PRODUCTS LIABILITY LITIGATION SINCE THE PASSAGE OF NAFTA AND THE UNINTENDED CONSEQUENCES

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I. INTRODUCTION

Imagine it is a typical Saturday afternoon. You and your child have planned to escape the sticky heat of Houston by taking refuge at the neighborhood pool. Imagine that while en route to the pool you are involved in a minor car accident that causes the car's airbags to deploy. Imagine that your child is tragically killed as a result of the car being equipped with a defective airbag, and imagine you bring a successful suit against the manufacturer of the airbag. It would not be a stretch to imagine that the judgment against the manufacturer would be several thousand dollars.[1]

Now imagine that you and your child are not U.S. citizens and you are not in Houston, Texas, but rather you and your child are citizens of Mexico in Mexico City seeking to escape the same heat, driving the same car, with the same defective air bag to a nearby lake. Imagine you also get into a minor car accident and the same defective airbag kills your child. Imagine you too bring a successful suit against the same manufacturer, but the maximum award for the loss of your child's life is $2500 as opposed to the several hundreds of thousands of dollars an American citizen would receive.[2]

While it may seem unfathomable to American citizens that a manufacturer would only be liable for $2500 for such an accident, it is a hard reality for Mexican citizens.[3]

Since the birth and passage of the North American Free

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1. *See generally* Crespo v. Chrysler Corp., 75 F. Supp. 2d 225, 227, 231–32 (S.D.N.Y. 1999) (involving a products liability suit against Chrysler, brought by a mother whose child was killed by an airbag deployment in a minor accident, in which the $750,000 jury award was overturned on other grounds).

2. *See* Gonzalez v. Chrysler Corp., 301 F.3d 377, 378, 381, 383 (5th Cir. 2002) (discussing the limitation on the award of damages imposed by Mexican law in tort suits brought by Mexican citizens against U.S. manufacturers).

3. *Id.* at 380.

Trade Agreement (NAFTA), there has been an expansion of trade within the borders of North America.[4] Indeed, NAFTA's removal of the many trade barriers that plagued the signatory nations has proven to be beneficial for the U.S. economy,[5] but it has also created what should have been a foreseeable problem.[6] The increased flow of goods between the United States and Mexico has coincided with increased products liability litigation.[7] In fact, "product's liability is today recognized as having important international dimensions, for there literally are not physical boundaries that a given consumer product may not cross during the course of its manufacture, marketing, distribution and ultimate use by the consumer."[8]

In particular, Mexican plaintiffs who suffer injuries from defective American-made products desire to have their disputes against the American manufacturers of these products settled in the United States, while the American manufacturers aggressively fight to keep these disputes out of the United

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4. Andrea Ford, *A Brief History of NAFTA*, TIME (Dec. 30, 2008), http://www.time.com/time/nation/article/0,8599,1868997,00.html (discussing that the concept behind NAFTA was "promoting economic growth by easing the movement of goods and services between the U.S., Mexico and Canada" and that Intra-North American trade has tripled since NAFTA's inception and trade between the three parties "currently accounts for about 80% of Canadian and Mexican trade and more than a third of U.S. trade.").

5. *See id.* (highlighting the increase in trade since NAFTA removed most tariffs and restrictions on trade between the United States, Canada, and Mexico); Heidi Sommer, *The Economic Benefits of NAFTA to the United States and Mexico*, NATIONAL CENTER FOR POLICY ANALYSIS (June 16, 2008), http://www.ncpa.org/pub/ba619 (highlighting the many benefits the United States has received since the enactment of NAFTA, such as a fifty percent growth in GDP, a 242% increase in trade with Mexico, and an increase in domestic production efficiency, among others).

6. *See generally* Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L.J. 1059, 1114 (1994) (noting that since the passage of NAFTA that "it is inevitable that transnational litigation between parties in Mexico and Texas increase[] as interaction across the border increases.").

7. *See* Philip A. Robbins, *Focus on U.S.-Mexico Practice: Product Liability*, ARIZ. ATT'Y, Mar. 2002, at 36 (stating that the increased flow of goods in terms of exports and manufacturing between the United States and Latin American countries leads to a greater potential for injuries and claims).

8. WARREN FREEDMAN, PRODUCT LIABILITY ACTIONS BY FOREIGN PLAINTIFFS IN THE UNITED STATES 1 (1988).

States.[9]

Mexican plaintiffs, who have knocked on the door of the American judicial system to have their claims heard, have traditionally been sent home by American defendants' use of forum non conveniens.[10] Unfortunately, the application of this doctrine has undermined the United States' deterrence interest in these cases.[11]

Part II of this Comment will briefly discuss the development of NAFTA and highlight how it has increased trade among the signatory nations.

Part III of this Comment will trace the development of the doctrine of forum non conveniens and discuss how it has been implemented as a blockade for foreign plaintiffs trying to gain access to the American judicial system.

Part IV of this Comment will examine the damages available in the United States and Mexico. It will argue that the significantly higher damage awards available in the United States and not available in Mexico are a primary reason why Mexican plaintiffs seek to have their claims heard in the United States. It will also argue that it is this disparity in damages that motivates American manufacturers to vigorously try to keep these claims out through the use of forum non conveniens.

Part V of this Comment will argue that the use of forum non conveniens to prevent Mexican plaintiffs from gaining access to U.S. courts is imprudent because it effectively eliminates the United States' deterrence interest in these cases.

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9. *See* Daniel Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations From Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 142 (1998) (noting that due to the dramatic increase in foreign disputes against multinational corporations courts have used forum non conveniens to protect them from the burden of defending suits in the United States).

10. *See generally id.* at 158–65 (explaining how the forum non conveniens doctrine has been used by federal and state courts in the United States to control international forum shopping).

11. *See generally* Elizabeth T. Lear, *National Interests, Foreign Injuries and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 590–99 (2007) [hereinafter *National Interests*] (discussing the deterrence interest that the United States has in cases brought by foreign plaintiffs with regards to the safety of consumers in the United States).

Part VI of this Comment will argue that a possible solution is the creation of a side agreement, similar to the North American Agreement on Environmental Cooperation (NAAEC), made between the signatory nations of NAFTA that would place a cap on the damages that are available in the three nations.

II. THE DEVELOPMENT AND SUCCESS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

Before the creation of NAFTA, Canada and the United States had established a trade agreement known as the U.S.-Canada Free Trade Agreement (CFTA).[12] Using CFTA as a model, the United States began discussions with Mexico seeking to create a similar type of agreement between itself and Mexico.[13] Soon thereafter, Canada joined the discussion and the negotiations between the three countries culminated in the creation of NAFTA on January 1, 1994.[14]

NAFTA is a cooperative economic intergovernmental organization[15] intended to promote the flow of goods across the signatory nation's borders.[16] Indeed, NAFTA's preamble states: "The government of Canada, the Government of the United Mexican States and the Government of the United States of America are resolved to .†.†. create an expanded and secure market for the goods and services produced in their

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12. Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past Present and Future*, 25 HOUS. J. INT'L L. 301, 303–04 (2003); U.S.-Canada Free Trade Agreement, Jan. 2, 1985, 27 I.L.M. 281; United States-Canada Free-Trade Agreement, Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) *noted in* 19 U.S.C. § 2112 (2000) (approving the agreement); Exec. Order No. 5923, 53 Fed Reg. 50638 (Dec. 14, 1988) (implementing the agreement, effective Dec. 14, 1988); Pub. L. No. 103-182, 107 Stat. 2057 (1993) (suspending the agreement while NAFTA is effective).

13. Staff & Lewis, *supra* note 12, at 304.

14. *Id.*; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; *North American Free Trade Agreement (NAFTA)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta (last visited Sept. 28, 2012) [hereinafter NAFTA Update].

15. Staff & Lewis, *supra* note 12, at 304.

16. Michael Sang H. Cho, *Private Enforcement of NAFTA Environmental Standards Through Transnational Mass Tort Litigation: The Role of the United States Courts in the Age of Free Trade*, 27 ST. MARY'S L.J. 817, 824 (1996).

territories."[17] Furthermore, one of the primary objectives listed in the agreement is the elimination of trade barriers and the facilitation of cross border movement of goods and services.[18]

NAFTA has succeeded in its goal of increasing trade among the signatory nations.[19] The United States, Canada, and Mexico represent the world's largest free trade area, linking 450 million people together and producing $17 trillion in goods and services.[20]

Looking at the numbers alone, NAFTA's success becomes quite evident.[21] Canada and Mexico were the United States' top two purchasers of goods as well as the top two suppliers of goods in 2009.[22] In fact, trade between the United States and Canada represents the largest flow of income, goods, and services in the world, with an average value of $1.2 billion per day.[23]

Although Canada represents the United States' number one trade partner, Mexico is not far behind.[24] Mexico has secured the position of being the United States' second largest trade partner since the implementation of NAFTA.[25] For example, in 2002 the trade between Mexico and the United States was valued at $232 billion annually, representing a 225% increase in

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17 NAFTA, *supra* note 14. NAFTA was approved by the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057.

18. *Id.* art. 102.

19. *See* NAFTA Update, *supra* note 14.

20. *Id.*

21. Robert A. Pastor, *Stop Blaming Nafta*, N.Y. TIMES, Mar. 6, 2008, *available at* http://www.nytimes.com/2008/03/06/opinion/06iht-edpastor.1.10774539.html (noting that one of NAFTA's goals was to reduce or eliminate trade barriers and since its passage trade between the member nations nearly tripled). *See generally* Rebecca Jannol et al., *U.S.-Canada-Mexico Fact Sheet on Trade and Migration*, MIGRATION POLICY INST., 1 (Nov. 2003), *available at* http://www.migrationpolicy.org/pubs/three_us_mexico_canada_trade.pdf (noting that trade relations between US and Canada is the largest flow of goods in the world; that Mexico is the second largest trade partner for the US next to Canada; and that "both Canada and Mexico send more than [eighty] percent of their exports to NAFTA partners").

22. *See* NAFTA Update, *supra* note 14.

23. Jannol et al., *supra* note 21.

24. *Id.*

25. *Id.*

trade since the enactment of NAFTA.[26] In fact, in 2009 it was estimated that the United States imported roughly $438 billion worth of goods and services from Canada and Mexico and exported $397 billion worth of goods and services to Mexico and Canada.[27]

Trade has not only increased between the United States and both Canada and Mexico; it has also increased between Canada and Mexico as well.[28] After the passage of NAFTA, trade between these countries more than doubled, being worth $6.5 billion initially and worth $15 billion subsequently.[29] In fact, Mexico has become Canada's fourth most valuable export market and Canada has become Mexico's second.[30]

It is quite clear that NAFTA has achieved its goal of increasing trade and the flow of goods between the signatory nations.[31] However, this flow of goods has also resulted in increased products liability litigation between American manufacturers and foreign plaintiffs.[32]

III. FORUM NON CONVENIENS: DEVELOPMENT AND APPLICATION IN THE UNITED STATES

Forum non conveniens allows a court, despite being an appropriate forum, to divest itself of jurisdiction for the convenience of the litigants if the action could have originally been brought in another forum.[33]

The Supreme Court in *Gulf Oil v. Gilbert* outlined the factors that must be considered when a court is determining

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26. *Id.*

27. NAFTA Update, *supra* note 14.

28. *See* Jannol et al., *supra* note 21 ("Since NAFTA, the two-way trade between Canada and Mexico more than doubled.").

29. *Id.*

30. *Id.* (noting that between the time of NAFTA's enactment and 2002, Canadian merchandise exports to Mexico rose at a rate 10.5% per year while imports from Mexico increased at a rate of 13.8% per year).

31. *Id.*

32. John P. Wilson, *Limitation of Manufacturer Liability for Administration of an AIDS Vaccine Overseas*, 30 INT'L LAW. 783, 792 (1996).

33. BLACK'S LAW DICTIONARY 665 (7th ed. 1999).

whether to dismiss a case on forum non conveniens grounds.[34] The Court in *Gulf* noted that when determining whether to dismiss a case it presumes that there are at least two forums in which the defendant is amenable to process.[35] The Court held that both the private and public interests at stake in all litigation must be considered when deciding between two proper forums.[36]

The private interest factors that may be considered include the following: (a) the relative ease of access to the various sources of proof, (b) the availability of compulsory process for attendance of unwilling witnesses, (c) the possibility of viewing the premises involved in the dispute if appropriate, (d) the enforceability of a judgment if one is obtained, and (e) the advantages and obstacles to a fair trial.[37]

The Court stated that the public interests factors that may be considered include the following: (a) the administrative difficulties and or burdens on a forum due to congested dockets, (b) the burden of jury service in a forum that has no "relation to the litigation," (c) the desirability to have cases tried in forums that "touch the affairs of many persons," and finally (d) the appropriateness of trying a case that has local interest in the local forum, or having a diversity case tried in a forum that would present the least choice of law problems.[38]

The Supreme Court further rationalized that it would give deference to the plaintiff's choice of forum, unless the balance of the public and private interest factors weighed strongly in favor of the defendant.[39]

While the doctrine of forum non conveniens is designed to ensure disputes are heard in the most convenient forum,[40] it has

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34. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). *See also National Interests*, *supra* note 11, at 563 (noting that although this case was decided in 1947 it "continues to govern forum non conveniens dismissals in the federal courts").

35. *Gulf Oil Corp.*, 330 U.S. at 506–07; *National Interests*, *supra* note 11, at 563 n.11.

36. *Gulf Oil Corp.*, 330 U.S. at 508; *National Interests*, *supra* note 11, at 563.

37. *Gulf Oil Corp.*, 330 U.S. at 508.

38. *Id.* at 508–09.

39. *Id.*

40. *See* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non*

also been corrupted into a tool used to forum shop by both plaintiffs and defendants.[41] The Supreme Court foresaw this possibility, particularly among plaintiffs, and therefore noted that a plaintiff could not "by choice of an inconvenient forum, vex, harass, or oppress the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."[42]

After *Gulf*, Congress enacted 28 U.S.C. § 1404, which authorized interdistrict transfers in federal courts based on a balancing of interests, similar to the interests balanced in *Gulf*.[43] This statute, however, ultimately had the effect of limiting the *Gulf* balancing test and factors to those cases in which the alternative forum is foreign.[44]

The formula set forth in *Gulf* remained relatively unchanged and unchallenged for about thirty years.[45] It was not until 1981 that the doctrine was again closely scrutinized by the Supreme Court in *Piper Aircraft Company v. Reyno*.[46]

Piper involved a motion to dismiss on forum non conveniens

Conveniens and the Enforcement of Foreign Judgments, 111 COLUM. L. REV. 1444, 1454 (2011) ("[The forum non conveniens] doctrine's purpose is 'to ensure that the trial is convenient.'").

41. *See* Dante Figueroa, *Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals*, 37 U. MIAMI INTER-AM. L. REV. 119, 131–32 (2005) ("[T]he U.S. Supreme Court has held that 'courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants may also move for dismissal under FNC . . . because of similar forum shopping reasons.'").

42. *Gulf Oil Corp.*, 330 U.S. at 508. *See National Interests*, *supra* note 11, at 564–65 (explaining that while "*Gulf Oil* was a classic case of domestic forum shopping," and that in *Koster v. American Lumbermens Mutual Casualty C*o, 330 U.S. 518 (1947), the Court was more "explicit about the relevance of the plaintiffs motives," in any balancing of conveniences a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience to the defendant).

43. *National Interests*, *supra* note 11, at 565.

44. *Id.*

45. *Id.* ("The federal forum non conveniens doctrine announced by *Gulf Oil* and *Koster* lay essentially dormant from 1948 to 1981.").

46. *See generally* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247–60 (1981) (holding that under *Gulf Oil*, dismissal was proper where a plaintiff's chosen forum "imposes a heavy burden on the defendant or court, and where the plaintiff is unable to offer any specific reasons supporting his choice" regardless of the "possibility of an unfavorable change in law").

grounds by an American manufacturer in a wrongful death action brought by the representative of several Scottish decedents killed in a plane crash in Scotland.[47] In *Piper*, the Supreme Court expanded what a court can and should consider in examining forum non conveniens motions, specifically in those actions brought by foreign plaintiffs who are trying to avoid an unfavorable law in their home forum.[48]

The Supreme Court noted that the possibility that Scotland would apply a less favorable law than the United States in that case was not an appropriate consideration in balancing the interests in a forum non conveniens analysis.[49] Specifically, the Court stated that "the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in a forum non conveniens inquiry."[50] Indeed, courts since *Piper* consistently reject the variety of arguments concerning the inadequacy of the law in alternative forums that plaintiff's attorneys put forward in an attempt to avoid dismissal on forum non conveniens grounds.[51] For example, plaintiff's lawyers have cited to "less developed law, less favorable remedies or fewer causes of action available in the alternative fora."[52]

Furthermore, the Court in *Piper* overruled the appellate court's holding, which automatically barred a forum non conveniens dismissal if it led to an unfavorable change in the applicable law for various policy reasons.[53]

One such policy consideration made by the court was that if substantial weight were given to the possibility of a change in

47. *Piper*, 454 U.S. at 238.

48. *See id.* at 255–56; *National Interests*, *supra note* 11, at 565–66.

49. *Piper*, 454 U.S. at 244–47.

50. *Id.* at 247.

51. Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT'L L. 665, 675 (1999).

52. *Id.*; *see* Polanco v. H.B. Fuller Co., 941 F. Supp. 1512, 1525 (D. Minn. 1996) (noting the plaintiff argued that Guatemala was not an adequate forum because its products liability law was not as well developed as that of the United States). The court rejected this argument due to the existence of a products liability cause of action in Guatemala, even if undeveloped, and an all-purpose negligence statute under the country's civil code. *Id.*

53. *Piper*, 454 U.S. at 250–52.

the law the doctrine would become useless because dismissal would "rarely be proper."[54]

The Court also noted that if the application of an unfavorable law created an automatic bar to dismissal that this would create several practical problems.[55] Particularly, the Court was concerned with the difficulties that would be involved with the subsequent choice of law analysis, the increased attractiveness of American courts to foreign plaintiffs,[56] and consequent forum shopping among foreign plaintiffs.[57]

While the Court clearly rejected the idea of giving substantial weight to the possibility of an unfavorable law being applied in the plaintiff's chosen forum,[58] it did concede that it was not holding that it "should never be a relevant consideration in forum non conveniens" questions.[59] The Court held that "if the remedy provided by the alternative forum is clearly inadequate or unsatisfactory that it is no remedy at all, the

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54. *Id.* at 250 (stating that because plaintiffs are able to choose among several forums because jurisdiction and venue requirements are often satisfied, plaintiffs will select the forum whose choice of law rules are the most favorable to them).

55. *Id.* at 251–52.

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> First, the trial court would have to determine what law would apply if the case were tried in the chosen forum, and what law would apply if the case were tried in the alternative forum. It would then have to compare the rights, remedies, and procedures available under the law that would be applied in each forum. Dismissal would be appropriate only if the court concluded that the law applied by the alternative forum is as favorable to the plaintiff as that of the chosen forum . . . The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.

Id. at 251–52.

57. *Id.* at 263–64 (discussing the flow of litigation into the United States from foreign plaintiffs who find American courts attractive forums and have begun to congest already crowded courts). *See also* Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 98 (2009) [hereinafter *Foreign Injury Paradox*] (noting that the key tool with which federal courts regulate forum shopping by foreign plaintiffs is the forum non conveniens dismissal).

58. *Piper*, 454 U.S. at 255–56 (noting that a foreign plaintiff's choice of forum deserves less deference than a citizen plaintiff).

59. *Id.* at 254.

unfavorable change in law may be given substantial weight,"[60] and a district court could "conclude that dismissal would not be in the interests of justice."[61] Hence, after *Piper*, defendants must only demonstrate that the plaintiff "would not lack *all* remedies in an alternative jurisdiction and that the respective private and public interest factors favor dismissal."[62]

The Supreme Court also modified the general tenants of *Gulf* regarding the deference it afforded a plaintiff's choice of forum if a plaintiff is foreign.[63] The Court affirmed the district court's determination that the presumption in favor of the plaintiff's chosen forum would apply with "less force" when the plaintiff was foreign.[64] The Supreme Court effectively created a lower threshold to be met in order for courts to dismiss actions brought by foreign plaintiffs on forum non conveniens grounds.[65]

IV. THE RELATIONSHIP BETWEEN DAMAGES AND FORUM NON CONVENIENS

As noted in part II of this Comment, the enactment of NAFTA has served as the catalyst for a surge in trade between the signatory nations.[66] While this growth of commercial activity has been beneficial, it has also had the detrimental impact of creating more products liability litigation between U.S. manufacturers and Mexican plaintiffs.[67] Particularly, the

60. *Id.*

61. *Id.*

62. Dunham & Gladbach, *supra* note 51, at 673 (emphasis added).

63. *Piper*, 454 U.S. at 255–56 ("Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves lees deference.").

64. *Id.*; *see also National Interests*, *supra* note 11, at 566 (explaining that although *Piper* did not change a word of the *Gulf* formula, it profoundly impacted federal forum non conveniens dismissals because it indirectly changed the defendant's burden). Specifically, after *Piper* the analysis became a true balancing test. *Id.* "The *Piper* majority evaluated the evidence as a whole; the defendant was not required to prove overwhelming hardship." *Id.*

65. Dunham & Gladbach, *supra* note 51, at 673.

66. Staff & Lewis, *supra* note 12, at 304; Cho, *supra* note 16; *NAFTA*, *supra* note 14; Jannol et al., *supra* note 21.

67. *See* Jason Farber, *NAFTA and Personal Jurisdiction: A Look at the Requirements for Obtaining Personal Jurisdiction in the Three Signatory Nations*, 19 LOY. L.A. INT'L & COMP. L. REV. 449, 449 (1997) ("With increased trade . . . international

growth in commercial activity has caused an "explosion of forum non conveniens litigation"[68] because plaintiffs injured by American-made products are increasingly seeking to have their case litigated in the United States.[69] Indeed, one author noted that "typically the hardest fought and most important issue" is over forum selection when a plaintiff is foreign.[70]

Why is the forum non conveniens battle one of the most important issues in a transnational case? The answer is simply damages.[71] Plaintiffs from Mexico seek to have their case litigated in the United States because of the availability and possibility of receiving much higher damage awards than they could in Mexico.[72] Conversely, American manufacturers aggressively try to prevent these cases from being litigated in the United States for the exact same reason, and furthermore, if they are successful "the case is often effectively over."[73]

A. Products Liability and Damages in the United States

A full discussion of the development of products liability law in the United States is beyond the scope of this Comment; however, it is important to note the high points in its development.

The origin of products liability in the United States is rooted in principles of contract law,[74] and consequently plaintiffs could

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companies will be more susceptible to lawsuits . . . NAFTA will affect not only the business world, but also the judicial systems of the three signatory countries.").

68. Wilson, *supra* note 32, at 792. *See, e.g.*, Carlos R. Soltero & Amy Clark-Meachum, *The Common Law of Mexican Law in Texas Courts*, 26 HOUSTON J. INT'L L. 119, 123–25 (2003) (discussing forum non conveniens suits in Texas).

69. Wilson, *supra* note 32, at 792; *see* Carlos Loperena, *Issues in Cross-Border Tort Litigation: Forum Non Conveniens, Choice of Law, and Other Matters*, 13 U.S.-MEX. L.J. 77, 79–82 (2005) (discussing Mexican plaintiffs' preference for trials in American courts).

70. *See* Wilson, *supra* note 32, at 792 (noting that the forum non conveniens battle is typically the hardest battle for all foreign plaintiffs).

71. *Id.* at 790.

72. Carlos Loperena, *supra* note 69, at 82.

73. Wilson, *supra* note 32.

74. *See* TERRENCE F. KIELY & BRUCE L. OTTLEY, UNDERSTANDING PRODUCTS LIABILITY 1 (2006) (stating that "recovery of damages resulting from defective products originally was governed (and limited) by principles of contract law," but theories of liability gradually expanded to include negligence and strict liability).

originally only bring a suit against a manufacturer of a defective product based on those principles.[75] However, in the late 19th century, plaintiffs began bringing suits sounding in negligence based on the manufacturer's behavior in producing defective products.[76]

A recurring problem that plaintiffs faced was the requirement of privity.[77] This requirement, which originally was thought to be a requirement only in contract law, "became an essential element in negligence actions as well."[78]

The dicta in *Winterbottom v. Wright* "was interpreted by courts in England and in the United States to mean that a manufacturer or seller of a defective product was not liable, either in contract or in negligence, to a buyer in the absence of a contractual relationship between them."[79] Therefore, as a result of the industrial revolution, manufacturers of defective products were "insulated from the buyers of their products due to the increase of middlemen, such as wholesalers and retailers,"[80] or rather a lack of privity. Ultimately this bar was removed.[81] Specifically, Judge Cardozo in *MacPherson v. Buick Motor Co.* rejected the application of privity in negligence cases,[82] and the requirement was further eliminated from breach of warranty cases in *Henningsen v. Bloomfield Motors*.[83]

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75. *See generally id.* (commenting that a claim for damages may now be based upon many different theories such as: "express warranty; implied warranty; misrepresentation; negligence; [and] strict liability.").

76. *See id.*

77. *Id.* at 5 ("Thus at common law, a person injured by a product had no cause of action against the manufacturer of the product unless that person was in privity of contract with the manufacturer.").

78. *Id.*

79. Winterbottom v. Wright (1842), 152 Eng. Rep. 402; KIELY & OTTLEY, *supra* note 74, at 6.

80. KIELY & OTTLEY, *supra* note 74, at 2–3.

81. *See id.* at 17 (discussing the aftermath of the removal of the privity requirement in products liability cases).

82. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1056–57 (N.Y. 1916) (finding that "lack of privity does not stand in the way of prosecution" because "in the reasonable contemplation of the parties to the warranty, [the plaintiff] might be expected to become a user of the automobile."). *See also* KIELY & OTTLEY, *supra* note 74, at 17 (noting that *McPherson v. Buick Motor Co.* eliminated privity in negligence cases).

83. *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 99–100 (N.J. 1960)

The final and most striking development in products liability law came in *Greenman v. Yuba Power Products*. In this case, Justice Traynor held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[84]

Consequently, plaintiffs today, in the United States, most often bring a products liability suit based on one of three theories: (a) strict liability, (b) negligence, or (d) breach of warranty.[85] Additionally, claims of unjust enrichment, fraudulent misrepresentation, negligent misrepresentation or concealment, and violating consumer statutes, are also viable claims that can be brought under products liability law.[86]

The primary remedy for those plaintiffs who successfully bring a suit in the United States is monetary damages.[87] A plaintiff in the United States may recover three primary types of damages: (a) nominal, (b) compensatory, and (c) punitive.[88]

Nominal damages may be recovered when a cause of action has been proved but there is an absence of substantial damage or rather no substantial damage has been shown.[89] Usually this is a trivial amount of money that is awarded.[90]

Compensatory damages are damages that attempt to restore the plaintiff to the position that they would have been in had they not been injured.[91] Compensatory damages are divided into

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(extending implied warranty of merchantability to "the purchaser of the car, members of his family, and to other person . . . ."). *See generally* KIELY & OTTLEY, *supra* note 74, at 17 (summarizing Henningsen v. Bloomfield Motors as extending warranties of automobiles to purchasers and other foreseeable users).

84. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963).

85. Mark D. Gately & Lauren S. Colton, *The International Comparative Guide to: Product Liability 2010*, GLOBAL LEGAL GROUP 305, 306 (2010), *available at* http://www.iclg.co.uk/khadmin/Publications/pdf/3657.pdf.

86. *Id.*

87. MEREDITH J. DUNCAN & RONALD TURNER, TORTS: A CONTEMPORARY APPROACH 649 (2010).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 649–50; Gately & Colton, *supra* note 85, at 311.

either general damages or special damages.[92] General damages are damages "not easily reduced to a dollar figure"[93] and are attributable to the conduct of the defendant.[94]

For example, general damages include pain and suffering, loss of consortium, and emotional trauma.[95] Conversely, special damages are damages to which a dollar amount can be exacted because they compensate for expenses that result from the accident.[96] For example, special damages would include payment of medical expenses, past and future lost earnings, and the loss or repair of damaged property.[97]

In addition to compensatory damages, an individual can recover hedonic damages in the United States.[98] Hedonic damages are awarded for intangible harms such as "loss of enjoyment of life."[99] Further, a child can recover for loss of parental care and comfort, and conversely a parent can recover loss of a child's care and comfort.[100] Finally, it is possible for a decedent's survivor to obtain damages for a wrongful death in a products liability case.[101]

Punitive damages are damages that are awarded when the defendants conduct is shown to have been outrageous, reckless, or these damages may be awarded if it shown that the defendant

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92. DUNCAN & TURNER, *supra* note 87, at 649–50.

93. *Id.* at 650.

94. Jeffrey R. Cagle et al., *The Classification of General and Special Damages for Pleading Purposes in Texas*, 51 BAYLOR L. REV. 629, 633 (1999) ("[G]eneral damages have also been substantively defined as those damages that are the necessary and usual result of the wrong complained of."); Bryan Fears, *What is the Difference Between Special and General Damages?*, TEX. INJURY L. BLOG (Aug. 17, 2009, 1:21 PM), http://www.txinjuryblog.com/2009/08/articles/legal-news/what-is-the-difference-between-special-and-general-damages/.

95. *See* Gately & Colton, *supra* note 85, at 311 (stating that compensatory damages "provide payment for medical expenses . . . loss of income, financial support and consortium.").

96. Fears, *supra* note 94.

97. Gately & Colton, *supra* note 85, at 311 (noting that compensatory damages can be awarded for medical expenses).

98. Malcolm E. Wheeler, *Comparative Aspects of Dispute Resolution in Particular Subject Areas: Product Liability*, 17 CAN.-U.S. L.J. 359, 359 (1991).

99. *Id.*

100. *Id.*

101. Gately & Colton, *supra* note 87, at 311.

had an "evil motive."[102]

The primary purposes of punitive damages are to punish and deter the defendant and others from engaging in similar conduct in the future.[103] Recently, many states have passed legislation that places caps on the amount of punitive damages recoverable.[104]

B. Products Liability and Damages in Mexico

Unlike the United States, where the body of products liability law has been developing for almost a century, products liability law has only recently emerged in Mexico's jurisprudence.[105] Therefore, products liability litigation does not occur with the same frequency in Mexico as it does in the United States.[106]

Products liability law in Mexico developed around two sources of law: the Federal Consumer Protection Law (Ley Federal de Protección al Consumidor) and the Civil Code for the Federal District (Código Civil para el Distrito Federal) (Federal Code).[107]

Despite the Federal Consumer Protection Law being in existence for more than thirty years,[108] the concept of products liability, as its own body of law, did not exist in Mexico's legislation until May 4, 2004, when the law was amended.[109] Under Article 82 of the Federal Consumer Protection Law a person who has been injured or a person who has suffered damage because of a defective product has two options.[110] The

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102. Thomas A. Packer, *Product Liability Law in the United States: Considerations for Foreign Companies*, GORDON & REES L.L.P (June 1995), http://www.gordonrees.com/publications/viewPublication.cfm?contentID=407.

103. *Id.*

104. Gately & Colton, *supra* note 85.

105. Francisco Velázquez, *Preview of Problems in Product Liability: U.S. and Mexico*, 8 U.S.-MEX. L.J. 117, 117 (2000).

106. *See id.* (noting that products liability cases are "extremely rare" in Mexico).

107. *Id.* at 119.

108. *See id.* ("The Consumer Protection Law has been in place since 1976.").

109. Ley Federal de Protección al Consumidor [LFPC] [Federal Consumer Protection Law], *as amended*, Diario Oficial de la Federación [DO], 04 de Septiembre 2012 (Mex.) [hereinafter LFPC].

110. Velázquez, *supra* note 105, at 119.

consumer may (a) seek a rescission or termination of the contract with the manufacturer, or (b) seek a price reduction.[111]

Under either option, the consumer may receive compensation for damages or losses suffered if the product has defects that make it unusable for its intended purposes.[112] However, before the consumer is entitled to such damages, he or she is required to attempt to negotiate a settlement with the manufacturer through a reconciliation process overseen by the Consumer Protection Agency.[113] If a settlement is achieved and reduced to writing, the manufacturer is exempt from future liability.[114]

The Federal Code provides the other source of liability.[115] Despite the fact that all of the states in Mexico have their own civil codes regulating injuries resulting from the tortious acts of others, almost all state civil codes are modeled after the Federal Code.[116] Liability under the Federal Code is governed by the concept of direct causation, or stated differently, liability is only imposed if the injury or damage suffered by a plaintiff is a direct consequence of the defendant's actions.[117] Article 1910 of the Federal Code states: "Whoever, in acting illegally or against good customs, causes injury to another is obligated to repair it, unless he proves the injury occurred as the consequence of the fault or inexcusable negligence of the victim."[118] Consequently, if a person causes damage or injury to another, that person is liable unless it is shown that the injury or damage was due to the "inexcusable fault or negligence" of the victim.[119]

Additionally, Article 1913 allows for a form of strict liability

111. LFPC, *supra* note 109, art. 82.

112. Velázquez, *supra* note 105, at 119.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 120.

117. Carlos F. Portilla & Enrique Valdespino, *The International Comparative Guide to: Products Liability 2006, Mexico,* GLOBAL LEGAL GROUP, 210 http://www.freshfields.com/publications/pdfs/2006/productliability2006.pdf (last visited Oct. 9, 2010).

118. Velázquez, *supra* note 105, at 119–20.

119. Portilla & Valdespino, *supra* note 117, at 210.

with regards to dangerous products, absent any fault on the part of the victim.[120] Article 1913 states: "'[I]f a person uses dangerous apparatus, instruments, mechanisms or substances he has to compensate [the injured party] for the damage caused, even if the act that caused the damage is not illicit, unless it is proven that the damage was caused as a consequence of fault or negligence of the injured party.'"[121]

In sum, under the Federal Code, liability resulting from the use of a defective product requires: (a) the existence of an obligation, (b) breach of that obligation, (c) causation between the injury or damage suffered and the defendants' breach of the obligation, and (d) the injury or damage cannot be the result of victim's fault or negligence.[122]

Mexico's civil codes govern the type of damages that can be recovered by a person who has suffered an injury from a defective product.[123] Under the Federal Code, economic damages and moral damages are recoverable.[124]

Economic damages are recoverable when there is damage to the product itself or an injury to a consumer.[125] There are four categories of injuries for which a person can receive economic damages under the Federal Code.[126] A person can receive economic damages if their injury results in a (a) temporary partial incapacity, (b) a temporary total incapacity, (c) a permanent partial incapacity, or (d) a permanent total incapacity or death.[127]

The amount of compensation a person would receive for each

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120. Código Civil Federal [CC] [Federal Civil Code], *as amended*, art. 1913, Diario Oficial de la Federación [DO], 30 de Agosto de 2011 (Mex.).

121. Robbins, *supra* note 7, at 37.

122. Portilla & Valdespino, *supra* note 117, at 210.

123. *See* Velázquez, *supra* note 105, at 119–20 (noting that the Federal Civil Code defines both damages and losses).

124. Portilla & Valdespino, *supra* note 117, at 213; Robbins, *supra* note 7, at 38; Jorge A. Vargas, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 SAN DIEGO INT'L L.J. 475, 498, 508–09 (2007).

125. Portilla & Valdespino, *supra* note 117, at 213.

126. *See* Velázquez, *supra* note 105, at 120 (listing the categories of injuries which fall under the Federal Labor Law).

127. *See id.*

injury is governed by technical rules set forth in the Federal Labor Law.[128] To calculate the damages that a person would receive for one of the four possible injuries, courts multiply the highest minimum daily wage for the injured person's profession in a particular region by four and then extend that amount by the prescribed number of days the Federal Labor Law has listed for each of the incapacities.[129] Additional damages, such as hospitalization expenses, medication expenses, or loss of income or earning capacity, can be added to the amount calculated according to the rules set forth by the Labor Law and are determined by the judge.[130]

Moral damages are damages that are awarded in addition to the economic or compensatory damages.[131] Moral damages are in some respects similar to the United States' concept of mental anguish damages or pain and suffering.[132] These damages are the "negative consequences" that a person suffers regarding their feelings, reputation, beliefs, honor, or private life.[133] The monetary amount of moral damages that are awarded are determined by a judge who weighs "the nature of rights hurt, the degree of liability, the financial standing of the liable party and that of the victim, and any other particular circumstances of the case."[134]

Unlike the United States, punitive damages do not exist in Mexico nor do damages for loss of consortium or pain and suffering.[135] Additionally, compensation for medical monitoring for circumstances in which a person is at a risk to be injured in the future is not available.[136]

C. Why Plaintiffs from Mexico Find the United States Attractive

It is axiomatic that a key to recovering substantial damages

128. *Id.*
129. *Id.*
130. Vargas, *supra* note 124, at 479; Robbins, *supra* note 7, at 38.
131. *See* Velázquez, *supra* note 105, at 120.
132. Portilla & Valdespino, *supra* note 117, at 213; Robbins, *supra* note 7, at 38.
133. Portilla & Valdespino, *supra* note 117, at 213.
134. *Id.*
135. *Id.* at 214; Vargas, *supra* note 124, at 484.
136. Portilla & Valdespino, *supra* note 117, at 213–14.

in a case involves a great deal of strategy. One of the first and often most important strategic decisions made by an attorney is the forum chosen to litigate the case.[137] Since the passage of NAFTA, citizens of Mexico who are injured by defective American-made products have increasingly attempted to have their cases litigated in the courts of the United States.[138] In fact, subsequent to the passage of NAFTA, one author predicted "commercial and private traffic between the two countries is destined to increase dramatically over the next several decades. Unfortunately, the increased interactions will likely result in a significant increase in litigation involving parties on both sides of the United States and Mexican border."[139] U.S. manufacturers and corporations have responded to the increase in products liability claims brought against them by Mexican plaintiffs by aggressively, and more often than not successfully, utilizing forum non conveniens to ensure the case is tried in Mexico and not the United States.[140]

Numerous reasons have been cited for why a plaintiff from Mexico would want to bring their products liability action in the United States. Specifically, plaintiffs from Mexico find the courts in the United States attractive because of (a) the availability of

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137. *See generally* Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006) (discussing the strategic choices involved in forum selection).

138. Anderson, *supra* note 6, at 1059–60. *See also* Cho, *supra* note 16, at 868 (arguing that a corollary effect of NAFTA and economic globalization is that the "United States courts will inevitably face more cross-border suits brought by citizens of other nations engaged in trade with the United States."); Daniel J. Dorward, *The* Forum *Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 142 (1998) (noting that increases in technology and transnational activity has resulted in "a dramatic increase in the number of international foreign disputes brought in the United States").

139. Anderson, *supra* note 6, at 1060.

140. *See* Jennifer L. Rosato, *Restoring Justice to the Doctrine of* Forum Non Conveniens *for Foreign Plaintiffs Who Sue U.S. Corporations in the Federal Courts*, 8 J. COMP. BUS. & CAP. MKT. L. 169, 169 (1986) (arguing that forum non conveniens has effectively allowed U.S. corporations to limit "liability in suits brought by foreign plaintiffs" because "U.S. . . . courts have consistently dismissed foreign plaintiffs on the basis of forum non conveniens."). *See also* Figueroa, *supra* note 41, at 123 ("[T]he effect both intended and inadvertent of the [forum non conveniens] doctrine has been to shield U.S. multinational corporations conducting business in Latin America from liability resulting from torts or product injury caused to Latin American plaintiffs by barring access to U.S. courts.").

strict liability, (b) the ability to choose among the fifty states where to file the suit, (c) the availability of jury trials, (d) the existence of contingent attorney's fees and the absence of taxing the losing party with their opponents fees, and (e) extensive discovery.[141] While these factors most certainly influence a Mexican plaintiff's decision to bring his or her suit in the United States, a major motivation behind their decision is the availability of much larger damages.[142]

The United States has become an "El Dorado" for Mexican plaintiffs because of the availability of larger damage awards than those available in Mexico.[143] Indeed, a comparison of damages recoverable between the two countries for similar injuries illustrates why a Mexican plaintiff would be motivated to attempt to bring their suit in the United States. For example, in Mexico if a person loses an arm in an accident that was caused by a defective product "a Mexican judge would feel very generous if they awarded $5,000[,]"[144] whereas a plaintiff in the United States would receive at least $200,000.[145]

A comparison between *Gonzalez v. Chrysler Corp.* and *Crespo v. Chrysler Corp.* is also particularly illustrative. *Gonzalez* involved a products liability claim against Chrysler in which the plaintiff alleged that the airbag in the plaintiff's

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141. FREEDMAN, *supra* note 8, at 1–2.

142. *See Panel Discussion: International Tort Litigation Involving the United States and Mexico*, 13 U.S.-MEX. L.J. 111, 113 (2005) (indicating that Mexican lawyers are asked to avoid Mexican courts "because the remedies for claims on damages and losses are more plaintiff-friendly in the United States").

143. William Schurtman, *Book Review: Product Liability Actions by Foreign Plaintiffs in the United States* 23 INT'L LAW. 774, 776 (1989). *See also* Sara Deutch Schotland, *A Practitioner's Perspective on the Teaching of Product Liability Law*, 45 J. LEGAL EDUC. 287, 288 (1995) ("It is axiomatic that U.S. product liability verdicts are for much larger sums than foreign judgments, in part because of the jury system, the contingent fee system, and the availability of pain-and-suffering and punitive damages.").

144. Symposium, *United States and Mexican Competition and Trade Law: Presentations at the Fourth Annual Conference of the United States-Mexico Law Institute, Inc.*, 4 U.S.-MEX. L. J. 125, 125–26 (1996).

145. *See* Charles E. Boyle, *Warning: The Perils of Products Liability*, INS. J., June 21, 2004, *available at* http://www.insurancejournal.com/magazines/west/2004/06/21/feastures/43391.htm (noting that an injury to a finger or thumb alone yields a median damage award of $258,537 in the United States).

Chrysler LHS was defective.[146] The plaintiff's three-year-old son was killed from the force of the car's airbag deploying when the car collided with another in Atizapan de Zaragoza, Mexico.[147]

Despite the fact that Texas had "a tenuous connection to the underlying dispute"[148], it is the forum that the plaintiff chose.[149] In fact, the car was purchased in Mexico, the accident occurred in Mexico, all the witnesses were Mexican, and neither the car nor the airbag was designed or manufactured in Texas.[150]

Consequently, it seems that the only motivating factor for Gonzalez to file suit in Texas and not in Mexico was the amount of damages available in both fora. Indeed, Gonzalez argued that Mexico would be an inadequate forum because of what he termed to be a "clearly unsatisfactory remedy" explaining that "Mexican law caps the maximum award for the loss of a child's life at approximately $2,500."[151] Even more indicative that the lure of higher damages was the primary impetus for Gonzalez to try to have the case heard in Texas, is his argument that the damage cap would "entitle him to a de minimis recovery only—a clearly unsatisfactory award for the loss of a child,"[152] and that "the cost of litigating" would exceed the amount he could actually recover,[153] or, more simply put, "the lawsuit [was] not economically viable in Mexico."[154]

While not specifically mentioned, it is likely that Gonzalez chose Texas primarily due to its close proximity to Mexico. Consequently, it is clear that money motivated Gonzalez's choice because he would incur less travel expenses by bringing the suit in Texas, and not the where Chrysler's principal place of business is located.[155]

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146. *See* Gonzalez v. Chrysler Corp., 301 F.3d 377, 379 (5th Cir. 2002).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 380.

152. *Id.* at 381.

153. *Id.*

154. *Id.*

155. *See id.* at 383 (stating a factor in determining forum for the suit, which was filed in Texas, may be "litigation costs" such as those accumulated due to "geographic

The facts of *Crespo* are strikingly similar to those of *Gonzalez*, the primary difference being that the plaintiff in *Crespo* was a U.S. citizen and not a Mexican citizen.[156] In *Crespo*, the mother of a five-year-old boy brought a suit against Chrysler when the airbag deployed after a minor accident killing her son.[157] The mother brought claims sounding in products liability and the jury awarded the mother $750,000.[158]

Ultimately however, the verdict was reversed on other grounds.[159] Nevertheless, the verdict in *Crespo* represents a $747,500 difference between what Gonzalez most likely would receive in Mexico and what Crespo would have received.[160] Further this disparity clearly illustrates why plaintiffs such as Gonzalez pursue their products liability cases in United States forums.

Moreover, a difference in damages this large would not only make the case more economical for a Mexican plaintiff but could also represent a "windfall" to such plaintiffs.[161] Indeed, the damages recoverable in the United States would most likely be far greater "than a lifetime of earnings" for a Mexican plaintiff because "[c]itizens of foreign countries who are injured by US technology or pharmaceuticals may earn a fraction of the wages commanded by their counterparts in the [United States]."[162] For instance, in 1999, the top three products liability compensatory damage awards were $107 million, $24 million, and $5.3 million.[163] Despite these damage awards being quite large, they

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distances").

156. *Id.* at 378; Crespo v. Chrysler Corp., 75 F. Supp. 2d 225, 227 (S.D.N.Y. 1999).

157. *Crespo*, 75 F. Supp. 2d at 227.

158. *Id.*

159. *Id.* at 232.

160. *See Gonzales*, 301 F.3d at 380 (stating that Mexican Law caps damages at $2,500 U.S.); *Crespo*, 75 F. Supp. 2d at 225 (stating that Crespo was awarded $750,000 by a jury); Ley Federal de Trabajo [LFT][Federal Labor Law], *as amended*, art. 502, Diario Oficial de la Federación [DO], 12 de Septiembre de 2012 (Mex.).

161. *See* Wilson, *supra* note 32, at 789–90 (explaining that a foreign plaintiff would want to bring their suit in the United States because damages in their home country would most likely be "vastly limited" when compared to damages in the United States).

162. *Id.* at 790.

163. Gary Wilson et al., *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85, 116 (2000). The author also notes that the trend of large products

are small when compared to the largest ever products liability damage award, which totaled $4.93 billion.[164] This damage award was granted in a case involving General Motors Corporation and a family that was severely burned after a rear end collision.[165] Alternatively, in Mexico the amount of damages recoverable if a professional is killed, not simply burned, because of a defective product is roughly $35,000.[166]

Additionally, *Vasquez v. Bridgestone/Firestone, Inc.* demonstrates that it is the availability of larger damage awards that entice Mexican plaintiffs to attempt to bring their case to the United States. *Vasquez* involved a car accident that killed six citizens of Mexico in Nuevo Leon, Mexico.[167] The estates of the deceased brought a products liability suit in Brownsville, Texas, against Bridgestone and General Motors, who were both involved in the manufacture of the car, as well as Lucent Technologies and Lucent Technologies Maquiladoras, alleging that the car and one of its tires was defective.[168]

The plaintiffs' first case was dismissed because the court lacked diversity jurisdiction.[169] The plaintiffs, subsequent to this dismissal, filed suit yet again in Orange County, Texas, and removed their case to a Federal District Court in Beaumont.[170] Ultimately, this second case was also dismissed but this time on forum non conveniens grounds.[171] The plaintiff's attempted filing their case two more times in different Texas counties, each time without success.[172]

Interestingly, the connection that Texas had to the case was indeed remote. The plaintiffs and decedents were citizens of Mexico, the tires and the car were manufactured, purchased, and maintained in Mexico, the accident took place in Mexico,

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liability verdicts has continued into 2000. *Id.*

164. *Id.*

165. *Id.*

166. Velázquez, *supra* note 105, at 120.

167. Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 670 (5th Cir. 2003).

168. *See id.* at 670, 673.

169. *Id.* at 670.

170. *Id.*

171. *Id.*

172. *Id.*

and as a consequence all of the physical evidence was located in Mexico.[173]

After the plaintiffs lost the forum non conveniens battle and the district court found the defendants' agreement to submit to the jurisdiction of Nuevo Leon made it an adequate forum, the plaintiffs, still unsatisfied, argued that the defendants should have been required to submit to the jurisdiction of a federal court in Mexico City.[174] The crux of the plaintiff's argument was that the defendants should have been required to submit to a federal court in Mexico City because "Mexican federal law provides greater damages than does the law of Nuevo Leon."[175] This clearly demonstrates that the plaintiffs were not concerned with whether it was the law of the United States or that of Mexico that was applied to their case, but were only concerned with maximizing their potential recovery. Stated differently, the plaintiff's choice of forum was not based on convenience, nor was it a maneuver to have the most favorable law applied, but rather was an attempt to fill their pockets as much as they could. The court in *Vasquez* recognized this stating, "[w]e are mindful of the disparate levels of wrongful death damages provided under Texas and Mexican law and the incentive for plaintiffs to sue in the United States."[176] Furthermore, the perseverance with which the plaintiffs attempted to have their case heard in the United States, coupled with the expense of re-filing the case four times,[177] is a strong indication that the plaintiffs were willing to expend their time and money in order to achieve the highest possible damage award.

Finally, *Cruz v. Cooper Tire & Rubber Co.*is instructive. . *Cruz* involved a car crash in Lagos De Moreno Jalisco, Mexico, where one passenger was killed and the other three passengers were seriously injured, all of whom were citizens of Mexico.[178]

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173. *Id.* at 672–73.

174. *Id.* at 671.

175. *Id.*

176. *Id.* at 675.

177. *See generally id.* at 670–71 (giving the convoluted procedural history wherein plaintiffs re-filed their case four times).

178. Cruz v. Cooper Tire & Rubber Co., 2009 WL 4016606, at *4 (W.D. Ark. Nov. 19, 2009).

Jose Cruz, acting as an individual and as a personal representative for the injured passengers, filed a suit against Cooper Tire & Rubber in the United States alleging that the accident and subsequent injuries were caused by a defective tire.[179] The allegedly defective tire was produced by Cooper Tire & Rubber Co in Findley, Ohio and manufactured in Texarkana, Arkansas.[180] The plaintiffs in their action specifically sought punitive and compensatory damages from the defendant.[181]

It is striking that the plaintiff's complaint specifically sought punitive damages[182] because these damages are simply not available in Mexico.[183] Nevertheless, despite the fact that the evidence "relating to the accident and condition of the tire [was] in Mexico,"[184] that the "accident took place in Mexico,"[185] that "those who may have witnessed the accident"[186] were in Mexico, and that "the cost of litigation for the plaintiffs [would] be greatly reduced" [187] if they were to try the case in Mexico, the plaintiff sacrificed these evidentiary and monetary advantages solely for the *possibility* of receiving punitive damages, or rather a larger recovery than would otherwise be available to them.

Indeed, as the discussion above indicates, Mexican plaintiffs injured by American-made products increasingly attempt to have their claims tried in the United States, because of the availability and likelihood of a much larger recovery than would be possible for them in Mexico.

D. Defendants, Forum Non Coveniens, and Damages

As discussed above, the battle over forum is typically one of

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179. *Id.* at *1.

180. *Id.*

181. *Id.*

182. *Id.*

183. *See* Edith Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 LOY. L.A. INT'L & COMP. L. REV. 235, 253 (1986) (explaining that punitive damages for tort liability are not permitted in Mexico, but that a criminal law judge can award punitive damages).

184. *Cruz*, 2009 WL 4016606 at *3.

185. *Id.*

186. *Id.*

187. *Id.* at *4.

the hardest and most important battles fought in a products liability case between a Mexican plaintiff and an American manufacturer.[188] American manufacturers fight aggressively to *prevent* these cases from being heard in the United States to avoid being slammed by the larger damages available,[189] and do so primarily through motions to dismiss for forum non conveniens.[190]

Indeed, American manufacturers will frequently employ the doctrine, even when it is more convenient for them to sue in their own home forum, in an effort to avoid the disastrous damages that they could be found liable for.[191] "An American defendant will argue tenaciously that its own home state is an 'inconvenient' forum because witnesses and documents are located abroad."[192] It has been noted that "[w]hile at first blush it may seem odd for an American defendant to insist that it would be inconvenient to defend an action in its home state"[193] their reason for doing so is their "desire to foreclose the foreign plaintiff from gaining access to all the benefits that have turned the United States into an El Dorado."[194] Further, American manufacturers not only use forum non conveniens to reduce the total amount of damages they could be found liable for, but also to reduce the risk that they would face *any* liability or rather

188. Wilson, *supra* note 32, at 792 (citing David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 938 (1990)).

189. *Id.*

190. *Cf.* Donald J. Carney, *Forum Non Conveniens in the United States and Canada*, 3 BUFF. J. INT'L L. 117, 117–18 (1996) (explaining that forum non conveniens has been argued to be a "vital safety valve to relieve pressure from the deluge of foreign plaintiffs seeking US damage awards in cases better tried elsewhere").

191. *Id.* at 125, 137 (explaining that United States defendants will argue that a foreign venue is appropriate to "avoid huge judgments" and that the most important factor they consider when making a forum non conveniens motion is "avoiding potentially onerous damage awards").

192. Schurtman, *supra* note 143, at 776.

193. *Id.*

194. *Id.* (noting that the defendants in the *Bhopal* case were successful in moving the case from a federal court in New York to India and settled for $470 million). The author of the book review argues this settlement is substantially lower than what it would have been had the case taken place in the United States. *Id.*

avoid *all* liability.[195] While the doctrine's stated purpose has been to ensure litigation occurs in the most convenient and appropriate forum, the reality is that "convenience has little to do with why defendants seek a forum non conveniens dismissal,"[196] and it has become an effective tool for U.S. corporations to limit their liability in cases brought by plaintiffs from Mexico.[197]

In *Gonzalez*, Chrysler obtained a dismissal of the case in Texas based on forum non conveniens grounds.[198] Consequently Gonzalez argued that "the case would never be brought in Mexico," because the forum non conveniens dismissal "determine[d] the outcome of this litigation in Chrysler's favor."[199] In support of Gonzalez's argument, one author has noted that if the defendant wins the forum non conveniens issue, "the case is often effectively over."[200]

In addition, many defendants are willing to agree to a number of conditions and sacrifice many strategic advantages to defeat a plaintiff's argument that Mexico is an inadequate forum for their claim.[201] This practice by defendants, created by the court to alleviate the harsh reality of a forum non conveniens dismissal,[202] is known as a conditional forum non conveniens

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195. *See* Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 58 (2000) ("The tacit concept behind the doctrine of forum non conveniens allows corporations to avoid legal responsibility because they operate multinationally.").

196. Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1167 (2005) (noting that the reason that defendants seek forum non conveniens dismissals is "to force the plaintiff to re-file the lawsuit in another country, whose substantive and procedural laws are more favorable to the defendant").

197. *Cf.* Rosato, *supra* note 140, at 169 (noting that, in general, forum non conveniens dismissal has become an effective means for U.S. corporations to limit their liability in suits brought by foreign plaintiffs).

198. Gonzalez v. Chrysler Corp., 301 F.3d 377, 379 (2002).

199. *Id.* at 381–83.

200. Wilson, *supra* note 32, at 792. *See* Figueroa, *supra* note 41, at 123–24 (arguing that forum non conveniens dismissals "force Latin American plaintiffs to re-file their complaints in their home [forum]."). The author notes that Latin American jurisdictions have subsequently refused to hear these remanded cases on various grounds. *Id.*

201. Heiser, *supra* note 196, at 1190.

202. Figueroa, *supra* note 41, at 141–42.

dismissal.[203]

For example, in *Cruz*, defendant Cooper Tire & Rubber, agreed to submit to the jurisdiction of a foreign court, waive the limitation defenses, and make all witness and documents it had control of available to the plaintiffs.[204]

Indeed, if the defendants had not agreed to submit to the jurisdiction of Mexico, it is likely that the case would never have proceeded in Mexico. Further, if they had not agreed to satisfy any judgment awarded by a court in Mexico it is also likely that the plaintiffs would have had an incredibly difficult time in getting them to do so. Hence, *Cruz* illustrates American manufacturer's willingness to waive such advantages to avoid US courts. It is manifest that the defendants in *Cruz r* were willing to sacrifice such advantages was to remove any chance of having to pay U.S. damages if found liable.[205]

Similar to *Cruz*, the defendants in *Vasquez* agreed to submit to the jurisdiction of a court in Nuevo Leon, provided that the case brought in the United States was dismissed on forum non conveniens grounds.[206] Again, the defendants clearly agreed to submit to jurisdiction in Mexico because of the significantly lower damages that they would be subjected to in Mexico.[207]

Nevertheless, it is questionable whether US defendants would still urge dismissal of cases brought by Mexican plaintiffs on forum non conveniens grounds if it is clear that U.S. courts would not apply the law of the United States regarding damages.[208] The fact that such questions are being posed by legal scholars indicates that liability, or more specifically, the amount of damages a defendant will be held liable for is a strong motivating factor for many defendants in their pursuit to

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203. *Id.*

204. Cruz v. Cooper Tire & Rubber Co., 2009 WL 4016606, at *3 (W.D. Ark. Nov. 19, 2009).

205. *See* Heiser, *supra* note 196, at 1190 ("Defendants readily agree to almost any condition that will remove concerns about the adequacy of an alternative forum.").

206. Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 671 (5th Cir. 2003).

207. *See Id.* at n.4 ("[T]he [d]efendant's expert stated that Nuevo Leon law limits wrongful death liability to approximately $5700 plus an unspecified amount of 'moral damages.'").

208. Heiser, *supra* note 196, at 1184.

dismiss such cases on forum non conveniens grounds.[209]

V. AMERICAN DEFENDANT'S USE OF FORUM NON CONVENIENS TO AVOID OR REDUCE THEIR LIABILITY AND ITS CONSEQUENCES FOR AMERICA.

What interest does the United States have in cases involving injuries to citizens of Mexico by defective American-made products? Even though the United States does not have a compensatory interest in protecting a Mexican plaintiff, it does have an interest in deterring American manufacturers from pursuing the same harmful conduct in the United States with the hopes of preventing similar types of injuries to American citizens.[210]

The Supreme Court in *Piper* rejected the plaintiff's argument that the United States had an interest in ensuring that American defendants were in fact deterred from continuing production of defective products.[211] The Court reasoned that "the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant."[212]

Since *Piper*, courts in the United States that weigh *Gulf's* public interest factors have undervalued the United States' deterrence interest.[213]

While the Supreme Court may have been correct in 1981 to argue that the deterrent effect on American manufacturers would likely be insignificant, this is no longer correct in light of

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209. *See generally* RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 59 (2007) (arguing that the greater the certainty about a plaintiff's self-serving forum-shopping reasons, such as "the habitual generosity of juries in the United States . . . [,] the easier it becomes for the defendant to succeed on a *forum non conveniens* motion").

210. *See National Interests*, *supra* note 11, at 562 ("[E]ven in cases brought by foreign plaintiffs injured in foreign countries by globally marketed goods, forum non conveniens dismissals undermine critical American interests in deterrence.").

211. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260–61 (1981) (finding that incremental deterrence would likely "be insignificant").

212. *Id.*

213. *See* Heiser, *supra* note 196, at 1181–82 (stating "the interest in deterrence is a weak one and is more readily overcome than the strong presumption that attaches to a resident plaintiff's choice of forum").

the growth in trade and commerce between the United States and Mexico brought about by NAFTA.[214] Indeed, the passage of NAFTA has strengthened America's deterrence interest in products liability cases brought by Mexican plaintiffs, but courts' routine practice of dismissing these cases on forum non conveniens grounds undermines the United States' deterrence interest and the safety of U.S. citizens.[215]

The United States interest in products liability claims involving injuries to Mexican citizens caused by defectively manufactured American-made products is best illustrated by a classification of the products that move across the border. [216] First, there are products that are distributed within both the United States and Mexico.[217] Secondly, there are products that are distributed solely within the United States and products that are distributed solely within Mexico.[218] Elizabeth Lear classified products that are distributed within both the United States and Mexico as "global goods."[219] Injuries involving

214. *See NAFTA: 10 Years Later*, U.S. DEP'T OF COMMERCE 1–2 (June 2004), *available at* http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_001987.pdf (stating that between 1993 and 2003 U.S. firms had exports worth $83.1 billion to Mexico, had a 106% growth of exports to Mexico, and that "[w]ithout NAFTA, U.S. firms would be at a disadvantage to key European competitors in Mexico . . . ."); William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1681–82 (1992) (noting that Justice Marshall presented no evidence that the deterrence effect would be insignificant); *National Interests*, *supra* note 11, at 572–75 (explaining that not hearing foreign injury claims in the United States could delay required design changes until manufacturers litigate a significant amount of claims in foreign countries); Heiser, *supra* note 196, at 1181 ("[I]nterest is to deter wrongful conduct, and the likelihood of a tort recovery against such a defendant strengthens the deterrent effect.").

215. *See* Dunham & Gladbach, *supra* note 51, at 686 (explaining that in the 1990s courts favored dismissals of cases brought by foreign plaintiffs). *See generally National Interests*, *supra* note 11, at 595–97 (highlighting the safety and deterrence concerns of American consumers regarding potential defects in automobile airbags used in the United States, even when the plaintiff is Mexican and the accident occurs in Mexico).

216. *National Interests*, *supra* note 11, at 572.

217. *Id.* at 573.

218. *Id.*

219. *Id.* at 572–73 (explaining that global goods are "goods that are produced for worldwide consumption without material, country-specific modifications in design" and non-global goods are those "not distributed within the United States").

"global goods" implicate the United States' deterrence interest because they implicate the safety of US consumers as much as they implicate the safety of Mexican consumers.[220]

For example, *Gonzalez* involved a defective airbag, designed by TRW Inc. and TRW Vehicle Safety Systems that was ultimately incorporated into the Chrysler LHS, the model of the car in *Gonzalez*.[221]

The court, in dismissing the case on forum non conveniens grounds, failed to recognize the deterrence interest that Texas had in hearing the dispute.[222] Despite the fact that Gonzalez's Chrysler was not designed or manufactured in Texas, Chryslers containing the same defective airbags were also sold in Texas and endangered Texas consumers.[223] Even though the United States did not necessarily have a compensation interest in the dispute, it did have a deterrence interest that Mexico would be unable to protect. [224]

Because the case was dismissed on forum non conveniens grounds Chrysler was able to escape considerable liability and was not deterred from continuing to incorporate the defective airbags in their vehicles.[225] More specifically, as Lear notes,

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220. *Id.* at 573. *See also Foreign Injury Paradox*, *supra* note 57, at 105 ("[T]he American deterrence interest in foreign injuries caused by global goods routinely equals or exceeds those of the injury forum.").

221. Gonzalez v. Chrysler Corp., 301 F.3d 377, 378 (5th Cir. 2002).

222. *See National Interests*, *supra* note 11, at 595–96.

223. *See id.* at 596 ("If the Chrysler LHS had an airbag defect, thousands of U.S. Consumers were at risk.").

224. *See id.* at 594–95 (explaining with regards to the numerous Bridgestone/Firestone Ford Explorer cases from Venezuela and Colombia that "the United States had no compensation interest in these claims"). However, the author notes that the United States' "deterrence interests were extraordinarily high given the number of Ford Explorers with Bridgestone/Firestone tires on the American roads." *Id.* at 595. Furthermore, with regard to *Gonzalez*, "Mexico could have had no objection to a U.S. decision to "over-compensate" its residents". *Id.* at 596.

225. *See id.* at 595–96 (explaining the Fifth Circuit's reasoning when it held that a $2500 damages cap for the death of a child in Mexico did not render the Mexican forum inadequate); David Schepp, *Chrysler and Ford Recall 160,000 Vehicles for Safety Defects*, DAILYFINANCE (Dec. 30, 2010), http://www.dailyfinance.com/2010/12/30/Chrysler-and-ford-recall-160-000-vehicles-for-safety-defects (stating that the defective airbags were not recalled until December 2010). The recall was not performed until eight years after the *Gonzalez* case was dismissed for forum non conveniens. *Gonzalez,* 301 F.3d at 377.

when corporations such as Chrysler avoid liability it "allows them to absorb significant costs associated with American accidents before the combined foreign and domestic losses mandate a design change or the withdrawal of the product from the American market."[226]

Further in *Cruz*, it can be assumed that the defendant did not limit their sales to Mexico but also sold their defective tires in the United States. [227] Again the court failed to consider the strong deterrence interest that the United States had in protecting its citizens from injuries resulting from the same defective tires. Lear notes that when courts dismiss such cases it "interferes with market pressures that steer American consumers toward safer products."[228] Indeed, when plaintiffs from Mexico are excluded from courts in the United States, it lowers the cost of the product to the consumers in the United States and makes the product more appealing. [229]

Finally, by excluding claims involving "global products" the defendant is able to escape the negative publicity and attention they otherwise would invariably receive.[230] Consequently American consumers do not receive the valuable information they need concerning potentially defective products.[231]

VI. POSSIBLE SOLUTION

It is clear that Mexican plaintiffs want to bring their

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226. *See National Interests*, *supra* note 11, at 574.

227. *Cf.* Cruz v. Cooper Tire & Rubber Co., 2009 WL 4016606, at *3 (W.D. Ark. Nov. 19, 2009) (noting that all the plans relating to the design and manufacturing of the tires resided in the United States and that the tire was manufactured in the United States).

228. *National Interests*, *supra* note 11, at 574.

229. *See id.* at 575 (explaining that "liability for injury is theoretically incorporated into the product price" and therefore "systematically excluding foreign injuries from the American courts arguably depresses the price paid by American consumers").

230. *See id.* at 578–79 (noting that "corporations are much quicker to redesign or recall a product after negative publicity" and that "[l]itigation in the United States raises the awareness of American consumers by attracting the attention of the American press.").

231. *See generally id.* at 578–79 (arguing that litigation in the United States has the effect of raising awareness of consumers by attracting the attention of the American press).

products liability cases to the United States in order to take advantage of the higher damages.[232] It is also clear that American manufacturer defendants want to keep these cases out for the very same reason and frequently do so via forum non conveniens.[233] Despite the low importance *Piper* placed on the United States deterrence interest, this interest has become much more important since the passage of NAFTA.[234] Therefore, it is necessary to develop a solution that simultaneously protects the United States interest in deterring defective products but also does not lead to rampant forum shopping among Mexican plaintiffs.

Because the passage of NAFTA accelerated trade between the United States and Mexico[235], and consequently products liability disputes[236], any solution should also be addressed through NAFTA. Indeed, one legal scholar has already opined that "the best mechanism for solving the forum non conveniens impasse would be an international treaty."[237]

Considering the above, it is clear that the United States, Mexico, and even Canada, should negotiate a side trade agreement similar to the North American Agreement on Environmental Cooperation (NAAEC), that requires signatory nations to agree to agree to cap damages at a specified amount for products liability suits involving "global goods."

Using the NAAEC as a model is instructive. The NAAEC

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232. *See supra* Part IV.

233. *See supra* Part V.

234. *Piper*, 454 U.S. at 268 (noting that any incremental deterrence gained by holding the trial in an American court is likely to be insignificant). *See* Emma Suarez Pawlicki, *Stangvik v. Shirley and Forum Non Conveniens Analysis: Does a Fear of Too Much Justice Really Close California Courtrooms to Foreign Plaintiffs*, 13 TRANSNAT'L LAW. 175, 210 (2000) (discussing California's interest in seeing that state corporations do not sell products that may end up hurting taxpayers and the greater emphasis placed on ensuring justice and deterrence).

235. *See supra* note 214 and accompanying text. *See also* U.S. DEP'T OF COMMERCE: INT'L TRADE ADMIN., TOP U.S. EXPORT MARKET 26–27 (2008) (stating that overall trade between the U.S., Canada, and Mexico increased 213% from 1993 to 2003).

236. *See* Mark B. Rockwell, *Choice of Law in International Products Liability: "Internationalizing" the Choice*, 16 SUFFOLK TRANSNAT'L L. REV. 69, 69 (1992) (attributing increased product liability cases in the U.S. to an increase in the transfer of products across borders as a result of nations embracing free trade).

237. Figueroa, *supra* note 41, at 159.

was enacted in conjunction with NAFTA and is a regional effort to promote environmental law and enforcement.[238] It was drafted and signed with the goal of ensuring that "economic growth [was] consistent with goals of sustainable development."[239] More simply, it was developed in an effort to protect the environment.[240] The agreement specifically delineated the commitments each country was obligated to make in order to support the "environmental goals and objectives of NAFTA."[241] The first of such commitments was to "assess, as appropriate, environmental impacts" with regards to trade.[242]

Other commitments included the promotion of "education in environmental matters," the encouragement of "the use of economic instruments for the efficient achievement of environmental goals," the prohibition of the "export of pesticides or toxic substances to the other two parties when the use of the pesticide or substance is banned in one's own territory," and finally ensuring that the laws of each country "provide[d] for high levels of environmental protection."[243]

Similar to the NAAEC, an agreement should be made between the signatory nations in which each country makes a commitment to cap all damages, not simply compensatory damages. The cap should take into account any money that would be awarded for pain and suffering and punitive damages in the United States and likewise any money awarded for moral damages in Mexico, in products liability cases involving "global public goods."[244] Further, similar to the NAAEC goal of ensuring

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238. *See* North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 5, Jan. 1, 1994, *available at* http://www.worldtradelaw.net/nafta/naaec.pdf (last visited Oct. 4, 2012) [hereinafter NAAEC].

239. H.R. Rep. No. 103-361(III), at 128 (1993), *reprinted in* 1990 U.S.C.C.A.N. 2731, at 2858. *See also* Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 271 (1994).

240. *See* NAAEC, *supra* note 239, at pmbl.

241. *See* Charnovitz, *supra* note 240, at 260.

242. *Id.* at 260–61.

243. *Id.*

244. *See* WILLIAM D. NORDHAUS, PAUL SAMUELSON AND GLOBAL PUBLIC GOODS 2–3 (2005) (explaining how nonrivalry and nonexcludability make global public goods different from other economic issues).

the protection of the signatory nation's environments from pollution and hazardous waste, [245] a side agreement could be enacted to ensure the protection of each of the signatory nation's interest in deterring the manufacture and distribution of defective products within their borders. Placing a cap on damages for injuries involving only global goods, would also have the effect of reducing forum shopping, particularly among plaintiffs from Mexico. It would eliminate the primary motivation of a Mexican plaintiff to bring their products liability case to the United State rather than in their home forum, and it would likely deter defendants from attempting to keep these cases out of U.S. courts.

Moreover, the NAAEC does not require the signatory nations to change their laws regarding environmental protection.[246] Rather the NAAEC mandates that the signatory nations ensure their environmental laws and regulations "provide for high levels of environmental protection" and work toward improving those laws and regulations.[247] Further, NAAEC obligates country to "effectively enforce its environmental laws and regulations through appropriate [means]."[248]

Using the NAAEC as a model, a side agreement between the signatory nations that adopts a cap on the highest amount of damages recoverable would not require either nation to change their substantive law regarding product disputes, but would merely mandate the highest amount that the signatory nations could award in damages to a person injured by a defective global product. Therefore, the United States could indeed continue to hold manufacturers of defective products strictly liable, negligent, or impose liability based on principles of warranty and contract, and likewise Mexico could continue to only recognize negligence and contract based liability. Furthermore, like the NAAEC, this side agreement could include a clause obligating each country to effectively enforce its products

245. NAAEC, *supra* note 239, at pmbl.

246. Gustavo Vega-Canovas, *NAFTA and the Environment*, 30 DENV. J. INT'L L. & POL'Y 55, 58 (2001).

247. NAAEC, *supra* note 239, art. 3.

248. *Id.*

liability laws.

Because the proposed side agreement would only entail determining a specific amount of damages that would be paid for injuries involving global goods and would not require the signatory nations to change their law substantively, it is hopeful that the use of the doctrine of forum non conveniens would return to its original purpose, primarily to "provide convenience for both litigants and courts by restricting the locus of a suit to a forum that has a strong interest in adjudicating the action."[249] If American manufacturers of global goods injure a plaintiff in Mexico and were faced with the possibility of being liable for the same amount of damages, regardless of whether the suit was brought in Mexico or in the United States, the probability that they would seek to keep the case out of US courts dramatically decreases. Further, many of the daunting choice of law questions that face courts today when confronted with a plaintiff from Mexico could be eliminated through a cap on damages. Indeed such a cap would moot many of these questions because it is likely that fewer plaintiffs from Mexico would seek access to US courts .

In sum the side agreement should:

a)Determine and set a cap on damages that could be recovered by a plaintiff who has been injured by a defective product,

b)Only pertain to those goods that are considered "global" or rather those goods that are sold in Mexico, Canada, and the United States, and

c) for all other defective goods, either those goods sold exclusively in the United States, Mexico, or Canada, or those goods that have been produced from a country not included in NAFTA, the cap would not apply.

While, the intricacies and details of such an agreement are beyond the scope of this Comment and while a cap would not resolve all of the dilemmas of forum shopping by plaintiffs from

249. *See* Janeth Duque, *The Southern District Reexamines the Doctrine of Forum Non Conveniens: Carlesnstople v. Merck and Co., Inc.*, 54 BROOK. L. REV. 379, 380 (1988) (noting that the doctrine's basic purpose is "to provide for the convenience of both litigants and courts in the interest of justice").

Mexico, it would most certainly be a step toward minimizing the problem.

VII. CONCLUSION

Indeed the passage of NAFTA has been quite beneficial for the economies of both the United States and Mexico, but it has also stimulated an increase in products liability litigation involving parties from the two countries.[250] Particularly, citizens of Mexico who are injured by American-made products are increasingly seeking to have their case litigated in the United States due to the lure of higher damage awards, while defendants are desperately trying to keep them out, often successfully through the application of forum non conveniens.[251] However, this result jeopardizes the safety of American citizens because the deterrence interest that the United States has in such cases is undermined. Consequently, it is necessary to take steps to address this problem.

250. Robbins, *supra* note 7, at 36, 38.

251. Daniel J. Dorward, *The Forum Non Cenveniens Doctrine and The Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 141, 147, 160 (1998).