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U.S. STATE RESPONSIBILITY *Á LA TRAIL SMELTER*: ARMS TRAFFICKING AND TRANSBOUNDARY HARM TO MEXICO

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Abstract. *Both President Obama and Secretary Clinton have stated that the United States accepts shared responsibility with Mexico for the Mexican drug war. The question this article will attempt to answer is whether shared responsibility for illegal arms trafficking from the United States into Mexico reaches beyond the world of political rhetoric. In attempting to examine whether there is a basis in international law for holding the United States responsible for arms trafficking into Mexico, this article will examine the international arbitration case of Trail Smelter for the principle it is credited with establishing: the prohibition against transboundary harm. It will explore whether the prohibition against transboundary harm can be applied to arms trafficking from the U.S. into Mexico by exploring the obligation to prevent harm to foreigners in the International Court of Justice case "Military and Paramilitary Activities in and against Nicaragua", which noted the duty of states to prevent the use of their territory for the purposes of illegal arms trafficking into other States. Finally, it concludes that the United States may be responsible under the doctrine of international state responsibility à la Trail Smelter for transboundary harm in Mexico's territory for 1) its failure to have an adequate legal structure in place that is capable of allowing it to meet its due diligence duty to prevent transboundary harm, and 2) for its failure to meet the standard of due diligence in preventing the arms trafficking.*

Key Words: *Transboundary harm, Mexican drug war, trail smelter, arms trafficking, State responsibility*.

Resumen. *Tanto el presidente Obama como la secretaria Clinton han declarado que Estados Unidos acepta responsabilidad compartida con México en la guerra contra las drogas en México. La pregunta que este artículo intentará*

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responder es si ¿la responsabilidad compartida del tráfico ilegal de armas desde Estados Unidos a México va más allá del mundo de la retórica política? Al tratar de examinar si existe una base en el derecho internacional para declarar a Estados Unidos responsable del tráfico de armas hacia México, este artículo examinará el caso de arbitraje internacional "Trail Smelter" en búsqueda del principio que presuntamente estableció: la prohibición de daños transfronterizos. Este artículo explorará si la prohibición de daños transfronterizos se puede aplicar al tráfico de armas desde Estados Unidos a México mediante la exploración de la obligación de prevenir el daño a extranjeros y el caso de la Corte Internacional de Justicia, "Actividades Militares y Paramilitares en y contra Nicaragua", donde se mencionó el deber de los Estados de prevenir el uso de su territorio con el propósito de traficar ilegalmente armas a otros Estados. Por último, este artículo concluye que Estados Unidos puede ser responsable bajo la doctrina de la responsabilidad internacional à la Trail Smelter por el daño transfronterizo en el territorio de México, lo cual constituye una violación de la soberanía de México, por: 1) no tener en vigor una estructura jurídica capaz de permitirle cumplir con su deber de debida diligencia para prevenir un daño transfronterizo, y 2) por su incumplimiento del estándar de diligencia debida para prevenir el tráfico de armas.

Palabras clave: *Daño trasfronterizo, guerra contra el narcotráfico, Trail Smelter, tráfico de armas, responsabilidad estatal.*

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I. Introduction

President Calderón of Mexico began his military attack on the drug cartels in December 2006.[1] The attack consisted of deploying thousands of military personnel and federal police throughout Mexico.[2] The immediate result of the military strategy was a rise in social violence instigated by drug cartels and a sharp increase in human rights abuses. From the declaration of the drug war in 2006 until 2010, there were 35,000 drug war-related killings in Mexico;[3] and the number has continued to rise.

In northern Mexico, violence has left entire towns abandoned, with the local government and residents fleeing to nearby cities in search of refuge from warring drug lords.[4] An internally displaced person from one abandoned town told a reporter: "It's like we're in the Wild West […] We have no mayor, no police, no transit system. We have been left to fend for ourselves."[5]

In cities such as Ciudad Mier, Tamaulipas, the town has been left without access to water, gas or electricity at times because warring drug lords have attacked water treatment facilities, gas stations, and electric transformers.[6] Sadly, the situation of Ciudad Mier is not unique.

By November 2010, Mexico had lost control of ninety percent of the state of Tamaulipas.[7] And unfortunately, Tamaulipas is just one example of a growing number of Mexican states, including Chihuahua and Michoacán, where the Mexican government is no longer in control of large portions of its own territory.[8]

While President Calderón has rejected the suggestion that Mexico might be a failed state, the President and his administration have come to acknowledge the power of drug cartels in Mexico:

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[1] Marc Lacey, *In Drug War, Mexico Fights Cartel and Itself*, N.Y. Times, Mar. 29, 2009, http://www.nytimes.com/2009/03/30/world/americas/30mexico.html?pagewanted=all (last visited Mar. 18, 2010). *See also* Colby Goodman and Michel Marizco, *U.S. Firearms Trafficking to Mexico: New Data and Insights Illuminate Key Trends and Challenges*, *in* Shared Responsibility: U.S.-Mexico Policy Options for Confronting Organized Crime 168 (Eric L. Olson *et al.* eds., 2010), *available at* http://wilsoncenter.org/topics/pubs/Chapter%204%20Reuter.pdf (stating the number of drug war-related deaths in 2010 had reached 28,000).

[2] Uniform Impunity, Mexico's Misuse of Military Justice to Prosecute Abuses in Counternarcotics and Public Security Operations, Human Rights Watch 2 (April 2009).

[3] Mary Beth Sheridan, *Mexico confirms use of US drones in drug war*, Wash. Post., Mar. 16, 2011, http://www.washingtonpost.com/world/mexico-confirms-seeking-us-drone-help-in-drug-war/2011/03/16/ABbSEZg_story.html (last visited Mar. 19, 2011).

[4] Miguel Alemán, *Northern Mexico's State of Anarchy: Residents Abandon a Border Town as Vicious Drug Cartels Got to War*, Latin Am. News. Nov. 20, 2010, http://online.wsj.com/article/SB10001424052748704104104575622840256881122.html?mod=wsj_share_facebook (last visited Mar. 19, 2011).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

> [H]e and his aides have spoken frankly of the cartels' attempts to set up a state with in a state, levying taxes, throwing up roadblocks and enforcing their own perverse codes of behavior. The Mexican government has identified 233 "zones of impunity" across the country, where crime is largely uncontrolled, a figure that is down from 2, 204 zones a year ago.[9]

Much of the harms caused to Mexican citizens, the military and police officers are a result of U.S. weapons illegally brought into Mexico from the United States. "Our inability to prevent weapons from being illegally smuggled across the border to arm these criminals causes the deaths of police officers, soldiers and civilians,"[10] stated the Secretary of State to the Obama Administration, Hillary Clinton, on an official trip to Mexico City in March 2009. In the words of Obama: "This war is being waged with guns purchased not here [in Mexico] but in the United States […] more than 90 percent of the guns recovered in Mexico come from the United States, many from gun shops that lay in our shared border […] So we have responsibilities as well."[11]

Both President Obama and Secretary Clinton have stated that the United States accepts shared responsibility with Mexico for the drug war.[12] This is in line with the 2009 United Nations Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem (UNODC Declaration).[13] At the core of the UNDOC Declaration is the principle of shared responsibility among nations in the fight against drug trafficking.[14] The question this article will at-

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[9] Lacey, *supra* note 1.

[10] Mark Landler, *Clinton Says U.S. Feeds Mexico Drug Trade*, N.Y. Times, Mar. 25, 2009, *available at* http://www.nytimes.com/2009/03/26/world/americas/26mexico.html?_r=1 (last visited: Mar. 21, 2011).

[11] *Obama Claims 90 percent of Guns Recovered in Mexico Come from U.S.*, St. Petersburg Times, Apr. 16, 2009, http://www.politifact.com/truth-o-meter/statements/2009/apr/16/barack-obama/Obama-claims-90-percent-guns-used-Mexico/ (last visited April 3, 2011).

[12] *U.S., Mexico Reconfirm Shared Responsibility in Drug War*, Latin American Herald Trib. http://laht.com/article.asp?ArticleId=354222&CategoryId=14091 (last visited Mar. 21, 2011) and Jose de la Isla, *Mexican President Helps Obama Shape Policy*, The East Valley Tribune.com, Mar. 23, 2011, http://www.eastvalleytribune.com/opinion/columnists/article_e316068e-5585-11e0-876d-001cc4c03286.html (last visited April 17, 2011).

[13] United Nations Office on Drugs and Crime, Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem 42 (Mar. 11-12, 2009).

[14] *Id*. Article 2 (b). "Address the need for a comprehensive, multisectoral and balanced approach involving demand reduction and supply reduction, each reinforcing the other, together with the appropriate application of the principle of shared responsibility, while stressing the need for services responsible for prevention, including law enforcement agencies, and ensuring that those measures are mainstreamed in publicly and privately provided health, education, rural development, agriculture and social services."

tempt to answer is whether shared responsibility extends beyond the world of "mere political rhetoric."[15]

In an attempt to examine whether there is a basis in international law for holding the United States responsible for illegal gun trafficking into Mexico, this article first examines the *Trail Smelter* international arbitration case[16] for the principle it is credited with establishing: the prohibition against transboundary harm.[17] Second, this article explores the theory of State liability, coming to the conclusion that in its current state of development the scope of the theory is too limited to provide a basis for U.S. responsibility for illegal arms trafficking into Mexico. Third, I re-examine the *Trail Smelter* case to see if it provides an alternative theory to State liability. This section concludes that *Trail Smelter* and the resulting declarations and environmental law treaties, along with the International Court of Justice decision in the *Corfu Channel Case*,[18] provide an adequate basis for a general principle that prohibits transboundary harm.

In Sections IV and V this article looks at other specific expressions of this general responsibility to prevent transboundary harm within international law. Specifically, the fourth section discusses the obligation to prevent harm to foreigners in their territories.[19] Here harm to a foreign national is equivalent to harm to the national's foreign State,[20] making it possible to conclude that the obligation to prevent harm to a foreign national was in fact an obligation to prevent a form of transboundary harm. Fifth, this article reviews a final form of the obligation to prevent transboundary harm found in the International Court of Justice case of *Military and Paramilitary Activities in and against Nicaragua*,[21] which notes States's obligation to prevent the use of their territories for the purpose of illegal arms trafficking into other States.

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[15] *See* Jorrit Kamminga, *Towards Shared Responsibility? The United States, Latin America and the Drug Trade*, The London School of Economics and Political Science, http://blogs.lse.ac.uk/ideas/2011/03/shared-responsibility/ (last visited April 17, 2011) (positing that shared responsibility does in fact reach beyond the world of "mere political rhetoric").

[16] Trail Smelter Arbitration (U.S. v. Can.) 3 R.I.A.A. 1905, 1913 (U.S.-CA Arbitral Tribunal 1938/41) [hereinafter Trail Smelter], *available at* http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

[17] Dr. Owen McIntyre, Consultant Report: Enhancing Transboundary Cooperation in Water Management in the Prespa Lakes Basin, United Nations Development Program 11 (Oct. 29, 2008).

[18] Corfu Channel Case (Alb. vs. Gr. Brit. & N. Ir.), 1949 I.C.J. 4, 23,36 (Apr. 9).

[19] Robert P. Barnidge, Jr., *The Due Diligence Principle under International Law*, 8 Int. Community L. Rev. 81, 99 (2006).

[20] *See* George T. Yates III, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, International Law of State Responsibility for Injuries to Aliens 214 (Richard B. Lillich, ed. 1983).

[21] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14, 83 (June 27) at para. 154 [hereinafter Nicaragua Case].

Sixth and finally, this article applies case law to the current arms trafficking situation between the United States and Mexico and concludes that the United States may be responsible under the doctrine of International State responsibility *à la Trail Smelter* for transboundary harm in Mexico's territory. This is a violation of Mexico's sovereignty because 1) it is questionable whether the United States has an adequate legal structure in place capable of allowing it to fulfill its due diligence obligations to prevent transboundary harm and 2) the United States has failed to meet the standard of due diligence in preventing arms trafficking into the territory of Mexico.

II. The Trail Smelter Arbitration

The Trail Smelter case concerned the town of Trail in British Columbia, Canada, about seven miles from the US-Canada border.[22] In the town of Trail, the Consolidated Mining and Smelting Company smelted large quantities of zinc and lead,[23] producing smoke in the form of a toxic concentrated sulfur dioxide which descended on the surrounding forests and crops "leaving a virtual moonscape in its wake."[24] Between 1917 and 1924, local Canadian farmers and residents engaged in a legal battle with the Consolidated Mining and Smelting Company, which resulted in an arbitral settlement of $60,000 USD to sixty farmers, but did not prohibit the company from continuing to pollute the environment.[25]

The sustained pollution began to flow down the valley and across the U.S.-Canada border, affecting the "gardens, field crops, grazing lands, orchards, and timber lots" of the residents of Stevens County, Washington, in the United States.[26] These residents, like those of Trail, sought to resolve their claims with the company.

When negotiations between the U.S. residents and Consolidated Mining and Smelting Company broke down, the U.S. and Canadian governments intervened, engaging in diplomatic exchanges and eventually sending the matter to the International Joint Commission (IJC),[27] set up by the 1909 Boundary Waters Treaty between the United States and Canada.[28] As with the earlier is-

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[22] Trail Smelter, *supra* note 16, at 1913.

[23] Allum, *in* Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration 14 (Rebecca Bratspies & Russell A. Miller eds., 2006) [hereinafter McCaffrey, *in* Transboundary Harm]; Trail Smelter, *supra* note 17, at 1907, 1913.

[24] Allum, *in* Transboundary Harm, *supra* note 23, at 14.

[25] *Id*. at 15.

[26] *Id*.

[27] *Id.* The International Joint Commission aims at resolving issues arising from the actions of United States and Canada in lake and river systems along the border that may be affecting the other state. See The International Joint Commission, who are we, available at http://www.ijc.org/en/background/ijc_cmi_nature.htm#What (last visited on Feb. 11, 2012).

[28] Stephan C. McCaffrey, *Of Paradoxes, Precedents, and Progeny: The Trail Smelter Arbitration 65*

sue between the residents of Trail and the smelting company, the IJC ordered compensation, but refused to enjoin the smelter's activity.[29] The U.S. residents were not appeased.

Further diplomatic engagement produced the Convention of Ottawa of April 15, 1935 and the *ad hoc* international arbitral tribunal.[30] Pursuant to the Convention, the Consolidated Mining and Smelting Company agreed to pay $350,000 USD for damages accrued before January 1, 1932, and agreed that all other claims would be sent to the Tribunal.[31] The Tribunal released its final decision in 1941, imposing environmental regulations on the company.[32] Resolution of the claims had taken fifteen years.[33]

The Trail Smelter Arbitral Tribunal's decision is regarded as a foundational case of environmental law[34] and the case provided the basis for the emerging theory of International State liability[35] in its famous dicta: "Under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing injury."[36]

The Trail Smelter precedent was important for several reasons. First, it held that an activity that was lawful, like smelting, might lead to liability to pay compensation for any damages incurred. Second, the Tribunal did not order that the smelter cease its activities pursuant to the obligation of cessation under the international law of State responsibility.[37] Instead, the smelter was allowed to continue its activities pursuant to regulations imposed by the Tribunal to minimize future harm to the victims.[38] Third, the Tribunal held

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Years Later, *in* Transboundary Harm, *supra* note 23, at 37. The 1900 Boundary Waters Treaty "provides the principles and mechanisms to help resolve disputes and to prevent future ones, primarily those concerning water quantity and water quality along the boundary between Canada and the United States." See International Joint Commission, Treaties and agreements, available at http://www.ijc.org/rel/agree/water.html (last visited on Feb. 11, 2012).

[29] Stephan C. McCaffrey, *Of Paradoxes, Precedents, and Progeny: The Trail Smelter Arbitration 65 Years Later*, *in* Transboundary Harm, *supra* note 23, at 37.

[30] *Id.*

[31] Allum, *in* Transboundary Harm, *supra* note 23, at 16.

[32] *Id*.

[33] *Id*. at 15.

[34] Jay Ellis, *Has International Law Outgrown Trail Smelter?*, *in* Transboundary Harm , *supra* note 23, at 56.

[35] Pierre-Marie Dupuy & Christina Hoss, *Trail Smelter and Terrorism: International Mechanisms to Combat Transboundary Harm*, *in* Transboundary Harm , *supra* note 23, at 56.

[36] Trail Smelter, *id.* note 17, at 1965.

[37] General Assembly, *Report of the International Law Commission* 53 U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 (2001), at Article 30: "The State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require."

[38] Trail Smelter, *id.* note 17, at 1974-78.

that a sovereign State, Canada, was liable to compensate the injured victims, as opposed to the actual wrongdoers, the operators of the smelter.

In fact, there was little international precedent to support the principle of State responsibility announced by the Trail Smelter Tribunal.[39] The Tribunal itself stated as much: "No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But here also, no decision of an international tribunal has been cited or found."[40]

Despite finding no case of air pollution in international law, the Tribunal used U.S. environmental law to reach its decision, claiming that American environmental law conformed to international law in the field:[41]

> The first problem which arises is whether the question should be answered on the basis of the law followed in the United States or on the basis of international law. The Tribunal, however, finds that this problem need not be solved here as the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law.[42]

In using U.S. law that dealt with the "quasi-sovereign rights of the States of the Union", the Tribunal analogized the national boundaries between states in the United States to the international boundary between the United States and Canada. While perhaps the unique relationship between the United States and Canada resembled the relationship existing at the time among U.S. states, such an analogy surely failed at the time, and still fails, to account for the circumstances associated with most international boundaries that do not share this same uniquely amicable relationship.[43]

Despite all this, the Tribunal's decision was not unfounded. The Tribunal cited a principle of international law and various cases in support of its decision:

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[39] Ellis, *in* Transboundary Harm, *supra* note 34, at 57.

[40] Trail Smelter, *supra* note 16, at 1965.

[41] McCaffrey, *in* Transboundary Harm, *supra* note 29, at 36.

[42] Trail Smelter, *supra* note 16, at 1963.

[43] Ellis, *in* Transboundary Harm, *supra* note 34, at 49; *see also*, John E. Read, *Pollution by Analogy*, *in* Transboundary Harm, *supra* note 23, at 47-49. States are generally not so willing to surrender their own interests. For example, Article 38 of the Statute of the International Court of Justice provides that "if the parties agree the Court may decide a case *ex aequo et bono*." Statute of the Court, 1940 I.C.J. Statute and Rules of the Court, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (last visited Jan. 24, 2012). In other words, the case can be decided not on the basis of international law, but on the basis of what is just and fair to the parties. American Law and Legal Information, Free Encyclopedia, http://law.jrank.org/pages/15213/ex-aequo-et-bono.html (last visited Mar. 25, 2011). To date, no ICJ decision has ever been made on this basis. *Id.*

> As Professor Eagleton puts in (*Responsibility of States in International Law*, 1928, p. 80): "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." A great number of such general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal […] International decisions, in various matters, from the *Alabama* case onward, and also earlier ones, are based on the same general principle […].[44]

In the decades since, *Trail Smelter* has taken on mythical proportions: "Every discussion of the general international law relating to pollution starts, and must end, with a mention of the Trail Smelter Arbitration."[45] So great was the influence of Trail Smelter, that in 1978, the International Law Commission began a project to create Draft Articles on International State Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, which relied heavily on the *Trail Smelter* Case.[46]

III. The International Law Commission's Draft Articles on International State Liability: International Liability for Injurious Consequences of Acts Not Prohibited by International Law

The project began as a result of the Commission's project codifying the law of State responsibility.[47] In 1969 and 1973, discussions inside the Commission indicated a belief that in certain cases States might be responsible for the harmful consequences of their otherwise lawful acts, despite no breach of obligations owed to other States, and thus no resulting State responsibility.[48] There was also the concern that technologies used in industry and business activities might cause transboundary harm despite the State's due diligence.[49] In these circumstances, in which the activity is legal and the State has com-

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[44] Trail Smelter, *supra* note 16, at 1963.

[45] Read, *in* Transboundary Harm, *supra* note 23, at 45.

[46] Ellis, *in* Transboundary Harm, *supra* note 34, at 56. The International Law Commission is formed by independent experts of international law; it was created by the United Nations General Assembly, and its object is "the promotion of the progressive development of international law and its codification." Statute of the International Law Commission, Article 1, G.A. Res. 174 (III), annex, U.N. Doc. A/RES/174(II) (Nov. 21, 1947).

[47] Alan E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?*, 39 Int'l Comp. L. Q. 1, 2 (1990) [hereinafter Boyle, *State Responsibility*].

[48] *Id.* at 2.

[49] Alan Boyle, *Liability for Injurious Consequences of Acts Not Prohibited by International Law*, *in* Oxford Commentaries on International Law: The Law of International Responsibility 98 (James Crawford *et al.* eds., 2010).

plied with the standard of due diligence, the loss would unfairly lie with the victim.[50]

To avoid dealing with questions of wrongfulness and limiting the scope of the *Draft Liability Articles* to only "lawful acts," the International Law Commission titled the *Draft Liability Articles* using the words "acts not prohibited by international law."[51] In this way, the regime was meant to overlap with circumstances that might give rise to responsibility as well.[52] In other words, liability was not envisioned to entail a lack of responsibility for those same activities in every circumstance.[53] The two regimes might even complement each other.[54] Unlike the *Draft Articles on State Responsibility*, the *Draft Articles on State Liability* were originally meant to codify primary obligations.[55] While primary obligations are directly imposed on States, secondary obligations flow from a breach of primary obligations. Secondary obligations are more akin to the procedural consequences of a breach of a substantive or primary obligation.[56] State liability and State responsibility can therefore coexist where State liability is seen as establishing the special primary obligations, the violation of which may incur secondary consequences prescribed by the doctrine of State responsibility.[57] As will be discussed below, the final *Draft Liability Articles* would codify both primary and secondary norms.

The *Draft Liability Articles*, as originally envisioned by the first Rapporteur, Quentin-Baxter, were primary obligations that did not necessarily incur secondary obligations for any breaches.[58] According to Quentin-Baxter, States had the duty to prevent harm and cooperate with other States on the risk of transboundary harm associated with activities occurring in their territories or under their control.[59] The States were also obligated to engage in negotiations with the goal of balancing interests, such as regarding the "importance of the activity, its economic viability, [and] the probability and seriousness of loss or

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[50] *Id.* at 98.

[51] Boyle, *State responsibility*, *supra* note 47, at 12.

[52] *Id*.

[53] Michael Montjoie, *The Concept of Liability in the Absence of an Internationally Wrongful Act*, *in* Oxford Commentaries on International Law: The Law of International Responsibility, *supra* note 49 at 505.

[54] Boyle, *supra* note 47, at 16.

[55] Julio Barboza, International Liability for the Injurious Consequences of Acts Not Prohibited by International Law and Protection of the Environment, in Académie de Droit International: Recueil des Cours vol. 247, 310-11 (1995).

[56] Alain Pellet, *The ILC's articles on State responsibility for internationally wrongful acts and related texts*, *in* Oxford Commentaries on International Law: The Law of International Responsibility, *supra* note 49, at 76.

[57] Montijoie, *in* Oxford Commentaries on International Law: The Law of International Responsibility, *supra* note 49, at 505.

[58] Boyle, *State Responsibility, id.* note 48, at 11.

[59] *Id*. at 5.

injury."[60] However, in Quentin-Baxter's view, failure to fulfill these obligations did not give rise to liability; rather only harm resulting from these activities gave rise to a right of action.[61] However, even here, the payment of compensation was not seen as an absolute obligation.[62]

> In sum, what the schematic outline sought was a world in which nothing was either prohibited or made obligatory and everything was negotiable. Underlying this was the perception that the sovereign equality of States precluded claims of absolute freedom of conduct and absolute freedom from harm, and that the burdens of socially desirable activities had to be shared equally.[63]

The second rapporteur, Julio Barboza, took a different approach to the *Draft Liability Articles*. He focused on strict liability rather than on breach of the duty of due diligence.[64] This focus takes into account a situation in which a State has met the standard of due diligence, but nonetheless an accident occurs and harms a neighboring State. For some, this is considered perhaps the most important contribution of State liability to the development of the general law of State responsibility.[65]

Barboza also held that for liability to ensue the risk posed by the activity must reach a level that is "appreciable" and the harm must reach a level that is "appreciably detrimental."[66] Like Quentin-Baxeter, in Barboza's perspective full reparations were not envisioned in liability since the key lay in balancing the benefit of the lawful act and the disadvantage of the harm.[67]

Barboza also did not take Quentin-Baxter's view that primary obligations could be breached without ensuing secondary obligations as a consequence of breach, such as the duty to pay damages.[68] While Barboza's view is more consistent with the traditional law of State responsibility, this consistency risks making State liability insufficiently different from State responsibility for it to be necessary.[69] Critics of the *Draft Liability Articles* claim that State responsibility is entirely capable of dealing with the issue of transboundary harm and charge that the distinction between lawful and unlawful activities is useless.[70] The *Trail Smelter* and *Corfu Channel* cases demonstrate that State responsibility, and specifically the duty of due diligence, can deal with activities

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[60] *Id*.

[61] *Id.*

[62] *Id.*

[63] *Id*. at 5-6.

[64] *Id.* at 6-7.

[65] *Id.* at 16.

[66] *Id*. at 7.

[67] Barboza, *supra* note 55, at 314.

[68] Boyle, *State Responsibility*, *supra* note 47, at 11.

[69] *Id*.

[70] *Id*. at 13.

that are technically lawful. The International Law Commission [hereinafter ILC] initially reasoned that State responsibility was insufficient to deal with transboundary harm because State responsibility calls for the cessation of the activity and full compensation.[71] However, some critics take issue with this reasoning:

> The weakness in [the International Law Commission's] argument lies in assuming that prohibition is the inevitable result of responsibility for wrongful acts and that a balancing of the benefits and burdens of socially useful activities is not possible in this context.
>
> […]
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> […]
>
> [This] reasoning in distinguishing this topic from State responsibility looks beset with conceptual and terminological confusion, and rests on dubious assumptions about prohibition as an inevitable consequence of wrongfulness.[72]

Whether or not responsibility is fully capable of refraining from calling for cessation of the harmful activity causing injury and refraining from requiring full compensation is as of yet an unsettled point of law.[73] While *Trail Smelter* is an example of the application of State responsibility, the circumstances surrounding the *Trail Smelter* case were specific to the special relationship between the United States and Canada, were both parties wished for the arbitral tribunal to balance the interests on both sides of the issue.

Another point of criticism of the International Law Commission's work on the *Draft Liability Articles* was that the ILC was at best creating, or at worst replicating, primary rules of environmental law:

> In effect, the ILC appeared to believe that no primary obligations of protection from transboundary harm existed: it seemed unable to grasp that international law might, as in Part XII of the 1982 UN Convention on the Law of the Sea, impose obligations of regulation, diligent control, and prevention of harm even on lawful activities without either prohibiting the activity or excluding the possibility of responsibility for the breach. Even in 1978, the ILC's view of the law seemed extraordinary.[74]

This brings the discussion to the topic of the scope of the International Law Commission's project. When the topic was initially taken up by the Commission it was not specifically limited to environmental law.[75] The Commission sought to codify general rules that might reach economic and mon-

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[71] *Id* at 13-14.

[72] *Id*.

[73] *Id*. at 14.

[74] Boyle, *in* Oxford Commentaries on International Law: The Law of International Responsibility, *supra* note 49, at 75.

[75] Boyle, *State Responsibility*, *supra* note 47, at 3.

etary harms as well.[76] In his contribution to *Recueil des Cours: Académie de Droit International*, Barboza wrote:

> [W]e believe that the existence of such a due diligence obligation as is found to emerge from the previously cited authorities [*Trail Smelter*, *Corfu Channel*, *Island of Palmas*, *Lake Lanoux*, the *1972 Stockholm Declaration*, and various multilateral and bilateral treaties] is grounded on a principle of customary international law of a general character prohibiting the noxious use of a State's territory, as emerges particularly from the *Corfu Channel* case, where the rule is formulated in general terms not confined to a particular use of the territory or to environmental interferences.[77]

This general principle of law prohibiting transboundary harm, however, was not to be codified into the *Draft Liability Articles*.

As the Commission's work progressed, it felt it lacked a basis for establishing and codifying principles in the sphere of economics as most the precedent for the project was in the area of environmental law and dealt with physical harm.[78] Additionally, the Commission felt there was a need to make the scope of the *Draft Liability Articles* more manageable,[79] perhaps so as not to leave States open to potentially unlimited liability. The draft articles were limited to harms with "physical consequences,"[80] specifically excluding transboundary harm that resulted from monetary or socioeconomic State policies or similar areas.[81]

As a result, the project focused on environmental harm. Criticism of the *Draft Liability Articles* argued that they had become merely an exercise in codifying and developing parts of environmental law with overlap in the area of State responsibility for breach of these duties.[82] For example, International Law Professor Alan E. Boyle commented, "[W]e are now dealing with primary environmental obligations, well established in customary law, in terms wholly consistent with the Commission's conception of responsibility for wrongful acts."[83]

Eventually, the *Draft Liability Articles* were further limited to address only the physical consequences of hazardous activities.[84] They were also divided into

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[76] *Id*.

[77] Barboza, *supra* note 55, at 327.

[78] *Id*

[79] International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (Prevention of Transboundary Harm from Hazardous Activities), 2001 v.II pt.2 U.N.Y.B. Int'l L. Comm'n 144, 151 (2001).

[80] *Id*.

[81] *Id*.

[82] Boyle, *State Responsibility*, *supra* note 47, at 4.

[83] *Id*. at 11.

[84] U.N GAOR, International Law Commission, *Report of Draft Articles on the Prevention of*

two different projects, resulting in the *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, which primarily dealt with primary norms and were adopted in 2001[85] and the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, which mainly dealt with secondary norms and were adopted in 2006.[86] In their final form, the *Draft Articles on Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities* place liability for transboundary harm not on the State where the harm originated, but on the operator of the activity causing the harm.[87] The limited scope of the final *Draft Liability Articles* makes them inapplicable to harms not arising from physically hazardous activities. For this reason, the *Draft Articles* do not apply to the US-Mexico arms trafficking situation because the harm is not a result of environmental damage nor is the harm physical. Given that States were reluctant to accept the *Draft Liability Articles* because they "might lead to an obligation to make unlimited reparation of all harm caused by activities not prohibited by international law,"[88] States are unlikely to be amenable to an argument for expansion of the *Draft Liability Articles* in the near future. Therefore, the limited scope of the codified *Draft Liability Articles* makes them inadequate for purposes of positing a more general prohibition of transboundary harm. The next section re-examines the Trail Smelter precedent for an alternative theory to State liability.

IV. Re-Examining Trail Smelter, Its Progeny, and the *Corfu Channel* Case for a General Prohibition of Transboundary Harm that Utilizes a Standard of Due Diligence

The principle arising out of *Trail Smelter* however does not bear the same limitations as the final *Draft Liability Articles*. Though the *Draft Liability Articles* rely heavily on the *Trail Smelter* Arbitral Tribunal decision, *Trail Smelter* was a decision clearly based on the doctrine of State responsibility, since the doctrine of State liability did not exist at the time. Though the *Trail Smelter* Arbitral Tribunal did not present its decision as such, it is possible to reach the conclusion that the Court's decision was based on the duty to prevent trans-

Transboundary Harm from Hazardous Activities, in the Work of its Fifty-fifth Session, Supp. No. 10. (A/56/10) (2001) [hereinafter Draft Liability Articles, Prevention], *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf (last visited Jan. 24, 2012).

[85] Draft Liability Articles, Prevention, *supra* note 84.

[86] Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, 2006 v.II pt.2 U.N.Y.B. Int'l L. Comm'n (A/61/10) (2006) [hereinafter Draft Liability Articles, Allocation], *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_10_2006.pdf (last visited Feb. 11, 2012).

[87] *Id.*

[88] Montjoie, *in* Oxford Commentaries on International Law: The Law of International Responsibility, *supra* note 49, at 512.

boundary harm and utilized the principle of due diligence. Much like the balancing test that occurs pursuant to the test of due diligence,[89] the *Trail Smelter* Arbitral Tribunal's decision was based on an attempt to balance the interests of the two State parties, the United States and Canada.[90] "The Tribunal has given consideration to the desire of the High Contracting Parties 'to reach a solution just to all parties concerned,'" stated the Tribunal about its own decision.[91] In performing the balancing test, the Arbitral Tribunal balanced "the interests of, in the Tribunal's phrases, 'the agricultural community' with the interest of industry."[92]

It is important to understand how due diligence operates. The obligation at hand is the duty to prevent transboundary harm. Due diligence is the standard or test of reasonableness to which States are held[93] in measuring a State's compliance with that obligation. Due diligence may also be described as a test of "appropriateness" or "proportionality."[94] In analyzing whether a State has met its obligation to act with due diligence, a court must consider whether the State's "conduct […] is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance."[95] In addition, as occurred in the *Trail Smelter* case, "a balance must be struck, 'in light of circumstances, between competing interests which vary in weight from case to case.'"[96]

In the decades since, Trail Smelter, and with it the duty to prevent transboundary environmental harm and the test of due diligence, has taken on classic proportions.[97] Its influence can be found in Principle 21 of the Stock-

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[89] Robert P. Barnidge, Jr. Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle 143 (2008) [hereinafter Barnidge, Non-State Actors and Terrorism].

[90] Read, *in* Transboundary Harm, *supra* note 23, at 52 ("There can be no doubt that the final decision of the Tribunal embodied practical results sought by the two governments. The *compromis* had explicitly directed the Tribunal to 'give consideration to the desire of High Contracting parties to reach a solution just to all parties concerned.' This platitude was interpreted by the Tribunal to indicate that the parties would not stand on absolute rights as sovereigns, but were concerned with balancing the interests of, in the Tribunal's phrases, 'the agricultural community' with the interest of industry'") and Ellis, in Transboundary Harm, *supra* note 23, at 57.

[91] Trail Smelter, *supra* note 16, at 1963.

[92] Ellis, in Transboundary Harm, supra note 23, at 57.

[93] Malcolm N. Shaw, International Law 861 (6th ed. 2008).

[94] *Id*.

[95] Barnidge, Non-State Actors and Terrorism, *supra* note 89, at 104 (quoting International Law Commission, Commentaries, Articles on Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission on the Work of its Fifty-Third Session 337, 394, U.N. Doc. A/56/10 Supp. No. 10 (2001)).

[96] Barnidge, Non-State Actors and Terrorism, *supra* note 89, at 143 (quoting H. L. A. Hart, The Concept of Law 135 (2nd ed. 1994)).

[97] See, *in* Transboundary Harm, *supra* note 23, at 45.

holm Declaration,[98] which declares that States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the national jurisdiction."[99] The obligation to prevent transboundary harm has also been established in various multilateral treaties, including the Law of the Sea Convention,[100] the Convention on Biological Diversity,[101] and the Convention on Environmental Impact Assessment in a Transboundary Context,[102] among others. Additionally, there are several bi-lateral treaties that use the same principle, including the U.S.-Mexico La Paz Agreement to Co-operate in the Solution of Environmental Problems in the Border Area, which states in pertinent part: "The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."[103] Finally, the United Nations

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[98] Ellis, *in* Transboundary Harm, *supra* note 23, at 56 ("Principle 21 of the Stockholm Declaration, which has itself taken on almost mythical proportions, is generally regarded as a reflection or restatement of the Trail Smelter holding […])." Principle 21 of the Stockholm Declaration states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the national jurisdiction." Declaration of Principles for the Preservation and Enhancement of the Human Environment, Principle 21, UN Doc A/Conf.48/PC.17) [hereinafter Stockholm Declaration Principle 21], *available at* http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503. (last visited Feb. 11, 2012).

[99] Stockholm Declaration Principle 21, *supra* note 98.

[100] U.N. Convention on the Law of the Sea, Article 194(2), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."

[101] Convention on Biological Diversity Principle 3, *opened for signature* on June 5, 1992, 1760 U.N.T.S. 79 ("States have, in accordance with the Charter of the United Nations and the principles of international law […] responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."). *See also* Convention on Biological Diversity Principle 14, *opened for signature* on June 5, 1992, 1760 U.N.T.S. 79: "In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage […]."

[102] Convention on Environmental Impact Assessment in a Transboundary Context, Article 2(1), *opened for signature* on February 25, 1991, 1989 U.N.T.S. 309. ("The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.").

[103] Agreement to Cooperate in the Solution of Environmental Problems in the Border Area art. 2,U.S.-Mex., Aug. 14, 1983, T.I.A.S. 10827.

General Assembly itself has declared "[t]hat in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction."[104]

A slew of other international environmental law cases touch on Trail Smelter-like responsibility. In the *Lake Lanoux Arbitration*[105] involving a claim by Spain that contested France's right to undertake development of Lake Lanoux,[106] the Arbitral Tribunal stated in *dictum* that "there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State."[107] In the *Island of Palmas Arbitration*, the Arbitral Tribunal stated:

> Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.[108]

In the *Nuclear Test* Case[109] Australia sued France for conducting nuclear tests in French Polynesia that released radioactive matter into the atmosphere,[110] claiming that these tests caused deposits of radioactive material on its territory.[111] Australia requested the ICJ declare that France was prohibited from carrying out further nuclear testing[112] as nuclear testing in the area was inconsistent with the rules of international law.[113] The ICJ avoided the legal issues by holding that because France had unilaterally stated its intention to stop conducting nuclear tests it was legally bound by its own declaration and therefore the Court had no need to address the merits.[114] In the ICJ's *Advisory Opinion on the Legality or Threat of Use of Nuclear Weapons*, the ICJ once again

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[104] Barboza, *supra* note 55, at 325 (citing Cooperation between the States in the Field of the Environment, U.N. G.A. Res. 2995 (XXVII), U.N.G.A.O.R., 27th Sess. (Dec. 15, 1972)).

[105] Lac Lanoux Arbitration (Fr. vs. Spain) 12 R.I.A.A. (1957), *available at* http://www.lfip.org/laws666/lakelanoux.htm (last visited Feb. 11, 2012).

[106] *Id.*

[107] McIntyre, *supra* note 17, at 11 (citing Lac Lanoux Arbitration (Fr. vs. Spain) 12 U.N.R.I.A.A. (1957)).

[108] Barboza, *supra* note 55, at 320 (citing Island of Palmas case (Neth. vs. U.S.) 1928 2 U.N.R.I.A.A. 839 (1928)).

[109] There were two nuclear tests cases. Australia's suit against France is discussed here and cited to, but New Zealand's case against France treating the same subject matter had substantially the same outcome.

[110] Nuclear Tests Case (Austl. vs. Fr.), 1974 I.C.J. 99, 258 (Dec. 20), *available at* http://www.icj-cij.org/docket/files/58/6093.pdf (last visited Feb. 11, 2012).

[111] *Id.* at 258.

[112] *Id.*

[113] *Id.* at 256.

[114] *Id.* at 270-272.

had a chance to pass upon the issue of whether international law prohibited the use of nuclear weapons. While the Court held that the state of international law was uncertain as to the legality of the use of nuclear weapons as a means of self-defense, it stated that "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law"[115] and held that this principle had to be taken into account in assessing whether military actions were necessary and proportional.[116] The case decision makes it clear that the principle of due diligence as regards environmental transboundary harm is now a principle of international law.

In addition to the Trail Smelter decision and the previously cited authorities, all of which deal with issues of an environmental nature, the International Court of Justice has pronounced on similar principles of law in an unrelated context. Namely, in the *Corfu Channel* case, the Court held that the People's Republic of Albania was responsible for damage that occurred to British navy ships when they struck landmines in the Corfu channel along the Albanian coast, killing forty-four men and injuring forty-two.[117] The Court held that Albania was responsible for the incident because it failed to warn of the presence of the minefield.[118] The Court imputed knowledge of the minefield to Albania, reasoning that any landmine laying activities would have been witnessed from the Albanian lookout posts on the coast.[119] In coming to this conclusion, the Court referred to the principle of international law holding that every State has the obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States."[120]

Here, the principle announced by the Court is freestanding, no longer confined to the environment or any other particular use of the land.[121] Together, the *Corfu Channel* case and the *Trail Smelter* case have strengthened States' international obligation to meet the standard of due diligence in preventing harms occurring within a State's own territory from affecting another sovereign State.[122] This article proposes that from the *Trail Smelter case* and its progeny of declarations and treaties, and from the *Corfu Channel* case, a general prohibition of transboundary harm can be seen to emerge, unrelated to the environment. This author is not alone in positing a general duty to prevent transboundary harm conditioned by a standard of due diligence. In

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[115] Legality or Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at 29 (Jul. 8).

[116] *Id.* at 30.

[117] Corfu Channel Case (Alb. vs. Gr. Brit. & N. Ir.), 1949 I.C.J. 4, 23,36 (Apr. 9).

[118] *Id.* at 22.

[119] *Id.* at 18-22.

[120] *Id.* at 22.

[121] Barboza, *supra* note 55, at 327.

[122] Dupuy & Hoss, *in* Transboundary Harm in, *supra* note 23, at 226.

his discussion of the *Draft Liability Articles*, the Special Rapporteur for the *State Liability Draft Articles*, Julio Barboza posits as much:

> The former evidence [the *Trail Smelter* line of cases and its progeny of bilateral and multilateral treaties as well as the *Corfu Channel* Case] seems to indicate that there is a *general prohibition* of "knowingly" using or permitting the use of a State's territory contrary to the rights of other States, as the *Corfu Channel* decision very rightly established —and before that did the Tribunal of the *Trail Smelter* case— and that causing transboundary harm is contrary to the well-established right of territorial sovereignty of States.[123]

The principle can also be expressed by way of the maxim *sic utere tuo, ut alienum non laedas*,[124] which means "so behave that you do not harm others" or "use your power so as not to injure your neighbors."[125] This maxim "has been used to describe the duty of States to exercise their sovereignty in such a way, so as not to cause damage to the territory of other States."[126]

This principle obligates all States to use due diligence to prevent transboundary harm. The obligation, like all obligations, has a relationship to a corresponding right to be free from transboundary harm.[127] Here, as applied to the drug war, both Mexico and the United States have the obligation to prevent transboundary harm and both States have the right to be free from transboundary harm. Of course, neither the obligation to prevent nor the right to be free from transboundary harm is absolute; the relevant test is due diligence of the State.

V. Specific Expressions of the Duty to Prevent Transboundary Harm —The Duty to Protect Foreign Nationals

The origins of the duty to prevent transboundary harm are difficult to trace. Most commentators would trace the origins of the principle prohibiting transboundary harm to the *Trail Smelter* case.[128] However, it is possible to

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[123] Barboza, *supra* note 55, at 330.

[124] McIntyre, *supra* note 17, at 11.

[125] Law Forum, Swarb.co.uk, http://www.swarb.co.uk/lawb/genLegalLatin.shtml (last visited Mar. 26, 2011).

[126] Geert van Calster, The Law(s) of Sustainable Development, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147544 (last visited Mar. 26, 2010).

[127] Robert Alexy, A Theory of Constitutional Rights 134 (New York, Oxford University Press, 2002) ("If *x* has a right as against *y* then *y* has a corresponding duty to *x*, and vice versa."). *See also* Hans Kelsen, General Theory of Law and State 75 (1945).

[128] *See* McIntyre, *supra* note 17, at 11 (stating that the emergence of the maxim *sic utere tuo, ut alienum non laedas* can be traced to the *Trail Smelter* arbitration). *See also* Barboza, *supra* note 55, at 330 ("The former evidence seems to indicate that there is a *general prohibition* of 'knowingly' using or permitting the use of a State's territory contrary to the rights of other States, as the

draw the conclusion that the duty to prohibit transboundary harm existed long before *Trail Smelter*, as evidenced in the duty of States to protect foreigners and foreign diplomats.

Before the advent of international human rights law, States generally were free to treat persons found within their own territories as they preferred.[129] The exception to this proposition was that States were required to exercise due diligence in respect to the duty to protect foreign nationals found in their territories.[130] This duty to protect foreign nationals has existed "ever since the appearance of classical writings upon international law."[131] As stated by Alwyn V. Freeman, author of the treatise *The International Responsibility of States for Denial of Justice*, "it has been universally accepted that, whether or not a State was bound to receive foreign subjects upon its soil, once they were received an obligation arose to protect them from harm and to punish wrongs committed against them."[132]

The duty to protect foreigners involved two obligations: the first obligation was the obligation to prevent harm from befalling foreigners and foreign diplomats. The second was the obligation to punish the perpetrators of the harm.[133] With respect to this first obligation, the duty to prevent harm to foreigners, the State's obligation extended even to the actions of private persons[134] and consisted of two requirements.[135] The first requirement was that the States possess the necessary infrastructure "to guarantee respect for the international norm on prevention."[136] This requirement constitutes an obligation of result, which imposes a duty, but does not compel the State to accomplish it by using a specific approach.[137] In addition, this first prong of the duty is not conditioned by the test of due diligence.[138] The second requirement was that States were obligated to use their infrastructure to prevent harm to

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Corfu Channel decision very rightly established —and before that did the Tribunal of the *Trail Smelter* case— and that causing transboundary harm is contrary to the well-established right of territorial sovereignty of States.").

[129] Thomas Weiss et al., The United Nations and Changing World Politics 105 (7th ed., Boulder, Westview Press, 2010).

[130] Barnidge, *supra* note 19, at 99.

[131] Alwyn v. Freeman, The International Responsibility of States for Denial of Justice 367 (Longmans, Green and Co., 1938).

[132] *Id.*

[133] Riccardo Pisillo-Mazzeschi, *Due Diligence and International Responsibility of States*, 32 G.Y.I.L. 9, 26 (1992).

[134] *Id.* at 25.

[135] *Id.* at 26.

[136] *Id.*

[137] Constantin P. Economides, *Content of the obligation: obligations of means and obligations of results, in* Oxford Commentaries on International Law: The Law of International Responsibility, *supra* note 49, at 37.

[138] Pisillo-Mazzeschi, *supra* note 133, at 27.

foreigners with the necessary diligence required by the circumstances.[139] The standard of due diligence conditioned this second requirement so that the State was not responsible to absolutely prevent all actions that might harm foreigners, but was merely obligated to exercise due diligence in attempting to prevent potentially harmful activities.[140]

The claim under international law for a failure to prevent harm to foreigners existed only when two conditions were met: first, the injured foreigner had to exhaust all local remedies, and second, the State of which the injured foreigner was a citizen had to agree to take up the claim on the foreigner's behalf, and in so doing, become the injured party.[141] Where a foreigner was harmed, the legal injury was to the foreign State of which the individual was a citizen, and this State could assert a legal claim.[142] In fact, the foreigner was not considered an injured person at all from the point of view of the law of diplomatic protection.[143] Any reparations due were the property of the harmed State and not the harmed individual.[144] In this sense, the harmed foreign national was analogous to an extension of the foreign sovereign's territory; harm to the national was equivalent to harm to the State itself.[145]

The duty to prevent harm to foreign nationals and the principle that emerges from the *Trail Smelter* and *Corfu Channel* cases (that activities occurring in a State's territory ought not to cause harm to the territory of another State) can be considered as arising from the same principle when foreign nationals are understood to be an extension of the foreign State's territory; they both constitute a form of transboundary harm to another State's territory. Just as is the case with transboundary harm in the context of environmental law, the standard of due diligence is the measure used to gauge whether State A has met its obligation to foreign State B as regards its duty to prevent harm from coming to foreigners from State B.

In this way, it is possible to reach the conclusion that the rules surrounding the obligation to protect foreign nationals contained one of the first international law prohibitions of transboundary harm, pre-dating the *Trail Smelter* and *Corfu Channel* cases. Both the rules surrounding the duty to prevent harm to foreigners and those prohibiting transboundary harm can be understood as an international form of tort law. As stated by George T. Yates III, named

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[139] *Id.*

[140] *Id.*

[141] George T. Yates III, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, *in* International Law of State Responsibility for Injuries to Aliens 214 (Richard B. Lillich, ed. 1983).

[142] *See* Janes (U.S. v. Mex.), 4 R.I.A.A. 86 (1926).

[143] Christian Tomuschat, *Individuals*, *in* Oxford Commentaries on International Law: The Law of International Responsibility, *supra* note 49, at 985.

[144] Phoebe Okowa, *Issues of admissibility and the law on international responsibility, in* International Law 472, 477 (Malcolm D. Evans ed., 3rd ed., 2010).

[145] *See* Janes (U.S. v. Mex.), 4 R.I.A.A. 86 (1926).

to the 2007 Panel of Experts on the Treatment of Foreign Law at the Hague Conference on Private International Law,[146] "[a] State can no more act with utter impunity than an individual, especially in today's increasingly interdependent world."[147]

VI. Specific Expressions of the Duty to Prevent Transboundary Harm —Organized Acts of Armed Force Against other States and Illegal Arms Trafficking

Most recently, the obligation to prevent transboundary harm has found a new incarnation in the duty of a State to prevent the use of its territory for "organized acts of armed force against other States."[148] In a dissenting opinion Judge Thomas Moore appeared to mention this duty when he posited, "[i]t is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people."[149] Additionally, in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations) the General Assembly recognized that States have: "[…] the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or *acquiescing* in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."[150]

This provision of the Declaration on Friendly Relations is considered customary international law.[151]

The International Court of Justice [hereinafter ICJ] dealt with the issue of the actions of rebels in one State against another State in the *Armed Activities on the Territory of the Congo* case.[152] The issue was whether Uganda had a right to self-defense against the actions of rebels in Congo (formerly Zaire). Uganda

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[146] Orrick, Biography, http://www.orrick.com/lawyers/Bio.asp?ID=162853 (last visited April 2, 2011).

[147] Yates III, *supra* note 141, at 213.

[148] Pisillo-Mazzeschi, *supra* note 133, at 35-36.

[149] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. para. 269 (ser. A) No. 10 (Sept. 7) (Moore, J., dissenting) (referring to the implications this principle might have for the court's opinion on jurisdiction over ships on the high seas).

[150] Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, para. 1, G.A. Res. 2625(XXV), annex, U.N. Doc. A/9890 (Oct. 14, 1970) (emphasis added) [hereinafter Declaration on Friendly Relations].

[151] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) I.C.J. Reports 2005, para. 300 (Dec. 19, 2005).

[152] *Id.*

argued that Congo was breaching its "duty of vigilance by tolerating" the rebel groups which were conducting armed cross-border operations.[153] Basing its decision in part on the Declaration on Friendly Relations, the ICJ implicitly accepted that such a duty exists, but held that "in the light of the evidence before it, the Court [could not] conclude that the absence of action by Zaire's Government against the rebel groups in the border area [was] tantamount to 'tolerating' or 'acquiescing' in their activities."[154]

Another famous case dealing with the duty to prevent organized acts of armed force against other states is the ICJ decision in the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua* (the *Nicaragua Case*).[155] The Nicaragua case is interesting because it can be understood as a case that furthered the duty to prevent organized acts of armed forces into a more specialized duty to prevent illegal arms trafficking regardless of whether the illegal arms trafficking was part of an armed attack.

The United States alleged that its actions supporting the Contras constituted collective self-defense of Nicaragua's neighboring countries and that Nicaragua's support of illegal arms trafficking into El Salvador constituted an armed attack against El Salvador, giving it the right of self-defense.[156] Although the United States alleged the fact, Nicaragua denied it was allowing arms traffic through its territory into El Salvador: "[i]n the proceedings on the merits, Nicaragua has addressed itself primarily to refuting the claim that it has been supplying arms and other assistance to the opponents of the Government of El Salvador."[157] The ICJ looked beyond the issue of whether there had been an armed attack by Nicaragua on El Salvador; instead of focusing on Nicaragua's duty to abstain from this behavior, the ICJ focused on Nicaragua's duty to prevent arms trafficking,[158] holding that Nicaragua was not responsible for the flow of arms into El Salvador.[159] The ICJ's reasoning implicitly accepted that a State has a due diligence obligation to prevent arms trafficking into another State as part of its duty to not tolerate the use of its territory for hostile military operations against another State:

> [I]f the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree

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[153] *Id.*

[154] *Id.* at 300-301.

[155] Pisillo-Mazzeschi, *supra* note 133, at 36.

[156] Nicaragua Case, *supra* note 21, at 35.

[157] *Id.* para. 131, 154.

[158] Pisillo-Mazzeschi, *supra* note 133, at 33 ("[W]hile the ICJ clearly brought the United States' conduct of *support* to the contras within the framework of a negative duty to abstain, it instead put the Nicaraguan conduct of *tolerance*, with regard to arms traffic, in the framework of a positive duty to protect, conditioned by the due diligence rule.").

[159] Nicaragua case, *supra* note 21, para. 160.

> of diligence than is achieved by even the combined efforts of the other three States […].[160]

In coming to its conclusion that Nicaragua had not breached its obligation to prevent arms trafficking into El Salvador, the ICJ considered that it had not been proven that arms trafficking through the territory of Nicaragua and into El Salvador had occurred after 1981.[161] The ICJ also reasoned that if such arms trafficking had in fact existed, it was of such a small degree that, "it could also have been carried on unbeknown to the Government of Nicaragua."[162] The ICJ noted that prior to 1981, "Nicaragua had taken immediate steps to put a stop to [the arms trafficking] once precise information had been given and, on the other hand, expressed inability to take such steps where Nicaragua was not provided with information enabling that traffic to be located."[163] In other words, the ICJ took into account Nicaragua's cooperation and good faith in attempting to prevent transboundary harm in assessing whether or not Nicaragua had met its duty of due diligence.

Finally, the ICJ also considered that Nicaragua was a country of limited resources as compared to the United States, a country which had also been unsuccessful in stopping the arms trafficking that it alleged existed.[164] If the United States could not stop the arms trafficking, Nicaragua could not be expected to stop it either, the ICJ reasoned.[165] In other words, a country of greater resources, such as the United States, has to meet higher expectations and therefore has a greater due diligence burden than a country of fewer resources.

While the allegations in the *Nicaragua Case* were that Nicaragua was directly involved in supplying arms into El Salvador and actual military aggression against El Salvador,[166] the ICJ's reasoning noted above suggests that even if Nicaragua had merely tolerated the flow of arms into El Salvador, or acted with anything less than a standard of due diligence to prevent the flow of arms into El Salvador, it would have been in violation of international law. While the situation in El Salvador was characterized as one of civil war,[167] it is possible to extend the reasoning of the *Nicaragua Case* to stand for the proposition that there is a duty to prevent the flow of arms into another State's territory for the use of military operations against that State even where the situation in the victim State is distinguishable from a civil war. Professor Pisil-

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[160] Pisillo-Mazzeschi, *supra* note 133, at 36 (quoting the Nicaragua case, *supra* note 22, para. 157).

[161] Nicaragua case, *supra* note 21, at 160.

[162] *Id.* at 156.

[163] *Id.* at 159.

[164] *Id.* at 157.

[165] *Id.*

[166] *Id.* at 126.

[167] *Id.* at 147.

lo-Mazzeschi supports this approach, stating: "[T]he principle that the State must not tolerate the use of its territory for hostile military operations against another State soon goes beyond the boundaries of the law of neutrality, and extends also to situations in which a state of war does not exist […]."[168]

Extension of the *Nicaragua* case is especially important in situations like the drug war in Mexico, where the victim State is involved in deep civil strife and the flow of arms into its territory is being used to support a war against government forces and greatly contributes to its instability. It might even be argued that the situation in Mexico so resembles a civil war that the reasoning in the Nicaragua case might be applicable to the situation in Mexico regardless of such an extension in the law. However, whether or not the situation in Mexico constitutes an internal armed conflict is beyond the scope of this paper. This article instead argues that the obligation to prevent arms trafficking outside the context of a civil war is supported by international instruments and human rights concerns.

For example, Article 5 of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (Firearms Protocol), states in pertinent part:

> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally:
>
> […]
>
> (b) Illicit trafficking in firearms, their parts and components and ammunition;[169]

While the United States is not a party to the firearms protocol as of yet, it was adopted by General Assembly Resolution 55/255 on May 31, 2001, and entered into force on July 3, 2005.[170] Additionally, the United Nations General Assembly has recognized that "the proliferation and illicit circulation of and traffic in small arms impede development, constitute a threat to populations and to national and regional security and are a factor contributing to the de-

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[168] Pisillo-Mazzeschi, *supra* note 133, at 35. It should be noted for clarity that Professor Pisillo-Mazzeschi has only expressed support for the principle that would prohibit a State from tolerating organized acts of armed forced against other States from occurring in its territory.

[169] Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, Article 5, May 31, 2001 2326 U.N.T.S. 208 [hereinafter Firearms Protocol], *available at* http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.

[170] Firearms Protocol, United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en (last visited April 19, 2011).

stabilization of States."[171] Prior to 1994, the General Assembly of the United Nations adopted a resolution relating to the illicit traffic of arms in general. For example, it "urge[d] Member States to exercise effective control over […] their arms imports and exports to prevent them from getting into the hands of parties engaged in the illicit arms trade."[172] The General Assembly started discussing the more specific issue of *small* arms in 1994.[173] In 1995, the General Assembly: "[i]nvite[d] Member States to implement national control measures in order to check the illicit circulation of small arms, in particular by curbing the illegal export of such arms."[174] While the General Assembly did not adopt a resolution on the topic of small arms in 1996[175] or 1997,[176] in 1998, it once again adopted a resolution on the matter, in which the General Assembly "[i]nvite[d] Member States in a position to do so to provide the necessary assistance, bilaterally, regionally and through multilateral channels, such as the United Nations, in support of the implementation of measures associated with combating illicit trafficking in and illicit circulation of small arms."[177] In 1999[178] and 2000,[179] the General Assembly once again adopted similar resolutions using comparable language to that of the 1998 resolution. In 2000, the General Assembly also "recommend[ed] the involvement of organizations and associations of civil society in efforts to combat the illicit circulation of small arms in the context of the national commissions and their participation in the implementation of the moratorium on the importation, exportation and manufacture of small arms."[180] In 2001, the General Assembly adopted a resolution that "[e]ncourage[d] cooperation between State organs, international organizations and civil society in combating the illicit traffic in small arms and supporting the collection of small arms in the subregions."[181] This language was used in additional United Nation (hereinafter U.N.) General Assembly resolutions between 2002 and 2011.[182]

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[171] Assistance to States for Curbing the Illicit Traffic in Small Arms, G.A. Res. 56/24 (U), Preamble, U.N. Doc. A/RES/56/24 (Nov. 29, 2001); G.A. Res. 52/38 (C), Preamble, U.N. Doc. A/RES/52/38 (Dec. 9, 1997).

[172] G.A. Res. 46/36 (H), para. 3, U.N. Doc. A/RES/46/36 (Dec. 6, 1991).

[173] G.A. Res. 49/75 (G), U.N. Doc. A/RES/49/75 (Dec. 15, 1994).

[174] G.A. Res. 50/70 (H), para. 5 U.N. Doc. A/RES/50/70 (Dec. 12, 1995).

[175] G.A. Res. 51/45 (L), U.N. Doc. A/RES/51/45 (Dec. 10, 1996).

[176] G.A. Res. 52/38 (C & J), U.N. Doc. A/RES/52/38 (Dec. 9, 1997).

[177] G.A. Res. 53/77 (T), para. 3, U.N. Doc. A/RES/53/77 (Dec. 4, 1998).

[178] G.A. Res. 54/54 (R), para. 4, U.N. Doc. A/RES/54/54 (Dec. 1, 1999).

[179] G.A. Res. 55/33 (Q), para. 4, U.N. Doc. A/RES/55/33 (Nov. 20, 2000).

[180] G.A. Res. 55/33 (F), para. 4, U.N. Doc. A/RES/55/33 (Nov. 20, 2000).

[181] G.A. Res. 56/24 (U), para. 6, U.N. Doc. A/RES/56/24 (Nov. 29, 2001).

[182] G.A. Res. 56/24(P), para. 6 U.N. A/RES/56/24P (Jan. 10, 2002); G.A. Res. 59/74, para. 5 U.N. A/RES/59/74 (Dec. 10, 2004); G.A. Res. 61/71, para. 4 U.N. A/RES/61/71 (Jan. 3, 2007); G.A. Res. 62/22, para. 6 U.N. A/RES/62/22 (Jan. 8, 2008); G.A. Res. 63/66, para. 6 U.N. A/RES/63/66 (Jan. 12, 2009); G.A. Res. 64/30, para. 6 U.N. A/RES/64/30 (Jan.

In addition, in her final report to the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Special Rapporteur on Small Arms Barbara Frey made the following recommendations:

> Under the due diligence standard, international human rights bodies should require States to enforce a minimum licensing standard designed to prevent small arms from being used by private actors to violate human rights. Other effective measures consistent with due diligence include the prohibition of civilian possession of weapons designed for military use; the sponsoring of effective amnesty programmes to decrease the number of weapons in active use; requirement of marking and tracing information by manufacturers; and incorporation of a gender perspective in policies regarding small arms. States have an affirmative duty under international human rights law to protect groups that are most vulnerable to small arms misuse, including victims of domestic violence.[183]

These Conventions, Resolutions and Recommendations support the extension of the due diligence obligation to prevent transboundary harm to the act of arms trafficking, even outside the context of a civil war. Additionally, the duty to prevent armed trafficking is in accordance with existing obligations for the United States pursuant to the U.N. Convention against Transnational Organized Crime,[184] which requires States to enact legislation criminalizing acts "facilitating […] the commission of serious crime involving an organized criminal group."[185]

VII. Application of the Proposed Duty to Prevent Transboundary Harm to Mexico and the United States

This article has proposed that there is a general principle prohibiting transboundary harm even outside environmental law. There may be various possible applications of the duty to prevent transboundary harm to the activities affecting the United States and Mexico. This article explores only one pos-

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12, 2010); G.A. Res. 65/50, para. 6 U.N. A/RES/65/50 (Jan. 11, 2011). See also G.A. Res. 56/24(V), para. 6 U.N. A/RES/56/24V (Jan. 10, 2002); G.A. Res. 58/241, para. 12 U.N. A/RES/58/241 (Dec. 23, 2003); G.A. Res. 59/459, para. 7, U.N. A/RES/59/459 (Dec. 10, 2004); G.A. Res. 60/81, para. 5, U.N. A/RES/60/81 (Jan. 11, 2006); G.A. Res. 65/64, para. 16, U.N. A/RES/65/64 (Jan. 13, 2011); G.A. Res. 65/64, para. 26, U.N. A/RES/65/64 (Jan. 13, 2011).

[183] Sub-Comm'n on the Promotion and Protection of Human Rights, Special Rapporteur on Small Arms, *Final report on Specific Human Rights Issues:Prevention of human rights violations committed with small arms and light weapons*, para. 42-43, U.N. Doc. A/HRC/Sub.1/58/27 (2006) (by Barbara Frey, Special Rapporteur) [hereinafter Frey, Final Report].

[184] United Nations Convention against Transnational Organized Crime, Dec. 13, 2000 2225 U.N.T.S. 209, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Feb. 11, 2012).

[185] *Id.* at Article 5.

sibility: arms trafficking from the United States into Mexico, drawing heavily on the extension of the *Nicaragua* case argued above that would prohibit arms trafficking from one State into another State for use against that State in times of great civil strife.[186]

The U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has reported that ninety percent of the illegal weapons seized in Mexico are traceable to the United States.[187] A more recent report by U.S. Senators Dianne Feinstein, Charles Schumer and Sheldon Whitehouse to the U.S. Senate Caucus on International Narcotics Control found that seventy percent of the illegal weapons seized in Mexico were traceable to the United States.[188] Whether the percentage is seventy percent or ninety percent, illegal weapons trafficking from the United States into Mexico is clearly occurring.

While the sale of AK-47 semi-automatic weapons used to be illegal in the United States pursuant to the Federal Assault Weapons Ban, the U.S. Congress allowed the ban to expire in 2004.[189] Consequently, one of the two most trafficked weapons recovered in Mexico in the last three years has been the AK-47 semi-automatic, with the AR-15 semi-automatic clone following close behind.[190] Recovery of U.S. sold AK-47s, AR-15s and other "high capacity long guns" has increased from twenty percent in 2004 to forty-eight percent in 2009.[191]

Mexican President Calderón has publicly expressed his disapproval of the fact that the United States allowed the assault weapons ban to expire, stating in a recent interview that "[i]f the United States would reestablish the law that President Clinton established [arms sales and arms trafficking] would decrease."[192] Despite such public requests, the United States has not reenacted the ban.

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[186] While the Nicaragua case implicitly accepted a due diligence obligation to prevent illegal arms trafficking from one State's territory into another State in the context of a civil war, this article argues for an extension of the *Nicaragua* holding as supported by various treaties, conventions and resolutions mentioned above.

[187] Lisa Guaqueta, *Arms Trafficking at the U.S.- Mexico Border*, FPIF, Mar. 26, 2010, http://www.fpif.org/articles/arms_trafficking_at_the_us-mexico_border (last visited: Mar. 19, 2011).

[188] Dianne Feinstein et al., Halting U.S. Firearms Trafficking to Mexico to the United States Senate Caucus on International Narcotics Control 6 (2011).

[189] Brady Campaign to Prevent Violence, http://www.bradycampaign.org/legislation/msassaultweapons (last visited Mar. 19, 2011). President Calderón has stated that, "If the United States would reestablish the law that President Clinton established [arms sales and traffic] would decrease." Javier Moreno, *Entrevista al Presidente de México: Para ganar una batalla, tienes que ir a por ella*, Mar. 27, 2011, http://www.elpais.com/articulo/reportajes/ganar/batalla/tienes/ir/elpepusocdmg/20110327elpdmgrep_1/Tes (last visited: April 4, 2011).

[190] *Id.*

[191] breitbart.com, *Obama Administration May Give ATF New Power to Fight Trafficking of U.S. Guns to Mexico*, Jan. 22, 2011 [hereinafter Breitbart], http://www.breitbart.com/article.php?id=xprnw.20110122.DC34434 (last visited April 3, 2011).

[192] Moreno, *supra* note 189.

Finally, an estimated ten percent of all U.S. gun dealers are located on the U.S.-Mexico border[193] and serve as major sources of the guns that are subsequently trafficked into Mexico.[194] A 2010 analysis showed that three out of four (seventy-five percent) of the recovered long guns were sold in the four U.S. border states.[195] Even controlling for population, Arizona, New Mexico and Texas have gun export rates that are 169% higher than other U.S. states and three times the gun export rate of California.[196] The differences in the rates of gun exports to Mexico among these border states may very well be due to gun regulations.[197] The state with the lowest gun export rate to Mexico, California, has several regulations that the other states do not have.[198] ATF agents have been quoted as saying that "Arizona's and Texas' laws make it easy to buy guns for smuggling to the cartels, while California's do not."[199]

> Similarly, a December 2008 report from Mayors against Illegal Guns found that five types of state laws were associated with lower rates at which a state exported crime guns to other states.
>
> California has four of those laws: requiring background checks for all handgun sales at gun shows, requiring purchase permits in advance of handgun sales, allowing local jurisdictions to regulate firearms, and allowing inspection of gun dealers.
>
> None of the other three border states, in contrast, had enacted any of the laws that were associated with lower crime gun export rates, and they have not enacted any of those laws since that report was published.[200]

Additionally, other studies have been conducted that conclude that California's gun laws are much more rigorous than the laws of the three other border states.[201]

The *Nicaragua case* discussed above can be understood to stand for the suggestion that there is a duty to prevent arms trafficking in one's territory that

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[193] Daniela Pastrana & Aprille Muscara, *Little Spillover of "Narco-Deaths"*, IPS, Mar. 19, 2011, http://ipsnews.net/news.asp?idnews=54914 (last visited Mar. 19, 2011).

[194] Colby Goodman and Michel Marizco, *U.S. Firearms Trafficking To Mexico: New Data and Insights Illuminate Key Trends And Challenges*, *in* Shared Responsibility: U.S.-Mexico Policy Options for Confronting Organized Crime 170 (Eric L. Olson *et al*. eds., 2010), *available at* http://www.wilsoncenter.org/sites/default/files/Shared%20Responsibility--Olson,%20Shirk,%20Selee.pdf (last visited on Feb. 11, 2012).

[195] Breitbart, *supra* note 191.

[196] Mayors Against Illegal Guns, Issue Brief: the Movement of Illegal Guns Across the U.S.-Mexico Border 3 (Sept. 2010), *available at* http://www.mayorsagainstillegalguns.org/downloads/pdf/issue_brief_mexico_2010.pdf (last visited Jan. 26, 2012).

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

flows into the territory of another State, particularly where the arms trafficking is part of "hostile military operations" or "an organized act of armed force" against the victim State. In this sense, this article has argued for an extension of the law in cases in which the victim State is experiencing deep civil strife. If the Inter-American Commission, or a court of law, were to examine the US- Mexico situation, it would need to take various factors into consideration.

As discussed earlier, when measuring whether a State has met the test of due diligence as regards the obligation to prevent transboundary harm, the first requirement is that the State possess the necessary infrastructure to guarantee its ability to meet the standard of due diligence.[202] This requirement does not compel the State to accomplish this goal using a specific approach.[203] Additionally, this first prong of the duty to prevent is not conditioned by due diligence.[204] Questions around this first prong would explore whether the United States has the appropriate legislation and enforcement apparatus to enable it to meet its duty of due diligence under the second prong. While this article does not set out to prove that the United States legislative infrastructure fails the first prong of this test, the facts described above suggest that there are significant questions around whether the United States's legislative infrastructure is such that it is able to meet the first prong of the test. While it is true that no specific legislative approach is required and the United States has the freedom to choose how it would set up its infrastructure,[205] whatever infrastructure it does establish must allow it to meet its due diligence requirement under the second prong of the test. As discussed earlier pursuant to the second prong of the duty to prevent transboundary harm, States are obliged to use their infrastructure with the necessary diligence required by the circumstances.[206]

In addressing this second prong and whether the facts as set out prove that the United States has failed to meet the standard of due diligence in terms of its duty to prevent the trafficking of arms in its territory from crossing into Mexico, the various factors that should be considered have been previously discussed. As in the *Trail Smelter* case, the interests of the two State parties, here the United States and Mexico, should be balanced.[207] This includes tak-

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[202] Pisillo-Mazzeschi, *supra* note 133, at 26.

[203] Economides, *in* Oxford Commentaries on International Law: The Law of International Responsibility, *supra* note 49, at 371.

[204] Pisillo-Mazzeschi, *supra* note 133, at 27.

[205] Economides, *in* Oxford Commentaries on International Law: The Law of International Responsibility, *supra* note 49, at 371.

[206] *Id.*

[207] Read, *in* Transboundary Harm, *supra* note 43, at 24 ("There can be no doubt that the final decision of the Tribunal embodied practical results sought by the two governments. The *compromis* had explicitly directed the Tribunal to 'give consideration to the desire of High Contracting parties to reach a solution just to all parties concerned.' This platitude was

ing into account "conduct that is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance."[208] In addition, as occurred in the *Trail Smelter* case, "a balance must be struck, 'in light of circumstances, between competing interests which vary in weight from case to case.'"[209]

The interests to be considered on the side of the United States might be the economic gain from the sale of small arms and the United States' interest in allowing its citizens to lawfully own guns. It is important to note that international law is not concerned with U.S. citizens' right to own arms as stated in the Second Amendment of the U.S. Constitution. That being said, the right of self-defense is a principle recognized in international law.[210] However, in her final report to the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Special Rapporteur on Small Arms Barbara Frey clarified that "[t]he principle of self-defence does not negate the due diligence responsibility of States to keep weapons out of the hands of those most likely to misuse them."[211] Therefore, the United States' right to make economic gain from the sale of weapons and its right to permit its citizens to own arms so that they might exercise their right to self-defense stands on one side of the balance, limited by the due diligence obligation to avoid out arms falling into the hands of those most likely to improperly using them and by the obligation to prevent transboundary harm.

On the other side of the balance is Mexico's right to be free from transboundary harm, specifically from the illegal traffic of guns across its border and into its territory for use against the State, its military, the police and its people. Moreover, when considering the amount of diligence needed under

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interpreted by the Tribunal to indicate that the parties would not stand on absolute rights as sovereigns, but were concerned with balancing the interests of, in the Tribunal's phrases, 'the agricultural community' with the interest of industry'.") and Ellis, in Transboundary Harm, *supra* note 23, at 57.

[208] Barnidge, Non-State Actors and Terrorism, *supra* note 89, at 104 (quoting International Law Commission, Commentaries, Articles on Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission on the Work of its Fifty-Third Session 337, 394, U.N. Doc. A/56/10 Supp. No. 10 (2001)).

[209] Barnidge, Non-State Actors and Terrorism, *supra* note 89, at 143 (quoting H. L. A. Hart, The Concept of Law 135 (2nd ed., 1994)).

[210] *But see* Frey, Final Report, *supra* note 193 ("The principle of self-defence, as an internationally recognized exemption from criminal responsibility, is not inconsistent with the due diligence responsibilities of States to regulate civilian possession of small arms. There is no independent or supervening right in international human rights law of self-defence that would require States to provide civilians with access to small arms; nor does the principle of self-defence diminish the State's responsibility to use due diligence to keep weapons out of the hands of those most likely to misuse them. Rather, States should exercise their due diligence responsibilities in the context of self-defence law, including the likelihood that those possessing firearms will act only out of necessity and with proportionality.").

[211] Frey, Final Report, *supra* note 193.

the circumstances, one factor is the United States's ability to meet its due diligence obligations. Generally speaking, the measure required by due diligence depends on the State's resources.[212]

> In fact, it may well constitute an autonomous principle that emerges from the different degree of responsibility or liability of each State, which should be proportionate to its technological and economic degree of development. It is obvious that the obligations, particularly those of prevention, will be more demanding on a highly industrialized country than on one of a low technological level.[213]

Given that the United States is a highly industrialized country with high levels of technological and economic development, its due diligence obligation as regards the duty to prevent arms trafficking in its territory will be more demanding than the obligations many less developed countries might be expected to meet. Certainly, the United States will have to meet a higher standard of due diligence than Nicaragua was expected to meet in the *Nicaragua* case.

Additionally, the special circumstances of extreme levels of violence in Mexico and the fact that U.S. sold weapons are being used to kill not only Mexican military and police, but innocent civilians should also be taken into account. The U.N. Special Rapporteur for Small Arms has asserted that "[t]he State has particularly acute obligations to protect vulnerable groups […] from abuses with small arms."[214] The civilians caught in the cross-fire of Mexico's drug war might very well be considered a vulnerable group meriting special obligations of protection.

Finally, in her report, the Special Rapporteur asserted that the non-derogable right to life of the International Covenant on Civil and Political Rights placed "absolute limitations on States actions involving weapons."[215] The report also asserted that States are required to "take effective measures to prevent the transfer of small arms into situations where they are likely to be used to commit serious human rights abuses."[216]

Taking all of these circumstances into account, it can be argued that the United States' interest in arms sales and its interest in allowing its citizens to bear arms should yield in the face of Mexico's right to have its territory free of injury caused by the trafficking of guns from the United States into Mexico. A detailed argument relevant to the facts, however, is beyond the scope of this paper.

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[212] Timo Koivurova, *Due Diligence*, The Max Planck Encyclopedia of Public International Law (2007), http://www.mpepil.com (last visited April 4, 2011).

[213] Barboza, *supra* note 56, at 363-364.

[214] Frey, Final Report, *supra* note 193.

[215] *Id.*

[216] *Id.*

From a policy perspective, the remedy available in *Trail Smelter* is advantageous in the context of the drug war because it requires the party causing the harm, the consumer State, to bear a greater proportion of the real costs of its consumer activities, rather than merely externalizing the said costs.[217] The consumer State is in a better position than the producer State to prevent the harms flowing from the drug war and to ensure that human beings are not victimized by its consumer activities. Since cooperation is key, the potential for responsibility may motivate the consumer State to partner with the producer State to develop and implement novel strategies to deal with the drug war. This cooperation is especially crucial when, as is generally the case, the producer State is less economically healthy and easily destabilized by the illegal activity.

VIII. Conclusion

This article has proposed that there is a general principle prohibiting transboundary harm even outside environmental law. This obligation emerges from the *Trail Smelter* case, its resulting treaties and declarations, and the *Corfu Channel* Case. Various expressions of the duty to prevent transboundary harm can be found in the obligation to protect foreign nationals, the *Armed Activities on the Territory of the Congo* case and the *Nicaragua* case.[218] There may be various possible applications of the duty to prevent transboundary harm to the transboundary activities affecting the United States and Mexico.

> State [responsibility] […] *à la Trail Smelter*, for drug trafficking harms to private individuals of other states might be configured in multiple ways […] Producer States could be liable for introducing harmful substances into consumer State markets. Consumer states could be liable for drug enforcement externalities (*i.e.*, for harms from its export of security and eradication activities). Consumer States could also be liable for being the source of the demand that motivates producer State supply activities. Or, from the perspective of decriminalization proponents, consumer States could be liable for their restrictive regulations to the extent these, by raising the market price, shift the production calculus in producer States relative to substitute crops and exports (*e.g.*, food and textiles).[219]

This article has explored only one possibility: arms trafficking from the United States into Mexico, drawing heavily on the *Nicaragua* case, and has

[217] Judith Wise & Eric L. Jensen, *in* Transboundary Harm, *supra* note 23, at 282.

[218] Academics from common law countries might understand this general principle prohibiting transboundary harm to be the equivalent of a kind of international tort law, an area of law that does not exist as such in the civil law system.

[219] Wise & Jensen, *in* Transboundary Harm, *supra* note 23, at 283.

argued for an extension of this case that would prohibit arms trafficking from one State into another State in the context of civil strife.[220]

It has been said that *Trail Smelter* was a case that was "first and foremost a case about the limits of sovereignty."[221] "The dispute arose from the exercise of sovereign rights: Canada's right to carry out lawful activities in its own territory (to smelt ore), and the U.S. right to determine what acts may take place within its territory (to harvest apples without interference from Canadian smelter smoke)."[222] Indeed, concerns about sovereignty are at the root of the prohibition of transboundary harm. The *Corfu Channel* case, which was essentially a conflict over where Albanian territory ended and international waters began, is another example of the issues of sovereignty that underlie the prohibition of transboundary harm. Here, arms trafficking into Mexican territory is no different; any resulting transboundary harm from such trafficking can be considered a violation of Mexico's sovereignty. The preamble to the Convention on Friendly Relations states that it "[reaffirms], in accordance with the U.N. Charter, the basic importance of sovereign equality and stress[es] that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations."[223] A violation of another State's sovereignty is of paramount concern in international law.

This article aimed to answer the question of whether the U.S. President Barack Obama's and U.S. Secretary of State Hillary Clinton's statements to the effect that the United States shared responsibility with Mexico for the U.S. drug war went beyond the world of mere political rhetoric. While there are theoretically many different aspects of the US-Mexico drug war that can be analyzed, this article has sought to analyze only one facet: U.S. responsibility for arms trafficking into Mexico. This article concludes that the United States may be in violation of its due diligence duty to prevent transboundary harm for 1) its failure to have an adequate legal structure in place that is capable of allowing it to meet its due diligence duty to prevent transboundary harm in prong two and 2) for its failure to meet the standard of due diligence in preventing the arms trafficking. While it is true that the United States may use whatever mechanisms it sees fit to meet the first prong of its obligation to prevent transboundary harm, whatever infrastructure it chooses to put in place in the way of legislation must enable it to meet its due diligence obligation pursuant to the second prong.

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[220] While the Nicaragua case implicitly accepted a due diligence obligation to prevent illegal arms trafficking from one State's territory into another State in the context of a civil war, this article has argued for an extension of the *Nicaragua* holding as supported by various treaties, conventions and resolutions mentioned above.

[221] Austen L. Parrish, *Sovereignty's Continuing Importance: Traces of Trail Smelter in the International Law Governing Hazardous Waste Transport*, *in* TRANSBOUNDARY HARM, *supra* note 23, at 183.

[222] *Id*. at 184.

[223] Declaration on Friendly Relations, *supra* note 160.

Finally, as regards the second prong of the due diligence test, like in the *Nicaragua* case, where Nicaragua's cooperation and good faith with the United States in stopping arms trafficking into El Salvador was key to the ICJ's reasoning that Nicaragua had met its duty of due diligence, the United States's cooperation with Mexico is key as well. The United States has invested considerable resources into the Merida Initiative through which the United States funds, trains, equips and provides technical assistance to Mexico's military in the war on drugs.[224] The Merida Initiative, like past U.S. aid to producer States such as Colombia, Bolivia and Peru, has been directed at military intervention.[225] This type of cooperation is in the economic interest of the United States, which is the top global arms exporter in the world, holding 31% of the global arms export industry in 2007.[226] However, there are other ways in which the United States might cooperate with Mexico beyond military intervention, such as limiting the sale of guns along the US-Mexico border, or at least the sale of military style semi-automatic weapons.[227] The United States might also consider cooperating with Mexico in creating more checkpoints along the roads leading to Mexico to help Mexico stop trafficking guns into its territory.

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[224] Rafael Azul & Kevin Kearney, *Mexico's "war on drugs" employs army torture and police-state tactics*, WSWS.ORG, May 25, 2009, http://www.wsws.org/articles/2009/may2009/mexi-m25.shtml (last visited Mar. 19, 2011). Notably, the bill was passed only after stripping conditions guaranteeing human rights due to complaints from Mexican officials that the conditions violated their sovereignty. Manuel Roig-Franzia, *Anti-Drug Assistance Approved for Mexico*, WASH. POST, Jun. 28, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062703229.html?nav=emailpage (last visited Mar. 19, 2011). Some human rights conditions remain however, though they are not necessarily enforced: "Under the Merida Initiative, the State Department is supposed to withhold 15% of anti-drug aid unless Mexico meets four conditions: ensuring that soldiers accused of human rights abuses are prosecuted in civil courts, improving the accountability of the Federal Police, enforcing a ban on torture, and consulting with civil groups about the anti-drug strategy."

Chris Hawley, *U.S. punishes Mexico for human rights abuses*, USA TODAY, Sept. 3, 2010, http://www.usatoday.com/news/world/2010-09-03-mexico-rights-abuses_N.htm (last visited: Mar. 19, 2011).

[225] U.S. DEPT. OF STATE, U.S. SUPPORT FOR COLOMBIA: FACT SHEET RELEASED BY THE BUREAU OF WESTERN HEMISPHERE AFFAIRS (Mar. 28, 2000), http://www.state.gov/www/regions/wha/colombia/fs_000328_plancolombia.html (last visited Mar. 21, 2011).

[226] *Top Four Arms Exporters: United States, Russia, Germany, and France, Atlantic Review*, TRANSATLANTIC AFFAIRS, May 16, 2008, http://atlanticreview.org/archives/1078-Top-Four-Arms-Exporters-USA,-Russia,-Germany-and-France.html (last visited Apr. 23, 2011).

[227] The most recent effort by the Obama Administration to crack down on illegal weapons trafficking into Mexico does not actually restrict guns sales, but merely requires "gun stores to notify the Bureau of Alcohol, Tobacco, and Firearms (ATF) when they sell two or more semi-automatic, magazine-loading weapons to an individual within a period of five business days." Geoffrey Ramsey, *US to crack down on arms trafficking over Mexico border*, THE CHRISTIAN SCIENCE MONITOR, July 14, 2011.

In the face of the drug war that Mexico is fighting in its own territory, one might expect the United States to increase federal drug and weapons prosecutions along the border. In fact, it has done just the opposite. In April 2011, the Justice Department's data showed only 484 new weapons prosecutions, the fewest prosecutions since January 2001, and a decrease of 7.9% since January 2010 and of 28.8% since January 2006.[228] Attorney General Terry Goddard of Arizona has referred to the USAO's failure to prosecute weapons and drug crimes as "a national abdication by the Justice Department." California Representative Zoe Lofgren has received calls from federal agents complaining: "They've pulled so many U.S. attorneys off drug crimes and organized crime caseloads that federal agents are trying to get help from local district attorneys because they can't wait six weeks for a wiretap order."[229] In a January 2009 article, the NY Times reported that U.S. Attorneys on the US-Mexico border generally refuse to prosecute suspects found with 500 pounds of marijuana or less. As a result, law enforcement authorities report that drug traffickers are breaking up their loads to avoid stiffer federal penalties.[230] In light of the drug war in Mexico, abdication of weapons prosecutions, drug prosecutions and money laundering prosecutions seems hard to justify. Together with the United States' refusal to change its gun laws, these facts cast doubt on the United States' good faith cooperation with Mexico in fighting the drug war.

President Obama may therefore be correct in stating that the United States shares responsibility with Mexico in regards to the U.S.-Mexico drug war. Because this statement may go beyond mere political rhetoric and into the realm of international legal responsibility, the United States should make every effort to cooperate with Mexico in reducing arms trafficking from the United States into Mexico in order to meet its obligation to prevent transboundary harm. Whether this means the United States must enact new legislation, adjust enforcement mechanisms, and/or increase cooperation with Mexico is not clear. These are questions the U.S. government should explore as its potential responsibility exists regardless of whether Mexico decides to invoke it.[231]

Were Mexico to invoke U.S. responsibility, it need only follow Article 1 of the Charter of the United Nations, which states that: "The parties to any

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[228] Transactional Records Access Clearinghouse: Weapons Prosecutions Decline to Lowest Level in a Decade, Syracuse University, April 11, 2011, *available at* http://trac.syr.edu/tracreports/crim/249/ (last visited Feb. 11, 2012).

[229] Solomon Moore, *Push on Immigration Crimes is Said to Shift Focus*, N.Y. Times, Jan. 11, 2009, http://www.nytimes.com/2009/01/12/us/12prosecute.html?pagewanted=1&_r=1 (last visited Nov. 7, 2010).

[230] *Id.*

[231] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, at 116.

dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[232] The dispute resolution methods included in the U.N. Charter are helpful regardless of whether armed trafficking from the United States into Mexico endangers international peace and security.

Consequently, Mexico may politically pressure the United States through the U.N. General Assembly to comply with its due diligence obligations, may bring the case before the International Court of Justice,[233] or may choose to take countermeasures against the United States.[234]

As with any other violation of international law, the potential lack of due diligence as regards the United States's failure to control the arms trafficking into Mexico would involve an obligation to make reparations.[235] Generally speaking, reparations should take the form of restitution, compensation and satisfaction, either singly or in combination, depending on the particularities of the case.[236] The most important reparations in this case would be those of cessation and guarantees of non-repetition of the arms trafficking from the United States into Mexico.

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[232] U.N. Charter, Article 33, para. 1.

[233] Since the U.S. does not accept the compulsory jurisdiction of the ICJ, Mexico would have to find another source of jurisdiction such as a treaty or agreement with the United States to bring the case before the ICJ. The finding of such a source is beyond the scope of this article.

[234] Articles on Responsibility of States for Internationally Wrongful Acts, Articles 49-54, G.A. Res. 56/83 annex, U.N. Doc. A/RES/56/83 (Jan. 28, 2002)

[235] The Factory at Chorzów (Ger. v. Pol.) (merits) 1927 P.C.I.J. (ser. A) No. 17, 29 (Sep. 13, 1928).

[236] Articles on Responsibility of States for Internationally Wrongful Acts, Article 34, G.A. Res. 56/83 annex, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

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INDIGENOUS GUATEMALAN AND MEXICAN WORKERS IN WASHINGTON STATE: LIVING CONDITIONS AND LEGAL ISSUES

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Abstract. *Indigenous workers are migrating to Washington State in increasing numbers. These workers often speak little or no Spanish or English, and instead speak pre-Hispanic languages such as* Mixteco *(spoken in southern Mexico) and* Mam *(spoken in Guatemala).* Mam *and* Mixteco *workers migrate to the U.S. due to a number of social, political and economic pressures in their countries. Once they are in the U.S.,* Mixteco *workers generally perform difficult and poorly paid work in agriculture, while* Mam *workers work long days harvesting floral greens, often for less than the minimum wage. Indigenous workers face numerous legal needs, often involving immigration, wage payment, workers' compensation, housing, health care and language access, but addressing these needs is complicated by language barriers, cultural differences, and a general distrust of outsiders fostered by the history of violence and oppression in the workers' home countries. Case studies of litigation on behalf of* Mam *and* Mixteco *workers illustrate these dynamics. To address the legal needs of indigenous workers in Washington State, lawyers' associations in the home countries and in the U.S. should establish a transnational project to develop* pro bono *services for workers; law schools should train lawyers and students, in conjunction with community groups, to enforce workers' rights; and advocates should develop a pilot partnership project to match medical services in the U.S. with corresponding services in Mexico or Guatemala to cooperate in providing treatment and compensation to deserving workers under the Washington State workers' compensation system.*

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Key Words: *Indigenous, migration, immigration, Mixteco, Mam, Washington State, transnational labor, floral greens, language barriers, pro bono legal work.*

Resumen. *Los trabajadores indígenas están migrando al estado de Washington en un número cada vez mayor. Estos trabajadores a menudo hablan poco o nada de español o inglés, y en su lugar hablan lenguas prehispánicas, como el mixteco (hablado en el sur de México) y mam (se habla en Guatemala). Los trabajadores mixtecos y man emigran a los Estados Unidos debido a una serie de presiones sociales, políticas y económicas en sus países. Una vez que están en los Estados Unidos, los trabajadores mixtecos en general realizan un trabajo difícil y mal pagado en la agricultura, mientras que los mam trabajan largas jornadas en la cosecha de las verduras florales, a menudo por menos del salario mínimo. Los trabajadores indígenas se enfrentan a numerosas necesidades legales, a menudo relacionadas con la inmigración, el pago de salarios, la compensación de trabajadores, la vivienda, la salud y el acceso al idioma, pero ello se complica debido a las barreras del idioma, diferencias culturales, y una desconfianza generalizada de los extranjeros promovida por la historia de violencia y opresión en los países de origen de estos trabajadores. Los estudios de casos de litigio en nombre de los trabajadores mam y mixtecos ilustran esta dinámica. Para atender las necesidades legales de los trabajadores indígenas en el estado de Washington, las asociaciones de abogados en los países de origen y en los Estados Unidos deberían establecer un proyecto trasnacional para desarrollar servicios pro bono para los trabajadores; las escuelas de derecho deben capacitar a los abogados y estudiantes, en colaboración con grupos comunitarios, para hacer cumplir los derechos, y los defensores deben desarrollar un proyecto piloto de colaboración para que los servicios médicos en los Estados Unidos coincidan con los servicios correspondientes en México o Guatemala; cooperar en el suministro de tratamiento y la compensación a los trabajadores que la merecen en el estado de Washington.*

Palabras clave: *Indígena, migración, inmigración, mixteco, mam, estado de Washington, labor trasnacional, follajes para arreglos florales, barreras del idioma, asesoría jurídica pro bono*.

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I. Introduction

Indigenous Mexicans and Guatemalans facing poverty, displacement, and violent conflict are moving to the western United States in greatly increasing numbers. While indigenous workers historically headed to California and Oregon before Washington State, thousands of Washington residents now speak pre-Hispanic languages such as *Mixteco*, *Mam*, and *Purépecha*, often with limited ability to communicate in Spanish. Since the 1990s, many legal, medical, and social services providers have noted that Spanish- and English-language communication no longer suffices to meet the needs of indigenous people employed in many of the lowest-paying and most difficult jobs in these states.

One major indigenous group in Washington State is the *Mixteco* people from the Mexican state of Oaxaca,[1] who often do agricultural work throughout the state. Another is the *Mam* community from the Guatemalan department of Huehuetenango, typically employed in the floral greens industry on the Olympic Peninsula of western Washington.[2] Members of both indigenous groups are largely unaware of community resources and are often wary of soliciting services or asserting their legal rights. In addition to language barriers, members of these communities face considerable cultural hurdles that keep them socially and politically isolated in the United States, as they have been in their home countries. Some of these hurdles include linguistic and geographic barriers, distrust of authorities and outsiders, and systems for conveying and enforcing rights and responsibilities that vary significantly from corresponding systems in the U.S.

Non-profit groups in Washington State, including Columbia Legal Services (hereinafter "Columbia")[3] and Sea Mar Community Health Centers,[4] collaborate to address the pressing needs of major indigenous groups in Washington State. In order to overcome cultural barriers and support the community, Columbia has hired a *Mixteco*-speaking community worker to develop a program to educate indigenous *promotores*, or community advocates,

[1] While *Mixtecos* also come from other Mexican states, including Puebla and Guerrero, immigrants from Oaxaca are most commonly found in Washington.

[2] Washington State is divided by the Cascade Mountain range that runs North-South. Western Washington contains the state's capitol city and major urban centers, including Seattle, as well as agricultural and forest land. Eastern Washington is primarily agricultural and has a lower concentration of urban centers.

[3] Columbia Legal Services is a nonprofit law firm that protects and defends the legal and human rights of low-income people. Columbia represents people and organizations in Washington State with critical legal needs who have no other legal assistance available to them. Columbia is engaged in efforts to conduct outreach, community education, and advocacy within communities of indigenous immigrants in Washington.

[4] Sea Mar Community Health Center is a community-based organization committed to providing quality, comprehensive health and human services to diverse communities, specializing in service to Latinos.

regarding community resources, legal rights, and basic health issues, as well as supplement Columbia's advocacy program with grass roots input on legal needs and priorities. The long-term goal of this program is to develop *Mixteco* leaders who can educate and advocate for their community. Columbia is also working to develop a similar project with *Mam*-speaking floral greens harvesters in western Washington.

Legal workers, medical providers, and scholars in Washington State are also developing ideas for collaborations with foreign universities, attorneys, the Federal Ombudsman, and human rights organizations to serve the transnational indigenous communities. Potential projects include community education in Mexico and Guatemala on U.S. legal rights and resources as well as academic exchanges and *pro bono* legal representation for indigenous communities in the U.S., Mexico, and Guatemala. Such concerted and multi-faceted efforts are needed to assist those who are among members of the poorest, most exploited, and most culturally isolated people in Washington State.

We begin this article by introducing two major groups of indigenous workers currently in Washington: the *Mam* and the *Mixteco*. Next we highlight some barriers faced by these workers due to language, culture, and other differences between Washington State and their home communities. We then briefly examine legal problems commonly faced by Washington-based workers and summarize their rights under applicable laws. With that backdrop, we present several case studies from the *Mam* and *Mixteco* communities in Washington to help illustrate how these barriers and legal problems function in practice and how they have been addressed. Finally, we discuss lessons we have learned to date and present three proposals for improving the working and living conditions of these workers through transnational collaboration and exchange.

II. *Mam* Workers in Washington State

1. Mam *Origin and Current Populations*

The transnational indigenous worker population in Washington includes about 1,500 Guatemalans of Maya descent, approximately 1,200 of whom are *Mam* workers and their families currently living in Shelton, Bremerton, Belfair, and Forks on the Olympic Peninsula in western Washington.[5]

Most *Mam* workers who migrated to Washington State are from Todos Santos Cuchumatán. Todos Santos is a rural community of about five thousand people located in the department of Huehuetenango in western Guate-

[5] Columbia estimated the populations of various indigenous groups in Washington through an informal survey of community members. Columbia Legal Services, *Survey of Indigenous Immigrant Workers in Washington* (2010), *available at* http://www.columbialegal.org/files/IndigenousSurvey5.pdf.

mala. It sits in a mountain valley at 8,200 feet above sea level in a remote area not far from the Mexican border.[6]

The predominant language spoken in Todos Santos is *Mam*. Most men speak Spanish as a second language, but many women, especially older women, speak little or no Spanish. Todos Santos is one of the few Maya towns remaining in Guatemala where men, women, and children continue to wear traditional clothing. Many homes in Todos Santos are made of adobe bricks with thatch roofs, dirt floors and fire pits for cooking and heating. Indoor plumbing is relatively rare, especially in the surrounding villages. Most people subsist on corn, beans, and potatoes, sometimes supplemented with meat from chickens, turkeys, or pigs. The hillsides are planted with corn, potatoes, beans, and a few cash crops: chiefly broccoli and some coffee at the lower elevations.

Todos Santos is still very similar to the village described by the American anthropologist Maud Oakes sixty years ago in her book, *The Two Crosses of Todos Santos*.[7] For many people there, especially the young, Todos Santos is experiencing rapid and substantial change. Banks and money-wiring services are now common; many people carry cell phones; popular music is commonly heard on the street; and several internet cafés have opened their doors. There are also numerous large, multi-story houses recently built with remittances sent from the United States, some of which have American flags painted on the sides to acknowledge the source of financing.[8] According to the Bank of Guatemala, these remittances, or "*migra* dollars," are now the country's biggest source of income, exceeding every leading export crop including coffee, bananas, and sugar.[9]

2. *When, Why, and How* Mam *Workers Migrated from Todos Santos*

The current migration of *Mam* workers to Washington State began in the mid-1990s, about the same time as the signing of the Peace Accords that ended the Guatemalan civil war. The migration of *Mam* workers may have been facilitated by the earlier flow into the U.S. of indigenous Guatemalan

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[6] Most other indigenous workers from Guatemala are *Kanjobal* immigrants living in Belfair, Washington. *Id.* The *Kanjobal* workers migrated to Washington from an even more remote area of northern Huehuetenango to the north and east of Todos Santos. Manuela Camus, *Introducción: Huehuetenango, Mesoamérica y la 'Frontera Sur*,' Comunidades en movimiento: la migración en el norte de Huehetenango 22-24 (Manuela Camus ed., 2007).

[7] Maud Oakes, The Two Crosses of Todos Santos, 29-36 (1951).

[8] These observations are based on visits to Todos Santos in March 2005 and June 2010. Recent changes in Todos Santos are also discussed in Jennifer Burrell, *Migration and the Transnationalization of Fiesta Customs in Todos Santos Cuchumatán, Guatemala*, 32 Latin American Perspectives (2005).

[9] Matthew J. Taylor et al., *Land, Ethnic and Gender Change: Transnational Migration and its Effects on Guatemalan Lives and Landscapes*, 37 Geoforum 42 (2006).

war refugees seeking asylum, including *Mam* from Todos Santos, who fled in the 1980s and early 1990s.[10] Since then, the *Mam* community in Washington has grown steadily, as news of opportunities in Washington and remittances have reached Todos Santos.

Although for hundreds of years the town was relatively self-sufficient, it has recently become less so. In the past, people from Todos Santos did seasonal work picking coffee and bananas on the coastal plantations in southern Guatemala, but always returned home to Todos Santos for the remaining part of the year. Nowadays, supplemental income from a few months of seasonal work on the coast no longer provides sufficient income for most families. Although the population continues to grow, the amount of productive land has remained fixed. As a result, more and more *Todosanteros* feel forced to migrate to the United States to support themselves and their families. Almost everyone in Todos Santos has at least one family member living in the U.S. According to one estimate, almost a third of the population of Todos Santos now resides in the United States.[11]

In most cases, *Mam* workers reach the U.S. in groups using hired guides, or *coyotes*, who escort them to the U.S. border with Mexico, and sometimes cross with them into the United States. The trip through Mexico has always been dangerous and costly, and in recent years has become even more so.[12] Workers usually borrow money to pay for the trip from relatives or money lenders at home. These debts may take years of work in Washington to pay off.[13] In the past, this migration was often temporary, but the heightened risk and cost of the trip have led an increasing number of *Mam* immigrants to settle in Washington for the long term. Intensified border enforcement since the terrorist attacks of September 11, 2001 has contributed to a reduction in temporary or "circular" migration and has further encouraged long-term settlement.

At one time, *Mam* workers who reached Washington State were almost all young males, many of whom had fathered children in Guatemala before leaving.[14] Women effectively head these households and raise their children in Todos Santos without their fathers.[15] Recent census data shows that one-

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[10] Taylor, *supra* note 9, at 44; *see also* Olivia Carrescia, Todos Santos: The Survivors (First Run/Icarus Films, 1989).

[11] Burrell, *supra* note 8, at 16.

[12] Central Americans traveling through Mexico face extortion, sexual abuse, kidnapping, and murder by organized crime groups such as the *Zetas*, often with the knowing participation or acquiescence of Mexican authorities. Maureen Meyer, *A Dangerous Journey Through Mexico: Human Rights Violations against Migrants in Transit*, The Washington Office on Latin America 1-5 (Dec. 2010), *available at* http://www.wola.org/publications/a_dangerous_journey_through_mexico_human_rights_violations_against_migrants_in_transit.

[13] *Id.*

[14] Kurt Spreyer, Tales from the Understory: Labor, Resource Control, and Identity in Western Washington's Floral Greenery Industry 137-38 (2004).

[15] Burrell, *supra* note 8, at 18.

third of Todos Santos households are now headed by females; in most cases, the men in these households have migrated to the United States.[16] A growing number of *Mam* women have also recently arrived, either alone or accompanied by males and, sometimes even with small children. In addition, there are now a significant number of U.S.-citizen children who have been born in Washington to *Mam* parents.[17] *Mam* workers were first drawn to Washington State by the opportunity to make money harvesting salal and other floral greenery, known as "brush" or *brocha*, which grows in the forests of Washington. The *Mam* workers are employed by floral greenery companies (called "brush sheds") to gather forest brush which in turn is packaged and sold to florists all over the world. The attractive glossy green leaves and stems of the harvested greens provide structure to flower bouquets, and their durability makes them ideal for shipping. In the Pacific Northwest alone, harvesting forest greens is a $150 million annual industry.[18]

Almost all *Mam* workers who harvest brush are male.[19] The few women employed generally work alongside their husbands or extended family.[20] *Mam* women generally describe brush harvesting as a job of "last resort" because of the hardships of hiking over difficult terrain, often in extreme weather, carrying heavy brush bundles and working to keep up with teams of men.[21] Most *Mam* women work in the home caring for children, in restaurants, as wreath-makers, or in the brush sheds cleaning, packing and sorting the floral greenery in preparation for sale.[22]

The majority of *Mam* workers lack transportation to commute to where they harvest the brush. An organizer, or *raitero*, often transports them for a fee (usually a share of gas money plus a small percentage of each worker's daily pay). In other cases, a group of workers with access to a van commute together, each paying a share of the gas, without the need for a *raitero*. Although workers occasionally enter and harvest on land without the land owner's permission, they usually obtain permits that allow them to harvest brush on specific land for a specific period of time. *Mam* workers sometimes obtain brush harvesting permits directly from either the U.S. Forest Service or pri-

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[16] Burrell, *supra* note 8, at 30.

[17] Some of these families are tri-lingual, with parents who speak fluent *Mam* and some Spanish, as well as school-age children who speak some *Mam*, some Spanish, and fluent English.

[18] Lesley Hoare, *The Changing Work Force in Pacific Northwest Forests: Salal Harvesters*, Northwest Forest Worker Safety Review 7 (2007).

[19] Kathryn A. Lynch & Rebecca J. McLain, Access, Labor, and Wild Floral Greens Management in Western Washington's Forests, U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station General Technical Report PNW-GTR-585 46 (2003).

[20] *Id.*

[21] *Id.*

[22] Spreyer, *supra* note 14, at 138; Lynch, et al., *supra* note 19, at 46.

vate landowners; sometimes they acquire them from the brush sheds who, in turn, obtain them from the land owners.

Brush picking work is both arduous and risky,[23] requiring long days in the forests hiking over difficult terrain, often in wet and cold weather, while carrying heavy bundles of brush along with tools needed to cut it.[24] Experienced workers can gather up to 300 pounds of salal during a day of work, which they must then carry out of the forest. Workers may perform this labor for ten or eleven months out of the year. To maximize wages, they often work six or seven days per week, leaving before dawn and returning to the brush sheds at the end of each day to sell the product. In many if not most cases, they earn less than the Washington State minimum wage of $8.55 per hour.[25] Because the work is difficult and the pay low, brush pickers occupy the bottom rung of the economic ladder. Like other transnational indigenous groups, they often live well below the federally recognized poverty level.

III. *Mixteco* Workers in Washington State

1. Mixteco *Origin and Current Populations*

Another group of indigenous workers that migrated *en masse* to Washington State is the *Mixtecos*. Most *Mixteco* workers in Washington come from the state of Oaxaca, one of the poorest areas in Mexico. The region is home to almost 500,000 *Mixtecos*, who comprise one of the largest indigenous populations in the nation.[26] *Mixteco* workers typically come from small, rural com-

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[23] In September, 2010, a brush picker working on the Olympic Peninsula was shot and killed by a hunter. *Hunter Arrested in Fatal Shooting Near Shelton*, Seattle Times, Oct. 1, 2010, *available at* http://seattletimes.nwsource.com/html/localnews/2013048385_apwabrushpickerkilled.html.

[24] Washington State Department of Labor & Industries, Harvesting Washington's Brush: Monitoring Compliance with Labor Laws in the Floral Greens Industry 5-6 (2005).

[25] Report from Stan Owings, MS, CDMS, Owings and Associates, to Katherine L. Mason, Casey Law Firm (Feb. 16, 2005), *available at* http://www.columbialegal.org/files/OwingsReRamirez.pdf. (Board certified vocational expert found in 2004 that brush pickers in western Washington earned an average of $55 per day for eight to nine hours of work, averaging $6.11 to 6.88 per hour). Washington's minimum wage is tied to the consumer price index, and it can change annually. Wash. Rev. Code § 49.46.020. The 2012 minimum wage is $9.04. Washington State Department of Labor & Industries, *History of Washington Minimum Wage*, *available at* http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/History/default.asp. Wash. Rev. Code stands for Revised Code of Washington, which contains all Washington State statutes — laws passed by the legislature and approved by the governor or passed directly by the people.

[26] Gaspar Rivera-Salgado, *Mixtec Activism in Oaxacalifornia*, 42(9) American Behavioral Scientist 1446 (June/July 1999).

munities governed by customary laws from the colonial era known as *usos y costumbres*.[27] Many of their villages can be reached only after miles of travel over dirt roads, some of which are impassable in the rainy season.[28]

Prior to the Spanish conquest, *Mixteco*s thrived across a large portion of southern Mexico called the *Mixteca*.[29] The *Mixteca* includes parts of the present-day states of Oaxaca, Guerrero, and Puebla.[30] The *Mixteco* civilization established trade routes between *Mixteco* villages in the highlands, lowlands, and along the coast of the *Mixteca* region, where extreme variation in geography and temperature produces microclimates and a wide range of crops and wild game.[31] Although *Mixtecos* across the *Mixteca* have many linguistic and cultural commonalities, they tend to identify themselves by their hometowns because land disputes are common among *Mixteco* villages.[32]

Mixtecos in Washington State come from various Mexican towns and speak many variants of the *Mixteco* language, including the most common dialects *Mixteco Alto* (High *Mixteco*) and *Mixteco Bajo* (Low *Mixteco)*, names attributed to the altitude of towns where they are spoken.[33] *Mixteco Alto* is mostly used in the mountains of Oaxaca and Guerrero, and *Mixteco Bajo* primarily in the lowlands of Oaxaca. Dialects, however, vary significantly. The *Mixteco Alto* of one town is often different from the *Mixteco Alto* of a town just a few miles away.[34] In attempting to categorize the *Mixteco*-speaking population, Columbia Legal Services has designated three broad categories to represent the distinct variants spoken by *Mixteco* workers in the State of Washington: *Mixteco Alto*, *Mixteco Bajo*, and *Mixteco* from Guerrero.[35] Approximately 5,500 *Mixtecos* live

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[27] Leah K. VanWey, et al., *Community Organization, Migration, and Remittances in Oaxaca*, 40(1) Latin American Research Review 86 (2005).

[28] Mines, Richard, et al., California's Indigenous Farmworkers: Final Report of the Indigenous Farmworker Study to the California Endowment 22-26 (Jan. 2010), *available at* http://www.indigenousfarmworkers.org/IFS%20Full%20Report%20_Jan2010.pdf (describing nine representative indigenous communities in the state of Oaxaca, including five *Mixteco*-speaking communities).

[29] Alejandra Leal, *La identidad mixteca en la migración al norte: el caso del Frente Indígena Oaxaqueño Binacional*, 2 Amérique Latine Histoire et Mémoire (2001), *available at* http://alhim.revues.org/index610.html.

[30] *Id.*

[31] John Monaghan, *Mixtec History, Culture, and Religion in* Archaeology of Ancient Mexico and Central America: an Encyclopedia 476-77 (2001).

[32] Carol Nagengast & Michael Kearney, *Mixtec Ethnicity: Social Identity, Political Consciousness and Political Activism*, 25 Latin American Research Review 61-91, see especially 72 (1990).

[33] Monaghan, *supra* note 32, at 476-477.

[34] Summer Institute of Linguistics in Mexico, *Mixtecan Family*, *available at* http://www.sil.org/mexico/mixteca/00i-mixteca.htm.

[35] The categories "*Mixteco Alto*" and "*Mixteco Bajo*" refer to speakers who originate in Oaxaca. *Mixteco* from Guerrero, at least that we have encountered in Washington, is a form of *Mixteco Alto* that is mostly understandable to *Mixteco Alto* speakers who hail from Oaxaca. *Mixtecos* from Guerrero who are in Washington come from the region of Chemaltepec.

in Washington.[36] The great majority, approximately 3,500, speak *Mixteco Alto*. Of those remaining, most speak *Mixteco Bajo*, with about 100 *Mixteco* speakers from Guerrero.[37]

Traditionally, *Mixteco* writing was a logographic system in which pictures and symbols represented complete words and ideas.[38] Although a modern system of *Mixteco* writing has been recognized by the Mexican Ministry of Public Education, the numerous variants of the language make it impractical; as a result, few *Mixtecos* learn how to write.[39]

Due to extreme poverty and shortcomings in educational systems, indigenous Mexicans are more likely to quit school early and less likely to be literate than their non-indigenous counterparts.[40] Most *Mixtecos* living in Washington State have only completed a few years of formal schooling in Mexico; many, in fact, are functionally illiterate. Most speak little or no Spanish and no English.

Mixteco communities are present in many areas of the state, mostly in agricultural regions.[41] Some communities, including the town of Winchester, Washington, contain as few as fifteen *Mixteco* individuals —one or two families.[42] Others, such as the community in the Mt. Vernon-Burlington area, contain approximately 2,000 *Mixtecos*.[43]

2. *When, Why and How* Mixteco *Workers Migrated to Washington State*

Economic pressures have caused many *Mixtecos* to migrate north. Soil erosion, declining crop yields, water shortages, increased competition from U.S. corn producers, and deterioration of the traditional barter economy have forced *Mixteco* workers to migrate in order to survive.[44] Surveys show that 18

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[36] Columbia Legal Services Survey, *supra* note 5.

[37] *Id.*

[38] Elizabeth Boone & Walter D. Mignolo, Writing Without Words: Alternative Literacies in Mesoamerica and the Andes 102 (1994).

[39] *See, e.g.*, Eduardo Stanley, *La casa de la lengua de lluvia. Esfuerzos por lograr que el idioma mixteco pueda escribirse* (July 18, 2003), *available at* http://www.laprensa-sandiego.org/archieve/july18-03/lengua.htm.

[40] Daniel Cortés Vargas et al., *La educación indígena en México: inconsistencias y retos*," Observatorio Cuidadano de la Educación, *available at* http://www.observatorio.org/comunicados/EducDebate15_EducacionIndigena.html (noting that indigenous students are often poorer, more likely to have health problems, and more likely to attend schools with serious lack of infrastructure than their non-indigenous counterparts. They are also often unable to learn due to language barriers with Spanish-speaking teachers. As a result, illiteracy among Mexican indigenous adults is 31.6%, compared to 6.7% among non-indigenous adults).

[41] Columbia Legal Services Survey, *supra* note 5.

[42] *Id.*

[43] *Id.*

[44] Mines, *supra* note 28, at 13; *see also* Eric Schlosser, *In the Strawberry Fields*, The Atlantic (Nov. 1995).

percent of the Mexican adult population (as a whole) receives remittances from workers in the U.S.; the rate for *Mixteco* workers is at least that high if not higher.[45]

In a survey of 38 *Mixtecos* living in Washington State, every individual interviewed reported leaving Mexico due to poverty or lack of work. Unsurprisingly, nearly all interviewees said they came to Washington for work opportunities. Some mentioned that they were also motivated because they had family members already living in Washington. All those surveyed arrived in Washington between 1979 and 2010, with most having done so in the last decade. All but one reported that people from their hometown were already in Washington before they immigrated. None of those we interviewed obtained permission to enter the U.S., and the majority walked across the U.S.-Mexico border.[46]

Many of the interviewees did not travel directly to Washington State, having first worked in other states such as California and Arizona after entering the U.S. In several established *Mixteco* communities including Walla Walla and Othello, immigrants travelled directly to those cities to join family members.[47]

A California study found that most indigenous Mexicans in the U.S. (56%) are men; among indigenous communities in Mexico, most are women (58%).[48] The same study found that 93% of indigenous Mexican men and 83% of indigenous Mexican women in the U.S. worked a month or longer in agriculture.[49] Women seemed to earn less and were generally treated worse.[50] Over half the women and a quarter of the men earned below the minimum wage.[51]

3. *Working and Living Conditions of* Mixteco *Workers in Washington State*

Mixtecos living in central and eastern Washington commonly work in the tree fruit industry, which includes cherries, pears, peaches, and apples. For approximately nine months of the year, during the different tree cycle and growth stages, there is substantial work to be performed. When the trees need care, or when it is time to harvest the fruit, there is only a short window of time to do a significant amount of work. This means that when work is available, the hours are long, the work is strenuous, and workers push themselves to make as much money as they can. Workers must build up savings to

[45] Leah K. VanWey, et al., *Community Organization, Migration, and Remittances in Oaxaca*, 40 Latin American Research Review 84 (2005).

[46] Columbia Legal Services Survey, *supra* note 5.

[47] *Id.*

[48] Mines, *supra* note 28, at *33*.

[49] *Id*. at 38.

[50] *Id.* at 61.

[51] *Id.*

sustain their families through the slow winter months when few *Mixtecos* can find work.

Orchard owners have discovered that the best way to get workers to perform quickly is to pay them on a per piece basis, *e.g.*, for each tree pruned or each box of apples picked. Paying piece-rate discourages workers from taking breaks, and allows them to earn more if they can work quickly. The workers move as quickly and efficiently as possible, running up and down ladders in all weather conditions, often while carrying sharp tools or heavy loads of fruit.

For this reason, orchard work is dangerous. Workers are frequently injured by falls from ladders. Fruit on the ground, especially apples, causes falls and ankle injuries. Repetitive stress injuries are also common, as workers repeat the same motions thousands of times a day, which can damage tissue in hands, arms, and joints, causing work to become painful or impossible over time. Another hidden danger for *Mixteco* orchard workers is exposure to pesticides. Most tree fruit is grown with pesticides, and workers must wear protective clothing and handle their clothing carefully when they arrive home to avoid exposing their families to chemicals. While a large exposure to pesticides often causes immediate, dramatic results such as vomiting, skin sensitivity, or eye and throat irritation, low-level exposure over time may also harm workers and their families. *Mixtecos* working in orchards bring pesticide residue home with them on their clothes, bodies, and in their cars. One study linked pesticide exposure to a higher risk of developmental problems and delays in children.[52]

Aside from stress and danger, the agricultural work available to *Mixtecos* is unstable and competitive. An orchard may need many workers for a week, but for the next month have no available work. After a job ends, the indigenous workers in central Washington may drive up to 100 miles to find orchards that are hiring. Employers can take their pick of the eager, available labor and often hire young men before women and older workers. If a worker does find a job, he or she must work hard and avoid displeasing supervisors. Sometimes the bosses use fear tactics to influence workers' behavior, even preventing them from reporting illegal activity. Most are naturally reluctant to speak out against mistreatment for fear of losing their jobs and being blacklisted by local farms.

IV. Barriers Encountered by Indigenous Workers

Several significant barriers prevent indigenous immigrants from successfully utilizing community services and obtaining access to justice, including linguistic and cultural isolation, and historic oppression by majority groups.

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[52] V. A. Rauh et al., *Impact of Prenatal Chlorpyrifos Exposure on Neurodevelopment in the First 3 Years of Life Among Inner-City Children*, 118 Pediatrics 1845-59 (2006).

1. *Language Barriers*

While there has been no comprehensive study of language proficiency among indigenous immigrants in Washington, our work indicates that a vast majority of indigenous immigrants living in Washington State do not speak Spanish as a native language; even among those who can speak some Spanish, many do not read or write Spanish.[53] English proficiency among the indigenous populations is extremely low.

In our work with indigenous people in Washington State, we have documented the presence of at least eight Mexican and Guatemalan indigenous languages.[54] Many of these languages contain sub-groups and localized variants that are mutually unintelligible or difficult to understand for speakers of the same languages.[55] Based on our work with indigenous communities and other community organizations, we estimate that there are fewer than a dozen skilled indigenous-language interpreters in Washington State, and differences in dialect increase the difficulty of finding competent interpreters.

Because many indigenous-language speakers have not obtained the fluency necessary to communicate effectively about complex issues in Spanish, and because professional indigenous-language interpreter services are not readily available, many indigenous people find themselves unable to express or resolve problems in critical areas such as workplace rights, housing, and health care.

There may also be language barriers within the families of these indigenous workers. The United States-born children of indigenous immigrants speak English as a native language, but may communicate with their parents primarily in Spanish —a second language for both the children and their parents— rather than in the parents' native indigenous tongue. The children's lack of fluency in their parents' native indigenous language can complicate efforts by outreach workers to communicate with indigenous workers through their English-speaking children.[56]

2. *Cultural Differences*

Many transnational indigenous migrants to Washington State come from native cultures which rely on unwritten customary laws and conventions rather than written statutes and contracts.[57] This fact, along with low levels of

[53] Mines, *supra* note 28, at 4.

[54] These languages include *Amuzgo, Kanjobal, Mam, Mixteco, Nahuatl, P'urépecha, Triqui,* and *Zapoteco*.

[55] Monaghan, *supra* note 31, at 476-477; Mines, *supra* note 28, at 21.

[56] *Id.* at 43.

[57] *Id.* at 45; John M. Watanabe, Maya Saints & Souls in a Changing World 106-25 (1992).

literacy in Spanish, may make it difficult for indigenous immigrants to understand the importance of written agreements and documents.

These indigenous cultures also perceive disease, health, and healing in a vastly different way than the mainstream United States medical establishment.[58] As discussed below, these differences can significantly affect indigenous patients' access to effective medical care.

3. *History of Genocide, Violence, and Oppression*

As is true of indigenous peoples throughout the Americas, Mexican and Guatemalan indigenous peoples have experienced hundreds of years of oppression, discrimination and exploitation at the hands of majority groups. Countless people have been expelled from their lands[59] and have been the targets of brutal violence.[60] In many cases, governments have actively tried to eliminate indigenous languages and cultures.[61] The history of violence and oppression is particularly extreme in the case of indigenous Guatemalans, including the *Mam* community in Todos Santos, who suffered the consequences of 36-years of civil war, arguably the worst and bloodiest conflict in recent Latin American history.[62] During this extended period, 200,000 people were killed or disappeared; 150,000 became refugees; and 1.5 million were internally displaced, the majority of indigenous Guatemalans caught in the middle or targeted by the Guatemalan military.[63] In 1999, the United Nations Commission for Historical Clarification concluded that violence by the Guatemalan government against indigenous groups in the 1980s constituted genocide.[64]

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[58] Mines, *supra* note 28, at 83-85.

[59] *Id*. at 10-11; Christopher H. Lutz & W. George Lovell, *Survivors on the Move: Maya Migration in Time and Space*, *in* The Maya Diaspora 13-34 (2000); Alejandra Leal, *La Identidad Mixteca en la Migración al Norte: el Caso del Frente Indígena Oaxaqueño Binacional*, 2 Amérique Latine Historie et Mémoire (2001), *available at* http://alhim.revues.org/index610.html#text.

[60] Lutz & Lovell, *supra* note 59, at 33-34; *see also* Catherine L. Hanlon & W. George Lovell, *Flight, Exile, Repatriation and Return: Guatemalan Refugee Scenarios, 1981-1998*, *in* The Maya Diaspora, *supra* note 59, at 35 para. 6-8; Rufino Domínguez, Binational Ctr. for the Dev. of Oaxacan Indigenous Cmties., *Las Graves Violaciones a los Derechos Humanos de los Migrantes y Nuestras Familias* (2010), *available at* http://centrobinacional.org/2010/11/las-graves-violaciones-a-los-derechos-humanos-de-los-migrantes-y-nuestras-familias/.

[61] Mines, *supra* note 28, at 11; Lutz & Lovell, *supra* note 59, at 23-25.

[62] *See*, *e.g.*, Beatriz Manz, Paradise in Ashes: a Guatemalan Journey of Courage, Terror, and Hope 91-182, 2004; David Stoll, Between Two Armies 60-164 (1993).

[63] Taylor, *supra* note 9, at 44; *see also* Manz, *supra* note 62, at 91-182; Stoll, *supra* note 62, at 60-164.

[64] Comisión de la ONU para el Esclarecimiento Histórico [United Nations Commission for Historical Clarification], Guatemala, Memoria del Silencio 39-41 (1999), *cited in* Manz, *supra* note 62, at 224-225.

Indigenous people in Mexico have faced racial discrimination by the government and non-indigenous peoples since the arrival of the Europeans.[65] Currently, this population suffers deprivation of public services and educational opportunities.[66] The education system, for example, fails to take into account indigenous peoples' unique cultures and languages.[67]

As explained above, both Mexican and Guatemalan indigenous peoples have been subjected to severe discrimination in their home countries.[68] Unsurprisingly, indigenous immigrants do not escape discrimination when they leave Mexico or Guatemala. Instead, Spanish-speaking *mestizos*, or non-indigenous Mexicans and Guatemalans, often perpetuate the discrimination against these workers in the United States, in addition to discrimination by the mainstream U.S. population.[69] A Washington State study describes the ethnic hierarchy with white and Asian-Americans at the top, followed by Latino U.S. citizens, undocumented Latinos, and finally indigenous people at the bottom.[70]

In the economic sphere, indigenous immigrants work in ethnically stratified labor markets where they occupy the least desirable levels.[71] Accustomed to poor living and working conditions in Mexico, *Mixtecos* may be seen as ideal candidates for U.S. farm labor contractors because they can be housed in substandard conditions, given difficult work, and be paid low wages.[72] This history of discrimination and violence profoundly affects indigenous immigrants' interactions with members of the Washington communities where they settle. As the authors of California's recent report on indigenous farmworkers put it, "[t]heir experience has taught them not to trust outsiders."[73] Distrust of outsiders and fear of governmental authorities may be even greater in the

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[65] Suhas Chakma & Marianne Jensen, The Int'l Work Group for Indigenous Affairs & Asian Indigenous & Tribal Peoples Network, Racism Against Indigenous Peoples, 280 (2001).

[66] *Id.*

[67] *Id*. at 282; Mines *supra* note 28, at 2.

[68] Mines, *supra* note 28, at 11; Lutz & Lovell, *supra* note 60, at 13-34; Carol A. Smith, Ed., Guatemalan Indians and the State 1540 to 1988 258-85 (1990).

[69] Our clients tell of *mestizo* foremen who order them not to speak indigenous languages at work and *mestizo* children who taunt Guatemalan indigenous children at school for being "Indian." Oregon and California indigenous farmworkers report discrimination on the basis of language in work and health care settings. Stephanie Farquhar et al., *Promoting the Occupational Health of Indigenous Farmworkers*, 9 Journal of Immigrant Minority Health, 9 (2007); Mines, *supra* note 28, at 63, 75; Seth M. Holms, *An Ethnographic Study of the Social Context of Migrant Health in the United States*, 3 PLoS Medicine 1776 (2006).

[70] Farquar, *supra* note 69.

[71] Jonathan Fox & Gaspart Rivera-Salgado, Indígenas Mexicanos Migrantes en los Estados Unidos 12 (2004).

[72] Mines, *supra* note 28, at 55; Felipe H. López & David Runsten, El Trabajo de los Mixtecos y los Zapotecos en California 288-290 (2004).

[73] Mines, *supra* note 28, at 4.

case of the *Mam* immigrants as a result of the horrific governmental violence they and their families suffered during Guatemala's long civil conflict.[74] Any increased level of fear and distrust is hard to discern, however, because it is masked by the universal fear of governmental authority and outsiders that all undocumented immigrants share as a result of their unauthorized immigration status. All of them —both *Mam* and *Mixteco* alike— fear interaction with individuals outside their small communities who may bring their unauthorized status to the attention of U.S. immigration authorities. As a result, legal professionals, social service providers, and government officials must work especially persistently to gain indigenous immigrants' trust before effective communication can take place.

Immigrant indigenous people's distrust of Washington's systems is further exacerbated by the fact that their communities as a whole are relative newcomers to the state, and there is little community knowledge of what customs prevail and what services are available. The majority of indigenous immigrants have been in Washington for fifteen years or fewer.[75] On the whole, these immigrants have not had time to develop connections to the larger communities, living instead in culturally and linguistically isolated groups. Due to their lack of integration and limited economic opportunities, very few of their members have attained educational levels that allow them to join the ranks of social service providers, which would facilitate understanding between indigenous communities and mainstream society.

V. Legal Issues Affecting Indigenous Workers

The cultural and linguistic barriers faced by these indigenous immigrants have a profound effect on their legal situation, especially regarding immigration status, work, housing, health care, and language access.

1. *Immigration Status*

Because most indigenous workers living in Washington State have arrived recently, adults with authorized immigration status are rare. A major overhaul of U.S. immigration laws in 1996 drastically reduced the available avenues for unauthorized immigrants who perform manual labor to obtain legal status in the United States.[76] Previously, unauthorized workers had an opportunity to apply to an immigration judge ("IJ") for legal status called "suspension

[74] Burrell, *supra* note 8, at 14.

[75] As indicated by Columbia Legal Services' survey of a small sample of Washington indigenous immigrants. Columbia Legal Services Survey, *supra* note 5.

[76] On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

of deportation" if they had resided in the U.S. for at least seven years, did not have a disqualifying criminal record, and could demonstrate that their removal (commonly known as "deportation") would cause "extreme hardship" to themselves or qualifying family members.[77] In 1996, however, this form of relief was eliminated and replaced with a much more restrictive "cancellation of removal," which requires ten years of continuous residence, no disqualifying criminal record, and the most onerous requirement: proof that their removal would cause "exceptional and extremely unusual hardship" to a United States citizen ("citizen") or lawful permanent resident ("permanent resident") spouse, parent, or child.[78] An IJ has no power to consider discretionary or humanitarian grants of relief for migrant workers who have resided in the U.S. for less than ten years or who do not have qualifying relatives (a spouse, child or parent who is either a citizen or permanent resident).

In addition to these limited exceptions, the 1996 law eliminated individuals ability to adjust their status through a U.S.-citizen or permanent-resident petitioner if the immigrant entered the U.S. without authorization.[79] Immigrants who enter the U.S. unlawfully and subsequently marry U.S. citizens are still forced to return to their home country for a consular interview.[80] In addition, they often face a ten-year bar to returning to the U.S. as a result of their prior unlawful presence.[81] One exception is for survivors of domestic violence, who may apply for immigration documents from within the U.S. if the abuser is a spouse or parent with citizen or permanent resident status.[82]

The 1996 law also made it more difficult for individuals facing persecution in their home country to obtain relief. Most importantly, the law now requires applicants for political asylum to submit their applications within one year of arrival to the U.S., or within one year of changed circumstances in their home countries that materially affect eligibility for asylum.[83] Political asylum continues to require that applicants demonstrate that they face a "well-founded fear of persecution" on account of race, religion, nationality, political opinion, or membership in a particular social group.[84] Given the U.S. State Department's reports that conditions generally have been improving in Central America since the wars of the late 1980s and early 1990s, most

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[77] 8 U.S.C. § 1254 (1995). U.S.C. stands for United States Code, which contains all United States federal statutes, passed by Congress and approved by the President.

[78] 8 U.S.C. § 1229b(b)(1).

[79] 8 U.S.C. § 1255.

[80] *Id.*

[81] 8 U.S.C. § 1182(a)(9)(B). A waiver is available in certain situations, but the applicant must usually wait outside the country between three to 14 months to see if the discretionary waiver application is approved. 8 U.S.C. § 1182(a)(9)(B)(v).

[82] 8 U.S.C. § 1154(a). This benefit is also available for an elderly parent who is abused by her or his adult citizen son or daughter. 8 U.S.C. § 1154(a)(1)(A)(vii).

[83] 8 U.S.C. § 1158(a)(2)(B), (D).

[84] 8 U.S.C. § 1101(a)(42).

applicants will have difficulty in demonstrating the well-founded fear of persecution necessary for asylum.

Despite these largely restrictive changes, some positive developments now provide certain migrant workers an opportunity to obtain legal status. For instance, Congress enacted a special visa (the "U" visa) for immigrants who are victims of certain crimes, including domestic violence, most violent crimes, and involuntary servitude and peonage, of particular importance as migrant workers are often exploited by employers seeking to avoid payment of wages.[85] In order to qualify, the victim must demonstrate that she or he cooperated with law enforcement in the investigation or prosecution of the crime.[86] In addition, Congress enacted the "T" visa for victims of human trafficking. This visa also requires victims to cooperate with law enforcement in the investigation or prosecution of the crime.[87]

Migrants who are apprehended by immigration authorities and placed in removal proceedings face major obstacles to securing relief. First, many individuals are detained throughout the removal process. This process usually lasts at least a few months if the person seeks to obtain substantive relief.[88] Some are eligible to apply for release from detention in exchange for a bond, but the minimum bond is $1,500 and it is not uncommon for detainees to be required to post $10,000 and $20,000 bonds.[89] Those detained often face especially difficult choices when their spouses or children rely on them for financial and emotional support. In addition, unlike in the U.S. criminal justice system, individuals in removal proceedings have no right to a government-paid lawyer.[90] Unless the person is fortunate enough to receive *pro bono* representation or has the resources to retain a private attorney, she or he is forced to face the process alone.

Finally, those who are ordered removed from the country face great peril if they attempt to re-enter. Any person who is ordered removed and unlawfully reenters the country is subject to criminal prosecution that often results in prison sentences ranging from two to twenty years.[91]

Fear of the authorities pervades most unauthorized immigrants' decision-making in other areas as well. They are reluctant to complain about workplace abuses and injuries or to assert their rights to safe housing for fear of drawing attention to themselves. While civil courts, most Washington State agencies, and even many federal agencies do not participate in immigration enforcement, most indigenous immigrants do not understand the complex

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[85] 8 U.S.C. § 1101(a)(15)(U)(iii).

[86] 8 U.S.C. § 1101(a)(15)(U)(i)(III). There is no requirement that law enforcement obtain a conviction against the perpetrator.

[87] 8 U.S.C. § 1101(a)(15)(T).

[88] 8 U.S.C. § 1226.

[89] 8 U.S.C. § 1226(a)(2)(A).

[90] 8 U.S.C. § 1229a(b)(4)(A).

[91] 8 U.S.C. § 1326.

relationships between governmental entities, and are justifiably afraid of the severe consequences of immigration enforcement.

2. *Wage-and-Hour Issues*

A frequent legal complaint among indigenous immigrants is their employers' failure to pay wages owed.[92] Under Washington State law, the vast majority of employees have the right to earn a minimum wage per hour.[93] In 2012, the minimum wage in Washington is $9.04 per hour.[94] Most employees also have the right to overtime pay.[95] Washington law offers other protections for workers, including the right to meal and rest breaks,[96] and the requirement that employers pay on time[97] and with pay records that document required information such as wages earned and hours worked.[98] Federal law also provides specific protections for agricultural workers, including the right to enforce wage rates promised by employers and recruiters.[99]

These laws protect employees regardless of their immigration status.[100] However, a 2002 United States Supreme Court decision denying compensation for lost wages to unauthorized workers who file unfair labor practice claims[101] has caused employers to renew arguments that unauthorized work-

[92] In a 2008 California survey of indigenous farmworkers, 27% of the legal complaints voiced by participants were for non-payment or underpayment of wages. Mines, *supra* note 28, at 102. For more general information on the vast scope of the problem of failure to pay wages in the United States, *see* Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009), *available at* http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf.

[93] Wash. Rev. Code §§ 49.46.020; 49.46.010(4). The federal Fair Labor Standards Act also guarantees a minimum wage, 29 U.S.C. § 206(a), but that minimum wage is currently $7.25 per hour, 29 U.S.C. § 206(a)(1)(C).

[94] *See History of Washington Minimum Wage, supra* note 24.

[95] Wash. Rev. Code § 49.46.130(2).

[96] Wash. Admin. Code §§ 296-126-092, 296-131-020. Wash. Admin. Code stands for Washington Administrative Code. It contains Washington State's regulations, implemented by state agencies under authority of statutes.

[97] Wash. Admin. Code §§ 296-126-023, 296-128-035, 296-131-010.

[98] Wash. Admin. Code § 296-126-040.

[99] 29 U.S.C. §§ 1822(c), &1832(c) (the Migrant and Seasonal Agricultural Worker Protection Act or "AWPA"). These promises or "working arrangements" need not be in writing to be enforceable. *Colon v. Casco*, 716 F. Supp. 688, 693-94 (D. Mass. 1989).

[100] Statement of Gary Moore, Director of Washington State Department of Labor & Industries (May 1, 2002), *available at* http://www.columbialegal.org/files/MooreReHoffman.pdf; *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (holding that AWPA applies to all workers irrespective of immigration status), *cert. denied*, 487 U.S. 1235 (1988); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-02 (W.D. Mich. 2005) (holding that immigration status was not relevant where class sought damages for work performed under AWPA and the Fair Labor Standards Act).

[101] *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 146-47 (2002).

ers are not entitled to certain forms of compensation.[102] As a result, employers sometimes succeed in inquiring into plaintiffs' immigration status in the course of lawsuits.

Two large coverage gaps in wage-and-hour protections also affect many indigenous workers. First, agricultural workers are largely exempt from the right to collect overtime pay.[103] Second, workers who are not "employees" of the people who pay them, but are instead "independent contractors" are not afforded any of the rights described above.[104]

3. *Workers' Compensation*

Washington workers, including agricultural workers, who are injured at work generally have the right to industrial insurance or "workers' compensation,"[105] a program administered by the Washington State Department of Labor & Industries (hereinafter "the Department"). For workers injured on the job, this insurance program pays for necessary medical treatment, a portion of wages lost while the worker recovers, and benefits in cases of permanent disability or death.[106] Compensation is provided regardless of immigration sta-

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[102] *See Rivera v. NIBCO*, 364 F.3d 1057, 1065 (9th Cir. 2004). At the same time, the Inter-American Court of Human Rights has said, in the context of a discussion of non-discrimination and the rights of migrant workers with unauthorized status, that "the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment." Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. C.H.R. Advisory Opinion, Report No. 18/03, OEA/Ser.A., doc. 18 (2003).

[103] Wash. Rev. Code § 49.46.130(2)(g). The federal Fair Labor Standards Act requires overtime for workers who engage in packing agricultural products, provided that the packing facility is not on a farmer's farm or that the farmer processes products from other farms. *See* 29 U.S.C. §§ 203(f), 213(b)(12); *Mitchell v. Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286, 290 (5th Cir. 1959).

[104] The distinction between employees and independent contractors is poorly defined in Washington law, and the legal analysis is very fact-specific. *See* definitions of "employee" and "employer" under Wash. Rev. Code § 49.46.010 (Minimum Wage Act); Wash. Rev. Code § 49.12.005 (Industrial Welfare Act); Wash. Rev. Code § 51.07.070 (Industrial Insurance ("workers' compensation")); and Wash. Rev. Code § 49.17.020 (Washington Industrial Safety and Health Act). There is no definition of "independent contractor" in Washington statutory law. However, examples cited by courts as "independent contractors" include brush pickers (workers who gather floral greenery in the forest). *Cascade Floral Products, Inc.*, No. 01-2-00877-7, slip op. (Superior Ct. of Washington State for Mason County, April 25, 2003) *available at* http://www.columbialegal.org/files/MasonCyBrushRuling.pdf. *See also* discussion of *Mam* workers' employment status, Section VI.1, *infra.*

[105] Title 51 Wash. Rev. Code.

[106] Chapter 51.36 Wash. Rev. Code; Wash. Rev. Code §§ 51.32.090, 51.32.060, 51.32.067. Other benefits such as vocational counseling may also be available. Wash. Rev. Code §§ 52.32.095-.0991. To receive benefits, injured workers generally must apply within one year

tus.[107] However the Department may deny benefits on the grounds that the injured person is an "independent contractor" and not an "employee" of any particular business, among other reasons.[108] As discussed below in the *Mam* case study, this is a particular problem for the *Mam* community, whose work in "brush picking" is often considered "independent contractor" work.

A worker can appeal a decision of the Department by filing an appeal within 60 days of the decision.[109] However, due to their restricted educational opportunities and attendant limited literacy, indigenous workers often have difficulty with appeals and other parts of the claims process.

It is unlawful to discharge or otherwise discriminate against any employee for filing a claim for compensation or exercising any other rights under the workers' compensation law.[110] It is also unlawful for an employer to discourage a worker from making a claim for compensation.[111] Indigenous workers are nevertheless especially vulnerable to retaliatory behavior because linguistic and cultural barriers often make them unaware of their rights.

4. *Housing Issues*

Most indigenous transnational migrants must rent low-cost shelter when they arrive in the United States. Most people who rent housing are covered by Washington State's Residential Landlord Tenant Act (hereinafter "RLTA").[112] The RLTA outlines in detail a landlord's duties to a tenant; including duties to keep the premises structurally sound, weather tight, and in compliance with health and safety codes; and to supply and maintain heat, water, hot water, electrical, and plumbing systems.[113] The RLTA also specifies when and how a tenant can terminate tenancy[114] and when a landlord must refund a tenant's deposit.[115] However, these provisions usually require written notice or other documents,[116] and indigenous renters often have difficulty deciphering and complying with these requirements.

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of injury or within two years of the discovery of an occupational disease Wash. Rev. Code § 51.28.050; Wash. Rev. Code § 51.28.055. The worker's medical provider is required to facilitate the worker's claim for compensation. Wash. Rev. Code § 51.28.020.

[107] Wash. Rev. Code § 51.32.010.

[108] *See* Wash. Rev. Code §§ 51.08.180, 51.08.195.

[109] Wash. Rev. Code § 51.52.060.

[110] Wash. Rev. Code § 51.48.025.

[111] Wash. Rev. Code § 51.28.010.

[112] *See* Wash. Rev. Code § 59.18.040. Seasonal agricultural workers who live in housing in conjunction with their agricultural employment are excluded under Wash. Rev. Code § 59.18.040(6).

[113] Wash. Rev. Code § 59.18.060.

[114] *See*, *e.g.*, Wash. Rev. Code §§ 59.18.200 and .090.

[115] Wash. Rev. Code § 59.18.280.

[116] *See*, *e.g.*, Wash. Rev. Code § 59.18.070 (tenant must deliver written notice to landlord

Agricultural workers who receive seasonal housing as part of their employment are not afforded the remedies of the RLTA, but their living conditions are prescribed by federal and state standards for construction, water supply, sewage disposal, bathing facilities, cooking facilities, etc.[117] Federal law also makes any violation of Federal and State farmworker housing standards a violation of the Federal Migrant and Seasonal Agricultural Worker Protection Act, the principal federal law protecting farmworkers.[118]

Both State and Federal law forbid discrimination in the sale or rental of housing based on race, color, and national origin, among other similar protections.[119] While landlords cannot lawfully refuse to rent to indigenous families, they often require social security numbers, ostensibly as a means of verifying creditworthiness.[120] Because most indigenous immigrants in Washington State are unauthorized immigrants and thus lack social security numbers, this requirement is a substantial barrier to obtaining housing.

When indigenous immigrants decide to stay in Washington, many wish to purchase a home. For most agricultural workers, the only financially viable option is a used manufactured home in a manufactured home park.[121] These

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before exercising remedies for defective conditions on the premises); WASH. REV. CODE § 59.19.200 (written notice of 20 days required to terminate month-to-month tenancy); WASH. REV. CODE § 59.18.260 (written lease agreement required for landlord to collect deposit).

[117] *See* WASH. ADMIN. CODE §§ 246-358-001 to 175; WASH. ADMIN. CODE § § 246-361-001 to 165; 29 C.F.R. § 500.321(a)(1); 29 C.F.R. § 190.142. C.F.R. stands for Code of Federal Regulations. It contains the regulations implemented by federal agencies under authority of federal statutes.

[118] 29 U.S.C. 1823(b)(1). This provision applies not only to employers and recruiters, but to any person who controls housing for migrant workers. *Howard v. Malcolm*, 629 F.Supp. 952, 954 (E.D.N.C. 1986). However, workers are often reluctant to complain about housing conditions for fear of workplace retaliation or fear that government agencies will close the housing altogether to enforce the standards.

[119] *See* WASH. REV. CODE § 49.60.030; 42 U.S.C. § 3604.

[120] Though the authors are aware of no such claims to date, a policy of requiring social security numbers may constitute unlawful discrimination under the federal Fair Housing Act ("FHA") because it creates a disparate impact on minority groups. *See* 42 U.S.C. § 3604 (discrimination based on race or national origin in housing prohibited); 42 U.S.C. § 3604 (most private landlords covered by the FHA); *Oti Kaga, Inc. v. South Dakota Housing Development Authority*, 342 F.3d 871, 883 (8th Cir. 2003) (stating that a facially neutral policy that has a significant impact on a protected minority group may violate the FHA).

[121] A manufactured home park is a community of two or more manufactured homes. WASH. REV. CODE 59.20.030(10). Manufactured homes are relatively inexpensive to build and are designed to be moved, either whole or in a small number of pieces, along public highways. Then they are installed semi-permanently in a manufactured housing "park," where they can be connected to utilities. The parks are owned by a landlord, and often contain up to hundreds of manufactured homes (each owned by individual homeowners) situated within a few feet of each other, with small yards. The homes are commonly known to Latin-American immigrants as "*trailas*," derived from the English word "trailer," a nonmotorized vehicle designed to be hauled behind another vehicle.

homes are inexpensively constructed, ostensibly portable, and located on another's land, so the homeowner has no other option but to rent the land beneath her home from a third party. It is rare for these homes to appreciate in value, and they are often costly. Indigenous immigrants must often pay maintenance charges on old homes, a monthly home payment, and a monthly rent payment for the lot on which their home sits.

People in this situation are protected by the Mobile/Manufactured Home Landlord Tenant Act (hereinafter "MHLTA"), which governs the rental of land on which homes are built.[122] When a homeowner rents the land for the manufactured home, the landowner is in a powerful position. Manufactured homes are very costly to move.[123] Some older homes cannot be moved because they are too old to transport on the streets. Consequently, if the homeowner is ordered to move the home, he or she must pay thousands of dollars to dispose of it.[124] Homeowner-renters enjoy more protections under the MHLTA than renters under the RLTA similar to this act, however, written notices and documents are often required for homeowner-renters to exercise their rights.[125]

To complicate matters, the purchase and sale of manufactured homes is governed by contract law. Manufactured homes are considered chattel rather than real estate, and they can be bought and sold like automobiles.[126] Because transactions relating to these homes are mostly unregulated, there are many opportunities to take advantage of unwary purchasers. For example, we have seen cases of people selling homes for many times their value, "selling" homes that they did not own, and selling homes that were unfit for human habitation. Indigenous immigrants are easy victims because they usually lack the knowledge to investigate the home's legality and value or are unaccustomed to asking for written purchase and sale contracts, which provide important protections if the deal sours.

5. *Access to Health Care*

A vast majority of adult indigenous immigrants in Washington State lack health insurance, meaning that they have great difficulty paying for medical

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[122] Wash. Rev. Code 59.20.010 *et seq*.

[123] In January 2011, a Washington manufactured-home moving company estimated the minimum cost to move a home is $5,000. That estimate is based on a moveable single-wide manufactured home with no attached structures. If a home is not moveable due to age or disrepair, does not have wheels, has attached structures like a deck or awning, or is larger (double- or triple-wide), moving costs increase.

[124] If a home is moveable, the transportation charges detailed above apply. Additional charges apply at the point of disposal based on weight. If a home is not moveable, the homeowner must employ an on-site demolisher to demolish the home and then transport it to the disposal site.

[125] *See* Wash. Rev. Code § 59.20.090(3) & (4).

[126] *See United States v. 19.7 Acres of Land*, 103 Wash.2d 296, 301, 692 P.2d 809 (1984); *Clevenger v. Peterson Constr. Co.*, 14 Wash. App. 424, 426, 542 P.2d 470 (1975).

care.[127] In partnership with the Federal government, Washington State provides medical benefits to certain classes of disabled and low-income adults.[128] Adults, however, must be citizens or authorized immigrants to receive these benefits.[129] The state maintains a small group of programs for low-income unauthorized immigrants, known as alien medical programs.[130] The programs cover only limited treatment for medical emergencies, cancer, and renal failure.[131] Children from low-income families[132] and low-income pregnant women[133] are also eligible for medical benefits regardless of immigration status.

Many indigenous people rely on local hospitals and clinics for care. Federal law requires hospitals to treat all people with emergency medical conditions, regardless of whether they have medical insurance.[134] State law, in turn, requires hospitals to provide low-income patients with free or reduced-cost care, depending on their income.[135] Many communities also have reduced-cost medical clinics which provide preventive and non-emergency care.

Most hospitals and community clinics, however, require proof of income before financially assisting patients. Because many indigenous workers earn money in cash,[136] they face difficulties in completing required paperwork. Though most hospitals and clinics will accept personal declarations of income,[137] indigenous patients often lack the knowledge and linguistic capacity to inquire into this possibility.

6. *Language Access*

Failure to provide interpreters or other services in a language that allows indigenous persons to access federally funded services may constitute national origin discrimination under Title VI of the federal Civil Rights Act of 1964.[138]

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[127] The United States health care system is largely private, and patients without health insurance must generally pay a fee for each service they receive. These medical services often cost much more in the United States than they do in Mexico. *See* Mines, *supra* note 28, at 80.

[128] *See* Wash. Admin. Code §§ 388-503-0505, 388-450-0210, 388-478-0080.

[129] Wash. Admin. Code § 388-503-0505.

[130] *See* Wash. Admin. Code § 388-438-0110.

[131] Wash. Admin. Code §§ 388-438-0115, 388-438-0120.

[132] Wash. Admin. Code § 388-505-0210.

[133] Wash. Admin. Code § 388-462-0015.

[134] 42 U.S.C. § 1395dd.

[135] Wash. Rev. Code § 70.170.060; Wash. Admin. Code §§ 246-453-010 *et. seq*.

[136] Particularly those working in the brush picking industry.

[137] Under Washington regulation, hospitals are *required* to accept personal declarations of income. Wash. Admin. Code § 246-453-030(4).

[138] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that failure to take affirmative steps to address language barriers for minority children who are excluded from effective participation in an educational program violates title VI regulations).

Title VI covers various services, including health care, education, police, and courts.[139]

Title VI, however, does not require interpreters for all federally-funded services. Federal guidance requires that agencies consider four factors in deciding what "reasonable steps" they must take to ensure meaningful access to services for limited English proficient (hereinafter "LEP") persons: (1) the number or proportion of LEP persons in the service population; (2) how often LEP individuals come into contact with the program; (3) the importance of the benefit, service, information, or encounter to the LEP person; and (4) the resources available to service providers and the costs of providing language services.[140] Because indigenous immigrants are usually a small proportion of the community served by the agency, and qualified indigenous interpreters are hard to find, agencies may assert that they are not required to provide interpreters.

Lack of language access can also affect indigenous immigrants' access to quality health care. Many indigenous people find themselves struggling to communicate in Spanish with medical providers, while others make do with family members —sometimes young children—[141] for interpretation of difficult medical concepts.

Washington State law specifically requires that courts appoint certified or qualified interpreters to LEP persons in legal proceedings.[142] The government must pay for the interpreter in both criminal and civil proceedings in which the LEP individual is indigent.[143] Courts must have a "language assistance plan" that includes procedures for appointing interpreters and notifying court users of the right to an interpreter.[144]

Under Washington State law, school districts must provide "transitional bilingual education" to LEP students.[145] This includes assistance in the student's primary language "where practicable," and may include instruction in Eng-

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[139] *See* Department of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455- 41472 (June 18, 2002); United States Department of Health & Human Services, Office of Civil Rights *available at* http://www.hhs.gov/ocr/civilrights/resources/laws/revisedlep.html.

[140] U.S. Department of Justice Guidance, 67 Fed. Reg. 41455, 41459 (June 18, 2002).

[141] Even English-speaking children are not qualified interpreters for medical concepts, and they may be even less effective than expected because they do not share a native language with their parents. Some indigenous parents do not speak indigenous languages to their children (based on the figures cited herein, it would appear that most do not), and many of those children speak English as a first language. Spanish, the language these children use to interpret, is often a second language for all parties involved. Mines, *supra* note 28, at 43.

[142] Wash. Rev. Code § 2.43.030 (state-certified interpreters must be appointed absent good cause, *e.g.*, lack of certified individuals).

[143] Wash. Rev. Code § 2.43.040.

[144] Wash. Rev. Code § 2.43.090.

[145] Wash. Rev. Code § 28A.180.040.

lish as a second language (hereinafter "ESL").[146] Districts must also provide "appropriately bilingual" communication to parents of LEP students when feasible.[147] Similarly, federal law prohibits schools from failing to take appropriate action to overcome language barriers that impede equal participation in instructional programs.[148] While ESL instruction should be widely available, the lack of teachers and instructional assistants who speak indigenous languages is a barrier to instruction in indigenous languages.

VI. Case Studies

The foregoing discussion of common barriers and legal problems faced by indigenous immigrant workers in Washington is based on knowledge gathered during years of working with members of these indigenous communities. While it is possible to analyze each barrier and legal problem discretely and in the abstract, in reality these obstacles occur simultaneously and influence one another. The true stories that follow of indigenous immigrants in Washington present a more accurate picture of the difficulties many face. We begin with a tragic Van accident in 2004 that resulted in the deaths of five *Mam* workers from Todos Santos, Guatemala.

1. *Case Study: 2004 Van Accident Resulting in the Deaths of Five* Mam *Workers*

Early in the morning on March 27, 2004, there was a head-on collision involving a vanload of eleven immigrant *Mam* workers from Todos Santos, then living in Shelton, Washington, who were going to pick brush in Lewis County. Five of the workers died and three more suffered life-threatening injuries, including one who was hospitalized for nearly a year and experienced permanent cognitive damage.[149] On December 19, 2005, two more *Mam* workers were killed in a similar van accident near Morton, Washington.[150] They were the sixth and seventh workers from Todos Santos to die in van accidents in Washington in less than two years. Hundreds turned out to grieve their deaths when their bodies were returned to Todos Santos.[151]

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[146] Wash. Rev. Code §§ 28A.180.030 & .040.

[147] Wash. Rev. Code § 28A.180.040(1)(b).

[148] Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f).

[149] Jane Hodges & Tan Vinh, *8 Killed, 4 Critically Hurt in 2 Highway Crashes*, Seattle Times, Mar. 28, 2004.

[150] Washington Dep't of Labor & Indus., Fatal Hazard – Transporting Brush Pickers in Unsafe Vehicles, Aug. 2005, *available at* http://www.lni.wa.gov/WISHA/hazalerts/Brushpicker.pdf.

[151] Tom Knudson & Hector Amezcua, *The Pineros: Village Weeps for Lost Sons*, The Sacramento Bee, Jan. 29, 2006.

A. *Overcoming Fears and Suspicions and Developing Trust*

The first challenge in representing the injured *Mam* workers and survivors of the workers who died in this accident was to overcome their fear of authorities and suspicion of outsiders. This required a number of meetings with the *Mam* workers and family members using bilingual *Mam*-Spanish interpreters, as well as a trip to Todos Santos to meet with family members. Because the need for legal representation was so great, the *Mam* overcame their general desire to remain invisible and agreed to work with lawyers to bring claims on their behalf.[152]

B. *Fitting Claims within Workers' Compensation Framework*

The next challenge was to frame the claims of the *Mam* workers and their families in a way that fit within the framework of Washington workers' compensation law. As noted in the legal summary, Washington workers' compensation law covers Washington employees who are injured at work. In order for a Washington worker to be covered by the workers' compensation law, however, the worker must be an "employee," as opposed to an "independent contractor."[153] Thus, in order to assert claims for workers' compensation arising from the van accident, the *Mam* workers had to be *employees* working for an identifiable *employer* at the time of the accident.

The brush sheds have consistently argued that the *Mam* workers are independent contractors, not employees, and, therefore, brush sheds are not required to comply with workers' compensation laws, pay minimum wage, or comply with worker safety laws. However, information gathered from brush pickers indicates that in many cases, the true economic relationship between them and the brush sheds is an employee-employer relationship. In most cases, the workers pick the brush that the brush sheds specify, in locations the brush sheds direct, using permits obtained from the brush sheds, and the workers return at the end of each day to sell the brush they have picked to the same brush sheds that provided the permits.

The Department of Labor and Industries conducted audits confirming these facts and found that "[m]any of the audits have shown that the brush pickers are employees of the packing sheds."[154] To our knowledge, however, the Department has never issued citations or taken any other punitive action

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[152] In other matters involving legal issues such as housing issues, where the *Mam* workers and family members may feel there is less at stake, workers have been more reluctant to organize and assert their rights.

[153] *See* Parts V.A and V.B. herein.

[154] Washington Dep't of Labor & Indus., Protecting Workers and Promoting Fair Business Practices in the Specialty Forest-Products Industry, Aug. 2005, *available at* http://www.columbialegal.org/files/ProtectingWorkersSpecialtyForestProductsIndustry.pdf.

against the brush sheds for violating worker safety or workers' compensation laws. Nor, to date, has a Washington court been presented with these facts establishing the economic reality that brush workers in Washington are employees of the brush sheds or that they are entitled to the legal protections afforded to employees.

Under existing legal standards and the limited facts in that case, it might have been difficult to hold any one of the brush sheds responsible as the employer for workers' compensation purposes.[155] Thus, in an effort to ensure that the injured *Mam* workers and the surviving family members of those who died received workers' compensation benefits, it was necessary to argue that the driver and owner of the van (who died in the accident and was also a *Mam* worker from Todos Santos) was the employer and that the passengers in the van were his employees. This was supported by a notebook found in the van after the accident showing that each of the other *Mam* workers paid the driver a fraction of what they received from the brush sheds (as well as gas money).[156] Although the driver/employer had never paid workers' compensation insurance premiums, the passengers were covered under a state fund for employees whose employers fail to pay the required premiums. Treating the driver as the employer and the passengers as his employees did not require the brush sheds to accept responsibility as the workers' employers, but was a viable way under the unusual facts of that case to convince the Department to accept the workers' and their families' claims.

C. *Establishing Workers' Earnings from Brush Picking Work*

The next challenge was to demonstrate the earnings of the *Mam* workers from their brush picking work. The Department was willing, in principle, to compensate the *Mam* workers and their families for the wages lost as a result

[155] In 2003, the major brush sheds in Washington brought a lawsuit in Mason County Superior Court in Shelton and obtained a ruling stating that a brush shed will not be liable as an employer when it meets five conditions. According to the court's ruling, a brush shed is not liable when it (1) sells a permit to a brush picker, (2) does not require the brush picker to sell the product back to the company, (3) does not direct or control the work of the brush picker, (4) is not in the brush picking business, but rather is in the brush buying and brush packing business, and (5) requires that brush pickers be solely responsible for their own taxes and for complying with all other business regulations. Washington Dep't of Labor & Indus., Harvesting Washington's Brush: Monitoring Compliance with Labor Laws in the Floral Greens Industry, July 2005, *available at* http://www.columbialegal.org/files/HarvestingWashington-Brush.pdf.

[156] Under Washington workers' compensation law, an employment relationship exists when the employer has a right to control the worker's conduct in the performance of his or her duties and there is consent by the worker to an employment relationship. *See*, *e.g.*, *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wash.2d 550, 588 P.2d 1174 (1979). In the van accident case, the Department accepted the evidence that the driver deducted a portion of the workers' earnings as sufficient to demonstrate an employment relationship.

of the deaths and injuries caused by the accident, but it required evidence of the amount of the lost wages. Because these *Mam* workers labor in a hidden, "black market" economy, it could have been extremely difficult to quantify these lost earnings. The brush sheds do not keep permanent records of the amounts they pay to individual workers, and the workers themselves often have limited records of their earnings.

Fortunately, during the course of its investigation, the Department interviewed numerous *Mam* workers in the brush picking industry, and gathered information regarding the workers' daily, weekly, and monthly earnings. Using that information, a vocational expert determined that the *Mam* workers earned an average of $55 for eight to nine hours of work per day, or $6.11 to $6.88 per hour, well below the Washington minimum wage.[157] This created a dilemma for the Department, because it did not want to pay workers' compensation benefits above the workers' actual earnings, but it also did not want to pay benefits based on earnings below the minimum wage. As a result, the Department agreed to pay compensation to the *Mam* workers and their families based on the Washington minimum wage, but only on a four-fifths (4/5) time basis — even though, in fact, the *Mam* workers regularly worked six or seven days a week.

D. *Seeking Spousal Benefits Based on Customary Marriages*

The last major legal effort was to obtain spousal survivor's benefits for the *Mam* women whose partners died in the van accident, based on their Maya customary marriages. The couples were never legally married in church or in civil ceremonies, but had lived together for many years, committed their lives to each other, raised and cared for their children together, and held themselves out to the community in Todos Santos as married couples. As such, they met all the requirements for a customary marriage under Guatemala's *unión de hecho* law.[158]

The Department agreed that Guatemalan law was the relevant law for determining whether the surviving spouses, all of whom were women, had been married to the *Mam* workers who died and qualified for spousal survivor benefits. The Department also found that the *Mam* women met all the requirements for demonstrating a customary marriage under Guatemalan law. Unfortunately, despite these findings, the Department concluded that the *Mam* women were not entitled to spousal benefits because they and their *Mam*

[157] Owings Report, *supra* note 25.

[158] A marriage under the *unión de hecho* law is similar to a common law marriage as recognized in many states in the U.S. Under both forms of customary marriage, two people are accorded the same legal treatment as formally married couples if they live together for a significant period of time, hold themselves out to the world as a married couple, and intend to be married.

husbands had not met a technical requirement under Guatemala's *unión de hecho* law requiring that a couple present themselves to a lower court in Guatemala to obtain a legal order. Compliance was impossible because the husbands had died in the van accident. As a result, the children of the deceased *Mam* workers are receiving monthly survivor's payments (and will receive the payments until they each turn 18), but the wives did not receive additional spousal benefits.

E. *Lessons from the Van Accident Case Involving Mam Workers*

This case provides a window into the difficult lives and dangerous work of the hundreds of *Mam* workers who have migrated to Washington from Todos Santos. As the successful representation of the *Mam* workers in this case illustrates, when circumstances are sufficiently extreme and the need for legal representation compelling, it is possible to overcome language barriers, suspicion of outsiders, distrust of authority, fear of deportation, as well as every other barrier that often prevents the effective representation of indigenous workers.

At this time, the biggest challenge for *Mam* workers and their advocates in dealing with the brush industry is to find some way to hold the brush sheds responsible for providing basic worker protections and fairer pay to these workers, on whom the entire brush industry depends. Currently, *Mam* workers are often considered, rightly or wrongly, to be unprotected under Washington minimum wage or worker safety laws, and may only obtain workers' compensation, if at all, by characterizing their co-workers —usually other *Mam* workers from Todos Santos— as their employers. The brush sheds' businesses have been structured to make these *Mam* brush picking workers appear to be independent contractors, even though the economic reality is that the workers are working as employees for the brush sheds.[159]

At the same time, it is unclear whether a majority of *Mam* workers would prefer to be employees rather than independent contractors. As employees, for example, they would be entitled to workers' compensation, minimum wage, and protection under the worker safety laws that cover other Washington employees. On the other hand, as employees, they would also have to provide work authorization permits to the brush sheds in order to work in the U.S., something few of them have.

Generally speaking, workers' compensation cases on behalf of *Mam* workers and their families provide hope. As a result of these cases, eight *Mam* children from Todos Santos whose fathers died in the van accident now receive monthly checks from the Department, and they will continue receiving these

[159] *See* 29 C.F.R. §500.20, defining "employment" under the Agricultural Worker Protection Act under the economic reality relationship test, including the degree of the putative employer's control over the work performed, and the extent to which the services rendered is an integral part of the putative employer's business.

payments until they each reach the age of 18 (or 21 if they remain in school). In the case of the *Mam* worker who nearly died and spent almost a year in the hospital, the Department has paid well over $1 million for his medical care, which saved his life; and it will pay him a monthly pension for the rest of his life for the permanent injuries he suffered. As a result of our work on these cases and our continuing outreach to the community, we have developed an increasing level of trust with the *Mam* community in Washington which should help in future advocacy on their behalf on issues relating to housing rights, healthcare access, language assistance, and the like.

2. *Case Study:* Mixteco *Workers Living in Mobile Home Park in Othello, Washington*

In 2008, Columbia Legal Services opened an office in central Washington and conducted targeted outreach to Othello, a community with approximately 800 *Mixteco Alto* speakers. Shortly thereafter, the office began hearing about problems in the Othello Fields Mobile Home Park.[160] Many of the homeowners who rent spaces in Othello Fields are *Mixtecos*. In fact, the trend in Othello among *Mixtecos* is to arrive and immediately begin renting small, run-down apartments in several locations. When they have decided to purchase a mobile home, many *Mixtecos* prefer to live in Othello Fields because many from their community already live there. In spite of familiar neighbors, however, Othello Fields is not an easy place to live. Absentee owners have delegated park management authority to two managers who are often unavailable, unhelpful, and abusive to park residents.

A. *Clash with Authority: Illegal Additions to Mobile Homes*

The first case Columbia took from the Othello Fields Mobile Home Park involved two cousin homeowners who wanted to improve their homes. Both were in the process of building larger entryways, and one was building an additional room off the entryway. Both cousins had invested substantial money in improvements, and their families had put in many hours of labor.

Unfortunately, the cousins were not familiar with state and county regulations regarding manufactured homes. One day the county inspector notified the cousins that the structures were illegal and needed to be removed. The cousins, however, were illiterate and mistakenly believed the notification tag placed on their property was the county's "seal of approval." They continued the projects until receiving an eviction notice for unauthorized construction. Eviction from a manufactured home park can be very costly for homeowners, who must either sell their home or move it to another location (assuming this can be found). Illegal additions had the added impact of invalidating the sale

[160] The name of the mobile home park has been changed to protect the residents.

until the cousins were able to comply with government regulations. In short, the cousins were in a difficult situation.

At the cousins' request, Columbia intervened and established communications with the park. After extensive negotiations, the latter agreed not to evict the tenants provided they comply with numerous conditions. Columbia brought in a county and state inspector to look at the homes and advise the cousins how to proceed. A *Mixteco Alto* interpreter was hired to facilitate communication. The effort to stop the eviction was painful; the cousins and their families had to face the grim fact that much time and money had been wasted. In addition, they had to invest even more time and money to tear down the construction and dispose of the materials. The county and state inspectors discovered that the roof of one home had been illegally modified by the prior owner and informed a cousin that she could not move or sell her home until the roof had been entirely rebuilt in accordance with the building code —a project well beyond her family's means. In addition, the inspector informed her that it was unsafe for anyone to live in the home since the roof could collapse at any time.

B. *A Question of Responsibility to Maintain Utilities*

Another case involved park infrastructure. In a manufactured home park, each homeowner must provide maintenance up to the point where their homes connect to the park's utilities, *e.g.*, water and electricity.[161] The park's duty, on the other hand, is to maintain the equipment that provides utilities to the homeowners up to the point of connection to the owners' homes. For instance, the park must maintain common water pipes up to the points where the common system connects to the individual homes.

In this case, a homeowner's electricity stopped working in the dead of winter, when the temperature in eastern Washington often drops well below freezing. With difficulty due to limited Spanish, the homeowner repeatedly asked the managers (one of whom speaks Spanish) to fix the problem, but they insisted that since it was affecting his house, it was his responsibility. Finally, the homeowner retained a company to diagnose the situation. The company discovered that the park's electrical hookup, a large, metal box on an electrical pole, had burned out and needed to be replaced. They charged the homeowner $150 for the diagnosis and a temporary repair, and then another $1,200 to replace the electrical box. The homeowner paid the company with most of his savings that was set aside to get his family through the winter, which is when most agricultural workers are unemployed.

The homeowner then took the invoices to the managers and asked, in basic Spanish, for them to pay him back for the repair. The managers repeatedly refused the request. The homeowner could not understand their refusal

[161] Wash. Rev. Code § 59.20.130(6).

and finally sought help from Columbia, which helped him understand how to represent himself in small claims court.

The client presented his case in small claims court through two interpreters: one who interpreted from *Mixteco Alto* to Spanish and another who interpreted from Spanish to English. The park managers defended their positions by arguing they had merely asked the homeowner, on several occasions, to provide verification that the repair was being done to park property. They said the homeowner had never done so and, for this reason, could not reimburse him. The judge quickly determined that the repair was related to park property and ordered the park to pay. After his day in court, the homeowner was elated; the judge had been fair, and he had won.

C. *Easy Money*

In this final example, the homeowner was late in paying his lot rent around the end of 2008. By contract, this made him liable to the park for a $45 late fee once the rent was six or more days late. However, the homeowner did not realize he owed a fee and the park managers never informed him of the fact. As a result, every month thereafter, the homeowner's rent was considered late because of the unpaid late fees and, although he paid his rent on time, another $45 each month owed was added to his account. Finally, by August 2010, late fees owed exceeded $900, which triggered an eviction notice. This notice was the first the homeowner heard of the debt, and he was shocked and dismayed because $900 is a fortune to his family.

After extensive negotiations, Columbia helped the homeowner reach an agreement with the park's attorney. The homeowner agreed to punctually pay half the debt along with his next month's rent. In exchange, the park agreed to stop eviction proceedings and erase the homeowner's balance. The homeowner faced an unethical business practice —this was not a procedural mistake by the landlord but rather a deceptive withholding of information— that was very difficult to prove as a legal violation.[162] *Mixtecos* and other indigenous immigrants are particularly vulnerable to this type of abuse because most cannot read their rental contracts, often do not understand the agreements they sign, and have few trusted resources outside of their communities. The basic reason for this is extreme pressures on this isolated community.

[162] Other homeowners in parks with the same ownership have complained that the managers sometimes pick up rental payments late and mark them late (triggering late fees), though the payments were placed in the drop-box by the due date. In this case, the late payment occurred so long ago that the homeowner had no memory of when the rent had been paid. If the practice of late-pickups is an unfair or deceptive pattern of conduct affecting other renters, it may represent a violation of the Washington Consumer Protection Act, WASH. REV. CODE §§ 19.86 *et. seq*. *See*, *e.g.*, *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531 (1986).

Mixtecos face discrimination from those outside of their communities, predatory practices by those who make a living by taking advantage of poor people, and live in fear because of immigration laws. Many *Mixtecos* prefer to bow their heads and take abuse as the cost of providing a better future for their children.

D. *Lessons from Working with* Mixteco *Manufactured Home Owners*

The dream of having one's own home is common to many *Mixtecos* in Central Washington. Although advocates see potential problems that can follow from buying a used manufactured home in a park, the solution is not to discourage *Mixtecos* from purchasing these homes. In fact, manufactured housing communities are important sources of low-income housing and, when they are well-managed, can have a positive impact on residents and on the area in which they are located.

Because people will not stop buying used manufactured homes, education is key to preventing or minimizing many problems. For instance, homeowners need to know that receipts for each monthly rent payment serve as proof that rent was paid on time. By conducting a basic investigation of manufactured homes, potential purchasers can prevent a range of common problems including whether the seller actually holds title to the home, whether the purchase price represents fair value, and whether any modifications made to the home were legal.

Community education for *Mixtecos* in central Washington is particularly challenging because of cultural isolation, language barriers, and generally low levels of education. Advocates recognized that the community's trust was essential, and therefore requested an introduction from a local organization. To ensure relevance, advocates first asked *Mixtecos* what information they could provide, then used interactive teaching techniques based on popular education theory which assumes that all people have knowledge based on their life experiences and drawing on those experiences is the best way to educate effectively. Because advocates were aware that few *Mixtecos* could read, they provided handouts with plentiful illustrations.

To maintain contact after the initial presentations, Columbia hired a full-time *Mixteco* community worker to build and maintain connections between advocates and the *Mixteco* community. The community worker produced a compact disc in *Mixteco* with illustrations and advice on five common problems faced by *Mixtecos* in Washington. The compact disc has been distributed across Washington and has helped *Mixteco* workers find statewide assistance.

Even with the best educational outreach program, problems are bound to arise. To send a strong message to Washington's *Mixtecos* that Columbia is a trustworthy organization, Columbia's office in the heart of central Washington prioritized cases that involve *Mixtecos*. After helping a few clients with

legal problems, word began to spread and, as a result, *Mixtecos* now refer family and friends to Columbia. As a result of this combination of targeted outreach, communication, and advocacy, Columbia has begun to build trust within the *Mixteco* community. Now that Columbia has represented various homeowners in Othello Fields, more homeowners think of Columbia when they have housing problems. We are optimistic that by increasing homeowners' knowledge and challenging park management when problems arise, the quality of life for all families living in the park will improve. As advocates continue to strengthen their ties to the community, trust, communication, and interaction will increase and should help *Mixtecos* enjoy the benefits of rights that belong to them under Washington State law.

VII. Lessons Learned and the Way Forward

Years of experience working directly with immigrant workers, and more recent work with Washington State's growing indigenous immigrant communities, have taught us many lessons about the effective legal representation of transnational migrants. Primary among these have been that workers are most likely to assert their legal rights when they find trusted advocates and community organizations to help them. While all immigrants face cultural, geographic and linguistic isolation, indigenous workers face a deeper level of isolation and discrimination. The traditional means of community support, such as unions, community interaction, church, neighborhood groups and bilingual media simply don't exist in most communities in which indigenous workers find work. Spanish-speaking advocates and co-nationals who cannot communicate directly with workers in their own language are hampered in their attempts to render assistance.

Workers are more likely to seek help when they have overcome isolation. For many, this means seeking the support of their community both in the United States and their place of origin. Important aspects of that support include access to advocates who understand their unique language and culture. Finding community members who understand their legal problems and work to protect their rights is also integral to that support. While the U.S. legal system has jurisdiction over these workers' legal problems, only their home communities in Mexico can provide adequate moral support.

Properly addressing legal issues fundamental to indigenous immigrants requires cross-border collaborations and building upon existing resources in both countries. Opportunities for collaboration exist at several levels. In this section, we outline three potential opportunities presented from the general to the more specific, and offered here as initial thoughts gleaned from our experiences and those of indigenous community leaders in Washington State. We present these with the caveat that while we have a fairly clear understanding of the resources that exist in Washington State as well as fair knowledge

of existing resources within the U.S., our knowledge of what is available in Mexico and Guatemala is far outweighed by what we do not know. We welcome additional ideas for collaborative projects, as well as criticism and further development of these ideas.

1. *Create a Washington State Pilot Project to Develop a* Pro Bono *Practice within Mexico and Guatemala*

Along with its rich tradition of publicly and privately funded legal services programs, law schools active in community projects, as well as progressive trade unions, Washington State has traditionally had a deep commitment to lawyer volunteerism. This is due in large part to the commitment made by the association of attorneys, the Washington State Bar Association.

In Washington State, all lawyers must belong to the state Bar Association.[163] The Bar Association administers the statewide test that admits lawyers to practice, and oversees yearly licensing and disciplinary processes that can result in the loss of attorneys' license to practice law. The Washington State Supreme Court sets rules that lawyers must follow in order to continue in their profession. One of the state rules governs *pro bono* practice, and states: "Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay. A lawyer should aspire to render at least thirty (30) hours of *pro bono público* service per year."[164]

Generally, *pro bono* work means legal work that is provided without charge or at a reduced charge to individuals or religious, charitable, community, educational, or other groups. For many low income people, including indigenous immigrant workers, their only opportunity to access legal representation is through a *pro bono* attorney.

At its highest levels, the Washington Bar Association encourages and celebrates *pro bono* service. The Bar Association has a separate committee dedicated to increasing *pro bono* service by issuing yearly awards for such service, supporting a county-by-county *pro bono* recruitment network, and publicizing *pro bono* opportunities to its members.[165] Some larger law firms hire coordinators who recruit lawyers from within the firm to do volunteer *pro bono* work.[166]

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[163] At both the state and federal level, many voluntary associations of lawyers exist, such as the American Bar Association and the National Lawyers' Guild. Smaller voluntary affinity groups also proliferate, such as associations of labor lawyers, immigration lawyers, and the like.

[164] Washington State Rules of Prof'l Conduct 6, *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=ga&setName=RPC&pdf=1.

[165] *See* Washington State Bar Association, *available at* http://www.wsba.org/Legal-Community/Volunteer-Opportunities/Public-Service-Opportunities/Pro-Bono-Opportunities; Pro Bono Opportunities Guide, *available at* http://www.advocateresourcecenter.org/oppsguide/.

[166] Recent important *pro bono* legal work on behalf of indigenous workers in Washington includes the successful *pro bono* representation of a *Mam* woman from Todos Santos who sought

It is our understanding that such a formal *pro bono* system does not exist in Mexico or Guatemala, although lawyers in these countries certainly volunteer in their communities, and some *pro bono* services to the poor are offered through law schools as well as through Non-Governmental Organizations ("NGOs") with lawyers on staff. A collaborative project between Washington State and Mexico lawyers and law schools —and, as the project develops, their counterparts in Guatemala— could establish a more formal system of *pro bono* service. That, in turn, could increase our mutual understanding of each country's legal system and increase resources available to indigenous and other migrant workers when they return home.

One step towards a pilot project of this nature was a 2011 *pro bono* conference sponsored in 2011 by the University of Washington. The conference included deans and faculty of UNAM and the Universidad Michoacán del Oriente in Mexico.

2. *Build a Cadre of Lawyers and Community Organizers that Can More Effectively Represent Indigenous Workers*

A clinical or other law-school based program could train lawyers who have ties to indigenous communities transnationally, are knowledgeable about law and practice transnationally, and who could work together, in conjunction with community groups, to enforce indigenous workers' rights within the United States. A law school class or clinic could focus on one particular subject —immigration, labor rights, rights of those who do not speak the dominant language, or rights of indigenous people— with sessions including international law, national law, local law, and law that arises from the customs and usages of indigenous people. Bilingual students could study for a portion of their time in Mexican or Guatemalan law schools and a portion of their time in Washington State law schools. For part of the coursework, students could spend some time in the home communities of indigenous people and the U.S. communities where indigenous people settle, working with community leaders and helping to identify legal problems for indigenous migrants and potential solutions to these problems.

The three law schools in Washington State (Seattle University, the University of Washington, and Gonzaga University) could help develop this project. Each has a vibrant clinical program. Seattle University is linked to the Jesuit university system in Mexico, and the University of Washington has signed an agreement with the National Autonomous University of Mexico (UNAM) to promote an exchange of students and legal education. UNAM

and was granted withholding of deportation by the United States Immigration Court in Seattle in April 2011 based on past gender-based violence, her well-founded fear of future gender-based violence if she returned to Guatemala, and the documented failure of Guatemalan authorities to protect rural Mayan women from gender-based violence.

operates an extensive practice project for third-year law students, its *bufetes jurídicos gratuitos*, that include labor law in their portfolio. Columbia Legal Services in Washington State, a not-for-profit law firm, has a long tradition of community-based lawyering, and has spearheaded an indigenous worker legal project. Ties are beginning to develop between Washington legal services, Washington community leaders, and NGOs that operate in communities in Oaxaca from which migrant workers come. These NGOs include the Frente Indígena de Organizaciones Binacionales ("FIOB"), the Global Workers Justice Alliance Defenders Network, and the Centro de los Derechos del Migrante, all of which work within Oaxacan communities to provide support to indigenous migrant workers.[167] The project could also help to identify bi- or tri-lingual community members who could work with communities in Washington State.

3. *Increasing Access to Workers' Compensation for Indigenous Transnational Workers*

As noted earlier in this article, employees injured on the job in Washington are entitled to paid medical care and compensation in the event of lost wages, disability, or death. But many workers do not even file compensation claims because they are unaware of their rights. Apart from the dangers of retaliation, lack of knowledge of their rights, and language barriers, they face practical challenges to cross-border access to compensation. For many workers in agriculture and brush harvesting, including indigenous workers, who return to their homes as their base of care and support, workers' compensation benefits simply end. State agencies are ill-equipped to pay compensation across borders. Access to prescription drugs out of the U.S., and the billing process for these, is problematic. Even more daunting is finding a surgeon, specialist, physical therapist, or other medical provider located near the worker in Mexico or Guatemala who is willing and able to bill a U.S. state agency for their services.

A pilot project could match medical services in the United States with medical services in Mexico or Guatemala and coordinate worker's compensation billing and payment mechanisms in the United States with those in Mexico or Guatemala. Such a project could explore systems for accomplishing smooth handling of worker's compensation claims across borders. The Washington State Department of Labor & Industries, which administers the state program, is amenable to processing the claims transnationally. The Secretariat of Foreign Affairs with its consulates, the Secretariat of Health, the National Commission on Human Rights, or other public or private institutions within Mexico might be conduits for identifying and training physicians to handle claims. Ongoing efforts to identify secure means of transferring

[167] *See* www.fiob.org; www.globalworkers.org; www.cdmigrante.org.

money to rural areas of Mexico and Guatemala could be applied in order to ease payments to workers and their providers.

This project would take advantage of already existing public and private legal resources identified in the U.S. —law schools, NGOs, and public agencies charged with protecting workers. It could be scaled up to other areas both in the U.S. and elsewhere, especially the six states where most foreign worker fatalities occur (California, New York, Florida, Texas, Illinois, and New Jersey).[168] For Mexico, it could explore linkages within the U.S. with other legal services providers, medical service providers, unions, and community groups that have a presence in these states and in Mexico, such as the National Alliance of Latin American and Caribbean Communities, and Enlace International. Migration and human-rights-focused NGOs such as the Scalabrini Casas del Migrante, the Pastoral de Movilidad Humana, and projects in Mexico of the Appleseed Foundation might also be of help. Linkages between the two countries could help establish ties to other human rights, legal, or health-focused organizations.

With nearly 10,000 indigenous Mexican and Guatemalan workers in Washington State coupled with a high rate of workplace accidents given the dangerous work in which they are involved, cross-border access to workers' compensation is an important goal. Since employers pay into the workers' compensation system for the benefit of workers, and since rates depend on their safety record, ensuring access to compensation for transnational workers can promote workplace safety within the U.S.

VIII. Conclusion

Indigenous migrants to Washington State face a variety of legal difficulties that intersect in complex ways and are often compounded by social and cultural barriers. Despite these barriers, however, transnational indigenous migrants from Guatemala and Mexico contribute socially and economically to the state and create increasingly settled communities. In order to effectively serve these indigenous communities, social, legal, and medical services providers must collaborate with these communities, each other, and cross-border colleagues. With greater cooperation, patience, and persistence, the lives of indigenous peoples can be improved —regardless of where they live.

[168] Katherine Loh & Scott Richardson, *Foreign-Born Workers: Trends in Fatal Occupational Injuries 1996-2001,* Monthly Labor Review 41-44 (2004).

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CORPORATE VEIL PIERCING: A PROPOSAL FOR MEXICO

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Abstract. *This article uses an Economic Analysis of Law approach to propose the adoption of the doctrine of corporate veil piercing in Mexico. This study not only recognizes the economic benefits of limited liability for society, but also identifies the incentives it creates for shareholders to abuse of the corporate form by using the corporation to unduly appropriate a corporation's assets at the expense of the corporation's creditors. On this basis, the article describes the American equity doctrine of veil piercing that courts apply in order to reach shareholders' assets in cases of fraud or misconduct against the corporation's creditors. Finally, the paper describes the current legal framework in Mexico and proposes the adoption of corporate veil piercing in the Mexican legal system.*

Key Words: *Corporation, legal personality, limited liability, corporate veil piercing, economic analysis of law.*

Resumen. *Este artículo propone la adopción de la desestimación de la personalidad jurídica en México, empleando como método el análisis económico del derecho. Este estudio no sólo reconoce los beneficios económicos que se derivan de la responsabilidad limitada para la sociedad, sino que también identifica los incentivos que ésta crea en los accionistas para apropiarse indebidamente de los bienes de la sociedad anónima en detrimento de los acreedores de ésta. Sobre esta base, el artículo describe la doctrina americana de la desestimación de la personalidad jurídica que los jueces aplican para alcanzar los bienes de los accionistas en casos de fraude o de actos ilícitos cometidos en contra de los acreedores de la sociedad anónima. Finalmente, el artículo describe el marco jurídico actual en México para hacer frente al abuso de la forma societaria como resultado de la responsabilidad limitada y propone la adopción de la desestimación de la personalidad jurídica en México.*

Palabras clave: *Sociedad anónima, personalidad legal, responsabilidad limitada, desestimación de la personalidad jurídica, análisis económico del derecho.*

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I. Introduction

In the 19th century, new challenges posed by the industrial revolution forced entrepreneurs to find innovative ways to organize their business activities and limit their exposure to liability.[1] Although industrial enterprise at that time required increased capital investment and risk, the rule of unlimited liability made raising capital ex- tremely difficult, as few investors were willing to risk all their assets on a single investment. For this reason, laws regarding limited liability and modern corporate structure were enacted to help large enterprises acquire working capital. As a by-product, these rules also helped boost the economic role played by small entrepreneurs.[2]

Since then, limited liability has facilitated investment in large, complex enterprises as well as a wide range of risky activity.[3] From an economic perspective, limited liability has become "the most efficient system of allocation of business risks and costs";[4] as it has benefited not only individuals and legal entities but also enhanced the growth of companies and corporate conglomerates. Limited liability has also played a key role in industrial R&D, as it

[1] In the beginning, corporate charters were granted by the state and were viewed as a privilege for corporations engaged in activities related to public functions. *See* Philip I. Blumberg, *Limited Liability and Corporate Groups. Procedural Law*, 11 J. Corp. L. 573 (1986), reprinted in Franklin A. Gevurtz, Corporate Law Anthology, 14, 17 (1997). This is true for corporations in common law countries. The origins of corporations in Roman Law countries is older; it can be traced back to the 17th century. *See* Jorge Barrera Graf, *Las sociedades en derecho mexicano*, 3 (1983).

[2] *See* Stephen B. Presser, Piercing the Corporate Veil 1-15 (1991).

[3] *Id.*

[4] *See* José Engracia Antunes, *Liability of Corporate Groups* 127 (Studies in Transnational Economic Law, Vol. 10, Kluwer Law and Taxation Publishers, 1994).

creates incentives for shareholders to invest in risky but potentially high value-added activity.

Unfortunately, limited liability has also created incentives for shareholders to abuse the corporate form by using the corporation to commit fraud and other unlawful acts at the expense of creditors. Although many arguments may be made against the abuse of limited liability, Economic Analysis provides a useful insight into the effects of such behavior. From this point of view, the abuse of limited liability creates economic inefficiencies, as corporations transfers improperly the cost of their activities to creditors; as a result, the "corporation engages in socially-excessive risk taking."[5] Put differently, the company's managers are incentivized to take excessive risk, often involving activities that promise little real value.[6] As a consequence, the company does not properly internalize the real costs involved.

The abuse of limited liability is closely related to corporate structure and types of investors. When the company has only a few shareholders, the problem of socially excessive risk is exacerbated. [7] When shareholders participate in company management, they are more likely to engage the enterprise in risky activity —at the expense of creditors— in order to obtain a higher return on their investment. Cost transfer to creditors is exacerbated when the creditors cannot negotiate adequate compensation because; (a) they are unable to sign agreements with the corporation (e.g. tort creditors); or (b) despite having signed an agreement, the interest rate charged is based on deceptive information about the company's finances.

Given these potential side effects, several provisions in the Ley General de Sociedades Mercantiles [hereinafter LGSM] and the Código Civil Federal [hereinafter CCF] have been implemented in Mexico to protect creditors against corporate insolvency *despite* limited liability, including minimum capitalization requirements,[8] restrictions on dividend payments[9] and fraudulent

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[5] *See* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 109 (1985).

[6] For the purposes of this paper, value-creating activity means that the total value of such activity increases the value for both the corporation's shareholders and creditors. Conversely, an activity is not value-creating when the total value is negative because the cost it imposes on creditors is greater than the benefits obtained by shareholders.

[7] This statement includes subsidiaries controlled by its parent; this paper, however, will not analyze the treatment of parents and their subsidiaries in the context of veil-piercing due to time and space constraints.

[8] Minimum capitalization requirements are based on the concept of capital as an expression of a minimum amount of assets that are available to creditors during the life span of the corporation, and which consist in shareholder's equity contributions. Shareholders are free to determine that amount in the charter, but in any case it cannot be less than $50,000 pesos. *See* LGSM, Articles 6, V and 89, II.

[9] The LGSM imposes restrictions on dividend payments as well. The payment of dividends is determined by shareholders in the annual meeting. Just as statutory reserves, restrictions on dividend payments are based on the notion of capital; they arise from net earnings, after

conveyance law.[10] Although these rules help protect creditors, they have proven to be impracticable and fairly easy to circumvent.

In the United States, a special provision known as "piercing the corporate veil" or "veil piercing" is used to challenge limited liability in cases of shareholder fraud or misconduct. Under this doctrine, "a court determines that the debt in question is not really a debt of the corporation, but ought, in fairness, to be viewed as a debt of the individual or corporate shareholder or shareholders."[11] Despite this law's effectiveness in dealing with the abuse of limited liability, it has a "rare, severe and unprincipled" nature.[12]

The purpose of this article is to analyze the rules of veil piercing in the United States and formulate a proposal for its enactment in Mexico. Since a full analysis of limited liability cannot be presented here due to space constraints, this article is offered as an introduction.

Although veil piercing may be applied to diverse business structures, including limited liability partnerships (LLPs) and limited liability companies (LLCs), this article shall only consider the corporate form in its analysis. Although veil piercing is commonly applied to parent-subsidiary relationships —as the incentives to abuse limited liability and corporate structure is exacerbated in these situations— I shall only look at the general rules of veil piercing, as these principles also apply to parent-subsidiary relationships. A deeper analysis of these types of relationships, in particular corporate groups, is beyond the scope of this work.[13]

The content is structured as follows: Part II discusses definitions of the corporation and limited liability. Part III explains the legal and economic rationale of limited liability. Part IV analyses the inefficiencies and incentives that limited liability creates for shareholders and managers to make the corporation engage in excessively risky activity. Part V describes the rules of limited liability as well as legal measures used to deal with its abuse under Mexican Corporate Law. Part VI describes the equitable doctrine of veil piercing in

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the amount of capital has been covered and the assets for the statutory reserve have been separated. *See id.* Article 18. The statute sanctions shareholders and managers making them liable for the amounts distributed in violation of the statutory requirement to cover capital and reserves, and for the dividends declared and distributed despite of the lack of earnings. *See id.* Articles 172, 173 and 181.

[10] The CCF regulates the *acción contra la simulación*, the *acción pauliana* and the *acción oblicua*. The two first remedies are similar to the American fraudulent conveyance law. *See* CCF, Articles 2180-2182 and 2163-2169.

[11] Presser, *supra* note 2, 1-6.

[12] *Id.* at 89.

[13] The justification for piercing the corporate veil of a corporation is not that different from the justification of veil-piercing corporate groups. In fact, in the context of corporate groups the problems of limited liability are exacerbated, which makes the piercing of the corporate veil of a subsidiary even more evident. Discussion of corporate groups focuses on whether the whole group or just the parent should be held liable for the subsidiary's debts. Given space and time constraints, such analysis is beyond this study.

the U.S., including its advantages and disadvantages for both debtors and creditors. Part VII explains previous attempts to adopt veil piercing legislation in Mexico. Part VIII presents ways to implement veil piercing in Mexico. Part IX offers conclusions.

II. Definitions of Legal Personality and Limited Liability

1. *Legal Personality*

The corporation is a legal person; an autonomous entity with its own legal personality distinct from those of its shareholders.

The legal personality of the corporation has been explained by Hansmann and Kraakman as a way to partition assets. In their view, legal personality facilitates "the separation between the firm's bonding assets and the personal assets of the firm's owners and managers."[14] According to these authors, legal personality is an "affirmative asset partitioning" that results in "the designation of a separate pool of assets that are associated with the firm and are distinct from the personal assets of the firm's owners and managers."[15]

Legal personality plays a key role in activities performed by every business. Benefits of legal personality to corporations include: property acquisition in the name of the company rather than the shareholders; perpetual life for the entity; preservation of the business's going-concern value; and a reduction of monitoring costs.[16]

2. *Limited Liability*

Frank Easterbrook and Daniel Fischel define limited liability as "a complex set of contracts among managers, workers and contributors of capital" that "means that the investors in the corporation are not liable for more than the amount they invest."[17]

Hansmann and Kraakman explain the concept of limited liability based on asset partitioning. These authors claim that limited liability, as opposed to legal personality, is a defensive form of asset partitioning "in which creditors of the firm have no claim upon the personal assets of the firm's shareholders, which are pledged exclusively as a security to the personal creditors of the individual shareholders."[18]

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[14] *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387, 393 (2000).

[15] *Id.*

[16] *See* Robert Charles Clark, *Corporate Law*, §1.2 (1986).

[17] *See* Easterbrook & Fischel, *supra* note 5, at 89.

[18] *See* Hansmann & Kraakman, *supra* note 14, at 395.

III. Legal and Economic Rationale of Limited Liability

The main justification of limited liability is its efficient allocation of risks and costs.[19] In this way, limited liability has been explained in the context of both the entity's structure and the relationships between shareholders, managers and creditors.

1. *Corporate Structure and Types of Creditors*

The number of shareholders, their role in corporate management and the types of creditors involved in the enterprise also strongly influence the incentives created by limited liability.

A. *Types of Corporations*

Regarding corporate structure, commentators have identified two types of entities: publicly-held and closely-held corporations.

a. Publicly-Held Corporations

The main features of publicly-held corporations are: *a)* the free transferability of investor's interests; and *b)* the separation of management from ownership.

Melvin Aaron Eisenberg defines this type of corporation as one with "a large number of shareholders, most of whom neither participate in the management of the corporation nor directly monitor corporate management."[20]

Publicly-held corporations are generally large enterprises requiring large amounts of capital and many investors to engage effectively in business.

In a publicly-held corporation, shareholders are so numerous that no single party owns enough shares "to have the incentive, or the ability, either individually, or by creating coalitions with other shareholders, to exercise control over the operational or strategic decisions of the firm."[21] This type of corporation is most suitable for passive shareholders whose sole interest is investment. Minority shareholders often do get involved in the affairs of corporations, especially if their interests are considered "strategic." The main point is that nothing prevents any shareholders, even those who own a small minority, from getting involved in corporate affairs, to a certain extent. Con-

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[19] *See* Engracia, *supra* note 4, at 127.

[20] *See* Melvin Aaron Eisenberg, *Contractual Freedom in Corporate Law: Articles and Comments; The Structure of Corporation Law*, 89 Colum. L. Rev. 1461, 1471 (1989).

[21] *See* William A. Klein & John C. Coffee, Jr., Business Organizations and Finance Legal Economic Principles, 107 (8th ed., 2002).

trol is instead exercised by professional managers as it "eliminates the risk that a lone shareholder could take action in the firm's name that would effectively bind the others."[22]

The free transferability of shareholders' equity interests reinforces the passive attitude of many shareholders. Free trade makes it easy for shareholders to enter and exit the corporation at any time. The corporate form is a model contract that reduces transaction costs because its terms are so complete that investors have no need to negotiate with other shareholders or the corporation's creditors.[23]

b. Closely-Held Corporations

Closely-held corporations are typically small enterprises with "a small number of shareholders, most of whom either participate in or directly monitor corporate management."[24]

Unlike publicly-held corporations, the structure of closely-held corporations does not allow the free transferability of shares and the separation of ownership and control.[25] Closely-held corporations function as like partnerships.[26] Since there are fewer shareholders, most participate in corporate management. By participating in the decision-making process, shareholders ensure that the corporation generates profit. Shareholders limit the free transferability of shares in these types of enterprises in order to capture benefits for themselves.

B. *Types of Creditors*

In economic terms, creditors can be classified into two types: voluntary and involuntary. The main difference between them is their respective abilities to negotiate the allocation of risks and costs.

Whereas voluntary creditors normally enter into contracts with debtors after negotiating terms based on risk, involuntary creditors do not enter into contracts because of excessive transaction costs.[27]

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[22] *Id*. at 109.

[23] *Id*. at 108.

[24] *See* Eisenberg, *supra* note 17, at 1463.

[25] *See* Clark, *supra* note 13, at §18.1.

[26] Under the Uniform Partnership Act §101 (6), a partnership "means an association of two or more persons to carry on as co-owners a business for profit." The difference between a partnership and a corporation is that partners are not protected with limited liability whereas corporate shareholders are protected with limited liability. The lack of limited liability protection for partners creates incentives for them to take part actively in the management of the partnership.

[27] Transaction cost is "the cost of effecting an exchange or other economic transaction.

Voluntary creditors generally know more about the risks involved and can better negotiate contractual terms with debtors. For example, as credit specialists, financial creditors are in a better position to negotiate contract terms; conversely, employees enter into agreements with employers but generally have less information about the business and significantly less bargaining power.[28] With respect to involuntary creditors, a classic example is tort creditors.

2. *Benefits of Limited Liability*

As mentioned above, the economic reality and structure of corporations as well as the types of creditors involved determine the advantages and disadvantages of limited liability. In this way, publicly-held corporations and financial creditors in general have been used as the premises to justify the limited liability principle for corporations.

A. *Posner*

In an article published in the 1970's, Richard Posner analyzed the benefits of limited liability.[29] For Posner, the principle of limited liability is so basic to investment that even in the absence of legal statutes, the parties would invariably contract to limit their respective liabilities. The main reason is that investors would be rarely if ever willing to put at risk more than the amount of their total investment. As a result, the risk assumed becomes part of negotiations and helps define the terms between borrowers and investors.

Posner holds that creditors are risk averse; and that if not for a limit on liability, they would be much less willing to invest. Creditors set an interest rate according to the risk assumed, making them indifferent between a risky and a "riskless" credit. Moreover, creditors are better positioned to bear risk; they can assess risks more easily and economically than shareholders, who only seek to invest and know little about the actual affairs of the business. Many creditors specialize in lending, so they have enough information to determine the level of risk to which they are exposed and then can set the appropriate interest rate. If an increase in risk of default can be foreseen, creditors can raise interest rates accordingly; if this increase is unknowable, however, then another feasible option would be amortized loans. In case the risk of default during the life of the loan decreases, the borrower can always negotiate an

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These costs, which vary in magnitude from one economic system to another, include those of negotiating and drafting contracts and the subsequent costs of adjusting for misalignments." See Donald Rutherford, Routledge Dictionary of Economics, 569 (2nd ed., 2002).

[28] *See* Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. Chi. L. Rev. 499, 505 (1976).

[29] *See id.*

interest rate reduction. In order to protect themselves, lenders usually include restrictions on corporate activity in the loan agreement.

For Posner, limited liability is necessary because it helps to minimize the overall social cost of capital.[30] When statutes establish limited liability for certain types of business enterprise, the parties involved no longer need to bargain every term and condition; as a result, the costs and times associated with transactions have been significantly reduced.

B. *Easterbrook and Fischel*

Easterbrook and Fischel identify two basic principles for limited liability in a corporation (a) reduced separation cost and specialization; and (b) reduced capital costs.[31]

a. Separation cost and specialization

i) Limited Liability Reduces the Costs of Monitoring other Shareholders and Managers

When corporate liability is unlimited, shareholders are liable for the debts of the corporation; thus all their assets are at stake. The exposure of shareholders' assets to creditors creates incentives for shareholders to transfer assets from the corporation to themselves at the expense of other shareholders. In these circumstances, shareholders have to monitor other shareholders in order to prevent this from occurring. Limited liability eliminates the need for asset transfer.

This principle also applies to monitoring corporate managers. In an agency relationship, the agent has incentives to act in a way that can harm the principal. This holds true for the agency relationship between shareholders and managers. Shareholders must monitor managers in order to keep them from transferring the corporation's assets to themselves. When liability is limited, the "cost of precaution" equals the expected "cost of harm"[32] (which

[30] *See id*. at 501. Posner considers that despite risks faced by creditors, unlimited liability or prohibition on dividend payments would be uneconomical, an "efficient corporate law is not one that maximizes creditor protection on the one hand or corporate freedom on the other, but one that mediates between these goals in a way that minimizes the costs of raising money for investment." *Id*. at 509.

[31] *See* Easterbrook & Fischel, *supra* note 5, at 98-101.

[32] According to the Economic Analysis of Law, "when each individual bears the full benefits and costs of his precaution, economists say that social value is internalized. When an individual bears part of the benefits or part of the costs of his precaution, economists say that some social value is externalized. The advantage of internalization is that the individual sweeps all of the values affected by his actions into his calculus of self-interest, so that self-interest

equals the amount of their investment); beyond this point, the value of monitoring is significantly reduced.

ii) Limited Liability Allows the Free Transfer of Stock and a Reduced Purchase Price

When liability is unlimited, value equals "the present value of future cash flows and the wealth of shareholders."[33] Share transfers to new investors necessarily involve negotiations with shareholders; as a result, investors interested in acquiring stock must invest time and money in obtaining information about pricing.

On the contrary, limited liability makes shares fungible, because their value "is determined by the present value of the income stream generated by a corporation's assets."[34]

As a consequence, share value reflects how well the company executives are managing the enterprise. When the share prices fall, it is generally a signal of poor managerial performance. Outsiders are likely to purchase a large volume of shares in order to assert control of the corporation and achieve more efficient management. This creates incentives for managers to administer the corporation efficiently.

iii) Limited Liability Facilitates the Diversification of Risks to Shareholders

When corporate liability is unlimited, shareholders lack incentives to diversify their investments because it increases their risk of loss. As a result, it becomes more difficult to raise capital from new investors. Conversely, limited liability permits shareholders to diversify their investments in order to reduce risk.

iv) Limited Liability Facilitates Investment in Risky Activities

When corporate liability is limited, shareholders have incentives to invest not only in positive net-present value activities but also risky projects that could otherwise make them lose their entire assets.

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compels him to balance all the costs and benefits of his actions. According to the marginal principle, social efficiency is achieved by balancing all costs and benefits […] In situations when both the injurer and the victim take precaution against the harm, the internalization of costs requires both parties to bear full cost of the harm." See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, Economic Analysis of Law: Selected Readings 42 (Donald A. Wittman ed., 2008).

[33] *Id.* at 96.

[34] *Id.* at 98.

b. Capital Costs

Markets thus provide valuable information to creditors and shareholders about the risks of any specific investment, thereby lowering search and due diligence costs.

As the costs of corporate monitoring are financed by both shareholders and creditors, the incentive to monitor excessively is generally reduced.

According to Easterbrook and Fischel, share price "reflects the value of the firm as affected by decisions of specialized agents,"[35] *i.e.*, it generally reflects how well a corporation is managed. Since investors have only a residual claim if the corporation becomes insolvent, they are motivated to monitor only to the extent that such cost does not exceed the total amount of their investment. Shareholders' monitoring of activities benefit the corporation's creditors. The creditors' incentive to monitor the corporation, especially when their interests are secured, does not generally exceed their respective interest; as a result, their monitoring cost is reduced. Notably, creditors have a comparative advantage in monitoring management. This is especially true for sophisticated creditors who specialize in lending. This type of creditor has industry-specific information that permits negotiation of contractual terms in return for partial protection from risk.

C. *Hansmann and Kraakman*

Hansmann and Kraakman have developed arguments that complement the ideas explained above.[36]

For these scholars, limited liability reduces monitoring costs not only for the company's creditors but also for the shareholders' personal creditors. Under limited liability, shareholders' personal creditors solely monitor assets belonging to their debtors rather than the corporation in which their debtors have made investments.

Limited liability also helps reduce so-called governance costs. Firstly, it permits shareholders to participate in the company's gains and losses as well as exercise control over the enterprise, regardless of their identities and holdings. Secondly, it shifts the burden of monitoring from the shareholders to creditors. This is desirable, since many creditors are better informed about the corporation's financial condition.

Finally, under unlimited liability, creditors collect from shareholders' personal property when the corporation is insolvent; however, collection efforts imply costs for both creditors and shareholders, thus a significant amount collected from shareholders' personal property is wasted in collecting.

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[35] *Id.* at 95.

[36] Despite the fact that Hansmann & Kraakman offer diverse arguments, I will only cite those which I believe contain new elements.

IV. Inefficient Incentives Created by Limited Liability

As it was explained, limited liability has both positive and negative effects. The negative effects are closely related to corporate structure, types of creditors and asymmetrical information.

1. *Involuntary Creditors and Uninformed Creditors*

Limited liability allocates risks to competent risk-bearers. Creditors are deemed to be better risk-bearers than shareholders because they usually have more and better information to evaluate risks. They can also negotiate compensation packages in a contract that more accurately reflect the risks involved, including protective covenants to minimize increases in the risk of default (voluntary creditors). There are, however, exceptions to this assumption because there are creditors that, for different reasons, cannot enter into a contract to protect themselves against the risk of default (involuntary creditors).

Some involuntary creditors do not enter into a contract with the debtor because it is prohibitively expensive for them to negotiate the terms of the contract. Some involuntary creditors do not enter into a contract with the debtor because the probability of loss or default is too low, thus negotiating protection against such loss turns wasteful.

It should be noticed that the problem of allocation of the risk is not exclusive for involuntary creditors (who do not enter into a contract to allocate the risk of loss); the allocation of the risk is a problem for many voluntary creditors too, specifically for uniformed voluntary creditors. Many voluntary creditors —despite being in a contractual relationship with the debtor— lack the bargaining power to adequately allocate costs and protect their credit upon entering into a contract. Lastly, the elevated cost of information often prevents creditors from adequately assessing the risks involved; as a result, these investors often fail to negotiate a proper compensation and protection package.[37]

When the corporation "misrepresents the nature of its activities, its ability to perform or its financial condition,"[38] creditors cannot accurately assess risks and, as a result, are unable to formulate adequate compensation packages. When creditors are not adequately compensated for their risk of loss, the corporation is forced to externalize these costs, resulting in harmful inefficiencies.

This problem is exacerbated when there is an asymmetry of information,[39] which confers an advantage on informed parties at the expense of unin-

[37] Posner defines unsophisticated creditors as those "to whom the costs of ascertaining the true corporate status of the real estate company would be substantial." Posner, *supra* note 23, at 521.

[38] *See* Easterbrook & Fischel, *supra* note 5, at 112.

[39] Asymmetric information is not by itself inefficient; in fact, it can have an efficient result

formed parties. Asymmetric information is problematic because it usually results in a redistribution of wealth. Creditors are forced to spend money to learn the real financial situation of the corporation, a completely unnecessary expense.[40]

Insurance has played an important role in this area, mainly in tort liability. Insurance functions as a private system of liability in which insurers charge premiums based on the risks of each activity. Debtors also have incentives to protect their assets by insuring against liability; this does not mean, however, that all debtors purchase insurance. Furthermore, for some types of harm it is better to deter the harmful party; insurance only allows the insured party to continue engaging in risky and socially undesirable activities in exchange for a certain amount of money. One alternative is to post bond in the amount of the expected liability; even though this solution is usually only available when the debtor is well capitalized.[41]

As for voluntary creditors with no bargaining power or insufficient information to negotiate effectively, Easterbrook and Fischel hold that the corporation can have optimal incentives to take precautions, as long as the creditors are well-represented and organized. This is usually the case with bondholders and employees, who can be represented by a trustee or labor union that negotiates compensation as well as other terms and conditions.[42]

2. *Closely-Held Corporations*

Aside from the structure and function of closely-held corporations, other elements must be taken into account when analyzing the negative effects of limited liability.

In general, as long as the corporation is solvent, its managers' main fiduciary duty is to maximize shareholders' interests. Shareholders participate in corporate profits in the form of dividends but are also among the first to lose their investments when the corporation goes belly-up; for this reason, shareholders prefer projects which involve higher-than-expected returns. Activities with higher-than-expected returns imply a higher risk of loss that may hurt creditors as the corporation may become insolvent.

In publicly-held corporations, shareholders generally cannot make corporations engage in excessively risky activity because their ownership interests are too small to influence managerial decisions. In fact, managers at most publicly-held corporations risk losing their jobs if shareholders become un-

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when it contributes to create a link between knowledge and the control of resources at minimal cost. *See* Robert Cooter, Law and Economics, 282 (4th ed., 2003).

[40] *See* Posner, *supra* note 22, at 521.

[41] For a deep analysis of the problems related to limited liability and liability insurance *see* M. LoPucki, *The Death of Liability*, 106 Yale L.J. 1 (1996-1997) at 71-369.

[42] *See* Easterbrook & Fischel, *supra* note 5, at 105.

satisfied with corporate performance. The risk of job loss gives managers incentives to make efficient decisions at the expense of the business's creditors.[43]

In closely-held corporations, however, there is rarely a separation between ownership and management; shareholders usually play active roles in the company's affairs, acting as managers or exercising control over management to engage in high-risk activities to the detriment of creditors.[44] In addition, shareholders in closely-held corporations often have incentives to enter into self-dealing transactions with the enterprise, which may leave it with insufficient assets to pay creditors. It should be noted that these incentives increase when the corporation is under financial distress.

V. Limited Liability and Rules to Protect Creditors in Mexico

1. *The Corporate Form in Mexico*

The origins of the corporate form in Mexico go back to the eighteenth century in the *Ordenanzas de Minas* that established the basis for the creation of enterprises by dividing capital contributions into freely transferred units and granting owners the right to vote.[45]

The first statute to properly regulate corporations was the *Código de Comercio* of 1854 (Commercial Code of 1854) which recognized certain types of business enterprises as legal persons and allowed limited liability for their shareholders. Although the 1883 and 1889 codes regulated corporations and other business organizations, it wasn't until 1934 that the national Congress issued a specialized law, the *Ley General de Sociedades Mercantiles*[46] (General Law of Corporations).

Despite the controversy surrounding the nature of corporations, the Mexican legal system treats the construct of the corporation as a contract among investors for the fulfilment of a common goal.[47]

A single shareholder, for example cannot establish a corporation under the LGSM, which requires a minimum of two shareholders.[48] There are two rationales for this rule: *a)* the corporation is an exercise of the constitutional right to assemble;[49] and *b)* the corporation is a contract between investors and, as such, requires at least two parties. [50]

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[43] *See* Frank H. Easterbrook, *Two Agency- Cost Explanations of Dividends*, 74 Am. Econ. Rev. 650, 652 (1984).

[44] *See* Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 Colum L. Rev. 1203, 1247-1259 (2002).

[45] *See* Joaquín Rodríguez Rodríguez, *Tratado de sociedades mercantiles*, 5 (7th ed. 2001).

[46] *Hereinafter* called LGSM.

[47] *See* Código Civil Federal [CCF] Article 2688 (Méx.).

[48] *See* Ley General de Sociedades Mercantiles [LGSM] Article 89 (Méx.).

[49] *See* Constitución Política de los Estados Unidos Mexicanos [CPEUM] Article 9 (Méx.).

[50] *See* CCF Article 1792.

The legal personality of an entity has to be recognized expressly by law.[51] In general, only business enterprises registered in the public registry are accorded legal personality.[52] The most important consequence of legal personality is the creation of a separate entity or "person" with its own rights, duties and assets distinct from those who created it.

Although no legal provision exists that explicitly allows corporations to invest in other corporations as shareholders, this power is implied in the LGSM, which stipulates that all corporate bylaws must contain the names of shareholders, whether individuals or entities, as long as the latter have legal personality recognized under law.[53]

2. *Current Creditor Protection Measures under Mexican Corporate Law*

As explained earlier, the modern-day corporation is founded upon the rule of limited liability; under this rule, shareholders are only liable for the company's debts up to the amount of their total investment.[54]

When the LGSM was drafted, it was recognized that shareholders have incentives to abuse limited liability by removing corporate assets at the expense of creditors; as a result, the LGSM sets forth certain legal protections to creditors, including: *a)* minimum capitalization requirements; *b)* statutory reserves; and *c)* dividend restrictions.

Other key provisions protecting creditors can also be found in the *Código Civil Federal* (Federal Civil Code)[55] which is used for issues not addressed in the LGSM. The CCF contains provisions that allow creditors to challenge fraudulent conveyances (*acción pauliana* y *acción contra la simulación)*.The same statute also entitles creditors to force debtors to collect against their debtors.

A. *Minimum Capitalization Requirements*

Minimum capitalization requirements are based on the concept of capital as the total of the shareholder's equity contributions, which is a minimum amount of assets available to creditors during the life span of the corporation.[56] Shareholders are free to determine the amount of capitalization in the

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[51] In this sense, for our legal system, the enterprise is considered an economic entity but not a legal person.

[52] *See* LGSM Article 2. This provision establishes an exception for those entities which are not registered but function and negotiate with third parties as if they had adopted any form of business organization; notwithstanding, the default in complying with this formality results in personal unlimited liability for the owners.

[53] *See id.* Article 6.

[54] *See* CCF Article 87.

[55] *Hereinafter* called "CCF."

[56] *See* Rodríguez, *supra* note 38, at 229.

articles of incorporation, but in no case can it be less than $50,000 pesos.[57] In principle, any change in capital stock requires an amendment of the articles of incorporation. To avoid unnecessary costs, the LGSM stipulates that under certain circumstances the company's capital stock may be modified without formal amendment.

Based on their ability to modify capital stock, corporations have been classified into "fixed capital" and "variable capital" entities.

a. Fixed Capital

In fixed capital corporations, capital can be reduced either by reducing the outstanding, authorized stock or by modifying the par value of shares; either change requires the shareholders' majority vote.[58]

The LGSM requires corporations to notify publicly creditors when the stock has been repurchased, so that creditors may petition a court of law to grant payment or legal protection. This remedy is unavailable when it can be shown that the remaining assets are sufficient to cover the company's debts.[59]

b. Variable Capital

In variable capital corporations, reducing capital stock is easier. For these types of enterprises, a specific number of shares authorized in the articles of incorporation represent the minimum capital stock amount set by statute. Any change in that amount requires compliance with provisions established for these entities.

Apart from minimum capital, there is also a maximum capital requirement which changes whenever the shareholders issue and retire new shares that vary from the minimum capital stock. The procedure to issue new stock can either be stipulated in the articles of incorporation or established by the shareholders in a special meeting convened especially for this purpose.[6061] Creditors cannot object to any reduction in such amount.[62]

According to this system, the minimum capital is not necessarily that established by statute but rather determined by shareholders in proportion to the company's size, regardless of whether the stock is issued at par value or no par value.[63]

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[57] *See* LGSM Articles 6, V and 89, II.

[58] *See* José R. García López & Alejandro Rosillo Martínez, Curso de Derecho Mercantil, 371 (2003).

[59] *See* LGSM Article 9.

[60] *See id.* Article 213.

[61] *See id.* Articles 216 and 219.

[62] *See* Jorge Barrera Graf, *supra* note 1, 157.

[63] The par value of a share does not determine the amount of capital; on the contrary, the

c. Downsides of Capital Requirements under the LGSM

The disadvantage of a minimum capital stock requirement is that it creates incentives for shareholders to set a low level of capitalization both at the time of incorporation and during the entire life of the company. Moreover, the remedy granted to creditors of fixed-capital corporations is insufficient because creditors can object before a court in order to obtain either the payment of the debt or an adequate protection of their claim, so long a reduction of the capital is the result of the reduction of the shares rather than the result of insolvency. It focuses on cases in which the corporation calls back shares.

B. *Reserve Requirement*

The LGSM requires corporations to create a reserve for unexpected losses. This represents certain assets that, in order to protect the company's creditors, may not be distributed to shareholders.

To form the reserve, the LGSM requires the corporation to allocate at least five percent of the company's annual net earnings until the reserve equals at least twenty percent of capital stock.[64] Based on the articles of incorporation or that determined by the company's managers, the reserve can be reinvested;[65] however, it can never be used to make ordinary business payments.

The reserve can be used only when the corporation is considered to be in financial distress. Although it may be used to cover losses in the company's capital stock, it must always be replenished. The statute penalizes insufficient reserves by imposing unlimited liability on managers for any shortcoming; it should be noted, however, that these payments may be later recovered from shareholders.[66]

Despite sanctions imposed under law, this requirement can be easily circumvented. Reserves are based on a capital stock requirement determined by shareholders, which may be insignificant. Since no provision requires the existence of a special fund to maintain the reserve, it is normally used as an accounting mechanism subject to manipulation by unscrupulous managers.

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amount of capital determines the share's par value. When the corporation issues no par value shares, the amount of capital is divided between par and no par value shares according to that stipulated in the entity's articles of incorporation. The portion not represented by par value shares is divided into the authorized number of no par value shares; the result is the percentage of capital represented by each of these shares. When the corporation solely issues no par value stock, the amount of capital represented by each share is determined by dividing the entire amount of capital into the number of authorized shares.

[64] *See* LGSM Articles 20 and 21.

[65] *See* Rodríguez, *supra* note 38, at 802.

[66] *See* LGSM Article 21.

C. *Restrictions on Dividend Payments*

Although dividend payments are determined by the annual shareholders' meeting, the LGSM also imposes certain restrictions. Just like statutory reserves, restrictions on dividend payments are taken from the corporation's net earnings after the exact amount has been covered and assets for the statutory reserve have been separated. [67]

Company management prepares the annual financial statements for discussion and approval at the annual shareholders' meeting.[68] Once the financial statements are approved, the shareholders —acting on the advice of management— determine whether to distribute dividends or reinvest the earnings.

The statute penalizes shareholders and managers by making them liable for any amounts distributed that violate the statutory capital and reserves requirement, as well as for the distribution of any dividends without earnings.[69] Although creditors can sue shareholders or managers, shareholders are only liable for amounts they actually receive; whereas managers are jointly and severally liable for any distributed amounts.[70]

The effectiveness of this protection is undermined by the fact that asset value can be altered, giving rise to distribution at the expense of the company's creditors.[71]

One of this system's main problems is that shareholders play an active role in both establishing the capital stock requirement and declaring dividend payments. It overlooks the simple fact that:

a) Shareholders expect a return on their investment.
b) Dividend payments create a strong incentive to remove corporate assets at the expense of creditors.

D. *Fraudulent Conveyance Law*

The CCF also includes other provisions to protect creditors, including the *acción contra la simulación*, *acción pauliana* and *acción oblicua*. The two first remedies are equivalent to fraudulent conveyance in the U.S.[72]

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[67] *See id.* Article 18.

[68] *See id.* Articles 172, 173 and 181.

[69] *See id.* Article 19.

[70] *See* Rodríguez, *supra* note 38, at 372.

[71] In fact, this commentator explains that the problem of distribution in the absence of earnings and in violation of capitalization requirements is deepened when the corporation is in financial distress or on the verge of bankruptcy. *See id.* at 371.

[72] The Uniform Fraudulent Conveyance Act of 1918 (UFCA), the Uniform Fraudulent Transfer Act of 1984 (UFTA) and Bankruptcy Code expressly state that fraudulent transfers and obligations are challengeable under these laws. Both of them provide a broad definition

The *acción contra la simulación* (action against the simulation) is the creditor's right to challenge transactions made by the debtor with the intent to hide assets from creditors. According to the CFF article 2180, the *simulación* is an act where the parties to an agreement make untrue statements about it that results in fraud or deceit of one of such parties' creditors.

Based on the text of the statute, Rojina Villegas identified two types of transactions: *a)* concealed transfers (or incurred debt), and *b)* misrepresented transfers.[73]

a. Concealed Transfers or Obligations

In these transactions, no transfer of assets or incurred debt takes place; the parties simulate it.[74]

b. Misrepresented Transfers

Although a real transaction takes place, the debtor and third party misrepresent the transaction to the debtor's creditors.[75] The only way to challenge this type of transaction under law is by showing actual fraud, i.e., the debtor's intention to mislead the plaintiff.[76] If fraud cannot be proven, the transaction is deemed valid.

If the challenge succeeds, then the transaction is voided and the assets are returned.[77] If the assets had been transferred to third parties in good faith for fair consideration, the transaction cannot be voided.[78]

The difficulty in obtaining relief under this provision is that the plaintiffs must prove the parties' intent.[79] An alternative challenge would be the *acción pauliana*.

The *acción pauliana* is the creditors' right to challenge a fraudulent transaction; unlike the *acción contra la simulación, the acción pauliana* is limited only to

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of transfer: "any transaction that effectively transfers property interests." In order to challenge such transaction it is necessary to show fraud, that is to say, the transfer was made with the actual intent to hinder, delay or defraud or transfers in which the debtor does not receive "fair consideration," under the UFCA, or "reasonably equivalent value." See UFCA §§4-7, UFTA §4 and Bankruptcy Code §548.

[73] *See* CCF Article 2180.*See* Rafael Rojina Villegas, Derecho Civil Mexicano, 488 (8th ed., 2001).

[74] It is considered that there is a secret agreement between parties. *See id*.

[75] For example, the debtor made a donation but she tells creditors that the transfer was a sale.

[76] The plaintiff must show that the debtor's intention was to deceive creditors.

[77] *See* CCF Article 2182.

[78] *See id.* Article 2184.

[79] In most cases, courts are forced to make presumptions. *See* "Molina de Romero, Elena," XIV-Julio S.F.J., 816 (8a. época, 1988).

creditors who invested before the challenged transaction took place.[80] This remedy covers all transactions which cause or aggravate the debtor's insolvency.[81] Insolvency is important to decide whether there was fraudulent conveyance; however, the statute additionally requires creditors to prove harm. The *acción pauliana* also grants creditors the right to collect from third parties.[82]

The challenged transaction could have been realized either for consideration[83] or without consideration. In cases without consideration, the transaction is presumed to be fraudulent;[84] otherwise, creditors must show that the parties to the transaction acted in bad faith.[85] The purpose of this remedy is to void the transfer up to the amount of the debt owed. When assets have been transferred in good faith to third parties, the transaction cannot be voided; but the first transferee must pay damages.[86]

As in the *acción contra la simulación*, this provision is severely weakened by the difficulty of demonstrating the debtor's intent.[87]

Fraudulent transfers are also regulated by the *Ley de Concursos Mercantiles* (Bankruptcy Act),[88] which empowers the trustee to solicit the bankruptcy court to void transactions made with the intent to defraud creditors.[89] The provisions of the LCM differ from the CCF in two aspects: *(a)* it includes a list of transactions presumed to be fraudulent;[90] and *(b)* once the transaction is voided, the assets become part of the estate which, unlike the CCF, benefits all creditors.

Another unusual but useful protection to creditors is the *acción oblicua*. The *acción oblicua* is the creditors' right to file complaints against debtors of the debtor, when the latter refuses with the intent of avoiding payment to creditors.[91] If successful, the debtor collects from her own debtors, which results in more assets available for the debtor's creditors. Unfortunately, this provision is rarely utilized with success because of restrictions imposed by the rules of civil procedure.[92]

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[80] *See* CCF Article 2163.

[81] The insolvency required is similar to balance sheet insolvency; that is, when the debtor's liabilities exceed its assets. See Article 2166.

[82] *E.g*, insurers or guarantors. *See* Rojina, *supra* note 64, at 436.

[83] It strictly requires for consideration or without consideration. For this reason, it does not matter whether the transfer was made for fair consideration as long as some value had been given in exchange for the property.

[84] *See id.* Article 2165.

[85] *See* CCF Article 2164.

[86] *See id.* Articles 2167 and 2169.

[87] *See* Rojina, *supra* note 64, at 439.

[88] *Hereinafter* LCM.

[89] See *Ley de Concursos Mercantiles* [LCM] Article 114 (Méx).

[90] *See id.* Article 112

[91] *See* CCF Article 2171.

[92] See Ernesto Gutiérrez y González, Derecho de las obligaciones, 768 (15th ed. 2003).

Finally, it must be mentioned that bankruptcy courts lack equity powers to subordinate claims of insiders or the corporation itself.[93]

As one can see, the existing legal remedies are clearly inadequate, mainly because the concept of capital on which all these provisions are based is determined by the shareholders and can be easily manipulated. Moreover, the mechanisms used to challenge fraudulent transfers require showing the debtor's intent to deceive creditors, making it difficult if not impossible for creditors to win in court.

Given the failure of current Mexican law to address the abuse of limited liability, it is necessary to analyze other legal remedies, in particular "piercing the corporate veil."

VI. Corporate Veil Piercing under U.S. Corporate Law

1. *Origins*

Unlike other forms of creditor protection, the origins of veil piercing are uncertain; and the criteria used to apply this protection are not uniform.[94]

Presser explains that by the end of the 19th century some legal scholars questioned the justification of limited liability.[95] During the early part of the 20th century, corporations functioned as partnerships. During the Great Depression, however, U.S. lawmakers tried to codify the equitable doctrine of piercing the corporate veil as a legal way to protect creditors. The foundations of modern veil piercing were established in three seminal legal texts: Judge Benjamin Cardozo's opinion in *Berkey v. Third Avenue Railway Co.*,[96] Maurice Wormser's article *Piercing the Veil of Corporate Entity* and Frederick J. Powell's book *Parent and Subsidiary Corporations: Liability of a Parent Corporation for the Obligations of Its Subsidiary.*[97]

Cardozo's opinion is relevant as it was one of the first writings to criticize the unprincipled nature of this legal mechanism and proposed a standard to determine the circumstances under which the parent entity should be held liable for the debts of its subsidiaries. According to his approach, veil piercing should be applied not only when there is an agency relationship between the parent and its subsidiary, but when "the attempted separation between parent and subsidiary will work a fraud upon the law."[98]

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[93] *See* Duncan N. Darrow et al., *Symposium The New Latin American Debt Regime — Restructuring Strategies for Mexican Eurobond Debt*, 16 NW. J. Int'l L. & Bus. 117, 156 (1995).

[94] Wormser's article, written in 1912, precisely discusses several cases from the 19th century in which courts disregarded the corporate form. *See* Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 Colum. L. Rev. 496 (1912).

[95] *See* Presser, *supra* note 2, at 1-21.

[96] *See Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84 (1926).

[97] *See* Presser, *supra* note 2, at 1-21.

[98] *See Berkey* 244 N.Y. at 95.

Judge Powell proposed in his book a three-prong test to pierce the veil of a subsidiary. This approach requires: *(a)* that the subsidiary functions as an "alter ego" or "instrumentality"; *(b)* the occurrence of "fraud or wrong" or "injustice"; and *(c)* an "unjust loss or injury."[99]

Since piercing the corporate veil is considered an exception to limited liability, it is generally regarded as the harshest form of creditor protection. Efforts to unify divergent criteria have failed because the basis of this doctrine is the equitable power of American courts;[100] moreover, limited liability is so fundamental to society that courts are reluctant to apply it.

Under this doctrine, "a court determines that the debt in question is not really a debt of the corporation, but ought, in fairness, to be viewed as a debt of the individual or corporate shareholder or shareholders."[101] It is a judicial exception to the principle of limited liability, "by which courts disregard the separateness of the corporation and holds shareholders responsible for the corporation's action as if it were the shareholder's own."[102] Unlike other legal devices, it benefits only creditors who have requested that the court disregard the corporate form.

Since the legal provisions used to protect creditors were established as tools to make debtors internalize unfair costs imposed on creditors, why should piercing the corporate veil —which affects shareholders so severely— be allowed when other alternatives exist such as covenants, minimum capital requirements and fraudulent conveyance laws? The answer is that the harshness of veil piercing has a deterrent effect on investor misconduct, as it strips investors of their right to limit liability for corporate debts.

2. *Corporate Veil Piercing Tests*

There are no clear, consistent rules, but in an attempt to systematize the divergent criteria that courts use to pierce the corporate veil, legal scholars have identified two approaches.

A. *"Instrumentality" or "Alter Ego"*

Based on previous veil piercing cases and focusing on the parent-subsidiary relationships, this test was formulated by Powell in 1931.[103]

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[99] *See* Presser, *supra* note 2, at 1-33.

[100] Under Article III, section 2 of the U.S. Constitution, federal courts' inherent powers include equity. See Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 Am. Bankr. L.J. 1, 12 (2005).

[101] *See* Presser, *supra* note 2, at 1-6.

[102] *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036 (1991).

[103] *See* Philip I. Blumberg, The Law of Corporate Groups. Substantive Law § 6.02 (1985); Presser, *supra* note 2, at 1-32.

This approach consists of three elements that must be shown by the plaintiff:

a. "Instrumentality"

The words "instrumentality" and "alter ego" are employed to describe a relationship in which a parent controls the subsidiary in such a manner that the subsidiary functions as a mere instrument to benefit the parent's shareholders at the expense of the subsidiary's creditors.[104] It refers to the relationship between the parent and the subsidiary and requires showing that the parent exercises complete control or domination over the subsidiary.

Powell does not define what should be understood as control and domination, but lists several possible features, including:

a) The parent owns all or most of the subsidiary's stock.
b) The parent's directors and officers take part in the management of the subsidiary.
c) The subsidiary's directors and officers act independently and in the best interests.
d) The parent finances the subsidiary.
e) The parent was involved with the incorporation of the subsidiary.
f) The subsidiary is inadequately capitalized.
g) The parent bears some expenses or losses incurred by the subsidiary.
h) The subsidiary deals exclusively with the parent.
i) The subsidiary owns only the assets conveyed by the parent.
j) The parent uses the subsidiary's assets as its own.
k) The formal legal requirements of the subsidiary are observed but there appears to be "fraud or wrong" or "injustice."

This prong has to do with the relationship between the parent and creditors of the subsidiary and requires showing a kind of misconduct by the parent.

Powell suggests that for this prong, the following factors also be taken into account:

a) Actual fraud detected in the relationship between the parent and the subsidiary.
b) Violation of a statute through the parent's use of the subsidiary.
c) The parent has deprived the subsidiary of its assets.
d) The doctrine of estoppel can be invoked as a result of the parent's use of the subsidiary.
e) The parent has used the subsidiary to commit a tort.

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[104] *See* Debra Cohen-Whelan, *Individual Responsibility in the Wake of Limited Liability*, 32 U.S. F.L. Rev. 335, 348 (1998).

b. "Unjust loss" or "injury"

This prong requires showing harm to the subsidiary's creditors caused by acts of the parent.

Despite the fact that Powell does not list factors for this prong, he distinguishes between contract and tort creditors and asserts that tort creditors always satisfy this prong.

The "instrumentality" or "alter ego" approach was adopted and broadened in *Lowendahl v. Baltimore & O.R. Co.*[105] and requires showing three elements:

a) The parent controls the subsidiary in such a way that it "is said to have no will, mind or existence of its own and to be operated as a mere department of the business of the stockholder."[106]
b) The control exercised by the parent is used to commit fraud, violate a legal duty or commit unjust conduct.
c) The fraud or wrongful act resulted in an unjust loss and injury to the creditor. This decision holds that the parent is liable whenever it "has expressly made a subsidiary its agent or has itself committed the tort in suit."[107]

In addition, the "instrumentality" or "alter ego" approach has a variant established in *Automotriz del Golfo de California S.A. de C.V. v. Resnick*,[108] which holds that the corporate form should be disregarded when it is shown that: *(a)* there is a unity of interest and ownership so that the subsidiary and parent cannot be considered as two separated entities; and *(b)* if parent and subsidiary are treated as separate entities there will be an inequitable result.[109]

As can be observed, although only nuances seem to differentiate these two results —mainly the requirement of an inequitable result— the terminology here suggests a kind of misconduct.

B. *Agency Relationship*

This approach was adopted in *Berkey v. Third Avenue Railway Co.*[110] and is based on the concept of agency relationship.

In an agency relationship "one person —the principal— uses another person —the agent— to act on his behalf";[111] the principal is bound by the acts

[105] *See Lowendahl v. Baltimore & O.R. Co*. 247 A.D. 144 (1936).

[106] *Id.* at 154.

[107] *Id.* at 157.

[108] *See Automotriz del Golfo de California S.A. de C.V. v. Resnick*, 47 Cal. 2d 792 (1957).

[109] *See id*. at 796.

[110] Berkey v. Third Avenue Railway Co., 244 N.Y. 602 (1927).

[111] *See* Eric Rasmusen, *Agency Law and Contract Formation*, 1 (The Harvard John Olin Discussion Paper Series, No. 323, 2001).

of the agent, who "is not entitled to the gains of the enterprise —nor is he expected to carry the risks."[112] The idea of this approach is that the subsidiary has acted on behalf of the parent and therefore the parent is liable for the debts of the subsidiary.

The agency approach proposes a two-prong test, namely:

a) First prong. This refers to the parent-subsidiary agency relationship. In order for this requirement to be satisfied, the parent must be shown to have exercised complete control over the subsidiary.[113] In case the control exercised by the parent does not qualify as "domination," the relationship can be evaluated under the test of honesty and justice.[114]
b) Second prong. This requires showing that the "separation between parent and subsidiary will work a fraud upon the law."[115]

Blumberg mentions that this approach is often confused with the "instrumentality" or "alter ego" approach; given the difficulty to show that consent was given by both parties, the agency theory has been used in few cases.[116]

C. *Key Elements to Pierce the Corporate Veil*

To summarize, regardless of the approach (the "instrumentality or alter ego" approach or the "agency" approach), there are some elements that courts constantly look at to determine whether or not to pierce the corporate veil. These factors include: *a)* control; *b)* undercapitalization; *c)* failure to observe corporate formalities; and *d)* fraud, wrongful or unjust act.

a. Control

In veil piercing cases where both a parent and subsidiary are involved, courts regard control as an essential factor in order to allow the subsidiary's creditors to reach the parent's assets. However, it "more often appears as a conclusory label than as a term with determinate meaning."[117]

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[112] *Id.* at 4.

[113] In *Walkowszky v. Carlton* the court held that "[w]henever anyone uses control of the corporation to further his own rather than the corporation's business, he will be liable for the corporation's acts 'upon the principle of *respondent superior* applicable even where the agent is a natural person.' Such liability, moreover, extends not only to the corporation's commercial dealings, but to its negligent acts as well." *See Walkowszky v. Carlton* 18 N.Y. 2d, 414, 417 (N.Y. 1966).

[114] *See Berkey*, 244 N. Y. at 95.

[115] *Id.*

[116] *See* Blumberg, *supra* note 91, at §6.06.1.

[117] *See* Deborah A. DeMott, *The Mechanisms of Control*, 13 Conn. L. Int'l L. 233, 234 (1999).

It should be noticed that control by itself is not enough to pierce the corporate veil because one of the effects of limited liability is precisely that it separates ownership from control.

As a rule, corporations are managed by professionals; thus shareholders' power is limited to electing directors and deciding a few other issues. In closely-held corporations, shareholders engage actively in corporate management. There is no separation of ownership and control. For this reason, the same directors and officers (*i.e.* control) is not enough by itself to pierce the corporate veil.[118]

For Blumberg, what is relevant in veil piercing is "the manner and extent of control."[119] It is not enough that the parent determines the policies, finances and expenses of the subsidiary; on the contrary, it is necessary to show that the parent has an "intrusive, hands-on, day-to-day control with the parent often leaving no discretion whatsoever to the subsidiary."[120]

Deborah DeMott explains that the kind of control necessary to pierce the corporate veil is different from the kind of control exercised in an agency relationship (courts frequently do not draw a distinction between them, though).

According to DeMott, in an agency relationship, there are two entities perfectly differentiated, so the agent and the principal do not operate as if they were one entity. Given the mutual consent of both parties, one entity can be the agent of the other without any kind of ownership relationship. Conversely, the kind of control that courts consider necessary to pierce the corporate veil implies the nullification of the legal personality of each entity and, as a result, the existence of just one entity. This kind of control is known as "domination." In addition, when there is an agency relationship, there is legal ownership, whereas domination is usually exercised *de facto*.[121]

Courts usually also look at other elements before concluding that one corporation dominates its subsidiary. For example, whether or not the subsidiary is undercapitalized and whether shareholders treat the corporation's assets as if they belonged to them.[122]

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[118] *See id.* at 238.

[119] *See* Blumberg, *supra* note 91, at §10.02.

[120] *See* William J. Rands, *Domination of a Subsidiary by a Paren*t, 32 Ind. L. Rev. 421, 437 (1999). In *Krivo Industrial Supp. Co. v. National Distill. & Chem.*, the court explained that veil-piercing control refers to actual, participatory, total control of the corporation's actions. This kind of control is "a total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation;" it implies such a "domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal." The simple active participation of shareholders in the management of the corporation or the mere ownership of the majority or all of the stock of the corporation does not constitute the kind of control required. *See Krivo Industrial Supp. Co. v. National Distill. & Chem.*, 483 F.2d 1098, 1105, 1106 (5th Cir. 1973).

[121] *See* DeMott, *supra* note 105, at 239.

[122] *See id*. at 239, 241.

b. Undercapitalization

"Adequate capitalization" or "undercapitalization" is frequently taken into account to pierce the corporate veil, but the exact definition of these terms is not clear.

In the U.S., state statutes do not require any specific capitalization level; and even if this were required, capitalization often fails to reflect the company's solvency, as asset value can be easily inflated. In veil piercing cases, courts often look at "the amount of equity furnished by shareholders"[123] in connection to the corporation's activities; as well as the risk of loss that such activity implies.[124] Some courts also take into account the initial and/or current levels of capitalization, as equity contributions made by shareholders are often required only at the time of incorporation and not as an ongoing obligation.[125]

Courts differentiate between contract creditors and tort creditors when evaluating this prong. For tort creditors, courts are particularly concerned about the level of capitalization, as such creditors cannot fairly negotiate compensation. Conversely, for contract creditors —who can investigate the company's financial condition and negotiate an interest rate that compensates for the risk involved— undercapitalization cannot be used to justify veil piercing, unless they have been misled into believing that the corporation had more assets than it does.[126]

Undercapitalization is usually considered helpful but not decisive as an element to pierce the corporate veil, as in some cases it provides courts with evidence of fraudulent or self-dealing transactions;[127] most legal scholars, however, believe that undercapitalization should not be considered an important factor in applying veil piercing.

Firstly, for many start-up businesses, shareholders often cannot contribute large amounts of equity; besides, it is often more convenient to provide

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[123] *See* David Millon, *Piercing the Corporate Veil, Financial Responsibility and the Limits of Limited Liability*, 35 (Washington and & Lee Public Law and Legal Theory Research Paper Series, Working Paper No. 03-13, 2003). Most courts focus only on shareholders' assets, but some include all corporate assets. *See* Franklin A. Gevurtz, *Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 Or. L. Rev. 853, 888 (1997).

[124] *See id.*at 883. For Easterbrook and Fischel adequate capitalization is "an amount of equity that is within the ordinary range for the business in question," which depends on "the kind of business on which the corporation is embarked." Easterbrook & Fischel, *supra* note 5, at 113; *See* also Harvey Gelb, *Piercing the Corporate Veil—The Undercapitalization Factor*, 59 Chi. Kent. L. Rev. 1, 14 (1982); Minton v. Cavaney, 56 Cal. 2d 576, 580 (Cal. 1961) (stating that the capital is adequate when it is consistent with the activities in which the corporation has engaged and the risks implied).

[125] *See* Mark A. Olthoff, *Beyond the Form—Should the Corporate Veil Be Pierced?* 64 UMKC L. Rev. 31, 315 (1995).

[126] *See* Robert W. Hamilton, *The Corporate Entity*, 49 Tex. L. Rev. 979, 987, 988 (1971).

[127] *See* Gevurtz, *supra* note 111, at 883.

resources in the form of debt rather than equity.[128] Secondly, even though shareholders might make adequate contributions at the time of incorporation, it is difficult for the company to maintain the same level of capitalization during its entire business life. Finally, some legal scholars hold that requiring the corporation to keep the same level of capitalization; or requiring that the equity cushion cover all future debts, could be viewed as an imposition of unlimited liability, as shareholders would function as personal guarantors of the corporation.[129]

c. Failure to Observe Corporate Formalities

Lack of formalities refers to corporations' breach of procedures required by statute.[130] Failure to observe corporate formalities by itself is not sufficient to hold shareholders liable for the corporation's debts, but it can help to identify shareholder misconduct.

This element is closely related to control and refers to issues such as:[131]

a) Failure to issue stock. The fact that the corporation has not issued stock certificates indicates that there are no shareholders and the company is probably undercapitalized.[132] This is generally a starting point to detect shareholder misconduct.
b) Failure to convene shareholders' or board of directors' meetings; as well as failure to formally approve or carefully document transactions. Failure to hold meetings and properly document transactions suggests the existence of unfair transactions between the corporation and its shareholders, in which shareholders are removing assets from the corporation at the expense of the corporation's creditors.[133]

In a few cases, the failure to observe corporate formalities has served as the basis to pierce the corporate veil when creditors were misled into believing that they were dealing directly with shareholders rather than the corporation.[134] For some legal scholars, this factor is irrelevant, because it does not

[128] *See* Millon, *supra* note 111, at 36.

[129] *See id*. at 37.

[130] *See* Russell Lance Miller, *Piercing the Corporate Veil in Kentucky: An Analysis of United Sates v. WRW Corp.*, 221 N. Ky. L. Rev. 541, 548 (1995).

[131] Gevurtz, *supra* note 111, at 867. *See Kinney Shoe Corp. v. Polan* 939 F.2d. 209, 212 (4th Cir. 1991) (holding that "inadequate capitalization combined with disregard of corporate formalities, causing basic unfairness, are sufficient to pierce the corporate veil").

[132] *See id.*

[133] *See id.* at 868.

[134] *See* Millon, *supra* note 111, at 33.

have any impact on creditors;[135] even if the creditors have been misled, the transaction can be challenged under other legal devices, such as fraudulent conveyance law.[136]

d. Fraud, Wrongful or Unjust Act

This element encompasses different types of misconduct: *a)* acts which constitute fraud; and, *b)* acts which are considered to be unjust. The former refers to shareholder's wrongful dealings with creditors,[137] while the latter is based on the legislative policy which holds that "it is unfair to allow owners (of the corporation) to avoid debts at the expense of a corporation's creditors."[138]

Three types of misrepresentations have been considered by courts as fraud to pierce the corporate veil: *a)* representations concerning the financial status of the corporation; *b)* statements promising performance; and *c)* representations and other actions which mislead the creditor into believing that someone, other than the corporation, is assuming the debt.[139] In each case, there must be intent to mislead or confuse the creditor.

The second category of transactions usually refers to unfair self-dealing. Protection from unfair self-dealing in contractual relationships is based on the principle that "the controlling shareholder of the corporation will not be free to do whatever he or she wants with corporate assets. Otherwise, the owner could have the corporation borrow money, take all the money out of the corporation, and leave the creditor unpaid."[140]

In tort cases, controlling shareholders have incentives to remove the assets from the corporation in order to avoid compensating tort victims for the loss or harm suffered; therefore measures that prevent shareholders from self-dealing are desirable.[141] Veil piercing has a deterrent effect for shareholders to self-deal with the corporation's assets because if the court finds that shareholders have removed assets from the corporation at the expense of its creditors then grants creditors the right to collect not only from the corporation but also from shareholders with no limits.[142]

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[135] *See* Blumberg, *supra* note 91, at §10.09.

[136] *See* Millon, *supra* note 111, at 34.

[137] *See* Gevurtz, *supra* note 111, at 870.

[138] *See* John H. Matheson & Raymond B. Ebyt, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owner's Limited Liability Protection*, 75 Wash. L. Rev. 147, 178 (2000).

[139] *See id.* at 871-874.

[140] *See id.* at 875.

[141] *See id.*

[142] *See id.* at 879.

D. *Rationale and Problems of Corporate Veil Piercing*

a. Rationale

Easterbrook and Fischel consider that the legal rationale of this doctrine is "obscure."[143] The economic rationale, however, is clear, based on the moral hazard[144] generated by limited liability.

According to these scholars, courts should pierce the corporate veil when corporations have engaged in excessively risky activities that externalize their costs, as the aim is to "balance the benefits of limited liability against its costs."[145]

Veil piercing offsets the incentives that limited liability creates for shareholders and managers to engage in excessively risky activities at the expense of company creditors, especially in the case of closely-held corporations and tort creditors.

As explained above, shareholders participate in the profits of the corporation in the form of dividends but they are also the first to lose their investments if the corporation becomes insolvent; for this reason, shareholders prefer projects which have a higher expected return. Activities with a higher expected return imply a higher risk of loss. Given limited liability, shareholders are indifferent to such risk of loss because in case of failure, they will only lose their investment.

In a publicly-held corporation, shareholders are unable to influence the management of the corporation because they are generally too numerous and passive to affect the management's decisions. In these situations, there is usually a separation of ownership and management. In closely-held corporations, however, shareholders often play an active role in the company's affairs, serving as managers or causing management to engage in high-risk activities to the detriment of creditors. The lack of separation between ownership and management in closely-held corporations exacerbates the problems of limited liability because shareholders often operate the company to gain higher levels of return even if the net future value is negative.

Veil piercing alters shareholders' incentives to make corporations engage in overly risky activity. Due to veil piercing, the assets of shareholders are exposed to the company's creditors. As a consequence, shareholders have incen-

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[143] *See* Easterbrook & Fischel, *supra* note 5, at 109.

[144] Moral hazard "is an incentive problem that arises in cases where the actions of individuals cannot be observed and contracted upon, creating ASYMMETRIC INFORMATION among individual parties to a transaction […] The nature of transactions characterized by moral hazard is such that individuals do not have incentives to behave in ways that lead to Pareto efficient outcomes." The Blackwell Encyclopedic Dictionary of Managerial Economics 134 (Robert E. McAuliffe ed., Blackwell, 1999).

[145] *See id.*

tives to invest in ventures with a positive net future value; that is to say, even if it involves risky activity, it helps create value. Veil piercing imposes unlimited liability on shareholders for the corporation's debts; as a result, shareholders avoid making the corporation engage in activities likely to create no positive value because shareholder's assets are at stake.

As for tort creditors, limited liability facilitates the externalization of costs that result from risky activities. Since tort creditors are not in a position to negotiate cost allocation, they are not compensated for the risks they bear. Limited liability exacerbates this problem because shareholders lose their investment; as a result, they remain indifferent to the risks assumed by the corporation.

Veil piercing alters shareholders' incentives to make corporations engage in risky activities that can often result in unlawful acts.

b. Problems of Corporate Veil Piercing. Uncertainty

Limited liability is desirable as an efficient system of risk allocation, where risks are borne by better risk-bearers. Limited liability, however, has a downside: it creates moral hazard.

Under limited liability, shareholders are only liable to the extent of their investment; since they have incentives to engage in risky activity, the probability of loss increases accordingly. The consequence of moral hazard is cost externalization, an inefficient result.

Creditors are usually better risk-bearers, as they possess more information to assess risks and are in a better position to negotiate adequate compensation, in effect avoiding cost externalization. The corporation, however, can externalize costs when it isn't possible for creditors to enter into contractual agreement. Even when creditors can negotiate terms to compensate for their risk of loss, the information they possess is usually insufficient or misleading, preventing them from negotiating an adequate interest rate. In these cases, the doctrine of corporate veil piercing helps make the corporation internalize the costs of its activities.

Uncertainty is the main problem faced by creditors when they try to access shareholders' assets through veil piercing. As explained earlier, since this doctrine has few standards, courts tend to adopt either the instrumentality approach or agency approach but follow neither of them strictly. None of the above factors are enough by themselves to lead to veil piercing. Notably, similar facts often result in different outcomes. Uncertainty regarding veil piercing has thus had negative consequences, since it either discourages investment in important activities or induces excessive precaution. In sum, investors are unsure whether they may be held liable without limit for corporate debts.[146]

[146] *See* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 Iowa J. Corp. L. 479, 514 (2001).

E. *Formality*

Another downside is that when courts focus solely on questions of formality, diminishing the importance of the company's real-world conditions, creditors are even less likely to obtain remedy.

For example, undercapitalization alone does not lead to veil piercing. In general, shareholders have incentives to keep the corporation's capitalization low, doing no harm to creditors as long as the corporation keeps paying its debts. When undercapitalization is taken into account, shareholders guess the amount that needs to be kept as capital in order to avoid veil piercing, thus shareholders have incentives to keep the corporation with a capital that is not adequate to protect the corporation's creditors but that helps them avoid veil piercing, without ensuring protection for creditors.[147]

Another example is when courts require showing control without taking into account that subsidiaries are controlled to a greater or lesser extent by the parent. As long as some formalities are observed, a parent can control a subsidiary and benefit at the expense of the corporation's creditors.

Some authors, such as Stephen Bainbridge, have proposed to eliminate veil piercing. Bainbridge explains that limited liability offers many benefits to society, whereas veil piercing is too confusing. He considers that "the question is not whether the shareholder used the corporation as his or her alter ego, but whether the shareholder personally engaged in conduct for which he or she ought to be held liable."[148] This being said, it is extremely difficult to consider the elimination of veil piercing as a mechanism to protect creditors.

Robert Charles Clark regards it as an alternative to fraudulent conveyance law and other statutes.[149] For this scholar, veil piercing is a good alternative because it does not require careful scrutiny of each individual transaction[150] and, unlike other legal devices, has a strong deterrent effect.[151]

Although clarity is desirable, in my opinion having a flexible framework may be more advantageous than rigid rules. In a general scheme, courts have broader scope for interpretation, adapting rules to the actual necessities of society. This does not mean that efforts to codify veil piercing are pointless and should be applied arbitrarily; on the contrary, it is absolutely necessary to systematize, improve and better implement legal doctrine.

3. *Alternative Creditor-Protection Measures*

Other legal scholars, keeping in mind the problem of moral hazard and the weaknesses of veil piercing as a legal device to protect creditors, have

[147] *See* LoPucki, *supra* note 34, at 22.

[148] *See id.* at 516.

[149] *See* Clark, *supra* note 13, at §2.4.

[150] *See* Gevurtz, *supra* note 111, at 878.

[151] *See id*.

proposed alternative solutions such as insurance, management liability and even the imposition of unlimited liability as a rule for any kind of business organization. Due to lack of space and the introductory nature of this analysis, I shall mention only a proposal presented by Henry Hansmann and Renier Kraakman.

Hansmann and Kraakman propose the imposition of pro rata unlimited shareholder liability for corporate torts. According to these authors, regardless of corporate structure, whether publicly- or closely-held, "limited liability in tort cannot be rationalized."[152]

The premise is that hazardous activities imply a higher level of risk, which means for shareholders that if the project is successful, the return will be higher. Since limited liability protects investors from losing all their assets, it also creates incentives to overinvest in hazardous activities. In addition, limited liability creates incentives for investors to underinvest in the corporation in order to reduce exposure to tort claims, which is easy to do if we consider that corporations can raise capital through long term debt instead of equity.[153]

Hansmman and Kraakman's proposal has been criticized for the detrimental effects that it would have on stock markets and the prohibitive collection costs it would imply.[154]

VII. Veil Piercing in Mexico

1. *History of Corporate Veil Piercing in Mexico*

Attempts to adopt the doctrine of piercing the corporate veil in Mexico are not new. In 1939, Mexico's Congress passed the *Ley que Establece los Requisitos para la Venta al Público de Acciones de Sociedades Anónimas*[155] (Law Establishing the Requirements for the Share Sale to the Public Corporations)[156] which included a provision that made shareholders liable for corporate debts. The adoption of this provision was the result of political and social realities at that time, characterized by the government's outsized role in the nation's economic life.

At that time, the stock market was not yet developed; as a result, a corporation composed of numerous shareholders did not yet exist. It was therefore assumed that any type of control exercised by an individual shareholder was, by definition, unfair self-dealing.[157] Based on this reasoning, the statute in-

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[152] *See id.* at 1880.

[153] *See id.* at 1883.

[154] *See* LoPucki, *supra* note 34, at 55-61.

[155] *See* Ley que Establece los Requisitos para la Venta al Público de Acciones de Sociedades Anónimas [LERVPASA] Article 13 (Méx.).

[156] *Hereinafter* "LERVPASA."

[157] *See* Diario de Debates de la Cámara de Diputados 5, Dec. 15, 1938 (Méx.).

cluded two provisions that contained the legal basis for piercing the corporate veil. The main provision stipulated the following: "Individuals exercising control over a corporation, regardless of whether they own a majority of stock, shall be secondarily liable for non-contractual debts arising from corporate misconduct."[158]

As can be seen, this provision was addressed to shareholders regardless of whether they were individuals, entities or majority owners; stockholders were held liable only if they exercised control and the debt resulted from corporate misconduct. At that time, the only factor taken into account to pierce the corporate veil was the exercise of corporate control, the meaning of which was left entirely up to the courts.

As a result, shareholders were generally held liable only to the extent that creditors could not recover from the corporation. As a general rule, when secondary liability is imposed, the plaintiff has to sue first; only if the plaintiff is unable to collect from the debtor then creditors can collect from someone else, known as the secondarily liable party. Article 14 of the LERVPASA created an exception to this rule. It makes express reference to Article 24 of the LGSM; under this provision, creditors are entitled to sue both the organization and its owners; amounts due are recoverable from owners only if collection from the company is not possible because of insufficient assets.[159] In either case, there was no requirement to show that the company was insolvent.

The statute was effective for a very short period of time, as most of it was abrogated by subsequent statutes. Nowadays, it is unclear whether the articles that refer to veil piercing are still enforceable.[160] Regardless of this point, only two cases exist in which veil piercing under the LERVPASA was discussed. In both these decisions, the Supreme Court broadly interpreted the provisions, holding that when a controlling shareholder exercised control and the debt arose from a non-contractual relationship, shareholders were not entitled to limited liability.[161] Due to their doubtful enforceability and legal formalism that prevails in Mexican courts, judges have been reluctant to follow the Supreme Court's interpretation.[162]

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[158] D.O.F. December 30, 1939.

[159] *See id.* LGSM Article 24; Rodríguez, *supra* note 96, at 80-82; Proyecto de Ley de Desestimación de la Personalidad Jurídica Societaria [PLDPJS], Sen. Rep., LVIII Leg., 24 (2002).

[160] Despite of the fact that it was abrogated by the Ley de la Comisión Nacional de Valores of 1953 and Ley del Mercado de Valores of 1974, in 1983 the Supreme Court held that the statute was not derogated, some provisions were abrogated except for articles 13 and 14. *See* "Castillo, Ariel Angeles," 175-178 IV S.J.F. 175 (6a. época, 1983). The resolution is not binding because it does not comply with the requirements established in Article 192 of the *Ley de Amparo*.

[161] *See id.*

[162] See Roberto Obando Pérez, *Una vision dual de la doctrina del levantamiento de la persona jurídica* 182, *available at* www.ijf.cjf.gob.mx/publicaciones/revista/25/r25_10.pdf.

2. *2002 Corporate Veil Piercing Bill*

After the 1994 economic crisis in Mexico, when many insolvency cases involved shareholder fraud, lawmakers became concerned about how to deter fraudulent conduct and provide effective remedies to creditors against debtor insolvency. As a result, Congress passed new statutes and amended existing laws, most of them in relation to bankruptcy and financial institutions. The issue of whether the corporate form should be disregarded became an important Congressional issue; in 2002, a bill to adopt corporate veil piercing (*Proyecto* de *Ley de Desestimación de la Personalidad Jurídica Societaria* or Bill on the Rejection of Corporate Legal Personality) was submitted but, unfortunately, legislative debate and approval did not conclude successfully. This project is notable, however, because it illustrates how inadequate Mexican law was in 2002 with regard to piercing the corporate veil.

This project proposed applying veil piercing to all entities with or without legal personality in which owners misrepresent their dealings with a formal entity to third parties.[163] It is also notable that the bill's terms were contradictory, as its provisions addressed all entities with legal personality (partnerships, corporations and any other type of business organization —implying inclusion of enterprises in which unlimited liability was already the rule), as well as entities without formal legal standing. Under this proposal, veil piercing would disregard the legal personality of an entity as well as ignore stockholders' limited liability; as a result, a major shortcoming of this bill was that it included entities in which owners already had unlimited liability as well as entities with no legal personality.

Veil piercing should not be applied to all types of business organizations because the problem is not legal personality but the incentives that limited liability create for business owners and managers to make decisions that harm creditors. Veil piercing should only be applied to corporations and other limited liability business organizations.[164] As for entities without legal personality, if the owners have misrepresented the status of the entity, there is no need to regulate their liability, because owners and managers are already fully liable in such situations under the LGSM.[165]

Under this proposed bill, a remedy was devised to challenge business owners and third persons that exercised control.[166] Based on the proposed bill's text, third parties could be held liable for corporate debts; what is not clear, however, is how third parties would exercise control over the entity. One possible interpretation of this proposal is that third parties include members of the board of directors; but statutes already provide for remedies against the

[163] *See* PDPJS Article 6.

[164] The general rule is contained in Article 2964 of CCF.

[165] *See* LGSM Article 7.

[166] *See id.*

misconduct of managers. Since veil piercing addresses the moral hazard created by limited liability, managers should not be punished; third parties do not enjoy limited liability.

An alternative interpretation is that the proposed bill adopted the enterprise liability approach; that is to say, the "third party" is a corporation belonging to a single enterprise. This interpretation seems logical since most presumptions about control and fraud under the proposed bill were based on the relationships between the individual companies that comprise a corporate group. Since the negation of limited liability is a harsh sanction, however, it is very important that provisions enabling courts to pierce the corporate veil are clear.

Under this proposed bill, the following three elements must be shown by the plaintiff:[167]

A. Objective Element

This element requires showing that control was exercised over the entity to the extent that the entity's acts were the acts of the owners. Control could be presumed where: *a)* the owner or third party determined the strategic policies of the entity; *b)* the owner or third party financed the entity; *c)* all liabilities were allocated to one entity while assets were allocated to the second entity despite both entities belonging to the same corporate group; *d)* the owner or third parties were, either directly or indirectly, major investors in the entity; *e)* the owner, third party and entity shared identical management; *f)* a majority of the owner or third party's assets were obtained from the entity; *g)* a commingling of assets owned by the owner, third party and entity; *h)* any other fact that reasonably indicates the exercise of control.

As can be observed, the proposed bill did not adequately define the meaning of control; instead, it described several situations that constitute presumptions of control. Most of the presumptions were based on the ordinary operation of parents, subsidiaries and closely held corporations, which by themselves cannot be considered unlawful.

B. Subjective Element

This consists in showing that the owner or third party abused its legal personality in order to defraud creditors, commit fraud or violate "imperative laws."[168] For the first two factors, the proposed bill included definitions. Given the difficulty of proving the defendant's intention to commit fraud, the statute provides a list of presumptions.

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[167] *See id*. Articles 9-15.

[168] *See id*. Article 14.

According to the proposal, creditors are defrauded when the entity has benefited by avoiding payments to creditors. Presumptions of intent to defraud creditors included: *a)* in a corporate group, most of the debts were allocated exclusively to one of the constituent entities; *b)* the owner or third party made use of the assets of the corporation as their own; *c)* the owner or third party made a loan to the entity without adequate assurance of payment; *d)* engagement in excessively risky activities; *e)* improper or fraudulent management of the entity; *d)* any fact from which it could be reasonably concluded that the owners and third parties had intended to defraud creditors. Fraud upon the law was defined by the bill as: *a)* evasion of an imperative law; or *b)* the principles' intent to abuse the entity to obtain a benefit.

C. Result

This requires showing that unless the corporate veil is pierced: *a)* creditors who invested in good faith will be harmed; or *b)* fraud upon the law will take place; or *c)* a violation of imperative laws will occur.

This prong has been designed to allow the court to assess the harm caused if the corporate veil is not pierced. The consequences of corporate veil piercing under this rule would be unforeseeable. As a result of legal formalism, Mexican lower courts tend to favor a narrow interpretation of the law.

Lastly, the proposed bill stated that only in exceptional cases was a remedy available.

VIII. An Alternative Proposal for the Adoption of Veil Piercing in Mexico

In previous parts of this paper, I explained how limited liability constitutes the most efficient allocation of risks and, as such, argue for its preservation. On the other hand, since limited liability creates incentives for shareholders to impose excessive risks on creditors without compensation, many have pointed out that it is also necessary to have legal devices that facilitate the internalization of costs imposed on creditors when the corporation engages in activities that put its own solvency at risk.

The dilemma of how to protect creditors without abolishing limited liability has caused a certain extent of uncertainty and weakness in existing legal remedies that protect creditors. The most typical is the doctrine of piercing the corporate veil. On the one hand, it is rarely applied because of its unprincipled nature; this said, it has been a very effective creditor-protection measure.

Through application of this doctrine, courts create an exception to the limited liability rule; as a result, the elements considered by courts to deter-

mine whether the corporate form should be disregarded are closely related to justifications for preserving or eliminating limited liability.

In Mexico, several attempts have been made to adopt this doctrine but, for different reasons, all have failed. After the 1994 economic crisis in Mexico, when many insolvency cases involved abuse of the corporate form, implementation became an important issue; as a result, a new bill was proposed. Based on the bill's content and explanations given by its drafters, among its principle motivations was the frequency of fraud in corporate groups during the 1990's.[169] From my point of view, this was an important step to improve the current system of creditor protection; specifically because it showed how undeveloped Mexican doctrine was in this important legal area.[170]

For reasons explained above, corporate veil piercing should be enacted in Mexico. In order to adopt this doctrine, however, clear and well-defined rules must first be included in the LGSM, the statute that regulates corporations and other business organizations. This statute consists of fourteen chapters; the first contains general rules for all business organizations; the next three chapters establish rules for mergers and dissolutions; and the remaining sections contain provisions for diverse business organizations. Given that veil piercing is an exception to limited liability, provisions that regulate it should be included in a new chapter.

A rule should also be adopted that makes shareholders secondarily liable for corporate debts rather than jointly liable. The reason is that when a corporation is solvent, its creditors would be entitled to full debt payment. Corporate veil piercing is a harsh measure that should be reserved only to minimize incentives available for shareholders to exploit the corporate form at the expense of creditors. Joint liability is undesirable, as it exacerbates the problem of uncertainty because it implies that creditors can sue at the same time both the corporation and its shareholders, regardless of whether the corporation is solvent or not. Conversely, secondary liability implies that creditors have to sue the corporation first and so long the corporation has no assets to pay, then creditors are entitled to sue its shareholders.

Taking into account U.S. case law, the following elements should be considered in evaluating whether to pierce the corporate veil under the LGSM:

1. *Undercapitalization or Insolvency*

One of the elements that American courts consider is whether the corporation is undercapitalized. It should be noted that in seven U.S. states,[171]

[169] *See* PLDPJS at 35.

[170] There are recent studies on corporate veil piercing which do a comparative analysis with other systems. For example, *see* Roberto Obando Pérez, *supra* note 162. This article offers a deep analysis of corporate veil-piercing under Spanish Corporate Law.

[171] See John H. Matheson & Raymond B. Eby, *supra* note 138, at 147, 178 (2000).

no minimum capital amount is required; as a result, undercapitalization is determined by the court.

In Mexico, the capitalization requirement under the LGSM is $50,000 pesos, an amount so insignificant that compliance is easy, regardless of the size and risks assumed by the corporation. Despite the legal requirement, many corporations have larger capital stocks in order to appear financially sound to creditors.

Despite capitalization requirements under the LGSM, undercapitalization is an important element that courts need to assess in evaluating whether to pierce the corporate veil. When a company is incorporated for the purpose of misleading creditors, shareholders generally fail to transfer any assets to the corporation at the time of start-up. For this reason, undercapitalization provides a clue whether the corporate structure is being abused at the expense of creditors.

Alternatively, courts should also take into account insolvency in determining whether to pierce the corporate veil. This does not mean, however, that veil piercing should be applied solely in bankruptcy cases; on the contrary, insolvency should be assessed as an alternative to undercapitalization because many insolvent corporations are liquidated outside bankruptcy.

Insolvency is a good way to evaluate whether limited liability and the corporate structure are being abused. When the debtor is solvent, creditors may receive payment in full; when the debtor is insolvent, however, creditors are not entitled to full payment. This problem is exacerbated when there is more than one creditor. Insolvency also creates inefficiencies by providing incentives for the debtor's managers and shareholders to invest in value-diminishing projects and decrease investment in value-adding projects. Value-diminishing projects involve excessively risky activities with a negative net present value[172], so that the expected value of creditor's claims is likely to be reduced by a greater amount than the expected gain generated by the project for shareholders. These projects are nonetheless attractive, however, because the company's managers seek to increase the expected equity value despite their cost to creditors. The managers' main goal is to avoid bankruptcy and losing their jobs.[173] For this reason, insolvency exacerbates incentives to abuse both the corporate form and limited liability.

As for proof of corporate insolvency, a test could be required as the one required by the article 10 of the LCM in a bankruptcy case, which not only refers to the lack of assets but also to the lack of liquidity.

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[172] For the purposes of this text, value diminishing projects are those with a negative net present value, meaning a project that reduces the total amount of value for both the debtor and the other party to the contract. For more information about positive and negative present value transactions see for example Richard Posner, Economic Analysis of the Law (4th ed. 1991).

[173] *See* Jesse M. Fried, *Executory Contracts and Performance Decisions*, 46 Duke L.J. 517, 1821 (1996).

2. *Failure to Observe Corporate Formalities*

Lack of formality refers to corporations' breach of statutory procedures. Failure to observe corporate formalities by itself is not sufficient to hold shareholders liable for corporate debts, but it can be used to help identify shareholder misconduct.

This element is closely related to control and refers to issues such as:

1) Failure to issue stock. The fact that the corporation has not issued stock certificates indicates that there are no shareholders and the company is probably undercapitalized. This is generally a starting point to detect shareholder misconduct.
2) Failure to convene shareholders' or board of directors' meetings; as well as failure to formally approve or carefully document transactions. Failure to hold meetings and properly document transactions suggests the existence of unfair transactions between the corporation and its shareholders, in which shareholders are removing assets from the corporation at the expense of the corporation's creditors.

This is a key element for veil piercing. In insolvency and fraud cases, this element is fairly common.

3. *Control*

In cases in which the shareholder is another corporation (*i.e.* there is a parent-subsidiary relationship), then the element of control must be shown. This refers to the relationship between the parent and subsidiary and requires proof that the parent exercises complete control or domination over the subsidiary. It is not enough that the parent determines the general policies, supervises or controls the finances and expenses of the subsidiary; on the contrary, it must be shown that the parent exercises day-to-day control over the subsidiary, often leaving no discretion to the subsidiary to make independent decisions. Control implies that the parent is so involved in the day-to-day management of the subsidiary that both have become, in essence, one entity.

Some clues given to guide the court include the following:

1) The parent owns all or most of the subsidiary's stock.
2) The parent's directors and officers take part in the management of the subsidiary.
3) The parent finances the subsidiary.
4) The parent bears some expenses or losses incurred by the subsidiary.
5) The subsidiary deals exclusively with the parent.

6) The subsidiary owns only the assets conveyed by the parent.
7) The parent uses the subsidiary's assets as its own.

A. *Misrepresentation*

Plaintiffs should be required to prove misrepresentation as it implies that the corporation was being used by managers and shareholders to deceive creditors.

Proof should be specifically required that the company's shareholders or managers have misled creditors into believing that the entity had more assets than it really did. The key here is that managers or shareholders made the creditor believe there were enough assets to pay the debts. There must be an intention to mislead or confuse creditors.

B. *Tort Creditors*

Corporate veil piercing should be available to tort creditors without the need to prove other elements except undercapitalization or insolvency. In general, a voluntary creditor that enters into a contract with a debtor negotiates the terms and price of the contract based on the risk of loss involved. This is particularly true for sophisticated voluntary creditors who have a significant stake in the transaction; these creditors have the ability to evaluate information about the real costs of the entity's activities. Unlike voluntary creditors, tort creditors are not in contractual relationships with debtors; for this reason, tort creditors cannot negotiate debt terms. As a result, shareholders and managers fail to internalize the costs of the entity's excessively risky activities.

Such criterion was followed by the LERVPAS. Under this statute, shareholders could be held liable for corporate debts based on misconduct

C. *Injury*

This element is closely related to insolvency as it refers that the misrepresentation, that is to say the abuse of the corporate form and limited liability results in an injury to the corporation's creditors because it prevents creditors from collecting their claims; creditors suffer an injury because insolvency makes them lose something they have the right to receive.

The advantages of this proposal are simplicity and directness. Given the harsh nature of veil piercing, the rule should be simple and clear. This proposal addresses corporations and the elements to be considered by courts are those common in most corporate veil piercing cases. Although other options exist, the purpose herein is to stimulate discussion about the adoption of corporate veil piercing in Mexico.

IX. Conclusion

Economic reality makes it hard to imagine the world without limited liability, which has permitted worldwide expansion of business and the development of risky but productive activity. By virtue of limited liability, risks are allocated to the most efficient risk-bearers. Creditors are better at bearing risk because they can negotiate adequate compensation for the risks they assume. There are, however, exceptions to this assertion.

Limited liability creates incentives for shareholders to engage in risky activities without compensating creditors. Problems generated by limited liability are generally related to corporate structure. In corporations that have only a few shareholders, the likelihood of moral hazard is increased. Shareholders often take part in management to make the enterprise engage in risky activities in order to obtain higher returns on their investment at the expense of creditors.

The downsides of limited liability are also determined by the types of creditors involved, especially when these individuals cannot negotiate adequate compensation. Difficulties to negotiate adequate compensation occur either because (a) creditors are unable to enter into agreement with the corporation, *e.g.*, tort creditors; or (b) because the corporation misrepresents its financial condition.

Aware of these problems, lawmakers have developed several legal mechanisms to protect creditors. The harshest remedy is the doctrine of "piercing the corporate veil," under which courts can make an exception to limited liability. Although this doctrine has been criticized, it is arguably the most effective way to internalize costs. A major weakness of this remedy, however, is a lack of clarity. As a result, there are currently few reliable standards; similar circumstances may produce completely different outcomes.

Mexico urgently requires a legal mechanism that permits corporate veil piercing. Any proposal must take into account the need to provide effective protection to creditors and, at the same time, preserve limited liability as the cornerstone of corporate law.

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THE STRUGGLE FOR LEGAL PHILOSOPHY (*VIS-À-VIS* LEGAL EDUCATION): METHODS AND PROBLEMS*

Imer B. Flores**

Abstract: *The article challenges the empirical claim that suggests that the legal skills needed to successfully practice law are not —and cannot be— learned at law schools, and contrasts it with the conceptual claim that indicates that the legal tasks needed for practicing law presuppose a legal theory —or at least requires a link between theory and practice. Hence, the dual claim –empirical and conceptual — is that legal philosophy is an important part of a legal curriculum and necessary to bridge, rather than to deepen, the existing gap between theory and practice.*

Key Words: *Jurisprudence, legal education, legal philosophy, problematic turn, theory and practice.*

Resumen: *El autor cuestiona la pretensión empírica que sugiere que las habilidades jurídicas necesarias para ejercer exitosamente el derecho no son —ni pueden ser— enseñadas en las facultades de derecho, y la contrasta con la pretensión conceptual que indica que las herramientas legales necesarias para ejercer el derecho presuponen una teoría jurídica —o al menos requieren un vínculo entre teoría y práctica. Por tanto, su pretensión doble —empírica, por un lado, y conceptual, por el otro— es que la filosofía jurídica es una parte importante del*

* An earlier version of this article was originally prepared for and presented in the Special Workshop on "Alternative Methods in the Education of Philosophy of Law (and the Importance of Legal Philosophy in the Legal Education)" at the XXIII IVR World Congress *Law and Legal Cultures in the 21st Century: Diversity and Unity* in Krakow, Poland, in 2007, and was translated into Turkish as: "(Hukuk Eğitiminde) Hukuk Felsefesi İçin Savaşim: Yöntem ve Sorunlar", trans. Öykü Didem Aydin, Hukuk Felsefesi ve Sosyolojisi Arkivi, No. 18, İstanbul, Barosu Yayinlari, 2008, at 28-48.

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currículo y necesaria para establecer un puente entre teoría y práctica, en lugar de profundizar la brecha entre ellas.

Palabras clave: *Ciencia del derecho, educación jurídica, filosofía jurídica, giro problemático, teoría y práctica.*

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Resistance to injustice, the resistance to wrong in the domain of law, is a duty of all who have legal rights, to themselves —for it is a commandment of moral self-preservation— a duty to the commonwealth; —for this resistance must, in order that the law may assert itself, be universal.

Rudolf von Jhering, *Der Kampf ums Recht* (1872)

I. Introduction: Unchaining Prometheus

Liberating legal philosophy from the chains of both traditional legal education, which tends to demote it to just another *informative* subject to be memorized and repeated for the final exam like a variation of black-letter and doctrinal law, and the corresponding legal profession that relegates it to a mere peripheral role that is completely meaningless, useless and worthless for a legal operator or practitioner —like an advocate, a judge and even a legislator—, implies readdressing it as a necessary and important *formative* part of the legal curriculum and that is entirely meaningful, useful and worthwhile.[1]

[1] See Imer B. Flores, *Algunas reflexiones sobre la enseñanza del derecho: Enseñar a pensar y a repensar el derecho*, 5-7 Cauces. Expresión de los estudiantes de la Facultad de Derecho 30 (2003). *Langdell v. Holmes: On Legal Education —and the Legal Profession*, 3 De Legibus. Review of the Harvard Law School Association of Mexico 13 (2004) (Published electronically in: 4 Mexican

In that sense, it is imperative to teach law and legal philosophy not only from a theoretical perspective, but also from a practical one, by privileging critical thinking, dialectical and dialogical inquiry, as well as problem orientation over mere memorization.[2]

As a result, it is necessary to discuss proper methods for teaching legal philosophy beyond the lecture and case systems; and shift from merely teaching abstract and general *informative* theories to be learned and memorized to more concrete and particular *formative* problems to be argued, discussed and solved (dissolved and resolved). In this sense the struggle for legal philosophy is analogous to the one Rudolf von Jhering foresaw when he published *Der Kampf ums Recht* [The Struggle for Law] in 1872, and the one Herman Kantorowicz —under the *nom de plume* of Gnaeus Flavius— foretold when he published *Der Kampf um die Rechtswissenschaft* [The Struggle for Legal Science *aka* The Battle for the Liberation of Legal Science] in 1906.[3]

Departing from the *Begriffsjurisprudenz*,[4] Jhering denied that law consists of rules derived from abstract concepts and declared that the life of the law is a struggle —a struggle of nations, of State power, of classes, of individuals. As the circumstances of life change, people demand changes in the law, but these changes usually come about only after a bitter struggle of acceptance and resistance, of obedience and disobedience, of recognition and rejection. Individuals who feel they have suffered wrongdoing demand legal redress, and their demands, if successful, lead to the establishment of new legal rights. Jhering's agenda is a stimulus to make law —and legal philosophy— a means for achieving social change.

Law Review (2005): http://info8.juridicas.unam.mx/cont/mlawr/4/arc/arc2.htm). *Prometeo (des)encadenado: La enseñanza del derecho y los estudios de posgrado*, 14-15 Cultura y derecho 93 (2004) (There is revised version: *Prometeo (des)encadenado: La enseñanza del derecho en México*, 7 Academia. Revista sobre enseñanza del derecho 51 (2006). *Protágoras* vis-à-vis *Sócrates: Los métodos de enseñanza-aprendizaje del derecho*, in Metodología del Derecho Comparado. Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados 125 (José María Serna de la Garza ed., UNAM-IIJ, 2005).

[2] *Cf.* Brian H. Bix, Jurisprudence: Theory and Context 3 (3rd ed., Sweet & Maxwell, 2003): "Part of the purpose in writing this book [*i.e. Jurisprudence: Theory and Context*] was to counter a tendency to treat jurisprudence as just another exercise in rote memorization. It is often tempting for jurisprudence students […] to treat the major writers in the area as just a variation on black-letter, doctrinal law: that is, as points, positions and arguments to be memorized, in order that they can later be repeated on the final examination."

[3] See Rudolf von Jhering, The Struggle for Law (trans. John Lalor, The Law Book Exchange Ltd., 1997) (Published originally in English: 1915) (There is a Spanish version: La lucha por el derecho (trans. Adolfo Posada y Biseca, Librería General de Victoriano Suárez, 1921); and a reprinted version: Porrúa, 1982). Hermann Kantorowicz, *La lucha por la ciencia del derecho*, in Friedrich Karl von Savigny *et al.*, La ciencia del derecho 323 (trans. Werner Goldschmidt, Losada, 1949).

[4] On the *Begriffsjurisprudenz* or Conceptual Jurisprudence, see Edgar Bodenheimer, Jurisprudence. The Philosophy and Method of Law 70-4 (Harvard University Press, 1962).

Meanwhile, endorsing the *Freirechtsbewegung*,[5] Kantorowicz enrolled new combatants to the cause of liberating legal science from its dogmatic assumption of being capable of solving any present or future problem, something no other science either theoretical or practical presumes or can presume. Kantorowicz's manifesto is an invitation not only to leave behind such dogmatism and the presumption of having inferred all the answers to complex questions beforehand, but also to look forward for the solutions of both the theoretical and practical problems of legal science —and of legal philosophy.

In this article, I will challenge the empirical claim that suggests that the legal skills needed to successfully practice law are not —and cannot be— learned at law schools, and compare it with the conceptual claim that indicates that the legal tasks needed for practicing law presuppose a legal theory —or at least requires a link between theory and practice. Hence, my dual claim —empirical, on the one hand, and conceptual, on the other hand— is that legal philosophy is an important part of legal curriculum and necessary to bridge, rather than to deepen, the existing gap between theory and practice. In this sense, in order to emphasize the importance of legal philosophy in legal education, in the following two sections, I intend to appraise:

1) The interconnection between theory and practice to differentiate two sets of methods, accentuating the aims of theoretical scholars, as embodied by Dean Christopher Columbus Langdell,[6] and the objectives of practical practitioners, as identified with Justice Oliver Wendell Holmes,[7] but nothing precludes these methods from being integrated into a single one; and,
2) The interrelation between these methods not only to distinguish two types of problems, one which emphasizes the objectives of legal philosophy as a science, as held by Socrates, and the other that sees applied legal philosophy as an art, as instructed by Protagoras, but also to disseminate what I consider a "problematic turn".

Finally, in the last section, on a more personal note, I assess alternative methods in the education of philosophy of law, by sharing my own integrated model for legal education and for teaching-learning legal philosophy thorough lectures and seminars, readings and materials, including cases and problems, as well as examples borrowed from the so-called law & literature movement, which integrates not only theoretical and practical methods, but also theoretical and practical problems.

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[5] On the *Freirechtsbewegung* or Free Law Movement, see Bodenheimer, *supra* note 4, at 109.

[6] See, for example, C.C. Langdell, Selection of Cases on the Law of Contracts (1871) (There is 2nd ed., 1877).

[7] See, for instance, Oliver Wendell Holmes Jr., *Book Notices*, 14 American Law Review 234 (1880).

> *It is obvious that no matter how complete the theory may be, a middle term is required between theory and practice, providing a link and a transition from one to the other.*
>
> Immanuel Kant, *Über den Gemeinspruch: 'Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis'* (1793)

II. Methods: Langdell *et* Holmes

Keep in mind that Justice Felix Frankfurter —former student and professor at Harvard Law School— once suggested: "In the last analysis, the law is what lawyers are. And the law and the lawyers are what the law schools make them."[8] However, it is commonly said that (higher) education is in crisis because of an increasing gap between what theory supplies and practice demands. It is also said that this crisis reaches all vanguard and rearguard countries, public and private institutions, natural and social sciences, alike. Accordingly, legal education in Mexico —and elsewhere— appears to be in crisis: law schools and lawyers, as well as other legal practitioners and theoreticians, seem to be divorced —or at least look as if they are in the process of getting a divorce.

To prove my point of how opportunity and possibility, instead of fatality and necessity, arise from calamity and emergency, let me call your attention to the fact that nobody could foretell the synergy Judge Harry T. Edwards set in motion in the United States of America when in the early 1990s he expressed his deep concern about "the growing disjunction between legal education and the legal profession," in an article with the same title and two postscripts for a couple of symposiums.[9]

Notwithstanding the striking differences, the status of the gap between legal education and the legal profession in most of the countries is very similar, not only in terms of the divorce between theory and practice, but also the lack of ethical practice —to the extent that law no longer appears to be a liberal profession. For example, Elena Kagan —then Dean at Harvard Law School, later Solicitor General and now Justice of the Supreme Court— did

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[8] Letter from Felix Frankfurter (Professor, Harvard Law School) to Mr. Rosenwald (May 13, 1927), quoted in Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Michigan Law Review 34 (1992).

[9] See Edwards, *supra* note 8, at 34; *The Growing Disjunction between Legal Education and the Legal Profession: A Postscript*, 91 Michigan Law Review 2191 (1993); and, Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction between Legal Education and the Legal Profession"*, 69 Washington Law Review 561 (1994). See also Flores, *Langdell v. Holmes*…, *supra* note 1, at 13-20; *Symposium: Legal Education*, 91 Michigan Law Review 1921 (1993); and *Symposium: The 21st Century Lawyer: Is There a Gap to Be Narrowed?*, 69 Washington Law Review 505 (1994).

steer her deanship into such an enterprise.[10] Nonetheless, a word of caution is in order: for Professor James Boyd White, "the relevant line is not between the 'theoretical' and 'practical' […] but between work that manifests interest in, and respect for, what lawyers and judges do, and work that does not." To put it in a few words, he argues: "The opposition between 'theoretical' and 'practical' is […] misleading."[11]

He is absolutely right in that we must be suspicious of anyone who disregards theory or practice because since they are linked together, the denigration of the one is the derision of the other and *vice versa*. Instead, we must insist on mutual interest and respect for what lawyers, judges and other legal practitioners achieve, on one side, and for what scholars, students and other legal theoreticians accomplish, on the other. At the end of the day, it is clear that there already is a bridge connecting the two sides: to the extent that one can be on one side or on the other —as in the "revolving door" metaphor.[12]

The problem is that sometimes the bridge seems to be falling apart —or the revolving door seems to get stuck— leaving the "impractical" scholar and the "atheoretical" practitioner *incommunicado*. It is imperative to restore the link between law schools and legal arenas or playing fields; or, in slightly different terms, re-tying the knot between theory and practice, scholars and practitioners, to the extent that the "practical scholar" and the "theoretical practitioner" will be reconnected again.

In this sense, let me now turn to legal education, where theory and practice really do meet. At any law school, we can find the future judge, lawyer, legislator, and legal official or practitioner in any student, and the past —or even the present— judge, lawyer, legislator, and legal official or practitioner in any scholar.[13] In analyzing, legal education in general and legal philosophy in particular, there are three different but interconnected questions worth asking: 1) *what* to teach-learn; 2) *how* to teach-learn; and 3) *why* teach-learn?[14]

I take it for granted that the issues of *where* and *when* to teach-learn have been settled in favor of professional law schools —not merely technical ones— and permanent/continuous/on-going legal education —not tempo-

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[10] *Cf.* Elena Kagan, *Connecting to Practice*, Harvard Law Bulletin: "Managing the Profession. The World of Law School and the World of Practice are about to Get Closer" 2 (Fall 2006).

[11] James Boyd White, *Law Teachers' Writing*, 91 Michigan Law Review 1970 (1993).

[12] The "revolving door metaphor" has several applications but it usually suggests that it is neither clear nor precise when someone is in or out or where something begins or ends. In that sense: when someone is a theoretician or a practitioner, as well as where theory and practice begins or ends.

[13] White, *supra* note 11, at 1970: "[T]he main mission of law school, where practice and teaching really do meet: the education of future lawyers."

[14] I have addressed these questions elsewhere *a propos* of law in general, and will address them in the following part of this article focusing on legal philosophy, in particular. See Flores, *Langdell v. Holmes*…, *supra* note 1, at 20-39.

rary studies— whereas the queries on *what*, *how to* and *why* teach-learn are not established, as they are in constant flux, shaping one another. Moreover, the "world wide web" or the "Internet" has certainly increased the possibilities and potential of where and when to teach-learn law in general and legal philosophy in particular: *anywhere* and *anytime*.[15]

1. *Why Teach-Learn?*

The question of *why* teach-learn can be easily rephrased as *what* for or for *what* purpose? The obvious short answer is to train the legal practitioners and legal theoreticians, *i.e.* professors and researchers, our modern complex global society needs. However in recent times, the legal profession —which by definition has been traditionally considered a liberal one— has had to reinforce its commitment with society at large by emphasizing its public and social role: *pro bono*.[16]

As education implies receiving information and also formation, it enables future legal practitioners and theoreticians to apply their knowledge analytically and critically to solve the problems of their profession and its corresponding science. However, there are two main paths, each of which corresponds to a distinct role of logic: 1) *practical*, leaning to the fulfillment of the aims of the legal profession and the assessment of the correctness of legal premises and conclusions; and 2) *theoretical*, slanting towards the realization of the aims of legal science and the evaluation of legal propositions (on law). For the purposes of this paper, I will refer to Holmes and Langdell to accentuate these two distinct kinds of legal methods, as they embody the *legal profession* and *legal science*, in that order, and exemplify the *theoretical practitioner* and the *practical scholar*, respectively.[17]

To put it in Karl N. Llewellyn's terms: "Technical skill is not *a* foundation only. It is *the necessary* foundation."[18] Moreover, as law schools are professional schools and not merely technical ones, they also have to focus on theoretical

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[15] In the teach-learn dichotomy, the later element —as the defining and stronger one— has a lexical priority: the important part is learning regardless of the teaching or even without it. See Flores, *Algunas reflexiones sobre la enseñanza del derecho*…, *supra* note 1, at 31-2; and, Flores, *Protágoras vis-à-vis Sócrates*…, *supra* note 1, at 28.

[16] See Harold Lasswell and Myres McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale Law Journal 203 (1943); and Teaching for Social Justice. A *Democracy and Education* Reader (William Ayers, Jean Ann Hunt & Therese Quinn eds., The New Press and Teachers College Press, 1998).

[17] I have identified the former with Protagoras —or even Cicero— and the latter with Socrates elsewhere. For the purposes of this paper, I will use them to emphasize two diverse kinds of problems to law: scientific or theoretical, on one side, and, technical or practical, on the other. See Flores, *Protágoras* vis-à-vis *Sócrates*…, *supra* note 1, at 136.

[18] Karl N. Llewellyn, Jurisprudence: Realism in Theory and Practice 367 (The University of Chicago Press, 1962).

knowledge. As we have already pointed out, they cannot focus exclusively on the scientific or theoretical aims of the science or on the technical or practical ends of the profession; they must simultaneously combine practical and theoretical interests, particular and general objectives, and technical and scientific goals, among other things.[19] In this sense, it is necessary to teach-learn legal philosophy as the link and transition between them.

2. *How to Teach-Learn?*

The traditional method of teaching-learning law, including legal philosophy courses, in Mexico —and presumably in most Latin American and civil law countries— is mainly based on a system of *lectures*, which is characterized as the exposition of a topic —or series of topics— by the professor in the classroom and students' passive reception of the information. Students' duties are limited to reading —or more precisely following— a textbook and taking notes of the professor's "luminous/radiant/resplendent" exposition, while the professor has the prerogative —which ought to be a duty— of answering students' questions and doubts.

Among the criticism of the traditional method, I would like to point out that knowledge seems to belong exclusively to the professor and as a result the teaching-learning process is a mere monologue and not a true dialogue. Furthermore, there is a strong myth that law schools should limit themselves to teaching theory and not practice. The belief is that law school professors are unable and unfit to teach experience because experience is —and only can be— taught by "real" life. However, as we have argued, it is important, as Dean Roscoe Pound suggested, to teach both "law in books" and "law in action".[20]

Acting as the devil's advocate, let me say that despite the shortage of professional legal scholars in Mexico, especially "practical scholars", law schools are fortunately full of legal practitioners, specifically "theoretical practitioners", who can teach not just law in books, but law in action as well. However, they tend to teach law only from a scientific and theoretical perspective, instead of complementing it with a technical and practical one.

In this sense, it is necessary to teach-learn law from the perspective of both the theorist and the practitioner. In most civil law countries, like Mexico, the first thing that comes to mind —to complement and not substitute the traditional lecture method— is to adopt and adapt the case method —to reinforce the problem-solving nature of lawyers and legal professionals— but it is also necessary to avoid focusing solely on practice and cast off the phantom of formalism, *i.e.* excessive trust in syllogism and deduction. It is worth mention-

[19] See Charles Eisenmann, Law. The University Teaching of Social Sciences 17-55 (UNESCO, 1973).

[20] See Roscoe Pound, *Law in Books and Law in Action*, 44 American Law Review 12 (1910).

ing that in the United States of America, where the case system is still the general rule for teaching most legal courses, the lecture is the exception for teaching certain subjects, such as legal philosophy. Although the case method is not normally used to teach-learn legal philosophy, it may be used to stress some of its contents. What is more, nothing precludes the quest for a balance between these and other methods, such as those used in England, where lectures are used along with the case system and tutorials.[21]

3. *What to Teach-Learn?*

In terms of *what* to teach-learn, we must teach-learn not only the law that "is", but also the law that "must" be. In this sense, it is necessary not to discard any possibility, *i.e.* the law that "ought to be", "can", "could", "may", "might" or "should" be. In other words, it is neither possible nor desirable to reduce legal education to teaching-learning positive legal rules as something that is merely formal and valid from a merely descriptive perspective based on legal formalism and positivism. On the contrary, we must teach-learn law in its widest scope, assessing its content critically, including evaluative and normative-prescriptive points of view along with the different alternative and non-traditional perceptions —and constructions— of law.[22]

The main objection is aimed against the excessive trust given to the analytical, deductive-inductive, formal and rational logic by focusing on the apparent mechanic application and neutrality of the syllogism. In the United States of America, Holmes was the first to open fire against legal formalism and his target was no other than Langdell. However, in his famous essay "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream", H.L.A. Hart said:[23]

> Holmes certainly never went to these extremes [represented by Llewellyn and Frank]. Though he proclaimed that judges do and must legislate at certain points, he conceded that a vast area of statutory law and many firmly established doctrines of the common law […] were sufficiently determinate to make it absurd to represent the judge as primarily a law-maker. So for Holmes the judge's law making function was 'interstitial'. Holmes's theory was not a philosophy of 'full steam ahead and damn the syllogisms.'

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[21] See Jerome Hall, *Teaching Law by Case Method and Lecture* (paper presented at the annual meeting of the Society of Public Teachers of Law in Edinburgh, July 15, 1955). See also Eisenmann, *supra* note 19, at 144-152.

[22] See Imer B. Flores, *La concepción del derecho en las corrientes de la filosofía jurídica* [*The Concept of Law in the Theories of Legal Philosophy*], 90 Boletín Mexicano de Derecho Comparado 1001 (1997); and *El porvenir de la ciencia jurídica. Reflexión sobre la ciencia y el derecho*, in La ciencia del derecho durante el siglo XX, 999 (Instituto de Investigaciones Jurídicas, UNAM, 1998).

[23] H.L.A. Hart, *American Jurisprudence through English Eyes: the Nightmare and the Noble Dream*, in Essays in Jurisprudence and Philosophy 128 (Oxford University Press, 1983).

And Hart even suggested:[24]

> Perhaps the most misused quotation from any American jurist is Holmes's observation of 1884 (*sic*) '[t]he life of the law has not been logic: it has been experience.' This in its context was a protest against the rationalist superstition (as Holmes thought it) that the historical development of the law by the courts could be explained as the unfolding of the consequences logically contained in the law in its earlier phases. Judicial change and development of the law were, Holmes insisted, the expression of judges' 'instinctive preferences and inarticulate convictions' in response, as he said, to the 'felt necessities' of his time.

Although Hart tries to minimize Holmes' frontal attack against "logic", or at least against the "excessive use and extreme confidence in logic", everybody knows that Holmes' multi-cited quote "[t]he life of the law has not been logic: it has been experience" has become more than an anthem.[25] However, not everybody knows that it originated prior to the publication of *The Common Law* in 1881. As it appeared for the first time in January 1880, in a Book Notice to the Second Edition of *A Selection of Cases of the Law of Contracts with a Summary of the Topics covered by the Cases* by C.C. Langdell:[26]

> Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris*, or *logical* integrity of the system as a system. He is perhaps the greatest living theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together [...] so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which actually shaped the substance of the law. The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views.

At this point it is imperative to tone down the phrase to modulate its force. I believe it is really a frontal assault against the traditional, openly analytical, deductive-inductive, formal and rational logic, but in no way it is intended to abolish its use or that of non-traditional, overtly dialectical, adductive-subtractive, informal and reasonable logic. Let me call to your attention to the following lines of the book, in which Holmes explains: "[t]he object of

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[24] *Id.* at 33.

[25] Oliver Wendell Holmes Jr., The Common Law 1 (Dover, 1991) (Published originally: 1881).

[26] Holmes, *supra* note 7, at 234.

this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all." And, in the subsequent lines, he adds:[27]

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

In fact, in his seminal "The Path of Law" of 1897, Holmes denounced: "The fallacy [...] that the only force at work in the development of the law is logic."[28] Hence, even though he recognizes the important place and role of traditional logic, he cynically argues that it is not everything:[29]

> This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.

Similarly, in his "Law in Science and Science in Law" address, Holmes stated:[30]

> I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results. It is a necessary method for the purpose of teaching dogma. But inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary

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[27] Holmes, *supra* note 25, at 3.

[28] Oliver Wendell Holmes Jr., *The Path of the Law*, 110 Harvard Law Review 997 (1997) (Published originally: 1897).

[29] *Id.* at 998.

[30] Oliver Wendell Holmes Jr., *Law in Science and Science in Law*, in Collected Legal Papers 238 (Constable and Co., 1920).

> that those who make and develop the law should have those ends articulately in their minds.

Indeed, as Julius Cohen suggests, Holmes' critical assessment of the imbalance between "logic" and "experience" does not "support the view that logic has *no* place in the development of the law […] The error would, accordingly, be in viewing law *solely* as an exercise in deductive logic […] [In fact, m]uch of Holmes's notable contributions to legal thought have been a function of keen *logical* analysis of legal doctrines."[31]

Actually, Holmes also disapproved of the other extreme, *i.e.* the fallacy that the only force at work in the development of the law is history-tradition: "Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the rôle [*sic*] of history more important than it is."[32] Appropriately, he recommended:

> The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is, and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.

This idea of complementariness is also explicit in Pound's *Law Finding through Experience and Reason*, in which, in his opening remark, he recalls that more than three centuries before, in the early 17th century, Sir Edward Coke, Chief Justice of the Court of Common Pleas, first, and of the King's Bench, later, and archenemy of Sir Francis Bacon, argued that "Reason is the life of the law, nay the common law itself is nothing else but reason," and concluded that "law is an artificial reason:" "an artificial perfection of reason, gotten by long study, observation, and experience, and not of everyone's natural reason; for *nemo nascitur artifex*."[33] In the *Centennial History of the Harvard Law School*, in a section probably written by Pound himself, it is said:[34]

> It has, however, become evident in recent years […] that the scope of legal study must extend beyond printed books, certainly beyond law books. Since law is not a water-tight compartment of knowledge but a system of rules for the

[31] Julius Cohen, *Justice Brennan's "Passion"*, 10 Cardozo Law Review 193 (1998).

[32] Holmes, *supra* note 28, at 1003.

[33] Edward Coke quoted in Roscoe Pound, Law Finding through Experience and Reason 45 (University of Georgia Press, 1960). See Imer B. Flores, *The Quest for Legisprudence: Constitutionalism v. Legalism*, in The Theory and Practice of Legislation: Essays on Legisprudence 43-4 (Luc J. Wintgens ed., Aldershot, Ashgate, 2005).

[34] Roscoe Pound quoted in Erwin N. Griswold, *Intellect and Spirit*, 81 Harvard Law Review 295 (1967).

regulation of human life, the truth of those rules must be tested by many facts outside the past proceedings of courts and legislatures.

> *Unless the jurist is at the same time a philosopher, at any rate in moral matters, he is under the greatest temptation to do this, for his business is merely applying existing laws, and not to enquire whether they are in need of improvement.*
>
> Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795)

III. Problems: Socrates *re* Protagoras

In contrast to the traditional approach denounced by both Jhering and Kantorowicz which tends to privilege *systematic* knowledge, as well as the creation and completion of a system from which to derive or infer all the answers even to the more complex questions both theoretical and practical, we can shift to a more *problematic* one. In a few words, it is counterintuitive to focus on a general system to solve a specific problem or set of problems and not to center on the particular problem or set of problems. It is worth noting the problematic turn can be traced both in philosophy in general, and to legal philosophy in particular, back to 1911, when Paul Nartop published his *Philosophie. Ihr Problem und ihre Probleme* prior to his posthumous *Philosophische Systematik* (1958) and Hans Kelsen presented his *Habilitationsschrift* entitled *Hauptprobleme der Staatsrechtslehre. Entwickelt aus der Lehre vom Rechtssatze.*[35]

[35] Keep in mind that the problematic approach was popularized by Nicolai Hartmann in his *Zum Problem der Realitätsgegebenheit* (1931), *Das Problem des geistigen Seins. Untersuchungen zur Grunlegung der Geschichtsphilosophie und der Geisteswissenschaften* (1933), "Das Problem des Apriorismus in der Platonischen Philosophie" (1935) and "Aristoteles und das Problem des Begriffs" (1939), all prior to his *Systematische Philosophie* (1942), and by Philipp Heck in his *Das Problem der Rechtsgewinnung* (1912), as well as by Kelsen himself, not only in his *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (1920) and *Das Problem des Parlamentarismus* (1925), but also in the first edition of his *Reine Rechstlehre* under the subtitle of *Einleitung in die rechtswissenschaftliche Problematik* (1934) and even in its second edition under the subtitle of *Mit einem Anhang: Das Problem der Gerechtigkeit* (1960), and by Erik Wolf in his *Das Problem der Naturrechstlehre* (1955). In Latin America, the pioneers of this approach were Carlos Cossio in Argentina, and Eduardo García Máynez in Mexico; and their followers include: Juan Llambías de Azevedo in Uruguay; Luis E. Nieto Arteta in Colombia; and also Luis Recaséns Siches in Mexico. On one side, Cossio published *La reforma universitaria o el problema de la nueva generación* (1927), *La coordinación de las normas jurídicas y el problema de la causa en el derecho* (1948), his exchange with Kelsen as *Problemas escogidos de la teoría pura del derecho. Teoría egológica y teoría pura* (1952), and as a clear allusion to Nartop's landmark, *La teoría egológica del derecho: su problema y sus problemas* (1963). On the other, following Hartmann, his professor, García Máynez published "El problema del fundamento filosófico-jurídico de la validez del derecho" (1933), "El problema de la libertad moral en la ética de Hartmann" (1943), "El problema de la definición del derecho"

The list of legal philosophers emphasizing problems rather than systems —or at least before completing them and/or for proving them— includes Chaïm Perelman, who published his "Le problème du bon choix" (1948) before concluding with Lucie Olbrechts-Tyteca, one decade after, the *Traité de l'argumentation: La nouvelle rhétorique* (1958),[36] and on his own a collection of articles in English which were published precisely as *The Idea of Justice and the Problem of Argument* with an "Introduction" by Hart.[37] Furthermore, in the process of testing their systems, authors like Joseph Raz had to highlight concrete problems such as the nature of law and its normativity.[38]

Although only some contemporary authors like Bix,[39] Anthony T. Kronman[40] and Brian Leiter[41] explicitly do address problems, the vast majority have been tackling them at least implicitly in following the so-called Hart-Dworkin debate. Hart's *The Concept of Law* is an archetype of the problematic turn. In the "Preface" of this text, Hart analyzes and identifies three persistent questions or recurrent issues ("How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from and how is it

(1954), "Algunas consideraciones sobre el problema de las antinomias en el campo jurídico" (1963), and *El problema de la objetividad de los valores* (1969). *See*. Imer B. Flores, Eduardo García Máynez (1908-1993). Vida y obra 153 (Instituto de Investigaciones Jurídicas, UNAM, 2007). A couple of these texts have been translated into English and one was published originally in German. *See*. Eduardo García Máynez, *The Philosophical-Juridical Problem of the Validity of Law*, in Latin-American Legal Philosophy 459 (trans. Milton R. Konvitz & Miguel A. de Capriles, Harvard University Press, 1948); *Das Problem der Definition des Rechts*, 3 Österr. Zeitschrift für Öffentliches Recht 307 (1951); and *Some Considerations on the Problem of the Antinomies of Law*, 49 Archiv für Rechts-und Sozialphilosophie 1 (1963).

[36] See Chaïm Perelman & Lucie Olbrechts-Tyteca, The New Rhetoric: A Treatise on Argumentation (trans. J. Wilkinson & P. Weaver, University of Notre Dame Press, 1969).

[37] See Chaïm Perelman, The Idea of Justice and the Problem of Argument (Routledge & Kegan Paul, 1963).

[38] See Joseph Raz, *The Problem about the Nature of Law*, 3 Contemporary Philosophy: A New Survey 107 (1983); and 21 University of Western Ontario Law Review 203 (1983), reprinted in Joseph Raz, Ethics in the Public Domain. Essays in the Morality of Law and Politics 195 (Oxford University Press, 1994). See also Joseph Raz, Practical Reason and Norms 170 (2nd ed., Oxford University Press, 1990): "The problem of the normativity of law is the problem of explaining the use of normative language in describing the law or legal situations."

[39] See Brian H. Bix, *Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?*, 16 Ratio Juris 281 (2003); and, *Problem: Conceptual Analysis* (on file with the author). See also Ira M. Ellman, Elizabeth Scott, Paul Kurtz, Lois A. Weithorn, and Brian Bix, Family Law: Cases, Text, Problems (4th ed., LexisNexis, 2004).

[40] See Anthony T. Kronman, *The Problem of Judicial Discretion*, 36 Journal of Legal Education 481 (1986).

[41] See Brian Leiter, *Beyond the Hart/Dworkin Debate: the Methodology Problem in Jurisprudence*", 48 American Journal of Jurisprudence 17 (2003), reprinted with minor changes in Brian Leiter, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy (Oxford University Press, 2007).

related to moral obligation? What are rules and to what extent is law an affair of rules?") to "show later why they come together in the form of a request for a definition of law or an answer to the question 'What is law?' or in more obscurely framed questions such as 'What is the nature (or the essence) of law?'"[42]

What is more, the best contemporary schematic depiction of the problems of legal philosophy available is the one presented by Hart himself in his "Problems of the Philosophy of Law", which was originally published in 1967 as part of Paul Edward's *Encyclopedia of Philosophy*, and republished in 1983 in his collection entitled *Essays in Jurisprudence and Philosophy*, also known as "the brown book".[43] The original version was divided into two sections: the first dealt with "Problems of Definition and Analysis" and the second, with "Problems of the Criticism of Law", while the revised version added a third group between the two original ones called "Problems of Legal Reasoning". According to the last version:

1) "Problems of Definition and Analysis" comprises problems of defining law; of the structure of law, such as the relationship between law, coercion and morality; and of analysis, mainly conceptual analysis;
2) "Problems of Legal Reasoning" embraces problems of fixity and flexibility; of creation-legislation and application-adjudication; of certainty and predictability; of choice and discretion both about facts and norms; of *the* only correct answer/decision; and of (interstitial) judicial legislation; and
3) "Problems of the Criticism of Law" includes problems of evaluating the aims and purposes of the law; problems related to substantive law (to its content) and "procedural law" (its principles); problems related to justice and other values, such as equality, liberty and utility/usefulness; and problems deriving from the obligation to obey the law.

To stress the fact that the problematic turn combines a merely theoretical approach with a more practical one, it should be noted that, for instance, the problems of fixity and flexibility are problems not only of legal philosophy, but also of applied legal philosophy. In Hart's own words:[44]

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[42] See H.L.A. Hart, The Concept of Law 1-17 (Oxford University Press, 1961) (There is 2nd ed., with *Postcript*: 1994). See also Ronald Dworkin, *The Model of Rules*, 35 University of Chicago Law Review 14 (1967), reprinted as *Is Law a System of Rules?* in Essays in Legal Philosophy 25 (Robert S. Summers ed., Basil Blackwell, 1968); and as *The Model of Rules I* in Taking Rights Seriously 14 (Harvard University Press and Duckworth, 1977) (There is 2nd ed. with *Appendix: Reply to Critics*: 1978).

[43] See H.L.A. Hart, *Problems of the Philosophy of Law* in H.L.A. Hart, Essays in Jurisprudence and Philosophy, *supra* note 23, at 88-119.

[44] Hart, *supra* note 42, at 127 (130-1).

> In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for latter settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case. In some legal systems at some periods it may be that too much is sacrificed to certainty, and that judicial interpretation of statutes or of precedent is too formal and so fails to respond to the similarities and differences between cases which are visible only when they are considered in the light of social aims. In other systems or at other periods it may seem that too much is treated by courts as perennially open or revisable in precedents, and too little respect paid to such limits as legislative language, despite its open texture, does after all provide. Legal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules. To escape this oscillation between extremes we need to remind ourselves that human inability to anticipate the future, which is at the root of this indeterminacy, varies in degree in different fields of conduct, and that legal systems cater for this inability by a corresponding variety of techniques.

The interrelation between the two needs and their corresponding methods or techniques was envisioned four decades before by Justice Benjamin N. Cardozo in *The Growth of the Law*, the sequel to his *The Nature of the Judicial Process*:

> The law of our day faces a twofold need. The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth.[45]

Whereas legal philosophy and the logic of *certainty* may be enough for the first need as a merely theoretical one, to satisfy a more practical need the second one requires applied legal philosophy and the logic of *probability*. In Cardozo's own voice:[46]

> If you ask what degree of assurance must attach to a principle or a rule or a standard not yet embodied in a judgment before the name of law may be properly be affixed to it, I can only fall back upon a thought which I shall have occasion to develop farther, the thought that law, like other branches of social science, must be satisfied to test the validity of its conclusions by the logic of probabilities rather than the logic of certainty.

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[45] Benjamin N. Cardozo, The Growth of the Law 1 (Yale University Press, 1924). See Benjamin N. Cardozo, The Nature of the Judicial Process (Yale University Press, 1921).

[46] Cardozo, The Growth of the Law, *supra* note 45, at 33. See Holmes, *supra* note 28, at 1001: "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."

Jurisprudence must rip the fading parts of the law, and ripen the flourishing ones.

Hermann Kantorowicz, *Der Kampf um die Rechtswissenschaft (1906).*

IV. Conclusion: Towards an Integrated Model (for Legal Education and) for Teaching-Learning Legal Philosophy

So far our claim has been that it is not merely possible, but necessary, to integrate 1) theoretical knowledge and practical knowledge; 2) the traditional method —whether lectures or case studies— and non-traditional methods like problems; and 3) legal formalism and positivism and other alternative approaches in an model for legal education in general, and for teaching-learning legal philosophy in particular.

Ultimately, in order to close the gap between legal education and the legal profession, it is necessary to re-construct the bridge —or to fix the revolving door— to establish a rapport between the practical scholar and the theoretical practitioner by combining theoretical knowledge with practical knowledge, traditional methods —whether lectures or case studies— with non-traditional methods, and legal formalism and positivism with other alternative approaches, to encompass most of the problems legal practitioners and theoreticians face.

Consequently, following "something like" this path and inspired by Lon L. Fuller's manual *The Problems of Jurisprudence*,[47] which includes six chapters: I. Justice; II. Positive Law; III. The Growth of Law; IV. Utilitarianism; V. Legal Analysis; and, VI. The Principles of Order, I have managed —or at least tried— to teach several courses on Jurisprudence, mainly Legal Argumentation, Legal Philosophy and Legal Theory, for more than fifteen years both to undergraduate and graduate students, including judges and legislators, as well as other legal officials, operators and practitioners, with a theoretical and practical problem-solution orientation and hope to consolidate this approach more firmly in the future.[48]

Departing from the tendency of using a single textbook as encouraged by the systematic approach and subscribing Hart's anti-textbook pedagogical philosophy endorsed by the problematic approach, I require (mandatory)

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[47] Lon L. Fuller, The Problems of Jurisprudence (The Foundation Press, 1949).

[48] Legal Argumentation can be taught with a more practical approach in comparison with Legal Philosophy and Legal Theory, but any professor might be tempted to teach these courses exactly the same way. My resistance to teaching Legal Argumentation with a solely theoretical approach has led me to firmly believe that we can also teach Legal Philosophy and Legal Theory with an integrated approach that is both theoretical and practical. See Stephen E. Gottlieb et al., Jurisprudence. Cases and Materials: An Introduction to the Philosophy of Law and Its Applications (2nd ed., LexisNexis, 2006).

readings and (obligatory) reports so as to promote the appraisal of the relevant material and assessment of its contents that tends to privilege specific problems. In Hart's own terms:[49]

> I hope that this arrangement may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain. So long as this belief is held by those who write, little progress will be made in the subject; and so long as it is held by those who read, the educational value of the subject must remain very small.

I also promote open discussion of both factual and hypothetical cases, which I consider stimulating since they help make people think and re-think the issues when they are assigned to a certain role or stance —even one opposite their initial intuitions. In the past, I have extensively used Fuller's "The Case of the Speluncean Explorers"[50] and Recaséns Siches' "The Case of Ida White (or The Vanished Legacy)"[51] for the purpose of not only demonstrating how one's interpretation of the law to be applied to a case at hand is related to (limited and restricted by) one's perception of the law, but also teaching-learning substantive parts of law, such as criminal law and civil law, respectively.

I try to finish each session —or at least one, some or most of them— with a seminar in which I expect my students to do a little more criticism and research on a topic that is usually posed as a problem or set of problems. In a still theoretical mode, in my Legal Philosophy course, for example, I often emphasize the problem of the epistemological and scientific nature of jurisprudence; the problem of the different methodologies and theories of law; the problem of defining law; the problem of analysis and critique of distinct legal concepts; the problem of the relationship between law, coercion and morality; the problem of the scope and the limits of legislation and adjudication; and other specific problems, depending on the topic that might be of interest at that time, such as abortion, death penalty, electoral reform, euthanasia, freedom of expression or speech, pornography, same-sex marriages/unions, and so on.

Furthermore, regarding the materials and readings used to address these and other problems, I present cases (and appeals) that have or will be decided not only by the Mexican Supreme Court of Justice, but also by other na-

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[49] Hart, *supra* note 42, at vii.

[50] Lon L. Fuller, *The Case of the Speluncean Explorers*, 112 Harvard Law Review 1858 (1999) (Published originally in: 1949, and republished in: The Case of the Speluncean Explorers. Nine New Opinions (Peter Suber ed., Routledge, 1998)).

[51] Luis Recaséns Siches, Nueva filosofía de la interpretación del derecho 256-269 (Fondo de Cultura Económica, 1956); and Tratado general de filosofía del derecho 647-654 (Porrúa, 1959). See Fred L. Gross, *The Vanished Legacy*, in Fred L. Gross, What is the Verdict? 115 (Macmillan, 1944).

tions' constitutional and supreme courts, as well as by international and regional courts like those for human rights. With this, I expect students to learn the ropes of legal reasoning by immersing themselves in the cases and gain awareness of their own perception of the law.

Following Jhering's lead in *Scherz und Ernst in der Jurisprudenz* (1884),[52] I also put forward readings —and other materials— that are both humorous and serious. These include manuscripts of legal, moral and political philosophers and theorists, and transcripts of deliberations and discussions between legal officials, operators and practitioners, as well as passages from the classics, historians, literary authors and critics, and even films, to illustrate a specific problem or set of problems.

I have found humor is an effective way of dealing with complex issues and difficult situations. For instance, following both Niceto Alcalá Zamora y Torres and Niceto Alcalá Zamora y Castillo, father and son, who have analyzed the golden age of Spanish literature and its relationship to law to a great extent and having Miguel de Cervantes's *Don Quixote* at hand, I have drawn examples related chiefly to principles of justice and fairness, as well as procedural law.[53] Similarly, I have found very good exemplifications of several legal problems in William Shakespeare's plays, including his comedies, histories and tragedies, such as "Coriolanus" (1608), "King Henry V" (1597-1599), "King Lear" (1605-1606), "King Richard II" (1595-1597), "King Richard III" (1594-1597), "Macbeth" (1606) and "The Merchant of Venice" (1596-1597), among others.[54]

In terms of the duty/obligation to obey the law or (dis)obedience to the law/legislation, I have contrasted Sophocles' *Antigone* and Plato's *Apology of Socrates* and/or *Crito*.[55] On the relationship between language and law, I have

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[52] See Rudolf von Jhering, *Jurisprudencia en broma y en serio* (trans. Román Riaza, Revista de Derecho Privado, 1933). There is an English version with selections of the essay *Im Juristischen Begriffshimmel* [*In the Heaven of Legal Concepts*], in Readings in Jurisprudence and Legal Philosophy 678 (Morris R. Cohen and Felix S. Cohen eds., Prentice-Hall, 1951). See also Felix S. Cohen, *Trascendental Nonsense and the Functional Approach*, 35 Columbia Law Review 809 (1935). H.L.A. Hart, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence* in Essays in Jurisprudence and Philosophy, *supra* note 23, at 265.

[53] See Imer B. Flores, *Niceto Alcalá-Zamora y Castillo (1906-1985): Estampas del derecho en broma y en serio*, in Los maestros del exilio español en la Facultad de Derecho 1 (Fernando Serrano Migallón ed., Porrúa and Facultad de Derecho, UNAM, 2003); and *Derecho y literatura: Finas estampas procesales en la obra de Niceto Alcalá-Zamora y Castillo*, in XII Congreso Mundial de Derecho Procesal, Vol. I: Obtención de información y de asunción probatoria, procesos sumarios y familiares 3 (Marcel Storme and Cipriano Gómez Lara eds., Instituto de Investigaciones Jurídicas, UNAM, 2005). See also Miguel de Cervantes, Don Quixote de la Mancha (trans. Charles Jarvis, Oxford University Press, 1992) (Part I was originally published in 1605; and, Part II was originally published in 1615).

[54] See William Shakespeare, The Complete Works of William Shakespeare (Avenel Books, 1975).

[55] See Sophocles, Antigone (Dover, 1993); and Plato, *The Apology* and *The Crito*, in The

used Alf Ross's "Tû-Tû";[56] and on the open-texture of language and to some extent of law —the (in)determinacy of law/legislation and its relationship to purpose— both Hart's (including Fuller's reply) "No vehicles in the park"[57] and Gustav Radbruch's "No dogs in the subway/train station" (via Recaséns Siches) examples.[58] On the role of principles (even moral ones) in legal reasoning, I have used those quoted by Ronald Dworkin in his criticism of Hart, such as *Riggs v. Palmer* and *Henningsen v. Bloomfield Motors Inc*., as well as his imaginary, but still reality-based and much more recent "The Case of Mrs. Sorensen".[59]

On the argumentation not of rules but of facts regarding evidence and proof, I have used King Solomon's split-the-baby-decision and Governor Sancho Panza's judgments, among others.

On the one hand, one day two women came to King Solomon claiming both to be the mother of a live baby:[60]

> They argued back and forth in front of Solomon, until finally he said, "Both of you say this live baby is yours. Someone bring me a sword."
>
> A sword was brought, and Solomon ordered, "Cut the baby in half! That way each of you can have part of him."
>
> "Please don't kill my son," the baby's mother screamed. "Your Majesty, I love him very much, but give him to her. Just don't kill him."
>
> The other woman shouted, "Go ahead and cut him in half. Then neither of us will have the baby."
>
> Solomon said, "Don't kill the baby." Then he pointed to the first woman, "She is his real mother. Give the baby to her."

On the other hand, one day a woman, keeping fast hold of a herdsman and claiming that she had been forced to have sex with him, came to at the time governor Sancho Panza, who ordered him to pay twenty ducats in a leather purse to her and he did so trembling. She was scarcely gone out, when the governor said to him:[61]

Dialogues of Plato 79-104 and 117-129 (Vol. 1, trans. R.E. Allen, Yale University Press, 1984).

[56] See Alf Ross, *Tû-Tû*, 70 Harvard Law Review 812 (1957).

[57] See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harvard Law Review 593 (1958). Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 Harvard Law Review 630 (1958). See also Hart, *supra* note 42, at 121-50 (124-54).

[58] See Recaséns Siches, Tratado general de filosofía del derecho, *supra* note 51, at 645-7

[59] See Dworkin, Taking Rights Seriously, *supra* note 42, at 23; and Justice in Robes 7-9 (Harvard University Press, 2006).

[60] 1 *Kings* 3: 16-28, in The Bible. Contemporary English Version (CEV) (American Bible Society, 1995).

[61] Miguel de Cervantes, Don Quixote de la Mancha, supra note 53, at 758-9 (Part II, Chapter 45). There is a slightly different version in: Miguel de Cervantes, *The Cases Judged by*

"Honest man, follow that woman, and take away the purse from her, whether she will or no, and come back hither with it".

This was not said to the deaf or the stupid; for instantly he flew after her like lighting, and went about what he was bid. All present were in great suspense, expecting the issue of the suit; and presently after came in the man and the woman, clinging together closer than the first time, she with her petticoat tucked up, and the purse lapped up in it, and the man struggling to take it from her, but in vain, so tightly she defended it, crying out:

"Justice from God and the world! see, my lord governor the impudence, and want to fear of this varlet, who, in the midst of the town, and of the street, would take from me the purse your worship commanded to be given me."

"And has he got it?" demanded the governor.

"Got it?" answered the woman, "I would sooner let him take away my life than my purse. A pretty baby I should be, indeed: other-guise cats must claw my beard, and not such pitiful, sneaking tools: pincers and hammers, crows and chisels, shall not get it out of my clutches, nor even the paws of a lion; my soul and body shall sooner part."

"She is in the right", quoth the man, "and I yield myself worsted and spent, and confess I have not strength to take it from her".

And so he left her. Then said the governor to the woman:

"Give me that purse, virtuous virago."

She presently delivered it, and the governor returned it to the man, and said to the forceful, but not forced damsel:

"Sister of mine, had you shown the same, or but half as much courage and resolution in defending your chastity, as you have done in defending your purse, the strength of Hercules could not have forced you. Begone, in God's name, and in an ill hour, an be not found in all this island, nor in six leagues round about it, upon pain of two hundred stripes: begone instantly, I say, thou prating, shameless, cheating hussy!"

The woman was confounded, and went away, hanging down her head, and discontented; and the governor said to the man:

"Honest man, go home, in the name of God, with your money, and from henceforward, unless you have a mind to lose it, take care not to yoke with anybody."

Similarly, there is a real but very strange case ruled by a lower judge in Navolato, Sinaloa (Mexico).[62] This was an apparently counterintuitive decision as it imposed different burdens on the owners of female and male donkeys that while mating happened to break goods at a market shop. The owners were each required to pay for not half of the damage but two thirds and one third, due to the different degree of (ir)responsibility.

Sancho Panza, in The World of Law. I. The Law in Literature 9-15 (Ephrain London ed., Simon and Schuster, 1960).

[62] See Justicia con sentido común. Belem Torres y sus anécdotas 37-38 (Héctor Torres Beltrán, ed.).

On the relationship between the abduction and subtraction made by detectives and the legal reasoning used by judges and lawyers, following Manuel Atienza's example,[63] I have referred not only to Edgar Allan Poe's *The Purloined Letter* and his hero Auguste Dupin, but also to Sir Arthur Conan Doyle's *The Adventures of Sherlock Holmes* and Agatha Christie's *The Labours of Hercules (Poirot)*. Some terms ago, I added some cinema, that is, one of Blake Edwards' *The Pink Panther* films, namely *A Shot in the Dark*,[64] to demonstrate that if there is a lack of certainty about the historic truth, the legal truth is sometimes nothing but a shot in the dark —especially if Inspector Jacques Clousseau is the (anti)hero.

On the legal rationality of judges and legislators, as well as government officials, politicians and citizens, I have used Duncan Kennedy's *Freedom and Constraint in Adjudication*[65] and Richard Parker's *Here the People Rule*, which is drawn from Thomas Mann's novel "Mario and the Magician".[66] Similarly, I have used the movie *Advice and Consent*,[67] based on Allen Drury's novel of the same name, which introduced "The Washington Novel" genre and was inspired by McCarthyism's persecution of Alger Hiss, to portray not what political animals are like in Washington —or elsewhere— but what politics does to human animals.[68] I have also used other movies, such as *12 Angry Men*[69] and *Mr. Smith Goes to Washington*,[70] to prove analogous points.

Although I have so far tried to actually teach students *how* to solve not only theoretical problems but also practical ones, I suppose we need to go one step further in the future to give students more tools by teaching-learning: 1) more philosophy courses in general, such as logic, including the traditional logic (analytical logic or logic, for short) alongside non-traditional logic (dialectical logic, also known as topic and rhetoric), philology, and even esthetics (for the symbolism of law), as well as legal philosophy courses, in particular;[71] 2) more

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[63] See Manuel Atienza, Las razones del derecho. Teorías de la argumentación jurídica 26-39 (Centro de Estudios Constitucionales, 1997). (There is another edition: Instituto de Investigaciones Jurídicas, UNAM, 2003).

[64] A Shot in the Dark (MGM, 1964).

[65] See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 Journal of Legal Education 518 (1986).

[66] See Richard D. Parker, "Here, the People Rule". A Constitutional Populist Manifesto (Harvard University Press, 1994). *Cf.* Thomas Mann, *Mario and the Magician*, in Thomas Mann, Death in Venice. And Seven Other Stories 135-181 (trans. H.T. Lowe-Porter, Vintage Books, 1930).

[67] Advice and Consent (Otto Preminger Films, 1962).

[68] *Cf.* Roger Kaplan, *Allen Drury and the Washington Novel*, 97 Policy Review (1999): "Drury was able to depict not what political animals are like in Washington, but what politics does to the human animal."

[69] 12 Angry Men (Orion-Nova Productions, 1957; MGM, 1997).

[70] Mr. Smith Goes to Washington (Columbia Pictures, 1939).

[71] I have suggested elsewhere that despite a strong legal philosophy component, the UNAM's graduate and undergraduate programs for studying law requires reinforcement both

interdisciplinary studies not only on ethics and politics, but also on anthropology, sociology and psychology in order to apply them to subjects like administrative law, constitutional law, criminal law, and so on; and 3) as a result, more problems to be solved both theoretically and practically.

Finally, treating jurisprudence as a branch of philosophy and thus part of practical philosophy in conjunction with moral and political philosophy requires (re)integrating both legal philosophy and applied legal philosophy to the heart of jurisprudence. However, two points need further clarification. On the one hand, I argue for the need to harmonize the theoretical component of legal philosophy with the practical one (applied legal philosophy). It is usually the theoretical work that takes practice seriously and proves to be of great importance. On the other hand, by not taking a merely theoretical approach but a more practical one, I advise to subordinate neither general jurisprudence to particular jurisprudence nor the necessary philosophical and theoretical parts to a contingent of sociological and pragmatic ones. It is usually general jurisprudence that takes these particularities seriously, proving to be of great purport.[72] In Professor James Boyd White's words:[73]

> It is often the most theoretical work that will prove of surprising practical value, often the immersion in practical particularities that will stimulate the most valuable thought of a general kind. Much of the life of the law in fact lies in the constant interaction it requires between the particular and the general, between the practical and the theoretical.

in qualitative and quantitative terms, See Flores, *Prometeo (des)encadenado*…, *supra* note 1, at 100-103 (57-60).

[72] See Imer B. Flores, *La cama o el lecho de Procrustes: Hacia una jurisprudencia comparada e integrada*, in Boletín Mexicano de Derecho Comparado 273 (2008).

[73] White, *Law Teachers' Writing*, *supra* note 11, at 1970.

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NOTE

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WIND DEVELOPMENT OF OAXACA, MEXICO'S ISTHMUS OF TEHUANTEPEC: ENERGY EFFICIENT OR HUMAN RIGHTS DEFICIENT?

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Abstract. *Mexico's current law and policy regarding development of renewable energy sources is incompatible with the legal rights of its indigenous population. Specifically, a conflict exists in Mexico's Isthmus of Tehuantepec, a region that is both plentiful with wind power and the longtime home of many indigenous persons of the state of Oaxaca. The desire to harness the available wind energy has resulted in negative ramifications for the original inhabitants of the Isthmus, as Mexico's expansive energy policy conflicts with the rights of indigenous landholders in Oaxaca. These interests need not be competing. Utilizing the available wind energy through the construction of wind farms can be accomplished in a manner that accommodates the interests of potential wind developers and indigenous people. Regarding Mexico's energy legislation, more specific provisions regarding enforcement and potential sanctions are necessary to adequately protect the needs of the indigenous people. This would complement Mexico's substantial legislation regarding the rights of indigenous people. Reducing the use of unfair bargaining tactics, assuring that contractual negotiations are conducted in the appropriate language, expanding the indigenous participation in the economic benefits of wind development, and ensuring that the negative environmental ramifications are mitigated are all manners in which wind development in the Isthmus may be achieved successfully.*

Key Words: *Indigenous, wind power, wind, Oaxaca, energy law, environmental law, comparative law, foreign law.*

Resumen. *La ley mexicana relativa al desarrollo de fuentes de energía renovable no es compatible con los derechos de su población indígena. Específicamente, existe un conflicto en el Istmo de Tehuantepec, una región que tiene energía eólica abundante y que también es el hogar de muchas personas indígenas en el estado de Oaxaca. La utilización de la energía eólica disponible ha tenido consecuencias negativas para los habitantes originarios del Itsmo, porque la política*

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energética expansiva de México entra en conflicto con los derechos de los terratenientes indígenas. Estos intereses y derechos no tienen que estar en competencia. Usando la energía eólica que está disponible se puede lograr la construcción del campo eólico de una manera que incorpora los intereses de desarrolladores potenciales de la energía eólica y la gente indígena. Respecto a la legislación mexicana que tiene que ver con energía, necesita disposiciones más específicas sobre su aplicación, y sanciones para proteger adecuadamente las necesidades de las personas indígenas. Estos cambios se ajustarán a la importante legislación mexicana sobre los derechos de la población indígena. Reducir el uso de tácticas de negociación injustas, asegurar que las negociaciones contractuales se llevan a cabo en el idioma correspondiente, amplificar de la participación indígena en los beneficios económicos del desarrollo de la energía eólica, y asegurar que las consecuencias ambientales negativas se atenúen, son todas maneras en que el desarrollo eólico en el Istmo puede lograrse con éxito.

Palabras clave: *Indígena, energía eólica, viento, Oaxaca, derecho de la energía, derecho ambiental, derecho comparado, derecho extranjero.*

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I. Introduction

Mexico, a country with abundant natural resources, has one particular resource that has yet to be fully harnessed: wind power. Known as *energía eólica* in Spanish, certain regions of Mexico have consistent strong wind currents. One such region is within the state of Oaxaca. Oaxaca is located in the southeast of Mexico, and is bordered by the states of Puebla, Veracruz, Chiapas, and Guerrero.[1] The southern border of Oaxaca has a significant coastline on the Pacific Ocean.[2] According to the U.S. Department of Energy, in a collaborative effort put forth by both Mexican and American Energy Institutes, there

[1] Oaxaca is one of 31 states in the United Mexican States. *See Map of Oaxaca, Mexico*, Mapquest, *available at* http://www.mapquest.com/maps?country=MX (last visited: Nov. 27, 2011).

[2] *Id.*

are approximately 6,600 square kilometers of land with "good-to-excellent wind resource potential" in Oaxaca, Mexico.[3] Using what the report deems a "conservative assumption," this translates into over 3,000 megawatts of electric potential in the region.[4] An additional 5,300 square kilometers of Oaxacan land with "moderate wind resource potential" also exist, bringing the total of potential wind energy up to 44,000 megawatts.[5] To provide a comparison, the Hoover Dam generates approximately 4,000 megawatts, enough to bring power to about 1.3 million people each year.[6] Thus, the wind resource potential in Oaxaca is very high, with overall capacity in Oaxaca reaching more than ten times the energy production capacity of the Hoover Dam. The Mexican Wind Power Association (*Asociación Mexicana de Energía Eólica* or AMDEE) came to similar conclusions, finding that the amount of wind energy generated in Oaxaca to be high enough to potentially fulfill seven percent of the country's electric energy needs.[7]

Unfortunately, there also exists a negative side to Oaxaca's wind potential: the construction of clean-energy windmills has been referred to as a "dirty business" by various news sources and environmental organizations due to the unethical practices of the companies funding the wind development.[8] This note intends to explore the development of various wind projects in Oaxaca, Mexico, the legal implications of the wind projects under Mexican law, as well as the human and environmental implications resulting from the projects.

II. Current Wind Projects in Mexico

Mexico first began to explore Oaxaca's wind potential on the Isthmus of Tehuantepec, also known as *La Ventosa*,[9] or "the windy region."[10] The Isthmus is of special interest because it is situated near an unusually warm ocean

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[3] *See National Renewable Energy Laboratory, Wind Energy Resource Atlas of Oaxaca*, U.S. Department of Energy, 41-42, 45 (2003), http://pdf.usaid.gov/pdf_docs/PNADE741.pdf (last visited: Oct. 3, 2011).

[4] *Id.*

[5] *Id.*

[6] *Hoover Dam: Frequently Asked Questions and Answers, Hydropower at Hoover Dam*, U.S. Department of the Interior Bureau of Reclamation (last reviewed: February 2009), http://www.usbr.gov/lc/hooverdam/faqs/powerfaq.html.

[7] *See* Ricardo Henestroza Orozco, *Centrales eólicas en el Istmo de Tehuantepec; su impacto ambiental y socioeconómico*, 74 Elementos 39, 41 (2009).

[8] *See* Chris Hawley, *Clean-Energy Windmills a 'Dirty Business' for Farmers in Mexico*, USA Today (June 17, 2009); *see also* Zach Dyer, *Clean Energy Plays Dirty in Oaxaca*, NACLA (March 23, 2009), https://nacla.org/node/5638; Ray Stern, *Windmills in Mexico's Isthmus of Tehuantepec Screw Over Landowning Farmers*, Phoenix New Times (June 24, 2009), http://blogs.phoenixnewtimes.com/valleyfever/2009/06/windmills_in_mexicos_isthmus_o.php.

[9] *See* Hawley, *supra* note 8.

[10] *See* Orozco, *supra* note 7, at 40.

current, which, combined with the area's temperature and pressure gradient, results in a strong northern wind.[11] Other attractive factors conducive to developing the region include: the potential of ground-level development, thus avoiding the high costs of installing windmills in the sea or on top of mountains; the high number of hours per year with wind; the wind's direction being substantially fixed with a long season from north to south and a short season from south to north; and a quality of wind considered "excellent" by experts.[12]

The pioneering wind project in the Isthmus is known as Venta I, which began operations in 1994.[13] This facility, comprised of seven wind turbines, is capable of producing approximately 1.575 megawatts.[14] It was largely financed by the Mexican government and received technical support from the World Bank.[15] Two similar projects, Venta II and Venta III, began in 2006 and 2008, respectively.[16] Venta II has a much higher output capacity, generating about 83.3 megawatts of energy.[17] Venta III exceeds both Venta I and Venta II combined, producing 101 megawatts of energy.[18] Subsequently, private industry became interested in developing the region.[19] Multibillion-dollar construction conglomerates CEMEX and ACCIONA developed the monumental EURUS wind farm, which became functional in 2009.[20] The EURUS farm delivers 250 megawatts of energy from 167 wind turbines, making it one of the larger wind energy facilities in the world.[21] Succeeding the Venta and EURUS projects came three new developments in 2010: Eurus II (212.5 megawatts); bii Nee Stipa I (26.35 megawatts); and La Mata-La Ventosa (67.5 megawatts).[22] The development of wind farms does not appear to be slowing

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[11] *Id*.

[12] *Id*.

[13] *See* Shalanda H. Baker, *Unmasking Project Finance: Risk Mitigation, Risk Inducement, and an Invitation*, 6 Texas Journal of Oil, Gas, and Energy Law 273, 281 (2011); *see also Environmental and Social Strategy*, Inter-American Development Bank, www.iadb.org/document.cfm?id=36289046 (last visited: Oct. 7, 2011).

[14] *See* Baker, *supra* note 14 at 281; Ricardo Henestrozo Orozco, *Desarrollo del proyecto eólico en la región del Istmo de Tehuantepec*, 42 Investigación y Ciencia, 18-21 (2009).

[15] *See* Baker, *supra* note 14; Henestrozo Orozco, *supra* note 14, at 19.

[16] *See* Baker, *supra* note 15, at 281; *see* Henestrozo Orozco, *supra* note 14, at 19.

[17] *See* Henestrozo Orozco, *supra* note 14, at 19.

[18] *Id*.

[19] *See First Phase of 250-MW Eurus Wind Farm*, Renewable Energy World (January 30, 2009), *available at* http://www.renewableenergyworld.com/rea/news/article/2009/01/first-phase-of-250-mw-eurus-wind-farm-54627; Mexican President Inaugurates First Phase of EURUS Wind Farm (Jan. 22, 2009), http://www.reuters.com/article/2009/01/22/idUS231680+22-Jan-2009+BW20090122.

[20] *See supra* note 21.

[21] *Id*.

[22] *See* 2010 Wind Energy Status in Mexico- GWEC, Asociación Mexicana de Energía Eólica,

down, as the Mexican Wind Power Association estimates the development of an additional 717.2 megawatts of wind power in 2011.[23] Further, the Mexican government estimates that the entire country is capable of producing about 71 gigawatts of energy.[24]

III. Mexican Energy Law and Policy

Under Mexican energy law, the development of wind power is both accepted and encouraged.[25] Mexico is motivated to find clean, renewable energy, as demonstrated by legislative amendments to the country's energy-related statutes over the last few years.[26] Beginning in 2008, the Mexican government began working to find efficient solutions to the country's energy needs.[27] There are multiple legislative acts of interest that were created or amended to reflect this goal, including the Renewable Energy Usage and Energy Transition Financing Act, the Public Electricity Service Act, the Energy Regulatory Commission Act, and the Sustainable Usage of Energy Act.[28] These legislative acts speak to the paramount importance of developing alternative energy sources, however do not provide much commentary regarding the potential human and environmental repercussions associated with such development.[29] Specifically regarding wind turbines, little to no attention is paid to the negative ramifications that may occur as a result of the mass construction of wind farms in Oaxaca and other regions deemed to have wind potential.[30] While there are certainly positive effects of wind development in Oaxaca, such benefits are largely outweighed by the associated problems that come with such development.[31]

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http://www.amdee.org/Recursos/Wind_Energy_Status_in_Mexico-GWEC (last visited: Oct. 7, 2011).

[23] *Id*.

[24] *Id*.

[25] *See generally* Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética [L.A.E.R.F.T.E.] [Renewable Energy Usage and Energy Transition Financing Act], *as amended*, Diario Oficial de la Federación [D.O.], 1 de enero de 2011 (Mex.); Ley del Servicio Público de Energía Eléctrica [L.S.P.E.E.] [Public Electricity Service Act], *as amended*, Diario Oficial de la Federación [D.O.], 22 de diciembre de 1975 (Mex.); Ley de la Comisión Reguladora de Energía [L.C.R.E.] [Energy Regulatory Commission Act], *as amended*, Diario Oficial de la Federación [D.O.], 31 de octubre de 1995 (Mex.); Ley para el Aprovechamiento Sustentable de la Energía [L.A.S.E.] [Sustainable Energy Use Act], Diario Oficial de la Federación [D.O.], 28 de noviembre de 2008 (Mex.).

[26] *See supra* note 28.

[27] *Id*.

[28] *Id.*

[29] *Id.*

[30] *Id*.

[31] *See infra* note 33.

Mexico's Renewable Energy Usage and Energy Transition Financing Act (*Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética*) establishes the country's main objectives regarding energy use and consumption. The Act states:

> The use of renewable energy sources and clean technologies is of the public interest and will be held in the framework of the national strategy for energy transition by which the Mexican government will promote energy efficiency and sustainability, as well as reduce dependence on hydrocarbons as the country's primary source of energy.[32]

This Act has been described as the "development of a national strategy for the sustainable use of energy."[33] The Act also includes a provision that allows the Executive Branch, in conjunction with the Secretariat of Energy, to enter into agreements with the Mexican states and the Federal District, with the objective of "promot[ing] measures to support industrial development for renewable energy use."[34] The adoption of such a law and accompanying policy indicates strong support of energy development within Mexico, bringing such development into both the public and national spheres.

The Renewable Energy Usage and Energy Transition Financing Act does condition the government's approval of alternative energy sources to a certain degree. The Act limits itself, stating: "the use of [renewable energy sources] for electricity production […] will be subject to the provisions of applicable law."[35] Nevertheless, the Act fails to describe in detail what the "ap-

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[32] "El aprovechamiento de las fuentes de energía renovable y el uso de tecnologías limpias es de utilidad pública y se realizará en el marco de la estrategia nacional para la transición energética mediante la cual el Estado mexicano promoverá la eficiencia y sustentabilidad energética, así como la reducción de la dependencia de los hidrocarburos como fuente primaria de energía." Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética [L.A.E.R.F.T.E.] [Renewable Energy Usage and Energy Transition Financing Act], Article 2, *as amended*, Diario Oficial de la Federación [D.O.], 1 de enero de 2011 (Mex.).

[33] 2010 Wind Energy Status in Mexico- GWEC, *Asociación Mexicana de Energía Eólica*, http://www.amdee.org/Recursos/Wind_Energy_Status_in_Mexico-GWEC (last visited: Oct. 7, 2011).

[34] "II. Promuevan acciones de apoyo al desarrollo industrial para el aprovechamiento de las energías renovables;" Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética [L.A.E.R.F.T.E.] [Renewable Energy Usage and Energy Transition Financing Act], Article 8, *as amended*, Diario Oficial de la Federación [D.O.], 28 de noviembre 2008 (Mex.).

[35] "El aprovechamiento de […] el viento […] para la producción de energía eléctrica, se sujetará y llevará a cabo de conformidad con las disposiciones jurídicas aplicables en la materia." Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética [L.A.E.R.F.T.E.] [Renewable Energy Usage and Energy Transition Financing Act], Article 4, *as amended*, Diario Oficial de la Federación [D.O.], 28 de noviembre 2008 (Mex.).

plicable law" that would restrain the development of varying power developments might be. Potential "applicable law" could be the Commission for the Development of the Indigenous People Act (*Ley de la Comisión Nacional para el Desarrollo de los Pueblos Indígenas*), which would bring the rights of Oaxaca's indigenous people to the forefront of any discussion involving use of their land. While this section of the Act could be interpreted as a way to limit the "national strategy" from harming other important sectors of the country, such as its human population and environment, its power to do so remains uncertain due to the lack of detail provided.

The Renewable Energy Usage and Energy Transition Financing Act is the only energy-related legislation that directly addresses the rural populations living where the new energy projects are developed. Directly addressing projects with a capacity greater than 2.5 megawatts,[36] these projects are expected to: "Ensure participation of local and regional communities through meetings and public consultations convened by the municipal, *ejido*, or communal authorities […] to agree on the participation of social development projects in the community."[37] If the land used for new energy projects is not purchased by the energy developers, those in charge of the project are expected to be contractually bound to pay rent to the landowners.[38] Finally, the Act states: "To promote social development in the community where renewable energy generation projects take place, the projects should be run according to the best international practice and should meet the applicable regulations relating to sustainable rural development, environmental protection, and land rights."[39] This provision of the law is certainly positive for the indigenous people, as it provides protection for the members of the population that could easily be overpowered by big industry moving into regions of Mexico based upon its energy appeal. However, it is unclear how the provision will be enforced. In fact, there is already concern for the manner in which landowners are being treated due to the use of Oaxacan land for wind energy, as there have been reports of inadequate compensation and unfair bargaining tactics.[40]

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[36] *Id.* at Article 21.

[37] *Id.*

[38] *Id.*

[39] "Promover el desarrollo social en la comunidad, en la que se ejecuten los proyectos de generación con energías renovables, conforme a las mejores prácticas internacionales y atender a la normatividad aplicable en materia de desarrollo rural sustentable, protección del medio ambiente y derechos agrarios." *Id.*

[40] Betina Cruz Velásquez, *Free Trade and Climate Change Resistance: Voices from the South, interview by Cecilia Olivet and Mary-Lou Malig* (Dec. 2009), http://www.tni.org/interview/free-trade-and-climate-change-resistance-voices-south-3; *See also* Chris Hawley, *supra* note 8. Ms. Cruz Velásquez was recently arrested, with the cause of her arrest believed to be her participation in activism. Charges refer to a protest in April 2011 at a building controlled by CFE (*Comisión Federal de Electricidad*). *See also* Eric Vance, *A Case of Big Wind Bullying in Mexico?* The Christian Science Monitor (February 28, 2012), *available at* http://www.csmonitor.com/World/Americas/Latin-America-Monitor/2012/0228/A-case-of-Big-Wind-bullying-in-Mexico.

In addition to regulating the development and proliferation of energy to the public, to promote the development of renewable energy sources, the Public Electricity Service Act (*Ley del Servicio Público de Energía Eléctrica*), also permits the sale of electrical energy. The Act provides, in relevant part: "The sale of electricity is governed by the rates approved by the Secretariat of Finance and Public Credit."[41] Originally, this clause referred to the sale of energy by the government, as private electricity sales are not allowed under Mexican law.[42] However, the 1992 amendment to the Act, permitting *autoabastecimiento* or the self-generation of electricity, allowed the disbursement of electricity in five specified situations.[43] The Mexican government retains control of energy produced in excess of 30 megawatts, but this amendment opened the door to greater participation by private parties in energy production. Although the development of cleaner energy practices is undoubtedly positive, the Mexican legislature again fails to address exactly how these new projects will be implemented, especially concerning the protection of the inhabitants and environment of the windy regions. In fact, the Act has an entire section labeled "Sanctions," yet these sanctions only address the technicalities of energy production.[44] More of a focus is required to protect the envi-

[41] "La venta de energía eléctrica se regirá por las tarifas que apruebe la Secretaría de Hacienda y Crédito Público." Ley del Servicio Público de Energía Eléctrica [L.S.P.E.E.] [Public Electricity Service Act], Article 30, *as amended*, Diario Oficial de la Federación [D.O.], 22 de diciembre de 1975 (Mex.).

[42] *See* Baker, *supra* note 13, at 61.

[43] *See* Ley del Servicio Público de Energía Eléctrica [L.S.P.E.E.] [Public Electricity Service Act], Article 35, *as amended*, Diario Oficial de la Federación [D.O.], 22 de diciembre de 1975 (Mex.). Energy may be disbursed in the following situations: where the electrical energy is produced for the consumer's own use, where the energy is cogenerated with a secondary type of energy (*e.g.* steam), where the energy is independently produced and sold to the Federal Electricity Commission, where the energy project has a low capacity (no greater than 30 megawatts), and finally where the electrical energy is intended for importation or exportation.

[44] The Act imposes: "an administrative penalty of a fine of up to three times the amount of electricity consumed from the date of the offense, in the cases referred to in Sections I to IV. In the case of the offenses described in Sections V and VI, the fine is one hundred times the daily minimum wage in effect for the Federal District per KW capacity of the plant's self-supply, cogeneration, independent production or small-scale production per KW sold or consumed. In the case of Section VII the fine shall be fifty to one hundred times the amount of the minimum wage. The different cases are as follows: I. Whoever, without authorization, uses the lines or conductors of electricity belonging to the Federal Electricity Commission or another particular line fed by these lines: II. The user that consumes electricity through facilities that alter or impede the normal operation of the instruments of control measures or the supply of electricity; III. Those who consume electricity without having negotiated contracts; IV. A person who uses electricity in any form or quantity that is not authorized by the negotiated contract; V. The person who sells, resells, or for any other legal act, disposes of capacity or power, except as expressly permitted by this Act; VI. Who establishes self-sufficient plants, cogeneration, independent production or small scale production, or who exports or imports electrical energy without the permits referred to in Article 36 of this Act, and VII.

ronment of areas intended for energy development, as interaction between energy developers and the land's inhabitants, namely indigenous people and wildlife, will undoubtedly occur.

The possibility of energy exportation under the Public Electricity Service Act merits special attention. Mexico's Foreign Investment Act (*Ley de Inversión Extranjera*) excludes certain parts of industry from foreign investment —one of which is electricity.[45] Thus, it also appears as though there is a conflict between the Public Service Electricity Act and the Foreign Investment Act, as the former allows exportation, whereas the later reserves electricity-based transactions to the State. It is entirely possible that exportation is permissible under the Foreign Investment Act, however to what degree remains uncertain based upon the law as it exists currently. Regulatory measures are required to further clarify the intent of this law. If foreign investment is allowed, the potential for serious harm to the native population in the windy regions of Mexico becomes even more serious, as Mexico's high level of wind energy is likely very attractive to foreign investors. Currently, foreign companies in Mexico are only producing energy for their own use. However, some United States companies have already expressed interest in importing the energy for use within the States.[46] It would be unfortunate for Mexico's potential interest in foreign investment would supersede the rights of those already living in the areas of interest.

The final relevant Act, the Energy Regulatory Commission Act (*Ley de la Comisión Reguladora de Energía*), establishes a governing body for energy generation and usage within Mexico. This legislation gives the Commission the responsibility of overseeing energy production, sale, acquisition, and distribution.[47] It not only confers upon the Commission a list of detailed objectives, with the majority related to the aforementioned responsibilities, but also includes a few references to the health and safety of the regions where energy is being produced. The Act allows the Commission to "request the application of security measures when there is news of an event that may endanger the public health and safety [and] order verification visits […] to supervise and monitor, within the Commission's competence, compliance with legal provisions applicable to the regulated activities."[48] Further, the Commission is also allowed to "impose administrative sanctions" for those in violation of the

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Whoever commits any other violation of the provisions of this Act or the regulations." Ley del Servicio Público de Energía Eléctrica [L.S.P.E.E.] [Public Electricity Service Act], Article 40, *as amended*, Diario Oficial de la Federación [D.O.], 22 de diciembre de 1975 (Mex.).

[45] Ley de Inversión Extranjera [L.I.E.X.] [Foreign Investment Act], Article 5, *as amended*, Diario Oficial de la Federación [D.O.], 27 de diciembre de 1993 (Mex.).

[46] *See* Hawley, *supra* note 8.

[47] Ley de la Comisión Reguladora de Energía [L.C.R.E.] [Energy Regulatory Commission Act], Article 2, *as amended*, Diario Oficial de la Federación [D.O.], 31 de octubre de 1995 (Mex.).

[48] *Id.*

aforementioned "legal provisions."[49] However, once again, the reader is confronted with the Act lacking enough specificity as it remains unclear what "legal provisions" are applicable under this Act. Thus, in pursuance of Mexico's new clean energy agenda, it would be far too easy for the environmental and human repercussions to fall through the cracks of the law.

IV. Mexico's Indigenous Laws

In a stark contrast to the ambiguity of Mexico's laws with respect to the human effect of environmental development are the country's laws regarding its extensive indigenous population. The move toward including indigenous rights in the country's laws started with the Indigenous and Tribal Peoples Convention of 1989, referred to as the "only binding international instrument dealing with indigenous peoples' rights" to which Mexico was a party.[50] Then, beginning in 1992, Mexico made a marked shift towards the inclusion of its vast indigenous population in the country's laws. Under President Carlos Salinas, Article Four (now Article Two) of the Mexican Constitution was amended, newly stating: "Mexico is a multicultural nation based originally upon its indigenous peoples."[51] As the constitutions of the Mexican states largely follow the form and substance of the federal constitution,[52] the idea of multiculturalism is echoed by the constitution of Oaxaca, which similarly finds that its State is composed of "plural" ethnicities.[53] The amendment to the Federal Constitution's Article Four further stated: "The law will protect and promote the development of [indigenous] languages, cultures, practices, customs, resources and specific forms of social organization [*sic*], and shall guarantee its members effective access to state jurisdiction."[54] This was the

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[49] *Id*.

[50] Rachel Sieder, *The judiciary and indigenous rights in Guatemala*, 5 Int'l J. Const. L. 211, 214 (2007).

[51] "La Nación tiene una composición pluricultural sustentada originalmente en sus pueblos indígenas." Constitución Política de los Estados Unidos Mexicanos, Feb. 5, 1917, Article 4, as amended in 1992 (Mex.); *see also* Guillermo de la Peña, *A New Mexican Nationalism? Indigenous Rights, Constitutional Reform and the Conflicting Meanings of Multiculturalism*, 12 Nations and Nationalism 279, 287 (2006).

[52] *See* Jorge A. Vargas, Mexican Law for the American Lawyer 19 (2009).

[53] "El Estado de Oaxaca tiene una composición étnica plural, sustentada en la presencia y diversidad de los pueblos y comunidades que lo integran. El derecho a la libre determinación de los pueblos y comunidades indígenas se expresa como autonomía, en tanto partes integrantes del Estado de Oaxaca, en el marco del orden jurídico vigente; por tanto dichos pueblos y comunidades tienen personalidad jurídica de derecho público y gozan de derechos sociales. Constitución Política del Estado Libre y Soberano de Oaxaca, Apr. 4, 1922, Article 16 (Mex.).

[54] Constitución Política de los Estados Unidos Mexicanos, Feb. 5, 1917, Article 4, as amended in 1992 (Mex.); *see also* Guillermo de la Peña, *supra* note 51. *See also supra* note 50

first time that Mexico referred to itself as "multicultural" and committed to preserving the resources of the indigenous.[55] The inclusion of these rights in the constitution initially created some controversy, with different indigenous rights groups being concerned with the lack of specificity within the amendment.[56] Further, other changes to Mexico's constitution at the time, specifically the reform of the *ejido* system in Article 27, were highly criticized as many indigenous groups —notably those in Chiapas— were forced off their land.[57] However, the overall changes to the Constitution still demonstrated a shift in policy towards the support of the indigenous people in Mexico's laws.[58]

Mexico's focus upon indigenous rights continued with President Vicente Fox's election in 2001.[59] Additional new amendments to the constitution referenced the importance of "indigenous identity" and established limited indigenous autonomy.[60] The amendments also established governmental responsibility for indigenous peoples' equality and —to a certain extent— opportunity, stating:

> The Federation, States, and Municipalities, to promote equal opportunities for indigenous people and to eliminate any discriminatory practice, shall establish institutions and determine policies to ensure the observance of the rights of indigenous people and the integral development of their people and communities, which shall be designed and operated in conjunction with their cooperation.[61]

Additionally, an especially relevant provision of the second Article of the constitution, largely dedicated to preserving the rights and autonomy of in-

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regarding similarities between the federal and state constitutions in Mexico. Here, the constitution of Oaxaca nearly mirrors the language in the federal constitution regarding the rights of indigenous people.

[55] *See* Guillermo de la Peña, *supra* note 51, at 287-288.

[56] Jorge A. Vargas, Mexican Legal Dictionary 700 (2009); *see* Guillermo de la Peña, *supra* note 51, at 288.

[57] Kimberly Olson, *Will Fox Change Chiapas? Not Unless Trade Partners Understand the Real Issues*, 10 Minn. J. Global Trade 459, 463-64 (2001). Justifications for the amendment include: (1) communal farms could not produce enough food for the country, requiring imports to satisfy Mexico's needs; (2) a change was needed to "encourage agricultural growth; and (3) the changes were made in preparation for NAFTA, with land privatization allowing corporations to buy land in the resource-filled area. *Id.*

[58] *See* Guillermo de la Peña, *supra* note 51, at 288.

[59] *Id*.

[60] Constitución Política de los Estados Unidos Mexicanos, Feb. 5, 1917, Article 2 (Mex.).

[61] "La Federación, los estados y los municipios, para promover la igualdad de oportunidades de los indígenas y eliminar cualquier práctica discriminatoria, establecerán las instituciones y determinarán las políticas necesarias para garantizar la vigencia de los derechos de los indígenas y el desarrollo integral de sus pueblos y comunidades, las cuales deberán ser diseñadas y operadas conjuntamente con ellos." Constitución Política de los Estados Unidos Mexicanos, Feb. 5, 1917, Article 2 (Mex.).

digenous populations, states: "This Constitution recognizes and guarantees the right of the indigenous people to self-determination and, consequently, to autonomy, including: […] V. To conserve and improve the indigenous peoples' habitat and preserve the integrity of their land in the terms of this Constitution."[62] This constitutional amendment states there exists an affirmative obligation to conserve indigenous land, yet the current state of indigenous land in the Isthmus tells another story. That indigenous people are losing their territorial rights as a result of uneducated decision making can in no way be interpreted as a conservationist approach to their land rights.

The intent to preserve indigenous lands is further developed in the section of the Mexican constitution regarding land rights. Article 27, in relevant part, begins by stating: "The law will protect the integrity of indigenous groups' land."[63] The Article elaborates upon this statement, explaining: "The law, considering the respect and strength of the community life in the *ejidos* and communities, will protect the land for human settlement and regulate land use, forests, and shared waters and provide the incentive needed to raise the standard of living of its people."[64] This section of the constitution reinforces the Mexican government's intent to provide for the indigenous population and desire to protect its landholdings. Here, the language is especially definitive, reflecting the government's agenda regarding the betterment of indigenous people as well, with the noteworthy addition of "rais[ing the indigenous peoples'] standard of living."

Including indigenous rights in something as authoritative as Mexico's constitution demonstrates the country's commitment to furthering the rights of its indigenous population. Mexico's constitution is the country's highest source of law.[65] For this reason, it is unclear why Mexico's laws regarding environmental development do not address in detail the conflict that is already occurring between the indigenous people and such development.[66] One

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[62] "Esta Constitución reconoce y garantiza el derecho de los pueblos y las comunidades indígenas a la libre determinación y, en consecuencia, a la autonomía para: …V. Conservar y mejorar el hábitat y preservar la integridad de sus tierras en los términos establecidos en esta Constitución." Constitución Política de los Estados Unidos Mexicanos, Feb. 5, 1917, Article 2 (Mex.).

[63] "La ley protegerá la integridad de las tierras de los grupos indígenas. La ley, considerando el respeto y fortalecimiento de la vida comunitaria de los ejidos y comunidades, protegerá la tierra para el asentamiento humano y regulará el aprovechamiento de tierras, bosques y aguas de uso común y la provisión de acciones de fomento necesarias para elevar el nivel de vida de sus pobladores." Constitución Política de los Estados Unidos Mexicanos, Feb. 5, 1917, Article 27 (Mex.).

[64] *Id.*

[65] *See* Vargas, *supra* note 52.

[66] *See* Vance, *supra* note 40. In La Venta, "according to eyewitnesses, a group of wind farm workers tried to break up the protest and fights broke out. [Land rights activist] Cruz herself was beaten and one of the wind farm employees was shot in the head and killed"; *see also Mexico: Indigenous People Attacked, Threatened,* Amnesty International (March 20, 2012), *available*

possibility is that the constitution's support of preserving indigenous land is somewhat undermined by a further provision within Article 2, regarding the use of technology within indigenous lands. Article 2, section 7 explains that an additional goal of the government is to:

> Support productive activities and sustainable development of indigenous communities through actions to reach economic sufficiency, the application of incentives for public and private investments that promote job creation, incorporation of technologies to increase their own productive capacity and to ensure fair access to the supply and marketing systems.[67]

The use of indigenous land for energy production could fall under this section of the Article, as the development of alternative energy certainly qualifies as the "incorporation of technologies to increase their own productive capacity." However, this statement remains subject to the aforementioned provisions regarding conservation of indigenous land and indigenous autonomy, which casts doubt upon the theory that this provision allows the energy developers to have unwanted control over indigenous land.

The constitution of Oaxaca also speaks to both the preservation and use of indigenous land.[68] Article 16 explains: "The State [of Oaxaca], within its competence, recognizes indigenous people and the social right to use and enjoyment of natural resources on their lands and territories, under the terms of the regulatory law as well as budgetary programs that shall dictate measures to ensure the economic, social, and cultural development of indigenous people and communities."[69] This provision comes to the same general conclusion as the federal constitution: the indigenous people should have use of their land, including the resources therein. However, Oaxaca's constitution takes indigenous land usage a step further by indicating that the land is sub-

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at http://www.amnesty.org/en/library/asset/AMR41/020/2012/en/f75157e0-1a78-4df1-8a8c-4d5e06fb85aa/amr410202012en.html (reporting that members of the Coordination of United Peoples Ocotlán Valley, an organization defending the rights of indigenous landowners against mining companies, were shot and/or killed as a result of their protests).

[67] "Apoyar las actividades productivas y el desarrollo sustentable de las comunidades indígenas mediante acciones que permitan alcanzar la suficiencia de sus ingresos económicos, la aplicación de estímulos para las inversiones públicas y privadas que propicien la creación de empleos, la incorporación de tecnologías para incrementar su propia capacidad productiva, así como para asegurar el acceso equitativo a los sistemas de abasto y comercialización." Constitución Política de los Estados Unidos Mexicanos, Feb. 5, 1917, Article 27 (Mex.).

[68] *See infra*.

[69] "El Estado, en el ámbito de su competencia, reconoce a los pueblos y comunidades indígenas el derecho social al uso y disfrute de los recursos naturales de sus tierras y territorios, en los términos de la ley reglamentaria; asimismo, de acuerdo a sus programas presupuestales, dictará medidas tendientes a procurar el desarrollo económico, social y cultural de los pueblos y comunidades indígenas." Constitución Política del Estado Libre Y Soberano de Oaxaca, Apr. 4, 1922, Article 16 (Mex.).

ject to the terms of "regulatory law" and "budgetary programs," which leaves more room for other areas of industry to use the land if there are applicable legislative provisions that allow such an intrusion. This can be directly contrasted with the federal constitution, which phrases a similar section of the law to state that the land will be "protected" as opposed to including that it is subject to other laws and programs in existence.

In addition to the federal constitutional amendments of 1992 and 2001, to add further support to the commitment of Mexico to its indigenous people, Mexico promulgated several individual acts regarding indigenous rights. These acts include the Commission for the Development of the Indigenous People Act (*Ley de la Comisión Nacional para el Desarrollo de los Pueblos Indígenas*) and the Act for Linguistic Rights of the Indigenous People (*Ley General de Derechos Linguísticos de los Pueblos Indígenas*), both enacted in 2003.[70] Regarding the preservation of indigenous rights, the Commission for the Development of the Indigenous People Act is significant in its designation of certain protective measures for indigenous rights and land. The Act for Linguistic Rights of the Indigenous People is groundbreaking in that it protects the indigenous culture, which was vastly ignored in Mexican legislation until the Act's enactment. However, the Act for Linguistic Rights is less relevant in terms of a protectionist view of indigenous rights.

The Commission for the Development of the Indigenous People Act establishes a governing body that exists to support and protect the indigenous population.[71] The Commission is expected to govern its actions in accordance with a list of six principles, with the most relevant regarding environmental reform being to:

> I. Observe the multiethnic and multicultural nature of the Nation […] III. Promote the integration and mainstreaming of policies, programs, and activities of the Federal Public Service for the development of people and communities; IV. Promote sustainable development for the reasonable use of natural resources in the regions without risking the indigenous heritage of future generations; […] VI. Consult indigenous people and communities when the Federal Executive institutes legal reforms, administrative acts, development programs, or projects that significantly impact their living conditions and environment.[72]

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[70] *Leyes Federales Vigentes*, Cámara de Diputados (Oct. 19, 2011), *available at* http://www.diputados.gob.mx/LeyesBiblio/index.htm.

[71] Ley de la Comisión Nacional para el Desarrollo de los Pueblos Indígenas [L.C.N.D.P.I.] [Commission for the Development of the Indigenous People Act], *as amended*, Articles 1-2, Diario Oficial de la Federación [D.O.], 31 de mayo de 2002 (Mex.).

[72] La Comisión regirá sus acciones por los siguientes principios:

"I. Observar el carácter multiétnico y pluricultural de la Nación; II. Promover la no discriminación o exclusión social y la construcción de una sociedad incluyente, plural, tolerante y respetuosa de la diferencia y el diálogo intercultural; III. Impulsar la integralidad y transversalidad de las políticas, programas y acciones de la Administración Pública Federal para el desarrollo de los pueblos y comunidades indígenas; IV. Fomentar el desarrollo sustentable para

This part of Mexico's environmental legislation is especially troubling due to its contradictory nature. While the Commission exists to protect the "multiethnic and multicultural nature of the Nation," it also gives some leeway for the use of indigenous lands for the country's energy development. That is, although the Commission is expected to work for the "development of [indigenous] people and communities," it also is granted permission to "promote sustainable development for the reasonable use of natural resources in the [indigenous] regions." While the Act specifies that these advances should not "risk […] the indigenous heritage" of the region, as previously mentioned, there are no safeguards in place to prevent Mexico's environmentally-focused policy from superseding the indigenous population's rights. If anything, this part of the Act further solidifies Mexico's commitment to renewable energy, and establishes that indigenous rights come secondary to such an advance.

It is crucial to speak to the importance of the *ejido* in indigenous culture and development.[73] The *ejido* system of land ownership began in 1917, following the Mexican Revolution, with the goal of returning land controlled by the wealthy elite to the people.[74] Under the *ejido* system, land was redistributed to the indigenous and poor via transfers from the federal government to communal groups under Article 27 of the constitution.[75] The land was then used by both of these groups, and was generally inalienable.[76] The *ejido* land became transferable in 1992 following reforms to the Mexican constitution and the Agrarian Act (*Ley Agraria*), however such transfer still remains limited.[77] For Mexican nationals, the process is reasonably simple: Mexican nationals

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el uso racional de los recursos naturales de las regiones indígenas sin arriesgar el patrimonio de las generaciones futuras; V. Incluir el enfoque de género en las políticas, programas y acciones de la Administración Pública Federal para la promoción de la participación, respeto, equidad y oportunidades plenas para las mujeres indígenas, y VI. Consultar a pueblos y comunidades indígenas cada vez que el Ejecutivo Federal promueva reformas jurídicas y actos administrativos, programas de desarrollo o proyectos que impacten significativamente sus condiciones de vida y su entorno." Ley de la Comisión Nacional para el Desarrollo de los Pueblos Indígenas [L.C.N.D.P.I.] [Commission for the Development of the Indigenous People Act], *as amended*, Article 3, Diario Oficial de la Federación [D.O.], 31 de mayo de 2002 (Mex.).

[73] "En caso de que no se pusieran de acuerdo, el Tribunal Agrario proveerá la venta de dichos derechos ejidales en subasta pública y repartirá el producto, por partes iguales, entre las personas con derecho a heredar." Ley Agraria [L.A.G.] [Agrarian Act], *as amended*, Article 18, Diario Oficial de la Federación [D.O.], 26 de febrero de 1992 (Mex.).

[74] Carmen G. González, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. Pa. J. Int'l Econ. L 723, 733 (2011).

[75] *Id. See also supra* note 60.

[76] *Id*.

[77] *See* Ann Varley, *Modest Expectations: Gender and Property Rights in Urban Mexico*, 44 Law & Soc'y Rev. 67, 71 (2010); *See also* Carmen G. González, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. Pa. J. Int'l Econ 723, 735 (2011).

may buy *ejido* land from the *ejidatarios* so long as the land has been privatized, which is permitted under Article 27. Only approximately ten percent of ejido owners have chosen to do so, however this remains a viable option for both Mexicans and *ejido* owners.[78] Pursuant to the reforms, under Article 27 of the constitution, foreigners can only acquire *ejido* land where it has been properly privatized, or the owner risks a former *ejido* member staking a claim to the title.[79]

The reforms to Article 27 have been criticized as a means utilized by the Mexican government to allow United States and Canadian approval of the North American Free Trade Agreement (*Tratado de Libre Comercio*); by permitting privatization of land, foreign entities would gain access to Mexico's natural resources and be more inclined to invest.[80] Possible justifications for the loss of indigenous land rights were offered: the inability of small farms to produce enough food to meet Mexico's needs, the need for change to allow Mexico to improve its agricultural sector, as well as the importance of corporation being allowed property rights for investment purposes.[81] However, these justifications are not enough to compensate for the loss faced by the indigenous populations who depend on the land for their sustenance and suffered as a result of losing the use of their land.[82]

Thus, the current law that is in place to protect the indigenous communities of Mexico may appear powerful but in reality poses little obstacle to those who require its protection. A likely result of the law's inability to protect the indigenous population is the severe conflict already existing between the indigenous people and the alternative energy developers in Oaxaca, namely the groups who are financing windmill construction in the Isthmus of Tehuantepec. There have been protests regarding windmill developments, where as many as "several hundred protestors" blocked the roads leading to the areas where proposed construction was to occur, some holding signs saying "no to the project."[83] According to the North American Congress on Latin America (NACLA), a nonprofit organization that reports on Latin America's relationship with the United States, the Mexican government used unethical means

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[78] Oliver de Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Farmland Users*, 52 Harv. L. Rev. 503, n. 113 (2011).

[79] Constitución Política de los Estados Unidos Mexicanos, Feb. 5, 1917, Article 27 (Mex.). For more on the changes to the Mexican Constitution regarding land rights, *see generally* María Teresa Vázquez Castillo, Land Privatization in Mexico: Urbanization, Formation of Regions, and Globalization in Ejidos (2004); Wayne A. Cornelius & David Myhre eds., The Transformation of Rural Mexico (1998); Richard Snyder & Gabriel Torres eds., The Future Role of the Ejido in Rural Mexico (1998).

[80] See Olson, *supra* note 60.

[81] *Id.*

[82] *Id.* at 464-465.

[83] Mark Stevenson, *Mexico Fires Up $500 million wind farm*, USA TODAY (Jan. 2, 2009), *available at* http://www.usatoday.com/money/industries/energy/2009-01-22-laventosa_N.htm.

to allow developers access to the wind ridden lands in the domain of the indigenous population.[84] In an interview with the Tepayac Center for Human Rights in Oaxaca, director Javier Balderas commented that when landowners contracted with representatives from EURUS regarding leases of their farmlands, the representatives stated that they were only interested in "the study of winds on their lands."[85] There was allegedly no mention of wind turbine construction in the region. Further, Balderas explained that, due to the language barrier between the landowners and the representatives, there were further miscommunications that resulted in an uninformed transfer of land.[86]

Although energy developers generally comply with provisions of the Energy Acts requiring rental payments, this rent fails to provide fair compensation for land's use with rents reported to be as low as $50 to $60 in total.[87] In comparison, a single cow produces about $90 worth of milk each month;[88] being unable to use a large parcel of land for livestock, therefore, would substantially decrease profits and the low levels of rent do not properly offset this loss. A land rights activist from Oaxaca substantiated this suspicion, stating, "The indigenous landowners receive 150 pesos[89] per hectare per year. They also receive a one-time payment of 1,000 pesos[90] if they sign the contract."[91] While the use of the land for windmill construction certainly reflects Mexico's Energy policy, the rights intended to be asserted through the constitution and the Acts enacted for the protection of indigenous people are entirely disregarded here. This likely stems from the lack of enforcement provisions included in the legislation, and requires reform for the policies to be vindicated.

In addition to paying laughable amounts of rent, the companies and government entities using land for wind turbines are in theoretical violation of Mexico's Agrarian Act (*Ley Agraria*).[92] According to the aforementioned Oaxacan activist, "the compan[ies that lease land in the Isthmus have] no restric-

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[84] *See* Dyer, *supra* note 8.

[85] *Id.*

[86] *Id.*

[87] *Id.* The average monthly rent for land use is significantly higher elsewhere in the world. Although it is difficult to draw an exact comparison, in the United States, land leased for wind turbines brought in between $8000 and $18000 annually for landowners. *See* Anne C. Mulkern, *Wind is the new cash crop in rural Wash. Town*, E&E (Oct. 10, 2010), http://www.eenews.net/public/Greenwire/2010/10/18/1. *See also*, *supra* note 15, at 286 ("Amounts paid to other farmers [in Oaxaca] are said to be ten to twenty times less than amounts offered to American farmers for similar uses"). Diego Cevallos, *Farmers and Scientists See Risks in Wind Energy*, TIERRAMERICA, Feb. 26, 2011, http://www.tierramerica.info/nota.php?lang=eng&idnews=85 ("The landowners were fooled with fixed arrangements, ridiculous payments for rent (for installing the turbines) and impediments to farming.").

[88] *See* Hawley, *supra* note 8.

[89] Approximately 11 dollars per 2011 conversion rates.

[90] Approximately 68 dollars per 2011 conversion rates.

[91] *See* Cruz Velásquez, *supra* note 40.

[92] *See infra* note 97.

tions in the use of the land. The contracts are for 30 years but they can be automatically renewed for another 30 years and only the company can terminate the contract."[93] While the Agrarian Act does not regulate renting the land, it does set out specific parameters for the sale of *ejido* land, including that all of those who are part of the particular *ejido* up for sale must be in agreement in order for the sale to be legal.[94] Pertinent parts of the Article state: "Where plots [of *ejido* land] are sold, the family of the seller who have worked these fields for more than one year, the ejidatarios, those domiciled on the *ejido* and the ejidal population, in that order, shall have the right to notification […] If notification is not made, the sale may be canceled."[95] If *ejido* land is rented for a term of 30 years, with the provision of an additional 30-year extension, this is such a deprivation of use of the land that it essentially equates to the actual sale of the land. Thus, it is entirely possible that this type of contract could be illegal under Mexican law if the intent behind the laws is taken into consideration.[96]

The negative effect of the lack of enforcement provisions in legislation that exists to protect the indigenous extends further, as illustrated by the fact that the agreements, written in Spanish, were given to landowners whose only fluency lies in indigenous languages.[97] This purported practice is in direct conflict with the Act for Linguistic Rights of the Indigenous People, which states, "It is the right of all Mexicans to communicate in the language he or she speaks without restrictions whether the communication is public, private, oral, or in writing, in all social, economic, political, cultural, religious and any applicable contexts."[98] Presenting a contract in Castilian Spanish to landown-

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[93] *See* Cruz Velásquez *supra* note 40.

[94] "En caso de la primera enajenación [alienación] de parcelas sobre las que se hubiere adoptado el dominio pleno, los familiares del enajenante, las personas que hayan trabajado dichas parcelas por más de un año, los ejidatarios, los avecindados y el núcleo de población ejidal, en ese orden, gozarán del derecho del tanto, el cual deberán ejercer dentro de un término de treinta días naturales contados a partir de la notificación, a cuyo vencimiento caducará tal derecho. Si no se hiciere la notificación, la venta podrá ser anulada." Ley Agraria [L.A.G.] [Agrarian Act], *as amended*, Article 84, Diario Oficial de la Federación [D.O.], 26 de febrero de 1992 (Mex.).

[95] Ley Agraria [L.A.G.] [Agrarian Act], *as amended*, Article 84, Diario Oficial de la Federación [D.O.], 26 de febrero de 1992 (Mex.).

[96] *See also* Baker, *supra* note 13, at n. 73.

[97] *Id*. The disputed contract referenced by those being interviewed was negotiated between a large company and a Zapoteco-speaking landowner. *Zapoteco* is one of the indigenous language groups in Mexico. *See* Cruz Velásquez, *supra* note 40.

[98] "Es derecho de todo mexicano comunicarse en la lengua de la que sea hablante, sin restricciones en el ámbito público o privado, en forma oral o escrita, en todas sus actividades sociales, económicas, políticas, culturales, religiosas y cualesquiera otras." Ley General de Derechos Lingüísticos de los Pueblos Indígenas [L.G.D.L.P.I.] [Act for Linguistic Rights of the Indigenous People], *as amended*, Article 9, Diario Oficial de la Federación [D.O.], 13 de marzo de 2003 (Mex.).

ers who primarily speak indigenous languages is in violation of this provision, as a contract qualifies as a communication "in writing" for an "economic" purpose; to comply, the contract should have been translated into the applicable indigenous language for the landowners. This practice also conflicts with the "right to notification" established by the Agrarian Act.[99] However, as has been previously noted, the constitutional and other legislative acts in favor of the indigenous populations have no real means of enforcement. Thus, while the legislation in favor of the indigenous represents positive ideals in theory, such legislation is severely deficient in practice.

It is imperative that contracts involving leases to companies intending to develop land for wind farm development are constructed in a satisfactory manner. In a 2009 guide developed by Farm Management Specialists at North Dakota State University, the important areas of negotiations are highlighted, including: duration, renewable period, tower removal responsibilities and specifications, placement of access roads, construction period, responsibility for fences and gates, type of payment and compensation packages, transparency of wind company financial records, inflation and escalator clauses, as well as the various taxes and liability issues that may or may not apply.[100] While information regarding the contracts has not been highly disseminated, with the majority of public knowledge of the contracts' content being based upon news reports, it appears highly unlikely that all of these concerns were fairly bargained for in the execution of contracts between the landowners and the companies interested in wind development, as indicated by agreements based upon unfair levels of rent and negotiations conducted in unfamiliar languages.

Mexico's Secretariat of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales,* hereinafter *SEMARNAT*) recently addressed the conflict between the indigenous people and the development of wind energy in Oaxaca. The SEMARNAT stated that it "plan[s] to adjust the technical and administrative processes to ensure [...] the incorporation of the local population [in the development of wind power].[101] The changes would occur in the form of an Official Mexican Norm (*Norma Oficial Mexicana*), and would involve "local stakeholders," including landowners, in constructing the legal framework.[102] Such changes would help ease the tension that has developed between the landowners and the wind developers, as more involvement within the lawmaking process would likely allow the indigenous people to assert their rights more strongly. However, it remains to be seen

[99] Ley Agraria [L.A.G.] [Agrarian Act], *as amended*, Article 84, Diario Oficial de la Federación [D.O.], 26 de febrero de 1992 (Mex.).

[100] Dwight Aakre & Ron Haugen, *Wind Turbine Lease Considerations for Landowners*, NDSU Extension Services 2-5, 2009.

[101] *Semarnat adecua norma de explotación en energía eólica* (Aug. 26, 2011), *available at* http://www.noticiasnet.mx/portal/principal/61006-semarnat-adecua-norma-explotacion-energia-eolica.

[102] *Id.*

whether such changes will actually be instituted, as well as if the changes will achieve their intended purpose.

V. Environmental Repercussions of Wind Farms

The legal incompatibility of Mexico's energy and indigenous policy is not limited to the rights of the country's indigenous people, as other segments of the country's population have suffered from the energy-related advances in Oaxaca. Mexico's Ecological Equilibrium and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*) addresses the need to protect the environment, yet the windmill construction, designed to be environmentally friendly, may do just the opposite. Environmental impact assessments of the targeted areas intended to be developed as wind farms are needed, because studies from other regions of the world demonstrate the negative environmental impact of windmills. For accuracy's sake studies should be conducted specifically in Mexico to see if the same issues hold true there.

The Ecological Equilibrium and Environmental Protection Act requires: "III. The preservation, restoration, and enhancement of the environment; IV. The preservation and protection of biodiversity and the establishment and administration of protected natural areas."[103] In one area of Oaxaca, the construction includes building new roads, pouring tons of concrete to create towers, and putting gravel into fields to sustain the cranes' weight.[104] This does not comport with the notion that the environment is to be preserved, as required by the Act, because these measures involve serious disruption of the land. The Act also includes measures for sanctions, requiring: "[t]he establishment of control measures to ensure the safety, compliance, and application of this Act […] as well as the imposition of administrative and criminal penalties that apply."[105] However, it is unclear if this environmental policy is being realized, as there are significant drawbacks associated with windmill construction that are seriously affecting Oaxaca's environment, including harm to birds living

[103] The Act provides: "II. Definir los principios de la política ambiental y los instrumentos para su aplicación; III. La preservación, la restauración y el mejoramiento del ambiente; IV. La preservación y protección de la biodiversidad, así como el establecimiento y administración de las áreas naturales protegidas; […] X. El establecimiento de medidas de control y de seguridad para garantizar el cumplimiento y la aplicación de esta Ley y de las disposiciones que de ella se deriven, así como para la imposición de las sanciones administrativas y penales que correspondan." Ley General del Equilibrio Ecológico y la Protección al Ambiente [L.E.E.E.P.] [Ecological Equilibrium and Environmental Protection Act], *as amended*, Article 1, Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

[104] Chris Hawley, *Firms Rush to Stake Claims in Mexico's Isthmus*, Arizona Business & Money (June 24, 2009), http://www.azcentral.com/business/articles/2009/06/24/20090624biz-winpower0624.html.

[105] *See supra* note 106.

in the area, disruption of the Isthmus' natural ecosystem, and physical harm to people living in the area.[106]

Windmills also seriously affect migratory bird populations. Studies conducted at the site of Venta II, monitored by INECOL from 2007-2008, noted 78 bird carcasses.[107] This statistic is exceedingly conservative —experts suggest that the actual mortality at this single site is perhaps 50 times higher.[108] Furthermore, research from both Europe and the United States also demonstrates that windmills are harmful for birds, especially birds of prey.[109] A study of California's Altamont Pass, which has 6,500 windmills distributed across 190 kilometers of land, demonstrated that the turbines killed hundreds of birds annually.[110] Further, in the entire United States, there are between 10,000 and 40,000 bird fatalities annually that are attributed to windmills.[111] While Mexico's wind farms are substantially smaller, with the largest being home to only 167 turbines, the study still found that "the lower the turbine density, the higher the mortality rates."[112] As such, there may still be conflicts between the birds in Oaxaca and the installed windmills, especially considering that the Isthmus is considered a migratory bird corridor.[113] It is important to add that many more birds are killed by cars than by windmills each year.[114] However, the less wildlife that is harmed by the development of new technologies, the better, as established by the Ecological Equilibrium and Environmental Protection Act.[115]

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[106] *See infra*.

[107] *See* George C. Ledec et al., Greening the Wind: Environmental and Social Considerations for Wind Power Development 103 (2011).

[108] *Id.* Mortality is likely higher as a result of the following factors: "(i) rapid removal of small carcasses by scavenging animals, between the once-weekly searches [conducted by the researches]; (ii) the inability to search much of the target area due to the type of vegetation and/or not enough searchers; and (iii) the tendency to overlook small, mostly camouflaged carcasses, even in open fields." *Id.* For larger birds, the adjustment need not be as high, because: (a) larger carcasses are generally scavenged on-site; (b) larger carcasses are more visible and more likely to be found during the researcher's search. *Id.*

[109] Victoria Sutton & Nicole Tomich, *Harnessing Wind is Not (By Nature) Environmentally Friendly*, 22 Pace Envt'l L. Rev 91, 95-96 (2005).

[110] *Id.* at 95.

[111] *Id.* at 96.

[112] *Id.*

[113] Organizations and businesses that intend to develop areas in the Isthmus for wind energy are expected to submit Environmental Reports. One such organization, the Inter-American Development Bank, is partially funding the EURUS wind farm with additional monetary contributions from Acciona of Spain. *See* Inter-American Development Bank, Mexico Eurus Wind Project (ME-L1068) Environmental and Social Management Report (ESMR) 2 (Nov. 20, 2009), *available at* http:// idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2150998.

[114] *See* Sutton & Tomich, *supra* note 109.

[115] Ley General del Equilibrio Ecológico y la Protección al Ambiente [L.E.E.E.P.] [Ecological Equilibrium and Environmental Protection Act], *as amended*, Article 1, Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

The importance of Mexico protecting bird populations is further supported by the fact that Mexico is a party to the Convention for the Protection of Migratory Birds and Game Mammals. The treaty states: "it is right and proper to protect migratory birds, whatever may be their origin, in the United States of America and the United Mexican States, in order that the species may not be exterminated."[116] Mexico has additional incentive to initiate reforms in its laws that prevent the birds from being harmed, as demonstrated by its responsibilities under both domestic and international laws to which it is a party. It is relevant to further note that windmills similarly affect bats, with a total of 123 bat carcasses found between 2007 and 2008.[117] Recently in Indiana, windmills were shut down at night after a rare bat was killed by their operation.[118] Such efforts to protect the environment are very important to maintain agreement between a country's environmental law and its energy policy.

Harm to people living in areas where windmills are constructed poses an additional concern. Noise pollution is one issue associated with windmills.[119] Windmills may generate noise that is within hearing range from 4,500 feet upwind and 7,000 feet downwind.[120] Windmills also can impact television and radio transmission.[121] If windmills are constructed in areas with few human residents, these problems have virtually no effect. However, according to a 2010 survey, the Isthmus is home to over 3.8 million residents, so the likelihood of there being no residential conflicts with the windmills is slight.[122]

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[116] *See* Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Article I, Feb. 7, 1936. It is recognized that the treaty's objective is to prevent the "extermination" of bird species, which is a low standard for both United States and Mexico to meet. However, if birds are, in fact, being harmed by the operation of windmills, the long-term effect of such harm must be examined in light of this treaty. The Isthmus is a migration corridor for many bird species, and experiences millions of birds flying through the region depending on the year. *See supra* note 110.

[117] *See supra* note 110.

[118] *See* Inter-American Development Bank, Mexico Eurus Wind Project (ME-L1068) Environmental and Social Management Report (ESMR) 2 (Nov. 20, 2009), *available at* http:// idb-docs.iadb.org/wsdocs/getdocument.aspx?docnum=2150998; *See also* Kathy Mellot, *Windmills to Shut at Night Following Demise of Rare Bat*, The Tribune Democrat (Oct. 17, 2011), http:// tribune-democrat.com/local/x345569257/Windmills-to-shut-at-night-following-demise-of-rare-bat. While it is undeniable that the social, economic, and political conditions in Mexico are vastly different to those in Indiana, the concern for wildlife in the areas where windmills are constructed remains a valid concern.

[119] *See* Organization for Economic Cooperation and Development (OECD), Environmental Impacts of Renewable Energy 7 (1988); *See also* Michael B. Walsh, *A Rising Tide in Renewable Energy: The Future of Tidal In-Stream Energy Conservation* (TISEC), 19 Vill. Envtl. L.J. 193, 205 (2008).

[120] See Walsh, *supra* note 119 at 206.

[121] *Id.*

[122] *Santo Domingo Tehuantepec, Oaxaca*, México en cifras, información nacional, por entidad

Research continues to investigate the physiologic responses caused by exposure to windmills, or "Wind Turbine Syndrome, indicating that humans' brains respond to low frequency sound in a detrimental fashion.[123] The human noise recipient is unaware of the noise, but the sound waves still send signals to the brain and "the physiologic response of the cochlea to turbine noise is also a trigger for tinnitus and the brain-level reorganization that tinnitus represents."[124] Crop flooding is another negative side effect of windmills' presence in rural areas. The large amounts of concrete needed to construct the wind turbines pose the risk of changing watershed levels.[125]

It may be argued that section 1 of the Ecological Equilibrium and Environmental Protection Act permits wind turbine construction, as the turbines qualify as "sustainable use" developments.[126] The fifth provision encourages: "[t]he sustainable use, preservation and, where appropriate, restoration of soil, water and other natural resources, to support the economic benefits and societal activities along with the preservation of ecosystems."[127] This part of the law supports the required development of the "sustainable use" of "natural resources," which can be used to justify the wind turbine construction. However, this law also limits the development of natural resources to a certain degree, requiring the reconciliation of environmental development with the "preservation of ecosystems." Thus, any development is required to guard its environmental effects; this is an especially useful portion of the law, as it directly speaks to environmental protection in relation to renewable energy developments.

According to one of its delegates, the SEMARNAT intends to issue a rule that would "look […] for companies to establish projects that adhere to international standards and respect the local environment, especially biological diversity, wildlife, flora, and care of the groundwater."[128] This is especially promising, as such a rule would help resolve some of the major issues that the development of wind power creates. However, it is the opinion of this author that anything issued by the SEMARNAT would have to be very explicitly worded to be effective. The SEMARNAT states that it would prefer

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FEDERATIVA Y MUNICIPIOS, *available at* http://www.inegi.org.mx/sistemas/mexicocifras/default.aspx?e=20.

[123] Nina Pierpoint, MD, PhD, The First International Symposium on the Global Wind Industry and Adverse Health Effects: Loss of Social Justice?, Keynote Address: Wind Turbine Syndrome & The Brain. Oct. 30, 2010, *available at* http://www.epaw.org/documents.php?lang=en&article=n13.

[124] *Id.*

[125] *See also* Baker, *supra* note 13, at 287.

[126] Ley General del Equilibrio Ecológico y la Protección al Ambiente [L.E.E.E.P.] [Ecological Equilibrium and Environmental Protection Act], *as amended*, Article 1, Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

[127] *Id.*

[128] *See supra* note 104.

companies to "adhere to international standards" in terms of respecting the environment, however without specific provisions delineating exactly what this means, enforceability will be at a minimum.

VI. Positive Aspects of Wind Farm Development

In contrast to the indigenous and environmental issues that accompany windmill construction in Oaxaca, there are many positive aspects of the development that aid Mexico in both a global and local context. Reducing the country's dependence upon nonrenewable energy is certainly beneficial, especially considering the serious environmental consequences associated with use of fossil fuels, most notably the acceleration of global warming as a result of using natural gas, coal, and oil.[129] Once a windmill is constructed and becomes functional, it does not rely on any fuel use whatsoever, reducing the predominant dependence on fuel-generated electricity that is common elsewhere in Mexico.[130] Because of this, it may be argued that although there are negative repercussions associated with the windmills, a lesser reliance on fossil fuels supersedes any such conflicts due to the serious threat that global warming poses. Additionally, in general, wind power has a low societal cost. That is, because wind power is harnessed using an existing and renewable resource, it has fewer adverse effects when compared to the use of fossil fuels, which pollute, contaminate, and generate waste when being extracted.[131] The use of wind power also does not require a high level of water use, because it relies upon kinetic energy, not thermal energy. This is an additional positive aspect associated with the use of wind power, as water is in short supply in many areas and needed for other purposes.[132]

The United States is in advantageous location; it is close enough to Mexico to allow for the importation of energy while making it a clear contender for production of windmill-generated electricity. In fact, the United States has already expressed interest in utilizing some of the energy produced by windmills in both Oaxaca and Baja California.[133] In addition to spreading renewable energy throughout the continent, higher environmental cooperation at the international level may come out of Mexico's windmill development as the countries will potentially be working together to achieve the spread of wind-generated electricity.

Increasing the number of jobs and stimulating the economy are other positive results derived from the windmill construction. Windmills are often

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[129] Ronald H. Rosenberg, *Diversifying America's Energy Future: The Future of Renewable Wind Power*, 26 Va. Envtl. L.J. 505, 506 (2008).

[130] *Id.* at 522.

[131] *Id*. at 523.

[132] *Id*. at 524.

[133] *See* Stevenson, *supra* note 83.

constructed in either rural or low-income regions, and with the development of a new industry comes the possibility of new employment opportunities for the residents in the area.[134] According to ACCIONA, a Spanish company engaged in a joint endeavor with Mexico's CEMEX to construct a wind farm capable of powering up to 25% of CEMEX's electricity needs, 850 jobs were created by the construction of the wind farm.[135] To provide examples of such jobs, one landowner in Oaxaca stated that he used part of the money that the wind developers gave him to use his land to buy a bus that he uses to take windmill workers to and from the construction sites. Additionally, another landowner used the money from the wind developers to open up an automotive parts store, and another Oaxaca resident was able to get a job as a traffic conductor in the area surrounding the windmill construction site.[136] While there is nothing to substantiate ACCIONA's claims of creating 850 new jobs as a result of windmill construction, the aforementioned examples suggest that at least a finite number of employment opportunities would be created by wind development in Oaxaca. Further, through establishing leases with the landowners, it can be expected that additional income will be generated from having the windmills on primarily agricultural lands, as already experienced by various United States' towns.[137] One scholar even posits that windmill development may have a preservationist effect upon agricultural lands, leaving them undisturbed by prospective developments due to the desire to maintain the windmills' integrity.[138]

VII. Solutions for the Future and Conclusion

Considering the importance of renewable energy in today's political and environmental policy, there needs to be a way to reconcile the negative impact the windmills have upon Oaxaca's environment and indigenous population with the Isthmus's incredible potential as an energy source. One such way is to allow the indigenous populations to profit from the wind energy development, allowing wealth to be spread to the indigenous communities via the new wind-based technology. If the aforementioned assertion is assumed equitable, that renewable energy supersedes any potential environmental consequences, then Mexico's indigenous policy can potentially be vindicated through allowing the indigenous populations a share of proceeds derived from wind energy development.

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[134] *See* Rosenberg, *supra* note 129, at 525.

[135] *See* Stevenson, *supra* note 83.

[136] *See* Hawley, *supra* note 8.

[137] James R. Healey, *Wind Power Generates Income*, Usa Today (Aug. 15, 2002), *available at* www.usatoday.com/money/industries/energy/2002-08-15-wind_x.htm.

[138] *See* Roseberg, *supra* note 129, at 525-526.

An analogy exists between the Native American's control of the United States' casino gaming industry and the possibility for Mexico's indigenous population to have potential control over the development of wind power on its lands. The Native Americans face great disadvantages, with lower education levels, a high rate of unemployment, and a lower life expectancy among their people.[139] To help aid the Native Americans in developing self-sufficiency, both the judicial and legislative branches acted to help the different Tribes produce a profit through gaming.[140] The Indian Gaming Regulatory Act was groundbreaking in this arena, because it created a "statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[141]

The outcome of allowing Native Americans to profit from gaming has had both positive and negative effects upon the United States' indigenous population.[142] There are clear social advantages to allowing Native American's to control the gaming industry, as revenue has been used for educational programs as well as nutrition, housing, and healthcare programs that were not federally funded.[143] Some of the proceeds from gaming also have been used for substance abuse rehabilitation and prevention programs.[144] Money earned through gaming also has been invested into other sectors of business to allow more Native American job opportunities.[145] However, there also exist the dangers of exploitation. Assuming non-Native Americans enter the gaming industry and gain control, an increased danger of criminal activity that is commonly associated with gaming could arise, or a lessened sense of sovereignty on account of intrusion by nontribal government with respect to gaming, as well as the possibility of internal divisiveness on the sundry issues that could therein arise.[146]

An additional analogy may be drawn between the current situation in Mexico regarding monetizing wind power on the lands of indigenous people and the American Congress's attempts to create a similar agreement between Native Americans and private industries' interest the Native American's mineral rights. The ninety-seventh United States Congress passed the Indian Mineral Development Act of 1982 (IMDA)[147] to provide Indian tribes with flexibility

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[139] Cathy H.C. Hsu, Legalized Casino Gaming in the United States 44-45 (1999).

[140] *Id.* at 48. *See also, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Indian Gaming Regulatory Act of 1988. *But see Red Lake Band v. Swimmer* (1990).

[141] Cathy H.C. Hsu, Legalized Casino Gaming in the United States 48 (citing Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 et seq.).

[142] *Id.* at 55-60.

[143] *Id.* at 55.

[144] *Id.*

[145] *Id.*

[146] *Id.* at 57-59.

[147] Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C.A. §§ 2101-2108.

in the development and sale of mineral resources.[148] "Foremost among the beneficial effects of IMDA was the opportunity for Indian tribes to enter into joint venture agreements with mineral developers.[149] The contractual relationships permitted by IMDA were designed to meet two objectives: First, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources."[150]

A structure similar to the Native Americans' mineral and gaming control may be a viable solution to the conflict between Oaxaca's indigenous people and the wind farm developers. Allowing the indigenous people to derive a profit from the presence of wind power, separate from a lease of the land, would prevent the purported takings of land that are occurring today and help foster participation between the now-competing groups. Such additional revenues are especially important because, similar to the Native Americans, Mexico's indigenous people are faced with serious disadvantages. The injustices faced by Mexico's indigenous "are linked to land and territories, natural resources, administration of justice, internal displacement, bilingual education, language, migration and constitutional reforms."[151] A recent study demonstrated that approximately 75 five percent of Mexico's indigenous population lives below the poverty line, as opposed to only 50 percent of non-indigenous people in Mexico.[152] In Oaxaca specifically, approximately 56 percent of the population self-identifies as indigenous, thus there is a high concentration of people in this region who could utilize additional financial support.

Just as the Native Americans used proceeds from gaming and mineral development for services to better their community, the same could exist for the indigenous people, using the funds derived from wind energy to combat discrimination and poverty. Additional monetary support would provide for an increased level of autonomy, as well as the establishment of additional resources to improve the indigenous peoples' strikingly low standard of living. The income from wind energy could be used for basic needs, such as food, healthcare, and education. The new source of income could aid the indigenous in becoming more self sufficient through the establishment of long-term goals such as increasing indigenous employment. Furthermore, if the indig-

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[148] *See* S. Rep. No. 97-472, 97th Cong.2d Sess. 2 (1982); *see also Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1458 (Mont. 1986).

[149] *Advancing Indigenous People's Rights in Mexico*, United Nations Human Rights (July 7, 2011), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/IndigenousPeoplesRightsInMexico.aspx.

[150] *Id.*

[151] *Id.*

[152] *See* Vicente A. García Moreno & Harry Anthony Patrinos, *Indigenous peoples and poverty in Mexico,* The World Bank (April 2011), *available at* http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1289834880964/Mexico_brief.pdf. *See also* Figure Four, *id.*

enous people were to have ties to the burgeoning wind industry, it is likely that their participation in the political process would increase. It is conceivable that having a significant stake in energy development would require involvement in local government, energy counsels, etc. Such involvement would also help counter discriminatory practices, as the indigenous people would occupy a more prominent place in society. A notable positive difference between the Native American's involvement with the gaming industry and the potential for Mexico's indigenous community to derive a profit from windmills is that it is unlikely there will the same type of crime associated with wind energy development as exists with gaming.

However, the existence of additional income may not be enough to overcome the years of oppression faced by the indigenous. Similarly, it is difficult to foresee whether or not it would even be possible to include the indigenous people in wind production, as this would require significant collaborative efforts between wind power developers, the indigenous, and the government, which is quite the undertaking. In conclusion, legislative action could be a viable option for Mexico to address the land rights of the indigenous in a way that allows for a mutually beneficial relationship between the indigenous and private parties.

Another option would be the construction of a community wind project. Community wind projects, also referred to as "decentralized energy projects," permit small groups to produce energy and sell it, deriving a profit from the sale.[153] Such projects exist internationally, and have been quite successful.[154] An illustrative example exists in Denmark:

> Denmark's story began in the 1980s, with families becoming shareholders in cooperative wind farms. Hundreds of families came together and decided to pool money, create a cooperative, and buy, install and operate a wind turbine. The Danish government made sure that these wind turbines could be connected to the national power grid and that they received a cost-covering payment from the utilities for the generated electricity. As a result, around 200,000 Danish families became shareholders in wind turbines and several former land machinery companies started manufacturing wind turbines. Today many Danish wind companies are world market leaders, with their specific know-how and with an overall turnover of €4.7 billion in 2007 (US$7 billion).[155]

A similar approach, albeit a bit ambitious, could be very successful in areas of Mexico intending to develop wind power, where the indigenous people hold shares in a wind farm and participate in the wind farm's operations. If the indigenous were to invest in the farms, not only would they have bet-

[153] Stefan Gsanger, *Community Power Empowers*, Discovery News (May 26, 2009), *available at* http://news.discovery.com/tech/community-wind-power-opinion.html.

[154] *Id.*

[155] *Id.*

ter bargaining power, they would also have additional sources of income, which may help them escape poverty. One obstacle to this approach would be the federal government's regulation of the sale of electricity.[156] Further, wind power plants are prohibitively expensive to finance.[157] It is unlikely the indigenous people would be able to provide such funds given the high incidence of poverty they experience.[158]

A final viable option would be the creation of an organization that exists specifically to enforce indigenous peoples' rights.[159] The organization would bridge the gap between the large companies wanting to develop wind power and the indigenous people.[160] This would likely improve the indigenous people's bargaining power, and perhaps provide a solution to some of the issues discussed above. If the indigenous people were to have a resource devoted to their protection, it is highly likely that they would have a better chance to vindicate their rights. However, it is important to note that the indigenous community is mainly rural and somewhat isolated from big cities. Thus, any such organization would face the challenge of establishing an effective outreach program to be effective. Further, the organization would need to find an efficient way to meet the different linguistic needs of the different indigenous populations in Oaxaca, which may be additionally difficult. Nevertheless, some sort of protective entity is necessary to uphold the rights of the indigenous people, and certainly merits attention from the Mexican government.

This is not the first time that the indigenous' land rights have been addressed. In 1994, after Mexico became a party to NAFTA, there was a rebellion in Chiapas regarding indigenous land rights.[161] The indigenous people claimed rights over potentially impacted lands, advocating that Mexico should have one state devoted to the indigenous people.[162] This rebellion, while not resulting in a single indigenous state, did result in the acknowledgement of Mexico as a multicultural country after negotiation between communities and the federal government took place to gain recognition of this right.[163] It it is time to revisit this struggle, and either vindicate the indigenous rights that were established as a result of this conflict, or renegotiate indigenous land rights in a way that allows energy-based progress as well as protects the indigenous claim to the land.

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[156] *See supra*, note 153.

[157] To provide an example, the construction of the Venta II, III, and IV wind farms cost more than 600 million U.S. dollars. *See New Wind Farms for a Cleaner Mexico*, Power Engineering (Mar. 8, 2012). http://www.power-eng.com/news/2012/03/08/new-wind-farms-for-a-cleaner-mexico.html (last visited: Mar. 29, 2012).

[158] *See supra* note 148.

[159] Pers comm., Jorge A. Vargas, Nov. 16, 2011.

[160] *Id.*

[161] *See* Olson, *supra* note 48.

[162] *Id.*

[163] *Id.*

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COMMENT

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PEMEX'S MATURE FIELDS AWARDS: THE FIRST BIDDING ROUND UNDER THE NEW PEMEX LAW

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Abstract. *This article offers a perspective on the legal, economic and institutional issues associated with a new type of procurement transaction that was made possible by the Energy Reform of 2008. The procurement by Pemex Exploration & Production (E&P) concerned the purchase of field redevelopment services on a long-term contract in three blocks located in the state of Tabasco. The procurement was carried out by means of a public tender in which the sole biddable element was the offered fee/barrel. The character of the contract was that of a farm-out, that is, the common practice, found internationally, by which an operating company with leaseholder rights to acreage in effect subleases an area to another company which, in return, receives a legal interest in the revenue from future production of the well or wells that the second company may drill. The discussion calls into question the legality and economic justification of the lowest-price award criterion, and observes that Pemex made an ad hoc interpretation of Article 6 of the Petroleum Law to justify the concept of a fee/barrel. Finally, the report asks if the new contractual modality represents, in the first place, a new chapter in Mexican oil policy, and, in the second place, does it represent a step toward privatization.*

Key Words: *Pemex, procurement, energy sector, oil, privatization.*

Resumen. *Este comentario ofrece una perspectiva acerca de la problemática legal, económica e institucional relacionada con una nueva forma de adquisiciones que se puede realizar a partir de la reforma energética de 2008. Se ofrece un estudio de caso de la adquisición por Pemex Exploración y Producción (PEP) de servicios para un nuevo desarrollo de un contrato de largo plazo de campos ubicados en tres cuadrantes en el estado de Tabasco. La adquisición se llevó a cabo por medio de una licitación en la cual el único componente de la licitación fue con respecto a la oferta de precio por barril. La naturaleza del contrato fue*

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la de una subcontratación, una práctica común a nivel mundial en la cual una empresa explotadora con derechos de arrendatario de una superficie le otorga en subarrendamiento a otra empresa los derechos que a su vez recibe un beneficio legal de los ingresos de la producción futura del pozo o pozos que esta ultima pudiera perforar. El texto cuestiona la legitimidad y la justificación legal del criterio de otorgarlo al postor con el menor precio, y advierte que Pemex realizó una interpretación ad hoc del artículo 6 de la Ley Federal del Petróleo para justificar el concepto de precio de barril. Por último, el comentario pregunta si la nueva modalidad contractual representa, en primer lugar, un nuevo capítulo en la política del petróleo mexicano y, en segundo lugar, si constituye un paso hacia la privatización.

Palabras clave: *Pemex, adquisiciones, sector energético, petróleo, privatización.*

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I. Introduction

The first commercial fruit of the Energy Reform of 2008 was harvested on August 18, 2011, in a Pemex ceremony held in Villahermosa, Tabasco, headquarters of Pemex's Southern Region for exploration and production. It appears that Pemex's uncertain bet finally paid off: at least a few Mexican and international companies accepted a Technical Service Agreement (TSA) for the development of three onshore blocks. An award for third-party hydrocarbon production that included both oil and gas had not taken place in Pemex since 1951. In all, 11 companies had prepared bids for submission.

For what some observers believed should have taken no more than 30 minutes —the opening of bid offers and the announcement of the lowest-priced (and winning) bidder for each of three blocks— the Pemex protocol held in Villahermosa afforded a show of bureaucratic punctiliousness that finally, after 2 ½ hours, resulted in two winners for three blocks. As one Pemex executive tellingly pointed out, "You didn't get everything you wanted, and we didn't get everything we wanted."

This comment is based on observations of the Internet streaming of this event, coupled with a familiarity with the legal background and corporate culture of Pemex that gave both the contracts and the award ceremony their particular shapes. The comment also reflects off-the-record conversations with contractors and oil-company observers, and explores the implications of the awards both for Pemex's upstream unit as well as for its midstream and downstream businesses. To fully comprehend the legal and institutional drivers that facilitated this transition, some background is needed.

II. Background

To appreciate the importance of Mexico-based contracts that out-source Pemex's oil production operations, it will help to review some legal and policy issues. For Pemex, the challenge has always been to overcome the legal and political impediments that have prevented foreign oil companies from working in Mexico as operators.

1. *Article 6 of the Petroleum Act of 1958*

As a result of an 8-year battle with Pemex Director General Jaime J. Bermúdez, who had refused to turn over to the Senate copies of risk contracts that had been awarded to several American companies during the administration of Adolfo Ruiz Cortines,[1] the Mexican government promulgated the

[1] By the terms of a draft contract dated July 17, 1957, Pauley Petróleos Mexicanos and

Petroleum Act of 1958 on the last working day of Mr. Bermúdez' term in office. The most notable feature of Article 6 was that it was drafted in a way to thwart Pemex from entering risk contracts in the future. Although the oil monopoly was free to contract any provider it wished, payment could only be in cash and not be linked to the project's outcome. Payment in-kind was strictly prohibited.[2]

At an industry seminar held in Galveston in the spring of 2010, the question was raised about the legality of a fee/barrel as compensation for contractors in view of the restrictions of Article 6 (Exhibit A). The unexpected answer given by Sergio Guaso, the Pemex speaker, was that Article 6 had been interpreted to mean that it only applied to contracts that linked payment to production at market prices. Since Pemex was proposing a fixed-fee tariff and not a percentage of sales, however, the restrictions of Article 6 would not apply.

2. *Article 51 of the Pemex Administration Act of 2008*

Article 51 of the Pemex Administration Act of 2008 allows Pemex to supplant the traditional Public Works Law of 1999 in favor of innovative contract models. The Procurement Dispositions of 2010 provided guidelines and limitations of terms that could —and could not— be included by Pemex in a contract.

The new thinking, as embodied in the Pemex model contract, required that contractors be paid from a trust account funded by the sale of oil and gas production from the awarded block —with the caveat that funding occur on an after-tax basis. The contractor would thus be paid a biddable fee for any production that exceeded the level specified by Pemex for a given month in the life of the contract. The qualified contractor with the lowest bid price would be declared the winner.

3. *Article 47 of the Public Service Responsibility Act of 1982*

The painstaking efforts displayed on August 18th by the bid organizers — purportedly in the name of "transparency"— cannot be fully appreciated

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Edwin W. Pauley, Signal Oil and Gas Company and American Independent Oil Company, the contractors would be paid "a sum equivalent to 18 ¼% of value of sales of the production of oil, gas or other hydrocarbon substances from the wells drilled by the 'Contractor' into the structures selected under the First Clause of this Contract, as compensation for both the investment and risk incurred." In addition, the company's costs would be reimbursed [Text courtesy of Barrows Company of New York].

[2] Some of this history is recounted in Miguel Angel Granados Chapa, *Pemex Contra La Ley*, Reforma, Aug. 21, 2011, at 11. The author believes that the new contract model violates Article 6 of the Petroleum Law.

without deeper understanding of the apprehension felt by Pemex managers in matters involving contract bids.

In an implicit acknowledgment of the procurement abuses that took place during the Oil Boom of 1979-81, PRI presidential candidate Miguel de la Madrid spoke of the need for a "moral reform" of Pemex. On Dec. 31st, his administration promulgated the Public Service Responsibility Act of 1982, whose purpose was to hold any federal employee accountable not only for illicit enrichment, but also for economic damages to the State resulting from acts or omissions. Punishment could take the form of fines, temporary or permanent loss of employment or a ban on future public employment.[3]

Critics both inside and outside Pemex have complained that this law has been applied arbitrarily, and sometimes with a political agenda,[4] resulting in a risk-adverse culture with regard to the signing of supply contracts. An example of this apprehension can be seen from the Pemex Law of 2008 in relation to the procurement regime into which a given project falls. Only if a project is deemed "a substantive activity of a productive character"[5] does the Pemex Law even apply.

Curiously, there is no test for such a finding. The simple solution would be to have the project manager, in his status as manager, make such a determination; but there has been across-the-board resistance from Pemex business units which, as an alternative, regularly submit lists of activities subject to Article 51 contracts.

4. *Total-Value Procurement*

Pemex is not unfamiliar with the concept of total-value procurement. As this method requires the awarding of points to distinct elements of a bid, however, it could give rise to accusations of corruption. For this reason, it has

[3] In the late 1990s Antonio Acuña, at the time the director of the Cantarell Complex, was temporarily suspended from his employment for three months as a consequence of his decision to award a contract without adhering to government procurement rules. The director general of Pemex, Adrián Lajous, expressed his disagreement with this sanction, as Acuña apparently acted in an emergency situation. In an unexpected turn of events, on Oct. 10, 2011, Sergio Guaso, the mastermind of the new ventures initiatives since 2002, was suspended for three months for unspecified transgressions that were purportedly related to the *ill-starred* contract with EMS in 2007 for O&M services on a quadrant of Pemex pipelines. Mr. Guaso was reinstated after about two months, but two of his co-workers were still in the court system filing appeals.

[4] There is concern in Pemex that a future presidential administration would retroactively annul any contracts signed in violation of the 1982 law. During the Fox administration there was speculation that a PRD presidency would challenge the legality of the Multiple Service Contracts.

[5] This phrase, taken from the Pemex Administration Act of 2008, is more simply translated as a "core" or "mission-critical" activity.

not been embraced in the special Procurement Dispositions; instead, Pemex adheres to the traditional "lowest price" standard stipulated in the Public Works Law.

As the notably divergent bids on August 18th 2011 suggest, Pemex's plan to use qualifications criteria to only permit bidders of comparable levels —thus validating a lowest-price methodology— went notably unfulfilled. This outcome, however, was far better than the alternative, which would have been no bidders at all or less than a half-dozen.

III. Discussion

In this section we use two different perspectives to analyze what happened, what didn't happen and what might yet happen in the future in relation to E&P contract awards. One unanswered issue concerns the applicability of the upstream model contract to midstream and downstream projects.

1. *The Awards Ceremony*

About 27 companies bought more than 50 of the bid packages offered by Pemex for the three blocks. In the end, 17 of these companies were present for the submission of bids.

A. *Theatrics*

A big part of the protocol followed on August 18th for the submission and opening of bids was planned specifically for television. The most cinematic scene came at the beginning: the order in which a bidder would step forward and submit his bid was established by a lottery system that included randomly selected numbered balls placed in a rotating bin. Each company's turn was announced with great solemnity. For the approximately 75 people in the hall, this exercise prolonged the event by about 45 minutes without conferring any advantage either to Pemex or the bidder.

B. *Bidders and their Bids*

Pemex's official record of the proceeding provides details of the bids submitted by each of the bidders, as well as a list of bidder representatives. In a custom dating back to the Spanish colonial period, each of the 17 pages is adorned with the initials of each bidder representative (Exhibit B).

Despite these dramatic touches, Pemex chose not to provide corporate profiles or histories of any of the bidders; about a third in fact were unknown to industry observers. Not all bidders in the room submitted bids.

The winning bidders were notably less than most of their competitors and —surprisingly if not shockingly— significantly below Pemex's maximum allowable price.

C. *Santuario*

This block was the most popular receiving seven bids. Pemex's maximum bid price was $7.97/BOE, and the winning bid was $5.01 (by *Petrofac*). This bid was 63% of the maximum allowed, 48% below the average of all bidders and 20% of the value of the highest bid (by *Repsol*).

The third bidder whose quote was below Pemex's maximum price (at $6.99) was the joint venture between Constructora y Perforadora Latina, a Mexicali-based company specialized in the drilling of geothermal and water wells; and Monclova Pirineos Gas (MPG), operator of a Multiple Service Contract (MSC) in the Burgos Basin.[6]

D. *Magallanes*

Although there were five bidders for this block, only four bids were accepted (see below). Pemex's maximum bid price was $9.75/BOE; the winning bid was also $5.01 (again by *Petrofac*). This that none of these awards would have been possible without the Energy Reform of 2008, which allowed Pemex to experiment with contractual models outside the Public Works Law.

E. *Carlos Morales*

Ing. Morales thanked all those who participated in the bidding process; and, as an aside, noted: "You did not get everything you wanted, and we did not get everything we wanted."

In congratulating the winners, Juan José Suárez Coppel, Pemex's director general, referred to them as Pemex's new "partners."

2. *Who Got What?*

Answers to the questions, "*Who got what?*" and "*Who didn't get what?*" require additional investigation.

[6] MPG was legally formed on March 10, 2005, and subsequently, on March 23, 2005, signed Multiple Service Contract No. 414105826. By year-end MPG was operating 7 wells with an average production of 5 MM cfd, a volume 2 MM cfd above the initial production. See http://www.mpg-ihsa.com.mx/mpg/html/quienes.html.

A. *Contractors' Gains*

In one leap the two winning contractors breached the "Chinese Wall" around the Mexican oilfield service market that had been built, principally by Schlumberger, over the previous half-century. For Petrofac, a UK-based company, this beachhead in Mexico —with immediate revenue generation on Day One of the contract— is especially important, as it provides the company with a platform from which to bid on other Pemex contracts, be they incentive-based or otherwise.

It may turn out that this market platform will have to provide sufficient revenue to compensate for the minimal margins, if not losses, that a lowest-price bid will entail.

The winning contractors would also receive an earned, contractual interest in the revenue from future incremental production from their respective blocks, as well as a contractual interest in the revenue from baseline production where such production existed (Magallanes and Santuario).

B. *Pemex's Gains*

Pemex now has real evidence that there is a small subset of oil companies and oilfield service companies for whom the current contract model is acceptably competitive, if not by reference to the economics of a block then by reference to its value as a market-entry vehicle.

In the two winners, Pemex got, in *Petrofac*, a world-class oilfield service company that specializes in farm-ins, meaning, the assumption, on an equity basis, of responsibility for the development and management of oilfields that have already been discovered (Exhibit C). For the Santuario block, from Petrofac, by the bidding rules, Pemex got a commitment for an extra 100.5% of funding commitment for the basic development program.

In *Administradora en Proyectos de Campos (APC)*, Pemex got a Mexican company whose name was unfamiliar nationally or internationally. On September 21, a spokesman for APC told an industry congress in Mexico City that his company would provide *"vivienda digna"* (dignified housing) for squatters at the city refuse site located on the Carrizo block. On October 19, two months after the award, when the winners of the blocks were to sign the final contract, APC was unable to deliver the required performance bond; Pemex wasted no time in reassigning the contract to Schlumberger (at a much higher price).[7]

[7] Mexico energy journalist Ronald Buchanan, in telephone interviews with Grupo Industrial Monclova (GIMSA), learned that APC's principals were former employees who had only recently formed APC for the purpose of bidding in the Pemex mature field auctions. While the principals, as individuals, might have been qualified, the company had no experience what-

C. *What Pemex Didn't Get*

Pemex did not get its partner *Repsol* as a winner,[8] nor the name of a recognized American bidder on the final bidder list; nor an international bidder with a research facility in Houston.[9]

By virtue of the lowest-price criterion, Pemex did not get a contractor budget (measured by the tariff in US$/BOE) that could support much innovation. Collaterally, Pemex did not get an investment opportunity for a buy-in of 10% of a contract with a high-margin potential.

Three world-class companies that would have helped Pemex gain valuable new skills did not win the first bidding round. Although the Mexican energy conglomerate shall learn from *Petrofac*, by winning two blocks, this bidder took the space of a third company that would have better fulfilled Pemex's expectations. Instead of three expert-mentors in mature field rejuvenation, Pemex only got one.

Pemex also forfeited the opportunity to fully test the "Total Value Procurement" approach to bid evaluation. This method had been used in a limited way for the breaking of ties: by making companies break a tie on price —the amount by which their respective minimum work program would be increased— Pemex was using a non-price parameter. In the case of a second tie, Pemex planned to award the block to the bidder with the highest credit rating, another non-price parameter.

In sum, Pemex failed to exploit the results of an experiment that would have weighted elements that reliably predict contract performance. In awarding such sharply discounted bids —63%, 51% and 41% of the allowable maximum price— Pemex also failed to obtain a commitment to innovation that a bigger budget would have permitted.[10]

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soever, thus raising serious questions about how APC was qualified (or, in Pemex-speak, "prequalified") in the first place.

[8] Within two weeks of the mature field's awards in Villahermosa, an international controversy erupted when it was discovered that Pemex was seeking to double its shares in Repsol to almost 10%. In a document, *Contexto del aumento de participación de Pemex en Repsol* dated Sep. 1, 2011, Pemex explained its strategy to associate itself with SACYR, another Repsol shareholder, in order to have a 30% voting bloc on the corporate board. Pemex visualized Repsol as an on-going contractor in Pemex bid rounds for incentive-type contracts. In this context, Repsol's bid of $25/bbl, five times the winning bid, was a disappointment for Pemex. (Among themselves, industry observers commented that it was unrealistic for Pemex to have assumed that an increase in its equity would result in any increased interest in Mexico by Repsol's business units.)

[9] Pemex says it wants innovation, which usually means laboratory research and computer simulation as well as field trial-and-error. Petrofac has offices in Houston, but no research facility.

[10] Innovation is built on top of the bricks of failure, so a budget for innovation must include a room for paying for experiments that fail. It is unlikely that a low-budget operation will be able to afford to fund many failures.

D. *What Contractors Didn't Get*

It had been widely known, from the specimen contract of November 1, 2010, if not from a general knowledge of Mexican petroleum legislation, that contractors would not be given any commercial rights over production. As a result, contractors would not receive any direct, upside reward from rising market prices.

As a result of Pemex's insistence on awarding blocks to qualified bidders with the "lowest price," the most highly-qualified contractors did not receive fair treatment. Pemex would have preferred Dowell-Schlumberger to have won the Carrizo block rather than a roll-of-the-dice winner simply because it had much higher qualifications.[11]

3. *A New Chapter in Mexican Oil?*

Does the award of these contracts represent a new chapter in Mexican oil? There are two very clear answers to this question: *Yes* and *No*.

Yes

In the Multiple Service Contracts of 2003-05, contactors were only permitted to produce natural gas, whereas the new legal framework is focused on oil, as payment for natural gas is sharply discounted from BTU parity with oil. Even more important, the new rules permit contractors to invoice Pemex for both current and incremental production of its block instead of the rendering of discrete technical services.

At a higher level of analysis, the fact that a tender was made for mature fields at all is an implicit —albeit belated— acknowledgment that the market structure of the international, upstream oil industry exists for good reason: large companies' economies of scale are best suited to large-scale projects, while those of small companies are best fitted for small projects.[12] As a large company, Pemex E&P has no incentive to directly manage small projects; so it makes perfect sense for it to offer other oil companies operational responsibility in exchange for compensation based on production. Such an acknowledgment does indeed represent a new chapter in Mexican oil.

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[11] Pemex did get its (unexpressed) wish when APC failed to provide a performance bond two months later. (There is room for speculation that the missing performance bond was a cover for a management decision by Pemex that APC was so unqualified to undertake the project that it had to be pushed aside in favor of Schlumberger.)

[12] This argument in relation to Mexico was presented by George Baker and James L. Wilson in *Mexico's Basins Could Provide Niches for Various Sized Firms*, Oil & Gas Journal 53-57, Nov. 16, 1996.

No

Under the new scheme, the winners are still only contractors but without any of the commercial rights of a well owner: it's the scheme of the U.S. Gulf of Mexico, only turned on its head.

The absence of this central, commercial dimension means that nothing essential has changed.

Further in addition, the Hydrocarbons Commission (CNH) is still only an advisory body that generates reports that may or may not be read by the Energy Ministry. At this point, it is not yet a true upstream regulator whose responsibilities include the administration of tenders administered today by Pemex. The third leg of the oil status quo in Mexico is that the government has not initiated any effort to change the self-restrictive, inward-looking oil narrative in Mexico.

These three considerations support the conclusion that the August 18 awards do NOT represent a new chapter in Mexican oil.

4. Incentive Contracts from Pemex Refining, Chemicals and Gas?

The requirement that a contractor be paid on an after-tax basis is ideally suited to the situation in which the contractor produces a product that has a market value and that is taxed by federal authorities. Such a requirement is suited to Pemex E&P where crude oil and natural gas have global markets with international price benchmarks.

But what about steam, water treatment, hydrogen and other ancillary services needed by refineries and chemical plants? Such services a) lack international price benchmarks and b) have no unit tax liability, as they do not create revenue.

Such services would require an independent-supplier contract known in the industry as over-the-fence (OTF). The government and Pemex Refining have announced major plans for the expansion of capacity but, to date, no specimen contract under the new rules has been issued.

IV. Observations

One of the primary justifications for out-sourcing E&P operations is to provide Pemex a new learning platform from which to observe alternative approaches to engineering and project management; in this way, Pemex cannot be indifferent as to the number and quality of such "learning platforms." From Pemex's perspective, each block should have a different contractor with unique skill sets and management styles; and each contractor should be internationally recognized for its accomplishments in other parts of the world.

For Pemex, *Petrofac* represents such a platform. *Administradora en Proyectos de Campos (APC)*, a company based in Coahuila with experience in dry gas production in the Sabinas Basin, does not. There is a two-month period, until October 18, for the contacts to be formally signed. *During this time, reasons may surface that prevent the winner of the Carrizo block from proceeding with the contract.*[13]

The male-dominated culture of the E&P world in Mexico was visible in the all-male membership of the head table and the procession of male executives submitting their bid packages. A few scattered women could be seen in the audience. This scene is in stark contrast with *PMI*, Pemex's trading unit, which has a woman as president and a professional workforce that is over 50% female.

The names of a number of international companies that bought bid packages, including *Apache*, *Maersk* and *BP*, did not appear on the list of qualified bidders; the reasons for their omission have not been made public.

The proposal submitted by the consortium *IPC-Grupo R* was not accepted on the grounds that the "maximum price" had already been publicly announced. This rejection could only be justified in a culture in which bidders often try to cheat the system by preparing multiple bid envelopes.

Sergio Guaso was not among the speakers at the awards ceremony, as the public face of the bid round had passed to Vinicio Suro, the director of the Southern Region.

It is likely that the use of a "maximum price" —which, in effect, limits the budget for innovation— arises out of the apprehensiveness associated with the liability of a Pemex employee to sanctions for economic crimes of omission. Similarly, as seen in the August 18 bidding, the use of a "minimum price" can have a perverse effect on bidder strategy.

The choice of words by Pemex Director General Suárez Coppel in describing the winners of the blocks as "Pemex's newest partners" overstated the relationship, which is one of contractor to customer. In describing these companies as partners he was looking ahead to a future time, under revised legislation, by which an upstream partnership could exist as a matter of law and equity and not only as a figure of speech.

The "migration" of the Multiple Service Contracts based on the Public Works Law to new contracts based on the Pemex Law will present special challenges, *e.g.*, for a block already awarded under a long-term contract, there will be no competitive bidding.

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[13] As we anticipated in the original version of this article written on August 21, 2011, such reasons were eventually found. As mentioned, on Oct. 18th, on the occasion of the official signing of the contracts, the press reported that APC representatives had "neglected" to bring documents including a power of attorney and performance bond. The assertion that APC officials "forgot" to bring basic legal documents like a power of attorney is simply not credible. The inability to obtain a performance bond, however, is believable. As a result, Pemex officials immediately declared APC in default. Expediency, more than any bidding rule, likely prompted Pemex to award the contract to Schlumberger as the "next lowest bidder" (there were only two).

The time is long overdue for the Secretariat of Energy to apply its unpublished grid system to Mexican oil provinces; in this way, the term "block" will apply to a geometrical shape, and cease to be used as a metaphor for an anachronistic system of coordinates defined by degrees of latitude and longitude.

V. Conclusions

Pemex gets a C+ for this first round of block auctions. Most importantly, there were bidders who, by their bid quotes, aggressively sought to win one or more blocks. Their motives, however, were less about economics and more about protecting market share (Schlumberger) and gaining market entry (Petrofac).

Credit for this mixed success belongs mainly to New Ventures Manager Sergio Guaso and his team who —against tremendous odds— achieved a measure of market success from what started out as a set of microeconomic equations.

The bid-submission-and-award ceremony was designed to play well with a skeptical Mexican public, especially politicians and their followers who would search for ways to embarrass the government. The bureaucratic lipstick and eye make-up of the ceremony also indirectly reflected Pemex executives' vulnerability to accusations of impropriety.

The protocol of submitting and opening bids and immediately making an award on the simplistic basis of "lowest price" served both political and institutional goals. Politically, Pemex would appear in public as a paragon of transparency. Institutionally, Pemex officials, as civil servants, would stay clear of potential liability from future auditors and legislators who would seek to apply sanctions under the Public Service Responsibility Act.

As for midstream and downstream, it is not yet clear how —if at all— the Pemex Law and the DAC can be adapted to produce a contract model superior to that of the traditional public works law. This conundrum may explain why no other Pemex business unit has yet issued a public tender under the new Pemex law.

As for the awards that were just issued, the most significant challenges ahead are more sociological and cultural in nature than engineering or technical. Pemex employees and local communities will need to accept the presence and authority of new oilfield operators. Such acceptance will take time.

Despite what critics on the left may imagine, these contracts do not represent steps along a road toward "privatization." That road will be taken only when (a) the State assumes authority for the direct administration of farmout contracts associated with the exploration and exploitation of the national hydrocarbon patrimony (whose authority is currently delegated to Pemex);[14]

[14] See *Pemex's Farm-Out Program*, Mexico Energy Intelligence, Market Note 111 (Hous-

(b) Pemex is converted to a mercantile entity with minority shares in the New York Stock Exchange; and (c) bidders acquire leases that provide compensation at market prices.

One major fact has not changed: the oil patrimony of Mexico continues to belong to the State, not private parties. For this, we must look back and give thanks to President Lázaro Cárdenas and his advisors who, by means of the oil expropriation of 1938, cleared the air once and for all of a superstition from which the oil companies at that time could not free themselves: They wrongly believed that the oil industry cannot prosper on a world-wide basis without legal ownership of the oil in-situ. "Privatization" will not take the clock back; on the contrary, by allowing Pemex to enter into joint equity contracts with other oil companies, the new policy will move the clock forward from where it has been stuck since 1958.

ton, Feb. 2, 2012) which asks about alternative metrics by which the success of this particular procurement program might be evaluated in the years ahead (noting that the DAC require no such evaluation).

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