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Illegal Aliens: Can Monetary Damages Be Recovered from Countries of Origin Under an Exception to the Foreign Sovereign Immunities Act?

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NOTES

ILLEGAL ALIENS: CAN MONETARY DAMAGES BE RECOVERED FROM COUNTRIES OF ORIGIN UNDER AN EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITIES ACT?

I. INTRODUCTION

FOR many years the United States ("U.S.") has struggled with the high costs of illegal immigration, mounting to $5.4 billion in public assistance alone in 1990, according to one study.[1] In response the federal government has restricted social service and health care benefits paid to illegal aliens.[2] Affected states, including Arizona,[3] California,[4] Flor-

1. *See* DONALD HUDDLE, THE NET NATIONAL COSTS OF IMMIGRATION (Carrying Capacity Network, 1993) [hereinafter HUDDLE REPORT]. Dr. Huddle, a Rice University economist, also concluded that in 1992 some 2.07 million American workers were displaced from jobs by immigrants, legal and illegal, costing $11.9 billion. *Id.* at 1. The study was commissioned by Carrying Capacity Network ("CCN"), a nonprofit organization that "works to increase understanding of the interrelated nature of environmental degradation, population growth, resource conservation, and quality of life issues." *Id.* at 25. Copies of the study are available from CCN, 1325 G Street N.W., Suite 1003, Washington, D.C. 20005–3104; Gayle Hanson, *Illegal Aliens Strain an Ailing U.S. System; California Seeks Change in Federal Policies Requiring Health Care*, WASH. TIMES, Apr. 12, 1994, at A5.

2. *See* Cynthia Webb Brooks, Comment, *Health Care Reform, Immigration Laws, and Federally Mandated Medical Services: Impact of Illegal Immigration*, 17 HOUS. J. INT'L L. 141, 145–47 (1994) (summarizing the history of immigration law and policy); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 (codified at 8 U.S.C. § 1101 (Supp. II 1996)) [hereinafter IIRAIRA]. IIRAIRA strengthened border patrols, reformed exclusion and deportation laws, and increased penalties for alien smuggling. *Id. See also* H.R. 2202, 104th Cong. (1st Sess. 1995) [hereinafter Omnibus Immigration Reform Bill].

3. Arizona v. United States, 104 F.3d 1095, 1096 (9th Cir. 1997), *cert. denied*, 522 U.S. 806 (1997).

4. California v. United States, 104 F.3d 1086, 1095 (9th Cir. 1997).

ida,[5] New Jersey,[6] New York,[7] and Texas,[8] have all sued the U.S. government seeking compensation for the fiscal burdens allegedly thrust upon them by the federal immigration policy. While these suits have failed, state and local officials continue to chide the federal government, one of whom called it a "deadbeat dad" in its refusal to reimburse states for the costs generated by illegal aliens.[9]

California[10] responded with Proposition 187.[11] This ballot initiative[12] sought to report illegal aliens to the federal government and deny them access to public benefits.[13] It was swiftly blocked by an injunction.[14] Other states, including Florida[15] and Arizona,[16] have considered similar measures, but none of these have succeeded. Some observers believe that these movements fail because of concerns over possible damages to trade relations.[17] Yet such movements also simply do not play well in Peoria: many Americans frown upon denying services to illegal

5. Chiles v. United States, 874 F. Supp. 1334, 1335–36 (S.D. Fla. 1994), *aff'd*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 517 U.S. 1188 (1996).

6. New Jersey v. United States, 91 F.3d 463, 465 (3d Cir. 1996).

7. Padavan v. United States, 82 F.3d 23, 24 (2d Cir. 1996).

8. Texas v. United States, 106 F.3d 661, 663 (5th Cir. 1997).

9. *See* Hanson, *supra* note 1. San Diego County Supervisor Brian Billbray made this comment. *Id.*

10. Out of an estimated 5 million illegal aliens within the U.S., 2 million, 40%, reside in California. *See* Immigration and Naturalization Service, *Illegal Alien Resident Population Summary (1996)*, *at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegals.htm (last modified Sept. 4, 2002). *See also* Shari Fallek, Comment, *Health Care for Illegal Aliens: Why It Is a Necessity*, 19 HOUS. J. INT'L L. 951, 955 (1997).

11. CAL. PENAL CODE §§ 113, 114, 834b (Deering 1995) [hereinafter Proposition 187].

12. Proposition 187 passed by a margin of 59% to 41%. *See* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

13. *See* Hanson, *supra* note 1.

14. *See League*, 908 F. Supp. at 763. Judge Mariana Pfaelzer of the Central District of California issued the injunction. *Id.*

15. *See* Rex Hogard, *Backers File Illegal-Aliens Amendment with State,* ORLANDO SENTINEL, May 4, 1995, at C3. As in California, the supporters of the Florida measure called themselves the "Save Our State Committee." *Id.*

16. *See* Terese Hudson, *Cutting Off Care: California's Drastic Reaction to Illegal Immigrants Doesn't Play Well in Other States*, HOSP. & HEALTH NETWORKS, June 20, 1995, at 36.

17. *See id.*

aliens despite their status.[18] The problem nonetheless persists and continues to make headlines.[19]

This Note will explore a possible solution, focusing on Mexican illegal aliens within the U.S. as a paradigm.[20] Part II will discuss the general history of immigration in the U.S. It will then consider the various efforts to curb illegal immigration. Part III will explore the different views of national sovereignty as they relate to the treatment of illegal aliens. It will survey Mexican views of illegal immigration and examine statements of Mexican government officials that may serve to encourage Mexican citizens to cross the border into the U.S. illegally. It will conclude that such statements might support an action against the Mexican government based on an interpretation of the "commercial activity exception" to the Foreign Sovereign Immunities Act ("FSIA"). This Note will close with some thoughts on using the courts to deal with illegal immigration, and the value of this approach to contemporary global politics.

II. IMMIGRATION AND ILLEGAL ALIENS IN THE U.S.

A. U.S. Immigration History and Policy

In the beginning, there were few restrictions placed on immigration into the U.S.,[21] and these were usually short-lived.[22] In

18. *See* Michael Miller, *Anti-Illegals Law Mired in Court a Year*, REUTERS, Nov. 12, 1995, LEXIS, Nexis Library, REUTERS File. Some groups contend that such legislation nourishes discrimination against Hispanics. *See, e.g.,* Hogard, *supra* note 15.

19. *See, e.g.,* Ginger Thompson, *Mexico President Urges U.S. to Act Soon on Migrants*, N.Y. TIMES, Sept. 6, 2001, at A1. The Mexican President called for an agreement on the status of illegal aliens to be reached "before the end of this year [2001]." *Id.*

20. Although much of the data is outside the scope of this inquiry, see Jorge Durand et al., *Mexican Immigration to the United States: Continuities and Changes; Statistical Data Included*, LATIN AMERICAN RES. REV., Jan. 1, 2001, at 107, for a detailed analysis of Mexican migration patterns, legal and illegal. For example, most migrants come from Western Mexico, primarily from the states of Guanajuato, Jalisco, and Michoacan. *Id.*

21. *See, e.g.*, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 2 (1984).

22. *See, e.g.*, Alien and Sedition Acts of 1798, ch. 54, 1 Stat. 566 (1798); ch. 58, 1 Stat. 579 (1798); ch. 66, 1 Stat. 577 (1798); ch. 74, 1 Stat. 596 (1798) [hereinafter Acts]. The Acts were in force for only two years. They gave the President power to expel suspect foreigners by executive decree. President John Adams, however, used that power but twice, in the case of two Irish

1875, however, with accelerating immigration rates, Congress enacted the first immigration law.[23] In 1882 Congress followed up with laws excluding criminals, indigents, and other undesirables.[24] It also imposed a head tax of 50¢ upon accepted immigrants.[25] Then, in 1907, Congress commissioned the Dillingham Report ("the Report") to study immigration.[26] Many of the Report's recommendations were inserted into the Immigration Act of 1917, notably literacy requirements and the power to deport aliens convicted of specified offenses.[27] During the 1920s a "national origins" system of quotas was instituted. [28] The Immigration and Nationality Act of 1952 ("INA of 1952") incorporated these quotas.[29] Congress eventually replaced the national origins standard with a more neutral system, passing the Immigration and Nationality Act of 1965 ("INA of 1965").[30]

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journalists. *See* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 351 (1965).

23. Immigration Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477 (repealed 1974) (forbidding the admission of convicts and prostitutes).

24. Immigration Act of August 3, 1882, ch. 376, 22 Stat. 214 (repealed 1974).

25. ENCYCLOPEDIA OF AMERICAN HISTORY 474 (Richard B. Morris ed. 1965). The head tax was imposed in 1882 as well. It was subsequently raised to $2 in 1903, and $4 in 1907. *Id.*

26. Dillingham Commission Report, S. Doc. No. 758, 61st Cong. (3d Sess. 1911). President Theodore Roosevelt appointed the members of the Commission which was chaired by Senator William P. Dillingham. The 42-volume Report was published in 1911. *See* John A. Scanlan, *Immigration Control and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 864 n.24; RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 74 (1965).

27. Act of February 5, 1917, ch. 29, 39 Stat. 874, 877 (repealed 1952). This legislation also prohibited immigration from a broader portion of Asia, and granted the Secretary of Labor power to admit immigrants who would normally be subject to automatic expulsion. *Id. See also* PLENDER, *supra* note 26, at 74.

28. *See* Webb Brooks, *supra* note 2, at 145 n.22 (citing Immigration Act of 1921, ch. 8, § 2, 42 Stat. 5, 5–6; Immigration Act of 1924, ch. 190, § 11, 43 Stat. 152, 159–60. The quotas favored British immigrants and restricted those from Southern and Eastern Europe, and Asia).

29. *Id.* at 145 n.25 (citing Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82–414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C §§ 1101–1557 (1988)).

30. *Id.* at 146 n.26 (citing Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89–236, 79 Stat. 911 (1965) (amending certain portions of the 1952 Act, 8 U.S.C. §§ 1101–1557 (1952)). This placed an annual ceiling and per-country restrictions on immigration from the Eastern Hemisphere. It subjected admission preferences to family ties. *Id.* § 1205. The limit on East-

In 1978, responding to concerns over ballooning immigration, Congress created the Select Commission on Immigration and Refugee Policy ("the Commission").[31] The Commission's findings influenced the comprehensive reform of immigration policy embodied in the Immigration Reform and Control Act of 1986 ("IRCA").[32] Notably, IRCA reflected growing concern over illegal aliens.[33] It sought to eliminate enticements for undocumented workers to enter the U.S. and imposed stiff penalties on employers who knowingly hired illegal aliens.[34] Indeed, by 1990 the concern over illegal immigration had intensified to the point that the Commission recommended "closing the back door to undocumented/illegal migration, and opening the front door a little more to accommodate legal migration in the interests of this country."[35]

B. The Impact of Illegal Aliens in the U.S.

This concern was plausible given evidence showing that illegal aliens had exacted a high economic toll within the U.S.[36] A study conducted by Rice University economist Dr. Donald Huddle concluded that illegal aliens had cost taxpayers $5.4 billion in public assistance in 1990.[37] He estimated that the 1992 illegal alien population of 4.8 million had generated $11.9 billion in public assistance and displacement costs net from the taxes

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ern Hemisphere immigrants was 170,000, with the per-country cap of 20,000. *Id*. §§ 1151–1152. Additionally, it imposed an annual limit of 20,000 on Western Hemisphere immigration without regard to national origin. *Id*. §1154. In 1978, global per-country limits supplanted hemisphere ceilings. Immigration and Nationality Act of 1978, Pub. L. No. 95–412, § 1, 92 Stat. 907 (codified as amended at 8 U.S.C. § 1151 (1982) (amending the 1952 Act, § 201(a))).

31. Immigration and Nationality Act Amendment of October, 5, Pub. L. No. 95–412, § 4, 92 Stat. 907, 907 (1978).

32. Immigration Reform & Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359, 3359 (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IRCA].

33. *Id.*

34. *Id.*

35. H.R. Rep. No. 101–723(I), 101st Cong., 2d Sess. 32, 33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6713.

36. *See* 139 CONG. REC. S11,996 (daily ed. Sept. 20, 1993) (statement of Sen. Harry Reid, Democrat of Nevada). *See also* HUDDLE REPORT, *supra* note 1.

37. *See* HUDDLE REPORT, *supra* note 1.

they contributed.[38] More recent estimates have supported his findings, calculating the social services costs of illegal immigration at $24 billion.[39] Dr. Huddle predicted that illegal aliens would displace millions of American jobs, generating costs in the hundreds of billions of dollars.[40] While some researchers disagree,[41] many have drawn similar conclusions.[42]

Most of the illegal alien population is concentrated in a few states. U.S. Immigration and Naturalization Service ("INS") estimates for 1996 were as follows: California, 2,000,000; Texas, 700,000; New York, 540,000; Florida, 350,000; and Illinois, 290,000.[43] Over 40% of illegal aliens reside in California.[44] To

38. *See id.* at 1.

39. *The O'Reilly Factor* (Fox News television broadcast, June 20, 2002) (transcript # 062001cb.256) (on file with Journal). "[E]ach year, social services for illegal immigrants costs Americans $24 billion. If that money were reassigned, it could provide prescription drug relief to millions of older American citizens." *Id.*

40. HUDDLE REPORT, *supra* note 1, at 5. Dr. Huddle estimated the cost of job displacement between 1993–2002 would be $171.5 billion. He also concluded that within that same time frame illegal aliens would cost some $221.5 billion in public assistance and displacement expenses. *Id.*

41. *See, e.g.,* Juan O. Tamayo, *U.S. Mexican Summit to Focus on Trade*, UPI, May 29, 1981, LEXIS, Nexis Library, UPI File. The Mexican President was planning to offer President Ronald Reagan the results of a 4-year study showing that illegal immigrants made a positive contribution to the U.S. economy. A Mexican official went on to state that illegal aliens pay taxes, use few tax-supported public services, and lower inflation because they work for low wages. *Id. See also* Patrick Lee, *Studies Challenge View That Immigrants Harm Economy*, L.A. TIMES, Aug. 13, 1993, at A1. An Urban Institute study concluded both legal and illegal immigration help create jobs in urban areas. *Id.* Furthermore, Dr. Huddle's methodology has been questioned by, among others, Stephen Moore of the Cato Institute, and Jeffrey Passel and Michael Fix of the Urban Institute. *See* Stats Spotlight, *Statistical Controversies in Immigration* Policy, *at* http://www.stats.org/spotlight /immigration.html (last visited Oct. 26, 2002). Recently, a RAND study argued that "in spite of their proliferation, recent studies on the net fiscal costs of immigration do not provide a reliable estimate of what those net costs are." *See* Blake Harris, *State and Federal Agencies Are Using a Variety of Technological Tools to Help Prevent Illegal Immigrants from Obtaining Benefits to Which They Are Not Entitled, available at* http://www.interlog.com/~blake/soft.htm (Jan. 1997).

42. *See* Lee, *supra* note 41. A state survey of San Diego County concluded that illegal immigrants contributed $60 million in taxes, but cost the county $206 million, for a net drain of $146 million. *Id.*

43. *See Illegal Alien*, *supra* note 10. Rounding out the top ten states of residence: New Jersey (135,000); Arizona (115,000); Massachusetts (85,000); Virginia (55,000); and Washington (52,000). To gauge the increase, here are the 1994 INS figures for the top 3 states: California (1.6 million); New York

better appreciate California's situation, consider the opinion of one scholar who claimed that California would have to build a new school each day to accommodate the daily arrival of illegal immigrant children.[45] California authorities asserted that the state's illegal alien population increases by nearly 125,000 per year, and that it would spend over $2 billion on federally mandated education and health care benefits, as well as incarceration in 1996.[46] In California's suit filed against the federal government to recover expenses, the costs were broken down as follows: $395 million in emergency medical care, $390 million for incarceration and parole supervision, and $1.5 billion for education.[47] The complaint alleged that the federal immigration policy had produced these burdens, and therefore the state was entitled to monetary damages as well as declaratory and injunctive relief.[48] The complaint further alleged that the federal government had violated its duties under the Invasion and Guarantee Clauses of Article IV, § 4 of the U.S. Constitution, failing to shield California from invasion.[49] The Court found this issue nonjusticiable under the guidelines of *Baker v. Carr*.[50] Other

(510,000); and Texas (405,000). *See* Deborah Sontag, *3 Governors Take Pleas to the Senate*, N.Y. TIMES, June 23, 1994, at B7.

44. *See* Hudson, *supra* note 16, at 38.

45. *See* Webb Brooks, *supra* note 2, at 156.

46. California v. United States, 104 F.3d 1086, 1090 (9th Cir. 1997).

47. *Id.* at 1090 n.3.

48. *Id.* at 1089. A number of *amici curiae* briefs were filed on behalf of California, notably by some California and U.S. legislators, and by such groups as the Washington Legal Foundation, Allied Education Foundation, and the California Correctional Peace Officers Association. *Id.*

49. *Id.* at 1090.

50. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker v. Carr, 369 U.S. 186, 217 (1962).

states have sued the federal government on similar grounds, but these efforts have also failed, as noted above.[51]

California's Proposition 187 is the most famous state response to illegal aliens. It provided:

> The initiative provisions require law enforcement, social services, healthcare and public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care, and education.[52]

The initiative drew sharp criticism and charges of racism.[53] A federal district court quickly enjoined implementation of most of its provisions.[54] Nonetheless, Proposition 187 illustrated the

51. *See* Arizona v. United States, 104 F.3d 1095, 1096 (9th Cir. 1997), *cert denied*, 522 U.S. 806 (1997); California v. United States, 104 F.3d 1086, 1095 (9th Cir. 1997); Chiles v. United States, 874 F. Supp. 1334, 1335–36 (S.D. Fla. 1994), *aff'd*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 517 U.S. 1188 (1996).

52. *See* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal 1995). *See also* Proposition 187, *supra* note 11.

53. *See, e.g.,* PETER SALINS, ASSIMILATION, AMERICAN STYLE 6 (1997) (contending that Proposition 187 proponents exploited deep-rooted xenophobia); Kevin R. Johnson, *Fear of an "Alien Nation:" Race, Immigration, and Immigrants,* 7 STAN L. & POL'Y REV. 111, 113 (1996) ("The ability to achieve racial goals through facially neutral means makes it difficult to ascertain the extent to which racism influences the calls for restrictionist measures.").

54. *League*, 908 F. Supp. at 753. Among the detractors was then Mexican President Carlos Salinas who said of Proposition 187: "The voices of intolerance have returned." *See* Mark Fineman, *California's Elections; Mexico Assails State's Passage of Proposition 187*, L.A. TIMES, Nov. 10, 1994, at A28. In light of this criticism, it is interesting to note that Mexico has its own illegal aliens. They are called *los indocumendatos* and work for wages far below the minimum in boiler-room factories, sweatshops, and on ranches. They are victimized by corrupt employers, police, and local officials. Every year Mexico deports thousands of them, mostly Guatemalans, Hondurans, El Salvadorans, and other Central Americans who penetrate Mexico's porous southern border seeking a better life. They are sometimes transported by smugglers for a fee. Given this, some have charged hypocrisy in the criticisms of the California initiative, such as those of President Ernesto Zedillo who called it a violation of Mexican human rights. "There is a double standard here," said Luis Gonzalez Souza, a social science professor at Mexico City's National Autonomous University of Mexico, "we are not respecting the human rights of these undocumented immigrants in the same way we are demanding the U.S. to respect the human rights of Mexicans." *See* Mark Fineman, *Mexico's Migrant Policy Called A Harsher Proposition 187; Latin America: Critics Charge Castigating California is Hypocritical. Government says it is Reviewing the Prob-*

gravity of concern over illegal immigration, and the extent to which that concern had captivated the American public.[55] Citizens of Florida[56] and Arizona[57] have contemplated similar measures, but their efforts have failed to gain support. These efforts, however, show the impact that the costs of illegal immigration have made on people from different parts of the U.S.

There have also been vigorous congressional responses to illegal immigration. During the first session of the 103rd Congress in 1993, amid heated debates over the North American Free Trade Agreement ("NAFTA") and health care, illegal immigration garnered its fair share of attention.[58] In January of 1993, for example, Representative Al McCandless of California introduced legislation to assign 12,000 Department of Defense workers to help the INS and U.S. Customs Service conduct various

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lem, L.A. TIMES, Dec. 19, 1994, at A1. *See also* James Smith, *The Americas; A Weekly Look at People and Issues in Latin America; Migrants Targeted at Other Mexican Border; Plan Sends Illegals Back to the Country of Origin*, NEWSDAY, Sept. 9, 2001, at A18. In July 2001 Mexico instituted a repatriation initiative called *Plan Sur*, a border policy aimed at stemming the northward flow of illegals. Human rights organizations have criticized *Plan Sur* for largely the same reasons they have criticized American border control efforts, arguing it will lead would-be migrants to seek more dangerous routes or pay even more exorbitant fees to smugglers. *Id. Cf. Hearing on H.R. 238*, *infra* note 59; *Border Arrests, infra* note 66.

55. *See, e.g.,* 139 CONG. REC., *supra* note 36. In the words of Senator Reid: "The American people are demanding reforms that will restore order to an immigration system they perceive to be out of control." *Id*.

56. *See* Hogard, *supra* note 15. The Florida group patterned itself after the California lobby, calling itself the "Save our State Committee." It aimed at cutting off education, welfare, and other public services to illegal aliens. Although the Florida Department of State approved the ballot proposal, the group did not garner the signatures needed to qualify for a spot on the ballot. *Id.*

57. *See* Hudson, *supra* note 16. A businessman promoted the Arizona campaign, but was unable to secure enough support. Some attributed this failure to Arizona's desire to increase trade with Mexico. *Id*.

58. *See, e.g.,* H.R. 2757, 103d Cong. (1st Sess. 1993) (bill to amend the Immigration and Nationality Act pertaining to alien smuggling); S. 457, 103d Cong. (1st Sess. 1993) (bill to deny payment of federal benefits to illegal aliens); H.R. Con. Res.117, 103d Cong. (1st Sess. 1993) (resolution to improve U.S./Mexican cooperation to control illegal immigration); S. 1351, 103d Cong. (1st Sess. 1993) (bill to fortify border security); H.R. 1031, 103d Cong. (1st Sess. 1993) (bill to provide improved enforcement of employer sanctions). This is not an exhaustive list.

border-control operations.[59] In February of 1993, Nebraska Senator James Exon sponsored a bill to prohibit the direct payment of federal financial or unemployment benefits to illegal aliens.[60] In that same month California Representative Anthony Beilenson proposed a bill to strengthen laws penalizing employers for hiring illegal aliens.[61] Then, in 1997, Congress enacted the sweeping Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA").[62] IIRAIRA increased the INS budget, added personnel, and gave INS agents greater authority to repel illegal aliens.[63] When Congress limited health care

59. H.R. 245, 103d Cong. (1st Sess. 1993). Border crossings between Mexico and the U.S. cover a terrain of remote deserts and mountains that is difficult to traverse. In 1997, for example, there were 38 recorded migrant deaths in the Imperial Valley of southeast California. Thirty-seven died in that region in 1998. *See Week in Review; Mexico, U.S. Clash Over Chiapas; PGJDF Rape Scandal*, INFOLATINA S.A. DE C.V., Aug. 2, 1998. *See also U.S. Mexico to Meet on Border Safety*, UPI, May 25, 2001, LEXIS, Nexis, UPI File. Border jumpers often hire guides known as "coyotes," who are often unscrupulous. For instance, in late May, 2001, a coyote abandoned a group of 28 Mexicans as they trekked through a sun-baked desert in Arizona, in a region known as *El Camino del Diablo*, or "The Devil's Path," in 110° heat. Fourteen died before the Border Patrol found the group. The Border Patrol, however, has improved the emergency medical training of its personnel and has focused more attention on movements in treacherous regions in response to such incidents. *Id. See also Alien Smuggler Enforcement Act of 1999: Hearing on H.R. 238 Before the House Comm. On the Judiciary*, 106th Cong. (1999) (statement of Rep. James E. Rogan of California).

Also, the immigrant smuggling business generates between $7 billion and $8 billion dollars per year. Aliens often pay thousands of dollars for passage, only to be robbed. Nonetheless, a recent study by the Southern California Association of Governments found that alien smugglers are often "let off with a slap on the wrist." *Id*.

60. S. 457, 103d Cong. (1st Sess. 1993).

61. H.R. 1031, *supra* note 58 (requiring the U.S. Secretary of Health and Human Services to devise a fraud-resistant social security card). Immigration agents have raided many establishments in a crackdown on hiring of illegals, levying heavy fines, as illustrated by the cases of Filiberto's, a chain of 15 Mexican-food restaurants in Arizona, and Pappas Partners, a Texas restaurant chain. After pleading guilty to concealing and harboring illegal aliens, Pappas paid a record $1.75 million fine. *See* Mark Shaffer and Chris Moeser, *INS Shuts Valley Filiberto's; 15 Cafes Raided in Probe on Illegal Immigration*, ARIZ. REPUBLIC, Sept. 18, 1997, at A1.

62. IIRAIRA, *supra* note 2.

63. *See* Jacob Bernstein, *Welcome to America. Now Go Home; Granted Sweeping New Powers by Congress, the INS Is Quickly Earning a Global Reputation for Cruel and Capricious Conduct at Miami International Airport*, MIAMI NEW TIMES, Jan. 1, 1998, *available at* http//:www.miaminewtimes.com.

services to illegal aliens that same year,[64] it affixed the following statement to the legislation: "Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system."[65]

The INS has also stepped up border security in targeted areas. In the San Diego and El Paso areas, for example, it instituted a program called "Operation Gatekeeper."[66] Operation Gatekeeper made 1,168 arrests in its first 24 hours.[67] A similar program called "Operation Cochise" increased INS manpower in the Tucson area, using checkpoints, high-tech gadgetry, and undercover officers to catch illegal immigrants.[68] In June of 2000, Operation Cochise apprehended over 70,000 illegal border crossers.[69] To better appreciate the magnitude of the border traffic, consider that the U.S. Border Patrol caught 623,672 along the southwest border during the first half of 2002, capturing 97,424 in May alone.[70]

IIRAIRA sanctioned "expedited removal." Under this procedure, INS officers at immigration checkpoints may summarily deny anyone whose papers or verbal responses are suspect. Previously, those deemed ineligible were allowed to plead their cases before immigration judges. *Id.*

64. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. § 607 (Supp. II.1997)).

65. *Id.* at 2260. The statement further asserted that: "[I]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public resources." *Id.*

66. *See Border Arrests up as "Operation Gatekeeper" Begins*, UPI, Oct. 2, 1994, LEXIS, Nexis Library, UPI File. The operation involved some 200 agents. *Id. See also* Tim Vandenack, *U.S. Stemming Illegal Immigration*, UPI, Mar. 14, 1996, LEXIS, Nexis Library, UPI File. The San Diego and El Paso regions had accounted for about 65% of all border crossings, but this was reduced to 44% according to then INS chief Doris Meissner. Of interest also, the Mexican overland route is used by immigrants from all over the world as a point of entry into the U.S. *Id.*

67. Vandeneck, *supra* note 66.

68. *See* Scott Baldauf, *After Being Overrun, Douglas Takes Back Its Community*, CHRISTIAN SCIENCE MONITOR, Feb. 17, 2000, at 3.

69. *Id.*

70. Immigration and Naturalization Services, *Southwest Border Apprehensions, available at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrmay02/SWBORD.HTM (last modified July 5, 2002). Even so, this figure represents a decline in apprehensions of 32% compared with the same period in 2001. *Id.*

Some American citizens and lawmakers have resorted to more radical solutions to the problems of illegal immigration.[71] In Douglas, Arizona, for example, ranchers mustered armed vigilante squads to capture undocumented immigrants.[72] What's more, some lawmakers have proposed dramatic legislation such as moratoria on all immigration.[73] Most responses, however, have been less controversial. They have generally sought to curb illegal border traffic and reduce the costs generated by illegal immigration.[74]

The consumption of health care resources by illegal aliens has frequently augmented those costs. The migration of pregnant women from Mexico is illustrative.[75] According to Sally Super,

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71. *See, e.g., Visa Cheats; Warning from U.S. Embassy*, LATIN AMERICAN NEWSL., Mar. 21, 2000, at 3.

72. *Id.* According to the Barnett family, which farms in the area, ranchers have been forced to take such action to defend their property against illegal aliens. *Id.*

73. *See* Dena Bunis, *Balance Stressed in Border Approach: Powell Tries to Lower Expectations for Meeting Between Bush and Fox*, ORANGE COUNTY REG., Aug. 10, 2001, *available at* 2001 WL 9680585. Colorado Representative Tom Tancredo supports such a moratorium, stating: "[w]e must stop this unfettered flow into our country or we will see irreversible damage done to our economic and social resources." *Id.*
For an example of an immigration moratorium resolution, see *Immigration Moratorium Resolution, available at* http://www.balance.org/cap/legalimmindivres.html (last visited, Sept. 28, 2002).

74. *See* sources cited *supra* note 58. *See also* Stewart M. Powell and Dan Freedman, *U.S. To Increase Work Permits, Bush Tells Mexico's President*, SEATTLE POST-INTELLIGENCER, Sept. 7, 2001, at A6. President Bush and Congress members promised Mexican President Vicente Fox that they would try to expand a temporary-worker program to cover some of the 4½ million Mexicans living and working in the U.S. illegally. The existing temporary-worker program operated by the Immigration and Naturalization Service admitted 457,346 temporary workers from all countries in 1999, including 68,221 Mexicans. *Id. See also* Dan Eggen and Darly Fears, *Bush Weighs Legal Status of Mexicans; Illegal Immigrants May Get Residency*, WASH. POST, July 16, 2001, at A1. In a joint effort to deal with the problem of Mexican illegal immigrants, the Bush Administration is considering granting legal residency status to millions of illegal aliens. *Id.* This amnesty proposal, however, is controversial, but has many high-profile supporters like Arizona Senator John McCain. He said: "I believe these people are living here, and it's [amnesty] a recognition of reality." On the other hand, Texas Senator Phil Gramm opposes such amnesty, while supporting temporary-worker status for Mexican laborers. *See Fox News Sunday* (Fox News television broadcast, July 15, 2001) (on file with Journal).

75. *See* Hanson, *supra* note 1.

director of the maternity pavilion at Sharp Chula Vista Hospital, an organized ring helps pregnant women cross the border where they can obtain costly medical care subsidized by Californians.[76] The story of Hermillo Meave shows how high those costs can climb.[77] Meave was taken to Sharp Memorial Hospital in San Diego, in September of 1991.[78] Although he was being transferred from a hospital in Tijuana, Mexico with a chronic heart condition, he supplied a San Diego address.[79] Since he produced a California identification card and Medi-Cal number indicating eligibility for treatment under California's health care system, a hospital-based Medi-Cal worker ruled that he could be admitted, meaning that most of his medical expenses would be covered by the state.[80]

The day after Meave was admitted, surgeons implanted a pump to keep his heart beating until a donor heart could be found.[81] During the five-month waiting period, suspicions of fraud arose.[82] Despite these, Meave's application for a heart transplant was approved, and he received his new heart in February of 1992.[83] Then the truth emerged: Meave actually lived in Tijuana, Mexico and was not eligible for a transplant.[84] The bill came to $1 million;[85] the taxpayers of California paid it.[86]

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76. *Id.* Some officials contend that many are drawn by a California program which spent $80,000 over a two year period on Spanish-language advertisements, broadcast on Mexican radio and television, encouraging undocumented pregnant women to seek prenatal care in California. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* The case of Rene Garcia offers another striking example of an illegal alien defrauding the California healthcare system. Rene Garcia was taken to Sharp Chula Vista Hospital with a severe heart condition, also in need of a transplant. He produced documentation showing he was an American citizen, although he was not covered by insurance. Garcia's uncle took the case to the Legal Aid Society of San Diego, which castigated the Medi-Cal investigators for jeopardizing Garcia's life. When the application for Medi-Cal was processed, it was revealed that nine other individuals had used the same documentation. The patient was actually a Mexican national whose father and uncle had devised an elaborate scheme to procure a free heart transplant. The patient died three days after being hospitalized, leaving behind a

After a painstaking search for ways to lessen the costs of illegal immigration, from rhetoric to referenda, from legislation to litigation, what other avenues should be explored? Perhaps the answer may be gleaned from late Florida Governor Lawton Chiles's suit against the federal government over the issue: Governor Chiles did not want to deny public services to illegal aliens; he only wanted to compel the federal government to fund those services.[87]

Can a similar approach be used to compel payment for the expenses generated by illegal aliens from their countries of origin? The remainder of this Note will review the pertinent areas of international law and explore the possibilities of such legal action using Mexico/U.S. as a paradigm.

III. THE CASE FOR RESTITUTION OF HOST STATE BY ALIENS' COUNTRIES OF ORIGIN

A. Illegal Immigration and International Law

There are two principles that define the rights of sovereign nations to regulate the flow of alien immigration into their territories:[88] the principle of *state sovereignty*, which emphasizes national borders and allows the exclusion of aliens, and the principle of *interdependence*, which emphasizes the interrelationship among nations and forbids the exclusion of aliens.[89] Several prominent European and Latin American jurists subscribe to the principle of interdependence.[90] Most Anglo-Saxon

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$200,000 medical bill. The state declined to accept responsibility for the bill, leaving the hospital to sue the family in the hope of recovery. *Id.*

86. *Id.*

87. *See* Hudson, *supra* note 16, at 38.

88. *See* PLENDER, *supra* note 26, at 61.

89. *See id.* Marcel Sibert asked whether there was a rule of international law requiring a State to admit aliens into its territory, replying as follows: *"Pour résoudre cette question il a été fait appel à deux principes différents:1 au principe de la souveraineté des états, envisagé d'une manière absolue, ou bien 2 au principe de leur interdépendence."* [resolving this question called for two distinct principles: (1) the principle of state sovereignty, deeming states separate, and (2) the principle of their interdependence] (author's translation). *Id.*

90. *Id.* Sibert believed this principle was at the root of article 13(2) of the Universal Declaration of Human Rights which prescribes a right of return to one's country. *Id. See also* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th Plen. Mtg. U.N. Doc. A/810 (1948).

theorists, however, champion state sovereignty. [91] While the right to exclude aliens has not always been deemed a *sine qua non* of the state sovereignty principle, subscribing states have seldom felt obliged to admit aliens, except when compelled by human rights concerns.[92]

In his seminal work on international law, Hugo Grotius argued that the defense of the persons or property of the sovereign's subjects is a legitimate justification for war.[93] From this proposition it follows that a sovereign might expel aliens to protect the personal or proprietary rights of its citizens.[94] Grotius believed, however, that such expulsions without due care were barbarous, citing the authority of St. Ambrose to demonstrate that even famine did not justify the expulsion of aliens.[95]

Building on the work of Grotius, Samuel Pufendorf adduced limits on a sovereign's power to exclude aliens from its territory.[96] Accordingly, sovereigns must admit aliens with lawful reasons to enter, such as commercial motives.[97] Furthermore, once aliens are admitted, the sovereign must ensure their proper treatment.[98]

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91. PLENDER, *supra* note 26, at 61. Prominent among these theorists are Lassa Francis Lawrence Oppenheim and Robert C. de Ward. *Id*.

92. *Id* at 62.

93. *Id.* (citing HUGO GROTIUS, DE JURE BELLI AC PACIS, vol. II, ch. II, para. 15 (1702)).

94. *Id.*

95. *Id.* Saint Ambrose was Bishop of Milan in the 4th century A.D. When Emperor Theodosius ordered the massacre of the people of Thessalonica after officers of an imperial garrison stationed within were murdered (A.D. 390), Ambrose demanded that the emperor do public penance, and the emperor obeyed, securing the bishop's standing as a moral force. EDWARD GIBBON, 2 THE DECLINE AND FALL OF THE ROMAN EMPIRE 872–74 (Modern Library Edition 1995) (1782).

96. *Id.* (citing PUFENDORF, DE JURE NATURAE ET GENTIUM, LIBRI OCTO 354 (C. Oldfatter trans., 1934).

97. *Id.*

98. *Id.* Pufendorf sought to achieve a balance between the notions of freedom of movement and sovereignty, and distilled the following rule: "every state may reach a decision according to its own usage on admission of foreigners who come to it for reasons other than are necessary and deserving of sympathy; only no-one can question the barbarity of showing indiscriminate hostility to those who come on peaceful missions." *Id*. at 64. Immanuel Kant adopted Pufendorf's thesis in his international law treatise, *Perpetual Peace*, where he defined hospitality as the right of a foreigner not to be treated hostilely simple because he entered a foreign land. Nonetheless, Kant believed that foreigners could not claim the right to be guests, but only visitors, since a

Sir William Blackstone summarized the basic principles of sovereignty as follows: "by the law of nations no member of one society has the right to intrude into another . . . . [Nevertheless] great tenderness is shown by our laws . . . with regard to the admission of strangers who come spontaneously . . . they are under the king's protection."[99] British jurisprudence adopted this view,[100] as did that of the Continent[101] and Canada.[102]

American jurisprudence has also adopted this view, as emphasized by an opinion of the Solicitor for the U.S. State Department in 1909.[103] In that year, the Solicitor considered Ecuador's refusal to admit a Chinese-American laborer.[104] In light of a sovereign nation's "undoubted right" to exclude aliens, he could find no basis to object to Ecuador's decision to exclude the American citizen.[105]

American case law has incorporated this view of sovereignty as well.[106] In *Nishimura Ekiu v. United States*, Justice Horace Gray held:

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special treaty would be needed to create the status of guest or invitee with "freedom of the house." *Id.* In his treatise, *Le Droit De Gens,* Emeric de Vattel declared that a sovereign could deny entrance to foreigners in certain cases, such as when the welfare of the state was imperiled. *Id.*

99. *Id.* (alteration in source).

100. *Id.* at 70–72 (citing Musgrove v. Chun Teeong Toy, [1991] A.C. 272 (1891) (U.K.), and Montague Crackenthorpe who wrote in 1892: "it can hardly by disputed that every civilized State is entitled to make what regulations it pleases both as to emigration from, and immigration into its territory.") *Id.*

101. *See id* at 72. The German scholar P. Heilborn saw a close analogy between individual proprietary rights and a state's territorial sovereignty rights. *Id.* Speaking of the admission of aliens, Frederic de Martens said: *"Chaque état, en vertu de son omnipotence à l'intérieur, a le droit indubitable de fixer les conditions auxquelles il les admet sur son territoire." Id.* [each state has an indubitable right to set the conditions under which it admits them [aliens] into its territory by virtue of its control of internal affairs] (author's translation).

102. *Id.* at 71, (citing Attorney-General for Canada v. Cain, and Attorney-General for Canada v. Gilhula, [1906] A.C. 542 (1891) (U.K.), which upheld Canada's Alien Labor Act of 1897. The Committee deciding the case held: "by the law of nations the supreme power in every State has the right to make laws for the exclusion . . . of aliens.")

103. *Id.* at 73.

104. *Id.*

105. *Id.*

106. *See, e.g.,* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

> It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[107]

What's more, this view has been reaffirmed in more recent cases.[108] Thus, although the opposing viewpoint advocating free movement based upon the interdependence principle has gained acceptance,[109] the state sovereignty principle has far deeper roots in American jurisprudence.[110]

Nonetheless, Proposition 187-type legislation may violate the sovereignty principle's inherent duties to treat illegal aliens properly.[111] Indeed, such legislation aims at denying social services, health care, and education to illegal aliens. Such services are arguably necessary to ensure their proper treatment.[112] Since increasingly large numbers of migrants are seeking entrance into industrialized countries, and will continue to engender substantial social and economic costs, affected nations will inevitably face questions concerning the treatment of migrants.[113] Sovereignty issues will loom large within these questions. Moreover, it is unlikely that Proposition 187-type initiatives will ever garner international approval[114] despite the mer-

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107. *Id.* Justice Gray cited Vattel to support this proposition. *See supra* text accompanying note 98.

108. *See, e.g.,* Landon v. Plasencia, 559 U.S. 21, 32 (1982) (holding that the power to admit or exclude aliens is a sovereign right); United States *ex rel* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("An alien who seeks admission to this country may not do so under any claim of right.").

109. *See* PLENDER, *supra* note 26, at 61. In 1906, Dionisio Anzilotti stated the principle of free movement firmly: *"[I]l existe pour les états une obligation juridique d'admettre les étrangers sur leur territoire." Id* at 72 [sovereign states have a legal duty to admit foreigners into their lands] (author's translation).

110. *See supra* text accompanying note 103; Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

111. *See supra* text accompanying notes 98, 99.

112. *See* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 763 (S.D. Cal. 1995). *See also supra* text accompanying notes 98–99.

113. *See, e.g.*, Richard Bordreaux, *30,000 Join Genoa March for "Global Village" Sans Borders,* L.A. TIMES, July 20, 2001, at A10 (noting the skittishness toward migration issues in developed countries).

114. *See El Salvador's President Calderon Welcomes Summit Results*, BBC Summary of World Broadcasts (Radio El Salvador), Dec. 16, 1994, LEXIS, nexis Library, BBC File. President Armando Calderon Sol noted that rejection

its of their motives.[115] Thus, it is worthwhile to consider other methods of dealing with illegal aliens that better comport with the duties and obligations embedded in the state sovereignty principle.

B. Alternative Methods of Dealing with the Burdens of Illegal Aliens

A good place to start is with a program instituted by the U.S. in 1996 to return Mexican illegal aliens to Mexico.[116] Under this plan, the U.S. government pays the airfare from San Diego to airports close to the migrant's home in Mexico.[117] This program was designed to ensure that returnees would not attempt re-entry, since it conveyed them home rather than depositing them at the border where the temptation to re-cross is heightened.[118] In 1996 Congress earmarked $5 million for the program, and according to INS spokesman Greg Gagne, the program was expected to return 5,000 illegal immigrants by the end of that year.[119] According to Gagne, while the U.S. would pay the airfare, Mexico would cover the costs after the returnee landed.[120] Although this is a small-scale operation,[121] it represents an imaginative approach to dealing with illegal immigration. It

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of the notion of Proposition 187 "has come not only from the United States, but from outside the United States; that is, from the world." *Id. See also* David Welna, *Leaders at Miami Conference Discuss Divisive Issues*, Weekend Edition, (NPR broadcast, Dec. 10, 1994) (transcript # 1101–13) (on file with Journal). Mexico's expected response to Proposition 187 was noted. *Id.*

115. See generally HUDDLE REPORT, *supra* note 1 for insights into the financial motivations. *See also* Hanson, *supra* note 1.

116. *See* Phillip True, *13 Undocumented Immigrants Flown Home in New Program*, SAN ANTONIO EXPRESS-NEWS, Apr. 5, 1996, at A14.

117. *Id.*

118. *Id.*

119. *Id.* To qualify for this program, an undocumented Mexican must be at least 18 years of age, must have been arrested at least once by INS authorities, and must have no other record with U.S. law enforcement. A Mexican travel agency would make the air travel arrangements using Mexican carriers so that the returnees would be dealt with exclusively by Mexican officials on Mexican territory. What's more, those flown home through this program are not required to pledge that they will not try to enter the U.S. again, nor are they to be specially punished if they do so. *Id.*

120. *Id.* The Mexican Foreign Minister disputed the contention that Mexico would pick up the tab once on the ground. *Id.*

121. *Id.* The INS expected to return 150 aliens in a three-month period and then increase the number to roughly 420 per month until the end of 1996. *Id.*

also contains the thought-provoking idea of having Mexico bear some of the costs resulting from Mexican illegal immigration in the U.S.[122] This suggests at least the notion of a demand that Mexico defray other costs associated with Mexican illegal aliens crossing into the U.S.

Traditionally any such demand might sound in tort if it involved private parties, under the doctrine of negligence: an actor responsible for harming a party, in breach of a duty, is obliged to pay damages for the harm caused.[123] This principle is accepted by legal systems worldwide and is thus a proper basis for legal action under international law.[124] Indeed, international law can derive from "customary law,"[125] and the tort concept of negligence, embraced by the civil and common law alike, certainly qualifies as customary law.

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122. *Id.* As noted, the Mexican Foreign Minister disputed this contention. *See supra* note 120. Nonetheless, the *idea* of Mexico bearing some of the costs is presented, at least through the words of the INS spokesman.

123. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS §30, at 164–65 (5th ed. 1984). There are four elements necessary to satisfy a cause of action in negligence: (1) A duty or obligation recognized by law [in this case, that duty would be for government officials to refrain from encouraging the breach of another nation's sovereign rights to frame laws, to wit, the immigration laws of the U.S.]; (2) a breach of that duty [here, the statements made by Mexican government officials which arguably have encouraged the breach of those immigration laws]; (3) a reasonably close causal link between the conduct and the resulting injury [here, the legitimizing force that affirmative comments by Mexican government officials have on the design of border jumpers to in fact breach American immigration laws]; and (4) actual loss or damage to the interests of others [here, it would be the financial and social strains placed upon the American taxpayer in funding the outlays to social welfare programs necessitated by Mexican illegal aliens within the U.S.] *Id.*

124. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 (1987). For a discussion of the evolution of negligence in the common law, see John H. Wigmore, *Responsibility for Tortious Acts,* 7 HARV. L. REV. 315, 320–25 (1894). For a discussion of negligence in Roman Law, the antecedent of the civil law system, see FRITZ SCHULZ, CLASSICAL ROMAN LAW 572–73 (1969). Actions for compensation in Roman Law were at first penal. Interestingly, these penal actions served as models for legislators under Edward I, enshrining them within the common law, and illustrating the nexus between the two great legal systems. *See id.* at 574. See also Thomas Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1234 (2001) for a compendious treatment of the Roman Law development of negligence principles and their incorporation into the civilian tradition.

125. RESTATEMENT, *supra* note 124, § 102(1)(a).

C. Sovereign Immunity

Nonetheless, when dealing with sovereign states tort law is fettered by the doctrine of sovereign immunity.[126] In the U.S. the doctrine of sovereign immunity stems from the 1812 U.S. Supreme Court decision of *Schooner Exchange v. McFaddon*.[127] In *Schooner Exchange* Chief Justice Marshall held that the U.S. had waived jurisdiction over the activities of foreign sovereigns based on the principle of comity among nations.[128] This is called the "absolute theory of sovereign immunity," and pays homage to the ancient notion that the king could "do no wrong."[129] The principle of absolute sovereign immunity was wrought in an age when the exercise of judicial authority by one sovereign over another represented belligerence or the presumption of superiority.[130] Yet even after that age passed, courts retained absolute sovereign immunity to avoid embarrassing those charged with conducting foreign affairs.[131] Over time, however, as governments started to engage in activities hitherto performed solely by private individuals, many nations began to contemplate a more restrictive doctrine.[132]

This trend was apparent during the International Convention for the Unification of Certain Rules Relating to the Immunity State-Owned Vessels in 1926 ("Brussels Convention").[133] The Brussels Convention limited sovereign immunity for state-controlled enterprises to ships used exclusively for non-commercial endeavors.[134]

Although the U.S. did not participate in the Convention, after World War II it too began to restrict sovereign immunity

126. Schooner Exch. v McFadden, 11 U.S. 116, 138 (1812).
127. *Id.*
128. *Id.* at 136.
129. Victory Transp. v. Comisaria Gen., 336 F.2d 354, 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965).
130. *See id.*
131. *Id.*
132. *Id.*
133. State-Owned Ships Convention, Apr. 10, 1926, 176 L.N.T.S. 199. An English translation of the Convention may be found in ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS 303–308 (1933). See also *Victory Transp.*, 336 F.2d at 357 n.5 for excerpts of the Convention.
134. *Victory Transp.*, 336 F.2d at 358.

through negotiated treaties.[135] Then, in 1952, in a letter from Jack Tate, Acting Legal Advisor to the Acting Attorney General Phillip Perlman, the U.S. State Department (which had usually requested immunity for all actions against friendly sovereigns) adopted the restrictive theory of sovereign immunity in earnest.[136] After several years and much criticism,[137] Congress finally addressed the issue of sovereign immunity, enacting The Foreign Sovereign Immunities Act ("FSIA") in 1976.[138]

D. The Foreign Sovereign Immunities Act

During the post Tate Letter period, foreign governments customarily submited requests for sovereign immunity to the U.S. Department of State, a procedure that drew harsh criticism.[139] In response, the State Department's Office of the Legal Adviser began holding quasi-judicial hearings to determine whether immunity claims comported with the prescriptions of the Tate Letter. Often, however, foreign policy concerns supervened, [140] and uncertainty resulted.[141] This prompted congressional review, and culminated in the passage of the FSIA in 1976, now

135. The U.S. drafted 14 treaties restricting sovereign immunity between 1948 and 1958. *Id.*

136. Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 486–87 (1983). *See also* Letter from Jack Tate Acting Legal Adviser, Department of State, to the Acting Att'y Gen. Philip Perlman (May 19, 1952), *reprinted in* 26 DEP'T. ST. BULL. 984–985 (1952) and Alfred Dunhill of London, Inc. v Cuba, 425 U.S. 682, 711 (1976) [hereinafter Tate Letter]. "It will therefore be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." *Id.* The kernel of this restrictive theory may be gleaned from the dictum of *Schooner Exch.*, contemplating the possibility of a prince's private property being subject to territorial jurisdiction, since, in that case he would have assumed "the character of a private individual . . . " *Schooner Exch.*,11 U.S. at 145.

137. *See, e.g.,* Michael H. Cardozo, *Sovereign Immunity: The Plaintiff Deserves A Day In Court,* 67 HARV. L. REV. 608, 608 (1954).

138. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2892 (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602–11 (1994 & Supp. IV 1998)) [hereinafter FSIA].

139. *See Cardozo, supra* note 137.

140. *See* Rich v. Naviera Vacuba, SA, 295 F.2d 24, 25 (4th Cir. 1991) (considering the Cuban Revolution).

141. *See id.*

the sole means of obtaining jurisdiction over a foreign sovereign in the U.S.[142]

The FSIA grants foreign nations general immunity from the courts of the U.S. and the several states, subject to exceptions, thus embodying the restrictive theory of sovereign immunity.[143] Section 1605 lists the exceptions: waiver, [144] commercial activity,[145] property taken in violation of international law,[146] rights of property in the U.S. arising out of succession or gift,[147] claims for money damages or losses caused by the tortious acts or omissions of sovereign states or their agents, except those based on the performance of discretionary functions,[148] actions to enforce agreements,[149] and terrorism or extra-judicial killing.[150]

E. FSIA Commercial Activity Exception

The "commercial activity" exception is one of the FSIA's most frequently invoked exceptions, denying sovereign immunity when:

> [T]he action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the Unites States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[151]

In other words, there must be a nexus between the commercial activity of the foreign state and the U.S. in order to establish subject-matter jurisdiction under the FSIA.[152]

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142. 28 U.S.C. § 1330. The FSIA was enacted "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R. REP. NO. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.C.C.A.N 6604, 6604.

143. 28 U.S.C. § 1604.

144. *Id.* § 1605(a)(1).

145. *Id.* § 1605(a)(2)

146. *Id.* § 1605(a)(3).

147. *Id.* § 1605(a)(4).

148. *Id.* § 1605(a)(5).

149. *Id.* § 1605(a)(6).

150. *Id.* § 1605(a)(7).

151. *Id.* § 1605(a)(2).

152. Nelson v. Saudi Arabia, 923 F.2d 1528, 1534 (11th Cir. 1991).

Subsection 1603(d) offers some guidance in determining what constitutes "commercial activity" for the purposes of this exception.[153] It embraces both ongoing activity as well as single commercial transactions.[154] Furthermore, the commercial character of the conduct should be determined by the nature of the conduct rather than by reference to its purpose.[155] The FSIA, nonetheless, does not define "commercial activity." Indeed, Congress deliberately left the term open, letting the courts determine "on a case by case basis . . . the distinction between commercial and governmental."[156] Thus, case law has interpreted the meaning of commercial activity.[157] Accordingly, the contractual relations found in common business transactions are considered paradigmatic commercial activity.[158] This comports with the FSIA's legislative history as embodied in a House Report that concluded that a contract or series of contracts for the purchase of goods was commercial activity per se.[159] Put simply, when a government acts like a private person it forfeits sovereign immunity.

This Note contends that certain statements of Mexican government officials regarding the illegal migration of Mexican citizens into the U.S. may be deemed commercial activity under the FSIA commercial activity exception. This could expose the Mexican government to the jurisdiction of the courts of the U. S. and individual states.[160] As noted above, the exception was designed to lift the barriers of sovereign immunity when a government or its agents acted like a private person.[161] The animating spirit, evident from Chief Justice Marshall's dictum in

153. 28 U.S.C. § 1603(d).

154. *Id.*

155. *Id.*

156. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308–9 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982).

157. *See, e.g.,* Republic of Argentina v. Westover, Inc., 504 U.S. 607, 617 (1992); Gemini Shipping Inc. v. Foreign Trade Org., 647 F.2d 317, 319 (2d Cir. 1981); Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1109 (S.D.N.Y. 1982).

158. *Gemini Shipping*, 647 F.2d at 309.

159. *Id.*

160. 28 U.S.C. § 1605(a)(2).

161. The quintessential example of private-person activity is when the sovereign enters into contractual relations. *See Gemini Shipping,* 647 F.2d at 309.

Schooner Exchange,[162] suggests that the restrictive theory of sovereign immunity does not extend such immunity to activities inherent in the normal course of business. This allows the exception to encompass many activities involved in the conduct of business. By this rationale, *promotion* of an activity from which a government can *profit* monetarily may be construed as commercial activity under the FSIA commercial activity exception. Indeed, private persons often engage in such promotion-profit regimens. Thus, why should a government engaging in the same type of private-person (promotion-profit) activity be immune from legal action if the rationale for the restrictive theory of sovereign immunity is to insulate a government only when it acts in the public character of a sovereign? In theory it should not. Therefore, a suit based on the promotion-profit interpretation of FSIA commercial activity is consistent with the congressional intent to leave the interpretation of FSIA commercial activity to judicial gloss.[163]

Applying the promotion-profit interpretation of commercial activity to Mexico, the *promotion* is the encouragement by Mexican government officials of Mexican citizens to cross the border illegally into the U.S. The Monetary *profit* generated is the transfer payments sent from the U.S. to Mexico by illegal aliens. These payments generate some $6 billion per year, according to recent estimates.[164] Indeed, such transfer payments, inuring to the benefit of the Mexican government as economic stimuli, are the third largest source of foreign revenue in Mexico, behind tourism and oil.[165] If the promotion-profit interpretation of commercial activity were applied, these facts might expose the Mexican government to liability for the costs generated in the U.S. by Mexican illegal immigration, if it could be shown that the Mexican government was promoting that migration.[166]

The next section will canvass Mexican views of illegal immigration. It will then examine evidence suggesting that the

162. *See supra* text accompanying note 136.

163. *Gemini Shipping,* 647 F.2d at 308–09.

164. Michael Janofsky, *Immigrants Flood Border in Arizona, Angering Ranchers,* N.Y. TIMES, June 18, 2000, § 1, at 1.

165. *Id.*

166. For the costs generated, see *supra* Part II.B.

Mexican government has promoted the migration of illegal aliens into the U.S.

F. Mexican Views of Illegal Immigration; Mexican Promotion of Illegal Immigration into the U.S.

Mexican and American views of illegal immigration differ greatly. This section will explore the differences. It will focus on these different views as expressed in statements made by Mexican government officials. It will divide these statements into three categories: (1) statements suggesting that undocumented Mexican immigrants in the U.S. are not there illegally; (2) statements that justify the presence of undocumented immigrants in the U.S., claiming they are beneficial or necessary to its economy; and (3) statements that encourage Mexican to cross the border into the U.S. All of these statements are considered as evidence to support a claim against the Mexican government under the promotion-profit interpretation of the FSIA commercial activities exception.

The fundamental difference between American and Mexican notions of immigration is embodied in the Mexican Constitution.[167] Article 11 of the Mexican Constitution provides: "Any man has the right to enter into the Republic [of Mexico], *exit said Republic . . . without a passport . . . or any similar requirements*."[168] Hence, unlike the U.S., Mexico does not require its citizens to have documentation to travel abroad.[169] Thus, Mexico eschews the American definition of "illegal immigration," since that definition is based on a lack of documentation.[170] In contrast, such deficiency conforms to Mexican law.[171] The Mexican view considers undocumented immigrants within the U.S. to be "migratory workers" or "undocumented aliens," denying in essence that they have entered the U.S. illegally. [172]

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167. MEX. CONST. art. XI. See also Jorge A. Vargas, *Recent Development: Consular Protection to Illegal Migratory Workers and Mexican Undocumented Minors: Two Sensitive Issues Addressed by the Thirteenth Annual Meeting of the United States-Mexico Binational Commission*, 6 J. TRANSNAT'L L. & POL'Y 143, 157 (1996).

168. *Id.* at 157 n.67 (citing the Mexican Constitution) (alteration in source).

169. *Id.*

170. *Id.* at 157.

171. *Id.*

172. *Id.* Disputes over definitions have been great stumbling blocks among negotiating parties. Parties have often been unable to surmount the semantic

What's more, Mexican government officials believe that efforts to curb northward migration violate their citizens' rights.[173] Indeed, in response to California Governor Pete Wilson's suggestion that Mexico should try to stem the flow of illegal immigration, Mexican Foreign Relations Secretary Fernando Solana stated that any such efforts would violate the Mexican Constitution.[174] "In our country," said Solana, "there is absolute freedom of travel; we can leave our territory whenever we want and enter it whenever we decide to."[175] In a public statement addressing Wilson's comments concerning such Mexican efforts, Solana declared: "The proposal you make that Mexico help impede the flow of persons toward *our* border is unacceptable."[176] Solana noted "our" [the Mexican] border while failing to recognize its shared nature with the U.S. This omission arguably displayed an indifference to notion of illegal border crossing consistent with the Mexican view.[177]

The statements of other Mexican government officials also convey a belief that Mexican citizens entering the U.S. without documentation are not doing so illegally.[178] Mexican President Vicente Fox said: "It isn't fair to consider them [Mexican Illegal

differences to get to the actual problem. It is interesting to note that despite the denial that undocumented Mexican migrants are within the U.S. illegally, Mexican officials have not hesitated to apply the term "illegal" to unwanted foreign nationals within Mexico. When, for example, two U.S. diplomats were detained by villagers in Los Platanos, in the Chiapas state where the Zapatista rebellion was active, the president of Mexico's Institutional Revolutionary Party, Mariano Palacios Alcocer said "they [the U.S. diplomats] were in the country in an illegal way." Apparently their presence within the troubled region was sufficient to warrant the term "illegal." *Mexico, U.S. Clash, supra* note 59.

173. Ginger Thompson, *U. S. and Mexico Meet on Joint Migration Issues*, N.Y. TIMES, Apr. 4, 2001, at A4.

174. Governor Wilson made these suggestions during the initial proposals that spawned Proposition 187. Patrick J. McDonnell, *Mexico Rebukes Wilson Over Immigration Plan*, L.A. TIMES, Sept. 11, 1993, at A1.

175. *Id.*

176. *Id.* (emphasis added). Wilson wrote letters to President Salinas of Mexico, urging the Mexican government to help in stemming the tide of illegal immigrants. During a visit to the border at San Diego, he said that Mexican authorities could "shoo away" approaching border jumpers. This suggestion was dismissed in Mexico as an infringement of citizens' rights to exit the country. *Id.*

177. *See* Vargas, *supra* note 168.

178. *See Mexico Leader Wants Immigrants Made Legal*, AUGUSTA CHRON., July 29, 2001, at A2.

aliens within the U.S.] illegal when they are employed, when they are working productively, when they are generating so much for the American economy . . . [t]hey shouldn't have to walk around like criminals or stay hidden."[179] In a more recent interview, President Fox was more emphatic: "They are not illegals. They are not illegals. They are people that come there [to the U.S.] to work, to look for a better opportunity in life. . . ."[180] Similarly, at a conference discussing U.S. immigration policy held in San Antonio, Texas, Mexican Foreign Minister Enrique Loaeza justified the status of illegal aliens within the U.S.:[181] "They [Mexican illegal aliens] don't come to the U.S. to break the law; they don't come to the U.S. to commit crime."[182] This contrasts with the American position that regards border crossings without valid documentation as crimes per se.[183]

Mexican government officials have also indicated an unwillingness to accept the American view of border policy.[184] For example, Mexican Foreign Secretary Jose Angel Gurria stated that Mexican officials were warning people about the dangers of crossing the border, putting them on notice about the perils they might encounter. [185] Fernando Solis Camera, head of Mexico's Population and Migratory Services department of the Interior Secretariat, announced that Mexican citizens would not be deterred from illegally crossing the border into the U.S.[186] While Mexican officials contended that these statements were taken out of context, those officials ultimately justified the

179. *Id.* According to the Mexican magazine *Cambio*, the Fox government is hiring three firms to work on the migration issue. *See* Susan Ferriss, *Fox Scouting "Creative" Immigration Solutions*, ATLANTA J. AND CONST., Sept. 4, 2001, at A1.

180. *Hannity & Colmes,* (Fox News television broadcast, Mar. 26, 2002) (transcript # 032601cb.253) (on file with Journal).

181. *See* Carmini Danini, *Border Policy Eyed by Officials of Mexico*, SAN ANTONIO EXPRESS-NEWS, Aug. 29, 1997, at B1.

182. *Id.*

183. *See, e.g.,* IIRAIRA *supra* note 2.

184. *See Mexico's Blind Spot Deadly*, SAN ANTONIO EXPRESS-NEWS, Aug. 26, 1998, at B4.

185. *See Mexico Doubling Consular Staff*, AUSTIN AMERICAN-STATESMAN, Sept. 3, 1997, at A18.

186. *See Mexico's Migration Chief Criticizes U.S. Policy*, INFOLATINA S.A. DE C.V., Mar.12, 1998, *available at* LEXIS, News Group File, All.

statements by arguing that they were based on the Mexican Constitution's freedom of movement guarantees.[187]

Mexican government officials have been justifying the status of Mexican illegal aliens in the U.S. for many years. In 1981, for example, a Mexican official said that then Mexican President Lopez Portillo would try to impress President Ronald Reagan with the results of a Mexican study showing that illegal immigration contributed to the American economy.[188] Speaking at the above-mentioned San Antonio conference, Mexican Foreign Minister Loaeza declared that undocumented Mexican migrants go to the U.S. motivated by a desire to benefit the communities where they find work.[189] This view is widely accepted throughout Mexico.[190] Furthermore, Mexican officials have often argued that the U.S. needs Mexican laborers to do the work that natives shun.[191] Indeed, Mexican Foreign Relations Secretary Fernando Solana noted the contributions that illegal immigrants made to California's economy when he chided Governor Pete Wilson over Proposition 187.[192]

Mexican officials have also frequently adverted to the pressures that their returning nationals would impose on Mexico's economy.[193] This was particularly prevalent after the passage of Proposition 187.[194] Speaking of the Proposition's effects, Enrique del Val, Undersecretary of Regional Development, said there would be a major impact on the economy of several Mexi-

187. *Id.*

188. *See* Tamayo, *supra* note 41.

189. *See* Danini, *supra* note 182. "They [undocumented Mexican migrants] come to work and, through their work, to contribute to the prosperity of the communities where they reside." *Id.*

190. *See* Vandenack, *supra* note 66.

191. *Id.*

192. *See* McDonnell, *supra*, note 175. "The place that California occupies in the world . . . is due in large part to the efficient, responsible and often underpaid work of Mexicans. The enormous contribution that Mexicans have made to the state of California throughout history should not be lost sight of." *Id.* He added: "In the specific case of migratory workers, regardless of the type of work they do, they undoubtedly fill a role that the United States has not been able to satisfy." *Id.*

193. *See* Mark Fineman, *California Election; Mexico Assails Passage of Proposition 187; Immigration: Officials Say Measure 'Tramples' Human Rights and Commentators Call it 'Racist.' But President Salinas Stresses that it Does Not Represent the Position of the U.S. Government*, L.A. TIMES, Nov. 10, 1994, at A28.

194. *Id.*

can states if Mexican illegal aliens returned home.[195] "We are worried," said del Val, "Because if these services are denied them there, they will come back."[196] Many responses, however, were not so temperate. For example, in protest over Proposition 187, an angry mob vandalized a McDonald's restaurant in Mexico City's Zona Rosa District.[197] Also, given the Mexican government's blistering condemnation of American internal matters as embodied in Proposition 187 it is interesting to note its response to a U.S. Senate proposal criticizing Mexico's handling of the Zapatista rebellion.[198] The Mexican Foreign Secretariat was incensed, characterizing any such resolution as "unacceptable interventionism."[199]

Thus, the Mexican view of illegal immigration in the U.S. consists of four facets: (1) the Mexican Constitution's guarantee of free exit for its citizens without requiring documentation;[200] (2) declarations of Mexican government officials that undocumented Mexicans are not in the U.S. illegally;[201] (3) statements by Mexican officials that encourage border crossings into the U.S. or denigrate attempts to thwart them; [202] and (4) justifica-

195. *Id.*

196. Baja California, Michoacan, Zacatecas, and Guerrero are among the states that would be affected by this influx. *Id.* In anticipation of Proposition 187, Mexico's Secretary of Public Education, Jose Angel Pescador Osuna said his ministry was "taking measures to know how many children will be affected, which is the demand we now would have to fulfill, particularly in the border states." Among the projects considered were large public works programs to provide jobs for returning workers, using them to build hospitals and schools needed for their families, supporting the same needs denied by the California initiative. Commenting on Proposition 187, Mexican President Salinas asked: "What will happen to the children? Will they return to Mexico? Wash windshields in California? Sell newspapers on the streets or beg?" Along these lines, many analysts view outbound movement from Mexico as a "safety valve" for a nation unable to provide for its expanding population. See McDonnell, *supra* note 175. Nonetheless, there were other voices less denunciatory toward Proposition 187. Among them, Mexican television commentator, Sergio Sarmiento who said "rather than criticizing Proposition 187, we must improve our own economic situation, which is the only way we can guarantee our people decent jobs." *See* Fineman, *supra* note 194.

197. *Id.*

198. *Mexico, U.S. Clash*, *supra* note 59.

199. *Id.*

200. *See supra* notes 169–73.

201. This contrasts sharply with the American view. *See supra* text accompanying notes 176–79.

202. *See supra* text accompanying notes 175–87.

tions of illegal immigration in the U.S., coupled with claims that it is beneficial or necessary to the U.S. economy.[203]

Does any of this constitute the promotion of illegal immigration under the promotion-profit interpretation of FSIA commercial activity? Point (1) — the Mexican Constitution's free exit guarantees — does not. Mexico may craft constitutional provisions as it sees fit.[204] Although the free exit guarantees may be irresponsible, as some have suggested,[205] such a basis for legal action would indeed constitute an unacceptable intervention into Mexico's right to frame its own laws. Point (4) - justifications of illegal immigration as beneficial — also lacks merit in forming the basis for legal action. This is merely advertising a viewpoint. Moreover, some American economists and social scientists share that viewpoint.[206]

When Mexican officials, however, declare that undocumented aliens are not within the U.S. illegally, they are not merely voicing their disagreement with U.S. immigration policy.[207] When government officials speak, citizens listen. When, for example, the Mexican President states that Mexicans who have crossed into the U. S. without documentation are not illegal aliens in the U.S.,[208] Mexican citizens may draw a sense of legitimacy from his authority. That authority might strengthen the resolve of those considering crossing the border into the U.S. Likewise, when officials such as Foreign Relations Secretary Solana declare that Mexican citizens are free to leave without documentation,[209] Mexican citizens may be fortified by what amounts to a governmental imprimatur on crossing the border into the U.S. These and other such statements[210] may engender a sense of entitlement among Mexican citizens about crossing

203. *See supra* text accompanying notes 189–93.

204. *See* PLENDER, *supra* note 26, at 1. A nation's constitutional preferences clearly fall under the rubric of a sovereign right.

205. *See Mexico's Blind Spot*, *supra* note 185. "[T]he measure seems to encourage Mexican citizens to trample U.S. laws." *Id.*

206. *See* Lee, *supra* note 41.

207. *See Mexico Leader*, *supra* note 179. *See also Mexico's Migrant Policy*, *supra* note 54. Mexico's own policy toward migrants from its southern border parallels the American policy, tending to weaken the contention that there is genuine disagreement. *Id*.

208. *See supra* text accompanying notes 179–83.

209. *See* McDonnell, *supra* note 175.

210. *See* Thompson, *supra* note 174.

the border. Such statements may in fact encourage them to view the U.S.-Mexican border as an illusory boundary, traversable at will.

While such statements may be imprudent, it is unlikely that they would constitute promotion under the promotion-profit interpretation of commercial activity. They do not amount to direct encouragement of or interference with U.S. immigration law. Moreover, they can always be defended as expressions of the Mexican view derived from the Mexican Constitution's free exit guarantees.[211] At most, such statements constitute reckless rhetoric, best handled through diplomacy.

If, however, Mexican government officials actively encourage their citizens to cross the border without proper documentation, such encouragement may in fact constitute promotion. Such encouragement might thus form the basis for legal action under the promotion-profit interpretation of FSIA commercial activity. The statements of Fernando Solis Camera, head of Mexico's migration service, might fall into this category. He declared that Mexicans would not be deterred from crossing the border into the U.S. This may be construed as an encouragement for Mexican citizens to cross the border into the U.S. in defiance of U.S. law.[212] This also applies to the statements of Mexican Foreign Secretary Jose Angel Gurria. He announced that the government was alerting people about the dangers they might encounter should they attempt to cross.[213] Here, a Mexican government official is arguably facilitating border crossing with useful information.[214] One might defend such statements as warnings to avoid danger. But this argument is weakened since the object of danger and avoidance in question is U.S. border security.[215]

These statements may encourage or even facilitate border crossings. They form an incipient record of what may constitute promotion under the promotion-profit interpretation of FSIA commercial activity advocated above. While they do not in themselves reach the level of promotion needed to support a

211. *See* Vargas, *supra* note 168.

212. *See* Mexico's Migration Chief, *supra* note 187.

213. *Id.*

214. *Id.*

215. Border security is an indubitable product of U.S. sovereign rights. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

case under the commercial activity exception, they represent the building blocks of such a case.

Indeed, the promotion-profit interpretation of commercial activity is an expansion of what has traditionally been understood by FSIA commercial activity. Yet it comports with the principle that underlies the restrictive theory of sovereign immunity embodied in the FSIA.[216] Hence, the promotion-profit interpretation of FSIA commercial activity may be considered the progeny of those traditional notions of commercial activity. As such, it is the healthy offspring of our evolving law, preserving and carrying forth the spirit of the parent, adopting that spirit to confront the challenges of the times.[217]

IV. CONCLUSION

The burdens of illegal immigration are complex and legion, as shown in the earlier portions of this Note.[218] It is fitting that a nation so burdened would seek relief, accounting for the flurry of legislative, legal, and popular initiatives that we have seen in the U.S. in the past quarter century. Some argue that these measures are tinctured by bigotry or xenophobia; yet even these critics are apt to concede that there are legitimate economic and social concerns that justify restraining the influx of illegal aliens into the U.S.

Responses to these concerns must consider the needs of illegal aliens. In this regard, it may be unacceptable to deny services to illegal aliens, notwithstanding their defiance of U.S. immigration laws. These denials are even less acceptable when we consider that many illegal immigrants are children and dependents who did not voluntarily migrate, but were conveyed as members of larger units. To deny services to these individuals offends the humanitarian instincts of the international commu-

216. *See supra* Part III.D.

217. This also conforms to accepted notions of statutory interpretation, particularly the "statutory purpose" rule whereby a statute is interpreted by relating back to its underlying purpose. In this case, the underlying purpose is to restrict the immunity to governmental activities. For an example of this method of interpretation in action, albeit in a different legal realm, see William Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1064 (1999).

218. *See supra* Part II.B.

nity in general,[219] and those of the American people in particular.

Nonetheless, the state and federal governments within the U.S. should try to curb illegal immigration and reduce the costs it has engendered. Such is their obligation to the common weal, as well as their responsibility to secure the borders. Indeed, the need for border security was made painfully clear by the horrors of September 11.[220] Such too is their duty to relieve the tax-strained people of fiscal burdens whenever possible. Governments should be resourceful and creative in their remedial efforts, and should use one of the most elastic institutions available - the courts. This Note has suggested a template for engaging the courts to this end, with Mexican illegal immigration as a paradigm. It has done so in the hope of kindling debate.

The concept of suing a foreign government to recover costs incurred by illegal immigration from its lands based on the commercial activity exception to the FSIA is indeed controversial. Pursuing such an action would invoke a host of questions and require a careful balancing of interests.[221] Nonetheless, the principle that promotion-profit represents commercial activity is theoretically sound. It embodies the law's ability to evolve by analogy, applying old principles to new contexts. This is certainly a new context for the FSIA commercial activity exception. It is also a viable attempt to reduce the burdens of illegal immigration and should therefore be discussed.[222]

In a larger sense, this type of suit is appropriate for any nation confronting illegal immigration, for this is a global phenomenon that grows apace.[223] Such suits might encourage na-

219. *See*, Fineman, *supra* note 194.

220. Edwin Chen, *Bush Touts 'Smart' Border for U.S. and Mexico*, L.A. TIMES, Mar. 23, 2002, at A1; Richard Bordreaux, *The World Frustration Marks Fox, Bush Talks*, L.A. TIMES, Oct. 27, 2002, at A3 (noting the shift in focus from open borders to border security in the wake of September 11). *See also Border Arrests, supra*, note 66.

221. For an explication of such a balancing process, see JOSEPH DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 163 (1988).

222. *See* HUDDLE REPORT, *supra* note 1.

223. *See, e.g., Asylum-Seekers Find First World Hard To Get To*, IRISH TIMES, Dec. 10, 2001, at 6, reporting that an estimated 7 million illegal immigrants are brought to Europe every year by smugglers (under the legal theory propounded above, perhaps the nations of origin could be held accountable for failing to restrain these smugglers); Rokas M. Tracevkis, *Labor Force Ap-*

tions to respect each other's borders, and by extension, the laws and integrity of one another. This is arguably a sorely needed stimulus. Furthermore, if governments realized they faced legal action because of promoting illegal immigration, they might be stirred to improve conditions within rather than relying on the safety valve of outward migration.[224] Thus, such legal action may benefit not only the countries burdened by illegal immigration, but ultimately, their countries of origin as well.

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proaches EU Realm, BALTIC TIMES, Dec. 13, 2001, *available at* 2001 WL 30013071, reporting on Lithuanian citizens deported from Great Britain for working illegally in the country; David Sapsted, *Refugees Disrupt Freight Train Service To France*, DAILY TELEGRAPH (London), Nov. 23, 2001, at 8. The channel tunnel had to be suspended to prevent the influx of illegal aliens, at a cost of £8 million a week, according to Lord Berkeley, U.K. Rail Freight Group chairman. Tunnel closings have been common due to the influx of illegal aliens, delaying exports and undermining the British government's aim of increasing rail freight by 80% in the next decade. The illegal immigrants either ride inside the trains or cling precariously to the outside, and the issue has raised tensions between Britain and France; Sharon Labi, *Fed: Resolve to Keep Pacific Solution is Absolute*, AAP News, Dec. 8, 2001, *available at* 2001 WL 31342624, noting the flow of illegal immigrants into Australia and the Australian attempts to deal with it.

224. *See* comments by Mexican television commentator Sergio Sarmiento, *supra* note 197.

* I dedicate this Note to my parents, Eileen and Milton Turoff, who have always encouraged and supported my pursuit of knowledge. I also wish to thank all of those who have given me the benefit of their wisdom and input in writing this Note.