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## The Rise of Private Actors Along the United States-Mexico Border

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## THE RISE OF PRIVATE ACTORS ALONG THE UNITED STATES-MEXICO BORDER

JAMES M. COOPER\*

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### INTRODUCTION

Border regions are by their very nature contested sites.<sup>1</sup> Both contraband—illegal narcotics, humans, arms, and other uninspected

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goods—and legitimate goods move through these areas.<sup>2</sup> It does so evading state control, avoiding taxation, ignoring licensing, regularization, or some other official sanction or levy or inspection. The smuggling routes for contraband—drugs, products, people, and weapons—are lucrative; it is no wonder that border regions are zones of insecurity, for there is a scarcity of law enforcement or officials are on the payroll of smugglers.<sup>3</sup>

The US-Mexico border may well be such a contested site, yet it has played a large part of the hugely successful liberalized trade between Mexico, the United States, and Canada, under the North American Free Trade Agreement (NAFTA).<sup>4</sup> The trade pact, which went into effect on January 1, 1994, integrated the economy of Mexico, a developing country, with those of its two hemispheric partner countries, both of which were developed.<sup>5</sup> The amount of trade between the three countries since 1994 has almost quadrupled.<sup>6</sup> The supply chain for North America's economies has been streamlined.<sup>7</sup> Economies of scale have resulted in more efficiency, greater productivity, and higher profits for corporations in all three countries.<sup>8</sup> There have been hundreds of thousands of jobs created but also lost.<sup>9</sup>

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<sup>1</sup> The term “contested site,” “contested space,” “contested terrain,” or “ungoverned territory/space” refers to “failed or failing states; poorly controlled land or maritime borders or airspace; or areas within otherwise viable states where the central government’s authority does not extend.” ANGEL RABASA & JOHN E. PETERS, *UNGOVERNED TERRITORIES I* (Miriam Polon ed., 2007). Both physical space and the level of state control are vital to an area’s characterization as an ungoverned territory. *Id.*

<sup>2</sup> James M. Cooper, *The Complicated Relationship: A Snapshot of the U.S.-Mexico Border*, 2010.10 INT’L REPORTS OF THE KONRAD ADENAUER FOUND. 35, 56, (Sept. 30, 2010), available at [http://www.kas.de/wf/doc/kas\\_20667-544-2-30.pdf?100930130221](http://www.kas.de/wf/doc/kas_20667-544-2-30.pdf?100930130221).

<sup>3</sup> The level of governance in a territory can be indicated by control over borders. The function of borders can be the “interface between nation-states. . . [or] barriers where states control the transnational movement of people and goods.” RABASA & PETERS, *supra* note 1, at 12.

<sup>4</sup> See North American Free Trade Agreement Preamble, 32 I.L.M. 289 (1993). [hereinafter NAFTA, Can.-Mex.-U.S.]

<sup>5</sup> See James M. Cooper, *The North American Free Trade Agreement and Its Legacy on the Resolution of Intellectual Property Disputes*, 43 CAL. W. INT’L L.J. 157 (2012).

<sup>6</sup> See generally Mohammed Aly Sergie, *NAFTA’s Economic Impact*, COUNCIL ON FOREIGN RELATIONS (Feb. 14, 2014), <http://www.cfr.org/trade/naftas-economic-impact/p15790>; see also M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RESEARCH SERV., R42965, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) 10–14 (2015), available at <https://fas.org/sgp/crs/row/R42965.pdf>.

<sup>7</sup> Cooper, *supra* note 5.

<sup>8</sup> See generally Josh Bivens, *Globalization, American Wages, And Inequality: Past, Present And Future*, ECON. POLICY INST. (Sept. 6, 2007), <http://s1.epi.org/files/page/-/old/workingpapers/wp279.pdf>; see also Jaana Remes, *A Tale of Two Mexicos: Growth and Propensity in a Two-Speed Economy*, in NAFTA 20 YEARS LATER 14–3 30, 34 (2014), available

The United States' porous borders and the rise of illegal immigration dominate public discourse and media coverage on a daily basis.<sup>10</sup> The ongoing strength of narco-trafficking organizations<sup>11</sup> and the other crimes that occur along the US-Mexico border help sensationalize the violence.<sup>12</sup> There has been for decades a long-running call for better security at the border with Mexico.<sup>13</sup> This has grown only louder in recent years and resulted in US border vigilantes taking up arms and positions along the border. Also frequently, there is movement for even greater integration of the economies of the United States, Mexico, and Canada through the Trans-Pacific Partnership, more investment in Mexico's newly privatized energy sector, and other opportunities to enjoy the comparative advantage that comes with free trade.<sup>14</sup> In both

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at <http://www.pii.com/publications/briefings/piieb14-3.pdf>; see also Carlos Salas, *Mexico's Haves and Have-Nots: NAFTA Sharpens the Divide*, 35 NACLA REPORT ON THE AMERICAS 32, 34 (2002); see also Ralph Reiland, *NAFTA: Winners & Losers*, PITTS. TRIB. REV. 30, 34-35 (Jan. 29, 2007).

<sup>9</sup> VILLARREAL & FERGUSON, *supra* note 6, at 24-25; see also U.S. CHAMBER OF COMMERCE, OPENING MARKETS, CREATING JOBS: ESTIMATED U.S. EMPLOYMENT EFFECTS OF TRADE WITH FTA PARTNERS 1 (2010), available at [https://www.uschamber.com/sites/default/files/legacy/reports/100514\\_ftajobs\\_full\\_0.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/100514_ftajobs_full_0.pdf).

<sup>10</sup> PAUL GANSTER & DAVID E. LOREY, *THE U.S.-MEXICAN BORDER INTRO THE TWENTY-FIRST CENTURY* xvii (2d ed. 2008): "At the U.S.-Mexican border. . .only a tiny percentage of the people crossing the border on a regular basis do so illegally, yet this percentage frequently constitute the only border story deemed worth reporting in the mass media of both Mexico and United States." *Id.*

<sup>11</sup> "Drug-related homicides have dramatically increased in recent years in Mexico along the nearly 2,000-mile border it shares with the United States." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-175, *SOUTHWEST BORDER SECURITY: DATA ARE LIMITED AND CONCERNS VARY ABOUT SPILLOVER CRIME ALONG THE SOUTHWEST BORDER* (2013), available at <http://www.gao.gov/assets/660/652320.pdf>.

<sup>12</sup> MICHAEL T. MCCAUL, H. COMM. ON HOMELAND SECURITY, *A LINE IN THE SAND: CONFRONTING THE THREAT AT THE SOUTHWEST BORDER* 4 (Comm. Print 2006).

<sup>13</sup> "In the contemporary era, since the mid-1970s, 'border control' has emerged as a salient topic in U.S. politics, with concern for it often spurred on by sensationalist portrayals of undocumented immigration, drug trafficking, and occasionally even the threat of terrorism at critical issues for the U.S.-Mexico border region." TIMOTHY DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992* 1 (Victor J. Guerra ed., 1996).

<sup>14</sup> Addressing the Trans-Pacific Partnership (TPP) to his Organization for Action audience, U.S. President Obama expressed that the TPP is "the highest-standard trade agreement in our history" and the "most progressive trade agreement in our history." William A. Galston, *A Trade Deal With Help For U.S. Workers Baked In*, WALL ST. J. (Apr. 28, 2015, 7:15 PM), <http://www.wsj.com/articles/a-trade-deal-with-help-for-u-s-workers-baked-in-1430262925>. One day before Mexican President Enrique Peña Nieto took office, on discussing Mexico's challenges, Peña Nieto expressed that he would like to focus on "prosperity issues," and "the TPP is a great opportunity in that regard." Tim Padgett, *Mexico's Peña Nieto Talks to TIME: 'We Can Move Beyond the Drug War'*, TIME (Nov. 30, 2012), <http://world.time.com/2012/11/30/mexicos-pena-nieto-talks-to-time-we-can-move-beyond-the-drug-war/>.

stronger border security and deeper economic integration, private actors are playing increasing roles.

This Article is about the proliferation of private actors playing a role at the “broken border.” The Introduction of this Article sets out the conceptual framework for the Article and provides the roadmap for each part. Part I examines which private actors and corporations have increased their role at the US-Mexico border. These actors include multinational corporations including Mexican-sited factories (*maquiladoras*) and US government contractors engaging in national security work, as well as criminal organizations like human smugglers (*polleros* and *coyotes*) and drug cartels (*narcotraficantes*) from the Mexico side, and the border vigilantes, such as the Minutemen and American Border Patrol, on the US side.

Part II then examines the reasons why the role of private actors is expanding. These include various regional attempts by the US, Mexican, and Canadian governments to regulate border trade including NAFTA and the Security and Prosperity Partnership. There have also been bilateral (US-Mexico) attempts to fix the so-called “broken border” like the Merida Initiative. Many of these initiatives have provided a windfall for multinational corporations. Corporations have enjoyed the comparative advantages that come with a regional economy: reduction and elimination of trade barriers, a North American supply chain, and the ability for investors to sue sovereign states for lost profits incurred through nationalization, like takings or expropriation. There have also been many opportunities to contract for the US, Canadian, and Mexican governments.<sup>15</sup>

Part III argues that the expanded activities of private actors should be better regulated, and in the case of criminal organizations, stopped. The broadening of the canvas of individual networks that work along the border provides an opportunity to broaden the canvas of private actors.<sup>16</sup> There are many layers of motive, but economic interest is the

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<sup>15</sup> See Kate Linthicum, *Private companies profit from U.S. immigration detention boom*, L.A. TIMES (Apr. 24, 2015, 5:00 AM), <http://www.latimes.com/local/california/la-me-immigrant-detention-20150424-story.html>.

<sup>16</sup> GUNNAR BECK, FICHTE AND KANT ON FREEDOM, RIGHTS, AND LAW 21 n.22 (2008) (“The doctrine of Methodological Individualism as a methodological precept for the social sciences can be traced back to Max Weber, in particular to the first chapter of *Economy and Society*. It amounts to the claim that social phenomena must be explained by showing how they result from individual actions, which in turn must be explained through reference to the intentional states that motivate the individual actors.”).

overwhelming reason.<sup>17</sup> Finally, Part IV provides some concluding ideas concerning new forms of sovereignty and provides a call for more action among states to secure their respective borders in the context of the wars on drugs and on terror while also facilitating trade through managed borders to provide for economic growth and increased opportunity in legitimate activities.

## I. THE PROLIFERATION OF PRIVATE ACTORS AT THE UNITED STATES-MEXICO BORDER

This Part examines the proliferation of non-state actors and their increasing role at the US-Mexico border. This Part details the various actors including drug trafficking organizations (DTOs), which control and fight over routes through Mexico (*plazas*), and human smugglers and then looks at the role that multinational corporations play in the dynamics of the border.<sup>18</sup> Lastly, this Part examines the border vigilante groups on the US side of the border.

### A. DRUG CARTELS

According to the Drug Enforcement Administration (DEA), there are several major DTOs in Mexico today including the Sinaloa Cartel, Los Zetas, Tijuana Cartel, Juarez Cartel, Gulf Cartel, and La Familia Mochoacana (from which the Knights Templar originate.)<sup>19</sup> Together they account for an estimated \$30 to \$50 billion in revenue.<sup>20</sup> It

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<sup>17</sup> “Of course, by increasing the freedom of individuals the law makes it easier for them to exploit whatever material resources or economic power they possess. A legal order that seeks to promote individual freedom by guaranteeing a maximum degree of calculability will therefore inevitably work to the advantage of those who possess economic power and to the disadvantage of those who do not - will, in other words, sharpen and stabilize existing disparities in the material well-being of different individuals and classes in society. However, if one places a very high value on individual freedom and legal calculability, these distributional consequences may be morally acceptable - especially to those who stand to gain as a result.” ANTHONY T. KRONMAN, *MAX WEBER* 94 (William Twining ed., 1983).

<sup>18</sup> Craig A. Bloom, *Square Pegs And Round Holes: Mexico, Drugs, And International Law*, 34.2 *HOUS. J. INT’L L.* 345, 358 (2012).

<sup>19</sup> JUNE BEITTEL, CONG. RESEARCH SERV., R41576, *MEXICO’S DRUG TRAFFICKING ORGANIZATION: SOURCE AND SCOPE OF THE VIOLENCE* 1, 9 (2013), available at <https://fas.org/sgp/crs/row/R42965.pdf>.

<sup>20</sup> The drug industry is the second-largest source of foreign currency in Mexico, just behind oil. It earns somewhere between \$30 billion and \$50 billion a year—no one really knows, including the people in the industry.” Charles Bowden, *The War Next Door*, *HIGH COUNTRY NEWS* (Mar. 1, 2010), <http://www.hcn.org/issues/42.4/the-war-next-door>. Colombian and Mexican cartels earn

is no wonder that competition is deadly, with some 120,000 dead since the drugs war in Mexico ramped up in late 2006.<sup>21</sup> Events change rapidly as cartels fold, merge, or fall prey to violence or arrest. For example, in just a few months, the Jalisco Cartel Nueva Generation increased its territory and stepped up its attacks, even bringing down a Mexican military helicopter in a firefight.<sup>22</sup>

The largest and most powerful DTO in the Western Hemisphere, the Sinaloa Cartel, was once headed by Joaquin “El Chapo” Guzman.<sup>23</sup> By 2011, the Sinaloa Cartel controlled 45 percent of drug trade in Mexico.<sup>24</sup> Today, “[t]he Sinaloa Cartel is the single largest and most powerful drug trafficking organization in the Western hemisphere.”<sup>25</sup> El Chapo escaped from a maximum security prison in July 2015, exposing the corruption in the law enforcement communities of Mexico.<sup>26</sup> Today, the Gulf Cartel operates along eastern Mexico,<sup>27</sup> and is based in the border city of Matamoros, with operations in Tamaulipas and Veracruz.<sup>28</sup>

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\$18 billion to \$39 billion annually from sales of illicit drugs in the United States. Patrick Radden Keefe, *Cocaine Incorporated*, N.Y. TIMES MAG., June 15, 2012, available at [http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html?pagewanted=all&_r=0).

<sup>21</sup> “According to government figures, total homicides spiked to around 120,000 over Calderón’s six-year term—double the figure under the previous president, Vicente Fox.” Brianna Lee, *Mexico’s Drug War*, COUNCIL ON FOREIGN RELATIONS (Mar. 5, 2014), <http://www.cfr.org/mexico/mexicos-drug-war/p13689>.

<sup>22</sup> See *Mexican Army Helicopter Shot at in Drug Cartel Attack*, BBC NEWS (May 1, 2014), <http://www.bbc.com/news/world-latin-america-32560494>; see also Maria Verza, *Mexican Drug Cartel Jalisco New Generation Flexes Muscles*, YAHOO NEWS (May 2, 2015, 9:17PM), <http://news.yahoo.com/mexican-drug-cartel-jalisco-generation-flexes-muscles-203646320.html>

<sup>23</sup> *Sinola Cartel*, INSIGHT CRIME, <http://www.insightcrime.org/mexico-organized-crime-news/sinaloa-cartel-profile> (last visited Apr. 28, 2015).

<sup>24</sup> BEITTEL, *supra* note 19, at 11.

<sup>25</sup> Jeremy Bender, *Nearly Eight Years Into The Drug War, These Are Mexico’s 7 Most Notorious Cartels*, BUSINESS INSIDER (Oct. 20, 2014), <http://www.businessinsider.com/mexicos-7-most-notorious-drug-cartels-2014-10>.

<sup>26</sup> Catherine E. Shoichet et al., *Mexican drug lord Joaquin ‘El Chapo’ Guzman escapes*, CNN (July 12, 2015, 10:05 PM), <http://www.cnn.com/2015/07/12/world/mexico-el-chapo-escape/>.

<sup>27</sup> Thomas Kellner & Francisco Pipitone, *Inside The Drug Wars*, 27.1 WORLD POL’Y J. 29, 32 (2010); John Burnett, *Matamoros Becomes Ground Zero As Drug War Shifts On Mexican Border*, NPR.ORG (Apr. 1, 2015), <http://www.npr.org/sections/parallels/2015/04/01/396581287/matamoros-becomes-ground-zero-as-drug-war-shifts-on-mexican-border>.

<sup>28</sup> Patrick Corcoran, *Mexico’s Shifting Criminal Landscape: Changes In Gang Operation And Structure In The Past Century*, 16 TRENDS IN ORGANIZED CRIME 306, 320 (2013), available at <http://link.springer.com/article/10.1007%2Fs12117-013-9190-8>; Andrew V. Pestano, *Mexican drug cartels control fate of cities of Matamoros, Reynosa*, UPI.COM, [http://www.upi.com/Top\\_News/World-News/2015/04/02/Mexican-drug-cartels-control-fate-of-cities-of-Matamoros-Reynosa/4691427983673/](http://www.upi.com/Top_News/World-News/2015/04/02/Mexican-drug-cartels-control-fate-of-cities-of-Matamoros-Reynosa/4691427983673/) (last visited Nov. 11, 2015).

The Gulf Cartel is “one of the first cartels to turn into a mega-operation with a dedicated military wing that eventually mutated into Los Zetas, now one of the most violent criminal groups in the western hemisphere.”<sup>29</sup>

Los Zetas are the most brutal and feared DTO in Mexico.<sup>30</sup> Originally elite Special Forces of the Mexican Army, this organization worked for the Gulf Cartel, breaking away in 2010 to take control of drug trafficking routes in Tamaulipas, Nuevo Leon, and throughout the Gulf of Mexico.<sup>31</sup> Los Zetas also expanded operations to Guatemala.<sup>32</sup> Mexican authorities and the DEA have heavily targeted Los Zetas, which has led to the arrests and assassination of its leaders.<sup>33</sup>

The Juárez Cartel, one of the oldest DTOs, started its drug trafficking operations in the 1980s.<sup>34</sup> Once controlling one of the most lucrative territories along the US-Mexico border, today it is struggling to maintain control over its hometown as it fends off a challenge from the Sinaloa Cartel.<sup>35</sup>

The founder of the Tijuana Cartel, Miguel Arellano Felix, was a former police officer in Sinaloa.<sup>36</sup> This DTO, also called the Arellano-Felix Organization, was controlled by seven Arellano Felix brothers and sisters, who inherited the cartel from their uncle.<sup>37</sup> Like the Juárez Cartel, the Tijuana Cartel came to prominence due to its control over one of the most lucrative *plazas* along the US-Mexico border: Tijuana.<sup>38</sup> In 2008 internal struggles within the cartel led the organization to break into two

<sup>29</sup> Jeremy Bender, *Nearly Eight Years Into The Drug War, These Are Mexico's 7 Most Notorious Cartels*, BUSINESS INSIDER (Oct. 14, 2014, 12:49 PM), <http://www.businessinsider.com/mexicos-7-most-notorious-drug-cartels-2014-10#ixzz3YWjGi6t6Once>.

<sup>30</sup> *Zetas*, INSIGHT CRIME, <http://www.insightcrime.org/mexico-organized-crime-news/zetas-profile>.

<sup>31</sup> Eduardo Guerrero Gutierrez, *La Estrategia Fallida*, NEXOS: SOCIEDAD, CIENCIA, LITERATURA (Dec. 1, 2012) <http://www.nexos.com.mx/?p=15083>; see also Jorge Gonzalez, *La Democratizacion del Narcotrafico*, 7 REVISTA ENCRUCIJADA AMERICANA 95, 97 (2014), available at

[http://www.encrucijadaamericana.cl/articulos/a7\\_n1/Articulo\\_6\\_Jorge\\_Gonzalez.pdf](http://www.encrucijadaamericana.cl/articulos/a7_n1/Articulo_6_Jorge_Gonzalez.pdf).

<sup>32</sup> See Gary Moore, *Mexico's Massacre Era: Gruesome Killings, Porous Prisons*, 175.3 WORLD AFF. J. 61, 63 (2012).

<sup>33</sup> BEITTEL, *supra* note 19, at Summary.

<sup>34</sup> Howard Campbell, *No End In Sight: Violence In Juarez*, 44.3 NACLA REPORT ON THE AMERICAS 19 (2011).

<sup>35</sup> Corcoran, *supra* note 28, at 318.

<sup>36</sup> BEITTEL, *supra* note 19, at 10.

<sup>37</sup> *Id.*

<sup>38</sup> Craig A. Bloom, *Square Pegs And Round Holes: Mexico, Drugs, And International Law*, 34.2 HOUS. J. INT'L L. 345, 358 (2012).



factions.<sup>39</sup> After assassinations and arrests of the Arellano Felix brothers, a power vacuum opened in Tijuana into which the Sinaloa Cartel stepped.<sup>40</sup>

The Knights Templar were formed in 2010 by Salvador Gomez Martinez, a high-ranking official of La Familia Michoacana (LFM) who went rogue.<sup>41</sup> This cartel operates in the State of Michoacan.<sup>42</sup> Initially, the LFM aimed at eradicating drug use in Mexico,<sup>43</sup> but began erratically mixing violence with Christian evangelical beliefs and social justice ends.<sup>44</sup> These particular private actors are a large part of the violence in Mexico and at the United States-Mexico border.<sup>45</sup>

### B. POLLEROS, COYOTES, MARAS, AND OTHER HUMAN SMUGGLERS

Human smuggling is a major challenge for law enforcement around the world.<sup>46</sup> Different networks of people—called *coyotes* or *polleros* in local Spanish<sup>47</sup>—specialize in smuggling undocumented migrants across the US-Mexico border. “Most migrants are smuggled across the border in trucks, although there have been cases in which the

<sup>39</sup> BEITTEL, *supra* note 19, at 11.

<sup>40</sup> See Bloom, *supra* note 38, at 358–59.

<sup>41</sup> Bender, *supra* note 29.

<sup>42</sup> Jerjes Aguirre & Hugo Amador Herrera, *Institutional Weakness And Organized Crime In Mexico: The Case Of Michoacan*, TRENDS IN ORGANIZED CRIME, 221, 224 (Apr. 2013).

<sup>43</sup> LARRY K. GAINES & JANINE KREMLING, DRUGS, CRIME, AND JUSTICE: CONTEMPORARY PERSPECTIVES 296 (2d ed., 2014), available at [https://books.google.com/books?id=V4BIAgAAQBAJ&pg=PA296&lpg=PA296&dq=La+Familia+Michoacana+eradicating+drug+use&source=bl&ots=1c0LnjlEA6&sig=Jgi9OKO\\_OuFfH15LPgeKf8v7Tmg&hl=en&sa=X&ved=0CF0Q6AEwCW0VChMI04LRraWJyQIVy5WICH1B8wkd#v=onepage&q=La%20Familia%20Michoacana%20eradicating%20drug%20use&f=false](https://books.google.com/books?id=V4BIAgAAQBAJ&pg=PA296&lpg=PA296&dq=La+Familia+Michoacana+eradicating+drug+use&source=bl&ots=1c0LnjlEA6&sig=Jgi9OKO_OuFfH15LPgeKf8v7Tmg&hl=en&sa=X&ved=0CF0Q6AEwCW0VChMI04LRraWJyQIVy5WICH1B8wkd#v=onepage&q=La%20Familia%20Michoacana%20eradicating%20drug%20use&f=false) (last visited Nov. 11, 2015).

<sup>44</sup> JOHN P. SULLIVAN & ROBERT J. BUNKER, MEXICO’S CRIMINAL INSURGENCY: A SMALL WARS JOURNAL-EL CENTRO ANTHOLOGY 144 (2012), available at <https://books.google.com/books?id=TQprRphYMXoC&pg=PA144&dq=La+Familia+Michoacana+Christian+beliefs&hl=en&sa=X&ved=0CCKQ6AEwAmoVChMIwvjHxaaJyQIVEjqICh1grQyp#v=onepage&q=La%20Familia%20Michoacana%20Christian%20beliefs&f=false> (last visited Nov. 11, 2015).

<sup>45</sup> See generally JUNE BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 1, 1 (2015), available at <https://www.fas.org/sfp/crs/row/R41576.pdf>.

<sup>46</sup> See U.N. Office on Drugs and Crime, *Migrant Smuggling*, UNODC.ORG, <http://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html?ref=menuaside> (last visited Apr. 29, 2015).

<sup>47</sup> LOIS ANN LORENTZEN, HIDDEN LIVES AND HUMAN RIGHTS IN THE UNITED STATES 75 (2014).

crossing is made on foot, by rail or even through special tunnels.”<sup>48</sup> The number of undocumented immigrants detained at the border may have dropped by 22 percent in the first four months of the current fiscal year compared to the previous fiscal year, which ended in 2014,<sup>49</sup> but business is still booming for human traffickers. Smugglers do not risk much because if they are apprehended, they pretend to be immigrants. Authorities would usually deport them back to Mexico.<sup>50</sup>

With increased organized crime, Mexico has “become a major destination for sex trafficking, as well as a transit point and supplier of victim to the United States.”<sup>51</sup> Federal border authorities report that coyotes also kidnap, rape, and abandon their clients.<sup>52</sup> Migrant children are also at risk.<sup>53</sup> In 2014, over 57,000 unaccompanied immigrant children were detained in south Texas in about a one-year period.<sup>54</sup> The groups involved in the human sex trafficking are part of lucrative prostitution rings.<sup>55</sup> Los Zetas have branched out of their drug dealing business into kidnapping and sex trafficking. The cartel has also teamed up with Salvadorean gangs like Barrio 18 and Mara Salvatrucha.<sup>56</sup> While some coyotes believe they are “providing a valuable service to those

<sup>48</sup> U.N. Office on Drugs and Crime, *Smuggling of Migrants: The Harsh Search for a Better Life*, UNODC.ORG, <http://www.unodc.org/toc/en/crimes/migrant-smuggling.html> (last visited Apr. 27, 2015).

<sup>49</sup> Miriam Jordan, *Number of Immigrants Apprehended at U.S.-Mexico Border Falls*, WALL ST. J. (Feb. 13, 2015, 3:40 PM), <http://www.wsj.com/articles/number-of-immigrants-apprehended-at-mexico-border-falls-1423860040>. U.S. Border Patrol apprehended 97,667 undocumented immigrants trying to cross the U.S.-Mexico border. *Id.*

<sup>50</sup> U.N. Office on Drugs and Crime, *supra* note 48.

<sup>51</sup> Ann-Marie O’Connor, *Mexican cartels move into human trafficking*, WASH. POST (July 27, 2011), [http://www.washingtonpost.com/world/americas/mexican-cartels-move-into-human-trafficking/2011/07/22/gIQAmpVcI\\_story.html](http://www.washingtonpost.com/world/americas/mexican-cartels-move-into-human-trafficking/2011/07/22/gIQAmpVcI_story.html).

<sup>52</sup> Todd Miller, *Coyotes and Resistance on the U.S. Mexico Border*, NACLA, <https://nacla.org/news/coyotes-and-resistance-us-mexico-border> (last visited Apr. 27, 2015); SUSAN C. PEARCE, ELIZABETH J. CLIFFORD & REENA TANDON, IMMIGRATION AND WOMEN: UNDERSTANDING THE AMERICAN EXPERIENCE 81 (2011), *available at* <https://books.google.com/books?id=2xIUCgAAQBAJ&pg=PA81&dq=Mexican+coyotes+rape&hl=en&sa=X&ved=0CB0Q6AEwAGoVChMI9I3zyqeJyQIVVTKICh2ISQwW#v=onepage&q=Mexican%20coyotes%20rape&f=false> (last visited Nov. 11, 2015).

<sup>53</sup> John Burnett, *Who Is Smuggling Immigrant Children Across The Border?*, NPR (July 15, 2014, 8:03 AM), <http://www.npr.org/blogs/parallels/2014/07/15/331477447/who-is-smuggling-immigrant-children-across-the-border>.

<sup>54</sup> *Id.*

<sup>55</sup> O’Connor, *supra* note 51; Sanjuana Martinez, *Nowhere to Turn: Sex Trafficking in Nuevo Leon, Mexico*, LA JOURNADA (Aug. 14, 2011), *reprinted in* NACLA <https://nacla.org/news/2011/8/25/nowhere-turn-sex-trafficking-nuevo-leon-mexico> (last visited Apr. 27, 2015).

<sup>56</sup> LORENTZEN, *supra* note 47.

needing to find work north of the border,” others take advantage of inexperienced migrants.<sup>57</sup>

### C. BANKS AND OTHER FINANCIAL SERVICES INSTITUTIONS

Banks have played an important role in the money laundering of drug cartel money for decades. In 1995, the US government opened an investigation called “Operation Casablanca,” which resulted in the arrest of twenty-two high-ranking and midlevel bankers from twelve banks in Mexico in 1998.<sup>58</sup> US authorities found that drug traffickers used about one hundred US bank accounts, worth an estimated \$110 million, to launder money. An additional \$12 million were frozen on overseas bank accounts.<sup>59</sup>

Over the years, major financial corporations in the United States have played an important role in money laundering by Mexican drug cartels, which operate their drug trafficking with impunity.<sup>60</sup> There was a congressional hearing in 1998 on Citicorp/Citibank’s involvement in the drug money activities of Raúl Salinas, former senior Mexican official and brother of former President of Mexico Carlos Salinas de Gortari,<sup>61</sup> for which he was investigated and eventually sentenced in the United States.<sup>62</sup>

On April 10, 2006, Mexican soldiers in Mexico City found 128 black suitcases with 5.7 tons of cocaine, valued at \$100 million, on a DC-9 jet.<sup>63</sup> An investigation showed that smugglers bought the jet with laundered funds they transferred through one of the biggest banks in the

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<sup>57</sup> David Spener, *This Coyote’s Life*, 33.3 NACLA REPORT ON THE AMERICAS 22, 23 (Nov./Dec. 1999).

<sup>58</sup> Don Van Natta Jr., *U.S. Indicts 26 Mexican Bankers in Laundering of Drug Funds*, N.Y. TIMES (May 19, 1998), <http://www.nytimes.com/1998/05/19/world/us-indicts-26-mexican-bankers-in-laundering-of-drug-funds.html>.

<sup>59</sup> *Id.*

<sup>60</sup> Kevin Edmonds, *El Chapo’s Arrest: Money Laundering and Mexico’s Drug War*, NACLA (Apr. 25, 2014), <https://nacla.org/blog/2014/4/25/el-chapos-arrest-money-laundering-and-mexicos-drug-war>.

<sup>61</sup> 105 CONG. REC. H3941 (daily ed. May 22, 1998) (statement of Rep. Waters).

<sup>62</sup> Elisabeth Malkin, *Mexico: Former President’s Brother Is Cleared in a Corruption Case*, N.Y. TIMES (Dec. 16, 2014), [http://www.nytimes.com/2014/12/17/world/americas/mexico-former-presidents-brother-is-cleared-in-a-corruption-case.html?ref=topics&\\_r=0](http://www.nytimes.com/2014/12/17/world/americas/mexico-former-presidents-brother-is-cleared-in-a-corruption-case.html?ref=topics&_r=0).

<sup>63</sup> ED VULLIAMY, AMERICA: THE WAR ALONG THE BORDERLINE 345 (2011).

United States: Wachovia Bank (now owned by Wells Fargo Bank).<sup>64</sup> Wells Fargo Bank admitted in court that “its unit failed to monitor and report suspected money laundering by narcotics traffickers—including the cash used to buy four planes that shipped a total of 22 tons of cocaine.”<sup>65</sup> In 2010, Wachovia Bank was once again exposed for working with drug cartels to launder \$378.4 billion dollars from Mexican currency exchange houses between 2004 and 2007.<sup>66</sup> Wells Fargo Bank, which by 2010 was the owner of Wachovia Bank, paid \$160 million to settle the case.<sup>67</sup>

Western Union was also investigated for violations of regulations. Court records show that investigators discovered that workers in more than twenty Western Union offices “allowed the customers to use multiple names, pass fictitious identifications and smudge their fingerprints on documents.”<sup>68</sup> Western Union reached a settlement with the United States for \$65 million and the company promised not to break the law again.<sup>69</sup> In 2012, HSBC “admitted that it failed to apply legally required money laundering controls to \$60 trillion in wire transfers alone, in only a three year period, \$670 billion of which came from Mexico.”<sup>70</sup> HSBC paid a \$1.9 billion fine for the violations, which surpassed Wachovia’s violations and became the biggest violations of the Bank Secrecy Act in US history.<sup>71</sup>

More recently, Citibank received orders from the federal government to improve their money laundering controls. “The action comes after Comptroller of the Currency and the Federal Deposit Insurance Corporation (FDIC) issued its concerns over anti-money laundering efforts at Citi subsidiaries Citibank NA and Banamex USA.”<sup>72</sup>

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<sup>64</sup> Ed Villiamy, *How a Big US Bank Laundered Billions from Mexico’s Murderous Drug Gangs*, THE GUARDIAN (Apr. 2, 2011, 7:04 PM), <http://www.theguardian.com/world/2011/apr/03/us-bank-mexico-drug-gangs>.

<sup>65</sup> Michael Smith, *Banks Financing Mexico Gangs Admitted in Wells Fargo Deal*, BLOOMBERG (June 29, 2010), <http://www.bloomberg.com/news/print/2010-06-29/banks-financing-mexico-s-drug-cartels-admitted-in-wells-fargo-s-u-s-deal.html>.

<sup>66</sup> Chris Arsenault, *Dirty Money Thrives Despite Mexico Drug War*, AL JAZEERA (July 17, 2012, 1:31 PM), <http://www.aljazeera.com/indepth/features/2012/06/201261515312418850.html>.

<sup>67</sup> Edmonds, *supra* note 60.

<sup>68</sup> Smith, *supra* note 65.

<sup>69</sup> *Id.*

<sup>70</sup> Edmonds, *supra* note 60.

<sup>71</sup> *Id.*

<sup>72</sup> Halah Touryalai, *Fed Hits Citi Over Money Laundering Problems*, FORBES (Mar. 26, 2013, 12:02 PM), <http://www.forbes.com/sites/halahtouryalai/2013/03/26/fed-hits-citi-over-money-laundering-problems/>.

The issue became bigger when a Citigroup affiliate Banamex USA came under criminal investigation for money transfers across the border.<sup>73</sup> A few days earlier, Citigroup admitted that its Mexican unit Banamex was defrauded of \$400 million “in a scheme involving a financially shaky oil services company in Mexico.”<sup>74</sup> The FDIC and the California Department of Financial Institutions ordered Banamex USA to address the problems with their money launder compliance program.<sup>75</sup>

In addition, human smugglers have also used major banks to transfer funds for their illicit business. According to evidence in a federal criminal case against a gang of fifteen human smugglers, “Bank of America Corp., JPMorgan Chase & Co., and Wells Fargo have been used as financial conduits for the smuggling industry.”<sup>76</sup> According to the United Nations Office of Drugs and Crime, “gangs reap \$10 billion a year from about 3 million illegal border crossings from Mexico.”<sup>77</sup> Smugglers routinely detain immigrants until a family member deposits extra fees in a bank account for services rendered. To counter this, in July 2014 the Department of Homeland Security seized \$625,000 in illicit profits “from 288 bank accounts held by human smuggling and drug trafficking organizations” at undisclosed banks.<sup>78</sup>

#### D. CORPORATIONS

The main beneficiaries of NAFTA in Mexico have been large multinational corporations, while the principal losers have been the country’s working class.<sup>79</sup> After 1994, Mexico experienced high rates of

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Aruna Wiswanatha & David Hentry, *Fed Orders Citigroup to Improve Money Laundering Checks*, REUTERS (Mar. 26, 2013), available at <http://www.reuters.com/article/2013/03/26/us-citigroup-moneylaundering-idUSBRE92P00O20130326>.

<sup>76</sup> Michael Smith & Esmé E. Deprez, *One Thing Gangs Smuggling Latin Migrants Over the Border Can’t Do Without: Big Banks*, BLOOMBERG (Jan. 15, 2015), available at <http://www.bloomberg.com/news/articles/2015-01-16/one-thing-gangs-smuggling-latin-migrants-over-the-border-can-t-do-without-big-u-s-banks>.

<sup>77</sup> *Id.*

<sup>78</sup> Dep’t of Homeland Sec. Press Office, *Secretary Johnson Announces 192 Criminal Arrests in Ongoing ICE Operation to Crack Down on Human Smuggling to the Rio Grande Valley*, DHS.GOV (July 22, 2014), <http://www.dhs.gov/news/2014/07/22/secretary-johnson-announces-192-criminal-arrests-ongoing-ice-operation-crack-down>.

<sup>79</sup> Laura Carlsen, *Armoring NAFTA: Battleground For Mexico’s Future*, 41 NACLA REP. ON THE AMERICAS 17, 18 (2008); see also Jaana Remes, *A Tale of Two Mexicos: Growth and Propensity in a Two-Speed Economy*, 14-3 PIIIE BRIEFING 1, 34 (2014), available at <http://www.piiie.com/publications/briefings/piieb14-3.pdf>.

impoverishment.<sup>80</sup> Through NAFTA, Mexico has become the world's largest exporter of cars after Germany, South Korea, and Japan.<sup>81</sup> The aeronautical industry is no different. Bombardier, a Canadian company based in Montreal with a plant in Queretaro, Mexico, is another example of a corporation flourishing under regional free trade.<sup>82</sup> The small market for private airplanes in Canada was not profitable enough for Bombardier, but NAFTA allowed it to reach bigger markets to sell and manufacture.<sup>83</sup>

The US banking and financial services industries have enjoyed windfalls. In 2001, Citibank purchased Banamex, a Mexican bank, for \$12.5 billion.<sup>84</sup> In June 2001 Citibank had about 200 branches in Mexico, but by September 2001, after it bought Banamex, its branches increased to 1,560 and income grew to \$124 million.<sup>85</sup> After Citibank's purchase in 2001, Banamex was ranked second in assets, but first in equity, net-income, and private sector loans in Mexico, with about one quarter of the market.<sup>86</sup> Many corporations have indeed done well in the post-NAFTA era.

<sup>80</sup> From 1994 to 2000 the average wage decreased 21%, while the wages for the top 1% increased in 1999 and 2000. Carlos Salas, *Mexico's Haves And Have-Nots: NAFTA Sharpens the Divide*, 35 *NACLA REPORT ON THE AMERICAS* 32, 34 (2002). "Mexico is the only Latin American country where poverty increased, going from 31% to 37% between 2005 and 2011." Miguel Reyes Hernández, Humberto Morales Moreno, Miguel A. López López, & Jorge Abascal Jiménez, *The Denationalization of Pemex: Implications and Scope for Mexico*, 5 *LATIN AMERICAN POL'Y* 133 (2014).

<sup>81</sup> William Boston, *Volkswagen Set To Announce Expansion of Mexico Plant*, *WALL ST. J.* (Mar. 6, 2015) <http://www.wsj.com/articles/volkswagen-set-to-announce-expansion-of-mexican-plant-1425637339>; see also Tony Lewis, *Mexico: BMW to Build US\$1bn Factory*, *JUST AUTO* (July 4, 2014), [http://www.just-auto.com/news/bmw-to-build-us1bn-factory\\_id147747.aspx](http://www.just-auto.com/news/bmw-to-build-us1bn-factory_id147747.aspx); see also Sonari Ginton, *How NAFTA Drove the Auto Industry South*, *NPR* (Dec. 8, 2013), <http://www.npr.org/templates/story/story.php?storyId=249626017>.

<sup>82</sup> *NAFTA at 20: Ready To Take Off Again?*, *ECONOMIST* (Jan. 4, 2014) <http://www.economist.com/news/briefing/21592631-two-decades-ago-north-american-free-trade-agreement-got-flying-start-then-it>.

<sup>83</sup> Jackie Northam, *NAFTA Opened Continent For Some Canadian Companies*, *NPR* (Dec. 25, 2013), <http://www.npr.org/blogs/parallels/2013/12/25/255381132/nafta-opened-continent-for-some-canadian-companies>.

<sup>84</sup> GARY CLYDE HUFBAUER, *INST. FOR INT'L ECON., NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES* 203 (2005).

<sup>85</sup> Barbara A. Rehm, *Citi's Giant Bite In Banamex Deal Matched Ambitions*, 166 *AMERICAN BANKER* 4, 4 (Dec. 26, 2001).

<sup>86</sup> *Id.*

## E. PRIVATE SECURITY CONTRACTORS

Privatizing immigration detention in the US began in 1984, when the Corrections Corporation of America (CCA), also known as the “private incarceration leader,”<sup>87</sup> cut its very first deal with the Immigration and Naturalization Service (INS)<sup>88</sup> to operate immigration detention centers in Laredo and Houston, Texas.<sup>89</sup> After the 9/11 attacks, the US concentrated its resources on making the US-Mexico border more secure.<sup>90</sup> In December 2001 and March 2002 the US signed with Mexico the United States-Mexico Border Partnership Agreement to work on border security.<sup>91</sup> In addition to the creation of agencies and partnership agreements, the United States increased the number of border patrol agents and added new technology. At the end of the Fiscal Year 2012, the Border Patrol had over 21,000 agents.<sup>92</sup>

To add the new technology, the US government reached out to private companies that have benefited greatly with the new government approach.<sup>93</sup> In 2012, Unisys signed a \$132 million contract<sup>94</sup> to create the

<sup>87</sup> Robert E. Koulisch, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462, 476 (2008) [hereinafter *Blackwater and the Privatization of Immigration Control*].

<sup>88</sup> STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 2 (5th ed. 2009).

<sup>89</sup> *Blackwater and the Privatization of Immigration Control*, supra note 87, at 476.

<sup>90</sup> Lourdes Medrano, *Is US-Mexico border Secure Enough? Immigration Reform Could Hinge on Answer*, CHRISTIAN SCI. MONITOR (Mar. 6, 2013), <http://www.csmonitor.com/USA/Politics/2013/0306/Is-US-Mexico-border-secure-enough-Immigration-reform-could-hinge-on-answer>.

<sup>91</sup> Deborah Meyers, *Security at U.S. Borders: A Move Away from Unilateralism?*, MIGRATION POLICY INST. (Aug. 1, 2003), <http://www.migrationpolicy.org/article/security-us-borders-move-away-unilateralism>.

<sup>92</sup> U.S. Customs and Border Prot., *Border Patrol Overview*, CBP.GOV, <http://www.cbp.gov/border-security/along-us-borders/overview> (last visited Apr. 30, 2015); U.S. Customs and Border Prot., *Technology Innovation and Acquisition*, CBP.GOV, <http://www.cbp.gov/border-security/along-us-borders/technology-innovation-acquisition> (last visited Apr. 30, 2015). “USBP staffing roughly doubled in the decade after the 1986 IRCA, doubled again between 1996 and the 9/11 attacks, and doubled again in the decade after 9/11. As of September 20, 2014, the USBP had 20,863 agents, including 18,156 posted at the Southwest border.” LISA SEGHETTI, CONG. RESEARCH SERV., R42138, MEXICO’S BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 14 (2014), available at <https://www.fas.org/sgp/crs/homesecc/R42138.pdf>. See also U.S. Customs and Border Prot., *Border Patrol Agent Staffing by Fiscal Year*, CBP.GOV (Sept. 20, 2014), [http://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014_0.pdf).

<sup>93</sup> Ted Hesson, *15 Companies That Profit From Border Security*, ABC NEWS (Apr. 15, 2013), [http://abcnews.go.com/ABC\\_Univision/Politics/15-companies-profit-border-security/story?id=18957304](http://abcnews.go.com/ABC_Univision/Politics/15-companies-profit-border-security/story?id=18957304).

<sup>94</sup> *Id.*

first pedestrian border crossing in El Paso, Texas. The crossing “deploys a combination of gates systems, mobile handheld devices, and radio frequency identification technology to more efficiently identify and process pedestrians crossing the border into the U.S.”<sup>95</sup>

In 2014, Department of Homeland Security awarded EFW Inc. a \$145 million contract “for a series of border security towers to be built along the Mexican border with Arizona.”<sup>96</sup> The towers will detect, track, identify, and classify suspicious activity at the Arizona border. Also in 2014, Elbit Systems Ltd. was awarded a \$145 million contract for border surveillance technology.<sup>97</sup> The contract had potential to reach \$1 billion if “legislation to rewrite US immigration law passes Congress and helps fund the project’s expansion in the southwest.”<sup>98</sup> Elbit Systems Ltd. is known for providing a border control system for the Israeli police force. Elbit Systems has also assisted Israel with air, sea, and land entry points of security.<sup>99</sup>

In September 2006 Boeing Company was awarded by the DHS a three-year contract for the construction of SBInet.<sup>100</sup> The US government paid Boeing an estimated \$860 million for the project.<sup>101</sup> “SBInet was to be deployed over 387 miles of the Southwest border by the end of 2008.”<sup>102</sup> Soon after the project was started, it experienced several problems: “Despite more than a dozen Government Accountability Office (GAO) reports warning of serious SBInet deficiencies, senior

<sup>95</sup> Unisys, *Customs and Border Protection Opens Pedestrian Border Crossing System in El Paso with Support from Unisys*, UNISYS (Nov. 10, 2011), <http://www.unisys.com/news/News%20Release/Customs-and-Border-Protection-Opens-Pedestrian-Border-Crossing-System-in-El-Paso-with-Support-from-Unisys>.

<sup>96</sup> Fox News Latino, *Homeland Security Awards \$145 Million Contract For U.S.-Mexico Border Towers*, LATINO.FOXNEWS.COM (Mar. 1, 2014), <http://latino.foxnews.com/latino/news/2014/03/01/homeland-security-awards-145-million-contract-for-us-mexico-border-towers/>.

<sup>97</sup> Kathleen Miller, *Israel’s Elbit Wins U.S. Border Work After Boeing Dumped*, BLOOMBERG (Feb. 27, 2014), <http://www.bloomberg.com/news/articles/2014-02-27/israel-s-elbit-wins-u-s-border-surveillance-contract>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Griff Witte, *Boeing Wins Deal for Border Security*, WASH. POST (Sept. 20, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/19/AR2006091901715.html>.

<sup>101</sup> GAO, *Secure Border Initiative: Controls over Contractor Payments for the Technology Component Need Improvement*, WASHINGTON, DC: GAO 2 (2011), available at <http://www.gao.gov/new.items/d1168.pdf>.

<sup>102</sup> Doris Meissner, Donald M. Kerwin, Muzzaffar Chishti, & Claire Bergeron, *Immigration Enforcement In The United States: The Rise Of A Formidable Machinery*, MIGRATION POL’Y INST. 29, Jan. 2013, available at <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery> [hereinafter Meissner, et al.].



administration official and members of Congress continued to back the SBInet program through 2009.<sup>103</sup> In 2010, the GAO pointed out that Boeing had discovered 1,300 defects in the project between March 2008 and July 2009, and that more problems continued to come up at a fast pace.<sup>104</sup> In 2010, the DHS held back the funding for the project, and in January of 2011 Secretary of Homeland Security Janet Napolitano ended the funding for the SBInet project.<sup>105</sup>

CCA is currently “the biggest operator of private prisons in the world.”<sup>106</sup> The company made about \$1.7 billion in revenues in 2012. A quarter of the revenue (an estimated \$425 million) “came from contract with the Immigration and Customs Enforcement (ICE) and federal Bureau of Prisons to incarcerate non-citizens in the United States.”<sup>107</sup>

After the US government decided to end the transportation services by the Customs and Border Protection (CBP), it awarded the contract to G4S.<sup>108</sup> G4S currently has over 600 Custom Protection Officers operating over 100 vehicles used to transport undocumented immigrants who were are trying to cross the US-Mexico border.<sup>109</sup> On August 22, 2013, G4S was awarded a \$234 million contract by US Customs and Border Protection for the transportation of detainees in the Southwest border.<sup>110</sup>

In 2012, there were several other companies contracted with the US government to provide security services or technology at the US-Mexico border.<sup>111</sup> International Business Machines contracted for

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<sup>103</sup> *Id.* at 29.

<sup>104</sup> *Id.*

<sup>105</sup> CNN Wire Staff, *Homeland Security Chief Cancels Costly Virtual Border Fence*, CNN (Jan. 14, 2011), <http://www.cnn.com/2011/US/01/14/border.virtual.fence/>.

<sup>106</sup> Lee Fang, *How Private Prisons Game the Immigration System*, NATION (Feb. 27, 2013), <http://www.thenation.com/article/173120/how-private-prisons-game-immigration-system>.

<sup>107</sup> *Id.*

<sup>108</sup> G4S USA, *The Bus No One Wants to Catch*, G4S.US, <http://www.g4s.com/~media/Files/USA/PDF-Case-Studies/Customs%20and%20Border%20Patrol%20112311%20FINAL.ashx> (last visited Apr. 30, 2015).

<sup>109</sup> *Id.*

<sup>110</sup> Fed. Bus. Opportunity, *Southwest Border Transportation, Medical Escort and Guard Services*, FBO.GOV (Aug. 22, 2013), [https://www.fbo.gov/index?s=opportunity&mode=form&id=91edd01479626bfcaf64a03d99649c3a&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=91edd01479626bfcaf64a03d99649c3a&tab=core&_cview=1).

<sup>111</sup> Ted Hesson, *15 Companies that Profit from Border Security*, ABC NEWS (Apr. 15, 2013), [http://abcnews.go.com/ABC\\_Univision/Politics/15-companies-profit-border-security/story?id=18957304](http://abcnews.go.com/ABC_Univision/Politics/15-companies-profit-border-security/story?id=18957304).

information technology and telecommunications for \$100 million.<sup>112</sup> Pacific Architects & Engineers contracted for the operational systems development for \$97 million.<sup>113</sup> Science Applications International Corporation contracted for equipment maintenance, office building repair, and information technology services for \$69 million.<sup>114</sup> ESCgov contracted to provide office information system equipment for \$54 million.<sup>115</sup>

These are some of the private companies benefiting from the increase in security at the US-Mexico border. Now with the end of two wars, private security contractors “are turning their sights to the Mexican border in the hopes of collecting some of the billions of dollars expected to be spent on tighter security if immigration legislation becomes law.”<sup>116</sup>

#### F. THE BORDER VIGILANTES

It is not just private corporations that work to beef up security along the US-Mexico border, but also private individuals and their loosely organized affiliates. A state of tension between Anglos and Mexicans along the US-Mexico border dates back to the Treaty of Guadalupe Hidalgo on February 2, 1848, when Mexico sold California, Arizona, New Mexico, and Texas to the United States for 15 million dollars.<sup>117</sup> Between 1848 and 1928, 597 Mexicans were lynched by US-based vigilante mobs.<sup>118</sup> Mexicans faced danger during those years, with the rates of lynching against Mexicans far surpassing those against African Americans in the South. The last recorded lynching of a Mexican in the United States took place on November 16, 1928.<sup>119</sup> Even after the

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Eric Lipton, *As Wars End, a Rush to Grab Dollars Spent on the Border*, N.Y. TIMES, June 6, 2013, available at <http://www.nytimes.com/2013/06/07/us/us-military-firms-eye-border-security-contracts.html>.

<sup>117</sup> Jessica Conaway, *Reversion Back to a State of Nature in the United States Southern Borderlands: A Look at Potential Causes of Action to Curb Vigilante Activity on the United States/Mexican Border*, 56 MERCER L. REV. 1419, 1422 (2005).

<sup>118</sup> William D. Carrigan & Clive Webb, *When Americans Lynched Mexicans*, N.Y. TIMES (Feb. 20, 2015), [http://www.nytimes.com/2015/02/20/opinion/when-americans-lynched-mexicans.html?\\_r=0](http://www.nytimes.com/2015/02/20/opinion/when-americans-lynched-mexicans.html?_r=0).

<sup>119</sup> William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 J. SOC. HIST. 411, 414 (2003); see Steven W. Bender, *Sight*,

arrival of the US law enforcement officials and courts of law, vigilantes continued with their own extra-judicial system: “These mobs in fact often showed disdain for the due process of law by taking suspects from police custody and lynching them.”<sup>120</sup> It is as if little has changed over the last 125 years: “[a]fter the terrorist attacks against the United States on September 11, 2001, Cochise County became ground zero for the organizing of armed civilians and vigilantes dedicated to patrolling the southeastern Arizona side of the US border for undocumented migrants.”<sup>121</sup> By 2005, the news media focused on the increasing numbers of self-described patriots taking up arms to protect the United States from the seemingly unending wave of illegal immigrants coming north from Mexico.<sup>122</sup> Donning military fatigues, these border vigilantes took to their motor homes to help patrol the US border with Mexico and protect the homeland.<sup>123</sup> Some of these vigilante groups use names associated with the US government including “Friends of the Border Patrol” and “American Border Patrol”.<sup>124</sup> They have also attempted “to resemble US Customs and US Border Patrol agents by wearing military attire that bears similar insignia.”<sup>125</sup>

Armed with handguns, walkie-talkies, and night-vision goggles, they spread out along the border region from Texas through California,

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*Sound, and Stereotypes: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153, 1173 (2002).

<sup>120</sup> Peter Yoxall, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History, and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 524 (2006).

<sup>121</sup> EMMANUEL BRUNET-JAILLY, *BORDERLANDS: COMPARING BORDER SECURITY IN NORTH AMERICA AND EUROPE* 49 (2007).

<sup>122</sup> Civil Homeland Defense had been founded in 2002 and in April 2005 changed its name to the Minutemen Project. See Bradley McCombs, *AZ-based Border Minuteman Group Call it Quits*, ARIZ. DAILY STAR, Mar. 25, 2010, available at [http://azstarnet.com/news/local/border/az-based-border-minuteman-group-calls-it-quits/article\\_7d47c702-378b-11df-95cb-001cc4c03286.html](http://azstarnet.com/news/local/border/az-based-border-minuteman-group-calls-it-quits/article_7d47c702-378b-11df-95cb-001cc4c03286.html).

<sup>123</sup> According to the mission statement from the Minuteman Civil Defense Corp., “[t]o secure the United States borders and costal boundaries against unlawful and unauthorized entry of all individuals, contraband, and foreign military.” See MINUTEMANHQ.COM, <http://www.minutemanhq.com/hq/aboutus.php> (last visited Oct. 27, 2015).

<sup>124</sup> See generally Stephen R. Vina et al., CONG. RESEARCH SERV., RL 33353, *CIVILIAN PATROLS ALONG THE BORDER: LEGAL AND POLICY ISSUES* (2006), available at <http://www.fas.org/sgp/crs/homesec/RL33353.pdf>.

<sup>125</sup> Adalgiza A. Núñez, *Civilian Border Patrols: Activists, Vigilantes, or Agents of Government?*, 60 RUTGERS L. REV. 797, 810 (2008).

with a majority situating themselves in southern Arizona.<sup>126</sup> Jim Gilchrist, a co-founder of the Minutemen Project, explained:

The primary goal of the Minuteman Project is to bring national awareness to the illegal alien invasion of the United States. In a span of only two years, with a paltry purse of public donations, the Minuteman Project has brought more attention to the illegal alien crisis than many larger and longer-established immigration law advocacy groups have done in 25 years with aggregate donations of an estimated \$20 million. The Minuteman Project's secondary goal is to advocate for the enforcement of the U.S. immigration laws currently in place and to encourage the enactment of new immigration laws to close perceived "loopholes" in existing legislation.<sup>127</sup>

The Southern Law Poverty Center calls these groups "nativist extremist," designating a few as "hate groups."<sup>128</sup> The US government and its federal law enforcement officials have been forced to work out rules of procedure with these groups concerning the apprehension of suspected undocumented immigrants.<sup>129</sup> Since its height in 2006, the border vigilante movement has continuously dissipated.<sup>130</sup> The Southern Poverty Law Center reported that the numbers of nativist extremist groups dropped greatly by 2011.<sup>131</sup> In 2014, however, in response to the massive flood of immigrants from Central America to the US-Mexico border including tens of thousands of unaccompanied minors<sup>132</sup> from Honduras, El Salvador, and Guatemala, there were an estimated ten armed groups

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<sup>126</sup> See e.g., Tim Steller, *Blog: How Border-militia Members Got a Bad Name*, ARIZ. DAILY STAR (June 21, 2012), [http://azstarnet.com/news/blogs/senor-reporter/blog-how-border-militia-members-got-a-bad-name/article\\_9f99e6b0-bb22-11e1-bcb9-001a4bcf887a.html](http://azstarnet.com/news/blogs/senor-reporter/blog-how-border-militia-members-got-a-bad-name/article_9f99e6b0-bb22-11e1-bcb9-001a4bcf887a.html)

<sup>127</sup> Jim Gilchrist, *An Essay by Jim Gilchrist*, 22 GEO. IMM. L.J. 415, 416 (2008).

<sup>128</sup> *Intelligence Report, Spring 2007, Issue No. 25*, S. POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2007/spring/shoot-shovel-shut-up/the-groups-a-lis> (last visited Oct. 28, 2010).

<sup>129</sup> Yoxall, *supra* note 120, at 37.

<sup>130</sup> See Tim Steller, *Report: Border-watch Groups Vanishing*, ARIZ. DAILY STAR (Mar. 18, 2012), [http://azstarnet.com/news/local/border/report-border-watch-groups-vanishing/article\\_439813ad-d091-5b9c-8788-20ace8c2003a.html](http://azstarnet.com/news/local/border/report-border-watch-groups-vanishing/article_439813ad-d091-5b9c-8788-20ace8c2003a.html).

<sup>131</sup> Mark Potok, *The "Patriot" Movement Explodes*, S. POVERTY LAW CTR. (Mar. 1, 2012), <https://www.splcenter.org/fighting-hate/intelligence-report/2012/patriot-movement-explodes>; see also James Duff Lyall, *Vigilante State: Reframing the Minuteman Project in American Politics and Culture*, 23 GEO. IMMIGR. L.J. 257, 275 (2009).

<sup>132</sup> Some 57,000 minors were apprehended by the Border Patrol in a mere 10-month period. See *Border Vigilante Calls Attention to Adults Entering U.S. Illegally*, WBUR BOSTON NPR (Aug. 1, 2014), <http://hereandnow.wbur.org/2014/08/01/border-vigilante-texas>.

monitoring the border along the Texas portion of the border with Mexico.<sup>133</sup>

In short, there is a plethora of private actors operating in the border region—some of them for-profit and legitimate (private contractors), some of them for-profit and illegal (drug cartels and human smugglers), some of them not-for-profit (border vigilantes, Good Samaritans, and other relief non-governmental organizations).

## II. THE REASONS FOR THE PROLIFERATION OF PRIVATE ACTORS

This Part explores the reasons for the proliferation of private actors along the US-Mexico border. While we cannot presume that all the private actors are operating from the same imperative, economic need is often the overwhelming driving force behind their operations. Professor Martti Koskeniemi writes of “*homo economicus*, poised to perpetuate the realization of its idiosyncratic preferences. Such actors are completely controlled by the environmental conditions that make interest-fulfillment possible.”<sup>134</sup>

There indeed exists such a strong profit motive for many private actors at the border.<sup>135</sup> Drug cartels want to access the United States to sell their illicit products. Human smugglers profit from guiding undocumented immigrants into the United States for high fees (an

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<sup>133</sup> See Koltin Parker, *Armed Militia Purportedly Along the Border*, HOUSTON CHRON. (July 28, 2014), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Armed-militia-purportedly-along-the-border-5652531.php>; see also *Border Vigilante Calls Attention to Adults Entering U.S. Illegally*, *supra* note 132.

<sup>134</sup> MARTTI KOSKENIEMI, *THE POLITICS OF INTERNATIONAL LAW* 256 (2011).

<sup>135</sup> It is important to note that there are individuals and groups along the border not in it for profit. There are good Samaritans, including the Border Angels, Casa Cornelia Law Center, American Civil Liberties Union (ACLU), Human Borders, American Friends Service Committee (AFSC), Project Rescue, and other Latino and religiously based non-governmental organizations. These groups operate on the peripheries—both literally and metaphorically—of the U.S.-Mexico border, providing food, shelter, medical aid, and legal assistance and lobbying efforts for undocumented people crossing into the United States. They are all not for profit, and rely on the donations of charitable foundations and donors as well as some government grants for some. Where the US authorities are unable, or unwilling, to provide succor to those risking life and limb to cross into the United States, they have stepped in to provide much needed humanitarian relief. One other project, involving the ACLU, National Lawyers Guild, and La Raza Lawyers Association of San Diego, monitored the activities of the border vigilantes. See Leslie Berenstein, *Legal Groups to Watch County “Minutemen”*, SAN DIEGO UNION TRIBUNE, July 1, 2005, available at <http://legacy.signonsandiego.com/news/mexico/tijuana/20050701-9999-7m1watch.html>.

estimated \$5,000 a head is charged by some coyotes).<sup>136</sup> Border factory owners in Mexico want to take advantage of tax incentives, duty drawbacks, and the proximity to the US marketplace.<sup>137</sup> Multinational corporations operating in the United States want to win high-paying contracts from the Department of Homeland Security to beef up border security<sup>138</sup> and to sell goods and services to the Mexican government.<sup>139</sup> US border vigilantes are motivated for profit in the sense that they are protecting US jobs against low cost labor from Mexico and Central America competing for work.<sup>140</sup> Migrants, too, are motivated by money.<sup>141</sup> They are seeking better-paying work (or any work at all given the high levels of unemployment or underemployment in their respective countries).<sup>142</sup> A majority of these unauthorized immigrants are coming to

<sup>136</sup> “The migrants pay anywhere from \$4,000 to \$10,000 each for the illegal journey across thousands of miles in the care of smuggling networks that in turn pay off government officials, gangs operating on trains and drug cartels controlling the routes north.” Associated Press, *From Bribing Drug Cartels and Immigration Officials to Paying for Hotels and Train Rides: Coyote Smugglers Reveal Costs Involved in Smuggling Child Migrant from Central America to the U.S.*, DAILYMAIL (July 22, 2014, 12:12 AM), <http://www.dailymail.co.uk/news/article-2700946/From-bribing-drug-cartels-immigration-officials-paying-hotels-train-rides-Coyote-smugglers-reveal-costs-involved-smuggling-child-migrants-Central-America-U-S.html>.

<sup>137</sup> “Corporations are *Homo economicus*. Quite rationally and without malice, they try to increase their profits by any means, legal and occasionally illegal. Corporations that don’t follow this cardinal law of the jungle will go out of business, which means that whatever else a corporation makes, it’ll invariably produce externalities.” RAJ PATEL, *THE VALUE OF NOTHING: HOW TO RESHAPE MARKET SOCIETY AND REDEFINE DEMOCRACY* 48 (2009) (citing JUAN MARTINEZ-ALIER, *THE ENVIRONMENTALISM OF THE POOR: A STUDY OF ECOLOGICAL CONFLICTS AND VALUATION* (2002)).

<sup>138</sup> *Blackwater and the Privatization of Immigration Control*, *supra* note 87, at 466; see also Tom Turpel, *New Detention & Deportation Laws Workshop Explores Ideas About Immigration Reform*, NEW AM. MEDIA (2006), [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=c0a0c68318740d858606346e49703ecb](http://news.newamericamedia.org/news/view_article.html?article_id=c0a0c68318740d858606346e49703ecb) (stating that when former President George Bush announced that more spending should go towards detention facilities, share prices for CCA increased by 27%).

<sup>139</sup> Reuters, *PeopleSoft to Update Mexico’s Tax System*, L.A. TIMES (Aug. 6, 2004), <http://articles.latimes.com/2004/aug/06/business/fi-rup6.8>.

<sup>140</sup> “America still has millions of less-educated and /or low skilled workers to compete for the only jobs that immigrants are qualified to take. When immigrants are willing to work at below-market wages, many without benefits or employment taxes paid by employers, they place a squeeze on the bottom tiers of American workers.” JIM GILCHRIST & JEROME R. CORSI, *MINUTEMEN: THE BATTLE TO SECURE AMERICA’S BORDERS* 80 (2006).

<sup>141</sup> See Demetrios Papademetriou & Aaron Terrazas, *Immigrants in the United States and the Current Economic Crisis*, MIGRATION POL’Y INST. (Apr. 1, 2009), <http://www.migrationpolicy.org/article/immigrants-united-states-and-current-economic-crisis>.

<sup>142</sup> Income maximization explains why the more educated are more likely to emigrate (positive selection) and more educated migrants are more likely to settle in destination countries with high rewards to skill (positive sorting). See generally Jeffrey Grogger & Gordon H. Hanson, *Income Maximization and the Selection and Sorting of International Migrants*, 95 J. DEV. ECON. 42

the United States to make money to send home to their families in the developing world.<sup>143</sup>

These private actors can fill a void left by borders that are not fully regulated. When borders are contested, profiteers move in.

The U.S.-Mexican border, for example, has long been the subject of negative stereotypes by both the United States and Mexico. The 1920s saw the border depicted as a haven for gambling, prostitution, and vice, an image that has continued while other layers have been added. In the 1980s and 1990s, the border was frequently decried as a center of worker exploitation in assembly plants (*maquiladoras*), serious environmental problems, and out-of-control urban growth. The flow of illicit drugs across the border to consumers in the United States has produced the perception of a region characterized by drug wars and corruption.<sup>144</sup>

In addition to the sense of lawlessness that border regions generally provide,<sup>145</sup> it is important to recognize that the border has not yet been fully demarcated.<sup>146</sup> After all, the United States won this territory through military conquest. This situation was solidified in and by the Treaty of Guadalupe Hidalgo in 1848, an agreement which saw Mexico cede a huge portion of its national territory—what is present-day Arizona, California, New Mexico, parts of Colorado, Nevada, and Utah—to the United States. Notwithstanding this treaty, Samuel Truett explains that: “this land was *contested* and selectively unmade as social conflict and revolutionary struggles shook the foundations of the modern borderlands, dashing dreams of domestication and domination and conjuring the ghosts of frontiers past.”<sup>147</sup> (*Italics added*).

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(2011), *available* at [http://gps.ucsd.edu/\\_files/faculty/hanson/hanson\\_publication\\_migration\\_income.pdf](http://gps.ucsd.edu/_files/faculty/hanson/hanson_publication_migration_income.pdf).

<sup>143</sup> “In the United States last year [2012], more than \$120 billion was sent by workers to families abroad—making it the largest sender of remittances in the world. More than \$23 billion went to Mexico, \$13.45 billion to China, \$10.84 billion to India and \$10 billion to the Philippines, among other recipients.” Simon Tomlinson, *Revealed: How Immigrants in America Are Sending \$120 BILLION to their Struggling Families Back Home*, DAILYMAIL (Jan. 31, 2013), <http://www.dailymail.co.uk/news/article-2271455/Revealed-How-immigrants-America-sending-120-BILLION-struggling-families-home.html>.

<sup>144</sup> PAUL GANSTER & DAVID E. LOREY, *THE U.S.-MEXICAN BORDER INTO THE TWENTY-FIRST CENTURY*, at xxi (2d ed. 2008).

<sup>145</sup> See generally TED CONOVER, *COYOTES: A JOURNEY THROUGH THE SECRET WORLD OF AMERICA’S ILLEGAL ALIENS* (1987).

<sup>146</sup> See *50 Years Ago, A Fluid Border Made the U.S. 1 Square Mile Smaller*, NPR (Sept. 25, 2014), <http://www.npr.org/2014/09/25/350885341/50-years-ago-a-fluid-border-made-the-u-s-1-square-mile-smaller>.

<sup>147</sup> Samuel Truett, in *Fugitive Landscapes*, shows “how Mexicans and Americans tried but ultimately failed to domesticate Sonora and Arizona in the years before the coming of the

On the Mexican side, the state did not exercise a lot of control of the area, be it in criminal justice, regional trade, and international relations: “[a]s the colonies failed to flourish, border defenses were primarily left to state of local governments. In the absence of a strong central government, a few men known as caciques, or caudillos, took hold of state governments and rules with almost autonomy from Mexico City.”<sup>148</sup>

Nothing much has changed. Mexican authorities struggle to maintain effective control as police come under attack on a seemingly frequent basis.<sup>149</sup> The state does not enjoy a monopoly of force.<sup>150</sup>

### A. CARTEL BEHAVIOR

With unregulated revenue from the illicit drugs trade worth an estimated \$30 to \$50 billion annually,<sup>151</sup> it is no surprise that law enforcement officials, security forces, and political leaders are corrupted.<sup>152</sup> Many public servants—judges, law enforcement agents, and

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railroad.” SAMUEL TRUETT, *FUGITIVE LANDSCAPES: THE FORGOTTEN HISTORY OF THE U.S.-MEXICO BORDERLANDS* 9 (2006). See also OSCAR J. MARTÍNEZ, *BORDER PEOPLE: LIFE AND SOCIETY IN THE U.S.-MEXICO BORDERLANDS* 5–10 (1994).

<sup>148</sup> RACHEL ST. JOHN, *LINE IN THE SAND* 42 (2011).

<sup>149</sup> Jo Tuckman, *Fifteen Mexican Police Officers Killed in Deadly Ambush in Jalisco State*, *GUARDIAN* (Apr. 7, 2015), <http://www.theguardian.com/world/2015/apr/07/mexico-police-attack-jalisco-15-dead>; Dudley Althaus, *Mexico Cartel Kills 15 Police in Ambush*, *WALL ST. J.*, Apr. 8, 2015, at A9, available at <http://www.wsj.com/articles/drug-gang-kills-15-officers-in-mexico-142845048>.

<sup>150</sup> See E. Eduardo Castillo, *Ambush That Killed 15 Police in Western Mexico Could Signal Cartel’s Offensive Against State*, *U.S. NEWS & WORLD REP.* (Apr. 8, 2015), <http://www.usnews.com/news/world/articles/2015/04/08/ambush-that-killed-15-police-in-western-mexico-a-rarity>.

<sup>151</sup> Council on Hemispheric Affairs, *The Future of Mexico’s Drug Strategy*, *COHA.ORG*, (Aug. 5, 2015), <http://www.coha.org/the-future-of-mexicos-drug-strategy/>; Sandy Goodman, *Mexico Drug War a Lost Cause as Presently Fought*, *HUFF. POST* (Mar. 10, 2011), [http://www.huffingtonpost.com/sandy-goodman/mexico-drug-war-a-lost-ca\\_b\\_833097.html](http://www.huffingtonpost.com/sandy-goodman/mexico-drug-war-a-lost-ca_b_833097.html); Cf. “According to U.S. authorities, drug trafficking organizations send between \$19 and \$29 billion annually to Mexico from the United States, though the Government of Mexico disputes this figure.” BUREAU OF INT’L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, U.S. DEP’T OF STATE, 2013 INCSR: COUNTRIES/JURISDICTION OF PRIMARY CONCERN—GUATEMALA THROUGH MEXICO (Mar. 5, 2013), <http://www.state.gov/j/inl/rls/nrcrpt/2013/vol2/204066.htm>; John Burnett, *Awash in Cash, Drug Cartels Rely On Big Banks to Launder Profits*, *NPR* (Mar. 20, 2014), <http://www.npr.org/blogs/parallels/2014/03/20/291934724/awash-in-cash-drug-cartels-rely-on-big-banks-to-launder-profits>.

<sup>152</sup> See BUREAU OF INT’L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *supra* note 151; *Awash in Cash*, *supra* note 151.



elected officials—are in the employ of the narco-traffickers.<sup>153</sup> “[Drug trafficking] is an illegal form of capitalist accumulation. In some cases, it is an almost caricatured celebration of consumerism and wealth—narcomansions, big trucks, expensive tasteless clothing, gaudy jewelry—facilitated by neoliberalism and collusion with elements of the state.”<sup>154</sup>

The control over *plazas* means that profits increase.

[T]he cartelization is territorial, which induces wars among the cartels for control of space. Moreover, since the cartels do not pay rent or property taxes, their costs involve the costs of the violence, rather the normal carrying cost of rentals and mortgages. One could call the gains from controlling territory a “drug rent.”<sup>155</sup>

Loads, both of the legal and illegal kind, transported by truck are hijacked by other cartels or subject to “taxes” by corrupt police or military officers.<sup>156</sup> The closer to the border, the more control the cartels

<sup>153</sup> There is much corruption in Mexico according to Transparencia Mexicana’s 2010 Corruption Report. In 2010, an estimated 200 million acts of corruption occurred in the country. In 2007, this was estimated to be 197 million. In 2010, bribes cost each Mexican citizen an average of \$165 Mexican pesos. In 2007, this average was \$138 Mexican pesos. Clearly, corruption and perceptions of corruption continue to proliferate. In fact, Mexico remains the lowest rated country for the perception of corruption of the member countries of the OECD. See *generally* TRANSPARENCIA MEXICANA, ÍNDICE NACIONAL DE CORRUPCIÓN Y BUEN GOBIERNO—INFORME EJECUTIVO 2010 [National Index of Corruption and Good Government—Executive Report] (2010) (Mex.), available at [http://www.tm.org.mx/wp-content/uploads/2011/05/INFORME\\_EJECUTIVO\\_INCBG2010.pdf](http://www.tm.org.mx/wp-content/uploads/2011/05/INFORME_EJECUTIVO_INCBG2010.pdf). There is also evidence of U.S. agents on the payroll of the cartels: “U.S. Customs and Border Protection (CBP) data indicate that arrests of CBP employees for corruption-related activities since fiscal years 2005 account for less than 1 percent of CBP’s entire workforce per fiscal year.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-59, BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN CBP EFFORTS TO MITIGATE RISK OF EMPLOYEE CORRUPTION AND MISCONDUCT, Abstract (2012), available at <http://www.gao.gov/assets/660/650505.pdf>.

<sup>154</sup> HOWARD CAMPBELL, DRUG WAR ZONE: FRONTLINE DISPATCHES FROM THE STREETS OF EL PASO AND JUÁREZ 9 (2009). “The war in Mexico is for drugs and the enormous money to be made by supplying American habits, a torrent of cash that the army, the police, the government, and the cartels all lust for.” CHARLES BOWDEN, MURDER CITY: CIUDAD JUÁREZ AND THE GLOBAL ECONOMY’S NEW KILLING FIELDS 202 (2010).

<sup>155</sup> Fred E. Foldvary, *The Foreign Economic Effect of the U.S. War on Drugs*, 91 OR. L. REV. 1129, 1132–33 (2013).

<sup>156</sup> “[T]he Mexican army is a government-financed criminal organization, a fact which Mexicans learn as children.” CHARLES BOWDEN, MURDER CITY: CIUDAD JUÁREZ AND THE GLOBAL ECONOMY’S NEW KILLING FIELDS 202 (2010); CAMPBELL, *supra* note 154, at 23 (“Typically, a cartel purchases the loyalty of the head of the federal police or the military commander in a particular district. This official provides officers or soldiers to physically protect drug loads in transit or in stage facilities, and in some cases to serve as bodyguards for high-level cartel members. Police on the cartel payroll intimidate, kidnap or murder opponents of the organization, although they also may pressure and extort larger payments from the cartel with which they are associated.”)

need to exert.<sup>157</sup> The same can be surmised for human trafficking, with some people paying up to \$6,000 each to cross the US-Mexico border. According to the United Nations Office on Drugs and Crime, “migrant smuggling is a highly profitable business in which criminals enjoy low risk detection and punishment.”<sup>158</sup>

#### B. CORPORATIONS FIND A PLACE TO MANUFACTURE AND FROM WHICH TO EXPORT

Proximity to the US marketplace is important for the profitability of legitimate businesses. There are many incentives for Mexican factories to set up as close to the US border as possible.<sup>159</sup> Multinational corporations first came to the northern part of Mexico in 1965 as part of the Mexican government’s Border Industrialization Program to take advantage of the proximity to the US-Mexico border and because of a number of tax incentives. Maquiladoras in border cities like Ciudad Juarez and Tijuana supplied manufactured goods—automotive parts, televisions, and computers to name just three ubiquitous consumer products—to the American consumer.<sup>160</sup> The “foreign-owned plants that use cheap Mexican labor to assemble imported materials then send the finished product back to countries such as the United States, paying tax only on value added by the cheap labor.”<sup>161</sup>

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<sup>157</sup> See *Gun Battle Kills Three in Mexican Border City of Reynosa*, BBC NEWS (Apr. 18, 2015), <http://www.bbc.com/news/world-latin-america-32363587>.

<sup>158</sup> U.N. OFFICE ON DRUGS & CRIME, *Migrant Smuggling*, UNODC, <https://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html> (last visited Oct. 25, 2015).

<sup>159</sup> “It remains the case, however, that tensions which arise between making a profit, on the one hand, and social responsibility, on the other, are still primarily left to be resolved through free markets. But free markets can and do fail. International ground rules are needed to promote the benefits of corporate activity, as a form of cooperative enterprise, while at the same time restraining and mitigating the worst effects of unhindered consumerism and corporate greed. The market alone demonstrably cannot achieve this.” ALICE DE JONGE, *TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT* 27 (2011).

<sup>160</sup> “Just south of the United States, Mexico’s border towns witnessed the growth of the manufacturing model at the end of the twentieth century. In 1969, Mexico ranks first among manufacturing-assembly countries. By 1996, 372 of these businesses employed nearly 222,000 laborers, primarily in the automotive and electronics sectors.” SERGIO GONZÁLEZ RODRÍGUEZ, *THE FEMICIDE MACHINE* 26 (2012).

<sup>161</sup> Debbie Nathan, *Work, Sex and Danger in Ciudad Juárez*, NACLA REP. AMS., Nov./Dec. 1999, at 24, 24.

After the implementation of NAFTA, US and Canadian companies experienced several benefits from importing and exporting products through the maquiladora system in Mexico, such as the ability to avoid paying value-added taxes, avoid some non-tariff restrictions, and avoid temporary importation (duty free).<sup>162</sup> NAFTA also provided extra duty drawbacks for products that contained components from other NAFTA partner countries. However, Mexico went through a series of tax changes in January 1, 2014, which posed challenges to those who benefit from maquiladoras' tax breaks.<sup>163</sup> To placate factory owners, President Enrique Peña Nieto granted other tax benefits in early 2014, some temporary and others permanently.<sup>164</sup>

Major corporations have long done well in Mexico due to the country's long history of rewarding friends of the government with protected industries—free from competition from the outside.<sup>165</sup> After all, Mexico joined the GATT only in 1986 during the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade.<sup>166</sup>

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<sup>162</sup> See Alejandro García Seimandi, *Maquiladora and PITEX Programs: Trying to Improve the Obstacles*, 12 U.S.-MEX. L.J. 121, 126 (2004).

<sup>163</sup> Leonie Barrie, *Mexico: Tax Law Poses Challenges to Maquilas*, JUST-STYLE (Jan. 31, 2014), [http://www.just-style.com/news/new-tax-law-poses-challenges-to-maquilas\\_id120540.aspx](http://www.just-style.com/news/new-tax-law-poses-challenges-to-maquilas_id120540.aspx). Maquiladoras were then required to pay VAT on their imports under the Mexican tax reform. Sandler & Travis Trade Advisory, *New Mexican Tax Law Poses Significant Challenges to Maquila Operations* (Jan. 30, 2014), <http://www.strtrade.com/news-news-New-Mexican-Tax-Law-Significant-Challenges-Maquila-Operations.html>. Under the tax reform, “temporary imports were going to be subject to a 16 percent VAT, which generally is fully creditable but only for one month after such VAT is paid,” which typically results in the right to a tax refund. Eugenio Grageda Nuñez, *Value Added Tax (VAT): Impacts on the Maquiladora Industry Began Jan. 1, 2015*, NAT'L L. REV. (Jan. 27, 2015), available at <http://www.natlawreview.com/article/value-added-tax-impacts-maquiladora-industry-began-jan-1-2015-0>.

<sup>164</sup> Maquiladoras could apply a tax benefit that provides an additional deduction relating to tax-exempt employee benefits payments, tax payers that complied with certain formalities were given a “2-year period to fulfill the requirement of a 30% foreign ownership of the machinery and equipment (M&E) used in the maquila operation,” and reduced income tax rates in place from 2003 and 2013. *Mexico: Presidential Decree Published Providing Tax Benefits for Maquiladoras*, PWC, at 1 (Jan. 17, 2014), available at <https://www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-tp-mexico-tax-incentives-maquiladoras.pdf>.

<sup>165</sup> Andrew Bast, *Crony Capitalism in Emerging Markets*, NEWSWEEK (Aug. 16, 2010), <http://www.newsweek.com/crony-capitalism-emerging-markets-71795>; See also Eric Martin & Brendan Case, *Mexico's President Can't Shake Cronyism Doubts After Probe*, BLOOMBERG (Aug. 23, 2015, 5:51 PM), <http://www.bloomberg.com/news/articles/2015-08-23/mexico-s-president-can-t-shake-cronyism-doubts-after-probe>.

<sup>166</sup> *Members and Observers*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Oct. 25, 2015); see also General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 194.

Notwithstanding the obligation to liberalize trade and allow for foreign competition, Mexico has been described as a “captured state,”<sup>167</sup> meaning that:

[t]he Mexican state is confronted with very strong private interests in sectors such as telecommunications, banking, cement and others, which the state is incapable of controlling. To a large extent, these companies or groups force the state to define regulatory conditions in their sectors so as to be favorable to their private interests rather than to the public at large.<sup>168</sup>

Hence, the regulatory institutions empowered to control these companies remain weak and unable to do their work or even controlled by the powerful corporations.<sup>169</sup>

### C. LIBERALIZATION: THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNITED STATES-MEXICO BORDER

The North American Free Trade Agreement<sup>170</sup> (NAFTA) attempted to make some of the US-Mexico border less of a contested site and open up Mexico’s traditionally protected industries. The border between the United States and Mexico was a large part of the grand plan to better align the countries’ commerce.<sup>171</sup> By using US technology, millions of goods could be produced by less expensive labor in Mexico for export to and consumption in the United States. All of the North American continent would become part of the same supply chain,

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<sup>167</sup> See generally WORLD BANK, DEMOCRATIC GOVERNANCE IN MEXICO: BEYOND STATE CAPTURE AND SOCIAL POLARIZATION 37–53 (2007).

<sup>168</sup> BERTELSMANN STIFTUNG, BTI 2014 MEXICO COUNTRY REPORT 9 (2014), available at [http://www.bti-project.de/uploads/tx\\_itao\\_download/BTI\\_2014\\_Mexico.pdf](http://www.bti-project.de/uploads/tx_itao_download/BTI_2014_Mexico.pdf).

<sup>169</sup> “Regulation is needed to overcome and minimize the negative externalities that corporate activity produces because corporations cannot be expected to minimize their own negative externalities. It also stands to reason that to the extent that the negative externalities of corporate activity are global in nature, then the laws aimed at minimizing them need to be global in nature as well.” DE JONGE, *supra* note 159, at 27.

<sup>170</sup> NAFTA, Can.-Mex.-U.S., *supra* note 4. Congress approved NAFTA by means of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (codified at 19 U.S.C. § 3311 (2006)). NAFTA became effective on January 1, 1994. Exec. Order No. 12889, 58 Fed. Reg. 69681 (Dec. 27, 1993).

<sup>171</sup> “NAFTA was a brave new world for the three governments.” David A. Gantz, *The Evolution of U.S. Views on FTA Investment Protection: From NAFTA to the United States-Chile Free Trade Agreement*, in THE FIRST DECADE OF NAFTA: THE FUTURE OF FREE TRADE IN NORTH AMERICA 503, 507 (Kevin C. Kennedy ed., 2004).

enjoying just in time production and the comparative advantage that comes with such a liberalized trade regime.<sup>172</sup>

NAFTA was also a boon for many corporations, particularly the large, multinational ones.<sup>173</sup> It increased trade through tariff reduction, but also the integration of the production process—so that now some 40 percent of Mexican exports to the United States actually contain US-made components. There is a supply chain that is transnational, as it relies of production in both countries along the US-Mexico border. Duty drawbacks allow for a fully integrated supply chain in the three partner countries and a truly regionally integrated inventory management (“just in time”) system.

Foreign companies seized the opportunity to find cheap labor, especially with the implementation of NAFTA in 1994.<sup>174</sup> Mexico’s strategic advantage was the surplus value that could be extracted from each worker—hence, larger profits were possible: “[m]anufacturing-assembly along the Mexican border exists as an ultra-contemporary technological enclave in the midst of a degraded environment.”<sup>175</sup>

Soon after NAFTA went into effect, Mexico’s trade increased 17.5 percent with the United States and 33.3 percent with Canada.<sup>176</sup> Additionally, exports, imports, and foreign investment increased in the country.<sup>177</sup> President Carlos Salinas de Gortari, who negotiated NAFTA during his administration, publicly proclaimed the neoliberal policy as a step forward for Mexico.<sup>178</sup> President Vicente Fox, who took office in

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<sup>172</sup> See generally MAXWELL A. CAMERON & BRIAN W. TOMLIN, *THE MAKING OF NAFTA: HOW THE DEAL WAS DONE* (2000).

<sup>173</sup> See Carrie Kahn, *How NAFTA Helped the Mexican Billionaires’ Club*, NPR (Dec. 31, 2013), <http://www.npr.org/2014/01/01/258668414/how-nafta-helped-the-mexican-billionaires-club>; see also William Mauldin, *Pacific Trade Deals Likely to Have Narrow Reach; Most Americans Wouldn’t Notice a Big Impact From the Trans-Pacific Partnership*, WALL ST. J. (Mar. 15, 2015), at A2, available at <http://www.wsj.com/articles/what-the-trans-pacific-partnership-would-and-wouldntdo-1426441618> (“Sweeping trade deals of the past—with Canada and Mexico in 1993, for instance, or China in 2000—presented big upsides and big risks for a broad swath of U.S. companies.”)

<sup>174</sup> Nathan, *supra* note 161, at 24.

<sup>175</sup> RODRÍGUEZ, *supra* note 160, at 30.

<sup>176</sup> Chris Olive, *Member States Developments: Mexico*, 1 NAFTA LAW & BUS. REV. AM. 122, 122 (1995).

<sup>177</sup> *Id.*

<sup>178</sup> Laura Carlsen, *Armoring NAFTA: The Battleground for Mexico’s Future*, NACLA REP. AMS., Sept./Oct. 2008, at 17, 18.

2000, also considered NAFTA a success while he was in office.<sup>179</sup> So, too, do Presidents Felipe Calderón and Enrique Peña-Nieto.<sup>180</sup>

It is not just companies that are doing business in Mexico that are thriving. Companies that attempt to do business there and elsewhere in the NAFTA region, even if they do not actually end up doing business, can enjoy financial windfalls for loss of expected profits. Chapter 11 of NAFTA provided binding arbitration for investors against states over lost investments. These investor-state dispute provisions were the most controversial part of the agreement, for Chapter 11 “establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties to the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal.”<sup>181</sup> A NAFTA investor—an individual or corporation that are non-state actors rather than one of the signatory countries—who alleges that a host government has breached its investment obligations, may choose one of three arbitral mechanisms: the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID), ICSID’s Additional Facility Rules, or the rules of the United Nations Commission for International Trade Law (UNCITRAL Rules).<sup>182</sup> Alternatively, the investor may choose the remedies available in the host country’s domestic courts.<sup>183</sup> An important feature of the Chapter 11 arbitral provisions is the enforceability in domestic courts of final awards by arbitration tribunals.<sup>184</sup>

This has been a boon for multinational corporations and their shareholders. These mechanisms are designed to protect investments—

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<sup>179</sup> Carlos Salas, *Mexico’s Haves and Have-Nots: NAFTA Sharpens the Divide*, NACLA REP. AMS., Jan./Feb. 2002, at 32, 33; Jaana Remes, *A Tale of Two Mexicos: Growth and Propensity in a Two-Speed Economy*, in *NAFTA 20 YEARS LATER* 30, 35 (2014), available at <http://www.piie.com/publications/briefings/piieb14-3.pdf>.

<sup>180</sup> Michael Abramowitz, *White House Defends NAFTA as Bush Meets With Heads of Mexico, Canada*, WASH. POST (Apr. 22, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/21/AR2008042100256.html>; see also Press Release, The White House, Press Conference by President Obama, President Peña Nieto, and Prime Minister Harper (Feb. 19, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/02/19/press-conference-president-obama-president-pe-nieto-and-prime-minister-h>; see also Patricia Rey Mallén, *20 Years of NAFTA: Enrique Peña Nieto, Barack Obama and Stephen Harper Talk the Economic Future of North America*, INT’L BUS. TIMES (Feb. 20, 2014), <http://www.ibtimes.com/20-years-nafta-enrique-pena-nieto-barack-obama-stephen-harper-talk-economic-future-north-america>.

<sup>181</sup> NAFTA, Can.-Mex.-U.S., *supra* note 4, at ch. 11, art. 1115.

<sup>182</sup> *Id.* at ch. 11, art. 1120.

<sup>183</sup> *Id.* at ch. 11 art. 1135(2)(c).

<sup>184</sup> *Id.* at ch. 11, art. 1136(4).

including the right for corporations to sue one or all of the NAFTA partner countries for expropriating, nationalizing, or otherwise “taking” an investment. This mechanism is very costly and thus only accessible to the largest of corporations. It has created a series of nuisance lawsuits to force foreign governments to capitulate for fear of incurring hundreds of millions of dollars of potential monetary damages and expensive legal fees.<sup>185</sup> The long-standing doctrine of sovereign immunity has been turned on its head, as “foreign” investors sue sovereign states before independent and binding tribunals.

#### D. THE SECURITY AND PROSPERITY PARTNERSHIP AND THE MÉRIDA INITIATIVE

Building on NAFTA, the Security and Property Partnership (SPP), agreed to by Canadian Prime Minister Paul Martin, Mexican President Vicente Fox, and US President George W. Bush in March 2005, was a culmination of security initiatives and common defense policies but was not a treaty with legal obligations.<sup>186</sup> According to a Canadian government website:

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<sup>185</sup> See NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY LESSONS FOR FAST TRACK AND THE FREE TRADE AREA OF THE AMERICAS, PUB. CITIZEN 1, 1–4, (2001), available at <https://www.citizen.org/documents/ACF186.PDF>. In *Ethyl v. Canada*, Ethyl Corporation, a Virginia-based corporation developed a gasoline additive known as methylcyclopentadienyl manganese tricarbonyl (MMT) and then exported it to Canada. After scientific studies brought light to the public health risks posed by MMT in 1997, the Canadian Parliament banned MMT. In response, Ethyl filed a NAFTA Chapter 11 investor-to-state claim against Canada and further argued that the ban was a violation of Article 1102 and 1106. After a NAFTA panel overruled Canada’s objection to the suit claiming that MMT was not a measure covered under Chapter 11, Canada settled the claim, resulting in Canada’s reversal of the MMT ban and paid \$13 million to Ethyl for legal fees and damages. Todd Weiler, *The Treatment Of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. INT’L & COMP. L. REV. 229, 231–32 (2003). See also *Pope & Talbot, Inc. v. Canada*, in which the tribunal ordered Canada to pay investors \$120,000. *Pope & Talbot, Inc. v. Canada*, 2000 UNCITRAL Trib., para. 18 (Can.) (final award on cost), available at <http://www.naftaclaims.com/disputes/canada/pope/pope-20.pdf>; *Pope & Talbot, Inc. v. Canada*, para. 33 (NAFTA/UNCITRAL Trib. Jan 25, 2000) (final award on cost), available at <http://www.naftaclaims.com/disputes/canada/pope/pope-20.pdf>. In *S.D. Meyers, Inc. v. Canada*, the Tribunal ordered Canada to pay \$850,000 to S.D. Meyers, Inc. with respect to arbitration fees and legal representation. *S.D. Meyers, Inc. v. Canada*, 2002 UNCITRAL Trib., paras. 53–54 (Can.) (final award, on costs), available at <http://www.naftaclaims.com/disputes/canada/sdmyers/myers-36.pdf>.

<sup>186</sup> See *North American Leaders Show Unity*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/4376431.stm> (last updated Mar. 23, 2005).

[t]he SPP... provides a flexible means for a dialogue, priority setting, collaboration and action on issues affecting the security, prosperity and quality of life of Canadians, Americans and Mexicans. It addresses diverse issues, such as border facilitation, the environment, food and product safety, and includes measures to improve overall North American competitiveness.<sup>187</sup>

There was no actual agreement, nor any binding obligations to supplement NAFTA. By the time the three government leaders met at the second summit of the SPP in Cancun, Mexico in March 2006, they turned to corporate leaders and trade associations to work together to create a more integrated trade area.<sup>188</sup> The North American Competitiveness Council, with thirty corporate representatives from some of North America's largest corporations, reported to the Executive branches in the three NAFTA partner countries, and was directed to improve trade and commerce by liberalizing rules of origin, exchanging information on health and safety, and harmonizing use of symbols on textiles and apparel. The SPP was about doing business more efficiently, competing with other trade blocs, and taking advantage of comparative advantage.<sup>189</sup> But without a multilateral treaty and a budget, and in the face of governmental inertia (in all three countries), not much came to pass in the end, and all talk of these initiatives came to a quiet end.<sup>190</sup>

Also designed at a multilateral level, the Mérida Initiative<sup>191</sup> is an attempt by the US and Mexican governments of allied countries to combat rising drug trafficking and other organized crime throughout Latin America.<sup>192</sup> Launched in October 2007, this initiative responded to

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<sup>187</sup> See *About SPP, Security and Prosperity Partnership of North America*, GOV'T OF CANADA, <http://www.ec.gc.ca/doc/ae-ve/2011-2012/1405/ec-com1405-en-s2.htm> (last visited Nov. 11, 2015).

<sup>188</sup> See generally Katherine Sciacchitano, *From NAFTA to the SPP: Here Comes the Security and Prosperity Partnership, but—What Security? Whose Prosperity?*, DOLLARS & SENSE, Jan.–Feb. 2008, available at <http://www.dollarsandsense.org/archives/2008/0108sciacchitano.html>.

<sup>189</sup> Neil Craik & Joseph DiMento, *Environmental Cooperation in the (Partially) Disaggregated State: Lessons from the Security and Prosperity Partnership of North America*, 8 CHI. J. INT'L L. 479, 484–92 (2008).

<sup>190</sup> While the spp.gov website has been taken down, there are still archived materials available online, primarily those posted by the Canadian government. See *About SPP, Security and Prosperity Partnership of North America*, *supra* note 187. The US government has also made available some archived materials at <http://www.ec.gc.ca/doc/ae-ve/2011-2012/1405/ec-com1405-en-s2.htm>. See also <http://2001-2009.state.gov/p/wha/rt/spp/>.

<sup>191</sup> See generally Mérida Initiative, U.S. DEP'T OF STATE, <http://www.state.gov/r/pa/plrmo/157797.htm> (last visited Oct. 30, 2015).

<sup>192</sup> A report from the Congressional Research Service provides an overview of the Mérida Initiative as of April 2014. See generally CLARE RIBANDO SEELKE & KRISTIN M. FINKLEA, CONG.



the Mexican government's request for support from the United States. "As part of the Mérida Initiative's emphasis on shared responsibility, the Mexican government pledged to deal with crime and corruption and the US government pledged to address drug demand and the illicit trafficking of firearms and bulk currency to Mexico."<sup>193</sup> Between 2008 and 2014, the US Congress appropriated over \$2.4 billion for Mérida Initiative programs in Mexico.<sup>194</sup> For fiscal year 2015, another \$201 million was allocated for Mexico through these programs.<sup>195</sup> The Mérida Initiative provides funds for border-security equipment, law enforcement training and resources, investment in economic sectors, and improving the coordination for international intelligence sharing.<sup>196</sup>

Corporations, including Sikorsky Aircraft Corp. and General Automatics, have done well under the Mérida Initiative.<sup>197</sup> In 2014, the United States approved a plan to sell eighteen Black Hawk helicopters made by Sikorsky Aircraft Corp. to Mexico for \$680 million.<sup>198</sup> "With engines made by a unit of General Electric Co., the Pentagon's Defense Security Cooperation Agency said spare parts, training, and other expenses take the potential contract value to \$680."<sup>199</sup> Some US defense

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RESEARCH SERV., R41349, U.S.–MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND (2015).

<sup>193</sup> SEELKE & FINKLEA, *supra* note 192, at 6.

<sup>194</sup> Mexico, too, made a significant investment in public security. In 2006 alone, Mexico's federal government invested an estimated \$3.5 billion dollars in security and public safety. M. en E. Reyes Tépac M., *El Presupuesto Público Federal para la FUNCIÓN SEGURIDAD PÚBLICA, 2013-14*, [The Federal Government Budget for Public Safety, 2013-14], DIRECCIÓN GENERAL DE SERVICIOS DE DOCUMENTACIÓN, INVESTIGACIÓN Y ANÁLISIS, at 44 (enero 2014), available at <http://www.diputados.gob.mx/sedia/sia/se/SAE-ISS-02-14.pdf> (Mex.); SEELKE & FINKLEA, *supra* note 192, at 27.

<sup>195</sup> SEELKE & FINKLEA, *supra* note 192, at 27. In October 2014, the U.S. State Department held back some of this assistance because of human rights obligations that the Mexican military was not meeting. Elisabeth Malkin & Azam Ahmed, *U.S. Withholds \$5 Million in Antidrug Aid to Mexico as Human Rights Rebuke*, N.Y. TIMES, Oct. 19, 2015, available at [http://www.nytimes.com/2015/10/20/world/americas/us-withholds-5-million-in-antidrug-aid-to-mexico-over-human-rights.html?\\_r=0](http://www.nytimes.com/2015/10/20/world/americas/us-withholds-5-million-in-antidrug-aid-to-mexico-over-human-rights.html?_r=0) (last visited on Oct. 23, 2015).

<sup>196</sup> See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-837, MÉRIDA INITIATIVE: THE UNITED STATES HAS PROVIDED COUNTERNARCOTICS AND ANTICRIME SUPPORT BUT NEEDS BETTER PERFORMANCE MEASURES (2010), available at <http://www.gao.gov/new.items/d10837.pdf>.

<sup>197</sup> Christy Thornton, *Obama's Support for Mexico Prioritizes Investors Over Citizens*, AL JAZEERA AMERICA (Jan. 13, 2015), <http://america.aljazeera.com/opinions/2015/1/mexico-obama-economy.html>.

<sup>198</sup> Doug Cameron, *U.S. Plans to Sell Mexico 18 Black Hawks to Tackle Drug Trade*, WALL ST. J. (Apr. 21, 2014), <http://www.wsj.com/articles/SB10001424052702304734304579516033688851754>.

<sup>199</sup> *Id.*

companies are exporting unsold military technologies to compensate for falling domestic sales.<sup>200</sup> A plethora of private corporations now play a role in the detection, apprehension, incarceration, and removal of undocumented migrants. They include the Correction Corporation of America, Wackenhutt, Geo4S, British Aerospace, Boeing, Raytheon, and a host of others.<sup>201</sup>

### III. WHY IS THE RISE OF PRIVATE ACTORS BAD?

The rise of private actors at the border is problematic for a number of reasons. First, this is a further example of the hollowing out of the state.<sup>202</sup> During the Administration of Ronald Reagan and the years of leadership of Margaret Thatcher in Great Britain, there was a focus on reducing government regulation and state intervention—so-called “neoliberalism.”<sup>203</sup>

[n]eo-liberalism is primarily concerned to promote a market-guided transition towards the new economic regime (e.g. Reaganism in the USA and Thatcherism in the UK). For the public sector, it involves a mixture of privatization, liberalization and adoption of commercial criteria in the residual state sector; for the private sector, it involves deregulation and a new legal and political framework providing passive support for market solution.<sup>204</sup>

The hollowing out of the state is another way to see the changes in state sovereignty—the move from government to governance. For Professor Bob Jessop, the 1980s were the time for the debate over the future of the nation-state and its ability to solve the world’s bigger problems or society’s smaller problems.<sup>205</sup> Global capitalism is a phenomenon that the

<sup>200</sup> *Id.*

<sup>201</sup> See generally Tom Dart, *Inside the US “Border Industrial Complex”: Spy Tech Meets Immigration Crackdown*, THE GUARDIAN, Apr. 26, 2015, <http://www.theguardian.com/world/2015/apr/26/surveillance-border-security-expo>.

<sup>202</sup> Bob Jessop, *Hollowing Out the “Nation-State” and Multilevel Governance*, in A HANDBOOK OF COMPARATIVE SOCIAL POLICY 11, 15–16 (Patricia Kennett ed., 2013); see Timothy Noah, *How Privatizing Government Hollowed Out the Middle Class*, MSNBC (June 3, 2014), <http://www.msnbc.com/msnbc/government-privatization-hurts-middle-class>.

<sup>203</sup> See generally R.A.W. Rhodes, *The Hollowing Out of the State: The Changing Nature of the Public Service in Britain*, 65 POL. Q. 138 (1994); see also Chris Skelcher, *Changing Images of the State: Overloaded, Hollowed-Out, Congested*, PUB. POL’Y & ADMIN., Autumn 2000, at 3, 3–19.

<sup>204</sup> Bob Jessop, *Post-Fordism and the State*, in POST-FORDISM: A READER 251, 266 (Ash Amin ed., 1994).

<sup>205</sup> *Hollowing Out the ‘Nation-State’ and Multilevel Governance*, *supra* note, at 202.

nation-state could not adequately address. The state is re-scaling its powers, both upwards and downwards, shifting away from traditional roles and taking on more of a network-based governance.

Protecting the border seems like an inherently governmental function,<sup>206</sup> one to be undertaken solely by state authorities, rather than outsourced by commission (like Boeing was for SBInet) or omission (like the border vigilantes). Contracting shifts public accountability to the private sphere.<sup>207</sup> The incentives to privatize are compelling, yet one unavoidable fact is that privatization creates a large probability of placing detainees in harm's way. More specifically, members of our national community<sup>208</sup> will be subject to unmonitored offenses within our borders. These offenses are prevalent in private detention facilities, as immigration detainees are subject to overcrowded prisons,<sup>209</sup> treated with indifference when it comes to their medical care,<sup>210</sup> including mental health.<sup>211</sup> They are subject to unnecessary shackling,<sup>212</sup> are fed inadequately,<sup>213</sup> and often with expired food.<sup>214</sup> Also, detainees are

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<sup>206</sup> An inherently governmental function was defined as a "function that is so intimately related to the public interest as to require performance by Federal Government employees." Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5, 112 Stat. 2382, 2384 (1998).

<sup>207</sup> See DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 57-65 (2005) (citing that private contractors are accountable to its stockholders, other market incentives, and some federal legislation, whereas, the government is accountable to Congressional budgets, federal laws, and potential governmental disciplinary measures); *Blackwater and the Privatization of Immigration Control*, *supra* note 87, at 474-76 (claiming that the transfer of legal liability is an incentive for government outsourcing and as a consequence such outsourcing can go "beyond the review authority of the courts of Congress").

<sup>208</sup> *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (stating aliens have lawfully been recognized as persons).

<sup>209</sup> See, e.g., [Proposed] Second Amended Complaint for Classwide Declaratory and Injunctive Relief at 10, *Kiniti et al. v. Myers*, No. 3:05-cv-01013-DMS-PCL (S.D. Cal. 2007) (on file with author) [hereinafter Amended Complaint, *Kiniti et al. v. Myers*].

<sup>210</sup> *Id.* at 2.

<sup>211</sup> *Brook House Immigration Detention Center - Fundamentally Unsafe*, July 12, 2010, U.K. IMMIGR. MAG., <http://immigrantmagazine.co.uk/?p=1836> [hereinafter *Brook House*].

<sup>212</sup> Letter from Sear Riordan, Staff Attorney, the Am. Civil Liberties Union Found., San Diego & Imperial Cnty, to Daniel P. Struck, Jones, Skelton & Hochuli, P.L.C., & Robin F. Baker, Field Office Dir., Det. & Removal Operations, ICE (Feb. 16, 2009) (on file with author), available at <https://www.prisonlegalnews.org/news/publications/aclu-letter-to-ice-re-abusive-shackling-of-immigration-detainees-at-the-san-diego-correctional-facility-2009/> (conveying that there is abusive shackling of immigration detainees at the San Diego Correctional Facility, a department controlled by the CCA).

<sup>213</sup> See *id.*; see also Amended Complaint, *supra* note 209, at 14 (illustrating that when detainees are on lockdown, they are left without meals and are forced to stay in their cells all day).

<sup>214</sup> *Private Prisons Turns on Employees for Speaking Out*, YOUTUBE (Mar. 9, 2012), <http://youtu.be/a4AFHBSTeQE>.

victims of additional tort violations such as assault,<sup>215</sup> battery,<sup>216</sup> rape,<sup>217</sup> and even death.<sup>218</sup> Such injuries are also known to occur during the removal process abroad when a detainee is still in a private security company's custody.<sup>219</sup>

This industry has led to “a lightning rod for credible human-rights abuse litigation.”<sup>220</sup> Unfortunately, these offenses, coupled with the privatization process, an arguably irreversible occurrence,<sup>221</sup> has led to “a corporate veil [that] distorts lines of legal responsibility.”<sup>222</sup> Is it little wonder that corporations are not trusted? “[T]he general public's view of corporations is not favorable. Interestingly, people in developed markets—including the U.S., U.K., Germany, Japan, and Hong Kong—retain especially skeptical views.”<sup>223</sup> Professors Ugo Mattei and Laura Nader lament:

[t]he mechanisms through which the transnational rule of law, as a deeply Western idea, has led incrementally to patterns of global plunder, a process initiated by the expansion of Euro-American society worldwide, and now continued by nations, in particularly the USA, and multinational corporate entities independent of explicit political or military colonialism.<sup>224</sup>

<sup>215</sup> Mike Riggs, *Prison Guard Instructs Immigrant Detainee to Drink His Semen, Gets Slap on the Wrist*, REASON.COM (Dec. 19, 2011), <http://reason.com/blog/2011/12/19/corrections-corp-of-america-guard-forces>.

<sup>216</sup> *Id.*

<sup>217</sup> Hamish Campbell, *Voices from Yarl's Wood—Update 1*, DAILYMOTION (Feb. 27, 2010), [http://www.dailymotion.com/video/xce2h5\\_voices-from-yarl-s-wood-update-1\\_news](http://www.dailymotion.com/video/xce2h5_voices-from-yarl-s-wood-update-1_news).

<sup>218</sup> Erin Rosa, *GEO Group, Inc.: Despite a Crashing Economy, Private Prison Firm Turns a Handsome Profit*, CORPWATCH (Mar. 1, 2009), <http://www.corpwatch.org/article.php?id=15308>.

<sup>219</sup> Thomas Gammeltoft-Hansen, *Can Privatization Kill?*, N.Y. TIMES, Apr. 1, 2012, <http://www.nytimes.com/2012/04/02/opinion/when-it-comes-to-immigration-privatization-can-kill.html> (explaining an incident on a plane where a PSC agent's indifference to a detained person's medical needs, led to a death. This led the New York Times to declare that privatization “eliminates government accountability and runs roughshod over the rights of those subjected to private corporations' control”).

<sup>220</sup> Robert Koulish, *A Corporate Takeover of American Borders*, BALTIMORE SUN, Apr. 21, 2006, [http://articles.baltimoresun.com/2006-08-21/news/0608210032\\_1\\_private-companies-border-military-contractors](http://articles.baltimoresun.com/2006-08-21/news/0608210032_1_private-companies-border-military-contractors).

<sup>221</sup> LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* 16–17 (2011).

<sup>222</sup> Gammeltoft-Hansen, *supra* note 219.

<sup>223</sup> Donald Baer, *The West's Bruised Confidence in Capitalism*, WALL. ST. J. (Sept. 22, 2015), available at <http://www.wsj.com/articles/donald-baer-the-wests-bruised-confidence-in-capitalism-1411358403>.

<sup>224</sup> UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 2 (2008).

The general decline of civil rights protection manifests south of the border. With the breakdown of public security in Mexico due to the drug war and its attendant phenomenon (as described above), there is effectively little rule of law south of the border. It is no surprise then that the war between cartels and the Mexican government (with money from the US Government through the Mérida Initiative) has been so brutal. With the choice of *plata o plomo* (money or a bullet), Mexico has suffered an unprecedented number of murders related to the drugs war<sup>225</sup> and a massive drop in confidence in the administration of justice.

At the north of the border, the US government has been absent with a unified and uniform response:<sup>226</sup>

Devolution became federal policy in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which included a clause known as section 287(g) that invited state, county, and city law enforcement agencies to sign partnerships with the federal government to enforce civil violations of federal immigration law.<sup>227</sup>

US immigration law is different in different judicial districts and immigration courts.<sup>228</sup> This creates more insecurity among migrants seeking to obtain redress for their immigration status in the United States.<sup>229</sup> That the low-skilled value of these workers is disposable adds to this insecurity.

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<sup>225</sup> According to Human Rights Watch's World 2012 Report, "Mexico has experienced a dramatic surge in homicides in recent years, driven in large part by the violent struggle between and within powerful criminal organizations to control the drug trade and other lucrative illicit businesses such as human trafficking." HUMAN RIGHTS WATCH, WORLD REPORT 2012: MEXICO 1 (2012).

<sup>226</sup> "Enforcement of the nation's immigration laws was once firmly under federal control, with local law enforcement playing an occasional supportive role upon request. That has changed. The federal government began to devolve enforcement power to the local level in 1996, offering to train officers in police departments and other local law enforcement agencies to arrest and screen suspected unauthorized immigrants." MONICA VARSANYI, PAUL LEWIS, DORIS PROVINE, & SCOTT DECKER, IMMIGRATION FEDERALISM: WHICH POLICY PREVAILS?, MIGRATION POL'Y INST., Oct. 9, 2012, available at <http://www.migrationpolicy.org/article/immigration-federalism-which-policy-prevails>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> "States and localities can have significant interest in the manner and extent to which federal officials enforce provision of the Immigration and Nationality Act (INA) regarding the exclusion and removal of unauthorized aliens. Some States and localities, concerned that federal enforcement disrupts families and communities, or infringes upon human rights, have adopted "sanctuary" policies limiting their cooperation in federal efforts. Other states and localities, in contrast, concerned about the costs of providing benefits or services to unauthorized aliens, or such aliens settling in their communities, have adopted measures to deter unauthorized aliens from entering or remaining within their jurisdiction. In some cases, such states or localities have

There has been a commodification of labor in the North American marketplace. Under NAFTA, labor issues, like environmental issues, were relegated to side agreements, out of range of the dispute resolution mechanisms for which the main guts of NAFTA provides.<sup>230</sup> This has provided for a devaluation of labor because it is an abundant, cheap, and unprotected commodity.<sup>231</sup> The extremely low wages and long hours at maquiladoras foster “the sense that workers are cheap, disposable commodities.”<sup>232</sup> Labor falls into the markets as if it were mainly a commodity, “subordinating the social to the ‘laws of the market.’”<sup>233</sup> Labor is increasingly being commoditized in global markets, where international corporations are free to roam the world and hire the most vulnerable workers.<sup>234</sup>

Migrant workers, who by definition have fewer freedoms, can be more vulnerable than average wage workers.<sup>235</sup> Low-skilled migrant workers are seen “as an expendable resource, a resource whose social protection and continued reproduction is of little or no concern.”<sup>236</sup> Migrant workers have become more vulnerable after NAFTA, which has increased the free flow of trade between the participatory countries.<sup>237</sup> Neither labor rights nor environmental protections are in the main agreement of NAFTA. The Chapter 20 dispute resolution mechanisms do not cover these issues at all.<sup>238</sup>

In turn, we have seen the opposite side of the same globalization coin—a rise in unchecked profits and a growing lack of regulation over the activities of multinational corporations. The privatization scheme is what Professors Ugo Mattei and Laura Nader have lamented:

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also sued to compel federal officials to enforce the immigration laws, or to compensate them for costs associated with unauthorized migration.” KATE M. MANUEL, CONG. RESEARCH SERV., R43839, STATE CHALLENGES TO FEDERAL ENFORCEMENT OF IMMIGRATION LAW: HISTORICAL PRECEDENTS AND PENDING LITIGATION IN TEXAS V. UNITED STATES 1 (2015).

<sup>230</sup> Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade and the Democracy Deficit*, 10 J. GENDER, RACE & JUST. 27 (2006).

<sup>231</sup> See generally *id.*

<sup>232</sup> Debbie Nathan, *Work, Sex and Danger in Ciudad Juarez*, NACLA REP. AMS., Nov.–Dec. 1999, at 25.

<sup>233</sup> Stuart Rosewarne, *Globalization and the Commodities of Labour: Temporary Labour Migrants*, 20 ECON. & LAB. REL. REV. 99, 104 (2010).

<sup>234</sup> Garcia, *supra* note 230, at 33–34.

<sup>235</sup> Rosewarne, *supra* note 233, at 107.

<sup>236</sup> *Id.* at 105.

<sup>237</sup> Jeff Faux, *How NAFTA Failed Mexico*, 14 AM. PROSPECT 35 (2003); see also Garcia, *supra* note 230, at 48.

<sup>238</sup> Garcia, *supra* note 230, at 49.

[t]he law, as constructed today by means of the World Trade Organization (WTO) agreement, the International Monetary Fund (IMF), and World Bank contexts of conditionality, and the ethnocentric nature of many rights discourses, is a rule of law that justifies looting to the paradoxical point of being itself illegal. At issue is whether the rule of law, operating in the context of colonialism and imperialism, results in disorder rather than order, providing for continuity in oppression rather than interruption of the colonial practice.<sup>239</sup>

Some critics have called the investor-state dispute resolution provisions of Chapter 11 of NAFTA, “corporate welfare,” profiteering centers, or worse, an abdication of national sovereignty, and the end of sovereign immunity.<sup>240</sup> Moreover, the economic benefits of NAFTA are still open to argument.<sup>241</sup>

NAFTA lowered trade tariffs between the three participatory countries, which gave foreign actors confidence to invest in Mexico.<sup>242</sup> While the country has experienced economic growth, several sectors within the country have experienced the opposite effect. Since 1994, economic activity has steadily increased in Mexico, which has benefited the rich and harmed the poor:<sup>243</sup> “[T]here are agreements like the North

<sup>239</sup> MATTEI & NADER, *supra* note 224, at 2–3.

<sup>240</sup> See PUBLIC CITIZEN, THE TEN YEAR TRACK RECORD OF NAFTA: UNDERMINING SOVEREIGNTY AND DEMOCRACY, [https://www.citizen.org/documents/NAFTA\\_10\\_democracy.pdf](https://www.citizen.org/documents/NAFTA_10_democracy.pdf) (last visited Oct. 30, 2015). “Think of NAFTA as a Trojan Horse attack on sovereignty and democracy: hidden beneath the “free trade” cover was an entire anti-democratic governance system under which policies affecting our daily lives in innumerable ways are decided out of our sign or control.”

<sup>241</sup> Julie Hirschfeld Davis, *Walking a Fine Line in Promoting a Trade Deal*, N.Y. TIMES, (May 1, 2015), [http://www.nytimes.com/2015/05/02/us/politics/obama-walks-fine-line-in-promoting-trans-pacific-partnership.html?emc=edit\\_th\\_20150502&nl=todaysheadlines&nid=22130518&\\_r=1](http://www.nytimes.com/2015/05/02/us/politics/obama-walks-fine-line-in-promoting-trans-pacific-partnership.html?emc=edit_th_20150502&nl=todaysheadlines&nid=22130518&_r=1) (“When President Obama defends the Trans-Pacific Partnership, a far-reaching agreement to tear down trade barriers between the United States and 11 other nations, he often argues it would cure the ills inflicted on American workers by trade pacts of the past, particularly the North American Free Trade Agreement. But on Friday, when his Council of Economic Advisers issued a report promoting the economic benefits of trade, one of its main claims was that taken together, trade agreements the United States has signed onto in the past had not, in fact, led to the outsourcing of any American jobs.”). See COUNCIL OF ECONOMIC ADVISORS, THE ECONOMIC BENEFITS OF U.S. TRADE (2015), *available at* [https://www.whitehouse.gov/sites/default/files/docs/cea\\_trade\\_report\\_final\\_non-embargoed\\_v2.pdf](https://www.whitehouse.gov/sites/default/files/docs/cea_trade_report_final_non-embargoed_v2.pdf).

<sup>242</sup> Roberto Rosas, *Trademarks Under the North American Free Trade Agreement (NAFTA)*, *With References to the Current Mexican Law*, 18 MARQ. INTELL PROP. L. REV. 167, 173 (2014).

<sup>243</sup> Faux, *supra* note 237; CHRISTOPHER WILSON, WORKING TOGETHER: ECONOMIC TIES BETWEEN THE UNITED STATES AND MEXICO, WILSON CENTER (2011), *available at* <http://wilsoncenter.org/publication/working-together-economic-ties-between-the-united-states-and-mexico>; see also Dustin Ensinger, *NAFTA Job Losses Continue To Mount*, ECONOMY IN

American Free Trade Agreement (NAFTA) and the chain of events leading to poverty are increasingly visible.<sup>244</sup> NAFTA increased foreign investment, displaced Mexican workers, devastated local communities with *maquiladora* factories, decreased wages for the working class, and increased wages for the upper class. NAFTA has led to huge social dislocation across Mexico:

[t]he North American Free Trade Agreement (NAFTA) allowed U.S. produce to compete with local produce. Instead of sending produce to the outside, what we found were mountain villages swamped with produce from the outside—foodstuff such as corn, beans, eggs, and junk food, as well as machines, computers, and commercial music. We also found agricultural lands in disuse. Young people had emigrated from what were only 40 years earlier self-contained, self-sufficient communities, and were now sending remittances homes, which people could use to buy global goods imported into the region.<sup>245</sup>

NAFTA's successor arrangement, the Security and Prosperity Partnership, also gave some pause. Critics painted the SPP as the blueprint for a takeover by the corporations.<sup>246</sup> Elected representatives in the United States saw the lack of democratic oversight as troublesome: "Some key issues for Congress regarding the SPP concern possible implications related to *private sector priorities*, national sovereignty,

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CRISIS (May 03, 2011), <http://economyincrisis.org/content/nafta-jobs-losses-continue-mount>; Yves Smith, *NAFTA Successfully Undermined Regulations*, N.Y. TIMES, (Nov. 27, 2013), <http://www.nytimes.com/roomfordebate/2013/11/24/what-weve-learned-from-nafta/nafta-successfully-undermined-regulations>.

<sup>244</sup> MATTEI & NADER, *supra* note 224, at 135.

<sup>245</sup> *Id.* at 205.

<sup>246</sup> In Canada, Maude Barlow, National Chairperson of the Council of Canadians called it as anti-democratic and a threat to Canada's water and energy. Maude Barlow addresses Parliament on the Security and Prosperity Partnership, COUNCIL FOR CANADIANS (May 1, 2007), <http://iatp.org/news/maude-barlow-addresses-parliament-on-the-security-and-prosperity-partnership>. For Lou Dobbs of CNN, the SPP was the gateway to a new common currency. Transcript, *Lou Dobbs Tonight*, CNN.COM (aired June 21, 2006), available at <http://transcripts.cnn.com/TRANSCRIPTS/0606/21/ldt.01.html> ("The Bush administration's open-borders policy and its decision to ignore the enforcement of this country's immigration laws is part of a broader agenda. President Bush signed a formal agreement that will end the United States as we know it, and he took the step without approval from either the U.S. Congress or the people of the United States."). Professor Stephen Zamora gave the SPP a bit more academic respectability by referring to it as an example of "NAFTA-related 'quasi-supranationalism'." Stephen Zamora, *Rethinking North America: Why NAFTA's Laissez Faire Approach to Integration is Flawed, and What to Do About It*, 56 VILL. L. REV. 631, 642 (2011).



transportation corridors, cargo security, and border security.<sup>247</sup> (Italics added).

In addition, this Article has explored the reduction of law and order at the US-Mexico border, given the amount of activities by private actors. The civil liberties of migrants are, at times, at risk with the border vigilantes. With *noms de guerre* like “Kingfisher,” “Bear Scout,” and “The Pirate,” the border vigilantes attracted much media attention in their quest to do the work that the US government could not or was not willing to do. But to patrol the border with Mexico meant taking on the law. The American Civil Liberties Union, National Lawyers Guild and various Hispanic advocacy groups worried over the treatment of Mexican nationals and others if border vigilantes caught undocumented migrants making their way into the United States.<sup>248</sup>

In April 2005, Chris Simcox from the Minutemen Project sent volunteer civilians with weapons to patrol “thirty-seven kilometers of desert between Douglas and Naco, Arizona, to the West.”<sup>249</sup> During the time that the Minutemen were patrolling the border, Douglas businesses suffered because people from the Mexican side were not crossing to buy groceries in response to the presence of the Minutemen.<sup>250</sup>

Mexico’s National Human Rights Commission had planned to publish maps to assist migrants in their trek across the desert in collaboration with Human Borders, a US-based non-governmental organization. The groups had to scrap their plans as the Minutemen announced that the maps would provide them with actionable intelligence to intercept more migrants and thwart their attempts to cross into the United States illegally. The maps would have provided details to migrants about the terrain, mobile telephone coverage, and the location of water stations set up by Humane Borders.<sup>251</sup>

The anti-Latino sentiment that runs with the nativist expression of self-defense (protecting the homeland) has fostered a reaction in the

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<sup>247</sup> M. ANGELES VILLARREAL & JENNIFER E. LAKE, CONG. RES. SERV., RS22701, SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA: AN OVERVIEW AND SELECTED ISSUES, Summary (2009).

<sup>248</sup> See Andrea Aguilar, Comment, *Civilian Border Patrols: The Right to Safely Cross the Border vs. the Right to Protect Private Property*, 11 SCHOLAR 371, 386 (2009).

<sup>249</sup> Julie A. Murphy Erfani, *Ineffective U.S. Border Crackdowns and Accelerating Crime*, in BORDERLANDS: COMPARING BORDER SECURITY IN NORTH AMERICA 41, 52 (Emmanuel Brunet-Jailly ed., 2007).

<sup>250</sup> *Id.*

<sup>251</sup> *Mexico Nixes Border Maps for Migrants*, WASH. TIMES, (Jan. 26, 2006), <http://www.washingtontimes.com/news/2006/jan/26/20060126-115358-8412r/>.

organized criminal organizations among Latinos. In response to the volunteer surveillance activities by US Minutemen groups, the Central American gang Mara Salvatrucha (MS-13) stated that they would be targeting the US nativist groups to “teach them a lesson.”<sup>252</sup> With all this, the US-Mexico border seems less secure, more dangerous, and less controlled by the authorities entrusted and empowered by the two respective governments on both sides of it.

#### IV. CONCLUSION

Borders are by their very nature contested sites. The US-Mexico border is emblematic of this. Portrayed in music (Manu Chau’s *Welcome to Tijuana*), film (Stephen Soderberg’s *Traffic*), and literature (Carlos Fuentes’ *The Crystal Frontier*), the US-Mexico border is viewed as a place of promise and potential but also one of tragedy—the place where dreams go to live and die—all at the same time. What has been going on at the border over the last two or so decades is a bipolar response: On the one hand there is free trade, integrated supply chains, interchange of technology and labor, source of corporate profits for global capital.<sup>253</sup> On the other hand there is an emerging state of emergency due to a breakdown of rule of law.

The state of emergency includes the inadequate response from the US government concerning the summer 2014 surge of 68,000 unaccompanied minors from Central America at the US-Mexico border seeking asylum.<sup>254</sup> The state of emergency includes the rise of self-defense groups proliferating in Mexican towns as a reaction to the lack of public security in the country. The state of emergency also includes the lack of adequate legislative action from the US government to tackle the “broken” immigration system, stymieing itself in the theater of

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<sup>252</sup> *Gang Will Target Minutemen Vigil on Mexican Border*, WASH. TIMES, (Mar. 28, 2005), <http://www.washingtontimes.com/news/2005/mar/28/20050328-125306-7868r/>.

<sup>253</sup> James Cooper, Op-Ed, *Time to Review Trade Relations With Mexico*, S.F. CHRON., (Mar. 12, 2013), <http://www.sfgate.com/opinion/openforum/article/Time-to-review-trade-relations-with-Mexico-4349734.php>.

<sup>254</sup> In Fiscal Year 2015 then reported (Oct. 1, 2014–Aug. 31, 2015), 66,115 unaccompanied minors were apprehended on the US-Mexico border. *Southwest Border Unaccompanied Children*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last visited Sept. 25, 2015); Ian Gordon, *70,000 Kids Will Show Up Alone at Our Border This Year. What Happens to Them?*, MOTHER JONES (June 3, 2014), <http://www.motherjones.com/politics/2014/06/child-migrants-surge-unaccompanied-central-america>.

temporary protective status from deportation and other subpar executive actions by the US president. Finally, the state of emergency includes the reality that cartels effectively control territory and supplant legitimate authority, thus abrogating the social contract between the governed and the government. The transnational nature of the private actors operating in the US-Mexico border region does pose significant challenges for the two sovereign states that are tasked with protecting and defending those borders.

The US government has increased number of federal officers and the tools they can use to help secure the border. Drones, tunnel detection, and other technologies are being deployed to look for contraband on the move to the United States. Mexico, too, has responded with force. Upon assuming power as President of Mexico in December 2006, Felipe Calderón ordered 50,000 federal troops to deploy throughout the country. They continue to occupy much of Mexico. His successor, Enrique Peña-Nieto, who assumed the Presidency in December 2012, believed that if he did not talk about the war on drugs and focused only on now seemingly elusive economic growth,<sup>255</sup> then the war on drugs would be over.<sup>256</sup> Sadly, the drugs war rages on<sup>257</sup> and the US-Mexico border is a frontline of that war.

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<sup>255</sup> Elisabeth Malkin, *Pessimism Pervades Mexico as Economic Promises Fall Short*, N.Y. TIMES, Sept. 2, 2015, at A6.

<sup>256</sup> James Cooper, *"Fistful of Dollars" Plays Out in Mexico*, PROVIDENCE J., (Nov. 5, 2014), <http://www.providencejournal.com/article/20141105/OPINION/311059987>.

<sup>257</sup> William Neuman, *Cartels Fracture in Mexico as Drug Kingpins Fall, and Violence Surges*, N.Y. TIMES, Aug. 13, 2015 at A4.