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Jason Farber

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NOTES AND COMMENTS

NAFTA AND PERSONAL JURISDICTION: A LOOK AT THE REQUIREMENTS FOR OBTAINING PERSONAL JURISDICTION IN THE THREE SIGNATORY NATIONS

I. INTRODUCTION

When the North American Free Trade Agreement (NAFTA) went into effect on January 1, 1994,¹ it was clear that international business was on the verge of drastic change. NAFTA's reach and potential impact, however, remained unclear. Three years later, NAFTA's scope, and specifically the liability of international businesses, remains ambiguous.

The drafters of NAFTA intended to alter the trade processes among the United States, Mexico, and Canada.² Consequently, U.S., Mexican, and Canadian businesses are going to modify their trading patterns to maximize NAFTA's benefits. Hopefully, these modifications will increase trade and business relations between these countries. With increased trade, however, international companies will be more susceptible to lawsuits. Undoubtedly, NAFTA will affect not only the business world, but also the judicial systems of the three signatory countries.

In civil matters, each country will follow its own system of adjudication,³ but this will not be as easy as it first appears. The United States, Canada, and Mexico will each have to implement changes in their standards for obtaining personal jurisdiction over foreign companies. The United States, in particular, will have to make dramatic changes in its personal jurisdiction requirements.

Obtaining personal jurisdiction over the defendant is essential

1. North American Free Trade Agreement, *done* Dec. 8-Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA].

2. *See id.* pmb1.

3. NAFTA does, however, set up an international panel to deal with problems relating to violations of the agreement itself. *See* NAFTA, *supra* note 1, chs. 19-20.

in every suit. Every country and state has its own manner of obtaining such jurisdiction.⁴ In the United States, the requirements for personal jurisdiction have evolved with necessity over time.⁵ Initially, the only way to obtain personal jurisdiction was to personally serve the defendant within the territory in personam.⁶ This is not the rule today.⁷ As more people traveled and companies expanded, this requirement for territorial presence became impractical, and thus, was changed.⁸ Furthermore, when the United States entered into the international arena as a major economic force and market for foreign goods, additional changes were needed. The U.S. Supreme Court articulated these changes in *Asahi Metal Industry Co. v. Superior Court of California*.⁹ In *Asahi*, the Supreme Court set forth the murky requirements for obtaining personal jurisdiction over foreign companies.¹⁰ Four Justices decided that a foreign company's awareness that its product would enter the forum was enough for valid jurisdiction.¹¹ In opposition, four Justices held that mere awareness was not enough.¹² Although the Court found that Asahi Metal was not amenable to the Court's jurisdiction, it left the standards for obtaining personal jurisdiction unclear.

The Supreme Court has continually recognized the need to change personal jurisdiction requirements to accommodate the transformation of the U.S. economy and international trade.¹³ Justice Brennan clearly expressed this rationale:

The vast expansion of our national economy during the past several decades has provided the primary rationale for expand-

4. For a discussion of every country's judicial system and requirements for personal jurisdiction, see 1 MODERN LEGAL SYSTEMS CYCLOPEDIA (Kenneth Robert Redden ed., 1988).

5. See discussion *infra* Part II. A.

6. See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

7. See *Asahi Metal Indus. Co. v. Superior Court. of Cal.*, 480 U.S. 102 (1987).

8. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); see also discussion *infra* Part II.

9. 480 U.S. at 102.

10. See discussion *infra* Part II.

11. See 480 U.S. at 104.

12. See *id.* at 117.

13. See *Hanson v. Denckla*, 357 U.S. 235 (1958); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

ing the permissible reach of a State's jurisdiction under the Due Process Clause. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.¹⁴

With the implementation of NAFTA, the time has come for another change in the U.S. requirements for personal jurisdiction. The *Asahi* rules cannot meet the judicial system's needs in relation to foreign companies governed by NAFTA. The special relationship embodied in NAFTA demands a more succinct set of rules that function better in international situations.

This Comment examines NAFTA's effect on the U.S., Mexican, and Canadian judicial systems. Part II discusses the present standards for personal jurisdiction in the United States, Mexico, and Canada, focusing more heavily on U.S. personal jurisdiction requirements due to their greater complexity. Part III examines various aspects of NAFTA and gives a hypothetical situation to illustrate the need for change. Part IV concludes with an evaluation of the present judicial situation and identifies the steps that should be taken to reach a more internationally effective stance. NAFTA is an important step towards a global economy.¹⁵ For it to work at an optimal level, however, each country must reconfigure its personal jurisdiction requirements.

II. PERSONAL JURISDICTION IN THE NAFTA COUNTRIES

A. Personal Jurisdiction in the United States

As the United States and its economy progressed, the re-

14. *Helicopteros*, 466 U.S. at 422 (Brennan, J., dissenting).

15. See 139 CONG. REC. H10,048, H9906 (daily ed. Nov. 17, 1993) (statement of Mr. Linder). Mr. Linder, in support of NAFTA, stated: "Whether we like it or not, we live in a global economy. People cross national boundaries as easily as our grandparents crossed from State to State. We simply cannot leave walls between nations whose people want nothing more than increased trade among friends." *Id.*

quirements for personal jurisdiction developed.¹⁶ In *Pennoyer v. Neff*,¹⁷ the U.S. Supreme Court set forth rules for obtaining personal jurisdiction that later Courts called "rigid."¹⁸ Soon after *Pennoyer*, technological advances blurred the traditional boundaries separating states, and companies extended their markets beyond their immediate surroundings. The Court thus had to devise new tests to deal with injuries caused by out-of-state companies.

The Supreme Court dealt with the issue in 1945 when the state of Washington attempted to tax the International Shoe Company, a Missouri-based corporation.¹⁹ In *International Shoe Co. v. Washington*, the Court held that jurisdiction over an out-of-state company was valid if that company had "minimum contacts" with the forum state.²⁰ Additionally, these contacts had to be sufficient such that forcing the company to litigate in the forum state would not offend "traditional notions of fair play and substantial justice."²¹

In *Hanson v. Denckla*, the Court further defined these requirements by stating that the defendant must have "purposely availed" himself of the benefits and protections of the forum state for the state to exercise personal jurisdiction over him.²² The Court in *World-Wide Volkswagen Corp. v. Woodson*²³ added that mere "foreseeability" that one's product could enter the forum state was not enough to establish the required "minimum contacts."²⁴

More recently, the Court addressed the issue of personal jurisdiction over foreign corporations in *Asahi Metal Industry Co. v. Superior Court of California*.²⁵ This case dealt with international affairs, and the Court had to balance the need for U.S. citizens to

16. U.S. Supreme Court majority, concurring, and dissenting opinions, in the area of personal jurisdiction, constantly refer to economic and technological progress. See *infra* Part II.A.

17. 95 U.S. 714 (1877).

18. *Hanson v. Denckla*, 357 U.S. 235, 250 (1958).

19. See *International Shoe Co. v. Washington*, 326 U.S. 310, 311-13 (1945).

20. See *id.* at 316.

21. *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

22. See *Hanson*, 357 U.S. at 254.

23. 444 U.S. 286 (1980).

24. *Id.* at 295.

25. 480 U.S. 102 (1987).

have a forum against the need for international trade.²⁶ While the Court reviewed *Asahi*, international companies began to fear that the sale of their products in U.S. markets, no matter how small or to whom they were delivered, could force them to litigate in U.S. courts.²⁷

Although *Asahi* started as a simple products liability case,²⁸ Justice O'Connor's and Justice Brennan's opinions in the *Asahi* split decision illustrate the requirements for obtaining personal jurisdiction over foreign corporations. In Part II-A of her opinion, Justice O'Connor concluded that a foreign corporation is amenable to a court's jurisdiction only if that corporation has taken specific action aimed at the forum.²⁹ Merely placing its product in the stream of commerce is not sufficient.³⁰ The corporation must "indicate an intent or purpose to serve the market in the forum State."³¹ Examples of actions that would constitute "an intent or purpose to serve the market"³² include: (1) designing the product

26. See Brief of the American Chamber of Commerce in the United Kingdom, and the Confederation of British Industry, *Asahi* (No. 85-693) available in LEXIS, Genfed Library, Briefs File. In its brief, the American Chamber of Commerce stated its first principle concern:

[a] rule of U.S. law that a foreign component part manufacturer is subject to the personal jurisdiction of any U.S. court in the territory in which it may be aware its foreign customer's products might come to rest, would substantially increase the costs and uncertainties of international trade for British manufacturers.

Id. The chamber made it clear that this concern applied to all international trade. The applicability of this concern was clear because *Asahi* had nothing to do with British manufacturers. See *id.*

27. See Brief for Cassiar Mining Corporation, *Asahi* (No. 85-693), available in LEXIS, Genfed Library, Briefs File. Cassiar Mining, an asbestos producer, often had to contest product liability suits in states in which it had not intentionally delivered its product. See *id.* Many of those cases were still pending, and the company feared that the outcome in *Asahi* would determine those cases as well. See *id.*

28. See 480 U.S. at 105. Mr. Zurcher lost control of his Honda motorcycle, causing his wife's death and severe injuries to himself. See *id.* He sued, among others, the tire manufacturer, Cheng Shin. See *id.* at 106. Cheng Shin settled the suit with Zurcher but demanded indemnification from the valve maker, *Asahi*. See *id.*

29. See *id.*

30. See 480 U.S. at 112 ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."). O'Connor held this view even if the corporation knows that its product will end up in the forum state when it places its product in the stream of commerce. See *id.*

31. *Id.*

32. See *id.* Some have designated this language the "additional conduct" test. *Sullivan v. Leaseway Transp. Corp.*, No. 86-1389-H, 1988 U.S. Dist. LEXIS 14530, at *13 (D.

for that market, (2) advertising in that market, (3) establishing a method for regular customer assistance in that market,³³ and (4) using a distributor as a sales agent in that market.³⁴ Because Asahi Metal had done none of these or any similar acts, Justice O'Connor and Chief Justice Rehnquist concluded that Asahi Metal had not purposefully availed itself of the benefits and protections of California.³⁵

In Part II-B of the *Asahi* opinion, eight Justices agreed that it offended "traditional notions of fair play and substantial justice" to force Asahi Metal to litigate in California.³⁶ Specifically, Asahi Metal would be forced to "traverse the distance between Asahi's headquarters in Japan and the Superior Court of California" and to deal with the burden of litigating in a foreign legal system.³⁷ Because a majority of the Court concurred with this part of the decision, these factors are probably the most significant in the case.

In his concurring opinion, Justice Brennan found the case to be unique: "This is one of those rare cases in which 'minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'"³⁸ Contrary to Justice O'Connor's decision, Justice Brennan decided that a company's placement of its product—whether a finished or component part—in the stream of commerce establishes "minimum contacts," especially if the company knows that its product will end up in the forum market.³⁹ By reaping that mar-

Mass. Dec. 14, 1988).

33. This raises an interesting issue: is listing a company's address or phone number on the package sufficient?

34. See 480 U.S. at 112.

35. See *id.*

36. See *Id.* at 113, 116

37. See *id.* at 114. The Court also seemed to take into account international relations, noting that a nation or state should take care in "stretching the long arm of personal jurisdiction over national borders." *Id.* The Court later made a similar reference when it stated that the "international context" of the case was a consideration. See *id.* at 116. For a description of the Japanese judicial system, see 1 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 5, at 2.70.26 (noting that one of the most important differences between the Japanese and U.S. legal systems is the lack of stare decisis in Japan).

38. 480 U.S. at 116 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-478 (1985)).

39. See *id.* at 117. Brennan stated, "as long as a participant . . . is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot

ket's economic benefits, the company should, under normal circumstances, be amenable to suit in that market.⁴⁰ Justice Brennan distinguished between a product entering a market fortuitously and one sent there purposely.⁴¹

After the *Asahi* decision, many were still unable to resolve the personal jurisdiction question,⁴² yet it was now up to the lower courts to apply this decision.⁴³ Some courts have strictly followed Justice O'Connor's opinion.⁴⁴ Others have applied *Asahi* only in situations involving foreign corporations and not in situations involving domestic companies.⁴⁵ Still other courts have resorted to "vote counting" in an effort to resolve the issue.⁴⁶ This leads to

come as a surprise." *Id.*

40. See *id.* at 117-19.

41. See *id.* at 116.

42. See David G. Savage, *Supreme Court Narrows Foreign Firms' Liability*, L.A. TIMES, Feb. 25, 1987, Business Section, at 2. The attorney for Asahi Metal, Graydon Staring, stated, "In all candor, I don't know how they would rule if any of the facts are changed for the next case." *Id.*; see also A.H. Hermann, *Long Arm Laws: A Lesson from the US*, FIN. TIMES, June 25, 1987, at 13 ("[The Court] did not provide lower courts with useful guidance as to how the weighing of domestic and foreign interests should be conducted."); *Asbestos: High Court Will Not Hear Minnesota Case Allowing Jurisdiction over Canadian Company*, BNA CHEMICAL REG. DAILY, Apr. 20, 1992, available in LEXIS, BNA Library, Bnacr File (reporting that a Canadian company petitioned the Supreme Court to hear its case, *Lac D'Amiante Du Quebec Ltee v. Stanek*, cert. denied, No. 91-1260 (U.S. Apr. 6, 1992), arguing that the lower courts need more guidance on the issue of personal jurisdiction and the stream of commerce theory).

43. Because *Asahi* was the last major Supreme Court case to deal with the issue of personal jurisdiction, an analysis of NAFTA and its affect on personal jurisdiction must begin with that case.

44. See *Catalfamo v. Jacobsen Race Cars, Inc.*, 866 F. Supp. 79, 83 (N.D.N.Y. 1994).

45. See *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1293 (7th Cir. 1992); *A.I.M. Int'l, Inc. v. Battenfeld Extrusions Sys., Inc.*, 116 F.R.D. 633, 642 (M.D. Ga. 1987) ("Unlike *Asahi*, this case does not represent a situation where foreign litigants must submit their dispute to another nation's judicial system.")

46. See *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994). The Eighth Circuit stated:

In short, *Asahi* stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the nonresident defendant. Should one engage in vote counting, which we are loath to do, it appears that five justices agreed that continuous placement of a significant number of products into the stream of commerce with knowledge that the product would be distributed into the forum state represents sufficient minimum contacts to satisfy due process.

Id. at 614; see also *Sullivan v. Leaseway Transp. Corp.*, No. 86-1389-H, 1988 U.S. Dist. LEXIS 14530 (D. Mass. Dec. 14, 1988). In *Sullivan*, Magistrate Robert Collings reconsidered and reversed his previous finding of a lack of personal jurisdiction, stating:

In sum, the test proposed by Justice O'Connor in part II-A could command no

Justice O'Connor's opinion in Part II-A being in the minority. One judge virtually held that *Asahi* was inapplicable to the area of mass tort law.⁴⁷ Other courts have chosen to follow Justice Brennan's opinion.⁴⁸ Thus, it is clear that a consistent application of *Asahi* has not yet developed.

A related issue concerns national contacts. The *Asahi* Court refused to answer whether a court could find jurisdiction based on the defendant's aggregate contacts with the United States as opposed to mere contacts with the forum state.⁴⁹ Some courts are now avoiding the issue of personal jurisdiction by finding sufficient national contacts to hold the foreign corporation subject to the court's jurisdiction.⁵⁰

B. Personal Jurisdiction in Mexico

Naturally, the United States is not the only nation whose judicial system will feel NAFTA's effects. Mexico's judicial system will also have to reconsider its current processes for obtaining personal jurisdiction as a result of NAFTA.

Considering Mexico was founded as a Spanish colony, it is not

more than four votes. An equal number rejected the test, and the ninth justice declined to state a position either way. In these circumstances, the plurality opinion drafted by Justice O'Connor is not the law of the case. I should not have based my allowance of [the defendant's] motions to dismiss upon it.

Id. at *6-7.

47. See Sheila L. Birnbaum & Gary E. Crawford, *Jurisdiction Ruling Charts New Course*, NAT'L L.J., June 22, 1992, at 18. Under Judge Jack B. Weinstein's doctrine of personal jurisdiction, because a state almost always will have an interest in adjudicating mass tort claims, a defendant will be held to the court's jurisdiction unless he can prove "relatively substantial hardship." See *id.*

48. See *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609 (W.Va. 1992).

49. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 n.* (1987) ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts between the defendant and the State in which the federal court sits.").

50. See *Newport Components, Inc. v. NEC Home Elecs. (U.S.A.) Inc.*, 671 F. Supp. 1525, 1537 (C.D. Cal. 1987) ("This theory allows a court to obtain personal jurisdiction over a foreign corporate defendant which has substantial contacts with the United States as a whole, even when its contacts with the forum state are insufficient to pass due process muster."); *Forschner Group, Inc. v. New Trends, Vrolixs J.-C.*, No. B-89-531 (JAC), 1994 U.S. Dist. LEXIS 18516, at *14-15 (D. Conn. Aug. 10, 1994); *Pacific Employer Ins. Co. v. M/T Iver Champion*, No. 91-0911 Section "I"(1), 1995 U.S. Dist. LEXIS 6566, at *11-14 (E.D. La. May 8, 1995).

surprising that its legal system is based on that of Spain.⁵¹ As a civil law country, Mexico's judicial system is quite different from the English-U.S. common law system. The main difference is that although Mexican courts give some weight to precedent and case law, both judges and attorneys concentrate their opinions and briefs on codified laws.⁵² Additionally, Mexico gives significant weight to treatises and writings by respected legal analysts and scholars.⁵³

Nevertheless, there are similarities between the United States and Mexico. Both the United States and Mexico are federations that are divided into states, and thus, they have both federal and state judicial systems.⁵⁴ In addition, both nations' judicial systems are structured in three tiers: district courts sitting at the base, appellate courts at the intermediate level and supreme courts at the pinnacle.⁵⁵ Furthering the similarities between the two nations, the Mexican legislature continues to codify much of U.S. common law.⁵⁶

One important issue to consider is the Mexican government's lack of stability.⁵⁷ Some scholars argue that former Mexican President Carlos Salinas entered into NAFTA to create some stability and to ensure the future path of the government.⁵⁸ Nevertheless, Salinas was not the only one concerned with his government; the U.S. Congress was also deeply interested in the stability of the

51. See S.A. BAYITCH & JOSÉ LUIS SIQUEIROS, *CONFLICT OF LAWS: MEXICO AND THE UNITED STATES: A BILATERAL STUDY* 1 (1968).

52. See Lyon L. Brinsmade, *Mexican Law—An Outline and Bibliography of English Source Materials Relating to Certain Aspects Thereof*, 6 INT'L LAW. 829, 831 (1972); 1 *DOING BUSINESS IN MEXICO*, § 3.02[3] (Andrea Bonime-Blanc & William E. Mooz, Jr. eds., 1995).

53. See 1 *DOING BUSINESS IN MEXICO*, *supra* note 52, § 3.02[2].

54. The United Mexican States (Estados Unidos Mexicanos) is divided into thirty-one states and the federal district. See Brinsmade, *supra* note 52, at 830; 1 *DOING BUSINESS IN MEXICO*, *supra* note 52, § 3.02[1].

55. See 1 *MODERN LEGAL SYSTEMS CYCLOPEDIA*, *supra* note 4, at 1.30.51.

56. See 1 *DOING BUSINESS IN MEXICO*, *supra* note 52, § 3.03.

57. See John Bailey & Leopoldo Gómez, *The PRI and Political Liberalization*, J. INT'L AFF. 291, 294 (1990).

58. See Susan Kaufman Purcell, *Mexico's New Economic Vitality*, CURRENT HIST., Feb. 1992, at 54, 58. This point seems to be one part of a codependent relation: for NAFTA to function as intended, a stable government must be in control.

Mexican government.⁵⁹

The issue of stability must be noted because it affects the judicial system, as well as the other branches of the federal government. The executive branch has always exerted its influence over the courts.⁶⁰ Thus, the independence of the court and the validity of its judgments are called into question when the state has an interest in the outcome.⁶¹ With the importance that the Mexican government has placed on NAFTA, the Mexican courts will likely answer disputes related to NAFTA in a way that benefits the Mexican government. These answers may affect not only substantive issues, but also procedural ones, such as personal jurisdiction.

Obtaining personal jurisdiction over a defendant in Mexico is very similar to the approach in the United States.⁶² Traditionally, a defendant is subject to the court's jurisdiction if he is domiciled in the forum.⁶³ In other words, a defendant must be within the court's territorial boundaries.⁶⁴ Jurisdiction may also be obtained through the defendant's connections with the forum state.⁶⁵ These connections may be established through business ties, tortious action, or even a contract to be performed in the forum state.⁶⁶ Due to these requirements, Mexico, unlike the United States, does not allow transient jurisdiction.⁶⁷ Furthermore, Mexico only recognizes in personam actions; it does not recognize in rem actions rendered in

59. See 139 CONG. REC. H10,048 (daily ed. Nov. 17, 1993). Congressman Sanders from Vermont stated: "The United States should not merge economies with a nation that is not a democracy. There is much evidence to suggest that Mr. Salinas, the President of Mexico, was himself illegally elected. Most of their state elections are rigged." *Id.* Congressman Stokes from Ohio supported Congressman Sanders by stating, "The essential point to remember in this debate is that the United States and Mexico are very different countries, with dramatically dissimilar historical traditions of respect for individual rights and freedoms." *Id.*

60. See 1 MODERN LEGAL SYSTEMS CYCLOPEDIA *supra* note 4, at 1.30.55-1.30.56. This statement is true even with respect to amending the constitution. See *Id.* at 1.30.51.

61. See *id.*

62. See *id.*

63. See BAYTCH & SIQUEIRIOS, *supra* note 51, at 222.

64. See *id.*

65. See 1 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 4, 1.30.52. For a discussion of Mexican jurisdiction, see 25 S.J.F. 1647 (5a época 1929); 28 S.J.F. 1573 (6a época 1931).

66. See 1 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 4, at 1.30.52; 1 DOING BUSINESS IN MEXICO, *supra* note 52, § 1.05[2].

67. See 1 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 5, 1.30.52.

foreign jurisdictions.⁶⁸ This rule intensifies the need for U.S. and Canadian courts to have valid in personam jurisdiction.⁶⁹

C. Personal Jurisdiction in Canada

Canada's legal system may be described as a fusion of the legal systems of the United States and Mexico. Like both its southern cousins, Canada is a federation of several provinces,⁷⁰ which are either civil or common law jurisdictions.⁷¹ Quebec, Canada's civil law territory, is a major geographic and political force in Canada. In fact, Quebec may eventually succeed in its attempts to secede from Canada,⁷² creating another party to NAFTA. Thus, this

68. See José Luis Siqueiros, *Enforcement of Foreign Civil and Commercial Judgments in the Mexican Republic*, 3 ARIZ. J. INT'L & COMP. L. 149, 156 (1986).

69. In addition to differences in their judicial systems and personal jurisdiction requirements, the United States and Mexico differ in the area of remedies. Unlike civil suits in the United States, civil suits in Mexico do not result in the award of sizable sums of money. See *Legal Considerations for Mexican Businesses in the United States*, MEX. TRADE & L. REP., Aug. 1, 1992, available in LEXIS, Busfin Library, Mtlr File. With NAFTA, many Mexican investors and businessmen are both anxious to enter the new markets and fearful of being hauled into U.S. courts. See *id.* Consequently, Mexican businessmen have sought ways to avoid personal jurisdiction in U.S. courts. See *id.*

One such attempt to avoid personal jurisdiction in U.S. courts is to form a subsidiary that conducts business solely in the United States. See *id.* The Mexican parent company conducts its business in Mexico with the subsidiary, and thereby, has no contacts with the forum state. See *id.* Nevertheless, this attempt at avoiding minimum contacts may prove worthless. Recently, several U.S. courts have exercised jurisdiction over a foreign corporation based on its ownership of a subsidiary doing business in the United States. See *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609 (W. Va. 1992); *United States v. Toyota Motor Corp.*, 561 F. Supp. 354 (C.D. Cal. 1983); *Meyers v. ASICS Corp.*, 711 F. Supp. 1001 (C.D. Cal. 1989); *West Virginia ex rel. CSR Ltd. v. MacQueen*, 441 S.E.2d 658 (1994).

Forum selection and arbitration clauses may be more effective ways for Mexican corporations to avoid litigation in the United States. As long as the forum chosen by the parties is stated in the contract and is reasonably related to the circumstances surrounding the contract, U.S. courts have upheld the validity of forum selection clauses. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-80 (1985). Forum selection clauses have been held valid since *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). It seems equally realistic that an arbitration clause would be enforceable.

70. See 1 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 4, at 1.20.38.

71. Although the United States has both civil and common law jurisdictions, civil law is not as extensive as in Canada. In fact, Louisiana is the only civil law jurisdiction in the United States. See N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 LA. L. REV. 1265, 1265 n.1 (1994) ("Alone in the common-law ocean of these United States, Louisiana is an island of civil law.").

72. See Nadya Labi et al., *The Week: October 29-November 4*, TIME, Nov. 13, 1995,

Comment examines both Canadian common law and civil law interpretations of personal jurisdiction.

1. Canadian Common Law of Personal Jurisdiction

Canadian common law views of personal jurisdiction are similar to those held in the United States; however, there is a slightly different emphasis. Although the United States is not indifferent to the issue of international comity,⁷³ Canada seems more concerned with the respect and fairness necessary in the international arena.⁷⁴ This may be explained because Canadian provinces are viewed as foreign states in relation to one other, not as united members of a greater whole.⁷⁵

Until 1990, the sole bases for personal jurisdiction were presence in the forum and consent.⁷⁶ As in the United States, this limitation caused many problems in Canada.⁷⁷ Finally, in *Morguard*

at 11. The citizens of Quebec recently decided to remain a part of Canada; however, the vote was amazingly close: 50.6% against secession, however, 49.4% for secession. See *id.* This near miss has left the separatist enthusiastic. One such separatist, Lucien Bouchard, stated, "The next time will be the right one. And the next time may come sooner than people think." *Id.*

73. See *Hilton v. Guyot*, 159 U.S. 113 (1895); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (finding an arbitration agreement, which would be invalid in the United States, to be valid due to international considerations).

74. See J.-G. CASTEL, *CANADIAN CONFLICT OF LAWS* 190 (3d ed. 1994); *Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 1098 (Can.).

75. See *Morguard Invs. Ltd.*, [1990] 3 S.C.R. at 1091. The court gave one reason for continuing to follow certain principles of foreign recognition law: "But, the approach was not confined to foreign judgments. It was extended to judgments of other provinces, which for the purposes of the rules of private international law are considered 'foreign' countries." *Id.* Another reason may be that there is no "full faith and credit clause" in Canadian law or the *Constitution Act, 1867*. See Catherine Walsh, *Conflict of Laws—Enforcement of Extra Provincial Judgments and In Personam Jurisdiction of Canadian Courts*: *Hunt v. T & N Plc.*, 73 CAN. B. REV. 394, 396 (1994); Vaughan Black, *Enforcement of Judgments and Judicial Jurisdiction in Canada*, 9 OXFORD J. LEGAL STUD. 547, 547 (1989). Nevertheless, the court in *Morguard Investments* stated:

For present purposes, it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgment of the courts of other constituent units of the federation.

Morguard Invs., 3 S.C.R. at 1091.

76. See Black, *supra* note 75, at 547.

77. See *id.*

There is thus a plethora of cases throughout Canada where two persons have en-

Investments Ltd. v. De Savoye,⁷⁸ the Canadian Supreme Court held that an out-of-state defendant may, under certain circumstances, be subject to a court's jurisdiction.⁷⁹

a. Morguard Investments Ltd. v. De Savoye

In this case, Morguard Investments was the mortgagee of property owned by the defendant, Douglas De Savoye.⁸⁰ The property was located in Alberta.⁸¹ The defendant was also in Alberta when he became involved with the plaintiff.⁸² Soon thereafter, De Savoye moved to British Columbia and defaulted on his mortgage.⁸³ Morguard subsequently filed suit in Alberta and mailed notice to De Savoye in British Colombia.⁸⁴ Morguard obtained a default judgment in Alberta and sought to enforce it in British Columbia.⁸⁵

The defendant argued that the Alberta court did not have jurisdiction over him because he was not within the territorial boundaries of the province, and thus, the Alberta judgment was unenforceable.⁸⁶ Although the court acknowledged that "presence" was the traditional standard for personal jurisdiction in both England and Canada,⁸⁷ it found that it was illogical to hold a federation to such a standard.⁸⁸ The court decided to hold the defendant to a new standard.

tered into a contract in one province, frequently when both were resident there at the time, but the plaintiff has found it impossible to enforce a judgment given in that province because the defendant had moved to another province when the action was brought.

Morguard Invs., [1990] 3 S.C.R. at 1091; cf. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

78. [1990] 3 S.C.R. 1077.

79. See *id.* at 1108.

80. See *id.* at 1083.

81. See *id.*

82. See *id.*

83. See *id.*

84. See *id.*

85. See *id.*

86. See *id.* at 1084.

87. See *id.* at 1087-92.

88. See *id.* at 1098. The court stated, "Under [modern] circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal." *Id.* The court further stated, "[T]he courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces." *Id.*

In order to strike a balance between the burdens of the plaintiff and the defendant,⁸⁹ the court held that a suit is permissible "where there is a real and substantial connection" between the defendant and the forum province.⁹⁰ This test followed the idea that "the guiding element in the determination of an appropriate forum must be principles of order and fairness."⁹¹ Canadian courts have not defined this standard; however, it appears strikingly similar to the "minimum contacts" and "traditional notions of fair play and substantial justice" standard in the United States, and thus, may entail similar guidelines. The Canadian Supreme Court proved this proposition three years later in *Hunt v. T&N PLC*,⁹² in which it tackled some of the questions that *Morguard* left unresolved.

b. Hunt v. T&N PLC

In *Hunt*, the plaintiff suffered cancer as a result of inhaling asbestos fibers produced by the defendants.⁹³ The plaintiff filed suit in British Columbia against the corporations, which were incorporated in Quebec.⁹⁴ The issue of "order and fairness" arose when the plaintiff requested the production of documents.⁹⁵ The defendants refused to comply, based on a Quebec law⁹⁶ that prohibited the removal of business documents from the province.⁹⁷

The Canadian Supreme Court held that the Quebec statute

89. *See id.* at 1108.

[T]he possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions *in rem* now. In any event, this consideration must be weighed against the fact that the plaintiff under the English rules may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred.

Id.

90. *See id.* The court stated, "It seems to me that the approach of permitting suit where there is a *real and substantial connection* with the action provides a reasonable balance between the rights of the parties." *Id.* (emphasis added).

91. *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, 313 (Can.).

92. *Id.* at 289 (Can.).

93. *See id.* at 297.

94. *See id.*

95. *See id.* at 298.

96. *See Business Concerns Records Act*, R.S.C., ch. D-12, § 4 (1993) (Can.).

97. *See Hunt*, 4 S.C.R. at 298.

did not comport with *Morguard's* "principles of order and fairness" because it impeded the judicial ruling of another province.⁹⁸ The court held that *Morguard's* standards were "constitutional imperatives," and thus, must be followed in all situations.⁹⁹

The court also explained that the "real and substantial connection" test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction."¹⁰⁰ The court further explained that "[w]hatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connection."¹⁰¹ Thus, the "real and substantial connection" test is not a *per se* test but rather an ideal of fairness and order that courts must keep in mind when deciding cases.

In *Hunt*, Justice La Forest stated that "[g]reater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe."¹⁰² Canadian courts have properly applied the "real and substantial connection" test to both international and interprovincial cases.¹⁰³

2. Quebec's Civil Law of Personal Jurisdiction

As in most civil law jurisdictions, Quebec does not respect the rule of *stare decisis*.¹⁰⁴ Nevertheless, Quebec courts normally follow holdings of the Canadian Supreme Court, because, at a minimum, it would be unsound to decide cases on principles that would be rejected on appeal.¹⁰⁵

In addition, the Quebec legislature has codified a similar standard of sufficient contacts for *in personam* jurisdiction.¹⁰⁶ Furthermore, Quebec courts have applied this connection test in their

98. *See id.* at 327.

99. *See id.* at 324. This holding also answers the question of whether such a standard is constitutional. For a broader discussion, see Walsh, *supra* note 75.

100. *Hunt*, [1993] 4 S.C.R. at 325.

101. *Id.* at 326.

102. *Id.* at 322.

103. *See* Walsh, *supra* note 75, at 402.

104. *See* JEAN-GABRIEL CASTEL, *THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC* 218 (1962).

105. *See id.*

106. *See* C.C.Q. art. 3164.

international cases.¹⁰⁷ Thus, even if Quebec successfully secedes and joins the NAFTA organization, it appears that Quebec will apply a standard of sufficient contacts.

D. Comparisons

The most striking similarity among these three nations is the relationship between the defendant's contacts with the forum and the forum's exercise of personal jurisdiction. While all three countries hold that there is valid jurisdiction over a defendant who meets the contacts requirement, only Mexico requires it in all situations.¹⁰⁸

The United States has the most definitive guidelines for defining the connections that meet the requirements for personal jurisdiction. Although *Asahi* was a very murky decision, it was the accumulation of decades of work. Since the *International Shoe* decision, the U.S. Supreme Court has continued to define and hone the minimum contacts test. The Canadian Supreme Court has not had this opportunity because the *Morguard* decision is so recent. Similarly, Mexico does not have a well-defined contacts requirement.¹⁰⁹

The U.S. definition of minimum contacts makes it relatively easy for U.S. courts to decide when a defendant has minimum contacts. There is, however, a downside. The test's specificity makes it harder to adapt to novel situations. When U.S. courts are confronted with radical developments in legal and economic affairs, they will either utilize the current view of minimum contacts or abandon precedent altogether. This uncertainty places U.S. courts in a more compromising position than their Canadian and Mexican counterparts. Canada may mold its relatively new rule to accommodate new situations created by NAFTA; Mexico, with its lack of a definition, may create a set of requirements that meets the situa-

107. See Walsh, *supra* note 75, n.47 (citing *Barnett Bank of S. Fla., N.A. v. Fellen*, [1994] Q.J. No. 305 (QL, Que.C.A., 1994)).

108. The Supreme Court of Canada has not yet addressed the issue of transient jurisdiction; in any case transient jurisdiction is still valid—even though authors like Catherine Walsh believe such jurisdiction is no longer constitutional. See Walsh, *supra* note 75, at 407.

109. Mexico may not have such a requirement because it is a civil law state, and thus, a judicial definition would not have the precedential effect necessarily given in the United States or Canada.

tion. In other words, although NAFTA has the potential of creating situations to which all three countries will have to adapt, the United States faces the additional burden of its precedent.

III. NAFTA

The U.S. Congress raised many concerns while debating the implementation of NAFTA.¹¹⁰ Perhaps not surprisingly, personal jurisdiction was not among the topics discussed. Nevertheless, the legislators did realize that their discussion of NAFTA did not touch all the areas that would feel its affect.¹¹¹

Many provisions of NAFTA indirectly touch on the issue of

110. See 139 CONG. REC. H10,048 (daily ed. Nov. 17, 1993). The following concerns, in no particular order, topped the list:

1. The effects on the average U.S. worker and the middle class. Congressman Miller stated:

[The U.S. workers] are an afterthought There is no chair for them. And when that became obvious to America, we ran in and tried to negotiate a side agreement, a side agreement that we will not vote on here [in Congress], a side agreement that is not enforceable, and a side agreement that will do nothing to protect American workers from the downward pressure on their wages that will be caused by NAFTA.

Id.

2. The possible migration of U.S. industries. Congressman Derrick stated: "I have had in the last 2 or 3 days a telephone call from a broom manufacturer in my district, wanting to know how to locate a plant in Mexico, and who to get in touch with in Mexico." *Id.* at H10,048.

3. The repercussions if the United States did not sign NAFTA. Congressman Franks asked and answered the question:

What happens if we do nothing, if we walk away from this agreement and carry on as usual?

Mexican consumers will continue to seek new products and services that can't be produced in Mexico. Other industrialized nations will merely step in and fill the void, enhancing their economic prosperity while our Nation's economy staggers along.

Id. at H9888.

It should be noted, however, that some of these issues relate to personal jurisdiction. For example, suppose a U.S. company migrates to Mexico and takes with it various U.S. workers to train the new Mexican employees. While in Mexico, one of the corporation's Mexican employees injures one of the U.S. workers. Would the state in which the U.S. worker was domiciled have jurisdiction to hear the case? This question may actually be an issue of choice of law, rather than a personal jurisdiction question, and thus is not addressed here.

111. Congressman Vento stated, "We have all kinds of problems that are not addressed [here]." 139 CONG. REC. H 10,048, H9893 (daily ed. Nov. 17, 1993).

personal jurisdiction. This Comment addresses the provisions of NAFTA that are relevant to personal jurisdiction. It then uses a hypothetical situation to illustrate the effect of those provisions on personal jurisdiction in the United States, Mexico, and Canada. The hypothetical clearly evidences the need for change.

A. NAFTA Provisions Relevant to Personal Jurisdiction

1. Article 302—The Reductions of Tariffs

Naturally, NAFTA's main concern is trade and the barriers that impede it. As author David Gantz pointed out, "NAFTA is first of all a 'free' trade agreement."¹¹² Article 302 of NAFTA mandates such "free" trade.¹¹³ Through various reduction schedules, all tariffs among the three signatories will be eliminated over a period of fifteen years after NAFTA's implementation.¹¹⁴

Eliminating all tariffs will essentially result in the creation of a single common market, similar to the United States itself, where no international considerations will be attached to the buying and selling of goods. It is unclear whether the concerns of comity and international affairs, which were so important to the U.S. Supreme Court in *Asahi*,¹¹⁵ will continue to be issues in this common market.

2. Rules of Origin

To ensure that only goods produced by the signatory nations receive NAFTA's advantages, the drafters set forth 200 pages of text dealing with the eligibility of goods,¹¹⁶ including the Rules of Origin.¹¹⁷ "[T]he rules of origin are designed to assure the production of parts and components in North America, as well as assembly of the final products, and to discourage assembly-type operations that rely extensively on parts and components imported from outside the region."¹¹⁸ Basically, the rules of origin allow a manu-

112. David A. Gantz, *Principal Features of the North American Free Trade Agreement*, in *MAKING FREE TRADE WORK IN THE AMERICAS* 34, 37 (Boris Kozolchik ed., 1993).

113. See NAFTA, *supra* note 1, art. 302.

114. See *id.* art. 302(2), annex 302.2(1), art. 401(2), annex 401.2.

115. See *supra* Part II.A.2.c.

116. See Gantz, *supra* note 121, at 38.

117. See NAFTA, *supra* note 1, art. 401, annex 401.

118. Gantz, *supra* note 112, at 38.

facturer in one of the three nations to use some outside components and still retain its product's NAFTA eligibility. The manufacturer retains its product's NAFTA eligibility by making sure that "each of those parts or components has undergone processing or assembly in the NAFTA region sufficient to result in a specified change in HS tariff classification."¹¹⁹

In some instances, however, goods must contain a minimum percentage of North American-produced parts to qualify for preferential NAFTA treatment.¹²⁰ This threshold amount is usually sixty percent of the regional value content or fifty percent of the net cost.¹²¹

As a result of the Rules of Origin, a corporation may take advantage of NAFTA by producing component parts for a company incorporated in one of the signatory nations even though NAFTA does not govern it.

3. Trucking Provisions

Until NAFTA, Mexican trucks were confined to a twenty-mile wide commercial zone running the length of the U.S.-Mexican border.¹²² NAFTA breaks down this barrier and allows Mexican trucks to travel anywhere in the border states, permitting Mexican corporations to expand their markets into areas previously closed to their products.¹²³ Many fear this increased presence

119. See NAFTA, *supra* note 1, commentary, bk. 1, booklet c3, at 133, Rule B. The term "HS" stands for "Harmonized System," a system that most major trading nations use. See Gantz, *supra* note 121, at 39. This requirement simply means that the final product is so different from its foreign component part that it is classified under a different HS tariff heading. See *Id.*

120. See NAFTA, *supra* note 1, commentary, bk. 1, booklet c3, at 137. This requirement pertains to goods such as certain automotive parts, footwear, and word processing machines. See *id.*

121. See *id.* The following equation may be used to determine the percentage of North American content within a product:

$$\frac{x - y}{x} = z$$

x = transaction value
y = value of non-North American materials
z = percentage of North American content

"Transaction value" is the "actual price paid to the producer for the product adjusted to an F.O.B. basis." *Id.*

122. See Michelle Mitelstadt, *U.S. Delays Rules Opening Roads to Mexican Truckers*, SANTA BARBARA NEWS-PRESS, Dec. 19, 1995, at A12.

123. See *id.*

poses a public hazard, claiming that Mexican trucks do not meet U.S. safety standards.¹²⁴ Regardless of whether these allegations are true, an increased presence inevitably increases the possibility of a mishap or unfortunate accident.

D. Dispute Resolution Provisions

Chapters 19 and 20 of NAFTA provide methods for settling disputes that arise out of NAFTA.¹²⁵ These chapters only deal, however, with problems relating to treaty interpretation and accusations of non-compliance.¹²⁶ Furthermore, neither of these provisions, nor any other provision give a private party the right to sue for violations.¹²⁷ Only a signatory country may use these dispute resolution provisions.¹²⁸ This limitation is additional proof that the drafters of NAFTA did not intend for NAFTA to affect traditional judicial stances in the signatory countries. In fact, it may be argued that the drafters took steps to insulate NAFTA from the courts of the three nations. If the courts of the signatory nations want a tighter jurisdictional grasp on corporations that use NAFTA to market their products more efficiently, these courts will have to look for help outside NAFTA.

B. NAFTA's Effect on Personal Jurisdiction

NAFTA will not affect situations where a corporation of a signatory nation does business within another of the three nations. Any of the three nations' "contacts" tests would adequately cover this situation. In Mexico, the court would have jurisdiction over the corporation even if the corporation's only connection with Mexico was performance of the contract there.¹²⁹ Canadian common law courts have been applying the "real and substantial" test to foreign corporations, and it would seem logical for this trend to continue, especially if the corporation is taking advantage of re-

124. *See id.*

125. *See NAFTA, supra* note 1, chs. 19-20. Chapter 19 of NAFTA is devoted solely to dispute resolution of "antidumping and countervailing duty cases." *See id.* ch. 19. Chapter 20 deals with more generalized disputes. *See id.* ch. 20.

126. *See id.* ch. 20.

127. *See id.*

128. *See id.* It should also be noted that these are alternative dispute resolution provisions and that they do not provide a legal cause of action or a judicial remedy.

129. *See supra* Part II.B.

duced tariffs.¹³⁰ Finally, in the United States, such transactions, assuming these are common business transactions, would probably constitute "minimum contacts,"¹³¹ and the corporation could be said to be "purposefully availing" itself of the benefits and protections of forum state.¹³² Furthermore, such transactions would probably comport with *Asahi*.¹³³ Problems would arise only when a third corporation is involved, such as when one corporation does business with the initial corporation that is purposefully availing itself in the forum, as in *Asahi*.

1. The Koehler and Fresno Toy Accident

The following hypothetical illustrates the inadequacies of the current personal jurisdiction requirements in the context of NAFTA. Problems arise when more than two parties are involved. The first version of the hypothetical deals with California residents and a Mexican corporation.

Fresno Toy is a Mexican corporation that produces video game components. It is a newly formed company and cannot furnish a finished product. Although it can create all the internal components of the games, it still has not built a plant that can manufacture the casing.

Sahai is a Japanese corporation that specializes in producing such plastic casing. Sahai, recognizing the opportunity to expand its market, convinces Fresno Toy to purchase casing rather than expand its plant.

As Fresno Toy's profits grow, it expands into the largest market in the world—the United States.¹³⁴ The casing that Sahai produces and Fresno Toy uses, however, does not meet U.S. safety standards because the casing's edges are too sharp. As a result, Fresno Toy's executives decide to build their own plant to manu-

130. See *supra* Part II.D.

131. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (establishing the "minimum contacts" requirement).

132. See *Hanson v. Denckla*, 357 U.S. 235 (1958) (establishing the "purposeful availing" requirement).

133. None of the courts that confronted the issue in *Asahi* questioned whether Honda or Cheng Shin was subject to the forum court's jurisdiction. See *Asahi Metal Indus. Co. v. Superior Court of Cal.* 480 U.S. 102, 107 (1987).

134. See 139 Cong. Rec. H10,048, H9886, H9895 (daily ed. Nov. 17, 1993).

facture the casings. Afraid to lose its U.S. market's revenues, however, Sahai once again convinces Fresno Toy to purchase casings that Sahai will alter to meet U.S. safety standards. Soon thereafter, Sahai delivers the new casings that meet all U.S. requirements.

Because the casing is only a minor part of the game, the final product qualifies under a different Harmonized System (HS)¹³⁵ classification. Therefore, the video games qualify for NAFTA treatment. Fresno Toy contracts with a California distributor to sell its product throughout the United States. Without the traditional tariffs, the games are cheaper and sell quickly. Both companies profit greatly.

Eventually, a problem arises (without which, this would be a poor hypothetical). Sahai's plastic is of substandard quality and shatters into several shards when dropped. The Koehlers, who are California residents, purchased the video game and enjoyed it for several months. One day, their toddler, Scott, found the game. Like most toddlers, Scott threw the game all over the house. On its final flight, the game hit the kitchen floor and shattered; and, again like most toddlers, Scott tried to eat the small pieces.

Although Scott suffered no permanent injuries (because this is a happy hypothetical), he did require surgery. Naturally, his parents want to sue. Furthermore, Mr. and Mrs. Koehler want to bring the suit in California because filing suit in Mexico would greatly reduce their damages award.¹³⁶ Thus, the question arises: can the California court obtain jurisdiction over Fresno Toy and Sahai?

There is no genuine issue as to Fresno Toy. The Mexican corporation purposefully availed itself of the benefits and protections of the forum state.¹³⁷ The real issue is obtaining jurisdiction over Sahai.

Sahai purposefully availed itself in Mexico by establishing contacts with a Mexican corporation, but it has no contacts within the United States. Nevertheless, it purposefully engaged in transactions that it knew would bring its product into the forum state.

135 See *supra* note 119

136. See *supra* Part II.E.

137. This hypothetical assumes that Fresno Toy had sufficient contacts with the United States and California to meet the minimum contacts requirement.

Furthermore, it altered its product so that it would be accepted in the forum. In short, in order to increase its profits, Sahai created a product for a forum and took advantage of the Mexican-U.S. trade relationship created under NAFTA.

It seems fair to allow courts to exercise jurisdiction over a company that intends for its product to enter the forum and takes advantage of an agreement intended to aid trade among three North American countries. Applying a balancing test, the state and national interests in protecting citizens outweigh the defendant's burden of defending in a forum where it intentionally sent its product.

One must ask whether this is one of those "rare situations" of which Justice Brennan spoke in *Asahi*.¹³⁸ Beginning this analysis with Justice Brennan's concurrence in *Asahi*,¹³⁹ one might suspect that the California court would have jurisdiction over Sahai. Brennan and the four other concurring Justices believed that placing one's product into the stream of commerce is usually enough to satisfy the "minimum contacts" requirement, especially when the corporation knew that the product would be entering the forum.¹⁴⁰

In the hypothetical, Sahai not only knew its casing would enter the forum, but also took additional steps to ensure that outcome. Furthermore, exercising jurisdiction over a company that goes to such lengths to enter the U.S. market appears to comport with "traditional notions of fair play and substantial justice."¹⁵⁶ Finally, if one interprets NAFTA as creating a single North American market, another concern addressed in *Asahi* disappears. There is no difference between trade without tariffs among states and trade without tariffs among nations. Thus, it is conceivable that U.S. courts would construe Sahai's contacts with Fresno Toy as the requisite minimum U.S. contacts.¹⁴¹

The real dilemma in personal jurisdiction arises in applying

138. See 480 U.S. at 116 (Brennan, J., concurring) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985)).

139. See *id.*

140. See *id.*

141. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1944)). Aggregate national contacts would have to be accepted as sufficient to bestow jurisdiction on the forum court.

Justice O'Connor's opinion in *Asahi*. Justice O'Connor held that mere awareness that one's product will enter the forum is insufficient to bind a defendant to the jurisdiction.¹⁴² Justice O'Connor stated that jurisdiction would be valid when the company indicated "an intent or purpose to serve the market in the forum State."¹⁴³ Although Sahai would seem to be within the California court's jurisdiction, Sahai's conduct does not fit squarely within any of Justice O'Connor's examples. Furthermore, Justice O'Connor based her examples and holding on the idea that the defendant had purposefully directed his actions to the forum state.¹⁴⁴ Here, Sahai has directed its actions to Fresno Toy, not to California. Sahai got its product into the U.S. market, but only through indirect means.¹⁴⁵ Justice O'Connor said jurisdiction would be valid where the company "[designed] the product for the market in the forum State."¹⁴⁶ In this hypothetical, it would undoubtedly be argued that Sahai did not *design* the casing for the *California* market, but rather *altered* it to meet *U.S.* safety standards. Furthermore, aggregating national contacts would not work because contacts with a nation differ from than availment in a market. Such problems arise due to the Court's adherence to territoriality and outdated notions of "forum States," rather than an international market. Clearly, if the California court follows Justice O'Connor's opinion strictly, it would be forced to dismiss the case for lack of jurisdiction.

Now, the hypothetical will be changed so that the Koehlers live in British Columbia rather than California. The issue of Sahai's contacts still arises because Sahai has no connections with the Canadian province. Under *Morguard*, a defendant must have a "real and substantial connection" with the forum.¹⁴⁷ A strict interpretation of this language would require a dismissal of the case. Unlike the United States, which has interpreted the meaning of "minimum contacts" to an extreme, Canadian courts still have the luxury of a relatively new precedent. In other words, the Canadian courts may give any reasonable meaning to the terms "real and

142. See *Asahi*, 480 U.S. at 112.

143. See *id.*

144. See *id.*

145. See *id.*

146. See *id.*

147. See *Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. at 1077, 1108 (Can.).

substantial connection.”

If the Canadian courts wish to exert jurisdiction over a company like Sahai, they will have to interpret the “real and substantial connection” test broadly. Perhaps the best aspect of this test’s language is that it uses the term “connection” rather than “contact.” Whereas “contact” implies actual intertwining of the defendant and the forum, “connection” is not as constricting.¹⁴⁸ In the present case, it could be argued that Sahai does have a real and substantial connection with the forum: it is the producer, creator, and modifier of the product that caused the accident in the forum. This interpretation of “connection” seems valid and workable if the Canadian courts are willing to accept it.

Finally, in the *Morguard* case, the court stated that a factor in its new test was that the Canadian provinces created a united market, and thus, needed such a test to foster unity.¹⁴⁹ NAFTA achieves such unity.

Now, the hypothetical will be changed so that Fresno Toy will be incorporated in Fresno, California. Like the Canadian courts, Mexican courts may easily dispose of this situation due to the lack of precedent. Actually, the fact that Mexican judges and attorneys do not rely heavily on precedent¹⁵⁰ is important. If a prior case contradicts what the presiding judge believes is appropriate, he will probably find a reason to disregard the former case.¹⁵¹ Nevertheless, Mexican legislators should address this situation and codify a standard; otherwise, vast inconsistencies may arise within the courts.

2. The Koehlers Revisited

A special situation arises between Mexico and the U.S. states bordering Mexico. Now, instead of the Fresno Toy corporation,

148. Webster’s Dictionary defines “contact” as “the act of *touching* or meeting” and “connection” as “a relation.” See WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 387, 393 (2d ed. 1983) (emphasis added). Thus, whereas U.S. courts require the defendant to have “touched” the forum in some way, Canadian courts only require a “real and substantial relationship” with the forum.

149. See *Morguard Invs.*, [1990] 3 S.C.R. at 1099.

150. See *supra* Part II.E.

151. The judge may find a reason in a treatise or the writing of a respected analyst who realized the potential situation. See 1 DOING BUSINESS IN MEXICO, *supra* note 52, § 3.02 [2].

the hypothetical involves the Fresno Trucking Company, a Mexican corporation that distributes Mexican-grown produce in trucks composed of Sahai-produced parts. With the implementation of NAFTA, Mexican farmers want to expand their market, and they want Fresno Trucking to ship their produce throughout the entire state of California. Sahai contracts with Fresno Trucking to manufacture various truck components guaranteed to meet U.S. safety standards. Again, the Koehlers are injured, but this time in an automobile accident with a Fresno truck caused by a malfunctioning Sahai component part.

This situation is slightly different because Sahai does not hope to sell its product in California, but rather desires to increase its business with Fresno Trucking by providing a needed product. Thus, its avilment in the forum state is not as purposeful. The outcome of this scenario illustrates the contrast between Justice Brennan's and Justice O'Connor's opinions.

Sahai purposefully placed its product into the stream of commerce, it knew its product would enter the forum market, it took advantage of a NAFTA provision; and, finally, its defective product injured the Koehlers. Under Justice Brennan's stream of commerce theory, these factors may be enough to bring Sahai within the California court's jurisdiction, especially if the court decides that the creation and employment of a single North American market and Sahai's knowledge and use of NAFTA would outweigh any international factors.¹⁵²

It is doubtful, however, that Justice O'Connor's opinion would afford the same weight to these factors. Justice O'Connor seems to require that the defendant perform some action tying him to the forum state, in addition to directing his actions to the forum.¹⁵³ As with the initial hypothetical, it seems incongruous to allow a defendant to escape jurisdiction where the exercise of such jurisdiction comports with "traditional notions of fair play and substantial justice," but the defendant has not met the "minimum contacts" requirement.

152. It seems both logical and fair to subject a foreign corporation to a foreign legal system when the corporation is well-versed in the foreign nation's laws and treaties.

153. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987).

3. Public Policy

In addition to these legal arguments, all three nations' courts may, and in fact should, address public policy concerns. In *Asahi*, the plaintiff had already settled his claim and had no real interest in the outcome of the case.¹⁵⁴ If the Koehlers or any injured party do not, or cannot, settle their claim out of court, there is a strong argument that the defendant should be brought before the court. Every nation and state has a strong interest in ensuring that its citizens are protected and adequately compensated for injuries arising within the state. The need to subject a company to the home court's jurisdiction is especially valid if the plaintiffs cannot afford to litigate elsewhere.¹⁵⁵

In addition, an equitable argument may be made for subjecting the defendant to the jurisdiction of the arena from which he profits. If a corporation uses a nation's laws and treaties to increase its own market and profits, it seems only fair to force it to comply with those laws and treaties. Although situations similar to those mentioned here will arise without NAFTA, NAFTA increases the possibility.

Furthermore, with NAFTA, a foreign corporation is taking advantage of a situation that the United States helped to create. Although purposeful availment of the benefits and protections of the NAFTA common market may be the type of intentional action required by Justice O'Connor's opinion, it is doubtful that this action would indeed fall within this category because the corporation's advances toward the U.S. market are not direct.

In short, NAFTA's creation of a single North American market allows foreign corporations to indirectly take advantage of that market. The three signatory nations' requirements for obtaining personal jurisdiction are currently inadequate to address such a situation.

IV. CONCLUSION

Due to either a lack of, or perhaps an excess of, definition, the

154. *See id.* at 106.

155. This situation brings up the issue of jurisdiction by necessity. Although this Comment does not discuss this issue, it is related because this Comment argues that personal jurisdiction standards must be changed in order to meet today's needs.

requirements for obtaining personal jurisdiction in the United States, Mexico, and Canada do not meet the needs of NAFTA's integrated market. Both Canada and Mexico must define their jurisdiction standards to deal with a corporation that creates a relationship with the forum which allows it to make a profit, but does not subject it to that forum's jurisdiction. The United States is in a similar position because the standards set forth in *International Shoe*, *Hanson*, *World-Wide Volkswagen*, and *Asahi* are too rigid to function in an international market. Although Justice Brennan's opinion in *Asahi* provides the possibility of an acceptable answer. Justice Brennan and the three concurring Justices are no longer on the Court.¹⁵⁶ By contrast, Justice O'Connor and most of her supporters remain. This situation may decide the future of personal jurisdiction in the United States.

One possible remedy to the present problem may be found in the Ninth Circuit's "but for" test of personal jurisdiction.¹⁵⁷ This test asks if the injury would have occurred *but for* the defendant's action toward or within the forum state. Such a test takes into consideration the defendant's activities without confining the court to any "rigid" requirements.

Finally, it should be noted that NAFTA's effect is not going unnoticed. One court stated:

In *World-Wide Volkswagen*, the Court noted that these "historical developments . . . have only accelerated in the generation since [*McGee*] was decided." [citation omitted] Although a generation has not quite passed since *World-Wide Volkswagen* was decided, the acceleration in the internationalization of commerce is apparent. In this age of NAFTA and GATT, one can expect further globalization of commerce, and it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states.¹⁵⁸

156. Brennan left the Court three years after *Asahi* was decided. David Savage, *Justices Bid Fond Goodbye to Brennan as Session Opens*, L.A. TIMES, Oct. 2, 1990, at A20.

157. See, e.g. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437 (9th Cir. 1988), *rev'd*, 897 F.2d 377 (9th Cir. 1990), *rev'd*, 499 U.S. 585 (1991).

158. *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994) (citation omitted).

Although the effects of NAFTA are unclear, the three signatory nations are entering a new era of global unification. This change necessitates creating new laws or altering existing ones to meet the demands of this new unification.

Jason Farber*

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