



# Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.

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LEX LOCI DELICTUS AND GLOBAL ECONOMIC  
WELFARE: SPINOZZI V. ITT SHERATON CORP.

Jack L. Goldsmith\* & Alan O. Sykes\*\*

I. INTRODUCTION

The traditional choice-of-law rule for tort was *lex loci delictus* — the law of the place where the plaintiff suffered the wrong.<sup>1</sup> Beginning with the legal realists in the 1920s, scholars (and later, courts) criticized the *lex loci* rule as formalistic, manipulable, unfair, and in some instances incoherent.<sup>2</sup> Judicial adherence to the *lex loci* rule has been diminishing for decades. Today only ten states embrace it.<sup>3</sup>

The *lex loci* rule has largely been replaced by interest analysis, its cousin the *Second Restatement*, and related approaches.<sup>4</sup> These modern choice-of-law methodologies are famously indeterminate and do not permit systematic generalizations about which substantive tort law governs in particular cases. But compared to the *lex loci* rule, the modern rules have one unmistakable consequence: they make it more likely that the forum court will apply local tort law to wrongs that occurred in another jurisdiction. For this reason, modern choice-of-law approaches give plaintiffs an incentive to sue in a forum that has more generous tort laws than the place of injury. This incentive is most powerful when plaintiffs are injured outside the United States by defendants amenable to suit within the United States. The substantive tort law and related procedural mechanisms available in U.S. courts are generally much more favorable to plaintiffs, and produce much larger recoveries, than the law and procedures available in foreign courts.

In *Spinozzi v. ITT Sheraton Corp.*,<sup>5</sup> Judge Posner, in typical contrarian fashion, presented a full-throated defense of the traditional *lex*

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\* Henry L. Shattuck Professor of Law, Harvard Law School.

\*\* Professor of Law, Stanford Law School. This essay draws on the more technical and elaborate analytical framework in Alan O. Sykes, *Transnational Tort Litigation as a Trade and Investment Issue* (Jan. 15, 2007) (unpublished manuscript, on file with the Harvard Law School Library).

<sup>1</sup> See, e.g., *Ala. G.S.R. Co. v. Carroll*, 11 So. 803, 805 (Ala. 1892).

<sup>2</sup> For a summary of these criticisms, see LEA BRILMAYER & JACK GOLDSMITH, *CONFLICT OF LAWS* 7–11, 21–22, 181–82 (5th ed. 2001).

<sup>3</sup> Symeon C. Symeonides, *Choice of Law in the American Courts in 2005: Nineteenth Annual Survey*, 53 AM. J. COMP. L. 559, 595–98 (2005).

<sup>4</sup> For a precise tally of states following these approaches, see *id.*

<sup>5</sup> 174 F.3d 842 (7th Cir. 1999).

*loci* rule in the context of a transnational tort. The plaintiff in *Spinozzi*, a dentist from Illinois, suffered serious injuries when he fell into a maintenance pit at a Sheraton hotel while on vacation in Acapulco, Mexico.<sup>6</sup> The district court, sitting in diversity and applying Illinois choice-of-law rules,<sup>7</sup> held that Mexican law governed the case and precluded the plaintiff's recovery because Mexican law "makes contributory negligence a complete defense to negligence liability and the uncontested facts showed that Dr. Spinozzi had been contributorily negligent."<sup>8</sup>

A unanimous Seventh Circuit panel, in an opinion by Judge Posner, affirmed. Judge Posner purported to apply the *Second Restatement's* "most significant relationship" test, which prevails in Illinois.<sup>9</sup> But he ignored the details of that test. Instead, he implicitly drew on an analysis that he had earlier sketched in his treatise.<sup>10</sup> He reasoned:

[The jurisdiction in which the accident occurs] is the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law. Most people affected whether as victims or as injurers by accidents and other injury-causing events are residents of the jurisdiction in which the event takes place. So if law can be assumed to be generally responsive to the values and preferences of the people who live in the community that formulated the law, the law of the place of the accident can be expected to reflect the values and preferences of the people most likely to be involved in accidents — can be expected, in other words, to be responsive and responsible law, law that internalizes the costs and benefits of the people affected by it.

. . . Illinois residents may want a higher standard of care than the average hotel guest in Mexico, but to supplant Mexican by Illinois tort law would disserve the general welfare because it would mean that Mexican safety standards (insofar as they are influenced by tort suits) were being set by people having little stake in those standards.<sup>11</sup>

Judge Posner argued, in other words, that because each jurisdiction has a comparative regulatory advantage with respect to events within its territory, the *lex loci* rule is efficient.<sup>12</sup>

<sup>6</sup> *Id.* at 843.

<sup>7</sup> See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that federal courts sitting in diversity must follow conflict-of-laws rules of the states in which they sit).

<sup>8</sup> *Spinozzi*, 174 F.3d at 844.

<sup>9</sup> *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971)).

<sup>10</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 645–46 (5th ed. 1998).

<sup>11</sup> *Spinozzi*, 174 F.3d at 845.

<sup>12</sup> Judge Posner noted in this analysis that the plaintiff's proposed application of forum law would imply that every non-Mexican plaintiff could go home and sue the hotel for torts that occurred in Mexico and would thus subject the Mexican hotel to differing and perhaps inconsistent obligations. *Id.* Judge Posner added, however, that the Sheraton could not claim to be concerned

Judge Posner's characteristically insightful comparative regulatory advantage argument for *lex loci*, and the analysis in his treatise on which it drew, has been influential in the burgeoning law and economics literature on choice of law.<sup>13</sup> Judge Posner, we think, was right to argue that application of the *lex loci* rule in cases of transnational torts promotes economic efficiency — but perhaps for the wrong reason. In our view, his arguments based on comparative regulatory advantage were overstated. But there is a different type of efficiency argument for a *lex loci* rule for transnational torts, one that relies on the basic antidiscrimination principles that inform the world trade regime.

## II. COMPARATIVE REGULATORY ADVANTAGE AND TORT LAW

Judge Posner's comparative regulatory advantage argument in *Spinozzi* is akin to one that economists have made in response to criticisms about relatively low standards of environmental and worker protection (safety standards, minimum wages, and the like) in developing countries. The critics claim that weaker standards are deleterious to the environment and to foreign workers (not to mention a source of unfair competitive advantage), and that nations with weaker standards should be pressured to raise them to the levels prevalent in developed countries. When, as in *Spinozzi*, a plaintiff argues for the application of U.S. law to an accident that occurred abroad, a similar claim is being advanced — in essence, that the applicable standard of liability in the country where the accident occurred is too low, and that the higher standard applicable in the United States is by some criterion more appropriate.

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with such varying liability because it had not insisted on choice-of-law or choice-of-forum clauses in its contracts. *Id.* at 845–46.

<sup>13</sup> The first significant economic treatment of choice of law was William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). Judge Posner raised choice-of-law questions in the first edition of his law and economics treatise, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 293 (1st ed. 1972), and presented the core of the comparative regulatory advantage argument in his third edition, see *id.* § 21.15 (3d ed. 1986). This analysis influenced the subsequent stream of conflicts scholarship using economics tools. See, e.g., Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002); Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L.J. 617 (1992); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990); Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in NEW DIRECTIONS IN LIABILITY LAW 90 (Walter Olson ed., 1988); Erin Ann O'Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 631 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000); Francesco Parisi & Erin A. O'Hara, *Conflict of Laws*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 387 (Peter Newman ed., 1998); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 59–68 (1989); Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975 (1994).

Economic writers have responded by arguing that heterogeneity in such matters as labor and environmental regulation is defensible and that raising standards in developing countries to those in developed countries would lower global welfare. Their essential argument is quite simple: Optimal labor and environmental standards depend on a range of factors including tastes, incomes, and access to technology. Because these factors differ across nations (and especially between developed and developing nations), there is no reason to think that standards should be the same everywhere. In particular, it is often desirable for developing nations to have lower labor and environmental standards because the opportunity costs of higher standards are greater in settings where the resources needed to obtain adequate food, clothing, shelter, medicine, and other basic necessities are in short supply.<sup>14</sup>

Judge Posner draws on this line of reasoning in suggesting that tort standards should differ across nations. Unpacked, Judge Posner's analysis is essentially as follows: Under the economic theory of accident law, damages should approximate the social harm caused by an accident, whether the liability rule is negligence or strict liability.<sup>15</sup> This proposition suggests a basis for important differences across nations in the quantum of liability. The amount of damages payable for a typical injury or fatality in lower-income countries will be lower because the amount that an optimal liability regime will induce to be spent on accident avoidance is lower — implicitly, the value of life and limb is lower in such countries, however jarring that may seem to some. For the same reason, the optimal amount of medical care for an injured individual, and thus the amount of compensation for medical expenses, will be lower.

The specific standard of care (level of precaution) for particular types of accidents should also differ across jurisdictions. Under strict liability, injurers will rationally (and optimally) take fewer precautions in jurisdictions where expected damages are lower. And under an efficient negligence regime, the due care standard will be set lower to reflect the fact that accidents are not as costly. The due care standard will also vary geographically according to a range of other factors that can influence the returns from care, such as population density and the

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<sup>14</sup> See generally 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996).

<sup>15</sup> Under negligence, if the due care requirement is the cost-effective level of care and damages are equal to actual harm caused, it will be rational for injurers to exercise due care because, by definition, it is cheaper to exercise due care than to pay damages in the event of an accident. Likewise, under strict liability, injurers will choose to exercise the cost-effective level of care if they must pay the actual cost of the harms that they cause. See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 259-60 (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 36-40 (1987).

state of economic infrastructure. Furthermore, the costs of accident avoidance can vary. Differences in human capital across nations can affect the costs to companies of inducing their workers to exercise care. Differences in manufacturing technologies can affect the costs of reducing the rate of product defects or industrial accidents.

Because of such considerations, Judge Posner concludes that the application of U.S. law to accidents that occur abroad may produce undesirable results from an economic standpoint. If the value of life or the appropriate level of compensation for medical expenses in Mexico were set with reference to the amounts established in U.S. lawsuits, for example, damages might deviate from the optimum by a wide margin. Similarly, if the due care standard in Mexico were assessed with respect to customary levels of care in the United States or to the costs of care in U.S. facilities, the same problem could arise. By contrast, Judge Posner reasons, the *lex loci* rule is efficient because of the comparative regulatory advantage of the jurisdiction in which the accident occurs.

Judge Posner's logic is sound up to a point, but it is subject to two important qualifications that Judge Posner does not discuss — qualifications that, taken together, undermine easy reliance on the comparative regulatory advantage argument for the *lex loci* rule.

The first qualification relates to the fact that if the core principles of U.S. tort law are efficient, as Judge Posner has often argued in his work,<sup>16</sup> then the application of those principles can yield efficient legal decisions when applied to an accident in any jurisdiction. For example, compensatory damages compute the present value of life and limb, lost income, medical care expenditures, and the like. If income streams are lower in Mexico than in the United States, and if medical care is less expensive there, then the application of U.S. law to a Mexican tort should result in appropriately lower recoveries. Care levels will then naturally adjust downward toward the optimum in cases governed by strict liability. And for cases governed by a negligence rule, proper application of the Learned Hand test will also result in a lower standard of care if the harm from a given accident is smaller or the costs of avoiding it are higher. In short, if U.S. tort law simply provides that people should take cost-effective precautions, then it will be efficient wherever it is applied. To the extent this is true, there is no longer any reason to prefer the *lex loci* to U.S. law for transnational torts. Indeed, to the degree that U.S. law is properly responsive to economic considerations and the law of other nations may not be, one might argue (naïvely, for reasons developed below) that the application

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<sup>16</sup> See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–34 (1972).

of U.S. law will actually improve matters by subjecting at least a subset of the accidents that occur abroad to a more sensible legal regime.

To be sure, the implementation of an “efficient” accident law regime, even in a purely domestic legal setting, is not a trivial task, because the information necessary to set efficient levels of care or optimal levels of damages can be difficult to obtain. A court may find it even more difficult when the relevant information is in another nation. Relatedly, even when the law embraces efficiency as its goal, the efficient rules of accident law are controversial. An efficient choice between strict liability and negligence, for example, is difficult to make and turns on such matters as the surplus associated with the curtailment of injurers’ and victims’ activity levels.<sup>17</sup> A similar difficulty arises in choosing between comparative negligence and contributory negligence (the issue in *Spinozzi*); either system can motivate parties to use due care in theory, at least under certain assumptions, although comparative negligence may inflate litigation costs.<sup>18</sup> The existence of error costs and their implications for appropriate rules of accident law also raise difficult challenges.<sup>19</sup> All of these problems exist in purely domestic systems; all of them may be exacerbated when courts in one nation try to apply efficient tort rules to harms caused in another.

These observations lead us to the second and more fundamental qualification of Judge Posner’s comparative regulatory advantage argument: there is simply no good reason to assume, as Judge Posner does, that differences in substantive tort law across jurisdictions represent efficient adaptations to conditions that vary geographically. There are many reasons other than efficiency why the details of liability standards and damages regimes might vary from nation to nation. Some nations may simply reject an economic approach to accident law in favor of a liability system that embraces some objective other than optimal deterrence. Different liability rules may also implicate different degrees of regulatory capture by trial lawyers or business lobbies, or even corruption. Liability rules may also be manipulated for the purpose of transferring rents from those outside a jurisdiction to those inside it. For these reasons, it is hard to believe that some of the most prominent differences between U.S. law and the law of other nations reflect efficient geographic variability. Why should U.S. law be far more receptive to the award of punitive damages, for example, than the law of most European nations? Do the large damages figures awarded in the United States and the relatively small ones awarded in many civil law countries really reflect differences in optimal damages?

<sup>17</sup> See Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 23 (1980).

<sup>18</sup> See LANDES & POSNER, *supra* note 15, at 201; SHAVELL, *supra* note 15, at 294 n.2.

<sup>19</sup> See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984).

Do we really believe that strict liability is efficient in the U.S. state jurisdictions that embrace it, but not in the states and nations that do not?

Judge Posner's *Spinozzi* opinion neglects this possibility that substantive rules across nations may reflect many factors, including chance, legal culture, history, the political efficacy of various interest groups, corruption, and other considerations bearing no systematic relationship to efficiency. Judge Posner reasoned that "if law can be assumed to be generally responsive to the values and preferences of the people who live in the community that formulated the law, the law of the place of the accident can be expected to reflect the values and preferences of the people most likely to be involved in accidents."<sup>20</sup> But the law of the place of the accident — in *Spinozzi*, Mexico — might not respond to the values and principles of its citizens, especially in nations with young or nonexistent democratic institutions. And citizens in any country might not believe that tort law should promote efficiency. It is also possible that the application of forum law — in *Spinozzi*, the law of Illinois — would be superior from an economic perspective because that law itself better reflects the efficiency criterion, and because in proper application to a foreign accident it adjusts the efficiency calculus for local conditions.

In sum, Judge Posner's claim about the optimal heterogeneity of tort law has a kernel of truth to it, but he erroneously assumes that all geographical variation is efficient, and he overlooks situations in which forum law would be superior. For these reasons, his comparative regulatory advantage argument does not systematically and convincingly demonstrate that *lex loci* is more efficient than forum law. There is, however, a different economic rationale for *lex loci* in the transnational setting.

### III. LEX LOCI AND GLOBAL ECONOMIC WELFARE

To understand why the application of Illinois tort law in the *Spinozzi* situation may be inefficient, we need to understand how the defendants came to be sued in the United States. Dr. Spinozzi was injured in the Acapulco Sheraton hotel, a resort owned by Empresas Turisticas Integradas, S.A. de C.V., and operated by Operadora InterAmericana de Hoteles, S.A. de C.V., both Mexican companies.<sup>21</sup> Normally, a Mexican firm is not amenable to suit in U.S. courts for activities that take place in Mexico. It would violate due process for a U.S. court to assert personal jurisdiction over a foreign firm that

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<sup>20</sup> *Spinozzi*, 174 F.3d at 845.

<sup>21</sup> *Spinozzi v. ITT Sheraton Corp.*, No. 93 C 0885, 1994 WL 559110, at \*1 (N.D. Ill. Oct. 6, 1994).



had no activities in the United States and had not availed itself of the benefits of the U.S. economy.<sup>22</sup> But the Mexican hotel's owner had licensing agreements with, and its operator was partially owned by, U.S. corporations (Sheraton International, Inc. and ITT Sheraton Corporation) over which the U.S. courts properly asserted personal jurisdiction.<sup>23</sup>

If Dr. Spinozzi were injured in any one of the hundreds of local Acapulco hotels that had no connection to the United States, he would have no ability to sue it in a U.S. court, and thus little chance of having U.S. tort law govern the injury in Mexico. The effect of U.S. personal jurisdiction rules is that only U.S. firms and firms with close U.S. connections can be sued in U.S. courts for torts committed outside the United States. And thus only U.S. firms and firms with close U.S. connections can be subject, under interest analysis and related doctrines, to the much stricter U.S. tort laws for injuries that occur abroad. This means that non-U.S. firms that operate outside the United States are potentially subject to lower tort liabilities for their activities than their U.S. competitors in the same markets. Put another way, the structure of U.S. personal jurisdiction and choice-of-law rules can result in the more pro-plaintiff standards of U.S. tort law being applied *discriminatorily* to the detriment of U.S. firms who operate abroad. Such discrimination would not occur if U.S. courts applied the *lex loci* rule instead of forum-centered interest analysis and its variants, because under *lex loci* the same law applies to all torts that take place in a particular jurisdiction, regardless of where the defendants are from.<sup>24</sup>

Similar forms of discrimination are often condemned under national and international law. If a foreign government — say, Mexico — were to apply a tort liability rule that discriminated against American exporters by holding them to a higher standard of care or to greater damages obligations than Mexican firms or firms from some third country, it would violate Article I and/or Article III of the General Agreement on Tariffs and Trade<sup>25</sup> (GATT), now embodied in the agreements that comprise the law of the World Trade Organization

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<sup>22</sup> See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 103 (1987).

<sup>23</sup> *Spinozzi*, 1994 WL 559110, at \*2, \*6.

<sup>24</sup> To be sure, plaintiffs suing in U.S. courts might still enjoy important procedural advantages that they cannot enjoy in suits against competitors of U.S. firms. This observation offers some justification for doctrines, such as *forum non conveniens*, that force plaintiffs to sue in the forum where the accident occurred. See Alan O. Sykes, *Transnational Tort Litigation as a Trade and Investment Issue* 35–37 (Jan. 15, 2007) (unpublished manuscript, on file with the Harvard Law School Library).

<sup>25</sup> Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188.

(WTO).<sup>26</sup> Such discriminatory rules would also be condemned by the nondiscrimination obligations of the North American Free Trade Agreement<sup>27</sup> (NAFTA), by the Treaty of Rome,<sup>28</sup> and by mainstream doctrine under the dormant commerce clause of the U.S. Constitution.<sup>29</sup> All of these legal systems recognize that discriminatory domestic regulations can function as barriers to trade, equivalent to tariffs and quotas, by raising the costs of foreign firms relative to those of domestic firms. If all foreign firms are affected equally, the result is an inefficient substitution of domestic production for foreign production, as well as an inefficient increase in price to consumers. When particular foreign nations are singled out for discrimination relative to others, a further inefficiency known to economists as “trade diversion” arises — less efficient foreign producers expand their sales and more efficient foreign firms subject to discrimination contract their sales.<sup>30</sup> The same problems can arise when discrimination is targeted not at the export transactions of particular foreign suppliers, but at particular foreign investors, as inefficient substitution of those with higher costs for those with lower costs occurs.<sup>31</sup>

The legal rules against such discrimination are not triggered in *Spinozzi* and similar cases because any discrimination against U.S. firms is being imposed by U.S. courts. Discrimination by a nation or state against one of its own firms does not violate the WTO, NAFTA, the Treaty of Rome, or the dormant commerce clause. Nonetheless, *the adverse economic consequences of the discrimination are the same when a nation discriminates against its own.*<sup>32</sup> At the extreme, U.S. firms may find their costs raised to the point that they exit the market in question altogether, leaving it to be served by less efficient foreign rivals. In less extreme cases, U.S. entities will simply see their share of the market shrink and that of less efficient competitors expand. The magnitude of the loss in any given case will of course depend on the magnitude of the cost differential imposed by discriminatory liability rules. Other things being equal, the greater the cost disadvantage suf-

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<sup>26</sup> See JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 415–46, 479–531 (4th ed. 2002). For services industries, the relevant obligations are those of the General Agreement on Trade in Services (GATS), in which the nondiscrimination obligation is more nuanced but still extremely important. See *id.* at 853, 891.

<sup>27</sup> U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289.

<sup>28</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

<sup>29</sup> See Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 34–45 (1999), reprinted in 4 *THE GLOBAL TRADING SYSTEM* 314, 333–40 (Kym Anderson & Bernard Hoekman eds., 2002).

<sup>30</sup> See PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS* 245 (6th ed. 2002).

<sup>31</sup> See Sykes, *supra* note 24, at 11–27.

<sup>32</sup> For a formal economic analysis, see *id.*

ferred by U.S. firms when they are subjected to U.S. tort standards on a discriminatory basis, the greater the degree to which less efficient competitors who do not confront such liability will displace the U.S. firms.

This conclusion about the effects of discrimination against U.S. firms applies even if U.S. liability rules appear clearly superior to foreign liability rules from an economic standpoint.<sup>33</sup> The selective application of U.S. tort law to U.S. firms can then result in the worst of all possible worlds, as efficient U.S. firms exit the market in question and are replaced altogether by foreign competitors who have higher costs, yet exhibit no greater levels of safety because they remain subject to the inadequate foreign liability system. Not only will U.S. firms suffer losses as a consequence, but citizens of foreign nations will also suffer as the costs of goods and services rise and no improvement in accident deterrence is achieved. The only beneficiaries may be the recipients of ex post transfers from American firms — in substantial measure, the plaintiffs' lawyers who were smart enough to file suit in U.S. court.

The analysis thus far has, like Judge Posner's opinion in *Spinozzi*, focused on suits under state tort law. But the same basic principles apply in other contexts. Lawsuits under the Alien Tort Statute<sup>34</sup> (ATS) are a good example. In the latest wave of ATS litigation, foreign plaintiffs have sued corporations — primarily U.S. corporations — in U.S. courts seeking civil redress for violations of customary international human rights laws in non-U.S. countries. Since ATS-style tort suits by private parties to recover under customary international law are available only in the United States,<sup>35</sup> and because U.S. personal jurisdiction laws apply much more easily to U.S. than to foreign firms, ATS suits function in effect as a discriminatory tax on U.S. corporations that operate in foreign jurisdictions. This burden may seem of little moment when claims of ethnic cleansing, genocide, torture, and the like are at stake. But the fact remains that the economic effect of discriminatory ATS suits is the same as in ordinary tort suits: at the margin, business opportunities may shift from U.S. firms to their less efficient competitors with little effect on the objectionable behavior.<sup>36</sup> In this light, the significant limitations that the Supreme Court recently placed on the permissible causes of action in ATS cases can

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<sup>33</sup> *Id.* at 11.

<sup>34</sup> 28 U.S.C. § 1350 (2000).

<sup>35</sup> See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 3 (2002).

<sup>36</sup> See Sykes, *supra* note 24, at 31–32.

be viewed as a step in the direction of increasing global economic welfare.<sup>37</sup>

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Dr. Spinozzi's lawyers emphasized to the Seventh Circuit that "the growth in international travel and communications is shrinking the globe in a human sense."<sup>38</sup> Judge Posner responded by saying that "the implication for conflict of laws is the opposite of what they think. It is not that the place of the accident is of diminishing relevance to the choice of law, but that it is of increasing relevance."<sup>39</sup> Judge Posner was right, but not necessarily for the right reason. His comparative regulatory advantage argument for *lex loci* is suspect because it is questionable whether variation in tort laws across nations is an efficient response to conditions that vary by geography. A better economic argument for *lex loci* begins by observing that U.S. personal jurisdiction rules combine with modern choice-of-law rules to apply U.S. tort laws discriminatorily to U.S. firms in a way that, under standard principles of trade law, can reduce global welfare. *Lex loci* eliminates this distorting economic effect by ensuring that all firms are subject to the same standard of liability for torts committed in a particular place.

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<sup>37</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). For an explanation of how *Sosa* narrowed the scope of ATS litigation, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

<sup>38</sup> *Spinozzi*, 174 F.3d at 846.

<sup>39</sup> *Id.*