

# A Move Away From the Moral Arbitrariness of Maquila and NAFTA-Related Toxic Harms

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*Once we decide to look for a conception of justice that nullifies . . . the contingencies of social circumstances as counters in quest for political and economic advantage, we are led to these principles [that] express the result of leaving aside those aspects of the social world that seem arbitrary from a moral point of view.<sup>1</sup>*

## INTRODUCTION

This essay examines a problem—toxic harms in the Rio Grande valley—from a moral point of view associated with the work of the philosopher John Rawls. The passage from Rawls that provides the prologue contains, at a high level of abstraction, the essence of this perspective. It suggests that in thinking about what we should do about toxic harms, we should disregard “those aspects of the social world that seem arbitrary from a moral point of view.”<sup>2</sup> In the Rio Grande valley, the foremost of these aspects is the U.S.-Mexico border. Surely, anyone who stands in an American border city like El Paso, and looks across the river at its impoverished twin, Ciudad Juarez, must be forcibly struck by the capriciousness of “the contingencies of social circumstance[s]”<sup>3</sup>—that is, the historical contingencies that put the border in the place that it is and not in some other.

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1. JOHN RAWLS, A THEORY OF JUSTICE 15 (1971).

2. *Id.*

3. *Id.*

Rawls supposes that a group of people come together to write a contract that will set forth the basic principles of a just society. Who are these people? For Rawls, they are the members of a closed society, one that is self-contained, into which people are born and live a complete life.<sup>4</sup> Such a society is, of course, rare, if not nonexistent, in the modern world. However, the Rio Grande borderlands can be thought of as a Rawlsian society, at least in a weak sense, even though they are divided by an international boundary. The borderlands are, in some important ways, a third country, Mexamerica, with a particular history, a distinct culture, and a united future—constituting, in a Rawlsian sense, a “system of cooperation over time, from one generation to the next.”<sup>5</sup> And cooperation in any well-ordered society entails some notion of fair play and reciprocity.

The most important thing about the decision-making process that Rawls sets up is that his contracting parties deliberate behind a veil of ignorance. “[N]o one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities.”<sup>6</sup> Rawls argues that “[s]ince all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.”<sup>7</sup> The people who come together to write their contract will not be swayed by reference to social circumstances that are morally arbitrary. They will not be influenced, for example, by the fact that they live on one side or the other of the Rio Grande. After situating them behind this veil, we would ask them to agree on “fair terms of social cooperation.”<sup>8</sup> More specifically, we want to ask what the participants in this experiment would do about cross-border toxic harms. Rawls presumes that their decisions would be for their future reciprocal advantage, because “contingent advantages and accidental influences from the past [would] not affect an agreement on the principles that are to regulate the institutions of the basic structure itself from the present into the future.”<sup>9</sup>

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4. JOHN RAWLS, *POLITICAL LIBERALISM* 12 (1993).

5. *Id.* at 14.

6. RAWLS, *supra* note 1, at 12.

7. *Id.*

8. *POLITICAL LIBERALISM*, *supra* note 4, at 304.

9. *Id.* at 23.

We would first, of course, specify some of the ends that the parties might wish to pursue and the beliefs they might bring to the project. We propose, for example, that they would desire good health<sup>10</sup> and that they would believe that persons who cause certain kinds of harm to others (like pollution-related illness) are blameworthy.<sup>11</sup> We also propose, with Rawls, that behind a veil of ignorance they would agree that their political and legal institutions should be egalitarian. That is, that each person would have “an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all.”<sup>12</sup> Given the fact that the contractors would not know their place in society *ex ante*, a preference for egalitarian institutions would be a rational choice. This would mean, among other things, that the contractors would agree that there would be no discrimination against victims of toxic harms based on the existence of the border.

This article focuses on the dimensions of this last principle. In Part I, we provide a description of the toxic pollution problems in the Rio Grande valley and of the current United States and Mexican efforts to deal with them. In Part II, we introduce a typical transboundary toxic harm fact pattern in a discussion of equal access to justice. The discussion centers on the doctrine of forum non conveniens, a jurisdictional rule that too frequently frustrates equal access. In Part III, we offer a solution to the conflicts that arise out of American and Mexican capital formation through the maquila program and NAFTA, the toxic harms in the border region, and the arbitrary application of the forum non conveniens doctrine. We present a set of presumptions that would disfavor the application of forum non conveniens against border and NAFTA-related plaintiffs. Based on the notion of concentric justice—that our moral obligations are most demanding in the innermost circles of our social world—we presume that border plaintiffs have a very strong claim to equal access. We

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10. For a Rawlsian argument that contractors behind a veil of ignorance would decide against imposing the costs of pollution-related medical conditions on the victims, see THOMAS W. POGGE, *REALIZING RAWLS* 190-98 (1989).

11. For an exploration of the social practice of blaming that uses as an example the case of an industrialist who dumps chemicals into a water supply, see MARION SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY* 221-24 (1992).

12. *POLITICAL LIBERALISM*, *supra* note 4, at 5. Beyond this there is, of course, a basic question: what is it that these egalitarians would equalize? The weakest claim would be for an equal distribution of opportunities, rather than outcomes. We claim no more in this article.

concede, however, that the strength of such claims may diminish with distance from American institutions of justice.

## I.

### THE MAQUILADORA PROBLEM

The Rio Grande, which establishes the border between the United States and Mexico for over 1,200 miles, has been called "the largest toxic lagoon known to humankind,"<sup>13</sup> a "virtual cess-pool,"<sup>14</sup> and "a public-health disaster waiting to happen."<sup>15</sup> In the Mexican city of Matamoros, where the river empties into the Gulf of Mexico, a toxic vapor cloud sometimes hangs in the sky like a shroud. Across the river in the hospitals of Brownsville, an alarming number of babies have been born with undeveloped brains. In 1992, three were delivered in a 36-hour period, one more than would have been expected in a comparable population in an entire year.<sup>16</sup> In Juarez, at the other end of the Rio Grande border, the incidence of 160 anencephalytic births between 1989 and 1993 was five times the expected rate.<sup>17</sup> Many people attribute these tragedies, and others like them,<sup>18</sup> to exposure to toxic chemicals. Two decades of brisk industrial growth on both sides of the border, spurred by Mexico's maquiladora program,<sup>19</sup> have overwhelmed the waste handling infrastructure.

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13. John Gravois, *Border Pollution Alarms Environmentalists: Foreign-Run Plants Creating Disaster Area*, HOUSTON POST, Feb. 13, 1991, at A6 (quoting John O'Connor, President, National Toxics Campaign).

14. Council on Scientific Affairs, *A Permanent U.S.-Mexico Border Environmental Health Commission*, 263 J. AM. MED. ASS'N 3319, 3320 (1990).

15. Linda Robinson, *Poisoning the Border: Many American-Owned Factories in Mexico are Fouling the Environment, and Their Workers Aren't Prospering*, U.S. NEWS & WORLD RPT., May 6, 1991, at 46 (quoting Dr. Reynaldo Godines, President, Tri-County Medical Society, Laredo, Texas).

16. Juanita Darling, *A River of Doubt: The Rio Grande's Pollution is Part of the Debate over NAFTA*, L.A. TIMES, Aug. 31, 1993, World Rep. at 2; Eduardo Montes, *Hunt Goes on for Cause of Brain Defects in Babies Born on Border: Theories Include Chemicals Emitted by Factories, Solvents in Gulf of Mexico, or Fathers Exposed to Chemicals at Work*, L.A. TIMES, July 26, 1992, at A1; Gaynell Terrell, *Tragic Puzzle Grips Families on the Border: Plant Pollution May Cause Brain not to Develop*, HOUSTON POST, May 17, 1992, at A1.

17. Diego Ribadeneira, *Trade Pact's Hidden Dirt: On Mexican Border, Firms Leave Perilous Filth*, BOSTON GLOBE, Mar. 21, 1993, at 77.

18. See, e.g., Edward Cody, *Disfigured Children, Distressed Parents; Suit Filed against U.S. Firm over Alleged Effects of Pollution in Mexican Border Region*, WASH. POST, Oct. 15, 1991, at A18.

19. See *infra* notes 21-43 and accompanying text.

Many maquilas import toxic raw materials from the United States for processing and simply dump the wastes in the river.<sup>20</sup>

A maquiladora is an industrial assembly plant that imports raw materials and component parts into Mexico duty free on the posting of a bond insuring that the finished products will be exported to the United States, the country of origin. If the products are exported back to the United States, as almost all are, tariff schedules apply only to the value added in Mexico—primarily labor, rent, and additional raw materials. The process is one of coproduction. By combining Mexican labor and American technology, a U.S.-based multinational corporation can minimize the cost of each input and maximize its profit margin.<sup>21</sup> The lower tariffs will provide a strong incentive for American manufacturers to locate in Mexico as long as they can secure the competitive advantage of relatively low wages. From a larger perspective, the maquiladora program is simply one part of the booming global assembly industry based on coproduction principles and low wages in developing countries. Since the early 1980s, maquila growth has been astonishingly rapid. By 1991, 375,000 people were employed in 1,739 maquilas on the border alone.<sup>22</sup>

Mexico's hope is that an export-oriented development strategy will lead the way to broad internal industrialization by tapping into local suppliers of inputs and services. Yet the maquilas have tended to form enclaves that rely almost entirely on inputs from the United States and have not integrated into the rest of the Mexican economy.<sup>23</sup> On the border, where the maquilas have been concentrated, this state of affairs has been routine. Delmex, an automotive maquila in Ciudad Juarez owned by Delco, a subsidiary of General Motors, is an instructive example.<sup>24</sup> The plant employs 1,350 lineworkers, almost all of whom are unskilled, to assemble electronic parts for automobiles. It purchases no production inputs in Juarez or anywhere else in Mexico. All the inputs come from the Delco plant in Chicago,

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20. LESLIE SKLAIR, *ASSEMBLING FOR DEVELOPMENT: THE MAQUILA INDUSTRY IN MEXICO AND THE UNITED STATES* 253 (1993).

21. Abelardo L. Valdez, *Expanding the Concept of Coproduction Beyond the Maquiladora: Toward a More Effective Partnership between the United States and Mexico, and the Caribbean Basin Countries*, 22 *INT'L LAW.* 393, 393-94 (1988).

22. See *infra* notes 58-63 and accompanying text.

23. PATRICIA A. WILSON, *EXPORTS AND LOCAL DEVELOPMENT: MEXICO'S NEW MAQUILADORAS* 7 (1992).

24. SKLAIR, *supra* note 20, at 115.

and all the outputs return to the United States.<sup>25</sup> Except for its use of Mexican workers, Delmex has little connection with the local economy. Like most border maquilas, Delmex is simply an offshore assembly point for Delco.

Among the inputs brought into Mexico are toxic raw materials used in industrial assembly processes. Although Mexican law almost always requires the repatriation of hazardous waste associated with the maquila program to the United States,<sup>26</sup> and the United States has agreed to accept it,<sup>27</sup> very little waste is actually readmitted,<sup>28</sup> and some is simply dumped in the Rio Grande.<sup>29</sup> In the period leading up to ratification of the North American Free Trade Agreement (NAFTA), the United States and Mexico acknowledged that "the total amount of hazardous wastes produced by maquiladoras is still not known and is believed to be significantly higher than the recorded values."<sup>30</sup> As Leslie Sklair puts it, this statement is "a euphemistic way of saying that no one knows how much toxic waste the maquilas dump illegally."<sup>31</sup> But Sklair does cite a survey of border maquilas by El Colegio de la Frontera Norte, a Mexican research institute, that found that 87 percent imported toxic raw materials from the United States, and only three percent returned toxic wastes.<sup>32</sup> The result is the toxic pollution problems of the border region.

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25. The average border maquila, which sources only seven percent of its production inputs in Mexico, is not much better integrated into the local economy. *Id.* at 67. Leslie Sklair suggests six measurements of success for the maquila program: 1) backward and forward linkages with the Mexican economy, 2) retention of foreign exchange, 3) upgrading of personnel, 4) genuine technology transfer, 5) condition of labor, and 6) more equal distribution of costs and benefits between the foreign investor and Mexico. *Id.* Whether NAFTA will lead to a greater integration of foreign investment or maquilize the entire Mexican economy is a crucial question for Mexican development.

26. Ley General de Equilibrio Ecológico y de la Protección al Ambiente, art. 153, § VI. English translations of the General Law of Ecological Balance and Environmental Protection are available from the Border Research Institute, P.O. Box 3001, Dept. 3BRI, Las Cruces, NM 88003.

27. See Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., art. VI, 22 I.L.M. 1025 (1983) [hereinafter *La Paz Agreement*].

28. SKLAIR, *supra* note 20, at 253-54.

29. *Id.* at 253.

30. U.S. ENVTL. PROTECTION AGENCY/SECRETARÍA DE DESARROLLO URBANO Y ECOLOGÍA, INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICAN-U.S. BORDER AREA: FIRST STAGE (1992-1994) III-20 (1992) [hereinafter *BORDER ENVIRONMENTAL PLAN*].

31. SKLAIR, *supra* note 20, at 252.

32. *Id.*

This is not to suggest, of course, that the jobs created by the maquiladora program have not been welcome. The poverty and unemployment that characterize developing countries are conspicuous on the Mexican side of the border. On the American side, metropolitan areas are among the nation's most impoverished too. Yet there is no other border in the world where there is a greater border-disparity in respective per capita income levels.<sup>33</sup> In the years before the maquiladora takeoff, for example, Brownsville was the third poorest city in the United States, outdone only by Laredo and McAllen, upriver.<sup>34</sup> Brownsville's rapid growth in the last two decades has been partly due to spillovers from the maquila program.<sup>35</sup> In fact, the maquilas have played a role in the increasing cultural consolidation of the region. The Rio Grande valley can be thought of as a spacious social laboratory in which the United States and Mexico have an opportunity to experiment with harmonious international living arrangements.

#### A. *The Maquila Legal Framework*

Until 1989, the maquiladora program was the only exception to Mexican investment laws that prohibited the complete ownership of Mexican businesses by foreign investors. Under the exception, many maquilas were, and still are, owned entirely by American investors in one of four forms: as a branch of an American business entity, a sole proprietorship, a partnership, or a corporation.<sup>36</sup> For a number of reasons, the business form most commonly used to facilitate maquila operations has been the basic Mexican corporation, the *Sociedad Anónima*, which can be created as a wholly owned subsidiary of a United States corporation<sup>37</sup> or as a joint venture of a group of American corporate investors.<sup>38</sup> In some cases, the joint venture may include a Mexican investor, particularly if there is reason for special govern-

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33. See generally, NILES HANSEN, *THE BORDER ECONOMY: REGIONAL DEVELOPMENT IN THE SOUTHWEST* 15 (1981); RAUL A. FERNANDEZ, *THE MEXICAN-AMERICAN BORDER REGION: ISSUES AND TRENDS* 37 (1989).

34. HANSEN, *supra* note 33, at 15 (1981).

35. FERNANDEZ, *supra* note 33, at 37.

36. For guides to the maquiladora industry from the foreign investor's perspective, see Charles T. DuMars, *Liberalization of Foreign Investment Policies in Mexico: Legal Changes Encouraging New Direct Foreign Investment*, 21 N.MEX. L.R. 251 (1991); John E. Tarbox, *An Investor's Introduction to Mexico's Maquiladora Program*, 22 TEX. INT'L L.J. 109 (1987).

37. See *infra* note 41 and accompanying text.

38. Tarbox, *supra* note 36, at 118.

ment concessions and cooperation.<sup>39</sup> Frequently, investors establish "twin" plants on both sides of the border. Capital intensive operations are conducted in the United States to take advantage of tax benefits, and labor intensive operations are conducted in Mexico to take advantage of lower wages. Finally, arrangements known as "shelters" allow American corporations which are too small to undertake a separate Mexican operation to subcontract work to an established maquiladora with idle capacity.<sup>40</sup>

For investors, "the combination of limited liability, one hundred percent ownership and management, and Mexican taxation of only those retained earnings actually remitted as dividends [have made the Mexican corporation] a popular form for maquiladoras."<sup>41</sup> In terms of the laws that control them, Mexican and American corporations are very similar. The key similarity, and the key advantage to the corporate form, may be that the liability of owners is limited to their capital contributions. Limited liability may be especially important in some industries, like electronics and film processing, which have inherent problems with the management of toxic materials. Although low wages have induced many multinationals to locate in Mexico, in several instances American companies have moved south of the border to escape American environmental regulation.<sup>42</sup> There is statistical evidence that "as pollution abatement costs in a given industry have increased [in the United States], the maquiladora investments in the same industry have grown."<sup>43</sup>

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39. *Id.*

40. SKLAIR, *supra* note 20, at 48-49.

41. Tarbox, *supra* note 36, at 118. Mexican foreign investment laws now permit 100% ownership in other circumstances. DuMars, *supra* note 36, at 261-62. Maquiladora investment will likely remain attractive at least until the tariff reductions of NAFTA are fully implemented in 2008. On this issue, see Cheryl Schechter & David Brill, Jr., *Maquiladoras: Will the Program Continue?* 23 ST. MARY'S L.J. 697 (1992).

42. See GENERAL ACCOUNTING OFFICE, EL COMERCIO ENTRE U.S. Y MÉXICO: EL TRASLADO A MÉXICO DE CIERTOS FABRICANTES ESTADOUNIDENSES DE MUEBLES DE MADERA DE LA ZONA DE LOS ANGELES (1991). Similarly, Leslie Sklair notes that GTE Communications moved a department of its plant from Albuquerque to Juarez after 64 GTE employees filed workers' compensation claims for chemical poisoning. SKLAIR, *supra* note 20, at 216.

43. David J. Molina, *A Comment on Whether Maquiladoras Are in Mexico for Low Wages or to Avoid Pollution Abatement Costs*, 2 J. ENV'T & DEV. 220, 220 (1993).

## B. *The Border's Hazardous Waste*

Although Mexico has a strong regulatory scheme for handling toxic materials, it has lacked effective enforcement. The General Ecology Law,<sup>44</sup> which took effect on March 1, 1988, contains a comprehensive set of guidelines for the generation, storage, transportation, and disposal of hazardous wastes. Among them are the kind of hazardous waste cradle-to-grave tracking and handling provisions contained in the United States' hazardous waste law, the Resource Conservation and Recovery Act.<sup>45</sup> Other provisions include the requirement that most wastes generated by maquilas must be returned to the country of origin.<sup>46</sup> For example, a handler must obtain a permit from Mexico's version of the U.S. Environmental Protection Agency, the Secretariat of Social Development (SEDESOL). Subsequently, the handler must provide detailed information to SEDESOL in waste generation logs, transportation waybills, recycling and final treatment reports, accidental spill descriptions, and so forth. SEDESOL must then review each submission for compliance with the Ecology Law and the regulations promulgated under it. Further, SEDESOL enforcement agents are authorized to conduct regular inspections of hazardous waste producers and handlers and to issue orders setting forth actions that must be taken to comply with the law. Failure to comply can result in the im-

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44. *Infra* note 46.

45. 42 U.S.C. § 6921 et seq. (1988). A handler, for example, must obtain a permit from Mexico's version of the U.S. Environmental Protection Agency, the Secretariat of Social Development (SEDESOL). Subsequently, the handler must provide detailed information to SEDESOL in waste generation logs, transportation waybills, recycling and final treatment reports, accidental spill descriptions, and so forth. SEDESOL is to review each submission for compliance with the Ecology Law and the regulations promulgated under it. Further, SEDESOL enforcement agents are authorized to conduct regular inspections of hazardous waste producers and handlers and to issue orders setting forth actions that must be taken to comply with the law. Failure to comply can result in the imposition of rather effective sanctions, including closure of the plant and jail time for responsible parties. Most of these requirements and procedures are contained in the regulations that implement the Ecology Law. For an English language checklist, see Edward M. Ranger, Jr., *A Compliance Checklist, BUS. MEX.*, Special Ed. 1993, at 86-89.

46. *Id.* The only exceptions are for wastes that are donated to a non-profit or educational organization for resale or "nationalized" by the government. One observer suggests that "nationalization" amounts to nothing more than claiming that the waste was lost in the production process. Elizabeth C. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223, 228 (1989).

sition of sanctions, including closure of the plant and jail time for responsible parties.<sup>47</sup>

Although some waste producers and handlers have been jailed for ignoring required procedures,<sup>48</sup> the consensus is that enforcement has been tragically inadequate. This is evidenced by the dreadful condition of the Rio Grande, dubbed "the greatest human health threat of any river in the country."<sup>49</sup> The parade of horrors in the valley includes open toxic waste pits, uncontrolled incineration of toxic waste, leaking toxic landfills, and toxic spills. In Matamoros, for example, one half mile from the river, a small canal leading from an American owned, maquila contains levels of xylene, a highly toxic solvent, 52,000 times the United States' safe drinking water standard.<sup>50</sup> The problem in Mexico, as in most rapidly industrializing countries, is that hazardous waste generators have been forced to rely on the assimilative capacity of air and water to absorb the pollution they create. Few developing countries have the basic infrastructure and services needed for safe disposal.<sup>51</sup> Although Mexico had seven authorized recycling facilities in 1990, none was in the Rio Grande border area.<sup>52</sup> Maquilas put their waste in drums to be taken away by disposal companies. Few American maquila managers could account for their waste's final destination. Many conceded that it was probably being disposed of improperly, and several expressed "hope that because toxic wastes are laundered through domestic firms, they will remain insulated when a controversy arises."<sup>53</sup>

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47. Ranger, *supra* note 45, at 86-89.

48. See, e.g., Dianna Solis, *Environment Officer Has Toughest Job in Mexico*, WALL ST. J., Aug. 17, 1992, at A4 (recycler jailed for unlawfully accepting thousands of barrels of contaminated wastes).

49. Gaynell Terrell, *Pollutants, Waste Put Rio Grande on Conservationists' List*, HOUSTON POST, April 21, 1993, at A15 (quoting the conservation group American Rivers).

50. Bruce Selcraig, *Poisonous Flows the Rio Grande: On the Verge of an Unprecedented Trade Agreement, the U.S. and Mexico Must Face the Damage They Have Done to the River that Unites Them*, L.A. TIMES MAGAZINE, October 25, 1992, at 30. Xylene is known to cause lung, liver, and kidney damage. The example is one of many that could be given.

51. H. Jeffrey Leonard, *Confronting Industrial Pollution in Rapidly Industrializing Countries: Myths, Pitfalls, and Opportunities*, 12 ECOLOGY L.Q. 779, 794 (1985).

52. BORDER ENVIRONMENTAL PLAN, *supra* note 30, at III-26.

53. Leonard, *supra* note 51, at 799. Jeffrey Leonard conducted many interviews with American maquiladora managers who were "alarmed at the potential long-term health implications of this practice." *Id.*

Apparently, Mexican officials did not begin a serious enforcement effort before the negotiation and ratification of NAFTA. Then, by increasing four-fold the number of inspectors in the field, Mexico increased the percentage of maquiladoras in compliance with the hazardous waste law from six to fifty-four percent. Even though a few of the worst maquilas were shut down,<sup>54</sup> however, the fundamental problems continue. At present, the border lacks the disposal infrastructure needed to handle the large volume of waste being generated. Further, the infrastructure deficit is not confined to industrial toxics. The rapid maquiladora-spurred growth of Mexican border cities, some of which have little or no sewage treatment capacity, has led to the massive dumping of organic waste into the Rio Grande. Along with the unknown volume of toxic chemicals that flows down the river each day from Juarez for the Gulf of Mexico, there are 55 million gallons of raw sewage.<sup>55</sup> Rates of hepatitis-A and dysentery have doubled and tripled, respectively, and the first cases of cholera were reported two years ago.<sup>56</sup> When the maquila program was created, Mexico was unprepared to deal with these side effects of massive industrialization in the border region.

### C. *The Border Environmental Plan and the North American Agreement on Environmental Cooperation*

In 1992, in the context of the NAFTA negotiations, the United States and Mexico stated their intention in the Border Environmental Plan to work together on transboundary pollution problems. With respect to hazardous wastes, the two countries promised to strengthen joint enforcement of tracking regulations,<sup>57</sup> to locate abandoned dumps in the border area,<sup>58</sup> and to increase hazardous waste treatment capacity, first in Juarez and

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54. Nicolas M. Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59, 91-92 (1994).

55. The total population of the border area increased from 3.2 million in 1980 to 6.2 million in 1990, the period of the maquiladora boom. BORDER ENVIRONMENTAL PLAN, *supra* note 30, at III-7.

56. Bruce Selcraig, *From Great River to Great Gutter: the Descent of the Rio Grande; a Testing Program by Mexican, American Students Confirms that the Artery Is Being Choked to Death with Waste, Neglect*, L.A. TIMES, May 19, 1994, at A5.

57. BORDER ENVIRONMENTAL PLAN, *supra* note 30, at VI-11-13. The Plan defines the border as an area 100 kilometers on each side of the international boundary. *Id.* at I-1.

58. *Id.* at VI-13-14. The Plan does not say, however, what will be done about the abandoned dumps that are found.

Matamoros.<sup>59</sup> Expressly recognizing that progress would require money for infrastructural development, Mexico and the United States pledged to spend \$400 million and \$341 million, respectively, on environmental initiatives during the Plan's first three-year phase.<sup>60</sup> However, if NAFTA eventually realizes its potential to spur industrial growth in Mexico and the United States, demands on the assimilative capacity of the border environment will continue to escalate. Indeed, concerns about the inadequacy of the Border Environmental Plan<sup>61</sup> and the possibility that NAFTA would exacerbate the border's environmental problems led to the negotiation and ratification of the North American Agreement on Environmental Cooperation.<sup>62</sup>

The Environmental Side Agreement is a stratagem that relies on trade sanctions to ensure that the United States, Canada, and Mexico will "effectively enforce [their] environmental laws and regulations."<sup>63</sup> The agreement creates the Commission for Environmental Cooperation which consists of (1) a Council, a governing body, which is made up of cabinet level or equivalent representatives of the Parties, (2) a Secretariat, which houses the Commission staff, and (3) a Joint Public Advisory Committee, which provides advice to the Council on environmental issues.<sup>64</sup> The basic responsibility of the Commission is to answer allegations that the NAFTA Parties are not enforcing their environmental laws. The Commission does so in one of two rather complicated ways, depending on whether the complainant is a non-governmental organization (or person) or a Party to the agreement. If the complainant is a non-governmental organization, the Secretariat and Council may choose not to pursue the matter. Were the investigation to go forward, the ultimate result would be the development of a factual record.<sup>65</sup> If the complainant is a NAFTA Party, the ultimate result may be trade sanctions, but only if the facts adduce "a persistent pattern of failure

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59. *Id.* at VI-11.

60. Robert L. Heckart & Tira Harpaz, *Critics Ask if NAFTA is 'Green' Enough*, NAT'L L.J., Dec. 21, 1992, at 17.

61. *See, e.g.*, TEXAS CENTER FOR POLICY STUDIES, AN ANALYSIS OF EPA'S PROGRESS ON THE INTEGRATED BORDER PLAN'S HAZARDOUS WASTE COMMITMENTS 1 (1993) (asserting that "[m]ost of the specific programs mentioned in the plan have not been created, nor have the existing programs been expanded as proposed. . .").

62. North American Agreement on Environmental Cooperation, Sept. 13, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 (1993) [hereinafter Environmental Side Agreement].

63. *Id.* at art. 5(1).

64. *Id.* at arts. 8-19.

65. *Id.* at arts. 14-15.

by [the offending] Party to effectively enforce its environmental laws.”<sup>66</sup>

Since the difficulties of environmental compliance are much greater in Mexico than in the other signatory countries, the scheme seems to make Mexico the target of any trade penalties. Perhaps it is fortunate, then, that the Environmental Side Agreement is unlikely to prove effective. First, as noted, the outcome of most actions may be nothing more than a finding of facts. Second, a complaining Party wanting to prove a persistent pattern of non-enforcement and, thus, obtain trade sanctions must overcome significant procedural hurdles, including consultation between the representatives of the Parties, a special session of the Council, an arbitral panel convened by the Council, and a reconvention of the same panel, before any sanction can be imposed.<sup>67</sup> In fact, when the Environmental Side Agreement was being considered, a high-ranking Mexican official publicly stated that sanctions would never be used.<sup>68</sup> It has been argued that, because “Mexico would not have entered into an agreement which would trigger immediate trade sanctions based on its current environmental enforcement practices[,] the signatories must not have viewed Mexico’s current environmental enforcement levels as unjustifiable.”<sup>69</sup> If, on the other hand, Mexico is expected to bring its enforcement effort up to the level of the United States and Canada, sanctions may result in fewer funds to spend on the development of environmental infrastructure and cleanup.<sup>70</sup>

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66. *Id.* at art. 22.

67. The dispute resolution procedures used when the complainant is a Party are set forth in Articles 22-36. For an analysis, see Laura J. Van Pelt, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 *TEX. INT’L L.J.* 123, 129-132 (1994). For the reasons stated in the text, the author concludes that the Environmental Side Agreement is not “an effective mechanism to ensure the enforcement of environmental laws.” *Id.* at 131.

68. *Id.* at 131 n.80 (citing a statement attributed to Mexican Secretary of Commerce Jaime Serra Puche).

69. Kublicki, *supra* note 54, at 112-13.

70. *Id.* at 112. Nicholas Kublicki proposes that the best way to help Mexico achieve its environmental goals is not to impose trade sanctions, but to institute a debt-for-environmental-infrastructure-development-exchange. *Id.* at 120. The suggestion has considerable merit.

## II.

## A SIDE AGREEMENT FOR EQUAL JUSTICE

Ever since the appearance of Rawls' *A Theory of Justice*, philosophers have debated whether the whole world constitutes a cooperative partnership that entails duties of fair play across national boundaries.<sup>71</sup> Some, like Charles Beitz, contend that because international trade provides cooperatively-obtained benefits to the trading partners, Rawlsian principles of fairness must apply globally.<sup>72</sup> Others, like Brian Barry, take the position that trade alone, no matter how extensive, does not constitute a cooperative structure of the relevant kind.<sup>73</sup> To the extent that international trade involves justice, it is merely the obligation to give a fair return. Barry observes that though trade across political boundaries has been conducted immemorially, "we would hardly feel inclined to think of, say, the Beaker Folk as forming a single co-operative enterprise with their trading partners on the Mediterranean."<sup>74</sup> He could also have chosen an example closer to home: the city of Casa Grandes, whose ruins now lie in the Mexican desert southwest of Juarez, once maintained trade relations with other city-states throughout Mesoamerica. Looking back, we would have no reason to expect the philosophers of Casa Grandes to give much attention to the ethical implications of their city's trade with the Anasazi far to the north in Chaco Canyon.

Indeed, Barry claims that "to the extent that we are inclined to think of the world as more of a co-operative enterprise now, this is not because trade is more extensive or multilateral, but because there really are rudimentary organs of international co-operation,"<sup>75</sup> like, for example, the Commission for Environmental Cooperation. However, the mere existence of these arrangements cannot entail duties of fairness. Instead, they are merely the fora through which decisions that may be based on ethical considerations are made and carried out. There must be something else that engenders the need for these considerations. For

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71. Rawls assumes that they would be members of "a society (illustrated by nations) conceived of as a more or less self-sufficient scheme of social cooperation and as possessing a more or less complete culture." RAWLS, *supra* note 4, at 272 n.9.

72. CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 150-53 (1979).

73. 2 BRIAN BARRY, *Humanity and Justice in Global Perspective*, in *LIBERTY AND JUSTICE: ESSAYS IN POLITICAL THEORY* 182, 194 (1991).

74. *Id.*

75. *Id.*

Barry, it is that “[j]ustice as fair play arises not from simple exchange but either from the provision of public goods that are collectively enjoyed (parks, defence, a litter-free or unpolluted environment, and so on) or from quasi-insurance schemes for mutual aid.”<sup>76</sup> It is not international trade, no matter how mutually beneficial, that calls considerations of fairness forward, but the mutual dependency required for the provision of goods (like a non-toxic environment) that cannot be furnished by individual effort. The Border Environmental Plan and the NAFTA Environmental Side Agreement implicitly recognize that on the Rio Grande border today, mutual dependency and justice are inseparable.

Even if the underfunded Plan and the overly-hedged Side Agreement were likely to reduce future toxic harms, a great deal of damage to the environment has already been done. Because the borderlands constitute a Rawlsian scheme of socio-economic cooperation, they demand institutions of governance that are fair to all. Unfortunately, the public laws have so far failed to provide anything like justice with respect to toxic harms. If our Rawlsian contractors were to agree that one of the public goods that just institutions would provide is reasonable protection from pollution-related illness, as Rawlsian philosophers predict they would,<sup>77</sup> then the borderlands are sadly lacking. This is not because the rules that regulate the handling of toxic substances are not sufficiently stringent, but because they have not been effectively enforced. The difference between the public laws on the books and the public laws in action is not the result of a cynical capitalist scheme to sacrifice the health of border inhabitants for corporate profits. The maquiladora industry has brought, at last, a measure of economic well-being to a terribly impoverished region, but border regulatory institutions have not been given the financial resources for enforcement and for the construction of pollution-control infrastructure to provide social justice. NAFTA and the Commission for Environmental Cooperation may contribute to the solution of those problems in the long term, but the demands of justice are corrective as well as prospective.

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76. *Id.*

77. *See, e.g.,* POGGE, *supra* note 10.

### A. A Hypothetical Example

Suppose, for example, that ToxMex, a maquila incorporated in Mexico but wholly-owned by ToxTex, a parent company incorporated in Texas, has been unlawfully releasing toxic wastes into the drinking water of a Mexican colonia. An outbreak of cancer is detected, and though it is difficult to trace its origin to the toxic releases, causation can be shown. The lawyer for the injured parties informs them that they could certainly file suit against the maquila in a Mexican court under the Mexican Civil Code, which sets forth standards of liability very much like those available in American tort law.<sup>78</sup> The problem is that ToxMex appears to be little more than a cost center for the American parent, which owns the building and all of the machinery, components, and raw materials used in the assembly process. It will probably be discovered that ToxMex has very few assets against which damages can be assessed.

In fact, the value of a personal injury action in Mexico may be minimal unless the victims can reach the United States parent corporation.<sup>79</sup> It might be possible, of course, to do so. Mexican law permits the introduction of foreign corporations as defendants in civil liability actions under jurisdictional rules similar to those that govern American civil actions. In addition, legal entities, including corporations, can be imputedly liable for injuries caused by their agents.<sup>80</sup> In this regard as well, Mexican law is similar to the American rule that a parent corporation can be held liable for harm caused by a subsidiary if the latter is a "mere instrumentality" or "alter ego" of the former.<sup>81</sup> However, there are some additional considerations. First, certain defenses under Mexican law—especially those relating to foreseeability and contributory negligence—may be considerably more powerful than under American law.<sup>82</sup> Second, the damages available under

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78. For discussions of Mexican civil liability law, see Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L.J. 1059 (1994); Daniel I. Basurto González & Elaine Flud Rodriguez, *Environmental Aspects of the Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659 (1991). Claims could be brought under theories of negligence or, possibly, strict liability.

79. González & Rodriguez, *supra* note 78, at 683.

80. *Id.* at 678.

81. See, e.g., *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986) (holding that the corporate veil of the parent corporation can be pierced if the subsidiary is organized and operated as a mere business conduit of the parent).

82. Anderson, *supra* note 78, at 1098-99.

Mexican law—essentially replacement of lost wages and payment of medical expenses—are likely to be considerably less generous.

The wage loss portion of the damage award, for example, will be determined by multiplying the claimant's daily income, up to a cap set by the civil code, by the number of days for which compensation is allowed by the code for the particular injury. If the claimant's income cannot be determined, the minimum income prevailing in the locality of the injury will be used, unless it exceeds the cap.<sup>83</sup> Unfortunately, the minimum often does exceed the cap, which has not been revised since the code was enacted and in many places is lower than the minimum wage. The medical expense portion of the award will probably be limited to the recovery of money actually spent by the victim on medical care received before judgment.<sup>84</sup> Finally, though there is a provision for "moral" damages, they are also severely capped, and generally available only if the defendant's negligence was wanton or willful.<sup>85</sup> The lawyer declares that Mexican law provides "absurdly low standards of compensation when compared to those standards of Texas"<sup>86</sup> and suggests that it might pay to investigate the possibility of bringing the claims in Texas under Texas law.

She soon discovers that Texas has discarded the traditional common law rule of *lex loci delicti* for determining conflict-of-law issues in tort claims, which applied the substantive law of the place of the injury, and has adopted instead the most-significant-relationship test of the *Restatement (Second) of Conflict of Laws*.<sup>87</sup> This means that in deciding which substantive law to apply, the Texas court will consider a number of factors to determine which country has the most significant relationship to the incident, including:

- (a) the relevant policies of Texas and the interests of Mexico,
- (b) the protection of justified expectations,
- (c) the ease in determining and applying the law to be applied,
- (d) the place where the injury occurred,
- (e) the place where the conduct causing the injury occurred, and
- (f) the domicile or place of incorporation of the parties.<sup>88</sup>

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83. *Id.* at 1101.

84. *Id.* at 1103.

85. *Id.* at 1101-03.

86. *Id.* at 1100.

87. *See* *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421-22 (Tex. 1984).

88. The first three factors are set forth in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). The last three are set forth in *id.* at § 145. For a recent

Because these factors are somewhat vague, the lawyer cannot be sure that the Texas court would apply Texas law, but she does think she can make a strong argument on her clients' behalf.

In fact, she is confident that a Texas court will assert personal jurisdiction over the parent corporation since it is incorporated in Texas and has its principal place of business there. Additionally, the court may pierce the corporate veil between the subsidiary and the parent, because courts are much more likely to hold parent corporations liable in tort cases when the subsidiary is inadequately capitalized.<sup>89</sup> She files suit in Texas. Imagine what her mystified clients must think, several months later, when she says:

Well, we served the defendant with a summons at its place of business in the forum. We sued the defendant in one of the places in which [the Texas] venue statute said a defendant may be sued. We were even able to persuade the court that our choice of forum was a reasonable one under the due process clause of the Constitution since the defendant could reasonably anticipate being haled into court [there]. Best of all, we convinced the court that it should apply the forum's pro-plaintiff law because the forum state has the most significant relationship to the controversy. However, I must tell you that the case was dismissed because the judge didn't think this was an appropriate forum.<sup>90</sup>

The judge has discretion under a Texas statute to dismiss personal injury cases by use of the forum non conveniens doctrine, even though personal jurisdiction and proper venue are established.<sup>91</sup> The only good news for the lawyer's clients is that the judge conditioned the dismissal subject to ToxTex's agreement to submit to the jurisdiction of the appropriate Mexican court. The parent corporation consented, in effect, to the piercing of the corporate veil, but it was also able to move the case to Mexico where it will be tried under Mexico's pro-defendant law.

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discussion of how the Restatement factors are employed, see Michael G. Guajardo, *Texas Adoption of the Restatement (Second) of Conflict of Laws: Public Policy is the Trump Card, But When Can It Be Played?*, 22 TEX. TECH L. REV. 837 (1991).

89. Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 988 (1971).

90. This imaginary conversation was first reported in Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 781 (1985).

91. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 1995). The statute reads as follows:

With respect to a claimant who is not a legal resident of the United States, if a court of this state, on written motion of a party, finds that in the interest of justice an action to which this section applies 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 action in whole or in part.

## B. *The Doctrine of Forum Non Conveniens*

The Texas forum non conveniens law was enacted in 1993, in response to the highly controversial decision of the Texas Supreme Court in *Dow Chemical Company v. Alfaro*.<sup>92</sup> *Alfaro* involved product liability and breach of warranty claims brought by a group of Costa Rican banana plantation workers exposed to dibromochloropropane, a liquid pesticide, manufactured by Dow Chemical Company and Shell Oil Company and shipped to Costa Rica after it was banned in the United States. Finding for the workers, the court declared that the legislature had abolished the common law doctrine of forum non conveniens in 1913.

In essence, the forum non conveniens doctrine permits dismissal when the court chosen by the plaintiff determines that the case would be more conveniently and fairly tried elsewhere. Federal courts and most state courts, in applying the doctrine, have followed the balancing approach set forth by the United States Supreme Court in *Gulf Oil Corporation v. Gilbert*.<sup>93</sup> It is worth quoting *Gulf Oil* at some length on the numerous factors to be weighed in deciding whether dismissal is warranted:

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . . It is often said the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress," the defendant by inflicting upon him expense or trouble not necessary to own right to pursue his remedy. . . . Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin.<sup>94</sup>

What makes *Alfaro* remarkable is the intensity with which concurring Justice Doggett expressed his view of these various considerations and of the forum non conveniens doctrine generally.

Alone among the members of the court, Justice Doggett declared that not only had the Texas legislature abolished forum non conveniens, but that it was right to do so: "[t]he refusal of a Texas corporation to confront a Texas judge and jury is to be labelled 'inconvenient' when what is really involved is not con-

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92. 786 S.W.2d 674 (Tex. 1990).

93. 330 U.S. 501 (1947).

94. *Id.* at 508-09.

venience but connivance to avoid corporate accountability.”<sup>95</sup> Justice Doggett makes a rather compelling argument that not allowing disabled Costa Rican plantation workers to sue “a multinational corporation in a court three blocks away from its world headquarters and another corporation, which operates in Texas this country’s largest chemical plant . . . has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad.”<sup>96</sup> To Justice Doggett, it was “ironic that defendants for years have sought to preserve a right to be sued in a home country, yet Shell nevertheless argues that when it is sued in its hometown, the legal fiction of *forum non conveniens* is needed to ensure *convenience* and *fairness*.”<sup>97</sup>

With respect to the private interest factors of *Gulf Oil*, Justice Doggett was dismissive. In fact, he pointed out that Dow and Shell had first attempted to remove the case to the federal trial court to gain access to more favorable federal *forum non conveniens* rules. After the federal judge remanding called that effort specious, Dow and Shell litigated the case for three years in state court before filing their *forum non conveniens* motion. By the time it was granted by the state trial judge, “[m]any of the so-called ‘convenience’ problems had already been resolved.”<sup>98</sup> Extensive discovery had been completed; interrogatories had been answered and returned by the plaintiffs; and they had agreed to come to Texas for medical examinations and depositions. Justice Doggett concluded that in the forty-three years since *Gulf Oil*, the communication revolution has made the private interest factors largely irrelevant anyway. Certainly, technological innovation in information and transportation systems since *Gulf Oil* has significantly changed the meaning of inconvenience. Any inconveniences of trial in Texas would probably have been greater for the plaintiffs than for the defendants. Indeed, it is an irony of *forum non conveniens* that it is the local defendant who almost always wants to try the case elsewhere.<sup>99</sup>

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95. *Alfaro*, 786 S.W.2d at 680.

96. *Id.* at 680-81.

97. *Id.* at 684 (emphasis in original).

98. *Id.* at 682 n.4.

99. Referring to one of the dissenters, Justice Doggett noted: “Justice Cook seems to suggest that it may violate due process for Shell to be sued in Houston. It is an extremely novel holding, unprecedented in American constitutional law, that a corporation could be denied due process by being sued in its hometown.” *Id.* at 685 n.8.

With respect to the public interest factors of *Gulf Oil*, Justice Doggett was equally dismissive. First, he noted that the courts of Texas would not be forced to adjudicate lawsuits in which the state of Texas would have little interest. In fact, the requirements of personal jurisdiction/due process analysis would ensure that Texas *would* have a sufficient interest in the case.<sup>100</sup> Second, he predicted that the courts of Texas would not be flooded with “foreign litigation” and asserted that, in any event, “[c]ongestion in the courts cannot justify a legal rule that produces unjust results.”<sup>101</sup> Third, Justice Doggett asserted that comity—or deference to the interests of the foreign jurisdiction—“is not achieved when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions.”<sup>102</sup> Instead, comity is best achieved by not “incurring the wrath of the Third World as it increasingly recognizes that it is being used as the industrial world’s garbage can.”<sup>103</sup> We agree.

### III.

#### A LIMITATION ON FORUM NON CONVENIENS IN ARTICLE III COURTS

Our first proposal to afford plaintiffs greater protection in an Article III federal court could take two different forms.<sup>104</sup> First, Congress could establish limited statutory protection for the Mexican plaintiff against a forum non conveniens dismissal by creating the following statutory presumptions with regard to toxic harms: (a) if the injury is within the border region, there is an irrebuttable presumption that the U.S. forum is convenient; (b) if the injury is within the NAFTA free trade area, there is a rebuttable presumption that the U.S. forum is convenient; and (c) if the injury is outside of the NAFTA free trade area, there is a rebuttable presumption that the U.S. forum is inconvenient.

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100. *Id.* at 685. For an elaboration of this point, see Stein, *supra* note 90 (arguing public interest analysis under the forum non conveniens doctrine is redundant of personal jurisdiction-due process analysis).

101. *Dow Chemical Co. v. Alfaro*, 786 S.W.2d at 686 (citing *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975)).

102. *Id.* at 687.

103. *Id.* (quoting Hon. Michael D. Barnes, Representative to Congress from Maryland).

104. It is important to bear in mind that fairness and due process are not at issue when a defendant makes a forum non conveniens motion. Due process, through constitutional requirements of personal jurisdiction and venue, has already been satisfied.

Second, Congress could require, as a condition precedent to a multinational corporation's participation in NAFTA trade or maquila investment, that the defendant waive all *forum non conveniens* motions in federal courts, while allowing the courts *sua sponte* to apply the doctrine. Both approaches would implicitly recognize that there are good reasons for giving special consideration to border plaintiffs, but neither would preclude judicial discretion to dismiss in appropriate cases.<sup>105</sup>

Regardless of which proposal Congress might choose, the federal district court would be faced with the same issues that courts presently consider when determining whether to dismiss on a *forum non conveniens* motion—the private interests of the litigants and the public interests of the jurisdiction in which the court sits.<sup>106</sup> Neither interest is controlling, but the interest “likely to be most pressed, is the private interest of the litigant.”<sup>107</sup> In this Part, we focus on (a) private interests in the context of the ma-

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105. It should be noted that under either option, a federal court could deny jurisdiction on the less than concrete “minimum contacts” test. However, if this happened, it would be because the plaintiff simply failed to sue in the correct district court because there will always be a district court in the United States that has jurisdiction over a United States corporation.

106. This interest or factor analysis is now irrelevant to a federal court's determination of whether the suit should have been brought in a different federal district. Inter-state considerations by federal courts are now analyzed under the federal transfer or venue statute. 28 U.S.C. § 1404 (1995). “As a consequence, the federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad.” *American Dredging Co. v. Miller*, 114 S. Ct. 981, 986 n.2 (1994) The factors are only relevant for state courts to apply when the case should have been brought in a different state or in a foreign country and for federal courts to apply when the case should have been brought in a foreign country.

107. *American Dredging Co.*, 114 S. Ct. at 985-86 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)) (emphasis added). The complete quote is as follows:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling [witnesses, that is, the subpoena power of the court], and the cost of obtaining attendance of unwilling witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. Factors of public interest also have [a] place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in

quila industry, (b) public interests in the same context, and (c) the effects of a special forum non conveniens statute on the general venue statute<sup>108</sup> in federal and state courts.

#### A. *Private Interests and the Disfavored Foreign Plaintiff*

According to forum non conveniens doctrine, the private interests of the litigants can be summarized in one word—convenience.<sup>109</sup> Ironically, however, the defendant can rarely make a forum non conveniens motion on grounds of self convenience because it is usually requesting that the case be litigated in a jurisdiction other than its home forum. Indeed, many forum non conveniens motions look more than a little cynical because the defendant is actually opting for the more inconvenient forum to itself. “In reality, plaintiffs engage in forum shopping and defendants engage in reverse forum shopping, each seek to turn to their own advantage the laws and procedures” of their opponent’s forum.<sup>110</sup> Consider, for example, the position of Dow Chemical in *Alfaro*, forced to make the disingenuous claim that it was inconvenient to be sued in the forum in which its corporate headquarters are located.<sup>111</sup> When the foreign plaintiff files in the United States and the U.S. corporation seeks to proceed in the foreign country, inconveniences “do[ ] not seem to be an issue, as each side strenuously contends for the privilege of bearing them.”<sup>112</sup> It is not likely that a plaintiff is vexing, harassing, or oppressing a defendant where the plaintiff is ceding the “home turf” advantage and where the plaintiff’s economic capabilities are small relative to those of the defendant.<sup>113</sup>

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some other forum untangle problems in conflict of laws, and in law foreign to itself.

108. 28 U.S.C. § 1404 (1995).

109. There are other issues such as whether the plaintiff would have an alternative forum. However, the fact that the plaintiff, if made to refile his suit in a foreign forum, may have little success with a favorable verdict or judgment is of little significance when a court is determining whether it should apply forum non conveniens, unless “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” *Piper Aircraft v. Reyno*, 454 U.S. 235, 254 (1981).

110. Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 *TEX. INT’L L.J.* 501 (1993).

111. *Supra* notes 95-99 and accompanying text.

112. *Stewart v. Dow Chemical Co.*, 865 F.2d 103, 106-07 (1989).

113. *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445, 453 (1978) (If “the plaintiff elects to sue the defendant in the latter’s district of residence, his choice should be disturbed only upon a strong showing that it is required by the

Nevertheless, the current presumption that the plaintiff's choice of forum will be honored is given less force when the plaintiff is a foreign citizen.<sup>114</sup> This restriction on the general principle favoring the plaintiff comes from the U.S. Supreme Court's decision in *Piper Aircraft Co. v. Reyno*.<sup>115</sup> *Piper Aircraft* was a wrongful death action, brought by heirs of passengers killed in an airplane crash. The merits of the case were never heard in any American court because of the *forum non conveniens* doctrine. The plaintiffs initiated their action in California state court, but the case was removed to a Federal District Court in California and then transferred to a more convenient forum,<sup>116</sup> the United States District Court for the Middle District of Pennsylvania. The Pennsylvania court dismissed the action, stating that Scotland would be a more convenient forum.<sup>117</sup> It noted that all of the deceased, including the passengers and the pilot, and all of the deceased's next of kin, were Scottish residents.<sup>118</sup> Furthermore, the crash and all the ensuing investigations were in Scotland,<sup>119</sup> and the companies that owned and operated the chartered plane were organized in the United Kingdom.<sup>120</sup> The manufacturer of the plane and the manufacturer of the plane propellers were the only connections the case had to the United States.<sup>121</sup>

Obviously, however, a Scottish plaintiff and a Mexican plaintiff are not similarly situated, and the law need not treat them alike. When considering private factors in the *forum non conveniens* analysis, convenience, which is foremost, translates into time and

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balance of convenience") (quoting *Daquila v. Schlosberg*, 253 F.2d 888 (D.C. Cir. 1958)).

114. "Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981).

115. 454 U.S. 235 (1981).

116. Transfer in venue was made pursuant to 28 U.S.C. § 1404(a).

117. *Piper Aircraft*, 454 U.S. at 241-44. The District Court dismissed, 479 F. Supp. 727 (1979), and the United States Court of Appeals for the Third Circuit reversed, 630 F.2d 149 (1980). The Supreme Court reversed the Court of Appeals decision. *Piper Aircraft*, 454 U.S. 235 (1981).

118. *Id.* at 239.

119. *Id.* at 239. The British Department of Trade conducted an initial investigation and concluded that the plane propeller may have been defective. A British Review Board, upon request of the propeller manufacturer, held a hearing on the investigation report and concluded that the pilot error, as opposed to a propeller defect, was probably the cause of the accident. *Piper Aircraft*, 454 U.S. at 239.

120. *Id.*

121. The propellers were manufactured in Ohio, and the plane was manufactured in Pennsylvania. *Id.*

expense. In geographic terms, Mexico borders the United States, whereas Scotland is half-way to China. For a court sitting in Texas, every possible city in Mexico is closer, geographically, than Maine. And our focus is on the border itself. In that context, at least one federal trial court decision, rendered after *Piper Aircraft*, seems to agree that the forum non conveniens doctrine is misplaced. In *Reid Dominion Packaging Ltd. v. Old Tyme Softdrinks, Inc.*,<sup>122</sup> the defendant was a New York corporation; the plaintiff was a Canadian corporation. The suit was filed in the Western District of New York, only fifty miles from the plaintiff's headquarters. The court noted that whether it granted or denied the defendant's forum non conveniens motion, either the plaintiff or the defendant would be slightly inconvenienced, but granting the motion "would merely shift rather than minimize inconvenience."<sup>123</sup> The court then denied the motion stating that "inasmuch as the defendant chose to do business in New York, its complaint of the inconvenience of defending a lawsuit in this district should not be given considerable weight."<sup>124</sup> By the same token, there is little inconvenience to shift when the defendant is within 100 miles of the border.<sup>125</sup>

Thus, a Mexican plaintiff's case arising out of maquila production on the border, at the very least, should not be dismissed under the forum non conveniens doctrine unless there is a compelling reason for doing so. The La Paz agreement defines the border area as the land extending 100 kilometers, 62 miles, on either side of the inland international boundary.<sup>126</sup> Most production under the maquila program occurs within these 62 miles south of the border. Many inconvenience arguments pertaining to the transportation of witnesses and the delivery of documents to foreign fora are obsolete given modern technology.<sup>127</sup> With

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122. 661 F. Supp. 555, 556 (1987).

123. *Id.* at 556 (emphasis added).

124. *Id.*

125. See, e.g., *Truck Transport Co. v. Canadian National Railways*, 168 F. Supp. 619, 620 (E.D. Mich. 1958) ("we are not convinced that the bringing of defendant's witnesses 60 miles for a trial at the forum chosen by the plaintiff in view of the factual picture here present (defendant's railroad station is across the Detroit River from this Courthouse, and accessible by car and bus in a matter of minutes) meets the test for forum non conveniens.").

126. La Paz Agreement, U.S.-Mex., art. I(d), annex II, T.I.A.S. No. 11269.

127. *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 684 (Tex. 1990) (quoting *Calvano Growers of Cal. v. Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring); see also *Picketts v. International Playtex, Inc.*, 576 A.2d 518, 529 (Conn. 1990).

ease of transborder trade and investment comes ease of transborder shipment and travel. In fact, videotape, expert testimony, and pictures can replace the need to transport all the witnesses or to conduct a view of the site.<sup>128</sup> Moreover, the burden of most inconveniences will be borne by the foreign plaintiff, who has chosen the forum in the first place.

### B. *Public Interests*

The United States Supreme Court has recognized judicial discretion as a touchstone of the forum non conveniens doctrine. In the context of maquila production, however, complete trial court discretion is not easy to justify. The defendant is always an American corporation doing business under the color of the maquila program or NAFTA and the countries with an interest are always Mexico and the United States, which are bound by treaties that encourage open borders to trade and investment. Indeed, the public factors would be even less divergent if a limitation on the forum non conveniens provision were incorporated into the maquiladora program, rather than the broader NAFTA, because the location of the plaintiff, the harm, and the subsidiary corporation would likely be along the United States-Mexico border.

The public interest most often espoused for forum non conveniens motions is comity.<sup>129</sup> To maintain favorable international relations, it is often claimed that the suit should be brought in the forum where the accident occurred, so as to not give the

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128. *Picketts*, 576 A.2d at 529-30.

129. Issues of comity come into play only if there is a conflict between domestic and foreign law. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2910 (1993). No conflict exists for purposes of comity "where a person subject to regulation by two states can comply with the laws of both." *Id.* (quoting Restatement (Third) Foreign Relations Law § 403).

By hearing a private cause of action against a United States defendant corporation, a United States court would not be obstructing Mexico's interest in enforcement of its laws. SEDUE can still proceed through its administrative measures to correct the damage to the environment. The only interest the plaintiff has is to be personally compensated, not to interfere with the administration of governmental regulations.

Under the maquila agreement, U.S. laws apply and harmonization is encouraged—two factors that would suggest there is not a conflict. "[T]he Parties shall jointly explore ways to harmonize, as appropriate, their air pollution control standards and ambient air quality standards in accordance with their respective legal procedures." *La Paz Agreement*, annex V, art. V, T.I.A.S. 11269 (1990). The differences between Mexico's and the United States' tort laws do not necessarily create a conflict.

United States the appearance of operating an imperialistic judicial system. However, this implies that there is an equal factual footing.<sup>130</sup> Some scholars have agreed with the Supreme Court that foreign plaintiffs' suits should face a statutory presumption supporting a forum non conveniens motion.<sup>131</sup> That may be justifiable with respect to plaintiffs from Scotland, for example, where principles of comity might actually favor litigating abroad.<sup>132</sup> The comity principle is less convincing with respect to the Rio Grande border, however, because (1) NAFTA and the maquila agreements have international access as a goal, (2) toxic torts caused by blatant violation of both domestic legislation and bilateral agreement are so offensive that Mexico would not likely be affronted by a United States assertion of American jurisdiction, and (3) regional border interests are significant.

A principle of foreign trade and investment, especially among closely committed trading partners, should be that responsibility accompanies benefit. Indeed, this principle should apply with even more force to multinational corporations. Free trade agreements, globalized markets, instantaneous access to capital, technical communication installations, and transnational transportation infrastructures have significantly enhanced multinational corporations' capability to conduct trade and set up foreign subsidiaries. With their substantial capital returns on open borders such corporations should be required to submit to jurisdiction on the same basis—open borders. The maquila program and NAFTA are supposed to be mutually advantageous to the Mexican and United States economies, specifically benefiting Mexican workers and American corporations. For Mexico's balance of payments, the maquila program is second only to oil exports in importance.<sup>133</sup>

Such an argument for corporate responsibility was made in *Piper Aircraft*, where the plaintiff-respondents argued that the United States and its citizens generally have "an interest in ensuring that American manufacturers are deterred from producing defective products."<sup>134</sup> The Supreme Court responded that if

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130. The arguments of comity most often arise from the cases that involve citizens of countries that are not linked economically by trade agreements or are not otherwise linked politically or socially. Thus, comity arguments applied to "unlinked" citizens should not be made with equal force to "linked" citizens.

131. See generally, Silberman, *supra* note 110.

132. See, e.g., *Piper Aircraft*, 454 U.S. 235 (1981).

133. 137 Cong. Rec. S6550-01, S6567 (1991).

134. *Piper Aircraft*, 454 U.S. at 235.

such an interest existed, it was probably insignificant.<sup>135</sup> The effects of a toxic release, however, unlike an airplane accident, are not limited to individuals at the crash scene. Toxics affect whole communities, and they are not respecters of national borders. Both Mexico and the United States' environmental and trade regulatory agencies, courts, and citizens, especially those living on the border, have an interest in ensuring that American manufacturers and their Mexican subsidiaries do follow appropriate standards of care in their operations. Indeed, under the waste control regulations of the maquila agreement, maquila subsidiaries must ship their hazardous waste to the United States.<sup>136</sup> However, because the cost for each barrel of waste is between \$150 to \$1,000, most maquila waste is "stockpiled, buried, dumped, flushed, burned, or 'donated' to charities for 'recycling'—an environmental charade."<sup>137</sup>

Because there is inadequate enforcement of the Mexican law, United States companies operating in Mexico "are under little more than a moral obligation to protect either their workers or the environment."<sup>138</sup> In essence, scrupulous maquilas have policed themselves because the Mexican government has lacked the capacity to do so. The administrative process is clearly inadequate to deter environmentally damaging activity. The annual budget of SEDUE severely handicaps its ability to police border environmental violations, despite its intention not to allow the border to become a "pollution haven for the United States."<sup>139</sup>

The judicial process could pick up some of this slack. Opponents to restricting the forum non conveniens doctrine argue that limitations would burden United States courts. However true this argument may be, it is not substantial in the context of the

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135. *Id.* at 261.

136. The La Paz agreement, T.I.A.S. 11269 (1990), requires the following: "1. The country of import may require, as a condition of entry, that any transboundary shipment of hazardous waste or hazardous substances be covered by insurance, bond or other appropriate and effective guarantee" that the waste will be exported to the United States. La Paz Agreement, annex III, art. XIV, TIAS 11269. *See also* 57 Fed. Reg. 20602-01 (Notices of the EPA) (May 13, 1992), 1992 WL 99120.

137. 137 Cong. Rec. S6550-01, S6568 (1991).

138. *Id.* While "[s]ome corporations—Union Carbide for example—are lauded by activists for treating workers and the environment well[, others can not] claim the same honor." *Id.*

139. *Id.* (quoting Rene Altamirano, director of pollution prevention for SEDUE). The United States spends about twenty-five dollars per capita for environmental protection as compared with Mexico's approximate fifty cents. *Id.* (quoting 1991 figures and noting that Mexico had only spent eight cents in 1989).

proposal at issue. The proposed statute would not be a general anti-forum non conveniens statute; rather, it would be limited to a narrow class of cases—toxic torts arising out of NAFTA or maquila authorized production in an area where there is widespread failure to comply with environmental laws.

It is inevitable that these plaintiffs will have to be afforded some judicial procedure. If a United States court dismisses on grounds of forum non conveniens and makes the defendant agree to jurisdiction and waive statute of limitations defenses,<sup>140</sup> the court in Mexico will be forced to take the litigation. We are protecting our nation's courts from border litigation by sending it to another nation's courts. Even though additional tort cases from Mexican plaintiffs may be a burden to United States courts, it is a burden worth bearing if the resulting civil liability makes maquila companies more environmentally responsible and reinforces the enforcement efforts of an already overloaded SEDUE.

### C. *The Form of a Forum Non Conveniens Statute*

There is a model for an equal access agreement adaptable to the purpose at hand. In 1979, a joint working group of the Canadian and American Bar Associations produced a draft treaty for equal access for injuries from transboundary pollution between Canada and the United States.<sup>141</sup> The supporting commentary makes it clear that the intention of the drafters was to design a regime that would be "strictly procedural [with] no effect whatever on substantive rights or remedies in either country."<sup>142</sup>

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140. A court could make the defendant agree to: (1) jurisdiction in the foreign country, *Stewart v. Dow Chemical Co.*, 865 F.2d 103, 104-05 (1989), (2) enforcement of the foreign judgment in the United States, subject to its right to appeal in the foreign forum, *id.* at 105, (3) waive certain procedural defenses such as the statute of limitations, *id.*, (4) make all of the witnesses under its control available to testify in the foreign forum, *id.* at 104, and (5) allow discovery in the foreign court of any materials which would be available under the Federal Rules of Civil Procedure in a United States Court, *id.* at 104-05.

141. *Joint Working Group on the Settlement of International Disputes, Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution Between Canada and the United States*, in *SETTLEMENT OF INTERNATIONAL DISPUTES BETWEEN CANADA AND THE USA: RESOLUTIONS ADOPTED BY THE AMERICAN BAR ASSOCIATION ON 15 AUGUST 1979 AND BY THE CANADIAN BAR ASSOCIATION ON 30 AUGUST 1979 WITH ACCOMPANYING REPORTS AND RECOMMENDATIONS* (20 September 1979).

142. *Id.* at 48. For an analysis of the draft treaty, see Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 *HARV. ENVTL. L. REV.* 85 (1991).

The heart of the convention, Article 2, simply states that “[t]he country of origin shall ensure that any natural or legal person resident in the exposed Country, who has suffered trans-frontier pollution damage . . . shall at least receive equivalent treatment to that afforded in the Country of origin, in cases of domestic pollution. . . .”<sup>143</sup> The only step beyond that, but one that is equally important, is to assure that even if the pollution is not transnational, victims will be able to reach transnational tortfeasors in the jurisdiction of their choosing. Unfortunately, the United States Supreme Court has held to the contrary. Although there is a strong presumption in favor of a domestic plaintiff’s choice of forum, a foreign plaintiff’s choice deserves little weight.<sup>144</sup> In the Mexican-American borderlands, there is no justification for such a policy.

Instead, Congress could implement an equal access principle by enacting a “special venue statute,” which would replace the “general venue statute”<sup>145</sup> for purposes of toxic torts committed by corporations trading under NAFTA or the maquila program. If the general venue statute applies and the defendant waives any objections to the plaintiff’s choice of forum,<sup>146</sup> the court in which the suit is filed is still not bound to respect the plaintiff’s election because “[t]he defendant’s consent to be sued extends only to give the court jurisdiction of the person; it assumes that the court, having the parties before it, will apply . . . its discretionary judgment as to whether the suit should be entertained.”<sup>147</sup> Therefore, under the general venue statute, the defendant can never evade the court’s discretion to dismiss *sua sponte* for *forum non conveniens*.

A special venue statute can have the effect of eliminating the *forum non conveniens* doctrine for a limited class of cases without modifying the application of the general venue statute.<sup>148</sup> The Federal Employers Liability Act (FELA), for example, allows the plaintiff to sue the defendant in any location where it was actually carrying on business.<sup>149</sup> The goal of FELA’s special venue section is to prevent the injustice of making an injured em-

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143. *Id.* at xiii.

144. *Piper Aircraft*, 454 U.S. at 255 (1981).

145. 28 U.S.C. § 1404 (1988).

146. *Gulf Oil*, 330 U.S. at 506 (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165, 168 (1939)).

147. *Id.*

148. *Id.* at 505.

149. FELA provides:

ployee travel a long distance to sue the employer. Congress expressly attempted to balance the plaintiff's disadvantage against a large railroad company by "loading the dice a little in favor of the workman in the matter of venue."<sup>150</sup> The defendant should, when appropriate, bear some inconvenience in defending a suit; it is especially appropriate where the plaintiff begins at a sharp disadvantage.

Under FELA, plaintiffs engage in forum shopping, but by the permission of Congress,

[t]here is nothing to restrain use of that privilege, as all choices of tribunal are commonly used by all plaintiffs to get away from judges who are considered to be unsympathetic, and to get before those who are considered more favorable; to get away from juries thought to be small-minded in the matter of verdicts and to get to those thought to be generous; to escape courts whose procedures are burdensome to the plaintiff, and to seek out courts whose procedure, make the going easy."<sup>151</sup>

If Congress had not given plaintiffs this advantage, defendants could potentially force them to try multiple lawsuits: the first would be at home, to determine if they would be allowed to try their principal lawsuit elsewhere. Such a result would be debilitating to any damage award ultimately received.

FELA, unlike the general venue statute, ties the discretionary hands of the federal courts. Under FELA, neither the defendant nor the federal court in which the suit is filed can use *forum non conveniens* to defeat the plaintiff's choice of federal forum.<sup>152</sup> Only a congressional action defeats the plaintiff's choice.<sup>153</sup> Thus, the general venue statute which authorizes district courts to transfer suits in the interest of justice and for the convenience of the parties does not apply to suits brought by plaintiffs under FELA.<sup>154</sup> Therefore, the plaintiff's choice rather than conven-

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Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56 (1995).

150. *Miles v. Illinois Central Railroad Co.*, 313 U.S. 698, 707 (1942) (Jackson, J., concurring).

151. *Id.*

152. *Porter v. Fleming*, 74 F. Supp. 378 (D.C. Minn. 1947).

153. *Leet v. Union Pac. R. Co.*, 155 P.2d 42, 25 Cal.2d 605 (1944), *cert. denied*, 65 S. Ct. 1403 (1945).

154. *Boyd v. Grand Trunk Western R.R. Co.*, 338 U.S. 263 (1949).

ience is controlling, and forum non conveniens can in no circumstance be used to dismiss that choice.<sup>155</sup>

Furthermore, under FELA a plaintiff's choice of federal forum cannot be defeated by a state court. In *Baltimore & Ohio Railroad Co. v. Kepner*, the U.S. Supreme Court held that a state court can not enjoin on the ground of inequity and vexation a suit that was brought in federal court under FELA because the FELA venue section honors the plaintiff's federal choice of forum regardless of inconvenience to the defendant.<sup>156</sup> The defendant in *Kepner* contended that even though there was venue in the forum selected by plaintiff, the plaintiff acted in a "vexatious and inequitable manner" because he brought the suit in a distant jurisdiction while there was a convenient one at his doorstep.<sup>157</sup> The venue section in the act occupies the entire field of venue for federal courts under the act, and a privilege of venue granted by the legislative body which protects the plaintiff's election cannot be interfered with regardless of the amount of inconvenience or expense the defendant may encounter.<sup>158</sup>

In *Miles v. Illinois Central Railroad Co.*,<sup>159</sup> the United States Supreme Court decided that a plaintiff's choice of state forum under FELA also cannot be defeated or enjoined by a sister state's court. Generally, restrictions on venue in state courts are outlined by state law.<sup>160</sup> "The opportunity to present causes of action arising under the FELA in the state courts came, however, not from the state law but from the federal."<sup>161</sup> Although a state may not interfere with a plaintiff's ability to bring suit under FELA in a federal court or in a sister state's court,<sup>162</sup> it may deny access to its own courts for suits under FELA as long as it bases its denial on reasons of local policy and enforces its denial impar-

155. *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941). Note that the constitutional requirements of due process for jurisdiction must always be satisfied.

156. *Id.*

157. *Id.* at 51.

158. *Id.* at 54.

159. 315 U.S. 698 (1942).

160. *Id.* at 703.

161. *Id.* The *Miles* Court stated that:

since the existence of the cause of action and the privilege of vindicating rights under the FELA in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right [to] sue in federal courts. It is no more subject to interference by state action than was the federal venue in the *Kepner* case.

*Id.* at 704.

162. *Id.* at 704.

tially.<sup>163</sup> When Congress has created a scheme that is intended to favor a plaintiff's power to choose a forum over the court's power to dismiss, a state policy which empowers the courts hinders the intent of Congress to balance disparity between the plaintiff and defendant. In *Kepner* and *Miles*, the special forum non conveniens provision was intended to protect plaintiffs from such judicial discretion.

If Congress were to draft a special forum section for NAFTA or maquila-related suits, similar to the FELA forum section, it would have to turn a common law tort action (workman against parent corporation) into a federal right with mandatory federal jurisdiction and concurrent state jurisdiction. The foreign plaintiff could then bring his suit into any federal court where jurisdiction and venue were satisfied. Of course, if jurisdiction were not satisfied, his case would be dismissed. If venue were not satisfied, his case would be transferred to a more convenient forum under the general venue statute. It is clear, under *Kepner*, that his case in federal court could not be dismissed by any forum non conveniens motion made by the defendant, the selected court, any other federal court, or any state court. And, under *Miles*, if he were to initiate the suit in a state court, a sister state could not defeat his choice of forum.

The simplest anti-forum non conveniens measure Congress could take would be to declare that when a toxic injury occurs within the area defined by the Border Environmental Plan as the border region (one hundred kilometers on each side of the inter-

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163. *Missouri, Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 4 (1950). States retain the right to control their own courts with regard to FELA litigation. *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142 (1907); *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929). There is nothing in FELA or the general venue statute that forces "State courts to entertain or retain Federal Employers' Liability litigation 'against an otherwise valid excuse,'" *Mayfield*, 340 U.S. at 5 (quoting *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. at 388), even though the suit was properly brought in the state court. *State ex rel. Great Northern Ry. Co. v. District Court*, 365 P.2d 512, 139 Mont. 453 (1961); *Gonzales v. Atchinson T. & S.F. Ry. Co.*, 371 P.2d 193, 189 Kan. 689 (1962). The states' rights are not without limitation. States can not specifically exclude all FELA suits, nor can they offend the Privileges and Immunities Clause. *Mayfield*, 340 U.S. at 4. If a state court permitted access to its courts by its own citizens suing under FELA but denied access to its courts by foreign citizens suing under FELA, it would be violating the Privileges and Immunities Clause. *Miles*, 315 U.S. at 704 (citing U.S. CONST., Art. IV, § 2). Although, a state can prefer its residents over all non-residents, whether they are citizens or not. *Mayfield*, 340 U.S. at 3-4.

national boundary),<sup>164</sup> *forum non conveniens* would not be a defense available in the federal courts. This does not suggest that the federal courts have moral obligations to provide global justice as "the world's forum of final resort."<sup>165</sup> Instead, it recognizes that the demands of justice are concentric. Every institution of justice sits in the center of many concentric circles moving out from it. In the closest circle, the demands of justice are the greatest, if for no other reason than the fact that each institution is in a better position to help people who are in nearer, rather than more distant, circles. This is often said to be the reason why justice makes no international demands.<sup>166</sup> We are most often engaged in projects undertaken within our own countries, instead of across international boundaries. With respect to the *maquila* problem, however, concentric demands of justice favor equal access to justice regardless of the international boundary.

Shared moral identity is a prerequisite for moral community. On an international level, we are only beginning the difficult work of building such a community. John Rawls' social contract is merely a plausible generalization of principles that would bring such a community into existence. In a Rawlsian world,

[e]very society must have a conception of how it is related to other societies and of how it is to conduct itself toward them. It lives with them in the same world and except for the very special case of isolation of a society from all the rest—long in the past now—it must formulate certain ideals and principles for guiding its policies toward other peoples.<sup>167</sup>

Limiting the *forum non conveniens* defense in Article III federal courts with respect to cases arising in the border region would be a small but significant step in the right direction. We assume that participants in Rawls' social contract would embrace the principle of equal access to justice. Behind their veil of ignorance, they would take pains to insulate their life chances, as much as they could, from pure bad luck. We assume they would not make the location of the border a counter in their lives' outcomes. Our

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164. *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, at 687 n.10 (Tex. 1990) (quoting Harold Corbett, Senior Vice-President for Environmental Affairs, Monsanto Company).

165. *Id.* at 680 (Hightower, J., concurring) (inviting the Texas Legislature to reenact the *forum non conveniens* doctrine).

166. See, e.g., PETER S. WENZ, ENVIRONMENTAL JUSTICE 318 (1988).

167. John Rawls, *The Law of Peoples*, in ON HUMAN RIGHTS 41, 44 (Steve Shute & Susan Hurley eds. 1993).

proposal to restrict *forum non conveniens*—and nothing more—in the special circumstances we have described would be a move away from the moral arbitrariness of maquila-related toxic harms.

#### IV. CONCLUSION

*Contiguous objects must have an influence much superior to distant and remote. Accordingly, we find in common life, that men are principally concerned about those objects which are not much removed either in time or space, enjoying the present, and leaving what is far off to the care of charge and fortune.*<sup>168</sup>

We began with the social contract philosophy of John Rawls; we conclude from a perspective more quotidian: the facts of the famous case of *Palsgraf v. Long Island Railroad Co.*<sup>169</sup> In *Palsgraf*, a railroad employee standing on a railway platform helped a passenger board a moving train by giving her a push from behind. In the process, the passenger dropped a package containing fireworks, which exploded. The explosion toppled a scale standing at the far end of the platform, which struck Palsgraf. The blow caused her injuries and she sued the railroad company. Year after year, beginning law students learn that *Palsgraf* concerns a basic tort law question: to whom is a duty owed? The answer, according to a majority of the New York Court of Appeals, is consonant with our notion of concentric rings of justice. On the surface, this article is about *forum non conveniens*; below, it is about tort law.

Justice Cardozo, writing for the majority, argued that the railroad employee's conduct may have been negligent in relation to the passenger he pushed, but not in relation to Palsgraf. For the majority, negligence in the abstract is not a tort. The plaintiff must show that the defendant's duty of care extends particularly to the plaintiff's well-being. According to Cardozo, Palsgraf could not establish such a duty under the facts of the case because "[n]othing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed."<sup>170</sup> Justice Andrews disagreed. He argued that a failure to take reasonable care for the well-being of others was universal: that "[e]veryone owes to the world at large the duty of refraining

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168. DAVID HUME, A TREATISE ON HUMAN NATURE 428 (L.A. Selby-Bigge ed., Oxford University Press 1978) (1739).

169. 162 N.E. 99 (N.Y. 1928).

170. *Id.*

from those acts that may unreasonably threaten the safety of others."<sup>171</sup> According to Andrews, someone who causes harm is legally responsible to anyone whom he injures. That is, he owes them a duty of care for their well-being, regardless of their remoteness to the risk. In the contest between Cardozo and Andrews, the latter clearly lost. Cardozo's position—which law students learn to call the doctrine of proximate cause—has carried the field.

The phrase "proximate cause" has proven to be an unfortunate choice to describe Cardozo's intentions. Law students often assume that Cardozo must have been thinking that the problem has something to do with the relative strength of the links in the chain of causation, but this seems puzzling because obviously the railroad employee's act was a crucial link in the chain that led to Palsgraf's injury. For Cardozo, the problem is not whether the railroad employee's act was a more or less strong link in the chain of causation, but that Palsgraf was not "within the range of [the railroad employee's] apprehension."<sup>172</sup> Strictly speaking, this is not a question of causation, but of proximity, or—perhaps more accurately—community of interest. Cardozo gave no reason for making proximity the criterion of the plaintiff's right to a remedy. Alan Brudner offers the following rationale:

We have seen that a right to another's care is the product of a relationship of mutual concern and respect. . . . [M]y right to another's care is mediated through a concept wherein the parties are so identical that the duty of care of one for the other is simultaneously the other's duty of care for the first. This is the neighbor principle according to which someone whom a reasonably circumspect person would contemplate as likely to be injured by his activity has a right to the exercise of care on his behalf. . . . [T]he neighbor principle generates an authentic right to care.<sup>173</sup>

Neighbors have moral claims, Brudner says, simply because they are neighbors. Each neighbor's claim is part of an interlaced network of moral claims that come from living in a "dialogic community."<sup>174</sup>

For us, the interesting thing about *Palsgraf*, the doctrine of proximate cause, and Brudner's "neighborliness" rationale, is

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171. *Id.* at 103.

172. *Id.* at 100.

173. ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* 193 (1995).

174. Brudner uses this term to specify "the interdependence of community and the atomistic self." *Id.* at 17.

their congruence with the notion of concentric rings of moral obligation. We have argued that moral obligations are strongest within the innermost circles of human effect (family, workplace, city, or town) and diminish with distance.<sup>175</sup> In tort law, this is reflected in the concept of proximate cause. One might argue that this is inconsistent with a Rawlsian worldview. Rawls demands that we make our social contract without regard for "those aspects of the social world that seem arbitrary from a moral point of view."<sup>176</sup> Moreover, we must make this contract behind a veil of ignorance that conceals the actual circumstances of our own lives, so that each of us would realize that we could have been born in anybody else's shoes. One might argue from this that since anyone could have been born anywhere, everyone has moral claims on everyone else. Yet we have said that in a world constituted of concentric circles of obligation, moral claims diminish with distance. We should have added that they may never entirely vanish. The question, for which there may be no obvious answer, is whether others are, in Cardozo's words, "within the range of apprehension."<sup>177</sup>

Our proposal for modifying the doctrine of *forum non conveniens* in federal courts is also congruent with the notion of concentric justice. We propose that (a) if the injury is within the border region, there is an irrebuttable presumption that the United States forum is convenient; (b) if the injury is within the NAFTA free trade area, there is a rebuttable presumption that the United States forum is convenient; and (c) if the injury is outside of the NAFTA free trade area, there is a rebuttable presumption that the United States forum is inconvenient. To be candid, we do not object to the complete abolition of *forum non conveniens*, but we recognize that federal courts are faced with practical problems of judicial administration in dealing with global claims. Our proposal does not preclude judicial discretion to dismiss in appropriate cases. It implies, however, that at the level of deciding *forum non conveniens* motions, we should assume that in the innermost circles of justice, plaintiffs are within the range of our apprehension. Certainly the border area, at least, is a community in which dialogues of justice deserve a full hearing.

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175. *Id.* at notes 168-69 and accompanying text.

176. RAWLS, *supra* note 1, at 15.

177. *Palsgraf*, 162 N.E. at 100.

No one can say for certain why the cluster of anencephalic births along the Mexican border between Brownsville and Matamoros occurred. The causal mechanisms of disease clusters are elusive. In fact, there may be no particular cause, or set of causes, for a given cluster. "Normal" rates of neurological birth defects, exceeded in Brownsville by a factor of five between 1986 and 1991, are merely averages of scattered highs and lows. It may be that Brownsville in those years was simply a high spot without a particular cause—though many people deeply believe that "what goes on behind the border has something to do with it."<sup>178</sup> Several Texas-resident plaintiffs filed personal injury lawsuits against American corporations operating maquilas in Matamoros. When the last of these suits was settled,<sup>179</sup> the defendants expressed sympathy for the families, of course, but denied that the settlement was an admission of any wrongdoing or culpability involving the maquilas,<sup>180</sup> and, indeed, no official scientifically-reliable inquiry has ever established a connection between the maquilas and the birth defects. For now, there will be no trials at which American companies could be forced to disclose the chemicals they used in Matamoros and how they disposed of their waste. Still, for these American plaintiffs, not subject to forum non conveniens dismissal, there is a rough sense that justice was at least addressed.

For many others, there is not the same certainty. Reportedly, some 25,000 farmworkers living in a dozen developing countries are suing American manufacturers of powerful pesticides sold in the developing world but banned, in some cases, in the United States. As those exposed to the chemicals see it, American companies "sent these products [to developing countries] as if they were a toxic dump, without regard for the health of the people living in them."<sup>181</sup> The companies respond that they had understandings with their customers that "the product[s] would be used within the[ ] safe handling guidelines [printed on their la-

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178. Sue Anne Pressley, *Years After Cluster of Birth Defects, Pain and Mystery Linger in Brownsville*, WASH. POST, Sept. 17, 1995, at A3 (quoting Paula Gomez, director of the Brownsville Community Health Center and member of the One Border Foundation, which did an inconclusive study of the Brownsville cluster).

179. *Id.*

180. *Id.* (quoting a statement by General Motors, which owns three plants in Matamoros). General Motors was one of the last defendants to settle.

181. Diana Jean Schemo, *Pesticide From U.S. Kills the Hopes of Fruit Pickers in the Third World*, N.Y. TIMES, Dec. 8, 1995, at A8 (quoting Guillermo Touma, an Ecuadorian farm labor organizer).

bels].”<sup>182</sup> The problem for American courts, of course, is that these claims—identical to those in *Alfaro*—represent enormous burdens. It is fair to presume that American fora for cases involving injuries in a country like Ecuador, where many of these claims arose, are inconvenient. On the other hand, American courts may be the only fora where any rough approximation of justice could be had. The Ecuadorian plaintiffs, for example, contend that under their legal system, they are unable effectively to raise liability issues related to toxic exposures. They say their only recourse is “to trust in God, and in the courts of the United States.”<sup>183</sup> We have no trouble saying that American courts should be presumptively open to border and NAFTA-area plaintiffs. The Ecuadorian claims, on the other hand, are the hard cases in more distant concentric circles, near the edge of our apprehension, where moral obligations diminish, but do not disappear.

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182. *Id.* (quoting Gennaro A. Filice, a lawyer representing Dow Chemical).

183. *Id.* (quoting Mario Brito, an Ecuadorian plaintiff).

