

2010

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Mark E. Wojcik

Javier Zenteno Gomez

Jorge G. de Presno

David W. Austin

Recommended Citation

Mark E. Wojcik et al., *Mexico*, 44 INT'L L. 701 (2010)
<https://scholar.smu.edu/til/vol44/iss1/45>

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Mexico

MARK E. WOJCIK, JAVIER ZENTENO GÓMEZ, JORGE G. DE PRESNO, AND
DAVID W. AUSTIN*

I. Tax Increases to Offset Decline in Oil Revenues

Oil revenue accounts for more than one-third of the Mexican government's annual income.¹ In 2009, after oil revenues declined during the recession, Mexican lawmakers looked for alternative revenue sources.² As part of the 2010 budget, Mexican legislators increased several taxes in 2009:

- *Value Added Tax*: The value added tax (VAT) was increased for the first time in more than a decade.³ Legislators raised the VAT from fifteen percent to sixteen percent for 2010 as part of a national government strategy to reduce the country's dependence on oil revenues and to help secure the country's credit rating.⁴ It is forecasted that in 2011 it will decrease to fifteen percent;⁵
- *Income Tax*: Legislators also increased the income tax for top earners by two percent from twenty-eight percent to thirty percent.⁶ It was, however, forecasted that the income tax rate will be reduced to twenty-nine percent in 2013 and to twenty-eight percent in 2014;⁷

* This year in review article presents only some of the major legal developments in Mexico during 2009. Javier Zenteno Gómez and Jorge G. de Presno (both of Thompson & Knight Abogados, S.C.) authored parts I, II, and III. David W. Austin, a Professor of Legal Writing at California Western School of Law, authored part IV. Mark E. Wojcik, a professor of law at The John Marshall Law School in Chicago and Adjunct Professor at the Facultad Libre de Derecho de Monterrey, served as committee editor and author of parts V and VI.

1. Adam Thomson, *Mexico Raises Taxes in Effort to Counter Falling Revenue from Oil*, FIN. TIMES, Oct. 22, 2009, at 5, http://www.ft.com/cms/s/0/79c9b6f6-bea2-11de-b4ab-00144feab49a.html?ncklick_check=1.

2. *See id.*; *see also Mexico's Credit Rating*, SAN DIEGO UNION-TRIBUNE, Nov. 8, 2009, at A11.

3. Thomson, *supra* note 1.

4. *See id.*; *see also Mexico's Credit Rating*, *supra* note 2, at A11 (reporting that Mexican Finance Minister Agustín Carstens said that the 2010 budget, an increase in tax collection, and the liquidation of a state power country "should help the country keep its credit rating"). Although the VAT increase was just one percent, it was expected to generate 24 billion pesos in additional tax revenue in the coming year. Thomson, *supra* note 1, at 5. The rate of increase originally proposed was two percent. *Id.*

5. *See Ley del Impuesto al Valor Agregado* [Value Added Tax Law], Diario Oficial de la Federación [D.O.], 1 de Octubre de 2007 (Mex.), *available at* <http://www.diputados.gob.mx/LeyesBiblio/pdf/77.pdf>.

6. Thomson, *supra* note 1.

7. *See Ley del Impuesto sobre la Renta* [Federal Income Tax Law], Diario Oficial de la Federación [D.O.], 4 de Junio de 2009 (Mex.), *available at* <http://www.diputados.gob.mx/LeyesBiblio/pdf/82.pdf>.

- *Cash Deposits Tax Law*: The Cash Deposits Tax Law was implemented in 2008. In 2010, the tax will increase to three percent, and the taxable amount of cash deposits will decrease from MXN or MXP\$25,000 to MXN or MXP\$15,000;⁸ and
- *Special Tax on Production and Services*: The Special Tax on Production and Services will be modified differently according to the segment involved, including (1) a new tax of three percent on telecommunications, excluding internet services; (2) the existing tax on alcoholic beverages (including beer), will increase from twenty-five percent to twenty-eight percent; and (3) the existing taxes on gambling and lotto, will increase to thirty percent (in 2010).⁹

II. Labor and Employment: Social Security

Several amendments to the Social Security Act were published in the Federal Official Gazette on July 9, 2009, with the purpose of avoiding the erosion of labor rights arising from outsourcing, the new hiring trend in Mexico.¹⁰ The new amendments affect employers regarding social security matters under two premises: (1) they become joint obligors of social security dues with the outsourcing company directly hiring the employees; and (2) they must provide information to the Mexican Social Security Institute (IMSS) with the purpose of “cross referencing” the information provided by the outsourcing companies.¹¹

III. Criminal Law Amendments

Following amendments to the Mexican Constitution on June 18, 2008,¹² and in support of Mexico’s policy against crime and drug dealing, the decree on reformed, added, and repealed provisions of laws concerning crime was published in the Federal Official Gazette on January 23, 2009.¹³ To establish uniformity between the amended Federal Con-

8. See *Ley del Impuesto a los Depósitos en Efecto* [Cash Deposits Tax Law], Diario Oficial de la Federación [D.O.], 1 de Octubre del 2007 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LIDE.pdf>.

9. See *Ley del Impuesto Especial sobre Producción y Servicios* [Special Tax over Production and Services], Diario Oficial de la Federación [D.O.], 27 de Noviembre de 2009 (Mex.) available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/78/pdf>.

10. *Ley del Seguro Social* [Social Security Law], Diario Oficial de la Federación [D.O.], 9 de Julio de 2009, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/92.pdf>, at arts. 5-A, § VIII; 304-A, §§ XX, XXI; 304-B, § IV (including amendments), arts.15-A, ¶¶ 3, 4, 5, 6, 7, 8; 75 ¶ 2; 304-A, § XXII (including additions).

11. See *id.*

12. See Javier Zenteno Gómez & Jorge G. de Presno, *Latin America and Caribbean*, 43 INT’L LAW. 1117, 1132 (2009) (year in review developments for 2008); see also *Constitucion Política de los Estados Unidos Mexicanos* [Const.], as amended, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf> (showing amended articles 16 through 22).

13. Decreto por el que se reforma, adicionan y derogan diversas disposiciones del Código Federal de Procedimientos Penales, de la Ley Federal contra la Delincuencia Organizada, de la Ley que Establece las Normas Mínimas sobre Readaptación Social de Sentenciados, del Código Penal Federal, de la Ley de la Policía Federal Preventiva, de la Ley Orgánica de la Procuraduría General de la República, de la Ley Federal de Responsabilidades Administrativas de los Servidores Públicos, y de la Ley Federal de Procedimiento Contencioso Administrativo [Decree on the Reform, Various Added and Repealed Provisions of the Federal Code of Criminal Procedures, the Federal Law Against Organized Crime, Law Establishing Minimum Regulations

stitution and secondary laws, amendments were made to the following federal laws: (1) Federal Criminal Procedure Code; (2) Federal Law Against Organized Crime; (3) Law Establishing Minimum Regulations on Social Rehabilitation of Convicts; (4) Federal Criminal Code; (5) Federal Administrative Accountability of Public Servants Act; and (6) Federal Law on Administrative Procedure.¹⁴ The amendments include:

- Minimum regulations for searches issued by the public prosecutor, and for restraining orders;
- Detailed instructions on the preservation of crime scenes; and
- The admission of communications recordings as evidence by private entities, provided that the recording has a direct relation to a crime and that the accused party participates in such communication recording.¹⁵

IV. Mexico's Drug War

Mexico continued its war on drug trafficking that Mexican President Felipe Calderón launched against drug cartels in 2006.¹⁶ In 2008, an estimated 1,600 people were killed in drug-related violence,¹⁷ and in 2009, more than 2,500 people were killed.¹⁸ Overall, the fight between “drug traffickers and the government [has] claimed more than 15,000 lives in [the past] three years.”¹⁹ In his state-of-the-union address in 2009, President Calderón announced that his administration would reform civilian law enforcement and the courts,

for the Social Rehabilitation of Convicts, the Federal Criminal Code, the Law of the Federal Preventive Police, the Organic Law of the General Procedure of the Republic, the Federal Administrative Accountability of Public Servants Act, and the Federal Law of Administrative Procedure], *Diario Oficial de la Federación* [D.O.], 23 de Enero de 2009 (Mex.) available at <http://www.senado.gob.mx/comisiones/LX/gobernacion/content/reforma/docs/23enero2009.pdf>.

14. Código Federal de Procedimientos Penales [Federal Criminal Procedure Code], as amended, *Diario Oficial de la Federación* [D.O.], 30 de Agosto de 1934 (2009) (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/7.pdf>; Ley Federal Contra La Delincuencia Organizada [Federal Law Against Organized Crime], as amended, *Diario Oficial de la Federación* [D.O.], 7 de Noviembre de 1996 (2009) (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/101.pdf>; Ley que Establece las Normas Mínimas Sobre Readaptación Social de Sentenciados [Law Establishing Minimum Regulations on Social Rehabilitation of Convicts], as amended, *Diario Oficial de la Federación* [D.O.], 19 de Mayo de 1971 (2009) (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/201.pdf>; Código Penal Federal [Federal Criminal Code], as amended, *Diario Oficial de la Federación* [D.O.], 14 de Agosto de 1931 (2009) (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/9.pdf>; Ley Federal de Responsabilidades de los Servidores Públicos [Federal Administrative Accountability of Public Servants Act], as amended, *Diario Oficial de la Federación* [D.O.], 13 de Marzo de 2002 (2009) (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/240.pdf>; Ley Federal de Procedimiento Contencioso Administrativo [Federal Law on Administrative Procedure], as amended, *Diario Oficial de la Federación* [D.O.], 1 de Diciembre de 2005 (2009) (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFPCA.pdf>.

15. See Penales [Federal Criminal Procedure Code], *Diario Oficial de la Federación* [D.O.], 20 de Agosto de 2009 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/7.pdf>.

16. Eduardo Verdugo, *Mexico's Calderon Vows to Win War on Drugs by 2012*, USA TODAY, Feb. 27, 2009, available at http://www.usatoday.com/news/world/2009-02-27-mexicodrugwar_N.htm.

17. See José de Córdoba & Joel Millman, *Mexico Ramps Up Drug War With a Surge on Rio Grande*, WALL ST. J., Dec. 22, 2009, at 1.

18. *Id.*

19. Tracy Wilkinson, *Wife of Slain El Monte Civic Leader Tells How Night Out With Friends Morphed Into Horror*, L.A. TIMES, Jan. 3, 2010, at A29, A32.

and that “the Mexican army would continue to lead the fight until local and state police forces are free of corruption.”²⁰

Local and state politicians have increasingly become targets of violence by the drug cartels, which have also attacked rival gangs. Some murders are particularly vicious, intended to gain media attention and frighten both rival drug gangs and law enforcement officers. “Prosecutors, police chiefs, and thousands of others have been killed,” and entire families sometimes come under attack.²¹ Even innocent bystanders and tourists have fallen victim to the increasing levels of violence.²² Here are some recent examples of violence from the drug war:

- José Bladimir Antuna, a journalist who wrote about organized crime for *El Tiempo de Durango*, was strangled to death.²³
- In the state of Michoacán, gunmen killed Deputy Public Safety Director José Manuel Revueltas, two of his bodyguards, and a bystander.²⁴
- Army Brigadier General Juan Arturo Esperanza, the appointed police chief of Garcia in Nuevo Leon, was assassinated.²⁵
- In Villahermosa (capital city of the Gulf Coast state of Tabasco), gunmen killed Congressional candidate José Francisco Fuentes Esperon, his wife, and his two sons.²⁶
- In Ciudad Juarez, a border city that “has seen the worst of the nation’s drug violence,” gunmen killed eighteen people at the El Alviane Drug Rehabilitation Center.²⁷
- Gunman killed a police commander in Ciudad Juarez.²⁸
- Adriana Ruiz Muñoz, a cheerleader for the Xoloitzcuintles soccer team in Tijuana, was found beheaded, apparently because drug traffickers suspected her “of being a snitch.”²⁹
- Americo Delgado, an 80-year-old lawyer for a convicted Tijuana drug kingpin, was stabbed to death in his home in Toluca in Mexico State.³⁰
- Ensign Melquisedet Angulo Córdova, a thirty-year-old special forces sailor, was killed during a government raid on a top Mexican drug lord, Arturo Beltrán Leyva.³¹ He was hailed as a national hero for his role in the raid that killed the

20. *Calderón Vows to Push Fight Against Cartels*, SAN DIEGO UNION-TRIBUNE, Sept. 3, 2009, at A8.

21. Elizabeth Malkin, *Vengeful Fury in Drug War Chills Mexico*, N.Y. TIMES, Dec. 23, 2009, at A1.

22. Wilkinson, *supra* note 19.

23. *Journalist Killed*, SAN DIEGO UNION-TRIBUNE, Nov. 8, 2009, at A11.

24. *Calderón Vows to Push Fight Against Cartel*, *supra* note 20. A car driving the deputy public safety director was intercepted by two vehicles carrying the gunmen. *Id.*

25. *Police Killed*, SAN DIEGO UNION-TRIBUNE, Nov. 8, 2009, at A11. Five police officers and five others were arrested in the investigation of his assassination. *Id.*

26. *Mexican Candidate and Family Slain*, SAN DIEGO UNION-TRIBUNE, Sept. 6, 2009, at A9.

27. Olivia Torres & Alicia A. Caldwell, *Third Rehab Center Attacked in Ciudad Juarez—18 Patients Shot to Death as Drug Violence Persists*, SAN DIEGO UNION-TRIBUNE, Sept. 4, 2009, at A3; *Calderón Vows to Push Fight Against Cartels*, *supra* note 20.

28. *Police Killed*, *supra* note 25.

29. *Arrests in Cheerleader Death*, SAN DIEGO UNION-TRIBUNE, Nov. 8, 2009, at A11.

30. David Gaddis Smith, *Defense Lawyer Killed*, SAN DIEGO UNION-TRIBUNE, Sept. 6, 2009, at A13.

31. Malkin, *supra* note 21.

Mexican drug lord and six of his gunmen.³² On the day after Córdova was buried, gunmen seeking revenge for the drug lord killed his mother, aunt, sister, and brother.³³

- Agustin Roberto Salcedo, an educator and U.S. citizen, was kidnapped along with five other men from a bar where he and his wife had gone for drinks along with a group of friends, in the state of Durango.³⁴ All of the victims, including a lawyer and his younger brothers, were shot and killed.³⁵

These are but a handful of the murders reported in Mexico's drug wars. The level of violence attributable to the war on drugs and the organized criminal activity that precipitated it cannot, however, be measured simply by counting corpses. Kidnappings, carjackings, extortion, and other forms of crime and aggression infect the quality of daily life.³⁶ Many offenses go unpunished: "[T]he norm in Mexico is impunity. Most crimes go unresolved."³⁷ To be clear, more than 220,000 people have been arrested on drug charges during the course of President Calderon's war on drugs.³⁸ The vast majority of those arrested were released and only five percent of those who remained incarcerated were actually convicted.³⁹

Mexico's drug cartels started recruiting more teenagers and young people to replace those killed or arrested.⁴⁰ These young people serve as "expendable foot soldiers" for the cartels in battles over drug trafficking routes to the United States and local drug using markets in Mexico.⁴¹ The Mexican government's crackdown has led drug cartels to diversify their illegal operations, "moving from the shipment of narcotics to extortion, immigrant smuggling[,] and kidnapping."⁴² Some operations may have also been shifted to the United States.⁴³

Government forces have not been exempt from strong criticism for their handling of the war on drugs and there have been reports alleging that Mexican soldiers have engaged

32. *Id.*

33. *Id.*; David Luhnow & José de Córdoba, *Hit Men Kill Mexican Hero's Family*, WALL ST. J., Dec. 23, 2009, at A1; Tracy Wilkinson, *Mexico Under Siege: Hero's Family Slaughtered*, L.A. TIMES, Dec. 23, 2009, at A1.

34. Wilkinson, *supra* note 19.

35. *Id.*

36. *See id.*

37. *Id.*

38. Jorge Castaneda, *No Exit for Mexican Leader From Ill-Conceived War on Drugs; Three Years of Violence and Thousands of Deaths Have Seen the Volume of Drugs Actually Increase*, TORONTO STAR, Dec. 21, 2009, at A27.

39. *Id.* (estimating that only 3,000 drug-related arrests resulted in criminal sentences over the past three years). *See also, e.g.*, Marc Lacey, *War Without Borders: Mexico Lawmen Outmatched by Drug Violence*, N.Y. TIMES, Oct. 17, 2009, at A1 (citing independent scholarly reviews suggesting that "only about a quarter of crimes in Mexico are ever reported and that only a small fraction ever result in convictions").

40. *See, e.g.*, William Booth & Steve Fainaru, *A "Lost Generation" as Mexico's Youths Get Caught Up in Drug Wars*, SAN DIEGO UNION-TRIBUNE, Nov. 8, 2009, at A11.

41. *Id.*

42. *Id.*; *see also* Dana Littlefield, *Spillover of Carnage in Mexico Undeniable: 17 Alleged to Lead Local Killing Crew*, SAN DIEGO UNION-TRIBUNE, Oct. 18, 2009, at B1.

43. *See, e.g.*, *U.S. Arrests More than 300 in Mexican Drug Cartel Raids*, USA TODAY, Oct. 23, 2009, at 10A (reporting more than 300 arrests made or charges filed in Arizona, California, Florida, Georgia, Kansas, Illinois, Massachusetts, Minnesota, Mississippi, Missouri, Oklahoma, Nevada, New York, North Carolina, South Carolina, Tennessee, Texas, and Washington state).

in “extrajudicial killings, torture, and arbitrary detentions.”⁴⁴ In a report examining these allegations, Amnesty International acknowledged that the current climate of violence renders law enforcement duties “difficult and dangerous for those charged with improving public security conditions.”⁴⁵ Nevertheless, the human rights organization cautioned “crime cannot be fought with crime.”⁴⁶ The U.S. State Department also reported “accusations of [Mexican] army abuses had risen sixfold in the two years since President Felipe Calderón’s offensive against drug cartels began in 2006.”⁴⁷ The State Department was satisfied, however, that measures to curtail abuses had been taken and also recommended that U.S. government aid not be withheld as a result of the charges.⁴⁸ According to Carlos Pascual, U.S. Ambassador to Mexico, meetings between military lawyers from both the United States and Mexico were being organized to help address some of the issues highlighted by Amnesty International and other rights organizations.⁴⁹ The ambassador acknowledged, however, that it has been “extremely difficult to get a consistent and transparent response from the military” regarding the charges of abuses perpetrated by government forces. President Calderon has insisted that his government “was engaged in a ‘scrupulous effort to protect human rights’ and that he knew of a not ‘a single case’ in which authorities did not respond to allegations against the military.”⁵⁰

“Mexico has [also] approved a sweeping overhaul of its judiciary to replace closed-door judicial proceedings with trials” as one measure intended to limit arbitrary detention of those arrested.⁵¹ Such measures can succeed only if lawyers and judges are retrained and resources allocated to allow “rebuilding courtrooms and improving forensic technology.”⁵² One positive result of President Calderon’s efforts against the drug cartels has been an increased focus on eradicating those allies of the cartels within the Mexican criminal justice system.⁵³ Among notable law enforcement officials arrested on charges of complicity with the drug cartels was Miguel Colorado Gonzales, “the former head of the attorney general’s organized crime unit.”⁵⁴ Also detained was former assistant attorney general, Noe Ramirez, at one time the head of the agency overseeing organized crime (SIEDO); he was accused of receiving monthly payments of almost half a million dollars from one of the cartels.⁵⁵ A proposed amendment to the Mexican Constitution, passed by the Senate in April, would allow the government to seize property and income derived from drug-related crime, and use the proceeds to finance criminal investigations and compensate victims.⁵⁶ Given that Mexico’s drug cartels have an estimated combined annual

44. Marc Lacey, *Rights Group Report Faults Mexican Army’s Conduct in Drug War*, N.Y. TIMES, Dec. 8, 2009, at A12.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Lacey, *supra* note 44.

52. *Id.*

53. David Brennan, *Mexico’s Twin Challenges: Reforming Its Criminal Justice System and Combatting Drug-Cartel Violence*, ORANGE COUNTY LAW., Jan. 2009 at 41.

54. *Id.*

55. Tere Miller-Spotter, *Mexico Senate Approves Pre-conviction Property Seizures in Drug Cases*, JURIST, April 3, 2009, <http://jurist.law.pitt.edu/paperchase/2009/04/mexico-senate-approves-pre-conviction.php>.

56. *Id.*

turnover in excess of \$10 billion,⁵⁷ this latest measure is likely to prove an effective weapon in President Calderon's arsenal as he continues to pursue his country's war on drugs.

Charges of corruption and abuse have also been leveled against both U.S. and Canadian government agents, mostly in connection with acts facilitating cross-border drug trafficking.⁵⁸ In the past two years, at least eighty U.S. border officers have been convicted of corruption and it is estimated that there are almost as many investigations each year involving border officers who have accepted bribes so that illegal drugs could be trafficked into the United States.⁵⁹ One recent case involves a Canadian border guard who was indicted on charges alleging that on at least eleven occasions he allowed a truck loaded with cocaine to illegally cross the border after being paid an average of \$50,000 each time.⁶⁰

These are painful and dangerous times in the cities and states most affected by these drug wars. There is also every indication that the violence it is generating will continue to spread internationally. According to the U.S. Department of Justice, Mexican drug cartels are active in 230 U.S. cities (up from fifty in 2006).⁶¹ The Mexican government's resolve to continue the battle against drugs and drug traffickers appears steadfast, notwithstanding increasing concern that the war on drugs is one that cannot be won.⁶²

V. Same-Sex Marriage in Mexico City

Turning aside opposition from the Roman Catholic Church, lawmakers in Mexico City passed a law (by a vote of thirty-nine to twenty) in December 2009, approving same-sex marriage in Mexico City, a city inhabited by approximately twenty million people.⁶³ The new law defines marriage as a "free union between two people."⁶⁴ The new law gives same-sex couples the same rights as opposite-sex couples, "including the right to adopt, inherit, obtain joint housing loans, and share insurance policies."⁶⁵ The mayor of Mexico City was expected to sign the legislation.⁶⁶

57. Chris Ayres, *US Cracks Down On Sinaloa Drug Cartel As Mexico Sends In The Army*, TIMES ONLINE, Feb. 27, 2009, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article5811885.ece.

58. Oakland Ross, *Can We Escape Mexico's Drug Wars?*, TORONTO STAR, Oct. 18, 2009 at A6, available at 2009 WLNR 20583853.

59. *Id.*

60. *Id.*

61. *Id.*

62. See, e.g., Trans-Border Institute/Justice in Mexico Project, San Diego, CA, *Justice in Mexico News Report*, Dec. 2009, available at <http://www.justiceinmexico.org/news/pdf/justiceinmexico-december2009news-report121709.pdf> (citing critiques of the administration's war on drug by representatives of non-governmental and religious organizations).

63. See, e.g., Tracy Wilkinson, *Mexico City Passes Historic Gay Rights Bill*, L.A. TIMES, Dec. 22, 2009, at A1.

64. *Id.*

65. *Id.*

66. *Id.* at A21; *Capital City Legalizes Same-Sex Marriage*, WALL ST. J., Dec. 22, 2009, at A18; *Mexico: Mexico City Lawmakers Approve Same-Sex Marriage*, N.Y. TIMES, Dec. 22, 2009, at A12.

VI. NAFTA Trucking Dispute

Under the North American Free Trade Agreement (NAFTA), trucks from Mexico were to be allowed to deliver cargo to destinations within the United States and Canada by the year 2000.⁶⁷ The United States never implemented that NAFTA provision, allegedly because of safety concerns over trucks from Mexico. Instead, Mexican trucks were allowed to deliver cargo only to limited commercial zones within an average of twenty to twenty-five miles of Mexico's border with California, Arizona, New Mexico, and Texas.⁶⁸ Goods destined for points beyond those limited commercial zones had to be transferred to U.S. trucks for final delivery.⁶⁹

In 2001, the U.S. Congress enacted safety requirements specifically for Mexican trucks.⁷⁰ Mexican trucking associations protested against these requirements,⁷¹ but they were re-enacted each year as part of the Appropriations Act for the U.S. Department of Transportation.⁷²

In 2007, the Bush Administration attempted to launch a pilot-trucking program that would have allowed 100 Mexican trucking companies to make deliveries throughout the United States.⁷³ The pilot program would also have allowed 100 U.S. trucking companies to deliver goods throughout Mexico.⁷⁴

Reactions to the pilot-trucking program were mixed. U.S. labor unions and trucking organizations protested the pilot program, claiming that Mexican trucks posed safety risks and that Mexican drivers were working hours far beyond the limits of reasonable safety. Other opponents' raised environmental issues, concerns over increased smuggling of narcotic drugs, and increased security threats.⁷⁵ The Sierra Club, Public Citizen, the Environmental Law Foundation, and the International Brotherhood of Teamsters sued to enjoin the pilot-trucking program until the Secretary of Transportation provided the public with an opportunity to comment on the pilot program before it became effective.⁷⁶

Supporters of the pilot program suggested that the alleged safety concerns were really fears that U.S. trucking companies would lose business to lower-paid drivers from Mexico. Supporters noted that the pilot program would bring the U.S. into compliance with its NAFTA obligations, allow greater access to the Mexican market, and deliver goods to U.S. consumers with fewer delays and less cost.

67. See, e.g., Elisabeth Malkin, *Nafta's Promise, Unfulfilled*, N.Y. TIMES, Mar. 24, 2009.

68. See Rossella Brevetti, *Transportation: [U.S. Department of Transportation] Announces Pilot Program to Allow Mexican Trucks in U.S. Interior for First Time*, 24 Int'l Trade Rep. (BNA) 312, 312 (2007).

69. *Id.*; Rossella Brevetti, *NAFTA: Administration's Pilot Program to Open U.S. to Mexican Trucks Draws Opposition*, 24 Int'l Trade Rep. (BNA) 386, 386 (2007).

70. Pub. L. No. 107-87, § 350, 115 Stat. 833, 864 (2001).

71. See Brevetti, *Transportation*, *supra* note 68, at 312.

72. See Pub. L. No. 107-87, § 350, 115 Stat. 833, 864 (2001).

73. See Brevetti, *Transportation*, *supra* note 68.

74. See *id.*

75. See Rossella Brevetti, *NAFTA: Reps. Hunter and Kaptur Introduce Bill Putting Limits on Mexican Trucking Plan*, 24 Int'l Trade Rep. (BNA) 522 (2007).

76. Sierra Club v. U.S. Dep't of Transp., No. C 07-2210 (N.D. Cal. Apr. 23, 2007); see Rossella Brevetti, *NAFTA: Teamsters, Congress Seek to Block Pilot Program on Access for Mexican Trucks*, 24 Int'l Trade Rep. (BNA) 593, 593 (2007). See also Carolyn Whetzel, *NAFTA: Federal Appeals Court Refuses to Stay Cross-Border Long-Haul Truck Project*, 24 Int'l Trade Rep. (BNA) 1251, 1251 (2007).

Congressional reaction to the pilot-trucking program shared the mixture of public opinion, with some members of Congress favoring the program and others opposed. In the end, those opposed to the program prevailed. Two senators successfully attached a requirement to a supplemental appropriations bill that required public notice and comment,⁷⁷ and two members of the U.S. House of Representatives introduced a “NAFTA Trucking Safety Act” that put additional requirements on trucks from Mexico.⁷⁸ The Federal Motor Carrier Safety Administration (FMCSA) of the U.S. Department of Transportation delayed implementation of the pilot program.⁷⁹ FMCSA published notice in the *Federal Register* seeking public comments on the Demonstration Project on NAFTA Trucking Provisions.⁸⁰

In 2007, Congress attached additional restrictions on trucks from Mexico (attaching it to legislation funding the Iraq war).⁸¹ Congress required that the pilot Mexican trucking program comply the specific safety requirements applicable only to trucks from Mexico, that the public be allowed to comment on the pilot trucking program before it entered into effect, and that the Inspector General report to Congress as to whether Mexican trucks were posing a risk to highway safety in the United States.⁸² The legislation also required the Department of Transportation to show how it would ensure that trucks from Mexico would deliver goods only between Mexico and the United States and not between two points in the United States.⁸³

In other legislation, the U.S. House of Representatives voted to remove all funding for the pilot trucking program and to cut off funding for a twelve lane NAFTA “Super Highway” between Mexico, the United States, and Canada.⁸⁴

The Bush Administration announced its intention to proceed with the pilot-trucking program.⁸⁵ The FMCSA received and reviewed 2,359 comments or docket submissions in response to notices published in the *Federal Register*.⁸⁶ The agency said that approximately 2,330 of the 2,359 comments were submitted by individuals and were usually “no more than a few sentences” concluding that Mexico trucks were unsafe and urging the govern-

77. See Rossella Brevetti, *NAFTA: Administration Committed to Implementing Pilot Program With Mexico to Open Trucking*, 24 Int'l Trade Rep. (BNA) 457, 457 (2007).

78. See Brevetti, *NAFTA: Reps. Hunter and Kaptur*, *supra* note 75.

79. See Rossella Brevetti, *Transportation: House Transportation Committee Clears Bill Restricting Mexican Trucking Pilot Program*, 24 Int'l Trade Rep. (BNA) 658, 658 (2007); Rossella Brevetti, *NAFTA: Transportation Department Seeks Comments on Delayed Mexican Trucking Pilot Program*, 24 Int'l Trade Rep. (BNA) 626, 626 (2007).

80. See also Brevetti, *NAFTA: Transportation Department Seeks Comments*, *supra* note 79, at 626; 72 Fed. Reg. 23,883 (May 1, 2007), available at 2007 WL 1243741.

81. See Rossella Brevetti, *NAFTA: Mexican Truck Access Restricted Under Iraq Funding Measure*, 24 Int'l Trade Rep. (BNA) 766, 766 (2007).

82. Pub. L. 110-28, § 6901 (2007).

83. See Brevetti, *NAFTA: Mexican Truck Access Restricted*, *supra* note 81, at 766.

84. See Rossella Brevetti, *NAFTA: DOT's Peters Urges Congress to Permit Mexican Trucking Program to Proceed*, 24 Int'l Trade Rep. (BNA) 1513, 1513 (2007); Amy Tsui, *Transportation: Funding for Mexican Truck Program, NAFTA Highway Cut From Spending Bill*, 24 Int'l Trade Rep. (BNA) 1121, 1121 (2007).

85. Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46,263 (Aug. 17, 2007), available at 2007 WL 2330142; see also Rossella Brevetti, *NAFTA: FMCSA Must Make Additional Improvements in Mexican Truck Plan*, 24 Int'l Trade Rep. (BNA) 1252, 1252 (2007).

86. Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. at 46,263, 46,265.

ment to abandon the pilot trucking program.⁸⁷ The FMCSA said that it also received comments in support of the program.⁸⁸

The pilot trucking program was launched on September 6, 2007.⁸⁹ But the following week, the U.S. Senate voted to prohibit the Transportation Department from using funds to implement the pilot program for Mexican trucks.⁹⁰ The House of Representatives had already passed its own funding restrictions.⁹¹ Conferees for both the House and Senate agreed to keep the restrictions on the Mexican pilot-trucking program.⁹²

Mary Peters, who was then the Secretary of the Department of Transportation, urged Congress to remove the funding restrictions on the cross-border trucking pilot program. She held a press conference with U.S. Commerce Secretary Carlos Gutierrez and Mexican Transportation Secretary Luis Tellez.⁹³ At this press conference, a Maryland state trooper inspected a U.S. truck and a Mexican truck participating in the pilot program.⁹⁴ The inspection showed that both trucks to be virtually identical.⁹⁵ The FMCSA also announced funding to place GPS-satellite tracking technology on Mexican trucks crossing into the United States to ensure that drivers complied with hours-of-service laws and rules limiting deliveries to the designated commercial zones.⁹⁶

The safety demonstration at the press conference did not end the controversy, which continued into the presidential elections. The pilot-trucking program was never fully implemented, and opponents of the pilot project convinced Congress to block further funding of the pilot trucking program.⁹⁷ That prohibition appeared in Section 136 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act of 2009, which was part of the \$410 billion Omnibus Appropriations Act (2009) that President Obama signed into law.⁹⁸ This effectively ended the pilot-trucking program.

In response to the cancellation of the pilot-trucking program, Mexico imposed retaliatory tariffs on eighty-nine American products, representing \$2.4 billion in trade and affecting forty U.S. states.⁹⁹ Mexico published a list of affected products in the March 18, 2009, issue of the *Diario Oficial*.¹⁰⁰ Mexico's economic minister, Gerardo Ruiz Mateos,

87. *Id.* at 46,265.

88. *Id.* at 46,265-66.

89. See Brevetti, *NAFTA: DOT's Peters Urges Congress*, *supra* note 84, at 1513.

90. See *id.*

91. See *id.*

92. See Rossella Brevetti, *Transportation: House-Senate Conferees Approve DOT Bill Containing Mexican Trucking Program Ban*, 24 Int'l Trade Rep. (BNA) 1624, 1624 (2007).

93. See Brevetti, *NAFTA: DOT's Peters Urges Congress*, *supra* note 84, at 1513.

94. See *id.*

95. See *id.*

96. See *Transportation: Monitoring Equipment to Be Installed In Trucks to Scrutinize U.S.-Mexico Traffic*, 24 Int'l Trade Rep. (BNA) 1625, 1625 (2007).

97. See Mark J. Segrist, *Trade Wars: Mexico Strikes Back and Levels Retaliatory Tariffs on a Wide Range of U.S. Exports*, 1 INT'L LAW STUDENT NEWS 4 (2009).

98. *Id.*; Editorial: *A Small and Dangerous Spat*, N.Y. TIMES, Mar. 19, 2009, at A30.

99. Greg Hitt et al., *Mexico Strikes Back in Trade Spat*, WALL ST. J., Mar. 17, 2009; *Mexico: Tariffs Placed on U.S. Goods*, N.Y. TIMES, Mar. 17, 2009; Segrist, *supra* note 97; Marc Lacey & Ginger Thompson, *As Clinton Visits Mexico, Strains Show in Relations*, N.Y. TIMES, Mar. 25, 2009.

100. Segrist, *supra* note 97.

said that the retaliatory measure was taken for the failure of the United States to comply with its obligations under NAFTA regarding transport.¹⁰¹

The White House said that it would work with Congress to create a new cross-border trucking program that addresses safety concerns.¹⁰² Nevertheless, others have noted that the truck drivers' argument that Mexican trucks are unsafe is a spurious argument and a flimsy cover for protectionism.¹⁰³ Indeed, Mexican trucks operating along the U.S. border and in the pilot program had a better inspection record and fewer violations than American trucks.¹⁰⁴

The *New York Times* said in an editorial that it understood that the White House did not want to threaten passage of the Omnibus spending bill and economic stimulus package by "raising a ruckus over Mexican trucking, a comparatively minor issue."¹⁰⁵ But it also said that President Obama "must make clear that—sometime soon—all properly inspected Mexican trucks must be able to work throughout the country, as NAFTA requires. That would not only solve this trade spat, but it would provide the world with needed reassurance that the United States will stand by its trade agreements in difficult times."¹⁰⁶

After the pilot-trucking program was cancelled, independent trucking companies of Mexico, acting through the trade association CANACAR (the Cámara Nacional del Auto-transporte de Carga), filed an arbitration demand under NAFTA Chapter 11.¹⁰⁷ The demand was filed against the United States under NAFTA Articles 1116 and 1120.¹⁰⁸ CANACAR represents individual constituent members, who are independent trucking companies in Mexico.¹⁰⁹ The only Mexican trucking companies not included as claimants in the arbitration demand are captive trucking divisions of companies that transport their own goods (such as trucks owned by the Coca-Cola Company, transporting Coca-Cola products).¹¹⁰ CANACAR claims that the United States violated three NAFTA articles 1102 (National Treatment); 1103 (Most-Favored Nation Treatment); and 1105 (Minimum Standard of Treatment). The United States has indicated that it would defend its cancellation of the pilot-trucking program in the NAFTA arbitration.

101. *Mexico: Tariffs Placed on U.S. Goods*, *supra* note 99, at B10.

102. Hitt et. al., *supra* note 99.

103. *Editorial: A Small and Dangerous Spat*, *supra* note 98.

104. *Id.*

105. *Id.*

106. *Id.*

107. U.S. Dept. of State, CANACAR v. United States, Notice of Arbitration, Apr. 2, 2009, *available at* <http://www.state.gov/documents/organization/121599.pdf>.

108. *Id.* at 2.

109. *Id.*

110. *Id.*

