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OPENING THE U.S.-MEXICO BORDER: PROBLEMS AND CONCERNS FOR THE BUSH ADMINISTRATION, THE COUNTRIES, AND THE LEGAL SYSTEM TO CONSIDER

Jason C. Messenger[†]

I. INTRODUCTION

Before the tragic events of September 11, 2001,¹ one of the most highly debated issues was whether the border separating the United States (U.S.) and Mexico should be opened to the trucking and shipping companies of Mexico.² President George W. Bush and Congress have since decided to open the U.S.-Mexico border to allow Mexico's shipping companies access into the U.S. President Bush announced on September 15, 2001, that "[o]ur borders are tighter than they have ever been before,"³ and the security of the U.S. and Mexico border will no doubt play a prominent role in the trade relations between the two countries. The possible ramifications of the terrorist attack on the U.S. on free trade between the United States and Mexico are beyond the scope of this comment, but will briefly be addressed where applicable.

This comment will address the recent status of the trucking provisions of the North American Free Trade Agreement (NAFTA), the underlying

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1. *After a Day of Carnage, Nation Stalks the Killers*, ARK. DEMOCRAT GAZETTE, Sept. 13, 2001, at A1. On September 11, 2000, thousands were killed after terrorists hijacked four commercial airliners and used two of these planes to strike the Twin Towers of the World Trade Center in New York City, and one against the Pentagon in Washington, D.C. The fourth plane crashed in Western Pennsylvania. *Id.*

2. Joe Cantlupe & Dana Wilkie, *No Immigration Deal on Table for Fox Visit to U.S.*, THE SAN DIEGO UNION-TRIBUNE, Sept. 1, 2001, at A1.

3. Ian Christopher McCaleb, *Bush Works Phones to Build Coalition* (Sept. 15, 2001), at <http://www.cnn.com/2001/US/09/15/bush.terrorism/index.html>.

concerns and objectives of the U.S. and Mexico in relation to an open border, and the possible effects of an open border on the legal system of the U.S.

II. THE NORTH AMERICAN FREE TRADE AGREEMENT

A. *Background of the North American Free Trade Agreement and its Trucking Provisions*

NAFTA was entered into by the U.S., Mexico, and Canada on December 17, 1992, and implemented two years later, on January 1, 1994.⁴ NAFTA was designed to promote and expand free trade between the U.S., Canada, and Mexico.⁵ The enactment of NAFTA merged the U.S., Canada, and Mexico into the largest free trade region in the world.⁶ The agreement was revolutionary because it took Canada and Mexico, two of the United States' biggest trading partners, and created the goal of elimination of trade barriers, promoting fair competition, and increased investment opportunities.⁷

Despite these goals, NAFTA has been the subject of much controversy with proponents claiming that NAFTA is necessary for the economic success of North America, and opponents claiming that NAFTA means fewer jobs for Americans and will cause multiple domestic issues.⁸ However, both the U.S. and Mexico have benefited from the agreement, with exports to the U.S. amounting to approximately 25% of Mexico's economy and U.S. exports to Mexico totaling over eighty-seven billion in goods and services in 1999.⁹ The shipment of these goods across the border of the U.S. and Mexico via ground carriers remains a hotly contested and unfulfilled provision of NAFTA.

4. North American Free Trade Agreement, 32 I.L.M. 289, 32 I.L.M. 605 (1992) [hereinafter NAFTA]; North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3311 (1994).

5. Michael R. Skahan, Comment, *The NAFTA Trucking Dispute With Mexico: Problem? What Problem?*, 5 NAFTA L. & BUS. REV. AM. 603 (1999).

6. John C. Thomure, *The Uneasy Case for the North American Free Trade Agreement*, 21 SYRACUSE J. INT'L L. & COM. 181 (1995).

7. *Id.*; see also Skahan, *supra* note 5, at 604.

8. Pamela C. Schmidt, Note, *NAFTA: The Effect of the Motor Carrier Provisions on the Future of the Agreement*, 20 HASTINGS INT'L & COMP. L. REV. 505 (1997).

9. Graham Jones, *End of a Special Relationship?* (Sept. 6, 2001), available at <http://www.cnn.com/2001/WORLD/europe/09/06/bush.europe/index.html>.

B. *The Trucking Provisions of NAFTA*

1. The Beginning of the Dispute: The Clinton Administration

The NAFTA provisions governing motor carriers intended a gradual removal of restrictions on operation of trucks between the U.S. and Mexico.¹⁰ The provisions called for the open access of U.S. highways in its border-states to Mexico's ground carriers by December 18, 1995.¹¹ A reciprocating agreement was contained in these provisions, allowing Mexican drivers to obtain operating permits for the four border-states of the United States and drivers for the U.S. would be able to operate in Mexico's six border states.¹² Full access to the roads of Mexico, the U.S., and Canada was to begin on January 1, 2000.¹³ The full access to North American highways would have ended a thirteen-year freeze on the entry of Mexican trucks to the highways of the U.S.¹⁴

The governments of the U.S. and Mexico awaited the implementation of NAFTA's trucking provision and made preparations for the border opening.¹⁵ The U.S. Department of Transportation gave two million dollars for inspection costs to the U.S. border-states.¹⁶ The North American Transportation Summit, held on April 29, 1994, resulted in the issuance of a Memorandum of Understanding, which outlined the plans for cooperation between the transportation officials of the U.S. and Mexico.¹⁷ Mexican truckers were subsequently educated about the opening of the border and forthcoming inspections.¹⁸ Mexico also joined the U.S. and Canada in the Commercial Vehicle Safety Alliance (CVSA), which is a coalition designed to harmonize the inspection and safety requirements of the countries.¹⁹

The Clinton administration, feeling pressure from labor unions and the Democratic Party, delayed the implementation of the partial access to

10. See Peter J. Cazamias, Comment, *The U.S.-Mexican Trucking Dispute: A Product of a Politicized Trade Agreement*, 33 TEX. INT'L L.J. 349 (1998) (citing NAFTA).

11. *Id.*

12. *Id.* at 350.

13. Juan Carlos Luna et al., *Foreign Law Year in Review: Mexican Law*, 34 INT'L LAW. 861, 873 (2000).

14. Cazamias, *supra* note 10, at 349.

15. *Id.* at 352.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 353; see also Commercial Vehicle Safety Alliance, at <http://www.cvsa.org> (last visited Mar. 3, 2002).

the border-states.²⁰ The delay was announced on the day the provisions were to take effect, and the administration cited safety concerns and inadequate harmonization of U.S. and Mexico trucking standards.²¹ The harmonization standards called for the compatibility of the size and weight of trucks, safety standards, and licensing of drivers.²² This delay amounted to a breach of the agreed upon provisions of NAFTA.²³ The efforts of Mexico and the U.S. to implement NAFTA's trucking provisions apparently were not enough to appease the Clinton administration.²⁴ Mexico subsequently filed for arbitration under NAFTA's Chapter 20, and the panel ruled in February of 2001, that the U.S. violated its obligations to Mexico.²⁵

2. Pre-Opening Means of Cross-Border Shipping

The use of commercial trucks to carry goods from the United States and Mexico to each other is vital to the success of NAFTA. Commercial trucks transport 80% of trade value between the U.S. and Mexico, and 70% of U.S. and Canada trade is transported via trucks.²⁶ Unlike Canada, however, Mexico has yet to harmonize any of its standards with those of the United States, such as the requirement for periodic inspections.²⁷ Conflicting standards for truck regulation and safety have been cited as the main reason for the lack of implementation of the trucking provisions.²⁸

Despite the disparity in standards, the U.S. has allowed Mexican products and commercial trucking companies to come across the U.S.-Mexico border by different methods. Under the Motor Carrier Safety Act of 1994, Mexican commercial vehicles have been able to pass into and

20. Skahan, *supra* note 5, at 606-07.

21. *Id.* at 606.

22. Schmidt, *supra* note 8, at 508.

23. *Id.* at 509.

24. Skahan, *supra* note 5, at 606.

25. *Allowing Mexican Commercial Vehicles to Operate in U.S.: Hearings Before the House Comm. on Commerce Science, and Transportation*, 106th Cong. (July 18, 2001) (statement of Norman Mineta, U.S. Secretary of Transportation) [hereinafter Mineta House Testimony]; see also Skahan, *supra* note 5, at 612.

26. *Allowing Mexican Commercial Vehicles to Operate in U.S.: Hearings Before the House Transportation and Infrastructure Comm.*, 106th Cong. (July 18, 2001) (statement of Duane Acklie, Chairman of American Transportation Association) [hereinafter Acklie House Testimony]. This testimony is also available at http://truckline.com/insideata/comments/071801_statement_acklie1.html (last visited Feb. 9, 2002).

27. *Inspections*, at <http://www.cvsa.org/Inspections/inspections.html> (last visited Feb. 9, 2002).

28. Skahan, *supra* note 5, at 607.

operate in commercial zones within the U.S. border-states.²⁹ Over 8,000 Mexican trucking companies have authority to operate in these twenty-mile zones.³⁰ The most commonly used method involves the use of drayage trucks.³¹ A minimum of three drivers and three tractors are used for this process to carry a single international freight across the U.S.-Mexico border.³² For a shipment from the U.S. to Mexico, a truck from the U.S. carries the shipment to a warehouse just outside the border where it is picked up and carried by the drayage hauler.³³ The drayage hauler, operated by a Mexican carrier, carries the shipment across the border to a freight yard or warehouse, where the trailer will be picked up and delivered to the final destination within Mexico.³⁴ A downside of the drayage hauler method is the increase in the traffic and congestion along the U.S.-Mexico border, which directly results from the exchanges between the trucks at the border.³⁵ Additional downsides to this method include higher insurance costs and the cost of running three drivers and trucks on either side of the border.³⁶

3. The Bush Administration's Guiding Principles for Change

The Bush administration developed "four core principles" to aid in the implementation of the NAFTA trucking provisions.³⁷ The first is concerned with the safety involved with cross-border trucking from Mexico, which "will not be sacrifice[d]" for the implementation of the provisions.³⁸ Additionally, all drivers, trucks, and companies from Mexico wishing to operate in the United States, regardless of whether in a border zone or not, will be required to meet the "identical safety and operating standards that apply to U.S. and Canadian carriers."³⁹ The third principle

29. *Allowing Mexican Commercial Vehicles to Operate in U.S.: Hearings Before the House Transportation and Infrastructure Comm.*, 106th Cong. (July 18, 2001) (statement of Henry Cuellar, Secretary of State of Texas) [hereinafter Cuellar House Testimony].

30. *Id.*

31. See Acklie House Testimony, *supra* note 26.

32. *Id.*; see also David Eaton, *Transformation of the Maquiladora Industry: The Driving Force Behind the Creation of a NAFTA Regional Economy*, 14 ARIZ. J. INT'L & COMP. L. 747, 791 (1997) [hereinafter Eaton].

33. Eaton, *supra* note 32, at 791.

34. Acklie House Testimony, *supra* note 26.

35. Eaton, *supra* note 32, at 791.

36. *Id.*; see also Panel Presentation, *Cross-Border Movement of Goods: Developments in U.S.-Mexico Customs Procedures*, 7 U.S.-MEX. L.J. 169, 174 (1999).

37. Mineta House Testimony, *supra* note 25.

38. *Id.*

39. *Id.*

recognizes the need of the United States to fulfill its legal obligations to Mexico under NAFTA.⁴⁰ If the obligations are met, Mexico will reciprocate and permit U.S. trucks into Mexico.⁴¹ Equal opportunity and fairness to the "Mexican carriers lawfully operating in the United States" is the goal of the fourth principle.⁴²

President Bush's safety implementation plan for NAFTA's provisions has five parts, which require the cooperation of the U.S., Mexico, and the respective trucking companies.⁴³ The Administration first proposes a safety review of all trucking companies before allowing operations in the U.S.⁴⁴ The Federal Motor Carrier Safety Administration has proposed rules governing the applications of Mexican carriers for cross border operations within the United States.⁴⁵ Additionally, the Administration wishes to expand safety inspections of commercial vehicles at the border and increase the number of inspectors to handle inspecting the increased traffic flow during the times commercial trucks would be allowed through.⁴⁶ Driver audits have also been proposed, to insure compliance with the driver requirements, which include the number of hours the driver has been in service and licensing.⁴⁷ Finally, the Administration proposes improving the infrastructure of the borders and industry education programs for each country's drivers.⁴⁸

C. *Current Status of the Open Border Issue*

Congress passed a fairly restrictive bill on December 4, 2001, which will permit Mexican carriers to move past the commercial zones and into the rest of the continental U.S.⁴⁹ President Bush, most likely due to the heightened safety concerns after September 11th, relaxed his position on the strictness of the measures and signed the bill on December 18, 2001.⁵⁰ President Bush called the passing of the bill "an important victory for

40. *Id.*

41. *Id.*

42. *Id.*

43. Mineta House Testimony, *supra* note 25.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Lizette Alvarez, *Senate Votes to Let Mexican Trucks in U.S.*, N.Y. TIMES, Dec. 4, 2001, at A20.

50. *Congress Breaks Logjam on Mexican Truck Access: The Long Struggle Over Mexican Motor Carriers' Right to Operate in the United States Has Ended*, Logistics Management & Distribution Report, no. 1, vol. 41, at 13 (Jan. 1, 2002).

safety and free trade,” and also stated that the U.S. “must promote the highest level of safety and security on American highways while meeting our commitments to our friends to the south.”⁵¹ The legislation calls for safety inspections of every Mexican trucking company’s fleet if the fleet is larger than four trucks, physical inspections every ninety days of every Mexican truck operating in the U.S., electronic verification of most Mexican truck driver’s licenses, proof that the trucking companies have insurance and drug testing programs, and limits the entry of the trucks to only ten border crossings.⁵² Given the stringent requirements, and a host of other regulatory and economic factors, few Mexican carriers are expected to begin full cross-border operations once the U.S. highways are completely open and all the restrictions can be fully enforced, which could take several months.⁵³ Although the legislation to cover the open U.S.-Mexico border is now in place, the Department of Transportation (DOT) does not have an operational plan between it and the “border states to ensure that Mexican-domiciled carriers comply with U.S. safety standards.”⁵⁴

II. THE DEBATE: CONCERNS AND DESIRES OF MEXICO AND THE U.S.

A. *Mexico*

Mexico stands to benefit greatly once the United States’ obligations under the trucking provisions of NAFTA are fully implemented. Not only will the country be enjoying the full implementation of NAFTA, but Mexico will also begin to enjoy a relationship with the U.S. that will be quite similar to that between the U.S. and Canada. An open border with the U.S. will provide a basis for Mexico to narrow business, trade, and investment opportunity disparities that currently exist.⁵⁵ Mexico has enjoyed a substantial growth in trade with the U.S. and Canada, as well as growth in foreign investment, as a direct result of NAFTA.⁵⁶ Mexico’s

51. Christopher Lee, *House Votes to Allow Mexican Trucks to Begin Deliveries Throughout U.S.*, DALLAS MORNING NEWS, Dec. 1, 2001, at 2F.

52. *Id.*

53. U.S. General Accounting Office, *North American Free Trade Agreement: Coordinated Operational Plan Needed to Ensure Mexican Trucks’ Compliance With U.S. Standards*, Report No. GAO-02-238 (Dec. 2001) at 2 [hereinafter GAO Report].

54. *Id.*

55. Sidney Weintraub, *The Meaning of NAFTA and its Implications for the FTAA*, 6 NAFTA L. & BUS. REV. AM. 303, 310 (2000).

56. David M. Gilmore, *Free Trade Area of the Americas: Is it Desirable?*, 31 U. MIAMI INTER-AM. L. REV. 383, 393 (2000).

economy, however, has not yet grown to levels even close to that of its NAFTA trading partners. The economy of Mexico and the migration of Mexican citizens to the U.S. are perhaps the two core concerns of Mexico's president, Vicente Fox, and the government of Mexico.⁵⁷

1. The Economy of Mexico

The economy of Mexico relies on the prosperity of the U.S.⁵⁸ Therefore, when the U.S. is booming economically, the trade between the NAFTA countries increases, and Mexico profits from the international trade with the U.S.⁵⁹ Before the recent economic downturn of the U.S., Mexico's economy was growing at an incredible rate, and was the fourth fastest growing economy of the world's largest countries.⁶⁰ This was due in large part to foreign investment resulting from NAFTA, which has averaged around ten billion dollars per year.⁶¹ Half of Mexico's oil exports are to the U.S., and the country's total trade with the U.S. was \$246 billion in 2000.⁶² Tourism also plays a key role in the success of the Mexican economy, with almost 5.4 million visitors coming from the U.S. and Canada.⁶³ Since 1996, Mexican imports from the U.S. and exports to the U.S. have steadily increased, as well as employment in the *maquiladora* industry.⁶⁴

The *maquiladora* industry is almost completely reliant on trade with the U.S. through NAFTA.⁶⁵ In 1999, close to 34% of the total imports into Mexico and 46% of all exports were related to the *maquiladora* industry.⁶⁶ The industry works by the U.S. companies sending component parts and machinery to Mexico, where they enter duty free, and are assembled and subsequently sent back to the U.S.⁶⁷ The *maquiladora* industry has

57. See Fox, *Bush Promote Closer U.S.-Mexican Partnership* (Sept. 6, 2001), available at <http://www.cnn.com/2001/ALLPOLITICS/09/06/us.mexico/index.html>.

58. Brendan Case, *Bordering on an Upturn Mexico's Economic Fortunes Dependent on U.S. Recovery*, DALLAS MORNING NEWS, Jan. 26, 2002, at 1F.

59. *Id.*

60. Robert M. Kossick, Jr. & Julian Fernandez Necklemann, *Structuring Private Equity Transactions in Mexico*, 6 NAFTA L. & BUS. REV. AM. 105, 119 (2000).

61. *Id.*

62. See Acklie House Testimony, *supra* note 26.

63. Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 377 (2000).

64. See Gilmore, *supra* note 56.

65. See Symposium, *Workers, Profits, and Trade: The Benefits and Burdens of Maquiladoras*, 23 T. JEFFERSON L. REV. 45, 46 (2000) [hereinafter *Workers, Profits, and Trade*].

66. *Id.* at 49.

67. *Id.* at 46.

become a vital part of the border economy of Mexico, although these industries do exist throughout the country.⁶⁸ However, wage rates for the Mexican workers have not risen.⁶⁹

Mexico's economy, as previously stated, is dependent on the success of the U.S. economy.⁷⁰ Economic growth in the country has been slowed substantially, and President Fox's promises of a 7% economic growth by the middle of his first term are not appearing likely at this time.⁷¹ Mexico's low wages for its high population, as well as an unequal social hierarchy, have contributed to the country's historically poor economy.⁷² The low wages have prompted migrant Mexican workers in the U.S. to remit between six and eight billion dollars a year to their relatives still residing in Mexico.⁷³ The remittances are actually the third largest source of outside income for Mexico, after oil and tourism.⁷⁴ While these remittances help the Mexican economy tremendously, they have also led to an even larger concern for Mexico, migration of Mexican citizens to the U.S.

The fulfillment of the trucking provisions of NAFTA, and the resulting open border policy for the trucking companies of the U.S. and Mexico, do have some in Mexico concerned with possible effects on the shipping carriers in Mexico.⁷⁵ Many Mexican truck drivers and carrier companies are fearful that they will not be able to compete against the U.S. fleets, which are larger, more efficient, and more modern than that of their Mexican counterparts.⁷⁶ The costs of operating a truck, fuel, and parts are all significantly higher for the carriers of Mexico when compared to those of the U.S.⁷⁷ Furthermore, the average salaries for truck drivers of the U.S. are twice that of Mexican drivers.⁷⁸

68. *Id.* at 46-47.

69. *Id.* at 47.

70. Case, *supra* note 58.

71. *Id.*

72. Weintraub, *supra* note 55, at 309.

73. Presidents Bush, Fox Agree to U.S.—Mexico Bilateral Working Group on Immigration, 78 no. 8 Interpreter Releases 414, 415 (Feb. 26, 2001).

74. *Id.*

75. Chris Kraul, *NAFTA May Deliver Blows to Mexican Truckers*, L.A. TIMES, Aug. 15, 2001, at A1.

76. *Id.*

77. *Id.* At the time the L.A. Times article was written, diesel gas for a Mexican carrier in the border towns of Texas averaged around \$2.10 (U.S. dollars from Mexican pesos) compared to around a \$1.40 for a U.S. carrier. *Id.*

78. *Id.* The average annual salary of a truck driver in Mexico is \$20,000, compared to \$40,000 for a U.S. driver. *Id.*

The fulfillment of NAFTA's trucking provisions will further the Act's goal of free trade, and will work to attract investment into the trucking companies of Mexico.⁷⁹ Despite the fears of some in Mexico, the fulfillment of these provisions and the resulting competition with trucking companies of the U.S. has been viewed as "the best way to make Mexican transportation more efficient."⁸⁰ The open border will have a positive impact on the *maquiladora* industry, since it is the main source of drawing dollars and the key to development of Mexican industries is the U.S. dollar.⁸¹ The government and citizens of Mexico should be able to profit from the increased trade, investment, and exposure that an open border with the U.S. will likely bring.

2. Labor and Immigration

Mexico seeks an open U.S. border for labor, as well as trade.⁸² President Fox obviously realizes the importance of the migrant Mexican worker to the economy of Mexico, and its relation to NAFTA.⁸³ The Mexican president has been pushing for a guest worker program, to allow legal Mexican labor to grow in the U.S., and for health, education, and labor rights for Mexican citizens working legally in the U.S.⁸⁴ The increased rights would allow these citizens to join labor unions and get drivers' licenses.⁸⁵ President Fox has also expressed his desire for the U.S. to grant "blanket amnesty" for illegal Mexican immigrants in the country.⁸⁶

The Mexican government recognizes the benefits increased foreign investment and trade an open border will likely bring. A direct result of these increases is a more vibrant economy for Mexico, and a corollary to a more successful economy will be a decrease in migration. The fulfilled NAFTA trucking provisions will likely bring increased wages for the citizens of Mexico who work in foreign trade industries, thereby creating less of a need for Mexican citizens to travel across the U.S. border illegally.

79. *Id.*

80. *Id.*

81. *Workers, Profits, and Trade*, *supra* note 65, at 48-49.

82. Robert S. Leiken, Essay, *An End to Isolation*, FOREIGN AFFAIRS 91 (Council on Foreign Relations, Inc. Sept. 2001).

83. *See supra* notes 72-74.

84. Neal R. Peirce, *Fox's Vision: Right for the Century*, NATION'S CITY WKLY., Sept. 11, 2000; *see also Mexican Leader to Address Congress*, *supra* note 54.

85. *See* Leiken, *supra* note 82.

86. *Mexico's Leader Seeks Immigration Deal This Year* (Sept. 5, 2001), available at <http://www.cnn.com/2001/ALLPOLITICS/09/05/us.mexico/index.html>.

B. *The Primary Concerns of the United States*

1. Narcotics

The U.S. has been waging an overt war on narcotics since the administration of Ronald Reagan.⁸⁷ In 1999, close to fifteen million Americans were users of illegal drugs, which is the highest level of users since the 1979 estimate of close to twenty-five and a half million.⁸⁸ The war continues, as shown by the budget of the Drug Enforcement Agency (DEA), which was over one and a half billion in 2000.⁸⁹ Commercial traffic plays an invaluable role in the economy of the U.S. and the business of drug traffickers.⁹⁰

Drug traffickers smuggle record levels of narcotics into the U.S. via the U.S.-Mexico border, and are presenting a growing risk to the security of the U.S.⁹¹ Mexico is a major source of heroin, marijuana, and cocaine trafficking to the U.S.⁹² Three of the four primary points of cocaine importation are located along the Mexico border in Texas, Arizona, and California.⁹³ Marijuana trafficking through Mexico accounts for the majority of marijuana smuggled into the U.S.⁹⁴ This high volume of narcotics trafficking has established Mexican traffickers as "the world's preeminent drug traffickers."⁹⁵

The essential role of commercial traffic and the U.S.-Mexico border is obvious since rather large amounts of these illegal drugs are carried on tractor-trailers and are reused to carry the funds from the sales in the

87. See generally Douglas Herring, Comment, *Getting High from South of the Border: Illicit Smuggling of Rohypnol as an Example of the Need to Modify U.S. Response to International Drug Smuggling After NAFTA*, 18 LOY. L.A. INT'L & COMP. L. REV. 841, 857 (1996).

88. Drug Enforcement Agency, *Overview of Drug Use in the United States*, available at <http://www.usdoj.gov/dea/stats/overview.htm> (last visited Nov. 14, 2001).

89. Drug Enforcement Agency, *DEA Staffing and Appropriations FY 1973-2000*, available at <http://www.usdoj.gov/dea/stats/lawstats.htm> (last visited Nov. 14, 2001).

90. See generally Donnie R. Marshall, Administrator of the Drug Enforcement Agency, Congressional Testimony to House of Representatives Judiciary Subcommittee on Crime (Mar. 29, 2001), available at <http://www.usdoj.gov/dea/pubs/cngrtest/ct032901.htm>.

91. *Id.*

92. *Id.* Mexico is the largest point of shipment of South American cocaine, with 65% of the cocaine intended to be sold in America reaching its destination. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

U.S.⁹⁶ The full implementation of NAFTA's trucking provisions also play a key role, since the U.S. relies on interception of drugs at the border.⁹⁷ If inspection routines are not increased, shipments of illegal goods and narcotics will continue to pass through the border and perhaps at an increased rate given the inevitable increase of commercial traffic.⁹⁸ However, some feel that NAFTA will actually act to slow the flow of illicit drugs into the U.S.⁹⁹

Mexico and the U.S. have acted together in an effort to hasten the flow of narcotics into the U.S.¹⁰⁰ President Fox has pushed for cooperation with the U.S. and the battle against drug trafficking from Mexico.¹⁰¹ Fox has promised to increase Mexico's efforts to fight the drug trafficking that will result from the implemented provisions of NAFTA.¹⁰² However, even with increased inspections, illegal drugs are still going to enter the U.S. The governments of the U.S. and Mexico can only make it more difficult for traffickers to do business in the countries.

2. Immigration and Employment

The link between commercial vehicles entering the U.S. from Mexico and immigration is obvious. More commercial trucks allowed in the U.S. from Mexico means more chances for illegal immigrants to enter the country, along with legal Mexican citizens doing business in the U.S. The need of the illegal immigrant to leave his country fits the human "propensity to migrate in search of a better life," which is one of the most powerful human drives.¹⁰³ The impact immigration has on the population of the U.S. is evidenced by the fact that 40% of the U.S. population growth can be traced to immigration.¹⁰⁴ The flow of permanent immigrants, both legal and illegal, to the U.S. is at one of its highest levels ever.¹⁰⁵ The U.S. and Mexico agreed to negotiate a bilateral immigration agreement after concluding the negotiations for NAFTA, but as of this writing, no

96. See generally Drug Enforcement Agency, DEA News Release (June 20, 2001), available at <http://www.usdoj.gov/dea/pubs/pressrel/pr062001.htm> [hereinafter DEA News Release].

97. See generally Herring, *supra* note 87, at 848.

98. *Id.* at 853.

99. *Id.* at 853-54.

100. DEA News Release, *supra* note 96.

101. Fox, *Bush Promote Closer U.S.-Mexican Partnership*, *supra* note 57.

102. Peirce, *supra* note 84.

103. Peter H. Schuck, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT'L L. 1 (2001).

104. *Id.* at 3.

105. *Id.*

agreement has been reached.¹⁰⁶ President Bush and President Fox have expressed their desires to fulfill these promises, while also fulfilling the trucking provisions and obligations of NAFTA.¹⁰⁷ President Bush, however, is opposed to President Fox's call for "blanket amnesty."¹⁰⁸

Economic and social pressures have a great impact on the rate of immigration from Mexico to the U.S.¹⁰⁹ The proponents of the full implementation of NAFTA and its trucking provisions continue to argue that NAFTA will increase trade between the member countries, and the resulting economic improvements in Mexico should reduce the need for the country's workers to migrate north of the border to the U.S.¹¹⁰ Opponents of opening the U.S.-Mexico border argue the millions of illegal immigrants from Mexico have a detrimental effect on the labor force of the U.S. by increasing the unemployment rates in the U.S. counties along the Mexican border.¹¹¹ Immigration affects wage rates, work conditions, and the type of jobs available to the U.S. worker.¹¹² The demand for housing, education, consumer goods, and social services also correlates with the rate of immigration in the U.S.¹¹³

The effect the open border will have on the U.S. carriers and their employees is perhaps the key to their support or protest of the open

106. Maria Elena Bickerton, *Prospects for a Bilateral Immigration Agreement With Mexico: Lessons from the Bracero Program*, 79 TEX. L. REV. 895 (2001).

107. *Mexican Leader to Address Congress*, available at <http://www.msnbc.com/news> (last visited Feb. 9, 2002). President Fox expressed his desire on September 5, 2001, by telling President Bush and the American public "[t]he time has come to give migrants and their communities their proper place in the history of bilateral relations . . . we can and must reach an agreement." *Id.*

108. *Mexico's Leader Seeks Immigration Deal This Year*, *supra* note 86. President Bush is opposed to President Fox's call for "blanket amnesty" for illegal Mexican immigrants, but Bush is considering expanding the temporary worker program to allowing permanent residency to Mexicans living illegally in the U.S. *Id.* Bush feels the best way to reduce immigration is "for Mexico to grow a middle class, and the avenue for Mexico to grow a middle class is trade." *Id.* An amnesty program in 1986 granted permanent legal status to 2.7 million migrant workers, and a blanket amnesty program would grant such status to even more illegal immigrants. *See* Schuck, *supra* note 103, at 4.

109. *See supra* notes 71-73; *see also* Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J.L. & TRADE AM. 121, 125 (1998).

110. Johnson, *supra* note 109, at 132.

111. *See* J. Patrick Larue, *The "Ill-icit" Effects of NAFTA: Increased Drug Trafficking into the United States Through the Southwest Border*, 9-Sum CURRENTS: INT'L TRADE L.J. 38, 44 (2000). Approximately one in six workers in the U.S. are foreign born. Schuck, *supra* note 103, at 4.

112. *See* Schuck, *supra* note 103, at 3-4.

113. *Id.*

border agreement. The expected increase in Mexican presence in the U.S. upon complete implementation of the NAFTA trucking provisions has opponents of the plan, including the Teamsters, worried that the Mexican trucks will take business from U.S. carriers and cause a loss of employment for many of the American drivers.¹¹⁴ Supporters of the open border with Mexico include the American Trucking Association (ATA), which represents 30,000 trucking companies.¹¹⁵ The ATA's support for NAFTA stems from the ability of the U.S. carriers to form joint ventures with Mexican carriers, which could save American drivers the difficulty of traveling in Mexico.¹¹⁶ The joint ventures will allow U.S. carriers to operate more efficiently in Mexico by not having their drivers traveling for an even more extended period in a foreign country, and meanwhile expanding on the current level of business in the States.¹¹⁷

The issue remains whether President Bush will make concessions on his immigration policy. However, given his approval of the restrictive legislation governing the open border, concessions on his immigration policy do not seem likely. Members of the trucking industry in the U.S. have supported the Bush Administration's stance on NAFTA, but whether employment in the U.S. will be hurt as a result remains to be seen. Without proper inspection, illegal immigrants may be able to take advantage of the increased flow of vehicles into the U.S. The effect immigration has on the economy has been documented, and it may be possible for jobs to increase in the trucking industry while decreasing in other areas of employment.

3. Safety of U.S. Highways

The most pressing problem regarding the open border with Mexico's trucking companies is the safety of those trucks that currently, and those that will, pass through the U.S.-Mexico border, and what regulations and standards those Mexican carriers should be required to meet. Foreign motor carriers that operate in the U.S. must meet the same federal and state regulations that U.S. carriers are required to meet, which include insurance requirements, safety regulations, and payment of taxes and

114. Kraul, *supra* note 75.

115. *Id.*

116. *Id.* The increase in trade flow should lead to increased business and more jobs for the trucking industry in the U.S. Acklie House Testimony, *supra* note 26.

117. See generally Acklie House Testimony, *supra* note 26. The ATA foresees that U.S. drivers will continue to carry shipments to the U.S.-Mexico border where a "responsible" Mexican carrier will receive the shipment and take the shipment onto its destination in Mexico. *Id.* Furthermore, Chairman Acklie felt it would be several years before long haul deliveries would be carried out in the U.S. by Mexican carriers. *Id.*

fees.¹¹⁸ The drivers must meet all applicable immigration and custom laws.¹¹⁹ All of these requirements are reciprocal, so U.S. carriers are held to the standards and regulations of Canada and Mexico when operating in those countries.¹²⁰ Although President Bush and Congress have reached an agreement on what standards Mexican carriers will be required to meet, the DOT and the states must develop an operational plan to enforce those standards.¹²¹

a. Inspection of Foreign Carriers

The U.S.-Mexico border stretches for approximately 2,000 miles.¹²² With around 85% of all U.S.-Mexico trade passing via trucks, the road-worthiness of those trucks is essential to efficient trade between the countries.¹²³ Each foreign carrier must obtain a permit from the Interstate Commerce Commission (ICC) and comply with the standards of the Department of Transportation (DOT) to operate in the U.S.¹²⁴ The carriers of Mexico must also meet all of the requirements set forth by the legislation governing the open U.S.-Mexico border.¹²⁵

Although the rates for each border station may differ, of the thousands of Mexican trucks that enter the U.S. only approximately one-third of Mexican trucks crossing the U.S. border are inspected.¹²⁶ Over one-third, approximately 37%, of these trucks fail the inspection at the U.S. border.¹²⁷ Texas and California handle the largest portions of Mexican carrier border crossings of the four U.S.-Mexico border-states.¹²⁸ Texas inspectors do random checks on the roughly 8,600 trucks that pass through

118. Office of the Secretary of Transportation on the North American Free Trade Agreement Conference, July 13, 2001, 66 FR 36819, 2001 WL 786464.

119. *Id.*

120. *Id.*

121. GAO Report, *supra* note 53.

122. Ken Ellingwood, *CHP Border Inspection of Trucks Wins Praise*, L.A. TIMES, Aug. 2, 2001, at 1.

123. Ricardo J. Cata, *Emerging Markets Liability in Latin America*, 27 U. MIAMI INTER-AM. L. REV. 509, 518 (1996).

124. Eaton, *supra* note 32, at 792.

125. Alvarez, *supra* note 49.

126. Russ Rizzo, *Mexican Trucking Talks Stuck*, THE DALLAS MORNING NEWS, July 25, 2001, at 2D. It should be noted that the exact percentage of Mexico's trucks that are stopped and inspected at the border varies. Some trucking industry sources have reported the figure as low as 1%, based on an Office of the Inspector General audit report. See Sean Kilcarr, *Tug of War; Mexican Border Opening Still Up for Grabs*, FLEET OWNER, Aug. 2001.

127. Ellingwood, *supra* note 122.

128. *Id.*

the border every day, and handle almost 70% of the Mexican trucks passing into the southwestern U.S.¹²⁹ Mexican carriers passing into California have a failure rate of 27%, compared to the national average of 24% for U.S. motor carriers.¹³⁰ The inspection failure rates for Mexican trucks passing into the remaining states are 34% for New Mexico, 40% for Arizona, and 41% for trucks passing through Texas border stations.¹³¹ The reasons for this great disparity can be traced to the state assets dedicated to border stations.

b. Problems With Inspection at Borders

The current problems facing U.S. border-states and their inspection stations are a lack of inspectors and capital, which can be used to hire and train inspectors in addition to updating the inspection stations to include larger inspection bays for questionable trucks.¹³² Texas is attempting to stay at pace with the increasing demand for inspectors by hiring and training more, which will allow for more frequent inspections.¹³³ California has spent millions of dollars to expand the inspection stations along the U.S.-Mexico border.¹³⁴ The Texas State Government has also asked for additional federal funding to build eight new stations that will be more equipped to handle the increased traffic along the border.¹³⁵ These stations will be similar to those in California, which have been instrumental in helping inspectors catch and correct unsafe conditions on all trucks.¹³⁶ New Mexico and Arizona also have plans for new inspection stations.¹³⁷ All of the stations will need improvements in inspection of records, inspections, and proof of insurance.¹³⁸ The inspection of the logbooks is vital, since Mexico does not have a requirement on the number of hours a driver may be behind the wheel, unlike the U.S. and Canada.¹³⁹

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Ellingwood, *supra* note 122; *see also* Cazamias, *supra* note 10, at 352.

134. Eaton, *supra* note 32, at 794.

135. Ellingwood, *supra* note 122.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See* Skahan, *supra* note 5, at 611. The U.S. also requires that drivers be able to read and speak English well enough to speak to the general public and understand traffic signs and signals, as well as be able to respond to inspectors and other officials. 49 C.F.R. § 391.11(b)(2) (2001).

The DOT has asked for additional funding to double the current number of safety inspectors for each border state, and has also asked for room in the budget for eighty new federal safety inspectors, thereby raising the total number of state and federal border inspectors to almost five hundred.¹⁴⁰ The additional funding requested by the DOT for 2002 will be used to aid the border-states.¹⁴¹ The administration and border-states are obviously hopeful that the increased funding will allow for more thorough inspections and inspectors, which will allow the stations to be similar to those already in place in California.¹⁴²

c. Public Safety: Why the Two Sides Fail to See Eye to Eye

The Bush Administration and the American Trucking Association were two of the main proponents in the U.S. for the fulfillment of NAFTA's trucking provisions leading to an open border for U.S. and Mexican trucking companies.¹⁴³ The opposition to the open border issue has included many from the Democratic and Republican parties, as well as numerous private groups devoted to highway and U.S. citizen safety.¹⁴⁴ The proponents' strongest argument lies with the examples set by the California inspection system, while the opponents point to the status of Mexican highways and regulations.

In addition to complying with the terms of NAFTA and the NAFTA arbitration decision, the proponents of an open border with Mexico see it as a way to allow free exchange of goods through safe and responsible motor carriers for all of the NAFTA countries.¹⁴⁵ The open border will allow for efficient trading between the countries by eliminating the need for drayage carriers that are presently used to move goods across the border.¹⁴⁶ The proponents of the open border feel the proposals by the Bush Administration, and the use of the California inspection stations as a model, will keep the Mexican shipping carriers in compliance with the U.S. standards presently imposed on its own carriers and those of Canada.¹⁴⁷ Thorough application and inspection processes, proponents argue, will catch any problems with safety, registration, or insurance requirements.¹⁴⁸ In addition, an open border with the U.S. will not necessarily mean a

140. Mineta House Testimony, *supra* note 25.

141. *Id.*

142. *See generally* Ellingwood, *supra* note 122.

143. *See supra* notes 37-48; *see also* Acklie House Testimony, *supra* note 26.

144. *See Rizzo, supra* note 126.

145. *See Acklie House Testimony, supra* note 26.

146. *Id.*

147. *Id.*

148. *Id.*

deluge of unsafe Mexican shipping carriers on U.S. roadways, as some U.S. carriers use their own drivers to take the product to the border and exchange shipments with those Mexican carriers with whom they have a working partnership.¹⁴⁹ The opponents of the open border can also use the GAO report from December 2001 to criticize the lack of an operational plan for implementing the open border requirements.¹⁵⁰

Opponents of the opening of the U.S. border did not feel the Bush Administration's proposals prior to the passing of the open border legislation were adequate enough to ensure the safety of American motorists.¹⁵¹ The safety implementation plan President Bush supported allowed for an eighteen-month safe harbor for Mexican trucks to allow the Federal Motor Carrier Safety Administration (FMCSA) to compile information from the inspection of the trucks and to study any crash reports involving these vehicles.¹⁵² The "safe harbor" would have limited the penalties on Mexican carriers for safety infractions, and the critics of the plan felt this amounted to an experiment on the safety of American citizens.¹⁵³ After Congressional hearings in July of 2001, and the criticism that took place in the hearings, the Bush Administration backed off of its support of the interval in favor of mandatory initial inspections.¹⁵⁴

The implementation plan and the eighteen-month interval are not the only concerns of the opponents of an open border. Mexico does not have any limits on the number of hours a driver may be in service.¹⁵⁵ This is of major concern due to the strong correlation between fatigue and motor vehicle accidents.¹⁵⁶ Mexico's trucks are also allowed to be considerably heavier than the trucks operated in the U.S., but the U.S. plans to install more weigh stations at the busiest border crossings to enforce weight

149. *Id.*

150. GAO Report, *supra* note 53.

151. *Allowing Mexican Commercial Vehicles to Operate in U.S.: Hearings Before the Senate Commerce, Science, and Transportation Comm.*, 106th Cong. (July 18, 2001) (statement of Joan Claybrook, President of Public Citizen) [hereinafter Claybrook Senate Testimony].

152. *Id.*; see also *Allowing Mexican Commercial Vehicles to Operate in U.S.: Hearings Before the House Transportation and Infrastructure Comm.*, 106th Cong. (July 18, 2001) (statement of Jacqueline S. Gillan, Vice President of Advocates for Highway and Auto Safety) [hereinafter Gillan House Testimony].

153. Gillan House Testimony, *supra* note 152.

154. *Administration Supporters Slow Senates Over Mexican Trucking Dispute*, available at <http://www.msnbc.com/local/azrep/m72278.asp> (last visited Apr. 4, 2002).

155. Skahan, *supra* note 5, at 610.

156. Claybrook Senate Testimony, *supra* note 151.

limits.¹⁵⁷ The weight limit on U.S. trucks is 80,000 pounds, while the Mexican trucks are currently allowed to operate at a weight of 106,900 pounds.¹⁵⁸ Research has shown that heavier tractor-trailers have more crashes, and more severe crashes, than those of a lighter weight, and that heavier vehicles cause damage to U.S. roads and highways.¹⁵⁹ The trucks are also different lengths, which poses a problem with the highways of Mexico that are built to accommodate forty-eight foot trailers and not the fifty-three foot trailers used by the U.S. carriers.¹⁶⁰ Finally, the conditions of the U.S. operated border stations, as discussed above, are another chief concern.¹⁶¹ Infrastructure improvements, permanent inspection facilities, and full-time inspectors are needed to protect the American public from unsafe vehicles.¹⁶²

The movement of hazardous materials over the U.S.-Mexico border is perhaps the best example of the serious safety concerns presented by an open border policy.¹⁶³ The risk to public health and safety that is synonymous with the word "hazardous" will be exacerbated by untrained drivers, vehicles in poor condition, and improperly documented shipments.¹⁶⁴ A thorough inspection on either side of the border should be able to identify such problems, but both the U.S. and Mexico have different standards for hazardous material manifests.¹⁶⁵ In addition, the United Nations has standards for labeling hazardous waste and materials, and there is confusion over the proper application of the standards for Mexican carriers entering the U.S.¹⁶⁶ The dissimilar shipment manifests and poorly labeled shipments of hazardous materials have led to a lack of adequate information regarding the products that cross over the U.S.-

157. Kilcarr, *supra* note 126; *see also* Stephen Horn, House of Representatives, *Highway Safety and Free Trade*, Congressional Press Releases, at 5 (Dec. 5, 2001).

158. Kilcarr, *supra* note 126.

159. Gillan House Testimony, *supra* note 152; *see also* Schmidt, *supra* note 8, at 513.

160. Warren Goff, *Transportation of Cargo Across the U.S.-Mexico Border*, 8 U.S.-MEX. L.J. 3, 7 (2000).

161. Claybrook Senate Testimony, *supra* note 151.

162. *Id.* The last permanent inspection facility was built in 1998 and there are no permanent facilities outside of California. *Id.* Texas had plans to build similar stations, but was unable to implement those plans. Texas is currently seeking these particular stations from the federal government. *See* Cuellar House Testimony, *supra* note 29.

163. Eaton, *supra* note 32, at 799.

164. *Id.* at 794. Poorly documented shipments can complicate rescue and cleanup matters for hazardous materials, since the substances may not be properly identified. *See generally id.* at 794-95.

165. *Id.* at 796-97.

166. *Id.* at 796.

Mexico border every day, and this lack of information has made regulation of the flow of materials difficult.¹⁶⁷

The House of Representatives and the opponents of the open border expressed these concerns and noted the lack of compatible safety standards between the U.S. and Mexico, when it urged President Bush to continue the delay on implementation of the NAFTA trucking provisions.¹⁶⁸ The differences in standards impact the safety of the drivers of the carrier, as well as the safety of every motorist traveling on an American highway. The U.S. government should still be concerned with the lack of a "coordinated operational plan" between the DOT and the border-states to address ways to enforce the safety requirements and keep America's roadways safe.¹⁶⁹

III. LEGAL ISSUES ARISING FROM AN OPEN BORDER WITH MEXICO

The opening of the U.S.-Mexico border will bear a tremendous impact on the legal system of the U.S., and those who intend to use the system to impose liability on another party. This section will pose several hypothetical situations that assume the borders are now completely open to commercial vehicles traveling into the U.S. from Mexico.¹⁷⁰ These hypothetical situations also assume commercial trucks of both the U.S. and Mexico travel on each other's roadways.

Civil suits are likely to rise in the arena of auto negligence at a substantial rate once cross-border traffic rises in the NAFTA countries. Citizens of Mexico and the U.S. are likely to bring actions against each other to seek remedy for some injury they have suffered resulting from a traffic accident. In relation to each of these situations, issues concerning jurisdiction and recognition and enforcement of the judgment against a party will be discussed.¹⁷¹ The discussion in these sections will not only center around what impact, if any, an open U.S.-Mexico border will have

167. Eaton, *supra* note 32, at 797-98.

168. H.R. 152, 106th Cong. (2001).

169. GAO Report, *supra* note 53, at 27.

170. Fictional names and circumstances devised by the author. Any relation to a real person, place, or occurrence is not intended and is merely coincidental.

171. Four possible auto negligence actions will be considered. The actions will include: a citizen of Mexico bringing suit in the U.S. against a U.S. citizen for injuries resulting from an accident which occurred in the U.S., a Mexican citizen bringing suit in the U.S. against a U.S. citizen for injuries resulting from an accident which occurred in Mexico, a Mexican citizen bringing action in Mexico against a U.S. citizen for an accident which occurred in either the U.S. or Mexico, and a U.S. citizen bringing suit against a citizen of Mexico for an accident which occurred in either Mexico or the U.S. See *supra* note 170.

on the judiciary, but also on what tools the legal system has to prevent or deal with any such problems. The possible effects of an open border on the caseload of the U.S. judiciary will also be discussed.

In some of the following sections, the hypothetical situations will involve Pedro Gonzalez (Gonzalez), a Mexican citizen, and Charles Smith (Smith), a citizen of the U.S., for explanation purposes.¹⁷² A civil suit for personal injury results from an accident between the two men, and the defendant is employed by a commercial carrier in their respective country. In all of the following situations, assume the foreign citizen's vehicle passes over the U.S.-Mexico border without being stopped for any sort of thorough inspection. Additionally, in situations where state law questions arise, Texas law will be examined due to the great number of vehicles crossing its border with Mexico every day.

A. *Jurisdiction and Venue*

The possibility of a personal injury claim arising in a United States court as a direct result of trade between the United States and Mexico was likely not in the minds of the drafters of NAFTA. The rights of victims suing under tort law to choose their forum are not addressed in NAFTA, simply because NAFTA is intended to promote trade and address disputes arising from trade.¹⁷³ The dispute resolution provisions of NAFTA relate to the areas of investment, financial services, unfair trade actions, failure to enforce labor laws, environmental violations, and the interpretation and application of NAFTA.¹⁷⁴ The issue is not whether a foreign citizen, or alien, can bring suit in the U.S., but where the suit can be brought and whether that court has the power to exercise jurisdiction over the parties.

1. Subject Matter Jurisdiction

The jurisdiction of a United States court is governed by the federal or a state constitution, as well as the relevant federal or state statute.¹⁷⁵ Federal courts of the U.S. are allowed to extend jurisdiction over cases between U.S. citizens and citizens or subjects of a foreign state.¹⁷⁶ Courts

172. Fictional names devised by the author for explanation purposes.

173. See Winton deRuyter Woods III, *Transnational Litigation of Comprehensive General Liability Coverage in Environmental Impairment Cases and The NAFTA*, 15 ARIZ. J. INT'L & COMP. L. 345, 348 (1998).

174. David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025, 1030 (1999).

175. U.S. CONST. art. III, § 2; see also 28 U.S.C. § 1332(a) (1994). Each state will have its own requirements for jurisdiction of its state courts. See, e.g., OKLA. CONST. art. VII, § 1.

176. U.S. CONST. art. III, § 2.

do not have jurisdiction over suits between two aliens.¹⁷⁷ A federal court has jurisdiction over the subject matter of a lawsuit if the amount in controversy exceeds \$75,000, and the suit is between citizens of a U.S. state and citizens of another state or foreign state.¹⁷⁸ In an action between Gonzalez and Smith, a federal court would have subject matter jurisdiction, regardless of who was the plaintiff or defendant, as long as the amount of damages sought was in excess of \$75,000.¹⁷⁹ In addition to subject matter jurisdiction, courts must also have jurisdiction over the defendant.¹⁸⁰

2. Personal Jurisdiction

Subject matter jurisdiction and personal jurisdiction are required in order for a court to exercise its power over the parties to a lawsuit.¹⁸¹ The requirement of personal jurisdiction, however, does not appear to be as easily established as subject matter jurisdiction. In order for the court to exercise jurisdiction over the defendant's person, the defendant must either be present in the court's state or "have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."¹⁸² A court will have personal jurisdiction over defendants who reside in the forum state, for "domicile in the state is alone sufficient."¹⁸³ The plaintiff in a suit involving a defendant who is a citizen of a foreign country, such as Gonzalez, would have to establish minimum contacts of the defendant in the forum state, and these contacts must either be continuous or related to the plaintiff's cause of action.¹⁸⁴ In actions against a foreign defendant, minimum contacts are

177. Michael C. McCutcheon, *Identity Theft, Computer Fraud and 18 U.S.C. § 1030(G): A Guide to Obtaining Jurisdiction in the United States for a Civil Suit Against a Foreign National Defendant*, 13 LOY. CONSUMER L. REV. 48, 56 (2001). The Supreme Court upheld this language of the Constitution in 1809. *Hodgson et al. v. Bowerbank*, 9 U.S. 303 (1809).

178. 28 U.S.C. § 1332(a) (1994). Federal courts are also allowed to extend jurisdiction over cases involving issues of federal law. 28 U.S.C. § 1331 (1994).

179. See *supra* note 176 and accompanying text. The diverse citizenship requirement of section 1332(a) is met, since Smith is a U.S. citizen and Gonzalez is a citizen of Mexico. 28 U.S.C. § 1332(a) (1994).

180. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

181. See *supra* notes 175-78 and accompanying text.

182. *International Shoe Co.*, 326 U.S. at 316. The minimum contacts test is designed to allow a court to "subject a defendant to a judgment" and fulfill the constitutional right of due process of law. *Id.*

183. *Milliken v. Meyer*, 311 U.S. 457, 462 (1940). Presence in the state is not enough to establish general jurisdiction over a defendant. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-15 (1984).

184. *International Shoe Co.*, 326 U.S. at 316-18.

especially important “because of the unique and onerous burden placed on a party called upon to defend a suit in a foreign legal system.”¹⁸⁵ If Gonzalez regularly travels into the U.S., the court could establish general jurisdiction over him and have jurisdiction over him for all purposes.¹⁸⁶ If Gonzalez’s contacts with the U.S. were minimal, Smith would have to show that the contacts were related to the auto negligence claim.¹⁸⁷ In situations where a Mexican citizen, such as Gonzalez, travels into the U.S. to conduct business and causes an accident, the court would likely find purposeful availment to the laws of the state and establish jurisdiction over the defendant.¹⁸⁸ The same test would be used for a U.S. citizen not a resident of the forum state.¹⁸⁹

The exercise of personal jurisdiction over Gonzalez, or Smith if Gonzalez brought suit, would have to comply with due process and statutory authority, regardless of whether an action for negligence took place in federal court or state court.¹⁹⁰ The court may evaluate its compliance with due process in exercising personal jurisdiction over a defendant, by examining the burden on the defendant, the interest of the forum state in hearing the case, the interest of the plaintiff in a convenient and effective relief, and the efficiency of the court hearing the case.¹⁹¹ In state courts, state long arm statutes will determine whether courts can exercise personal jurisdiction over a particular defendant.¹⁹² If Smith brought an action against Gonzalez in a Texas state court for negligently operating his vehicle and causing an accident while in Texas, the court would be able to extend jurisdiction over Gonzalez since he “commit[ed] a tort in whole or

185. *CSR Ltd. v. The Honorable Scott Link*, 925 S.W.2d 591, 595 (Tex. 1996); *see also Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 114 (1987).

186. *See, e.g., Helicopteros*, 466 U.S. at 414-15.

187. *International Shoe Co.*, 326 U.S. at 318; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). The defendant will avail himself to the laws of the forum state if his contacts with the state allowed him to benefit from and be subject to the laws of that state. *Burger King*, 471 U.S. at 476. If the contacts the defendant has are substantially connected to the claims of the plaintiff, the contacts, though isolated or minimal, will be enough for the court to exercise jurisdiction. *See id.*

188. *Id.* at 475-76. Jurisdiction is proper “where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State.” *Id.* at 475.

189. *Id.*

190. *See generally* McCutcheon, *supra* note 177, at 56-57.

191. *Burger King*, 471 U.S. at 477. The legal system’s interest is in “obtaining the most efficient resolution of controversies” by avoiding overly burdensome caseloads. *Id.*

192. McCutcheon, *supra* note 177, at 57.

in part in Texas.”¹⁹³ While exercising jurisdiction over Smith or Gonzalez is relatively easy to establish, establishing the proper forum for an action between the two is more complicated.

3. Venue

Venue statutes are designed to provide a convenient forum for an action's resolution, and can vary from state to state.¹⁹⁴ The federal court system has its own separate statutes for determining the proper forum for an action.¹⁹⁵ In federal cases where jurisdiction is based on diversity of citizenship, the action may be brought in “a judicial district where any defendant resides,” where “a substantial part of the events or omissions” that lead to the claim occurred, or if no other venue is proper the action may be brought where “any defendant is subject to personal jurisdiction at the time the action is commenced.”¹⁹⁶ An action against a foreign citizen may be brought in any U.S. district court.¹⁹⁷ Due to the broad reach of the federal statutes, selection of a venue for a pending action can often be the result of “forum shopping.”¹⁹⁸

Plaintiffs may choose a particular forum for any number of reasons. A plaintiff may choose a forum for convenience, favorable substantive or procedural laws, potential jury biases in the forum, low caseloads in the district, or good potential for recovery of damages.¹⁹⁹ The plaintiff may not choose a forum in order to “vex, harass, or oppress the defendant by inflicting upon him expense or trouble not necessary to his own right to

193. See TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(2) (1997). The Supreme Court of Texas has interpreted the long arm statute to extend “as far as the federal constitutional requirements of due process will allow.” *CSR Ltd.*, 925 S.W.2d at 594.

194. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 79 (3d ed. 1999).

195. The general venue statute is found in 28 U.S.C. § 1391 (1994). There are also federal statutes determining the proper venue for specific areas of law, such as stockholder's derivative actions and civil actions against the United States. See, e.g., 28 U.S.C. §§ 1400, 1401 and 1402 (1994).

196. 28 U.S.C. § 1391(a) (1994). Claims brought on the basis of federal law or where diversity of citizenship is not the only basis for jurisdiction, fall under the provisions of § 1391(b). The language of this clause of the statute is almost identical to that of clause (a). 28 U.S.C. § 1391(b) (1994).

197. 28 U.S.C. § 1391(d) (1994).

198. Phillip F. Cramer, Note, *Constructing Alternative Avenues of Jurisdictional Protection: Bypassing Burnham's Roadblock Via § 1404(A)*, 53 VAND. L. REV. 311, 316 (2000). The importance of venue is “shown by the frequency with which parties contractually provide for and litigate the issue. Suit might well not be pursued, or might not be as successful, in a significantly less convenient forum.” *Id.* (quoting *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 39-40 (1988) (Scalia, J. dissenting)).

199. *Id.* at 317.

pursue his remedy.”²⁰⁰ The defendant’s convenience is of concern to a court, since the plaintiff is able to choose the forum in which to bring the action.²⁰¹

The selection of a forum in suits involving a citizen of Mexico and a citizen of the U.S. could become an even more important issue for the U.S. legal system, and the parties, with the opening of the U.S.-Mexico border. Citizens of Mexico injured in auto accidents with U.S. citizens are likely to bring suit in the U.S.²⁰² Many districts and states have reputations as being plaintiff friendly states, where the potential for large awards is greater than in other jurisdictions.²⁰³ Texas is one of the jurisdictions popular for plaintiffs to bring suit.²⁰⁴ Texas has used wide discretion for jurisdiction over personal injury and wrongful death actions through its “pro-plaintiff” substantive and procedural laws.²⁰⁵ The favorable laws of Texas are sure to invite Mexican plaintiffs injured by U.S. drivers to bring suit in the state and take advantage of the “pro-plaintiff” laws in the hope of recovering a large monetary judgment.²⁰⁶ U.S. drivers are equally as likely to bring suit against Mexican citizens who have crossed over the U.S.-Mexico border in Texas.²⁰⁷ The open U.S.-Mexico border will likely lead to increased traffic in both countries, with the chances of a person being injured and suing for that injury increasing with every truck passing through the border unimpeded by a thorough inspection.²⁰⁸ Statutes and legal doctrines exist which would allow the U.S. legal system to reduce the potential flood of litigation.

200. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). A plaintiff may hope that by bringing an action in a venue inconvenient to the defendant the chances the defendant will settle the case or defend the case less strenuously will increase. See Cramer, *supra* note 198 n.155.

201. See *Gulf Oil*, 330 U.S. at 508; see also Cramer, *supra* note 198, at 317.

202. See generally Cramer, *supra* note 198, at 317.

203. *Id.*

204. *Id.*

205. *Id.* Texas’ long arm statute allows extension of jurisdiction over defendants as long as it does not violate the notions of due process. See *supra* notes 192-93 and accompanying text. Any defendant committing a tort in Texas is subject to the exercise of personal jurisdiction in Texas. *Id.*

206. See generally Cramer, *supra* note 198, at 317.

207. See generally *id.* This is true whether U.S. citizens are injured in Mexico as the result of an unsafe vehicle or negligent driver, or injured on a U.S. roadway by an uninspected truck or unsafe driver. The proximity of Texas to Mexico also plays a part in the likely selection of this state as a forum. *Id.*

208. See *supra* notes 155-62.

Courts have used the doctrine of forum non conveniens to change the plaintiff's choice of forum.²⁰⁹ Forum non conveniens allows a court to dismiss an action even though the court may exert jurisdiction over the suit and the parties.²¹⁰ In common law, forum non conveniens was used to dismiss the plaintiff's action in cases of extreme inconvenience on the defendant.²¹¹ Forum non conveniens protects defendants from litigation in a distant forum that has little or no relation to the parties or the subject of the action.²¹² The doctrine also protects the interests of the chosen forum state in avoiding undue burdens on the state's courts and citizens, which would bear the cost of inappropriate litigation.²¹³ The interests of justice are also protected by the doctrine of forum non conveniens by ensuring the most appropriate forum for the action is used and removing actions from courts that are not as well suited to exert power over the matter.²¹⁴

The doctrine of forum non conveniens allows a court to take a number of interests into account when determining whether their court is the proper forum for an action. A court may take into account both private and public interests when determining whether it is the most appropriate forum for the action.²¹⁵ When considering the private interests of the litigants, the court may examine the accessibility of evidence, the ability to compel attendance of an unwilling witness or party, and all other issues "that make trial of a case easy, expeditious and inexpensive."²¹⁶ The court may also consider any potential problems with the enforceability of an obtained judgment against a party.²¹⁷ The court will weigh these interests and will only disturb the plaintiff's choice of venue in situations where "the balance is strongly in favor of the defendant."²¹⁸ The court is also able to consider the interests of the public, such as the potential burden on the jury, having local controversies decided in the local courts, and avoiding potential conflicts of law when a court in another forum applies the state

209. See Cramer, *supra* note 198, at 339.

210. *Id.* The doctrine is one originating from common law. *Id.* "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil*, 330 U.S. at 507.

211. Cramer, *supra* note 198, at 341.

212. *Id.*

213. *Id.*

214. *Id.* at 341-42.

215. See *Gulf Oil*, 330 U.S. at 508.

216. *Id.*

217. *Id.*

218. *Id.*

law of a forum better suited for the action.²¹⁹ Forum non conveniens has been codified and revised to allow transfers between courts of the federal system.²²⁰ Congress has enacted federal transfer statutes to solve the inconvenient forum problem when another district court is the proper forum for the action.²²¹ However, federal district courts continue to use the forum non conveniens doctrine in actions where an alternative forum lies in another country.²²²

Due to the enacting of federal transfer statutes and the federal application of the forum non conveniens doctrine only to cases where an alternative forum rests in a foreign country, it is necessary to briefly discuss the doctrine in state courts.²²³ The forum non conveniens doctrine continues to be used in an open fashion in state courts, such as the state courts of Texas and California.²²⁴ The public and private interest considerations are still applied, but the interests take on a state specific tone.²²⁵ Texas has codified forum non conveniens, and established two different standards for the application of the doctrine.²²⁶ The Texas statute applies the doctrine by dividing the threshold requirements for a “plaintiff who is not a legal resident of the United States” and for plaintiffs who reside in the U.S. legally.²²⁷ California’s forum non conveniens doctrine requires the threshold question of whether there is an alternative forum

219. *Id.* at 509.

220. Cramer, *supra* note 198, at 340.

221. *See, e.g.*, 28 U.S.C. §§ 1404, 1406 (2001).

222. *See* Cramer, *supra* note 198, at 340. Not all actions involving a foreign citizen will have an alternative forum in a foreign country. If a foreign citizen resides in the U.S. on a temporary visa, he will be deemed a resident of the U.S. state in which he makes his domicile, since he is subject to the laws of that state. *See supra* notes 182-83 and accompanying text. The federal transfer statutes would then apply, rather than forum non conveniens. *See supra* notes 220-22 and accompanying text.

223. With the likely increase in cross-border traffic an open border will bring, state courts will have to consider the forum non conveniens doctrine when faced with actions involving U.S. citizens and citizens of Mexico. *See supra* notes 155-62, 207-08 and accompanying text. The state courts can exert jurisdiction over the subject matter with diverse citizens when the matter in controversy does not exceed \$75,000. *See supra* notes 178-79 and accompanying text. The state long arm statute will determine if the court can exert jurisdiction over the parties. *See supra* note 192 and accompanying text.

224. *See Baker v. Bell Helicopter Textron, Inc.*, 985 S.W.2d 272, 274 (Tex. Ct. App. 1999); *see also Stangvik v. Shiley, Inc.*, 819 P.2d 14, 17 (Cal. 1991).

225. *See Stangvik*, 819 P.2d at 17-18; *see also Baker*, 985 S.W.2d at 275.

226. TEX. CIV. PRAC. & REM. CODE § 71.051 (1999); *see also Baker*, 985 S.W.2d at 275.

227. TEX. CIV. PRAC. & REM. CODE § 71.051(a), (b).

for the plaintiff's claim, and the court may then determine if the forum is suitable.²²⁸

The federal transfer statute authorizes a court to transfer a case to another federal district court for a number of reasons.²²⁹ The influence of forum non conveniens is evident in the language of the statute.²³⁰ Federal courts may consider the convenience of the parties and witnesses, the interests of justice, and whether the plaintiff could have brought the case in another forum.²³¹ The statute, like forum non conveniens, is designed to prevent the waste of a court's valuable time and protect the parties' interests.²³² When considering whether the interests of justice require a transfer of the action to another forum, courts consider where the cause of action arose, the burden on the forum's court system, and the enforceability of an obtained judgment in another forum.²³³ Though Congress has superseded the forum non conveniens doctrine, it is obvious the doctrine continues to be used in federal courts when these courts use 28 U.S.C. §1404 to transfer a case to another federal district court.

The doctrine of forum non conveniens, with the opening of the U.S.-Mexico border, could prove to be an invaluable tool for federal and state courts to use when faced with a potential flood of litigation resulting from accidents between U.S. and Mexican citizens. The doctrine may be used by the federal courts in situations where an alternative forum lies in Mexico, or will be indirectly used when an alternative forum may lie in another district court.²³⁴ Texas state courts, for instance, could use the doctrine when a citizen of Mexico, who "is not a legal resident of the United States,"²³⁵ commits a tort in the state of Texas.²³⁶ The courts use of

228. See Emma Suarez Pawlicki, Comment, *Stangvik v. Shiley and Forum non Conveniens Analysis: Does a Fear of Too Much Justice Really Close California Courtrooms to Foreign Plaintiffs?*, 13 TRANSNAT'L LAW. 175, 215, 217 (2000). The California Court of Appeals has concluded the doctrine will be applied to dismiss a case unless the "alternative forum is a foreign country in which the courts are not independent, or due process is not applied." *Id.* at 217 (quoting *Boaz v. Boyle & Co.*, 46 Cal. Rptr. 2d 888, 894 (Cal. App. 1995)).

229. See 28 U.S.C. § 1404 (1994).

230. See *id.*

231. See *id.*

232. Cramer, *supra* note 198, at 350.

233. *Id.* at 356. The consideration of the burden on the local court system also includes a consideration of whether the forum can become "a dumping ground for the nation's (and the world's) tort litigation." *Id.* at 356-57. Again, the influence of forum non conveniens is shown in the factors courts have considered when evaluating whether to transfer a case. See *supra* notes 216-19 and accompanying text.

234. See *supra* notes 222-23 and accompanying text.

235. TEX. CIV. PRAC. & REM. CODE § 71.051(a) (1997).

public and private interest considerations will play a more prominent role in the determination of the proper venue for an action involving U.S. and Mexican citizens.

The doctrine of *forum non conveniens* will probably be implemented most often, by federal courts in actions involving torts committed in Mexico by U.S. citizens. In a suit brought by Gonzalez in federal court in Texas against Smith, for an accident occurring in Mexico, the federal court would apply the doctrine as stated in *Gulf Oil v. Gilbert*,²³⁷ and more recently reiterated in *Piper Aircraft v. Reyno*.²³⁸ In *Piper Aircraft*, Reyno brought an action for wrongful death against Piper Aircraft, a U.S. corporation, for the deaths of passengers aboard a plane manufactured by Piper, which crashed in Scotland.²³⁹ The passengers on board the plane were all Scottish subjects, as was the plaintiff.²⁴⁰ At the district court level, Piper transferred the case from California to a district court in Pennsylvania via section 1404.²⁴¹ Piper subsequently moved to dismiss on the basis of *forum non conveniens*, which the district court granted.²⁴² The Third Circuit Court of Appeals reversed the district court's dismissal of the action.²⁴³ The U.S. Supreme Court reversed the Third Circuit, and upheld the district court's order of dismissal.²⁴⁴ The Supreme Court stated "the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."²⁴⁵ Dismissal of the action on *forum non conveniens* grounds is appropriate when the plaintiff's choice of forum is burdensome on the defendant or the court, and when the plaintiff does not have "any specific

236. The committing of a tort in the state of Texas will allow the state court to exert personal jurisdiction over the Mexican citizen. See TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(2), *supra* note 193.

237. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

238. See *supra* notes 215-19 and accompanying text; see also *Piper Aircraft v. Reyno*, 454 U.S. 235, 241 (1981).

239. *Piper Aircraft*, 454 U.S. at 238-39.

240. *Id.*

241. *Id.* at 240.

242. *Id.* at 241-44.

243. *Id.* at 244.

244. *Id.* at 261.

245. *Piper Aircraft*, 454 U.S. at 247. The court further stated that if the possibility of a change in law was given substantial weight, the doctrine of *forum non conveniens* would not work to dismiss an action, and plaintiffs would be able to select a "forum whose choice-of-law rules are the most advantageous" to their action. *Id.* at 250. The change in law, however, is still an issue to be considered by the courts. *Id.* at 254.

reasons of convenience supporting his choice.”²⁴⁶ However, the district court may conclude the interests of justice require not dismissing the case, if the laws of the alternative forum are inadequate in providing a remedy for the plaintiff.²⁴⁷ The Supreme Court held the laws of Scotland did not fall within that category.²⁴⁸ Furthermore, the strong presumption given to the plaintiff in favor of the choice of venue is not as strong when the plaintiff is a foreign citizen.²⁴⁹ Finally, the Supreme Court held that Scotland had a stronger interest in the action than an American court, since the accident occurred there and the decedents were Scottish.²⁵⁰ The court reiterated, “there is a local interest in having localized controversies decided at home.”²⁵¹

The doctrine of forum non conveniens will work to dismiss actions brought by Mexican plaintiffs in the U.S., when these actions have little connection with the U.S. If an action was brought by Gonzalez against Smith for an accident occurring in Mexico, the choice of a U.S. forum would not be given the usual strong presumption in favor of the plaintiff's choice of forum, since he is not a U.S. citizen, and the accident did not occur within the U.S.²⁵² The forum court would have to examine the public and private interest factors, and weigh these factors against the burden on the court and the defendant Smith, as well as consider the reasoning for Gonzalez's choice of a U.S. court.²⁵³ Smith could use the federal transfer statute to move the action to a more convenient forum, as well as use the statutes to find a court whose application of the interest factors may be more favorable than the plaintiff's selected forum, just as Piper did in *Piper Aircraft v. Reyno*.²⁵⁴ The public interests in the litigation, as well as

246. *Id.* at 249. The discretion to dismiss an action lies with the district court in the forum state. *Id.* at 247-48.

247. *Id.* at 254. However, the court noted that Reyno admitted the action was brought in the U.S. due to its laws being more favorable to the action than the laws of Scotland. *Id.* at 240.

248. *Id.* at 255. Strict liability in tort was not recognized in Scotland at the time, nor did it allow a wrongful death action not brought by the relatives of the decedent, which was the case in *Piper v. Reyno*. *Id.* at 248.

249. *Id.* at 255-56.

250. *Id.* at 260.

251. *Piper Aircraft*, 454 U.S. at 260.

252. *See supra* notes 248-49 and accompanying text.

253. *See supra* notes 215-19, 245 and accompanying text.

254. *See, e.g., supra* notes 240-41 and accompanying text. This situation would be more likely to occur when the potential for a large judgment is high, and the defendant seeks to avoid such a monetary burden—so much so that they are willing to undergo some sort of inconvenience in having the suit take place in Mexico. For instance, if a U.S. commercial

the interests of the court, prove the most compelling in situations where the choice of forum is based, in whole or part, on favorable tort law.²⁵⁵ If Gonzalez's motivation for bringing the action in the U.S. is partially based upon favorable tort law like the plaintiff's in *Piper Aircraft v. Reyno*, the court will have to examine the potential burden upon the court of having more actions brought there for the same purpose.²⁵⁶ Furthermore, the court would have to consider whether there was a public interest in having the disputes handled in a U.S. or Mexican forum.²⁵⁷ If the potential burden on the ability of the court to handle cases expeditiously and inexpensively is great, the public interest would likely be great, considering it is the citizens of the forum who bear the costs of an inappropriately brought action.²⁵⁸ The court may already be facing numerous actions brought by U.S. citizen plaintiffs against Mexican carriers for a claim resulting from unsafe operation or condition of one of these trucks, which would likely weigh in the consideration of the court's burden in a convenient forum analysis. In considering the interests of the litigants, the court hearing a case brought by Gonzalez against Smith would have to examine the accessibility of the evidence and the ability to compel attendance of unwilling parties.²⁵⁹

The interests of justice in protecting the rights and interests of U.S. citizens will control whether a court will dismiss an action on the grounds of forum non conveniens. The public interest in having an action brought by a U.S. plaintiff, such as Smith, kept in a U.S. court would likely deter a court from dismissing such an action upon the motion of a Mexican defendant, if the court determines that the defendant purposefully availed himself to the laws of the U.S. The interests of the public in keeping a Mexican plaintiff's choice of a U.S. forum will likely hinge on whether the defendant, a U.S. citizen, may litigate relatively conveniently in a Mexican court, given the high cost of inappropriate litigation. If the Mexican plaintiff has no adequate remedy in Mexico, the interests of justice will keep the action in the U.S. courts.²⁶⁰ The citizens of the forum would likely

carrier employed Smith, the carrier may wish to forgo the expense of litigating in Mexico, versus facing the potential liability resulting from a large judgment in the plaintiff's favor.

255. See *supra* notes 245-49 and accompanying text. The favorable tort laws of Texas, for instance, will draw plaintiffs towards bringing action in courts of that state. See *supra* notes 203-06 and accompanying text.

256. See *supra* note 246 and accompanying text.

257. See *supra* note 249 and accompanying text.

258. See *supra* notes 213, 216 and accompanying text.

259. See *supra* note 216 accompanying text.

260. See *supra* note 246 accompanying text.

agree with keeping the suit in the U.S. if a wrongfully injured Mexican citizen had no hope for recourse in Mexico.

B. Recognition and Enforcement of a Foreign Judgment

Enforcement of a judgment is key to an injured party being able to receive the compensation awarded by a court of law. If the party cannot enforce the judgment upon the adversary, the entire legal process preceding the judgment has been for naught. Just as NAFTA does not include forum provisions for a civil suit, the trade agreement does not include any provisions for the recognition or enforcement of civil judgments, perhaps because the drafters of the agreement did not foresee such problems.²⁶¹ U.S. courts have enforced the judgments of Mexico's courts upon U.S. citizens.²⁶² Despite provisions in the Mexican Federal Code of Civil Procedure establishing guidelines for the recognition of foreign judgments in Mexico, courts in the country have not enforced U.S. civil judgments.²⁶³ The lack of recognition of a foreign judgment is contrary to both U.S. and Mexico laws.²⁶⁴

Mexico's laws require eight conditions to be met in order to enforce a foreign judgment under Mexican law.²⁶⁵ These conditions, or restrictions, include the requirements that the judgment not affect real property in Mexico, jurisdiction of the foreign court must have been proper, the defendant must have been personally served, the judgment be final, and that the judgment not be contrary to the public policy or laws of Mexico.²⁶⁶ Even if these conditions are met, the laws of Mexico still allow the court to exercise judicial discretion and deny the request of enforcement if the courts of the country the judgment originates from do not enforce similar judgments of Mexican courts.²⁶⁷

261. See *supra* note 173; see also Roger R. Evans, *Enforcement of U.S. Judgments in Mexico: Illusion or Reality*, 64 TEX. B.J. 139, 140 (Feb. 2001).

262. See *Southwest Livestock & Trucking, Inc. v. Ramon*, 169 F.3d 317 (5th Cir. 1999).

263. Evans, *supra* note 261, at 146. The standards have been in existence in Mexico for twelve years. *Id.*

264. See 28 U.S.C. § 2502(a) (1994); see also Evans, *supra* note 261, at 145.

265. Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-MEX. L.J. 137, 147 (1997). The law in Mexico was amended in 1988 to allow recognition foreign recognition of judgments. *Id.* at 143, 147. Prior to 1988, Mexico did not have substantive laws to enforce or interpret foreign judgments. See Evans, *supra* note 261, at 140.

266. Evans, *supra* note 261, at 145.

267. Vargas, *supra* note 265, at 147.

Foreign judgments are not entitled to full faith and credit under the laws and Constitution of the U.S.²⁶⁸ The doctrine of comity has been used to recognize the judgments of other nations for enforcement in the U.S., but will not be used when public policy and national interests are at stake.²⁶⁹ The enforcement of foreign judgments was first recognized in *Hilton v. Guyot*.²⁷⁰ The Supreme Court directed that foreign judgments, since they “are not entitled to full faith and credit and conclusive effect,” are to be used as evidence of the justice of the claim.²⁷¹ Furthermore, the court stated “that international law is founded upon mutuality and reciprocity.”²⁷² The case law of the U.S. is still based upon the ruling of the Supreme Court in *Hilton*.²⁷³

The doctrine of comity continues to be applied in the courts of the U.S. when considering the enforcement of foreign judgments upon U.S. citizens.²⁷⁴ In *Southwest Livestock v. Ramon*, the Fifth Circuit was faced with the issue of recognizing a judgment obtained in Mexico against a Texas Corporation.²⁷⁵ Reginaldo Ramon, a Mexican citizen, sued Southwest Livestock and Trucking in a Mexican court for breaching a promissory note.²⁷⁶ The note was executed by Ramon and Southwest in Mexico, and loaned \$400,000 to Southwest.²⁷⁷ Ramon obtained a judgment against Southwest for the defaulted notes, with the interest rate set at 48%, which was the amount stated in the note and legal under Mexican law.²⁷⁸ However, prior to the ruling in Mexico, Southwest Livestock sued Ramon in federal district court in Texas claiming the judgment in Mexico violated Texas usury law.²⁷⁹ The district court granted Southwest Livestock’s motion for summary judgment, and awarded Southwest Livestock \$5,776,356.93 in damages plus post judgment interest and attorney fees.²⁸⁰ The district court held that the judgment in Mexico “violated Texas public

268. U.S. CONST. art. IV, § 1.

269. David Henry, *Run from the Border: The Need for Recognition of Foreign-Commercial Judgments in Texas Courts*, 31 TEX. TECH L. REV. 211, 214 (2000).

270. *Id.* at 215; see also *Hilton v. Guyot*, 159 U.S. 113 (1895).

271. *Hilton*, 159 U.S. at 130.

272. *Id.*

273. See Henry, *supra* note 269, at 215.

274. See *Southwest Livestock v. Ramon*, 169 F.3d at 317.

275. *Id.* at 318.

276. *Id.*

277. *Id.*

278. *Id.* at 319.

279. *Id.*

280. See *Southwest Livestock*, 169 F.3d at 319.

policy, and that Texas law applied.”²⁸¹ The Fifth circuit based its subject matter jurisdiction on diversity of citizenship, just as the court in the Gonzalez hypothetical would have to apply.²⁸² However, Texas state law requires that a judgment of a foreign nation, which awards money damages, must be recognized in the state unless the “judgment debtor establishes one of ten specific grounds for nonrecognition.”²⁸³ The Fifth circuit held that the judgment Ramon was awarded in Mexico for default on a promissory note was not contrary to Texas public policy, and that in Texas “it is irrelevant that the Mexican judgment itself contravened Texas’s public policy against usury.”²⁸⁴

The question is now whether public policy according to state law would prohibit recognition of a judgment against Smith in Mexico, since the U.S. federal district court could use the doctrine of forum non conveniens to dismiss Gonzalez’s case and cause him to bring the case in Mexico. If Smith brought an action in Texas claiming post judgment interest on the damages in Mexico exceeded usury laws, just as Southwest Livestock claimed, or that the Mexican court did not have jurisdiction over him, a federal district court would have to determine whether a judgment in Mexico against a U.S. citizen violated Texas public policy if Gonzalez sought enforcement of the judgment in the U.S.²⁸⁵ A civil judgment for monetary damages, such as Gonzalez’s negligence judgment, will be recognized in Texas barring establishment of one of the ten grounds for nonrecognition in Texas.²⁸⁶ Smith’s best argument would lie in a claim that Mexico does not recognize the judgments of Texas.²⁸⁷ Mexico has yet to enforce the judgments of U.S. courts in the country.²⁸⁸ However, if a

281. *Id.*

282. *Id.* at 320; *see supra* notes 175-79 and accompanying text.

283. *Southwest Livestock*, 169 F.3d at 320.

284. *Id.* at 321.

285. *See supra* note 219 and accompanying text.

286. In Texas, a foreign judgment will not be conclusive if the system of law in which judgment was rendered is not compatible with due process or there was a lack of personal jurisdiction or subject matter jurisdiction over the defendant in the foreign court. *Southwest Livestock*, 169 F.3d at 321. A foreign judgment will not be recognized in Texas if there was a lack of sufficient notice of the proceedings, fraudulent obtaining of the judgment, the cause of action is repugnant to Texas public policy, the judgment conflicts with a final and conclusive judgment elsewhere, the foreign suit was contrary to an agreement between the parties, or if it is shown the foreign country does not recognize Texas judgments. *Id.* The factors together represent the ten factors relevant to recognition of a foreign judgment, of which an opponent to recognition must show at least one of in Texas. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (1997).

287. *See generally Southwest Livestock*, 169 F.3d at 321.

288. Evans, *supra* note 263, at 146.

federal district court in Texas, or for that matter any other state, refused to recognize or enforce a Mexican judgment, the court's decision would lead to unenforceability of similar judgments of the U.S. in Mexico.²⁸⁹ Therefore, in cases involving recognition of Mexican judgments, U.S. federal district courts not only must be prepared to recognize the judgments of Mexico against U.S. citizens, but must also prepare themselves to deal with the enforcement of the judgment should that prove to be an issue.²⁹⁰

The problem with recognition and enforcement of a foreign judgment is that each requires "separate and distinct inquiries."²⁹¹ Foreign judgments may not be enforced unless they are entitled to recognition.²⁹² Judgments of a foreign court are not entitled to recognition if the foreign judicial system does not have procedures compatible with due process or provide impartial tribunals.²⁹³ A U.S. court may also refuse recognition of a foreign judgment if the foreign court did not possess jurisdiction over the defendant pursuant to the laws of that court.²⁹⁴ The Maryland court in *Guinness v. Ward* stated that a foreign judgment for monetary damages "is only enforceable to the same extent that a sister state judgment entitled to full faith and credit would be under the same circumstances."²⁹⁵ The problem is that judgments of a foreign nation are not entitled to full faith and credit under the laws of the U.S.²⁹⁶ The consequences of not recognizing and enforcing a judgment of a court of Mexico will be a similar lack of recognition and enforcement of U.S. judgments over Mexican citizens, making it impossible for injured parties of either country to hold their adversary responsible for his or her actions.²⁹⁷ These disparities must be resolved for wrongfully injured parties to receive full compensation for their injuries and to avoid further legal costs.

289. Evans, *supra* note 261, at 143-44. Mexico's Federal Code specifically requires that foreign courts enforce Mexican judgments, in order for a Mexico court to enforce a similar judgment of that foreign nation's courts. *Id.* at 144.

290. *See generally id.*

291. *Southwest Livestock*, 169 F.3d at 322 (citing *Guinness v. Ward*, 955 F.2d 875, 889 (4th Cir. 1992)). A foreign judgment for monetary damages "is only enforceable to the same extent that a sister state judgment entitled to full faith and credit would be under the same circumstances." *Guinness*, 955 F.2d at 889.

292. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. (b) (1987).

293. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(1) (1987).

294. *Id.*

295. *Guinness*, 955 F.2d at 889.

296. U.S. CONST. art. IV, § 1.

297. *See supra* notes 201-06 and accompanying text.

IV. CONCLUSION

The true implications of an open border with Mexico will not surface until the trucks of the U.S. and Mexico begin crossing the borders and enjoying the open roads in each other's countries. President Bush and Congress reached an agreement that will satisfy President Fox and the rest of Mexico's government. Although the U.S. has fulfilled its obligation under NAFTA, the proper steps to ensure the safety of the roadways of the U.S. and Mexico have still not been taken and planned out. Given the present state of affairs in the U.S., it may be some time before the border is completely open and the DOT and border states have an operational plan in place. One thing is certain—the three branches of the U.S. federal government must be prepared to deal with the likely increase in narcotics traffic and illegal immigration, as well as prepare to adjust to possible changes in the application of the laws of the U.S. to foreign plaintiffs. The judiciary of Mexico must also be prepared to live up to the reciprocity provision in the Constitution of Mexico, or face a new lack of recognition of its own judgments in the U.S.