3-1-2003


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INTRODUCTION: THE CURRENT AND WINDING PATHS OF US-MEXICO WHITE COLLAR CRIME

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In recent years globalization, the information revolution, and free trade have facilitated a tremendous growth of all types of commerce. People can move goods, capital, ideas, and people instantaneously. Unfortunately, one group of people who increasingly are able to operate in a borderless world are criminals.

All types of criminals, including individuals, small groups, and organized crime groups are able to exploit the limits of sovereignty, including the legal and cultural differences, time gaps, and the periodic tension between the United States and Mexico to carry out successfully their criminal goals.

This edition of the United States - Mexico Law Journal concerns Mexico and United States white collar crime at the millennium. The division between white collar and other crime is clear rather than arbitrary. White collar, or business, crimes refer to a range of criminal activity, including the three types considered in this edition of the Journal: corruption, money laundering, and organized crime.

White collar crimes would include those enumerated by Professor Alejandro Posadas:1 public corruption; obstruction of justice; fraud; tax crime; securities crimes against financial institutions; environmental crimes and money laundering. Each crime also includes, inter alia, securities and commodities futures crimes; customs and trade crimes; crimes against export control and economic sanctions; trade in endangered species; alien smuggling; and trafficking in human beings.

Many Mexico-United States white collar crimes have a cross-border or transnational element. For instance, many transnational crimes target the United States because of its market size. Many contraband crimes, such as trade in endangered species, trafficking of human beings, and so forth, target the United States. In many cases Mexico is the intended intermediary country for the contraband. In many cases the contraband, whether it is people or goods, such as narcotics, may stay in Mexico.

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Mr. Zagaris has served as counsel in more than forty criminal trials and approximately five appellate cases. His criminal work has included counseling on extradition and international evidence gathering cases, testifying as an expert in international criminal cases involving money laundering and tax crimes, counseling of witnesses for grand jury investigations, prisoner rights, representation of parolees, probation revocation matters, and early release of prisoners on emergency medical problems. His private practice has also included monitoring international tax and enforcement developments in the United States and the Caribbean for foreign governments and corporate clients. Since 1985, he has edited the INTERNATIONAL ENFORCEMENT LAW REPORTER, a monthly publication which discusses developments in international criminal and related enforcement law matters. His international tax practice has included counseling twelve governments on developing international financial sector work and tax treaty strategy and negotiations. His bar activities include: chair, Committee on International Tax, Section of International Law & Practice, American Bar Association, 1989-92; Chair, Committee on International Criminal Law, Criminal Justice Section, American Bar Association, 1989-93; member, Executive Committee and Executive Council, American Society of International Law, 1991-93; co-chair, Committee on Public International and Criminal Law, D.C. Bar Assoc.; and President, Washington Foreign Law Society, 1990-91. He has been an adjunct professor of law at the Washington College of Law, American University, Fordham Univ. School of Law in New York, and John Marshall College of Law in Chicago. He received the degrees of B.A., J.D. and LL.M. from George Washington University, the LL.M. cum laude from Stockholm University and the LL.M. cum laude from the Free University of Belgium. He was admitted to the bars of Oregon and Idaho in 1973, California in 1976, and the District of Columbia in 1978.

1. See Professor Posadas' article in this edition of the Journal
Another visible trend is that a pattern develops in transnational crime on the border. Many criminal organizations that smuggle contraband into the United States obtain goods in return: guns or weapons, vehicles or airplanes, precursor chemicals, and other goods that are useful in their criminal enterprises.

In 1986 the United States criminalized money-laundering. Mexico criminalized money laundering ten years later. The comparative lack of anti-money laundering legislation and mechanisms in the context of a flourishing means to move money across the border facilitated many different ways to launder the proceeds of crime and frustrated efforts of regulators and law enforcement to prevent and combat money laundering. The United States has prioritized money laundering more than has Mexico. Indeed Mexico only recently overcame its severe financial crisis of 1994-95. In the early 1990s, banks were reprivatized and a new regulatory framework implemented. Yet Mexican anti-money laundering agencies have not yet developed the resources, mechanisms, and experience to effectively implement anti-money laundering measures. A few years ago the United States government undertook Operation Casablanca, a sting operation primarily directed at Mexican and foreign banks engaged in transnational money laundering. The operation illustrated a pattern in United States-Mexican transborder law enforcement. United States law enforcement achieved numerous convictions and forfeited substantial assets. However, the successes caused a rift between United States and Mexico. The Mexican Government complained that the Operation occurred in violation of the Mexican Constitution and law and the spirit of United States-Mexican anti-money laundering cooperation, particularly the requirement to notify Mexico and engage in cooperative enforcement efforts.

In this edition of the Journal, there is a discussion of a hypothetical problem involving transnational money laundering. The problem involves both financial institutions and law firms. The panel included the Assistant Attorney General from Mexico in charge of anti-money laundering and several United States experts.

Anti-corruption is an important transnational crime issue. In the United States-Mexico context, anti-corruption involves the crime of bribery of foreign officials for the purpose of obtaining or retaining business. Anti-corruption involves corruption of public officials involved in the investigation, prosecution, and adjudication of crimes. The nature and consequences of corruption are different in both countries. Corruption in Mexico tends to go further into political institutions due to Mexico’s highly centralized political system. In addition, Mexico’s comparative lack of professional career services (with some exceptions), transparency and accountability through oversight, audit, freedom of information are comparatively less developed than their counterparts in the United States and Canada. Until recently, the domination of the Mexican political system by the Institutional Revolutionary Party, or PRI, hindered the normal operation of checks and balances. The election of the National Action Party (PAN), aggressive media reporting, and a new freedom of information act together have helped to restrain the environment for corruption in Mexico.

In the United States, corruption is more likely to inflict a particular department as well as towns and cities. The elements in the United States that serve to check or limit corruption are an aggressive media, competitive parties, professional norms, federal oversight, aggressive litigation, and other checks. Lucinda Low, Esq.'s article discusses anti-corruption issues.

Organized crime can manifest itself through many forms – from a few individuals who form an ad hoc gang to rob or even kidnap taxi passengers to a national gang to undertake cargo hijacking or an international organized crime group that transports drugs, people, or arms, while laundering money and bribing law enforcement and judicial officials. In two complementing articles, Paul Coggins of Dallas, Texas and Rodrigo Labardini of the Mexican Embassy in Washington, D.C. discuss approaches in their respective countries to combat organized crime.

Due to the significant asymmetry in power between the United States and Mexico, the United States often exports to Mexico its solutions to crime. For instance, the United States has cooperated with Mexico in an approach to organized crime, money laundering, and corruption. The United States has helped in conceptualizing and preparing legislation, vetting and training officials, and working on joint operations. The power asymmetries and perceptions of Mexican authorities' lack of will to repress transnational crime sometimes results in United States unilateral initiatives, such as the aforementioned Operation Casablanca.

One trend in combating transnational crime is to invoke the national security or even "war" paradigm. The United States and Mexico have prioritized as national security matters organized crime and money laundering connected with organized crime and other crimes, such as drug and arms trafficking. Whereas Mexico has prioritized arms trafficking, the United States has prioritized narcotics and migration crimes.

One positive feature of Mexico-US efforts to combat white collar and other forms of criminality has been a number of bilateral enforcement initiatives. They have included a variety of international enforcement cooperation treaties, executive agreements, and Memoranda of Understanding (MOU), a number of working groups to coordinate and even conduct joint operations, and even some efforts to harmonize legislation. The second panel discussion on procedures for investigating and prosecuting white collar crime will discuss some of these efforts.

In the treaty/executive agreement/MOU area, Mexico and the United States have concluded enforcement cooperation agreements on a wide range of substantive crime matters: customs, tax, securities, commodities futures, recovery and return of stolen and embezzled vehicles and aircraft, recovery and return of stolen cultural property, and anti-money laundering.
Indeed, Mexico and the United States also have treaties on traditional procedural aspects of criminal cooperation including mutual assistance in criminal matters,\(^\text{10}\) extradition,\(^\text{11}\) and execution of penal sanctions.\(^\text{12}\)

Pursuant to some of the treaties and agreements Mexico and the United States conduct simultaneous criminal (and civil) enforcement operations. For instance, they have arrangements to conduct simultaneous criminal and civil tax investigations.\(^\text{13}\)

Approximately twice a year the border states' attorneys general meet, together with their federal attorneys general and sometimes other federal law enforcement agencies, to discuss common problems and solutions to criminal problems. These meetings have resulted in the establishment of committees or working groups on various continuing crime problems.

On an institutional level there have occurred meetings, exchanges of personnel, translations and studies of each other's laws and procedures, an overall enhanced understanding of each other's laws and culture. These developments have helped establish confidence in each country's ability to cooperate.

The international enforcement cooperation effort has produced strains and tensions that follow a historical continuum. The Mexican Government is sensitive to, and periodically protests, violations of its laws and sovereignty: kidnapping, such as the famous case of Dr. Alvarez Machain and frequent cases in which kidnapping by fraud is blurred with waiver of extradition and irregular rendition. In recent years United States businessmen have been lured by Mexican state law enforcement officials into Mexico where they have been subsequently prosecuted.

Another longstanding tension concerns the asymmetry in punishment of criminals, and especially the concern by Mexico with the death penalty and life imprisonment sentences. These Mexican concerns have resulted in rejection, both by Mexican courts and its executive, of United States requests to extradite. In August 2002, Mexican President Vincente Fox cancelled his scheduled visit to the Texas ranch of United States President George W. Bush to protest the execution of a Mexican by the State of Texas. More than one-half of foreigners on death row in the United States are Mexicans.

The refusal by Mexico to extradite or prosecute individuals subject to the death penalty or life imprisonment has resulted in criticism by the United States Government and accusations of impunity by criminals in Mexico. In some cases fugitives have been organized crime leaders who have effectively used procedural


\(^{\text{13}}\) See, e.g., for U.S.-Mexican tax enforcement cooperation, Bruce Zagaris and Juan Soldevila, Tax Eagles Soar Across the Rio Grande: Tax Enforcement Cooperation Increases Between Mexico and the United States, 2 MEXICO TRADE & LAW RPTR. 1119 (Nov. 1994)
rights, in the Mexican Constitution and criminal system, such as the *amparo*,\textsuperscript{14} and allegedly improper methods, such as bribery, to avoid prosecution.

Human rights abuses suffered by Mexican nationals trying to improperly migrate to the United States have been a source of much continuing controversy. Indeed, President Fox's creative diplomatic initiative to regularize the immigration status of Mexicans has encountered United States political problems, especially in the wake of the terrorist incidents of September 11, 2001. United States frustration over the inability to stop or even slow the increased illegal entry of persons from Mexico has led to the militarization of the border and caused migrants to use more risky entry points, resulting in deaths in the desert. Nevertheless, border states cooperate periodically in programs to police the criminal practices of unscrupulous coyotes who are paid to help migrants but sometimes take advantage of and even rob, rape, and murder them.

An interesting development has been the status of law enforcement within the North American Free Trade Agreement. Reflecting the politics of NAFTA, NAFTA has enforcement and criminal sanctions for one area of the law: intellectual property. In the run-up to NAFTA, Mexico had to amend significantly its intellectual property rights law. NAFTA provides significant criminal rights to enforce intellectual property rights violations. The United States Government has held discussions with Mexico over alleged violations of international property rights law, including failure to prosecute and obtain convictions of international property rights law violations, and lack of proper criminal sanctions. NAFTA requires its signatories to afford international property rights law owners in the other country with a host of remedies and procedural rights.\textsuperscript{15}

The only other provision of NAFTA concerning enforcement cooperation concerns a procedural legal matter relating to customs cooperation.

NAFTA does not provide for criminal or even quasi-criminal cooperation in other substantive law areas. Although NAFTA contains environmental and labor side accords, neither provides for criminal or quasi-criminal enforcement. Both of the side accords lack the funding, the institutional mechanisms, or the substantive or procedural provisions to enable the governments to take criminal enforcement action.

Notwithstanding the lost opportunities of NAFTA to address criminal and quasi-criminal enforcement cooperation, enforcement cooperation remains imperative at the federal and state level between the two countries. Occasionally, states, such as Sonora and Arizona, have undertaken experiments to cooperate on criminal matters, such as cross-border vehicular thefts and dealing with juveniles who come from one country and are arrested in the other.\textsuperscript{16}


\textsuperscript{15} For additional background on US-Mexican IPR enforcement cooperation, see Bruce Zagaris and Alvaro Aguilar, *Enforcement of Intellectual Property Protection between Mexico and the U.S.: Dynamic Entertainment and a Precursor of Criminal Enforcement for Western Hemispheric Integration?*, 5 FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENTERTAINMENT L.J. 41-124 (Aug. 1994)

\textsuperscript{16} For additional background on cooperation between Sonora and Arizona, see *Some Positive Aspects of U.S.-Mexico National Security and International Enforcement: Subnational Cooperation and The Arizona-Sonora Experiment*, in *PUBLIC SECURITY AND DEMOCRATIC GOVERNANCE: CHALLENGES TO MEXICO AND THE UNITED STATES* (Georgetown University, 2001)
A key aspect of efforts to construct international enforcement regimes is the privatization of law enforcement, which is also referred to as the partnership between law enforcement and the private sector. In most areas of white collar crime, conventions, soft law, legislation, and regulations require businesses to have effective programs to prevent crime. For instance, anti-money laundering measures require banks, financial institutions, and a growing number of covered persons to have due diligence programs, including know your customer, identification and reporting of suspicious transactions, enhanced due diligence for high risk products, compliance officers, training, and independent testing of training.

Similarly, in anti-corruption programs businesses must have effective programs to regulate their employees, joint venture partners, and agents in their investments and economic relations in foreign countries.17

17. For additional background on US-Mexican enforcement cooperation and implications for business, see Bruce Zagaris, International Criminal and Enforcement Cooperation in the Americas in a Post-NAFTA Transition Period with Special Attention to Investing in Mexico, 3 SOUTHWESTERN J. OF LAW AND TRADE IN THE AMERICAS 1-84 (1996)