance includes facilitating on-site visits and inspections of waste treatment, storage, or disposal facilities, as well as assistance with the production of documents and records.

Where the Mexican facility has been abandoned, access by U.S. inspectors might be a relatively straightforward matter under the cooperation provisions of the La Paz Agreement. Where the Mexican facility is still operating, or remains under the control of a company that is potentially responsible for the contamination, access by U.S. inspectors may not be possible. If U.S. officials cannot conduct or participate in an inspection, they may at least be able to coordinate with Mexican officials. Coordination may help ensure that the necessary information is obtained during a Mexican government inspection of the site, or derived from documents or records previously collected by Mexican agencies. Absent such coordination, it will be difficult for U.S. officials to ensure the production of Mexican government records in cases where Mexican officials are not party to the legal action. While the Mexican Constitution and federal laws provide for public access to environmental information, certain types of information are not publicly available, including information relating to matters that are the subject of pending judicial proceedings or inspection and enforcement actions.

A further complication relates to the presentation of Mexican documents or testimony of Mexican citizens in a U.S. legal proceeding. Mexican nationals cannot be subpoenaed to appear involuntarily in U.S. court, and a U.S. court cannot require the production of documents from non-parties. Depositions may provide an alternate approach to obtaining this evidence. Where a witness is willing to be deposed, the deposition may be taken before a U.S. consular officer, in accordance with U.S. law and rules governing notice, conduct and admissibility of the deposition. Involuntary depositions are governed by the Hague Evidence Convention, and require submission of a "letter of request," formally seeking assistance of a Mexican court in compelling the witness' testimony. Such letters may be transmitted through diplomatic channels, or directly from a U.S. court to a court in Mexico. Such depositions generally will be taken under control of the Mexican court, in accordance with Mexican law. This could pose an additional obstacle in the case of Mexican government officials, whom Mexican law may prevent from being compelled to testify.

C. U.S. Private Tort Suit for Personal or Property Injuries

Environmental enforcement options in the U.S. judicial system also include lawsuits by private plaintiffs to recover damages for personal or property injuries caused by pollution or exposure to hazardous substances. While many private lawsuits for personal and property injuries will be filed in state court, such tort cases also could be filed in or removed to federal court. Legal issues that could arise

in these kinds of cases in a transboundary context include federal subject-matter jurisdiction, state jurisdiction and the "local action" rule, the *forum non conveniens* doctrine relating to the appropriateness of a U.S. venue, and choice of substantive law between U.S. and Mexican legal norms.

Federal Subject-Matter Jurisdiction. In federal cases, a court's jurisdiction over the subject matter is usually based on diversity of citizenship between the parties, though it is also possible that the existence of a "federal question" will provide the basis for subject-matter jurisdiction. Diversity exists where the amount in controversy exceeds $75,000, and the lawsuit is one between: (1) citizens of different states; (2) citizens of a state and citizens or subjects of a foreign state; (3) citizens of different states (where citizens or subjects of a foreign state are additional parties); or (4) a foreign state as plaintiff and citizens of a State or of different States. Diversity jurisdiction is commonly invoked in large tort cases where the makeup of the parties meets one of these criteria. For purposes of determining diversity, a corporation is deemed to be a citizen of any state by which it has been incorporated and of the state where it has its principal place of business.

Federal question jurisdiction exists in civil actions arising under "the Constitution, laws, or treaties of the United States." Where the cause of action is created by state rather than federal law (as in most tort cases), the case may still arise "under the laws of the United States" if that cause of action requires "resolution of a substantial question of federal law." A related basis for federal question jurisdiction is the Alien Tort Claims Act (ATCA), a 200-year-old procedural law that has been revived in recent years as a vehicle to bring alleged human rights and environmental violations before U.S. courts on behalf of foreign plaintiffs. ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Many recent ATCA cases focus on human rights abuses, which may be easier to establish as violations of international law than environmental damages. Few cases have sought to litigate specific treaty rights, and to the extent that treaties to which the U.S. and Mexico are currently parties refer to acts between nations, it would be difficult to base an environmental ATCA claim against a private actor on a treaty violation. Attempts to base environmental ATCA claims on the broader "law of nations" have thus far met with little success, though some key cases remain on appeal. In general, plaintiffs bringing an environmental case under ATCA would need to consider carefully whether the specific conduct at issue caused public health and environmental devastation of such magnitude as to constitute a violation of one or more widely-recognized sources of international law.

State Jurisdiction: The Local Action Rule. Environmental cases brought in state courts may raise questions concerning the "local action" rule, which originated in the common law and has been incorporated into some states' venue statutes. Under the local action rule, courts may not exercise jurisdiction over a real property action unless the property is within the territorial boundaries of the state where the court is sitting. In the border states of Arizona, California, and Texas, this rule might present a hurdle to a case in state court that includes allegations of trespass on lands or other harm to land. However, the modern trend has been to strictly construe these provisions, and courts in the U.S. have been reluctant to apply the local action rule to actions that are not directly related to *title* to property. Thus, it may be possible to avoid the rule in cases that focus on property damages, or even in cases that combine property rights claims with other causes of action, such as a tort claim.

The Forum Non Conveniens *Doctrine.* When both a U.S. and a Mexican court have jurisdiction over a particular matter, the doctrine of *forum non conveniens* addresses whether the U.S. court may decline jurisdiction in favor of the foreign tribunal. In light of federal and state courts' willingness to grant dismissal based on *forum non conveniens* motions, private plaintiffs face considerable hurdles in filing tort actions based on activities and damages that occurred in Mexico. The court's decision whether to retain jurisdiction involves a weighing of private and public interest factors, and is necessarily dependent on the particular circumstances of the case. For federal court cases, federal common law establishes the framework for analysis; in state court, state common law and statutes apply.

Under federal common law, a U.S. court with jurisdiction to hear a case may nonetheless decline jurisdiction if, for convenience and "in the interest of justice," the case should be brought in another forum. The initial inquiry is whether an alternative forum is available and adequate. If so, the court

evaluates the private and public interests at stake in determining whether the case should proceed in the U.S. The foreign court will be deemed "available" if it can properly assert jurisdiction over the dispute; indeed, U.S. courts often have conditioned their dismissal on the defendant's agreement to submit to the foreign court's jurisdiction. The foreign court will likely be deemed "adequate" if it will permit litigation of the subject matter of the dispute, even if there are significant differences in the available causes of action, procedures, and remedies. Once these showings have been made, the court will weigh a number of private- and public-interest factors that consider the practical convenience and policy implications of trying the action in one forum or the other. Trial courts have discretion in evaluating these factors, but also must give weight to plaintiff's original choice of forum.

The *forum non conveniens* analysis varies somewhat from state to state, though many states apply an analysis similar to the two-part federal standard, first determining the "suitability" or "adequacy" of the alternative forum and then balancing a variety of private- and public-interest factors. Like federal courts, state courts may tend to dismiss foreign cases if the dismissal can be conditioned on defendant's acceptance of the foreign court's jurisdiction. Texas law has gone so far as to codify a distinction between wrongful death cases brought by U.S. residents and those brought by non-residents, making it much easier for the latter to be dismissed on *forum non conveniens* grounds.

Because Mexican law provides causes of action in negligence and strict liability for personal and property damages, the mere fact of differences in Mexican court procedures (*e.g.*, the absence of jury trials) and remedies (*e.g.*, the absence of punitive damages) may not suffice to convince a U.S. federal or state court to retain jurisdiction over an environmental case. Courts also may be less inclined to give deference to the forum choice of plaintiffs who are not U.S. citizens or legal residents. On the other hand, suits involving activities in Mexico —especially in the border region—have the advantage of geographic proximity to the U.S. Thus, while compulsory process against unwilling Mexican witnesses may remain a problem, the cost and difficulty of transporting witnesses, experts and other information from Mexico may be considerably less than in some cases involving multiple states in the U.S. Moreover, damage in the border area is also a practical concern to U.S. government agencies and communities. In light of the legal and political framework fostering cross-border economic, political and social interaction, a court might well conclude that the liability of U.S. actors for their activities in Mexico is a matter of significant public interest that weighs in favor of retaining jurisdiction in the United States.

Choice-of-Law Issues. For tort cases brought in the U.S. involving conduct in Mexico, the court likely will need to decide whether to apply U.S. or Mexican law. Federal courts in a diversity action apply the choice-of-law rules of the state in which they sit; otherwise, federal common-law rules are applied, which follow the approach of the Restatement (Second) of Conflict of Laws. Some states (including Texas and Arizona) also use the framework established in the Restatement, but others (including California and New Mexico) have formulated the inquiry somewhat differently. In most jurisdictions, the choice-of-law analysis in a tort suit involving activities in Mexico will depend heavily on the particular circumstances of the case.

Key factors in this analysis are the location of the conduct and the injury, the relationship of the parties to the U.S. and to Mexico, and the policy interests of each country in having its substantive law apply to the case. The relationship among these factors varies from jurisdiction to jurisdiction, depending on the equities of the case and the court's jurisprudence in the area. In general, where the injury takes place in Mexico and affects Mexican residents only, and where the defendant's ties to the forum state are minimal or not central to the case at hand, then a U.S. court will be inclined to find that Mexican law should govern the case. This conclusion might be different where U.S. residents are among the injured plaintiffs or where the environmental damage extends into the forum state.
Some states, including California and Texas, have emphasized that the choice-of-law analysis begins with a determination as to whether a conflict of law exists in the first place. If the law of the two jurisdictions is the same, then there is a "false conflict," and the forum state's law will generally apply. With respect to tort actions, Mexico and U.S. law governing negligence and strict liability are similar, though not precisely the same, but Mexican law on damages does differ significantly from most jurisdictions in the U.S. Nevertheless, some courts have viewed this as a false conflict in tort cases where

the defendant is a U.S. citizen or corporation, and applied U.S. law. Thus, in a tort case involving conduct in Mexico and a U.S. defendant, some courts might conclude that no conflict of law exists, either because the law of the two countries are similar, or because Mexico does not have an interest in applying its (different) law to the case at hand.

II. ACTIVITY OR CONDUCT IN THE U.S./RESPONSIBLE PARTY IN MEXICO

Where the environmentally harmful activity occurs in the U.S. and the responsible party is in Mexico, a government or private action in U.S. court will face additional legal issues. These include the court's personal jurisdiction over the defendant; legal obstacles to obtaining evidence abroad, in addition to those discussed above; and enforcement of a U.S. judgment in Mexican courts.

Obtaining Personal Jurisdiction over Foreign Defendants. Before a court can decide a case, it must have jurisdiction over the parties. Federal law establishes the requirements for a court to obtain personal jurisdiction over foreign defendants in non-diversity actions in federal court. In diversity actions, and in actions brought in state court, state law governs. In all cases, three requirements must be met, which are analyzed similarly under both federal and state law: (1) actual notice to defendant and service of process; (2) the existence of "minimum contacts" between the defendant and the forum state; and (3) "amenability" of defendant to service.

The notice requirement is governed by two international treaties on service of process abroad, the Hague Service Convention and the Inter-American Service Convention, to which both the U.S. and Mexico are now parties. The Hague Service Convention establishes mandatory procedures for matters to which it applies, but also allows parties to agree to other means. Thus, the Inter-American Service Convention's provisions for service through letters rogatory would also be an acceptable mechanism in U.S.-Mexico cases. The "minimum contacts" requirement derives from the U.S. Constitution, and is satisfied where a defendant's contacts with the forum state are directly related to the cause of action or are less directly related, but "continuous and systematic"—either of which is generally present in environmental cases. Amenability to service means that the forum state has authorized the court to exercise its jurisdiction abroad, typically through the kind of long-arm statute that has been enacted in all four U.S. border states.

Obtaining Evidence Abroad. As noted above, international agreements, along with U.S. and Mexican domestic law, establish the legal requirements for gathering evidence abroad. When the person in Mexico from whom evidence is sought is also a defendant in the case, at least two additional issues arise: plaintiff's ability, under the Hague Evidence Convention and Mexican law, to seek production of documents in addition to testimony; and the possibility of using the U.S. court's power of compulsion to require production of documents or testimony.

In the former case, Mexican courts will act on pre-trial discovery requests for the production of documents if three tests are met: (1) the U.S. judicial proceeding has commenced; (2) the documents are "reasonably identifiable," and the request is based on a "reasonable belief" that the documents are known to or in possession of the defendant; and (3) there is a "direct relationship" between the evidence and the proceeding. Because discovery in Mexico is heavily controlled by the judge and generally takes place during the trial itself, it is possible that interpretation of these requirements will result in more restrictive discovery than takes place in the United States.

Given these limitations, a plaintiff may need to consider whether to invoke the U.S. court's power of compulsion over parties under its jurisdiction to require the production of documents or testimony, independently of the provisions of the Hague Evidence Convention. However, doing so could raise considerable issues of Mexican sovereignty, and could pose a practical problem if the plaintiff anticipates seeking enforcement of the U.S. judgment in Mexico.

Enforcement of U.S. Judgments in Mexican Courts. Because there is no international agreement on enforcement of judgments to which both the United States and Mexico are parties, Mexican law provides the sole legal backdrop for the recognition and enforcement of foreign civil judgments in Mexican courts. The substantive and procedural aspects are set forth in Mexico's Federal Code of Civil Procedures, as part of the 1988 amendments to the Code.

Substantively, the foreign judgment must meet several criteria: the foreign court must have had ju-

risdiction compatible with Mexican law; the defendant must have received personal service of process; the foreign judgment must be final and must not have been issued in an *in rem* action against real property; and there must not be parallel proceedings between the same parties in Mexico. Further, the Mexican court may refuse to enforce the judgment if it is determined to be contrary to Mexican public policy, or if it is determined that the country issuing the judgment itself does not enforce foreign judgments in similar cases.

Procedurally, the party seeking to enforce a U.S. judgment in Mexico must pursue the action in the jurisdiction in which the defendant is domiciled or, in the absence of such domicile, the jurisdiction in which the defendant's property is located. Under Mexican law, a foreign judgment will be enforced only if it complies with the formalities contained in the Mexican Code of Civil Procedure regarding letters rogatory. The request must be accompanied by an authenticated copy of the judgment, translations into Spanish, a designated domicile within the jurisdiction of the Mexican court in which the requesting party can receive notices, and an authenticated copy of proof that the defendant was served personally and that the judgment is final. The subsequent Mexican court proceeding opens with service of a summons on both the plaintiff and defendant, and the court may schedule a hearing to receive evidence.

PART THREE: ANALYSIS OF SELECTED LEGAL ISSUES—
ACTIVITY OR CONDUCT IN MEXICO/RESPONSIBLE PARTY IN THE UNITED STATES

This part discusses situations where conduct causing damage to public health or the environment occurs in Mexico, and the responsible party is in the United States. A typical example of this scenario is a *maquiladora* whose owners have left Mexico for the U.S. and have abandoned hazardous wastes or otherwise produced environmental damage in Mexico. Another example might be a functioning *maquiladora* that is owned or administered by a U.S. entity in a way that allows liability arising in Mexico to be assigned to that U.S. entity. This report explores legal issues that arise in establishing civil liability in such circumstances.

If a violation of environmental law or damage to the environment occurs in Mexico, then the first place to look for a legal solution would be the laws of the jurisdiction in which the damages occurs—that is, Mexico. This Part therefore begins with an overview of the opportunities and obstacles for bringing a private or governmental civil action in Mexico, including a summary of Mexican civil remedies and a review of U.S. law on enforcing a Mexican civil judgment in the United States. As the discussion in Section I suggests, U.S. legal doctrine leaves open the possibility for enforcing a Mexican monetary judgment in U.S. courts; however, Mexican law presents legal and practical limitations on obtaining such a judgment in an environmental case, particularly with respect to the enforcement of Mexican environmental statutes.

For this reason, and because environmental violations in Mexico may involve associated violations of U.S. law, this Part focuses on potential recourse by government agencies and private parties to the U.S. system of environmental enforcement. For example, a *maquiladora* or other Mexican business that illegally disposes of wastes in Mexico might also have failed to properly manifest or transport hazardous wastes in the U.S. Or, conduct in the border area that produces environmental damage in both the U.S. and Mexico may provide a basis for applying U.S. environmental laws. Following the description of Mexican civil remedies, the discussion turns to legal issues that would likely arise in two types of U.S. civil lawsuits—actions to enforce environmental statutes and tort actions to recover damages for injury to people or property.

In actions to enforce U.S. environmental laws and regulations, a central issue is whether the statutes may be applied extraterritorially. U.S. courts have created a "presumption against extraterritoriality." Section II discusses the legal, administrative and political factors to be considered in pursuing extraterritorial enforcement to address the problem of the U.S.-Mexico border as a shield to liability. This section also considers the legal framework for obtaining evidence in Mexico in cases involving transboundary enforcement of U.S. statutes. In this regard, U.S., Mexican and international law present constraints that must be anticipated in developing an enforcement case.

Section III, which addresses transboundary enforcement through private tort actions, focuses primarily on the issue of *forum non conveniens*. Although U.S. courts have been willing to dismiss cases in favor of a more convenient foreign forum, this section explores the considerations for finding U.S. courts a convenient forum in cases involving conduct across the border in Mexico. Section III also reviews issues of federal and state subject-matter jurisdiction in such cases—including use of the Alien Tort Claims Act and the local action rule—as well as the legal framework for making choice-of-law decisions.

Another issue that is likely to arise in U.S.-Mexico transboundary enforcement cases—the liability of U.S. parent corporations for conduct involving their subsidiary or related facilities in Mexico—is not discussed in this report. Many Mexican facilities in the border region participate in Mexico's *maquiladora* program. Through this program, Mexican corporations may receive up to 100 percent foreign investment in the capital and management of the corporation, and many *maquiladoras* in the Mexico border region are owned by U.S. parent companies.[18] It is a general prin-

[18] *See generally* GERALD MORALES ET AL., AN OVERVIEW OF THE MAQUILADORA PROGRAM (1994), *available at* http://www.dol.gov/dol/ilab/public/media/reports/nao/maquilad.htm (last visited May 1, 2002).

ciple of U.S. corporate law that a parent corporation—one that exercises control of another corporation through ownership of its stock—is not liable for the acts of its subsidiary.[19] In order to hold a parent corporation liable, a plaintiff must show that such liability is warranted under either a theory of direct liability or a theory of derivative liability, commonly referred to as "piercing the corporate veil."[20] Federal and state common law standards for piercing the veil differ somewhat, but in general the standards are considered hard to meet.[21] However, a preliminary conflict of law question may arise as to whether U.S. or Mexican law applies to the corporate veil-piercing issue.[22] Though not analyzed in this report, these issues present important questions for future research on strengthening transboundary environmental enforcement, particularly in light of the extent of U.S. corporate activity in the Mexico border region.

I. CIVIL ENVIRONMENTAL ENFORCEMENT IN MEXICO

This section begins with an overview of the civil legal remedies[23] available under Mexican law to enforce violations of Mexican environmental legislation and to recover damages for injury to person or property. Under the current legal framework in Mexico, environmental enforcement faces considerable legal obstacles when the defendant is located in the United States.

In addition to the limitations presented by Mexican law, a practical hurdle in cases where the defendant is in the United States is the likelihood that the defendant no longer has assets in Mexico. In such cases, a Mexican enforcement action would need to produce a judgment capable of being enforced in U.S. courts where the defendant is holding whatever assets it may have. Following the summary of Mexican legal remedies, this section discusses the U.S. legal doctrine governing the recognition and enforcement of foreign money judgments. As that discussion suggests, U.S. law does provide for enforcement of foreign money judgments in certain circumstances. An understanding of the types of judgments that might be enforced in U.S. courts can help guide enforcement decisions in Mexico. This may be even more important in the future, as Mexico considers reforms to the system of civil liability in environmental matters.[24]

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[19] *See* United States v. Bestfoods, et al., 524 U.S. 51, 55-56 (1998).

[20] In *Bestfoods*, the Court distinguished the situation in which a corporate parent may be derivatively liable based on its participation in and control of the operations of a subsidiary *generally*, from one in which the parent participates in and controls the subsidiary *facility* specifically on behalf of the parent. In the latter case, the parent corporation may be held directly liable, regardless of the nature of the parent-subsidiary relationship under state corporate law. 524 U.S. at 58 (citations omitted). *Bestfoods* involved a case under CERCLA, and the Court stated that direct liability as an "operator" under that Act would arise where parent companies "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 59. *See also* U.S. v. Dell'Aquilla, 150 F.3d 329, 334 (3d Cir. 1998) (applying the *Bestfoods* discussion of direct liability as an operator to a case involving the Clean Air Act, noting that both laws have a common purpose and nearly identical definitions of the term "operator").

[21] Piercing the corporate veil is viewed as an extreme remedy, one used sparingly by the courts since corporate status is not to be lightly disregarded. *See* Coryell v. Phipps, 128 F.2d 702, 704 (5th Cir. 1942), *aff'd*, 317 U.S. 406 (1943). *See also* Chapman v. Field, 602 P.2d 481, 483 (Ariz. 1979); Sonora Diamond Corp. v. Superior Court, 99 Cal. Rptr. 2d 824 (2000).

[22] Where a U.S. subsidiary was incorporated in Mexico and the facility in question operates in Mexico, there are strong arguments for applying Mexican law to determine whether to pierce the corporate veil. On the other hand, the U.S. will be the location of the parent's state of incorporation, and in some cases the location of the environmental damages addressed by the enforcement action. With respect to veil-piercing claims, the Restatement (Second) Conflict of Law appears to leave some room for interpretation as whether to apply the choice-of-law rules of the state of incorporation or of the state with the most significant relationship to the case. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 301, 302, 306 (1989). Some federal decisions interpreting the Restatement support the view that the choice-of-law analysis on this question does not necessarily point to the state of incorporation (Mexico, in this case). *See, e.g.,* First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621-22 (1983) (suggesting that to the extent issues of corporate identity involve the rights of third parties, the law of the state of incorporation need not be given conclusive effect); Chrysler Corp. v. Ford Motor Corp., 972 F. Supp. 1097, 1103 (E.D. Mich. 1997) (declining to use the veil-piercing law of the state of incorporation in a CERCLA action, and noting that the "state directly affected by the alleged corporate wrongdoing must be allowed to determine the extent to which the corporate veil may be pierced").

[23] As noted earlier, the term "civil" law in this report reflects its common usage in the U.S. This section focuses on opportunities for addressing environmental harm through non-criminal judicial actions in Mexico.

[24] In 2002, the Mexican legislature considered legislation introduced by the Mexican Green Party (*Partido Verde Ecologista de México*) to create a new civil liability scheme for environmental harms.

A. Mexican Civil Legal Remedies for Addressing Environmental Harm

Following is a summary of the opportunities for bringing two types of civil actions in Mexico to address environmental harms: an action to enforce the requirements of Mexican environmental legislation; and an action to recover for injuries to person or property. This section provides a general overview only, rather than a detailed description of all possible avenues for addressing environmental violations. More detailed analysis, while outside the scope of this report, is warranted given the potential limitations on civil actions noted below.

1. Statutory Enforcement Actions

As mentioned in Part I, the General Law of Ecological Equilibrium and Environmental Protection is Mexico's central federal environmental law, while the Federal District and the states have similar framework laws for environmental matters that fall within state and local jurisdiction. The LGEEPA provides administrative sanctions for violations of the law, including fines, facility closure, and other "safety measures."[25] The Secretariat of Environment and Natural Resources, through PROFEPA and other offices, is responsible for implementing and enforcing the law.[26] The LGEEPA does not provide for direct citizen enforcement of the law, though it does establish the "popular complaint" (*denuncia popular*) procedure, through which citizens may file complaints with the government concerning violations of the law.[27]

In contrast to the environmental law framework in the United States, in which environmental statutes establish administrative, civil and criminal enforcement mechanisms, the LGEEPA establishes administrative fines and provides for the referral of violations to the Federal Attorney General (*Procuraduría General de la República*) for criminal prosecution. The law does not establish a mechanism for obtaining statutory fines through a non-criminal court proceeding. In addition, Mexican law does not appear to make specific provision for taking an administrative action against a party who does not reside in Mexico. Criminal prosecution is possible in such cases, and the Federal Penal Code (*Código Penal Federal*) provides monetary penalties and terms of imprisonment for a variety of environmental crimes.[28] However, the need for extradition may pose a considerable obstacle to criminal enforcement because, even in the limited circumstances in which extradition might be warranted and successful, the process would be slow and would require the coordination and cooperation of many organizations in both countries, including the Department of State and the Mexican Secretariat of Foreign Relations. Thus, where a party commits a violation of the LGEEPA or its implementing regulations and leaves Mexico for the U.S. before an administrative action has been successfully undertaken, Mexican authorities may have limited practical recourse for pursuing the sanctions authorized under the statute.

Inability to recover cleanup costs is another obstacle to pursuing governmental enforcement under the LGEEPA against a defendant who subsequently moves to the United States. While the LGEEPA authorizes the Mexican government to order a violator to clean up contaminated property,[29] neither the LGEEPA nor other environmental legislation in Mexico authorizes the government to recover the cost of cleaning up the abandoned site if the violator fails to comply with a cleanup order. The monetary fines available under the LGEEPA may be insufficient to cover the government's costs of cleaning up such a site. In determining the amount of the fine, the government may consider factors such as the impact on public health and ecological systems.[30] However the maximum fine available is an amount equal to 20-50,000 times the current daily minimum salary

[25] L.G.E.E.P.A. arts. 171-175*bis*.

[26] L.G.E.E.P.A. arts. 171, 202; Organic Law of the Federal Public Administration, art. 32*bis*.

[27] The LGEEPA sets forth the requirements for filing a complaint and for the government to respond. L.G.E.E.P.A. arts. 189-204. *See generally* Greg M. Block, *One Step Away From Environmental Citizen Suits in Mexico*, 23 Envtl. L. Rep. 10347 (June 1993).

[28] *See, e.g.*, Federal Penal Code, Title 25.

[29] The December 31, 2001 reforms to the LGEEPA added a provision that could potentially improve the government's ability to ensure that such a cleanup is undertaken. LGEEPA article 147*bis* requires all parties carrying out highly risky activities to obtain environmental risk insurance. SEMARNAT is to create a National System of Environmental Risk Insurance for this purpose, and according to the transitory articles to the new legislation, the insurance is to be subject to regulations promulgated by SEMARNAT. *See* Decree of the Mexican Congress Reforming the General Law of Ecological Equilibrium and Environmental Protection, D.O., December 31, 2001.

[30] L.G.E.E.P.A. art. 173.

in the Federal District.[31] As of January, 2002, the minimum salary in the Federal District was 42.15 pesos—or about $4.25—per day.[32] Thus, the maximum fine available is the equivalent of roughly $212,000. For repeat violations, the amount of the fine can be up to two times the initial amount imposed, not to exceed double the maximum allowed.[33]

2. Civil Action for Damages

Mexico's Civil Code (*Código Civil Para el Distrito Federal en Materia Común y Para Toda la República en Materia Federal*)[34] establishes a basis for individuals to bring an action in court to recover for injuries to their person or property.[35] For example, those who cause harm to others as a result of acts that are either "illicit" or "against good custom" are responsible for reparation of the damage, either by restoring the situation to its previous state, or by making a payment of money.[36] The LGEEPA sets forth certain types of conduct that may give rise to liability, providing that those who damage or pollute the environment, natural resources or biodiversity are liable and obligated to repair the damages in conformity with applicable civil legislation.[37] The Civil Code also establishes a form of strict liability for damages caused by the use of a mechanism, instrument, or substance that is dangerous by virtue of its speed, explosive character, flammability, electrical current or other similar factors, even where no illicit act has occurred.[38] The Civil Code defines the types of injuries that may be compensated, including physical injuries to person or property, as well as non-physical ("moral") damages.[39]

Thus where an individual or corporation engages in environmentally harmful conduct in Mexico, a private party could pursue a civil lawsuit to recover damages for injuries contemplated under the Civil Code. In such cases, Mexican law addresses service of process on defendants living outside Mexico.[40] Nevertheless, civil lawsuits to recover damages have not been a common legal tool in Mexico, as they are in the U.S.[41] Legal commentators have emphasized the substantive and procedural difficulties in using the Mexican system of civil liability to address environmental damages, including the difficulty in establishing proof of causation and the absence of class action suits.[42]

Only those who have suffered damages themselves possess standing to sue for damages under Mexico's Civil Code.[43] Thus, civil lawsuits are generally viewed as addressing disputes between individuals. Nevertheless, the legal framework appears to leave open the possibility that the Mexican government could bring a civil lawsuit for environmental damages under the general liability provisions of the Civil Code where its own property or resources have been damaged. That is, while the gov-

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[31] L.G.E.E.P.A. art. 171. This maximum fine reflects an increase (from 20,000 times the daily salary) instituted pursuant to the 2001congressional reforms to the LGEEPA. *See* Decree of the Mexican Congress Reforming the General Law of Ecological Equilibrium and Environmental Protection, D.O., December 31, 2001.

[32] *See* Instituto Nacional de Estadística, Geografía e Informática (INEGI), Minimum Salary for the Federal District, *available at* http://df.inegi.gob.mx/coyuntura/espanol/sm.html (last visited June 17, 2002).

[33] L.G.E.E.P.A. art. 171.

[34] As its name suggests, this code is applicable to matters within the Federal District, and also constitutes federal law on federal subjects. *See* Fernando Alejandro Vazquez Pando, *New Trends in Mexican Private International Law*, 23 Int'l Law. 995 (1989).

[35] *See generally* Civil Code arts. 1910-1934. The Federal District and the states have corresponding codes. Whether the action is brought in federal court or in the Federal District or state courts depends on the source of the damage. Derecho Ambiental 245 (José Juan González Márquez, ed., Universidad Autónoma Mexicana 1994). According to the Mexican Constitution, federal courts have jurisdiction to hear civil or criminal matters that arise from obligations under federal laws; however, when those matters affect individual interests only, state courts are also empowered to hear the cases. *Id.* (citing art. 104 (I) of the Mexican Constitution). In addition to the Civil Code, the Federal Law of Responsibility for Nuclear Damages establishes civil liability for damages caused by activities involving nuclear materials.

[36] Civil Code arts. 1910, 1915. An exception exists when the damages are the result of the fault or inexcusable negligence of the victim. *Id.* at art 1910.

[37] L.G.E.E.P.A. art. 203. *See also* L.G.E.E.P.A. arts. 151 and 151*bis* (liability of those who handle and dispose of hazardous wastes).

[38] Civil Code art. 1913. An exception to liability is provided in cases of fault or inexcusable negligence on the part of the victim.

[39] *See* Civil Code art. 1916.

[40] Article 327 of the Mexican Federal Code of Civil Procedures (*Código Federal de Procedimientos Civiles*) provides that when the defendant resides outside of Mexico, the court is to increase the time for service of the summons. Other portions of this law provide for the use of international judicial requests in the service of process abroad. *See* Federal Code of Civil Procedures arts. 550-556.

[41] *See* Derecho Ambiental 244 (José Juan González Márquez, ed., Universidad Autónoma Mexicana 1994).

[42] *See, e.g.*, Raúl Brañes, Derecho Ambiental Mexicano 136-137 (Universo Veintiuno 1987); Greg M. Block, *One Step Away From Environmental Citizen Suits in Mexico*, 23 Envtl. L. Rep. 10347, 10348 (June 1993).

[43] *Id.*

ernment does not have authority to bring civil cases on behalf of others, it might be able to pursue a civil lawsuit for environmental damages to property or resources owned by the government itself. For example, if groundwater is contaminated or if soil contamination occurs on federal property, the federal government might be in a position to seek relief under the Civil Code.[44] While this type of lawsuit appears possible within the terms of existing law, it is unclear whether such a case has ever been brought by the Mexican government.

B. Recognition and Enforcement of Mexican Judgments in the U.S.

In considering the range of enforcement options available under Mexican law when the responsible party resides outside Mexico—and in considering any future reforms to the Mexican system of environmental liability—it is important to determine whether a money judgment obtained in Mexico is likely to be enforced in the United States. That is, it is fairly likely in the types of cases discussed here that the defendant will not have sufficient assets in Mexico to satisfy the judgment. Perhaps the defendant—whether a Mexican national or a U.S. citizen—has continuing business connections in Mexico that would cause him to acquire or exercise control over assets in Mexico. In many cases, though, including those involving abandoned Mexican plants, the defendant's assets in the U.S. or other foreign country will present the best hope for recovery.

The discussion below presumes that a civil monetary judgment has been obtained from a Mexican court and discusses the legal framework for bringing an action in the U.S. to enforce that judgment. The determination of whether a Mexican money judgment can be enforced in the U.S. is generally guided by the law of the state in which the enforcement action is brought. The Mexican judgment creditor will need to show that the Mexican court issuing the judgment had personal and subject-matter jurisdiction over the case. While courts have discretion to deny enforcement of foreign judgments that are deemed contrary to public policy, environmental judgments are not likely to run afoul of this rule given the scope of the environmental law regime—both common law and statutory—in the United States.

One issue that may arise in cases involving foreign governmental judgments is whether the judgment constitutes a fine or penalty, or whether it can be fairly characterized as remedial or compensatory. The Uniform Foreign Money-Judgments Recognition Act, discussed below, excludes fines or penalties from the terms of the Act, while the Restatement of Law suggests that courts have discretion to deny enforcement of such judgments. A U.S. court—whether or not the Uniform Act applies—will be more likely to enforce a civil monetary judgment obtained by the Mexican government if the judgment is compensatory, rather than punitive, in nature. Federal and state case law provides support for distinguishing between civil governmental judgments that are remedial from those that are punitive, and the Restatement of Law notes this distinction as well. Thus, as the discussion suggests, a Mexican civil money judgment that was clearly remedial in nature would have the best chance for enforcement in the United States.

Because this report focuses on civil enforcement actions, this section does not analyze in detail the possibility of enforcement of Mexican *administrative* monetary orders in U.S. courts. Federal case law governing enforcement of foreign country judgments involves primarily judgments of foreign courts. The Uniform Foreign Money-Judgments Recognition Act does not contain an explicit preclusion of administrative judgments, though the Act's prefatory notes speak of the judgments of foreign "courts."[45] The Restatement (Third) of Foreign Relations Law does, however, leave a door open to the possibility of enforcement of foreign administrative orders. The comments to Section 481 of the Restatement, which provides a rule for recognition and enforcement of foreign judgments, note that it is unclear whether the rule applies to judgments of foreign administrative tribunals, but that "no rule either requires or prevents recognition and enforcement of decisions of foreign tribunals that

[44] For a description of the broad realm of federal property and resources established by the Mexican Constitution and federal statutes, *see* Derecho Ambiental 38, 47-51 (José Juan González Márquez, ed., Universidad Autónoma Mexicana 1994). Further examination of the federal laws may be needed to answer the related question, which agency – and which office within the agency—is authorized to pursue such a lawsuit.

[45] *See* National Conference of Commissioners on Uniform State Laws, Uniform Foreign Money-Judgments Recognition Act, Prefatory Note, *available at* http://www.nccus1.org/nccus1/pubndrafts.asp (last visited June 12, 2002).

do not possess all the characteristics of courts."[46] Both the Restatement and case law on the subject suggest the possibility of enforcement of administrative judgments, depending on the subject of the administrative case and the procedures used.[47] Future research into this question may be warranted, given the potential limitations on legal remedies through Mexican courts.

1. Substantive Law Governing Enforcement of Foreign Money Judgments in the U.S.

Since the United States is not party to any treaties providing for recognition or enforcement[48] of judgments, no international authority is controlling on this issue. Therefore, U.S. courts must look to domestic laws to determine whether to recognize and enforce a foreign money judgment.

Based on the rule of *Erie Railroad Co. v. Tompkins*,[49] U.S. federal courts, in cases based on diversity, apply the substantive law of the forum state to the recognition of foreign judgments. The Restatement (Second), Conflict of Laws, notes that "the consensus. . . .is that, apart from federal question cases, such recognition is governed by State law and that the federal courts will apply the law of the State in which they sit."[50] Absent a significant question involving U.S.-Mexico foreign relations, the existence of a federal question is unlikely in a case seeking enforcement of a Mexican monetary judgment, and the substantive law of the forum state in which the enforcement action is brought will generally apply.[51]

The legal framework for determining whether to enforce a foreign judgment differs from state to state. This section reviews current state law in this area for the four U.S. border states. California, Texas and New Mexico are among approximately 32 states that have adopted the Uniform Foreign Money-Judgments Recognition Act,[52] which provides for enforcement of money judgments of a foreign nation.[53] The California, New Mexico, and Texas versions of the Act are virtually identical to each other and to the Uniform Act.[54] Therefore, enforcement of foreign judgments in these states will be discussed together. Arizona, which follows the Restatement of the Law in the area of enforcement of foreign judgments, is discussed separately.

a. California, Texas, New Mexico: Uniform Foreign Money-Judgments Recognition Act

The Uniform Act (and state laws adopting the Act) sets out two key criteria for determining whether the Act may be applied to enforce a foreign judgment: (1) whether the judgment is a "foreign judgment" and (2) whether the foreign judgment is "final and conclusive and enforceable where rendered." In addition, the Uniform Act provides discretionary bases for a court to refuse enforcement of a foreign judgment.

i. Judgments Subject to the Uniform Act

Whether the judgment is a "foreign judgment." The Uniform Act applies only to foreign judgments,

[46] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. f (1987).

[47] While there do not appear to be any reported attempts to enforce a foreign administrative judgment in an environmental matter, some decisions have recognized other types of administrative orders. *See, e.g.*, Regierungspraisident Land Nordrhein Westfalen v. Rosenthal, 232 N.Y.S.2d 963, 967 (1962) (recognizing decision of German administrative agency to revoke an award of restitution for victims of Nazism, and finding that the administrative order became binding and subject to execution after defendant failed to contest the order in court); Petition of Breau, 565 A.2d 1044, 1050 (N.H. 1989) (upholding the State Board of Education's reliance on the fact-finding of a Canadian administrative body in revoking a teaching license, and noting that "presumably. . . our domestic law accords preclusive effect to administrative judgments under the same conditions that apply to the judgments of a court. . . .").

[48] A foreign judgment is recognized when it is given the same effect as in the state where it was rendered with respect to the parties, the subject matter of the action, and the issues involved. A foreign judgment is enforced when, in addition to being recognized, a party is given the affirmative relief to which the judgment entitles him. Recognition of a judgment is a condition precedent to its enforcement. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Chapter 5, Topic 2, introductory cmt. (1989).

[49] 304 U.S. 64 (1938).

[50] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (1989).

[51] *See id. See also* Choi v. Kim, 50 F.3d 244, 248 (3d Cir. 1995); South Carolina Nat. Bank v. Westpac Banking Corp., 678 F. Supp. 596 (D. S.C. 1987); Svenska Handelsbanken v. Carlson, 258 F. Supp. 448 (D. Mass. 1966).

[52] Unif. Foreign Money-Judgments Recognition Act, 13 U.L.A. 261 *et seq.* (1986).

[53] UNIFORM LAW COMMISSIONERS, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, A FEW FACTS ABOUT THE...UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT, *available at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ufmjra.asp (last visited May 17, 2002).

[54] *See* N.M. STAT. ANN. § 39-4B-1 *et seq.* (2001); CAL. CIV. PROC. CODE § 1713.1 *et seq.* (2000); TEX. CIV. PRAC. & REM. CODE ANN. § 36.001 *et seq.* (2001).

defined as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters."[55] Since fines and other penalties are not covered in the definition of foreign judgments, a key question in cases involving a Mexican governmental judgment is whether the judgment is a "fine or other penalty." This question is addressed in some detail below. If the judgment is not considered a fine or penalty, the judgment will be enforced provided the other conditions of the Act are satisfied. If the judgment is determined to be a fine or penalty under the meaning of the Uniform Act, then the judgment will not be enforced under the Act.

Whether the foreign judgment is "final and conclusive and enforceable where rendered." Assuming that the judgment to be enforced is considered a "foreign judgment" within the meaning of the Uniform Act, the next requirement is that the foreign judgment is "final and conclusive and enforceable where rendered." A foreign judgment may be enforced under the Uniform Act even though the judgment is on appeal or is subject to appeal. The U.S. court may stay the enforcement proceeding where the defendant demonstrates that he intends to appeal or that an appeal is pending.[56]

The Act provides that a foreign judgment is conclusive between the parties to the case to the extent that it "grants or denies recovery of a sum of money." The Act further provides[57] that a foreign judgment is *not* conclusive if any of the following three circumstances exist:

- The judgment was rendered under a system that does not provide impartial tribunals or proce dures compatible with due process of law;[58]
- The foreign court did not have personal jurisdiction over the defendant; or
- The foreign court did not have jurisdiction over the subject matter.

The Uniform Act elaborates on the requirement of personal jurisdiction by setting forth six possible bases for establishing jurisdiction over the defendant. However, this list is not exclusive, as the Act provides that courts may recognize other bases of personal jurisdiction. The six enumerated bases are as follows:

- Defendant was served personally in the foreign country;
- Defendant voluntarily appeared in the proceedings;
- Defendant agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
- Defendant was domiciled in the foreign country when the proceedings in the foreign court were instituted, or, if the defendant is a corporate body, had its principal place of business, was incorporated, or had otherwise acquired corporate status in the foreign country;
- Defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; and
- Defendant operated a motor vehicle or airplane in the foreign state and the proceedings arose out of such operation.[59]

With respect to Mexican environmental enforcement cases, the second and fifth bases cited in the Act—defendant's voluntary appearance or proceedings arising out of business carried out by the defendant in its business office in the foreign country—are the most likely to apply.

It is important to note that the Uniform Act does not preclude enforcement of a foreign judgment that falls outside the scope of the Act. California, Texas and New Mexico have adopted the provision stating that the Uniform Act "does not prevent the recogni-

[55] *See* CAL. CIV. PROC. CODE § 1713.1 (2000); N.M. STAT. ANN. § 39-4B-2 (2001); TEX. CIV. PRAC. & REM. CODE ANN. § 36.001 (2001).

[56] *See* CAL. CIV. PROC. CODE § 1713.6 (2000); N.M. STAT. ANN. § 39-4B-7 (2001); TEX. CIV. PRAC. & REM. CODE ANN. § 36.007 (2001).

[57] *See* CAL. CIV. PROC. CODE § 1713.4 (2000); N.M. STAT. ANN. § 39-4B-5 (2001); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005 (2001).

[58] While not addressing the issue directly, a recent U.S. case dealing with enforcement of Mexican judgments has implicitly recognized that, as a general matter, the Mexican legal system provides procedures compatible with the requirements of due process of law. *See* Southwest Livestock and Trucking v. Ramon, 169 F.3d 317 (5th Cir. 1999). In addition, a number of courts have dismissed U.S.-Mexico cases on the grounds of *forum non conveniens*, thereby finding that Mexico provides an "adequate" alternate forum to hear the case. *See, e.g.*, Mizokami Bros. of Arizona v. Mobay Chemical Corp, 660 F.2d 712 (8th Cir. 1981); Rodriquez Diaz v. Mexicana de Avion, SA., 1987 U.S. Dist. LEXIS 13399 (W.D. Tex. Jan. 23, 1987); Alma Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 144 (E.D.Tex. 1992).

[59] *See* CAL. CIV. PROC. CODE § 1713.5 (2000); N.M. STAT. ANN. § 39-4B-6 (2001); TEX. CIV. PRAC. & REM. CODE ANN. § 36.006 (2001).

tion of a foreign country judgment in a situation not covered by" the Act.[60]

ii. Discretionary factors for denying enforcement under the Uniform Act

According to the Uniform Act, even if a judgment falls within the scope of the Act, a court is not required to enforce a foreign judgment in certain specified circumstances where the validity of the underlying judgment is in question. The Act lists six such circumstances. If the court finds that any of these six enumerated circumstances exist, the court may—but is not required to—refuse to enforce the foreign judgment. Cases should be evaluated to ensure that these six factors are not at issue:

- Inadequate Notice: The defendant did not receive notice of the foreign proceedings in sufficient time to enable him to defend;
- Fraud: There is evidence that the judgment was obtained by fraud;[61]
- Judgment Against Public Policy: The claim on which the judgment is based is repugnant to the public policy of the state;[62]
- Conflicting Judgments: The judgment conflicts with another final and conclusive judgment;
- Inconsistent Proceeding: The proceeding in the foreign court was contrary to a prior agreement between the parties under which the dispute in question was to be settled through other means; and
- Inconvenient Forum: In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.[63]

Texas' version of the Act adds a seventh basis for non-recognition: lack of reciprocity. In Texas, a foreign judgment need not be recognized "if it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in [Texas] that, but for the fact that they are rendered in [Texas], conform to the definition of 'foreign country judgment.'"[64] New Mexico and California do not include such a basis in their versions of the Uniform Act.[65]

iii. Applying the Uniform Act to environmental judgments: The case of fines and penalties

As noted above, judgments that constitute fines or penalties fall outside the scope of the Uniform Act. Where the foreign judgment was issued in favor of a governmental agency in an environmental enforcement case, a threshold question may be whether the judgment is considered a fine or penalty. While federal and state courts have addressed the subject of enforcement of fines and penalties, a Mexican money judgment for environmental damages would present a case of first impression.

Cases interpreting "fine or penalty" in the enforcement of foreign judgments. In the 1892 case *Huntington v. Attril*,[66] the Supreme Court discussed the notion of "penalties" in the context of enforceability of foreign judgments. In that case, the Court's central inquiry in determining whether the judgment of one state should be given full faith

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[60]*See* TEX. CIV. PRAC. & REM. CODE ANN. § 36.008 (2001); CAL. CIV. PROC. CODE § 1713.7 (2000); N.M. STAT. ANN. § 39-4B-8 (2001).

[61]The type of fraud referred to here is fraud which has prevented a party from having a full and fair opportunity to present his or her case. *See* Mackay v. McAlexander, 268 F.2d 35 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960).

[62]In order to violate domestic public policy so as to warrant refusing to give deference to a foreign judgment, the foreign judgment must not merely affirmatively act on matters as to which domestic law is silent, but must contravene crucial, stated public policy that affects the fundamental interest of the forum. Overseas Inns S.A. P.A. v. U.S., 685 F. Supp. 968 (N.D. Tex. 1988), *aff'd*, 911 F.2d 1146 (5th Cir. 1990).

In Texas, a judgment may be challenged on the basis that "the cause of action [on] which the judgment is based is repugnant to the public policy of this state, not the judgment itself." Norkan Lodge Co. Ltd. v. Gillum, 587 F. Supp. 1457, 1461 (N.D. Tex. 1984). For instance, a judgment ordering interest on a defaulted loan to be paid at a rate of 48% was held not to violate public policy in Texas, even though the Texas Constitution places a 6% interest rate cap on such contracts that do not contain a stated interest rate. Presented with these facts, the court reasoned that, although the judgment itself may be contrary to public policy, the cause of action on which the judgment was based, an action for collection of a promissory note, was not contrary to public policy. Southwest Livestock & Trucking Co. v. Ramon, 169 F.3d 317 (5th Cir. 1999).

[63]*See* CAL. CIV. PROC. CODE § 1713.4 (2000); N.M. STAT. ANN. § 39-4B-5 (2001); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005 (2001).

[64]TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (2001).

[65]As noted in Part Four, the Mexican Federal Code of Civil Procedures gives Mexican courts discretion to refuse to enforce a foreign judgment if it is demonstrated that the country in which the judgment was issued does not enforce foreign country judgments in similar cases. C.F.P.C. art. 571.

[66] 146 U.S. 657 (enforcement in Maryland of a judgment rendered by a New York court under a state statute making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all of its debts).

and credit by the courts of another state was whether the judgment is penal. The Court acknowledged "...the fundamental maxim of international law, stated by Chief Justice Marshall in the fewest possible words: 'The courts of no country execute the penal laws of another.'"[67] The Supreme Court concluded that whether a statute is penal "depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."[68] The Court noted that the test is whether the statute is: "in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person."[69]

The *Huntington* test for determining whether a foreign judgment is penal—that it punishes an offense against public justice rather than affords a private remedy—has not been the subject of extensive case law. In one case, a federal district court concluded that a Belgian money judgment was remedial rather than penal even though the Belgian court had entered the civil remedy along with other criminal penalties.[70] Similarly, a Massachusetts court's decision to enforce a Canadian court's award of costs to a Canadian law firm turned on whether the purpose of the underlying law "is remedial in nature affording a private remedy to an injured person, or penal in nature, punishing an offense against the public justice."[71]

Although subsequent cases have affirmed the principles set forth in *Huntington*, they have not addressed how those principles would apply to the context at hand —the recognition of a money judgment obtained by a foreign *government*. Moreover, while some cases have discussed the enforcement of foreign government money judgments, those decisions do not involve enforcement of a judgment in an environmental case.[72]

In light of *Huntington* and its progeny, a plaintiff would need to make two related arguments in order to show that a judgment obtained by the Mexican government in a civil environmental enforcement case is not "penal" and is therefore subject to recognition in the U.S. First, the judgment should not be considered penal simply because it was obtained by a government. Second, the judgment, and the statute underlying the judgment, are remedial in purpose and nature. In making these arguments, it is instructive to consider federal and state decisions that analyze the circumstances under which a judgment in favor of a government is considered penal. Courts have had occasion to undertake this analysis in two contexts that are distinct from, yet related to, the present: the application of full faith and credit to state judgments, and review of U.S. government enforcement decisions.

Cases interpreting "penal" for purposes of applying full faith and credit to U.S. sister state judgments. The question of applying full faith and credit to sister state judgments is relevant to transboundary enforcement, because the same considerations regarding "penal" judgments apply to U.S. sister state judgments. A number of cases provide support for the proposition that judgments obtained by a state governmental entity are not necessarily considered "penal" and may be enforced by another state.

For example, in *Connolly v. Bell*[73] a New York court decided to enforce a New Jersey monetary judgment that reflected defendants' profit from a fraudulent transaction with the state government. In determining that the New Jersey judgment was not penal, the court stressed that "the basic cause of action rested on the common law of tort, and not on a claim created by statute as a method of enforcing a state's governmental interests" and that

[67] *Id.* at 666 (citing The Antelope, 23 U.S. (10 Wheat) 66, 123 (1825)).
[68] *Id.* at 673-74 (emphasis added).
[69] *Id.* at 683.
[70] Chase Manhattan Bank, N.S., v. Herbert S. Hoffman et al., 665 F. Supp. 73 (D. Mass. 1987) (involving charges of criminal bankruptcy, ordinary bankruptcy and accounting irregularities). The court found that: ". . . the judgment was remedial: it afforded a private remedy rather than punished an offense against the public justice of Belgium." *Id.* at 76. *See also* Bullen v. United Kingdom, 553 So. 2d 1344 (Fla. 1989) (enforcing a U.K. judgment for the fraudulent evasion of value added tax punishable by fines and imprisonment, even though the order had been entered incident to criminal conviction).
[71] Desjardins Ducharme v. Francis O. Hunnewell, 411 Mass. 711, 713-714 (1992) (finding the award of costs to be remedial, rather than penal, although the award was based on a percentage of the amount in issue not directly related to actual costs incurred by the firm).
[72] Some cases have addressed other types of governmental judgments, particularly the collection of taxes. *See, e.g.*, Her Majesty the Queen in Right of Province of British Columbia v. Gilbertson, 597 F.2d 1161, 1165 (9th Cir. 1979) (denying enforcement of a Canadian governmental judgment against Oregon citizens for nonpayment of taxes and applying the "revenue rule," which provides that the courts of one jurisdiction do not recognize the revenue laws of another jurisdiction); Bullen v. United Kingdom, 553 So. 2d 1344 (Fla. 1989) (enforcing a U.K. judgment for the fraudulent evasion of value added tax punishable by fines and imprisonment, even though the order had been entered incident to criminal conviction).
[73] 286 A.D. 220 (1955).

"the damages awarded were given as the best available remedy to help make the plaintiffs whole, and were not intended solely as smart money to avoid future offenses or vindicate public justice."[74] The court stated that the damages "were compensatory in a broad sense."[75] Regarding the fact that the state itself brought the action, the court stated that

> we must keep in mind that here the State was in effect a private suitor seeking a private remedy to vindicate its proprietary interests. The mere fact that a sovereign State was the litigant is not controlling. In effect, it has received an award of damages found to approximate the gains of one who had deprived the state of its property rights. Such a recovery is not to be refused full faith and credit on the theory that the judgment was penal.[76]

Cases interpreting "penal" in the context of government enforcement actions. In light of the enormous growth of enforcement actions taken by administrative agencies, the courts have been called on to consider whether these actions are remedial or penal in nature, in order to determine the extent of defendants' rights provided by criminal or civil processes. The leading environmental law case that addresses the nature of civil monetary sanctions, *United States v. Ward*,[77] discusses directly the distinction between a "remedial" and a "penal" judgment. The Supreme Court noted that Congress's use of the term "civil penalty" suggested that it had meant to create a civil rather than criminal sanction.[78] The Court then considered "whether Congress, despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to '[transform] what was clearly intended as a civil remedy into a criminal penalty'" and found that the intention was civil rather than penal."[79]

The reasoning in Ward was reaffirmed in *United States v. Hudson*.[80] The *Hudson* Court cited several factors to consider in determining whether a judgment is penal, and stated that "these factors must be considered in relation to the statute on its face," and "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.[81]

Other decisions in government enforcement cases have addressed the remedial versus penal distinction when interpreting various statutory schemes. In *U.S. v. Telluride Co.*,[82] which involved interpretation of the Clean Water Act's statute of limitations in an enforcement action for injunctive relief and civil penalties, the Tenth Circuit refused to define the term "penalty" as all "wrongs to the public."[83] Rather, the court stated:

> Our focus in defining a penalty. . . is whether the sanction seeks compensation unrelated to, or in excess of, the damages caused by the defendant, rather than restricting the term by the type of injury, public or private. The injury to the public resources in this case does not alter the remedial nature of the injunction in restoring the damaged wetlands, or in other words, making the injured party whole.[84]

Finally, a recent Canadian decision illustrates the reasoning that might apply in a case seeking enforcement of an environmental judgment obtained by a foreign government entity. In *United States of America v. Ivey et al.*,[85] the Ontario Court of Justice recognized and enforced the judgment

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[74] *Id.* at 229.

[75] *Id.*

[76] *Id.* at 230. *See also* Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935) (finding that the obligation to pay taxes is not penal but is an enforceable statutory liability that is quasi-contractual in nature); Philadelphia v. Austin, 429 A.2d 562, 571 (1981) (giving full faith and credit to a Pennsylvania civil court judgment imposing a fine for failure to file tax returns, concluding that "the purpose of the $300 penalty is not to punish, but to grant a civil remedy to the City in its role as tax collector").

[77] 448 U.S. 242 (1980)(involving Clean Water Act "civil penalty" imposed for discharge of oil into navigable waters).

[78] *Id.* at 249.

[79] *Id.* at 249 (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

[80] 522 U.S. 93 (1997).

[81] *Id.* at 100 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963) and *Ward*, 448 U.S. at 249). The factors include: whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of *scienter*; whether its operation will promote the traditional aims of punishment - retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned.

[82] 146 F.3d 1241 (10th Cir. 1998).

[83] *Id.*

[84] *Id.* at 1246. The *Telluride* court did, however, distinguish the case from *Huntington,* which involved concerns of state sovereignty and comity. *Id. See also* Johnson v. SEC, 87 F.3d 484, 488 (D.C. Cir. 1996) (concluding that a "penalty" is a form of punishment imposed by the government that "goes beyond remedying the damage caused to the harmed parties by the defendant's action").

[85] [1995] 130 D.L.R. (4th) 674, *aff'd*, [1996] 139 D.L.R. (4th) 570.

of a U.S. court in a CERCLA (Comprehensive Environmental Response, Compensation and Liability Act) action against a Canadian defendant, where the judgment reflected the U.S. government's unrecovered costs in cleaning up a Superfund site. The court found that the recovery under CERCLA could not be classified as penal in nature because "[t]he measure of recovery was directly tied to the cost of the required environmental cleanup."[86] The *Ivey* court noted that CERCLA represents

> the judgment of Congress as to an appropriate regime of civil liability for environmentally hazardous substances in certain circumstances. The defendants chose to engage in the waste disposal business in the United States and the judgments at issue here go no further than holding them to account for the cost of remedying the harm their activity caused. [87]

Therefore, the United States, in asking for comity, was not asserting its sovereignty within Ontario.[88] The *Ivey* court noted that "[e]nvironmental law is but one of many areas where the traditional remedies of the common law have effectively been supplanted by detailed statutory and regulatory regimes" so it is undesirable to interpret and expand the public law defense.[89]

Thus, the notion of what is "penal" has evolved considerably since the Supreme Court decided *Huntington v. Attril*, particularly in reaction to the growth of an extensive civil and administrative jurisprudence in the United States. Now, a civil environmental judgment in favor of a governmental agency where the government is not seeking compensation in excess of damages and where the government demonstrates evident remedial intent, could well be considered remedial rather than penal. Moreover, as noted earlier, the Act does not preclude enforcement of foreign judgments that fall outside the scope of the Act. Thus, even if a U.S. court considered the foreign judgment to be a fine or penalty, an argument could be made that the court should still enforce the judgment. Federal and state case law provide support for doing so where the judgment is clearly compensatory in nature. The Restatement of Law in the area of enforcement of judgments also provides some support for this argument.

b. Arizona: Restatement of the Law

Arizona courts use the Restatement of the Law in guiding their determination of when to recognize foreign judgments. In *Rotary Club of Tuscon v. Chaprales Ramos de Pena*,[90] the court considered Section 98 ("Recognition of Foreign Nation Judgments") of the Restatement (Second) of Conflict of Laws (1971).[91] That section provides: "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned." According to the comments to Section 98, a foreign judgment should not be recognized unless the U.S. court finds that the foreign court had jurisdiction and:

> there has been an opportunity for a full and fair trial[92] abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment . . . .[93]

Thus many of the factors enumerated in the Uniform Act are also contained within the scope of the Restatement. In addition, Arizona state law provides that a foreign country judgment may be enforced only if the judgment is capable of being enforced in the foreign country under that country's laws.[94]

While the *Rotary Club* decision considered only the Restatement (Second) Conflicts of Law, the

[86] *Id.* at 684.
[87] *Id.* at 689.
[88] *Id.* at 689-690.
[89] *Id.* at 689.

[90] 773 P.2d 467, 469 (Ariz. App. 1989).
[91] In *Rotary Club of Tucson*, decided in 1989, the court applied the 1971 Restatement.
[92] An Arizona court has ruled that a Mexican trial was not "full and fair" where improper service was rendered. Rotary Club, 773 P.2d at 470. In that case, service was made on defendant's attorney who, in the opinion of the Arizona court, was not an authorized agent of defendant, either express or implied. *Id.*
[93] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (1989) (quoting Hilton v. Guyot, 159 U.S. 113, 202 (1895)).
[94] ARIZ. REV. STAT. § 12-549 (2000).

court noted that "courts in Arizona follow the Restatement of Law in the absence of contrary authority."[95] Thus, a recent Ninth Circuit decision applying Arizona law in a case seeking to enforce a British judgment analyzed both the Restatement (Second) Conflicts of Law and the Restatement (Third) of Foreign Relations.[96] According to the Restatement of Foreign Relations, a court is not required to recognize a foreign country judgment that is "repugnant to the public policy of the United States or of the State where recognition is sought.[97] The Ninth Circuit found that this exception is to be interpreted narrowly, and upheld the foreign court's award of attorneys' fees.[98]

Both Restatements address the question whether the judgment being enforced is a fine or penalty. Section 89 of the Restatement (Second) Conflict of Laws relates to the enforcement of a foreign judgment on a penal cause of action and provides: "No action will be entertained on a foreign penal cause of action." However, the Restatement states that this rule is narrow, applying "only to actions brought for the purpose of punishing the defendant for a wrong done by him" and not applying "to actions brought by a private person *or public* body to recover compensation for a loss."[99] Furthermore, Section 120 establishes the following: "A valid judgment rendered on a non-penal governmental claim in a State of the United States will be recognized and enforced in a sister State."[100]

The Restatement (Third) of Foreign Relations Law also addresses the issue: "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines or penalties rendered by the courts of other states."[101] While the comments to this section suggest that government actions to impose fines or penalties for violations of its regulations fall within the provision, the definition of penal judgment makes a distinction between compensatory and punitive judgments: "A penal judgment, for purposes of this section, is a judgment in favor of a foreign state. . .and primarily punitive rather than compensatory in character."[102] Thus, the determination of whether a fine or penalty should be enforced under this Restatement provision is similar to the question posed by the Uniform Recognition of Foreign Money-Judgments Act. It is important to note, though, that non-recognition of fines and penalties is not mandatory under the Restatement.

2. Procedures for Filing to Enforce a Judgment

No single procedure exists in the United States for the registration of foreign judgments. According to the Restatement (Third) of Foreign Relations Law, a civil action must be filed in order to enforce a debt arising out of a foreign judgment, and such an action may generally be brought in the jurisdiction where the defendant debtor's property is located.[103] The Uniform Enforcement of Foreign Money Judgments Act does not specify a uniform procedure for enforcing a foreign country judgment, but provides that a judgment entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state which is entitled to full faith and credit.

California. In California, under the adopted Uniform Act, a foreign judgment is enforceable in the same manner as a judgment of a sister state, which is entitled to full faith and credit. However, California specifically provides that foreign judgments are *not* enforced pursuant to the special procedural provisions allowed for enforcement of sister-state judgments.[104] A foreign plaintiff must initiate a civil action for recognition and enforcement of the judgment.[105]

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[95]773 P.2d at 469 n.2.

[96]In Re Hashim, 213 F.3d 1169 (9th Cir. 2000).

[97] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) (1987).

[98]213 F.3d at 1172. In addition to the public policy exception discussed in *Hashim*, the Restatement (Third) of Foreign Relations Law lists several grounds for non-recognition of foreign judgments. These grounds nearly parallel those contained in the Uniform Recognition of Foreign Money-Judgments Act, discussed above. The exemptions address whether the foreign state: possesses impartial tribunals and procedures comporting with due process; established personal jurisdiction and subject-matter jurisdiction in the action; provided defendant with notice; obtained the judgment by fraud; or entered a judgment that conflicts with another judgment or that is contrary to an existing agreement. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987).

[99]RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89, cmt. a (1989)(emphasis added).

[100]The Restatement (Second) of Conflict of Laws § 98 (comment b) suggests that sister state and foreign country judgments are generally treated the same.

[101]RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1987).

[102]RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 cmt. b (1987).

[103]RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481cmt. g, h (1987).

[104]CAL. CIV. PROC. CODE § 1713.3 (2000).

[105]*See generally* CAL. CIV. PROC. CODE § 680.010, *et seq.* (2000). In general, a judgment must be enforced within ten years of its issuance. CAL. CIV. PROC. CODE § 683.020 (2000).

Arizona. In Arizona, there are no special statutory provisions governing procedures for enforcing a Mexican court judgment, except the requirements that the action be filed within four years of the judgment.[106] Thus, a foreign plaintiff must file a civil action to recognize and enforce the judgment.[107]

Texas. Texas' version of the Uniform Act includes procedures for filing foreign country judgments that are not contained in the Uniform Act. To file a foreign country judgment in a Texas court, the judgment creditor must file an authenticated copy of the foreign judgment with the clerk of the court in the county in which the judgment debtor resides, or in any other court as allowed under Texas venue laws.[108] The judgment creditor must also file with the clerk an affidavit stating the name and last known address of both the judgment creditor and the judgment debtor.[109] The clerk then mails notice of the filing to the judgment debtor at the address provided.[110] Texas' version of the Uniform Act also provides procedures for contesting recognition. After receiving notice, the judgment debtor may contest recognition of the foreign judgment by the Texas court by filing with the court a motion for non-recognition. Such a motion must be filed within 30 days of receipt of notice if the judgment debtor resides in the U.S., or within sixty days of receipt of notice if the debtor resides abroad.[111] Once a foreign country judgment has been "filed with notice given as provided by this chapter," it is enforceable in the same manner as a sister state judgment, provided it meets the requirements of the Act and is not refused recognition by the court.[112]

New Mexico. New Mexico has included the Uniform Act's "short cut" provision for enforcing a foreign country judgment. A foreign country judgment that meets the recognition criteria included in the statute "is enforceable in the same manner as the judgment of a sister state that is entitled to full faith and credit."[113] To file a foreign (sister state) judgment in New Mexico, a judgment creditor must present an authenticated copy of the foreign judgment to the clerk's office of the district court of any county in which the judgment debtor resides or has property or property rights that could be used to satisfy the judgment.[114] A judgment filed in this manner "shall have the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, staying, enforcing or satisfying as a judgment of the district court of this state and may be enforced or satisfied in like manner. . . ."[115] The judgment creditor must also concurrently file with the court clerk an affidavit stating the name and last known address of both the judgment debtor and judgment creditor.[116] Upon receipt of this information, the court clerk must mail notice of the filing to the judgment debtor at the address provided.[117] The law provides an opportunity for staying execution of the judgment: "If the judgment debtor shows the district court sufficient grounds upon which enforcement of a judgment of any district court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction that is required in this state."[118]

3. Summary and Observations

A court judgment for damages obtained by an individual under Mexico's Civil Code would fit generally within the U.S. framework for enforcement of foreign country judgments. Such a judgment obtained by the Mexican *government* would likely be challenged by the debtor on the grounds that a governmental judgment should not be recognized and enforced by a U.S. court.

However, case law suggests that the mere fact of a foreign governmental judgment does not preclude enforcement. In a number of cases, courts have been willing to treat a government plaintiff much like a private party seeking a remedy for damage to its proprietary interests. A U.S. court—whether or not the Uniform Act applies—will be more likely to enforce a government money judgment if it finds that the judgment is compensatory in nature, and more likely to deny enforcement if

[106] ARIZ. REV. STAT. § 12-544(3) (2000).

[107] This would take the form of a common law action on the judgment or an action for debt and must be filed within four years of the date the foreign judgment was entered. James O. Ehinger, *Enforcement of Foreign Country Judgments in Arizona*, ARIZ. ATT'Y (March 1997).

[108] TEX. CIV. PRAC. & REM. CODE ANN. § 36.0041 (2001).

[109] TEX. CIV. PRAC. & REM. CODE ANN. § 36.0042 (2001).

[110] *Id.*

[111] TEX. CIV. PRAC. & REM. CODE ANN. § 36.0044 (2001).

[112] TEX. CIV. PRAC. & REM. CODE ANN. § 36.004 (2001).

[113] N.M. STAT. ANN. § 39-4B-4 (2001).

[114] N.M. STAT. ANN. § 39-4A-3 (2001).

[115] *Id.*

[116] N.M. STAT. ANN. § 39-4A-4(A) (2001).

[117] N.M. STAT. ANN. § 39-4A-4(B) (2001).

[118] N.M. STAT. ANN. § 39-4A-5 (2001).

the judgment appears punitive. The Mexican Civil Code emphasizes *restoration* of damages. Thus, the type of civil monetary judgment for environmental damages that is potentially available to Mexican government agencies under existing law—a "private" suit under the Civil Code—would likely fit within the U.S. legal framework for enforcement of foreign judgments.

To the extent that future changes in Mexican laws expand the authority of Mexican officials to obtain a court judgment for non-criminal monetary sanctions established in the LGEEPA or other environmental laws, such a judgment would be challenged on the grounds that it is a penalty. Yet this barrier is not insurmountable. U.S. courts have looked beyond labels such as "civil penalty" to determine that such judgments are not truly punitive in nature. Enforcement in the U.S. would thus depend heavily on whether the Mexican judgment was deemed remedial or compensatory—rather than punitive—in character. This determination would turn on a number of factors, though a court may be more inclined to enforce a civil penalty judgment where the amount of the penalty reflects the costs of remediating the environmental damage. The same considerations would hold true for administrative orders, if a U.S. court determined that it could enforce an order issued by such a body.

This argument for characterizing a Mexican fine or penalty as remedial rather than punitive might be applied to Mexican criminal law judgments as well. This is important because at present, Mexican criminal environmental law seems to provide more expansive enforcement tools for the government than non-criminal law. While a monetary judgment arising out of Mexico's criminal laws would clearly face considerable obstacles to enforcement in the U.S., some federal and state courts have enforced foreign money judgments that were issued incident to criminal proceedings. In such cases, the focus is on the nature of the claim and the judgment rather than the category of court that renders the judgment. For example, if a Mexican criminal court fashioned a money judgment that was based directly on the costs of repairing the damage caused by the defendant's actions, the judgment would look similar to the kind of civil compensatory judgment that could be recognized by a U.S. court. That Mexican environmental laws can only be enforced in court through the criminal process might provide additional support for viewing such a criminal monetary judgment, or at least the part of the judgment that reflects remedial or compensatory damages, as the kind of judgment that should be recognized by a U.S. court.

Ultimately, the decision whether or not to recognize a Mexican judgment will probably turn on the particular circumstances and nature of the judgment in question. Where the defendant appears to be using the border as a shield to avoid a clear obligation, a court might well have added incentive to provide comity.

II U.S. ENFORCEMENT ACTION: CIVIL SUIT TO ENFORCE ENVIRONMENTAL LAWS AND REGULATIONS

Given the potential limitations on Mexican enforcement in the transboundary context, it is important to consider the role of federal or state civil enforcement in the U.S. in cases where the conduct causing the damage occurred primarily in Mexico.[119] Such a case might involve, for example, improper management of wastes by a Mexican *maquiladora* that is owned by a U.S. company. Or, it might involve illegal transport of hazardous wastes to Mexico, where those wastes are subsequently disposed of improperly.

This section examines a key legal issue that affects U.S. enforcement efforts in such cases: whether U.S. laws may be applied extraterritorially to address conduct that occurred in Mexico. Although current legal doctrine provides little direct support for extraterritorial environmental enforcement, the question is largely one of statutory interpretation. While a review of all environmental statutes for potential extraterritorial applications is beyond the scope of the report, this section concludes with a description of the way in which one federal environmental law—the Comprehensive Environmental Response, Compensation and Liability Act—has been used in limited fashion to address conduct in Mexico with environmental consequences in the U.S. Because of Mexico's geographic proximity to the U.S., there may be certain situations

[119]Many federal and state environmental laws provide for citizen enforcement. While this section does not address citizen suits specifically, some of the obstacles facing the "private attorney general" in the transboundary context are noted here – for example, the need for cooperation with Mexican enforcement officials and the potential for courts to interpret statutory citizen suit provisions as applying only domestically.

in which specific provisions of CERCLA or other environmental laws could be applied to address significant environmental impacts in the U.S. caused by conduct in Mexico, as well as conduct in the U.S. that results in environmental impacts in Mexico.

Following the discussion of extraterritoriality, the section reviews legal issues related to evidence gathering in U.S. enforcement cases involving conduct in Mexico. Where the U.S. plaintiff seeks information from a Mexican national—either a government official or a private citizen—who is not party to the U.S. action, informal cooperation is key to obtaining information. The La Paz agreement promotes such cooperation between U.S. and Mexican officials. Other international agreements provide a basis for requesting Mexican judicial assistance in compelling deposition testimony where necessary. Mexican law may, however, pose obstacles to obtaining such testimony from Mexican government officials.

A. The Extraterritorial Application of U.S. Laws

It is likely that the common law "presumption against extraterritoriality" will be invoked by the defendant in any lawsuit involving arguably extraterritorial enforcement of U.S. environmental laws. Thus, where a case involves application of U.S. environmental laws to conduct that occurred abroad, or to conduct whose impacts occurred exclusively abroad, plaintiffs must consider this issue.

Federal case law provides the necessary backdrop for understanding when the presumption is invoked and what evidence is needed to overcome the presumption. In general, plaintiffs must demonstrate that the statute they are seeking to enforce was intended to apply to the circumstances at hand. To make this showing, courts have accepted evidence of the express language of the relevant statute; the purpose and structure of the statute; and the legislative history and administrative interpretations of a statute.

A number of federal decisions have upheld the extraterritorial application of U.S. laws where conduct abroad results in significant impacts within the U.S., or where conduct in the U.S. results in adverse effects outside the country. However, those decisions generally have involved laws regulating business relations—anti-trust, securities and bankruptcy laws—rather than environmental laws. While statutory intent of extraterritorial application may be fairly clear in a limited number of cases, many of the situations addressed in this report—for example, activities at an abandoned *maquiladora*, or one-time conduct by a U.S. citizen while in Mexico—will necessitate a more complex and far-ranging analysis of the statutory provisions, in light of the facts and the existing case law.

1. Background

It is well established that Congress has authority to enforce its laws beyond the territorial boundaries of the United States.[120] This "jurisdiction to prescribe" is based on four main principles: (1) the territorial principle (regulation of conduct or persons within the territory of the regulating state); (2) the effects principle (regulating conduct outside the territory, where effects occur within the territory); (3) the nationality principle (regulating the conduct of nationals of the regulating state); and (4) the protective principle (regulating conduct outside the territory that is directed at the national security of the regulating state).[121] The exercise of this jurisdiction must be "reasonable."[122]

Nevertheless, the courts have adopted a presumption against the extraterritorial application of U.S. laws. In *E.E.O.C. v. Arabian American Oil Co.* (*Aramco*), the Supreme Court reiterated its 1949 holding in *Foley Bros., Inc. v. Filardo*: "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[123] According to the Court, the presumption avoids a "conflict of law" situation, where two conflicting laws are applicable to certain conduct.[124] Underlying the presump-

[120] *See, e.g.*, E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991) [Aramco]; Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-285 (1949); Blackmer v. United States, 284 U.S. 421 (1932); Cook v. Tait, 265 U.S. 47 (1924).

[121] Restatement (Third) of Foreign Relations Law § 402 & cmt. c-f (1987).

[122] Restatement (Third) of Foreign Relations Law § 403 (1987). The Restatement lists the factors to be considered in determining reasonableness, including: the connection between the conduct and the territory of the regulating state; the connection between the actor and the regulating state; the nature of the regulated activity; and the interests other states may have in regulating such activity. *Id.*

[123] Aramco at 248 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

[124] Aramco at 248.

tion is the concern that applying U.S. laws extraterritorially would interfere with another sovereign's power to regulate within its territory. Moreover, the presumption reinforces the notion that Congress "'is primarily concerned with domestic conditions.'"[125] In applying the presumption, the Supreme Court has also cited the "commonsense notion that Congress generally legislates with domestic concerns in mind."[126]

2. Avoiding or Overcoming the Presumption

Federal case law does not always draw a clear line between analysis of whether the presumption against extraterritoriality is *applicable* in the first place and analysis of whether the case at hand successfully *overcomes* the presumption. In either case, court decisions suggest that the central question is one of statutory construction and the analysis is similar: whether Congress intended the statute to apply extraterritorially.

The presumption against extraterritoriality can be avoided or overcome when Congress clearly states its intention that a statute apply extraterritorially. In *Aramco,* the Supreme Court stated that to apply a statute extraterritorially requires "the affirmative intention of the Congress clearly expressed."[127] The Court found that the broad jurisdictional language of Title VII was boilerplate and did not indicate Congressional intent.[128]

Many cases, though, will involve statutes that do not contain a clear Congressional expression regarding extraterritorial application.[129] More recent Supreme Court and lower court decisions reveal that courts will often look to other factors in the absence of a clear expression of Congressional intent to apply, or not apply, a law extraterritorially. In *Sale v. Haitian Centers Council, Inc.*, for example, the Supreme Court looked to "all available evidence" in determining whether the Immigration and Nationality Act applied extraterritorially.[130] In *Smith v. United States*, the Supreme Court explicitly took into consideration both the structure and legislative history of the statute in question, the Foreign Tort Claims Act.[131] In *Kollias v. D & G Marine Maintenance*, the Second Circuit considered the structure, purpose and administrative interpretation of the Longshore and Harbor Workers' Compensation Act, stating that "the Supreme Court has made clear since *Aramco* that reference to nontextual sources is permissible."[132]

The presumption against extraterritoriality is likely to be raised by a defendant in cases where the conduct or the effects at issue occurred primarily outside the United States. In both types of circumstances, courts have held that particular statutes do apply extraterritorially.[133]

In *Aramco*, the Supreme Court held that Title VII did not apply where *both* the conduct at issue and the impact of that conduct occurred outside the United States. However, the Court distinguished the case from one in which allegedly unlawful conduct has some effects within the United States.[134] In *Hartford Fire Insurance Co. v. California*, a case involving the Sherman Act, the Supreme Court did not discuss the presumption against extraterritoriality but stated that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[135]

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[125] *Id.* (quoting Foley Brothers, 336 U.S. at 285).

[126] Smith v. U.S., 507 U.S. 197 (1993).

[127] Aramco at 248 (quoting Foley Bros., 336 U.S. at 285).

[128] *Id.* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1994), prohibits certain employment practices that discriminate based on race, color, religion, sect, or national origin.

[129] Jonathon Turley, *"When In Rome": Multinational Conduct and the Presumption Against Extraterritoriality,* 84 NW. U. L. REV. 598 (Winter 1990). Indeed, Professor Turley notes that "the presumption would not be relevant if the statute contained any expressed intent on the issue of extraterritoriality." *Id.* at 637.

[130] 509 U.S. 155, 177 (1993).

[131] 507 U.S. 197 (1993). Some factors to consider in assessing the overall structure of the statute are: whether there are venue provisions that accommodate extraterritorial application; whether there are provisions addressing overseas governmental investigation or enforcement; and whether limiting the applicability of the statute would undermine its effectiveness. DAVID HUNTER *ET AL.*, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1421 (Foundation Press 1998).

[132] 29 F.3d 67, 73 (1994).

[133] For a detailed analysis of how courts have ruled on the applicability of the presumption in these two contexts, see William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998).

[134] E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 252 (1991) [Aramco] (discussing Steele v. Bulova Watch Co., Inc., 344 U.S. 280 (1952), which involved conduct in Mexico in violation of the Lanham Trademark Act).

[135] 509 U.S. 764, 795-96 (1993). Among other things, the Court cited U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) and the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415 (1987) in support of this conclusion.

Some lower courts considering other statutes also have found that the presumption will not apply when the conduct abroad has impacts in the United States. In *Schoenbaum v. Firstbrook*, the Second Circuit held that the Securities Exchange Act applies when transactions abroad involve a stock registered and listed on a U.S. exchange and adversely affect U.S. investors.[136] In *Environmental Defense Fund (EDF) v. Massey*, a case involving the National Environmental Policy Act (NEPA), the D.C. Circuit observed in dicta that the presumption against extraterritoriality "is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States."[137] Nonetheless, courts have refused to apply some statutes extraterritorially despite the existence of impacts in the U.S.[138]

Another situation in which some federal courts have applied U.S. laws extraterritorially is where the conduct at issue occurred within the U.S., even though the adverse effects of the conduct occurred outside the country. In *EDF v. Massey*, the plaintiff alleged that the National Science Foundation violated NEPA by failing to prepare an Environmental Impact Statement for its plans to incinerate food wastes in Antarctica.[139] The court determined that the case did not present an extraterritoriality problem at all, given that NEPA is a procedural statute and the decision making process regulated under NEPA occurs domestically.[140] Courts have also held that the Securities Exchange Act may apply where conduct occurred within the U.S., even though harm resulted outside the country.[141]

3. Application of Environmental Statutes Extraterritorially

Federal court decisions. Many of the federal decisions applying U.S. laws extraterritorially have involved statutes that regulate economic activity.[142] In general, the presumption against extraterritoriality has been applied with greater force to environmental laws.[143] Thus, the scope of extraterritorial application has expanded with respect to laws regulating the market, while courts have applied "the more stringent clearly expressed intent standard to nonmarket cases. . . ."[144]

The National Environmental Policy Act has been the subject of a considerable number of federal decisions examining whether Congress intended NEPA's requirements for environmental review to apply to government actions occurring outside the United States. As discussed above, the D.C. Circuit avoided applying the presumption in a NEPA case involving a federal decision to incinerate food wastes in Antarctica. In an earlier D.C. Circuit case the court applied NEPA to a highway construction project in the Darien Gap of Panama where the U.S. was contributing two-thirds of the funding and where the activity in question had the potential to increase transmission of foot-and-mouth disease to U.S. livestock herds.[145] There the government did not question the applicability of NEPA, and the court avoided the extraterritoriality issue. On the other hand, a number of federal courts have refused to apply NEPA extraterritorially, particularly where the existence of

[136] 405 F.2d 200, 208 (2d Cir. 1968), *rev'd on other grounds en banc*, 405 F.2d 215 (2d Cir. 1968), *cert. denied sub nom.*, Manley v. Schoenbaum, 395 U.S. 906 (1969). *See also* Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 922-23 (D.C. Cir. 1984) (applying the Sherman Anti-Trust Act extraterritorially).

[137] 986 F.2d 528, 531 (D.C. Cir. 1993).

[138] *See, e.g.,* Subafilms Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1097 (9th Cir. 1994) (finding that application of federal copyright law to acts of infringement that occurred entirely overseas would promote international discord and undermine a stable international intellectual property regime).

[139] 986 F.2d at 528.

[140] *Id.* The court also found that foreign policy concerns were diminished since Antarctica is not a sovereign state.

[141] *See* Securities and Exchange Commission v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977) (federal securities laws applicable where "at least some activity designed to further a fraudulent scheme occurs within" the U.S., even if there are not significant impacts within the country); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1335 (2d Cir. 1972).

[142] *See, e.g.,* Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) (Sherman Antitrust Act); Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (Trademark Act of 1946); United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (Sherman Act).

[143] For a detailed discussion of the differing treatment accorded to economic regulation and social regulation, see Jonathon Turley, *"When in Rome": Multilateral Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 655 (Winter 1990) (concluding that the "presumption against extraterritoriality remains an unevenly applied, highly chauvinistic canon of construction," and recommending reversal of the presumption). *See also* Silvia M. Riechel, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115 (1994); Beatrice Cameron, *Global Aspiration, Local Adjudication: A Context for the Extraterritorial Application of Environmental Law,* 11 WIS. INT'L L.J. 381, 404-418 (1993).

[144] Jonathon Turley, *"When in Rome": Multilateral Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 637 (Winter 1990).

[145] Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978).

treaty relations or foreign policy issues were a significant concern.[146]

Case law is limited on the subject of applying other environmental laws extraterritorially. In a decision concerning the Marine Mammal Protection Act of 1972 (MMPA), the Fifth Circuit noted that courts must examine the nature of a law to determine whether limiting its "'*locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.'"[147] In refusing to apply the MMPA to a U.S. citizen who captured dolphins while in the coastal waters of the Bahamas, the court cited concerns about interference with national sovereignty, and stated that the "nature" of a conservation statute is "based on the control that a sovereign such as the United States has over the natural resources within its territory . . . . Other sovereign states enjoy similar authority."[148]

A lower court recently held that the Magnuson-Stevens Fisheries Conservation and Management Act[149] could be applied extraterritorially.[150] In that case, involving a challenge to NMFS regulations restricting fishing of highly migratory species, the court found that the Magnuson-Stevens Act could apply to conduct that occurred beyond the exclusive economic zone of the U.S. The court cited Section 1812 of the Act, which provides: "The United States . . . shall promote the achievement of optimum yield of such species throughout their range, both within and beyond the exclusive economic zone."[151] The court noted that "Congressional intent to extend United States jurisdiction to areas on the high seas beyond sovereign jurisdictional limits is clear," given this and other provisions of the Act specifically addressing U.S. efforts to pursue regulation of fisheries beyond the exclusive economic zone.[152]

The extraterritorial application of a federal pollution law was the subject of *Amlon Metals, Inc. v. FMC Corp*.[153] In *Amlon*, the plaintiffs were British companies and their U.S. agent who entered into a contract with the defendant, a U.S. company, for the shipment of copper residues to England for reclamation. Although the defendant was to have treated the residues for purposes of reclamation, when the material arrived in England it was found to contain xylene, 7-hydrogen and chlorinated phenols. Plaintiffs initially sued the defendant in British court, but that court dismissed the suit on the grounds that all of the conduct at issue took place in the U.S. and U.S. law would apply. The plaintiffs filed suit in the U.S. for injunctive relief and damages under the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA),[154] claiming that the materials shipped by the defendant posed an imminent and substantial danger.[155]

The District Court in *Amlon* sought to determine whether RCRA's citizen suit provision applies when the hazardous wastes at issue pose an imminent and substantial endangerment outside the U.S. Plaintiffs cited previous federal decisions, as well as the legislative history of the Act, in arguing that RCRA applies because the conduct at issue occurred within the U.S. Nevertheless, the court applied the presumption against extraterritoriality and concluded that the legislative history, structure and language of the Act did not support extraterritorial application of the citizen suit provision.[156] Thus,

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[146]*See* Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n., 647 F.2d 1345 (D.C. Cir. 1981) (NEPA did not apply to the Nuclear Regulatory Commission's approval of the export of a nuclear reactor to the Philippines); Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990) (NEPA did not apply to the Army's transportation of chemical munitions from the Federal Republic of Germany to an island in the Pacific); NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993) (NEPA did not apply to require Department of Defense to prepare environmental impact studies for U.S. military installations in Japan).

Another "procedural" regulation—the consultation provision of the Endangered Species Act (ESA)—was the subject of Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The Eighth Circuit had found that the Act did not apply to federal projects outside the U.S. While the Supreme Court dismissed the case for lack of standing, a concurring opinion based dismissal on the presumption against extraterritoriality. Justice Stevens found that Congress did not intend the ESA's consultation requirement to apply to federal agency actions abroad. 504 U.S. at 588-89.

[147]United States v. Mitchell, 553 F.2d 996, 1002 (5th Cir. 1977) (quoting United States v. Bowman, 260 U.S. 94, 98 (1922)).

[148]553 F.2d at 1002.

[149]16 U.S.C. §§ 1801-1882.

[150]Blue Water Fisherman Assn. vs. National Marine Fisheries Service (NMFS), 158 F. Supp 2d 118 (D. Mass. 2001).

[151]*Id.* at 122.

[152]*Id.* at 123 n.19.

[153]775 F. Supp. 668, 675 (S.D.N.Y. 1991).

[154]42 U.S.C. §§ 6901 *et seq.* (1994).

[155]775 F. Supp. at 669-670.

[156]775 F. Supp. at 675-76. For example, the court cited *Aramco* in finding that the inapplicability of RCRA's citizen suit venue provision "was probative of a lack of congressional intent" to apply the statute abroad. *Id.* at 675 n.9.

the *Amlon* analysis suggests the difficulty faced by citizen enforcement suits in the transboundary context, though it remains an open question whether other courts would reach the same result in future citizen suits brought under RCRA or another environmental statute.[157]

On the other hand, there is nothing in the *Amlon* decision suggesting that if, for example, EPA had alleged violations of the export provisions of RCRA, which require notification of export of hazardous waste to the EPA Administrator and to the government of the receiving country, there would have been similar extraterritorial concerns.[158] The Court in *Amlon* was well aware that the dispute was principally over a contract and that the plaintiffs' recourse under RCRA was to remedial provisions rather than to regulatory provisions. In a regulatory enforcement action, the fact that export violations cause harm abroad should not be a barrier to enforcement, since such export provisions by their nature concern waste destined for another country.[159]

Use of administrative authority: CERCLA and Superfund. The considerations for applying environmental laws extraterritorially are illustrated in one area of the law that has been used administratively in limited circumstances to address activities that took place in Mexico. On at least one occasion, EPA has used Superfund resources to address environmental impacts in the U.S. resulting from activities in Mexico.[160]

Under the Comprehensive Environmental Response, Compensation and Liability Act,[161] the "Superfund" can provide funding to address a release or a substantial threat of a release of a hazardous substance into the environment.[162] The definition of "environment" has precise limits. The only environment that can be protected by Superfund is waters, land and air in the United States or under the jurisdiction of the United States.[163] This means that if the environment affected by the release or threat of release is only the environment of Mexico and not the United States, then neither the Superfund nor the authority of CERCLA could be used to respond to the problem. The Act does not require that the source of the release be within the U.S., only that the environment affected is the U.S. environment.

It is possible to imagine circumstances in which EPA might decide that it had the authority under CERCLA to address problems that originated in Mexico. For instance, if an aquifer that is shared between the United States and Mexico were contaminated by industrial activity in Mexico, then investigation of the sources of the problem, characterization of the problem, and even clean-up of the problem could be argued to be protective of the environment of the United States. To the extent that these activities would be undertaken to protect the environment of the United States, they might be candidates for the Superfund.

EPA has used CERCLA in such circumstances in the past. In the fall of 2000, as part of a joint

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[157] In a 1974 opinion in a tort case, the Sixth Circuit seemed to suggest that a citizen suit could be pursued under the Clean Air Act for damage to Canadian property from U.S. facility emissions. Michie v. Great Lakes Steel Div., National Steel Corp, 495 F.2d 213, 216 n.2 (1974) ("Clearly, a suit for injunctive relief could have been (but was not) brought under federal law").

[158] In fact, the Court cites legislative history that establishes the intent of Congress to regulate exports. *See* 775 F. Supp at 674.

[159] Indeed, with respect to illegal or environmentally damaging transboundary shipments of hazardous waste, the La Paz agreement requires that "the competent authorities of the country of export shall take all practicable measures and initiate and carry out all pertinent legal actions that they are legally competent to undertake" to ensure that the wastes are returned and damages repaired. La Paz Agreement, Annex III, *supra* note 14, at art. 14.

[160] A 1994 EPA investigation under the Toxic Substances Control Act (TSCA) could also arguably be described as an extraterritorial application of the Act. EPA used its subpoena authority under TSCA to request information from 95 U.S.- based companies about their facilities located in Mexico. The EPA subpoenas sought information about the types and quantities of chemicals contaminating the New River in Mexico, in order to determine whether those chemicals were posing an unreasonable risk to the population and environment in California. It is important to note, however, that while the subpoenas sought information about facilities outside the U.S., they solicited information from the files of domestic companies, not from the related (discharging) companies in Mexico. *See generally* DAVID HUNTER *ET AL.*, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1421 (Foundation Press 1998).

[161] 42 U.S.C. § 9601(11) (1994). CERCLA created the "Superfund," a trust fund available to U.S. EPA to clean up hazardous substances in the environment when those responsible for the release will not or cannot do so. Similar, although smaller, funds are available in many states. The Superfund is used by EPA both for emergency, short-term cleanups, such as the cleanup of hazardous chemicals that have leaked from a truck, and for long-term, multi-million dollar cleanups such as groundwater contamination in regional aquifers.

[162] "Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act. . . ." 42 U.S.C.§ 9604(a)(1) (1994).

[163] 42 U.S.C. § 9601(8) (1994).

investigation by EPA, the Arizona Department of Environmental Quality and Mexico's PROFEPA, CERCLA resources were used to conduct soil sampling in Mexico and groundwater sampling in the United States.[164] The sampling was conducted at Nogales Wash, which flows from Nogales, Sonora, through Nogales, Arizona. The goal was to determine sources of the contamination and to better assess the extent and likelihood of further contamination in the U.S. To the extent that such an investigation identifies parties responsible for the contamination, those parties could potentially be liable under CERCLA to reimburse the Superfund for its expenditures.[165] The Act does not appear to restrict liability to parties who are in the United States or who are U.S. citizens.[166]

CERCLA has also been used by EPA to bring about proper disposal of wastes that were illegally exported to Mexico. Under the terms of the La Paz agreement, the U.S. and Mexico are required to readmit exported shipments of hazardous wastes or hazardous substances that are returned by the other country.[167] In a 1997 case, this agreement was invoked to facilitate the return by Mexican customs officials of trucks containing mining wastes that EPA and PROFEPA agreed had been illegally shipped to Mexico by a U.S. company. EPA ordered the U.S. exporter to take responsibility for the material. A federal district court, in denying the exporter's subsequent petition to recover its disposal costs under CERCLA sections 106(b) and 106(c), found that the failure of the U.S. exporter to take responsibility for returned wastes constitutes a release under CERCLA, which defines release to include the abandonment of barrels or containers.[168]

EPA decides Superfund questions on a case-by-case basis, ranking sites for cleanup based on threats to public health and the environment. Therefore, whether EPA will be willing or able to use the Superfund for a transboundary problem—and to seek compensation from responsible parties—will depend in large part on the specific facts of the case. As in any type of U.S. enforcement action involving activities in Mexico, the interests of the Mexican government will also be a factor. In the case of Superfund, the absence of a comparable Mexican legal remedy may make the use of U.S. law more compelling.

4. Summary and Observations

In any enforcement case involving the exercise of extraterritorial jurisdiction, it is necessary first to evaluate the basis for asserting such jurisdiction—the connection between the United States and the conduct, effects and parties in the case. Plaintiffs must demonstrate that the statute being enforced was intended to apply in such circumstances. In most cases, statutes are ambiguous regarding extraterritorial application, and federal courts have looked at a variety of sources in determining congressional intent. Indeed, courts have upheld the extraterritorial application of statutes regulating the market even where those statutes are not explicit on the subject.[169]

For the most part, though, federal case law has not yet established the extent or limits of the extraterritorial reach of environmental statutes. Some environmental statutes contain provisions that

[164] Information about this case was provided by a telephone interview with John Rothman, Office of Regional Counsel, U.S. EPA Region IX (June 2002).

[165] To the extent that EPA incurs costs under CERCLA in investigating or responding to a release or threat of release of a hazardous substance, persons responsible for the costs under the CERCLA liability provisions, which include owners and operators of the facility, and persons responsible for the hazardous substances at the facility, would arguably be liable regardless of location. 42 U.S.C. § 9607(a) (1994). Practically speaking, though, the universe of potentially liable parties would be restricted to those facilities that are located near enough to cause damage in the U.S., particularly in areas were surface water or ground water flow into the United States.

[166] 42 U.S.C. § 9607 (1994) describes persons who are liable under CERCLA. The term ''person'' is defined in 42 U.S.C. § 9601(21) (1994), as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."

[167] Annex III of the La Paz Agreement, *supra* note 14, governs transboundary shipments of hazardous wastes and hazardous substance. Article IV provides: "The country of export shall readmit any shipment of hazardous waste that maybe returned for any reason by the country of import." Article IX states: "The country of export shall readmit any shipment of hazardous substances that was not lawfully imported into the country of import."

[168] A&W Smelter and Refiners, Inc., v. Clinton et al., 962 F. Supp. 1232, 1238 (N.D. Cal. 1997) (citing 42 U.S.C. § 9601(22) (1994)).

[169] Jonathon Turley, *"When in Rome": Multilaterial Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 601 (Winter 1990) (finding that courts "consistently grant extraterritorial relief under 'market statutes' . . even though they acknowledge that the statutes are silent on whether such application was intended by Congress").

would clearly apply where the effects (*e.g.*, RCRA export provisions) or conduct (*e.g.*, Magnuson-Stevens Act fishing restrictions) occurred outside the U.S. Other statutory provisions, such as the Superfund provisions of CERCLA, appear to establish a strong basis for certain extraterritorial application. Cases involving more wide-ranging application of environmental laws to conduct in Mexico will require plaintiffs to explore all available evidence and arguments that the statute should be interpreted to reach the specific conduct or effects at issue.

Conduct that takes place just over the border with Mexico, involving a U.S. citizen defendant and clear environmental or public health impacts in the U.S., might provide the most likely basis for pursuing extraterritorial application of environmental laws. A key factor in such cases is the extent to which U.S. enforcement interferes with Mexican sovereignty. Such considerations may be more significant in cases that address behavior in Mexico that is part of a Mexican regulatory program—*e.g.*, cases seeking to apply U.S. air or water pollution laws to discharges and emissions that originated at a *maquiladora* in Mexico. In most cases involving questions of extraterritoriality, the support and cooperation of the Mexican government would be extremely important from a legal, as well as a political and diplomatic perspective. Moreover, such support is central to gathering evidence and preparing and presenting the case generally, as discussed in the following section.

B. Obtaining Evidence Abroad

For many U.S. enforcement cases involving conduct that occurred wholly or partly in Mexico, it will be necessary to obtain information that is located in Mexico—samples, records, or other information about facility operations and/or environmental damages. Because this part of the report addresses cases in which conduct occurs in Mexico and the responsible party is in the U.S.—for example, a CERCLA contribution action against a U.S. parent company or an action to prove sham recycling by a U.S. company operating in Mexico—the following discussion does not cover evidence gathering when the defendant is in Mexico. (Part Four discusses additional legal considerations in such cases.) The following discussion focuses on cases brought by a government agency, although the legal tools for obtaining evidence in Mexico may also be available to individuals in situations permitting citizen suits.

As discussed earlier, cooperation between U.S. and Mexican authorities is essential not only with regard to political and diplomatic concerns, but also for practical reasons, since U.S. agencies will need assistance in gathering this evidence. The broad framework for this cooperation was set by the 1983 La Paz agreement. The La Paz Agreement expressed the desire by the executive branches of both governments to work together to improve the environment in the zone extending 100 kilometers along each side of the international boundary. The Agreement establishes a specific mechanism for this coordination: bi-national, geographically-based working groups of U.S. and Mexican officials that meet regularly to exchange information and concerns about a variety of environmental problems in the border area.

The Agreement specifically provides that the U.S. and Mexico "shall cooperate in the solution of the environmental problems of mutual concern in the border area"[170] and "shall consider, and, as appropriate, pursue in a coordinated manner practical, legal institutional and technical measures. . . ."[171] In an annex to the agreement that addresses the cross-border movement of hazardous waste, the parties agree, to the extent practicable, to "provide to each other, mutual assistance designed to increase the capability of each Party to enforce its laws applicable to transboundary shipments of hazardous waste or hazardous substances. . . ."[172] This assistance may include the provision of documents and records, as well as "the facilitating of on-site visits to treatment, storage or disposal facilities."[173]

The following pages discuss two ways U.S. officials might seek to obtain information from Mexico in preparing an enforcement action—through the inspection of the Mexican facility/site

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[170] La Paz Agreement, *supra* note 14, at art. 2.

[171] La Paz Agreement, *supra* note 14, at art. 6. This article further states that "such cooperation may include periodic exchanges of information and data on likely sources of pollution in their respective territory which may produce environmentally polluting incidents. . . ".

[172] La Paz Agreement, *supra* note 14, Annex III, Agreement of Cooperation Between the United States of America and the United Mexican States Regarding the Transboundary Shipment of Hazardous Wastes and Hazardous Substances, November 12, 1986, U.S.-Mex., at art. XII.

[173] *Id.*

and through requests for information and assistance from Mexican government agencies or other individuals. The section ends with a discussion about using depositions to obtain information for presentation as evidence in a U.S. court proceeding.

1. Access to Mexican Facilities for U.S. Inspectors

Access to Mexican facilities can enable U.S. enforcement officials to collect and document the evidence they need to substantiate suspected violations of U.S. law and to ensure that the information will be admissible in any future U.S. judicial proceeding.

Abandoned Facilities. Where the Mexican facility has been abandoned, access by U.S. inspectors may be a relatively straightforward matter. Where the government has assumed control of the site, cooperation between U.S. and Mexican officials would be the necessary pre-condition to a U.S. site visit. Such cooperation is explicitly encouraged under the La Paz agreement. In other circumstances—for example, if the site has been transferred to the control of a third party—access may depend on whether that party is promoting and cooperating in the clean-up of the site.

Active Facilities. Where a Mexican facility is still operating, or remains under the control of a company that is potentially responsible for the contamination, access by U.S. inspectors is a more difficult proposition. The LGEEPA provides for inspections by "duly authorized personnel," and does not appear to specifically address the inclusion of persons other than Mexican government officials.[174] Short of participating in an inspection, EPA officials may be able to coordinate with Mexican inspectors, so that certain types of information can be obtained during the Mexican government inspection of the site. The following paragraphs discuss whether U.S. officials might obtain inspection reports or other information from a Mexican government agency.

2. Obtaining Information from Mexican Governmental Agencies

In addition to inspection reports, Mexican government agencies may already possess information about a facility's operation or its environmental impacts that is relevant to a U.S. enforcement action. For example, if EPA is considering an enforcement action against a U.S. company that sent hazardous wastes to a "sham recycling" facility in Mexico (in violation of RCRA's export requirements), the agency will likely need information about conditions and activities at the Mexican facility. This information may include written records, such as inspection reports and sampling results, as well as informal communications with Mexican officials. As already noted, cooperation between U.S. and Mexican officials is vital to ensuring that EPA can investigate suspected violations and build its enforcement case. There have been various instances of such cooperation in the past.[175]

Absent cooperation, it will be difficult for U.S. officials to ensure the production of Mexican government records, since Mexican officials will generally not be party to the U.S. legal action. Annex III of the La Paz Agreement requires the U.S. and Mexico to provide each other with copies of publicly available records of government departments and agencies. U.S. officials might send a written request to the Mexican agency for access to specific documents that are available to the public.[176] While the Mexican constitution and federal laws provide for public access to environmental information, certain types of information are explicitly not publicly available, including information relating to matters that are the subject of pending judicial proceedings or inspection and enforcement actions.[177]

Moreover, it is important to note that the Mexican Federal Code of Civil Procedures (*Código Federal de Procedimientos Civiles* or CFPC)[178] contains certain provisions that could limit the ability of U.S.

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[174] L.G.E.E.P.A. art. 162. *See also* Federal Law of Administrative Procedures arts. 62-69.

[175] For example, in one case involving improper shipment of hazardous wastes from a *maquiladora* to a U.S. facility, SEMARNAT officials provided EPA with information regarding representations that the *maquiladora* had made to Mexican environmental officials, which allowed EPA to compare that information with the information that it had received from the company. Telephone Interview with John Rothman, Office of Regional Counsel, U.S. EPA Region IX (June 2002).

[176] *Id.* Article XII further provides that requests for such information are to be in writing and translated into the language of the requested state.

[177] *See* L.G.E.E.P.A. art. 159 *bis* 3. For a detailed discussion of public access to environmental information in Mexico, see Commission on Environmental Cooperation, NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY SERIES (Winter 1999) at 111-155, *available at* http://www.cec.org/files/pdf/LAWPOLICY/Vol-3e_EN.pdf (last visited July 31, 2002).

[178] This law governs federal matters, while the Federal District and the states have corresponding codes for local matters.

parties to obtain records from Mexican officials. Article 559 of that Code states that Mexican federal and state government officials are prohibited from exhibiting documents contained in official Mexican archives under their control. An exception to this restriction exists in personal matters involving personal documents, when permitted by the law and when a court so orders.

The context for this provision suggests that it may not apply to situations involving informal cooperation, where governmental information is made available outside of a judicial proceeding. First, the provision is part of the Code's Fourth Book, which governs International Procedural Cooperation. Second, according to some Mexican legal scholars, the provision was drafted to address the fact that government agencies were receiving "frequent and excessive requests on discovery proceedings ordered by U.S. courts."[179] Thus, with the addition to the Federal Code of procedural mechanisms for providing international judicial assistance came measures to limit the burden on Mexican agencies relating to foreign litigation.[180] In situations where U.S. enforcement officials (or private citizen enforcers) are seeking information in investigating a case, and not in the context of a judicial proceeding, it is possible that the prohibition in article 559 would not bar Mexican officials from providing information that is otherwise available under Mexican law.

The opportunities under the law for obtaining information from Mexican government agencies may change significantly with the implementation of the new Federal Law on Transparency and Access to Public Governmental Information, which is scheduled to take effect in 2003.[181]

[179]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, 396-397 (1994) (citations omitted).

[180]*Id.*

[181]*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*, D.O. June 11, 2002

3. Presenting Mexican Information in a U.S. Proceeding: Depositions

The need to present Mexican documents and/or the testimony of Mexican officials or other individuals in a U.S. court proceeding raises additional complications. Mexican nationals cannot be subpoenaed to appear in U.S. court, since they are not subject to the court's jurisdiction, and a U.S. court cannot require the production of documents from non-parties. It is possible that a Mexican official or private citizen would be willing to appear voluntarily in U.S. court. Nevertheless, there remains a risk that circumstances will prevent the witness from being in court at the appointed time. Depositions may provide an alternate approach to obtaining the evidence.[182]

Background. U.S. federal and state law establish the first layer of rules governing discovery and admissibility of evidence generally, as well as rules specifically concerning discovery of information outside the United States.[183] Enforcement officials must also proceed in accordance with international law and Mexican law when taking depositions or seeking other information in Mexico.

Both U.S. and Mexico are parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters [hereinafter Hague Evidence Convention].[184] The Hague Evidence Convention establishes a mechanism through which a "judicial authority" in one member country may request judicial assistance, including assistance obtaining evidence for a judicial proceeding, from another member country.[185] The mecha-

[182]U.S. courts have noted the availability of deposition testimony through letters rogatory as one factor in considering the relative convenience of U.S. and foreign forums. *See, e.g.,* DiRienzo v. Philip Services Corp., No. 99-7825, 2000 WL 33725106 (2d Cir. Apr. 1, 2002).

[183]These domestic rules governing discovery and evidence will not be discussed here.

[184]Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231. Mexico, but not the U.S., is also party to the Inter-American Convention on the Taking of Evidence Abroad, Jan. 30, 1975, 23 U.S.T. 2555, 14 I.L.M. 328.

[185]Hague Evidence Convention, *supra* note 184, at art. 1. The Convention does not cover use of letters of request for service of process or to enforce a judgment. *Id.* For a discussion of international law in those areas, see Part Four.

nism for requesting judicial assistance is the letter of request.[186]

Voluntary Depositions (Cooperating Witnesses). When a U.S. party wishes to take a deposition of a willing witness in Mexico, the Mexican courts' power of compulsion is not required, and the time-consuming Hague Evidence Convention procedures for submitting a letter of request can be avoided.[187] Such depositions would proceed in accordance with U.S. law and rules governing notice, conduct and admissibility of the deposition, and may be taken before a U.S. consular officer.[188]

Involuntary Depositions (Uncooperative Witnesses). While cooperation between U.S. and Mexican authorities is important to the success of a U.S. enforcement action involving conduct in Mexico, there may be circumstances that require information from an official or other individual who is not willing to give a deposition. In such cases, U.S. officials seeking to compel a Mexican resident to give a deposition may use a letter of request to arrange the deposition, pursuant to federal and state law, and in accordance with the provisions of the Hague Evidence Convention and Mexican law.

The Hague Evidence Convention sets forth the information that must be included in a letter of request, and provides that no legalization or other similar formalities may be required.[189] The State Department has developed guidelines for the preparation of letters of request.[190] The request, which must be written in or translated into Spanish,[191] is transmitted to the Mexican Secretariat of Foreign Affairs, which in turn transmits the request to the appropriate judicial authority.[192] In addition to transmittal of letters of request through the designated central authority, Mexico has agreed to allow the transmission of letters of request through diplomatic/consular channels, or directly from a court in the U.S. to a court in Mexico; in the latter case, however, Mexico requires that all requirements related to the legalization (authentication) of signatures are fulfilled.[193]

While a member state must make its judiciary's power of compulsion available in obtaining evidence, the Hague Evidence Convention gives the requested state some control over how the discovery proceeds. The judicial authority executing a letter of request "shall apply its own law as to the methods and procedures to be followed," although the authority is required to follow a request for a special method or procedure unless that procedure

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[186]Hague Evidence Convention, *supra* note 184, at art. 1. Letters of request, or letters rogatory, constitute requests by a court of one country to a court of another country asking the answering court to locate a person within the jurisdiction and obtain answers to written questions. *See* U.S. v. Bastanipour, 697 F.2d 170, 178 n.3 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091 (1983). The Hague Evidence Convention allows parties to establish other procedures for taking evidence. Indeed, the civil procedure codes of Mexico City and of the states may authorize different procedures, *e.g.*, enabling an attorney to transmit requests for depositions and other judicial assistance directly to the Mexican court. *See* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059, 1080 (1994). Such procedures would be governed entirely by local law. *Id.*

[187]*See generally* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059, 1087-88 (1994); U.S. DEP'T OF STATE, INTERNATIONAL JUDICIAL ASSISTANCE - MEXICO, *available at* www.travel.state.gov/mexicoja.html (last visited July 31, 2002).

[188]*See* 22 U.S.C. §§ 4215, 4221 (1994); FED. R. CIV. P. 28(b)(1),(2); Hague Evidence Convention, *supra* note 184, at art. 16. Mexico has registered an exception to the Hague Convention, rejecting the taking of evidence by persons appointed as "commissioners," but not to the taking of evidence (without compulsion) by diplomatic officers or consular agents. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FULL STATUS REPORT CONVENTION #20, *available at* www.hcch.net/e/status/stat20e.html (last visited July 31, 2002). *See also* U.S. DEP'T OF STATE, INTERNATIONAL JUDICIAL ASSISTANCE - MEXICO, *available at* http://www.travel.state.gov/mexicoja.html (last visited July 31, 2002); U.S. DEP'T OF STATE, OBTAINING EVIDENCE ABROAD, *available at* http://www.travel.state.gov/obtaining_evidence.html (last visited July 31, 2002).

[189]Hague Evidence Convention, *supra* note 184, at art. 3.

[190]*See* U.S. DEP'T OF STATE, PREPARATION OF LETTERS ROGATORY, *available at* http://www.travel.state.gov/letters_rogatory.html (last visited July 31, 2002).

[191]Hague Evidence Convention, *supra* note 184, at art. 4.

[192]Member states must designate a central authority for receiving requests for judicial assistance, and Mexico has designated the Secretariat of Foreign Affairs (Secretaría de Relaciones Exteriores or SRE). HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FULL STATUS REPORT CONVENTION #20, *available at* http://www.hcch.net/e/status/stat20e.html (last visited July 31, 2002).

[193]HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FULL STATUS REPORT CONVENTION #20, *available at* http://www.hcch.net/e/status/stat20e.html (last visited July 31, 2002). Both the U.S. and Mexico are parties to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, Oct. 5, 1961, T.I.A.S. No. 10072, 527 U.N.T.S. 189 [hereinafter Hague Legalization Convention]. Under the Convention, to have a document legalized for use in another member state, a special certification called an "apostille" must be affixed to the document by the competent (designated) authority. Hague Legalization Convention arts. 3, 4. *See generally* U.S. DEP'T OF STATE, HAGUE CONVENTION ABOLISHING THE REQUIREMENT OF LEGALIZATION FOR FOREIGN PUBLIC DOCUMENTS: LEARN ABOUT THE HAGUE LEGALIZATION CONVENTION, *available at* http://www.travel.state.gov/hague_foreign_docs.html (last visited July 31, 2002).

is incompatible with the internal law of the state of execution, or is impossible to carry out for practical or procedural reasons.[194] In general, a deposition pursuant to the Hague Evidence Convention will be taken in accordance with Mexican law and under the control of the Mexican court.[195] Mexico's Federal Code of Civil Procedures permits the taking of depositions and provides for direct questioning of a witness by a party (or the party's representative).[196]

Mexican legal restrictions on government testimony. Mexico's Federal Code of Civil Procedures contains a provision that poses potentially significant obstacles for a U.S. party in obtaining the testimony of a Mexican government official. According to Article 563 of the Code, federal and state officials are prohibited from making declarations regarding their official functions in judicial proceedings and in the taking of evidence. The article also provides that such testimony is to be given in writing in cases involving private matters, when a Mexican judge so orders.

Legal commentators have noted that this provision was a response to the "high number of suits filed against Mexican governmental agencies both at the federal and state levels in U.S. courts. . . ."[197] Nevertheless, on its face the provision would seem to apply to the taking of depositions pursuant to a request for Mexican judicial assistance, even though the Mexican official may not be a party to the U.S. case. It is less clear whether the prohibition applies to testimony given without resort to an international judicial request (*e.g.*, voluntary testimony via deposition or in U.S. court), since the provision is part of the Fourth Book of the Code, which governs International Procedural Cooperation.

With respect to depositions pursuant to the Hague Evidence Convention, a letter of request can only be refused if it falls outside the functions of the judiciary of the requested state, or if the requested state feels that its sovereignty or security would be prejudiced by the request.[198] However, the Convention allows a person to refuse to give evidence if they have a privilege or a duty under their domestic law to so refuse.[199]

Article 563 of the Mexican Federal Code of Civil Procedures does contain an exception that allows for written testimony in "private matters." U.S. parties seeking a deposition of a Mexican governmental official might thus seek to persuade a Mexican judge that the U.S. litigation should be considered a private matter and request the judge to take the testimony in writing.

III. U.S. ENFORCEMENT ACTION: PRIVATE TORT SUIT FOR PERSONAL OR PROPERTY INJURIES

Situations involving environmentally damaging activities in Mexico and responsible parties in the U.S. might also be addressed through lawsuits in the U.S. by private plaintiffs to recover damages for personal or property injuries. For example, where an accidental or routine chemical discharge by a *maquiladora* results in injury to people or property in the surrounding area, those affected (Mexican or U.S. residents) might bring suit in the United States against a U.S. company, alleging that the company was responsible based on its own activities or the activities of its Mexican subsidiary. Other situations might involve accidents, such as truck spills, caused by U.S. corporations or individuals while in Mexico.

This section begins with a short outline of the bases for federal subject-matter jurisdiction in private lawsuits for damages. While recent cases have sought to reinvigorate the Alien Tort Claims Act in cases involving transboundary environmental harm, the most likely basis for federal jurisdiction in such tort cases is diversity of citizenship. With respect to state jurisdiction, one doctrine that may arise in cases involving damage to property is the local action rule, which restricts real property actions to

[194] Hague Evidence Convention, *supra* note 184, at art. 9. For a general discussion on the taking of depositions and other evidence abroad, see U.S. DEP'T OF STATE, INTERNATIONAL JUDICIAL ASSISTANCE - MEXICO, *available at* http://www.travel.state.gov/mexicoja.html (last visited July 31, 2002). For a brief discussion on setting up a deposition in Mexico, see U.S. DEP'T OF STATE, OBTAINING EVIDENCE ABROAD, *available at* http://www.travel.state.gov/obtaining_evidence.html (last visited July 31, 2002).

[195] *See* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059, 1087 (1994).

[196] C.F.P.C. arts. 562, 173.

[197] 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, 390 (1994).

[198] Hague Evidence Convention, *supra* note 184, at art. 12a.

[199] Hague Evidence Convention, *supra* note 184, at art. 11. The Mexican Federal Code of Civil Procedures provides that current or former public officials are not required to testify at the request of parties, with respect to a matter within the scope of their functions; rather, they may only be required to testify when the court judges their testimony as indispensable for the investigation of the truth. C.F.P.C. art. 169.

courts in the jurisdiction where the property is located. The recent trend in applying this doctrine, however, suggests that it would not necessarily bar cases in which damage to property (rather than title to property) is the predominant property issue.

The section next considers a central legal issue in transboundary environmental tort lawsuits—whether the U.S. is the appropriate forum for the case. While a U.S. court may have jurisdiction over the subject matter and over the defendant, the court may nonetheless invoke the doctrine of *forum non conveniens* to decide whether the foreign forum provides a more suitable forum for hearing the case. The doctrine has been invoked in numerous cases to support dismissal, and poses a considerable obstacle to pursuing enforcement through tort actions in the U.S. Nevertheless, the court's decision whether to retain jurisdiction involves a weighing of private and public interest factors and is thus necessarily dependent on the particular circumstances of the case.

Finally, the section summarizes the legal framework for determining whether U.S. law or Mexican law will apply to the substantive (tort) issues in dispute. Choice of law is a legal issue that is likely to be considered by the court in such cases, both as part of, and independent of, the *forum non conveniens* analysis. The analysis will differ somewhat from jurisdiction to jurisdiction, but in all cases is heavily dependent on the facts of the case, in particular the location of the conduct and the harm, the relationship of the parties to the U.S. and to Mexico, and the policy interests of each country.[200]

A. Federal Subject-Matter Jurisdiction

While many private lawsuits for personal and property injuries will be filed in state court, such tort cases could also be filed in federal court or they could be removed to federal court from a state court. Subject-matter jurisdiction in these cases is usually based on diversity of citizenship, although it is possible that the existence of a federal question will provide the basis for jurisdiction.

1. Diversity Jurisdiction

Diversity of citizenship is the most likely basis for federal subject-matter jurisdiction in transboundary tort cases. Federal law establishes original federal jurisdiction over civil actions where the amount in controversy exceeds $75,000, if the lawsuit is between (1) citizens of different states; (2) citizens of a state and citizens or subjects of a foreign state; (3) citizens of different states (where citizens or subjects of a foreign state are additional parties); or (4) a foreign state as plaintiff and citizens of a State or of different States.[201] The statute further provides that a corporation is deemed to be a citizen of any state in which it has been incorporated and of the state where it has its principal place of business.[202] Thus, for example, diversity jurisdiction would exist in a tort action against a U.S. company unless any of the plaintiffs are citizens of the U.S. state in which the defendant was incorporated or has its principal place of business.

2. Federal Question Jurisdiction

According to 28 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The Supreme Court has held that where state law creates a cause of action, the case may still arise under the laws of the United States if that cause of action requires "resolution of a substantial question of federal law. . . ."[203]

In one recent case applying this holding, the Fifth Circuit decided that federal question jurisdiction existed in a tort action brought by Peruvian citizens against a U.S.-based mining company because the case raised "substantial questions of federal common law by implicating important federal policy concerns."[204] The court found that foreign policy issues were implicated because the government of Peru strongly objected to the case being heard in the U.S. and because the Peruvian government had participated substantially in the ac-

[200] The legal issues involved in obtaining evidence from Mexico are not discussed separately here, as the general framework discussed in the previous section is relevant in the private tort context as well.

[201] 28 U.S.C. § 1332 (1994).

[202] *Id.*

[203] Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 13 (1983). *See also* Gully v. First Nat'l Bank, 299 U.S. 109, 112-113 (1936); Michigan Southern R.R. Cov. Branch & St. Joseph Counties Rail Users Ass'n, Inc., No. 99-1838, 2002 WL 662653 C.A.6 (Mich. 2002).

[204] Torres v. Southern Peru Copper Corp., 113 F.3d 540, 543 (1997). After upholding the district court's denial of plaintiffs motion to remand the case to state court, the Fifth Circuit summarily upheld the district court's dismissal of the case on *forum non conveniens* and comity grounds. *Id.* at 544.

tivities for which the U.S. company was being sued.[205]

A related basis for federal question jurisdiction may exist under the Alien Tort Claims Act, a federal statute that has been revived in recent years as a vehicle to bring alleged human rights and environmental violations before U.S. courts on behalf of foreign plaintiffs.

Alien Tort Claims Act. The Alien Tort Claims Act of 1789 (ATCA) provides in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[206] To obtain federal jurisdiction under ATCA, a plaintiff must show that (1) he or she is an alien, (2) suing for a tort, (3) committed in violation of international law.[207]

Many of the recent cases brought under ATCA allege human rights abuses, which may be easier to establish as violations of international law than environmental damages. These cases come in the wake of the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*, which involved a claim against a Paraguayan police official living in the United Stated brought by relatives of a Paraguayan citizen who was allegedly tortured to death by the official while in Paraguay.[208] The court found that official torture is prohibited by the law of nations and that international law became part of the U.S. common law upon the adoption of the Constitution.[209]

To demonstrate a violation of international law, an environmental ATCA claim must involve a violation of either a treaty of the U.S. or of the "law of nations." Treaties are agreements among States and generally establish obligations of those States.[210] To the extent that a treaty regulates the behavior of the nations that are party to the treaty, it would be difficult to base an environmental ATCA claim against a private actor on a violation of the treaty. For example, the La Paz Agreement between the U.S. and Mexico establishes obligations for the two governments rather than for private parties within the U.S. and Mexico. Some existing environmental treaties do establish civil liability regimes for private actors in certain circumstances; it is possible that the U.S. and Mexico could enter into such treaties in the future, establishing the types of violations that could be pursued through an ATCA claim.[211]

The other basis for an ATCA claim—the law of nations—encompasses universally-recognized norms of international law, which are determined by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[212] A recent federal district court decision rejected an ATCA claim involving environmental damages. In *Aguinda v. Texaco, Inc.*,[213] Ecuadoran plaintiffs alleged damages resulting from Texaco's oil piping and waste disposal practices. The claims for monetary and equitable relief were brought under various tort theories and violations actionable under the Alien Tort Claims Act. In their ATCA claim, plaintiffs sought to use Principle 2 of the 1992 Rio Declaration on Environment and Development as a source of international law. The District Court cited a recent Fifth Circuit decision in stating that the ATCA "applies only to shockingly egregious viola-

[205] *Id.*

[206] 28 U.S.C. § 1350 (1994).

[207] Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995) (citing Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980)).

[208] 630 F.2d at 886.

[209] *Id.* at 880, 886.

[210] *See generally* DAVID HUNTER *ET AL.*, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 206-207 (Foundation Press 1998); Jennifer Rankin, *U.S. Laws in the Rainforest: Can A U.S. Court Find Liability for Extraterritorial Pollution Caused by a U.S. Corporation? An Analysis of Aguinda v. Texaco, Inc.*, 18 B.C. INT'L & COMP. L. REV. 221, 254 (1995).

[211] For a discussion of existing treaties that address civil liability in the areas of waste, nuclear activities, oil pollution, and other dangerous activities, see PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 652, 672 (1995); Anastasia Khokhryakova, *Beanal v. Freeport-McMoRan, Inc.: Liability of a Private Actor for an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 463, 483 (Summer 1998). These treaties generally do not address U.S.-Mexico transboundary issues or are not in force in the U.S. *Id.*

A related, but separate, question is whether a treaty provides a private right of action. Few courts have addressed this question in the context of the ATCA. *See* Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 546 (1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (rejecting ATCA claim and finding that courts have "held consistently that only treaties with a specific provision permitting a private action, or one to be clearly inferred, may suffice as the basis for federal jurisdiction").

[212] Filartiga, 630 F.2d at 880 (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

[213] 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, Aguinda v. Texaco, Docket No. 01-7756(L), 01-7758(C), 2002 WL 1880105 (2nd Cir. Aug. 16, 2002).

tions of universally recognized principles of international law."[214]

Plaintiffs bringing an environmental tort case under the Alien Tort Claims Act would need to consider carefully whether the specific conduct at issue—*e.g*, the discharge of toxic or hazardous substances into the environment—caused public health and environmental devastation of such magnitude as to constitute a violation of one or more widely recognized sources of international law. Recent cases suggest that such a claim would be difficult to establish.[215]

It is also important to note that while ATCA specifically provides a forum for tort actions arising from violations of international law, it does not necessarily render the doctrine of *forum non conveniens* inapplicable as a matter of law in such cases. As the District Court stated in *Aguinda*, "courts have applied *forum non conveniens* analysis to cases involving claims brought under the ATCA in essentially the same manner as applied to all other cases."[216] The District Court further held that nothing in the text of the ATCA suggests that the U.S. forum should be given preference over a more convenient foreign forum that is adequate to handle the case.[217]

B. State Jurisdiction: The Local Action Rule[218]

Under the local action rule, courts may not exercise jurisdiction over any "local" action involving real property unless the property at issue is found within the territorial boundaries of the state where the court is sitting.[219] When the action of trespass developed in England, jurymen were supposed to have personal knowledge of the facts, thus all cases had to be tried in the neighborhood of the occurrence.[220] This idea was brought to the United States and encompassed in the local action rule.

Some states have incorporated the local action rule into their venue statutes. Among the U.S. border states, for example, Arizona, California, and Texas have venue statutes requiring that actions for injuries to land be brought in the jurisdiction where the land is located.[221] In these states, the local action rule might present a hurdle to the pursuit of a case in state court that includes trespass on lands or other harm to land; however the trend is to strictly construe these provisions.[222] Courts in the U.S. have been reluctant to apply the local action rule to actions that are not directly related to title to property, even when interpreting venue statutes that provide that injuries to land must be brought in the county where the land is located.[223]

In states such as California, Arizona, and Texas, two considerations are relevant to avoiding the application of the local action rule. First, the venue statutes in these states require that in cases involving injuries or damages to real property, the *county* in which the real property is situated is the proper county for trial.[224] Thus, when the injured property is not located in any county within the state, it

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[214] 142 F. Supp. 2nd at 552 (quoting Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) (quoting Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983)). *See also* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (rejecting the Stockholm Principles as too general to support plaintiff's ATCA claim involving hazardous waste export violations).

Another potential obstacle to bringing an environmental ATCA claim is the need to demonstrate that the defendant is a "state actor." *See* Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 Stan. Envtl. L.J. 145, 161 (1999) (noting that the "dominant trend in case law. . . [is to require] that ATCA plaintiffs must prove state action when the offense does not amount to genocide, war crimes, or slavery." *But see* Richard Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 Va. J. Int'l. L. 594-96 (2000) (arguing that courts should not require a showing of state action in certain environmental ATCA cases).

[215] For a discussion of theories for pursuing environmental ATCA claims by linking environmental violations to the kinds of "core" human rights violations that some courts have already recognized, see Richard Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 Va. J. Int'l. L. 565, 574-599 (2000).

[216] 142 F. Supp. 2d at 553 (citations omitted). In affirming the decision, the Second Circuit also noted in dicta that even if ATCA were interpreted to cover plaintiffs' arguments, dismissal would be warranted on *forum non conveniens* grounds. Aguinda v. Texaco, Docket No. 01-7756(L), 01-7758(C), 2002 WL 1880105 (2nd Cir. Aug. 16, 2002).

[217] *Id.*

[218] In addition to the local action rule, state statutes may establish specific jurisdictional requirements for tort or other lawsuits brought by foreign plaintiffs. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 71.031 (2001) (governing wrongful death actions where acts or omissions occurred out of state). Such laws are not discussed in this report.

[219] Bigio v. Coca-Cola Co., 239 F.3d 440, 449-450 (2d Cir. 2000).

[220] Restatement (Second) of Conflict of Laws § 87 cmt. a (1989).

[221] Ariz. Rev. Stat. § 12-401(12) (2000); Cal. Civ. Proc. Code § 392(1)(a) (2000); Tex. Civ. Prac. & Rem. Code Ann. § 15.011 (2001).

[222] Restatement (Second) of Conflict of Laws § 87 cmt. a (1989).

[223] Secretariat of the Commission for Environmental Corporation, Background Paper on Access to Courts and Administrative Agencies in Transboundary Pollution Matters (May 1999).

[224] Ariz. Rev. Stat. § 12-401(12) (2000); Cal. Civ. Proc. Code § 392(1)(a) (2000); Tex. Civ. Prac. & Rem. Code Ann. § 15.011 (2001).

can be argued that the action would be covered by the general venue provision allowing venue in the place of the defendant's residence.[225]

Second, the local action rule might be avoided if the action combines a tort claim (a transitory action) with a claim for damages to property (a local action). For example, courts in Texas have held that the local action rule venue provision does not govern "where title to land was involved only incidentally or secondarily, but only where the title to the land is the 'dominant purpose' of the lawsuit.[226] Applying this reasoning, the local action rule would not affect suits that are brought primarily for damages to property and persons, even though the property is not located in the state.

Recent federal decisions also suggest that the local action rule would not present a hurdle in federal cases based on diversity jurisdiction. *Bigio v. Coca-Cola Co*[227] involved claims of conversion and violation of the law of nations, in a case addressing the confiscation of plaintiff's property in Egypt. The Second Circuit determined that actions brought on the basis of a legal theory other than trespass are not limited by the local action rule.[228] The court also noted that the case should not be dismissed because it involved predominantly non-local claims, while the claims of a local nature were merely implicit in the complaint.[229] Similarly, the local action rule has been held not to apply to claims that are "transitory"—such as tort or product liability claims—and that "are not bound to any issues of title or possession of real property."[230]

[225]DAVID HUNTER *ET AL.*, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1455 (Foundation Press 1998); SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL CORPORATION, BACKGROUND PAPER ON ACCESS TO COURTS AND ADMINISTRATIVE AGENCIES IN TRANSBOUNDARY POLLUTION MATTERS (May 1999).

[226]Box v. Ameritrust Texas, N.A., 810 F. Supp. 1776 (1992) (citing Scarth v. First Bank & Trust Co., 711 S.W.2d 140 (Tex. App. 1986) and Stiba v. Bowers, 756 S.W.2d 835, 839 (Tex. App. 1988)). *See also* Armendiaz v. Stillman, 54 Tex. 623 (1881) (allowing plaintiff who owned land in Mexico to bring action in Texas where conduct harming land occurred).

[227]239 F.3d 440 (2d Cir. 2000).

[228]239 F.3d at 450.

[229]*Id. See also* Raphael Musicus, Inc. v. Safeway Stores, Inc., 743 F.2d 503 (7th Cir. 1984).

[230]In re: School Asbestos Litigation, 921 F.2d 1310, 1319 (3d Cir. 1990). *See also* Raphael Musicus, Inc. v. Safeway Stores, Inc., 743 F.2d 503, 508 (7th Cir. 1984) ("The determinative element in defining a transitory action is whether the type of relief requested is of a 'personal' nature so that the court, in acting upon the person or personal property of the defendant. . . need not act directly upon the lands involved.").

C. THE *FORUM NON CONVENIENS* DOCTRINE

When both a U.S. and Mexican court have jurisdiction over a particular matter—*i.e.*, where Mexican courts provide an alternate forum for hearing the case— the doctrine of *forum non conveniens* addresses whether a U.S. court may decline jurisdiction in favor of the foreign tribunal. Plaintiffs seeking damages from a U.S. defendant for environmental activities in Mexico can expect the defendant to argue that the case should be heard in Mexico instead of the U.S. For federal court cases, federal common law establishes the framework for analysis; in state court, state common law and statutes apply.

The *forum non conveniens* analysis undertaken by federal and state courts are similar, though the precise framework for that analysis differs somewhat depending on the federal circuit, or the state court, in which the case is brought. In light of federal and state courts' willingness to grant dismissal based on *forum non conveniens* motions, private plaintiffs face considerable hurdles in filing tort actions based on activities and damages that occurred in Mexico. Nevertheless, whether a court retains jurisdiction over an environmental tort case involving Mexico or declines to hear the case in favor of a Mexican forum will depend on a weighing of private and public interest factors, and the outcome is thus heavily dependent on the facts at hand.

1. Actions in Federal Court: Factors considered by the court in deciding a motion for dismissal based on the *forum non conveniens* doctrine

Although the Supreme Court has not addressed the issue directly, many circuit courts have ruled that federal cases based on diversity jurisdiction use the framework established by federal common law when undertaking a *forum non conveniens* analysis.[231] This rule is based on the view of *forum non*

[231]*See e.g.,* Monegro v. Rosa, 211 F.3d 509, 511 (9th Cir. 2000); Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd., 2 F.3d 990, 992 (10th Cir. 1993); Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis, Ltda., 906 F.2d 45, 50 (1st Cir. 1990); In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc), *vacated on other grounds*, 490 U.S. 1032 (1989), *prior opinion reinstated in relevant part*, 883 F.2d 17 (5th Cir. 1989); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985).

conveniens as an issue of court procedure rather than substantive law.[232]

Under federal common law, a U.S. court with jurisdiction to hear a case may nonetheless decline jurisdiction if, for convenience and in the interest of justice, the case should be brought in another forum. According to an early Supreme Court decision, "(t)he ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice."[233] The initial inquiry is whether an alternate forum exists.

In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes the criteria for choice between them.[234]

Thus, when the defendant moves to dismiss an environmental tort case involving Mexico on the ground of *forum non conveniens*, the initial inquiry is whether Mexican courts provide an adequate alternative forum. If so, the court evaluates both the private and public interests at stake in determining whether the case should proceed in the U.S. The defendant has the burden of proving all elements of the *forum non conveniens* analysis.[235] As stated by the Supreme Court in *Piper Aircraft v. Reyno*, the defendant "must provide enough information to enable the District Court" to evaluate the alternative forum.[236]

a. Determination of adequate alternative forum

In *Reyno*, a wrongful death suit brought by survivors of Scottish citizens who died in a airplane crash in Scotland against the manufacturer of the airplane, the Supreme Court set forth the framework for determining the availability of an adequate alternative forum. Interpreting *Reyno*, courts have applied a two-part analysis. First, the court considers whether an alternative forum is "available" and second, the court considers whether the alternative forum is "adequate." The courts then weigh the relevant public and private interests.[237]

Is the alternative forum "available"? An alternative forum is "available" to the plaintiff when the foreign court can assert jurisdiction over the litigation sought to be transferred. As stated in *Reyno*: "Ordinarily, the requirement of an alternative forum will be satisfied when the defendant is 'amenable to process' in the other jurisdiction."[238]

Courts have often conditioned dismissal on the defendant's agreement to submit to the jurisdiction of the foreign court. For example, the district court's decision in *Reyno*, affirmed by the Supreme Court, conditioned dismissal on "(d)efendants abiding by their stipulation to submit to the jurisdiction of the courts of Scotland and their waiver of the Scottish statute of limitations."[239] Some courts have ruled that the stipulation of a defendant to submit to the jurisdiction of a foreign forum—or the court establishing this as a condition of dismissal—suffices to establish that an alternative forum is available.[240]

Is the alternative forum "adequate"? An important holding of the *Reyno* decision is that an alternative forum is not inadequate merely because the substantive law that would be applied there is less favorable to the plaintiff. The Court stated that the "possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."[241] In order to be adequate, the alternative forum must permit litigation of the subject matter of the dispute.[242] In *Reyno*, the Supreme Court noted that there may be rare situations in which

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[232] *See* American Dredging Co. v. Miller, 510 U.S. 443 (1994).

[233] Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 527 (1947).

[234] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506 (1947).

[235] *See, e.g.*, Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001), *aff'd.*, Aguinda v. Texaco, Docket No. 01-7756(L), 01-7758(C), 2002 WL 1880105 (2nd Cir. Aug. 16, 2002); Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001); In re Air Crash Disaster near New Orleans, 821 F.2d 1147, 1164-1165 (5th Cir. 1987); Reid-Walen v. Hansen, 933 F.2d 1390, 1394 (8th Cir. 1991); Lacey v. Cessna Aircraft Co., 862 F.2d 38, 43 (3d Cir. 1988).

[236] 454 U.S. 235, 258 (1981).

[237] *See, e.g.,* Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001); Delgado v. Shell Oil Co. et al., 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000); In re Air Crash Disaster near New Orleans, 821 F.2d 1147, 1165 (5th Cir. 1987).

[238] Piper Aircraft v. Reyno, 454 U.S 235, 254 n.22.

[239] Piper Aircraft v. Reyno, 479 F. Supp. 727, 728 (M.D. Pa. 1979). *See also* Iota v. Texaco, 157 F.3d 153, 159 (2d Cir. 1998) (dismissal of suit by an Ecuadorian plaintiff against Texaco on *forum non conveniens* grounds was improper, "absent a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts for purposes of this action").

[240] *See, e.g.*, DiRienzo v. Philip Services Corp., 232 F.3d 49 (2d Cir. 2000), *vacated in part*, No. 99-7825, WL 33725106 (2d Cir. 2002); Syndicate 420 at Lloyd's London v. Early American Ins. Co., 796 F.2d 821 (5th Cir. 1986); Mizokami Bros. of Arizona v. Mobay Chemical Corp., 660 F.2d 712, 719 (8th Cir. 1981).

[241] 454 U.S. at 247.

[242] *Id.* at 255.

"the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all," and the unfavorable change in law may be given substantial weight.[243] Dismissal was thus improper in a case where the Court was unsure whether a tribunal in the alternative forum, Ecuador, would hear the case, and there was no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted.[244]

In the wake of the *Reyno* decision, courts have dismissed cases on *forum non conveniens* grounds despite significant differences between the U.S. court and the foreign forum in terms of the causes of action, remedies and litigation procedures. Courts following the *Reyno* line of reasoning have held that the alternative forum does not need to have the same cause of action to be considered adequate.[245] It does not necessarily matter if the cause of action available in the alternative forum is rarely used.[246] Moreover, the fact that a potential damage award in a foreign country may be less favorable to the plaintiff than that available in the United States does not render a foreign court an inadequate forum.[247]

Courts have varied in the importance they assign to differences in procedures available in the alternative forum, including issues such as access to proof,[248] availability of jury trials,[249] and delay.[250] Courts have also considered the financial hardship to plaintiff in bringing suit in the alternative forum.[251]

b. Balancing of public and private interests

Once it has been determined that an adequate alternative forum exists, the next step in the *forum non conveniens* analysis is to evaluate and weigh the private interests of the litigants and the public interests. In *Gilbert*, the Supreme Court set out the following private and public interest factors to be considered in deciding whether the U.S. court or an alternative forum is most appropriate:[252]

Private Interest Factors:
- Relative ease of access to sources of proof;
- Availability of compulsory process for attendance of unwilling defendants;
- Cost of obtaining attendance of willing witnesses;
- Possibility of viewing the premises if that is appropriate;
- Other practical problems that make trial of a case easy, expeditious, and inexpensive; and

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[243] *Id.* at 254.

[244] *Id.* at n.22 (citing Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 78 F.R.D. 445 (Del. 1978)).

[245] *See generally* DiRienzo v. Philips Servs. Corps., 232 F.3d 49, 57 (2d Cir. 2000), *vacated in part,* No. 99-7825, WL 33725106 (2d Cir. 2002) ("Even if particular causes of action or certain desirable remedies are not available in the foreign forum, that forum will usually be adequate so long as it permits litigation of the subject matter of the dispute, provides adequate procedural safeguards and the remedy available in the alternative forum is not so inadequate as to amount to no remedy at all."). *See also* Alnwick v. European Micro Holdings, Inc., 137 F. Supp. 2d 112, 119 (E.D.N.Y. 2001) (Dutch forum adequate "even assuming that Dutch law does not recognize the tort of fraud").

[246] In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842, 848-52 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987).

[247] *See, e.g.,* Jennings v. Boeing Co., 677 F. Supp. 803, *aff'd,* 838 F.2d 1206 (3d Cir. 1987); Capital Currency Exch., N.V. v. National Westminster Bank PLC, 155 F.3d 603, 609-11 (2d Cir. 1998) (England adequate forum despite fact that English courts had never awarded money damages in antitrust case); De Melo v. Lederle Labs., 801 F.2d 1058, 1061 (8th Cir. 1986) (forum adequate although it fails to provide for recovery of punitive damages).

[248] *See* Lacey v. Cessna Aircraft Co., 932 F.2d 170, 182 (3d Cir. 1991) ("the barriers to obtaining access to essential sources of proof in the foreign forum" may be "so severe as to render that forum . . . an inadequate alternative"); *but see* In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 809 F.2d 195, 205-06 (2d Cir. 1987) (finding forum adequate even though discovery limited to admissible evidence); Proyectos Orchimex de Costa Rica, S.A. v. E.I. Du Pont de Nemours & Co., 896 F. Supp. 1197, 1201 (M.D. Fla. 1995) ("it is not necessary that the alternative forum have extensive pre-trial discovery procedures comparable to those found in the United States").

[249] *See* Magnin v. Teledyne Continental Motors, 91 F.3d 1424, 1430 (11th Cir. 1996) (referring to many cases dismissing actions in favor of forums where civil actions are not tried by a jury); Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991) (finding complete lack of jury trial did not render Japan an inadequate forum).

[250] *See* Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1227 (3d Cir. 1995) (delay in the Indian courts created "the prospect of judicial remedy becoming so temporally remote that it is no remedy at all").

[251] The First, Second, Seventh, and Eighth Circuits have required lower courts to consider a plaintiff's financial hardships and the effect of bringing the action in the alternative forum. Murray v. BBC, 81 F.3d 287, 292 (2d Cir. 1996) (stating plaintiff's burden is "one of several relevant factors"); Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 720 (1st Cir. 1996) (retaining jurisdiction and finding plaintiffs would face financial obstacles); Reid-Whalen v. Hansen, 933 F.2d 1390, 1398 (8th Cir. 1991) ("The district court 'must be alert to the realities of the plaintiff's position, financial and otherwise, and his or her ability as a practical matter to bring suit in the alternate forum,'" quoting Lehman v. Humphrey Cayman, Ltd., 713 F.2d 339, 346 (8th Cir. 1983)); Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1246-47 (7th Cir. 1990).

[252] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-9 (1947).

- Enforceability of a judgment, once made.

Public Interest Factors:
- Administrative difficulties (*i.e.*, court congestion);
- Relation of the community to the litigation, so as to justify imposing jury duty on community members;
- Local interest in having localized controversies decided at home;[253] and
- Local interest in having trial of a diversity action in a forum that is familiar with the state law that must govern the case.[254]

Trial courts have discretion in evaluating and weighing the private and public interest factors: "Where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."[255] While the evaluation is discretionary, a plaintiff's choice of forum ordinarily will not be disturbed unless the private and public interest factors strongly favor trial in a foreign country. [256] In *Reyno* the Court weakened this presumption when the plaintiff is foreign, holding that "the presumption in favor of the plaintiff's forum choice applies with less than maximum force when the plaintiff is foreign."[257]

Although a foreign plaintiff's choice of forum will receive less deference, that choice remains a factor. As the Ninth Circuit explained, "less deference is not the same thing as no deference."[258] Similarly, the Fifth Circuit stated: "The [*Reyno*] Court's language . . . is not an invitation to accord a foreign plaintiff's selection of an American forum no deference since dismissal for *forum non conveniens* is the exception rather than the rule."[259]

Lower courts have varied in their articulation of the standard for weighing public and private interests. According to the Ninth Circuit: "If the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper."[260] The Fifth Circuit has stated that a moving defendant must "establish that the private and public interests weigh heavily on the side of trial in the foreign forum."[261] According to the Third Circuit, "in order to favor dismissal, the

[253]This factor refers to the relative interests of the U.S. and the foreign forum in hearing the case. A related concept is the judicial doctrine of international comity, which the Supreme Court described long ago as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Hilton v. Guyot, 159 U.S. 113, 164 (1895). In more recent years, courts have considered abstaining from cases on the grounds of international comity when there is a case pending before the courts of the foreign country. *See, e.g.*, Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000). The doctrine of comity has also been raised when there is no parallel proceeding, but where the U.S. cases involve significant concerns of the foreign nation and thus raise important issues of sovereignty. *See, e.g.*, Sequihua v. Texaco, 847 F. Supp. 61 (S.D. Tex. 1994) (dismissal on grounds of comity where plaintiffs live in Ecuador; activity and harm occurred in Ecuador; challenged conduct is regulated by Ecuador; and Ecuador strenuously objected to the proceeding). Thus, where tort cases brought in the U.S. involve parallel proceedings in Mexico or raise important questions of U.S.-Mexico relations – *e.g.*, where the government of Mexico is involved in the conduct at issue or where the government actively objects to the lawsuit – a court might undertake a separate analysis of those issues under the federal common law framework of international comity. Nevertheless, the analyses are likely to be intertwined. *See, e.g.*, Jota v. Texaco, 157 F.3d 153, 160 (2d Cir. 1998) (dismissal on comity grounds warranted without regard to the availability of a foreign forum only in "extreme cases. . .where a foreign sovereign's interests were so legitimately affronted by the conduct of litigation" in the U.S.).

[254]In the international context, this factor involves determining whether a U.S. court will be called on to apply foreign law or whether the case will present an unnecessary conflict of laws. The question of whether U.S. or foreign law will govern the case has been an important factor in some *forum non conveniens* decisions. *See, e.g.*, Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd,* Aguinda v. Texaco, Docket No. 01-7756(L), 01-7758(C), 2002 WL 1880105 (2nd Cir. Aug. 16, 2002). An analysis of how courts evaluate the choice-of-law question in tort cases follows this section's discussion of *forum non conveniens.*

[255]Piper Aircraft v. Reyno, 454 U.S. 235, 257 (1981).

[256]Gilbert, 330 U.S. at 509.

[257]454 U.S. at 255. The Second Circuit recently reversed a *forum non conveniens* dismissal in a case brought by a lawful U.S. resident, finding that a foreign plaintiff should not receive less deference in terms of choice of forum when the plaintiff is lawfully residing in the U.S. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d. 88, 101-103 (2000).

[258]Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) (overruling a *forum non conveniens* dismissal of a case brought by aspiring baseball players in the Dominican Republic against the San Francisco Giants).

[259]In re Air Crash Disaster near New Orleans, 821 F.2d 1147, 1164 n.26 (5th Cir. 1987).

[260]Lueck v. Sundstrand Corp., 236 F.3d 1137, 1145 (9th Cir. 2001).

[261]In re Air Crash Disaster near New Orleans, 821 F.2d at 1164. In In re Air Crash Disaster Near New Orleans, the Fifth Circuit established that if there is an adequate alternative forum and the balance of private interest factors favors dismissal, the district court does not need to consider the public interest factors; however, if the private interest factors do not weigh in favor of the dismissal, the court must then consider the public interest factors. *Id.* at 1165; *see also* Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G., 955 F.2d 368, 376 (5th Cir. 1992).

analysis must 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to the plaintiff's convenience. . . .'"[262]

c. Review of Related Case Law

The following cases illustrate how federal courts have applied the *forum non conveniens* factors in situations involving (1) environmentally-related claims in Latin America and (2) other tort claims arising in Mexico.

Environmental cases. In *Aguinda v. Texaco, Inc.*, discussed above, Ecuadoran plaintiffs alleged property damage, personal injuries, and increased risk of disease as a result of negligent or otherwise improper oil piping and waste disposal practices by the defendant. Despite plaintiffs' arguments that an Ecuadoran court was not an adequate alternative forum, the District Court dismissed the case.[263] Plaintiffs argued that Ecuador's jurisprudence did not recognize class actions, and that procedural processes in Ecuador made it difficult, if not impossible, to litigate tort actions and to receive the equitable remedy plaintiffs were seeking. In response to plaintiffs' arguments that Ecuador has tighter restrictions on discovery, denies oral cross-examination in certain circumstances, and prefers court-appointed experts over party-retained experts, the District Court stated, "the notion that any of these differences renders "inadequate" in any fundamental sense the civil law system employed by Ecuador, by most other nations in South America, and by most of the nations of Europe is insulting to those nations and absurd on its face."[264]

In *Sibaja v. Dow Chemical Co. and Shell Oil Co.*,[265] Costa Rican banana plantation workers alleged sterilization from exposure to a nematocide manufactured by defendants. The court dismissed in favor of an alternative forum in Costa Rica, based on its weighing of private and public interest factors.[266] Similarly, in *Delgado v. Shell Oil Co. et al.*,[267] thousands of banana plantation workers from twelve foreign countries sought damages. The court determined that Burkina Faso, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Ivory Coast, Nicaragua, Panama, the Philippines, Saint Lucia, and Saint Vincent all constituted adequate alternative fora and that the defendant had carried its burden of showing that private and public interests favored dismissal.[268] The *Delgado* court conditioned the dismissal on the defendant's stipulation to waive all jurisdictional and limitation defenses and on acceptance of jurisdiction by foreign courts involved in the cases.[269]

Cases involving conduct in Mexico. In recent years, federal courts have had occasion to undertake *forum non conveniens* analysis in cases involving conduct in Mexico. While these cases do not involve environmental torts of the sort addressed in this report, the decisions offer some insight into how courts have weighed factors that would likely be presented in such a case.

In *Prevision Integral de Servicios Funerarios, S.A. de C.V. v. Kraft*,[270] the district court rejected a *forum non conveniens* motion in a case involving claims of conversion, fraud and breach of fiduciary duty under Texas state law. After finding that Mexico was an adequate and available forum, the court evaluated a number of the private interest factors set forth in *Gilbert*. Key factors in *Kraft* were the defendant's failure to identify any witnesses that would be unavailable in the U.S., and the court's determination that many of the witnesses resided in the U.S. The court found that the issue of compulsory process to reach unwilling witnesses was a relatively neutral factor as between the U.S. and Mexican forums.[271] The court gave little weight to the need for English translation for some witnesses and documents, and found that while a limited set of issues involved application of Mexican law, "the Court is not hamstrung by limited application of foreign laws and jurisprudence."[272] Fi-

[262]Lony v. E. I. Du Pont de Nemours & Co., 886 F.2d 628, 640 (1989) (quoting Piper Aircraft v. Reyno, 454 U.S. 235, 241 (1981)).
[263]142 F. Supp at 537, *aff'd*, Aguinda v. Texaco, Docket No. 01-7756(L), 01-7758(C), 2002 WL 1880105 (2nd Cir. Aug. 16, 2002).
[264]*Id.* at 543. In affirming the dismissal, the Second Circuit also found Ecuador to be an adequate forum and found that plaintiffs' concerns about obtaining evidence in the U.S. were addressed by Texaco's agreement to comply with discovery requests that would otherwise be permissible in the U.S. Aguinda v. Texaco, Docket No. 01-7756(L), 01-7758(C), 2002 WL 1880105 (2nd Cir. Aug. 16, 2002).
[265]757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985).
[266]*Id.* at 1217.
[267]890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (2000).
[268]890 F. Supp. at 1372.
[269]*Id.* at 1357.
[270]94 F. Supp. 2d 771 (W.D. Tex. 2000).
[271]*Id.* at 778-79.
[272]*Id.* at 779.

nally, the court considered public interest factors and found that Mexico's interest in hearing the case was slight, since most of the conduct at issue involved U.S. institutions and alleged violations of U.S. law [273]

In 1995 a Mexican insurance company's negligence claims against a U.S. carrier of goods for losses resulting from a highjacking in Mexico resulted in dismissal on *forum non conveniens* grounds.[274] After finding that Mexican law applied to the case, the court determined that a Mexican forum was available and that it was an adequate forum absent a showing that the plaintiff would be deprived of any remedy or treated unfairly by the Mexican courts, even though Mexican law would not generally provide a comparable amount of recovery.[275] In weighing the private interest factors, the court emphasized that a greater number of relevant witnesses resided in Mexico, and that this would result in greater costs, inconvenience and language barriers in obtaining evidence if the case were tried in the U.S. instead of in Mexico. The court further noted that the trial of a case involving Mexican law would involve difficulty in access to relevant statutes and case law, as well as the need for translators and legal experts. On the public interest side, the court found that Mexico had a greater interest in hearing the case and was more competent to address Mexican law. Although the court found the factors weighed heavily in favor of the Mexican forum, the court conditioned dismissal on the defendant's agreeing to make witnesses available in Mexico and to satisfy the Mexican judgment.[276]

In a 1981 decision, the Eighth Circuit upheld a *forum non conveniens* dismissal, but required that the dismissal be subject to a number of conditions, including: (1) the Mexican court's consent to jurisdiction; (2) the defendant's submitting to the jurisdiction of the Mexican courts; (3) the defendant agreeing to make available in Mexico all documents and witnesses within its control; and (4) the defendant agreeing to satisfy any judgment awarded by the Mexican courts.[277] The lower court opinion dismissing the case had emphasized that: most witnesses were in Mexico and it would be impossible or very expensive to bring them to the U.S.; many witnesses and documents would require English translation; and Mexican law would govern most issues.[278]

Similarly, in *Rodriquez Diaz v. Mexicana de Avion, SA.*,[279] the court conditioned dismissal on defendants' agreement to submit to the jurisdiction of the Mexican courts and to make all relevant witnesses and documents in their control available. In dismissing claims of negligence and product liability arising from the crash of a Mexicana Airlines flight in Mexican air space, the court rejected plaintiffs' arguments that the relationship between Mexicana Airlines and the Mexican government would cause the trial to be delayed for years, that it would be difficult to obtain jurisdiction over Boeing in Mexico, and that proof was in the United States. The court also noted that: "There is certainly no indication that the remedy provided by the Mexican forum would be so clearly inadequate or unsatisfactory that it would be no remedy at all."[280]

2. Actions in State Court: Factors considered by state courts in deciding a motion for dismissal based on the *forum non conveniens* doctrine

Cases brought in state court may also face a *forum non conveniens* challenge, and state courts will look to state statute or case law in making a determination whether to decline jurisdiction. This section reviews state *forum non conveniens* law in the four U.S. border states.

California. In California, the doctrine of *forum non conveniens* has been codified. California Code of Civil Procedure Section 410.30 provides:

> when a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.

The California Supreme Court addressed the issue in *Stangvik v. Shiley, Inc.*,[281] establishing a two-step analysis comparable to the federal standard.

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[273] *Id.* at 781.

[274] Seguros Comercial Americas S.A. de C.V. v. American President Lines, 910 F. Supp. 1235 (S.D. Tex. 1995).

[275] *Id.* at 1245-46.

[276] *Id.* at 1247-49.

[277] Mizokami Bros. of Arizona v. Mobay Chemical Corp., 660 F.2d 712 (8th Cir. 1981).

[278] *Id.* at 718.

[279] 1987 U.S. Dist. LEXIS 13399 (W.D. Tex. Jan. 23, 1987).

[280] *Id.* at 8. *See also* Alma Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 144 (E.D. Tex. 1992) (dismissing related case, citing difficulty in obtaining testimony and evidence in Mexico).

[281] 819 P.2d 14 (Cal. 1991).

The first step is to determine whether the alternate forum is a "suitable" place for trial. If it is, the next step is to consider the private interests of the litigants and the public interest in retaining jurisdiction in California. In *Stangvik*, a products liability case, the court determined that Sweden and Norway were suitable forums, given the fact that defendants had stipulated to jurisdiction there and had agreed to waive all statute of limitations defenses.[282] The court also found that the private and public interest factors weighed in favor of dismissal, but set forth a number of conditions for dismissal, including that the defendant agree to submit to jurisdiction in Sweden and Norway, comply with the discovery orders of the Scandinavian courts, make past and present employees available to testify in Sweden and Norway at defendant's cost, waive any statute of limitations defense in the Scandinavian courts, and pay any final judgments rendered by the Scandanavian courts in the action.[283]

Arizona. In Arizona, application of *forum non conveniens* is based on common law rather than statute. The Arizona Court of Appeals analyzed the question in *Cal. Fed. Partners v. Heed*,[284] using a set of private and public interest factors similar to those analyzed by federal courts. Although the contract at issue in *Heed* was negotiated in California and some witnesses were in California, the Court of Appeals deferred to the discretion of the trial judge who dismissed the California defendant's *forum non conveniens* challenge, since the contract terms specified that Arizona law would be used to construe its terms, the property was located in Arizona, and the defendants are partners in an Arizona partnership and maintain an Arizona office. The court stated: "Where factors of convenience are closely balanced, the plaintiff is entitled to his choice of forum."[285]

In an earlier decision, the Court of Appeals upheld a *forum non conveniens* dismissal in a tort case arising from an auto accident in Mexico.[286] Because the only connection to Arizona was that the defendant lived in the state, the court upheld dismissal conditioned on, among other things, the defendant's submitting to jurisdiction in Mexico and the enforcement in Arizona of any Mexican money judgment against defendant.[287]

New Mexico. In New Mexico, the *forum non conveniens* analysis is also established by the courts, and was discussed at length in *Marchmann v. NCNB Texas National Bank*.[288] In *Marchmann*, the New Mexico Supreme Court essentially applied the federal *forum non conveniens* standard, relying heavily on the Supreme Court decision in *Gilbert v. Gulf Oil*. The *Marchmann* court also noted that the failure to move promptly to dismiss on grounds of *forum non conveniens* is a factor for the court to consider in the analysis, along with other public and private interest factors.[289]

Texas. In Texas, the doctrine of *forum non conveniens* has been codified. The Texas wrongful death statute[290] provides that:

> With respect to a plaintiff who is not a legal resident of the United States, if a court of this jurisdiction, on written motion of a party, finds that in the interest of justice a claim or action [for personal injury or wrongful death] would be more properly heard in a forum outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non-conveniens and may stay or dismiss the claim or action in whole or in part on any conditions that may be just.[291]

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[282] *Id.* at 18.

[283] *Id.* at 17 n.2.

[284] 751 P.2d 561 (Ariz. App. 1987). The private interests include: the relative ease of access to sources of proof; availability of compulsory process for, and cost of, obtaining attendance of unwilling witnesses; the possibility of viewing the scene of the conduct; enforceability of the judgement; and other practical problems that make trial of a case "easy, expeditious and inexpensive." *Id.* at 562. The public interest factors include: the burden of jury duty on people of a community with no relation to the litigation; the appropriateness of holding the trial in a forum that is familiar with the law that must govern the case; and the administrative difficulties of trying the case in an already overburdened jurisdiction. *Id.*

[285] 751 P.2d at 563.

[286] Avila v. Chamberlain, 580 P.2d 1223 (Ariz. App. 1978).

[287] *Id.* at 1225. *See also* Coonley & Coonley v. Turk, 844 P.2d 1177 (Ariz. App. 1993) (dismissing declaratory judgment action on a will, where dispute arose in Iowa, Iowa law was controlling, and the only connection with Arizona was fact that plaintiff was an Arizona resident).

[288] 898 P.2d 709 (1995).

[289] *Id.* at 719-21.

[290] The legislature had repealed the previous wrongful death statute following a court decision holding that the law had effectively abolished the defense of *forum non conveniens* in cases of personal injury, even in cases where injuries occurred in other countries. *See* Dow Chem. Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990) (Costa Rican plaintiffs allegedly sterilized by working with a nematocide in the fields of a banana plantation in Costa Rica).

[291] TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (2001).

This provision applying to non-U.S. residents stands in contrast to Subsection (b) of the statute, which applies to cases involving U.S. resident plaintiffs and requires the defendant to prove that dismissal is warranted by a preponderance of the evidence.[292] The statute further provides that a court may not dismiss a case if the plaintiff is a legal resident of Texas, or if the plaintiff makes a *prima facie* showing that an act committed in Texas was a proximate or producing cause of the alleged injury.[293]

In a recent case, the Texas Court of Appeals rejected an argument that, in adopting Subsection (a), the Legislature intended to adopt as binding authority the federal *forum non conveniens* doctrine set forth in *Reyno*.[294] The court interpreted the term "interest of justice," as used in Subsection (a), to represent "an issue of fundamental fairness to be determined on a case-by-case basis."[295] Thus, where fundamental fairness dictates that a case would be better tried in an alternate forum, the Texas court should dismiss on *forum non conveniens* grounds. However, the court went on to say that, while the factors listed in Subsection (b) are not controlling in a *forum non conveniens* analysis under Subsection (a), the factors are *instructive* in determining whether a trial judge has abused his discretion in granting dismissal based on *forum non conveniens*.[296]

3. Summary and Observations

U.S. courts have found foreign forums to be "available" where the defendant agrees to submit to the foreign court's jurisdiction, and have found foreign forums "adequate" even where the foreign law—both substantive and procedural—provides plaintiffs with more limited recourse than they would have in the United States. Thus, given that Mexican law provides a cause of action in negligence or strict liability for personal and property damages, even differences in Mexican court procedures (*e.g.*, the absence of jury trials) and remedies (*e.g.*, the absence of punitive damages) may not suffice to convince a U.S. court to retain jurisdiction.

Courts have considerable discretion in balancing public and private factors to determine whether the U.S. is an inconvenient forum, given the circumstances of each case. In considering these factors, courts may give more deference to the forum choice of a plaintiff who is a U.S. citizen or legal resident. Where much of the conduct and injury at issue occurred in Mexico, several factors could weigh against the U.S. forum—*e.g.*, the unavailability or cost in transporting witnesses located in Mexico; the cost and inconvenience of translating testimony and documents into English; and the need to apply Mexican law to the key issues in the case. On the other hand, lawsuits involving activities that occurred in Mexico—especially in the border region—have the advantage of geographic proximity to the U.S. As a number of legal commentators and courts have pointed out, Spanish-English translators and Mexican legal experts are readily available, and the cost of transporting witnesses in the border region may be significantly less than the cost of transporting witnesses between states in the U.S.[297] Of greater concern to a court will likely be the lack of compulsory process where significant non-party evidence exists in Mexico, particularly in light of the willingness of some courts to condition dismissal on a U.S. defendant's agreement to make witnesses available in a Mexican proceeding.

Courts will also weigh the public interests of Mexico and the U.S. in hearing the case. Both nations have strong interests in ensuring that envi-

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[292] TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (2001). According to the statute, the defendant must prove: the existence of an alternate forum; the existence of an adequate remedy in the alternate forum; that maintaining the action in Texas would work a substantial injustice to defendant; that the alternate forum can exercise jurisdiction over all defendants; that the balance of the private and public interests favor the alternate forum; and that dismissal would not result in unreasonable duplication or proliferation of litigation.

[293] TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e),(f) (2001).

[294] Baker v. Bell Helicopter Textron, Inc., 985 S.W.2d 272, 276 (Tex. App. 1999).

[295] *Id.* at 277.

[296] *Id.* at 276-77. A U.S. parent corporation of a *maquiladora* recently settled a tort case brought in Texas state court after the corporation failed on a *forum non conveniens* motion to dismiss. According to reports of the case, the plaintiffs – survivors of *maquiladora* workers killed when their company bus overturned – sued the U.S. parent. William Signet, *Maquila Liability*, TWIN PLAN NEWS (Sept. 2000). In the case, the U.S. parent had an agreement with the *maquiladora* to provide, maintain, and operate the buses used to transport the workers. *Id.*

[297] *See, e.g.*, John S. Harbison & Taunya L. McLarty, *A Move Away From the Moral Arbitrariness of Maquila and NAFTA-Related Toxic Harms*, 14 UCLA J. ENVTL. L. & POL'Y 1, 24-26 (1995/96); Michael Sang H. Cho, *Private Enforcement of NAFTA Environmental Standards Through Transnational Mass Tort Litigation: The Role of United States Courts in the Age of Free Trade*, 27 ST. MARY'S L. J. 817, 858 (1996).

ronmental damages resulting from cross-border economic activities are redressed. Clearly Mexico has an interest in regulating the conduct of *maquiladoras* and other Mexican facilities. Yet, environmental damage in the border area is also a practical concern to U.S. federal and state government agencies and to U.S. communities in the border region. While Mexico has an interest in the relationship between U.S. parent companies and their Mexican subsidiaries, the U.S. has an interest in ensuring that U.S. companies are accountable for their activities. In light of the legal and political framework fostering cross-border economic, political and social interaction, a court might conclude that the liability of a U.S. company for its activities in Mexico is a matter of significant public interest that weighs in favor of retaining jurisdiction in the U.S. courts.[298]

The remainder of this section summarizes how courts determine whether to apply U.S. or Mexican law in cross-border environmental tort cases. The choice-of-law analysis is important both in making the preliminary decision about whether the U.S. is an inconvenient forum and in establishing the legal framework for deciding the case if the U.S. court retains jurisdiction.

D. Choice-of-law Issues

For tort cases brought in the U.S. involving conduct that occurred in Mexico, the court will likely consider whether to apply U.S. or Mexican law. In determining which law governs, federal courts in a diversity action apply the choice-of-law rules of the state in which they sit.[299] However, if jurisdiction is not based on diversity of citizenship, federal common law choice-of-law rules are applied, and federal common law follows the approach of the Restatement (Second) of Conflict of Laws.[300]

The framework for making a choice-of-law determination will differ depending on which court is undertaking the analysis. Federal courts (in non-diversity cases) and some states (including Texas and Arizona) use the framework established in the Restatement (Second) Conflict of Laws, while other states (including California and New Mexico) have formulated the inquiry somewhat differently. In most jurisdictions, the choice-of-law analysis in a tort suit involving environmental activities in Mexico will depend heavily on the particular circumstances of the case.[301] As one Texas court stated: "There is no set formula for determining the significance of any particular contact, which must generally be weighed on a case-by-case basis and balanced against other such contacts."[302]

Key factors in the analysis are the location of the conduct and the injury. Another important factor is the relationship of the parties to the U.S. and to Mexico. Additionally, the policy interests of each country are a central consideration. The relationship among these factors and how they are evaluated will vary from jurisdiction to jurisdiction, depending on both the equities of the case and the court's jurisprudence in the area.

1. Federal Common Law Governing Choice of Law

Section 6 of the Restatement (Second) of Conflict of Laws establishes that a court will follow a statutory directive of its own state on choice of law. When there is no such directive, Section 6 provides that the court should consider the following principles:

- the needs of the interstate and international systems;
- the relevant policies of the forum;
- the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
- the protection of justified expectations;
- the basic policies underlying the particular field of law;

[298] As one state court judge noted: "When a court dismisses a case against a United States multinational corporation, it [eliminates] the most effective restraint on corporate misconduct." Dow Chemical v. Alfaro, 786 S.W.2d 674, 688 (Tex. 1990) (concurring opinion).

[299] *See* In re Air Disaster at Ramstein Air Base, Germany, 81 F.3d 570 (5th Cir. 1996); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

[300] *See, e.g.*, Chuidian v. Philippine National Bank, 976 F.2d 561 (9th Cir. 1992); Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 795 (2d Cir. 1980); Edelmann v. Chase Manhattan Bank, N.A., 861 F.2d 1291 (1st Cir. 1988); Halkias v. General Dynamics Corp., 31 F.3d 224 (5th Cir. 1994).

[301] In those states that still rely purely on the *lex loci delicti* rule (the law of the jurisdiction in which the wrongful act occurred), the analysis would be much more straightforward and would point to application of Mexican law unless wrongful conduct in the U.S. was also a basis for the lawsuit.

[302] Trailways, Inc. v. Clark, 794 S.W.2d 479, 485 (Tex. 1990).

- certainty, predictability and uniformity of result; and
- ease in the determination and application of the law to be applied.

Section 145(1) of the Restatement (Second) of Conflict of Laws establishes the general conflict of laws principle for tort cases:

> The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in [Section] 6.

Section 145 also sets forth the following facts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue in tort. According to Section 145(2), these contacts are to be evaluated according to their relative importance with respect to the particular issue:

- the place where the injury occurred;
- the place where the conduct causing the injury occurred;
- the domicile, residence, nationality, place of incorporation and place of business of the parties; and,
- the place where the relationship, if any, between the parties is centered.

The comments to Section 145 note that the choice-of-law analysis may lead a court to apply the law of the forum state to certain issues, and the law of the foreign state to others.[303] For example, a court may apply its own rules to issues involving trial procedure and the rules of a different state to the substantive questions in the case. Moreover, each substantive issue "should receive separate consideration if it is one which would be resolved differently under the local law . . . of the potentially interested states."[304]

[303] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. d (1989).

[304] *Id.* In an action for wrongful death, the choice-of-law inquiry is very similar to that for general tort cases. In an action for wrongful death, the first assumption is that the local law of the state where the injury occurred will determine the rights and liabilities of the parties. *Id.* § 175. However, similarly to § 145, the law of the state that has, with respect to the particular issue, a more significant relation to the occurrence and the parties, will apply. *Id.*

2. State Law Governing Choice of Law

Many states follow the Restatement, while others have established different formulations of the choice-of-law analysis. Following is a summary of the choice-of-law principles used by courts in the four U.S. border states.

California. California follows the "governmental interests" analysis for determining the choice of law.[305] This choice-of-law analysis presumes that California law applies unless the proponent of foreign law can show otherwise.[306] The only compelling reason to displace the law of the forum is if such a choice of law would impair the interest of a foreign jurisdiction.[307]

The analysis in California is a three-step test.[308] First, the court must determine if there is a difference in the substantive laws of California and the foreign jurisdiction as to the issue involved. Second, if the laws are different, the court must determine the interests, if any, of the jurisdictions in applying their own laws. To determine the interest of a foreign jurisdiction in the application of its own laws, the court examines "the particular law and asks whether those policies will be served by applying that law in the action before the forum."[309] If only one jurisdiction has an interest in applying its law, there is only a "false conflict" and the law of that jurisdiction is applied. When neither jurisdiction has an interest in applying its own law, California law is applied. When both jurisdictions have an interest, then a there is a "true conflict" and the courts proceed to the third step.[310]

The third prong is the "comparative impairment test," in which the courts determine which jurisdiction's interest "would be most impaired if its policies were subordinated to those of the other jurisdiction."[311] For example, in *Bauer*, the court found that applying California's law to the issue

[305] *See* Bauer v. Club Med Sales, Inc., No. C-95-1637 MHP, 1996 WL 310076 (N.D. Cal. 1996); Browne v. McDonnell Douglas Corp., 504 F. Supp. 514 (N.D. Cal. 1980).

[306] *See* Bauer at 2.

[307] Browne at 517.

[308] *See* Bauer at 2.

[309] *Id.* at 2 (citing Hurtado v. Superior Court, 11 Cal. 3d 574, 581 (1974)).

[310] *Id.* at 3.

[311] *Id.* at 4. This process is not one of weighing conflicting interests but of attempting "to determine the appropriate scope of conflicting state policies." *Id.* at 4 (quoting Bernhard v. Harrah's Club, 16 Cal. 3d 313, 320-321 (1976)).

before the court (whether a stairwell in a building in Mexico was properly constructed) would have been "unduly harsh" and equivalent to ordering "adoption of a universal building code," and thus decided to use Mexican law.[312] On the issue of damages for wrongful death, the court in *Bauer* only reached the second step under the choice-of-law question in choosing to apply California law. The court found that Mexico did not have an interest in that aspect of the case, since the plaintiffs and the decedent were United States citizens and the defendant was a U.S. corporation.[313]

Arizona. In determining the controlling law for multi-state torts, Arizona follows the Restatement (Second) of Conflict of Laws, and the law of the state with the "most significant relationship to the occurrence and to the parties" will be applied.[314]

New Mexico. New Mexico has not formally adopted the Restatement (Second) of Conflict of Laws.[315] When determining the law to be applied in a tort action, New Mexico generally follows the doctrine of *lex loci delicti* and applies the law of the jurisdiction in which the wrongful act occurred.[316] The "place of the wrong" is the location where the "last act necessary to complete the injury" occurred.[317] However, policy considerations may override the place-of-wrong rule. For example, in *Torres v. State,* the court found that public policy requires that New Mexico law be used to determine the duties of New Mexico law enforcement officials for their actions in New Mexico, even though the place of injury was the state of California.[318]

Texas. In Texas, the "most significant relationship" test enunciated in sections 6 and 145 of the Restatement governs conflicts of law in torts.[319] This analysis turns on the qualitative nature of the contacts at issue, as affected by the policy considerations outlined in the Restatement.[320] In determining which forum has the most significant relationship, Texas courts have emphasized two factors in particular—the relevant policies and interests of the forum and the basic policies underlying the particular field of law.[321]

In *Vizcarra v. Roldan*, an employee of a Texas-based company struck a pedestrian while the employee was driving back from the company's facility in Mexico. The court held that Mexican law should apply because the conduct occurred in Mexico, the relationship between the parties arose there, and Mexico has some policy interest in having its law govern the conduct of drivers within its borders.[322] The court found that there was no conduct in Texas that the state would have sufficient interest in controlling and that, although the defendant was a U.S. company, Mexico has an interest in applying its laws limiting tort recovery since the defendant owned a warehouse and did business in Mexico.[323]

However, in *Ford Motor Co. v. Aguiniga*, which involved a products liability claim stemming from an automobile accident that occurred in Mexico, the court reached a different result. The court emphasized that prior to undertaking the choice-of-law analysis, it must first identify the conflict of law.[324] The conflict in this case involved the amount of damages that could be recovered; Texas allowed unlimited damages, while Mexican law placed a limitation on damages. The court evaluated the contacts with Mexico and with Texas and found that since the defendants were a U.S. citizen and a U.S. corporation, Mexico's interest in protecting its citizens from unlimited tort damages was not relevant. On the other hand, the court found that Texas has a strong interest in controlling corporate action in the manufacture of defective products—in this case, the automobile.[325] The court concluded that where only one government has an in-

[312] *Id.* at 4.
[313] *Id* at 6.
[314] *See* Bill Alexander Ford Lincoln Mercury v. Casa Ford, Inc., 931 P.2d 1126, 1128 (Ariz. App. 1996).
[315] *See* In the Matter of Estate of Gilmore, 946 P.2d 1130, 1136 (N.M. Ct. App. 1997).
[316] *See* Torres v. State, 894 P.2d 386 (1995) (citations omitted).
[317] *Id.* at 390.
[318] 894 P.2d at 390. *See also* In the Matter of Estate of Gilmore, 946 F.2d at 1135-6.
[319] *See* Vizcarra v. Roldan, 925 S.W.2d 89, 90 (Tex. App. 1996) (citing Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979)). Texas' wrongful death statute provides that where an act or omission underlying a suit took place outside of Texas, the court "shall apply the rules of substantive law that are appropriate under the facts of the case." TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(b) (2001).
[320] Vizcarra at 91; Ford Motor Co. v. Aguiniga, 9 S.W.3d 252, 260 (Tex. 1999).
[321] Sanchez v. Brownsville Sports Ctr., Inc., 51 S.W.3d 643, 669 (Tex. 2001); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984).
[322] 925 S.W.2d at 90.
[323] *Id.* at 92.
[324] 9 S.W.3d. at 260.
[325] *Id.* at 261.

terest in the case, a false conflict exists, even if the law of the two countries differs. In such cases, the law of the forum applies.[326]

3. Summary and Observations

In the type of case discussed in this Part of the report, the conduct giving rise to the injury occurs in Mexico and the defendant resides in the U.S. Where the injury takes place in Mexico and affects Mexican residents only, and where the defendant's ties to the forum state are minimal or not central to the case at hand, a U.S. court hearing the case may be inclined to find that Mexican law should govern the case. This conclusion might be different where U.S. residents are among the injured plaintiffs or where the environmental damage extends into the forum state. A court might also find a stronger governmental or policy interest for applying U.S. law where the U.S. defendant's actions in the case have a more direct connection to the forum state.[327]

Some states, including California and Texas, have emphasized that the choice-of-law analysis begins with a determination as to whether a conflict of law exists. If the law of the two jurisdictions is the same, then there is a false conflict, and the forum state law will generally apply. For tort actions, Mexican and U.S. law governing negligence and strict liability are similar, though not precisely the same.[328] On the subject of damages, however, Mexican law does differ significantly from the law of most jurisdictions in the U.S.[329] Nevertheless, some courts have viewed this as a "false conflict" in tort cases where the defendant is a U.S. citizen or corporation; finding that Mexico has no interest in having its damages limitation applied to non-Mexican parties, those courts have applied U.S. law. Thus, in a tort case involving conduct in Mexico and a U.S. defendant, some courts might conclude that no conflict of law exists either because the law of the two countries are similar, or because Mexico does not have an interest in applying its (different) law to the case at hand.

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[326] *Id. See also* Sanchez v. Brownsville Sports Ctr., Inc., 51 S.W.3d 643, 670 (Tex. 2001) (Texas' interest in applying its products liability law outweighed Mexico's interest in regulating the use of vehicles within its borders). As noted earlier, the U.S. parent of a *maquiladora* recently settled a tort suit brought by relatives of the plant's workers after the court denied the parent company's motion to dismiss based on *forum non conveniens*. William Signet, *Maquila Liability*, TWIN PLAN NEWS (Sept. 2000). The parent company had also sought to have Mexican law applied in the case, but the Texas state court relied on the "false conflict" doctrine in ruling that Texas law should apply. *Id*.

[327] *See generally* Michael Sang H. Cho, *Private Enforcement of NAFTA Environmental Standards Through Transnational Mass Tort Litigation: The Role of United States Courts in the Age of Free Trade*, 27 ST. MARY'S L. J. 817, 863 (1996) (a U.S. state would have "strong interests in deterring [trans-national companies] from polluting areas just beyond the geographical border and preventing [trans-national companies] from taking advantage of Mexico's lax tort liability system").

[328] *See* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059, 1100 (1994) (noting that the general principles governing negligence and strict liability in Mexico do not differ greatly from tort law in Texas, though in Mexico the defense of contributory negligence may act as a complete bar to recovery); *cf.* Boris Kozolchyk & Martin Ziontz, *A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the Untied States*, 7 ARIZ. J. INT'L & COMP. L. 1, 35 (Fall 1989) (differences in Mexican tort law are "sharp" when its application to a particular case is carefully examined).

In one recent case involving an alleged tort committed in Mexico by employees of a U.S. airline, the Second Circuit determined that a conflict of laws did exist because of the differences in Mexican and New York law concerning false imprisonment, negligence, and gross negligence. Curley v. AMR Corporation, 153 F.3d 5, 13 (2d Cir. 1998) (finding that Mexico's substantive law governs, since New York's conflict of laws "interests analysis" gives greatest weight to the location of the tort).

[329] *See, e.g.,* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059, 1100-1101 (1994) (Mexican law on damages "considerably less generous than that of Texas," in light of codified limitations on damage awards and the statutory wage figures used in the calculation of damages).

PART FOUR: ANALYSIS OF SELECTED LEGAL ISSUES—
ACTIVITY OR CONDUCT IN U.S./RESPONSIBLE PARTY IN MEXICO

This Part addresses situations in which conduct causing damage to public health or the environment occurs in the United States, and the responsible party is in Mexico. One example of this type of situation is a violation of U.S. law by Mexican truckers, particularly where those violations result in damage to the environment, natural resources or public health. Another example might be the violation of U.S. hazardous waste handling requirements by a *maquiladora* that is sending its wastes to the United States for disposal.[330]

The following discussion focuses on key legal issues that might arise in a U.S. civil environmental lawsuit brought by a government agency or a private citizen against a defendant in Mexico. Whether the case is seeking a remedy under statutory or common law, a central issue is whether the court has jurisdiction over the parties. Thus, Part Four begins with a discussion of the requirements for establishing personal jurisdiction over the defendant, including service of process requirements. International agreements to which both countries are parties provide the legal framework for serving a defendant in Mexico.

Obtaining evidence abroad is another legal issue that will likely arise when the defendant to a U.S. lawsuit resides in Mexico. In Part Three, the report reviewed evidence gathering in Mexico by means of depositions, where neither party to the U.S. lawsuit resided in Mexico. This Part discusses the legal issues that arise in obtaining testimonial or documentary evidence from a party in Mexico. In this area, international agreements, along with U.S. and Mexican domestic law, establish the legal requirements for gathering evidence.

Finally, Part Four considers the legal framework for enforcing a U.S. judgment in Mexico. Where the defendant resides in Mexico, there is a possibility that the assets needed to satisfy the judgment will be in Mexico as well. The report concludes with an overview of the Mexican legal requirements that govern whether a U.S. judgment may be enforced in that country.

I. OBTAINING PERSONAL JURISDICTION OVER FOREIGN DEFENDANTS

Federal law establishes the requirements for obtaining personal jurisdiction over foreign defendants in non-diversity actions in federal court. In diversity actions, or in cases brought in state court, state law governs.

A. ESTABLISHING PERSONAL JURISDICTION: FEDERAL LAW

In order to demonstrate that a court may exercise personal jurisdiction over a defendant who resides in Mexico, the party bringing a non-diversity suit in federal court must show that three requirements have been met: (1) actual notice to the defendant; (2) "minimum" contacts with the forum state; and (3) amenability to service.[331]

1. Actual Notice

Unless otherwise prohibited by federal law, Federal Rule of Civil Procedure 4(f) provides that service may be effected in a place outside the United

[330] In 1999, EPA brought a RCRA administrative enforcement action against a *maquiladora*—Maquiladora Chambers de México—in connection with the company's shipment of hazardous waste from its manufacturing facility in Sonora to the United States. The alleged violations included: failure to comply with manifesting requirements; improper packaging of hazardous waste containers; and failure to label and mark hazardous waste containers properly. The company settled the case by paying a fine to EPA and paying for two compliance training courses for *maquiladoras* in Sonora. Telephone interview with John Rothman, Office of Regional Counsel, U.S. EPA Region IX (June 2002).

[331] Omni Capital International v. Rudolf Wolff & Co., 484 U.S. 97 (1987).

States[332] by three different means. The Supreme Court has made clear that any means used must be reasonably calculated to give notice.[333]

- First, service may be effected "by any internationally agreed means reasonably calculated to give notice. . . ."[334]
- Second, if there is no international agreement or if the agreement allows other means of service, service may be effected in the manner prescribed by the law of the foreign country in which service must occur; as directed by the foreign authority in response to a letter of request; or (unless prohibited by the law of the foreign country) by in-person delivery of a copy of the summons and complaint or delivery via mail sent by the clerk of the court using a form requiring a signed receipt.[335]
- Third, service upon an individual in a foreign country may be effected by alternative means, as directed by the reviewing court, that do not conflict with international agreements.[336]

Both the United States and Mexico are parties to two international agreements that are relevant to service of process abroad: (1) the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters[337] (hereinafter Hague Service Convention) and (2) the Inter-American Convention on Letters Rogatory and the Additional Protocol to the Inter-American Convention on Letters Rogatory[338] (hereinafter Inter-American Service Convention). The following pages provide a general description of these agreements, which establish the requirements that must be followed for effecting service of process in Mexico.[339]

The Hague Service Convention. The Hague Service Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."[340] The Convention has been interpreted by the Supreme Court as establishing mandatory procedures for service of judicial documents abroad.[341] The Restatement (Third) of Foreign Relations states the point clearly: "If service is made in the territory of a state party to the Hague Service Convention by a method not provided for in the Convention, or by a method to which that state has filed an objection, the service is ineffective in the United States. . . ."[342]

The Hague Service Convention contains a model request for service, which is to be used by parties to the Convention.[343] Article 2 of the Convention mandates that each party designate a Cen-

[332]In cases involving Mexican trucks, plaintiffs may be able to avoid service of process abroad. Federal law requires that motor carriers designate an agent to receive service of process for each U.S. state in which they operate. 49 U.S.C. § 13304 (1994). This information is to be provided to the Federal Motor Carrier Safety Administration (U.S. Dep't of Transportation) on designated forms. *See also* 49 C.F.R. §§ 366, 368 (1994).

[333]Milliken v. Meyer, 311 U.S. 457, 463 (1941).

[334]FED. R. CIV. P. 4(f)(1).

[335]FED. R. CIV. P. 4(f)(2)(A-C).

[336]FED. R. CIV. P. 4(f)(3).

[337]Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 5, 1965, T.I.A.S. No. 6638, 658 U.N.T.S. 163. The Hague Service Convention took effect in Mexico on June 1, 2000. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FULL STATUS REPORT CONVENTION #14, *available at* http://www.hcch.net/e/status/stat14e.html (last visited May 15, 2002).

[338]Inter-American Convention on Letters Rogatory, S. Treaty Doc. 98-27, 98th Cong., 2d sess., (1984), pp. III-V, XII.; 14 I.L.M. 339 (Mar. 1975), and the Additional Protocol to the Inter-American Convention on Letters Rogatory, S. Treaty Doc. 98-27, 98th Cong., 2d sess., (1984), pp. III-V, XII., 18 I.L.M. 1238 (1979).

[339]Prior to Mexico's accession to the Hague Service Convention, U.S. litigants could carry out service of process on defendants in Mexico by using the letters rogatory process under the Inter-American Service Convention or by complying with an alternate method established in federal or state rules of civil procedure. *See generally* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059 (1994).

[340]Hague Service Convention, *supra* note 337, at art. 1. At the time the Convention was signed, the parties did not agree to a definition of the phrase "civil or commercial matters." Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55 (1990). The U.S. defines the term to cover any proceeding that is not criminal, including administrative proceedings. *Id.*

[341]Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988). Thus, "by virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." *Id.* at 699; *see also* Ackermann v. Levine, 788 F.2d 830, 840 (2d Cir. 1986) (service complying with Hague Convention effective even where it did not satisfy inconsistent provision of the Federal Rules of Civil Procedure). The Hague Service Convention is not required to be used if the plaintiff can serve a wholly owned and controlled U.S. subsidiary of the foreign corporation or if the address of the person to be served is not known. Schlunk, 486 U.S. at 707.

[342]RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 472 cmt. a (1987).

[343]Hague Service Convention, *supra* note 337, at art. 3. In the U.S., a Request for Service form (USM-94) may be obtained from the local office of the U.S. Marshal's Service. U.S. DEP'T OF STATE, HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRA-JUDICIAL DOCUMENTS IN CIVIL AND COMMERCIAL MATTERS, *available at* http://www.travel.state.gov/hague_service.html (last visited May 21, 2002).

tral Authority to receive requests for service, and Mexico has designated the General Direction of Legal Affairs of the Ministry of Foreign Affairs (*Dirección General de Asuntos Jurídicos de la Secretaría de Relaciones Exteriores*).[344] Parties seeking service of process in Mexico forward two copies each of the Request for Service form and the document(s) to be served (along with all necessary translations) to the Mexican Central Authority.[345] All documents must be translated into Spanish.[346] The Central Authority determines whether the request conforms to the Convention, serves the document if it conforms, and certifies and returns the certificate of service.[347]

Under the Hague Service Convention, the Central Authority may serve the documents by a method prescribed by Mexico's internal law.[348] The Convention also allows for service by the particular method requested by the applicant, unless that method is incompatible with Mexican law.[349] This option appears to be infrequently used and if it is used, the requesting party must pay for the costs of serving documents by the particular method specified.[350]

The Hague Service Convention provides for additional methods of service. However, Mexico has declared objections to some of these and they may therefore be unavailable to U.S. parties seeking service of process in Mexico.[351] For example, Mexico has prohibited service directly through a contracting state's diplomatic or consular agencies in Mexican territory, unless the document is to be served on a national of the country in which the documents originate, and provided that the service does not contravene public law or violate "individual guarantees."[352] Mexico also has issued the following reservation concerning Article 10, which provides for service through the postal channels, or from judicial officers, officials, or other interested parties in the state of origin directly through the judicial officers or other officials in the state of destination:

> In relation to Article 10, the United Mexican States are opposed to the direct service of documents through diplomatic or consular agents to persons in Mexican territory according to the procedures described in sub-paragraphs a), b), and c), unless the judicial authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees. The request must contain the description of the formalities whose application is required to effect service of the document.[353]

Because the Hague Service Convention has been in effect in Mexico only since 2000, it is difficult to say how Mexican authorities will interpret this reservation if requests for service are made pursuant to Article 10. One commentator urges litigants to make service through the Central Authority "if there is *any* doubt concerning the acceptability of an alternative method" provided under the Hague Service Convention.[354]

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[344]HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FULL STATUS REPORT CONVENTION #14, *available at* http://www.hcch.net/e/status/stat14e.html (last visited May 15, 2002).

[345]Hague Service Convention, *supra* note 337, at art. 3. The State Department notes that U.S. Marshals no longer forward service requests under the Convention; rather the party seeking service mails the documents directly to the foreign Central Authority. For more information about the procedures for forwarding requests for service of process, see U.S. DEP'T OF STATE, HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRA-JUDICIAL DOCUMENTS IN CIVIL AND COMMERCIAL MATTERS, *available at* http://www.travel.state.gov/hague_service.html (last visited May 21, 2002).

[346]*See* Hague Service Convention, *supra* note 337, at art. 5; HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FULL STATUS REPORT CONVENTION #14, *available at* http://www.hcch.net/e/status/stat14e.html (last visited May 15, 2002).

[347]Hague Service Convention, *supra* note 337, at arts. 4, 5, and 6.

[348]Hague Service Convention, *supra* note 337, at art. 5. In general, service in Mexico is a formal process controlled by the courts. *See* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059, 1069-70 (1994). Article 5 of the Hague Service Convention also allows the Central Authority to serve the documents by "delivery to an addressee who accepts it voluntarily."

[349]Hague Service Convention, *supra* note 337, at art. 5.

[350]Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55 (1990).

[351]Hague Service Convention, *supra* note 337, at arts. 8-11, 18; HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FULL STATUS REPORT CONVENTION #14, *available at* http://www.hcch.net/e/status/stat14e.html (last visited May 15, 2002).

[352]HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FULL STATUS REPORT CONVENTION #14, *available at* http://www.hcch.net/e/status/stat14e.html (last visited May 15, 2002). Mexico has not objected to the use of consular channels to forward documents for service to authorities in Mexico that are designated for this purpose. *See* Hague Service Convention, *supra* note 337, at art. 9.

[353]*See* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FULL STATUS REPORT CONVENTION #14, *available at* http://www.hcch.net/e/status/stat14e.html (last visited May 15, 2002).

[354]Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55 (1990).

In addition to the procedures spelled out in the Hague Service Convention, Article 19 of the Convention provides that if the internal laws of a state permit methods of transmission other than those provided for in the Convention, those methods may also be used. As noted above, service of process in Mexico is a formal process that is largely controlled by the courts.[355] A U.S. litigant could consider proceeding with service of process pursuant to Mexican law, though this would require careful scrutiny and the assistance of Mexican counsel, and may not prove more expeditious.[356]

One method of service that is permitted under Mexican law—letters rogatory—is also the subject of an international agreement and thus provides an alternative approach that is well-defined. The use of letters rogatory would be permissible under the Hague Evidence Convention both because it is allowed under Mexican law,[357] and because it is established pursuant to the Inter-American Service Convention. The Hague Service Convention states:

> The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular direct communication between their respective authorities.[358]

The following paragraphs describe briefly the requirements for using letters rogatory pursuant to the Inter-American Service Convention.

The Inter-American Service Convention. The Inter-American Service Convention creates a detailed system for effecting service of process through the use of letters rogatory transmitted through the appropriate channels.[359] The Convention applies to "civil and commercial matters held before the appropriate authority" for the purpose of performing "procedural acts of a merely formal nature, such as service of process. . . ."[360] Although Article 16 of the Convention states that the parties to the Convention may "declare that its provisions cover the execution of letters rogatory in criminal, labor and 'contentious-administrative' cases. . . ." the U.S. and Mexico have not made such declarations.[361] Each state party is required to establish a central authority to serve as receiving agent for letters rogatory from other member countries.[362] The Department of Justice is the central authority in the U.S., while Mexico has designated an office within its Ministry of Foreign Affairs.[363]

Litigants are required to use a standardized form (contained in an Annex to the Protocol to the Convention), which constitutes the letter rogatory. The Convention also contains two additional forms, as well as a description of the judicial documents that must be included with the request.[364] The Convention requires translation of the complaint or

[355]*See* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059, 1072 (1994).

[356]*See* Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-MEX. L. J. 137, 138 (1997); Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55 (1990); Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059, 1068-70 (1994).

[357]*See* C.F.P.C. arts. 549-556; C.F.P.C. Article 547 provides that parties may also choose to forego the use of letters rogatory. *See generally* C.F.P.C. art. 551; *see also* 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, 391 (1994).

[358]Hague Service Convention, *supra* note 337, at art. 11. In addition, Article 25 of the Hague Service Convention states that the Convention "shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties."

[359]Aside from setting forth these procedures, the Convention is silent as to how service may or may not be effected. The Fifth Circuit and at least one lower federal court have held that the Inter-American Service Convention does not exclude methods of service of process other than letters rogatory. *See* Kreimerman v. Casa Veerkamp, 22 F.3d 634 (5th Cir. 1994); Pizzabiocche v. Vinelli, 772 F. Supp. 1245 (M.D. Fla. 1991).

[360]Inter-American Service Convention, *supra* note 338, at art. 2.

[361]*See* U.S. DEP'T OF STATE, INTER-AMERICAN CONVENTION ON LETTERS ROGATORY AND ADDITIONAL PROTOCOL (INTER-AMERICAN SERVICE CONVENTION), *available at* http://www.travel.state.gov/interam.html (last visited May 21, 2002).

[362]Inter-American Service Convention, *supra* note 338, at art. 4.

[363]Mexico has designated the *Dirección General de Asuntos Jurídicos, Dirección Jurídico Contenciosa, Departamento de Exhortos y Relaciones Con Embajadas, Secretaría de Relaciones Exteriores*. *See* U.S. DEP'T OF STATE, INTER-AMERICAN CONVENTION ON LETTERS ROGATORY AND ADDITIONAL PROTOCOL (INTER-AMERICAN SERVICE CONVENTION), *available at* http://www.travel.state.gov/interam.html (last visited May 21, 2002).

[364]*See* Inter-American Service Convention, *supra* note 338, at art. 3. The Forms are available on the web site of the Organization of American States, http://www.oas.org. In the U.S., Forms USM-272 and USM 272A are to be used for this purpose, and may be obtained from the U.S. Marshall's Office. U.S. DEP'T OF STATE, INTER-AMERICAN CONVENTION ON LETTERS ROGATORY AND ADDITIONAL PROTOCOL (INTER-AMERICAN SERVICE CONVENTION), *available at* http://www.travel.state.gov/interam.html (last visited May 21, 2002).

pleading to be served, and provides that the documents forwarded with the request are considered authenticated if they bear the seal of the judicial or administrative authority that issued the letter rogatory.[365] Once the request is transmitted by the U.S. Central Authority to the Central Authority of the state of destination, the latter is required to transmit the letter rogatory to the "appropriate judicial or administrative authority for processing in accordance with the applicable local law."[366]

The Inter-American Service Convention provides that letters rogatory are to be executed in accordance with the laws and procedural rules of the state of destination.[367] The state of destination may, at the request of the authority issuing the letter rogatory, allow special procedures for executing the letter rogatory, provided such procedures are not contrary to the law of the executing state.[368] Mexico's Federal Code of Civil Procedures establishes rules governing international letters rogatory, which generally parallel the provisions of the Inter-American Service Convention.[369] The Code provides that letters rogatory may be transmitted by four methods: by the interested parties; through judicial channels; through consular or diplomatic agents; or by the competent authority of the requesting or receiving state.[370]

2. Minimum Contacts

The requirement for demonstrating that the defendant has "minimum" contacts with the forum in which the case is brought is based on the 14th Amendment to the U.S. Constitution. According to the Supreme Court, ". . . due process requires only that in order to subject a defendant to a judgment . . . if he is not present within the territory of the forum, he have certain minimum contacts within it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[371]

There are two ways to demonstrate the minimum contacts necessary to establish personal jurisdiction. Personal jurisdiction can be established where a defendant's contacts arise from, or are directly related to, the cause of action; alternatively, personal jurisdiction can be established where a defendant's contacts with the forum state, though not directly related to the plaintiff's cause of action, are "continuous and systematic."[372] Most cases brought to enforce U.S. environmental laws will arise from the defendant's conduct in the U.S. and thus should satisfy the minimum contacts requirement.

For example, in *Neilson v. Sioux Tools*,[373] the District Court found sufficient "minimum contacts" in a case arising under CERCLA. The defendant corporation was sued by a subsequent owner of property contaminated by defendant to recover cleanup costs pursuant to CERCLA. The defendant, who had not had any significant contact with Connecticut for the thirteen years prior to the suit, filed a motion to dismiss based on lack of personal jurisdiction. However, the court denied the motion, holding that defendant's alleged contamination of the property was directly related to defendant's activities during the fourteen-year period in which defendant had active contacts within Connecticut, and that the injury arose from the defendant's transaction of business.[374]

In another CERCLA case, *United States of America v. Ivey, et al.*,[375] the District Court found that defendant Ivey, a Canadian citizen and resident served in Canada, was subject to personal jurisdiction in Michigan, where he been president and director of the defendant Michigan corporation and otherwise purposely availed himself of the privilege of conducting activities in Michigan.

3. Amenability to Service

A defendant is "amenable to service" when federal or state law has given the court the authority to

[365] Inter-American Service Convention, *supra* note 338, at art. 3.

[366] *See* Inter-American Service Convention, *supra* note 338, at art. 4. For more information on using the procedures of the Inter-American Service Convention, see the U.S. Department of State web site, http://www.travel.state.gov/interam.html.

[367] Inter-American Service Convention, *supra* note 338, at art. 10.

[368] *Id.*

[369] *See* C.F.P.C. arts. 549-556. *See generally* 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, 393-395 (1994); Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L. J. 1059, 1065 (1994).

[370] C.F.P.C. art. 551; *see also* 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, 394 (1994).

[371] International Shoe Co. v. State of Washington, 326 U.S. 310 (1945) (quoting Milliken v. Meyer, 311 U.S. 457 (1941)).

[372] *Id.* at 316-321.

[373] 870 F. Supp. 435 (D. Conn. 1994).

[374] *Id.* at 440.

[375] 747 F. Supp. 1235, 1238 (E.D. Mich. 1990).

exercise jurisdiction over the defendant. The Supreme Court has held that under the Federal Rules of Civil Procedure, a federal court "normally looks either to a federal statute or to the long-arm statute of the State in which it sits to determine whether a defendant is amenable to service, a prerequisite to its exercise of personal jurisdiction."[376]

Therefore, the party bringing a case in a U.S. federal court against a foreign defendant may demonstrate amenability to service by showing that either the federal statute in question or the long-arm statute of the state in which it sits provides amenability to service. Since federal environmental statutes generally do not address the issue of foreign defendants' amenability to service, a court will look to the state long-arm statute.[377] These statutes are discussed below for the four U.S. border states.

B. Establishing Personal Jurisdiction: State law

In order to demonstrate that a state court may assert personal jurisdiction over a foreign defendant, the party bringing suit must demonstrate that the state's notice requirements have been met, as well as the requirements of the state's statutes for amenability to service. With respect to amenability to service, state statutes—known as "long-arm" statutes—frequently parallel federal due process requirements relating to minimum contacts with the forum state. The long-arm statutes of the four border states are described below. The notice requirements of these states are also summarized here; however, service of process will be governed by the Hague Service Convention, since the Convention is binding on the states under the Supremacy Clause of the Constitution.[378] Thus, regardless of a specific state's notice rules—that is, whether or not the state's rules contain a provision parallel to FRCP 4(f)(1), permitting service pursuant to international agreement—service on a Mexican defendant made in accordance with the Hague Convention must be accepted by the state court.[379]

1. California

Notice. California Code of Civil Procedure Title 5, Chapter 4 establishes the requirements for service of process abroad. Service on a defendant outside the United States may be effected:

- as directed by the court in which the action is pending;
- in the manner set out by the Code for service generally; or
- using the method specified by the law of the place where the person is served or as directed by the foreign authority in response to a letter of request, provided the court finds that the method of service is indeed adequately calculated to give actual notice.

The statute sets out requirements for service on individuals and corporations, and authorizes service by delivery or by mail.[380]

California Long-Arm Statute. The California long-arm statute provides that: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[381] Under this broad language, amenability to service turns on the due process "minimum contacts" analysis.[382]

2. Arizona

Notice. Arizona's rules for service of process are identical to their federal counterpart. Therefore, the same notice requirements apply as under FRCP 4(f).[383]

Arizona Long-Arm Statute. State long-arm jurisdiction in Arizona also extends "to the maximum extent permitted by the Constitution of this state and the Constitution of the United States."[384]

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[376] Omni Capital International v. Rudolf Wolff & Co., 484 U.S. 97 (1987).

[377] *See, e.g.,* United States v. Ivey, 747 F. Supp. at 1238.

[378] *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (Hague Evidence Convention "pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies").

[379] *See* Restatement (Third) of Foreign Relations Law § 472 cmt. c (1987). This might hold true if service were made by letters rogatory pursuant to the Inter-American Service Convention, since that method would be permitted under the Hague Service Convention. In any event, the notice requirements in all four border states appear to permit service by letters rogatory.

[380] Cal. Civ. Proc. Code §§ 413.10, 414-416 (2000).

[381] Cal. Civ. Proc. Code § 410.10 (2000).

[382] *See* Cornelison v. Chaney, 545 P.2d 264 (Cal. 1976); Vons Companies, Inc. v. Seabest Foods, Inc., 14 Cal. 4th 434, 444 (1996).

[383] Ariz. R. Civ. Proc. 4.2(i),(k).

[384] Ariz. R. Civ. Proc. 4.2(a).

Thus, the personal jurisdiction analysis in Arizona, as in California, parallels the due process "minimum contacts" analysis.[385]

3. New Mexico

Notice. New Mexico law provides that notice may be given to any party under the jurisdiction of the New Mexico court system by personally serving the defendant with a copy of the summons, whether within or outside state lines.[386]

New Mexico Long-Arm Statute. The New Mexico long-arm statute provides that any person, regardless of citizenship, who transacts business, operates a motor vehicle, commits a tortious act, insures any person, property or risk, or has ever lived in a married relationship within New Mexico thereby submits him or herself to the jurisdiction of the New Mexico courts as to any cause of action arising from any of these activities.[387] To determine whether personal jurisdiction exists over an out-of-state, non-resident defendant, New Mexico courts apply a three-step test: Whether (1) the defendant's acts are enumerated in the long-arm statute; (2) the plaintiff's cause of action arises from the acts; and (3) the minimum contacts necessary to satisfy due process are established by the defendant's acts.[388]

Most environmental activities subject to transboundary enforcement will involve business activities and/or tortious conduct. The meaning of the terms "transaction of business" and "commission of a tortious act" is to be equated with the minimum contacts sufficient to satisfy due process.[389] Thus, such activities must meet the constitutional minimum contacts test discussed above.

4. Texas

Notice. Under Texas law, the notice requirement may be satisfied by serving a party in a foreign country with a copy of the citation and petition, by any of the following methods:

- in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;
- as directed by the foreign authority in response to a letter rogatory;
- by personal delivery or delivery by mail to the defendant as provided under Texas Rule of Civil Procedure 106;
- pursuant to the terms of any applicable international treaty;
- by consular or diplomatic officials when authorized by the U.S. State Department, on a party in a foreign country; or
- by any means directed by the court that is not prohibited by the law of the country in which service is to be carried out.[390]

Any method used must be reasonably calculated to give actual notice in time for the defendant to answer and defend. Proof of service may be as prescribed by international agreement, Texas rules, order of the court, or law of the foreign country.[391]

Texas Long-Arm Statute. The Texas long-arm statute provides for jurisdiction over non-resident defendants who do business in Texas. The statute lists a number of activities that constitute doing business in Texas, and provides that "other acts" can satisfy the requirement as well.[392] Although the Texas statute appears to have a more limited reach, the statute has been judicially interpreted to "reach as far as the federal constitutional requirements of due process will allow."[393] Therefore, the central consideration in satisfying Texas' long-arm statute is whether extending jurisdiction would be consis-

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[385]Manufacturer's Lease Plans, Inc. v. Alverson Draughon College, 565 P.2d 864, 865 (1977).

[386]N.M. STAT. ANN. § 38-1-16(B) (2001).

[387]N.M. STAT. ANN. § 38-1-16 (2001).

[388]Sanchez v. Church of Scientology, 115 N.M. 660, 663 (1993).

[389]Tarango v. Pastrana, 616 P.2d 440 (N.M. Ct. App. 1980); Telephonic, Inc. v. Rosenblum, 543 P.2d 825 (N.M. 1975).

[390]TEX. R. CIV. PROC. 108a.

[391]*Id.* The Texas long-arm statute (discussed below) contains additional provisions governing service of process on non-residents who conducted business or operated a motor vehicle in the state. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041 *et seq.*, 17.061 *et seq.* (2001). The statute allows for substituted service under certain circumstances on the Secretary of State for a nonresident that conducts business in the state and on the Chairman of the Texas Transportation Commission for a nonresident that operates a motor vehicle in the state. *Id.* §§ 17.044, 17.062.

[392]TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (2001).

[393]Shlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990); Guardian Royal Exchange Assurance v. English China Clays, P.L.C., 815 S.W.2d 223, 226 (Tex. 1991); C.S.R. Ltd. v. Link, 925 S.W.2d 591 (Tex. 1996).

tent with federal constitutional requirements of due process.[394]

C. Summary and Observations

Cases involving environmental activities and damage in the U.S. will likely present facts that meet the "minimum contacts" test incorporated in federal and state due process requirements for establishing personal jurisdiction over a Mexican defendant. For matters falling within the scope of the Hague Service Convention, compliance with that Convention is mandatory in federal or state court cases. Thus, whether or not the U.S. litigant anticipates the need to enforce a U.S. judgment in Mexican courts, the litigant must ensure that the chosen method of service satisfies the terms of the Hague Convention. In light of Mexico's reservations to various provisions of the Convention, transmission of requests for service through the U.S. and Mexican Central Authorities provides a straightforward, if potentially time-consuming, mechanism. The same can be said for the use of letters rogatory under the Inter-American Service Convention, which is another option that would be allowed under the terms of the Hague Service Convention. While the Hague Service Convention may allow a U.S. party to serve process in Mexico pursuant to other methods established by Mexican internal law, this route is less predictable and might not prove more efficient.

[394] *See also* Transportacion Especial Autorizada, S.A. de C.V. v. Seguros Comercial America, S.A. de C.V., 978 S.W.2d 716 (Tex. Ct. App. 1998) (personal jurisdiction established over Mexican transport company that did not have offices or employees in Texas, and whose primary contacts involved communications with customs brokers and Texas carriers and occasional deliveries just inside the Texas border); CSR Ltd. v. Link, 925 S.W.2d 591, 595 (Tex. 1996) (personal jurisdiction not established over an Australian defendant in a toxic tort case where the defendant sold asbestos to a U.S. corporation, but had no offices or employees in Texas, never entered into a contract in Texas, and never purposefully acted to direct its products to Texas).

II. OBTAINING EVIDENCE IN MEXICO

In a U.S. lawsuit that involves conduct in the U.S. and a liable party in Mexico, some of the necessary evidence will be located in Mexico. Part Three of this report discussed the use of depositions and other less formal approaches to gathering evidence from a Mexican official or other individual who is not party to the case. Many of those considerations are also applicable in cases involving a defendant who resides in Mexico. At least two additional issues arise when the defendant resides in Mexico. First, the plaintiff can seek the production of documents, as well as testimony. Second, in addition to invoking Mexico's powers of compulsion through the Hague Evidence Convention, the plaintiff can consider invoking the U.S. court's power of compulsion over the defendant.

A. Production of Documents

As discussed above, the Hague Evidence Convention and Mexican law establish a framework for a U.S. plaintiff to obtain documentary evidence from a defendant in Mexico through use of letters of request.[395] The Hague Evidence Convention does, however, specifically allow a party to "declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common law countries."[396] Mexico has made a declaration in this regard,[397] establishing three requirements for Mexican courts to act on judicial requests for the production and transcription of documents:

- that the judicial proceeding has been commenced;
- that the documents are reasonably identifiable as to date, subject and other relevant information and that the request specifies those facts and circumstances that lead the requesting party to reasonable belief that the requested docu-

[395] Hague Evidence Convention, *supra* note 184, at art. 1. See Part Three, Section II, above for a general discussion of the use of letters rogatory under the Convention.

[396] Hague Evidence Convention, *supra* note 337, at art. 23.

[397] Hague Conference on Private International Law, Full Statute Report Convention # 20, *available at* http://www.hcch.net/e/status/stat20e.html (last visited July 31, 2002); *see also* 28 U.S.C. § 1781 (2000).

ments are known to the person from whom they are requested or that they are in his possession or under his control or custody;[398] and
- that the direct relationship between the evidence or information sought and the pending proceeding be identified.

Mexico's reservations on this issue, as well as the corresponding articles of the Mexican Federal Code of Civil Procedures, reflect an important difference between the Mexican and U.S. legal systems with regard to pre-trial discovery. Whereas most civil litigation in the U.S. involves expansive discovery before the trial begins, in Mexico litigants generally do not gather evidence from each other before the trial. Rather, evidence gathering takes place during the court proceedings and is heavily controlled by the court.[399] While it is unclear precisely how a Mexican court receiving a letter of request will interpret Mexico's declaration under the Convention,[400] the declaration provides guidance for a U.S. litigant when describing a request for documents through the Hague Evidence Convention.

B. Using U.S. Court's Power of Compulsion

Where a U.S. plaintiff is seeking evidence from a party to the lawsuit who resides in Mexico, the Hague Evidence Convention is not the only resort for compelling the production of documents or the taking of testimony through depositions. When a foreign national is a party over whom the U.S. court exercises personal jurisdiction, the court may compel the party to produce evidence.[401] In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*,[402] the Supreme Court held that the language and history of the Hague Evidence Convention make it clear that the treaty does not provide the exclusive means, or even the first resort, for obtaining documents and information located in another country. Rather, the Convention "intended to establish optional procedures that would facilitate the taking of evidence abroad."[403] Thus, the Hague Evidence Convention is "one method" that a court may use to secure the production of evidence abroad.[404]

Although plaintiffs are thus not required to use the framework of the Hague Evidence Convention in seeking to obtain evidence from a defendant in Mexico, considerations of Mexican sovereignty are relevant to this decision. Indeed, *Aerospatiale* held that, in exercising their discretion to decide between use of the Hague Evidence Convention procedures or the Federal Rules of Civil Procedure,

> American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.[405]

Certainly, if the plaintiff anticipates the need to ask Mexican courts to enforce a U.S. judgment, the sovereignty considerations involved in this decision take on greater significance.

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[398] Mexico's Federal Code of Civil Procedures contains a corresponding limitation. Article 561 provides that the obligation to exhibit documents and other things in relation to lawsuits filed abroad does not include exhibiting documents identified only by their generic characteristics. The same article prohibits Mexican courts from ordering the general inspection of records that are not publicly available, unless specifically permitted by Mexican law.

[399] *See* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 St. Mary's L. J. 1059, 1082-1083 (1994).

[400] Some commentators have suggested that Mexican courts might interpret the requirement that the "judicial proceeding has been commenced," as barring letters of request seeking productions until the trial itself has begun, since evidence gathering does not generally begin in Mexico prior to the actual trial. *See* Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 St. Mary's L. J. 1059, 1083 (1994).

[401] Rules 30-34 of the U.S. Federal Rules of Civil Procedure provide for depositions, interrogatories, and production of documents for cases in federal courts.

[402] 482 U.S. 522, 533-34 (1987).

[403] *Id.* at 538.

[404] *Id.* at 541.

[405] *Id.* at 546. *See also* In Re: Anschuetz & Co., 838 F.2d 1362, 64 (5th Cir. 1988) (holding that the District Court is to undertake a case-by-case evaluation of whether the Hague Evidence Convention is appropriate, in light of the particular facts and sovereign interests involved).

III. ENFORCEMENT OF U.S. JUDGMENTS IN MEXICAN COURTS

A U.S. enforcement agency or a private citizen who obtains a civil monetary judgment in a U.S. court against a Mexican resident may need to consider enforcing the judgment in Mexico if the defendant does not have sufficient assets in the U.S. to satisfy the judgment. There is no treaty, convention or other agreement on enforcement of judgments to which both the United States and Mexico are parties. Mexican law thus provides the legal backdrop for the recognition and enforcement of foreign civil judgments in Mexican courts.

A. Substantive Requirements for Enforcing a Foreign Civil Judgment in Mexico

The recognition and enforcement of foreign judgments in Mexico takes place through the judicial process of "*homologación*."[406] The substantive and procedural aspects of this process are set forth in Mexico's Federal Code of Civil Procedures,[407] as part of the Code's 1988 amendments.[408]

A U.S. judgment will not be recognized or enforced in Mexico if the Mexican court determines that the judgment is contrary to public policy. Specifically, the Mexican Federal Code of Civil Procedures provides that foreign judgments will be recognized in Mexico to the extent that they are not contrary to the public order, consistent with Mexican law and treaties.[409] In determining whether to enforce the judgment, however, Mexican courts may not re-evaluate the merits of the judgment, nor examine the facts or the law on which the decision is based.[410] Rather, the courts are limited to examining the authenticity of the judgment and whether or not it may be executed in conformity with Mexican federal law.[411] Ultimately, the court may recognize and enforce the judgment in part or in whole.[412]

Article 571 of the Federal Code of Civil Procedures sets forth several criteria that must be satisfied in order to enforce a foreign judgment in Mexico.

- Foreign court jurisdiction: the foreign court must have had jurisdiction over the matter, in accordance with internationally recognized rules that are consistent with those of the Federal Code of Civil Procedures.[413]
- Finality of judgment: the foreign judgment must be final.
- Personal service of process: the defendant in the foreign proceeding had to have been summoned or notified personally for the purpose of providing him or her with an opportunity to be heard and present a defense.
- Exclusion of *in rem* actions: a U.S. judgment will not be enforced if it was issued in a real property action.
- Absence of parallel proceedings: Mexican courts will not enforce a U.S. judgment if the matter giving rise to the judgment is the subject of a lawsuit between the same parties in Mexico.

The Federal Code of Civil Procedures also gives Mexican courts discretion to refuse to enforce a foreign judgment, notwithstanding satisfaction of the above criteria, if it is demonstrated that the country in which the judgment was issued does not enforce foreign country judgments in similar cases.[414] However, Mexican legal scholars have

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[406] C.F.P.C. arts. 570, 554. This process, also known as *exequatur*, is required for international judicial requests that are not simply of a procedural nature. 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, 394 (1994).

[407] The Civil Procedures Code for the Federal District also contains provisions governing enforcement of judgments; however, those provisions are less comprehensive and include references to the federal code. *See* Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 Nw. J. Int'l L. & Bus. 376, 384 (1994).

[408] There seems to be little, if any, experience to draw on in the enforcement of U.S. judgments in Mexico. In a recent survey of selected law firms, none of those who responded had attempted to enforce a U.S. judgment in Mexico. Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-Mex. L. J. 137, 138 (1997).

[409] C.F.P.C. art. 569. This requirement appears similar to the provision in the Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261 *et seq.* (1986), giving U.S. judges discretion to refuse enforcement of a foreign judgment that contravenes public policy. See discussion in Part Three, Section I, above.

[410] C.F.P.C. art. 575.

[411] *Id.*

[412] C.F.P.C. art. 577.

[413] In general, Mexican courts will recognize the jurisdiction of a foreign court where the foreign rules of jurisdiction are compatible with Mexican law, except in cases that are within the exclusive jurisdiction of the Mexican courts. C.F.P.C. art. 564.

[414] C.F.P.C. art. 571. As discussed in Part III of this report, one potential question regarding enforcement of Mexican monetary judgments in the U.S. is whether the judgment is considered a "fine" or "penalty." To the extent that there are restrictions on enforcing such judgments in the U.S., such constraints might also be posed where U.S. government agencies seek to enforce civil judgments in Mexico.

noted that this provision does not require proof of the existence of reciprocity in order to enforce a judgment, but rather the proof of the absence of reciprocity to prevent enforcement.[415]

B. Procedural Requirements for Enforcing a Foreign Civil Judgment in Mexico.

The party seeking to enforce a U.S. judgment in Mexico must pursue the action in the Mexican court where the defendant is domiciled or, in the absence of such domicile, the court in which the defendant's property is located.[416] According to the Federal Code of Civil Procedures, a foreign judgment will be enforced only if it complies with the formalities contained in the Code regarding letters rogatory.[417] This provision suggests that the U.S. judgment and request for enforcement are to be transmitted through a letter rogatory. The subsequent Mexican court proceeding opens with personal service of a summons to both the plaintiff and the defendant.[418] Each party has nine working days to present defenses or exercise any rights they may have in the matter, and if either party has evidence to offer, the court will schedule a hearing.[419] Mexican law provides for the intervention of the public prosecutor (*ministerio público)* to represent any public rights or interests involved.[420]

The Federal Code also contains a number of procedural requirements relating specifically to requests for enforcement of foreign judgments. The request must be accompanied by the following documentation: an authenticated copy of the judgment; all required translations to Spanish; a designated domicile within the jurisdiction of the Mexican court in which the requesting party can receive notices in the enforcement proceeding;[421] and an authenticated copy of proof that the defendant was served personally and that the judgment is final.[422] The federal code also provides generally that in order to be recognized in Mexico, foreign public documents must be "legalized" (authenticated) by Mexican consular authorities, unless the documents were transmitted internationally through official channels, for example, by means of letters rogatory.[423]

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[415] *See* Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 Nw. J. Int'l L. & Bus. 376, 403 (1994).

[416] C.F.P.C. art. 573; *see* Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 Nw. J. Int'l L. & Bus. 376, 403 (1994).

[417] C.F.P.C. art. 571(I); *see* Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 Nw. J. Int'l L. & Bus. 376, 402 (1994). Articles 550-555 of the CFPC establish the requirements for using letters rogatory.

[418] C.F.P.C. art. 574; *see* Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 Nw. J. Int'l L. & Bus. 376, 403 (1994).

[419] C.F.P.C. art. 574.

[420] *Id.* Because of the nature of the proceeding to enforce a U.S. judgment, legal commentators emphasize the need for U.S. parties to hire local counsel. *See, e.g.,* Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-Mex. L. J. 137, 144 (1997); Ryan Anderson, *Transnational Litigation Involving Mexican Parties*, 25 St. Mary's L. J. 1059, 1113 (1994).

[421] One commentator notes that having local counsel in Mexico will establish a local domicile. Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-Mex. L. J. 137, 146 (1997).

[422] C.F.P.C. art. 572.

[423] C.F.P.C. art. 546, 552. Note, however, that both Mexico and the U.S. are parties to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, Oct. 5, 1961, T.I.A.S. 10072, 527 U.N.T.S. 189, which provides for authentication through the use of a seal ("apostille"). *See generally* U.S. Dep't of State, Authentication of Documents for Use Abroad, *available at* http://www.travel.state.gov/authentication.html (last visited July 31, 2002).

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