TACOS, TEQUILA, AND TAINTED ALCOHOL? AN
EXAMINATION OF THE TAINTED ALCOHOL PROBLEM IN
MEXICO AND WHAT IT MEANS FOR THE AMERICAN TOURIST

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I. INTRODUCTION

Warm weather, delicious food, and beautiful beaches make Mexico a favored vacation spot for many Americans. Just ask the Connor family who vacationed in Playa del Carmen in the summer of 2017. Upon the family’s arrival at one of Mexico’s most popular resorts, the two siblings decided to go for a swim and celebrate with a drink at the hotel bar. Just two hours later, Abbey, the family’s twenty-year-old, brunette-haired, bright-eyed daughter was found lying face down and unconscious in the resort’s pool. Maybe it was an accidental drowning, as Abbey’s death certificate states, but this is not certain. More often than not, the dangers associated with vacationing in Mexico revolve around gang activity and simply being in the “wrong place at the wrong time”. Other times, the reason tourists find themselves facing death involve a different kind of illegal activity within Mexico’s borders: the prevalent production and use of tainted alcohol.

A few weeks after Abbey’s death, the U.S. State Department’s Office of American Citizens Services and Crisis Management updated Mexico’s Country Specific Information to alert travelers regarding the prevalence of tainted or substandard alcohol in Mexico, that could cause illness or blackouts. Nonetheless, Mexico remains and will likely remain one of the top travel destinations for American tourists. With Americans now traveling to Mexico at their own risk, both Mexico and the United States must seriously address the tainted alcohol problem. This note assesses the rights of tourists victimized by tainted alcohol. More specifically, this note analyzes the rights of American tourists to impose liability on resorts, manufacturers, or the government of Mexico. This note will discuss the implications of bringing suit in either the U.S. or Mexico, and whether the remedies in these forums are adequate.

Part II of this note will begin by discussing product regulation for consumer safety in Mexico. Part II will then discuss Official Mexican Norms (NOMs), a primary way the Mexican government implements consumer

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3 Id.


safety standards. This note will focus on NOM-142-SSA1-1995, which provides mandatory labeling standards for alcoholic beverages in Mexico.\(^6\) It will then introduce and discuss the relevance of the Federal Commission for Protection against Health Risks (COFEPRIS).\(^7\) Mexico’s equivalent to the U.S. Food and Drug Administration, COFEPRIS is responsible for regulating consumer products and services that may entail health hazards. More importantly, COFEPRIS is the primary agency in Mexico that deals with regulating tainted alcohol.\(^8\) This part will conclude by discussing the current domestic regulations in place for tainted alcohol in Mexico.

Part III of this note will first provide a brief overview of Mexico’s tort law regime. Next, it will discuss what causes of action an American tourist may have against a resort or hotel where tainted alcohol was served and consumed. Next, this note will discuss the products liability cause of action an American tourist has under either Mexican or U.S. law. This part will then analyze whether American tourists have any cause of action against the government of Mexico. While countries are generally protected by sovereign immunity, this note suggests that other options are available to American tourists who want to hold the Mexican government liable. Part III will end by analyzing whether or not the remedies are adequate.

This note will conclude by reiterating that Mexico’s lack of regulations over those who produce, purchase, supply, and serve tainted alcohol is problematic. Customary international law currently exists on the treatment of tourists. In addition, the World Health Organization has developed a framework for regulating illicit tobacco products, thus, applying a similar model to tainted alcohol is feasible. This note will advance, from a policy perspective, that Mexico has an obligation to put some type of regulation in place for tainted alcohol. Ultimately, this note argues that if stricter domestic policies are put in place, American tourists traveling to Mexico can be assured that alcohol served is fit for consumption. Alternatively, American victims of tainted alcohol have legitimate causes of action to hold resorts, manufacturers, or the government of Mexico liable.

II. BACKGROUND

The Mexican government prioritizes protecting the population against public health risks associated with products sold, produced, or imported into

\(^6\) U.S. DEP’T OF TREASURY, INT’L TRADE RES. FOR MEXICO (2014) [hereinafter TRADE RESOURCES FOR MEXICO].


\(^8\) Id.
Mexico. In Mexico, the Federal Consumer Protection Act and the Federal Standardisation Act set a standard for products produced or sold in the country. Under the Federal Consumer Protection Act, “a supplier must provide consumers with specific warnings in relation to any product that...represent[s] a potential danger to consumers... or that has a dangerous nature that is foreseeable”.

To uphold product safety standards, the Federal Consumer Protection Agency of Mexico supervises compliance with consumer protection laws. Under its grant of authority, the agency initiates investigations into faulty products, issues recall orders, imposes fines, and orders reimbursement for any affected consumers. To further incentivize compliance, Mexican authorities can impose penalties if a product fails to comply with government standards or if a product jeopardizes the life, health, or safety of consumers. Penalties include: fines, temporary or permanent closure of business establishments, administrative detention, and suspension or revocation of relevant government licenses. Penalties may also vary since the agency must take into account factors including the degree of the breach, the intention of the responsible party, and the responsible party’s financial position.

Another way the Mexican government regulates products for safety is through the use of Official Mexican Norms (NOMs). Various departments of Mexico’s federal government issue NOMs, which govern the technical aspects of products sold in Mexico, such as the labels, warnings, and warranties that all products must contain. More specifically, NOMs are defined as “federal compulsory standards imposed on products, services, processes, activities, and work-place conditions...” A NOM’s authority extends to any business that manufactures, assembles, imports or sells products, furnishes services, stores, transports potentially harmful substances, or employs workers in Mexico. Thus, any business that has direct commercial deals with or in Mexico must comply with at least one of the many NOMs promulgated by the Mexican government.

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9 OECD Review, supra note 7, at 58.
10 Alfonso Septúveda et al., Product regulation, safety and recall Q&A: Mexico, Practical Law (Oct. 31, 2017) [hereinafter Mexico Q&A].
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 Signet, supra note 5, at 262.
19 Id. at 254.
20 Id.
For alcoholic beverages, NOM-142-SSA1-1995 requires that labels include the following information in Spanish: name/brand of the product, type of product, net content in metric units, country of origin, name/company name and address of the importer, alcohol content, lot number, and a warning statement.21 While the mandatory requirements of NOM-142-SSA1-1995 require proper labeling, they have no practical effect. Once the legally imported or domestically produced alcohol meets initial labeling requirements, manufacturers and illegitimate distillers can infuse the alcohol with cheaper products or extremely dangerous chemicals. These adulterated products, which initially pass the regulations of NOM-142-SSA1-1995, then end up in the hands of innocent consumers.

To combat these post-labeling health risks, the Mexican government established the Federal Commission for the Protection Against Sanitary Risks (COFEPRIS) in 2001.22 An agency under Mexico’s Ministry of Health, COFEPRIS has broad authoritative power over products and substances that present a public-health risk.23 The agency covers areas such as food and drink, medicines, medical equipment and supplies, and cosmetic products.24 In addition, COFEPRIS has authority to implement prevention and control strategies for risks considered deleterious to health. COFEPRIS also has the power to draft NOMs related to various products and ensure that any safety measures put in place are sufficient.25

In 2013, COFEPRIS proposed new regulations classifying ethyl alcohol and methanol as toxic substances, subject to sanitary regulation.26 Justifying the need for regulation, COFEPRIS emphasized an increase in the number of alcoholic beverages adulterated with ethyl alcohol and methanol throughout the country.27 Subsequently, COFEPRIS established control measures, traceability mechanisms, and registration procedures for all alcohol produced, traded, or imported into Mexico.28 The Ministry of Health, through COFEPRIS, then published a mandate that first required alcohol producers and importers to keep a precise and up-to-date record of the production, processing, manufacturing, preparation, mixing, condition, packaging, handling, storage, marketing, import, export, and transport of all alcoholic

21 TRADE RESOURCES FOR MEXICO, supra note 6.
22 OECD Review, supra note 7, at 58.
23 Id.
24 Id.
25 Id.
27 Id.
28 Id.
materials and products. Second, any sale of ethyl in bulk were prohibited, only allowing for the sale and distribution of pre-packaged ethyl. Third, the mandate required alcohol producers and importers to keep an extremely tight watch over their inventories. Once the mandate became effective, COFEPRIS reinforced its zero-tolerance policy for producers of illegal alcohol through a large number of verification visits to production sites, seizures of illegal alcohol, and closures of establishments and mills that failed to abide by regulations.

COFEPRIS also implemented Juntos contra la ilegalidad, or the Together Against Illegality campaign, working with other agencies in Mexico to stop the movement of illegal substances throughout the country. Under the Juntos campaign, COFEPRIS seized over 800,000 liters of illegal alcohol from two companies located in Veracruz and Hidalgo. COFRPRIS seized over 700,000 liters from the Veracruz company for violations including: having ethyl alcohol in bulk, bad labeling, poor sanitary conditions, and beverages without traceability. COFEPRIS seized the remaining liters from Hidalgo, including 1728 bottles of whiskey without documentation and some 16,000 liters labeled with counterfeit tags. In addition to seizing tainted alcohol, COFEPRIS also closed down a number of establishments for selling denatured alcohol to the public, lacking traceability measures, and refusing to allow inspectors in. By the end of 2015, the agency had carried

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34 Id.
35 Id.
36 Id.
37 Prensa, Comisión Federal para la Protección contra Riesgos Sanitarios, LA COFEPRIS y EL SAT ASEGURAN CASI 80,000 LITROS DE BEBIDAS
out more than 200 operations in various states and seized over 3 million liters of illegal alcohol in total.\(^{38}\)

When Abbey’s death garnered international attention in 2017, COFEPRIS immediately took action. In order to protect the health of tourists, COFEPRIS, in coordination with the Ministry of Tourism, worked to prevent the sale of adulterated alcohol in commercial establishments.\(^{39}\) Further protecting tourists, the Ministry of Tourism signed an agreement with COFEPRIS to implement permanent sanitary verifications in Quintana Roo, one of the most popular tourist destinations in Mexico.\(^{40}\) The agreement gave COFEPRIS the authority to ensure that the quality of food, water, and drinks complied with regulations.\(^{41}\) The agreement was a win-win, praised for its ability to protect both domestic and international visitors in Quintana Roo, while also protecting the millions of jobs generated by the tourism sector.\(^{42}\)

Under the new agreement, COFEPRIS conducted 31 verification visits to areas in Playa del Carmen and Cancun, closing down two establishments and seizing 344 liters of alcohol for inadequate sanitary conditions.\(^{43}\) COFEPRIS also shut down Fat Tuesday, a popular tourist bar in Cancun, for labels on alcoholic beverages that did not correspond to the original product.\(^{44}\) Additionally, the lobby bar of Hotel Iberostar Paraíso Maya, where Abbey Connor stayed, was shut down for violating sanitary conditions and serving alcoholic beverages that were expired and unlabeled.\(^{45}\)

Current regulations in Mexico emphasize the importance of coordinated work between the different federal agencies of Mexico. For example, both COFEPRIS and the Ministry of Tourism are committed to working together to guarantee the quality of products offered to tourists during their stay in Mexico.\(^{46}\) Moreover, the two agencies hope that the innovative Quintana Roo agreement will facilitate similar programs in other Mexican tourist


Id.

41 Id.

42 Id.

43 Id.

44 Id.

45 Id.

46 Id.
destinations. Additionally, the Secretary of Health, in coordination with COFEPRIS and the State Commission, continues to monitor beverages and food, in addition to training employees on the most current regulations.

Providing further assurance on the commitment to safety for tourists, a COFEPRIS official emphasized that administrative sanctions totaling over sixty million pesos have been imposed on commercial establishments throughout the country for breaching sanitary norms.

III. ANALYSIS

The structure of Mexico’s legal system can be viewed as a hierarchy. At the very top is Mexico’s Federal Constitution of 1917, followed by the five major codes of federal and state law. These codes define the legal rights and obligations of Mexican citizens and represent Mexican legislative efforts to integrate all norms into a systematic and comprehensive code. The Federal Civil Code plays the most salient role within Mexican society and is at the core of the Mexican legal system. More importantly, for purposes of this note, the Federal Civil Code also applies to tourists engaging in certain acts or transactions during their time in Mexico.

The Federal Civil Code is composed of four parts, also known as “Books.” Book 4 of the Federal Civil Code contains a chapter on “Liabilities Arising from Illicit Acts,” which articulates the basic principles that govern civil liability in personal injury and wrongful death cases. Under Mexico’s civil law, an act is deemed illicit when it is contrary to the laws of public order or customs. Public order, then, denotes the mechanism through which Mexico may declare that certain particular acts impinge upon the fundamental interests of Mexican society.

47 Id.
48 Id.
49 Id.

50 General Structure of the Mexican Legal System, JAMES E. ROGERS COLLEGE OF L. (July 31, 2017), http://libguides.library.arizona.edu/law-library/mexicanlaw/legalsystem (explaining that the five major codes are: the civil code, the civil procedures code, the criminal code, the criminal procedures code, and the commercial code).


52 Id. at 190.

53 Id. at 186 (citing C.C.D.F. art. 12).


55 Id.

56 Id. at 191 (citing C.C.D.F. art. 1830).

57 Id. at 190.
The Federal Civil Code, however, does not impose liability for torts, such as those found in common law jurisdictions in the United States.\textsuperscript{58} In the United States, tort law continuously evolves because of the particular facts of individual cases, resulting in a number of diverse and independent torts. Mexican tort law, on the other hand, is completely codified, and less susceptible to change.\textsuperscript{59} As a result, personal injury and wrongful death cases were largely non-existent for decades. Indeed, it was common knowledge in Mexico that no major law firm would even contemplate filing a suit in an “illicit act” case.\textsuperscript{60}

As tort law is largely underdeveloped in Mexico, personal injury or wrongful death liability hinges on the sparse frame of Article 1910 of the Federal Civil Code. It states: He who, acting improperly...or against the proper customs...causes damage to another, is obliged to make reparation for it, unless (such person) provides that the damage came about as a consequence of the fault or inexcusable negligence of the victim.\textsuperscript{61}

Thus, Article 1910 consists of two fundamental principles. First, a person or entity who commits a tortious act is obligated to compensate the victim. Second, contributory negligence bars any recovery.

A. Liability of the Resort

Travel law includes the traveler’s rights and remedies against resorts and hotels for wrongful death or physical injury.\textsuperscript{62} Thus, American tourists may sue a resort or hotel serving tainted alcohol. Case law in the U.S. also establishes that potential defendants located abroad include hotels, resorts, and parent companies that own the hotel or resort.\textsuperscript{63} The more pressing issue is where the tourist chooses to bring suit. If the tourist chooses to sue in Mexico, for example, the outcome, in terms of damages or other relief, may not be as favorable. There is an assumption that the worst strategy for a

\textsuperscript{58} 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 J. 475, 487 (2007) (attributing the absence of personal injury and wrongful death cases in Mexico to three reasons: the low reparation to indemnify a victim; the close relationship of Mexican law firms with major corporations; and the low education level of most Mexicans).

\textsuperscript{59} Id.

\textsuperscript{60} Vargas, supra note 51, at 196.


\textsuperscript{62} Thomas A. Dickerson, Accidents Abroad and Inconvenient Forums, 81-APR N.Y. St. B.J. 27 (2009).

victim is to sue in the foreign jurisdiction where the incident occurred.64 Thus, American tourists injured abroad tend to favor bringing suit in a U.S. court.65 These considerations make choosing a venue imperative. Generally, the forum selected by a plaintiff will be given serious consideration by a court.66 Thus, American courts have denied venue transfer requests to Mexico, fearing Mexico lacks the procedural safeguards and judicial efficiency necessary for an appropriate remedy. In Sacks v. Four Seasons Hotel Ltd., the court denied a Mexican resort’s request to transfer venue to Mexico because Mexico’s lack of procedural safeguards would have prevented plaintiffs from developing their evidence, and additionally, proceedings in Mexico would not have concluded within a reasonable time frame.67 Similarly, in D’Elia v. Grand Caribbean Co., plaintiffs were vacationing at a resort in Cancun, Mexico when the wife slipped on the floor and suffered serious injuries.68 The resort moved to dismiss the case, arguing Mexico as the proper venue.69 The court denied the motion because the resort offered “no authority to illustrate the existence of a satisfactory remedy for plaintiffs in Mexico or that their suit would survive Mexico’s statute of limitations”.70

If it is determined that the United States is the appropriate forum, Mexican law may still apply. Mexico strictly adheres to the traditional lex loci principle, meaning the law of the place where the tortious incident occurred is the law that governs the case. In Mastondrea v. Occidental Hotels Management, the plaintiff slipped and fell on a wet exterior staircase, breaking her ankle.71 The court held that while the New Jersey court had personal jurisdiction over the Mexican hotel, Mexican law applied to the action.72 The court found that Quintana Roo had a legitimate interest in its damage award criteria and “[A]pplication of New Jersey law would clearly frustrate the [domestic] policies of the…state.73 The court also emphasized that applying Mexican law was appropriate since the legal code of Quintana Roo was

64 Id. at § 8.18.
65 LAW JOURNAL PRESS, TRAVEL LAW § 1.03, Lexis.
66 See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 (1981) (explaining that if the remedy provided by the alternative forum is so clearly inadequate that it is no remedy at all, the unfavorable change in law may be given substantial weight and the district court may conclude that dismissal would not be in the interests of justice).
69 Id.
70 Id. at 7.
72 Id.
73 Id. at 290.
available in English and because international law consultants were available to clarify any misunderstandings.74

Alternatively, some courts have found Mexico as an adequate forum. In Loya v. Starwood Hotels & Resorts Worldwide, Inc., a tourist, vacationing in Mexico, died during a diving excursion.75 His widow brought a wrongful death action in U.S. state court against the hotel.76 The hotel cross-claimed for dismissal on the ground of forum non conveniens.77 The hotel argued that the activities leading up to the accident and the death itself occurred in Mexico and that evidence from people who were present before, during, and after the death were predominantly located in Mexico.78 The Ninth Circuit agreed with the hotel, and found Mexico as an adequate alternative forum.79 In another case involving Starwood Hotels, the court found that Mexico was an adequate forum because the resort stipulated that it would submit to the jurisdiction of any proper Mexican court.80 Additionally, the court found merit in the resort’s argument that as a foreign plaintiff, one could bring the Mexican equivalent of a tort action in the Mexican court.81 While the location of witnesses and evidence in Mexico may present challenges to bringing suit in the United States, precedent nevertheless shows that it is entirely possible to hold a Mexican resort or hotel accountable in a U.S. court.

American tourists may also impose liability on a resort or hotel by arguing a failure to investigate the dangers associated with tainted alcohol. This is a convincing argument, considering the history and presence of tainted alcohol in the major tourist destinations of Mexico. Courts should find resorts and hotels liable under the failure to investigate claim because it is these entities, and not the vacationing tourist, who are in the best position to assess the risks.82 The resort purchases the alcohol for the tourist’s consumption and can access information regarding the origin and production of the alcohol, as opposed to a tourist who relies on the resort to provide safe alcohol. More importantly, while similar cases in this context have been dismissed due to overly broad claims, a plaintiff’s claim in the case of tainted alcohol is narrow

74 Id.
75 Loya v. Starwood Hotels & Resorts Worldwide, Inc., 583 F.3d 656, 660 (9th Cir. 2014).
76 Id.
77 Id.
78 Id.
79 Id. at 665.
81 Id.
82 Contra Honeycutt v. Tour Carriage, Inc., 997 F. Supp. 694, 699 (W.D.N.C. 1996) (holding that there was no duty to warn the plaintiff of danger she could have observed and which the tour operator knew nothing about).
and particular as to the dangerous condition that caused the injury.\footnote{See Koons v. Royal Caribbean Cruises, Ltd., 774 F. Supp. 2d 1215, 1220 (S.D. Fla. 2011) (finding no duty to warn of high crime rate in Nassau). See also Darby v. Compagnie Nationale Air France 96 N.Y.2d 343, 349 (2001) (finding no duty to warn about hazards of the sea, including dangerous surf conditions).} This is especially true in cases where seizures of tainted alcohol occurred at the defendant resorts where past mislabeling or traceability violations have occurred. Under these particular circumstances, a resort is hard-pressed to claim that they did not know the dangers of tainted alcohol.

Finally, an American tourist may also hold a resort or hotel liable if the entity has advertised or solicited business in the United States. When such activity occurs, courts expect the entity to be available for lawsuits brought by injured residents.\footnote{See Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 715 (1st Cir. 1996) (holding that when a foreign entity directly targets residents in an ongoing effort to further a business relationship, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result because the district where the lawsuit is brought has a strong interest in protecting its citizens from solicitations for unsafe services). See also Reid-Walen v. Hansen 933 F.2d 1390, 1399 (8th Cir. 1991) (reversing the district court’s granting of defendant’s motion to dismiss on the ground of forum non conveniens because Bahamian hotel’s solicitation of business in the U.S. meant the hotel should not be surprised that it may be sued in the courts of the U.S.).} For various reasons, all-inclusive resorts in Mexico largely appeal to American consumers.\footnote{Susan Horner & John Swarbrooke, \textit{International Cases in Tourism Management}, 229 (2004).} American tourists are willing to fork over money for all-inclusive amenities provided by the resort because when everything is included in one place, the logistics of planning a vacation becomes easier. Thus, American tourists have a stronger case when a primary reason for staying at an all-inclusive resort includes the unlimited access to alcohol.\footnote{Jenny C. Ornberg & Robin Room, \textit{Impacts of Tourism on Drinking and Alcohol Policy in Low and Middle Income Countries: A Selective Thematic Review}, 41 \textit{Contemporary Drug Problems} 145 (2014) (discussing in recent years there has been a growth in “alcohol tourism” where alcohol or drinking becomes a main purpose of the trip).} Mexico’s advertising efforts to American consumers, who value the ease of an all-inclusive package, suggest that when a tourist is killed or injured in Mexico, American courts should retain jurisdiction.

Case law, however, suggests that bringing suit against a Mexican resort or hotel based on the entity’s advertisements in the United States is likely to fail. In \textit{Gianfredi v. Hilton Hotels Corp.}, the plaintiff sued after a slip and fall incident in a San Juan Hilton Hotel.\footnote{Gianfredi v. Hilton Hotels Corp., No. 08-5413, 2010 U.S. Dist. WL 1381900, at *1 (D.N.J. Apr. 5, 2010).} The plaintiff argued that the New Jersey courts had jurisdiction because of the hotel’s marketing, advertising, and
presence on the internet. The court dismissed the case. The court reasoned that the passive acceptance of customers and revenue from certain states could not subject a hotel to jurisdiction in New Jersey for any cause of action. Similarly, in Wilson v. Riu Hotels & Resorts, the plaintiff tried to recover damages for personal injuries sustained at the resort by arguing that she relied on the defendant’s printed brochures in making her decision to stay at the resort. The court found that even if the resort provided brochures to a travel agency in the United States for promotional purposes, jurisdiction could not extend to the Mexican resort because the plaintiff failed to show that the brochures specifically targeted Pennsylvania.

An American tourist who chooses to impose liability on a resort or hotel serving tainted alcohol must consider the various implications discussed above. An injured tourist will always prefer to have their case heard in an American court that will apply American law, but doing so is not always feasible. Despite conventional wisdom, many suits involving a foreign resort or hotel fail because courts find Mexico to be an adequate forum or, alternatively, the application of Mexican law to be appropriate.

B. Liability of the Manufacturer

Under traditional negligence law in Mexico, any tourist can initiate a product liability action based on a third party’s wrongdoing that caused harm. Defendants include any person or entity that caused or contributed to the harm. This means an American tourist has the ability to hold any manufacturer or distributor of tainted alcohol liable. In Mexico, plaintiffs bear the burden of showing: 1) that the harm is caused due to an action or omission on the part of the manufacturer or distributor that is contrary to law or good practice, 2) the immediate and direct linkage between the harm and damages, and 3) that the damages derive from the unlawful conduct on the part of the manufacturer or distributor. Once a plaintiff establishes these three elements, the burden shifts back to the defendant to prove that the harm caused was due to the fault or unacceptable negligence of the plaintiff. Alternatively,
the defendant may raise defenses such as *sine actio ne agix*, the defendant’s general denial of claims brought by the plaintiff, or a lack of legal standing.\(^{96}\)

It is very likely that an American tourist harmed by tainted alcohol will meet the three elements required for a product liability claim in Mexico. The first element, that an action or omission on the part of the manufacturer or distributor that was contrary to law or good practice harmed the plaintiff, is easily met. COFEPRIS and other Mexican authorities expressly prohibit the production of tainted alcohol. The manufacturers that continue to produce tainted alcohol act contrary to these laws harming the tourists who consume their products.

The second element, an immediate and direct linkage between the harm and damages, also falls in the tourists’ favor. It may be difficult, however, to prove that tainted alcohol is the cause-in-fact of a tourist’s injury. Every day, people all around the world choose to consume alcohol, which may or may not result in harm. Tainted alcohol, however, is different. The risks associated with tainted alcohol are much more serious than those associated with untainted alcoholic beverages. Therefore, the second element should focus on *tainted* alcohol. Given the hazardous materials in tainted alcohol, intoxication and blacking out occur much quicker. It can be argued that there is a direct linkage between tainted alcohol and harm since consumption of the exact same amount of untainted alcohol does not lead to similar consequences. Thus, tainted alcohol, rather than alcohol itself, is the direct reason for injuries caused to the consumer.

The third element regarding damages, is also easily met. The manufacture engages in unlawful conduct and there is no justification for such conduct. A tourist suffers damages and should be rightfully compensated when injury or wrongful death results from drinking tainted alcohol. Thus, the third element is satisfied.

Alternatively, Mexican tort law allows plaintiffs to pursue a strict liability claim against the manufacturers of tainted alcohol. A *responsabilidad objetiva*, or strict liability claim, arises from harm directly caused to the user by mechanisms, instruments, equipment, or substances that are considered inherently dangerous.\(^{97}\) Mexico views strict liability as a matter of public policy, thus, there are little exceptions or limitations to a strict liability action under Mexico’s law.\(^{98}\) The only defense available to the defendant under a strict liability claim is inexcusable or unacceptable negligence on the part of the victim.\(^{99}\)

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\(^{96}\) *Id.*

\(^{97}\) *Id.*

\(^{98}\) *Id.*

\(^{99}\) *Id.*
Historically, it was difficult for individuals to recover damages under a strict liability scheme in Mexico. Changes in Mexico’s law over the past couple decades, however, have made a strict product liability action more viable for plaintiffs. One such change is Mexico’s focus on the existence of an injury, rather than fault, in strict product liability actions. Fault is still recognized, but with increasing exceptions for products considered inherently dangerous. This, in turn, provides Americans with a strong cause of action against manufacturers of tainted alcohol.

Article 1913 of the Federal Civil Code states:

If a person uses dangerous apparatus, instruments, mechanisms, or substances he has to compensate [the injured party] for the damage caused, even if the act that caused the damage is not illicit, unless it is proven that the damage was caused as a consequence of fault or negligence of the injured party.

The Code asserts two major principles. First, there is compensation for damages caused by dangerous products. Second, compensation is provided even when the activity is legal. Under these two principles, American tourists have a very strong claim against manufacturers of tainted alcohol.

First, it is necessary to discuss what makes a thing “dangerous” under Mexican law. Case law in Mexico demonstrates the low bar for establishing the dangerousness of a product or substance. In a 1943 case, a Mexican power company asserted the defense that its cables were not “dangerous” because all possible care had been taken to make them safe. The Supreme Court of Mexico disagreed, analogizing the defendant’s argument to an automobile traveling down the highway. The court explained that although an automobile travels at speeds permitted by traffic regulations, that does not mean the automobile ceases to be a dangerous mechanism. Ten years later, the Supreme Court of Mexico once again addressed the dangerousness issue in another case involving the Mexican Light and Power Company. The court found that the dangerousness contemplated by Article 1913 was for the courts to decide, not the defendant, and the very fact that a product or substance caused an individual’s death established beyond a reasonable doubt the danger of such product or substance.

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102 Id. at 37.
103 Id.
105 Id.
106 Id. at 820.
Critics of the Supreme Court argue that what constitutes “dangerousness” is still vague and imprecise. They emphasize that any analysis of danger must take into account the functionality of the product. Nevertheless, there is no case in which Mexico’s Supreme Court has adopted this line of reasoning. Therefore, if a product causes death, a court will presume it is dangerous. The Supreme Court’s straightforward interpretation of danger has proven to be effective, as litigants almost never disagree with a lower court’s finding on the issue of “dangerousness” vigorously enough to appeal it to the Supreme Court. Thus, an American tourist would pass the “dangerousness” prong of a strict product liability claim, especially in cases where a death has occurred after drinking tainted alcohol.

Under the second principle of Article 1913, compensation will be provided if the plaintiff suffers harm, even when the manufacturer’s activity is completely legal. This favors the American tourist because any manufacturer of tainted alcohol is engaging in an illegal activity. Thus, compensation should be awarded to any tourist who suffers harm.

Under a strict product liability cause of action, a manufacturer will try to raise the inexcusable fault or negligence defense. A manufacturer is likely to blame injury on other factors such as irresponsible drinking on the plaintiff’s behalf. Mexican courts, however, have set a very high bar for this defense. First, in deciding whether the victim’s fault or negligence is “inexcusable”, Mexican courts do not apply the objective “reasonable man” test. Instead, Mexican courts apply a subjective test and use factors such as age and health to determine the fault of each victim.

Moreover, in earlier cases involving strict liability, Mexican lawyers tried to make a textual argument regarding the phrase “inexcusable fault or negligence”. In an early case, lawyers argued that although Article 1913 included both the words culpa (fault) and negligencia (negligence), the legislature intended for the two words to have different meanings; culpa with the more serious meaning. While negligencia may or may not be inexcusable, fault is inherently inexcusable. Thus, the lawyers urged the Supreme Court to read inexcusable as only modifying the word negligencia and not culpa. This would mean that any conduct of the victim considered as culpa would exonerate the defendant from liability. The Supreme Court disagreed and held that culpa and negligencia in Article 1913 were

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107 Butte, supra note 104, at 820 (citing Rafael Rojina Villegas, General Theory of Obligations, 3 COMPENDIO DE DERECHO CIVIL 274, 276 (1962)).
108 Id.
109 Butte, supra note 104, at 820.
110 Id. at 825.
111 Id.
112 Butte, supra note 104, at 824.
113 Id.
114 Id. at 824-25.
synonymous, and “inexcusable” applied to both terms.\textsuperscript{115} A manufacturer defending on the grounds that a plaintiff was inexcusably negligent or faulty in making the decision to consume alcohol is unlikely to prevail. In the end, tourists who drink alcohol in a foreign country have no choice in whether they consume alcohol that is tainted. In fact, given the choice, most, if not all, consumers would not choose to consume tainted alcohol. Therefore, there is no fault or negligence at all on the part of the tourist.

Alternatively, the U.S. travel tort regime allows an American tourist to bring claims against a foreign manufacturer in the United States.\textsuperscript{116} An American tourist who has met the initial procedural thresholds of establishing personal jurisdiction, service of process, and forum non conveniens has the option of pursuing action in a U.S. court.\textsuperscript{117} In the U.S., manufacturers and processors of alcoholic beverages can be held liable under theories of negligence and strict liability.\textsuperscript{118}

In a negligence claim, a plaintiff must first address the “duty of care” question. This question asks whether the manufacturer, processor, or seller owed a duty of care to the consumer.\textsuperscript{119} A significant case, on this point is \textit{Anheuser-Busch v. Southard}.\textsuperscript{120} Here, the plaintiff brought action against the beer manufacturer after becoming ill from drinking beer contaminated with moths and flies.\textsuperscript{121} The plaintiff claimed that the manufacturer’s negligence in sealing the beer bottle caused the plaintiff’s injuries, extreme pain, and mental anguish.\textsuperscript{122} The court found for the plaintiff, explaining that the beer manufacturer was required to use ordinary care in the manufacture of its beverages.\textsuperscript{123} The court noted that under the ordinary care standard, the manufacturer was only required to exercise such care and caution as would be exercised by an ordinary prudent person under similar circumstances and like conditions.\textsuperscript{124} The court ultimately held that the manufacturer was required to use care in the production, preparation, and bottling of its beer as would render it safe for human consumption.\textsuperscript{125}

\begin{thebibliography}{99}
\bibitem{115} Butte, \textit{supra} note 104, at 825.
\bibitem{117} \textsc{Litigating International Torts in U.S. Courts}, \textit{supra} note 63, at § 1.2.
\bibitem{118} Francis M. Dougherty, Annotation, \textit{Products Liability: Alcoholic Beverages}, 42 A.L.R. 4\textsuperscript{th} 253 (1985).
\bibitem{119} \textit{Id.}
\bibitem{120} \textit{Anheuser-Busch v. Southard}, 84 S.W.2d 89 (Kan. 1935).
\bibitem{121} \textit{Id.}
\bibitem{122} \textit{Id.}
\bibitem{123} \textit{Id.} at 90.
\bibitem{124} \textit{Id.}
\bibitem{125} \textit{Id.}
\end{thebibliography}
Under the reasoning of *Anheuser-Busch*, a U.S. court is inclined to find against a Mexican manufacturer of tainted alcohol. Any manufacturer of tainted alcohol will never meet the ordinary care standard articulated by the *Anheuser-Busch* court. This is especially true because tainted alcohol manufacturers engage in an activity that no ordinary, law-abiding manufacturer of legal alcohol would engage in. Moreover, no matter how much care manufacturers use in the production, preparation, or bottling of their product, tainted alcohol will never be safe for consumers.

Once a plaintiff establishes that the manufacturer, processor, or seller owes a duty of care, the remaining elements of a negligence claim fall into place. Regarding a breach of the duty owed to a consumer, courts will hold a manufacturer or processor liable if there is evidence that the manufacturer or processor knew or should have known of the adulteration of the alcoholic beverage. Clearly, those manufacturing tainted alcohol have complete knowledge of the activity they are engaging in. Therefore, a court deciding this issue does not have to engage in the more burdensome “should have known” analysis. Next, it must be shown that the tainted alcohol was the cause of the injury. It can be difficult for consumers to present sufficient causative proof to warrant holding the manufacturer, processor, or seller liable. For example, in *Weinberg v. Peter Doelger Brewing Co.*, the court held that a consumer of beer which was contaminated with dirt, sand, and other foreign substances could not recover damages from the manufacturer because the consumer produced no evidence to show that the condition of the beverage was the cause of his resulting illness. The court noted that from the evidence presented, the jury could have easily concluded that the consumer’s illness was caused by some product other than the beer manufactured by the defendant. Similarly, in *Murray v. Ballantine & Sons*, plaintiff’s beer, bottled by the defendant, contained foreign substances. The court held that the evidence was insufficient to establish liability of the manufacturer. The court stated that a causal connection was a vital element of the plaintiff’s case and without such proof, especially medical testimony, the plaintiff could not prevail.

An American tourist injured by tainted alcohol would have less difficulty showing a causal connection between the tainted alcohol and injury or illness. First, in stark contrast to the cases mentioned above, an American tourist would have a sufficient amount of relevant evidence to show the condition of

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126 Dougherty, *supra* note 118, at § 3[b].
128 *Id.* at 69 (explaining no evidence was introduced as to the nature of the sediment or establishing the fact that the foreign substance rendered the beer unfit for consumption).
130 *Id.*
131 *Id.* (explaining no evidence was admitted showing exactly what foreign substances were in the beer bottle).
the tainted alcohol was the cause of the injury, illness, or even death. For example, tainted alcohol that has been seized by the Mexican government from resorts and hotels, and specifically those with missing labels and untraceable features, could provide proof as to the unfit condition of the product. Moreover, medical testimony could be introduced, speaking to the effects of consuming tainted alcohol. Assuming the manufacturer or processor will be found guilty of negligence in the purchase or sale of the adulterated alcohol, damages are warranted for the plaintiff.132

Another option for holding manufactures of tainted alcohol liable is through a strict liability cause of action. It is true that virtually all products are capable of causing harm. Therefore, the law provides some exceptions to liability for inherently dangerous products because even when used properly, these products have the potential to cause harm due to their inescapable risks.133

In general, manufacturers are not liable for selling inherently dangerous products to the public as long as they provide adequate warnings about the risks of the product.134 Because many products cannot be made entirely safe for consumption, the Restatement (Second) of Torts states that “unreasonably dangerous,” as it relates to § 402A, means the product sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer.135 Even better for the American tourist harmed by tainted alcohol, the Restatement clearly expresses that tainted alcohol is unreasonably dangerous. Specifically, comment i of § 402A states “good whiskey is not unreasonably dangerous merely because it will make some people drunk and is especially dangerous to alcoholics, but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous.” 136

Under the assumption that tainted alcohol does not deserve the same protections as legal alcohol, § 402A states that one who sells any product in a defective condition, unreasonably dangerous to the user or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, if: a) the seller is engaged in the business of selling such a product; and b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.137 Under § 402A, Mexican manufactures of tainted alcohol will be found liable. First, the manufacturer is engaged in the business of selling tainted alcohol. Second, the manufacturer of the tainted alcohol is aware that the alcohol will reach consumers, including

132 Dougherty, supra note 118, at § 3[b].
135 RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (AM. LAW INST. 1965).
136 Id.
137 RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).
tourists vacationing in the country. To show there was no change in the condition of the tainted alcohol as sold, the American tourist must establish that the injury was caused by a defect in the product, and that such defect existed when the product left the hands of the manufacturer. The defect condition of the alcohol can be established through evidence of tainted alcohol that has been seized, and specifically those from manufacturing sites.

Under a product liability scheme in either country, an American tourist has a strong cause of action against a manufacturer of tainted alcohol. Pursuing a claim against alcohol manufacturers has historically been difficult, and at times, seemed impossible. Because of the inherently dangerous nature of alcohol, courts are hesitant to hold manufacturers liable. Tainted alcohol, however, is different. While tainted alcohol is technically an “alcohol” product, it should not receive the protections that other inherently dangerous products receive. Under certain circumstances, manufacturers of inherently dangerous products should be protected from liability because to some extent, consumers have common knowledge of the risks associated with these products. More specifically, consumers understand the risks associated with alcohol and make the ultimate decision of whether or not to consume such products. With tainted alcohol however, the consumer cannot assess the risks of such product because the consumer is not aware they are drinking tainted alcohol to begin with.

C. Liability of the Mexican Government

Historically, courts of every state have recognized the immunity of a foreign sovereign. Early on, Chief Justice Marshall firmly established foreign sovereign immunity in American law. Over a century later, in 1976, the Foreign Sovereign Immunities Act (FSIA) was enacted to codify the doctrine of sovereign immunity. FSIA provides that a foreign state is presumed immune from the jurisdiction of U.S. courts and may not be forced to submit to the jurisdiction of those courts unless a specific exception applies. As the world becomes increasingly globalized, courts are vigilant not to alter foreign relations with their decisions, and thus, foreign sovereign immunity principles remain. Growing recognition of individual rights, however, directly conflict with the underlying doctrine of sovereign immunity. Generally, American courts have followed the “absolute theory” of immunity,

139 See The Schooner Exchange v. McFaddon 11 U.S. 116, 146 (1812) (holding that until the United States exercised its complete territorial power “in a manner not to be misunderstood”, the United States promised impliedly to exempt visiting sovereigns from its jurisdiction because to hold otherwise would affect the power and degrade the dignity of the foreign sovereign).
which grants immunity in all cases where a sovereign is a defendant.\footnote{142} Nevertheless, our courts also attempt to put limits on the absolute theory of immunity to further another fundamental principle of American law: providing remedies for those who are wronged.

FSIA § 1605 provides general exceptions to the jurisdictional immunity of a foreign state.\footnote{143} These exceptions are the sole grounds for which a U.S. court may exercise jurisdiction over claims against a foreign state. For the American tourist injured by tainted alcohol, the most relevant exception to FSIA is the commercial activity exception.\footnote{144} The commercial activity exception applies broadly, reaching not only foreign states themselves, but also political subdivisions of foreign states and the agencies and instrumentalities of foreign states.\footnote{145} Under the commercial activity exception, an American tourist injured by tainted alcohol may attempt to pursue a claim against the Mexican government.

The commercial activity exception will withdraw sovereign immunity from a foreign state if two requirements are satisfied. First, the plaintiff’s lawsuit must be based on the foreign state’s commercial activity, or alternatively, an act in connection with the foreign state’s commercial activity.\footnote{146} Second, the foreign state’s act or activity must have a sufficient nexus or direct effect in the United States.\footnote{147} FSIA has defined a commercial activity as either a regular course of commercial conduct or a particular commercial transaction or act.\footnote{148} Moreover, under FSIA, courts must determine whether a particular activity qualifies as commercial based on the nature of the activity, rather than its purpose.\footnote{149} For example, the United States Supreme Court has held that regardless of a foreign state’s motive, courts must determine whether the conduct at issue is the type of conduct parties engage in for commerce.\footnote{150} If so, the commercial activity exception may apply. Conversely, if the conduct or transaction in question can only be carried out by sovereigns and is of a type in which private citizens cannot engage, the commercial activity exception does not apply.\footnote{151}

Under the first element of the commercial activity exception, the plaintiff’s claim must be based on a foreign state’s commercial activity or an act in

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\footnote{142} The Jurisdictional Immunity of Foreign Sovereigns, 63 Yale L.J. 1148, 1150 (1954).
\footnote{143} 28 U.S.C.A. § 1605 (West 2016).
\footnote{144} 28 U.S.C.A. § 1605 (West 2016).
\footnote{146} 28 U.S.C.A. § 1605(a)(2) (West 2016).
\footnote{147} Id.
\footnote{148} 28 U.S.C.A. § 1603(d) (West 2005).
\footnote{149} Id.
\footnote{151} See Saudi Arabia v. Nelson, 507 U.S. 349, 360-61 (1993) (holding that Argentina’s refinancing of debt by issuing bonds was a commercial activity because the bonds could be traded in international markets and promised a future stream of cash income).
connection with a foreign state’s commercial activity. Under the second element, the commercial activity must have a sufficient nexus, or direct effect in the United States. To find a sufficient nexus or direct effect exists, the plaintiff’s action must be based on: 1) a commercial activity carried on in the United States by foreign state, 2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere, or 3) an act outside the United States in connection with the foreign state’s commercial activity elsewhere that causes a direct effect in the United States. Since the American tourist consumes tainted alcohol in Mexico, the third clause of § 1605(a)(2) is most applicable and a court’s determination of whether a foreign state’s activity or act outside the United States has a direct effect in the United States is often a very difficult, fact-intensive inquiry. Because the tainted alcohol is consumed abroad, an American tourist who wishes to sue under the third clause of § 1605(a)(2) must take into account the various approaches taken by jurisdictions.

Early FSIA decisions made use of a “minimum contacts” standard when assessing jurisdiction under § 1605(a)(2)’s third clause. However, whether and to what extent courts apply this minimum contacts analysis also varies among jurisdictions. For example, the Eleventh Circuit has taken the view that the direct effects language of § 1605(a)(2) essentially makes it equivalent to the language of a minimum contacts standard. Thus the two analyses overlap. On the other hand, the Sixth Circuit has entirely eliminated the use of a minimum contacts analysis when determining whether a direct effect exists. More recently, some jurisdictions have said that to be direct, an effect must be an immediate consequence of the foreign state’s activity. Other jurisdictions have adopted the legally significant act test. This test focuses on the place where the legally significant acts giving rise to the claim occurred, in order to determine where the effect was actually felt.

An American tourist will argue that Mexico’s government engages in commercial activities by promoting tourism. Furthermore, Mexico’s government has continued to promote tourism even while the problem of tainted alcohol persists throughout the country, establishing a sufficient commercial activity that the plaintiff’s injury is based upon. Mexico will argue that promoting tourism is not a commercial activity that private parties can engage in. This argument is likely to succeed. When Mexico’s government promotes tourism and aids businesses and entities that seek to

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153 Guevara v. Republic of Peru, 608 F.3d 1297, 1309-10 (11th Cir. 2010).
155 Weltover, Inc., 504 U.S. at 618.
156 Terenkian v. Republic of Iraq, 694 F.3d 1122, 1134 (9th Cir. 2012).
engage in the tourism industry, the government is not said to be involved in a commercial activity under the FSIA. Instead, these activities are merely the promotion of opportunities and incentives within an area of Mexico.

Courts have also held that a foreign state’s commercial activity that eventually leads to the plaintiff’s injury is insufficient. In OBB Personenverkehr AG v. Sachs, an American tourist was seriously injured while boarding a train in Austria.\(^{158}\) The train was operated by the defendant, OBB, an Austrian state-owned railway.\(^{159}\) The plaintiff claimed her suit fell within the commercial activity exception because the suit was “based upon” the travel agent’s sale of the train ticket in the United States which could then be attributed to the defendant through the common law principles of agency.\(^{160}\) The District court held that Sachs’s suit did not fall within § 1605(a)(2) and dismissed the suit.\(^{161}\) The Ninth Circuit, sitting en banc, reversed, holding that OBB had engaged in a commercial activity in the United States.\(^{162}\) The Supreme Court reversed in a unanimous opinion and held that Sachs’s suit fell outside the commercial activity exception.\(^{163}\) The court found that the “gravamen” of Sachs’s suit plainly occurred abroad. The claims were based upon an unfortunate incident in Austria, allegedly caused by wrongful conduct and dangerous conditions in that country, not the selling of the ticket to the plaintiff.\(^{164}\)

The Supreme Court’s decision in Sachs illustrates plaintiffs’ difficulty in attempting to overcome FSIA. Many claims for acts occurring abroad are rejected by the United States, and when they are not, the exceptions to sovereign immunity are significantly limited. Since the Mexican government’s promotion of tourism will likely be deemed an insufficient commercial activity, an American tourist’s claim under §1605(a)(2) may be meritless. Even when a commercial activity is established, the gravamen of the American tourist’s claim will rarely occur in the United States. Instead, the “gravamen” of the claim occurs in Mexico because the American tourist consumes the tainted alcohol there. Due to the high bar set by FSIA, it is unlikely that an American tourist who suffers injury from tainted alcohol will be successful in holding the Mexican government liable.

\(^{159}\) Id.
\(^{160}\) Id.
\(^{161}\) Id.
\(^{162}\) Id.
\(^{163}\) Id. at 392.
D. Are the Remedies Adequate?

American tourists must keep in mind that there is possibly “no other area of Mexican law...as contrastingly different from U.S. law...” than Mexico’s civil liability law.\textsuperscript{165} As another scholar described it, “[A]part from the common element of all torts that is equally shared by the United States and Mexico, ‘that someone has sustained a loss or harm as the result of some act or failure to act by another’, there are no similarities”.\textsuperscript{166} For example, in Mexico, there are no juries in personal injury cases, there is no adherence to the principle of stare decisis, and punitive damages are non-existent.\textsuperscript{167} Therefore, the remedies available to American tourists may be inadequate.

Traditionally, Mexico’s legal framework did not provide compensation for any non-material or non-physical damages.\textsuperscript{168} Effectively avoiding an American-style system of awarding damages, Mexico has carefully crafted a scheme that awards only what it considers just compensation.\textsuperscript{169} Article 1915 states that damages shall consist, at the election of the injured party, either in the restoration of the damaged item to its previous condition when possible or in the payment of the damages and loss.\textsuperscript{170} In this regard, Mexico’s law for awarding damages in civil liability cases rests on the primary principle of restoring the damaged item to its previous condition.\textsuperscript{171} Only when restoration is not possible will compensation be provided for damages and losses.\textsuperscript{172} Additionally, Mexico believes in awarding the exact amount needed to compensate a victim for their damages.\textsuperscript{173} Payment exceeding a victim’s actual damages would be a windfall, which is contrary to Mexican Civil Law’s fundamental principles of justice and equity.\textsuperscript{174}

Moreover, under Mexican law, the damages owed to a victim of a tortious act are calculated based on the damage structure used in worker’s compensation claims.\textsuperscript{175} Federal Civil Code Article 1915 lays out the compensation scheme for injured individuals. Federal Civil Code Article 1915 states that when the damage is caused to persons and produces death, total permanent disability, partial permanent [disability], total temporary

\textsuperscript{165} Vargas, \textit{supra} note 58, at 484 (citing \textsc{stephen zamora et al.\textemdash}, \textsc{mexican law} 520 (2004)).
\textsuperscript{166} \textit{Id.} at 497.
\textsuperscript{167} \textit{Id.} at 484-86.
\textsuperscript{168} Vargas, \textit{supra} note 51, at 187.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textsc{jorge a. vargas, mexican civil code annotated – bilingual edition} 637 (2005) [hereinafter \textsc{mexican civil code annotated}].
\textsuperscript{171} Vargas, \textit{supra} note 51, at 201 (citing C.C.D.F art. 1915).
\textsuperscript{172} \textit{Id.} at 201-02.
\textsuperscript{173} \textit{Id.} at 202.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} Vargas, \textit{supra} note 51, at footnote 6.
[disability] or partial temporary [disability], the amount due as reparation shall be determined pursuant to what is prescribed by the Federal Labor [Act].

The Federal Labor Law, in turn, limits the maximum amount of damages that can be awarded. Any victim who is partially, temporarily, or permanently incapacitated will be remedied under a compensation formula set by the Federal Labor Law. The formula sets out the following damage calculation: the highest minimum daily wage in force in the state in which the tortious act occurred multiplied by four, and extending for the number of days during which the victim suffers from the incapacity, with a maximum of 1,095 days.

Damages are limited even more in cases of death. Article 500 of Mexico’s Federal Labor Act states that when death occurs, recovery shall include two months of salary for funeral expenses and payment of the amount established in Article 502. Article 502 states that in the case of death, the recovery shall be in the amount equivalent to the sum of 730 days of salary, without deduction of any prior recovery the worker received during the time of “temporary disability.” When damages are calculated based on worker’s compensation principles, an injured tourist’s recovery is reduced to a trivial amount. It is true that the civil codes of some Mexican states provide larger recoveries for accidents that occur within the country’s border. These state civil codes, however, do not apply to aliens traveling in Mexico. Instead, nationality and naturalization laws in Mexico provide that aliens are subject to the Federal Civil Code.

Fortunately, in 1982 Mexico amended its Federal Civil Code to include a new category of damages called moral damages. Article 1916 of the Federal Civil Code, as amended, reads:

It should be understood for moral damage the non-physical injury inflicted upon a person’s feelings, affections, beliefs, decorum, honor, reputation, privacy, image and physical appearance, or how that person is being perceived in the opinion of others. Moral damage is to be presumed when any

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176 Id. at 196 (citing C.C.D.F. art. 1915).
177 Jorge A. Vargas, Mexican Law for the American Lawyer 420 (2009) [hereinafter Vargas, Mexican Law for the American Lawyer].
178 Vargas, supra note 51, at 199 (citing The Federal Labor Act Article 500).
179 Id. (citing The Federal Labor Act Article 502).
181 Id.
182 Id. at 195.
person’s freedom, or his or her physical or psychological integrity, are illegitimately injured or diminished.\textsuperscript{183}

This resembles the American concept of pain and suffering.\textsuperscript{184} A party causing moral damage through an illicit act or omission must pay monetary damages in addition to any other civil damages.\textsuperscript{185} Historically, moral damages were limited to one-third of the actual, physical damage.\textsuperscript{186} Today, moral damages may be granted in unlimited amounts.\textsuperscript{187} In determining the amount of moral damages, Mexican courts will take into account a number of factors including the injured person’s rights, the degree of liability, the economic situation of the responsible party and the victim, as well as other circumstances of the case.\textsuperscript{188} Moral damages allow a greater damage award for the American tourist. This is especially true in jurisdictions like Quintana Roo, where the legislature amended the State Code allowing for moral damages.\textsuperscript{189} More importantly, the legislature of Quintana Roo amended its Code for the specific reason of protecting the tourism industry within that state.\textsuperscript{190} Nevertheless, moral damages may be ignored by a Mexican judge influenced by extra-judicial pressures.\textsuperscript{191}

Absent constitutional violations or strong public policy, American courts will apply Mexico’s damages scheme. In Feldman v. Acapulco Princess Hotel, the issue before the Supreme Court of New York was whether the law of the place a tort occurs governs the issue of damages in a personal injury action arising out of that tort.\textsuperscript{192} The plaintiff was injured on the pool slide at the hotel and subsequently brought action to recover damages for pain and suffering, lost income, and hospital and medical costs. In total, the plaintiff’s claim for damages exceeded $29,000.\textsuperscript{193} While acknowledging that the “Mexican limitation of damages may be distasteful to many and is surely disadvantageous to the plaintiff in this case,” the court ultimately held that the law of Mexico, where the tort occurred, governed the issue of damages.\textsuperscript{194} The court reasoned that “[A]pplication of the law of the place of injury and the defendant’s domicile best balances governmental interests and, to the

\textsuperscript{183} Vargas, supra note 51, at 212.
\textsuperscript{184} VARGAS, MEXICAN LAW FOR THE AMERICAN LAWYER, supra note 177, at 423.
\textsuperscript{185} Id.
\textsuperscript{186} Michael W. Gordon et al., Rendering and Enforcing Foreign Judgments in Mexico and the United States: A Panel Discussion, 2 U.S.-MEX. L.J. 91, 97 (1994).
\textsuperscript{187} Id. at 98.
\textsuperscript{188} MEXICAN CIVIL CODE ANNOTATED, supra note 170, at 639.
\textsuperscript{189} Gordon, supra note 186, at 98.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 488.
extent foreseeable, fulfills the reasonable expectations of the individual parties involved. Even with a clear recognition that the damage scheme in Mexico may unjustly prejudice a rightful plaintiff’s meritorious cause of action, the New York Supreme Court refused to find any public policy exception that would bar application of Mexico’s limitation of damages.

IV. CONCLUSION

The serious implications of tainted alcohol obligate Mexico to put stricter domestic policies in place. International customary law currently exists on the treatment of tourists. The most prominent player in this context is the United Nations World Tourism Organization (UNWTO) and its subsequent creation of the Global Code of Ethics for Tourism. The Code, created in 1999 and acknowledged two years later by the United Nations, is “a set of comprehensive principles for tourism addressed to governments, the travel industry, communities, and tourists alike.” Article 1.4 of the Code states:

It is the task of the public authorities to provide protection for tourists and visitors and their belongings; they must pay particular attention to the safety of foreign tourists owing to the particular vulnerability they may have; they should facilitate the introduction of specific means of information, prevention, security, insurance and assistance consistent with [the tourist’s] needs.

Mexico committed itself to the provisions of the Code when the country became a member of the UNWTO in 1975. In order for Mexico to retain its status as “a paradise for [American] tourists,” the country should abide by the Code’s provisions and eliminate the tainted alcohol problem.

While there is no binding international treaty on illicit alcohol, an international treaty on tobacco control exists – The World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC). The evidence-based treaty reaffirms the right of all people to the highest standard of health. The first treaty ever negotiated under the auspices of

195 Id.
196 Id.
199 See VARGAS, MEXICAN LAW FOR THE AMERICAN LAWYER, supra note 177, at 384 (explaining the significance of tourists and the tourism industry in Mexico).
200 Conference of the Parties to the WHO FCTC, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, WORLD HEALTH ORGANIZATION [WHO], http://www.who.int/fctc/text
the WHO, aims to counter the increase of harmful tobacco consumption by making it a legal requirement for countries to introduce certain tobacco-control strategies.201

Article 15 of the FCTC addresses the illicit trade of tobacco products. Article 15 reinforces that the elimination of all illicit tobacco products, including illicit manufacturing and counterfeiting, are essential components of tobacco control.202 Moreover, Article 15 recommends that each party adopts and implements effective measures to control and regulate the production and distribution of tobacco products to prevent illicit trade.203 In 2012, the very first protocol to the FCTC was created in accordance with Article 15 of the FCTC; its objective was to eliminate all forms of illicit trade in tobacco products.204 The Protocol required the establishment of a tracking and tracing regime and covered other important matters including offenses for liability, seizure techniques, and the disposal and destruction of confiscated products.205 Because the same challenges exist for illicit alcohol products as illicit tobacco products, a framework convention for illicit alcohol should be adopted.

Alcohol is the only psychoactive substance in common use that is not controlled internationally. Tobacco has the 2005 framework convention, psychopharmaceuticals have the 1971 convention on psychotropic drugs, and even sports doping conventions have been created to control substances used as performance enhancers.206 We know more today than ever about which strategies can effectively control alcohol related harms.207 Yet, little attention is paid to the physical and social burdens attributable to illicit alcohol. Thus, the international community must act.

Momentum is already gaining for a Framework Convention on Alcohol Control. In the past couple of years, the World Medical Association and the American Public Health Association have been among those who have voiced their support for such a framework.208 Noting the substantial contribution of

201 Id. at v.
202 Id. at art. 15.1.
203 Id. at art. 15.7.
205 Id.
alcohol to injury, disease, and death worldwide, supporters propose that the FCTC be used as a model for other global health problems, such as alcohol control.\(^\text{209}\)

A framework convention for alcohol control would greatly protect public health. First, a framework convention on alcohol could place restraints on international trade in alcohol. While Mexico’s tainted alcohol problem only involves alcohol consumed by an American tourist traveling in Mexico, implementing international trade regulations would certainly funnel to national and local controls on the alcohol market.\(^\text{210}\) The adoption of a framework convention for alcohol is also likely to have persuasive effects across all levels of government and society.\(^\text{211}\) The international treaty will call on Mexico to act, and provide Mexican officials with roadmaps and guidance on how to implement effective policies.\(^\text{212}\)

In order for Mexico to continue its reign as one of the most popular travel destinations, Mexico must take its domestic and international obligations seriously. The adoption of an international framework on alcohol will also aid Mexico in protecting against the harms of tainted alcohol. We must recognize the serious harms of alcohol at the international level to facilitate discussion. In turn, this discussion allows for the creation of an effective international alcohol policy. No other family should have to experience the unimaginable pain the Connor family experienced after the death of their only daughter. The problem of tainted alcohol is a serious threat to the lives of the millions of tourists who travel to Mexico every year and must be addressed immediately.

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\(^{211}\) Room et al., *supra* note 206, at 1249.

\(^{212}\) *Id.*