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GROUP LITIGATION REACHES MEXICO: REVISITING MEXICO'S SYSTEM OF COLLECTIVE ACTIONS AS A VEHICLE TO ENSURE EFFICIENT IMPLEMENTATION OF ENVIRONMENTAL JUSTICE

David P. Vincent*

Abstract. *This Note analyzes the decision of the Mexican legislature to allow for a system of group litigation to redress a particular set of environmentally based legal problems. The laws of Mexico, as they currently read, do not comport with the legislative intent of the authors of the legislation to allow for group litigation. This is primarily an effect of the economic incentives imposed by the new system of group litigation on institutional interests and corporate actors in Mexico. The argument advanced by this Note is that either judicial or legislative clarifications must be made to this legislation to effectuate the intent of the acts of the Mexican Congress. This may be achieved through Jurisprudencias, Ejecutorias, expansive judicial interpretation in the coming years, or through additional legislative amendments; all of which could provide additional parameters to ensure the unassailable environmental and constitutional rights of Mexican citizens. However, this Note advances the idea that the most effectual vehicle for implementing such change is through the introduction of additional pecuniary damages with regard to group litigation. In the coming years, the system of group litigation in Mexico is certain to come under heavy criticism and scrutiny from citizens, legal scholars and politicians alike. The arguments proposed herein must be addressed by the Mexican Congress to ensure that the environmental rights of citizens, guaranteed by the Mexican Constitution, are not subordinated to institutional economic interests.*

Key Words: *Political Constitution of the United Mexican States, environment, collective action, comparative law, pecuniary damages, public policy.*

Resumen. *Este trabajo analiza la decisión de la legislatura mexicana para permitir un sistema de demanda colectiva para corregir un conjunto de tecnolo-*

* J.D. 2012, University of San Diego School of Law; B.A. 2009, University of California, San Diego. I am forever grateful to Professor Jorge A. Vargas for his patient, thoughtful, and vigilant mentorship throughout the development of this topic and beyond; to Laura Hamister for her translations and profoundly helpful advice on numerous occasions; and to the *Mexican Law Review* editorial staff for their outstanding comments, suggestions, and editorial work.

gías que se basan en problemas legales. En este momento, las leyes de México no se compadecen con la intención de los legisladores. Principalmente esto es un efecto de los incentivos económicos impuestos por la nueva acción colectiva que relacionan a los intereses institucionales y los actores corporativos en México. El argumento de este trabajo es que aclaraciones judiciales o legislativas son necesarias para que la presente legislación cumpla con la intención legislativa de los actos del Congreso mexicano. Se pueden lograr los cambios necesarios a través de jurisprudencias, ejecutorias, la interpretación expansiva de la judicatura en los próximos años, o por modificaciones legislativas, todo lo cual podría permitir parámetros adicionales que garanticen los derechos inexpugnables ambientales y constitucionales de los ciudadanos de México. Sin embargo, este trabajo afirma que el mejor vehículo para la aplicación de dicho cambio es la introducción de la indemnización de daño pecuniario con respecto a los litigios del grupo en México. En los próximos años, el sistema de acciones colectivas en México recibirá fuertes críticas y se encontrará bajo el escrutinio de los ciudadanos, abogados y políticos. Los argumentos propuestos por el autor deben ser resueltos por el Congreso mexicano para garantizar que los derechos ambientales de los ciudadanos, garantizados por la Constitución mexicana, no se subordinan a los intereses económicos institucionales del país.

Palabras clave: *Constitución Política de los Estados Unidos Mexicanos, medio ambiente, acción colectiva, derecho comparado, daños materiales, políticas públicas*.

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I. Introduction

Along the trajectory of any juridical evolution, a country is certain to run into the need for amendments and revisions as it realizes that its initial plan for implementation is unlikely to both effectuate the legal end sought and assuage the reservations of those involved and affected. Examples of such transitions include the end of apartheid politics in South Africa, the shift from communism to democratic political systems in Eastern Bloc countries, and the emergence of the "green" movement in the United States in the late 1960s and in Europe after the signing of the Kyoto Protocol.

One such legal development is underway in Mexico. The members of the LXI Legislature of the Mexican Congress[1] passed a series of legislative additions and amendments allowing for the introduction of collective actions into Mexico's legal system.[2] A collective action is a lawsuit in which a group brings

[1] The LXI Legislature of the Congress of Mexico meets from September 1, 2009, to August 31, 2012. Members of the Mexican Senate were elected in the elections of July 2006 while members of the Chamber of Deputies were elected in the elections of July 2009.

[2] Decreto por el que se reforman y adicionan el Código Federal de Procedimientos Civiles, el Código Civil Federal, la Ley Federal de Competencia Económica, la Ley Federal de Protección al Consumidor, la Ley Orgánica del Poder Judicial de la Federación, la Ley General del Equilibrio Ecológico y la Protección al Ambiente y la Ley de Protección y Defensa al Usuario de Servicios Financieros [Decree to amend and add the Federal Code of Civil Procedure, Federal Civil Code, the Federal Economic Competition Law, Federal Consumer Protection Act, Organic Law of the Federal Judicial System, General Ecological Balance and Environ-

a claim collectively and sues a particular class of defendants.[3] This form of collective lawsuit is similar to the American legal mechanism known as "class action." The collective action legislation passed in Mexico entered into force on March 1, 2012.[4] This legislative package approved by the Congress in April 2011 was set forth in a Decree (*hereinafter* "Decree" refers to this August 30, 2011 Decree unless otherwise noted) published in the Federal Official Gazette (*Diario Oficial de la Federación*) on August 30, 2011.[5] The Decree amends a number of laws and acts: the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*); Federal Civil Code (*Código Civil Federal*; *hereinafter* "Mexican Civil Code"); Federal Economic Competition Law (*Ley Federal de Competencia Económica*); Federal Consumer Protection Act (*Ley Federal de Protección al Consumidor*); Organic Law of the Federal Judicial System (*Ley Orgánica del Poder Judicial de la Federación*); General Ecological Balance and Environmental Protection Act (*Ley General de Equilibrio Ecológico y Protección al Ambiente*); and the Law for the Protection of Financial Service Users (*Ley de Protección y Defensa de los Usuarios de los Servicios Financieros*).[6] Although this note focuses strictly on the effect of this legislation on environmental protection, legislative recognition of such actions will also have an impact in numerous additional areas, such as consumer protection, economic competition, urban development and Mexican cultural property.[7]

This Note holds that implementation of collective actions in Mexico provides substantial improvements for citizen and governmental redress of environmental problems. However, the legal structure ratified for implementation lacks the economic incentives needed to completely effectuate the change sought by congressional intent as it opens avenues to institutional actors by which neglecting Mexican law can be the most economically efficient outcome.

Therefore, the argument advanced by this Note is that clarifications must be made to this amendment, through either *Jurisprudencias* or *Ejecutorias*,[8] ex-

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mental Protection Act, and the Law for the Protection of Financial Service Users] [hereinafter Decree], Diario Oficial de la Federación [D.O.], 30 de Agosto de 2011 (Mex.) (This Decree enters into force March 1, 2011, six months from the publication of the Decree); *see also* Cacheaux, Cavazos & Newton, *Constitutional Amendment Pertaining to Collective Lawsuits*, *available at* http://mexicoreport.com/en/2010/04/Constitutional-Amendment-Pertaining-to-Collective-Lawsuits?aid=947 (last visited Oct. 20, 2011).

[3] Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 38 (New Haven: Yale University Press), 1987.

[4] Catherine Dunn, *Mexico's New Class Action Law Opens a Litigation Frontier*, *available at* http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202518442900 (last visited Oct. 13, 2011).

[5] *See* Decree, *supra* note 2.

[6] *Id.*

[7] *Id.*

[8] *See* Jorge A. Vargas, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 San Diego Int'l L.J. 475, 500-01 (2007). The federal deci-

pansive judicial interpretation in the coming years or additional legislative amendments, all of which could allow additional parameters to ensure the unassailable environmental and constitutional rights of Mexican citizens. Mexico has made significant progress in addressing environmental law issues over the past forty years. However, additional substantive changes are necessary to ensure that citizens' environmental rights are not subordinated to institutional economic interests. It is the opinion of this Note that the most effectual vehicle for accomplishing such change is through the implementation of additional economic damages with regard to collective actions in Mexico, similar to the notion of punitive damages in American jurisprudence.

Part I introduces the legislative amendments that provide for collective actions, the legal repercussions of the action and the legal argument proposed by this Note. Part II outlines Mexico's legal system with particular attention paid to environmental law and its evolution over the past century. Part III addresses the recent amendment made to Article 17 of the Mexican Constitution (*hereinafter* "Article 17," unless otherwise noted),[9] which allows for class actions through a number of additions and amendments to existing federal law, focusing on a number of significant changes to the nation's legal system. Part IV distinguishes the procedural and substantive aspects of the Mexican collective action system from the American system. Part V analyzes the economic consequences of this amendment. Part VI discusses some of the major complications of this new juridical regime and proposes possible solutions to ensure that the new system of collective actions reflects the legislative intent of the recent constitutional amendment. This part reasons that either a change in judicial interpretation or additional legislative action regarding

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sions known as *Jurisprudencias* are legally binding on lower courts, and *Ejecutorias* or *Tesis* only carry "persuasive" value to lower courts. Accordingly, in compliance with Articles 192 and 193 of the Federal Amparo Act, Mexican courts formally adhere to the substantive content of *Jurisprudencias* and pay an adequate degree of deference to *Ejecutorias* and *Tesis*, when rendering their rulings and decisions.

[9] Global Class Actions Exchange of Stanford University, Mexico Adopts a Class Action Procedure (July 29, 2010), *available at* http://globalclassactions.stanford.edu/content/mexico-adopts-class-action-procedure-july-29-2010 (last visited Nov. 30, 2011); *see also Decreto por el que se reforman y adicionan el Código Federal de Procedimientos Civiles, el Código Civil Federal, la Ley Federal de Competencia Económica, la Ley Federal de Protección al Consumidor, la Ley Orgánica del Poder Judicial de la Federación, la Ley General del Equilibrio Ecológico y la Protección al Ambiente y la Ley de Protección y Defensa al Usuario de Servicios Financieros* [Decree to amend and add the Federal Code of Civil Procedure, Federal Civil Code, Federal Economic Competition Law, Federal Consumer Protection Act, Organic Law of the Federal Judicial System, General Ecological Balance and Environmental Protection Act, and the Law for the Protection of Financial Service Users] [hereinafter July 2010 Decree], Diario Oficial de la Federación [D.O.], 29 de Julio de 2010 (Mex.). This Decree enters into force March 1, 2011; the text of the amendment to Article 17, published to the Official Gazette on July 29, 2010: "El Congreso de la Unión expedirá las leyes que regulen las acciones colectivas. Tales leyes determinarán las materias de aplicación, los procedimientos judiciales y los mecanismos de reparación del daño. Los jueces federales conocerán de forma exclusiva sobre estos procedimientos y mecanismos [...]."

damages for collective actions would help Mexico comport with the intent of the amendment. Finally, Part VII concludes with a summary of the legal arguments proposed.

II. Mexico's Legal System with Respect to Environmental Law

Legislating environmental problems in Mexico has taken place rather gradually, with substantial changes occurring quite recently.[10] Though broad constitutional articles have been used in addressing environmental issues since the enactment of the Political Constitution of the United Mexican States of 1917 (*Constitución Política de los Estados Unidos Mexicanos de 1917*; *hereinafter* "Mexican Constitution of 1917" or "Mexican Constitution"), the first legislation directly concerning environmental issues was promulgated only as recently as 1971.[11] However, from 1971 to the present, Mexico has implemented an about-face with respect to environmental law. Environmental law in Mexico can be divided into three distinct periods: the Emergence of Environmental Law in Mexico, the Mexican Environmentalism Movement and the Era of Free-Market Environmentalism in Mexico.

1. *The Emergence of Environmental Law in Mexico (1917-1971)*

Mexico's environmental legislation is rooted in the Mexican Constitution of 1917. Article 27 of the Mexican Constitution regulates the ownership of lands and waters in Mexico while specifying the obligation of the Mexican government "to preserve or restore the ecological balance" of the land.[12] Additionally, Article 73 empowers Congress to delimit the powers of states and municipalities regarding environmental protection.[13] Since the enactment of the Mexican Constitution, environmental law in Mexico has largely relied on these and similar provisions to effectuate substantive environmental change.[14] However, the effects of these constitutional amendments were not very pervasive until the early 1970s when Mexico, like many other developing economies, followed the impetus of environmental movement of the United States.[15]

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[10] Benjamín Revuelta Vaquero, *Environmental Law in Mexico: A New Paradigm* at 131, *available at* http://info8.juridicas.unam.mx/pdf/mlawrns/cont/5/nte/nte6.pdf (last visited Oct. 13, 2011).

[11] *Id.*

[12] Juan Antonio Herrera Izaguirre et al., *Mexico's Environmental Law in the GMO Era* at 122, *available at* http://info8.juridicas.unam.mx/pdf/mlawrns/cont/1/cmm/cmm7.pdf (last visited Oct. 19, 2011).

[13] *Id.*

[14] *See generally* Benjamín Revuelta Vaquero, *supra* note 10, at 131.

[15] *Id.*

2. *The Mexican Environmentalism Movement (1971-2008)*

The 1970s environmental movement in the United States was born of the fears and anxieties concerning environmental issues brought out by the confluence of several political events[16] and publications —most prominently, Rachel Carson's *Silent Spring*.[17] Similarly, Mexico's environmental legislation also began to evolve in the early 1970s. During the 1970s and 1980s, many Latin America countries experienced waves of social mobilization and popular protests as countries in the region transitioned away from military dictatorships.[18] Although Mexico was largely immune from the political unrest endemic to much of Latin America, this period nonetheless proved to be formative for environmental mobilization in Mexico.[19] Mexico consequently experienced the emergence of an environmental movement that grew in size and strength and gained national visibility by the mid-1980s.[20]

Constitutional reforms in 1971 and 1987 granted the Mexican Congress the authority to legislate on environmental matters.[21] In 1988, the General Ecological Balance and Environmental Protection Act was created[22] and offered a more comprehensive approach to environmental conservation. Unlike previous legislation, this act went beyond preserving the environment as it considers the importance of biological resources.[23]

During a series of environmental reforms implemented in the 1990s, Mexican environmentalists were successful in influencing national environmental policy and achieved a series of significant policy triumphs.[24] In a relatively short period, Mexico's green movement emerged and became an important political actor.[25] At this time, the Mexican Congress passed a constitutional amendment adding a fourth paragraph to Article 4 providing for the right of all persons to an adequate environment for their development and well-being.[26] Although general, this constitutional provision serves as an aspira-

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[16] *See generally* John McCormick, The Global Environmental Movement 1-8 (1995).

[17] Rachel Carson, Silent Spring (1962).

[18] Jordi Díez, *The Rise and Fall of Mexico's Green Movement* at 2, *available at* http://www.cpsa-acsp.ca/papers-2007/Diez.pdf.

[19] *See generally* Jose Roberto Quintos Guevara, *Popular Environmental Education: Progressive Contextualization of Local Practice in a Globalizing World* 81-90 (2002), http://vuir.vu.edu.au/15285/1/Guevara_2002.pdf.

[20] *See* Beatriz Oliver, *Participation in Environmental Popular Education Workshops: An Example from Mexico*, 33 Convergence 44-53 (2000).

[21] Herrera Izaguirre, *supra* note 12, at 125.

[22] *Id.*

[23] *Id.*

[24] Díez, *supra* note 18, at 2.

[25] *Id.*

[26] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, art. 4, Diario Oficial de la Federación [D.O.], 30 de Agosto de 2011 (Mex.).

tional right. Mexico currently lacks the procedural formalities, statutes and regulations needed to fully implement the spirit of this amendment. Despite this, the amendment does serve a didactic purpose. Additionally, the recent amendment to Article 17, as well as numerous others contemplated or implemented by Mexican legislatures, lends additional credence to the text of Article 4.

Subsequent steps towards attaining environmental rights in Mexico during this period have mainly resulted from the international treaties the country has signed.[27] Two such examples are the 1972 Stockholm Conference on Human Environment and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed and ratified in 2000.[28]

Although contemporaneous with the environmentalism movement in the United States, the environmentalism movement in Mexico did not embrace the notion of "free-market environmentalism" at this time. Free-market environmentalism is a position that argues the free market, property rights, and tort law provide the best tools to preserve the health and sustainability of the environment.[29] This contrasts with the theory of state intervention to protect the environment —the most common modern approach in civil law countries like Mexico.[30] Perhaps the most ubiquitous implementation of free-market environmentalism is the use of "class action" or "collective action" lawsuits. These legal mechanisms have been used across the world to redress environmental issues.[31] However, until the dawn of the 21st century, Mexico resisted any attempt to implement a legal regime that allowed the use of such legal mechanisms.[32]

This period noticeably differed from the previous one in that it was the first time in Mexican legal history in which substantive legislative efforts were made to contend with environmental issues. During this period, the nation followed the lead of the United States and implemented legislative measures reflecting the concerns of the environmentalism movement —clean air, clean water, conservation, etc.[33] The end of this period did not mark a lull in legisla-

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[27] Revuelta Vaquero, *supra* note 10, at 131.

[28] *See generally* Héctor Herrera, *Panel Discussion: Mexican Environmental Legal Framework*, 2 San Diego Justice J. 31, 31-35 (1994).

[29] *See generally* Richard Stroup, *Free-Market Environmentalism*, *available at* http://www.nesgeorgia.org/files/free_market_environmentalism.pdf.

[30] *Id.*

[31] *See generally* Revuelta Vaquero, *supra* note 10, at 131.

[32] Dunn, *supra* note 4.

[33] The Federal Government of Mexico, through the Secretariat of the Environment, Natural Resources and Fishing (*Secretaría de Medio Ambiente*, *Recursos Naturales y Pesca* (SEMARNAP)), has sole jurisdiction over those acts that effect two or more states, acts that include hazardous waste, and procedures for the protection and control of acts that can cause environmental damage or serious emergencies to the environment. The Secretariat's main activities are to make environmental policy and enforce it; assist in urban planning; develop rules and technical standards for the environment; grant (or deny) licenses, authorizations and permits; decide on

tive action concerning environmental matters; rather, the distinction between this period of Mexican environmental legal history and the subsequent one was predicated on the economic implications of environmental legislation.

3. *The Era of Free-Market Environmentalism in Mexico (2008-Present)*

Over the past few years, Mexico has been increasingly reticent to promulgate environmental regulations.[34] Recently, Mexico's deterrence mechanisms with regard to environmental law have begun to focus their impetus on economic incentives rather than legal regulation.[35] This Note refers to this sea change as the beginning of free-market environmentalism in Mexico.

These amendments are emblematic of the change from regulation to free-market environmentalism to preserve the health and sustainability of the environment. They allow for collective actions and provide guidelines for their regulation and procedural implementation, as has been done in other countries in the Americas, such as the United States, Brazil, Uruguay, Argentina and Venezuela.[36] Collective actions seek to aggregate the rights of a group of persons for their defense in group litigation.[37] The various rights of the members of a group are considered collective in the strict sense of individuals in a collective group according to a ruling on the propriety of a collective action, and whether or not there are common circumstances to permit linking all the individuals together for their common protection or defense.[38]

III. Constitutional Amendment Allowing for Group Litigation in Mexico

Early on in the congressional sessions beginning on February 1, 2011, two legislative proposals allowing for implementation of collective actions in Mexico appeared to be leading in the debate, one originating in the Chamber

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environmental impact studies; and grant opinions on and assist the states with their environmental programs. This Secretariat enforces the law, regulations, standards, rulings, programs and limitations issued by it through the National Environment Institute and the Federal Attorney Generalship of Environmental Protection (*Procuraduría Federal de Protección al Ambiente*) (PROFEPA). Penner & Associates, *Environmental Law in Mexico*, *available at* http://www.mexicolaw.com/LawInfo08.htm (last visited Oct. 22, 2011).

[34] *See generally* Revuelta Vaquero, *supra* note 10, at 131; Juan Antonio Herrera Izaguirre, *supra* note 12, at 125.

[35] *See generally* Revuelta Vaquero, *supra* note 10, at 131; Juan Antonio Herrera Izaguirre, *supra* note 12 at 125.

[36] Cacheaux, Cavazos & Newton, *supra* note 2.

[37] *Id.*

[38] *Id.*

of Deputies (*Cámara de Diputados*) and the other in the Senate (*Cámara de Senadores* or *Senado*).[39] The Chamber of Deputies bill was introduced in July 2010 by Representative Javier Corral Jurado of the National Action Party (*Partido Acción Nacional*) —the governing party at the time.[40] This bill would give a number of public officials and entities the requisite standing to file collective actions, including the President, the Attorney General, municipalities, public prosecutors, and civil and consumer associations, as well as any individual in Mexico.[41] This bill proposed no class certification or admissibility rules.[42] Under this bill, a defendant would be given ten days to respond to a complaint, which would be followed by a short evidentiary phase.[43] The judge would then decide the case based on its merits within ninety days.[44] The bill's support waxed and waned through late 2010 in comparison with the contemporaneously proposed Senate bill.

The Senate bill was subsequently introduced by Senator Jesús Murillo Karam of the Institutional Revolutionary Party (*Partido Revolucionario Institucional*), the largest party in the Chamber of Deputies at the time.[45] This bill sought to amend Article 17 of the Mexican Constitution to allow for collective actions. Senator Murillo had been involved in a previous attempt to draft such a law in 2008, when he headed a Senate Task Force charged with drafting such a bill.[46] The Task Force failed to reach consensus on the action; however, Senator Murillo came out of as a "champion," which gave his 2010 proposal significant credibility.[47] Though the Decree bears little resemblance to the original Murillo bill introduced in September 2010, Senator Murillo's amended bill became law in Mexico.[48] Prior to the amendments detailed in the Decree, Article 17 read:

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[39] *See* William J. Crampton & Silvia Kim, *The Federalist Society for Law and Public Policy Studies, Piecing Together the Puzzle of Mexican Class Actions*, *available at* http://www.fed-soc.org/publications/detail/piecing-together-the-puzzle-of-mexican-class-actions (last visited Nov. 13, 2011).

[40] *See* Decree, *supra* note 2.

[41] Crampton & Kim, *supra* note 39.

[42] *Id*.

[43] *Id*.

[44] *Id.*

[45] The bill proposed a bundle of amendments to several pieces of legislation: the Código Federal de Procedimientos Civiles (Federal Civil Procedure Code), el Código Civil Federal (Federal Civil Code), la Ley Federal de Competencia Económica (Federal Competition Law), la Ley Federal de Protección al Consumidor (Federal Consumer Protection Law), la Ley Orgánica del Poder Judicial de la Federación (Federal Judicial Branch Law), la Ley General del Equilibrio Ecológico y la Protección al Ambiente (Environment Protection Law) and Ley de Protección y Defensa al Usuario de Servicios Financieros (Law for the Protection of Financial Service Users).

[46] Crampton & Kim, *supra* note 39.

[47] *Id.*

[48] *See* Decree, *supra* note 2.

> Individuals shall be authorized neither to take the laws in their own hands nor to violently claim a right.
>
> Every person shall be entitled to a fair trial in a court of law. Courts' rulings shall be issued within the legal timetables. Courts shall resolve legal controversies in a speedy, thorough, and impartial way [...].[49]

In late 2010, after intense debate and discussion, Senator Murillo's bill was amended to introduce safeguards intended to protect defendants' rights.[50] After publication in the Official Gazette, the relevant text of the amendment reads: "The Federal Congress shall issue laws governing collective actions. Such laws determine the application materials, judicial proceedings, and mechanisms for damage repair. Federal judges know exclusively about these procedures and mechanisms [...]."[51]

Collective actions are divided into three categories: (1) diffuse actions to protect comprehensive rights that belong to society in general and not to any individual in particular, like the right to a clean environment, (2) collective actions to protect rights that belong to a group of persons linked by a legal relationship, and (3) homogeneous individual rights collective actions to protect a group linked by a contractual relationship.[52] The opt-out procedure presented in the early drafts of Senator Murillo's bill was replaced by a mixed system under which it is possible to opt out of collective actions if they involve diffuse rights and opt in if they involve collective rights or individual homogeneous rights.[53]

Accompanying the above amendments was the introduction of a clear certification phase with familiar criteria, such as commonality, adequate representation, class definition and superiority.[54] These included rules that provide for parties' right to appeal the trial court's certification ruling.[55] In addition, the "loser pays" rule was adopted and attorney's fees were subject to caps that aim at avoiding abuse.[56] In late December 2010, the revised Murillo bill was

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[49] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Article 17, Diario Oficial de la Federación [D.O.], 30 de Agosto de 2011(Mex.): "Ninguna persona podrá hacerse justicia por sí misma, ni ejercer violencia para reclamar su derecho […] Toda persona tiene derecho a que se le administre justicia por tribunales que estarán expeditos para impartirla en los plazos y términos que fijen las leyes, emitiendo sus resoluciones de manera pronta, completa e imparcial. Su servicio será gratuito, quedando, en consecuencia, prohibidas las costas judiciales."

[50] *See* July 2010 Decree, *supra* note 9.

[51] Gregory L. Fowler et al., *Class Actions in Latin America: A Report on Current Laws, Legislative Proposals and Initiatives*, 1:1 Latin Am. F. News l. (International Bar Association), Oct. 2008, at 72.

[52] *Id.*

[53] *See* Decree, *supra* note 2.

[54] Fowler et al., *supra* note 51.

[55] *Id.*

[56] *See* Decree, *supra* note 2; *see also* Fowler et al., *supra* note 51.

approved unanimously in committee and, shortly thereafter, by the Senate's Plenary Assembly.[57] The August 30, 2011 publication of the Decree in the Official Gazette marked the completion of the process and its implementation as of March 1, 2012.[58] This six-month *vacatio legis*[59] allowed the Mexican Congress a prescribed period in which all of the governmental entities involved in the enforcement of the action may address and take the requisite administrative, budgetary and legal measures necessary to put the decree into force.

In Mexico, as in other civil law jurisdictions, the procedures for collective actions do not necessarily resemble the procedures used in common law countries. The following part will juxtapose Mexico's nascent group litigation system with the long-established common law system implemented in the United States.

IV. Comparative Analysis of Procedural and Substantive Aspects of Group Litigation in the United States and Mexico with Specific Regard to Pecuniary Damages

Much like the way class action addresses the legal mechanism of remediation for a group of litigants in the United States, the term "collective action" encompasses group litigation in Mexico. This part will discuss the procedural and substantive aspects of group litigation in these countries, setting aside the possibility of injunctive relief and focusing on the pecuniary damages as set forth in the substantive laws of both the United States and Mexico. The respective differences in the procedural and substantive aspects of group litigation will serve as a point of reference throughout this Note and in regard to the possible solutions proposed in Part VI.

1. *The Procedural Aspects of Group Litigation*

In American federal courts, class actions are governed by Federal Rules of Civil Procedure Rule 23 (*hereinafter* "Rule 23") and 28 U.S.C.A. § 1332(d).[60] Class actions may be brought before a federal court if the claim arises under federal law, or if the claim falls under 28 U.S.C.A. § 1332(d).[61] In Mexico,

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[57] Fowler et al., *supra* note 51.

[58] *See* Decree, *supra* note 2.

[59] *Vacatio legis* is a technical term in civil law referring to the period between the promulgation of a law and the time the law takes legal effect. *See* Jerzy Stelmasiaka, *Environmental Protection as a Political-Legal Problem in Central-Eastern European Countries*, 21 Journal of East and West Studies 59, 61 (1992).

[60] *See* FED. R. CIV. P. 23(a)(3).

[61] *See* 28 U.S.C.A. § 1332(d) (West 2011) [*United States Code Annotated*]; under § 1332(d)(2) the federal district courts have original jurisdiction over any civil action where the amount in controversy exceeds $5,000,000 and (1) any member of a class of plaintiffs is a citizen of a

a legislative package approved by the Congress in early 2011 regulates collective actions.[62] As described in Part III, this enactment took the form of a Decree that outlines the amendments and additions to various sections of the Mexican Civil Code that will serve as the procedural nexus for collective actions.

In the United States, a group must be timely in filing its class action documentation. For federal causes of action, the statute of limitations is dependent on the legal issue in play;[63] however, the typical statute of limitations in American jurisprudence ranges from two to six years.[64] A statute of limitation may be tolled when it is interrupted by operation of law or policy to preclude its expiration against an absent class member during a relevant period.[65] While there can never be certainty that an absent class member's statute of limitations will be extended by a case filed as a class action, federal courts recognize a general policy of honoring such tolling to preclude the statute running against absent class members during pendency of a class action.[66]

Mexico's civil law system provides periods of prescription that specify the time in which all collective actions must be filed. The Mexican Civil Code provides a statute of limitations of three years and six months to initiate any collective action.[67] This period contrasts with the statute of limitations for obligations arising from unlawful acts not included in the Decree, which is codified in Article 1934 of the Mexican Civil Code and prescribes two years starting from the day in which the damage was caused.[68] In the case of harm or injury with continuous or ongoing effects, the term will run as of the last day on which the harm was caused.[69] In environmental legal matters, oftentimes the harm continues over an extended period. In such situations, numerous Mexican jurists predict this forty-two month timeframe will not apply, but rather, the statute of limitations will be tolled.[70]

State different from any defendant; (2) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (3) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

[62] *See* Decree, *supra* note 2.

[63] *See* 18 U.S.C.A. § 3282(a) (West 2011) [*United States Code Annotated*].

[64] *Id.*

[65] *See* Chardon v. Fumero Soto, 462 U.S. 650, 652 (1983).

[66] *See generally* Tosti v. City of Los Angeles, 754 F.2d 1485, 1489 (9th Cir. 1985); *see also Chardon v. Fumero Soto*, 462 U.S. 650, 652 (1983); *see also In re Rhone-Poulenc Rorer Inc,* 51 F3d 1293, 1298 (7th Cir. 1995).

[67] *See* Código Civil Federal de México [C.C.F.] [Federal Civil Code], *as amended* on January 28, 2010, Article 584, Diario Oficial de la Federación [D.O.] 29 de Agosto de 1932 (Mex.)

[68] *Id.* at Article 1934: "Artículo 1934. La acción para exigir la reparación de los daños causados en los términos del presente capítulo, prescribe en dos años contados a partir del día en que se haya causado el daño."

[69] *Id.* at Article 584.

[70] *Id.*

As previously explained, these provisions became effective March 1, 2012.[71] Legal scholars and commentators are still unsure as to how courts will apply the statutory requirements in other unpredictable situations. Mexican academics and jurists have speculated as to what the criteria of the courts will be for the plaintiffs in such a scenario in which one develops a harm or injury outside the statutory limit. However, the answer to this question will only become apparent once federal judges encounter such situations in the coming months and years.

In both the United States and Mexico, the procedure for filing a class action is to file suit with one or several named plaintiffs on behalf of a proposed class.[72] The proposed class must consist of a group of individuals or business entities that have suffered a common injury or injuries.[73] After filing a complaint, the plaintiff must certify the class.[74] The procedure of class certification differs in the United States and Mexico. The following paragraphs will address the procedural requirements for class certification in both the United States and Mexico.

A. *Class Certification in the United States*

Class certification is the determination by a judge that a group of individuals has met both the requirements set forth in Rule 23 and an initial motion to dismiss it on the merits.[75] Such a ruling is necessary to ensure judicial economy and to guarantee that courts are not inundated with meritless lawsuits. Therefore, in the United States, Rule 23 requires that the plaintiff demonstrate adequacy, numerosity, commonality and typicality.[76]

The requirement of adequacy in a class action provides for ensuring that the representative parties adequately protect the interests of the class. Federal courts construe the adequacy requirement quite liberally, and are unlikely to deny certification on such grounds.[77] However, class representative status may properly be denied "where the class representatives have so little knowledge

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[71] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* on August 30, 2011, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[72] Fed. R. Civ. P. 23.

[73] *Id.*

[74] *See generally id.*

[75] Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: a Pocket Guide for Judges 6 (2005), http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/$file/ClassGde.pdf.

[76] Fed. R. Civ. P. 23(a).

[77] *See generally* South Carolina Nat Bank v Stone, 139 F.R.D. 325, 329 (DSC 1991); *see also* McGlothlin v Connors, 142 F.R.D. 626, 634 (W.D. Va 1992); Adair v. Sorenson, 134 F.R.D. 13, 19 (D. Mass. 1991) (Holding that a class representative "need not have knowledge of all the relevant facts to be an adequate representative.").

of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys."[78]

Under Rule 23, "the class must be of sufficient numerosity to make joinder impracticable." The term "impracticable" does not mean impossible.[79] Impracticability itself depends on an examination of the facts and imposes no numerical limitations.[80] Courts have repeatedly stated that whether the numerosity requirement is met depends on the facts of each case.[81] Generally, courts will find the numerosity requirement satisfied when the class comprises forty or more members and will find that it has not been satisfied when the class is composed of twenty-one or fewer.[82] However, these are not rigid parameters, and the ultimate issue is whether the class is too large to make joinder impracticable.[83]

Regarding commonality in a class action, there must be one or more legal or factual claims common to the entire class.[84] Courts have routinely recognized that the commonality requirement is not high,[85] and federal courts throughout the United States have consistently applied a liberal standard for

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[78] *See* Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1077-78 (2d Cir. 1995).

[79] *See* Robidoux v Celani, 987 F2d 931, 935 (2d Cir. 1993); *Smith v. B&O R.R.*, 473 F. Supp. 572, 581 (D. Md. 1979); Doe I v. Guardian Life Insurance Company of America, 145 FRD 466, 471 (N.D. Ill. 1992); Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964).

[80] *See* General Tel. Co. of Northwest, Inc. v. EEOC, 446 U.S. 318, 329 (1980); *see also* Gurmankin v. Costanzo, 626 F.2d 1132, 1135 (3d Cir. 1980) ("We believe that the numerosity requirement must be evaluated in the context of the particular setting […]"); Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 109 (E.D. Pa. 1992) (Huyett, J.) (stating that the number in the class is not, by itself, determinative). Accord, Gordon v Forsyth County Hosp Auth., Inc., 409 F. Supp 708, 717 (MDNC 1976) (There is no specific threshold number of absent class plaintiffs required as a prerequisite to certification).

[81] *See e.g.*, General Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980); Perez-Funez v. District Director, I.N.S., 611 F. Supp. 990, 995 (C.D. Cal. 1984).

[82] *See* Cox v. American Cast Iron Pipe, 784 F.2d 1546, 1553 (11th Cir. 1986); Padron v. Feaver, 180 F.R.D. 448 (S.D. Fla. 1998); Ansari v. New York University, 179 F.R.D. 112, 114 (S.D.N.Y. 1998); Town of New Castle v. Yonkers Contracting Co., 131 F.R.D. 38, 40 (S.D.N.Y. 1990); Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir.), *cert. denied*, 515 U.S. 1122 (1995). *See also* Jordan v Lyng, 659 F. Supp 1403, 1410 (ED Va 1987)(One hundred members or less have been found to meet requirement); Afro American Patrolmens League v. Duck, 503 F.2d 294 (6th Cir. 1974) (Thirty-five members sufficient); Markham v. White, 171 F.R.D. 217, 221 (N.D. Ill. 1997)(class of 35 to 40 plaintiffs sufficient to satisfy numerosity where class members resided in different states).

[83] *See* Strykers Bay Neighborhood Council v. New York, 695 F. Supp. 1531, 1538 (S.D.N.Y. 1988).

[84] Fed. R. Civ. P. 23.

[85] *See* Morris v. Transouth Fin. Corp., 175 F.R.D. 694, 697 (M.D. Ala. 1997). *See also* Shipes v. Trinity Industries, 987 F2d 311, 316 (5th Cir. 1993) (Threshold requirements of commonality and typicality are not high). If a benefit may be achieved through class disposition, the rule

finding commonality in class actions.[86] The commonality test is "qualitative rather than quantitative."[87] Essentially, these cases and their progeny suggest there need be only a single issue common to all members of the class.[88] Just as common issues of law are not required for all class members, common issues of fact are not required among all class members.[89] Class actions may be certified on limited common issues of fact.[90]

Lastly, Rule 23 of the Federal Rules of Civil Procedure provides that a class action may not be maintained unless "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[91] Unlike numerosity and commonality, which focus on the characteristics of the class, typicality and adequacy of representation focus on the characteristics of the plaintiff representative of the class.[92] Typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it arose or to the relief sought. Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.[93] As the Supreme Court has explained, "The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiffs' claims."[94] The typicality analysis asks, "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct."[95]

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requires only that the resolution of common questions affect all or most of the class members; Jenkins v Raymark Indus., 782 F.2d 468 (5th Cir. 1986).

[86] Morris v. Transouth Fin. Corp., 175 F.R.D. 694, 697 (M.D. Ala. 1997). *See also* Shipes v. Trinity Industries, 987 F2d 311, 316 (5th Cir. 1993) (Threshold requirements of commonality and typicality are not high). If a benefit may be achieved through class disposition, the rule requires only that the resolution of common questions affect all or most of the class members. Jenkins v Raymark Indus., 782 F.2d 468 (5th Cir. 1986).

[87] *See* In re American Medical Systems, Inc., 75 F 3d 1069 (6th Cir. 1996). *See also* Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982) (The commonality test of Rule 23(a)(2) is met when there is "at least on issue whose resolution will affect all or a significant number of the putative class members.").

[88] *Id.*

[89] Haywood v Barnes, 109 F.R.D. 568, 577 (E.D.N.C. 1986).

[90] Central Wesleyan College v W.R. Grace, 6 F.3d 177, 184 (4th Cir. 1993).

[91] Fed. R. Civ. P. 23(a)(3).

[92] Hassine v. Jeffes, 846 F.2d 169, 176 n.4 (3rd Cir.1988); *see also* Herbert B. Newberg, Newberg on Class Actions, Prerequisites for Maintaining a Class Action, §3:13, at 316-17 (4th ed. 2002).

[93] Herbert B. Newberg, *supra* note 92, § 3.15 at 335.

[94] General Telephone Co. of the Northwest v. Equal Employment Opportunity Commission, 446 U.S. 318, 330 (1980).

[95] Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (quoting Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985)).

Having met the abovementioned four criteria gives a group seeking redress in the United States legal standing. Mexico, as a civil law country, differs somewhat in the system its legislature has passed for class certification. The required elements of class certification in Mexico will be addressed in the following subsection.

B. *Class Certification in Mexico*

Like the United States, class certification in Mexico ensures an efficacious judicial system with respect to collective actions. The Decree published to the Official Gazette in August 2011 required that, as of March 1, 2012, plaintiffs hoping to file collective actions under the authority of the amendment made to Article 17 fulfill a number of requirements: adequate representation, commonality, superiority and legal standing.

The Decree amends Article 586 of the Mexican Civil Code of Procedure defining adequate representation (*representación adecuada*).[96] Although the final decision is in the hands of the federal judge hearing the case, some of the factors for which adequate representation is determined are to: "I. Act with diligence, skill and good faith in defending the interest of the public at trial; II. Not be in [a] conflict of interest with his or her clients about relevant activities; [...] V. Not [have] been charged with incompetence, bad faith or negligence in prior collective actions [...]."[97]

At this time, Mexico has yet to rule on collective action litigation.[98] Therefore, it is uncertain how Mexican federal judges will apply these standards. However, the guidelines set forth in the amendment to Article 586 seem to set rigid guidelines that ensure that group litigants are provided with diligent representatives as must be the case to ensure the effective organization for legal redress to affected citizens.

The Decree amends Article 588 of the Mexican Civil Code of Procedure to illustrate the requirement of commonality.[99] As in American jurisprudence, commonality in Mexico is statutorily defined as the presence of one or more common legal or factual claims.[100] It will be interesting to see how Mexican judges interpret this commonality requirement in the months and years to

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[96] Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended* on December 30, 2008, Article 586, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[97] *Id.*

[98] These amendments became legally effective March 1, 2012; *see* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* on August 30, 2011, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

[99] *See* Código Federal de Procedimientos Civiles, *as amended* on December 30, 2008, Article 588, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[100] *Id.*

come. The Decree also mandates that a collective action may only be certified if it demonstrates superiority, or that the group litigation mechanism is deemed the most efficient method to address the legal issue.[101]

Lastly, in order to file a collective action in Mexico, one must have legal standing (*legitimación activa*). In the United States, standing is subsumed by meeting the Rule 23 requirements of adequacy, numerosity, commonality and typicality.[102] In comparison, the Mexican Decree has settled the requirements for legal standing under a collective actions claim, issuing legal standing to a group of Mexican regulatory agencies: The Federal Bureau of Environmental Protection (*Procuraduría Federal de Protección al Ambiente*), the Federal Consumer Protection Bureau (*Procuraduría Federal del Consumidor*), the National Commission for the Protection and Defense of Financial Service Users (*Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros*) and the Federal Antitrust Commission (*Comisión Federal de Competencia*).[103] Additionally, a common representative of a community comprised of at least 30 members can be granted standing for collective action.[104] Civil non-profit associations legally incorporated at least one year prior to the date when the action has been filed also enjoy legal standing, having as their statutory purpose the promotion or defense of rights and interests in the area in question —consumer protection, financial services or environmental compliance.[105] Lastly, the Attorney General of the Republic has the benefit of legal standing in collective actions.[106]

2. *The Substantive Aspects of Group Litigation*

As with procedural law, substantive law in the United States and Mexico demonstrate marked differences. This section will address the differences in substantive law in the two countries, focusing on laws regarding pecuniary damages issued in group litigation.

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[101] *See* Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended* on December 30, 2008, Articles 588-89, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.). Although this provision has yet to be challenged, Mexican jurists believe that in the coming months and years this provision will be enforced liberally. *See also* Robert Kossick, *The Rule of Law and Development in Mexico*, 21 Ariz. J. Int'l & Comp. L. 715, 725-30 (2004) (noting Mexico's recent neoliberal development agenda and judicial reforms).

[102] *See* Fed. R. Civ. P. 23(b) (2); *see also* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Krawez v. Stans, D.C., 306 F. Supp. 1230 (1969); Planned Parenthood Federation, Inc. v. Schweiker, 559 F. Supp. 658, 662 (D.D.C. 1983).

[103] *See* Código Federal de Procedimientos Civiles [C.F.P.C.], *as amended* on December 30, 2008, Article 585 (I), Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[104] *Id.*

[105] *Id.*

[106] *Id.*

In the United States, damages issued in class actions fall primarily into one of two general categories: compensatory damages and punitive damages. Compensatory damages refer to the pecuniary damages the defendant pays to the injured plaintiff to cover the actual costs of the plaintiff's injury. If the defendant is found liable for the plaintiff's injuries, the judge or jury will calculate the amount of actual damages to be awarded.[107] These calculations are strictly based on evidence of the plaintiff's costs.[108] Punitive damages, however, are subject to much more scrutiny where judge-made substantive law is created to define the rights and obligations of the parties involved. Unlike the damages system in the United States, punitive damages are not part of Mexican jurisprudence. In Mexico, damages issued in collective actions are limited to compensatory damages, in which a judge or jury objectively determines what a successful plaintiff loses in terms of opportunity, and nothing more.[109] Unlike American jurisprudence, Mexico has a number of numerous substantive laws, rather than simply legal opinions, regarding collective actions.

It is important to note that the United States, under the aegis of the Rules of Decision Act,[110] allows the filing of class actions in both state and federal courts. First enacted in 1789, the Rules of Decision Act discourages forum shopping and avoids the unfair administration of laws in cases heard by federal courts because of the diverse citizenship of the involved parties. The landmark decision in *Erie Railroad Co. v. Tompkins*[111] interpreted the Rules of Decision Act to include not only state statutes, but also controlling judicial decisions or state Common Law as constituting the laws of the state.[112] *Erie* overruled *Swift v. Tyson*,[113] which construed the Rules of Decision Act as not requiring federal courts to apply state common law in diversity cases.[114] Class actions under the authority of a particular state give state legislatures the prerogative to pass their own local class action procedures.[115] Legislation passed in such a manner creates significantly different procedural and substantive legal implications from state to state. To simplify the analysis below, this Note will focus specifically on federal class actions. In contrast with class action procedure in the United States, Mexico currently only allows for collective actions to be filed in federal courts. This subsection will compare the legislation and limitations regarding pecuniary damages in group litigation.

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[107] *Id.* at Articles 581, 604-05.

[108] *Id.*

[109] *Id.*

[110] 28 U.S.C.A. § 1652 (1948).

[111] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[112] *See id.*

[113] Swift v. Tyson, 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842).

[114] *See id.*

[115] *See generally* Crampton & Kim, *supra* note 39.

A. *Substantive Aspects Regarding the Issuance of Pecuniary Damages in the Context of Group Litigation in the United States*

As a result of *Erie*, federal courts in diversity jurisdiction must apply the substantive law of the state in which it sits. This was incongruous with the past procedure sanctioned previously by *Swift v. Tyson*, which allowed federal judges in cases based on diversity jurisdiction to ignore the common law local decisions of state courts in the state in which the court was located. Of course, application of the *Erie* doctrine was a difficult decision for the Court, since overruling *Swift* meant a large number of decisions by the Court and all lower federal courts were no longer valid. However, the Court did not declare the Rules of Decision Act itself unconstitutional.[116] Instead, it reinterpreted the Act so federal district courts hearing cases in diversity jurisdiction had to apply the whole of the law, both statutory and judge-made, of the states in which they sat.[117] This Note does not seek to analyze the numerous different substantive laws applicable to each state, but will focus on the substantive laws regarding damages issued in federal class action proceedings.

Over the last twenty years of Supreme Court jurisprudence, there have been numerous influential decisions devoted to punitive damages, the larger and more subjective of the possible damage awards, within the context of class actions.[118] The interests of the Court in this area have been driven by effort on the part of defendants to limit both the scope of liability for compensatory awards and the instances and amounts applicable to punitive damages awards.[119]

In 1993, the Supreme Court heard *TXO Prod. Corp. v. Alliance Res. Corp*. Here, the defendant argued that the punitive damages award violated the Due Process Clause.[120] In this argument, the defendant failed; however, the decision of the case set an outline for an award of punitive damages in that "vagueness, lack of guideline and the lack of any requirement of a reasonable relationship between the actual injury and the punitive damage award, in essence, would cause the Court or should cause the Court to set it aside on Constitutional grounds."[121] The Court in *TXO Prod. Corp.* added additional clarity to the delegation of punitive damages, stating such damages awards "are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages awards must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it."

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[116] *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

[117] *Id.*

[118] Francis E. McGovern, *Punitive Damages and Class Actions*, 70 Louisiana L.R. 435, 436 (2010).

[119] *Id.*

[120] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 451 (1993).

[121] *Id.* at 451.

In 1996, the United States Supreme Court addressed punitive damages in *BMW of North America, Inc. v. Gore*,[122] holding that punitive damages must be reasonable as determined by the degree of reprehensibility of the conduct that caused the plaintiff's injury, the ratio of punitive damages to compensatory damages, and any comparable criminal or civil penalties applicable to the conduct.[123] Subsequently, in 2003, the case of *State Farm Auto. Ins. v. Campbell*[124] resolved the issue that punitive damages may *only* be based on the acts of the defendants that harmed the plaintiffs.[125] More recently, in *Philip Morris USA v. Williams*,[126] the Supreme Court ruled that punitive damage awards cannot be imposed for the direct harm the misconduct caused others, but may consider harm to others as a function of determining how reprehensible it was.[127] Misconduct that is more reprehensible justifies a larger punitive damage award, just as a repeat offender in criminal law may be punished with a tougher sentence.[128]

This subsection has identified the current substantive law behind pecuniary damages in the context of American class actions. The following subsection will introduce the specifics underlying the issuance of such damages in Mexican collective actions.

B. *Substantive Aspects Regarding the Issuance of Pecuniary Damages in the Context of Group Litigation in Mexico*

Impelled by the promulgation of the amendment to Article 17, Article 603 *et seq.* of the Decree amending the Federal Code of Civil Procedure addresses the substantive law behind the pecuniary and injunctive judgments (*sentencias*) of collective actions in Mexico. In diffuse actions, the judge may order the defendant to repair the damage caused to the community.[129] This compensation may include performing one or more actions or refrain from doing.[130] If this is not possible, the judge shall order substitute performance (*cumplimiento sustituto*) according to the infringement of the rights or interests of the com-

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[122] BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

[123] *Id.* at 575-82.

[124] State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

[125] *Id.* at 416-20.

[126] Philip Morris USA v. Williams, 549 U.S. 346 (2007).

[127] *Id.* at 358-61.

[128] *See generally* McMahon v. Bunn-O-Matic, 150 F.3d 651, 654 (7th Cir. 1998); Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994); Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996) (Posner, J.).

[129] Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended* on December 30, 2008, Article 604, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[130] *Id.*

munity.[131] In the case of collective actions and homogeneous individual rights collective actions, the judge may order the defendant to repair the damage, consisting of the realization of one or more actions or refraining from doing such actions, and to cover damages individually to group members as provided in this article.[132] Only if this option is not possible will the judge defer to the issuance of pecuniary damages.[133] In such a case, whether a diffuse action, collective action or homogeneous individual rights collective action, the reparation to the plaintiff community is the same —compensatory damages.[134]

Under Mexican jurisprudence, the vast majority of these compensatory damages issued are likely to come under the guise of "damages and losses" (*daños y perjuicios*). Articles 2104 through 2110 of the Mexican Civil Code fall under Title Four of the Code, entitled "Effects of Obligations," which govern such damages and losses. Chapter One of this article deals with the consequences of non-compliance.[135] Article 2104 of the Mexican Civil Code states "Whoever is obligated to perform an act and fails to do so or performs such act without conforming to what was agreed, will be responsible for the loss of profit (*lucrum cessans*)." Article 2107 of said Code further establishes, "[t]he type of responsibility referred in this Title, will imply the return of the goods or the price, or the repair of the damages and the indemnification of the prejudices."[136] Articles 2108 and 2109 define "compensatory damages" and "loss of future earnings," respectively, as follows: "compensatory damage is the loss or decrease of assets suffered as a result of the failure to comply with an obligation" and "lost profits are the deprivation of lawful gains that would have resulted had there been compliance with an obligation."[137] Moreover, Article 2110 states that "Damages and losses shall be an immediate and direct consequence resulting from the breach of the obligation, either caused or that had to be necessarily caused."[138]

Although the Mexican application of damages relies only on the abovementioned provisions, the system is likely to change as the practice of issuing damages for sanctions begins in 2012. In the forthcoming part, this Note will examine the implications and make judges and legislators cognizant of the effects of Mexico's practice of issuing damages in the absence of any juridical or legislative action. This will provide a practical guide for those on the

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[131] *Id.*

[132] *Id.* at Article 605.

[133] *Id.*

[134] *Id.* at Articles 604-05.

[135] *See* Código Civil Federal de México [C.C.] [Federal Civil Code], *as amended* on January 28, 2010, Articles 2104-09, Diario Oficial de la Federación [D.O.], 29 de Agosto de 1932 (Mex.).

[136] *Id.* at Article 2107.

[137] *Id.* at Articles 2108-09.

[138] *Id.* at Article 2110.

frontlines of these cases to ensure that justice is accomplished with respect to the consumer and the environment in the formative stages of collective actions in Mexico.

V. Implications of the Amendment to Article 17 of the Mexican Legal System

With the provisions described in Part III, the Federal Congress in Mexico pieced together a collective action model intended to protect the interests of numerous stakeholders. However, to this point, it is largely academic to speculate as to the implications the amendment will have on corporate and individual action. Prior to the amendment of Article 17, the legal mechanism of group litigation was foreign to Mexico's civil law system. Nevertheless, inferences regarding the applicability of Mexico's existing statutory provisions are the best available resources to speak to the consequences of Mexico's actions regarding collection actions. Part V uses this information to draw conclusions primarily on the economic implications of the aforementioned legislative amendment to Article 17. However, it does bear noting that given the newness of the Decree, many of the opinions and projections addressed within this section are projections that are more speculative than authoritative assertions.

As addressed in Part III, the amendment to Article 17 published to the Official Gazette on August 30, 2011, provides for a system that limits damages a successful plaintiff may recover for the costs of remediating the harm or injury incurred. Under the legislation passed by the Mexican Congress, plaintiffs in a collective action may seek no additional pecuniary damages.[139] This is a stark contrast to the legal structure for collective actions provided by many common law countries. For example, in the United States, it is permissible for a plaintiff to seek additional pecuniary damages in such an action.[140] The most emblematic of these damages is the award of punitive damages.

Punitive damages are damages intended to reform or deter the defendant and others from engaging in conduct similar to that which formed the basis of the lawsuit.[141] Oftentimes, this is the impetus behind punitive damages, with punitive damages often being awarded when compensatory damages

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[139] *See generally* Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended* on December 30, 2008, Articles 581, 604-605, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[140] *See* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages* 139, 139-150 (1986).

[141] *See generally* McMahon v. Bunn-O-Matic, 150 F.3d 651, 654 (7th Cir. 1998); Liebeck v. McDonald's Restaurants, Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994).

are deemed an inadequate remedy.[142] Since they are usually paid in excess of the plaintiff's provable injuries, punitive damages are awarded only in special cases, usually under tort law, in cases in which the defendant's conduct was egregiously insidious.[143] However, the court may also impose them to prevent under-compensation of plaintiffs, to allow redress for undetectable torts and to take some strain away from the criminal justice system.[144] Although the purpose of punitive damages is not to compensate the plaintiff, the plaintiff will in fact receive all or some portion of the punitive damage award. The lack of the option to pursue punitive damages within the Mexican legal system raises the possibility that the Mexican system may provide too little of an economic incentive to affect corporate behavior.

Consider a *maquiladora*[145] that produces LCD televisions. In Mexico, many *maquiladoras* lack proper waste management facilities and the ability to clean up disposal sites, which is why some of the hazardous waste is disposed of illegally.[146] These *maquiladoras* may dump their waste into rivers or landfills where the hazardous toxins will seep into nearby aquifers and contaminate the local water supply. This is but one hypothetical scenario that would both affect a given population and particular environment. Under Mexico's newly enacted legislation, the affected population may file a collective action seeking pecuniary damages for the harm or injury incurred as a result of the environmental tort. Suppose the *maquiladora* saved more in its illegal disposal of the waste than the damages sought by the plaintiffs in their collective action. In such case, the *maquiladora* has no incentive to cease its illegal behavior without the imposition of some sort of additional damages award. Thus, the *maquiladora* will avoid economic inefficiency by continuing to dispose of materials illegally.

The intent of the legislative actions taken by the Mexican Congress does not comport well with this possibility. In proposing his bill that eventually became law, Senator Murillo wrote a piece of legislation to better protect citizens and consumers from violations of their constitutional rights. This includes, among other rights, the right of all persons to an adequate envi-

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[142] *See generally* McMahon v. Bunn-O-Matic, 150 F.3d 651, 654 (7th Cir. 1998); Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994); Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996).

[143] *Id.*

[144] *See* Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996).

[145] Black's Law Dictionary (9th ed. 2009), maquiladora, *n.* (1976) "A Mexican corporation, esp. one that holds a permit to operate under a special customs regime that temporarily allows the corporation to import duty-free into Mexico various raw materials, equipment, machinery, replacement parts, and other items needed for the assembly or manufacture of finished goods for export."

[146] Mary E. Kelly, Free Trade: The Politics of Toxic Waste 48; Clapp, Jennifer, Piles of Poisons: Despite NAFTA's Green Promises, Hazardous Waste Problems are Deepening in Mexico 25 (2002).

ronment for their health and development guaranteed by Article 4 of the Mexican Constitution.[147] Senator Murillo believed Mexican citizens were in a state of "*anomia*,"[148] essentially *lacuna legis* or *lacuna lex*; in which there is a gap in the law that is not addressed.[149] The fact that the legislation passed by the LXI Legislature of the Mexican Congress aims at providing better protection for citizens and consumers from violations of their constitutional rights, yet allows for the possibility of blatant disregard of these rights under the guise of institutional economic interests, signifies that this legislation is incomplete.

The Mexican legal system and the recent constitutional amendment to Article 17 require either a nuanced judicial approach or additional legislative modification to ensure the protection of citizens' constitutional rights —especially the reckless disregard of these rights by institutional actors seeking only increased profits. These changes need not necessarily embody the philosophy of American jurisprudence, but can build upon the economic incentives used to modify institutional behavior in the changes that Mexico will make in the coming years. The potential of these aims will be the focus of the discussion in Part VI.

VI. Possible Solutions to the Complications Posed by the Current Juridical System

In 1979, Professor Arthur R. Miller published an article contrasting the myths and realities of group litigation in the United States. To some, Professor Miller wrote, the legal mechanisms allowing for group litigation seemed a "Frankenstein monster," while to others it appeared as a "knight in shining armor."[150] Professor Miller's comments illustrate the diverse views individuals have regarding group litigation. Numerous legal scholars have spoken about the complexities inherent to the system of group litigation.[151] These problems are not endemic to the United States. It is understandable that many within the legal community may fear that the actions taken by Mexico, although beneficial, are too complex to be addressed by the Mexican legal system and

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[147] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* on August 30, 2011, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[148] Iniciativa para el Desarollo Ambiental Sustenable, the "Class Action" and its Relationship with the Environmental Damage 3, http://www.iniciativasustentable.com.mx/documents/01_documents_ideas_eng.pdf (last visited Nov. 12, 2011).

[149] *Id.*

[150] *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'*, 92 Harv. L. Rev. 664, 665 (1979).

[151] *See*, *e.g.*, Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 Duke J. Comp. & Int'l L. 405 (2001); James E. Starrs, *Continuing Complexities in the Consumer Class Action*, 49 J. Urb. L. 349 (1971-1972); Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 Ariz. L. Rev. 533 (1997).

are unlikely to address the inefficiencies and insufficiencies present within the Mexican legal system for the protection of collective environmental rights. In the United States, class actions are complex, lengthy procedures. These decisions therefore pose a tremendous burden on the American court system. Accordingly, significant expertise is required both by the judges and by the litigators involved in order to present or defend a successful class action suit. At the time of this publication, Mexico is quite unfamiliar with the system of group litigation and this system could easily take a period of five years for Mexican courts to become accustomed with this nascent area of law. This means that Mexican group litigation in the coming years is likely to be both scarce and tentative.

Collective actions are essentially the incarnation of the American class action. This is a new, foreign area within Mexican law. Therefore, the Mexican federal government and federal judiciary are likely to be initially ignorant of the niceties involved in such litigation. Currently, Mexican judges and jurists have no sources to consult and therefore could be reticent in handling cases and rendering the first decisions in the coming years. It is also likely that the first decisions will be incomplete or imperfect because of this lack of experience. Therefore, many of these decisions will be challenged through the *recurso de amparo*, a Mexican legal mechanism established to protect the constitutional rights of individuals and companies against violations from public authorities.[152] This Note argues that to ensure an efficient system of group litigation in Mexico, three requisite factors must be present: quality judges abreast of the nascent system of collective actions, lawyers trained in collective action procedure and litigation, and outstanding scientific experts.

1. *The Role of the Mexican Judiciary in Collective Action Litigation*

A. *The Role of the Federal Council of the Judiciary in Collective Action Litigation*

Only weeks after assuming the Presidency in 1994, President Ernesto Zedillo Ponce de Leon made "one of the most surprising changes in the legislative history of Mexico."[153] President Zedillo submitted a legislative bill to the Senate amending twenty-seven articles of the Mexican Constitution, which profoundly altered the structure and function of Mexico's federal judicial system.[154] This legislative package transformed the composition, structure, and function of the Mexican judiciary.[155]

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[152] Jorge A. Vargas, *Mexican Law on the Web the Ultimate Research Guide*, 32 Int'l J. Legal Info. 34, 38 (2004).

[153] Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 Am. U. J. Int'l L. & Pol'y 295 (1996).

[154] *Id.* at 295-296.

[155] *See generally id.* at 296.

> The amendments reduced the number of Supreme Court Justices from twenty-six to eleven, and established stricter qualifications for nominations. In addition to changing the manner in which the Justices are appointed, their tenure was limited to fifteen years. With the intention of creating a truly constitutional court, President Zedillo modified the original jurisdiction of this highest tribunal. [The legislation] also created a new judicial organ, the Council of the Federal Judiciary [...], inspired by similar modern judicial structures operating in Europe and Latin America.[156]

In accordance with the guidelines and directives subsequently formulated by the Plenary of the Council of the Federal Judiciary, this branch of the government has been overseen and regulated by the Institute of the Judiciary (*Instituto de la Judicatura*).[157]

Pursuant to Organic Law of the Federal Judicial Power (*Ley Orgánica del Poder Judicial de la Federción*),[158] the Council of the Federal Judiciary (*Consejo de la Judicatura Federal*; *hereinafter* "the Council," unless otherwise noted) is to have the following five commissions: 1) Administration, 2) Judicial career, 3) Discipline, 4) Creation of new organs and 5) Description.[159] In his initiative proposing for the creation of the Council, President Zedillo stated:

> In order to elevate in the future, the professional quality of those who will have to impart justice, this reform aspires to raise to a constitutional rank the judicial career, so in the future the appointment, description and removal of judges and magistrates will be subject to general, objective and impartial criteria to be determined by the laws on this matter.[160]

To accomplish this goal, the Institute of the Judiciary, an auxiliary organ of the Council, is in charge of the "research, development, training and updating of the members of the Federal Judicial Power, and of those who aspire to belong to it."[161] The Institute may employ support programs from regional offices (*extensiones regionales*) with the possibility of assistance from Mexican

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[156] *Id.*

[157] *Id.*

[158] *See* Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], Diario Oficial de la Federación [D.O.], 26 de Mayo de 1995, at 2 (illustrating the text of the Act). This Mexican statute was inspired by the United States 1789 Judiciary Act.

[159] *Id.* at Article 77.

[160] Iniciativa Presidencial de Reformas al Poder Judicial y de la Administración de Justicia Constitucional, Presidencia de la Republica, Palacio Nacional, México, Dec. 5, 1995, at 18; *see also* Vargas, *supra* note 153, at 327.

[161] See Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], Article 92, Diario Oficial de la Federación [D.O.], 26 de Mayo de 1995; the functions and powers of this Institute are controlled by "the norms to be determined by the Federal Council of the Judiciary in the respective regulations." *See also* Jorge A. Vargas, *supra* note 153, at 327.

universities; these programs serve to benefit federal judges in their constitutional mandate to timely resolve the matters of which is the subject of this Note.[162]

The Institute of the Judiciary has the support of an Academic Committee (*Comité Académico*),[163] with the ability to implement "programs and courses" designed:

> 1) To develop a practical knowledge regarding the procedures and matters under the jurisdiction of the Council of the Federal Judiciary; 2) To perfect certain technical skills; 3) To strengthen and specialize in matters dealing with the applicable law, doctrine and jurisprudence (*jurisprudencia*); 4) To perfect techniques on legal analysis, interpretation and argumentation; 5) To teach administrative techniques relating to the jurisdictional function; 6) To develop legal vocations in favor of a judicial career, and the ethical values associated with it; and, 7) To promote academic exchanges with institutes of higher education.[164]

Given the importance, originality, and complexity of these new collective actions, it may be prudent for the Mexican Congress to require the Federal Council of the Judiciary to administer a course and require members of the federal judiciary interested in participating in these actions to attend. This could help mitigate some of the potential problems that may occur in the presence of an inexperienced judiciary.

B. *The Role of Federal Judges in Collective Action Litigation*

As the idea of group litigation is novel to Mexico, federal judges must be prudent in the issuance of decisions during the initial years of implementation of collective actions. Since Mexico does not adhere to the principle of *stare decisis*,[165] the significance of case law in Mexico is secondary compared to the importance given to the legal principle, rule, or norm found in the appli-

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[162] Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], Article 92, Diario Oficial de la Federación [D.O.], 26 de Mayo de 1995.

[163] Jorge A. Vargas, *supra* note 153, at 327.

[164] Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], Article 95, Diario Oficial de la Federación [D.O.], 26 de Mayo de 1995.

[165] *See* Jorge A. Vargas, *Legislative Enactments – Mexican Law with Professor Jorge A. Vargas*, http://www.mexlaw.com/best_websites/2_legislative.html, according to Black's Dictionary, the simplest notion of *stare decisis* is "to abide by, or adhere to, decided cases." As a doctrine, "when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." *See also* Norne v. Moody, Tex. Civ. App., 146 S.W.2d 505, 509-10 (1940). As a policy of courts, it is when courts have to "stand by precedent, and not to disturb settled point." Neff v. George, 364 Ill. 306, 4 N.E.2d 388, 390-91 (1936).

cable provision of a given statute or code.[166] As a result, great significance will be placed on the applicability of legal principles employed in the litigation of collective actions.

As illustrated in the preceding part, the economic implications of the these forthcoming amendments and additions create situations in which it may be economically efficient to violate the law and pay compensatory damages to replace what the plaintiffs were objectively determined by a judge or jury to have lost, and nothing more. American jurisprudence implements punitive damages to punish a defendant for his or her conduct as a deterrent to the future commission of such acts. Such damages are likely to eliminate the economic incentive to intentionally violate one's legal obligations. In Mexico, remunerations analogous to punitive damages are likely to be implemented only in cases of egregiously insidious behaviors.[167] Under Mexican jurisprudence, the vast majority of damages issued in any sort of reparation are likely to come under the guise of "damages and lost profits" (*daños y perjuicios*).[168]

Additionally, to ensure the constitutionally guaranteed environmental rights of citizens are not subordinated to institutional economic interests, Mexican judges could begin to interpret Articles 2104 *et seq.* of the Mexican Civil Code expansively and incorporate additional damages to dissuade institutional actors from breaking environmental laws under the aegis of an economic efficiency argument. As mentioned in Part IV, Articles 2104 through 2109 of the Mexican Civil Code deal with the consequences of non-compliance.[169] In the coming years, Mexican judges should interpret these statutory provisions expansively to ensure that institutional actors are not incentivized to break the law. Specifically, Article 2109[170] should be read broadly to penalize any party receiving economic gains from a failure to meet a legal duty. The Mexican judiciary should be cognizant of the effects that its initial decisions will have on large institutional actors. The issuance of Article 2109 damages in such a way is likely to eliminate the economic incentive to intentionally violate one's legal obligations. Such an expansive interpretation could mimic

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[166] *See* Jorge A. Vargas, *supra* note 165.

[167] *See* Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico*, 35 U. Miami Inter-Am. L. Rev. 183, 187-88 (2004) (analyzing Mexico's recently introduced change in the Civil Code protecting the subjective notion of "moral damages" in civil liability cases).

[168] Antonio Ojeda Avilés & Lance A. Compa, *Globalización, Class Actions y Derecho de Trabajo* (2002), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1380&context=articles (last visited Oct. 13, 2011).

[169] *See* Código Civil Federal de México [C.C.F.] [Federal Civil Code], *as amended* on January 28, 2010, Articles 2104-09, Diario Oficial de la Federación [D.O.], 29 de Agosto de 1932 (Mex.).

[170] *Id.* at Articles 2108-09; Articles 2108 and 2109 define "damages" and "losses", respectively, as follows: "damage is the loss or decrease of assets suffered as a result of the failure to comply with an obligation" and "losses are the deprivation of lawful gains that would have resulted had there been compliance with an obligation."

the principles reflected in the United States Supreme Court's ruling in *BMW of North America, Inc. v. Gore*,[171] which held that additional pecuniary damages must be reasonable and determined by the degree of reprehensibility of the conduct that caused the plaintiff's injury.[172] This is the most administratively feasible option for members of the Mexican judicial system to eliminate the presence of such "efficient breaches" of citizens' constitutional rights in the coming years.

To guarantee the intent of the amendments and additions of the Decree are fulfilled, that individual constitutional rights are not alienated or subordinated to institutional economic interests, Mexico must implement a system of damages similar to the American system that punishes activities antithetical to the constitutional environmental rights of its citizens. This change need not be the issuance of "punitive damages" or the result of legislative action if Mexican judges begin to interpret Articles 2104 *et seq.* of the Civil Code more expansively and incorporate additional damages. If such a system may not be executed through the expansive reading of the relevant portions of the Mexican Civil Code, then it is the prerogative of the federal government to pass legislation that allows for the implementation of an equivalent arrangement. The inability to accomplish these juridical changes will fail to realize the intent of both the Decree, to fulfill the *lacuna legis* or *lacuna lex* of the citizens of Mexico, and the didactic purpose of the recent amendment of Article 4, the right of all persons to an adequate environment for their development and well-being, by placing institutional interests above the constitutional rights of the Mexican public.

2. *The Role of Mexican Lawyers in Collective Action Litigation*

As mentioned in Part IV, the Decree amends Article 586 of the Mexican Civil Code of Procedure to define adequate representation for group litigation in Mexico. The above analysis mentioned that Mexico has yet to rule on this aspect of collective action litigation.[173] The standards set forth in the amendment to Article 586 would seem to set rigid guidelines that ensure that group litigants are provided with diligent representatives as must be the case

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[171] *See generally* BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

[172] *Id.* at 575-82 (commenting on the feasibility of additional pecuniary damages; although this case focused specifically on punitive damages, numerous federal class actions decided thereafter have cited *BMW of North America, Inc. v. Gore* and held that additional pecuniary damages must be reasonable and determined by the degree of reprehensibility of the conduct that caused the plaintiff's injury). *See* Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998 (9th Cir. Cal. 2004); Abner v. Kan. City S. R.R. Co., 513 F.3d 154 (5th Cir. La. 2008).

[173] These amendments become legally effective March 1, 2012; *see* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended on* August 30, 2011, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

to ensure an effective organization for legal redress to affected citizens. However, because an ineffective representative is as deleterious as anything is to a plaintiff or defendant, federal judges must be sure that this article is strictly enforced. Like the United States, Mexico respects the principles of *res judicata* and allows only one attempt to resolve any collective action. Accordingly, it is paramount that Mexican lawyers approach collective actions, or any action, diligently to prevent the possibility of preclusion.

3. *The Role of Scientific Experts in Collective Action Litigation*

Numerous studies have documented the significant role that science plays as a tool in group litigation to substantiate claims and corroborate the validity of pecuniary damages.[174] Scientific data and expert testimony are often included to buttress a claim and the admissibility of such evidence is often a consequence of the extant evidentiary rules and their application.[175] In the United States as well as in many other countries, expert witnesses are at once detested and treasured.[176] "Experts are seen as mercenaries, prostitutes, or hired guns, witnesses devoid of principle who sell their opinions to the highest bidder."[177] However, this scorn is mitigated by the imperative function such scientific testimony plays in both its evidentiary role and the calculus of settlement.[178]

In Mexico, the pervasiveness of expert witnesses is not as widespread as it is within the United States. Simple demand-side economics would suggest that the paucity of legal decisions requiring experts in Mexico would suggest that the country might not have the quantity or be prepared to supply the qualified experts for such legal expertise. Mexico will need to deal with this inefficiency in the coming years – either by contracting with foreign experts or catalyzing the development of such experts in response to the need posed by collective actions.

Addressing the lack of expert witnesses, as well as addressing and training quality judges and lawyers in order to comply with the recent requirements of collective actions in Mexico is essential to the development of an efficient system of group litigation in Mexico.

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[174] *See generally* Suman Kakar & Sanjeev Sirpal, *The* In-Terrorem *Value of Science: Bisphenol-A Litigation and an Empirical Assessment of Science as a Collective Litigation Tool*, 2 Beijing Law Review 55, 55-62 (2011); P. Lee, *The Daubert Case and Expert Opinion*, Translating Evidence into Practice 1997 Conference Summary —Session B: Scientific Evidence and the Courts, *available at* http://www.ahcpr.gov/clinic/trip1997/trip2.htm.

[175] *See* Kakar & Sirpal, *supra* note 174.

[176] L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. Rich. L. Rev. 1389, 1389-90 (1995).

[177] *Id.*

[178] *See* Kakar & Sirpal, *supra* note 174, at 55-62; P. Lee, *supra* note 174.

VII. Conclusion

It does not suffice to recognize simply the constitutional right to a healthy environment; it is necessary to admit functional procedural legitimation to ensure these rights are provided, regardless of the desires of powerful institutional economic interests. This Note has discussed the insufficiency and inefficacy of the Mexican legal system, on its face value, for the protection of collective environmental rights. This Note has emphasized the need for the Mexican judiciary to allow for a more expansive reading of Articles 2104 *et seq.* of the Mexican Civil Code, or for the Mexican Congress to add additional parameters to implement and strengthen its vision to effectively protect the unassailable constitutional rights of its citizens.

Mexico has made significant progress in addressing environmental law issues through free-market environmentalism. However, the Mexican Congress must make substantive amendments to the nation's legal system to ensure that the environmental rights of citizens, guaranteed by the Mexican Constitution, are not subordinated to institutional economic interests. This Note advances the idea that the primary, most effectual vehicle for implementing such change is through the introduction of additional pecuniary damages with regard to collective actions in Mexico.

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